IN THE MATTER OF
AN ARBITRATION UNDER THE RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Alicia Grace; Ampex Retirement Master Trust; Apple Oaks Partners, LLC; Brentwood Associates Private Equity Profit Sharing Plan; Cambria Ventures, LLC; Carlos Williamson-Nasi; Carolyn Grace Baring; Diana Grace Beard; Floradale Partners, LLC; Frederick Grace; Frederick J. Warren; Frederick J. Warren IRA; Gary Olson; Genevieve T. Irwin; Genevieve T. Irwin 2002 Trust; Gerald L. Parsky; Gerald L. Parsky IRA; John N. Irwin III; José Antonio Cañedo-White; Nicholas Grace; Oliver Grace III; ON5 Investments, LLC; Rainbow Fund, L.P.; Robert M. Witt; Robert M. Witt IRA; Vista Pros, LLC; Virginia Grace

Claimants

v.

United Mexican States

Respondent

CLAIMANTS' REPLY

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. This is a quintessential case of discrimination, retaliation, expropriation, and unfair treatment carried out by the United Mexican States ("México" or "Respondent") [1] against Integradora de Servicios Petroleros Oro Negro, S.A.P.I. de C.V. ("Integradora," and together with its subsidiaries, including Perforadora Oro Negro, S. de R.L. de C.V. ("Perforadora"), "Oro Negro" or the "Company") in response to Oro Negro's refusal to pay bribes to officials of Petróleos Mexicanos ("Pemex"), México's state-owned oil company as well as Oro Negro's sole client. México did this so that Pemex could benefit and possibly provide additional business to Oro Negro's competitors who did pay bribes, like Seamex Limited ("Seamex"). In furtherance of this goal, and realizing that there was a monetary prize to be had, México also colluded with the Ad-Hoc Group of bondholders controlling the majority of Oro Negro's bonds (the "Ad-Hoc Group") to financially strangle Oro Negro, cancel Oro Negro's contracts (the "Oro Negro Contracts") under which the Company had provided services to Pemex, and ultimately seize Oro Negro's primary assets, five state-of-the-art jack-up rigs (the "Rigs"). México and the Ad-Hoc Group engaged in this offensive against Oro Negro with the intent and effect of benefitting a willing co-conspirator, Seamex, a new entrant into the jack-up market and Oro Negro's largest competitor, which paid bribes to Pemex in order to obtain highly favorable contracts and which is affiliated with the Ad-Hoc Group.

2. México was well aware of the corruption within Pemex, and it had a duty to root out that corruption and protect Oro Negro and Claimants' investments from it. México not only failed its duty, but also actively fostered that corruption because various high-level Mexican officials were

[1] Unless otherwise specified, all defined terms have the same meaning as in Claimants' Statement of Claim.

personally benefiting from it. Ultimately, that corruption caused the destruction of Claimants' investment.

3. México's discriminatory and retaliatory actions against Oro Negro included, *inter alia*: unilaterally and illegally amending the Oro Negro Contracts in 2015 and 2016 to reduce Oro Negro's day rates more than its competitors' and suspend 40% of its Contracts, even though Oro Negro's performance was better and its services were less expensive than its competitors, who did not receive such harsh treatment from Pemex; withholding millions of dollars in payment of Oro Negro's daily rates without justification for years; repeatedly representing that Pemex would contract three new state-of-the-art rigs (the "New Rigs") from Oro Negro and causing Oro Negro to commission the New Rigs, only for Pemex instead to contract five older rigs from Seamex at more expensive day rates and cause Oro Negro to lose its USD 125 million down payment on the New Rigs; attempting to permanently amend the Oro Negro Contracts again in 2017 in order to push the Company into insolvency, and enforcing that effort by illegally threatening to cancel the Oro Negro Contracts and withholding over USD 100 million in unpaid daily rates; colluding with the Ad-Hoc Group to deprive Oro Negro of financial respite by refusing reasonable contract renegotiations or bond restructuring, in order to terminate the Oro Negro Contracts and [redacted]; pushing Oro Negro to file for *concurso mercantil*, *i.e.* bankruptcy protection in September 2017; unlawfully terminating the Oro Negro Contracts in September 2017; working with the Ad-Hoc Group to initiate multiple baseless criminal and tax investigations against Oro Negro and its management; colluding with the Ad-Hoc Group to obtain corrupt judicial orders permitting the seizure of all of Perforadora's bank accounts and cash in September 2018 and the physical takeover of the Rigs in October 2018; and ultimately completing its scheme to allow the Ad-Hoc Group to seize Oro Negro's Rigs in 2019.

4. To vindicate their rights, Claimants initiated this arbitration against México by filing their Notice of Intent in March 2018. Claimants subsequently filed their Notice of Arbitration in June 2018. Starting around the date when Claimants filed their Notice of Arbitration, and in retaliation for Claimants' having done so, México has initiated eight baseless criminal investigations against Integradora, Perforadora, and their directors, employees, and lawyers. These criminal investigations appear to be a direct response to this proceeding, reflect an intentional effort to deter Claimants from pursuing their NAFTA claim, and are, without exception, based on patently and demonstrably false facts and allegations. Pursuant to this retaliatory campaign, México issued baseless arrest warrants against several Oro Negro executives, including two Claimants in this proceeding, in July 2019, and successfully obtained INTERPOL Red Notices against them in September 2019. The groundlessness of the charges on which the INTERPOL Red Notices were based is evident given that the INTERPOL cancelled those Red Notices as of November 20, 2020, after the persons subject to these notices petitioned INTERPOL to cancel them by describing México's misconduct. In parallel to México's criminal investigations, starting in October 2017, after Integradora and Perforadora filed for *concurso* protection, México launched seven baseless tax audits against Integradora and four of its subsidiaries, including Perforadora, all of which are still pending. These tax audits are comprehensive investigations into virtually every aspect of the finances and operations of Integradora and its subsidiaries dating as far back as 2013.

5. Such has been the egregious and wide-reaching extent of México's ongoing retaliation against Oro Negro and Claimants that Claimants were forced to file an Application for Interim Measures before the Tribunal in July 2019. Though the Tribunal subsequently ordered México to "to make all the efforts to collaborate for the arbitration to take place in an effective way, and to

abstain to adopt any unjustified measure that may aggravate the dispute," Respondent has continued its aggressive campaign of retaliation and harassment against Claimants to this day.

6. Claimants filed their Statement of Claim in October 2019. In the Statement of Claim, Claimants explained how México's actions against Oro Negro taken through Pemex and other instrumentalities violated multiple NAFTA provisions, including the obligations not to expropriate foreign investments under Article 1110, to dispense fair and equitable treatment to foreign investments under Article 1105, and to provide full protection and security to foreign investments under Article 1105. Claimants proved their claims with extensive documentary, investigatory, and circumstantial evidence. Claimants submit with this Reply memorial additional supportive evidence demonstrating México's egregious conduct that has either been recently made available to Claimants or recently created. Among this evidence is a trove of communications and other documents proving overwhelmingly that México colluded with the Ad-Hoc Group to destroy Oro Negro and seize its Rigs, [redacted], as well as documents and admissions further demonstrating the endemic corruption in Pemex with the support of and direction from higher levels of the Mexican government.

7. Rather than face these claims and the evidence supporting them, México largely devotes its Statement of Defense to disregarding the plentiful evidence of corruption in Pemex and México's retaliation against Oro Negro and collusion with the Ad-Hoc Group; blaming Oro Negro and the economy for Oro Negro's demise; grasping for supportive arbitral jurisprudence and misrepresenting the factual record to ground its baseless jurisdictional objections; attempting to rewrite the NAFTA to serve its unsupported legal arguments; creating artificially high legal standards that it hopes Claimants cannot meet; and denying the reality of the damages that its

actions caused Claimants through the expropriation and destruction of their investment in Oro Negro. Neither México's factual narrative nor its legal arguments withstand scrutiny.

8. Claimants have acquired and submitted evidence demonstrating that México has violated the NAFTA, despite two major evidentiary impediments raised by México in bad faith. First, given the numerous investigations and proceedings that have been initiated against Oro Negro, its executives, and various of the Claimants, México has cast an air of intimidation and retaliation over this proceeding that has deterred several potential witnesses from testifying to México's misdeeds. Many of the potential witnesses that Claimants could have procured to offer additional first-hand knowledge of México's illegal measures are simply unwilling to come forward for fear of retaliation and reprisals by the Mexican State. Second, despite being ordered by the Tribunal to produce documents responsive to 59 of Claimants' Document Requests, México produced a clearly deficient number of documents—243 in total. México's excuses for this deficiency consist of specious legal arguments twice rejected by the Tribunal in Procedural Orders 8 and 9, and implausible assertions that it could not find relevant documents even where the undisputed facts and México's *own references to those documents* show that to be untrue. In light of México's deficient production and its violation of the Tribunal's document production orders, throughout this memorial Claimants request that the Tribunal draw specific adverse inferences against México where it refused to produce documents as ordered.[2] México did not produce any documents in response to 36 of the Claimants' Requests and where it did produce documents, its paltry productions provided almost no internal communications or analyses, although specifically requested by Claimants and ordered by the Tribunal. Even where Respondent produced some

[2] A complete list of the adverse inferences Claimants are requesting can be found in **Appendix L**.

documents, the incompleteness of its production is obvious in light of the record, and the absence of certain documents known to exist is conspicuous.

9. In any event, México's legal arguments regarding jurisdiction and the merits are unpersuasive. México's jurisdictional arguments rely on misstatements of relevant law and misrepresentations of the factual record.

10. *First*, México asserts that several Claimants have not substantiated their shareholding in Oro Negro. México is incorrect. All of the Claimants in this arbitration are shareholders in Integradora.

11. *Second*, México contends that Claimants with alleged direct minority interests in Integradora lack standing to file claims under Article 1116 of the NAFTA for reflective losses, *i.e.*, a decrease in the value of a shareholding caused by injury to the company in which the shares are held. México's contention is contrary to the plain language of the NAFTA's text, as well as the Treaty's object and purpose as well as to the general force of current public international law jurisprudence. Indeed, México's interpretation would mean that minority shareholders would be left entirely unprotected under the NAFTA, despite that the NAFTA indisputably protects minority shareholding.

12. *Third*, México argues that the Tribunal lacks jurisdiction *ratione personae* over Messrs. Carlos Williamson Nasi ("Mr. Williamson") and José Antonio Cañedo White ("Mr. Cañedo") under Article 1117 because neither has the requisite ownership or control over the Mexican entities. México is incorrect. Each of them owned one-third of the Mexican entities, and together the two owned a majority. Further, *each* had control over the Mexican Entities—both as individuals and together—because they were always unified in their decisions.

13. *Fourth*, México contends that the Tribunal lacks jurisdiction *ratione personae* over Messrs. Williamson and Cañedo because they violated Article 1121 of the NAFTA. According to México, Messrs. Williamson and Cañedo had run afoul of the Treaty's waiver requirement merely because their lawsuit alleging a breach of contract by private parties shares some factual background with the NAFTA arbitration. However, the prohibition of Article 1121 only applies to a parallel proceeding involving a government measure alleged to breach the NAFTA, which is not the case in the other lawsuit.

14. *Fifth*, México argues that the Tribunal lacks jurisdiction *ratione personae* over Messrs. Williamson and Cañedo because they are both United States and Mexican nationals. In making this argument, México attempts to rewrite the NAFTA to exclude dual nationals or to impose a dominant and effective nationality test, neither of which is permissible or appropriate under the terms of the NAFTA, international law, or arbitral jurisprudence. In any event, the dominant and effective nationality of both Messrs. Williamson and Cañedo is United States.

15. *Sixth*, México contends that the Tribunal lacks jurisdiction *ratione materiae* with respect to contractual claims. In doing so, México ignores that Claimants did not raise a contractual claim, but a Treaty claim alleging México's breaches of the NAFTA Articles 1105 and 1110. Regardless, México argues that any Treaty claim based on a contractual relationship *ipso facto* amounts to a contractual claim that falls outside of a NAFTA tribunal's jurisdiction. México is wrong, and its contention is disproven by its own authorities recognizing that a set of facts that may give rise to a contract claim can also—and separately—give rise to a treaty claim and engage the state's international liability.

16. *Finally*, México argues that the Tribunal lacks jurisdiction because there is no legal causal connection between the claimed acts and Claimants' alleged damages. México ignores the text of

the NAFTA to incorrectly assert that Claimants must demonstrate *proximate cause* for jurisdictional purposes. In reality, the Treaty requires only relatedness between the claimed acts and the alleged damages. In any event, Claimants have demonstrated that México's acts proximately caused Claimants' damages under any plausible standard of causation for the purposes of establishing jurisdiction.

17. México's merits arguments fare no better.

18. *First*, México argues that Pemex's actions in this case cannot be attributed to México. This argument disregards arbitral jurisprudence as well as the facts of this proceeding showing that Pemex, a state-owned monopoly and organ of México, exercised governmental and sovereign authority and prerogatives against Oro Negro. In fact, México has argued this very point in a related litigation in the United States successfully invoking sovereign immunity under U.S. laws, and it should thus be estopped from claiming otherwise here. Pemex's actions are in any event attributable to México under the standard set forth in the NAFTA and applicable public international law.

19. *Second*, México contends that it did not expropriate Claimants' investment under Article 1110. México claims that there was no expropriation because nothing was taken from Claimants since Claimants still have their now valueless shares in Oro Negro. However, Claimants' substantial investments in México were plainly expropriated as a result of México's illegal acts. México conveniently ignores the numerous awards finding that shares can be expropriated when investors have been substantially deprived of the value of the shares, although they retain title in those shares. Further, there is no question that contract rights can be expropriated when a state engages in a campaign to deprive investors of their investment through arbitrary and illegal actions by means of governmental power, and it is further indisputable that Oro Negro's Rigs were

taken through the illegal actions of México and its judiciary, working in concert with a group of Oro Negro's bondholders.

20. *Third*, México launches a multifaceted argument that it did not violate its obligation to grant fair and equitable treatment to Claimants' investment under Article 1105. México first contends that Claimants' retaliatory and discriminatory behavior was too vague to state a claim under the NAFTA and international law. México is incorrect, as Claimants' claims are specific, heavily detailed, and supported by extensive documentary, investigatory, and circumstantial evidence.

21. México next argues that Claimants must meet an artificially high standard in proving a violation of the fair and equitable treatment obligation because they must satisfy the customary minimum standard of treatment under international law. This assertion is unsupported by arbitral jurisprudence and fails even to engage with Claimants' explanation that the minimum standard of treatment has evolved essentially to converge with the fair and equitable treatment standard under international law. Regardless, under any plausible standard, Claimants have met their burden of proving that México took bad faith, retaliatory, discriminatory, and arbitrary actions against Oro Negro, all hallmarks of the minimum standard of treatment under international law. Claimants have also proven that México discriminated against Claimants, a *per se* violation of the fair and equitable treatment obligation and the minimum standard of treatment.

22. México next insists that Claimants must meet an artificially high standard to prove corruption under the fair and equitable treatment standard and that they cannot do so here. Relevant and recent arbitral jurisprudence disproves México's contention and shows that corruption need only be proven on the balance of probabilities. In any event, Claimants have proven corruption under any plausible standard with copious evidence.

23. México proceeds to argue that its retaliatory and discriminatory campaign against Claimants was a mere contractual breach that is not actionable under the NAFTA. México is mistaken. Arbitral jurisprudence and the facts of this proceeding show that México's actions against Claimants were undertaken in its sovereign capacity and contravened Claimants' legitimate expectations—inculcated by México's express representations—that Claimants would not be subjected to a corrupt business and regulatory environment. Claimants' claims are well within the NAFTA's ambit, and they have proven various breaches of this standard by México.

24. México further asserts that Claimants repackage a national treatment claim—which cannot be brought against governmental procurement under NAFTA Article 1108—as a fair and equitable treatment claim. This is an improper attempt by México to rewrite Claimants' fair and equitable treatment claim and the NAFTA itself. In reality, Claimants have stated a claim and proven that México discriminated against Oro Negro, among other actions, in violation of its obligation to provide fair and equitable treatment under the NAFTA.

25. México at last boldly asserts that there were *no* irregularities in the judicial proceedings involving Oro Negro and its management. This assertion is flatly contradicted by the record. Claimants provided many examples of such irregularities, including various orders directly affecting Claimants and their investments issued by a judge who most assuredly was bribed to issue his arbitrary and non-transparent rulings, which México cannot explain away.

26. *Fourth*, México contends that it did not violate its obligation to provide full protection and security to Claimants' investment under Article 1105. México submits an antiquated and unsupported view of the obligation as requiring only *physical* protection of an investment. However, arbitral jurisprudence confirms that *full* protection and security mandates both *legal* and *physical* protection of an investment, both of which México failed to provide to Claimants'

investment here. In any event, México does not even respond to Claimants' contention that it failed to provide *physical* protection to Claimants' investment in Oro Negro.

27. *Finally*, México challenges the applicable damages standard as to Claimants' expropriation claim, arguing that the standard of NAFTA Article 1110(2) applies. But México ignores the finding made by many tribunals that Article 1110(2) is applicable only in cases of legal expropriation—which is not the case here. México further tries to argue that Claimants' loss was not caused by its illegal actions. Those arguments are unavailing before the record showing México's collusion with the Ad-Hoc Group to destroy Oro Negro and deprive Claimants of their investment. Lastly, México's attempts to adjust the damages calculation by Compass Lexecon are baseless and its expert's alternative valuation is incorrect.

28. In short, México's arguments misstate the factual record and international law and withstand no scrutiny. México is unable to overcome Claimants' evidence and meticulous recounting of the facts showing that México retaliated and discriminated against Oro Negro for its refusal to pay bribes to Pemex, and that México colluded with the Ad-Hoc Group to destroy Oro Negro and seize its assets. México also cannot counter Claimants' extensive recitation of law and arbitral decisions supporting their claims that México's behavior violated several provisions of the NAFTA. Moreover, México fails to undermine Claimants' explanation of exactly how its actions caused Claimants' damages. Claimants implore the Tribunal to hold México accountable for its violations of the NAFTA and international law that destroyed Claimants' investment in Oro Negro.

29. While Claimants have documented myriad ways in which México has violated the NAFTA and thereby caused Claimants' damages, it is important to note that Claimants need prove *only one* such violation in order to be entitled to full compensation. Accordingly, each of México's violations of the NAFTA is an independent basis upon which Claimants are entitled to full relief.

Furthermore, even if the Tribunal were to deem that some of México's acts, standing alone, were not breaches of the NAFTA, México's actions nevertheless had the *cumulative* effect of breaching the NAFTA and causing Claimants' damages. In the Statement of Claim and this Reply memorial, Claimants demonstrate, *inter alia*, that México:

a. illegally expropriated Claimants' investment by:
    i. substantially depriving Claimants of the value of their investments in Mexico;
    ii. assisting in the taking of Oro Negro's jack-up Rigs;
    iii. refusing to pay past due rates in order to coerce Oro Negro to accept unfavorable amendments to Oro Negro's contracts;
    iv. unlawfully amending and then terminating Oro Negro's contracts; and
    v. destroying Oro Negro's reputation;
b. violated its obligation to accord Claimants and their investment fair and equitable treatment by:
    i. engaging in corruption and bribery, including soliciting bribes from Claimants;
    ii. violating Claimants' legitimate expectations that the environment would welcome foreign investors and that they would not be subject to corruption;
    iii. failing to root out or punish individuals involved in corruption;
    iv. retaliating against Oro Negro and Claimants for their refusal to pay bribes through draconian, unilateral, and unlawful contractual modifications and suspensions, and ultimately terminations;

v. colluding with the Ad-Hoc Group to financially strangle Oro Negro, terminate Oro Negro's contracts, and seize its Jack-Up Rigs;

vi. using sovereign power and governmental prerogative to unlawfully terminate the Oro Negro Contracts and engage in retaliatory and abusive actions against Claimants and Oro Negro;

vii. disregarding its commitments made in relation to the Oro Negro Contracts, such as returning the contracts to the original daily rates upon expiration of the amendments and paying liquidated damages at termination;

viii. discriminating against Oro Negro in comparison to Seamex, a competitor in like circumstances, with regard to contractual rates and termination provisions, likely in exchange for bribes;

ix. discriminating against Oro Negro in comparison to ODH, a competitor in like circumstances, which obtained liquidated damages for the termination of its contract;

x. depriving Oro Negro and Claimants of due process and transparency through irregular judicial proceedings marked by indicia of corruption;

xi. persecuting Claimants and Oro Negro with baseless criminal and tax investigations and proceedings, which continue to this day;

xii. participating in a defamation campaign against Claimants and Oro Negro;

xiii. refusing to pay Perforadora approximately USD 24 million in past due daily rates even though it had a legal obligation to do so; and

xiv. representing that it would contract Oro Negro's New Rigs, only to renege on those representations and cause Oro Negro to lose its down payment of USD 125 million; and

c. violated its obligation to accord Claimants and their investment full protection and security by:

i. failing to protect Claimants and Oro Negro from both the State itself and from third parties, specifically, the Ad-Hoc Group;

ii. failing to *legally* and *physically* protect Claimants and Oro Negro by perpetrating the use of fabricated evidence and permitting the seizure of Perforadora's cash and the Rigs based on the same;

iii. unlawfully intruding onto the Rigs alongside the Ad-Hoc Group; and

iv. permitting and even facilitating the seizure of the Rigs;

v. failing to *legally* protect Claimants and Oro Negro from, or to root out, corruption within Pemex, but instead actively fostering it;

vi. colluding with the Ad-Hoc Group to financially strangle Oro Negro, [redacted], and seize the Rigs and [redacted];

vii. participating in a defamation campaign against Claimants and Oro Negro;

viii. initiating seven baseless tax audits against Integradora and four of its subsidiaries;

ix. refusing to pay Perforadora approximately USD 24 million in past due daily rates even though it had a legal obligation to do so; and

x. engaging in numerous miscarriages of justice against Claimants and Oro Negro.

A. Structure of this Submission

30. This Reply is structured as follows. Section I provides an introduction and Executive Summary. Section II describes the relevant facts of the dispute, including the interrelated and corrupt actions taken by México's instrumentalities and functionaries—including in collusion with the ad-hoc group controlling the majority of Oro Negro's bonds (the "Ad-Hoc Group")—to deprive Claimants of and ultimately expropriate their investments in Oro Negro. Section III sets out the law applicable to this dispute. Sections IV and V explain why this Tribunal has jurisdiction over this dispute and why México's jurisdictional and admissibility objections should be rejected. Section VI refutes México's arguments concerning its substantive breaches of the North American Free Trade Agreement (the "NAFTA" or the "Treaty") and further explains how México's actions breached its obligations to Claimants under the Treaty and international law. Section VII sets out Claimants' request for relief.

31. Accompanying this Reply are: (i) the Second Witness Statement of Gonzalo Gil, numbered **CWS-5**; (ii) the Second Witness Statement of José Antonio Cañedo-White, numbered **CWS-6**; (iii) the Second Witness Statement of Avi Yanus, numbered **CWS-7**; (iv) the Witness Statement of Carlos Williamson-Nasi, numbered **CWS-8**; (v) the Second Witness Statement of Frederick J. Warren, numbered **CWS-9**; (vi) the Second Expert Report of Alfonso Lopez Melih, an expert on Mexican administrative and bankruptcy law; numbered **CER-4**; (vii) the Second Expert Report of Report of Jose Luis Izunza Espinosa, an expert on Mexican criminal law, numbered **CER-5**; (viii) the Second Expert Report of Pablo Spiller and Carla Chavich of Compass Lexecon, a firm with expertise in the valuation and quantification of damages, numbered **CER-6**; (ix) the Expert Report of Duncan Weir, an expert on jack-up rigs, numbered **CER-7**; and (x) the Expert Report of

Manuel Tron, an expert on Mexican tax law, numbered **CER-8.** Claimants also submit with this Reply new factual exhibits numbered **C-0233** to **C-0568** and legal authorities numbered **CL-0269 to CL-0413**.

II. FACTS

A. México Destroyed Oro Negro Because of Oro Negro's Refusal to Pay Bribes to Pemex and Other Mexican Officials

32. Corruption in México is widespread and pervasive at all levels of the government.[3] It acts as a barrier to trade, hinders economic performance and obstructs foreign investment.[4] México's energy sector is particularly prone to corruption and Pemex, "*la empresa emblemática de México*,"[5] is by no means an exception.[6] Pemex's former Director General, Adrian Lajous Vargas, characterized Pemex as suffering from "*una corrupción que incide en todos sus ámbitos y niveles jerárquicos*."[7]

33. Corruption permeates the conduct of business at Pemex. As Claimants have shown and will show further in this Reply, Pemex has awarded numerous contracts and preferential treatment on the basis of bribes paid to powerful Pemex and other governmental officials.[8] This is a general

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[3] Transparency International World Corruptions Perceptions Index (2020) Exhibit **C-233**; Israel López Linares, *México se coloca como el segundo país con más sobornos de Latinoamérica,* FORBES (Sept. 23, 2019), https://www.forbes.com mx/México-se-coloca-como-el-segundo-pais-con-mas-sobornos-de-latinoamerica/, Exhibit **C-234**; *see also GAN Integrity* México Corruption Report (July 2020), https://www.ganintegrity.com/portal/country-profiles/México/, **C-235**.

[4] Roberto Martinez B. Kukutschka, Integrity Risks for International Businesses in México, Transparency International (Dec. 22, 2018), https://www.u4.no/publications/integrity-risks-for-international-businesses-in-México, Exhibit **C-236**.

[5] *Historia de Petróleos Mexicanos*, PEMEX, https://www.pemex.com/acerca/historia/Paginas/default.aspx, Exhibit **C-237**.

[6] *GAN Integrity* México Corruption Report (July 2020), https://www.ganintegrity.com/portal/country-profiles/México/, **C-235**.

[7] Adrian LaJous, *Pemex: Resultados de refinación,* LA JORNADA (Mar. 16, 2018), https://www.jornada.com.mx/2018/03/16/opinion/020a1pol, Exhibit **C-238**.

[8] First Black Cube Statement, **CWS-4**, ¶¶ 28, 30-34, **Appendix H**, Excerpt 1,-8, 10, 20.

pattern at Pemex. Recent high-profile scandals involving millions of dollars of bribes paid to Pemex for lucrative contracts have received extensive coverage in the media.[9] Less often reported, though widely acknowledged to frequently occur, are incidents such as what occurred in the present case, in which existing contracts are terminated and promised contracts never entered into with competitive firms based on their refusal to participate in corruption schemes.[10] México's *Instituto Mexicano Para La Competitividad A.C.* ("IMCO") found that approximately two thirds of businesses reported having lost a business opportunity to a competitor that paid a bribe or used connections.[11] Yet the system of favoring companies based on their payment of bribes persists because corruption is by its nature difficult to ferret out and prove.[12] Moreover, opaque and multi-layered processes for awarding or modifying contracts, combined with high levels of impunity, have historically shielded those in power from prosecution.[13]

34. Oro Negro is a quintessential example of how México's corrupt business practices and retaliation could be wielded against a company not willing to engage in bribery. Oro Negro entered

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[9] *See, e.g.*, *Ex jefe de Pemex revela millonarios sobornos de Odebrecht a Peña Nieto*, DW (Aug. 20, 2020), https://www.dw.com/es/exjefe-de-pemex-revela-millonarios-sobornos-de-odebrecht-a-pe%C3%B1a-nieto/a-54629300, Exhibit **C-239**; and in relation to the Vitol, Inc. Settlement *see also Se acabaron los abusos: López Obrador pidió investigar a empresa ligada a Pena Nieto que recibió contratos millonarios*, INFOBAE (May 20, 2020), https://www.infobae.com/america/México/2020/05/20/se-acabaron-los-abusos-lopez-obrador-pidio-investigar-a-empresa-ligada-a-pena-nieto-que-recibio-contratos-millonarios/, Exhibit **C-240**.

[10] First Black Cube Statement, **CWS-4**, ¶¶ 28, 30-34; **Appendix H**, Excerpt 19, 20, 21, 22; *GAN Integrity* México Corruption Report (July 2020), https://www.ganintegrity.com/portal/country-profiles/México/, Exhibit **C-235** ("companies report that they have lost business opportunities due to competitors resorting to corruption [and] almost half of businesses have failed to win contracts because competitors have bribed procurement officials").

[11] *La Corrupción en México: Transamos y No Avanzamos, Índice de Competitividad Internacional* (2015), https://imco.org mx/indices/la-corrupcion-en-México/, Exhibit **C-241**. *See also GAN Integrity* México Corruption Report (July 2020), https://www.ganintegrity.com/portal/country-profiles/México/, Exhibit **C-235**.

[12] *See Unión Fenosa Gas*, Award, ¶ 7.52, **RL-0099** ("corruption is rarely proven by direct cogent evidence; but, rather, it usually depends upon an accumulation of circumstantial evidence."); *see infra* Section II.J.1.

[13] *See* BTI 2018 Country Report: México, Bertelsmann Stiftung's Transformation Index (BTI) (2018) at 11. https://www.bti-project.org/content/en/downloads/reports/country_report_2018_MEX.pdf, Exhibit **C-242** (Reporting that as of 2018, the judiciary had never launched an independent investigation on politicians.).

into the Mexican oil industry in 2012 after receiving assurances from Pemex's then-CEO, Juan José Suárez Coppel ("Mr. Suárez"), that México would treat Oro Negro fairly and commit to backing its investments.[14] Mr. Suárez assured Frederick Warren ("Mr. Warren"), one of Oro Negro's primary investors, that México was committed to complying with U.S. laws for foreign investors, including U.S. anticorruption laws.[15] Oro Negro was, as Mr. Suárez stated, "an example that other Pemex suppliers should follow."[16] Oro Negro quickly established itself as a supplier of premium, gold-standard rigs that were staffed by a highly trained crew and operated more efficiently, with higher functional capacity and a better safety record than almost any of Oro Negro's competitors in the industry.[17]

35. Yet within three years of Oro Negro's entry into the Mexican oil market, Pemex began imposing harsh, forced modifications to its existing contracts with Oro Negro.[18] It reduced the daily rates for the rigs and arbitrarily amended the payment terms to allow it to withhold payment from Oro Negro for nearly a year for work already completed and approved by Pemex, stating all the while that the reductions were temporary.[19] A year later, Pemex modified the contracts again, imposing harsher terms and suspending two of Oro Negro's rigs, again stating that these material reductions would be temporary.[20] By 2017—five years after Oro Negro entered into the Mexican oil market—México had colluded with Oro Negros's creditors [redacted], to drive Oro Negro out of business, terminate Oro Negro's contracts with

[14] First Warren Statement, **CWS-3**, ¶¶ 13-14.

[15] *Id.* at ¶¶ 13-14.

[16] *Id.* at ¶ 11.

[17] Second Gil Statement **CWS-5**, ¶ 14.

[18] *Id.* at ¶¶ 55, 61-62.

[19] *Id*.

[20] *Id.* at ¶ 60.

Pemex and cause its creditors to take over Oro Negro's five state-of-the-art jack-up rigs.[21] Pemex, [redacted], and Oro Negro's creditors realized that there was a prize to be had in bribes, kickbacks, and other corruption if they could succeed in wrestling these valuable contracts from Oro Negro and [redacted]. Ample evidence shows, as is detailed in the Statement of Claim and accompanying Witness Statements and will be further described below, México's about-face can only be explained by one key factor: its pervasive culture of corruption, which led it to retaliate against Oro Negro because of Oro Negro's refusal to pay bribes.[22]

1. Mexican Officials at All Levels of Government Use Arbitrary and Unchecked Powers to Extort Third Parties and Private Companies

36. After the U.S. investors in Oro Negro committed to their investment in México by acquiring Todco, a company with an established history in the oil and gas industry in 2012;[23] securing financing from reputable international investors,[24] and obtaining premium rigs in 2013; México's levels of corruption rose substantially. [25]

37. México's ranking on the Transparency International Index plummeted 40 places during President Peña Nieto's six-year term from 2012-2018, dropping to a ranking of 135 out of 180 countries. [26] Considered more corrupt than 134 other countries, México achieved the distinguishing credential of the most corrupt country in both the Organization for Economic

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[21] SOC, ¶¶ 1,100, 173-216; Second Gil Statement **CWS-5**, ¶¶ 63-64, 67-74.

[22] SOC, ¶¶ 1,100, 173-216; First Black Cube Statement, **CWS-4**, ¶¶ 28, 30-34; **Appendix H**, Excerpt 19, 20, 21, 22; First Cañedo Statement **CWS-2**, ¶¶ 17-22; Second Gil Statement **CWS-5**, ¶ 10; Second Cañedo Statement **CWS-6**, ¶ 67-70, 74-80.

[23] Second Gil Statement **CWS-5**, ¶ 12.

[24] First Warren Statement, **CWS-3**, ¶ 11.

[25] Baker Institute, Measuring Corruption in México at 9 (Dec. 2018), https://www.bakerinstitute.org/media/files/files/b190ca73/bi-pub-rodriguez-sanchezcorruption-121118.pdf, Exhibit **C-243** ("by most international and national measures, México has ranked increasingly worse on corruption and impunity in recent years").

[26] Transparency International World Corruptions Perceptions Index (2017), Exhibit **C-244**.

Cooperation and Development ("OECD") and the G-20.[27] In the Americas, only Venezuela, Haiti, Guatemala, Nicaragua and Paraguay rank worse than México.[28] By 2018, México earned a place among the top ten most corrupt countries in the world and achieved the unenviable position of the country in Latin America in which the most bribes were paid.[29]

38. During the Peña Nieto administration, corruption became an even more persistent obstacle to conducting business in México.[30] In a 2016 report, nearly half of businesses in México acknowledged that they had paid a bribe to public officials, stating that it was necessary to do so to operate and not engaging in bribery could lead to the loss of contracts.[31] México's energy sector and public procurement sectors are particularly prone to and plagued by corruption.[32] The high complexity of activities, the close interaction between the public and private sectors, and the large

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[27] Baker Institute, Measuring Corruption in México (Dec. 2018), https://www.bakerinstitute.org/media/files/files/b190ca73/bi-pub-rodriguez-sanchezcorruption-121118.pdf, Exhibit **C-243**.

[28] Transparency International World Corruptions Perceptions Index (2017), Exhibit **C-244**.

[29] World Justice Project Rule of Law Index ("RLI") (2018), Exhibit **C-245**. Since 2008, the World Justice Project has published its Rule of Law Index ("RLI") which measures countries based on the strength of their rule of law and contains a metric for corruption. In 2020, the RLI ranked México 102 out of 113 countries surveyed. *See also* Transparency International World Corruptions Perceptions Index (2017), Exhibit **C-244**; *México, el país que más sobornos paga en América Latina*, FORBES (Oct. 9, 2017), https://www.forbes.com mx/México-el-pais-que-mas-paga-sobornos/, Exhibit **C-246**; Israel López Linares, *México se coloca como el segundo país con más sobornos de Latinoamérica*, FORBES (Sept. 23, 2019), https://www forbes.com.mx/México-se-coloca-como-el-segundo-pais-con-mas-sobornos-de-latinoamerica/, Exhibit **C-234**.

[30] Roberto Martinez B. Kukutschka, Integrity Risks for International Businesses in México, Transparency International (Dec. 22, 2018), https://www.u4.no/publications/integrity-risks-for-international-businesses-in-México, Exhibit **C-236**; *see also GAN Integrity* México Corruption Report (July 2020), https://www.ganintegrity.com/portal/country-profiles/México/, Exhibit **C-235.**

[31] María Amparo Casar, *México: Anatomía de la Corrupción*, 2da. Edition, p. 40-41 (Oct. 2016), https://contralacorrupcion.mx/anatomiadigital/content/Anatomia_de_la_corrupcion.pdf, Exhibit **C-247**.

[32] Inaki A. Ardigo, U4 Transparency, Corruption in México (Oct. 21, 2019), p. 11, Exhibit **C-248**; OECD, Public Procurement Review of México's PEMEX: Adapting to Change in the Oil Industry, OECD Public Governance Reviews, OECD Publishing, Paris, Fig. 6.1 (2017), https://doi.org/10.1787/9789264268555-en, **CL-269**. (An international survey of foreign bribery cases concluded between 1999 and 2014 found that 57% were related to public procurement.); OECD, OECD Integrity Review of México: Taking a Stronger Stance Against Corruption, OECD Public Governance Reviews, OECD Publishing, Paris, p. 226 (2017), https://doi.org/10.1787/9789264273207-en, **CL-270**.

volume of transactions are all factors that notoriously permit corrupt practices to flourish.[33] México was well aware of this widespread corruption within Pemex and failed to protect Oro Negro from the deleterious effects of that corruption.

39. In México, governmental requests for bribe payments from businesses follow a recognizable pattern. Officials solicit bribes through a system of "*operadores*" or "*aliados*"—individuals directed by the expecting beneficiary to the representatives of the business targeted to provide the bribe.[34] First, the would-be requestor creates some "problem" for the business, such as by refusing to grant a permit, delaying the payment for services, or conducting arbitrary and frequent investigations that disrupt operations.[35] Then, the *operadores*, who typically have some relationship or connection to the representatives from whom the bribe is solicited, approach the target company's representative with an offer to resolve the newly created problem.[36] If the representative accepts, the *operador* paves the path for the bribe to be paid. If the representative declines, then the government steps up the problems until the company either relents or is driven out of México.

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[33] OECD, Public Procurement Review of México's PEMEX: Adapting to Change in the Oil Industry, OECD Public Governance Reviews, OECD Publishing, Paris, Fig. 6.1 (2017), https://doi.org/10.1787/9789264268555-en, **CL-269**; OECD, OECD Integrity Review of México: Taking a Stronger Stance Against Corruption, OECD Public Governance Reviews, OECD Publishing, Paris, p. 226 (2017), https://doi.org/10.1787/9789264273207-en, **CL-270**.

[34] First Cañedo Statement **CWS-2**, ¶¶ 17-18; Second Cañedo Statement **CWS-6**, ¶¶ 68-70, 74; First Black Cube Statement, **CWS-4**, ¶ 33, **Appendix H**, Excerpt 4 (Mr. José Carlos Pacheco, former Vice President of Pemex Drilling and Services, explaining that high-level Pemex officials often solicit and/or accept bribes through intermediaries, whom he referred to as "allies" or "*operadores*," stating *"[el jefe mayor] tiene sus operadores . . . dependiendo de cada . . . de cada director, de cada subdirector . . . cada uno tiene sus . . . aliados*.").

[35] First Cañedo Statement **CWS-2**, ¶¶ 17-18; Second Cañedo Statement **CWS-6**, ¶¶ 68, 69; Second Gil Statement **CWS-5**, ¶¶ 61-62.

[36] First Cañedo Statement **CWS-2**, ¶¶ 17-18; Second Cañedo Statement **CWS-6**, ¶ 69.

40. Representatives of Oro Negro saw the initiation of this pattern firsthand and were approached by *operadores* offering to resolve problems that Pemex had created.[37] Precisely because Oro Negro maintained a strong stance against engaging in corruption and refused to bribe, ultimately the externally manufactured problems, intended but unsuccessful in convincing Oro Negro to pay bribes, increased to the point that Oro Negro was driven out of business.

2. Pemex's Pervasive Culture of Corruption Created an Environment Where Companies Were Rewarded Based on the Bribes Given and Not Quality of Assets and Service

41. Corruption at Pemex is pervasive, widely recognized, and well-documented. President Manuel Lopez Obrador ("Mr. Lopez Obrador"), elected in 2018 and having run on an anti-corruption platform, was quick to acknowledge that Pemex was plagued by corruption.[38] Commenting on the arrest of former Pemex CEO Emilio Ricardo Lozoya Austin ("Mr. Lozoya") prior to Mr. Lozoya's extradition from Spain on corruption charges, Mr. Lopez Obrador stated "*Yo lo que les puedo comentar es que venimos de un régimen caracterizado por la corrupción y lleva algún tiempo limpiar. Estamos . . . limpiando, pero era mucho en todo, era mucho. Imperaba la corrupción, en todos los campos . . .*"[39]

42. Mr. Lozoya headed Pemex from February 4, 2012 until February 8, 2016, during which time Pemex began imposing harsh modifications on Oro Negro's contracts. He was removed from his post after being named by the U.S. Department of Justice in 2016 as a recipient of bribes from

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[37] First Cañedo Statement **CWS-2**, ¶¶ 19-22; Second Cañedo Statement **CWS-6**, ¶¶ 74-77.

[38] *AMLO alleges 'a lot' of corruption drove México's prior oil reforms*, WORLD OIL (July 15, 2020), https://www.worldoil.com/news/2020/7/15/amlo-alleges-a-lot-of-corruption-drove-México-s-prior-oil-reforms, Exhibit **C-249** (stating that there was "a lot" of corruption at the state-owned oil company Pemex during the previous administration, when the Mexican Congress passed landmark laws to open the government-run energy sector to private investment).

[39] *Se acabaron los abusos: López Obrador pidió investigar a empresa ligada a Pena Nieto que recibió contratos millonarios*, INFOBAE (May 20, 2020), https://www.infobae.com/america/México/2020/05/20/se-acabaron-los-abusos-lopez-obrador-pidio-investigar-a-empresa-ligada-a-pena-nieto-que-recibio-contratos-millonarios/, Exhibit **C-240**.

Odebrecht S.A. ("Odebrecht") in exchange for contracts and political influence. Odebrecht is the company at the center of one of the largest corruption schemes in history, referred to as the *Lava Jato* scandal. The *Lava Jato* scandal originated from an investigation into corrupt payments in Brazil and ballooned into a multi-jurisdictional investigation into payment of hundreds of millions of dollars of bribes by Brazilian and foreign entities in over a dozen entities for lucrative public works contracts.

43. Top officials at Odebrecht S.A. and Odebrecht México admitted to having paid bribes to Mr. Lozoya through private banks and offshore companies in order to win public work contracts.[40] Based on these admissions, the *Procuraduría General de la República* ("PGR") opened an investigation into Mr. Lozoya.[41] Mr. Lozoya and certain of his family members implicated in receiving or using corrupt funds were arrested. In particular, Mexican authorities accused Mr. Lozoya of, among other charges, receiving millions of dollars of bribes in exchange for awarding public works contracts and directing Pemex's purchase of a fertilizer plant from *Altos Hornos de México* ("Ahmsa") for the inflated price of USD 275 million.[42] Mr. Lozoya, having fled México to escape the charges, was detained in Málaga, Spain on February 12, 2020 and in July 2020, was extradited to México from Spain.[43]

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[40] *Fiscalía General de la República, Comunicado FGR 46/19, Situación actual del caso Odebrecht* (Feb. 14, 2019), https://www.gob.mx/fgr/prensa/comunicado-fgr-46-19-situacion-actual-del-caso-odebrecht, Exhibit **C-250**.

[41] *Fiscalía General de la República, Comunicado FGR 46/19, Situación actual del caso Odebrecht* (Feb. 14, 2019), https://www.gob.mx/fgr/prensa/comunicado-fgr-46-19-situacion-actual-del-caso-odebrecht, Exhibit **C-250**.

[42] Luis Pablo Beauregard, *España entrega a México Alonso Ancira, implicado en el 'caso Lozoya',* EL PAIS (Nov. 13, 2020), https://elpais.com/mexico/2020-11-13/espana-da-luz-verde-a-la-extradicion-de-alonso-ancira-implicado-en-el-caso-lozoya.html, Exhibit **C-251**. Similar accusations relating to Pemex's purchase of Grupo Fertinal, another fertilizing company, in 2016 for $635 million, are currently under investigation by the U.S. Department of Justice. *See* Robbie Whelan, *Documents Tie Mexican Mogul to Company at Center of Fraud Probe,* THE WALL STREET JOURNAL (Sep. 4, 2019), https://www.wsj.com/articles/documents-tie-mexican-mogul-to-company-at-center-of-fraud-probe-11567589400, Exhibit **C-252**.

[43] *Tribunal español autoriza la extradición de Emilio Lozoya a México*, EL ECONOMISTA (July 6, 2020), https://www.eleconomista.com.mx/internacionales/Tribunal-espanol-autoriza-la-extradicion-de-Emilio-Lozoya-a-México--20200706-0027 html, Exhibit **C-253**.

44. After his extradition to México, on August 11, 2020, Mr. Lozoya presented a declaration containing a series of allegations that made clear why Oro Negro's contracts were terminated, while the contracts of certain of its competitors, for inferior rigs and containing terms less favorable to Pemex, were extended. Mr. Lozoya's report described numerous incidents in which bribes paid by private entities to high-ranking government officials, including to President Enrique Peña Nieto ("President Peña Nieto"), José Antonio González Anaya ("Mr. González Anaya") and Carlos Treviño Medina ("Mr. Treviño"), allowed these entities to gain lucrative contracts and benefits from México and to influence México's energy policy during the energy reform to the detriment of those companies who did not pay such bribes.[44]

45. In his *denuncia*, Mr. Lozoya detailed a web of bribery and influence used to secure preferential treatment even when it clearly harmed the Mexican people. This commonly takes the form of contributions to political campaigns. Beginning with Odebrecht's "contribution" of U.S. USD 6 million dollars to Enrique Peña Nieto's campaign,[45] Mr. Lozoya explained how Odebrecht's contributions were not simply "*una relación soborno-contrato-soborno, era una relación más profunda. Se trataba de ejercer influencia sobre el Presidente de la República y el Legislativo de México . . . .*"[46] Ultimately, "*Odebrecht dio millones de dólares en la campaña para promocionar un proyecto político para posteriormente beneficiarse con contratos*."[47]

46. Odebrecht is, unsurprisingly, not the only entity to make recent news for bribes paid to Pemex in exchange for lucrative contracts. A wider investigation by the U.S. Department of

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[44] *Denuncia de Emilio Ricardo Lozoya Austin ("Lozoya Denuncia")*, pp. 2, 8, 10, 28, 31, 42, 59 (Aug. 11, 2020), Exhibit **C-254**.

[45] *Lozoya Denuncia*, p. 4, Exhibit **C-254**.

[46] *Id.* at p. 18, Exhibit **C-254**.

[47] *Id.*, Exhibit **C-254**.

Justice into Vitol, Inc. and Swiss-based Vitol, S.A. determined that beginning in 2015, Vitol Inc. had made payments amounting to millions of dollars to Pemex in return for lucrative contracts.[48] The continuing revelation of bribery and corruption at Pemex show what Mr. Lozoya describes as Pemex's "*modus operandi de abuso de poder y corrupcion*."[49]

47. The impact of years of decisions made on the basis of bribes paid had a destructive impact on Pemex and its finances. One particular project that benefitted from bribes and simultaneously drained Pemex's financial reserves between 2011 to 2014 is *Etileno XXI*. In 2011 Pemex agreed to extend an agreement with Braskem (a subsidiary of Odebrecht) for Pemex to sell ethane at an inexplicable 25% discount, leaving Pemex in an incredibly disadvantageous financial position.[50] The agreement proved to be "*super desventajosa*" for Pemex and presented "*enormes impactos estratégicos*."[51] The significant discount was achieved by providing "*fuertes sumas de dinero*" to several individuals associated with former president Felipe Calderon Hinojosa, including José Antonio Meade Kuribreña ("Mr. Meade"), then-Minister of Finance of México, and Mr. González Anaya, at the time working in the Mexican Ministry of Finance (*Secretaría de Hacienda y Crédito Público,* the "SHCP") and later named as Director of Pemex and then Minister of Finance, and Mr. Treviño.[52] One direct consequence Mr. Lozoya listed as resulting from the *Etileno XXI* decision is the drastic reduction in Pemex's budget for exploration and production.[53] The *Etileno XXI* incident is particularly striking because it clearly describes both the immediate effects of bribery

[48] U.S. Dep't of Justice, Vitol Inc. Agrees to Pay over $135 million to Resolve Foreign Bribery Case (Dec. 3, 2020), Exhibit **C-255**.

[49] *Lozoya Denuncia*, p. 41, Exhibit **C-254**.

[50] *Id.* at pp. 22-24, 46, Exhibit **C-254**.

[51] *Id.* at pp. 23, 25, 46, Exhibit **C-254**.

[52] *Id.* at pp. 22-23, 28, 31, Exhibit **C-254**.

[53] *Id.* at p. 24, Exhibit **C-254**.

on obtaining contracts for advantageous terms, and it also demonstrates the knock-on-effect that such illicitly awarded contracts can have on the distribution of finances and other projects. As Mr. Lozoya described it after his extradition in August 2020, "*Pemex no le vende ni le ha vendido, ni debería de vender, gasolina, diésel, turbosina, o petróleo crudo a un 30% de descuento. Esto fue claramente un desfalco a la Nación*."[54]

48. The disadvantages of the contract and its extension did not go unnoticed and was the subject of discussion in a meeting of Pemex's Board of Directors, which was presided over by Mr. Meade and includedMr. González Anaya and, by invitation, Ignacio Quesada Morales, who was CFO of Pemex at the time.[55] In the meeting, one of the Board members questioned "*severamente el proceso de ocultamiento de información, así como listando una larga lista de factores que evidenciaba lo desventajosa y turbio de las condiciones que favoracían a BRASKEM.*"[56] The Strategy and Investment Committe recommended to the Board that "*proyectos de este tipo sean revisados de acuerdo a los lineamientos que se deberán emitir con este propósito*."[57] Mr. Meade responded that "*no existía ninguna obligación de presentar el contrato de suministro al Consejo*."[58] In other words, Mr. Meade dismissed the recommendations of the committee regarding the disadvantages of the contract.

49. Mr. Lozoya describes another instance in which President Peña Nieto instructed him to meet with Federico Martínez Urmenta ("Mr. Martínez Urmenta"), the Director General of TRADECO, after Mr. Martínez Urmenta had informed him that "*él y su socio Carlos Salinas de*

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[54] *Id.* at p. 26, Exhibit **C-254**.

[55] *Acta 827 del Consejo de Pemex* (Apr. 29, 2011), **C-566**.

[56] *Lozoya Denuncia*, p. 23, Exhibit **C-254**; *Acta 827 del Consejo de Pemex* (Apr. 29, 2011), pp. 33-38, **C-566**.

[57] *Lozoya Denuncia*, p. 24, Exhibit **C-254**; *Acta 827 del Consejo de Pemex* (Apr. 29, 2011), p. 31, **C-566**.

[58] *Lozoya Denuncia*, pp. 23-24, Exhibit **C-254**; *Acta 827 del Consejo de Pemex* (Apr. 29, 2011), p. 31, **C-566**.

Gortarí estaban operando para sumar al PAN y conseguir votos para las reformas estructurales."[59] Mr. Martínez Urmenta made a series of requests concerning work his company had completed for Pemex that had incurred complaints, delays and breaches and requested that Mr. Lozoya modify the contracts and pardon the penalties.[60] Although Mr. Lozoya did not make changes to the contract, he learned that the same contracts had received the requested benefits when Mr. González Anaya assumed power in Pemex.[61] Years of bribery had caused Pemex to make business decisions to its detriment—or, as Mr. Lozoya described the *Etileno XXI* contract, "*en perjuicio de todos los mexicanos*."[62]

50. Mr. Lozoya's narrative of rewarding individuals for political contributions also unfortunately impacted the Claimants.[63] In the spring of 2015, Claimant Fred Warren, who was then a member of Oro Negro's Board, had a meeting with Mr. Ignacio Quesada, the former CFO of Pemex, and a member of Alvarez & Marsal, a consulting company. During the meeting, Mr. Quesada explained that the basis and explanation for México's favorable treatment of Seamex was a longstanding patronage relationship between President Peña Nieto, Mr. Lozoya, and David Martínez Guzmán ("Mr. Martínez").[64] Specifically, Mr. Quesada explained that Mr. Lozoya and Mr. Martínez financed and supported President Peña Nieto when he was Governor of the State of México and ultimately, helped him to become President of México.[65] Once Peña Nieto became

[59] *Lozoya Denuncia*, p. 42, Exhibit **C-254**.

[60] *Id.* at p. 42, Exhibit **C-254**.

[61] *Id.* at p. 42, Exhibit **C-254**.

[62] *Id.* at p. 27, Exhibit **C-254**.

[63] *Id.* at p. 18, Exhibit **C-254**.

[64] Second Gil Statement, **CWS-5**, ¶ 66; Second Cañedo Statement, **CWS-6**, ¶ 65; Second Warren Statement, **CWS-9**, ¶ 4.

[65] Second Gil Statement, **CWS-5**, ¶ 66; Second Cañedo Statement, **CWS-6**, ¶ 65; Second Warren Statement, **CWS-9**, ¶ 4.

President, Mr. Quesada told Mr. Warren that he rewarded Mr. Lozoya with the role of CEO of Pemex, and he rewarded Mr. Martínez with the extremely favorable contracts for Seamex.[66] Mr. Quesada noted that when President Peña Nieto was in power, he sought to consolidate Pemex's operations in Mexico City, enabling more effective executive management and corruption.[67] This crony partnership also helps to explain México's behavior in this case.

51. To distract from the data points that Claimants have assembled—in the form of documents, direct testimony, evidence, and adverse inferences—of Pemex's retaliation against Oro Negro for its refusal to pay bribes, México attempts to spin the revelations of corruption and bribes-for-contracts schemes as merely a byproduct of functioning anti-corruption mechanisms.

> Las Demandantes cuestionan el nombre y reputación de Pemex. La posición de la Demandada es clara; la administración del gobierno federal ha iniciado gestiones en contra la corrupción y en particular en contra de ciertos exfuncionarios públicos por probables actos de corrupción. El hecho de que existan este tipo de investigaciones no se puede traducir en que, de manera general y a la ligera, Pemex o cualquier ente del gobierno sea "altamente corrupta", ni tampoco permite realizar afirmaciones y calificativos sobre una supuesta "cultura generalizada de corrupción" al interior de Pemex, como las Demandantes alegan en este arbitraje.[68]

52. México's argument is not grounded in fact. As of 2018, long after Pemex officials' solicitations of bribery and undue and retaliatory terminations of the Oro Negro Contracts, the Mexican government never launched an independent investigation into corruption among the political ranks despite plenty of evidence suggesting the same, including evidence that Claimants'

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[66] Second Gil Statement, CWS-5, ¶ 66; Second Cañedo Statement, **CWS-6**, ¶ 65; Second Warren Statement, **CWS-9**, ¶ 4.

[67] Second Gil Statement, CWS-5, ¶ 66; Second Cañedo Statement, **CWS-6**, ¶ 65; Second Warren Statement, **CWS-9**, ¶ 4.

[68] SOC, ¶¶ 461-62.

submitted in this arbitration.[69,70] México essentially concedes this point in its Statement of Defense, as it does not point to a single investigation into a politician or Pemex official for bribery or corruption between 2012 and 2017, and instead points to "*una serie de medidas para prevenir y sancionar cualquier conducta ilícita al interior de la empresa*."[71] Rather than investigating the proven corruption within Pemex, México has instead retaliated against Oro Negro and its representatives, in a further attempt to strangle the company and intimidate its witnesses from coming forward. That the government states that it is now addressing years of corruption and wide-scale impunity[72], if it really is, says nothing about the prevalence of corruption during the relevant time period of 2012 to 2017. In fact, it further corroborates the environment of impunity in México in which Claimants received bribe solicitations, contracts were awarded to other companies on the basis of the payment of bribes, and Pemex freely retaliated against Claimants for refusing to "pay-to-play."

53. México states that "*desde hace muchos años, Pemex ha tomado una serie de medidas para prevenir y sancionar cualquier conducta ilícita la interior de la empresa, incluidos actos de*

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[69] *See* BTI 2018 Country Report: México, Bertelsmann Stiftung's Transformation Index (BTI) (2018) at 11, https://www.bti-project.org/content/en/downloads/reports/country_report_2018_MEX.pdf, Exhibit **C-242** (Reporting that as of 2018, the judiciary had never launched an independent investigation into politicians).

[70] *La Auditoría mexicana constata pagos "en exceso" de Pemex a Odebrecht por 40 millones de dólares*, EL PAÍS (Nov. 2, 2017), https://elpais.com/internacional/2017/11/02/mexico/1509641329_015446 html, Exhibit **C-256**; Javier Risco, *Meade y Odebrecht*, EL FINANCIERO (June 6, 2018), https://www.elfinanciero.com mx/opinion/javier-risco/meade-y-odebrecht, Exhibit **C-257**; *Empresarios de México exigen poner un alto a la corrupción*, FORBES (Oct. 10, 2017), https://www forbes.com mx/empresarios-de-mexico-exigen-poner-un-alto-a-la-corrupcion/, Exhibit **C-258**; Hewlett-Packard Russia Pleads Guilty to And Sentenced for Bribery of Russian Government Officials (Sept. 11, 2014), https://www.justice.gov/usao-ndca/pr/hewlett-packard-russia-pleads-guilty-and-sentenced-bribery-russian-government-officials, Exhibit **C-259**; *see generally* **Appendix H** to the Statement of Claim.

[71] SOD, ¶ 470.

[72] *See* BTI 2018 Country Report: México, Bertelsmann Stiftung's Transformation Index (BTI) (2018) at 11, https://www.bti-project.org/content/en/downloads/reports/country_report_2018_MEX.pdf, Exhibit **C-242** (Reporting that as of 2018, the judiciary had never launched an independent investigation into politicians).

corrupción."[73] This statement, made after the revelation in December 2016 that millions of dollars of bribes were paid to Pemex for contracts and influence, rings hollow in relation to Oro Negro's situation.

54. As the numerous corruption investigations involving Pemex demonstrate, Pemex's anti-corruption mechanisms remain an empty shell. Oro Negro could not have availed itself of the supposed "*mecanismos que existen al interior de Pemex para combatir conductas ilícitas realizadas por funcionarios de Pemex y los canales de queja y denuncia que están disponibles al público en general*"[74] because to do so would have required Oro Negro make a complaint directly to the organization soliciting the bribe.[75] Moreover, even if Oro Negro had lodged a complaint, given the environment in México, they likely would have faced retaliation for doing so.[76]

55. México fails to account for the fact that the mere presence of anti-corruption laws does not equate compliance or enforcement of the laws.[77] It's just window dressing without compliance and enforcement. Certainly, in the case with Pemex, it has since been revealed that Pemex officials were requesting and receiving large sums of bribe money throughout the time period of Oro Negro's contracts, despite being simultaneously subject to anticorruption mechanisms of the *Código Penal Federal*, the *Ley Federal de Responsabilidades Administrativas de los Servidores*

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[73] SOD, ¶ 470.

[74] SOD, ¶ 470 ("*mecanismos que existen al interior de Pemex para combatir conductas ilícitas realizadas por funcionarios de Pemex y los canales de queja y denuncia que están disponibles al público en general*").

[75] Second Gil Statement, **CWS-5**, ¶ 10; Second Cañedo Statement, **CWS-6**, ¶ 71.

[76] Second Cañedo Statement, **CWS-6**, ¶ 71.

[77] *ee, e.g.*, Organisation for Economic Cooperation and Development, *Implementing the OECD Antibribery Convention, Phase 4 Report: México* (Oct. 19, 2018), http://www.oecd.org/corruption/anti-bribery/OECD-México-Phase-4-Report-ENG.pdf, **CL-271** (Noting that "México had not prosecuted a case of foreign bribery since 1999, when the Mexican foreign bribery offence came into force").

Públicos, various codes of conduct and the "series of measures" implemented as a result of the energy reform.[78]

3. Oro Negro Prided Itself on Its Integrity and Insisted on Running a Clean Business that Did Not Engage in Bribery

56. Pemex attempted to follow the same pattern with Oro Negro as it did with other companies that *did* proceed to make the payments by sending an *operador* to try and resolve Oro Negro's problems.[79] The distinguishing factor between Oro Negro and the companies that secured more valuable contracts and who did pay bribes, was that Oro Negro refused to make the requested bribe payments and suffered the consequences for not having done so.

57. Oro Negro insisted on running a clean business and Oro Negro's management viewed as its differentiating asset the fact that Oro Negro was an institutional company that not only offered high quality assets, but also could withstand public scrutiny—inside and outside of México.[80] When Messrs. Cañedo, Williamson, and Gil founded Oro Negro, they emphasized transparency in its operations, strong corporate governance, and a dedication to clean and reputable business practices.[81]

58. Oro Negro's consistent efforts to operate transparently and legally were not just aspirational, they were also motivated by the management's intention to make the company public and the understanding that in order to do so they must be able to withstand the rigors of public view.[82] Oro Negro's management recognized that to be able to bring the company public and

[78] SOD, ¶¶ 471, 473-74, 476-77; *see also Lozoya Denuncia* p. 2, 59, Exhibit **C-254**.

[79] First Black Cube Statement, **CWS-4**, **¶ 33**; **Appendix H,** Excerpt 4; Second Cañedo Statement, **CWS-6**, ¶¶ 74-77.

[80] Second Gil Statement, **CWS-5**, ¶ 25.

[81] *Id.* at ¶¶ 25-26, 30, 34.

[82] *Id.* at ¶¶ 26-27.

maintain U.S. investors, they needed to consistently operate with exceptional business practices.[83] Second, Oro Negro's management wanted to operate outside of México. Oro Negro's independence from Pemex was important to the institutional investors Oro Negro sought and gave it the potential to expand worldwide.[84]

59. Oro Negro took seriously its responsibilities to its individual and institutional investors, many of whom were committed and subject to strong anticorruption regimes and had agreed to invest in reliance on México's promises of transparency and fairness in the oil and gas industry.[85]

4. Oro Negro Was the Best Amongst its Competitors and Did Not Need to Engage in Bribery To Receive Contracts

60. Not only was Oro Negro strongly committed to not engage in bribery, Oro Negro had no need to resort to such methods to win contracts: its rigs and operational efficiencies were among the best in the world.[86] The rigs were high-quality, capable of operating in a wide range of shallow waters and pressure and temperature environments, and importantly, staffed by Oro Negro's highly-trained and experienced personnel.[87]

61. In addition, Oro Negro offered a better economic package to Pemex than virtually all of its competitors. For example, Oro Negro's contracts were "*Renta con Mantenimiento Integral Mixto*" contracts, or "*REMI Mixto*," meaning that, unlike the contracts Pemex entered into with most of Oro Negro's competitors, Oro Negro bore the direct operating costs and liability for its crew.[88]

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[83] Second Gil Statement, **CWS-5**, ¶¶ 26-27.

[84] *Id.*

[85] Second Gil Statement, **CWS-5**, ¶¶ 24, 26-27; First Warren Statement, **CWS-3**, ¶¶ 7, 13.

[86] Second Gil Statement, **CWS-5**, ¶¶ 33-34.

[87] *Id.* at ¶ 14.

[88] *Id.* at ¶¶ 13-22.

62. Oro Negro's quality, performance and value proposition was easily above its competitors so Oro Negro had no need to pad its contract proposals with bribes.[89]

63. México's assurances that it would create a safe and transparent environment in which to invest were absolutely critical to Oro Negro's investors' decisions to invest in the oil industry in México.[90] Specifically, Juan José Suárez Coppel, the then CEO of Pemex, confirmed that international investors such as Mr. Warren should feel confident investing in companies doing business in México with Pemex and that Pemex would comply with relevant laws.[91]

B. Consistent with its Culture of Corruption, and, as Supported by Claimants' Evidence, Pemex Solicited Bribes from Oro Negro

64. México argues that Claimants' loss of their profitable company is the result of their own bad financial decisions and unfortunate market timing, but the facts simply do not line up to support México's storyline.

65. From 2012 to 2017, agents of the Mexican government solicited bribes from Oro Negro, including with thinly-veiled offers to smooth Oro Negro's relationship with Pemex, suggestions that Oro Negro "allow itself to be helped," and reminders that Oro Negro should learn how to "operate" to win and maintain its contracts from Pemex.[92]

66. México's dismissal of Mr. Cañedo's descriptions of bribe solicitations he received as "*fuertes insinuaciones*" ignores how bribes are requested in México.[93] As described above, bribes are subtly requested through suggestions from *operadores* working for or with the individual

[89] SOC, ¶ 3; First Gil Statement, **CWS-1**, ¶¶ 29, 65-66, 93-95; Second Gil Statement, **CWS-5**, ¶¶ 14, 33.

[90] SOC, ¶¶ 27-36.

[91] First Warren Statement, **CWS-3**, ¶¶ 7, 12-13.

[92] Second Cañedo Statement, **CWS-6**, ¶¶ 74-80.

[93] SOD, ¶ 459.

soliciting the bribe.[94] The term *operar* is commonly used to refer to bribery, kickbacks, or influence-peddling with the Mexican government, particularly in the context of government contracts.[95] As explained by José Carlos Pacheco ("Mr. Pacheco"), the former Vice President of Pemex Drilling and Services, bribes, often disguised as a "success fee" make their way to the "*jefe mayor*" through his "*operadores*."[96] Mr. Pacheco explained that "*cada director . . . cada subdirector . . . cada uno tiene sus . . . aliados*" and typically "*[t]odo el mundo lo sabe."*[97]

67. México is quick to point out that Mr. Cañedo does not describe having received an express request that he make a bribe to obtain a contract with Pemex or improve contractual terms. For such a direct instruction to have come, Mr. Cañedo would have had to make arrangements for the bribe, which was itself illegal and which he refused to do as he attests in his witness statement.[98]

68. Despite Mr. Cañedo's refusals to engage in discussions of bribes, he nevertheless received several requests, three of which he details in his witness statements.[99] The first incident, in 2015, involved a conversation with Mr. Andrés Caire ("Mr. Caire"). Mr. Caire, an acquaintance of Mr. Cañedo whom he had not heard from in years, contacted Mr. Cañedo by email to discuss matters "*importantes y urgentes*."[100] When they subsequently spoke by phone in response to Mr. Caire's

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[94] First Black Cube Statement, **CWS-4**, ¶ 33; First Cañedo Statement, **CWS-2**, ¶ 17; Second Cañedo Statement, **CWS-6**, ¶ 74.

[95] First Cañedo Statement, **CWS-2**, ¶ 17; SOC, ¶ 180.

[96] First Black Cube Statement, **CWS-4**, **Appendix H,** Excerpt 4.

[97] First Black Cube Statement, **CWS-4**, **Appendix H**, Excerpts 4, 5, and 6 (describing how "*operadores*" were used by Ricardo Villegas Vasquez, Deputy Director of PEP's Shallow Waters Unit from 2015 to 2017; Jorge Kim Villatoro, Pemex's General Counsel from 2016 to 2018; and Miguel Angel Servin, Pemex's Chief Procurement Officer from 2016 to 2018).

[98] Second Cañedo Statement, **CWS-6**, ¶ 71.

[99] First Cañedo Statement, **CWS-2**, ¶¶ 19-23; Second Cañedo Statement, **CWS-6**, ¶¶ 74-80.

[100] First Cañedo Statement, **CWS-2**, ¶ 19; Second Cañedo Statement, **CWS-6**, ¶¶ 75-77; Email exchange between José Antonio Cañedo White and Andrés Caire (Feb. 11, 2015), Exhibit **C-260**.

request, Mr. Caire described in detail Oro Negro's problems in obtaining payment from Pemex and offered solutions to accelerate the payments.[101]

69. Specifically, Mr. Caire was referring to Pemex's practice of withholding payment from contractors, in this case Oro Negro, for work already completed and pending Pemex approval so as to financially pressure the company to accede to making bribe payments.[102] Before an invoice could be entered into Pemex's system it had a complex, multi-step, internal approval process.[103] Pemex officials were required to approve, on at least three occasions, that Oro Negro had complied with the contractual terms required for it to be paid in order for Oro Negro to be able to submit an invoice, and for the invoice to be registered as a payment obligation in Pemex's system.[104] Once an invoice was submitted, Pemex was required to authorize payment within 20 days, but in the first round of contract amendments unilaterally increased this time period to 180 days.[105] In practice, Pemex would often delay authorizing payment for a significant amount of time and invoices were often not paid for almost one year, rather than the originally-contracted time period of 20 days.[106] Again, this was a mechanism of pressure that it used to coerce its contractors to accede to the bribe requests that would come to them through the *operadores*.

70. Pemex's capacity to obstruct Oro Negro's ability to submit invoices for work already completed and approved by Pemex, was a "created problem"[107] that followed the pattern of how

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[101] First Cañedo Statement, **CWS-2**, ¶ 19; Second Cañedo Statement, **CWS-6**, ¶ 75.

[102] Flowchart Reflecting Pemex Invoicing Process, Exhibit **C-261** (depicting the process for Oro Negro to submit payments and the various Pemex approvals required for approval of an invoice).

[103] Second Gil Statement, **CWS-5**, ¶ 61; Flowchart Reflecting Pemex Invoicing Process, Exhibit **C-261**.

[104] Flowchart Reflecting Pemex Invoicing Process, Exhibit **C-261**.

[105] Second Gil Statement, **CWS-5**, ¶ 61.

[106] *Id.*

[107] *See* First Cañedo Statement, **CWS-2**, ¶¶ 17-18; Second Cañedo Statement, **CWS-6**, ¶ 75.

bribery works in México, and which Pemex used to its advantage.[108] During contractual negotiations in 2015 and 2016, described in detail below, Pemex used payment delays, mostly through the delay in issuing invoices, to pressure and ultimately coerce Oro Negro to accept contract modifications. Later, in 2017, while it was colluding with the Ad-Hoc Group, it used both invoicing delays and brazen payment delays, as well as threats to cancel the ongoing contracts, to starve Oro Negro of cash which ultimately caused Oro Negro to file for bankruptcy.[109]

71. México misses the point by arguing that Mr. Caire "*no mencionó nada sobre sobornos requeridos por funcionarios públicos*."[110] The details Mr. Caire could provide about Oro Negro's situation, specifically Pemex's delays in issuing and paying invoices, showed that he had been briefed by Pemex and sent by Pemex and other governmental officials to function as an *operador*.[111] Moreover, Mr. Caire told Mr. Cañedo that Gonzalo Gil White ("Mr. Gil") did not know how to resolve these payment issues with Pemex.[112] He explained that other companies who knew how to work with Pemex received payment more quickly.[113] In short, if Oro Negro were willing to pay bribes, its invoices would be approved faster, and Oro Negro could avoid liquidity issues.[114]

72. On another occasion, Mr. Cañedo met with the owner of *Perforadora Latina* ("Latina"), one of Oro Negro's competitors, who was seeking to merge his company with Oro Negro.[115]

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[108] First Cañedo Statement, **CWS-2**, ¶¶ 17-18; Second Cañedo Statement, **CWS-6**, ¶¶ 74-75.

[109] Second Gil Statement, **CWS-5**, ¶¶ 64, 75-76.

[110] SOD, ¶ 457.

[111] Second Cañedo Statement, **CWS-6**, ¶¶ 74-75.

[112] *Id.* at ¶ 76.

[113] *Id.*

[114] *Id.* at ¶ 76.

[115] *Id.* at ¶ 78.

Latina's owner emphasized that Oro Negro did not know how to "operate" with Pemex.[116] Suggesting that Oro Negro did not understand how to influence Pemex, he set as a condition of the merger the requirement that Latina have control of the combined company because he could not depend on or wait for authorizations for operating decisions.[117] Mr. Cañedo understood this to mean that he did not want Oro Negro's Board to serve as a check and to prevent him from paying to Pemex the bribes necessary to exert his influence.[118] This also shows that Oro Negro's direct competitors in the market were willing to engage in, and did in fact engage in, bribery to obtain more favorable treatment from Pemex.

73. The last instance that Mr. Cañedo describes is how he was referred by Mr. Javier López Madrid ("Mr. López Madrid") to Froylán Gracia García ("Mr. Gracia"), a well-reputed fixer, or *operador*, for Mr. Lozoya,[119] but refused to engage.[120] México dismisses the story because Mr. Cañedo was never contacted by Mr. Gracia or Mr. López Madrid for a bribe.[121] However, Mr. López Madrid told Mr. Cañedo that the best way to have a good relationship with Pemex was through Mr. Gracia, *i.e.*, go and see Mr. Gracia, arrange for the bribe payment to Mr. Lozoya and others within the government, and all will run more smoothly for Oro Negro.[122] Importantly, Mr.

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[116] *Id*.

[117] *Id*.

[118] *Id*.

[119] **Appendix H**, Excerpt 8, 9; *Froylan García, la ruta de la corrupción durante el gobierno de Lozoya*, GLOBAL ENERGY (May 28, 2019), https://globalenergy.mx/noticias/hidrocarburos/froylan-gracia-la-ruta-de-la-corrupcion-durante-el-gobierno-de-lozoya/, Exhibit **C-262**; *El expediente de Froylan García*, EL UNIVERSAL (June 2, 2018), https://www.eluniversal.com.mx/columna/mario-maldonado/cultura/el-expediente-de-froylan-gracia, Exhibit **C-263**; *El mejor amigo y mano derecha de Lozoya: Froylan Garcia*, EL TIEMPO (Aug. 19, 2020), https://eltiempomonclova.mx/noticia/2020/el-mejor-amigo-y-mano-derecha-de-lozoya-froylan-gracia.html, Exhibit **C-264**.

[120] Second Cañedo Statement, **CWS-6**, ¶ 79.

[121] First Cañedo Statement, **CWS-2**, ¶ 22; SOD, ¶ 459.

[122] Second Cañedo Statement, **CWS-6**, ¶ 79.

Gracia, or the "*mastermind de las finanzas externas del director*" was featured heavily in the Black Cube evidence as "receiving millions of dollars" by charging USD 50,000 to USD 100,000 for meetings with the CEO of Pemex.[123] The story presents a consistent narrative with prior solicitations: payments were necessary in order to receive more favorable treatment.

C. Pemex Retaliated Against Oro Negro, Terminated its Contracts, and Put It out of Business, as a Result of its Refusal To Pay Bribes

1. The Treatment of Oro Negro Is Not Merely a Consequence of the 2014 Oil Crisis as México Contends

74. Oro Negro was a leader in the oil and gas industry.[124] It had superior rigs,[125] staff and operations, and had a strong business plan designed to help the company expand internationally.[126]

75. Yet within three years of Oro Negro's entry into the Mexican oil market, Pemex began imposing harsh modifications to Oro Negro's existing contracts and refused to contract the New Rigs it had pressured Oro Negro to commission.[127] In 2015 and again in 2016, Pemex imposed reductions on the daily rates for the rigs and in 2016, it suspended two of Oro Negro's rigs.[128] Each time it claimed that the amendments were temporary and related to "budgetary shortfalls" or a "liquidity crisis."[129] In 2017, Pemex proposed a set of amendments so harsh that if Oro Negro accepted it would not be able to make payments on its bonds (the "Bonds") and could survive only

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123 *See, e.g*. **Appendix H**, Excerpts 8, 9; First Black Cube Statement, **CWS-4**, ¶ 31.

124 Second Gil Statement, **CWS-5**, ¶¶ 10-23.

125 Second Gil Statement, **CWS-5**, ¶¶ 10, 19, 24; Expert Report of Duncan Weir ("Weir Expert Report"), **CER-7**, ¶ 11.

126 Second Gil Statement, **CWS-5**, ¶¶ 25-27.

127 *Id.* at 55, 61-62.

128 *Id.*

129 Second Gil Statement **CWS-5**, ¶¶ 55, 57; Message from the CEO of Pemex (Feb. 29, 2016), Exhibit **C-265**.

by negotiating a revision of its bond agreements.[130] Pemex set an ultimatum for Oro Negro to accept the amendments in writing and withheld payments due to Oro Negro, financially strangling it, to apply pressure. Simultaneously, the group of Oro Negro's bondholders (collectively, the "Bondholders") that owns the majority of the Bonds that Oro Negro issued to finance the purchase of the Rigs (the "Ad-Hoc Group")[131] pressured Oro Negro to accept the amendments while refusing to renegotiate the terms of the bonds and demanding that it relinquish all of its available cash as partial payment for the bonds. México's concerted action with the Ad-Hoc Group deprived Oro Negro of the cash it needed to operate and drove Oro Negro out of business. Consistent with the pattern of corruption described above, Pemex seized the opportunity it created to terminate Oro Negro's contracts and cause its creditors to take over Oro Negro's five state-of-the-art jack-up rigs.[132] As explained in more detail in Section II.G.3, [redacted].

76. Pemex's actions against Oro Negro make no business or commercial sense, but when considered in the context of the bribery and corruption that characterized Pemex, the conduct at each juncture, as described below, can be explained through an understanding of Pemex's corrupt mechanisms.

[130] Oro Negro Press Release (Aug. 11, 2017), Exhibit **C-266**; Letter from Bondholders (Aug. 11, 2017), Exhibit **C-146**.

[131] The Ad-Hoc Group is comprised of (1) Alterna Capital Partners, LLC ("Alterna"); (2) Asia Research and Capital Management Ltd. ("ARCM"); (3) Contrarian Capital Managaement, LLC ("Contrarian"); (4) CQS (UK) LLP ("CQS"); (5) GHL Investments (Europe) Ltd. ("GHL"); (6) Maritime Finance Company Ltd. ("MFC"); and (7) Ship Finance International Ltd. ("SFIL").

[132] SOC, ¶¶ 1,100, 173-216; Second Gil Statement, **CWS-5**, ¶¶ 64, 74.

77. Through ample evidence assembled prior to and since filing this Arbitration, it is apparent that México's about-face can principally be explained by one key factor: Oro Negro's refusal to pay bribes caused Pemex to retaliate against Oro Negro and expel it from the market, to be replaced by a company, Seamex, that had demonstrated its willingness to act as a reliable source of bribe payments.[133] Throughout this Reply, Claimants will expound on the following points that demonstrate corruption, collusion, and ultimately México's illegal expropriation of Claimants' investment and behavior that violates both NAFTA's fair and equitable and full protection and security claims:

- **Pemex prepares an internal report on Oro Negro, noting that Oro Negro was not engaged in corruption.** The report affirmed that "*[L]os accionistas cuentan con un contrato privado entre ellos anti-corrupción bastante fuerte, y en la investigación realizada no se han encontrado indicios de lo contrario*."[134] Aware of the corruption within the industry, Pemex had an obligation to protect investors, like Oro Negro, from this corruption.

- **Seamex enters the Mexican offshore services market and quickly enters into five highly favorable contracts with Pemex under suspicious circumstances**.[135] Pemex officials were instructed to travel to a secret meeting at a luxury five-star resort in Villahermosa to sign the contracts and were instructed to not modify or negotiate any of the terms.[136] The instruction to sign the contracts in this manner came "from the top."[137] Seamex is a joint venture between Seadrill Ltd. ("Seadrill") a Bermuda-incorporated company owned by the owner of one of Oro Negro's largest bondholders, and Fintech Investments Ltd., an international investment fund managed by New York-based Fintech Advisory, Inc. ("Fintech") that Pemex had hand-picked as Seadrill's joint venture partner.[138] Mexican billionaire Mr. Martínez owns Fintech.[139] Seadrill has also come under investigation internationally for bribery to obtain contracts. In September 2020, prosecutors in Brazil described a scheme between Seadrill and its joint venture partner

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133 SOC, ¶¶ 1,100, 173-216; First Black Cube Statement, **CWS-4**, ¶¶ 28, 30-34; **Appendix H**, Excerpts 11, 12; First Cañedo Statement, **CWS-2**, ¶¶ 65-66, 75-80; Second Gil Statement, **CWS-5**, ¶ 10.

134 Pemex Report on Oro Negro (Nov. 6, 2013), Exhibit **C-267**.

135 Second Gil Statement, **CWS-5**, ¶¶ 48-53.

136 *Id.* at ¶¶ 50-51.

137 *Id*. at ¶¶ 50-51.

138 SOC, ¶ 157; Second Gil Statement, **CWS-5**, ¶ 49.

139 SOC, ¶ 157; Second Gil Statement, **CWS-5**, ¶ 49.

Malaysia's Sapura Energy Bhd. with respect to three contracts worth USD 2.7 billion signed with Brazil's Petrobras in 2011.[140]

- **President Peña Nieto rewards loyal cronies with influential positions and uniquely favorable contracts**.[141] There was a longstanding patronage relationship between President Peña Nieto, Mr. Lozoya, and Mr. Martínez.[142] Mr. Lozoya and Mr. Martínez financed and supported President Peña Nieto when he was Governor of the State of México and ultimately, through their support, helped him to become President of México.[143] Once Peña Nieto became President, he rewarded Mr. Lozoya with the role of CEO of Pemex, where he was in a position to carry out President Peña Nieto's agenda, and he rewarded Mr. Martínez with the uniquely favorable contracts for Seamex.[144]

- **Mr. Cañedo declines an offer from a Pemex *operador* to "resolve" Pemex's payment delays.** When Mr. Caire approached Mr. Cañedo in 2015, he knew that Mr. Caire was an *operador* because of the level of detail in which Mr. Caire was able to describe Oro Negro's problems with obtaining payment from Pemex.[145]

- **Pemex imposes the first daily rate reductions on Oro Negro.** On June 26, 2015, Pemex imposed harsh amendments on the Oro Negro Contracts.[146] Pemex justified the reductions of the daily rates of the contracts by pointing to the financial constraints posed by the oil crisis in 2014 and said that the rate reductions would only last from June 2015 to May 2016.[147] But, as Mr. Gil points out, "[i]f Pemex's issue was a budgetary crisis, Pemex should have prioritized and extended Oro Negro's contacts, as they were the lowest cost contracts to Pemex, and instead cut the rate of higher cost providers."[148]

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[140] *Seadrill, Sapura latest firms targeted in Brazil's 'Car Wash' Probe*, REUTERS (Sept. 24, 2020), https://www.reuters.com/article/us-brazil-corruption-seadrill-idUSKCN26F12A, Exhibit **C-268**.

[141] Second Gil Statement, **CWS-5**, ¶¶ 56, 66; Second Cañedo Statement, **CWS-6**, ¶ 65; Second Warren Statement, **CWS-9**, ¶ 4.

[142] Second Gil Statement, **CWS-5**, ¶¶ 56, 66; Second Cañedo Statement, **CWS-6**, ¶ 65; Second Warren Statement, **CWS-9**, ¶ 4.

[143] Second Gil Statement, **CWS-5**, ¶ 66; Second Cañedo Statement, **CWS-6**, ¶ 65; Second Warren Statement, **CWS-9**, ¶ 4.

[144] Second Gil Statement, **CWS-5**, ¶ 66; Second Cañedo Statement, **CWS-6**, ¶ 65; Second Warren Statement, **CWS-9**, ¶ 4.

[145] Second Cañedo Statement, **CWS-6**, ¶¶ 74-75.

[146] Second Gil Statement, **CWS-5**, ¶¶ 55, 61-62; First Gil Statement, **CWS-1**, ¶¶ 52-53; SOC ¶ 83; Exhibit **C-H.1** is a copy of the June 26, 2015 Primus Contract amendment; Exhibit **C-H.2** is a copy of the June 26, 2015 Laurus Contract amendment; Exhibit **C-H.3** is a copy of the June 26, 2015 Fortius Contract amendment; Exhibit **C-H.4** is a copy of the June 26, 2015 Decus Contract amendment; Exhibit **C-I.1** is a copy of the November 14, 2016 Fortius Contract amendment; Exhibit **C-I.2** is a copy of the November 14, 2016 Decus Contract amendment; Exhibit **C-I.3** is a copy of the November 14, 2016 Impetus Contract amendment; Exhibit **C-I.4** is a copy of the November 14, 2016 Laurus Contract amendment; Exhibit **C-I.5** is a copy of the November 14, 2016 Primus Contract amendment.

[147] Second Gil Statement, **CWS-5**, ¶ 55.

[148] Second Gil Statement, **CWS-5**, ¶ 55.

- **President Peña Nieto appointed José Antonio González Anaya, the close friend of then-*Secretario de la Hacienda*, José Antonio Meade to replace Mr. Lozoya at the helm of Pemex**. In February 2016, Mr. Lozoya was removed from his post for his involvement in a corruption scandal so large and highly-publicized that it could not be ignored: the *Lava Jato* scandal. Mr. Mr. González Anaya, who was handpicked to lead Pemex by President Peña Nieto, escalated the discriminatory treatment against Oro Negro and was promoted to be the *Secretario de Hacienda*, México's Secretary of Treasury, in November 2017, where he held the purse strings for the entire country. As *Secretario de Hacienda*, Mr. Gonzalez Anaya replaced his close friend Mr. Meade, another high ranking Peña Nieto official, as *Secretario de Hacienda*.[149] Relevantly, Mr. Lozoya names both Mr. González Anaya, at the time working in the Secretaría de Hacienda y Crédito Público, and Mr. Meade, then-*Secretario de Energía*, in his *denuncia* as having received millions in bribes between 2011 to 2014.[150]

- **Pemex imposes the second daily rate reductions and suspends two of Oro Negro's Rigs**. In a meeting with Mr. Gil, Mr. González Anaya stated that Pemex was facing a short-term liquidity crisis[151] and that the additional amendments to the Oro Negro Contracts were temporary.[152] Mr. Gil reminded Mr. González Anaya that the Oro Negro Contracts were the most financially beneficial for Pemex and it did not make business sense to impose such harsh amendments to its most favorable contracts, but Mr. González Anaya imposed the amendments anyway.[153]

- **Pemex proposes a third round of amendments in March 2017 to make the rate reductions on two of Oro Negro's Rigs permanent and maintain the suspension of the other Rigs**.[154] Under Pemex's proposed new terms, Oro Negro could not meet its financial obligations to the Bondholders.[155] Pemex's Contract Negotiation Group, which reported to Mr. Treviño,[156] implemented various aggressive negotiating tactics, including delaying payments to Oro Negro, imposing artificial deadlines and threatening to cancel the Oro Negro Contracts, to pressure Oro Negro into accepting the new terms.[157] Mr. Treviño, who

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[149] During the Presidency of Enrique Peña Nieto, Mr. Meade served as Secretary of Foreign Affairs from December 1, 2012 to August 27, 2015, Secretary of Social Development from August 28, 2015 to September 6, 2016 and then Secretary of Finance and Public Credit (i.e., *Secretario de Hacienda*) from September 7, 2016 to November 27, 2017. *See Gonzalez Anaya, el nuevo secretario de Hacienda*, FORBES (Nov. 27, 2017), https://www.forbes.com mx/gonzalez-anaya-conocido-de-hacienda-amigo-de-meade/, Exhibit **C-269**.

[150] *Lozoya Denuncia* at p. 31, Exhibit **C-254**.

[151] Second Gil Statement, **CWS-5**, ¶¶ 57, 61.

[152] *Id.* at ¶ 57.

[153] *Id.* at ¶¶ 57, 61.

[154] SOC, ¶¶ 89-93.

[155] Second Gil Statement, **CWS-5**, ¶ 63.

[156] *Id.* at ¶ 64.

[157] *Id.* at ¶ 64.

was also named in the Lozoya *denuncia* as having received bribes in 2014,[158] rebuked Mr. Gil's request that Oro Negro receive equal or similar treatment to Seamex.[159] Seamex's extreme favored treatment did not make business sense if Pemex were truly motivated by concerns about liquidity.[160]

- [redacted][161][redacted][162][redacted][163]

- **Pemex threatened in August 2017 to cancel Oro Negro's contracts if Oro Negro did not agree to the 2017 Proposed Amendments as offered**.[164] When Oro Negro announced to the Bondholders the ultimatum imposed by Mr. Treviño, the Bondholders immediately agreed with Pemex's terms. The Bondholders were aware that under the terms imposed by Pemex, Oro Negro would not be able to make payments on the bonds and would need to revise the bond agreements.[165] Oro Negro informed Pemex that same day that it accepted the proposed amendments[166] but was, at the time, unaware of [redacted][167] Pemex continued to apply financial pressure on Oro Negro to accept

[158] *Lozoya Denuncia* at p. 31, Exhibit **C-254**.

[159] Second Gil Statement, **CWS-5**, ¶¶ 53, 65.

[160] *Id.* at ¶ 65.

[161] *See* [redacted] Exhibit **C-270 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[162] [redacted] Exhibit **C-271 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[163] [redacted] Exhibit **C-272 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[164] Second Gil Statement, **CWS-5**, ¶¶ 64, 67.

[165] Oro Negro Press Release (Aug. 11, 2017), Exhibit **C-266**; Letter from Bondholders (Aug. 11, 2017), Exhibit **C-146**.

[166] Oro Negro Acceptance of Proposed 2017 Amendments (Aug. 11, 2017), Exhibit **C-139**; Communicación de Oro Negro del 11 de agosto de 2017, **R-0228**.

[167] Oro Negro Press Release (Aug. 11, 2017), Exhibit **C-266**.

the 2017 Proposed Amendments, refusing to pay Oro Negro over USD 100 million in past due invoices.[168]

- **Oro Negro negotiated with the Bondholders in good faith but they would not allow Oro Negro to restructure the bonds**. Oro Negro expected the Bondholders would allow Oro Negro to restructure the bonds to avoid default, as this option was in the Bondholders' best interest.[169] Instead, the Bondholders pressured Oro Negro to accept the terms of the 2017 Proposed Amendments as written and refused to renegotiate the bond agreement.[170] On one occasion, Mr. Ercil emailed Mr. Gil threatening him that "[g]iven the bid for jack ups and excitement around México, creditors are not afraid to call a default in this market."[171] The Bondholders imposed unreasonable demands on Oro Negro, while refusing to restructure the bonds.[172]

- [redacted][173] [redacted][174] [redacted][175] According to Mr. Pacheco, Mr. Servín, who advocated for the cancellation of the Oro Negro contracts, usually received a "cut" or "benefit" from Pemex contracts.[176] In the case of Oro Negro, he did not.[177] Mr. Pacheco and Mr. Luis Sergio Guaso Montoya, the former Deputy

[168] SOC, ¶ 8.

[169] Second Gil Statement, **CWS-5**, ¶ 70. *See also* [redacted] Exhibit **C-273 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[170] Letter from Bondholders (Aug.23, 2017), Exhibit **C-144**; Letter from Bondholders, (Aug. 11, 2017), Exhibit **C-146**; Letter from Bondholders (Sept. 26, 2017), Exhibit **C-147**.

[171] Email from A. Ercil to G. Gil (Aug. 3, 2017), Exhibit **C-274**.

[172] Second Gil Statement, **CWS-5**, ¶¶ 70, 73; Letter from Paul Weiss (Ad-Hoc Group's counsel) to Oro Negro (Aug. 28, 2017), Exhibit **C-275**.

[173] [redacted] Exhibit **C-276 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted] Exhibit **C-276 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[175] First Black Cube Statement, **CWS-4**, ¶ 39; **Appendix H**, Excerpt 2-10.

[176] First Black Cube Statement, **CWS-4**, ¶ 39; **Appendix H**, Excerpt 6.

[177] First Black Cube Statement, **CWS-4**, ¶ 39; **Appendix H**, Excerpt 19-21.

Director of Strategic Planning at PEP, identified Mr. Servin as an individual that would need to be bribed to reestablish Oro Negro's contracts with Pemex.[178] [redacted] Oro Negro, in good faith, responded to an email from Pemex in connection with its continued negotiation of the 2017 Proposed Amendments, sharing a revised draft of the documents.[179] Pemex stopped responding and ultimately never executed the 2017 Proposed Amendments.[180] Instead, Pemex unlawfully terminated the Oro Negro Contracts.[181]

- [redacted][182] [183] [184] [185] [186]

- **México instituted baseless criminal actions against Oro Negro, its directors, employees and lawyers in concert with the Ad-Hoc Group to Seize Oro Negro's assets and Rigs and issue arrest warrants**. Since April 2018, after Claimants filed their Notice of Intent for this Arbitration, México coordinated with the Ad-Hoc Group to launch nine baseless criminal investigations against Oro Negro, its directors, employees and lawyers.[187]

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[178] First Black Cube Statement, **CWS-4**, ¶ 43; **Appendix H**, Excerpt 5, 6, 21.

[179] *See, e.g.*, Email from L. Sanchez to A. Del Val (Sept. 20, 2017), Exhibit **C-277**; Email from A. Del Val to Oro Negro Executives (Sept. 29, 2017), Exhibit **C-278**.

[180] Second Gil Statement, **CWS-5**, ¶ 74.

[181] *See* Oro Negro Contract Terminations, Exhibits **C-M.1-C-M.5**.

[182] [redacted] Exhibit **C-279 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[183] [redacted] Exhibit **C-280 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[184] [redacted] Exhibit **C-281 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[185] *See* [redacted] Exhibit **C-281 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[186] [redacted] Exhibit **C-282 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[187] SOC, ¶ 216.

[redacted][188] México illegally terminated the Oro Negro Contracts and refused to pay money owed to Oro Negro into the Mexican Trust.[189] México's corrupt officials, including local prosecutors and judges, assisted in freezing the accounts in the Mexican Trust and seizing Oro Negro's rigs by force based on fabricated and unconfirmed evidence. Furthermore, Mr. González Anaya, with his authority as *Secretario de Hacienda*, would have been in a position to fabricate evidence and send it to the PGR, facilitating the Ad-Hoc Group's criminal complaint. México requested INTERPOL issue international arrest warrants (Red Notices) against Messrs. Gil, Williamson, Cañedo, and Villegas that, after a review *over a year later* INTERPOL cancelled because they were based on frivolous and unsubstantiated charges.

D. Oro Negro's Contracts Were More Valuable from a Commercial Perspective to Pemex than its Competitors' Contracts

1. As Compared to its Competitors, the Oro Negro Contracts Were Advantageous to Pemex

78. When Oro Negro set out to do business in México with Pemex, its founders were intentional and strategic about the business decisions that they made.[190] They had gained a deep understanding of the market through their experience financing companies in the industry for many years.[191] First, after a thorough analysis of the industry in México, they saw that the vast majority of the oil and gas resources and areas for potential expansion were in shallow water.[192] As such, they sought to invest in top of the line jack-up rigs that could be versatile across Mexican shallow water reservoir portfolio.[193] They also invested in top talent, acquiring Todco, an established

188 *See* Section H.4.

189 *See* Sections G.4(ii)-(iii).

190 Second Gil Statement, **CWS-5**, ¶¶ 11-13; Second Cañedo Statement, **CWS-6**, ¶ 52; Williamson Statement, **CWS-8**, ¶ 57.

191 Second Gil Statement, **CWS-5**, ¶ 11.

192 *Id.*

193 *Id.* at ¶¶ 11-13.

drilling company in México, which provided Oro Negro with a scalable operational setup.[194] Oro Negro's founders sought to establish a new breed of Mexican oil services company, one that was institutional, efficient, and could eventually expand outside of México.[195]

79. In this context, Oro Negro entered into the Contracts with Pemex in 2013 and 2014.[196] When Oro Negro entered into the Contracts and throughout their duration, Pemex had an investment grade credit rating.[197] The Oro Negro Contracts with Pemex had various terms that made them more advantageous and less expensive for Pemex than Oro Negro's competitors' contracts.[198] This included both the terms of the contracts themselves and the fact that Oro Negro provided additional services and assumed additional liabilities under its contracts for daily rates that were comparable to its competitors.[199] It is important to highlight these terms both to show Oro Negro's superiority to its competitors, but also to explain the lack of rationality, from a business and economic standpoint, for Pemex to choose to cut Oro Negro's rates in the way that it did, and ultimately, to terminate Oro Negro's contracts.

80. First, Oro Negro's Contracts had shorter terms than its competitors' contracts. On average, the terms of Oro Negro's contracts were initially about three years.[200] By comparison, Grupo R, another Mexican company who operated jack-ups for Pemex, had contracts with terms of at least

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194 *Id.* at ¶¶ 12-13.

195 Second Gil Statement, **CWS-5**, ¶¶ 12, 26-27; Second Cañedo Statement, **CWS-6**, ¶ 52; Williamson Statement, **CWS-8**, ¶¶ 58-60.

196 Exhibits **E.1** through **E.5**.

197 Second Gil Statement, **CWS-5**, ¶ 25.

198 *Id.* at ¶¶ 37-41.

199 *Id.*

200 Exhibits **E.1** through **E.5**; Second Gil Statement, **CWS-5**, ¶ 38; **Appendix G**; Exhibits **C-F.1 to C-F.5**.

five years.[201] Perforadora Latina, another Mexican competitor, had contracts with over six year terms.[202] The Seamex contracts, which were entered into in 2014 and 2015 and will be discussed further below, have durations of an average of six years.[203]

81. In addition to duration, Oro Negro's contracts were also distinct from its competitors in another important way: Oro Negro was the first Mexican provider to bear the full cost of personnel as well as liabilities for downtime and delays under its contracts for comparable daily rates.[204] Specifically, Oro Negro had what is called a *REMI Mixto* contract, or *Renta con Mantenimiento Integral Incluyendo Cuadrilla de Perforación*.[205] Nearly all of its competitors had standard *REMI* contracts, or *Renta con Mantenimiento Integral*.[206]

82. Under Oro Negro's *REMI Mixto* contracts, Oro Negro supplied and bore the cost of key personnel who worked on the jack-ups.[207] These payroll costs amounted to approximately USD 5,000-8,000/day on each rig (USD 25,000-40,000/day across 5 rigs and USD 9,125,000-14,600,000/year across 5 rigs).[208] In standard *REMI* contracts, the lessor (Pemex) had to supply the personnel and bear the cost of all personnel.[209] Nearly all of Oro Negro's main competitors in México had standard *REMI* contracts (Perforadora Latina, Perforadora México, CICSA,

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[201] Second Gil Statement, **CWS-5**, ¶ 38; Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex at p. 9 (May 17, 2017), Exhibit **C-283**.

[202] Second Gil Statement, **CWS-5**, ¶ 38; Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex at p. 9 (May 17, 2017), Exhibit **C-283**.

[203] **Appendix G**; Exhibits **C-F.1** to **C-F.5**.

[204] Second Gil Statement, **CWS-5**, ¶ 39.

[205] Second Gil Statement, **CWS-5**, ¶ 39; Weir Expert Report, **CER-7**, ¶ 61; Second Cañedo Statement, **CWS-6**, ¶¶ 53-54.

[206] Second Gil Statement, **CWS-5**, ¶ 39.

[207] Second Gil Statement, **CWS-5**, ¶¶ 39-40; Weir Expert Report, **CER-7**, ¶ 76.

[208] Second Gil Statement, **CWS-5**, ¶ 40.

[209] *Id.* at ¶¶ 39-40.

Perforadora Central, and GOIMAR).[210] Oro Negro's *REMI Mixto* contracts were also beneficial to Pemex because Oro Negro's rigs came with qualified personnel to work on the rigs.[211] Because premium jack-ups were new in México as of 2012, there was a shortage of qualified Pemex personnel who were experienced and could operate them.[212] By supplying its own qualified personnel operating under its policies, Oro Negro was able to resolve a critical staffing issue for Pemex.[213] Oro Negro acquired a company called Todco in 2012 and with the acquisition, Oro Negro absorbed an operating team that had many years of experience in the operation of jack-up rigs.[214] Todco also had a reputation in México upon which Oro Negro was able to build.

83. In addition to the cost of personnel, under Oro Negro's *REMI Mixto* contracts, Oro Negro also bore the cost of loss of active time due to accidents and liabilities.[215] Under its competitors' standard *REMI* contracts, Pemex bore the cost and risk of mistakes that caused delays.[216] Oro Negro agreed to bear the additional costs and liabilities under a *REMI Mixto* contract because its goal was to eventually make Oro Negro a public company, and it wanted the company to have full operational capabilities.[217] Having full service capabilities would also make it easier for the company to grow internationally (so it was not beholden to Pemex).[218] With qualified personnel

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[210] *Id.* at ¶ 40.

[211] Second Gil Statement, **CWS-5**, ¶¶ 40-41; Weir Expert Report, **CER-7**, ¶ 61.

[212] Second Gil Statement, **CWS-5**, ¶ 41.

[213] *Id.* at ¶ 40.

[214] Second Gil Statement, **CWS-5**, ¶ 12; Oro Negro Valuation (June 2014), Exhibit **C-284**.

[215] Second Gil Statement, **CWS-5**, ¶ 39.

[216] *Id.* at ¶¶ 39-40.

[217] Second Gil Statement, **CWS-5**, ¶ 41; Second Cañedo Statement, **CWS-6**, ¶ 54; Williamson Statement, **CWS-8**, ¶ 58.

[218] Second Gil Statement, **CWS-5**, ¶ 41.

on board, the rigs were more versatile because they could then work outside of México in almost any shallow water environment in the world.[219]

84. Furthermore, and importantly, Oro Negro assumed costs and liabilities under the *REMI Mixto* contracts that other providers did not assume for the same (or even less) daily rates.[220] Oro Negro's original daily rates were as follows: *Primus* (USD 158,999), *Laurus* (USD 158,999), *Fortius* (USD 161,125), *Decus* (USD 161,125), and *Impetus* (USD 130,000).[221] Perforadora Central, Perforadora Latina, and CICSA had contracts initiated around the same time as Oro Negro's with comparable daily rates to Oro Negro (USD 158,000-162,000), but none of these companies had *REMI Mixto* contracts.[222] For comparable daily rates, Oro Negro assumed additional costs of USD 25,000-40,000/day for personnel, and also assumed the cost of lost time under the contracts that its competitors did not assume. All of this represented a significant savings for Pemex resulting from the Oro Negro contracts.

85. Based upon Oro Negro assuming the costs of key personnel and risks of downtime of the rigs, the Oro Negro Contracts were less expensive for Pemex than its competitors' contracts.[223] During various negotiations between Oro Negro and Pemex, including during the negotiations of the various amendments to the Oro Negro Contracts, Oro Negro executives explained to Pemex that Oro Negro's contracts were actually more financially beneficial to Pemex and as such, they should not receive the same cuts to their daily rates as their competitors.[224] If Pemex's main

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219 Second Gil Statement, **CWS-5**, ¶ 41; Second Cañedo Statement, **CWS-6**, ¶ 54.

220 Second Gil Statement, **CWS-5**, ¶ 43; Weir Expert Report, **CER-7**, ¶ 76.

221 Exhibits **E.1** – **E.5**.

222 Second Gil Statement, **CWS-5**, ¶ 40; Weir Expert Report, **CER-7**, ¶ 61; Exhibit **CDW-10**.

223 Second Gil Statement, **CWS-5**, ¶¶ 39, 54.

224 *Id.* at ¶¶ 43, 57 .

concern was its financial hardship and liquidity issues due to the downturn in oil prices as México now suggests,[225] one would think that México and Pemex would have imposed greater cuts on its more expensive contracts rather than impose less drastic cuts on some of those (*i.e.*, Seamex) and make more drastic cuts on the Oro Negro contracts that were actually more financially beneficial for Pemex and that imposed less liability for Pemex.[226] But this is not what Pemex and México did, as there were other illicit factors at play in their decision-making.

2. Oro Negro's Jack-up Rigs Were also Superior to its Competitors

(i) Oro Negro's Rigs Were of the Best Quality in the Mexican Market

86. In addition to Oro Negro assuming costs and liabilities under its contracts that its competitors did not assume and generally having contracts that were less expensive to Pemex, Oro Negro's fleet was homogenous, larger, more efficient, and as a whole, comprised the best rigs in their category built by the best shipyards in the world.[227] The *Primus* and the *Laurus* were KFELS Mod V-B built in 2012 and 2013, respectively, at Keppel FELS shipyard.[228] The *Fortius* and the *Decus* were Baker Pacific 400 built in 2013 and 2014, respectively at PPL Shipyard.[229] The *Vastus*, *Supremus*, and *Animus* were Baker Pacific 400 built in 2015 at PPL Shipyard.[230] All of the Rigs were commissioned brand new for Pemex's use.[231] The *Primus* and the *Laurus* were purchased

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[225] SOD, ¶¶ 6, 106-128.

[226] Second Gil Statement, **CWS-5**, ¶¶ 43, 52, 57.

[227] Second Gil Statement, **CWS-5**, ¶ 13; Weir Expert Report, **CER-7**, ¶ 68.

[228] Second Gil Statement, **CWS-5**, ¶ 13; Weir Expert Report, **CER-7**, Annex A, Table 3; General Specifications and Operating Parameters for the *Primus*, *Laurus*, *Decus*, *Fortius*, and *Impetus*, Exhibit **C-285** through Exhibit **C-289**; Oro Negro Valuation (June 2014), p. 7, Exhibit **C-284**.

[229] Second Gil Statement, **CWS-5**, ¶ 13; Weir Expert Report, **CER-7**, Annex A, Table 3; General Specifications and Operating Parameters for the *Primus*, *Laurus*, *Decus*, *Fortius*, and *Impetus*, Exhibit **C-285** through Exhibit **C-289**; Oro Negro Valuation (June 2014), p. 7, Exhibit **C-284**.

[230] Second Gil Statement, **CWS-5**, ¶ 13; Weir Expert Report, **CER-7**, Annex A, Table 3; General Specifications and Operating Parameters for the *Primus*, *Laurus*, *Decus*, *Fortius*, and *Impetus*, Exhibit **C-285** through Exhibit **C-289**.

[231] Second Gil Statement, **CWS-5**, ¶ 13.

brand new from Keppels FELS during the construction phase from a distressed company and had highly strategic delivery windows for Pemex.[232] Keppel FELS and PPL Shipyard are considered two of the top shipyards in the world.[233]

(ii) Oro Negro's Rigs Had the Best Physical Features, Many Unique in the Market Only to Oro Negro's Rigs

87. As a fleet, all of Oro Negro's rigs were of the highest specification, capable of operating in water depths of 400 feet (122 meters). The homogenous size of Oro Negro's rigs had various efficiencies, including in personnel, training, and maintenance.[234] Most of its competitors' rigs were 300-375 feet (91-114 meters).[235] Only one of its competitors, Grupo R, had an entire fleet of 400 foot jack ups.[236] Oro Negro's rigs also employed more efficient drills with 3,000 horsepower that could reach 30,000 feet (9.1 kilometers) of drilling depth.[237] This was the gold standard in the industry. This larger size of Claimants' rigs allowed for greater efficiency and less logistical costs because any of the rigs could be deployed across Pemex's shallow water portfolio.[238] Specifically, the greater space allowed for more space on the drill floor (which is safer for drilling), more variable load capacity, more storage capacity, and greater bed capacity.[239] Greater storage capacity on the jack-up also resulted in decreased operating costs for Pemex

[232] Second Gil Statement, **CWS-5**, ¶ 13.

[233] Second Gil Statement, **CWS-5**, ¶ 13; Weir Expert Report, **CER-7**, ¶ 25.

[234] Second Gil Statement, **CWS-5**, ¶ 22; Weir Expert Report, **CER-7**, ¶ 18.

[235] Second Gil Statement, **CWS-5**, ¶ 15.

[236] Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex (May 17, 2017), Exhibit **C-283**.

[237] Second Gil Statement, **CWS-5**, ¶ 19; Weir Expert Report, **CER-7**, Annex A, Table 3.

[238] Second Gil Statement, **CWS-5**, ¶ 14; Weir Expert Report, **CER-7**, ¶ 30.

[239] Second Gil Statement, **CWS-5**, ¶ 16.

because it required fewer supply trips to and from the rigs.[240] Greater bed capacity was also beneficial for Pemex because it could rely on space on Oro Negro's rigs for Pemex personnel who were routinely carrying out functions at production installations.[241] Oro Negro's rigs each had 150 beds.[242] Accommodation space at offshore installations is always a scarce and costly resource.[243]

88. Another critical benefit of Oro Negro's rigs was that their cantilever had a longer reach.[244] This was critical because this allowed Oro Negro to reach the farthest row of wells.[245] Many of its competitors' rigs had shorter cantilevers that could not reach the last row of wells. If a jack-up was drilling at a location with 6 wells, but the jack-up could not reach the last two wells, this could result in 1/3 of the value of the wells being left unutilized and underground.[246] The last row of wells in early stage fields could produce up to 20,000 barrels/day.[247]

89. Yet another key benefit of Oro Negro's rigs was that they could take a core sample of the seabed while floating, and without being anchored to the seabed.[248] Other rigs, including some of Oro Negro's competitors' rigs, did not have the ability to take a sample without being anchored to the seabed.[249] This ability to take a soil sample eliminated the need for a separate barge to come

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240 *Id.*

241 Second Gil Statement, **CWS-5**, ¶ 16; Weir Expert Report, **CER-7**, ¶ 26.

242 Second Gil Statement, **CWS-5**, ¶ 16; Weir Expert Report, **CER-7**, ¶ 26, Annex A, Table 3.

243 Second Gil Statement, **CWS-5**, ¶ 16.

244 Second Gil Statement, **CWS-5**, ¶ 19; Weir Expert Report, **CER-7**, ¶ 32.

245 Second Gil Statement, **CWS-5**, ¶ 19; Weir Expert Report, **CER-7**, ¶ 32.

246 Second Gil Statement, **CWS-5**, ¶ 19.

247 *Id.*

248 Second Gil Statement, **CWS-5**, ¶ 20; Weir Expert Report, **CER-7**, ¶ 52.

249 Second Gil Statement, **CWS-5**, ¶ 20.

to the site and take a soil sample before drilling could begin, making the surveying process more efficient and much less costly for Pemex.[250]

(iii) Oro Negro's Rigs Were the Most Efficient in the Mexican Market

90. Oro Negro also had a superior efficiency record than its competitors and its rigs had minimal downtime.[251] Given that Oro Negro was responsible for paying staff on the rigs as well as absorbing the costs of delays and downtime, it benefited Oro Negro to be as efficient as possible.[252] Jack-up rigs are pieces of equipment that operate 24 hours a day and 365 days per year.[253] Oro Negro had a 99.5% effective utilization rate.[254] This means that it met the conditions under the contract to receive the daily rate 99.5% of the time.[255] This is one of the highest utilization rates anywhere in the world.[256] Operational readiness is highly technical, and Oro Negro needed to meet various requirements (staffing, equipment, and otherwise) in order to invoice Pemex under the contract.[257] Oro Negro also had zero lost time incidents between 2014 and 2017.[258] Pemex's own documents show the exceptional monthly operating efficiency rates of four out of five of Oro Negro's jack-ups, which represent the percentage of time that the rig was able to operate.[259]

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250 Second Gil Statement, **CWS-5**, ¶ 20; Weir Expert Report, **CER-7**, ¶ 52.

251 Second Gil Statement, **CWS-5**, ¶¶ 17-18, 61; Weir Expert Report, **CER-7**, ¶ 55.

252 Second Gil Statement, **CWS-5**, ¶¶ 39-40; Weir Expert Report, **CER-7**, ¶¶ 76, 83.

253 Second Gil Statement, **CWS-5**, ¶ 17.

254 Second Gil Statement, **CWS-5**, ¶ 17; PDF Showing Uptime Percentage Per Rig (*Primus, Laurus, Fortius, Decus, Impetus*) (2013-2016), Exhibit **C-290**.

255 Second Gil Statement, **CWS-5**, ¶ 17.

256 *Id.*

257 *Id.* at ¶¶ 17, 61.

258 Second Gil Statement, **CWS-5**, ¶ 18; Oro Negro Growth Summary (2017), Exhibit **C-291**.

259 Operating Efficiency for the *Decus*, *Primus*, *Impetus*, *Fortius* Exhibit **C-292** through Exhibit **C-295**. Claimants note that Respondent did not produce operating efficiency for the *Laurus*; Weir Expert Report, **CER-7**, ¶ 55.

(iv) Oro Negro's Rigs Were the Safest in the Mexican Market

91. Oro Negro's rigs were also safer than its competitors' rigs.[260] Oro Negro had a nearly flawless safety record.[261] This was due both to its superior rigs and also to its ability to hire and train its own staff.[262] Oro Negro had a comprehensive incident reporting system that encouraged staff to report incidents to encourage a safer working environment.[263] The safety record of a company is based upon the number of hours a rig performs without an accident that results in the loss of productive time.[264] Competitors, like Seamex, had accidents that were costly and dangerous.[265] Specifically, Seamex had a "punch through" accident on its West Titania rig at a location called Manik where Oro Negro had previously informed Pemex that it was unsafe to drill.[266] Seamex's accident could have been very costly and could have resulted in the loss of life.[267] A punch through happens when a jack-up leg or legs rapidly penetrates into the sea floor, which causes the rig to become uneven.[268] A punch through can cause severe damage to the rig, a loss of balance to the rig, and most seriously, a loss of life.[269] Pemex subsequently asked Oro Negro to drill in an adjacent location to where Seamex had its punch through, and because of the

[260] Second Gil Statement, **CWS-5**, ¶ 23.

[261] Second Gil Statement, **CWS-5**, ¶ 21; Weir Expert Report, **CER-7**, ¶ 59.

[262] Second Gil Statement, **CWS-5**, ¶ 21; Weir Expert Report, **CER-7**, ¶ 61.

[263] Second Gil Statement, **CWS-5**, ¶ 21.

[264] *Id.*

[265] *Id.* at ¶ 23.

[266] Second Gil Statement, **CWS-5**, ¶ 23; Email Exchange Between A. Acuña, O. Aagaard, and G. Gil re Manik 101A Alternativa (Sept. 5, 2017), Exhibit **C-296**; Email Exchange Between A. Acuña, O. Aagaard, and G. Gil re Decus at Manik 101A Exp (Sept. 5, 2017), Exhibit **C-297**; Facebook Post regarding news article discussing Seamex punch through incident (June 30, 2017), Exhibit **C-298**.

[267] Second Gil Statement, **CWS-5**, ¶ 23.

[268] *Id.*

[269] Second Gil Statement, **CWS-5**, ¶ 23; Weir Expert Report, **CER-7**, ¶ 60.

floating core sampling capabilities of the Rigs, the crew was able to take a sample of the seabed without losing stability.[270] Based on the core sample it took, Oro Negro determined that the location was also unsafe to drill.[271]

(v) México Refused To Produce Documents Related to Oro Negro's Performance and the Tribunal Should Draw Adverse Inferences in this Regard

92. Not only do Claimants' witnesses, experts, and documents corroborate the superiority of Oro Negro's rigs to Seamex's rigs in most respects, but in response to Claimants' document requests, México produced no documents reflecting any negative performance on Oro Negro's part, either with its Statement of Defense or in document production, despite requests for the same.[272]

93. Specifically, Claimants' requested: "The documents related to or prepared in connection to Pemex's evaluation of Oro Negro's performance under the Oro Negro Contracts between April 1, 2013 and October 1, 2017."[273]

94. In response to this request, México produced two documents that showed that Oro Negro took important safety precautions that could have prevented accidents on its rigs. One document reflects that Oro Negro's drilling consultant's assessment of a particular drilling location revealed a considerable risk of penetration, or a punch through accident, and as such, the consultant recommended that Oro Negro not drill in that particular location.[274] Second, México produced another letter that Oro Negro sent to Pemex stating that based upon safety requirements from its

[270] Second Gil Statement, **CWS-5**, ¶ 23.

[271] *Id.*

[272] Claimants' Request for Production of Documents (July 20, 2020), Request No. 49.

[273] *Id.*

[274] Letter from Oro Negro to Ing. Juan Fernando Pérez Fuentes (Sept. 19, 2015), Exhibit **C-299**.

insurer, Oro Negro is asking Pemex to re-assign the *Fortius* platform to a new location.[275] These documents reflect Oro Negro's deep commitment to safety and efficient performance. México also produced documents reflecting operating efficiency for four of the five Rigs, which Claimants' expert found to reflect effective and efficient performance.[276]

95. Given that México has not produced any documents reflecting negative performance on Oro Negro's part in response to Claimants' Document Request 49, and in fact only produced documents that reflected Oro Negro's superior performance and commitment to safety, combined with the documents that Oro Negro has produced reflecting its superior performance and commitment to safety, Claimants respectfully request that the Tribunal infer that no documents exist responsive to this category, or that any further responsive documents would corroborate Oro Negro's superior performance and commitment to safety. Thus, consistent with the documents Claimants have produced, Oro Negro had a superior performance record. México undoubtedly had other documents evidencing Oro Negro's superior performance record when compared to its competitors but chose not to produce them.

96. These adverse inferences are appropriate because México has twice failed to produce these documents, and Claimants have provided evidence to support these inferences. Article 9(5) of the IBA Rules permits this Tribunal to draw adverse inferences when a party

> fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.

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[275] Letter from Oro Negro to Ing. Juan Fernando Pérez Fuentes re: location of the *Fortius* platform (March 13, 2017), Exhibit **C-300**.

[276] Operating Efficiency for *Decus, Primus, Impetus* and *Fortius*, Exhibits **C-292- C-295**; Weir Expert Report, **CER-7**, ¶ 55.

97. Such inferences are proper where a party to the arbitration fails to produce documents, and tribunals have recognized the propriety of such sanctions against Respondent states that have similarly argued that their laws do not allow the production of such documents.

98. In international arbitration, it is "an accepted principle that an adverse inference may be drawn from a party's failure to submit evidence likely to be at its disposal."[277] As surmised in *Feldman v. United Mexican States*, a rational party with evidence in its possession to rebut the claimant's allegation would have produced such evidence, and therefore it is "entirely reasonable . . . to make an inference based on [México's] failure to present evidence on [a certain] issue."[278]

99. Tribunals have specifically found that adverse inferences are proper when states refuse to produce documents by invoking internal legal restrictions although the Tribunal rejected their objections based on those restrictions. For example, in *United Parcel Services of America, Inc. v. Government of Canada*, the tribunal rejected Canada's objections to document requests based on cabinet privilege, and stated that a failure to produce the documents sought "may lead to the Tribunal drawing adverse inferences on the issue in question."[279] A similar warning arising from an unjustified claim of cabinet privilege was provided to Canada in *Pope & Talbot Inc. v. Government of Canada*, when Canada improperly withheld documents.[280]

100. As the Tribunal is aware, the Claimants sent a letter to the Tribunal on February 17, 2021 regarding the deficient nature of Respondents' document production. México responded on February 26, 2021. The Tribunal invited the Claimants to respond in conjunction with this Reply

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[277] *Levitt v. Islamic Republic of Iran*, Award No. 520-210-3 (Aug. 29, 1991), **CL-281**.

[278] *Feldman v. United Mexican States*, Award, ¶ 178 (Dec. 16, 2002), **RL-0078**.

[279] *United Parcel Servs. of Am., Inc. v. Gov't of Can.,* Decision of the Tribunal Relating to Canada's Claim of Cabinet Privilege 15 (Oct. 8, 2004), ¶¶ 13-15, **CL-282**.

[280] *Pope & Talbot Inc. v. Gov't of Can*., Decision by Tribunal (Sept. 6, 2000), ¶¶ 1.3-1.8, **CL-283**.

submission. Put simply, Claimants have requested various documents that are at México's disposal, and as discussed in Claimants' November 2, 2020 letter in response to México's initial objections to the Tribunal's order on the parties' requests for documents, there are no legal impediments in México to providing those documents to Claimants. The requested documents constitute the kind of documents that a rational party with evidence in its possession to rebut the a claimant's allegation would have in its records and should be produced. Moreover, México invoked internal legal restrictions for various of Claimants' requests even though the Tribunal rejected—in two separate instances—their objections based on those restrictions. Even the requests for which México does not invoke any legal impediment are grossly incomplete.

101. México's arguments in its February 26, 2021 letter miss the point. Its various statements about its "*innumerables esfuerzos*" to obtain documents fall flat when considered in light of the facts: México has produced essentially no internal communications, internal analyses, and/or discussions related to Oro Negro, Seamex or any of its competitors. México tries to absolve itself of responsibility by pointing the finger elsewhere and seeking the Tribunal's understanding with disingenuous claims that it is "*entre la espada y la pared*." Not so. México continues to hide behind the excuse of various supposed legal impediments for its failure to produce documents related to the SAT, FGR and the FGJCDMX. For the avoidance of doubt, México has produced no documents in response to any of these requests and as such, Claimants have been denied the basic information related to these ongoing, retaliatory, and damaging investigations.

102. While México does not have a "*facultad omnipotente*" as it suggests, it does have an obligation to coordinate with its various agencies and instrumentalities in good faith and to conduct a good faith search for documents. The evidence that Claimants have produced in this proceeding simply shows that México has not engaged in this effort in good faith.

103. With respect to Claimants' document production, Claimants expressly reject Respondent's statement that Claimants' production was incomplete, especially as Respondent does not even particularize this assertion. To be clear, Claimants reviewed relevant documents and emails within the relevant time periods requested by México and coordinated with counsel across numerous continents to obtain the requested documents. This was a significant undertaking, and Claimants responded to México's requests carefully and diligently within the time period in which the parties agreed. México's suggestion that Claimants have engaged in a "guerilla tactic" is nothing more than a veiled attempt to distract from México's own culpable omissions when it comes to document production.

3. Pemex's Failure To Contract the New Rigs After It Had Agreed To Do So Was a Decision Motivated by Corruption Rather than Commercial Needs, Discriminatory, and Arbitrary

(i) Pemex Communicated to Oro Negro that New Rigs Were Necessary

104. Around 2013, Pemex communicated to Oro Negro and others that it was going to promote significant investment in increasing oil production and reserves in México.[281] This was a tremendous effort for Pemex. President Peña Nieto pledged to increase production from 2.5 million barrels per day in 2013 to 3 million barrels per day by 2018, and to continue this investment beyond 2018.[282] Specifically, at the heart of this plan was modernizing and growing Pemex's feet of premium jack-ups.[283] Before 2012, Pemex had not previously contracted premium

[281] Second Gil Statement, **CWS-5**, ¶ 35; Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex (May 17, 2017), Exhibit **C-283**; Oro Negro Rating Agency Presentation (Mar. 2013), Exhibit **C-301**.

[282] Second Gil Statement, **CWS-5**, ¶ 35; Elisabeth Malkin, *México Opens Oil Fields to Foreigners*, THE NEW YORK TIMES (Aug. 13, 2014), https://www.nytimes.com/2014/08/14/business/international/México-unveils-plan-for-opening-oil-industry-to-foreigners.html, Exhibit **C-302**.

[283] Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex at 4 (May 17, 2017), Exhibit **C-283**.

jack-ups, it had only contracted conventional jack-ups, which were older and less efficient.[284] This meant both replacing the old rigs which were older than 30 years (nearly half of Pemex's fleet) and also growing Pemex's fleet significantly in the coming years.[285] Pemex frequently told representatives of Oro Negro that they needed to bring more jack-ups to México in order to meet Pemex's ambitious production goals.[286] In furtherance of this goal, Pemex itself contracted for two rigs from Keppel FELS in Singapore, Model MOD V-B.[287] Pemex's rigs, the Yunuen and the Kukulcan, were delivered in February 2015 and were immediately put to work.[288] Because many of México's main oil fields were mature and declining, Pemex required a significant level of investment to maintain a fixed level of production.[289] In order to increase production with declining fields, as Pemex sought to do, this required tremendous additional investment.[290] This increase in production that Pemex desired required additional yearly product.[291] This is because many of Pemex's assets and drilling locations were declining.[292] This required a tremendous investment in new assets just to maintain a fixed level of production, and significantly more to grow its production in the way President Peña Nieto and Mr. Lozoya sought to do.[293] In order to

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[284] Second Gil Statement, **CWS-5**, ¶ 36.

[285] Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex at 4 (May 17, 2017), Exhibit **C-283**; Second Gil Statement, **CWS-5**, ¶ 36.

[286] Second Gil Statement, **CWS-5**, ¶ 36.

[287] *Keppel FELS hands over jack-up newbuild to Pemex* (Mar. 31, 2015), https://www.offshore-energy.biz/keppel-fels-hands-over-jack-up-newbuild-to-pemex/, Exhibit **C-303**.

[288] *Keppel FELS hands over jack-up newbuild to Pemex* (Mar. 31, 2015), https://www.offshore-energy.biz/keppel-fels-hands-over-jack-up-newbuild-to-pemex/, Exhibit **C-303**.

[289] Second Gil Statement, **CWS-5**, ¶ 36.

[290] *Id.*

[291] *Id.*

[292] *Id.* at ¶ 11.

[293] *Id.* at ¶ 36.

meet these ambitious demands, Pemex required a tremendous investment in new equipment, and it asked Oro Negro to help it with this important initiative for México by bringing more jack up rigs.[294]

(ii) Pemex Wanted Oro Negro's Rigs

105. The Pemex team in charge of securing new assets had made clear to Oro Negro that in furtherance of Pemex's production goals, it wanted to contract additional premium rigs and to increase the size of its fleet, including by contracting more rigs from Oro Negro.[295] On numerous occasions, Pemex made clear to Oro Negro, and to its competitors, that it needed more premium jack-ups in México.[296] Pemex, in order to induce Oro Negro to continue investing in premium rigs, also made representations to Oro Negro that throughout Pemex's history, no Mexican company with available assets had ever been left idle by Pemex, essentially assuring that if Oro Negro brought new rigs into México, they would quickly be contracted and employed for the next 30 years, the useful life of the rig.[297] As a result of these conversations and with these assurances, Oro Negro went to its Board and got approval and secured financing to obtain four new rigs, the *Impetus*, the *Vastus*, the *Supremus*, and the *Animus*.[298] Pemex eventually contracted the *Impetus* in May 2016, although the *Impetus* remained idle in Mexican waters for quite some time before receiving a contract. Pemex did not contract the *Vastus*, the *Supremus*, and the *Animus*, contrary

294 *Id.* at ¶ 36.

295 *Id.* at ¶¶ 29, 36, 42, 46.

296 Second Gil Statement, **CWS-5**, ¶ 42; Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex (May 17, 2017), p. 4, Exhibit **C-283**.

297 SOC, ¶¶ 70 –80; First Gil Statement, **CWS-1**, ¶¶ 38–52; Second Gil Statement, **CWS-5**, ¶ 38.

298 Second Gil Statement, **CWS-5**, ¶ 42; Second Cañedo Statement, **CWS-6**, ¶ 59.

to assurances Pemex had made to Oro Negro. The *Vastus*, the *Supremus*, and the *Animus* will be referred to as the "New Rigs."[299]

106. For Pemex, replacing its older, conventional rigs was a process lasting a number of years, timed based upon the expiration of Pemex's contracts with conventional platforms.[300] Oro Negro knew that Pemex had various conventional contracts that were expiring and that Pemex needed a significant number of new jack-ups to meet its tremendous demand for additional production. For Oro Negro, contracting to build the New Rigs was also a time consuming and expensive process – the construction contracts were entered into between March and June of 2013 for delivery between late 2014 and early 2015 and required a total down payment of USD 125 million.[301] Based upon Pemex's representations to Oro Negro regarding the significant increases in oil production as well as its need for new premium jack-ups from Oro Negro, Oro Negro's Board approved the acquisition of the New Rigs.[302]

(iii) Consistent with Pemex's Representations, Oro Negro Offered the New Rigs to Pemex

107. In this context, and at Pemex's Request, Oro Negro made formal proposals to Pemex to lease the New Rigs. Oro Negro made the proposals for the *Supremus* and *Animus* on October 3, 2013, and stated that the *Supremus* would be available in July 2015 and that the Animus would be available in September 2015.[303] On January 27, 2014, Oro Negro made the formal proposals for the *Impetus* and *Vastus*, stating that the *Impetus* would be ready in November 2014, and that the

[299] Second Gil Statement, **CWS-5**, ¶ 42.

[300] Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex, (May 17, 2017), p. 7, Exhibit **C-283**.

[301] Exhibit **C-114 - C-122** are the three construction contracts and their amendments.

[302] Second Gil Statement, **CWS-5**, ¶ 42.

[303] Exhibit **C-123** is the October 3, 2013 Letter formally offering *Supremus and Animus* and Exhibit **C-124** is the January 24, 2014 Letter formally offering the *Impetus* and *Vastus*.

Vastus would be ready in February 2015.[304] Based upon Oro Negro's formal proposals, Pemex knew all of the specifications of the *Supremus, Animus,* and *Vastus*, and that Oro Negro had had these rigs built specifically to meet Pemex's particular requirements.[305] Pemex knew when the rigs would be available to Pemex.[306] It also knew the contractual terms under which Oro Negro was requesting to contract each of the New Rigs.[307] As is clear from the below chart (excerpted from Exhibit **C-283**, Letter and Presentation from the *Grupo Mexicano de Empresas de Perforación* to Pemex) as well as witness testimony, Oro Negro closely tracked the expiration of Pemex's contracts with its delivery windows for the New Rigs and knew its timing was advantageous with the expiration of old contracts.[308] Oro Negro, through Manuel Olea, the Deputy CEO of Oro Negro, was also in regular contact with Pemex, both in Villahermosa and in México City, about the status of the New Rigs.[309] He had regular in person meetings as well as email contact with various individuals at Pemex.[310] Specifically, with respect to Oro Negro's New Rigs, Mr. Olea negotiated directly with Rafael Aguilar ("Mr. Aguilar") and Luis Ignacio Garcia

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[304] Exhibit **C-123** is the October 3, 2013 Letter formally offering *Supremus and Animus* and Exhibit **C-124** is the January 24, 2014 Letter formally offering the *Impetus* and *Vastus*. Note that the Statement of Claim incorrectly stated that the offer for the *Impetus* and *Vastus* was made on January 27, 2014. The offer for the *Impetus* and *Vastus* was made on January 24, 2014.

[305] Exhibit **C-123** is the October 3, 2013 Letter formally offering *Supremus and Animus* and Exhibit **C-124** is the January 24, 2014 Letter formally offering the *Impetus* and *Vastus*. Oro Negro also provided subsequent information regarding the New Rigs at Pemex's request. *See* Letter from PPI to Oro Negro (Oct. 24, 2014), Exhibit **C-304** and Oro Negro's responses for the *Supremus*, *Animus*, *Vastus*, and *Impetus* (Oct. 30, 2014), Exhibit **C-305**- Exhibit **C-306**; Second Gil Statement, **CWS-5**, ¶ 43.

[306] Exhibit **C-123** is the October 3, 2013 Letter formally offering *Supremus and Animus* and Exhibit **C-124** is the January 24, 2014 Letter formally offering the *Impetus* and *Vastus*. Oro Negro also provided subsequent information regarding the New Rigs at Pemex's request. *See* Letter from Pemex Procurement International, Inc. (PPI) to Oro Negro (Oct. 24, 2014), Exhibit **C-304** and Oro Negro's responses for the *Supremus*, *Animus*, *Vastus*, and *Impetus* (Oct. 30, 2014), Exhibit **C-305**- Exhibit **C-306**.

[307] Second Gil Statement, **CWS-5**, ¶ 43.

[308] Second Gil Statement, **CWS-5**, ¶ 46; Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex (May 17, 2017), pp. 7-8, Exhibit **C-283**.

[309] Second Gil Statement, **CWS-5**, ¶¶ 43-44.

[310] Second Gil Statement, **CWS-5**, ¶ 43.

Mendoza ("Mr. Garcia") at Pemex, who told Mr. Olea that Pemex would be contracting the New Rigs.[311]

108. México now attempts to argue that it did not have the intention to contract the New Rigs, but the contemporary evidence shows the contrary. The New Rigs were specifically designed for contracts with Pemex, as Pemex was the only customer in México.[312] The New Rigs were designed for Pemex's unique safety specifications.[313] The New Rigs were also built from the outset with Pemex as a customer. For example, all of the manuals were written in English and Spanish.[314] The New Rigs were also built with unique safety specifications that Pemex required

311 Second Gil Statement, **CWS-5**, ¶ 42.

312 *Id.* at ¶ 43.

313 *Id.*

314 *Id.*

that were unique to Pemex.[315] Adding these additional rigs to Oro Negro's fleet would have created greater efficiency and economies of scale.[316]

109. More importantly, México represented to Oro Negro on various occasions that it planned to contract the New Rigs, as it had a tremendous demand for premium jack-ups and Pemex is the only client for these services in México.[317] As explained in the Statement of Claim, Mr. Aguilar, in an attempt to encourage Oro Negro to acquire more jack-ups and bring them to México, told Mr. Gil and Mr. Olea in a meeting that Pemex had never left Mexican assets idle.[318] Furthermore, during the naming ceremony for the *Impetus* rig, which took place in Singapore in January 2015, Oro Negro invited Gustavo Hernandez ("Mr. Hernandez"), General Director of Pemex Exploration and Production.[319] Oro Negro also invited some of the Bondholders. Mr. Hernandez attended the event, and in conversations with Oro Negro representatives, made clear that Pemex intended to contract the New Rigs at the prevailing rates.[320] Mr. Hernandez made this statement in front of Mr. Gil, Mr. Olea, and Mr. Ercil, one of the Bondholders.[321] This statement gave the Bondholders and Oro Negro's shareholders additional comfort about Oro Negro's financial position and the New Rigs.

110. Furthermore, after the naming ceremony, Mr. Gil memorialized this conversation with Mr. Hernandez, as well as his confirmation regarding contracting the New Rigs, in an email to the

315 *Id.*

316 Second Gil Statement, **CWS-5**, ¶ 29; Oro Negro Valuation (June 2014), pp. 2, 7, Exhibit **C-283**.

317 Second Gil Statement, **CWS-5**, ¶ 11, 38.

318 *Id.* at ¶ 42.

319 *Id.* at ¶ 44.

320 *Id.*

321 *Id.*

Board of Oro Negro. He explained that Javier Hinojosa, Mr. Hernandez's Chief of Staff, confirmed Pemex's desire to contract the New Rigs.

> please be advised that Luis Ramirez and I met earlier today with Mr. Javier Hinojosa, Chief of Staff of Mr. Hernandez and former head of Pemex's Drilling and Well Maintenance Unit. Mr. Hinojosa confirmed what Mr. Hernandez told me during the Naming Ceremony of Impetus. **He stated that the Impetus and the Vastus are confirmed for a direct assignment and did not rule out the same possibility for the remaining two rigs under construction; but in any event, they will be absorbed by Pemex**. He mentioned that there are 16 conventional units that will roll off their contracts during 2015 and they will replace them with new, premium units. Furthermore, **he mentioned Pemex being interested in entering into a JV with Oro Negro for the Supermus [sic] and the Animus and suggested we initiate conversations in this regard in the very short term**. Finally, he shared with us that the rigs under construction at KeppelFels from our competitor are behind schedule, making the Oro Negro assets even more attractive.[322]

Similarly, around the same time, Fred Warren, another Claimant and U.S. investor, sent an email to various shareholders stating:

> Gonzalo reported during our Board call this morning on his meeting with Gustavo Hernandez the CEO of Pemex E&P who confirmed Pemex's intention to execute contracts for our next 4 jack-up rigs by the end of the first quarter of 2015 at a day rate in the $150,000 for a term of at least 3 years and possibly up to 5 years.[323]

111. These contemporaneous communications reflect Pemex's intention to contract Oro Negro's New Rigs at market rates and the basis for Oro Negro's legitimate expectations regarding the same.

(iv) Pemex Enters into Five Contracts with Seamex, Rather than Contracting Oro Negro's New Rigs, as It Had Committed To Do

112. Rather than following through on its commitment to lease the additional rigs from Oro Negro, Pemex instead contracted five inferior rigs from Seamex, a company that the evidence shows bribed Pemex and that was owned in part by one of México's wealthiest and most influential

[322] Email from G. Gil to Oro Negro Board of Directors (Jan. 14, 2015), Exhibit **C-307** (emphasis added).

[323] Email from F. Warren to Oro Negro Board of Directors(Jan. 14, 2015), Exhibit **C-308**.

businessmen, Mr. Martínez.[324] Not only were Seamex's rigs inferior to Oro Negro's rigs, México also paid higher daily rates for Seamex's inferior rigs.[325]

113. Instead of contracting Oro Negro's superior rigs, Pemex awarded Seamex contracts with highly favorable terms to Seamex and therefore necessarily less advantageous for Pemex. These contract terms were favorable to Seamex, despite the fact that it had not contracted with Pemex before and therefore had no track record as a jack-up provider.[326] Additionally, the Seamex contracts have higher daily rates than Oro Negro's contracts, which meant Seamex's contracts were more expensive for Pemex than Oro Negro's contracts.[327] Seamex's daily rates range from USD 155,500 (for West Intrepid, West Courageous, and West Defender) to USD 171,500 (for West Titania and West Oberon).[328] For all of the contracts, Seamex was also entitled to a daily productivity bonus of up to USD 3,000.[329] If Seamex met these daily performance targets, which were reasonable targets that Seamex easily should have been able to meet, this could increase Seamex's daily rates to USD 158,500 to USD 174,500.[330] Given Oro Negro's superior record, if it had been offered performance bonuses, it nearly certainly would have been able to meet them.[331] Seamex's contracts also had no penalties for lower productivity ranges (MR ranges below 400).[332]

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[324] Second Gil Statement, **CWS-5**, ¶ 49.

[325] **Appendix G**; Exhibits **C-F.1 to C-F.5**; Weir Expert Report, **CER-7**, ¶ 76.

[326] Second Gil Statement, **CWS-5**, ¶ 49.

[327] **Appendix G**; Exhibits **C-F.1 to C-F.5**.

[328] **Appendix G**; Exhibits **C-F.1 to C-F.5**; Weir Expert Report, **CER-7**, Annex A, Table 11.

[329] **Appendix G**; Exhibits **C-F.1 to C-F.5**.

[330] **Appendix G**; Exhibits **C-F.1 to C-F.5**.; Weir Expert Report, **CER-7**, Annex A, Table 11.

[331] Weir Expert Report, **CER-7**, ¶ 83.

[332] Weir Expert Report, **CER-7**, ¶ 83.

In comparison, Oro Negro's contracts did not have any daily productivity bonuses and all had penalties for MR ranges below 400.[333]

(v) Pemex's Contracts with Oro Negro Were Significantly Worse than Seamex's Contracts

114. As detailed above, Oro Negro had better rigs than Seamex, yet the contracts that Oro Negro obtained were significantly worse than Seamex's contracts. Oro Negro's contracts imposed penalties for lower performance and did not contain bonuses for superior performance, and Seamex's contracts imposed no penalties for lower performance and awarded bonuses for superior performance. Furthermore, the Seamex Contracts do not allow Pemex to terminate them early except in extremely limited circumstances, which include cases of breach by Seamex, *force majeure*, or by agreement of the parties.[334] For comparison, Pemex could terminate Oro Negro's contracts unilaterally, at any time, for "duly justified reasons" (in Spanish, "*razones debidamente justificadas*").[335] This was also true for many of Oro Negro's competitors' contracts.[336] It is Claimants' understanding that Pemex's ability to unilaterally terminate its contracts early was a standard term in Pemex's contracts and the terms given to Seamex were unique in the Mexican oil field services industry.[337] These contractual comparisons are summarized in detail in Appendix G as well as in Annex A to the Weir Report and more generally in the following chart:

	Seamex Contracts (Exhibits C-F.1 to C-F.5)	**Oro Negro Contracts (Exhibits E-1 through E-5)**
Rates	Original rates: West Intrepid, West Courageous, and West	Original rates: *Primus* ($158,999), *Laurus*

[333] Exhibit **E.1**-**E.5**; Second Gil Statement, **CWS-5**, ¶ 52; Weir Expert Report, **CER-7**, ¶ 83.

[334] **Appendix G**; Exhibits **C-F.1 to C-F.5**.

[335] Oro Negro Contracts, **Exhibits E-1 through E-5**.

[336] Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex (May 17, 2017), pp. 10-11, Exhibit **C-283**.

[337] Weir Expert Report, **CER-7**, ¶ 79.

	Defender ($155,500), West Titania and West Oberon ($171,500)	($158,999), *Fortius* ($161,125), *Decus* ($161,125), and *Impetus* ($130,000)
Term	4.36 years through 6.82 years	2.82 years through 4.98 years
Penalties	No penalties for ranges below MR 400	Penalties for ranges below MR 400
Performance Bonus	Daily performance bonus of up to $3,000	None
Termination	Pemex may cancel: (1) For force majeure (2) In case of breach (3) In the event of the vendor's bankruptcy (4) For impossibility of (5) If the vendor cannot timely deliver the platform because it is engaged on a project under a prior contract. (6) By agreement between the parties	Pemex may cancel: (1) For force majeure (2) In case of breach (3) In the event of the vendor's bankruptcy (4) For impossibility of vendor's performance; and (5) For "duly justified reasons," as determined by Pemex[338]

115. Thus, there is no reasonable business justification for Pemex's preferential treatment of Seamex in comparison to its treatment of Oro Negro or any other provider with jack-up rigs. The reasons then for Pemex contracting with Seamex and giving that company significantly more favorable contracts were non-commercial.

(vi) The Orders for Seamex's Uniquely Favorable Treatment that Displaced Oro Negro Came from the Top Levels of Pemex and México

116. The orders to treat Seamex in this much more favorable manner, as compared to its treatment of Oro Negro, came from the very top of the Mexican political apparatus and Pemex hierarchy.

[338] The termination provision in the Impetus contract contained a slight variation. *See* **Appendix G**.

117. Oro Negro and its shareholders complained to Pemex about Pemex's discriminatory treatment against Oro Negro and favorable treatment of other vendors including Seamex to no avail. In fact, when Gonzalo Gil tried to discuss Seamex's preferential treatment with Pemex, stating that Oro Negro's contracts should be modified so they are at least in line with the terms of Seamex's contracts, he was told firmly that there was no negotiating to have contracts like Seamex's.[339] Specifically, Carlos Morales ("Mr. Morales"), when he was General Director of Pemex Exploration and Production, told Mr. Gil that he couldn't talk about the Seamex contracts.[340] He made clear to Mr. Gil that the order with respect to Seamex had "come from the top" of Pemex and the Mexican government.[341] Mr. Gil understood that to mean that the instructions with respect to Seamex had come from Mr. Lozoya and Enrique Peña Nieto.[342] Mr. Morales appeared uneasy about the situation.[343] Claimants understand that Mr. Lozoya and Mr. Morales had directly negotiated the agreement with Seamex, which was not standard practice.[344] Despite Mr. Morales being unwilling to negotiate to give Oro Negro contractual terms that were similar to Seamex, Mr. Gil made clear to Mr. Morales that Seamex's rigs were inferior and that Pemex had paid more to Seamex for an inferior asset and service.[345]

118. Mr. Gil also told Mr. Morales that the terms of the Seamex contracts were putting Oro Negro at a serious disadvantage with respect to the Company's perception in the capital markets.[346]

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339 Second Gil Statement, **CWS-5**, ¶ 53.

340 *Id.*

341 *Id.*

342 *Id.*

343 *Id.* at ¶ 51.

344 Email from M. Olea to G. Gil (Nov. 22, 2013), Exhibit **C-309**.

345 Second Gil Statement, **CWS-5**, ¶ 52.

346 *Id.* at ¶ 53.

Oro Negro had issued debt representing to investors that the unilateral termination clause in the Oro Negro Contracts was a standard feature in all Pemex contracts that was dead letter and had no practical enforcement.[347] Then, Seamex, a competitor providing the exact same type of service with comparable assets, was able to get the clause removed.[348] Overnight, Oro Negro was converted into a second class citizen with contracts that the market would perceive as more risky than Seamex's contracts.[349]

119. Similarly, Mr. Garcia, who was a member of the legal team at Pemex who negotiated contracts, told Oro Negro's Mr. Olea that he did not want to finalize and sign the Seamex contracts, but he received an instruction "from the top" within Pemex that he was to sign and finalize the Seamex contracts without modifying them at all.[350] Mr. Garcia explained that he was instructed to go to the Quinta Real Hotel in Villahermosa where the Seamex contracts would be signed all at once.[351] He was told that the Seamex representatives would also be there and that Pemex needed to sign the contracts at that meeting without having had an opportunity to negotiate any of the terms.[352]

120. Mr. Gil explained in his witness statement that negotiating and signing contracts with Pemex was a process that generally took a minimum of a few months.[353] Not only would the parties go back and forth on various terms, but once the contract was finalized, it took time to send the contract to all the parties who needed to sign it across multiple divisions within Pemex and

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347 *Id.*

348 *Id.*

349 *Id.*

350 *Id.*

351 *Id.* at ¶ 50.

352 *Id.*

353 *Id.*

multiple cities in México.[354] He never knew Oro Negro to have an exclusive meeting or signing ceremony, like the one that Seamex had, with high ranking Pemex officials in attendance in order to sign contracts.[355] He never heard of this with any of Oro Negro's competitors, either.[356] Furthermore, none of Oro Negro's contracts were ever signed without negotiation between the parties.[357] The speed as well as the circumstances under which the Seamex contracts were signed were quite unusual and suspicious.[358]

121. [redacted][359]

[redacted][360]

122. Furthermore, and importantly, México tries to argue that the acquisition of the New Rigs was simply poorly timed with the onset of the market downturn in the price of oil in 2014. Mr. Lozoya even made this argument regarding Seamex when called before the Mexican Cámara de

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354 *Id.*

355 *Id.*

356 *Id.* at ¶ 51.

357 *Id.* at ¶ 50.

358 *Id.* at ¶¶ 50-51.

359 [redacted] Exhibit **C-310 (Highly Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

360 [redacted] **C-311 (Highly Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

Diputados in March 2014.[361] Specifically, Mr. Lozoya testified that Pemex entered into the contracts with Seamex because there were "no other self-elevating platforms available" and that "demand exceeded supply."[362] However, this argument falls on its face when considered within the timeline of when Pemex contracted five inferior rigs from Seamex and from other competitors. Even if the significant drop in oil prices in 2014 impacted Pemex's liquidity,[363] the drop in oil prices alone does not explain Pemex's behavior. At around the same time that Pemex was telling Oro Negro that it needed to cut daily rates due to drops in oil prices and liquidity issues, it was contracting inferior jack-ups from Seamex at prices more expensive to Pemex and from Oro Negro's competitors.[364]

123. As previously explained, Oro Negro and other competitors had contracted to build new jack-ups in order to work with Pemex based upon Pemex's stated desire to dramatically increase production.[365] Oro Negro and its competitors had planned their delivery dates along with the

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[361] Questions from the *Cámara de Diputados* to Emilio Lozoya Austin (Mar. 2014), Exhibit **C-312**.

[362] Questions from the *Cámara de Diputados* to Emilio Lozoya Austin (Mar. 2014), Exhibit **C-312**. ("*La razón por la que se contrataron mediante adjudicación directa es que en el mercado mundial no hay plataformas autoelevables disponibles, es decir, la demanda de este tipo de equipos es mayor que la oferta existente, situación que ha prevalecido desde 2011 y continuará al menos durante 2014 y será posiblemente a finales del 2015 que empiece a equilibrase la condición de mercado.*

Cabe mencionar que previamente PEMEX, realizó procesos de licitación pública declarándose desiertos 19 requerimientos de plataformas autoelevables.

Al agotarse los equipos que ofertaron empresas mexicanas, así como internacionales con subsidiarias mexicanas, se tuvo la necesidad de acudir al mercado internacional para contar con plataformas autoelevables para cumplir los programas de trabajo y la producción de hidrocarburos comprometida. Permanentemente se investiga el mercado para determinar que equipos pueden estar disponibles para PEMEX, y a que empresas pertenecen, verificando sus especificaciones y condiciones operativas con visitas de trabajo por especialistas de perforación. Este análisis se realiza en todos los casos en que se detecta la existencia de equipos disponibles, no se realiza a una empresa en particular.")

[363] Second Gil Statement, **CWS-5**, ¶¶ 57, 61, 65.

[364] *Id*. at ¶¶ 52, 53.

[365] *Id.* at ¶¶ 11, 29, 35.

expiration of Pemex contracts with old equipment.[366] The new jack-ups that Oro Negro and many of its competitors acquired were filling in the gaps from the old contracts that were expiring and were ready when Pemex needed the new equipment.[367] However, Pemex contracted Grupo R's new rigs, the Cantarell I and Cantarell II, even though these rigs were ready after Oro Negro's *Vastus*, and were ready just a couple of months before the *Supremus*. Oro Negro's New Rigs were ready ahead of schedule, and as the *Vastus* was ready and "in line" before the Cantarell rigs, it should have been contracted first.[368] But non-commercial reasons carried the day (*i.e.*, bribes and orders from the very top of Mexican government).

124. Any argument that Oro Negro's rigs were not available at the time that Pemex needed them is also not legitimate, as the New Rigs were ready within months of the expiration of previous contracts.[369] Pemex could have extended its ongoing contracts that were expiring to maintain its drilling capacity for a couple of months until the New Rigs arrived.[370] The outgoing companies who had rigs that were nearing the end of their useful lives would not have any alternatives, as their rigs were old and conventional would not be contracted anywhere else in the world.[371] Pemex entered into new jack-up contracts with Seamex and with other competitors, whose rigs were of inferior quality and were behind Oro Negro's in line around the precise time that the New Rigs were ready. Simply put, Pemex knew Oro Negro's rigs were ready and available and it reneged

[366] Second Gil Statement, **CWS-5**, ¶ 46; Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex, (May 17, 2017), pp. 7-8, Exhibit **C-283**.

[367] Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex (May 17, 2017), p. 7, Exhibit **C-283**.

[368] Second Gil Statement, **CWS-5**, ¶ 47.

[369] *Id.* at ¶¶ 45-46.

[370] Second Gil Statement, **CWS-5**, ¶ 46.

[371] *Id.*

on its promise to contract and keep them employed for their useful lives and instead, contracted from Seamex and other competitors. Importantly, today, Seamex's five rigs still have productive contracts with Pemex with expiration dates from late 2024 through late 2026 at "market index adjusted" daily rates.[372]

125. Despite Pemex's new contracts with Seamex, during 2015 and 2016, Pemex continued leading Oro Negro to believe and representing to Oro Negro that it was interested in leasing the New Rigs.[373] Although the New Rigs were available for delivery between late 2014 and early 2015, Oro Negro delayed delivery on the New Rigs numerous times, at Pemex's request, with the understanding that Pemex would contract them, but that it just needed more time.[374] Had Pemex at any time expressly informed Oro Negro that it would not hire the New Rigs, Oro Negro would have sought to sell its purchase option of the New Rigs to a third party or would have attempted to find work for the New Rigs outside of México.[375] Indeed, due to Pemex's repeated representations to Oro Negro regarding the New Rigs, Oro Negro amended the construction contracts of the New Rigs to extend the deadline for Oro Negro to complete payment and take delivery on six occasions.[376] The last amendment gave Oro Negro a deadline of November 30, 2017 to complete payment and take delivery of the New Rigs, further reflecting Oro Negro's continued belief, even up through Pemex's unlawful termination of the Oro Negro Contracts, that Pemex intended to contract the New Rigs from Oro Negro. As a result of Pemex's failure to contract the New Rigs, Oro Negro lost its USD 125 million down payment on the rigs as well as

372 Matthew Donovan, *SeaMex Jackups Get Extensions at Market Index Rates* (June 2, 2020), Exhibit **C-313**.

373 Second Gil Statement, **CWS-5**, ¶¶ 42-45.

374 *Id.* at ¶ 45.

375 *Id.*

376 *Id.*

personnel costs associated with the project management team in Singapore who were supervising the construction of the New Rigs.

(vii) México Refused To Produce Documents Related to Pemex's Discriminatory Treatment of Oro Negro and the Tribunal Should Draw Adverse Inferences in this Regard

126. During the document production phase, Oro Negro requested documents related to "any investigation into Oro Negro's complaints to Pemex regarding Pemex's discriminatory treatment against Oro Negro and favorable treatment of other vendors, such as Seamex, prepared between January 1, 2014 and December 31, 2017."[377] Respondent did not produce any responsive documents, claiming that it was unable to locate any.[378] Respondent's claimed inability to locate any responsive documents is implausible, as Oro Negro complained to Pemex about its discriminatory treatment against Oro Negro and favorable treatment of other vendors such as Seamex.[379] In fact, Oro Negro and a group of competitors delivered a letter and PowerPoint presentation to Pemex detailing the unfair and unfavorable treatment that they had received as compared to Seamex.[380] It is not credible that Respondent would not have generated any documents in response to the various communications Oro Negro and others made to Pemex about the preferential treatment that Seamex received. As such, the Tribunal must infer that responsive documents would not be favorable to México's case. This leads to one conclusion: Respondent accorded preferential treatment to Oro Negro's competitors, specifically Seamex, and disregarded

[377] Claimants' Request for Production of Documents (July 20, 2020), Request No. 3 ("The documents related to any investigation into Oro Negro's complaints to Pemex regarding Pemex's discriminatory treatment against Oro Negro and favorable treatment of other vendors, such as Seamex, prepared between January 1, 2014 and December 31, 2017.")

[378] Letter from Orlando Pérez Gárate to Dawn Yamane Hewett and others (Jan. 8, 2021), Exhibit **C-314**.

[379] Second Gil Statement, **CWS-5**, ¶ 53.

[380] Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex (May 17, 2017), Exhibit **C-383**.

Oro Negro's complaints to Pemex regarding Pemex's discriminatory treatment against Oro Negro and favorable treatment of other vendors, such as Seamex.

127. Furthermore, Claimants also requested documents related to Pemex's refusal to contract the New Rigs, including any internal or external government correspondence, memoranda, official resolutions, reports, or analyses regarding the New Rigs prepared between January 1, 2013 and December 31, 2017.[381] In response to this request, Respondent produced three documents: a market analysis stating that the rigs of Grupo R and Oro Negro are the best option for the contracts,[382] and two letters between Pemex and Oro Negro regarding a possible contract regarding the New Rigs.[383] Respondent did not produce any internal correspondence or any documents showing Pemex's decision to refuse to contract the New Rigs or any analysis surrounding this decision. It is not credible that the produced documents represent the entirety of responsive documents within Respondent's possession, custody, or control. It is implausible that Pemex's decision to refuse to contract the New Rigs was not discussed internally, and even more implausible that there are only three documents regarding this decision within Pemex. As such, the Tribunal must infer that further responsive documents would not be favorable to México's case and thus there was no legitimate business reason for Pemex to refuse to contract the New Rigs with Oro Negro and Pemex's failure to contract the New Rigs was based upon an improper, illicit, and nefarious motive.

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[381] Claimants' Request for Production of Documents (July 20, 2020), Request No. 1 ("The documents related to Pemex's refusal to contract the New Rigs (*Supremus, Animus,* and *Vastus*), including any internal or external government correspondence, memoranda, official resolutions, reports, or analyses regarding the New Rigs prepared between January 1, 2013 and December 31, 2017.").

[382] Pemex Market Analysis (Sept. 2015), Exhibit **C-315**.

[383] Letter from Pemex to Oro Negro regarding equipment availability (Sept. 23, 2015), Exhibit **C-316**; Letter from Oro Negro to Pemex regarding equipment availability (Sept. 24, 2015), Exhibit **C-317**.

128. Moreover, in response to Claimants' Request 2, which asked for "The documents related to Pemex's contracting of five rigs from Seamex in 2014 and 2015, including quality of Seamex rigs and lease rates, prepared between January 1, 2014 and December 31, 2016," Pemex produced twelve documents.[384] Respondent did not produce any correspondence, but only annexes to the contracts with Seamex and pamphlets regarding Seamex's rigs.[385] It is not credible that the produced documents represent the entirety of responsive documents within Respondent's possession, custody, or control. It is implausible that there are no communications regarding Pemex's contracting with Seamex over a period of two years. Furthermore, it is clear that Respondent's production is incomplete because it includes Annex C to contracts between Pemex and Seamex, but not Annexes A and B. It is further not credible that there are no internal analyses regarding Pemex's decision to contract five rigs from Seamex. This is further evidence of foul play in Pemex's decision to contract the five rigs from Seamex and Claimants respectfully request that the Tribunal infer that responsive documents would not be favorable to México's case, as the decision to contract the five rigs from Seamex in a highly unusual fashion was made in excahnge for various poliitcal favors and bribes.

[384] Claimants' Request for Production of Documents (July 20, 2020), Request No. 2.

[385] West Titania Annex Fact Sheet (Nov. 14, 2014), Exhibit **C-318**; West Oberon Annex Fact Sheet (Feb. 10, 2014), Exhibit **C-319**; West Courageous Platform Information Sheet (May 13, 2016), Exhibit **C-320**; West Defender Platform Information Sheet (Apr. 19, 2016), Exhibit **C-321**; West Intrepid Platform Information Sheet (June 13, 2016), Exhibit **C-322**; West Oberon Platform Information Sheet (Aug. 11, 2016), Exhibit **C-323**; West Titania Platform Information Sheet, Exhibit **C-324**; West Courageous Contract 421004812 Annex C (Feb. 10, 2014), Exhibit **C-325**; West Defender Contract 421004815 Annex C (Feb. 10, 2014), Exhibit **C-326**; West Intrepid Contract 421004807 Annex C (Feb. 10, 2014), Exhibit **C-327**; West Oberon Contract 421004814 Annex C (Feb. 10, 2014), Exhibit **C-328**; West Titania Contract 421004897 Annex C (Feb. 10, 2014), Exhibit **C-329**.

4. From 2015-2017, Pemex Imposed Destructive Amendments to the Oro Negro Contracts and Financially Strangled Oro Negro

129. On June 26, 2015, citing supposedly necessary budget reductions due to the global decline in the price of oil, Pemex imposed destructive amendments to the Oro Negro Contracts, the first step in its financial strangulation of Oro Negro. As explained in detail in Claimants' Statement of Claim, Pemex reduced the daily rates under the *Primus*, *Laurus*, *Fortius*, and *Decus* Contracts through the 2015 Amendments from approximately USD 160,000 to approximately USD 130,000.[386] Pemex also falsely promised Oro Negro that the rate reductions would apply only from June 2015 to May 2016, at which time the daily rates would return to USD 160,000.[387] The temporary nature of the amendments was reflected in the terms of the amendments themselves, but also in Pemex's verbal representations to Oro Negro.[388] Oro Negro understood that Pemex was experiencing temporary liquidity issues and reluctantly agreed to the amendments because Pemex promised that the rate reductions were only temporary.[389] México cites to an Oro Negro press release in its Statement of Defense in which Oro Negro states that it will cooperate with Pemex in order to strengthen its relationship with Pemex going forward as supposed support for its argument that the amendments were solely based upon economic challenges facing the oil and gas industry.[390] It was Pemex who required Oro Negro's support at this juncture. Pemex consistently represented to Oro Negro that the orders to temporarily decrease daily rates were

386 Exhibit **C-H.1** through Exhibit **C-H.4** are copies of the 2015 Amendments.

387 Second Gil Statement, **CWS-5**, ¶ 55; Exhibit **C-H.1** through Exhibit **C-H.4.**

388 Second Gil Statement, **CWS-5**, ¶ 55.

389 Second Gil Statement, **CWS-5**, at ¶ 57.

390 *Comunicado de Oro Negro del 31 de agosto de 2015* ("Oro Negro believes these agreements will help strengthen Oro Negro's relationship with Pemex for the duration of the leases, reduces uncertainties, and position Oro Negro to maintain its positive momentum and to focus on its core operations, despite the macroeconomic challenges facing the oil and gas industry."), **R-0106**.

coming from the highest levels of the Mexican government; a requirement being imposed on Pemex from the top of the Peña Nieto administration.[391] Oro Negro was initially willing and inclined to support Pemex through what it described as a temporary liquidity crisis and at the time, felt that by accommodating Pemex's needs, Oro Negro was, in fact, strengthening its relationship with Pemex.[392]

130. Shortly after the 2015 Amendments were executed, Pemex and Oro Negro also agreed to a one year extension to the four contracts. Especially given the relative shorter duration of Oro Negro's contracts to its competitors, this modest extension did not even bring the duration of Oro Negro's contracts in line with its competitors' contracts.[393] Similar modest extensions were extended to other competitors who experienced rate reductions.[394]

131. Pemex also unilaterally insisted upon a modification to the payment terms of the Oro Negro contracts. México justified this modification once again based upon its budget shortfalls related to the downturn in oil prices.[395] Payment terms were modified from 20 days to 180 days "from the date of authorization."[396] In order for the expense to even be entered into Pemex's system for payment, Pemex needed to authorize the expense various times, which in practice, was a process that took significant time.[397] Until Pemex approved the invoice, the invoice was not reflected in Pemex's accounting system as a liability. In practice, many of Oro Negro's invoices were not paid

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391 Second Gil Statement, **CWS-5**, ¶ 58.

392 *Id.*

393 *Id.* at ¶ 59.

394 *Id.* at ¶ 59.

395 *Id.* at ¶ 60.

396 *Convenio modificatorio al contracto Decus, 30 de diciembre de 2015*, **R-0111**; *Convenio modificatoroio al contrato Fortius, 30 de diciembre de 2015*, **R-0112**; *Convenio modificatorio al contrato Laurus, 29 de diciembre de 2015*, **R-0113**; *Convenio modificatorio al contrato Primus, 29 de diciembre de 2015*, **R-0114**.

397 Second Gil Statement, **CWS-5**, ¶ 61; Flowchart Reflecting Pemex Invoicing Process, Exhibit **C-261**.

for almost a year.[398] This was a drastic change for Oro Negro and it had a significant impact on Oro Negro's cash flows.[399] Pemex also used its liberal payment terms to pressure Oro Negro to agree to subsequent modifications by withholding payment to Oro Negro.

132. Just as the rate reductions in the 2015 Amendments were set to expire, Pemex reneged on its promise that those Amendments would be temporary and imposed further draconian modifications to the Oro Negro Contracts. The 2016 Amendments were more drastic because they involved the supposedly temporary suspension of the *Primus and the Laurus* as well as reductions for the rest of the rigs as well. The temporary suspension of the *Primus* and the *Laurus* were particularly severe for Oro Negro, because it left the two rigs idle, while Oro Negro was still left paying the costs for its staff to maintain the rigs.[400] Importantly, none of Oro Negro's competitors had 40% of their fleet suspended for this lengthy period of time in 2016.[401]

133. The first set of reductions happened when Mr. Lozoya was in charge at Pemex, as did Pemex's irrational decision to contract the five additional rigs from Seamex, discussed in detail above.[402] Mr. Lozoya's placement within Pemex was strategic and a reward for having supported President Peña Nieto for many years. The award of the Seamex contracts was also an intentional favor to Mr. Martínez, another long-time patron of President Peña Nieto. The second round of reductions occurred under Mr. González Anaya's leadership at Pemex. In February 2016, President Peña Nieto appointed Mr. González Anaya to replace Mr. Lozoya as CEO of Pemex.

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398 Second Gil Statement, **CWS-5**, ¶ 61.

399 *Id.* at ¶ 62.

400 *Id.* at ¶ 60.

401 Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex (May 17, 2017), p. 9, Exhibit **C-283**.

402 Second Gil Statement, **CWS-5**, ¶¶ 53, 55, 56.

Mr. González Anaya was handpicked to lead Pemex by President Peña Nieto.[403] While Oro Negro was hopeful that things would improve under Mr. González Anaya, unfortunately, the situation with Pemex under Mr. González Anaya did not improve, and actually worsened.[404] As instructed, Mr. Anaya continued, and ultimately escalated, Oro Negro's discriminatory treatment.[405] The Peña Nieto administration then promoted Mr. González Anaya by appointing him to the powerful position of Secretary of *Hacienda* in November 2017, where, he held the purse strings for the entire country until the end of the Peña Nieto administration.[406]

134. During the second round of negotiations, Oro Negro pushed Pemex to provide it with assurances that these additional reductions would be temporary and that the contracts would return to the standard rates at the end of the reduction period.[407] Pemex assured Oro Negro that they had a new CEO, Mr. González Anaya, and that Pemex would honor the terms of the amendments that they signed with Oro Negro (meaning that the rate reductions would be temporary and that the contracts would return to their original terms after the expiration of the amendment term).[408] Pemex explained that they needed this temporary relief for liquidity purposes.[409]

135. In 2017, despite its prior assurances that the amendments would be temporary and that it needed only temporary support for liquidity purposes, Pemex tried to make the temporary rate reductions to the contracts permanent and was not offering additional tenor or duration to the contracts in exchange for the extreme rate reductions, and requested the continued suspension of

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403 *Id.* at ¶ 56.

404 *Id.*

405 *Id.*

406 *Id.*

407 *Id.* at ¶ 57.

408 *Id.*

409 *Id.*

the *Primus* and the *Laurus*.[410] Furthermore, its proposal included a new system for determining daily rates that was based upon a formula, which would tie daily rates to global day rates in the jack-up industry, making Oro Negro's income unpredictable.[411] From Oro Negro's perspective, these amendments were not financially sustainable.[412] Oro Negro could not meet its obligations to the Bondholders based upon the reduced rates and reductions to the contractual backlog, and it had negotiated and agreed to the terms of the bond agreements with the Bondholders based on the understanding that Pemex would comply with the contracts as originally negotiated.[413] In order to comply with these lower rates, Oro Negro would have needed to renegotiate its agreement with the Bondholders; absent doing so it would default on the bonds and the Bondholders would have the door open to execute on their collateral and take possession of the Rigs.[414]

136. In the context of the 2017 negotiations, Pemex exerted pressure on Oro Negro that was more intense than pressure applied in prior negotiations, and it came from the top within Pemex, Mr. González Anaya.[415] Although not known to Oro Negro at the time, and as will be discussed further below, Pemex, through its CEO Mr. González Anaya, sought to terminate the Oro Negro Contracts and [redacted].[416] This insidious and unusual behavior must have been motivated by cronyism and corruption. In furtherance of this goal, Pemex significantly

410 *Id.* at ¶ 60.

411 Email from A. Musalem to A. Del Val (Apr. 7. 2017), Exhibit **C-330**; Oro Negro press release (Aug. 11, 2017), Exhibit **C-266**.

412 Second Gil Statement, **CWS-5**, ¶ 63.

413 *Id.*

414 *Id.* at ¶¶ 63, 68.

415 *Id.* at ¶ 64.

416 *Id.* at ¶ 64.

delayed paying Oro Negro in order to try to pressure Oro Negro to accept the amendments to the Oro Negro contracts, which put further pressure on Oro Negro's financial situation.[417]

137. In its Statement of Defense, México cites to April 2017 meeting minutes stating that "only the *Decus* remains to be paid in the June-July 2016 period" to show that its payments were up to date.[418] This snapshot is misleading and does not represent the full picture of Pemex's dilatory tactics and failure to make payments to Oro Negro.[419] Pemex's invoicing process was extremely complicated.[420] One way that Pemex would delay payment to Oro Negro was by delaying approval of Oro Negro's invoices and refusing to enter them into their system. This happened frequently throughout the relationship. Pemex's payment delays worsened over the relationship with Pemex and significantly worsened throughout 2017, when Pemex delayed processing invoices and further simply refused to pay Oro Negro while pressuring Oro Negro to accept the 2017 Amendments.[421] By way of example, for work that Oro Negro performed and invoiced in October 2015, some invoices remained unpaid until June 2017.[422] Work that was performed in December 2015 was partially unpaid until May 2017.[423] For work from May 2017, Pemex delayed paying a portion of nearly USD 5 million until September 2018.[424] For work performed in August 2017, Pemex finally paid the outstanding amounts in September 2018.[425] In many cases, Oro

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417 First Gil Statement, **CWS-1**, ¶ 57.

418 **R-133**.

419 First Gil Statement, **CWS-1**, ¶ 57.

420 Flowchart reflecting Pemex invoicing process, Exhibit **C-261**; *Control de Facturación de Pemex*, Exhibit **C-331**.

421 First Gil Statement, **CWS-1**, ¶ 57.

422 *Control de Facturación de Pemex*, Exhibit **C-331**.

423 *Id.*, Exhibit **C-331**.

424 *Id.*, Exhibit **C-331**.

425 *Id.*, Exhibit **C-331**.

Negro was not permitted to issue an invoice until months after the work was completed. For example, work that Oro Negro performed in September 2015 was not invoiced until March 17, 2016, 169 days later, and paid on September 13, 2016.[426] Work Oro Negro performed in March 2016 was invoiced 286 days after executing the services, on December 22, 2016, and paid on January 11, 2017.[427] Pemex used the outstanding payments as a negotiating tactic to push Oro Negro to agree to the contract terms.[428] They also did this during prior negotiations. Despite these payment delays, Oro Negro still provided Pemex with excellent service.

138. In his witness statement, Mr. Treviño incorrectly states that in the context of the 2017 negotiations, Mr. Gil requested that Oro Negro receive superior treatment from Pemex than its competitors.[429] Mr. Gil unequivocally rejects that he ever asked that Oro Negro receive superior treatment from Pemex.[430] Instead, Mr. Gil was insisting, as he had a duty to do, both to debtholders of the company and to Oro Negro's shareholders, that Pemex comply with its contractual obligations and to ensure that Oro Negro did not receive *worse* treatment than its competitors.[431] Put in context of the conversations, Oro Negro was negotiating with Pemex in 2017 after having its rates reduced twice, supposedly temporarily each time, and then having two of its contracts suspended, again supposed temporarily.[432] It is important to note here again that none of its

426 *Control de Facturación de Pemex*, Exhibit **C-331**.

427 *Id.*, Exhibit **C-331**.

428 First Gil Statement, **CWS-1**, ¶ 57.

429 Witness Statement of Carlos Treviño Medina, ¶ 28.

430 Second Gil Statement, **CWS-5**, ¶ 65.

431 *Id.*

432 *Id.* at ¶¶ 63, 65.

competitors had 40% of their fleet suspended without pay in the context of the negotiations from 2015 to 2017.[433]

139. Oro Negro and Pemex engaged in various negotiations surrounding the proposed 2017 amendments (the "Proposed 2017 Amendments") beginning in March 2017.[434] Oro Negro was frustrated by Pemex's continued imposition of drastic cuts to its daily rates and suspensions of its jack-ups. From the beginning of the negotiations, Pemex pressured Oro Negro to accept the amendments by imposing artificial deadlines, frequently telling Oro Negro that it had limited time to accept its proposed amendments.[435] Beginning in March 2017, when Pemex made its initial proposal, it told Oro Negro that it had only five business days to accept the revised terms.[436] This extremely narrow window would have been nearly impossible for Oro Negro to obtain internal Board approval and to obtain approval from the Bondholders. The April 21, 2017 email from Mr. Del Val to Pemex accurately expresses Oro Negro's frustration with Pemex's unilateral imposition of the amendments and that Pemex was reneging on its promise that the amendments would be temporary.[437] At the end of the letter, Oro Negro requests that Pemex focus its efforts on strengthening the legal and commercial relationship it has with Oro Negro and that it continue to honor the Oro Negro Contracts and their respective modifications.[438] Oro Negro also emphasizes that Pemex should take into account at all times that a unilateral act that affects the Oro Negro Contracts may cause serious damages to Oro Negro and third parties, including their creditors and

[433] Second Gil Statement, **CWS-5**, ¶ 65; Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex (May 17, 2017), p. 9, Exhibit **C-283**.

[434] *Minuta de reunión entre Pemex y Oro Negro del 19 de abril de 2016*, **R-0131**.

[435] Second Gil Statement, **CWS-5**, ¶ 64.

[436] Pemex and Perforadora Drilling Equipment Negotiation Meeting Minutes (Mar. 23, 2017), Exhibit **C-332**.

[437] Email from A. Del Val to A. Musalem (Apr. 21, 2017), Exhibit **C-333**.

[438] *Id.*, Exhibit **C-333**.

employees.[439] México states that Oro Negro was less "flexible" in the 2017 negotiations than it was in prior negotiations.[440] This was principally because Oro Negro had been patient with Pemex with its liquidity issues for two years, Oro Negro has sustained revenue decreases as a result of the previous amendments of over 50%, and Pemex had now misled Oro Negro twice regarding the temporary amendments to its contracts and was unfairly and improperly cutting its contracts even further.[441] Additionally, the additional cuts that Pemex was insisting on during this third round, now permanent, would have finally destroyed Oro Negro unless the Bondholders would agree to materially modify the terms of the bonds.

140. Oro Negro continued to negotiate in good faith over the next few months, but Pemex continued to move the mark and refused to make the concessions that Oro Negro required. For Oro Negro, most importantly, it was asking Pemex to remove the unilateral early termination clause from the contracts.[442] This was because Oro Negro explained to Pemex that with the reductions it would need to restructure its debt and it wanted to be able to do so with certainty. It was also asking for a few additional items, including a reduction in the period for Pemex to make payments.[443] In early August, Mr. Gil emailed Mr. Treviño stating that Oro Negro had not received a response on their last proposal and that he would like to meet with Pemex as soon as possible.[444] Mr. Gil emphasizes that Oro Negro was eager to reach an amicable resolution with Pemex.[445]

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439 *Id.*, Exhibit **C-333**.

440 SOD, ¶ 172, Witness Statement of Mr. Servin, ¶ 27.

441 Second Gil Statement, **CWS-5**, ¶¶ 63-65.

442 Oro Negro Presentation, Contract Negotiations (June 2017), Exhibit **C-334**.

443 *Id.*, Exhibit **C-334**.

444 Email from G. Gil to C. Treviño (Aug. 3, 2017), Exhibit **C-335**.

445 *Id.*, Exhibit **C-335**.

141. To pressure Oro Negro to accept the amendments, Pemex also repeatedly threatened to terminate Oro Negro's contracts if Oro Negro did not accept Pemex's terms as written.[446] In early August 2017, during the course of negotiations with Pemex, Mr. Gil received a call from Mr. Ramirez Corzo stating that someone within Pemex had told him that it planned to terminate the Oro Negro Contracts and that there was nothing that Oro Negro could do to evade termination.[447] This call prompted a follow up meeting between Oro Negro and Pemex's Carlos Treviño, in which Mr. Treviño stated that if Oro Negro accepted the terms of the amendments as written, then Pemex would hold off on the terminations.[448] The proposed terms were: Pemex proposed to maintain (1) the suspension of the *Primus* contract until late 2018; (2) the suspension of the *Laurus* contract until late 2017; and (3) the reduced daily rate payment of USD 116,300 under the *Fortius* contract, the *Decus* contract and the *Impetus* contract permanently.[449]

142. On August 11, 2017, Oro Negro issued a press release explaining the proposed amendments, explaining that Pemex had threatened to terminate the Oro Negro contracts if it did not accept the terms, and that under the terms of the bond agreement, Oro Negro was required to consult with the Bondholders and obtain their consent in order to proceed.[450] Interestingly, on the same day that Oro Negro issued its press release, it received a letter from the Bondholders stating that they supported Pemex's proposed amendments and requesting that Oro Negro inform Pemex of the Bondholders' support for the amendments.[451] That makes no sense from a commercial perspective unless the Bondholders were angling to put Oro Negro out of business and take over

[446] Second Gil Statement, **CWS-5**, ¶¶ 64, 67.

[447] Second Gil Statement, **CWS-5**, ¶ 67.

[448] *Id.*

[449] Oro Negro press release (Aug. 11, 2017), Exhibit **C-266**.

[450] *Id.*, Exhibit **C-266**.

[451] Letter from Andrew Rosenberg to Oro Negro (Aug. 11, 2017), Exhibit **C-336**.

the company's assets. As the evidence in this case now proves, that is precisely what the Ad-Hoc Group was planning working in conjunction with México and Pemex. Oro Negro was understandably quite surprised that the Bondholders immediately agreed to the terms of the amendments, as Oro Negro's agreement to the amendments would have necessitated revisions to the bond agreement.[452]

143. On the same day, Oro Negro also sent a letter to Pemex accepting the proposed amendments to the contracts.[453] Oro Negro stated that it accepted the amendments in general terms but that it needed to comply with various formalities internally, therefore it needed some time to obtain approval.[454] These formalities included negotiating revised terms with the Bondholders.[455] In its August 11, letter, Oro Negro makes clear its desire to continue to work with Pemex through its budgetary challenges.[456] Importantly, this letter also states that Oro Negro understands, based upon representations from Pemex, that the proposed amendments do not contain terms more disadvantageous or onerous than those that Pemex negotiated with other providers with the same equipment.[457] This was, of course, untrue, especially as it related to Seamex, but Oro Negro did not know the at the time.

144. México's narrative of the sequence of events is contradicted by the documents in the record. Furthermore, México relies on highly dubious (and most assuredly coerced) testimony from Mr. Del Val, who entered into a cooperation agreement with México after México extorted him via the

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[452] Second Gil Statement, **CWS-5**, ¶ 68.

[453] Letter from Oro Negro to Miguel Angel Servín, August 11, 2017, **R-0228**; Letter from Oro Negro to Miguel Angel Servín, August 11, 2017, Exhibit **C-139**

[454] Letter from Oro Negro to Miguel Angel Servín, August 11, 2017, **R-0228**.

[455] Second Gil Statement, **CWS-5**, ¶ 68.

[456] Letter from Oro Negro to Miguel Angel Servín, August 11, 2017, **R-0228**.

[457] *Id.*, **R-0228**.

issuance of arrest warrants stemming from baseless accusations. After August 11, 2017, the parties continued to negotiate minor changes to the amendments. And, while México claims that in mid-September, Mr. Gil stopped answering messages from Mr. Treviño[458] regarding the Oro Negro Amendments—messages that México has not produced in this arbitration, despite being ordered to do so by the Tribunal[459]—the documents and facts in the record reflect that Pemex and Oro Negro continued negotiating the amendments.

145. Oro Negro in good faith accepted the terms of the 2017 Amendments on August 11, 2017, on the same day it sent out the above mentioned press release and it received the Bondholders' agreement to the terms of the amendments.[460] As the attached emails reflect and as Oro Negro stated in its August 11, 2017 communication, Oro Negro and Pemex continued negotiating the specific terms of the amendments throughout August and September 2017. Furthermore, and importantly, as Pemex understood, Oro Negro could not unilaterally agree to the terms of the amendments.[461] It not only required the Bondholders' agreement to the terms, but Oro Negro needed to negotiate separately with the Bondholders to restructure its debt, as Pemex's proposed contractual modifications were so onerous that Oro Negro would not have been able to pay the Bondholders as agreed.[462] As such, Oro Negro was simultaneously attempting to negotiate with the Bondholders throughout the summer of 2017.[463] As an August 24, 2014 email from Mr. Gil to the Bondholders makes clear:

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458 SOD, ¶ 241 n.314.

459 Procedural Order No. 8 (Oct. 9, 2020); Procedural Order No. 9 (Nov. 11, 2020).

460 Second Gil Statement, **CWS-5**, ¶ 68.

461 *Id.*

462 *Id.*

463 Second Gil Statement, **CWS-5**, ¶¶ 68-69; Email from G. Gil to O. Hjertaker, A. Ercil, and others (Aug. 24, 2020), Exhibit **C-337**.

> As you know, Pemex is seeking to change on a permanent basis the terms of our existing contracts. While we are in good faith negotiations with Pemex on definitive documentation to assure the proposed terms are accurately represented in the amendment, these changes are not in the best interest of the company without permanent changes to our capital structure. We have sent to your legal advisor on August 14th our proposal to restructure our debt obligations and to create a sustainable capital structure. We communicated that we are available to initiate discussions immediately.[464]

146. Oro Negro sought in good faith to also try to renegotiate its terms with the Bondholders while it was also negotiating with Pemex. [redacted][465] On September 20, 2017, Pemex sent Oro Negro revised versions of the 2017 Amendments to the contracts. In response to Pemex's email, Oro Negro conducted an internal review of the documents. Internally, Oro Negro discussed the amendments with counsel and proposed additional minor revisions.[466] On September 29, 2017, in good faith, Oro Negro sent revised drafts of the amendments to Pemex, highlighting Oro Negro's commitment to continue its contractual relationships with Pemex even after filing for *concurso mercantil*.[467] Oro Negro never expected that Pemex would unilaterally, and improperly, terminate the Oro Negro contracts.[468]

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464 Email from G. Gil to O. Hjertaker, A. Ercil, and others (Aug. 24, 2020), Exhibit **C-337**.

465 Second Gil Statement, **CWS-5**, ¶ 70.

466 *Id.* at ¶ 73.

467 Second Gil Statement, **CWS-5**, ¶ 74; *Escritura del Acta de Fe de Hechos que Otorgo a Solicitud de "Perforadora Oro Negro", Sociedad de Responsabilidad Limitada de Capital Variable* (2017), p. 417, Exhibit **C-338**.

468 Claimants understand that Seadrill, Seamex's parent company, recently filed for Chapter 11 bankruptcy protection in US courts. The original counterparty to the Seamex Contracts, Sea Dragon De Mexico S De R.L. De CV, also filed for Chapter 11 protection. To Claimants' knowledge, Pemex has not terminated the Seamex Contracts as a result of Seadrill and various subsidiaries filing for Chapter 11 protection

147. On October 3, 2017, rather than reviewing Oro Negro's proposed changes to the amendments, Pemex sent letters to Oro Negro purporting to terminate the Oro Negro Contracts.[469] These terminations were improper and unlawful.[470] Not only were Pemex's justifications for the purported terminations invalid, but there were various court orders in place that expressly prohibited Pemex from terminating the Oro Negro Contracts.[471] Specifically, with respect to the *Laurus*, there was a judicial order which expressly prohibited Pemex from authorizing, ordering, or in any other way causing, the early termination of the *Laurus*.[472] There was a further judicial declaration stating that the *Fortius*, *Decus*, *Impetus*, and *Primus* contracts were, and remained, valid and enforceable and stating that the purported termination notices lacked legal effect.[473]

5. México Refused To Produce Documents Related to Negotiations with Oro Negro and/or Seamex or Other Competitors and the Tribunal Should Draw Adverse Inferences in this Regard

148. In the document production phase of these proceedings, the Claimants requested, and the Tribunal granted, various of Claimants' document requests relating to documents and/or communications relating to the various amendments to the Oro Negro Contracts and/or to competitors' contracts. Specifically, Claimants requested:

> **Request 4**: The documents related to the 2015 Amendments to the Oro Negro Contracts, including any internal or external government correspondence, memoranda, official resolutions, reports, or analyses regarding Pemex's decision to impose the 2015 Amendments prepared between January 1, 2014 and December 31, 2015.
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> **Request 5**: The documents related to or prepared in connection to the 2016 Amendments to the Oro Negro Contracts, including any internal or external government correspondence, memoranda, official resolutions,

469 Exhibits **C-M.1 - C-M.5-T** are the Termination Letters.

470 Second Lopez Expert Report, **CER-4**, ¶¶ 41-59.

471 October 5 Order, pp. 31-34, Exhibit **C-N**; October 11 Order, pp. 1-2, Exhibit **C-O**.

472 October 5 Order, pp. 31-34, Exhibit **C-N**; October 11 Order, pp. 1-2, Exhibit **C-O**.

473 *Concurso Court* Order (Dec. 29, 2017), pp. 66-68, Exhibit **C-P**.

reports, or analyses regarding Pemex's decision to impose the 2016 Amendments prepared between January 1, 2015 and December 31, 2016.

Request 6: The documents related to or prepared in connection to the 2017 Amendments to the Oro Negro Contracts, including any internal or external government correspondence, memoranda, official resolutions, reports, or analyses regarding Pemex's decision to impose the 2017 Amendments prepared between January 1, 2016 and December 31, 2017.

Request 8: The documents related to the Oro Negro Contract terminations, including any internal or external government correspondence, memoranda, official resolutions, reports, or analyses regarding Pemex's decision to terminate the Oro Negro Contract prepared between March 1, 2017 and December 31, 2017.

Request 15: The documents and communications regarding the terms of the Seamex Contracts including any internal or external government correspondence, memoranda, official resolutions, reports, or analyses regarding Pemex's relationship with Mr. Martinez, Seamex, Fintech, Seadrill, and the Seamex Contracts, prepared between January 1, 2014 and December 31, 2018.

Request 42: The documents related to the negotiations regarding the amendments to the Seamex Contracts between 2015 and 2017, including any internal correspondence, notes, reports, analyses, or memoranda prepared between January 1, 2015 and December 31, 2017.

Request 43: The documents related to the negotiations conducted by the Pemex "Working Group" between 2015 and 2017, including internal correspondence, reports, notes, memoranda, analyses, emails or messages sent via WhatsApp, text message, iMessage, WeChat, Signal Messenger, Telegram, or any other cloud-based messaging service, prepared between January 1, 2015 and December 31, 2017. México refers to over 300 instances of contract amendments with other service providers but does not provide any documentary support for this statement.

Request 44: The documents related to or prepared in connection to Pemex's negotiated price reductions or contract cancellations with other jack-up rig providers with self-rising axles between January 1, 2015 and December 31, 2017.

Request 51: The documents related to Pemex's contracts, contract suspensions, and contract amendments with all its jack-up rig providers, including any correspondence, notes, reports, or analyses related to the reasons and terms of these contracts and amendments prepared between January 1, 2015 and December 31, 2017. Respondent cites to 25 temporary

> suspensions and 26 terminations of contracts between 2015 and 2017, but fails to provide any documentary support for this statement.

149. In response to these various requests, México either produced no documents, or produced a paltry number of documents which simply cannot represent the entirety of responsive documents within Respondents' possession, custody, or control. Importantly, México produced no internal communications, analyses, or discussions in response to any of these requests. With respect to Requests 4, 5, and 6, which relate to the 2015, 2016, and 2017 Amendments to the Oro Negro Contracts, México's limited production of documents is simply not credible. Although the Tribunal granted Claimants' request, Respondent did not produce **any** correspondence, memoranda, official resolutions, reports, or analyses regarding Pemex's decision to impose these Amendments. For example, in response to Request 4, México produced no documents, and instead, directed Claimants to copies of documents already produced in the case, including the 2015 Amendments themselves (Exhibits C.H1 through C.H.4), two agreements from the Board of Pemex adjusting the Pemex budget (R-98 and R-99) and the modifications to the contracts themselves (R-107 through R-114).[474] The production for Requests 5 and 6 was similarly inadequate and incomplete. It is not credible that the documents produced represent the entirety of responsive documents within Respondent's possession, custody, or control. Based upon Respondent's refusal to produce responsive documents, Claimants request that the Tribunal draw an adverse inference, that further responsive documents would not support México's case. As such, it cannot be denied that Respondent imposed the 2015, 2016, and 2017 Amendments to the Oro Negro Contracts and disregarded contractual commitments and obligations made in relation

[474] Letter from Orlando Pérez to Dawn Yamane Hewett and others, January 8, 2021, Exhibit **C-314**.

to the Oro Negro Contracts due to Oro Negro's refusal to pay bribes and the willingness of other companies to pay bribes to Pemex.

150. With respect to Request 8, México similarly produced no internal correspondence, discussions, and or analyses related to the Oro Negro Contract terminations. It is simply not credible that there was no internal discussion, debate, and analysis regarding the termination of the Oro Negro Contracts, terminations which Claimants have demonstrated were improper and did not impact other similarly situated competitors. In the absence of evidence to the contrary, Claimants respectfully request that the Tribunal draw an adverse inference that responsive documents would not support the position that México has pleaded in this arbitration. As such, it is clear that México colluded with the Bondholders to intentionally drive Oro Negro out of business by unlawfully terminating the Oro Negro Contracts.

151. Furthermore, with respect to Request 43, Claimants requested documents related to the Pemex Working Group conducted between 2015 and 2017. Claimants understand that the Working Group was convened for purposes of discussing and negotiating proposed amendments to various Pemex contracts. In response to this request, México produced no documents, and simply referred Claimants to documents responsive to other requests. México produced no correspondence and/or analysis surrounding the Working Group's negotiations and/ or decision-making. It produced no documents reflecting decisions of the Working Group related to Oro Negro. It is simply not credible that these documents do not exist. Clearly, they do, but do not support México's case. As such, the Tribunal should find that Pemex discriminated against Oro Negro and did not treat Oro Negro fairly and in the same way as it did its other competitors. Specifically, it did so because Oro Negro refused to engage in bribery.

152. Requests 15 and 42 relate to the terms of the Seamex Contracts and any amendments to the Seamex Contracts. México's production in response to these requests is similarly deficient and incomplete. México only produced the terms of the Seamex Contracts and their amendments, but again, did not produce any documents reflecting internal discussions, and/or analysis related to the Seamex Contracts and/or their amendments. In the absence of documentary evidence which assuredly does exist and was not produced, the Tribunal should draw an adverse inference that further responsive documents do not support México's case and conclude that Seamex received preferential treatment in the granting of the Seamex Contracts as well as any amendments to the Seamex Contracts.

153. México's production was also deficient in response to Requests 44 and 51 which related to price reductions, suspensions, and/or amendments with other jack-up providers. México produced no documents in response to Request 44, but pointed Claimants to six exhibits to its Statement of Defense and claimed that its responses to Request 51 are relevant to Request 44 as well.[475] With respect to request 51, México largely produced contract amendments with other jack-up providers. Respondent produced no correspondence, analysis, and/or discussion related to the contracts, suspensions, and/or amendments. As this production is incomplete at best, Claimants respectfully request that the Tribunal draw an adverse inference that further responsive documents do not support México's position and find that Respondent did not treat Oro Negro similarly to its other contractors, but discriminated against it due to Oro Negro's refusal to pay bribes.

[475] Letter from Orlando Pérez to Dawn Yamane Hewett and others (Jan. 8, 2021), Exhibit **C-314**.

6. México Refused To Produce Documents Related to Negotiations with Oro Negro and/or Seamex from Key Pemex Officials and the Tribunal Should Draw Adverse Inferences in this Regard

154. Importantly, in the document production phase, Oro Negro requested, and the Tribunal granted, various of Claimants' document requests relating to Pemex communications relating to Oro Negro, the Oro Negro Contracts, and Seamex. Specifically, Oro Negro requested:

> **Request 58**: All communications from Carlos Treviño Medina,[476] including emails and messages sent via WhatsApp, text message, iMessage, WeChat, Signal Messenger, Telegram, or any other cloud-based messaging service, regarding: 1) the Oro Negro Contracts, their amendments, and termination; 2) communications with the Bondholders; and 3) the Seamex Contracts and their amendments between January 1, 2014 and the present.
>
> **Request 59**: All communications from Maria Luz Lozano, [477] including emails and messages sent via WhatsApp, text message, iMessage, WeChat, Signal Messenger, Telegram, or any other cloud-based messaging service, regarding: 1) the Oro Negro Contracts, their amendments, and termination; 2) communications with the Bondholders; and 3) the Seamex Contracts and their amendments between January 1, 2014 and the present.
>
> **Request 60**: All communications from José Antonio González Anaya,[478] including emails and messages sent via Whatsapp, text message, iMessage, WeChat, Signal Messenger, Telegram, or any other cloud-based messaging service, regarding 1) the Oro Negro Contracts, their amendments, and termination; 2) communications with the Bondholders; and 3) the Seamex Contracts and their amendments between January 1, 2014 and the present.
>
> **Request 61**: All communications from Rodrigo Loustaunau, [479] including emails and messages sent via Whatsapp, text message, iMessage, WeChat, Signal Messenger, Telegram, or any other cloud-based messaging service, regarding: 1) the Oro Negro Contracts, their amendments, and termination; 2) Pemex's compliance with the orders from the *Concurso*

[476] Carlos Treviño Medina was Pemex's Corporate Director of Management and Services from February 2016 to November 2017, and then CEO until December 2018.

[477] Maria Luz Lozano has been Deputy Manager of Drilling and Well Services Procurement at Pemex since 2014.

[478] José Antonio González Anaya was CEO of Pemex from February 2016 until November 2017.

[479] Rodrigo Loustaunau held various roles in the legal department at Pemex and is currently Deputy Director for Litigation.

> Proceeding; and 3) the Seamex Contracts and their amendments between July 1, 2015 and the present.
>
> **Request 62**: All communications from Miguel Ángel Servín Diago,[480] including emails and messages sent via Whatsapp, text message, iMessage, WeChat, Signal Messenger, Telegram, or any other cloud-based messaging service, regarding: 1) the Oro Negro Contracts, their amendments, and termination; 2) communications with the Bondholders; 3) and the Seamex Contracts and their amendments between January 1, 2014 and the present.

155. These five individuals are the five fact witnesses that México proffered with its Statement of Defense.[481]

156. The Tribunal granted the production of email communications, noting that they "relate[s] to a relevant issue in this arbitration."[482]

157. Shockingly, for each of these requests, México stated that it did not locate any responsive documents. In essence, México is stating that none of its five witnesses—the individuals in key positions at Pemex during the negotiation of the various contractual amendments with Oro Negro as well as the unlawful termination of the Oro Negro contracts—generated any correspondence, memoranda, *oficios*, etc. related to Oro Negro, the Oro Negro Contracts, or related to Seamex.

158. México's assertion is not credible. For example, México submitted a witness statement from Mr. Servín with its Statement of Defense in which it details his involvement with the Oro

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[480] Miguel Ángel Servín Diago was Operations Director of Procurement and Supply at Pemex from April 2016 until December 2018.

[481] Witness Statement of Carlos Treviño Medina, Witness Statement of Maria Luz Lozano, Witness Statement of José Antonio González Anaya, Witness Statement of Rodrigo Loustanau, Witness Statement of Miguel Angel Servín Diago, submitted with Mexico's Statement of Defense.

[482] Procedural Order No. 8 (Oct. 9, 2020), Annex A, Claimants' Redfern Schedule. The Tribunal's decision reads: "The Claimants' request relates to a relevant issue in this arbitration. The Tribunal however first limits the production of the requested evidence to exchanges in writing or per email. The Tribunal further limits the production to the communications from Mr. Treviño regarding 1) the Oro Negro Contracts, their amendments, and termination; 2) communications with the Bondholders about the Oro Negro Contracts; and 3) the Seamex Contracts and their amendments. Lastly, the production is limited to documents prepared between April 1, 2017 to December 2018 and the present."

Negro Contracts, the Seamex Contracts, and the negotiation of the various contractual amendments with Oro Negro. Furthermore, Respondent also attached to its Statement of Defense email correspondence between Mr. Servín and the Bondholders which would have been responsive to Claimants' document Request 62.[483] Claimants obtained evidence which shows that [redacted][484]

159. México also submitted a witness statement from Rodrigo Loustaunau, which discusses his involvement with the Oro Negro Contracts and the Seamex Contracts. Moreover, although México states it has no communications from Mr. González Anaya, from whom it also submits a witness statement regarding negotiations with Oro Negro, it attaches to its Statement of Defense correspondence between Mr. Anaya and the Bondholders, which would have been responsive to Claimants' document Request 60.[485] México also submitted witness statements from Mr. Treviño and Ms. Lozano, and yet claims that it has no additional documents from either of them.

160. Further, Respondent identifies in its list of documents for production, but fails to produce, an internal Pemex email involving Mr. González Anaya "*con referencia al correo de Alp Ercil,*

[483] *See Correo de ARCM del 25 de abril de 2017*, **R-0167**.

[484] *See, e.g.*, [redacted] Exhibit **C-276 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**;*id.*, [redacted] Exhibit **C-276 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**; [redacted] Exhibit **C-339 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**; [redacted] Exhibit **C-340 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[485] *See Correo de ARCM del 3 de abril de 2017*, **R-0166**; *Correo de ARCM del 25 de abril de 2017*, **R-0167**.

respecto a tarifas, contratos y suspensiones."[486] Mr. Ercil was one of the Bondholders who was negotiating with Pemex during the summer of 2017 and colluded with Pemex to destroy Oro Negro. Taken alone, each of these failures to produce would already be stark and problematic. However, taken together, they are an egregious set of facts that require the Tribunal's intervention. As such, the Tribunal should draw an adverse inference that further responsive documents exist, but do not support México's case. The suspicious lack of communications from each of these key individuals, despite submitting a witness statement from each of them and despite their involvement with Oro Negro, the contractual negotiations, and discussions during the relevant time period indicate that the communications would have revealed that México treated Oro Negro unfairly and arbitrarily based on Oro Negro's unwillingness to pay bribes, and colluded with the Bondholders to drive Oro Negro out of business so that the Bondholders could take over the Rigs and [redacted].

E. With the Help of Oro Negro's Bondholders, México Drove Oro Negro into Bankruptcy

1. Documents from the Bondholders and Seamex [redacted]

161. In their Statement of Claim, Claimants explained that they sought assistance from a U.S. Bankruptcy Court to obtain documents and testimony (the "Chapter 15 Discovery") for investigating claims against the Ad-Hoc Group. These claims arise from [redacted]

162. The Chapter 15 Discovery was previously provided to the foreign representative (the "Foreign Representative") of the estates of Integradora and Perforadora in the matter *In re Perforadora Oro Negro, S. de R.L. de C.V.*, No. 18-11094, pending in the U.S. Bankruptcy Court

[486] Respondents Document Production List, 39.1 (Jan. 8, 2021), Exhibit **C-341**.

for the Southern District of New York (the "Chapter 15 Proceeding"). As of the date of the filing of the Statement of Claim, Claimants had not obtained approval to use the Chapter 15 Discovery in this arbitration, as it had been provided to the Foreign Representative subject to protective orders.[487]

163. Since the filing of the Statement of Claim, Claimant Frederick J. Warren, on behalf of all of the Claimants, filed two actions in the U.S. federal courts seeking to obtain the Chapter 15 Discovery pursuant to 28 U.S.C. Section 1782.[488] Mr. Warren was able to obtain certain of the Chapter 15 Discovery from (1) AMA Capital Partners, LLC ("AMA"), the Ad-Hoc Group's financial advisor; (2) Fintech, one of the owners of Oro Negro's main competitor, Seamex; and (3) Wilk Auslander LLP ("Wilk"), the law firm that represents Seadrill, the other owner of Seamex, in the Chapter 15 Proceeding. Mr. Warren also obtained express permission from AMA, Fintech, and Wilk, on behalf of Seadrill, to use the Chapter 15 Discovery in this arbitration, subject to two protective orders entered in the Section 1782 Proceedings.

164. This illuminative discovery reveals that [redacted][489] [redacted]

[redacted]

[487] SOC, ¶ 108.

[488] The actions are *In re Ex Parte Application of Frederick J. Warren for an Order to Obtain Discovery in Aid of Foreign Proceedings Pursuant to 28 U.S.C. § 1782*, No. 5:20-mc-00208, in the U.S. District Court for the Southern District of New York, and *In re Application of Frederick J. Warren for an Order to Obtain Discovery for Use in Foreign Proceedings Pursuant to 28 U.S.C. § 1782*, No. 4:20-mc-03517, in the U.S. District Court for the Southern District of Texas (together, the "Section 1782 Proceedings").

[489] Contemporaneous documents show that Pemex was having meetings and communications with the Bondholders in 2016 [redacted]. For example, in an April 2016 letter from Mr. Ercil, the CEO of ARCM, to the Director General of Pemex, Mr. Ercil thanks Pemex executives for meeting with him and proposes "[l]owering jack-up dayrates." Email from A. Ercil to JP. Aguilar (Apr. 11, 2016), **R-0229**, at 5. Nevertheless, Claimants note that México did not produce any additional communications with ARCM from 2015 and 2016, as Claimants had requested in Request for Production No. 39. Therefore, due to México's deficient production and deliberate withholding of evidence, Claimants respectfully request an adverse inference that México and ARCM were colluding to lower Oro Negro's rates in order to financially strangle Oro Negro during the negotiations of the 2015 and 2016 Amendments [redacted].

[redacted]. [redacted]

[redacted][490] Importantly, this is about the same time that Oro Negro began discussions with Pemex regarding the Proposed 2017 Amendments. [redacted].

165. [redacted]

[redacted][491]

166. [redacted]

[490] *See* [redacted] Exhibit **C-270 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[491] [redacted] Exhibit **C-342 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted][492]

167. México notably omits from its Statement of Defense any discussion of the substance of these months of meetings it had with the Ad-Hoc Group, asserting only that ARCM sought to persuade Pemex not to lower the rates of the Oro Negro Contracts.[493] [redacted] In response to Claimants' document requests on the topic,[494] which requested "documents regarding meetings between Pemex officials or their agents and the Bondholders or their agents regarding the 2017 Amendments" and "notes prepared by Pemex officials and their attorneys in conjunction with any of the Bondholders or their attorneys regarding Oro Negro, the Jack-Up Rigs, or the New Rigs from January 1, 2017 to the present,"[495] México has not produced any documents supporting such statements, such as email communications between ARCM and Pemex officials, meeting minutes, or even communications or records showing that meetings took place. On the contrary, the existing documents show that the Ad-Hoc Group agreed with Pemex's decision to impose the 2017 Proposed Amendments, even issuing a press release supporting the amendments in August 2017.[496] Respondent's failure to produce any documents regarding meetings between members of

[492] [redacted] Exhibit **C-271 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[493] *See* SOD, ¶¶ 229-30.

[494] Claimants' Request for Production of Documents (July 20, 2020), Request No. 10.

[495] *Id.*, Request No. 54.

[496] Letter from A. Rosenberg to Oro Negro (Aug. 11, 2017), Exhibit **C-336**.

the Ad-Hoc Group and Pemex officials, including any notes prepared relating to communications between Pemex officials and the Bondholders about Oro Negro or the Rigs, is striking. Given México's failure to produce documents regarding these meetings, Claimants request that the Tribunal draw an adverse inference that such meetings contained discussions regarding the Ad-Hoc Group's and Pemex's scheme to destroy Oro Negro.

168. Despite it being in its best interests to help Oro Negro obtain favorable terms from Pemex on the Oro Negro Contracts, as well as to restructure the Bonds so that Oro Negro would not default on them, the Ad-Hoc Group agreed with Pemex to pressure Oro Negro into accepting the 2017 Proposed Amendments, and at the same time refused to support a restructuring of the Bonds, which would have been required in order for Oro Negro to accept the restrictive terms of the 2017 Proposed Amendments.[497]

169. In the Chapter 15 Proceeding, Oro Negro took depositions of [redacted]

[497] Second Gil Statement, **CWS-5**, ¶ 75.

[redacted][498] [redacted]

[redacted][499] [redacted]

[redacted][500] This is clear evidence of collusion between Pemex and the Bondholders to chart a path for Oro Negro's destruction.

170. The Chapter 15 Discovery also confirms that [redacted] As noted, the 2017 Proposed Amendments were so onerous that without a modification to the Bond Agreement, Oro Negro would not have been able to meet its obligations to the Bondholders.

171. As explained below, Oro Negro tried to negotiate with the Bondholders for a modification to the Bond Agreement, to no avail. [redacted][501] Instead, the Bondholders tried to pressure Oro Negro to accept the

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498 [redacted] Exhibit **C-343 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

499 *Id.* at 86:19-24, Exhibit **C-343 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

500 [redacted] Exhibit **C-344**.

501 [redacted] Exhibit **C-273 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

2017 Proposed Amendments, without providing it with any relief under the Bond Agreement, so as to ensure the company's default and their takeover of the Rigs. For instance, on August 3, 2017, Mr. Ercil directed Mr. Gil to "sign with Pemex as soon as possible," threatening him that "[g]iven the bid for jack ups and excitement around México, creditors are not afraid to call a default in this market."[502]

172. [redacted] while each of the Rigs is worth USD 150 million, for a combined value of approximately USD 750 million, the Ad-Hoc Group purchased the majority of the Bonds at prices ranging from 45% to 65% of their value—that is, they paid from between USD 243 million to USD 351 million for the Bonds.

173. [redacted][503] [redacted][504]

[502] Email from A. Ercil to G. Gil (Aug. 3, 2017), Exhibit **C-274**; Second Gil Statement, **CWS-5**, ¶ 75.

[503] [redacted] Exhibit **C-272 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[504] *Id.*, Exhibit **C-272 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

174. [redacted][505] [redacted][506]

175. [redacted][507]

[505] [redacted] Exhibit **C-345 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[506] [redacted] Exhibit **C-346 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[507] [redacted] Exhibit **C-347 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**; *Id.* at 461,Exhibit **C-347 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

The Ad-Hoc Group Hired a Financial Advisor, AMA, Which Was

176.

177. In the Spring of 2017, the Ad-Hoc Group of Bondholders was officially formed. AMA had served as the Bondholders' financial advisor since 2015, and in 2017, the Ad-Hoc Group negotiated a new engagement agreement with AMA.

[508]

178.

[509]

[508] *See, e.g.*, Exhibit **C-340 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**

[509] Exhibit **C-348 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**; *see also* Exhibit **C-349 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**

[redacted].

3. [redacted]

179. [redacted] In March 2017, Oro Negro hired Ole Aagaard ("Mr. Aagaard") as the Chief Operations Officer at the insistence of the Ad-Hoc Group. [redacted][510]

180. When Oro Negro first offered the COO position to Mr. Aagaard, [redacted][511] [redacted][512]

[510] Second Gil Statement, **CWS-5**, ¶ 77.

[511] [redacted] Exhibit **C-350 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[512] *Id.*, Exhibit **C-350 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

181. [redacted] [513] The following month, [redacted] [514] [redacted] [515] [redacted] [516]

182. [redacted]

[513] [redacted] Exhibit **C-351 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[514] [redacted] Exhibit **C-352 (Highly Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[515] *See, e.g.*, [redacted] Exhibit **C-353 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[516] [redacted] Exhibit **C-279 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted][517]

183. Mr. Aagaard left Oro Negro in October 2017, [redacted][518] [redacted].[519] [redacted]

F. Pemex Forced Oro Negro To File for *Concurso Mercantil*

1. Oro Negro's Filing for *Concurso Mercantil* Was Not Strategic or Intentional, as México Claims

184. By late August/early September 2017, México's refusal to execute the 2017 Proposed Amendments and the Bondholders' refusal to re-negotiate the Bond Agreement left Oro Negro with no choice but to file for bankruptcy protection. México baselessly asserts that Oro Negro's filing for *Concurso Mercantil* was strategic, yet has refused to provide documents relating to its own decision not to execute the 2017 Proposed Amendments, which forced Oro Negro into bankruptcy. México produced a single document, an email with the attachments missing, in

[517] [redacted] Exhibit **C-354 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[518] [redacted] Exhibit **C-355 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[519] [redacted] Exhibit **C-356 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

response to Claimants' request for "documents related to Pemex's decision to not execute the 2017 Amendments to the Oro Negro Contracts."[520] Due to Respondent's failure to produce documents relating to Pemex's decision not to execute the 2017 Proposed Amendments, Claimants request that the Tribunal draw an adverse inference that the decision was due to Oro Negro's refusal to pay bribes to Pemex and the willingness of other rig operators to do so.

185. Contrary to México's statements in Section II.K. of its Statement of Defense that Oro Negro never intended to accept the 2017 Proposed Amendments, Oro Negro did accept them under duress but it was Pemex that ultimately did not execute them,[521] leaving Oro Negro with no other avenue but to seek protection via insolvency in part to protect itself from the unlawful termination of the Oro Negro Contracts by Pemex, something which Pemex had been threatening [redacted] throughout 2017. While México states in its Statement of Defense that "evidence" shows that Oro Negro never intended to enter into the 2017 Proposed Amendments, it does not provide any such evidence, other than a lone statement by Alonso Del Val Echeverria ("Del Val"), who, as discussed in Section II.I.1(d) below, is currently a highly unreliable source, as he is under the thumb of the Mexican authorities with whom he entered into a cooperation agreement after México filed baseless criminal charges and issued arrest warrants against him and then later detained him.[522] In any event, Del Val's statement confirms that Oro Negro accepted the 2017 Proposed Amendments, which México glosses over.[523]

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520 Claimants' Request for Production of Documents (July 20, 2020), Request No. 7.

521 *See* First Gil Statement, **CWS-1**, ¶ 64.

522 *See* Statement of Alonso Del Val (Sept. 2019), Exhibit **C-357**.

523 *See id.*; SOD, ¶ 181.

186. Further, Claimants specifically requested "documents related to or prepared in connection to the 2017 Amendments to the Oro Negro Contracts."[524] However, México produced only a handful of documents in response to this request, and did not include in its production the purported "evidence" it mentions in paragraph 181 of the Statement of Defense that allegedly shows that Oro Negro did not intend to enter into the 2017 Proposed Amendments. Due to Respondent's failure to produce documents evidencing that Oro Negro did not intend to enter into the 2017 Proposed Amendments, Claimants request that the Tribunal draw an adverse inference that no such documents exist and that Oro Negro did intend to enter into the 2017 Proposed Amendments, as evidenced by the documents produced by Claimants.[525]

187. In addition, Del Val's statement misleadingly states that Oro Negro was supposed to reach an agreement with the Bondholders following the acceptance of the Proposed 2017 Amendments but that it instead purportedly chose to resolve the request through bankruptcy and interim measures to compel Pemex to keep paying at the current contract rate. This is wrong. First, had Pemex agreed to the 2017 Proposed Amendments, it would only have had to pay the rates agreed to in the 2017 Proposed Amendments. Second, Del Val fails to mention that Oro Negro made many attempts to reach an agreement with the Bondholders in good faith, sending numerous emails to the Bondholders explaining that "[i]n light of the permanent nature of the [2017 Proposed Amendments] and the need to create a sustainable capital structure, [Oro Negro is] proactively

[524] Claimants' Request for Production of Documents (July 20, 2020), Request No. 6.

[525] *See, e.g.*, Oro Negro Press Release (Aug. 28, 2017), Exhibit **C-358**; [redacted] Exhibit **C-359 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**; [redacted] Exhibit **C-345 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

exploring ways to restructure [its] debt obligation,"[526] and that "[w]e want to move forward and make up as much ground as possible," to reach "a consensus on the terms of the restructuring."[527] [redacted][528] As Mr. Gil testifies, [redacted], Mr. Gil attempted to meet with the Bondholders in New York in person in order to find a solution, [redacted][529]

188. While México admits that the Bondholders insisted that Oro Negro accept the 2017 Proposed Amendments,[530] it incorrectly suggests that such acceptance would have permitted the Rigs to continue operating. Pemex and the Bondholders were well aware that Oro Negro's acceptance of the 2017 Proposed Amendments, without an amendment of the Bond Agreement, would financially starve Oro Negro and cause a default, which was an integral part of México's and the Ad-Hoc Group's plan.

189. Indeed, the Bondholders refused to negotiate an amendment of the Bonds that could have allowed Oro Negro to have a sustainable balance sheet while still providing the Bondholders with very favorable terms, including the issuance of new bonds totaling USD 300 million, USD 150 million self-amortizing preferred equity in Integradora with a 12% coupon, a cash payment of USD 30 million, and ownership of the *Primus* Rig, which would have provided the Bondholders

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526 Email from G. Gil to I. Green (Aug. 28, 2017), Exhibit **C-360**.

527 Email from G. Gil to A. Ercil and K. Bodden (Aug. 4, 2017), Exhibit **C-361**.

528 [redacted] Exhibit **C-359 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**; Second Gil Statement, **CWS-5**, ¶ 75; SOC, ¶ 106.

529 Second Gil Statement, **CWS-5**, ¶ 75; [redacted] Exhibit **C-362 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

530 *See* SOD, ¶ 217.

with a very substantial premium to the price of the Bonds at the time.[531] Nevertheless, the Bondholders rejected this Oro Negro offer and instead demanded that Oro Negro relinquish all of its available cash to the Bondholders as partial payment of the Bonds,[532] knowing that Oro Negro would not be able to accept such terms and still be able to financially survive. Not being able to reach agreement on a restructuring of the Bonds, and fearing Pemex's imminent illegal termination of the Oro Negro Contracts, Oro Negro had no choice but to file for bankruptcy protection.[533]

2. *Concurso* Proceedings

190. To protect Oro Negro's shareholders, creditors and employees, in September 2017, Perforadora and Integradora filed for restructuring in México, known as a *concurso mercantil*.[534] México's narrative on this issue does not comport with the facts and is nothing more than speculation.

(i) Perforadora and Integradora's *Concurso Mercantil*

191. México's mischaracterizes the facts and circumstances surrounding Perforadora and Integradora's *concurso* petitions.

192. *First*, México states that it has acted in compliance with the law and that "*los malos manejos, así como la precaria capacidad financiera de Oro Negro, fueron las causas por las cuales actualmente Perforadora Oro Negro e Integradora se encuentran en quiebra*."[535] While Oro Negro had financial difficulties,[536] these were a direct consequence of Pemex's imposition of

[531] Second Gil Statement, **CWS-5**, ¶ 75; Oro Negro Press Release (Aug. 28, 2017), Exhibit **C-358**.

[532] Second Gil Statement, **CWS-5**, ¶ 75; Letter from Paul Weiss (Ad-Hoc Group's counsel) to Oro Negro (Aug. 28, 2017), Exhibit **C-275**.

[533] Second Gil Statement, **CWS-5**, ¶¶ 75-78.

[534] SOC, ¶ 113.

[535] SOD, ¶ 235.

[536] SOC, ¶¶ 81-93, 122-144, 165-172.

destructive amendments to the Oro Negro Contracts and its conscious decision to withhold contractual monies due to Oro Negro to pressure it to accede to its demands. If Pemex had honored its contractual obligations, Oro Negro would have had a healthy financial situation.

193. Pemex caused the precarious financial situation that México claims is the root of Oro Negro's problems. At the time that Perforadora filed its *concurso* petition, Pemex owed it approximately USD 113 million in past due daily rates.[537] [redacted] [538]

194. *Second*, in an attempt to discredit Oro Negro and to justify its illegal actions, México further argues—without providing any evidence—that Oro Negro's lawyers were probably working on Perforadora and Integradora's filings for restructuring as early as in August 2017, which, according to México, demonstrates that Oro Negro never intended to enter into the 2017 Amendments and that Oro Negro's filing for *concurso mercantil* was done strategically "*con la finalidad de asegurar la obtención de medidas cautelares*."[539] México fails to provide any evidence to support these speculative claims.

195. As explained in the Statement of Claim and in detail in Section II.D.4 above,[540] and as the evidence provided by Claimants demonstrates, Oro Negro was in serious negotiations with Pemex regarding the 2017 Amendments and, in fact, it accepted the 2017 Proposed Amendments.[541] It was never Oro Negro's plan to file for bankruptcy, nor did Oro Negro do so in order to ensure that

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537 SOC, ¶ 114.

538 *See supra* Section II.E, *see also* SOC, ¶¶ 100-112, 122-123, 138-144.

539 SOD, ¶¶ 240, 242.

540 *See supra* Section II.D.4; *see* SOC, ¶¶ 89-93.

541 SOC, ¶ 93.

it would obtain injunctive relief. Oro Negro filed for bankruptcy to protect its shareholders, creditors and employees. In fact, it was only due to the uncertainty and financial distress resulting from Pemex's arbitrary, inappropriate, and illegal actions—including Pemex's refusal to pay past due daily rates owed to Perforadora (by September 2017, Pemex owed Perforadora approximately USD 113 million in past due daily rates, including for services provided over 900 days earlier)[542]—that Oro Negro was left with no choice but to file for bankruptcy protection in México.[543]

196. *Third*, México attempts to blame Oro Negro for the Mexican court system's delays in Oro Negro's bankruptcy proceedings. México claims that "*por errores atribuibles únicamente a Perforadora Oro Negro y/o a sus abogados, hasta el 5 de octubre de 2017 las solicitudes de concurso mercantil fueron admitidas por el Juez Concursal . . . .*"[544] Yet, México fails to provide any explanation or evidence to support this erroneous claim. The reason behind the delay has nothing to do with Oro Negro or its attorneys. This delay—which is not even at issue in this arbitration—was a result of the horrific earthquake that struck México City on September 19, 2017, and which shut down Mexican courts and therefore delayed their resolution of pending matters.[545]

197. *Fourth*, México's argument with regard to the supposed "strategic" nature of Oro Negro's filing for bankruptcy is false. México claims that Oro Negro did not have file for *concurso mercantil* to protect its shareholders, creditors, and employees because had Oro Negro really been interested in protecting its employees, it would have entered into the 2017 Proposed

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[542] First Gil Statement, **CWS-1**, ¶ 57. *See* Pemex's Unpaid Invoices, Exhibit **C-137**.

[543] First Gil Statement, **CWS-1**, ¶ 63.

[544] SOD, ¶ 241.

[545] *México: Closure of Federal Court of Administrative Justice Due to Earthquake*, LITTLER PUBLICATIONS (Sept. 25, 2017), Exhibit **C-363**.

Amendments.[546] México's argument is belied by the evidence and the law. *First*, the main objective of a *concurso* proceeding under Mexican law is to avoid a company's demise, including to protects its creditors from the company potentially defaulting on its obligations and to protect employees from being fired as a result of the company's collapse.[547] *Second*, as explained above and as a Mexican federal court confirmed,[548] Oro Negro *did* accept the 2017 Proposed Amendments. The only reason why the 2017 Proposed Amendments did not come to fruition is because Pemex failed to execute the required documents and continued to withhold critical past due amounts under the Oro Negro Contracts.[549]

198. *Lastly*, México states that Integradora's shareholders are dissatisfied with the company's executive's actions and cites to a petition filed by Banamex with the *Concurso* Judge to access the files pertaining to Integradora and Perforadora's *concursos*.[550] A telling sign of the fallacy of México's claim is that it has not provided any evidence that Banamex has claimed any wrongdoings by Integradora's executives or in respect to Integradora's *concurso*. In fact, Banamex made no claims against the actions of Integradora's executives.

199. In sum, for the reasons explained in Sections II.E and II.F,[551] it was due to the actions primarily of Pemex that Oro Negro was left with no choice but to seek bankruptcy protection.

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[546] SOD, ¶ 243.

[547] First Lopez Expert Report, **CER-1**, ¶ 18.

[548] Mexican Federal Court Opinion Ruling Pemex's Breach of Contracts (Feb. 20, 2019), p. 96, Exhibit **C-153**; First Lopez Expert Report, **CER-1**, ¶¶ 57-58.

[549] First Gil Statement, **CWS-1**, ¶ 63.

[550] SOD, ¶ 244.

[551] *See supra* Section II.F.

(a) The Etapa de Visita

200. In the visitation phase ("*etapa de visita*") of a *concurso* proceeding, the district judge responsible for the proceeding orders the Federal Institute of Insolvency Specialists (*Instituto Federal de Especialistas de Concursos Mercantiles*) (the "IFECOM") to designate a financial expert called the "*visitador.*"[552] The role of the "*visitador*" is to analyze the finances of the company filing for bankruptcy and to provide a non-binding report on its solvency to the district judge.[553] Integradora and Perforadora's "*visitador*" is Enrique Estrella. México tries in vain to pin Perforadora and Integradora's bankruptcy on Oro Negro's troubled finances by pointing to Mr. Enrique Estrella's finding that Perforadora had significant debts with its creditors.[554] As explained above, Oro Negro was in financial distress at the time it filed for bankruptcy protection in México and that was a direct consequence of Pemex's actions. The 2015 and 2016 amendments entailed a significant reduction in the daily rates of three contracts and the suspension of the other two contracts (reducing Oro Negro's revenues by over 50%)[555] and, importantly, Pemex delayed and eventually stopped paying Perforadora the daily rates under the Oro Negro Contracts.[556] Pemex owed Perforadora approximately USD 113 million in past due daily rates at the time that Perforadora filed its *concurso* petition.[557] In 2017 alone, Pemex incurred close to USD 90 million

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552 First Lopez Expert Report, **CER-1**, ¶ 21.

553 First Lopez Expert Report, **CER-1**, ¶ 21; Commercial Insolvency Law, Offical Journal of the Federation, Article 87 (Aug. 9, 2019) ("*El visitador, con base en la información que conste en el acta de visita, deberá rendir al juez, en un plazo de quince días naturales contados a partir de la fecha de inicio de la visita, un dictamen razonado y circunstanciado tomando en consideración los hechos planteados en la demanda y en la contestación, anexando al mismo, el acta de visita. El dictamen deberá ser presentado en los formatos que al efecto dará a conocer el Instituto*"), **CL-261**.

554 SOD, ¶ 247.

555 *See* NOA, ¶ 10; *see* SOC, ¶¶ 81-88; *see* First Gil Statement, **CWS-1**, ¶¶ 52-53, 59.

556 *See* First Gil Statement, **CWS-1**, ¶ 61.

557 SOC, ¶ 114.

in unpaid daily rates owed to Perforadora.[558] Under these circumstances, it is absurd for México to try to blame Oro Negro for its bad finances.

(b) The Etapa de Conciliación

201. If the district judge, after reviewing and analyzing the report prepared by the "*visitador*," concludes that the company has generally defaulted on its payment obligations under the test provided for in the applicable law, the judge will issue an order formally declaring the company in *concurso mercantil* and will initiate the conciliation phase ("*etapa de conciliación*") of the *concurso* proceeding.[559] In the conciliation phase, the district judge orders the IFECOM to designate a "*conciliador.*"[560] The role of the "*conciliador*" is to present to the judge a list of the company's creditors and liabilities.[561] After considering the list prepared by the "*conciliador*," the judge will issue a decision with a final list recognizing the creditors' claims against the company.[562]

202. México, in an attempt again to argue that Perforadora and Integradora's bankruptcy was a direct consequence of Oro Negro's troubled finances, claims that the *Concurso* Judge determined that Oro Negro owed millions of dollars to more than 160 creditors.[563] But this again ignores that it was Pemex's actions that financially strangled Integradora and Perforadora and left it unable to pay its bills.

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[558] First Gil Statement, **CWS-1**, ¶ 62; *See* Pemex's Unpaid Invoices, Exhibit **C-137**; *See* Order to Pemex to Pay Prior Invoices (June 18, 2018), Exhibit **C-138**.

[559] First Lopez Expert Report, **CER-1**, ¶ 24.

[560] First Lopez Expert Report, **CER-1**, ¶ 24.

[561] First Lopez Expert Report, **CER-1**, ¶ 25.

[562] First Lopez Expert Report, **CER-1**, ¶ 25.

[563] SOD, ¶ 254.

203. On September 11, 2018, the *Concurso* Judge formally declared Perforadora and Integradora in *concurso mercantil*.[564] México wrongly asserts that neither Perforadora nor Integradora raised in their *concurso* petitions that Pemex caused Oro Negro to file for *concurso mercantil*.[565] Perforadora expressly stated in its *concurso* petition that its ordinary operation ("*operación ordinaria*") and viability was dependent on Pemex's compliance with the Oro Negro Contracts and that a number of Pemex Perforación y Servicios' ("**PPS**") actions had debilitated Perforadora's financial situation.[566]

204. México also claims that Oro Negro confirmed throughout the *concurso* proceedings that the 2014 oil crisis had a significant impact on Pemex's operations, which had forced Pemex to negotiate the terms and conditions of the contracts it had entered into with services providers.[567] To support this, México conveniently chose to (1) selectively quote an extract of the *Concurso* Judge's September 11, 2018 order[568] declaring Perforadora and Integradora in *concurso mercantil*; and (2) omit that Oro Negro also consistently adduced in the *concurso* proceedings—as the *Concurso* Judge's September 11, 2018 order confirms—that Pemex's actions, including its imposition of destructive amendments to the Oro Negro Contracts (specifically, the reduction of the daily rates under the *Primus*, *Laurus*, *Fortius*, *Decus* and *Impetus* Contracts),[569] resulted in a

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564 Mexican Civil Court Order (Sept. 11, 2018), Exhibit **C-230**; First Lopez Expert Report, **CER-1**, ¶ 45.

565 SOD, ¶ 251.

566 Perforadora *Concurso* Petition (Sept. 11, 2017), p. 50, Exhibit **C-K**.

567 SOD, ¶ 251.

568 Mexican Civil Court Order (Sept. 11, 2018), Exhibit **C-230**.

569 *See* SOC, ¶¶ 81-88; *Primus* Contract Amendment (June 26, 2015), Exhibit **C-H.1**; *Laurus* Contract Amendment (June 26, 2015, Exhibit **C-H.2**; *Fortius* Contract Amendment (June 26, 2015), Exhibit **C-H.3**; *Decus* Contract Amendment (June 26, 2015), Exhibit **C-H.4**; *Fortius* Contract Amendment (Nov. 14, 2016), Exhibit **C-I.1**; *Decus* Contract Amendment (Nov. 14, 2016), Exhibit **C-I.2**; *Impetus* Contract Amendment (Nov. 14, 2016), Exhibit **C-I.**; *Laurus* Contract Amendment (Nov. 14, 2016), Exhibit **C-I.4**; *Primus* Contract Amendment (Nov. 14, 2016), Exhibit **C-I.5**.

direct decrease in Oro Negro's income which, in turn, had caused Oro Negro to generally default in its payment obligations towards its creditors.[570] Additionally, and very importantly, Perforadora explicitly stated that:

> Todos los recursos económicos que percibe Perforadora Oro Negro, Sociedad de Responsabilidad Limitada de Capital Variable, como contraprestaciones de los contratos de arrendamiento de plataformas que celebró con Pemex Perforación y Servicios, se depositan en un fideicomiso para pagar la deuda que adquirió Oro Negro Drilling, Pte. Ltd., así como diversas obligaciones fiscales; sin embargo, ante las eventualidades que ha presentado el precio del barril del petróleo mexicano, se han disminuido las rentas, por lo que en algún momento sostienen las comerciantes se volverá impagable la deuda corporativa, al margen de que ello ha ocasionado que las comerciantes hayan ido incumpliendo generalizadamente con sus obligaciones de pago con sus acreedores, al disminuirse sus recursos[571]

205. The above establishes that Oro Negro alleged in its *concurso* petitions that Pemex's actions caused Oro Negro to file for *concurso mercantil*. It also explained that the decrease in the daily rates under the Oro Negro Contracts—which Pemex imposed on Oro Negro—would eventually cause Oro Negro Drilling to default on its obligations under the Bond Agreement.[572] This is because the Bond Agreement provides for the establishment of a Mexican trust (in Spanish, *fideicomiso*) into which Pemex pays the revenue due to Perforadora for leasing the Rigs (the "Mexican Trust").[573] The Mexican Trust then distributed funds to Perforadora to pay ordinary business expenses, including operating the Rigs, taxes, and salaries.[574] Importantly, the funds deposited in the Mexican Trust also were used to repay the Bonds, which are governed by the Bond Agreement.[575] Perforadora's economic survival and ability to repay the Bonds was fully

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570 Mexican Civil Court Order (Sept. 11, 2018), pp. 11-12, Exhibit **C-230**.

571 Mexican Civil Court Order (Sept. 11, 2018), p. 12, Exhibit **C-230**.

572 Mexican Civil Court Order (Sept. 11, 2018), p. 12, Exhibit **C-230**.

573 *See* Bond Agreement, pp. 49-51, Exhibit **C-97**.

574 SOC, ¶¶ 63-64.

575 *See* SOC, ¶¶ 46-48; Mexican Civil Court Order (Sept. 11, 2018), p. 12, Exhibit **C-230**.

dependent on the daily rates paid by Pemex into the Mexican Trust. Therefore, when Pemex reduced or all together failed to make payments into the Mexican Trust and/or from the Mexican Trust to Perforadora, this deprived Perforadora of cash and its ability to repay the Bonds, ensuring its demise.

(c) The Etapa de Quiebra

206. In the conciliation phase ("*etapa de conciliación*"), the debtor and its creditors try to reach and enter into a restructuring agreement.[576] If the debtor and its creditors are unable to reach a restructuring agreement by the end of the conciliation phase, the judge will declare the company in liquidation.[577] On June 13, 2019, the *Concurso* Judge declared Oro Negro in liquidation.[578] México argues that Claimants' claim that as a result of Oro Negro being declared in liquidation it "must now wind down all operations, terminate all employees, maintain, maximize and ultimately sell-off all assets"[579] and that it must do "[a]ll of this is a direct consequence of México's wrongful measures, which is acting in alignment with the Ad-Hoc Group,"[580] makes no sense ("*carece de sentido*").[581] According to México, (1) Oro Negro's *concurso mercantil* petitions were part of a legal strategy aimed at obtaining injunctive relief; (2) Oro Negro had the opportunity to preserve its commercial relationship with Pemex, but simply decided not to do so; and (3) Oro Negro is bankrupt because it has accrued a significant number of debts and because it defaulted on its

[576] First Lopez Expert Report, **CER-1**, ¶ 26.

[577] First Lopez Expert Report, **CER-1**, ¶ 27.

[578] *Concurso* Judge's order declaring Integradora and Perforadora in liquidation (Jun. 13, 2019), Exhibit **C-165**.

[579] SOC, ¶ 146.

[580] SOC, ¶ 146.

[581] SOD, ¶ 257.

obligations under the 2016 Bond Agreement.[582] For the reasons explained in detail above,[583] México's claims lack merit.

207. In addition, México claims that "[l]*a Demandada tiene conocimiento que diversos acreedores y las Subsidiarias Singapur objetaron de manera enérgica algunas tomas de decisión y actuaciones del Sr. Pérez Correa*."[584] In the document production phase of these proceedings, Claimants requested "[t]he documents and communications related to the removal of the former liquidator of the Oro Negro estate, Fernando Pérez Correa, including the basis for Respondent's statement that it 'is aware that various creditors and the Singapore Subsidiaries strongly objected to some of the decisions and actions of Mr. Pérez Correa.'"[585] México only produced two documents, which seem to be related to the *Concurso* proceedings. México did not produce any correspondence, internal or otherwise. It is not credible that the produced documents represent the entirety of responsive documents within México's possession, custody, or control. By its own admission, México is aware of the circumstances surrounding the removal of Mr. Pérez Correa, and it is unlikely that such matter was not discussed or analyzed by México and appropriate officials. The Tribunal should draw adverse inferences that further documents exist, but do not support México's assertions, and conclude that México's failure to produce documents is evidence that México colluded with the Bondholders to subvert the *Concurso* proceeding by removing Mr. Pérez Correa as liquidator.

582 SOD, ¶ 257.

583 *See supra* Sections II.F.1, II.F.2(i).

584 SOD, ¶ 258.

585 Claimants' Request for Production of Documents (July 20, 2020), Request No. 18.

(ii) Injunctions Protecting Oro Negro and Amparos 66/2018 and 57/2018

208. México's recounting of the events related to the injunctive relief issued by the *Concurso* Court ("*medidas cautelares*") protecting Oro Negro is unavailing. Despite the *Concurso* Court's numerous injunctions protecting Oro Negro, including enjoining Pemex from (1) terminating the Oro Negro Contracts or acting in furtherance of any purported terminations and (2) ceasing to pay Perforadora under the Oro Negro Contracts,[586] Pemex—in complete defiance of the *Concurso* Court's orders—unlawfully terminated the Oro Negro Contracts and returned the Rigs to Perforadora and stopped paying the daily rates, including past due daily rates.[587] Remarkably, despite the significance and severity of Claimants' allegations regarding Pemex's arbitrary and defiant actions, México's Statement of Defense completely fails to address or rebut Claimants' claims in any significant manner.

209. Instead, México alleges—without any evidence—that Claimants sought to obtain injunctive relief to avoid having to comply with Oro Negro's contractual obligations, and that the *Concurso* Court rejected Oro Negro's request for injunctive relief because Oro Negro was solely trying to avoid fulfilling its obligations.[588] This is false. Oro Negro's requests for injunctive relief were directed at ensuring that Perforadora was complying with its *concurso* obligations and with Mexican law, as explained below, and the Court granted many of the requests.

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[586] *Concurso Court* Order (Oct. 5, 2017), pp. 31-34, Exhibit **C-N**; First Gil Statement, **CWS-1**, ¶ 81; First Lopez Expert Report, **CER-1**, ¶ 34; *Concurso Court* Order (Oct. 11, 2017), pp. 1-2, Exhibit **C-O**; First Lopez Expert Report, **CER-1**, ¶¶ 36-37.

[587] First Lopez Expert Report, **CER-1**, ¶¶ 35-36; *Primus* Certificate of Return (Nov. 3, 2017), Exhibit **C-133**; *Laurus* Certificate of Return (Nov. 3, 2017), Exhibit **C-134**; *Decus* Certificate of Return (Nov. 4, 2017), Exhibit **C-135**; *Impetus* Certificate of Return (Oct. 10, 2017), Exhibit **C-136**; First Gil Statement, **CWS-1**, ¶ 140.

[588] SOD, ¶¶ 260-261.

210. With regard to one injunctive measure, Oro Negro requested that the *Concurso* Court order Pemex to make the payments due under the Oro Negro Contracts directly to Perforadora instead of to the Mexican Trust.[589] México argues that this was one of Perforadora's requests for injunctive relief aimed at avoiding its contractual obligations.[590] However, Perforadora's request was based on Mexican law[591] and aimed at making sure that Perforadora was able to comply with its *concurso* obligations.

211. Deutsche Bank México, S.A., Institución de Banca Múltiple ("Deutsche México") is the Mexican Trust's administrator, and the Mexican Trust, through Deutsche México, manages all of Perforadora's income. As explained above, Perforadora's income is comprised entirely of payments it receives from Pemex under the Oro Negro Contracts for leasing the Rigs.[592] In the ordinary course, the Mexican Trust would distribute those funds only to the five Singapore Rig Owners (in addition to providing Perforadora with the funds necessary to pay ordinary business expenses, including operating the Rigs, taxes and salaries).[593] Importantly, in a *concurso*, the debtor's income (and all assets) must be used to pay off the creditors recognized in the *concurso*.[594] In Perforadora's *concurso*, the five Singapore Rig Owners were common or subordinate creditors of Perforadora, and there were preferred creditors to the Singapore Rig Owners who would not be paid off if the Mexican Trust were to continue to receive all of the payments Perforadora received

589 *Concurso Court* Order (Oct. 5, 2017), pp. 31-34, Exhibit **C-N**.

590 SOD, ¶¶ 260-261.

591 Jurisprudence from the *Tercer Tribunal Colegiado en Materia Civil del Primer Circuito* (Sept. 2, 2016), **CL-280**.

592 SOC, ¶¶ 63-64.

593 Mexican Trust (Dec. 15, 2016), Clause 9, Exhibit **C-3**.

594 *See* Commercial Insolvency Law, Offical Journal of the Federation, Article 87 (Aug. 9, 2019) ("*Se tendrá por no puesta, salvo las excepciones expresamente establecidas en esta Ley, cualquier estipulación contractual que con motivo de la presentación de una solicitud o demanda de concurso mercantil, o de su declaración, establezca modificaciones que agraven para el Comerciante los términos de los contratos*"), **CL-261**; *see also* Jurisprudence from the *Tercer Tribunal Colegiado en Materia Civil del Primer Circuito* (Sept. 2, 2016), **CL-280**.

from Pemex under the Oro Negro Contracts. Therefore, Perforadora's request was aimed exclusively at guaranteeing that Perforadora was complying with its responsibility in the *concurso* that its creditors be paid in the order determined by the *Concurso* Judge.

212. Perforadora also sought as injunctive relief that (1) the Nordic Trustee be enjoined from declaring an event of default under the 2016 Bond Agreement and (2) the Nordic Trustee's September 25, 2017 declaration that Oro Negro Drilling was in default[595] be suspended.[596] These requests were based on the fact that the sole reason for Nordic Trustee's declaration of default was Perforadora's *concurso* filing.[597] As explained below,[598] declaring a default on this basis is illegal under Mexican law.

213. México also alleges that Claimants' own tactics caused delays in the Mexican court's resolution of Pemex's challenges to the *Concurso* Court's orders that granted Oro Negro injunctive relief to prevent Pemex from terminating and ceasing to pay under the Oro Negro Contracts.[599] Specifically, México argues that Claimants' request that the Supreme Court of Justice of the Nation (*Suprema Corte de Justicia de la Nación*, "Supreme Court") resolve Perforadora's *Recurso de Revisión* 54/2019 caused delays in the Mexican court's resolution of Pemex's challenges to the *Concurso* Court's orders, and in particular delayed the *Octavo Tribunal Colegiado* in resolving *Recurso de Revisión* 54/2019.[600] These assertions are false. The Mexican courts were delayed in

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595 Default Declaration (Sept. 26, 2017), Exhibit **C-151**.

596 *Concurso Court* Order (Oct. 5, 2017), pp. 31-34, Exhibit **C-N**.

597 Default Declaration (Sept. 26, 2017), Exhibit **C-151**.

598 *See infra* Section II.D.4(i); *see also* Commercial Insolvency Law, Offical Journal of the Federation, Article 87 (Aug. 9, 2019) ("*Se tendrá por no puesta, salvo las excepciones expresamente establecidas en esta Ley, cualquier estipulación contractual que con motivo de la presentación de una solicitud o demanda de concurso mercantil, o de su declaración, establezca modificaciones que agraven para el Comerciante los términos de los contratos*"), **CL-261**.

599 SOD, ¶ 268.

600 SOD, ¶ 269. By way of context, Perforadora appealed the J*uzgado Onceavo de Distrito Civil's* January 15, 2019 order ("January 15 Order"), which granted Pemex's appeal of the *Concurso* Court's December 29 Order (which denied

resolving Pemex's challenges to the *Concurso* Court orders long before Perforadora's request to the Supreme Court. Importantly, the *Octavo Tribunal Colegiado* in three separate instances included in its agenda ("*listar para resolucion*") that it would resolve *Recurso de Revisión* 54/2019 and then failed to do so.[601] This shows that it was the *Octavo Tribunal Colegiado*'s own conduct—and not Perforadora's request to the Supreme Court—which caused delays in the Mexican court's resolution of Pemex's challenges.

214. In addition, México disputes Claimants' claim that Pemex's challenge to the December 29 Order via an *amparo* was pending (*Amparo* 66/2018)[602] by arguing that this *amparo* was resolved on January 15, 2019 (the "January 15 Order").[603] Once again, this is incorrect. As explained above, Perforadora appealed the January 15 Order through *Recurso de Revisión* 54/2019. On October 30, 2019, the *Octavo Tribunal Colegiado* resolved *Recurso de Revisión* 54/2019 and ordered the *Concurso* Court to analyze and determine whether the injunctive relief requested by Perforadora was in accordance with the Mexican Bankruptcy Code.[604] On February 11, 2020, the *Concurso* Judge issued a decision granting Pemex's challenge of the October 5 and October 11 Orders granting Perforadora injunctive relief (thereby leaving the December 29 Order without effect),[605] and ordered the revocation of the injunctive relief ordered by the *Concurso Court* through the October 5 and October 11 Orders, reasoning that such injunctive relief is not

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Pemex's challenge of the October 5 and October 11 Orders granting Perforadora injunctive relief). The January 15 Order instructed the *Concurso* Court to substantiate ("*fundar y motivar*") its December 29 Order. Perforadora filed an appeal against the January 15, 2019 Order. Perforadora's appeal is *Recurso de Revisión* 54/2019. *See* Perforadora's *Recurso de Revisión* against the January 15, 2019 Order (*Recurso de Revisión* 54/2019) (Feb. 6, 2019), Exhibit **C-364**.

601 *Octavo Tribunal Colegiado*'s Agenda for March 13, April 10, and September 19, 2019, Exhibit **C-365**.

602 SOC,¶ 121.

603 SOD, ¶ 271; J*uzgado Onceavo de Distrito Civil* Order (Jan. 15, 2019), Exhibit **C-366**.

604 *Octavo Tribunal Colegiado*'s Order (Oct. 30, 2019), Exhibit **C-367**.

605 *Concurso Court* Order (Oct. 5, 2017), Exhibit **C-N**; *Concurso Court* Order (Oct. 11, 2017), Exhibit **C-O**.

contemplated in the Mexican Bankruptcy Code.[606] Perforadora challenged the February 11, 2020 decision via an *amparo*.[607] The *amparo* is pending. Therefore, contrary to México's claims in its Statement of Defense, the matters at issue in Pemex's *Amparo* 66/2018 are still *sub judice*.

215. Next, México argues that "*la Sentencia de Revocación no fue del todo favorable para Perforadora Oro Negro, tan es así que la impugnó y calificó de ilegal mediante el Amparo 57/2018*."[608] That argument is misleading. México implies that the December 29 Order—which found that the October 5 and October 11 Orders applied retroactively and as such, that Pemex's purported terminations of the Oro Negro Contracts "were not valid" and that the Oro Negro Contracts were valid and enforceable[609]—was not favorable to Perforadora because it appealed the decision. However, it fails to explain that Perforadora only partially appealed the decision because the *Concurso* Court modified the injunctive relief granted to Perforadora through the October 5 Order and the October 11 Order to limit the relief to the public expenditure ("*gasto público*") available to Pemex.[610] Perforadora's appeal (Amparo 57/2018) was ultimately resolved in favor of Perforadora: the court found that the injunctive relief could not be limited to Pemex's public expenditure.[611]

216. México's claim that "*actualmente no existe medida cautelar o resolución judicial que haya declarado como ilegales o nulas las terminaciones anticipadas de los Contratos Perforadora-Oro*

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606 *Concurso Court* Order (Feb. 11, 2020), Exhibit **C-368**.

607 Perforadora *amparo* against *Concurso Court* February 11 Order (Mar. 3, 2020), Exhibit **C-369**.

608 SOD, ¶ 271.

609 *See Concurso* Court Order (Dec. 29, 2017), pp. 66-68, Exhibit **C-P**; *see also* First Lopez Expert Report, **CER-1**, ¶ 37.

610 Perforadora's appeal of the *Concurso Court*'s December 29, 2017 Order (*Amparo* 57/2018) (Jan. 23, 2018), Exhibit **C-370**.

611 *See Juzgado Onceavo de Distrito Civil* Order (Jan. 15, 2019), Exhibit **C-366**.

Negro" also is misleading, as the judicial case in México relating to this issue is *sub judice*.[612] On February 20, 2019, the *Juzgado Quinto de Distrito en Materia Civil* (the "*Juzgado Quinto de Distrito*") a Mexico City federal court, found that Pemex illegally terminated the Oro Negro Contracts and, as such, the terminations were unlawful, invalid, and unenforceable.[613] The *Juzgado Quinto de Distrito* found that (a) Pemex did not have the right to unilaterally terminate the Oro Negro Contracts on the ground that other vendors had offered better terms than Perforadora; and (b) in any event, Perforadora had already agreed to modify the Oro Negro Contracts as Pemex had demanded.[614] México's claim that there are currently no injunctions or resolutions declaring Pemex's terminations of the Oro Negro Contracts unlawful rests solely on the fact that the February 20, 2019 decision was revoked. However, the February 20, 2019 revocation was done on improper procedural grounds and, as such, Perforadora appealed the ruling revoking the February 20, 2019 decision through an *amparo*.[615] The *amparo* was decided and denied, but Perforadora has filed an appeal (*recurso de revisión*) that will be heard by the Mexican Supreme Court of Justice. Perforadora's appeal is still pending. Therefore, the revocation of the February 29, 2019 decision is not yet final.

217. In the document production phase of these proceedings, Claimants requested that México produce "[t]he documents related to Pemex's appeal of the February 2019 Federal Court ruling finding the Oro Negro Contract terminations to be unlawful, including any internal government

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612 SOD, ¶ 272.

613 *Juzgado Quinto de Distrito* Order (Feb. 20, 2019), Exhibit **C-153**.

614 *Juzgado Quinto de Distrito* Order (Feb. 20, 2019), pp. 172-1733, Exhibit **C-153**; Lopez Expert Report, **CER-1**, ¶ 58.

615 Perforadora *amparo* against *Segundo Tribunal Unitario* October 25, 2019 ruling revoking *Juez Quinto de Distrito Civil* February 20, 2019 decision (Nov. 20, 2019), Exhibit **C-371**.

correspondence, memoranda, official resolutions, reports, or analyses regarding the appeal."[616] The majority of the documents produced by México are court filings and orders. México did not produce any correspondence, internal or otherwise. It is not credible that the produced documents represent the entirety of responsive documents within México's possession, custody, or control. México, for example, produced no internal communications regarding Pemex's appeal of the February 2019 Federal Court ruling. Claimants request that the Tribunal draw an adverse inference that México knew that the February 2019 Federal Court ruling was valid but challenged it solely to cause delay so that Oro Negro would run out of money to maintain the Rigs and be forced to liquidate, which ultimately occurred in June 2019.

G. After Oro Negro Filed for *Concurso Mercantil*, México and the Ad-Hoc Group Continued their Efforts To Destroy Oro Negro

218. After Oro Negro sought the protection of the *Concurso* Court, México and the Ad-Hoc Group continued strategizing ways to destroy Oro Negro, and they executed their plan, in part, by ignoring numerous orders that the *Concurso* Court issued to protect Oro Negro.

219. [redacted][617]

[616] Claimants' Request for Production of Documents (July 20, 2020), Request No. 21.

[617] [redacted] Exhibit **C-344 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted]

[redacted][618]

220. [redacted]

[redacted][619]

1. [redacted]

221. [redacted]

[redacted][620]

[redacted]

618 *Id.*, Exhibit **C-344 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

619 *Id.*, Exhibit **C-344 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.; [redacted] Exhibit **C-372 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

620 [redacted] Exhibit **C-279 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted][621]

222. [redacted][622] [redacted][623] [redacted][624]

223. [redacted][625]

224. [redacted][626]

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621 [redacted] Exhibit **C-276 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

622 *Id.*, Exhibit **C-276 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

623 *Id.*, Exhibit **C-276 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

624 *Id.*, Exhibit **C-276 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

625 *Id.*, Exhibit **C-276 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

626 *Id.*, Exhibit **C-276 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted][627][redacted]

[redacted][628][redacted]

[redacted][629]

225. Despite Claimants' request, México has refused to produce any "documents related to or prepared in connection to Pemex's understanding of Oro Negro's filing for *Concurso* Proceeding between September 1, 2017 and November 1, 2017,"[630] claiming that it is unable to locate any. [redacted]

it is simply not credible that Respondent has no email communications, meeting notes, or other records relating to Perforadora's or Integradora's *Concurso* Proceeding during this time period. Given México's failure to produce these documents, Claimants request that the Tribunal draw an adverse inference that further documents exist, but do not support México's case and conclude that Respondent colluded with the Ad-Hoc Group to subvert the *Concurso* Proceedings and cause the

627 [redacted] Exhibit **C-373 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

628 [redacted] Exhibit **C-280 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

629 [redacted] Exhibit **C-276 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

630 Claimants' Request for Production of Documents (July 20, 2020), Request No. 36.

illegal termination of the Oro Negro Contracts in order to deny Oro Negro the funds necessary to operate and maintain the Rigs and force it to turn the Rigs over to the Bondholders.

226. [redacted][631][redacted][632][redacted][633][redacted][634]

227. [redacted][635]

631 [redacted] Exhibit **C-339 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

632 [redacted] Exhibit **C-240 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

633 *See supra* Section II.E.2.

634 *See, e.g.*, [redacted] Exhibit **C-374 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

635 [redacted] Exhibit **C-281 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

228. Due to Respondent's failure to produce any documents regarding meetings between members of the Ad-Hoc Group or their agents and Pemex Officials,[636] [redacted] Claimants request that the Tribunal draw an adverse inference that such meetings contained discussions regarding the Ad-Hoc Group's and Pemex's scheme to destroy Oro Negro.

2. [redacted]

229. [redacted][637]

230. [redacted]

[636] Claimants' Request for Production of Documents (July 20, 2020), Request No. 10.

[637] *See* [redacted] Exhibit **C-281 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted][638] [redacted]

[redacted][639]

231. There was no commercially or legally justifiable basis for Pemex to align itself with the Ad-Hoc Group to the detriment of Oro Negro, and in contravention of the express orders of the *Concurso* Court (discussed in Section II.G.4 below). Pemex's behavior can only be explained by a desire to punish Oro Negro for failing to pay bribes as well as be able to financially benefit from the pay-to-play windfall that would result once the Rigs were in the hands of the Bondholders [redacted].

3. [redacted]

232. [redacted]

[638] [redacted] Exhibit **C-282 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[639] [redacted]

[redacted][640] [redacted]

[redacted][641]

233. [redacted]

[redacted]

[redacted][642] Mr. Treviño later became CEO of Pemex in the fall of 2017 after Mr. González Anaya was promoted to be the new head of Hacienda.

234. [redacted]

[redacted]

[redacted][643]

235. [redacted]

[redacted]

[redacted][644] [redacted]

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640 [redacted] Exhibit **C-375 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

641 *Id.*, Exhibit **C-375 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

642 [redacted] Exhibit **C-376 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

643 [redacted] Exhibit **C-377 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

644 [redacted] Exhibit **C-347 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**; *Id.* at 455, Exhibit **C-347 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted][645] [redacted]

[redacted][646]

236. [redacted]

[redacted][647]

237. [redacted]

[645] *Id.* at 452, Exhibit **C-347 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[646] *Id.* at 451 [redacted]; *Id.* [redacted] Exhibit **C-347 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[647] [redacted] Exhibit **C-378 (Highly Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted][648] [redacted]

[redacted][649]

238. [redacted]

[redacted][650]

4. México, the Ad-Hoc Group, and Deutsche México Repeatedly Violated Injunctions that the *Concurso* Court Issued

239. Upon filing for bankruptcy on September 11, 2017, Perforadora had immediately sought injunctive relief to prevent the Nordic Trustee, acting on behalf of the Bondholders, from terminating the Bareboat Charters (defined below) and foreclosing on the Rigs.[651] Perforadora also sought to prevent Pemex from terminating or ceasing to pay under the Oro Negro Contracts.[652] Perforadora also sought injunctive relief to prevent Deutsche México from disbursing any trust funds other than to Perforadora to operate its business.[653]

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[648] [redacted] Exhibit **C-379 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**; *see also* [redacted] Exhibit **C-380 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)** [redacted]; [redacted] Exhibit **C-381 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)** [redacted]

[649] [redacted] Exhibit **C-379 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[650] [redacted] Exhibit **C-382 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[651] *Concurso* Petition (Sept. 11, 2017), Exhibit **C-K**.

[652] *Id*., Exhibit **C-K**.

[653] *Id.*, Exhibit **C-K**.

240. On October 5, 2017, the *Concurso* Court issued an order granting Perforadora's *Concurso* petition, and issuing numerous injunctions, including the ones described above. As discussed below, Pemex, the Ad-Hoc Group, and Deutsche México blatantly violated these injunctions and continue to do so.

(i) The Bondholders Illegally Declared an Event of Default of the Bond Agreement and Terminated the Bareboat Charters

241. On September 25, 2017, shortly after Perforadora's *concurso* filing, Nordic Trustee declared an event of default on the Bonds pursuant to Section 15.1(g)(i) of the Bond Agreement, which permits such declaration of default solely because Perforadora filed for an insolvency proceeding.[654] Upon the declaration of an event of default, the Ad-Hoc Group proceeded to replace the directors of Oro Negro Drilling and the Singapore Rig Owners.

242. [redacted][655] [redacted][656]

243. On October 5, 2017, the *Concurso* Court issued an injunction prohibiting the Nordic Trustee, acting on behalf of the Bondholders, from terminating the Bareboat Charters.[657] The Bareboat Charters were entered into between the Singapore Rig Owners and Perforadora, pursuant

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654 *See* Letter from Nordic Trustee to Oro Negro Drilling (Sept. 25, 2017), Exhibit **C-383**.

655 [redacted] Exhibit **C-384 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**; *see also* SOC, ¶ 122.

656 [redacted] Exhibit **C-385 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

657 *Concurso* Order (Oct. 5, 2017), Exhibit **C-N**.

to which the Singapore Rig Owners leased the Rigs to Perforadora—which, in turn, leased the Rigs to Pemex. A bareboat charter is an instrument commonly used in the maritime industry to lease a vessel without a crew or equipment.

244. However, the Ad-Hoc Group ignored the injunction and, using its unlawful control over the Singapore Rig Owners, purported to terminate the Bareboat Charters on the same day.[658]

245. In addition to being in violation of the *Concurso* Court injunction, the Ad-Hoc Group's actions were contrary to Mexican insolvency law and public policy. Specifically, Article 87 of the *Ley de Concursos Mercantiles* ("LCM"), the Mexican statute that governs insolvency proceedings, prevents creditors from taking an action that would worsen the condition of the debtor and prevent the debtor's ability to successfully reorganize.[659]

246. Indeed, on October 1, 2020, the *Octavo Tribunal Colegiado*, México's federal appellate court, ruled, in response to Perforadora and Integradora's appeal of an *amparo*,[660] that the *Concurso* Court has jurisdiction to apply Article 87 of the LCM to the Bond Agreement, even though it is governed by Norwegian law, on account of it having been invoked in connection with an insolvency proceeding in México.[661]

247. As a result of the *Octavo Tribunal Colegiado's* ruling, on February 22, 2021, the *Concurso* Court ruled that the event of default declared by the Nordic Trustee is contrary to Article 87 of the LCM and Mexican public policy.[662] That is, even though Section 15.1(g)(i) of the Bond Agreement states that insolvency constitutes an event of default, the *Concurso* Court ruled that *the*

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658 *See* Letters from R. Hancock to Perforadora (Oct. 5, 2017), Exhibits **C-160 - C-164**.

659 *See Concurso* Court Order (Feb. 22, 2021), Exhibit **C-386**.

660 An *amparo* is an appeal of a constitutional issue in México.

661 *Octavo Tribunal Colegiado* Order (Oct. 1, 2020), Exhibit **C-387**.

662 *Concurso* Court Order (Feb. 22, 2021), Exhibit **C-386**.

effects of this provision are void and unenforceable because such a provision worsens a debtor's condition and prevents a debtor from being able to maximize its estate and successfully reorganize, which is a violation of Mexican law and public policy.

248. The *Concurso* Court also held that as a result, the Ad-Hoc Group's removal and replacement of the Singapore Rig Directors, its revocation of prior powers of attorney and granting of new powers of attorney, Integradora's transfer of shares to Oro Negro Drilling, the letters of resignation of the previous directors of the Singapore Rig Owners from their positions as directors, and any actions carried out as a consequence of the above, *are all void*.[663] In short, the *Concurso* Court recently ruled that the Ad-Hoc Group's control of the Singapore Rig Owners is unauthorized, and that it is Oro Negro that controls the Singapore Rig Owners.

249. The *Octavo Tribunal Colegiado* issued a related ruling in October 2020, in response to an appeal that Oro Negro had filed, that is also favorable to Oro Negro. Specifically, it held that, in connection with *concurso* petitions that Oro Negro had tried to file on behalf of Oro Negro Drilling and the Singapore Rig Owners, that an independent director's approval—which was required pursuant to the Bond Agreement—is not needed for the petition to be approved, because the requirement of such approval can stifle the debtors' due process rights as it prevents the debtors from being able to seek bankruptcy protection.[664]

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[663] *Id.*, Exhibit **C-386**. Moreover, the *Concurso* Court Order confirms that the Ad-Hoc Group's actions taken on behalf of the Singapore Rig Owners, including the numerous criminal complaints that they filed in México, as discussed *infra* Section II.I.1(i), were also unauthorized. These baseless and unauthorized criminal complaints and investigations against Oro Negro and its former employees and shareholders, including two of the Claimants, have led to the issuance of arrest warrants against these individuals, causing them to live in fear of being captured and imprisoned in México.

[664] *Octavo Tribunal Colegiado* Order (Oct. 15, 2020), Exhibit **C-388**.

(ii) Pemex Illegally Terminated the Oro Negro Contracts

250. Another injunction that the *Concurso* Court issued on October 5, 2017 was prohibiting Pemex from terminating the Oro Negro Contracts.[665] However, as part of its strategy with the Ad-Hoc Group to destroy Oro Negro, on October 3, 2017, just days after Integradora's *Concurso* filing, and knowing that Perforadora had already sought the injunction to prevent Pemex from terminating the Oro Negro Contracts, Pemex delivered to Oro Negro letters purporting to terminate the Oro Negro Contracts.[666]

251. [redacted][667] [redacted][668] [redacted]

[665] *Concurso* Court Order (Oct. 5, 2017), Exhibit **C-N**.

[666] *See Primus, Laurus, Fortius, Decus* and *Impetus* Contract Termination Letters (Oct. 3, 2017), Exhibits **C-M.1 - C-M.5-T**.

[667] [redacted] Exhibit **C-389 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[668] *Id.*, Exhibit **C-389 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted][669]

252. Because Respondent failed to produce any documents regarding meetings between members of the Bondholders and Pemex Officials, including with respect to Pemex's termination of the Oro Negro Contracts, when those meetings almost certainly would have generated email communication regarding at least the date/time/substance of the meetings, despite the Tribunal ordering México to do so,[670] Claimants request that the Tribunal draw an adverse inference that such meetings contained discussions regarding the Ad-Hoc Group's and Pemex's scheme to destroy Oro Negro.

253. México's purported termination of the Oro Negro Contracts for all five Rigs was unquestionably prohibited by the injunction that the *Concurso* Court issued.[671] Perforadora informed the *Concurso* Court that Pemex was not in compliance with the injunction, because it had already sent Perforadora notices attempting to terminate the Oro Negro Contracts.[672]

254. In response, the *Concurso* Court issued another order on October 11, 2017 confirming the October 5, 2017 order that Pemex is prohibited from taking any steps to terminate the Oro Negro Contracts.[673] Pemex sought reconsideration of the October 5 and October 11 orders, and on December 29, 2017, the *Concurso* Court confirmed the orders, and stated that they applied retroactively, such that Pemex's purported termination of the Oro Negro Contracts via letters to

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669 [redacted] Exhibit **C-390 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

670 Claimants' Request for Production of Documents (July 20, 2020), Request Nos. 10-11.

671 *Concurso* Order (Oct. 5, 2017), Exhibits **C-N**; First Lopez Expert Report, **CER-1**, ¶ 34.

672 Letter from Perforadora to *Concurso* Court (Oct. 8, 2017), Exhibit **C-391**; First Lopez Expert Report, **CER-1**, ¶ 36; SOC, ¶ 118.

673 *Concurso* Order (Oct. 11, 2017), Exhibit **C-O**.

Oro Negro on October 3, 2017 is covered by and in contravention of the October 5 and October 11 injunctions.[674]

255. Moreover, on October 26, 2017, Oro Negro also initiated a commercial lawsuit against Pemex and its subsidiaries in Mexican federal court, in which it alleged that Pemex improperly terminated the Oro Negro Contracts relating to the *Fortius*, *Decus*, *Laurus*, and *Primus* rigs.[675] On February 20, 2019, the Mexican federal court agreed with Oro Negro, issuing a judgment stating that Pemex breached the Oro Negro Contracts relating to these Rigs by improperly terminating them, and ordering Pemex to pay damages.[676] Pemex has to date refused to make any such payments, instead appealing the judgment.[677]

(iii) Pemex Refused to Pay Past Due Amounts Owed to Perforadora Under the Oro Negro Contracts

256. The *Concurso* Court also issued numerous orders against Pemex to pay the past due daily balance into the Mexican Trust. It even threatened Pemex's CEO with contempt.[678] Contrary to México's argument that it never neglected the *Concurso* Court's orders to pay the past due daily

[674] *Concurso* Court Order (Dec. 29, 2017), Exhibit **C-P**. Pemex has filed an *amparo* to the December 29, 2017 order, which is still pending. Pemex *Amparo* (Jan. 25, 2018), Exhibit **C-149**. Claimants requested "documents related to Pemex's *amparo* challenge to the December 29, 2017 *Concurso* Court Order invalidating the Oro Negro Contract terminations and México's delay in resolving the *amparo*," in response to which Respondent only produced mostly court filings of orders. *See* Claimants' Request for Production of Documents (July 20, 2020), Request No. 20. It is not credible that the produced documents represent the entirety of responsive documents in Respondent's possession, custody, or control. For example, Respondent produced no internal communications regarding the *amparo* challenge. Accordingly, Claimants request that the Tribunal draw an adverse inference that Pemex challenged the *Concurso* Court's order solely to cause delay and provide time to engage in other tactics to destroy Oro Negro.

[675] Perforadora Oro Negro Demand against Pemex (Oct. 26, 2017), Exhibit **C-392**.

[676] *Juzgado Quinto de Distrito* Order (Feb. 20, 2019), Exhibit **C-153**.

[677] On January 22, 2021, the Fourteenth Tribunal Collegiate for Civil Matters for the First Judicial Circuit ruled that the Oro Negro Contracts are administrative, and therefore, Oro Negro has to sue Pemex with respect to the improper termination in the administrative, not civil, courts. *See* Fourteenth Tribunal Collegiate for Civil Matters Order (Jan. 22, 2021), Exhibit **C-393**.

[678] *Concurso* Court Order (Oct. 5, 2017), Exhibit **C-N**; *Concurso* Court Order (Aug. 22, 2018), Exhibit **C-158**.

balance into the Mexican Trust,[679] as explained in the Statement of Claim, in addition to the orders issued on October 5 and October 11, 2017, on June 18, 2018, the *Concurso* Court issued another order instructing Pemex to pay the approximately USD 96 million that it owed for services provided by Perforadora prior to October 3, 2017.[680] On July 24, August 22, and September 4, 2018, the *Concurso* Court had to issue additional orders, reiterating Pemex's obligation to pay USD 96 million that it owed to Perforadora.[681]

257. Moreover, while México asserts that it never neglected the *Concurso* Court's orders, it only produced a single court document in response to Claimants' request for "documents or communications related to Pemex's failure to pay past due amounts under the Oro Negro Contracts,"[682] and only three interoffice memoranda, but no correspondence, related to "the *Concurso* Proceeding court orders on June 18, July 24, August 22, and September 4, 2018 requiring Pemex to make payments to the Mexican Trust."[683] It is not credible that Respondent had no other documents relating to the payment of past-due amounts in light of the numerous court orders issued directing Respondent to make such payments, including against Pemex's CEO. Given México's refusal to produce documents regarding its failure to pay past due amounts under the Oro Negro Contracts, Claimants request that the Tribunal draw an adverse inference that Pemex's refusal to pay past due daily rates was part of its plan with the Ad-Hoc Group to financially strangle Oro Negro in order to force it to relinquish the Rigs.

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679 *See* SOD, ¶¶ 280-82.

680 *Concurso* Court Order (June 18, 2018), Exhibit **C-138**; SOC, ¶ 137.

681 *Concurso* Court Order (July 24, 2018), Exhibit **C-157**; *Concurso* Court Order (Aug. 22, 2018), Exhibit **C-158**; *Concurso* Court Order (Sept. 4, 2018), Exhibit **C-159**.

682 Claimants' Request for Production of Documents (July 20, 2020), Request No. 9.

683 *Id.*, Request No. 40.

258. Only when faced with potential imprisonment of its CEO, on September 4, 2018 and September 6, 2018, Pemex finally paid the approximately USD 96 million into the Mexican Trust.[684] Perforadora immediately requested USD 13 million from the Mexican Trust, most of which it used to pay outstanding value-added tax.[685] However, Perforadora was unable to obtain any of the other funds thereafter, on account of the actions that México and the Ad-Hoc Group immediately took to freeze the remaining assets in the Mexican Trust, as described in Section II.H.1 below.

259. México's argument that the payment of past due daily rates owed to Perforadora is unrelated to this proceeding is inapposite. Despite the *Concurso* Judge eventually issuing six orders during 2017 and 2018 compelling Pemex to pay these daily rates, over four years later, Pemex still owes Perforadora USD 24 million in past due daily rates.[686] There is no valid reason for Pemex to continue withholding these funds from Perforadora, and Respondent's having done so contributed to the eventual liquidation of Oro Negro.

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[684] First Gil Statement, **CWS-1**, ¶ 91; Letter from Perforadora to *Concurso* Court (Oct. 2, 2018), Exhibit **C-394**.

[685] First Gil Statement, **CWS-1**, ¶ 97; *see Concurso* Court Order (Oct. 2, 2018), Exhibit **C-395**.

[686] Pemex has not denied that it owes the USD 24 million to Perforadora, only arguing that it is the liquidator who must make the request. *See* SOD, ¶¶ 196-97. However, there is no requirement that an order must direct Pemex to make the payment that it owes—Pemex should do so on its own account. In any event, on December 23, 2019, following Perforadora's request to the *Concurso* Court to again compel Pemex to make the payment of the USD 24 million, the *Concurso* Court held that Perforadora lacks standing to make the request, as Oro Negro is now in liquidation, and so the request can only be made by the liquidator. *See Concurso* Order (Dec. 23, 2019), Exhibit **C-396**. On December 31, 2019, Perforadora filed a motion for reconsideration of the *Concurso* Court's decision. *See* Perforadora *recurso de revocación* against *Concurso* Court December 23, 2019 Order (Dec. 31, 2019), Exhibit **C-397**. On August 10, 2020, the *Concurso* Court denied the motion, and Perforadora filed an *amparo* before the *Juzgado Décimo Primero de Distrito en Materia Civil en la Ciudad de México* (the "*Juzgado Décimo Primero de Distrito*"). On February 26, 2021, the *Juzgado Décimo Primero de Distrito* denied Perforadora's *amparo* on the grounds that the request for payment can only be made by the liquidator. *See Juzgado Décimo Primero de Distrito* Order (Feb. 26, 2021), Exhibit **C-398**.

(iv) Deutsche México Misappropriated Oro Negro's Funds for the Benefit of the Bondholders

260. Both Pemex and the Ad-Hoc Group implemented strategies to keep funds out of Oro Negro's reach so as to hasten the demise of the company. As the Mexican Trust Administrator, Deutsche México is the entity that disburses funds to Perforadora. While Pemex refused orders by the *Concurso* Court to pay past due amounts, the Ad-Hoc Group planned, working in concert with Pemex and Deutsche México, to financially strangle Oro Negro. In response to Oro Negro's request, on October 5, 2017, the *Concurso* Court enjoined Deutsche México from disbursing funds other than to Perforadora to pay for its ordinary expenses.[687] However, in December 2017, Deutsche México released USD 23 million of Oro Negro's cash to the Nordic Trustee, in direct contravention of the *Concurso* Court's injunction.[688]

261. [redacted][689] [redacted][690] [redacted]

[687] *Concurso* Court Order (Oct. 5, 2017), Exhibit **C-N**.

[688] *See id.*, Exhibit **C-N**; Perforadora Petition (Jan. 17, 2018), Exhibit **C-399**.

[689] [redacted] Exhibit **C-400 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[690] [redacted] Exhibit **C-344 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted][691]

262. Deutsche México agreed to send the money in the Mexican Trust to the Nordic Trustee in violation of the injunction because [redacted][693]

263. [redacted][694] [redacted][695]

691 [redacted] Exhibit **C-374 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

692 [redacted] Exhibit **C-401 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

693 [redacted] Exhibit **C-402 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

694 [redacted] Exhibit **C-403 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

695 *See* [redacted] Exhibit **C-404 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**; [redacted] Exhibit **C-405 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**; [redacted]

264. Despite disbursing USD 23 million to the Bondholders in December 2017, Deutsche México refused to disburse any money to Perforadora, in contravention of repeated orders by the *Concurso* Court to do so, including on February 7,[696] February 28,[697] March 27,[698] and April 6, 2018.[699] To compel compliance, the *Juzgado Décimo Primero de Distrito* Court even threatened to sanction Deutsche México's CEO.[700]

265. Only on May 8, 2018, and again on September 27, 2018, Deutsche México finally complied with the *Concurso* Court's orders. On May 8, 2018, Deutsche México disbursed approximately USD 8 million in funds to Perforadora.[701] On September 27, 2018, Deutsche México disbursed another USD 13 million in funds to Perforadora.[702] However, to prevent any further funds from being accessed by Oro Negro, as described in Section II.H.1 below, in September 2018, the Ad-Hoc Group and México colluded to fabricate evidence and effectuate the issuance of an order by a local Mexican judge seizing the assets in the Mexican Trust, and as such preventing any further disbursements of funds to Oro Negro—to this day.

(v) The Ad-Hoc Group Misappropriated Oro Negro's Other Funds

266. In addition to [redacted], as well as coordinating with Mexican Officials to freeze Oro Negro's assets in the Mexican Trust in the fall of 2018, the Ad-Hoc Group also misappropriated

[redacted] Exhibit **C-406 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

696 *Concurso* Court Order (Feb. 7, 2018), Exhibit **C-407**.

697 *Concurso* Court Order (Feb. 28, 2018), Exhibit **C-408**.

698 *Concurso* Court Order (Mar. 27, 2018), Exhibit **C-409**.

699 *Concurso* Court Order (Apr. 6, 2018), Exhibit **C-410**.

700 *Concurso* Court Order (Mar. 27, 2018), Exhibit **C-409**.

701 *See* Confirmation of Payment made by Deutsche México to Perforadora (May 22, 2018), Exhibit **C-411**.

702 *See Concurso* Court Order (Oct. 2, 2018), Exhibit **C-412**; *see also* First Gil Statement, **CWS-1**, ¶ 97.

the funds that Oro Negro had in the accounts of the Singapore Rig Owners. At the time when the Ad-Hoc Group replaced the Singapore Rig Directors and took *de facto* control of the Singapore Rig Owners, the Singapore Rig Owners had held USD 8 million in bank accounts. The Ad-Hoc Group used the money in the Singapore Rig Owners' accounts to pay its legal fees, which were incurred in connection with its efforts to destroy Oro Negro and confiscate the Rigs.[703]

5. In January 2018, Pemex Had Planned To Meet with Oro Negro To Reinstate the Oro Negro Contracts, but Cancelled the Meeting [redacted]

267. In January 2018, Pemex was set to have negotiations with Perforadora to potentially reactivate the Oro Negro Contracts.[704] To that end, Pemex invited members of Oro Negro's management to attend a meeting at Pemex's headquarters.[705] However, without warning or explanation, shortly before the meeting was set to occur, Pemex cancelled the meeting and never rescheduled it.[706] [redacted][707] [redacted][708] [redacted]

[703] *See, e.g.,* Deutsche México Account Statement (2017) at 24, Exhibit **C-413**.

[704] Email from M. Villegas to A. Del Val (Jan. 18, 2018), Exhibit **C-414** (circulating proposed bullet points for meeting with Pemex); First Gil Statement, **CWS-1**, ¶ 93.

[705] First Gil Statement, **CWS-1**, ¶ 93.

[706] *Id.*, ¶ 94.

[707] [redacted] Exhibit **C-281 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[708] *Id.*, Exhibit **C-281 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted][709] [redacted][710] [redacted][711] [redacted] Pemex never reached back out to Oro Negro to set up a meeting to discuss a reinstatement of the Oro Negro Contracts, and never reactivated the Oro Negro Contracts.[712]

268. Claimants requested, and the Tribunal ordered, the production of documents related to the "communications regarding meetings between Pemex officials or their agents and the Bondholders or their agents regarding the renegotiation of the Oro Negro Contracts in January 2018."[713] Due to Respondent's failure to produce any documents [redacted] Claimants request that the Tribunal draw an adverse inference that responsive documents do exist, but do not support México's position, and conclude that such meeting contained a discussion regarding Pemex's cancellation of its meeting with Oro Negro to reactivate the Oro Negro Contracts and that Pemex agreed not to meet further with Oro Negro to discuss the possible reactivation of contracts for the Rigs in compliance with a request to Pemex by the Ad-Hoc Group that it not do so.[714]

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709 *Id.,*Exhibit **C-281 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

710 *Id.* at 621, Exhibit **C-281 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

711 *Id,* Exhibit **C-281 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

712 First Gil Statement, **CWS-1**, ¶ 95.

713 Claimants' Request for Production of Documents (July 20, 2020), Request No. 12.

714 Indeed, Claimants also requested "documents related to Pemex's January 2019 bidding and selection process" including relating to Pemex's decision not to include bids that Oro Negro prepared between September 2018 and February 2019, in response to which Respondent only produced only three documents. *See id.*, Request No. 68. It is

6. Commercial Litigation 446/2017

269. As explained above,[715] as a result of Pemex's refusal to abide by the *Concurso* Court's injunctions, on October 26, 2017, Oro Negro was forced to initiate a commercial lawsuit against Pemex and its subsidiaries ("Commercial Litigation 446/2017").[716] In Commercial Litigation 446/2017, Oro Negro requested that (1) Pemex's unilateral terminations of the Oro Negro Contracts relating to the *Fortius*, *Decus*, *Laurus*, and *Primus* rigs be declared ineffective and unlawful, and that (2) Pemex be ordered to comply with the *Fortius*, *Decus*, *Laurus*, and *Primus* Oro Negro Contracts and to make the payments agreed upon in the contracts from the commencement of Commercial Litigation 446/2017 through the conclusion of the term of the Oro Negro Contracts.[717]

270. As explained in the Statement of Claim,[718] in Commercial Litigation 446/2017 Oro Negro claimed that Pemex had unlawfully terminated the Oro Negro Contracts because Pemex argued in the Termination Letters that it was terminating the contracts because Pemex had entered into lease agreements with other vendors of Rigs for a daily rate of USD 116,300 and Perforadora had purportedly failed to accept leasing the Rigs to Pemex for that rate.[719] *First*, Pemex's assertions

not credible that the produced documents represent the entirety of responsive documents in Respondent's possession, custody, or control, especially as Respondent did not produce any correspondence or analysis relating to the failure to include Oro Negro in the bidding process. Accordingly, Claimants request that the Tribunal draw an adverse inference that Respondent unreasonably denied Oro Negro an opportunity to participate in Pemex's January 2019 bidding process and continue servicing Pemex under the Oro Negro Contracts due to Oro Negro's refusal to pay bribes.

715 *See supra* Section II.G.4.

716 Perforadora's Complaint in the Mexican Federal Court (Oct. 26, 2017), Exhibit **C-152**; First Lopez Expert Report, **CER-1**, ¶ 56.

717 Second Lopez Expert Report, **CER-4**, ¶ 83.

718 SOC, ¶¶ 124-131.

719 *See Primus, Laurus, Fortius, Decus* and *Impetus* Contract Termination Letters (Oct. 3, 2017), Exhibits **C-M.1 - C-M.5-T**; *see also* First Lopez Expert Report, **CER-1**, ¶¶ 51-52.

were false. As evidenced by Perforadora's August 11, 2017 letter to Pemex,[720] Perforadora did accept the aforementioned rate when it accepted the 2017 Proposed Amendments.[721] It was Pemex that failed to execute the proposed amendments.[722] *Second*, the *Fortius*, *Decus*, *Laurus*, and *Primus* Oro Negro Contracts do not contain any provision that would allow Pemex to unilaterally terminate these contracts on the basis that it was able to obtain better rates from Perforadora's competitors.[723] *Third*, Pemex's asserted ground for unilaterally terminating the Contracts did not constitute a "duly justified reason" for termination under Mexican law.[724] Therefore, Pemex could not terminate the *Fortius*, *Decus*, *Laurus*, and *Primus* Oro Negro Contracts for the reason it adduced in the Termination Letters.[725]

271. In its Statement of Defense, México fails to address Claimants' argument that Pemex's unilateral termination of the *Fortius*, *Decus*, *Laurus*, and *Primus* Oro Negro Contracts was unlawful. Rather, in its discussion of Commercial Litigation 446/2017,[726] México simply refers to a number of challenges filed by Pemex against Oro Negro's initiation of Commercial Litigation 446/2017 and against the February 20, 2019 Mexican federal court ruling.[727] México discusses

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720 Letter from A. Rosenberg to Oro Negro (Aug. 11, 2017), Exhibit **C-336**.

721 Letter Accepting the Amendments (Aug. 11, 2017), Exhibit **C-139**; *Comunicación del 11 de agosto de 2017 de Perforadora Oro Negro*, pp. 1-2, **R-0228**.

722 First Gil Statement, **CWS-1**, ¶ 64; *Escritura del Acta de Fe de Hechos que Otorgo a Solicitud de "Perforadora Oro Negro", Sociedad de Responsabilidad Limitada de Capital Variable* (2017), Exhibit **C-338**.

723 First Lopez Expert Report, **CER-1**, ¶ 53; *See Primus, Laurus, Fortius, Decus* and *Impetus* Contracts, Clauses 17-18, Exhibits **C-E.1-E.5**.

724 First Lopez Expert Report, **CER-1**, ¶¶ 48-50; *See Código Civil Federal* [CCF] [Federal Civil Code], Art. 1797, Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 03-06-2019 (Mex.),**CL-195**.

725 First Lopez Expert Report, **CER-1**,¶ 53.

726 SOD, ¶¶ 287-300.

727 The February 20, 2019 Mexican federal court ruling found that Pemex breached the *Decus*, *Fortius*, *Laurus* and *Primus* contracts by terminating them because the reasons set for by Pemex for terminating these contracts did not constitute "duly justified reasons" and, as such, that the terminations of those Oro Negro Contracts were unlawful, invalid and unenforceable. Mexican Federal Court Opinion Ruling Pemex's Breach of Contracts (Feb. 20, 2019), pp. 172-176, Exhibit **C-153**; First Lopez Expert Report, **CER-1**, ¶¶ 57-58.

these challenges in an attempt to argue that "[a]*ctualmente no existe ninguna decisión judicial que haya declarado como ilegales las terminaciones anticipadas de los Contratos Perforadora-PEP relacionados con las Plataformas Primus, Laurus, Fortius y Decus*."[728] But none of this excuses Pemex's unlawful termination of the *Decus*, *Fortius*, *Laurus* and *Primus* contracts. Respondent does not—and cannot—articulate why Pemex's unilateral terminations of the Oro Negro Contracts were lawful.

272. In particular, México focuses on the October 25, 2019 *Segundo Tribunal Unitario*'s revocation of the February 20, 2019 decision ("**October 25 Order**").[729] The *Segundo Tribunal Unitario* revoked the February 20, 2019 decision on procedural grounds, arguing that Perforadora should have commenced its litigation against Pemex for the termination of the Oro Negro Contracts in administrative courts ("*por la vía administrativa*") rather than in commercial courts ("*por la vía comercial*").[730] Initially, it is important to note that México's argument that the challenge to the Pemex terminations should have been made in the Mexican administrative courts is an admission by México that, in its opinion, the contracts for the Rigs are administrative contracts and its action to terminate the Oro Negro contracts was a governmental action, as only governmental administrative actions relating to administrative contracts with the Mexican government can be challenged in the Mexican administrative courts.

273. México states that there are challenges to the October 25 Order pending.[731] However, it conveniently omits to explain that one such challenge is Perforadora's appeal of the October 25

[728] SOD, ¶ 299.

[729] *Sentencia de Apelación 654/2019*, **R-0183**.

[730] *Sentencia de Apelación 654/2019*, **R-0183**.

[731] SOD, ¶ 299.

Order through an *amparo*.[732] The *amparo* was decided and denied, but Perforadora has filed an appeal (*recurso de revisión*) that will be heard by the Mexican Supreme Court of Justice. Perforadora's appeal is still pending. Thus, the revocation of the February 20, 2019 decision is not yet final and, as a result, whether Pemex's unilateral termination of the Oro Negro Contracts relating to the *Fortius*, *Decus*, *Laurus*, and *Primus* rigs was unlawful or not is still *sub judice*.[733] In addition, even if Perforadora was unsuccessful in its appeal, the only consequence would be that Perforadora would be required to file its action in administrative courts, which means that, in any event, it is yet to be decided whether Pemex's unilateral termination of the Oro Negro Contracts relating to the *Fortius*, *Decus*, *Laurus*, and *Primus* rigs was unlawful or not.

274. In light of the above, México's claim that the Oro Negro Contracts are terminated as of October 3, 2017 because there is currently no court ruling declaring Pemex's terminations of the *Fortius*, *Decus*, *Laurus*, and *Primus* contracts unlawful is misleading and unavailing.[734] Although there is no effective ruling declaring Pemex's unilateral terminations of the *Fortius*, *Decus*, *Laurus*, and *Primus* contracts illegal at the moment, the truth is that there is also no ruling or resolution whatsoever declaring such terminations legal and appropriate.[735] Bare, conclusory allegations are insufficient to address (much less rebut) Claimants' evidence-backed claim that Pemex's termination of the Oro Negro Contract was unlawful. For the reasons explained below,[736] Pemex's termination of the *Fortius*, *Decus*, *Laurus*, and *Primus* contracts was patently unlawful.

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[732] Perforadora's *amparo* against the October 25, 2019 ruling revoking the February 20, 2019 decision (Nov. 20, 2019), Exhibit **C-371**.

[733] Second Lopez Expert Report, **CER-4**, ¶¶ 85-86.

[734] SOD, ¶ 299.

[735] Second Lopez Expert Report, **CER-4**, ¶ 85.

[736] *See infra* Section II.G.6(i).

275. Lastly, México argues that in the hypothetical scenario that the February 20, 2019 Mexican federal court ruling[737] were to be confirmed, (1) any money that Pemex could be ordered to pay would be paid to Deutsche Bank as assignee of the collection rights under the Oro Negro Contracts; and (2) the *Concurso* Judge would have to determine whether any of the money that Perforadora would receive would have to be allocated to the bankruptcy estate ("*masa concursal*") in order to settle Perforadora's debts against its bankruptcy creditors ("*acreedores concursales*"). [738] México's claims regarding the hypothetical disbursement of funds in the event that the February 20, 2019 court ruling were to be confirmed are inapposite. How any funds are eventually disbursed and whether—and to what extent—these are allocated to Perforadora's bankruptcy estate to reduce Perforadora's liabilities in the *concurso* is a matter that would be litigated in Mexican courts and Perforadora would employ all legal avenues available to it under Mexican law to seek and defend its interests and those of its creditors.

(i) The Termination of the *Fortius*, *Decus*, *Laurus*, and *Primus* Oro Negro Contracts Was Unlawful and Invalid Under Mexican law

276. Mr. Jorge Asali's ("**Mr. Asali**") expert report fails to address the core of Claimants' claims with respect to Pemex's unlawful terminations the *Fortius*, *Decus*, *Laurus*, and *Primus* contracts: that Pemex's asserted ground for unilaterally terminating these contracts did not constitute a "duly justified reason" for termination under the contracts or under Mexican law.[739] Instead, Mr. Asali's expert report states that:

[737] The February 20, 2019 Mexican court ruling found that Pemex breached the *Decus*, *Fortius*, *Laurus* and *Primus* Contracts by terminating them because the reasons set forth by Pemex for terminating these contracts did not constitute "duly justified reasons." *See* Mexican Federal Court Opinion Ruling Pemex's Breach of Contracts (Feb. 20, 2019), Exhibit **C-153**.

[738] SOD, ¶ 300.

[739] First Lopez Expert Report, **CER-1**, ¶¶ 53-55.

> Las cláusulas de terminación anticipada previstas en los Contratos Primus *et al* tienen fundamento expreso en las disposiciones administrativas emitidas por Pemex, en apego a la Ley de Pemex Abrogada (las "Disposiciones Administrativas" también conocidas como "DACS"). Las Disposiciones Administrativas prevén la facultad de Pemex y sus subsidiarias de estipular cláusulas de terminación anticipada en los siguientes supuestos: (i) caso fortuito o fuerza mayor, (ii) cuando el contrato no resulte rentable o conveniente para Pemex o (iii) cuando así lo determine Pemex o sus subsidiarias. Dado que las causales enunciadas coinciden con las previstas en las cláusulas de terminación anticipada de los Contratos Primus et al, éstas resultan válidas a la luz de lo pactado y de las disposiciones administrativas que los rigen.[740]

277. In essence, Mr. Asali argues (1) that the early termination clauses in the Oro Negro Contracts relating to the *Fortius*, *Decus*, *Laurus*, and *Primus* rigs are explicitly based on the Administrative Contracting Provisions for Pemex and its subsidiaries (*Disposiciones Administrativas de Contratacion para Petróleos Méxicanos y sus Empresas Productivas Subsidiarias,* "**DACS**")—a statute that applies only to Pemex and that confers upon it special powers since it is acting in a governmental capacity. Importantly, the powers conferred to Pemex via this statute are not conferred under Mexican law on private parties. Mr. Asali also argues that given that the early termination grounds provided for in the DACS coincide with those stated in the early termination clauses of the Oro Negro Contracts, Pemex's terminations were valid and legal in light of the contracts and the administrative provisions governing the same.[741] Remarkably, Mr. Asali fails to provide any explanation whatsoever as to why the early termination grounds provided for in Clause 18 of the *Fortius*, *Decus*, *Laurus*, and *Primus* contracts being the same as those contemplated in the DACS automatically results in the legal conclusion that Pemex's unilateral terminations were legal. Also importantly, it is noteworthy for this case that Mr. Asali, on México's behalf, argues that the Oro Negro Contracts are of an administrative nature and

[740] Mr. Asali Expert Report, ¶ 71.

[741] Mr. Asali Expert Report, ¶ 71.

governed by the DACS and administrative law generally. While Claimants dispute this conclusion, México is again admitting here that the Oro Negro Contracts and Pemex's actions to terminate them are governmental functions.[742] As explained below, México's expert's claims are conclusory and insufficient to rebut Claimants' evidence on this point or support the conclusion that that Pemex's terminations were somehow lawful.

278. *First*, although Pemex's *contracting process* is administrative in nature, once the contract has been signed, the contract and all aspects related to the same—including the contracts' termination—are governed by commercial law.[743] Article 80 of the Petróleos Mexicanos Law (*Ley de Petróleos Mexicanos*, "**Pemex Law**") is unambiguous, unequivocal, and irrefutable on this point: "[u]*na vez firmado el contrato, éste y todos los actos o aspectos que deriven del mismo serán de naturaleza privada y se regirán por la legislación mercantil*."[744] Thus, the termination of the *Fortius*, *Decus*, *Laurus*, and *Primus* contracts and any disputes related to the same are governed by private commercial law.[745]

279. *Second*, Pemex's terminations of the Oro Negro Contracts relating to the *Fortius*, *Decus*, *Laurus*, and *Primus* were manifestly unlawful for three reasons.

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[742] Mr. Asali Expert Report, ¶¶ 64-69, 71.

[743] Second Lopez Expert Report, **CER-4**, ¶¶ 8-30.

[744] *Ley de Petróleos Méxicanos* [Petróleos Mexicanos Law ("Pemex Law")], Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 11-08-2014, Art. 80 ("*Todos los actos que se desarrollen dentro del procedimiento de contratación que se regula en el presente Capítulo, hasta el momento del fallo, inclusive, serán de naturaleza administrativa. Una vez firmado el contrato, éste y todos los actos o aspectos que deriven del mismo serán de naturaleza privada y se regirán por la legislación mercantil o común aplicable*"), **CL-83**; Second Lopez Expert Report, **CER-4**, ¶ 29.

[745] Second Lopez Expert Report, **CER-4**, ¶¶ 8-30.

280. *First*, under Mexican law, in order to unilaterally terminate a contract, the complaining party—in this case, Pemex—must be current in the fulfillment of all its contractual obligations.[746] Importantly, Pemex and its subsidiaries failed to pay Perforadora the daily rates due under the Oro Negro Contracts, so Pemex was unmistakably behind in its contractual obligations.[747] As stated earlier, Pemex owed Perforadora approximately USD 113 million in past due daily rates at the time that Perforadora filed its *concurso* petition.[748] In 2017 alone, Pemex incurred close to USD 90 million in unpaid daily rates owed to Perforadora.[749]

281. *Second*, in accordance with the Mexican law principle of contract preservation, if Pemex sought to terminate the Oro Negro Contracts early, it should have brought the corresponding actions against Perforadora in Mexican civil courts, the appropriate forum for such disputes and sought a judicial decree terminating the agreements.[750] If this had happened, the civil (and commercial) jurisdictional authority could have analyzed and issued a decision regarding the hypothetical legality of such terminations, rather than such terminations being based on the unilateral opinion of one of the contracting parties—Pemex.[751] However, instead of going before the competent and appropriate authority to settle the controversy, Pemex terminated the Oro Negro

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[746] Second Lopez Expert Report, **CER-4**, ¶ 34; Article 1949 of the Federal Civil Code ("*La facultad de resolver las obligaciones se entiende implícita en las recíprocas, para el caso de que uno de los obligados no cumpliere lo que le incumbe.*

El perjudicado podrá escoger entre exigir el cumplimiento o la resolución de la obligación, con el resarci-miento de daños y perjuicios en ambos casos. También podrá pedir la resolución aún después de haber optado por el cumplimiento, cuando éste resultare imposible"), **CL-195**.

[747] Second Lopez Expert Report, **CER-4**, ¶¶ 34-35.

[748] SOC, ¶ 114.

[749] First Gil Statement, **CWS-1**, ¶ 62; *See* Unpaid Invoices, Exhibit **C-137**; *See* Order to Pemex to Pay Prior Invoices (June 18, 2018), Exhibit **C-138**.

[750] Second Lopez Expert Report, **CER-4**, ¶ 36.

[751] Second Lopez Expert Report, **CER-4**, ¶¶ 36-37.

Contracts unilaterally and extra judicially, thereby violating Mexican law and the principle of contract preservation.[752]

282. *Third*, Pemex's termination of the *Fortius*, *Decus*, *Laurus*, and *Primus* contracts was also unlawful because Pemex's grounds for terminating the contracts does not constitute a "duly justified reason" under the Oro Negro Contracts. Pemex could only validly terminate the Oro Negro Contracts if Perforadora breaches them, for *force majeure*, or for "duly justified reasons" (in Spanish, "*razones debidamente justificadas*").[753] Under Mexican law, "duly justified reasons" means reasons (1) with sufficient probative evidence ("*suficiente valor probatorio*"); (2) based on non-subjective, non-arbitrary and non-discriminatory considerations; and (3) whose rationale and origins are adequately supported.[754] Not in the terminations, its subsequent arguments before Mexican courts, or in these proceedings has México provided any reasonable basis, let alone "duly justified reasons" for terminating the Oro Negro Contracts. Nothing in the language in the Oro Negro Contracts suggests that the parties agreed to the early termination of the Oro Negro Contracts in the event of a decrease in oil prices, because Pemex was able to secure better rates from competitors, or due to Pemex's budgetary reductions.[755] Much less do the Oro Negro Contracts offer objective criteria or parameters in this regard that could justify the unilateral considerations of Pemex and its subsidiaries in respect to such circumstances constituting a "duly justified reason" to terminate the contracts.[756] Therefore, Pemex's asserted grounds did not

[752] Second Lopez Expert Report, **CER-4**, ¶¶ 32-33, 36-37.

[753] *See Primus, Laurus, Fortius, Decus* and *Impetus* Contracts, Clause 18, Exhibits **C-E.1-E.5**; Second Lopez Expert Report, **CER-4**, ¶¶ 42-48.

[754] First Lopez Expert Report, **CER-1**, ¶ 50.

[755] First Lopez Expert Report, **CER-1**, ¶ 53; Second Lopez Expert Report, **CER-4**, ¶ 47.

[756] Second Lopez Expert Report, **CER-4**, ¶ 47.

constitute a "duly justified reason" for termination under Mexican law.[757] Thus, Pemex's termination of the *Fortius*, *Decus*, *Laurus*, and *Primus* Oro Negro Contracts was indeed unlawful under Mexican law.[758]

283. Rather than comply with the law and follow the requirements of Mexican law for terminating the Oro Negro Contracts, Pemex acted in a governmental manner and exercised governmental prerogatives and authority to issue the illegal, unilateral terminations. Following these illegal terminations, Pemex has continued to exercise governmental prerogatives, ignoring the various orders and decisions of the Mexican judiciary and maintaining steadfast in its illegal decisions to the detriment of Claimants and Oro Negro.

(ii) The Termination of the *Impetus* Oro Negro Contract Was Unlawful and Invalid Under Mexican law

284. As explained in the Statement of Claim, on November 7, 2017, Perforadora sued Pemex in the *concurso* proceeding (in an ancillary proceeding within the *concurso* called the "*Incidente de Ineficacia de Actos Jurídicos y Pago de Daños Punitivos*").[759] Perforadora (1) sought a declaration that Pemex's termination of the *Impetus* Contract was unlawful because it violated Article 87 of the Mexican Bankruptcy Code and (2) demanded specific performance and damages resulting from Pemex's breach of the *Impetus* Contract.[760] On December 29, 2017, the *Concurso* Court determined that Pemex had *unlawfully* terminated the *Impetus* Contract, in violation of the Mexican Bankruptcy Code.[761] Remarkably, despite the significance and severity of Claimants'

[757] First Lopez Expert Report, **CER-1**, ¶¶ 48-50; *See Código Civil Federal* [CCF] [Federal Civil Code], Art. 1797, Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 03-06-2019 (Mex.), **CL-195**.

[758] Second Lopez Expert Report, **CER-4**, ¶¶ 41-48.

[759] SOC, ¶ 133.

[760] Ancillary Proceeding Complaint (Impetus Termination Challenge) (Nov. 7, 2017), Exhibit **C-155**.

[761] *Concurso* Court Order (Dec. 29, 2017), Exhibit **C-P**. This is the same order which revised the scope of the *Concurso* Court October 5, Exhibit **C-N** and 11 Orders, Exhibit **C-O**.

allegations regarding Pemex's unlawful termination of the *Impetus* Contract, México's Statement of Defense completely fails to address or rebut Claimants' claims in any significant manner. Instead, México argues that (1) the *Concurso* Judge found that the ancillary proceeding initiated by Perforadora seeking a declaration that Pemex breached the *Impetus* Contract by unlawfully terminating it was not the correct proceeding through which Perforadora should have sought the requested relief; and (2) explaining that there are currently a number of challenges pending relating to whether the "*Incidente de Ineficacia de Actos Jurídicos y Pago de Daños Punitivos*" is the correct proceeding to request a declaration that that Pemex's termination of the *Impetus* Contract was unlawful. Once again, México discusses these challenges in an attempt to argue that, as a result, there is no current ruling declaring Pemex's termination of the *Impetus* Contract illegal.[762] Respondent does not—and cannot—articulate why Pemex's unilateral termination of the *Impetus* Contract was not unlawful.

285. Pemex's termination of the Impetus Contract was unlawful under Mexican law because, as explained, Pemex's termination violates Article 87 of the Mexican Bankruptcy Code which nullifies contractual provisions that worsen the debtor's condition based on a *concurso* filing.[763]

286. Ironically, in response to Claimants' claim, Mr. Asali's expert report argues that Article 87 is not applicable, because Pemex had already terminated the Oro Negro Contracts and thus the termination itself cannot violate Article 87:

> La interpretación literal del artículo 87 revela que el mismo no resulta aplicable a aquellos casos en que, como consecuencia de la presentación de la solicitud de

[762] SOD, ¶¶ 276-278.

[763] Pemex asserted in the Termination Letter that its reasons for termination were that Perforadora had filed for *concurso*, which constituted grounds for termination under Clause 30.3.2.3 of the *Impetus* Contract. *See* Commercial Insolvency Law, Offical Journal of the Federation, Article 87 (Aug. 9, 2019) ("*Se tendrá por no puesta, salvo las excepciones expresamente establecidas en esta Ley, cualquier estipulación contractual que con motivo de la presentación de una solicitud o demanda de concurso mercantil, o de su declaración, establezca modificaciones que agraven para el Comerciante los términos de los contratos*"), **CL-261**; First Lopez Expert Report, **CER-1**, ¶ 55.

> concurso mercantil, se termine un contrato, tal y como sucedió con el Contrato Impetus. Para que se agraven los términos del contrato, es necesario que el contrato subsista, lo que descarta el supuesto de que el contrato se termine. No pueden modificarse o agravarse los términos de un contrato terminado. Por lo tanto, la terminación del Contrato Impetus no actualizó la prohibición del artículo 87 de la Ley de Concursos, pues no agravó sus términos en perjuicio de Perforadora.[764]

287. This explanation is interesting to say the least. According to Mr. Asali, Pemex's action to terminate the contract and place Oro Negro in a much worse off position financially does not violate Article 87, because the contracts were already terminated at the time the judge found that the terminations were illegal and thus there were no contacts that could be worsened. Remarkably, Mr. Asali fails to explain why (1) Article 87 does not apply to the termination of a contract; (2) for the terms of a contract to worsen, the contract must subsist (*i.e*, it must not have been terminated); or (3) the termination did not worsen the terms of the *Impetus* Contract to Perforadora's detriment.[765]

288. Article 87 of the Mexican Bankruptcy code is clear: all contractual provisions that worsen the debtor's situation as a consequence of a *concurso* filing are deemed to be inexistent.[766] It is irrelevant that Article 87 of the Mexican Bankruptcy Law does not expressly list "termination" as one of the "modifications" that worsen the debtor's situation.[767] It is irrefutable in the circumstances of this case that the early termination of the contracts implies their modification in respect to the term of the contract, in detriment of the debtor's situation.[768] Termination is, in fact,

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[764] Mr. Asali Expert Report, ¶¶ 64-69, 71.

[765] Second Lopez Expert Report, **CER-4**, ¶¶ 52-55.

[766] Second Lopez Expert Report, **CER-4**, ¶¶ 51-52; Commercial Insolvency Law, Offical Journal of the Federation, Article 87 (Aug. 9, 2019) ("*Se tendrá por no puesta, salvo las excepciones expresamente establecidas en esta Ley, cualquier estipulación contractual que con motivo de la presentación de una solicitud o demanda de concurso mercantil, o de su declaración, establezca modificaciones que agraven para el Comerciante los términos de los contratos*"), **CL-261**.

[767] Second Lopez Expert Report, **CER-4**, ¶ 54.

[768] Second Lopez Expert Report, **CER-4**, ¶¶ 52, 54-55.

the most radical and destructive type of contract modification. Moreover, the early termination of a contract such as the *Impetus* Contract—which entails Perforadora's receipt of periodic income in exchange for its leasing of the Rigs to Pemex—undoubtedly further aggravates the debtor's situation and puts the viability of the company at risk because its termination results in Perforadora being deprived of cash,[769] thereby ensuring its demise.

289. In light of the above, Clause 30.3.2.3 of the *Impetus* Contract, which allows Pemex to terminate the contract in the event of Perforadora filing for *concurso*,[770] is unlawful under Mexican law and deemed to be inexistent because it is irrefutably a contractual provision that worsen the debtor's situation as a consequence of a *concurso* filing.[771] Thus, Pemex's termination of the *Impetus* Contract is and was unlawful under Mexican law.[772]

H. México and the Ad-Hoc Group Conspired to and Succeeded in Freezing Oro Negro's Assets and Taking Physical Possession of the Rigs

1. México and the Ad-Hoc Group Froze Oro Negro's Assets

290. México strategized with the Ad-Hoc Group to destroy Oro Negro by preventing Oro Negro from being able to access its cash, financially strangling it so that it would not be able to keep operating or fighting a legal battle against México and the Ad-Hoc Group. [redacted] Meanwhile, Pemex continued to

[769] Second Lopez Expert Report, **CER-4**, ¶¶ 52, 55.

[770] Oro Negro Impetus Contract, Clause 30.3.2.3, Exhibit **C-E.5**.

[771] Second Lopez Expert Report, **CER-4**, ¶¶ 52, 55.

[772] Second Lopez Expert Report, **CER-4**, ¶¶ 52, 55.

refuse to make payments into the Mexican Trust for past due amounts that it owed Oro Negro.[773] However, after the *Concurso* Court went so far as to threaten Pemex's CEO with imprisonment, Pemex was finally forced to pay USD 96 million into the Mexican Trust in September 2018—though, as discussed below, because of a plan devised by México and the Ad-Hoc Group, Oro Negro was never able to access the bulk of these funds.[774]

291. Indeed, México and the Ad-Hoc Group had developed a new tactic, wherein the Ad-Hoc Group instituted baseless criminal actions against Oro Negro, and wherein corrupt local Mexican prosecutors and judges issued rulings against Oro Negro that ultimately led to Oro Negro's destruction. Specifically, the Ad-Hoc Group, via its Mexican criminal attorneys, García González y Barradas Abogados ("GGB"), used the fabricated evidence that it obtained as a result of filing the June 18, 2018 complaint alleging mismanagement of funds (discussed in Section II.I.1(i)(a) below), to obtain a seizure of Oro Negro's assets.

292. That evidence consisted of a single spreadsheet that GGB supposedly "found" among hundreds of documents that the *Servicio de Administración Tributaria* (the "SAT"), México's tax agency, provided in connection with the mismanagement of funds complaint.[775] The spreadsheet supposedly showed that Oro Negro had engaged in business transactions with 16 companies that are notorious and blacklisted for engaging in tax fraud and tax evasion, to which it issued invoices totaling USD 500,000.00. The SAT's provision of the documents in response to an outside request (made by a Mexican federal prosecutor) was highly unusual and illegal under Mexican law, as México's federal tax code prohibits tax authorities from disclosing tax information to anyone

[773] *See supra* Section II.G.4(iii).

[774] *See Concurso* Order (Aug. 22, 2018), Exhibit **C-158**.

[775] *See* Contreras Interview (Sept. 21, 2018), Exhibit **C-2**.

unless required by a court order or in money laundering or tax evasion criminal investigations, which is not the case here.[776]

293. Nevertheless, pursuant to México and the Ad-Hoc Group's plan to freeze Oro Negro's assets, in September 2018, Ricardo Contreras ("Mr. Contreras"), an associate at GGB, sat for an interview with a local prosecutor in México City, Andres Maximino Perez-Hicks ("Prosecutor Perez").[777] During that interview, Mr. Contreras and Prosecutor Perez discussed the information on the spreadsheet that GGB allegedly obtained from the SAT.[778] Notably, Contreras never provided a copy of the spreadsheet to Prosecutor Perez. Moreover, although it would have been customary to do so, neither Prosecutor Perez nor any other Mexican officials ever asked Oro Negro for any information confirming or denying the information on the spreadsheet, such as the underlying invoices themselves or any information relating to the operations supposedly listed on the spreadsheet.[779]

294. Instead, on September 25, 2018, based solely on information that Prosecutor Perez obtained orally from Mr. Contreras during the interview, Prosecutor Perez went to a local judge in México City, Judge Enrique Cedillo-Garcia ("Judge Cedillo"), and requested a seizure of all of Oro Negro's assets in the Mexican Trust.[780] By then, the Mexican Trust finally contained funds—USD 96 million that Pemex was finally forced to deposit into the Mexican Trust following repeated orders by the *Concurso* Court, save USD 13 million that Perforadora had immediately managed to

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[776] Federal Tax Law, Offical Journal of the Federation, Aritcle 69 (2018), **CL-264**; First Izunza Expert Report, **CER-2**, ¶ 25. Moreover, as described in Section II.I.1(i)(c), the SAT has since admitted that it has no evidence that Oro Negro issued the invoices to the "sham" companies.

[777] *See* Contreras Interview (Sept. 21, 2018), Exhibit **C-2**.

[778] *See id*., Exhibit **C-2**.

[779] *See* First Gil Statement, **CWS-1**, ¶ 122; Second Gil Statement, **CWS-5**, ¶ 80.

[780] *See* Seizure Order (Sept. 25, 2018), Exhibit **C-23**.

withdraw in order to pay its value-added tax.[781] As such, this was the opportune moment for México and the Ad-Hoc Group to effectuate their plan to seize Oro Negro's assets.

295. With no investigation, substantive evidence, or even notice to Oro Negro, and even though the amounts in the Mexican Trust exceeded the USD 500,000.00 in the supposed invoices that Oro Negro purportedly issued *by close to USD 100 million*, Judge Cedillo granted Prosecutor Perez's request and ordered the USD 83 million in the Mexican Trust to be frozen and inaccessible to Oro Negro for 300 days (the "Seizure Order").[782] *In other words, Judge Cedillo ordered USD 83 million seized, to cover an alleged debt of USD 500,000*. Even if the facts reliably established this alleged debt, which they did not, Judge Cedillo's order was wildly disproportionate to the case presented to him.

296. Also notably, prior to requesting the Seizure Order from Judge Cedillo, the Ad-Hoc Group, via GGB, requested that Prosecutor Perez obtain a similar order from a Mexican federal judge,[783] but such order was denied as baseless.[784] The federal judge determined that Prosecutor Perez failed to provide any evidence that the Mexican Trust or any of the bank accounts of the Mexican Trust contained proceeds relating to criminal conduct.[785] However, the Ad-Hoc Group ignored the federal judge's order in furtherance of its plan to destroy Oro Negro and presumably went to a "friendly" judge to obtain the seizure of the cash in the Mexican Trust.[786]

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781 Letter from Perforadora to *Concurso* Court (Oct. 2, 2018), Exhibit **C-394**; *Concurso* Order (Oct. 2, 2018), Exhibit **C-395**.

782 Seizure Order (Sept. 25, 2018), Exhibit **C-23**.

783 *See* García González y Barradas Abogados Request to Mexican Federal Judge (Sept. 6, 2018), Exhibit **C-415**.

784 Federal Seizure Denial Order (Sept. 18, 2018), Exhibit **C-76**.

785 *Id*., Exhibit **C-76**.

786 It is also worth mentioning that the head of the *Secretaría de Hacienda y Crédito Público* (the "SHCP"), which is considered the supervisory agency over the SAT, during the time that the evidence against Oro Negro was fabricated, was Mr. Anaya, who was also the CEO of Pemex when the Oro Negro Contracts were illegally terminated. Moreover, GGB, the Ad-Hoc Group's attorneys who reviewed the fabricated evidence about Oro Negro, were also attorneys for

297. Neither Oro Negro nor any of its principals were informed of the Seizure Order by Prosecutor Perez or Judge Cedillo.[787] Instead, Oro Negro learned about it days later on October 1, 2018 when the Mexican media published articles about it.[788] [redacted][789] [redacted][790]

298. Prosecutor Perez continued to work with the Ad-Hoc Group to deprive Oro Negro of any funds. Shortly prior to the expiration of the Seizure Order on July 25, 2019, Prosecutor Perez filed a request with another local Mexican judge, Judge Joel de Jesus Garduño Venegas ("Judge Garduño"), to extend the Seizure Order.[791] Judge Garduño was the same judge who also ordered arrest warrants against certain Oro Negro shareholders and employees, as discussed in Section II.I.1(i)(d) below.

299. Judge Garduño granted the request and issued a new seizure order, freezing the accounts in the Mexican Trust for another 300 days.[792] By then, Oro Negro had already been ordered into

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Javier Duarte, who was connected to the 16 sham companies that were purportedly invoiced by Oro Negro in an embezzlement scheme. Furthermore, the legal representative of those sham companies, Eduardo Amerena, is also Mr. Anaya's personal lawyer.

787 Perforadora filed an *amparo* against the Seizure Order on the grounds that it violated Perforadora's due process rights, as Perforadora received no notice from the Ad-Hoc Group or its attorneys, Prosecutor Perez or the Mexican local prosecutor's office, or Judge Cedillo, of the Seizure Order. Instead, Claimants and Perforadora learned about the Seizure Order from the Mexican media. However, the *amparo* was nevertheless denied.

788 First Gil Statement, **CWS-1**, ¶ 122.

789 [redacted] Exhibit **C-416 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

790 [redacted] Exhibit **C-417 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

791 *See* Seizure Order Extension (July 18, 2019), Exhibit **C-418**.

792 *Id.*, Exhibit **C-418**.

liquidation by the *Concurso* Court. However, the renewal of the Seizure Order prevented Oro Negro from being able to pay attorneys' fees relating to its claims and the claims by its former employees and shareholders against México and the Ad-Hoc Group.[793]

300. On May 10, 2020, when the Seizure Order was set to expire for the second time, Prosecutor Perez again sought an extension, which another local México City judge, Judge Augustine Moreno Gaspar, granted, further extending the period of time during which the accounts in the Mexican Trust were to remain frozen.[794] Judge Augustine Moreno Gaspar has also issued multiple arrest warrants—including one set of arrest warrants about which Claimants' counsel learned on the date of this Reply—against certain Oro Negro personnel, including against one of the Claimants and a witness in this arbitration.[795]

301. On March 3, 2021, just days before the submission of this Reply, Prosecutor Perez again sought and obtained an extension of the Seizure Order, from Dr. Jupiter López Ruiz, another local México City judge, freezing Oro Negro's accounts for yet another 300 days.[796] As of the date of this Reply, Oro Negro's accounts in the Mexican Trust have been frozen for *over 900 days*, all on account of a claim that Oro Negro issued invoices to sham companies totaling USD 500,000.00, which has long since been disproven.

2. México and the Ad-Hoc Group's Joint Actions To Freeze Oro Negro's Funds Prevented Oro Negro's Ability To Successfully Reorganize, Instead

[793] Perforadora filed an *amparo* against the extension of the Seizure Order, but it was denied.

[794] Seizure Order Second Extension (May 10, 2020), Exhibit **C-419**. Oro Negro filed an *amparo* against the second extension of the Seizure Order, but, as with the previous *amparo*, this one too was denied.

[795] *See infra* Section II.I.1(ii).

[796] Seizure Order Third Extension (Mar. 3, 2021), Exhibit **C-420**.

Forcing Oro Negro To Turn Over the Rigs to the Bondholders and To Liquidate its Remaining Assets

302. The success of México and the Ad-Hoc Group in freezing the money in the Mexican Trust ultimately resulted in the Bondholders' improper acquisition of the Rigs. As the money in the Mexican Trust remained frozen, Oro Negro's executives and shareholders were forced to use their own personal funds to pay the expenses relating to the Rigs, including paying employee salaries, taxes, and maintenance costs.[797]

303. Eventually, however, Oro Negro ran out of any funds to continue paying the Rigs' expenses and the time within which Integradora and Perforadora needed to reorganize had lapsed. Accordingly, on May 15, 2019, the *Concurso* Court ordered that Perforadora deliver the Rigs to the Singapore Rig Owners, who are unlawfully controlled by the Ad-Hoc Group, on account of Perforadora no longer being able to maintain them, thus effectuating the plan that México and the Ad-Hoc Group had devised in 2017.[798] And, on June 13, 2019, the *Concurso* Court ordered Oro Negro into liquidation.[799] In September 2019, the Bondholders transported the Rigs out of Mexican waters.[800] In December 2019, the Bondholders sold the Rigs to the Nordic Trustee—so essentially to themselves—in the Bahamas through a sham auction for substantially less than what the Rigs are worth.[801] Their plan to take the Rigs from Oro Negro and Claimants thus was consummated with the aid at every juncture from various agencies and instrumentalities of the Mexican government.

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797 *See* First Gil Statement, **CWS-1**, ¶ 80.

798 *Concurso* Court Order (May 15, 2019), Exhibit **C-150**.

799 *Concurso* Court Order (June 13, 2019), Exhibit **C-165**.

800 *Concurso* Court Order (Nov. 25, 2019), Exhibit **C-421**; *Concurso* Order (Dec. 2, 2019), Exhibit **C-422**.

801 *See* Letter from Nordic Trustee to Bondholders (Apr. 17, 2020), Exhibit **C-423**.

3. México and the Ad-Hoc Group Colluded To Seize the Rigs by Force

304. The plan by México and the Ad-Hoc Group to take possession of the Rigs had been in the works for some time. In October 2018, after having successfully frozen Oro Negro's assets, Mexican officials, including Prosecutor Perez and Judge Cedillo, went on to execute the parties' next plan—to give the Bondholders physical possession the Rigs, [redacted].

[redacted][802] [redacted][803] [redacted][804] [redacted][805] [redacted]

306. [redacted]

After having successfully frozen Oro Negro's assets via the Seizure Order, México and the Ad-

[802] [redacted] Exhibit **C-424 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[803] *Id.* at 538, Exhibit **C-424 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[804] [redacted] Exhibit **C-425 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[805] [redacted] Exhibit **C-426 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

Hoc Group decided to confiscate the Rigs via a court order they obtained with the aid of the Mexican authorities. On October 18, 2018, Prosecutor Perez (the same prosecutor who obtained the Seizure Order), together with the Singapore Rig Owners, acting under the unlawful control of the Ad-Hoc Group, sought, and the next day successfully obtained, an order from Judge Cedillo (the same "friendly" judge who issued the Seizure Order) authorizing the Ad-Hoc Group to seize the Rigs by force (the "Rigs Take-Over Order").[806]

307. Just as with the Seizure Order, Prosecutor Perez and the Singapore Rig Owners sought and Judge Cedillo issued, the Rigs Take-Over Order solely based on the information provided in the interview to Prosecutor Perez by GGB associate Mr. Contreras, as well as on the basis that the Singapore Rig Owners, under the unlawful control of the Ad-Hoc Group, claimed to be the rightful owners of the Rigs.[807] Moreover, just as with the Seizure Order, while the purported evidence on which the issuance of the Rigs Take-Over Order was based states that the invoices that Integradora allegedly issued to the 16 "sham" companies totaled USD 500,000.00, the Rigs are worth approximately USD 150 million each. As such, in authorizing the Ad-Hoc Group to seize the Rigs, Judge Cedillo permitted the Ad-Hoc Group to dispossess Oro Negro of assets worth approximately USD 750 million in value based upon unfounded allegations reflecting a transfer of only USD 500,000.00.

308. [redacted]

[806] Judge Cedillo did not issue the Rigs Take-Over Order in writing. However, there is a video recording of its issuance. *See Tribunal Superior de Justicia de la Ciudad de México*, Hearing Video (Oct. 18, 2018), Exhibit **C-427**.

[807] *See id.*, Exhibit **C-427**.

[redacted].

[redacted][808] [redacted][809] [redacted]

310. [redacted]

[808] [redacted] Exhibit **C-428** **(Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[809] [redacted] Exhibit **C-429** **(Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted][810]

[redacted][811]

[redacted]

[redacted]

[redacted][812] [redacted][813] [redacted]

[redacted][814]

311. [redacted]

[redacted][815]

[redacted]

[redacted]

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[810] [redacted] Exhibit **C-430 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[811] [redacted] Exhibit **C-431 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[812] [redacted] Exhibit **C-432 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[813] [redacted] Exhibit **C-433 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[814] [redacted] Exhibit **C-434 (Highly Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**; [redacted] **C-435 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[815] [redacted] Exhibit **C-436 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted].[816]

312. Early on the morning of October 20, 2018, the operation went into effect, the crew [redacted] planning to fly a helicopter to each of the Rigs and land on the Rigs. The crew members included a Mexican police officer.[817] However, [redacted][818] [redacted][819] [redacted][820] [redacted][821] The one helicopter that did fly also encountered difficulties, as the crew members onboard the Rigs, loyal to Oro Negro, "wouldn't let [the Ad-Hoc Group's agents] [redacted][822] or land on the Rigs.[823]

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[816] [redacted] Exhibit **C-437 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[817] First Gil Statement, **CWS-1**, ¶ 125.

[818] [redacted] Exhibit **C-438 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[819] [redacted] Exhibit **C-439 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[820] [redacted] Exhibit **C-440 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[821] [redacted] Exhibit **C-441 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[822] [redacted] Exhibit **C-442 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[823] *See* First Gil Statement, **CWS-1**, ¶ 125.

313. [redacted][825][redacted][826][redacted][827]

314. On the next day, October 21, 2018, in attempting to land by force, one of the helicopters flew dangerously close, and almost killed a crewmember of one of the Rigs.[828] Three of Mr. Aagaard's crew members jumped out and onto the *Decus* Rig—the police officer, a private security guard hired by the Ad-Hoc Group, and GGB's Mr. Contreras, the associate who provided the interview to Prosecutor Perez that resulted in the issuance of the Rigs Take-Over Order.[829]

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824 [redacted] Exhibit **C-443** **(Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

825 [redacted] Exhibit **C-444** **(Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

826 [redacted] Exhibit **C-445** **(Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

827 [redacted] Exhibit **C-446** **(Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

828 First Gil Statement, **CWS-1**, ¶ 125.

829 *Id.*

315. On October 23, 2018, upon an emergency motion by Oro Negro to the U.S. Bankruptcy Court overseeing the Chapter 15 Proceeding (the "Chapter 15 Court"), the Chapter 15 Court entered a temporary restraining order prohibiting the Ad-Hoc Group and its agents from continuing to try to board and abscond with the Rigs.[830] On October 24, 2018, the *Concurso* Court followed suit, and also instructed Judge Cedillo to withdraw the order authorizing the takeover, *although he refused to do so*. Despite orders from both the Chapter 15 Court and the *Concurso* Court, Mr. Contreras and the security guard hired by the Ad-Hoc Group remained on the *Decus* for almost a week, refusing to leave, while claiming to the rest of the world that Oro Negro had kidnapped them.[831]

316. Because the Ad-Hoc Group and Mexican court officials attempted to seize the Rigs illegally—*i.e.*, they were prohibited from doing so by injunctions that the *Concurso* Court had issued which the Ad-Hoc Group, Prosecutor Perez, and Judge Cedillo disregarded—México's statement that on May 15, 2019, the *Concurso* Court ordered that the Rigs be forfeited to the Bondholders, is inconsequential.[832] México's suggestion that because Oro Negro no longer possesses the Rigs, the Rigs Take-Over Order by Judge Cedillo should be ignored is absurd.

4. The Destruction of Oro Negro Was a Joint Effort by México and the Ad-Hoc Group

317. México's assertion that Claimants' accusations cannot be directed at México but only at the Bondholders[833] is contrary to the facts. [redacted]

[redacted]

[830] *See* Order, *Del Val v. AMA Capital Partners, LLP*, No. 18-1693, Bankr. S.D.N.Y., ECF No. 7 (Oct. 23, 2018), Exhibit **C-447**.

[831] First Gil Statement, **CWS-1**, ¶ 126.

[832] *See* SOD, ¶ 285.

[833] *See id.*, ¶ 286.

[redacted][834] [redacted]

[redacted][835]

318. *Second*, not just the plan, but the actions taken in furtherance of the plan, were executed by both México and the Ad-Hoc Group. México and the Ad-Hoc Group implemented ways to financially starve Oro Negro: [redacted], México played its part by illegally terminating the Oro Negro Contracts and by continuing to refuse to pay money into the Mexican Trust, even when ordered by a Court to do so.[836] Moreover, México's corrupt officials, including corrupt local prosecutors and judges, actively assisted in freezing the accounts in the Mexican Trust based on fabricated and unconfirmed evidence.[837] The same Mexican prosecutor who requested the Seizure Order, and the same judge who issued it, colluded to also issue the Rigs Take-Over Order, despite injunctions by the *Concurso* Court forbidding such conduct.[838] Ultimately, México's actions in freezing the funds in the Mexican Trust directly led to the destruction of Oro Negro, as Oro Negro

834 *See* Section II.E.

835 *See* Section II.G.2.

836 *See* Sections II.G.4(ii)-(iii).

837 *See* Section II.H.1.

838 *See* Section II.H.3; First Gil Statement, **CWS-1**, ¶ 124.

eventually ran out of funds to operate the Rigs and was forced to turn over the Rigs to the Bondholders.[839]

I. México Has Continued Its Retaliation Against Oro Negro and its Principals to the Present Day Through Various Investigations

1. México and the Ad-Hoc Group Colluded by Filing Baseless Criminal Proceedings in México Against Oro Negro, its Shareholders, and its Management, and Issuing Arrest Warrants in order to Intimidate Them and Extort Them into Dropping Their Claims Against the Ad-Hoc Group and México

319. [redacted][840]

320. [redacted]

[839] *See* Section II.H.3; First Gil Statement, **CWS-1**, ¶¶ 99-100.

[840] [redacted] Exhibit **C-356 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted][841] [redacted]

[redacted][842] [redacted]

[redacted][843]

321. Once the Ad-Hoc Group coordinated with the Mexican prosecutors and filed the criminal actions against Oro Negro, the Ad-Hoc Group then colluded with Mexican court officials in order to move its baseless criminal claims forward in the Mexican courts. [redacted]

[redacted]

- [redacted]

  [redacted][844]

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[841] [redacted] Exhibit **C-448 (Highly Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**; [redacted] Exhibit **C-449 (Highly Confidential – Subject to Protective Order)**.

[842] [redacted] Exhibit **C-450 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[843] [redacted] Exhibit **C-374 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[844] [redacted] Exhibit **C-451 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

- [redacted]
  [redacted][845]
- [redacted]
  [redacted][846]
- [redacted]
  [redacted][847]
- [redacted]
  [redacted][848]
- [redacted]
  [redacted][849]
- [redacted]
  [redacted][850]

[845] [redacted] Exhibit **C-452 (Highly Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[846] [redacted] Exhibit **C-453 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[847] [redacted] Exhibit **C-454 (Highly Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[848] [redacted] Exhibit **C-455 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[849] [redacted] Exhibit **C-456 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[850] [redacted] Exhibit **C-457 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

- [redacted][851]
- [redacted][852]
- [redacted][853]
- [redacted][854]
- [redacted][855]
- [redacted][856] and
- [redacted]

[851] [redacted] Exhibit **C-458 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[852] [redacted] Exhibit **C-459 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[853] [redacted] Exhibit **C-460 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[854] [redacted] Exhibit **C-461 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[855] [redacted] Exhibit **C-462 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[856] [redacted] Exhibit **C-463 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted][857]

322. [redacted] as well as the actions taken by Mexican officials to harass and extort Oro Negro and its executives and shareholders based on meritless complaints that are described below, illustrate México's integral role in the retaliation against and destruction of Oro Negro.

(i) The Criminal and Tax Investigations Initiated by México in Retaliation Against Claimants

323. In its Statement of Defense, México attempts to evade responsibility for launching baseless criminal investigations against Integradora, Perforadora, their directors, employees and lawyers, by shifting blame to other actors, namely the Nordic Trustee. It points to the Nordic Trustee, who, according to México, at the Ad-Hoc Group's request, exercised its rights under the 2016 Bond Agreement, resulting in a considerable number of legal proceedings in México.[858] México's strategy is again to deflect blame on its co-conspirators and then to blame the Claimants for the illicit conduct in which it engaged with the aid of the Ad-Hoc Group. It attempts to portray Claimants as serial defaulters under the Bond Agreement and solely responsible for their financial difficulties and the consequences[859] but at the same time neglecting its legal obligation to investigate facts objectively and terminate investigations premised on false facts and evidence.[860]

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857 [redacted] Exhibit **C-464 (Highly Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

858 SOD, ¶¶ 309-312.

859 SOD, ¶ 309 ("*Al día de hoy ha quedado demostrado que los ejecutivos de Oro Negro tenían pleno conocimiento de las consecuencias jurídicas de estos incumplimientos y de decisiones corporativas que a la postre adoptaron algunos individuos*.")

860 México has a duty to investigate objectively and gather all available evidence, including evidence that demonstrates the defendant's innocence, and must terminate any investigation that is meritless. *See* Federal Penal

Instead, México, as explained above,[861] colluded with the Ad-Hoc Group and its advisors to launch and aggressively pursue baseless criminal investigations against Oro Negro in a further campaign to destroy Oro Negro and Claimants' investments and ensure the complete destruction of their assets and investments in México.

324. México also tries to deflect attention from its own wrongdoing by pointing to Claimants' New York proceedings against the Ad-Hoc Group.[862] Yet Claimants have amply demonstrated that México colluded with the Ad-Hoc Group and its agents to launch and aggressively pursue baseless criminal investigations against Integradora, Perforadora, their directors, employees, and attorneys. México's argument seems to be that Claimants cannot seek to hold México responsible for its violations of the NAFTA because certain Oro Negro investors are suing the Bondholders and others for their contributing actions in ensuring the demise of Oro Negro. It points to:

- different plaintiffs[863]
- are suing different defendants,[864]

Code, Official Journal of the Federation, Articles 129 and 131 (June 3, 2019), **CL-194**; *see also* First Izunza Expert Report, **CER-2**, ¶ 18.

[861] *See supra* Section II.I.1.

[862] SOD, ¶ 305.

[863] The Plaintiff in the matters *Gil-White v. Ercil*, No. 19-01294, Bankr. S.D.N.Y. (Jun. 6, 2019) and *Gil-White v. Contrarian Capital Mgmt., LLC*, No. 19-01294, Bankr. S.D.N.Y. (Jun. 24, 2019) (the "Tortious Interference Actions") is Mr. Gil, as the then-Foreign Representative on behalf of the Debtors Integradora and Perforadora (the "Debtors"), and personally. The Plaintiffs in the matter *Perez-Correa v. Asia Research and Capital Management Ltd.*, No. 19-01360, Bankr. S.D.N.Y. (Sept. 26, 2019) (the "Releases Action," and together with the Tortious Interference Actions, the "New York Lawsuits") are Fernando Perez-Correa as the then-Foreign Representative on behalf of the Debtors, and Messrs. Gil, Cañedo, Williamson and Villegas. The Claimants here are the U.S. shareholders of Integradora, only two of whom are the plaintiffs in the New York Actions. None of the Claimants are plaintiffs in the Tortious Interference Actions.

[864] The defendants in the Tortious Interference Actions are the Ad-Hoc Group, certain principals of the Ad-Hoc Group members, the owners of Seamex, Deutsche Mexico, the Singapore Rig Owners (who are unlawfully controlled by the Ad-Hoc Group), the new directors of the Singapore Rig Owners, AMA, and other agents of the Ad-Hoc Group, namely its lobbyist, Andres Antonius, and its Mexican criminal counsel, GGB. The defendants in the Releases Action are several members of the Ad-Hoc Group and the Singapore Rig Owners. Here, the arbitration is against México.

- based on different acts of the different defendants,[865]
- in separate proceedings,[866]
- in separate fora,[867]
- for different injuries,[868]
- under different theories of liability,[869]
- pursuant to different laws or legal instruments,[870] and
- requesting damages for those different injuries.[871]

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[865] The Tortious Interference Actions mainly allege that the defendants therein tortiously interfered with Oro Negro's contracts and business relationship with Pemex in order to seize Oro Negro's Rigs. The Releases Action alleges that the Ad-Hoc Group breached releases that the Bondholders provided to Oro Negro and its employees releasing them of any liability in connection with an audit that the Bondholders conducted in 2016. The Ad-Hoc Group members breached the releases by filing a criminal complaint in México against Oro Negro employees alleging them of criminal misconduct for the very actions that the Bondholders had released. Here, Claimants allege that México retaliated against Oro Negro for Oro Negro's failure to pay bribes and launching this arbitration as well as colluding with the Ad-Hoc Group to financially strangle and destroy the company.

[866] The New York Lawsuits are federal bankruptcy proceedings in the United States, while this is an arbitration action.

[867] The New York Lawsuits were filed as adversary proceedings related to the Chapter 15 Proceeding. This arbitration was filed under the NAFTA with ICSID as the administering authority.

[868] The New York Lawsuits allege injuries suffered by the Debtors and the individual plaintiffs resulting from defendants' tortious actions and breach of contract, including injuries suffered by Oro Negro on account of the freezing of its bank accounts and seizure of its Rigs, and injuries suffered by the individual plaintiffs as a result of the criminal actions filed against them. In this arbitration, the injuries alleged are the compete destruction of Claimants' investment.

[869] The New York Lawsuits are based on tort and breach of contract. This arbitration is based on breach of México's obligations under the NAFTA investment treaty, namely illegal expropriation and violations of the obligation to accord fair and equitable treatment and full protection and security to foreign investments.

[870] The New York Lawsuits seek to recover under New York law, and in the alternative, under Mexican law. This arbitration seeks to recover under the NAFTA investment treaty.

[871] The damages sought in the New York Lawsuits are those resulting from, among other things, the blocking of Oro Negro's access to its cash, the seizure of the Rigs, unnecessary legal fees and costs incurred by plaintiffs in defending against the numerous actions filed by defendants therein against them, and damages suffered by the individual plaintiffs through the destruction of their livelihoods and reputations via the issuance of the arrest warrants. *See* Complaint, *Gil-White v. Ercil*, No. 19-01294, Bankr. S.D.N.Y., ECF No. 1 (June 6, 2019) June, at 100-01, Exhibit **C-465**; Complaint, Complaint, *Gil-White v. Contrarian Capital Management, LLC*, No. 19-01301, Bankr. S.D.N.Y., ECF No. 1 (June 24, 2019)June, at 84-85, Exhibit **C-466**; Complaint, *Perez-Correa v. Asia Research and Capital Management Ltd.*, No. 19-01360, Bankr. S.D.N.Y., ECF No. 1 (Sept. 26, 2019), at 41-43, Exhibit **C-467**;

As México acknowledged in the Statement of Defense, the fourth New York Lawsuit was dismissed on June 6, 2019. *See* Notice of Voluntary Dismissal, *Del Val-Echeverria v. AMA Capital Partners, LLC*, No. 18-01693, Bankr. S.D.N.Y., ECF No. 31 (June 6, 2019), Exhibit **C-468**.

325. México attempts to argue that simply because the various proceedings share some common elements of fact, namely collusion to financially strangle Oro Negro to ensure the complete destruction of their investments in México, this proves that México cannot be liable in this proceeding. But that argument is without merit. It is not a controversial point to say that México can be severally liable for its actions in destroying Claimants' investments while other investors of Oro Negro pursue claims against the Bondholders and other third parties who colluded with México to destroy the company. These are not mutually exclusive claims as México suggests.

326. The reality is that, as Claimants have established, México violated the NAFTA as regards to Claimants' investment in México, and should be held accountable. No amount of arm waving from counsel about the bad acts of additional players in this saga absolve México from its own liability for its own actions under a treaty it signed.

(a) The PGR Investigation — Investigation CI 864/2018

327. On June 18, 2018, the Singapore Rig Owners filed a criminal complaint before the PGR (now known as *Fiscalía General de la República*), México's federal prosecutors' office, against Integradora, Perforadora, Mr. Gil and three of their employees accusing them of mismanaging funds in the Mexican Trust.[872] Specifically, the criminal complaint alleged that Perforadora had obtained from the Mexican Trust more funds than it required to maintain and operate the Rigs.[873] Importantly, as explained in detail in the Statement of Claim and in this Reply:[874]

- A Mexican federal judge concluded that the allegations of mismanagement of the Mexican Trust were completely baseless and that the PGR had no evidence demonstrating that the

[872] FED/SEIDF/UEIDFF-CDMX/0000864/2018 Complaint (June 18, 2018), Exhibit **C-469**; *See* SOC, ¶¶ 220-232.

[873] FED/SEIDF/UEIDFF-CDMX/0000864/2018 Complaint (June 18, 2018), Exhibit **C-469**; *See* SOC, ¶¶ 220-232.

[874] SOC, ¶¶ 220-229.

Mexican Trust was in any way related to any criminal conduct (the "Federal Seizure Denial");[875]

- México and the Bondholders nonetheless used this investigation to unlawfully[876] collect broad ranging tax information regarding Integradora and Perforadora from the SAT, México's tax agency;[877] and
- The primary purpose of the PGR Investigation was to create a vehicle for México to fabricate evidence against Perforadora that it could then use to attack Perforadora in other criminal proceedings that it could control. This is demonstrated by the fact that México and the Bondholders used information provided by the SAT to the PGR to initiate another meritless criminal investigation in September 2018—the Alleged Sham Companies Investigation[878]—which resulted in the seizure of all of Perforadora's cash and in a court order authorizing the Bondholders to take over the Rigs—these are the same proceedings referenced above where with the aid of the "friendly" Judge Cedillo, the Bondholders orchestrated these judicial actions against Oro Negro and its executives [redacted][879]

[875] *See* Federal Seizure Denial (Sept. 18, 2018), Exhibit **C-76**; First Izunza Expert Report, **CER-2**, ¶ 23.

[876] The PGR's broad request, and the SAT's response, were a blatant violation of Mexican law and basic human rights. Article 69 of the *Código Fiscal de la Federación*, México' s federal tax code, prohibits tax authorities from disclosing tax information to anyone, including other government agencies, absent a court order or in cases of money laundering or tax evasion, absent criminal investigations. Federal Tax Law, Official Journal of the Federation, Article 69 (2018), **CL-264**. *See also* First Izunza Expert Report, **CER-2**, ¶ 25.

[877] *See* Contreras Interview (Sept. 21, 2018), pp. 2-3, Exhibit **C-2**; First Izunza Expert Report, **CER-2**, ¶ 24.

[878] SOC, ¶¶ 239-252.

[879] SOC, ¶ 229; [redacted] Exhibit **C-428 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)** [redacted]; [redacted] Exhibit **C-429 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)** [redacted]; [redacted] Exhibit **C-431**

328. México tries to evade responsibility for these actions by deflecting blame on the Bondholders or on Claimants and Oro Negro.[880] It should be noted that many of the investigations were initiated after Claimants filed their Notice of Arbitration against México, demonstrating that reprisal nature of these measures.

329. Moreover, despite the significance and severity of Claimants' allegations regarding the PGR Investigation, México's Statement of Defense still completely fails to address or rebut Claimants' claims in any significant manner. Instead, México cherry-picks the portions of Claimants' allegations that it wishes to address, and ignores the core of Claimants' claims. México cannot rebut that the PGR Investigation is baseless and part of the coordinated plan between it and the Bondholders to destroy Integradora, Perforadora, and Claimants' investments.

330. In its relatively feeble attempt to justify the PGR Investigation, México argues as follows. *First*, México argues that the PGR's request to the SAT for tax information regarding Integradora and Perforadora,[881] and the SAT's response providing all the information that the PGR requested,[882] were done in accordance with the law because (1) the PGR has the authority to request information from different authorities in order to properly investigate the facts described in a complaint; and (2) the government agency from which the information is required (in this case,

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(Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3) [redacted] Exhibit **C-435 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)** [redacted].

[880] SOD, ¶ 317. México attempts to evade responsibility by claiming that "[d]*esde el comienzo de los Concursos Mercantiles (i.e., septiembre de 2017) hasta el día de hoy, han sucedido diversos eventos motivados por las propias Demandantes, por los Tenedores de Bonos y/o por Integradora Oro Negro y Perforadora Oro Negro*."

[881] *See* Contreras Interview (Sept. 21, 2018), p. 2, Exhibit **C-2**; First Izunza Expert Report, **CER-2**, ¶ 24.

[882] *See* Contreras Interview (Sept. 21, 2018), pp. 2–3, Exhibit **C-2**; First Izunza Expert Report, **CER-2**, ¶ 24.

the SAT), must promptly comply with the request for information.[883] México also argues that "*tampoco es inusual que dicha colaboración incluya mantener un manejo adecuado de información confidencial entre autoridades*."[884]

331. Strikingly, México omits to provide any explanation as to why, if the PGR and the SAT's actions were lawful, on November 2018—as Claimants explained in the Statement of Claim[885]—the SAT ***denied an identical request*** that the PGR made to gather additional tax information regarding third parties because it considered such request a violation of Article 69 of the *Código Fiscal de la Federación*, México's federal tax code, which prohibits tax authorities from disclosing tax information to anyone, including other government agencies, absent a court order or in cases of money laundering or tax evasion, absent criminal investigations.[886] México also fails to explain why if the PGR and the SAT were "correctly handling confidential information,"[887] Mr. Contreras, an associate at GGB, the Mexican law firm that acts as the Bondholders' criminal counsel, sat on September 21, 2018 for an interview with *Procuraduría General de Justicia de la Ciudad de México* (the "PGJCDMX"),[888] in which he described in detail almost the entirety of the information obtained by the PGR from the SAT, and claimed that the Bondholders had also reviewed the information.[889] The reason is patently obvious—the PGR's request to the SAT, and the SAT's response providing the information to the PGR, were an emblematic violation of

[883] SOD, ¶ 318.

[884] SOD, ¶ 319 (emphasis added).

[885] SOC, ¶ 227.

[886] Federal Tax Law, Official Journal of the Federation, Article 69 (2018), **CL-264**; First Izunza Expert Report, **CER-2**, ¶ 25; Second Izunza Expert Report, **CER-5**, ¶¶ 36-38; SAT Denial of Information (Nov. 26, 2018), Exhibit **C-177**.

[887] SOD, ¶ 319.

[888] *See generally* Contreras Interview (Sept. 21, 2018), Exhibit **C-2**.

[889] *See* Contreras Interview (Sept. 21, 2018), pp. 2–3, Exhibit **C-2**.

Mexican tax and privacy law and basic human rights. Furthermore, contrary to México's claim, the PGR and the SAT failed to keep tax information regarding Integradora and Perforadora confidential, and instead, shared it with the Bondholders and their counsel.[890] This was part of the collusion between these parties.

332. *Second*, México argues that Claimants have failed to demonstrate and provide evidence to support Claimants' statement in the Statement of Claim that "[t]he sole purpose of this PGR criminal investigation was to create a vehicle for México to fabricate evidence against Perforadora that it could then use to attack Perforadora in other criminal proceedings."[891] However, it is México that has failed to produce documents on this material issue in this case in the face of the Tribunal's explicit orders to do so.

333. In the document production phase of these proceedings, Claimants requested "[t]he documents related to the PGR investigation (Case No. FED/SEIDF/UEIDFF-CDMX/0000864/2018), including the entire investigation file, any internal or external government correspondence, memoranda, reports, or analyses regarding this investigation."[892] In addition, Claimants also requested "[t]he documents or communications related to or prepared in connection to the PGR's June 2018 request to SAT seeking all available tax information regarding Integradora Oro Negro and Perforadora Oro Negro including any internal or external government correspondence, memoranda, reports, or analyses regarding this investigation, as well as all documents sent to the PGR by the SAT in response to this request."[893] After being ordered to

890 First Izunza Expert Report, **CER-2**, ¶ 25.

891 SOC, ¶ 229.

892 Claimants' Request for Production of Documents (July 20, 2020), Request No. 25.

893 Claimants' Request for Production of Documents (July 20, 2020), Request No. 26.

produce these documents,[894] México raised an unsolicited objection,[895] and the Tribunal again ordered the production of the documents.[896] Despite the Tribunal's direct orders and in violation of Procedural Orders Nos. 8 and 9, México did not produce any responsive documents to these requests. México alleged that they are confidential and that there is a "legal impediment under the Mexican judicial system" that does not allow the production of these documents."[897] As explained below, México's justification falls flat. The Tribunal should draw adverse inferences from México's failure to produce the requested, and ordered, documents.

334. Specifically, the Tribunal should conclude that México's failure to produce these documents is evidence that (1) the Ad-Hoc Group's accusations giving rise to the criminal complaint in the PGR Investigation are unsubstantiated and false, (2) that México and the Ad-Hoc Group used this investigation to unlawfully collect broad ranging tax information regarding Integradora and Perforadora in contravention to Mexican law and basic human rights; and (3) that the sole or primary purpose of this investigation was to create a vehicle for México to fabricate evidence against Perforadora that it could then use to attack Perforadora in other criminal proceedings. Further, the Tribunal should conclude that México used the PGR Investigation as a vehicle to fabricate evidence against Oro Negro so that the Ad-Hoc Group could use the fabricated evidence to initiate another baseless criminal proceeding against Oro Negro, utilizing a Mexican court and judge that were obviously bribed, that resulted in the seizure of Oro Negro's cash and a court order authorizing the Ad-Hoc Group to take physical possession of the Rigs, which ultimately resulted in the destruction of Claimants' assets and investments in México. And it

894 Procedural Order No. 8, Decision on the Parties' Requests for Document Production (Oct. 9, 2020).

895 México's Letter to Tribunal (Oct. 20, 2020).

896 Procedural Order No. 8, Second Decision on the Parties' Requests for Document Production (Nov. 11, 2020).

897 Letter from Orlando Pérez Gárate to Dawn Yamane Hewett and others (Jan. 8, 2021), pp. 6-7, Exhibit **C-314**.

should finally conclude that all of this was part of the over plan between México and the Bondholders to destroy Oro Negro and Claimants' investments.

335. Despite México's failure to produce these documents in contravention of the Tribunal's orders, for the reasons explained in the Statement of Claim and in this Reply, it is patently clear that the PGR Investigation's sole or primary purpose was to create a vehicle for México to fabricate evidence against Perforadora that it could then use to attack Perforadora in other corrupt criminal proceedings.

336. Notably, a Mexican federal judge concluded that the allegations of mismanagement of the Mexican Trust were completely baseless and that the PGR had no evidence demonstrating that the Mexican Trust was in any way related to any criminal conduct.[898] Despite this, México and the Bondholders nonetheless used this investigation to unlawfully collect broad ranging tax information regarding Integradora and Perforadora from the SAT.[899] Mr. Contreras then described the information obtained by the PGR from the SAT in an interview with the PGJCDMX.[900] Based exclusively on the false information provided by the SAT to the PGR and on Mr. Contreras' interview,

- the Bondholders initiated another meritless criminal investigation in September 2018 with a judge that they likely bribed to manufacture their desired result—the Alleged Sham Companies Investigation[901]—which resulted in the seizure of all of Perforadora's cash and

[898] SOC, ¶ 225.

[899] SOC, ¶ 226.

[900] *See generally* Contreras Interview (Sept. 21, 2018), Exhibit **C-2**.

[901] SOC, ¶¶ 239-252.

in a court order from Judge Cedillo, a local judge in México City that they had in their pockets, authorizing the Bondholders to take over the Rigs;[902] and,

- on September 25, 2018, the PGJCDMX and the Bondholders sought and obtained another order from Judge Cedillo seizing all the bank accounts of the Mexican Trust and of Perforadora.[903]

337. The actions taken by México and the Bondholders stemming from the PGR Investigation speak volumes about the nefarious reasons behind their initiation of the PGR Investigation.

338. *Next*, México claims that

> [l]as propias Demandantes afirman que desde marzo de 2019 los señores Alonso del Val Echeverría, Edgar Rodrigo García y Laura Margarita Palacios Carrillo, y Perforadora Oro Negro han tenido pleno acceso a los expedientes de la CI 864/2018, y han podido participar en ella y han podido ejercer sus derechos mediante procedimientos domésticos, principalmente a través de juicios de amparo.

339. México grossly mischaracterizes Claimants's allegations in the Statement of Claim. Claimants only stated that Mr. Del Val's attorneys were finally allowed to access the case file in May 2019 after many months of litigation,[904] and that Perforadora and its employees (except Mr. Del Val) have challenged in Mexican courts through *amparos*[905] the PGR's failure to respond to their requests to (a) allow them to provide exculpatory evidence; and (b) give them access to the case file.[906] Claimants have never claimed that Edgar Rodrigo García, Laura Margarita Palacios Carrillo, and/or Perforadora have had access to the case file. To date—almost three years

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902 SOC, ¶ 229.

903 SOC, ¶ 247.

904 SOC, ¶ 224.

905 SOC, ¶ 224 n.380.

906 Exhibits **C-9**–**C-13** are Perforadora's and its employees' requests to the PGR; First Izunza Expert Report, **CER-2**, ¶ 21.

after the *amparos* were filed by Perforadora and its employees[907]—the *amparos* remain pending and Perforadora and its employees (except for Mr. Del Val and Laura Margarita Palacios Carrillo) have yet to receive a response from the PGR regarding their request to provide exculpatory evidence and to obtain access to the case file.

340. *Lastly*, México argues that the Mexican judge's denial of the PGR's request for an order seizing the Mexican Trust and all of Perforadora's bank accounts based on the allegations of mismanagement of the Mexican Trust in the PGR Investigation—the Federal Seizure Denial[908]—evidences that there was never collusion between México and the Bondholders.[909] In essence, México argues that the Federal Seizure Denial could have been appealed by the PGR in two different ways, and that the PGR has not appealed the Federal Seizure Denial demonstrates that México never retaliated against the Claimants and detracts any credibility from Claimants' allegations that there was an orchestrated effort on México's part to destroy Claimants' investments in México.[910]

341. México's argument is seriously flawed because contrary to its assertions, under Mexican law, the Federal Seizure Denial could not be appealed.[911] This is because México requested the seizure as an investigation technique.[912] In other words, México sought the preservation of the assets in the Mexican Trust and Perforadora's bank accounts.[913] The Federal Seizure Denial would only have become subject to appeal under Mexican law if the court had resolved on the issuance

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907 Exhibits **C-9**–**C-13** are Perforadora's and its employees' requests to the PGR.

908 Federal Seizure Denial (Sept. 18, 2018), Exhibit **C-76**; *see also* SOC, ¶¶ 231-232.

909 SOD, ¶ 322.

910 SOD, ¶¶ 322-323.

911 Second Izunza Expert Report, **CER-5**, ¶ 35.

912 Second Izunza Expert Report, **CER-5**, ¶ 35.

913 SOD, ¶ 344; Mexican National Code of Criminal Procedure, Article 229, **CL-284**.

of injunctive relief, which it did not.[914] And more importantly, as already proven, México went and obtained the seizure from a local judge who was most assuredly bribed and who gave México and the Bondholders the seizure that they could not obtain in the federal courts. Therefore, México's arguments regarding the implications of the Federal Seizure Denial and the PGR's failure to appeal such denial lack any merit.

(b) The Improper Representation Investigation— Investigation CI 187/2018

342. On September 20, 2018, Mr. Del Val, Integradora and Perforadora's former Chief Legal Officer, signed shareholder resolutions of Oro Negro Drilling and the Singapore Rig Owners on behalf of Integradora authorizing Jesús Guerra ("Attorney Guerra"), a Mexican attorney, to file for restructuring on their behalf. On September 29, 2017, Attorney Guerra filed for restructuring on behalf of Integradora, and also on behalf of Oro Negro Drilling and the Singapore Rig Owners.[915] In around June 2018, the Singapore Rig Owners, acting under the purported ownership and control of the Ad-Hoc Group, filed a criminal complaint before the PGJCDMX, México City's local prosecutor's office, against Mr. Del Val for signing the aforementioned shareholder resolutions on September 20, 2018.[916] The Bondholders subsequently filed a complaint in which they argue that Mr. Del Val misled the *Concurso* Judge by allowing Attorney Guerra to act on behalf of Oro Negro Drilling and the Singapore Rig Owners because, according to the Bondholders, they own and control Oro Negro Drilling and the Singapore Rig Owners, and they did not authorize Attorney Guerra to act on their behalf (the "Improper Representation Complaint").[917]

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914 Mexican National Code of Criminal Procedure, Article 467, **CL-284**; Second Izunza Expert Report, **CER-5**, ¶ 35.

915 *See* Improper Representation Complaint (June 13, 2018), p. 6, Exhibit **C-15**.

916 *Id*. at p. 6, Exhibit **C-15**.

917 *Id*. at pp. 6-7, Exhibit **C-15**.

343. México provides a timeline of events that in fact confirms Claimants' claims with respect to the Improper Representation Complaint. Integradora's shareholder authorization to Attorney Guerra is dated September 20, 2017; Attorney Guerra filed the restructuring petitions nine days later on September 29, 2017; and the Nordic Trustee exercised the Oro Negro Drilling Share Charge (Integradora's authorization to Nordic Trustee to replace, if certain conditions are met, Oro Negro Drilling's directors) in early October 2017.[918] Therefore, the questioned shareholder authorization was almost two weeks before, and the *concurso* filing was six days before, the date when the Bondholders purportedly became the owners of Oro Negro Drilling. Thus, there is no way that Mr. Del Val could have signed the shareholder resolutions to mislead Mexican courts.

344. México then argues that the Singapore Rig Owners' complaint alleges that Mr. Del Val filed for restructuring on behalf of Oro Negro Drilling and the Singapore Rig Owners despite not having received authorization from the Independent Director ("*Director Independiente*") of each of these companies.[919] México claims that authorization from the Independent Director of Oro Negro Drilling and the Singapore Rig Owners was an "essential requirement" but fails to provide any support for this statement.[920]

345. The reason behind such failure is clear: México is well aware that requiring the vote of the Independent Director to file for restructuring on Oro Negro Drilling and the Singapore Rig Owners' behalf is illegal under Mexican law.[921] Clause 13.5 of the 2016 amended Bond Agreement—which is governed by Norwegian law[922]—requires the vote of the Independent Director elected by

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[918] SOD, ¶ 325.

[919] SOD, ¶ 326.

[920] SOD, ¶ 325.

[921] Second Lopez Expert Report, **CER-4**, ¶ 88.

[922] *See* Bond Agreement (Nov. 9, 2016), p. 83, Exhibit **C-97**.

Oro Negro Drilling and its subsidiaries (the Singapore Rig Owners) for the company and its subsidiaries to be able to file for restructuring.[923]

346. The designation and application of foreign law in México is valid only and exclusively if it is carried out in accordance with Mexican laws and regulations, because the application of a foreign law in México is the exception, not the general rule.[924] Clause 13.5 of the Bond Agreement is contrary to México's laws and regulations because the Mexican Bankruptcy Code requires *only* the consent of the company's shareholders for it to be able to file for restructuring.[925] It does not require the vote of an Independent Director, much less one that is controlled by the company's creditors.[926] Requiring the vote of an Independent Director would condition the company's ability to restructure on the vote of a third party who is external to the company's administration in excess of the standard established by the Mexican Bankruptcy Code, which requires only the vote of the company's shareholders.[927] This would violate Mexican bankruptcy law as well as the Mexican Constitution.[928] Therefore, because it is contrary to Mexican law and against Mexican public policy, and because it imposes extraordinary requirements upon the company that are not prescribed under Mexican bankruptcy law for a company to file for restructuring, Clause 13.5 of the 2016 Bond Agreement is illegal and invalid in México.[929] Therefore, the vote of the Independent Director was not required for Mr. Guerra to file for restructuring on behalf of Oro

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923 *See* Bond Agreement (Nov. 9, 2016), p. 55, Exhibit **C-97**.

924 Second Lopez Expert Report, **CER-4**, ¶¶ 90-92.

925 Second Lopez Expert Report, **CER-4**, ¶ 93.

926 Second Lopez Expert Report, **CER-4**, ¶ 93.

927 Second Lopez Expert Report, **CER-4**, ¶ 94.

928 Second Lopez Expert Report, **CER-4**, ¶ 94.

929 Second Lopez Expert Report, **CER-4**, ¶¶ 93, 96.

Negro Drilling and the Singapore Rig Owners and the failure to obtain that vote could never be the basis for any valid criminal case in México.[930]

347. In any event, under the February 22, 2021 ruling, the *Concurso* Judge has already decided that the Bondholders improperly exercised their pledge of stock over Oro Negro Drilling and thus, the *Concurso* Judge declared that the exercise of their pledge is void. As a result, Oro Negro continues to validly own and control Oro Negro Drilling and the Singapore Rig Owners.[931] Since the *Concurso* Judge has now decided this issue, the Bondholders have no basis to allege that Mr. Del Val attempted to mislead the *Concurso* Judge.

348. Notably, in the document production phase of these proceedings, Claimants requested "[t]he documents or communications related to the Improper Representation Complaint (Case No. CI-FPC/74/UI-5 S/D/00187/06-2018), including any internal or external government correspondence, memoranda, reports, or analyses."[932] In violation of Procedural Orders Nos. 8 and 9, which explicitly ordered the production of this information, México did not produce any responsive documents to Claimants' requests alleging that they are confidential and that there is a "legal impediment under the Mexican judicial system" that does not allow the production of these documents.[933] In light of this, and of México's failure to rebut Claimants' allegations with respect to the Improper Representation Complaint, the Tribunal should draw adverse inferences and conclude that México's failure to produce documents and substantively address Claimants' allegations is evidence that México colluded with the Bondholders to initiate meritless criminal

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930 Second Lopez Expert Report, **CER-4**, ¶¶ 93, 96.

931 It is worth mentioning that in a prior ruling the *Concurso* Judge refused admission of the *concurso* petitions filed by Oro Negro Drilling and the Singapore Rig Owners due to the exercise of the pledge, but few days later the *Concurso* Judge ruled as mentioned above.

932 Claimants' Request for Production of Documents (July 20, 2020), Request No. 27.

933 Letter from Orlando Pérez Gárate to Dawn Yamane Hewett and others (Jan. 8, 2021), p. 7, Exhibit **C-314**.

proceedings, including the Improper Representation Complaint, as part of its efforts to harass and intimidate Claimants and their witnesses and to destroy the value of Claimants' assets and investments in México.

349. Next, México claims that the Improper Representation Investigation is still at an early stage, and that Mr. Del Val has had access to the case file and has been able to challenge, through *amparos*, the PGJCDMX's actions.[934] The stage at which the investigation is, whether or not Mr. Del Val has had access to the case file, and/or whether legal mechanisms to enforce his rights are available to him, is unrelated to the issue of whether México initiated this investigation against Claimants as an improper means of retaliation and of its plan with the Bondholders to attack Claimants and Oro Negro.

350. México also improperly affirms that "*las propias Demandantes han calificado a esta investigación penal como 'no grave*.'"[935] This is false. Claimants stated that "this investigation is based on allegations that warrant no serious consideration."[936] Claimants' statement is by no means equivalent to stating that the investigation is not serious. Claimants take this investigation very seriously because it imperils their investments and is yet another attempt by México, in collusion with the Bondholders, to harass and intimidate Claimants and their witnesses and to destroy the value of Claimants' assets and investments in México.

(c) The Alleged Sham Companies Investigation — Investigation 787/2018

351. In defense of its position, México also argues that the Singapore Rig Owners requested that (1) Deutsche Bank (the administrator of the Mexican Trust) also be indicted in the Alleged Sham

[934] SOD, ¶ 327.

[935] SOD, ¶ 328.

[936] Request for Interim Measures ("RFIM"), ¶ 46.

Companies Investigation;[937] and (2) the 16 sham companies to which Perforadora had allegedly issued invoices also be investigated and indicted.[938] México's statement lacks any merit because no criminal proceeding was ever initiated against Deutsche Bank and/or the 16 sham companies. Its accusations against Perforadora are demonstrably false; and there are numerous red flags that Mexican officials were bribed to procure the Seizure Order and/or the Rigs Take-Over Order.[939]

352. As explained above in Section II.H,[940] despite Mr. Contreras' failure to provide any physical evidence related to Perforadora's alleged commercial transactions with sham or ghost companies, and the fact that the Federal Seizure Denial had already disregarded the SAT's false evidence, based solely on Mr. Contreras' interview, (1) on September 25, 2018, the PGJCDMX and the Bondholders sought and obtained an order from Judge Cedillo seizing all the bank accounts of the Mexican Trust and of Perforadora;[941] and (2) on October 19, 2018, the Bondholders sought and obtained an order from Judge Cedillo that authorized the Bondholders to take over the Rigs.[942]

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[937] SOD, ¶ 331.

[938] SOD, ¶ 332.

[939] SOC, ¶¶ 244-246.

[940] It is worth mentioning that the head of the *Secretaría de Hacienda y Crédito Público* (the "SHCP"), which is considered the supervisory agency over the SAT, during the time that the evidence against Oro Negro was fabricated, was Mr. Anaya, who was also the CEO of Pemex when the Oro Negro Contracts were illegally terminated. Moreover, GGB, the Ad-Hoc Group's attorneys who reviewed the fabricated evidence about Oro Negro, were also attorneys for Javier Duarte, who was connected to the 16 sham companies that were purportedly invoiced by Oro Negro in an embezzlement scheme. Furthermore, the legal representative of those sham companies, Eduardo Amerena, is also Mr. Anaya's personal lawyer.

[941] Judge Cedillo's Seizure Order (Sept. 25, 2018), Exhibit **C-23**.

[942] Attached as Exhibits **C-26 – C-27** are discs containing the video recording of the two-day hearing where the Bondholders requested and Judge Cedillo issued the Rigs Take-Over Order (the "Rigs Take-Over Hearing"). The Bondholders did not request this Order in writing and Judge Cedillo did not issue a written Order and thus, the only record of this are the video recordings of the hearing. Courts in México City routinely take video recordings of hearings; First Izunza Expert Report, **CER-2**, ¶ 36.

353. Importantly, while the PGJCDMX eventually, after months of litigation, allowed the defendants in the Alleged Sham Companies Investigation to make copies of the case file,[943] the PGJCDMX refused to provide Perforadora with access to, and copies, of the most important evidence in the file—the disc from the SAT to the PGR that contains tax information. This disc supposedly including a spreadsheet reflecting Perforadora's relationship with the 16 sham companies—until May 2, 2019.[944] Therefore, México continued to deprive Perforadora for many months of the piece of evidence that served as the sole basis for the two highly irregular orders of Judge Cedillo (the Seizure Order and the Rigs Take-Over Order), which froze all of Perforadora's money and caused it to lose the Rigs. Notably, in addition to the requests for production of documents detailed above, in the document production phase of these proceedings, Claimants requested "[a]ll emails and messages sent via Whatsapp, text message, iMessage, WeChat, Signal Messenger, Telegram, or any other cloud-based messaging service, from SAT related to or prepared in connection to the fabricated Excel spreadsheet purporting to show Oro Negro's connection to sham companies, including any instructions from SAT officials regarding the preparation of the fabricated spreadsheet."[945] México did not produce any responsive documents to Claimants' request, claiming that it was unable to locate any. México's claimed inability to locate any responsive documents is implausible, as the spreadsheet was issued by an expert appointed by the PGJCDMX and allegedly provided by the SAT to the PGR. México did not produce any analysis/review of the spreadsheet or any other documents discussing its validity and/or its contents. Claimants request that the Tribunal draw an adverse inference that México

[943] SOC, ¶¶ 261-262.

[944] Proof of Appearance in Prosecutor's Office for the Investigation of Financial Crimes (May 2, 2019), Exhibit **C-470**.

[945] Claimants' Request for Production of Documents (July 20, 2020), Request No. 55.

fabricated or caused to be fabricated the Excel spreadsheet purporting to show Oro Negro's connection to sham companies in order to support the initiation of meritless tax audits and criminal investigations that ultimately led to the seizure of Oro Negro's assets, and ultimately the destruction of the value of Claimants' investments in México.

354. The reason PGJCDMX denied the files to Perforadora is obvious: the case file does not support Judge Cedillo's corrupt orders. Once Perforadora was finally granted access to the disc from the SAT, Perforadora's counsel hired an expert to examine the information contained therein in order to determine whether there was any evidence therein proving that Perforadora had provided services to the 16 sham companies. The expert confirmed that the disc does not contain any evidence indicating that Perforadora entered into commercial transactions with any of the 16 sham companies.[946] The experts concluded that while the 16 sham companies reported in their *Declaraciones Informativas de Operaciones con Terceros* ("DIOTs") services supposedly provided to them by Integradora and Perforadora, the information contained in the disc does not support the information provided in such DIOTs.[947] The experts concluded that Perforadora did not provide any services to the 16 sham companies.[948] This came as no surprise to Perforadora. Perforadora provides services only to Pemex. Thus, it makes no sense whatsoever that it would have ever invoiced anyone else, much less sham companies.[949]

[946] Berkeley Research Group ("BRG") Report (June 18, 2019), p. 14, Exhibit **C-190**.

[947] *Id*. at p. 8, **C-190**.

[948] *Id*. at p 5, **C-190**.

[949] First Gil Statement, **CWS-1**, ¶ 115.

355. As Claimants explained in the Statement of Claim and above,[950] the chronology of events described above raises a number of red flags that Mexican officials were bribed to procure the Seizure Order and/or the Rigs Take-Over Order. Mainly,

- (1) the SAT sent the PGR broad tax information regarding Perforadora, a request that the SAT often denies the PGR;[951]
- (2) GGB "found" that false evidence, imbedded in the numerous records provided by the SAT to the PGR;
- (3) in only eleven days after launching the investigation in the PGJCDMX, GGB obtained the Seizure Order;
- (4) the Seizure Order seized USD 84 million from Perforadora, while the accusation against Perforadora is that it issued invoices for USD 500,000 to 16 companies, an accusation that has nothing to do with and is blatantly and egregiously disproportionate vis-à-vis the Seizure Order;
- (5) Judge Cedillo issued the Seizure Order with no supporting evidence and based solely on Mr. Contreras' *ex parte* and unsupported statements;
- (6) the Rigs Take-Over Order authorized the seizure of the rigs worth close to USD 750 million in value, while the accusation against Perforadora has nothing to do with and is blatantly disproportionate vis-à-vis the Rigs Take-Over Order;

950 SOC, ¶¶ 244-245.

951 *See supra* Section II.I.1; Federal Tax Law, Official Journal of the Federation, Article 69 (2018), **CL-264**; First Izunza Expert Report, **CER-2**, ¶ 25; SAT Denial of Information (Nov. 26, 2018), Exhibit **C-177**.

- (7) GGB obtained the Rigs Take-Over Order based solely on a short, 40-minute summary at a hearing, without providing and without Judge Cedillo requesting any evidence;[952] and,
- (8) [redacted][953]

356. México again completely fails to explain, justify or even rebut Claimants' claims regarding these red flags. The Tribunal should draw adverse inferences from México failure to address Claimants' claim regarding the existence of a number of red flags pointing to Mexican officials being bribed to procure the Seizure Order and/or the Rigs Take-Over Order and conclude that Mexican officials were bribed to procure the Seizure Order and the Rigs Take-Over Order, which ultimately resulted in the destruction of Claimants' assets and investments in México.

357. Instead of addressing Claimants' claims in any substantive manner, México simply "details" for the "Tribunal's benefit" situations related to the Alleged Sham Companies Investigation.[954]

358. *First*, with respect to the *Empresas que Facturan Operaciones Simuladas* ("EFOS"), México essentially describes the process through which Mexican authorities catalogue a company

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[952] SOC, ¶ 246.

[953] [redacted] Exhibit **C-428 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)** [redacted]; [redacted] Exhibit **C-429 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)** [redacted]; [redacted] Exhibit **C-431 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)** [redacted] Exhibit **C-435 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)** [redacted]

[954] SOD, ¶ 335.

as an EFOS.[955] However, México (1) fails to address Claimants' allegation in the Statement of Claim that there is no record in the SAT's database of Perforadora ever issuing an invoice to these sham companies or of these companies ever issuing an invoice to Perforadora;[956] and, very importantly, (2) omits to mention that the SAT issued two decisions in March 2019 confirming that the invoices Perforadora supposedly issued to the sham companies never existed.[957] Instead, México claims that "*el Tribunal debe considerar que el Sr. del Val ha declarado que por una cuestión de estrategia legal Oro Negro ha calificado como "falsa" la documentación relacionada con dichas operaciones*."[958] As previously explained, Mr. Del Val made various statements supporting allegations made by México in this case but only after he was under their duress after being extorted by México via the issuance of arrest warrants stemming from baseless accusations and once he then entered into a cooperation agreement with México to free himself from the consequences of the baseless criminal charges.[959] Therefore, Mr. Del Val's credibility is seriously undermined. In addition, it is reasonable and expected as a legal strategy to label things the way they are. In this case, the information allegedly reflecting services supposedly provided by Integradora and Perforadora to sham companies was false and, hence, in order to enforce Oro Negro's rights, the information was labeled as what is was: false information. In any event, México has provided no evidence—other than a lone coerced statement by Mr. Del Val—in support of its contention that this investigation has any merit and is not anything more than an act

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955 SOD, ¶¶ 336-339.

956 *See* First Gil Statement, **CWS-1**, ¶ 118.

957 *See* SAT *Oficio* No. 500-74-02-01-02-2019-3401 (Mar. 15, 2019), Exhibit **C-471**; *See also* SAT *Oficio* No. 700-03-01-00-00-2019-0051 (Mar. 28, 2019), Exhibit **C-472**.

958 SOD, ¶ 342.

959 On September 4, 2019, the Mexican media reported that Mr. Del Val, the former General Counsel of Oro Negro, had plead guilty. The media also published a written sworn statement that Mr. Del Val provided to Prosecutor Perez on August 22, 2019 when pleading guilty. Mr. Del Val's sworn statement was provided by México as **R-008**.

of retaliation against Claimants.[960] In contrast, Claimants have substantiated their claim that this is another baseless criminal investigation that México, in collusion with the Ad-Hoc Group and their advisors, launched and pursued against Integradora, Perforadora, their directors, employees and lawyers.

359. *Second*, with respect to the Seizure Order, México—rather than addressing Claimants' claims in any substantive manner—presents a distorted and misleading narrative of the facts and circumstances surrounding the Seizure Order. México asserts that Perforadora's *amparo* against the Seizure Order was dismissed because it was filed extemporaneously ("*sobreseído por extemporáneo*").[961] This is misleading. México fails to mention that Perforadora challenged the court's dismissal of Perforadora's *amparo* against the Seizure Order as extemporaneous,[962] and that the appellate court held that Perforadora had not filed the *amparo* extemporaneously. México also asserts that Perforadora challenged the Seizure Order by means of a proceeding called "*Denuncia por Incumplimiento a una Declaratoria General de Inconstitucional*" before the Supreme Court, and the Supreme Court determined that the Seizure Order was legal and constitutional.[963] This is false. Perforadora filed the "*Denuncia por Incumplimiento a una Declaratoria General de Inconstitucional*" proceeding because the Supreme Court had recently declared that Article 242 of the Federal Code on Criminal Proceedings, a section of the Mexican criminal code relevant to the proceedings, was unconstitutional and therefore the Mexican government's authority to directly seize bank accounts was unlawful. In light of this, Perforadora

960 SOD, ¶ 307.

961 SOD, ¶ 345.

962 Perforadora *Recurso de Revisión* against the court's dismissal of Perforadora's *amparo* against the Seizure Order (Sept. 17, 2018), Exhibit **C-473**.

963 SOD, ¶ 346.

filed a "*Denuncia por Incumplimiento a una Declaratoria General de Inconstitucional*" before a Mexican federal court and thereafter an appeal before the Supreme Court claiming that the seizure of Perforadora's bank accounts was illegal because Article 242 of the Federal Code on Criminal Proceedings had been declared unconstitutional.[964] Contrary to what México claims, the Supreme Court did not determine that the Seizure Order was legal and constitutional. The Supreme Court simply found that the Seizure Order was issued on the basis of Articles 229 and 252 of the Federal Code on Criminal Proceedings—instead of on Article 242—and therefore it did not violate the Supreme Court's determination regarding the unconstitutionality of Article 242.[965] However, this does not mean that the Supreme Court found that the Seizure Order was constitutional. The Supreme Court did not evaluate the constitutionality, or lack thereof, of the Seizure Order.

360. México claims that considering that Perforadora's *amparo* against the Seizure Order was dismissed because it was filed extemporaneously,[966] and that the Supreme Court determined that the Seizure Order was legal and constitutional,[967] "*resulta infundada cualquier acusación de las Demandantes en contra de la supuesta ilegalidad del aseguramiento de cuentas bancarias de Perforadora Oro Negro y de Deutsche Bank, o cualquier acusación en contra del juez de control que la dictó*."[968] For the reasons explained above, México's argument fails.

361. *Lastly*, regarding the Rigs Take-Over Order, México simply states that (1) Perforadora filed an *amparo* against the Rigs Take-Over Order and obtained a temporary stay of the Order;

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964 Perforadora *Denuncia por Incumplimiento a una Declaratoria General de Inconstitucionalidad* (Nov. 16, 2018), Exhibit **C-474**.

965 *Sentencia Suprema Corte de Justicia de la Nación*, **R-0028**.

966 SOD, ¶ 345.

967 SOD, ¶ 346.

968 SOD, ¶ 347.

and (2) the Tribunal must take into consideration that the *Concurso* Judge returned the Rigs to the Singapore Rig Owners in May 2019 and that the Rigs are currently subject to a public auction process in the Bahamas.[969] México again omits critical information. As explained in detail in Section II.H. above,[970] on December 23, 2020, the *Concurso* Court ordered that the Rigs be returned to Mexican Waters within eight days.[971] However, the Bondholders have refused to comply with the order. Therefore, the Rigs remain unlawfully outside of Mexican Waters in violation of the *Concurso* Court's order.

362. In the document production phase of these proceedings, Claimants requested the documents or communications related to or prepared in connection with (1) the Sham Companies Investigation;[972] (2) the Seizure Order;[973] and (3) the Rigs Take-Over Order.[974] Claimants also requested "[t]he documents related to Oro Negro's November 25, 2018 letter to [the Mexican Ministry of Finance (the *Secretaría de Hacienda y Crédito Público*, the "SHCP")] requesting the preservation of all documents concerning an alleged relationship between Perforadora and the "sham" companies, and the fabrication of DIOTs showing such a relationship."[975] In violation of Procedural Orders Nos. 8 and 9, which ordered the production of these documents, México did not produce any responsive documents to Claimants' requests for documents or communications related to or prepared in connection with (1) the Sham Companies Investigation;[976] (2) the Seizure

969 SOD, ¶¶ 350-351.

970 *See supra* Section II.H.2.

971 *Concurso* Court Order (Dec. 23, 2020), Exhibit **C-475**.

972 Claimants' Request for Production of Documents (July 20, 2020), Request No. 28.

973 Claimants' Request for Production of Documents (July 20, 2020), Request No. 29.

974 Claimants' Request for Production of Documents (July 20, 2020), Request No. 30.

975 Claimants' Request for Production of Documents (July 20, 2020), Request No. 70.

976 Claimants' Request for Production of Documents (July 20, 2020), Request No. 28.

Order;[977] and (3) the Rigs Take-Over Order[978] alleging that they are confidential and that there is a "legal impediment under the Mexican judicial system" that does not allow the production of these documents.[979]

363. In addition, in response to Claimants' request related to Oro Negro's November 25, 2018 letter to the SHCP requesting the preservation of all documents concerning an alleged relationship between Perforadora and the "sham" companies and the fabrication of DIOTs,[980] México only produced Claimants' November 2018 letter to the SHCP and the Mexican Federal Tax Prosecutor's Office (*Procuraduría Fiscal de la Federación*) response to such letter, which argued that the Mexican Minister of Finance was legally and materially unable to act in the terms requested in Claimants' November 2018 letter because the preservation of evidence and the conduction of an internal investigation is outside of the scope of his authority.[981]

364. Here, the documents requested by Claimants are at México's disposal, and are documents that México should have produced. Moreover, México invoked internal legal restrictions for production of these documents although the Tribunal rejected—in two separate instances—their objections based on those restrictions. In light of this, and of México's failure to substantively address Claimants' allegations with respect to the Alleged Sham Companies Investigation, the Tribunal should infer that the documents requested by Claimants in connection with this investigation and not produced by México would be adverse to its interests. Specifically, the Tribunal should conclude that México's failure to produce these documents is evidence that (1)

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977 Claimants' Request for Production of Documents (July 20, 2020), Request No. 29.

978 Claimants' Request for Production of Documents (July 20, 2020), Request No. 30.

979 Letter from Orlando Pérez Gárate to Dawn Yamane Hewett and others (Jan. 8, 2021), pp. 7-8, Exhibit **C-314**.

980 Claimants' Request for Production of Documents (July 20, 2020), Request No. 70.

981 Letter from the Mexican Federal Tax Prosecutor's Office to Juan Morillo (Dec. 10, 2018), Exhibit **C-476**.

the Bondholders' criminal accusations are demonstrably false; (2) there are a number of red flags indicating that Mexican officials were bribed to procure the Seizure Order and/or the Rigs Take-Over Order; (3) the Seizure Order and the Rigs Take-Over Order are unlawful and the circumstances surrounding the issuance of both of these orders constitute a strong indication of the close coordination between México and the Bondholders and of México's retaliatory intent against Claimants; and, (4) México does not have any documents that prove the alleged relationship between Perforadora and the "sham" companies or any DIOTs allegedly reflecting the invoices that Perforadora purportedly issued to these sham companies.

365. Additionally, the Tribunal should conclude that México's failure to produce documents and address Claimants' allegations in any substantial manner is evidence that México colluded with the Bondholders to initiate meritless criminal proceedings, including the Sham Companies Investigation. The Tribunal should further conclude, as an adverse inference, that in pursuing the Sham Companies Investigation and in refusing to produce relevant requested and ordered documents, that these documents would further prove that Mexican officials were bribed to (a) convince the SAT to fabricate or deliver fabricated evidence to the PGR; and (b) procure the Seizure Order and the Rigs Take-Over Order, which ultimately resulted in the destruction of Claimants' assets and investments in México.

(d) The July 2019 Arrest Warrants Against Claimants and their Witnesses

366. As explained in the Statement of Claim,[982] on July 16, 2019, México issued arrest warrants against Messrs. Cañedo, Williamson, Gil, Mr. Villegas and Del Val (together, the "Defendants" and the "Arrest Warrants"). The Arrest Warrants are based in large part on baseless allegations in

[982] SOC, ¶¶ 281-313.

a May 3, 2019, complaint by the Singapore Rig Owners (the "May 3 Complaint"). The allegations in the May 3 Complaint and in the resulting Arrest Warrants have absolutely nothing to do with the allegations in the Sham Companies Investigation. However, the May 3 Complaint and resulting Arrest Warrants are part of the Sham Companies Investigation, because the Singapore Rig Owners filed the May 3 Complaint as an enhancement (*ampliación de querella*) of their original complaint regarding the sham companies. It appears that the Bondholders consolidated all their criminal cases in México City under the Sham Companies Investigation's case file, for which Prosecutor Pérez is responsible, so that he could remain in charge of all cases against Oro Negro, its owners and managers.

367. In the Statement of Claim, Claimants provided a detailed explanation of the allegations contained in the Arrest Warrants and why the allegations contained therein were patently false and baseless.[983] In short, (1) the Arrest Warrants did not describe how the individuals named in them were actually involved in the alleged wrongdoings; (2) the Arrest Warrants did not allege or even mention whether the Defendants knew of or were in any way involved in the wire transfers that, according to México, constituted the basis for the accusations leading to the Arrest Warrants; and (3) the elements of the crimes that the Claimants were accused of in the Arrest Warrants as having allegedly committed (abuse of trust and fraudulent administration) failed.[984]

368. Instead of grappling with the facts and the merits of Claimants' arguments, México argues that the Sham Companies Investigation[985] is being carried out in accordance with the applicable legal framework in order to confirm whether or not criminal conduct was committed within Oro

[983] SOC, ¶¶ 287-313.

[984] SOC, ¶¶ 287-313.

[985] For the reasons explained in the foregoing paragraph, the Arrest Warrants are part of the Sham Companies Investigation even though they are completely unrelated to the allegations in such investigation.

Negro, and that this situation cannot be equated to retaliation or persecution by México against the Claimants and its witnesses.[986] In support of its argument, México (1) explains that the PGJCDMX initiated the investigation in response to a complaint filed by the Singapore Rig Owners and that therefore México is simply complying with its duty to investigate;[987] (2) describes the crimes of which the Defendants are being accused and the basis for their indictments;[988] and (3) puts forth a timeline of facts and circumstances related to the issuance of the Arrest Warrants.[989]

369. Instead of rebutting Claimants' claims regarding the lack of basis for the issuance of the Arrest Warrants, México (1) relies on a statement from Mr. Del Val—whose credibility, as explained, is seriously undermined—to support its claim that the PGJCDMX is investigating Mr. Gil for the commission of fraudulent administration (*administracion fraudulenta*);[990] and (2) claims that the PGJCDMX is also investigating the Defendants for the commission of abuse of trust (*abuso de confianza*) because the Defendants controlled the administration of funds for the Singapore Rig Owners and Perforadora and therefore had access to the economic resources Perforadora received.[991] These claims fail to rebut the core of Claimants' allegations in relation to the Arrest Warrants. Moreover, México alleges that in a hearing in July 2019, the judge who issued the Arrest Warrants, Judge Garduño found that there was evidence demonstrating the need to issue the Arrest Warrants.[992] However, México fails to explain or describe the evidence Judge Garduño considered. The reason behind such failure is telling. Judge Garduño did not request,

[986] SOD, ¶ 363.

[987] SOD, ¶ 356.

[988] SOD, ¶¶ 357, 359.

[989] SOD, ¶¶ 353-362.

[990] SOD, ¶¶ 357-358.

[991] SOD, ¶ 359-362.

[992] SOD, ¶ 360.

nor did Prosecutor Perez provide, a single piece of evidence in support of the Arrest Warrants.[993] After about 90 minutes of Prosecutor Perez verbally describing the allegations, Judge Garduño simply recited on the record the same allegations and issued the Arrest Warrants.[994] This blatant lack of evidence to support the Arrest Warrants underscores their dubious nature and calls into serious question Judge Garduño's independence and impartiality.

370. Next, México claims the PGJCDMX's request for the Arrest Warrants "*obedece a una necesidad de cautela*" and that "[l]*a FGJCDMX . . . demostró la necesidad de cautela*."[995] Importantly, México claims that the issuance of an arrest warrant can *only* be ordered by a judicial authority when certain constitutionally established requirements are met.[996] México explains how the PGJCDMX demonstrated the "need for caution" (*necesidad de cautela*), but fails to explain how the issuance of the Arrest Warrants complied with the Mexican law constitutional requirements for the issuance of arrest warrants. México cannot explain this because the issuance of the Arrest Warrants did not comply with the Mexican constitution.

371. Under Mexican law, the decision to issue an arrest warrant must be duly grounded and reasoned, and there must be proof that the requirements for its issuance have been met.[997] Here, these requirements were not met.[998] The Arrest Warrants did not describe how the individuals named in them were actually involved in the alleged wrongdoings; failed to allege or even mention whether the Defendants knew of or were in any way involved in the wire transfers that, according

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993 *See* Arrest Warrants Hearing Recording (July 17, 2019), Exhibit **C-183**.

994 *See* Arrest Warrants Hearing Recording (July 17, 2019), Exhibit **C-183**.

995 SOD, ¶ 364.

996 SOD, ¶ 365.

997 Second Izunza Expert Report, **CER-5**, ¶¶ 49-50.

998 Second Izunza Expert Report, **CER-5**, ¶¶ 49-50.

to México, constituted the basis for the accusations leading to the Arrest Warrants; and the elements of the crimes that the Claimants were accused of in the Arrest Warrants as having allegedly committed (abuse of trust and fraudulent administration) failed.[999] Moreover, as explained above, Judge Garduño simply recited on the record the same allegations described by Prosecutor Perez verbally, and without requesting or reviewing a single piece of evidence, issued the Arrest Warrants at the end of a 90 minute hearing.[1000]

372. In addition, México claims that the investigation is still at an early stage, and that Messrs. Cañedo, Williamson, Gil, and Villegas and Ms. DeLong have had access to the case file and been able to challenge, through *amparos*, the PGJCDMX's actions.[1001] The stage at which the investigation is, whether or not Messrs. Cañedo, Williamson, Gil, and Villegas and Ms. DeLong have had access to the case file and/or whether legal mechanisms to enforce their rights are available to them, is unrelated to the issue of whether México issued the Arrest Warrants in compliance with Mexican law and as a means of retaliation.

373. Notably, in the document production phase of these proceedings, Claimants requested the documents or communications related to the issuance of the Arrest Warrants.[1002] In violation of Procedural Orders Nos. 8 and 9, which expressly ordered the production of these documents, México did not produce any responsive documents to Claimants' requests, alleging that they are confidential and that there is a "legal impediment under the Mexican judicial system" that does not allow the production of these documents.[1003] In light of this, and of México's failure to

[999] SOC, ¶¶ 287-313; *see also* First Izunza Expert Report, **CER-2**, ¶¶ 32, 35; Second Izunza Expert Report, **CER-5**, ¶¶ 47-48.

[1000] *See* Arrest Warrants Hearing Recording, (July 17, 2019), Exhibit **C-183**.

[1001] SOD, ¶¶ 367-368.

[1002] Claimants' Request for Production of Documents (July 20, 2020), Request No. 32.

[1003] Letter from Orlando Pérez Gárate to Dawn Yamane Hewett and others (Jan. 8, 2021), p. 9, Exhibit **C-314**.

substantively address Claimants' allegations with respect to the Arrest Warrants and the evidence Claimants have submitted in support of their claims, the Tribunal should draw adverse inferences and conclude that México's failure to produce documents and address Claimants' allegations is evidence that México colluded with the Bondholders to initiate meritless criminal proceedings against Oro Negro and its employees, including those leading to the issuance of the July Arrest Warrants, in order to harass and intimidate Claimants and their witnesses.

(e) The Duplicative Amparos *Investigation — Investigation CI 5523/2018*

374. On October 18, 2018, the PGR filed a criminal complaint against Mr. Del Val before the PGR.[1004] The PGR alleged that Mr. Del Val filed an a*mparo* in Mexico City (Amparo 685/2018) and another *amparo* in Jalisco (Amparo 1087/2018) in connection with the same investigation: the PGR Investigation (Investigation CI 864/2018) (the "Duplicative *Amparos* Investigation").[1005] As explained in the Statement of Claim, the basis for this complaint is false because Mr. Del Val described in detail, in each of his *amparos*, all other related and/or relevant *amparos*.[1006] To the best of Claimants' knowledge and belief, the investigation is still pending.

375. México claims that Claimants have failed to submit the actual complaint arising from this investigation.[1007] However, Claimants have submitted the only evidence in their possession related to this complaint. México has deprived Claimants of the ability to obtain additional documentation and evidence related to the Duplicative *Amparos* Investigation. In the document production phase of these proceedings, Claimants requested "[t]he documents or communications

[1004] Complaint in Criminal investigation FED/JAL/GDL/0005523/2018 (Oct. 18, 2018), Exhibit **C-41**.

[1005] Complaint in Criminal investigation FED/JAL/GDL/0005523/2018 (Oct. 18, 2018), Exhibit **C-41**.

[1006] SOC, ¶ 269.

[1007] SOD, ¶ 375.

related to the Duplicative *Amparos* Investigation (FED/JAL/GDL/0005523/2018), including the entire case file, internal correspondence, external correspondence, memoranda, reports, or analyses regarding the investigation."[1008] In violation of Procedural Orders Nos. 8 and 9, which expressly ordered the production of these documents, México did not produce any responsive documents to Claimants' requests alleging that they are confidential and that there is a "legal impediment under the Mexican judicial system" that does not allow the production of these documents.[1009]

376. Here, the documents requested by Claimants are at México's disposal, and are ones that Respondent should have produced. México invoked internal legal restrictions against producing these documents although the Tribunal rejected—in two separate instances—their objections based on those restrictions. The Tribunal should infer that the documents requested by Claimants in connection with the this investigation and not produced by México would be adverse to its interests. Specifically, the Tribunal should conclude that México's failure to produce these documents is evidence that the basis for this complaint is false.

377. The Tribunal should further conclude that México's failure to produce these documents is evidence that México colluded with the Bondholders to initiate meritless criminal proceedings, including the Duplicative *Amparos* investigation, as part of its efforts to harass Claimants and destroy Claimants' assets and investments in México and to destroy their investments in México.

378. México argues that it is unaware of the status of the Duplicative *Amparos* Investigation but yet claims—without providing any evidence—that "*con base en las otras investigaciones penales, la Demandada asume que el Sr. del Val cuenta con un defensor y ha tenido pleno acceso a la CI 5523/2018*."[1010] For the avoidance of doubt, Claimants do not have access to the case file or the

[1008] Claimants' Request for Production of Documents (July 20, 2020), Request No. 34.

[1009] Letter from Orlando Pérez Gárate to Dawn Yamane Hewett and others (Jan. 8, 2021), pp. 9-10, Exhibit **C-314**.

[1010] SOD, ¶ 376.

Complaint for the Duplicate *Amparos* Investigation, as México has refused to grant them access to these documents and then refused to produce them in the document production phase of this proceeding when the Tribunal ordered them to do so. México's unsubstantiated assertion lacks any merit as is its claim that Claimants did not submit any evidence related to this investigation other than Exhibit C-41.

(f) The Contempt Investigation — Investigation CI 480/2018

379. On October 21, 2018, the Singapore Rig Owners, acting under the purported ownership and control of the Bondholders, filed a criminal complaint against Perforadora and its employees before the PGR's office in Ciudad del Carmen.[1011] As explained in the Statement of Claim, the Singapore Rig Owners filed the complaint—which alleges that Perforadora and its employees are in contempt of the Rigs Take-Over Order because they did not allow the Bondholders to take over the Rigs[1012]—during the week when they were attempting to unlawfully take over the Rigs.[1013] Thereafter, in January 2019, the PGR filed charges against three Perforadora employees who were on board the Rigs during the week when the Bondholders attempted to take them over.[1014] A federal judge eventually dismissed the charges for lack of jurisdiction on the ground that federal prosecutors and judges do not have jurisdiction over such an investigation.[1015]

[1011] Complaint in Criminal investigation FED/CAMP/CAMP/000480/2018 (Oct. 21, 2018), Exhibit **C-40**.

[1012] *See* Complaint in Criminal investigation FED/CAMP/CAMP/000480/2018 (Oct. 21, 2018), pp. 5–6, Exhibit **C-40**.

[1013] *See* Complaint in Criminal investigation FED/CAMP/CAMP/000480/2018 (Oct. 21, 2018), p. 10, Exhibit **C-40**; *see also* SOC, ¶ 258.

[1014] *See* First Gil Statement, **CWS-1**, ¶ 129; *see also* SOC, ¶ 258.

[1015] *See* First Gil Statement, **CWS-1**, ¶ 129.

380. México claims that, on one hand, the Claimants argue that the Bondholders attempted to unlawfully take over the Rigs,[1016] and on the other hand, that there are indications that Perforadora deliberately decided not to comply with the Rigs Take-Over Order.[1017] The only evidence that México provides in support for the latter is a lone statement by Mr. Del Val,[1018] who, as already describe, is cooperating with México under duress and out of self-interest. Regardless, México mischaracterizes Mr. Del Val's statement. Mr. Del Val did not state that Perforadora decided "not to comply" ("*no acatar*") the Rigs Take-Over Order. Mr. Del Val only affirmed that Mr. Gil "*ordenó resistir y combatir la ejecución de la misma, para lo cual se enviaron abogados cada una de las plataformas*."[1019] Not complying with a judge's order and challenging an order are two different things. In any event, importantly, México conveniently omits to explain that Claimants challenged Judge Cedillo's Rigs Take-Over Order, that Claimants' challenge was lawful, and that as a result of Claimants' challenge, Judge Cedillo was instructed to withdraw the Rigs Take-Over Order.

381. Claimants challenged the Rigs Take-Over Order because, as explained in the Statement of Claim,[1020] such order was unlawful as it was based solely on Mr. Contreras' interview, in which he described in detail almost the entirety of the information obtained by the PGR from the SAT. As noted, Judge Cedillo was most assuredly bribed to issue that order. Claimants further challenged the Rigs Take-Over Order because the Federal Seizure Denial had already disregarded the SAT's false evidence and determined that the allegations of mismanagement of the Mexican

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1016 SOC, ¶ 258.

1017 SOD, ¶ 379.

1018 *Declaración del Sr. del Val*, Exhibit **R-0008**.

1019 *Declaración del Sr. del Val*, Exhibit **R-0008**, pg. 8.

1020 SOC, ¶ 259.

Trust were ***completely baseless*** and that the PGR had ***no evidence*** demonstrating that the Mexican Trust was in any way related to any criminal conduct.[1021] Therefore, not only did the result appear to be predetermined but, importantly, there was no basis for Judge Cedillo to issue the Rigs Take Over Order given that the SAT evidence had already been disregarded. Thus, upon a motion by Integradora and Perforadora, on October 23, 2018 the judge presiding over the Chapter 15 proceeding (the "U.S. Judge") entered an order prohibiting the Bondholders from continuing to attempt to take over the Rigs or in any way deprive Perforadora of its possession of the Rigs.[1022] That order remained in place for months, and the U.S. Judge never revoked it.[1023] Following the U.S. Judge's order, the *Concurso* Judge also ordered the Bondholders to cease their unlawful actions and instructed Judge Cedillo to withdraw the Rigs Take-Over Order, which Judge Cedillo unlawfully refused to do.[1024] Perforadora also filed an *amparo* against the Rigs Take-Over Order and obtained a temporary stay of the Order.[1025] Perforadora's *amparo* was ultimately resolved without studying the merits of its request for *amparo* because the *Concurso* Court instructed that the Rigs be returned to the Singapore Rig Owners.[1026]

382. As it did with respect to the Duplicative *Amparos* Investigation, México argues—without providing any evidence—that nothing has prevented the three Perforadora employees against whom the PGR filed charges, from having access to the Mexican judicial system.[1027] Whether or

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[1021] *See* Federal Seizure Denial (Sept. 18, 2018), Exhibit **C-76**.

[1022] U.S. Judge Order regarding the Rigs (Oct. 23, 2018), Exhibit **C-33**.

[1023] When Perforadora was forced to surrender the Rigs in May 2019, the order was rendered moot.

[1024] *Concurso* Court Order (Oct. 25, 2018), Exhibit **C-34**.

[1025] *Amparo* granting definitive suspension of the Rigs Take-Over Order (Oct. 26, 2018), Exhibit **C-35**; Perforadora *amparo* against PGJCDMX regarding Rigs-Take-Over Order (Oct. 19, 2018), Exhibit **C-36**.

[1026] *Concurso* Court Order (May 15, 2019), Exhibit **C-150**.

[1027] SOD, ¶ 381.

not Claimants have access to legal mechanisms in the Mexican judicial system is irrelevant to whether México initiated the Contempt Investigation as part of México's efforts to destroy Oro Negro's assets and investments in México and intimidate and extort Claimants and its witnesses.

383. Lastly, México ignores the relevance this investigation has to the Claimants' claims in this arbitration.[1028] México's assertion that these claims are not relevant to this arbitration is entirely disingenuous. For the reasons stated above, this investigation is clearly and completely relevant to the Claimants' claims in this proceeding. The record shows that the Contempt Investigation, coordinated by the Bondholders, is intrinsically related to Judge Cedillo's unlawful Rigs Take-Over Order and both are based upon flimsy evidence and suspicious circumstances. When the evidence is examined critically, it shows that México colluded with the Bondholders to dispossess Oro Negro of the Rigs and to initiate another meritless criminal proceeding as part of its efforts to destroy Claimants' assets and investments in México.

(g) The Tax Evasion Investigation — Investigation CI 997/2019

384. Despite the significance and severity of Claimants' allegations regarding Investigation CI 997/2019 (the "Tax Evasion Investigation")—mainly that the Mexican government's accusation in this investigation defies common sense and is plainly absurd, and that the SAT issued a decision stating that Integradora did not owe anything to the SAT[1029]—México's Statement of Defense completely fails to address or rebut Claimants' claims in any significant manner.[1030] Instead, México attempts to obfuscate by claiming that the Tax Evasion Investigation is at an early stage, and that México assumes that Integradora, Mr. Gil, and Gustavo Mondragón have requested that

[1028] SOD, ¶ 381.

[1029] SOC, ¶¶ 271-275.

[1030] SOD, ¶¶ 382-384.

the PGR provide them access to the Tax Evasion Investigation case file and that they will enforce their rights related to this investigation before the Mexican authorities.[1031] México's failure to substantively address Claimants' arguments on this issue points to its knowledge that the Tax Evasion Investigation is baseless and evidences México's campaign to retaliate against Claimants for pursuing this case and to destroy Integradora, Perforadora, and Claimants' investments, and to ensure the destruction of their assets and investments in México.

385. Notably, in the document production phase of these proceedings, Claimants requested "[t]he documents or communications related to or prepared in connection to Tax Evasion Investigation (Case No. FED/SEIDF/UEIFF-CDMX/0000997/2019 (CI 997/2019)), including the entire investigation file, any internal or external government correspondence, memoranda, reports, or analyses regarding this investigation."[1032] In violation of Procedural Orders Nos. 8 and 9, which ordered the production of these documents, México did not produce any responsive documents to Claimants' requests, alleging that they are confidential and that there is a "legal impediment under the Mexican judicial system" that does not allow the production of these documents.[1033] In light of this, and of México's failure to substantively address Claimants' allegations with respect to the Tax Evasion Investigation, the Tribunal should draw adverse inferences and conclude that México's failure to produce documents and address Claimants' allegations is evidence that México colluded with the Bondholders to initiate meritless criminal proceedings, including the Tax Evasion Investigation, as part of its efforts to destroy Claimants' assets and investments in México, and to retaliate against them for pursuing this case.

[1031] SOD, ¶¶ 384-385.

[1032] Claimants' Request for Production of Documents (July 20, 2020), Request No. 31.

[1033] Letter from Orlando Pérez Gárate to Dawn Yamane Hewett and others (Jan. 8, 2021), p. 8, Exhibit **C-314**.

(h) México's Tax Audits

386. México's Statement of Defense fails to address or rebut Claimants' claims regarding the baseless tax audits initiated by México as retaliation against Claimants in any significant manner.[1034] As explained in the Statement of Claim,[1035] the SAT launched a number of baseless tax audits against Integradora and its subsidiaries in 2017 and 2018, after Claimants refused to pay bribes and after Claimants initiated this arbitration proceeding, and another two in 2019.[1036] One of these seven tax audits began in April 2018, one month after Claimants delivered their Notice of Intent to México, and four of these seven tax audits began in August 2018, two months after Claimants delivered their Notice of Arbitration to México.[1037] Interestingly, the SAT's internal documents demonstrate that there was an instruction within the SAT to determine criminal tax liability against several individuals, including Claimants and key witnesses.[1038]

387. In addition to the suspicious timing of the tax audits, the tax audits have delved into virtually every aspect of the finances and operations of Oro Negro dating as far back as 2013. Moreover, the investigations themselves have been highly irregular. In just one recent example, the SAT refused to agree to enter into a Conclusive Agreement, akin to a mediation, with an Integradora subsidiary, a standard procedure for the SAT. The SAT's pretext was that the

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[1034] SOD, ¶¶ 388-393.

[1035] SOC, ¶¶ 317-320.

[1036] In addition to the seven tax audits described in Claimants' Statement of Claim, México launched an additional two tax audits against Integardora and its subsidiaries in 2019. Both of these tax audits were launched on July 10, 2019 against Servicios Todco, S. de R.L. de C.V. ("Todco"), one in respect to Todco's 2016 fiscal year, and the other one in regards to Todco's 2014 fiscal year.

[1037] *See* **Appendix C** to the Application for Interim Measures is chart summarizing all the tax audits, including their start date, the target company and scope. Exhibits **C-64 – C-70** are the orders by the SAT opening each of the seven tax audits.

[1038] SAT Informative Note re: Grupo Oro Negro (Nov. 28, 2018), Exhibit **C-477**; Internal SAT Communication re: Oro Negro, Exhibit **C-478**.

subsidiary allegedly did not act in good faith in refusing to schedule an appointment with the SAT to review the SAT's audit findings. However, in actuality, the SAT never provided the subsidiary with an appointment date, and a representative of the subsidiary had tried numerous times to schedule the appointment but could not reach anyone at the SAT's offices on account of the coronavirus pandemic.[1039] In addition, the SAT alleged that another reason for it not agreeing to a Conclusive Agreement is that the Oro Negro subsidiary did not provide documentation to the SAT during the tax audit, when the procedure permits a company to provide such evidence during the Conclusive Agreement period.[1040] Given that the SAT actually stands to benefit from the Conclusive Agreements, as these agreements result in the payment of taxes to the SAT if in fact they are owed, its actions to refuse it as to Oro Negro are highly unusual. This suggests that the SAT understands that no taxes are actually owed by Oro Negro's subsidiary.

388. Furthermore, as Claimants also explained in the Statement of Claim,[1041] in August 2019, the Mexican government opened a tax audit against Mr. Gil personally. In 2017, two years before this investigation was initiated, Mr. Gil requested and obtained permission from the SAT to cancel his tax identification number and to cease paying taxes in México due to his relocation to the United States.[1042] Prior to allowing Mr. Gil to leave the Mexican tax system, the SAT concluded that Mr. Gil did not owe any taxes and that there were no pending audits against him.[1043] It is evidently an act of retaliation that in late August 2019, the SAT informed Mr. Gil that it was conducting an audit against him, despite its prior confirmation that there were no pending

[1039] SAT *Oficio* 199-02-04-00-00-2020-2483 (Nov. 13, 2020), p. 7, Exhibit **C-479**; SAT *Oficio* 199-02-04-00-00-2020-2484 (Nov. 13, 2020), p. 5, Exhibit **C-480.**

[1040] SAT *Oficio* 199-02-04-00-00-2020-1123 (May 25, 2020), p. 3, Exhibit **C-481**.

[1041] SOC, ¶ 320.

[1042] *See* First Gil Statement, **CWS-1**, ¶ 139.

[1043] *See* First Gil Statement, **CWS-1**, ¶ 139.

investigations against him, that he owed no outstanding taxes, and that it therefore had no objection to Mr. Gil ceasing to be a Mexican tax payer.

389. The SAT's suspicious timing of the investigations, magnitude and depth of the audits, numerous uncommonly aggressive actions taken against Oro Negro, and one of its main executives, such as the refusal to enter into a Conclusive Agreement, and other irregularities that are not typical for the SAT, can only be understood as a scheme by México to inundate Oro Negro with purported tax liabilities in order to attempt to offset México's liability to Oro Negro for its unlawful termination of the Oro Negro Contracts and to retaliate against it because certain of its investors have pursued this case.[1044]

390. Instead of responding to Claimants' allegations in any substantive manner, México claims that (1) the NAFTA does not restrict a State's right to exercise its powers of review pertaining to tax matters; (2) Claimants have mechanisms under Mexican law available to them to exercise their rights in relation to the tax investigations; (3) it is unacceptable that Mexican individuals would attempt to evade criminal and tax investigations conducted in their own country, while at the same time seeking economic compensation in an investment treaty arbitration because they reside in the United States; and (4) there is no evidence that the Mexican authorities carried out acts of retaliation against Oro Negro.

391. México's claims lack merit. *First*, Claimants do not argue that NAFTA restricts México's ability to conduct lawful and substantiated tax audits. Claimants challenge México's initiation of tax audits against Integradora, its subsidiaries, and key witnesses in this NAFTA proceeding—such as Mr. Gil—as a means to retaliate against Claimants for refusing to pay bribes and initiating an investment treaty arbitration against México, and as a means to create artificial liabilities to

[1044] *See* Second Gil Statement, **CWS-5**, ¶ 83.

offset any eventual award against it in this case. *Second*, whether or not Claimants have legal mechanisms available to them is irrelevant to whether México initiated unlawful and arbitrary tax audits as a means to intimidate and harass the Claimants. *Third*, México's defamatory characterization of Claimants as attempting to evade criminal and tax investigations while simultaneously initiating an arbitration under NAFTA to seek economic compensation is not only false and lacking in any evidence whatsoever, but is also unrelated to the issue of whether México initiated baseless tax investigations against Claimants as a means of retaliation.

392. In the document production phase of these proceedings, Claimants requested "[t]he documents related to the SAT's decisions to initiate and continue the seven pending tax audits of Integradora Oro Negro and four of its subsidiaries, including Perforadora Oro Negro, including any internal government correspondence, memoranda, official resolutions, reports, or analyses regarding the audits."[1045] In violation of Procedural Orders Nos. 8 and 9, which expressly ordered the production of this information, México did not produce any responsive documents to Claimants' requests, claiming first that it was unable to locate any, and then alleging that they are confidential and that there is a "legal impediment under the Mexican judicial system" that does not allow the production of these documents.[1046] México alleged that the SAT does not issue any documents before commencing the tax audits because the initiation of the audit process is initiated by notifying the responsible bodies. It is not credible that seven tax audits were commenced without any internal discussion and/or analysis regarding the reasoning behind them being documented in writing. In light of this, and of México's failure to substantively address Claimants' allegations with respect to México's baseless tax audits to Integradora and its subsidiaries, the Tribunal should

[1045] Claimants' Request for Production of Documents (July 20, 2020), Request No. 22.

[1046] Letter from Orlando Pérez Gárate to Dawn Yamane Hewett and others (Jan. 8, 2021), p. 5, Exhibit **C-314**.

draw adverse inferences that responsive documents do exist, but do not support México's case, and conclude that México's failure to produce documents and address Claimants' allegations is evidence that México commenced and continued the meritless tax audits against Integradora and four of its subsidiaries, including Perforadora in retaliation for Oro Negro's refusal to pay bribes and in an attempt to harass and intimidate Claimants and their witnesses and as a means to create artificial liabilities to offset any eventual award against it in this case.

(ii) The Ad-Hoc Group's Criminal Complaints Have Led to the Issuance of International Arrest Warrants and two New Arrest Warrants Against Certain Members and Shareholders of Oro Negro

393. The Bondholders also colluded with Mexican officials to use the May 3, 2019 Complaint ("May 3 Complaint") as a basis to have a local Mexican judge issue arrest warrants against Messrs. Gil, Cañedo, Villegas, and Williamson.[1047] Specifically, on July 16, 2019, Prosecutor Pérez (who also obtained the Seizure and Rig Take-Over Orders) requested that Judge Garduño issue arrest warrants against Messrs. Gil, Cañedo, Villegas, and Williamson. Judge Garduño issued the arrest warrants following a hearing that lasted a little over two hours during which Prosecutor Perez spent approximately 90 minutes verbally describing the allegations, and Judge Garduño then recited the allegations on the record and issued the warrants.[1048] Judge Garduño never asked for a single piece of evidence in support of the arrest warrants, and Prosecutor Pérez also did not provide any supporting evidence in support of the warrants.

[1047] México also issued an arrest warrant against Alfonso Del Val Echeverría ("Del Val"), the former Chief Legal Officer of Integradora. Del Val surrendered to the Mexican authorities in August 2019. Upon surrendering, he responded to questioning by Prosecutor Perez regarding the allegations and signed a written statement. Notably, neither in the written statement nor in his answers to Prosecutor Perez did Del Val admit that any of the allegations in the May 3 Complaint were true, that they constitute a criminal offense, or that anyone at Oro Negro ever committed a criminal offense.

[1048] *See* Arrest Warrants Hearing Recording (July 17, 2019), Exhibit **C-183**.

394. Messrs. Gil, Cañedo, Villegas, and Williamson were never provided copies or any notice of the arrest warrants, and in fact did not have access to the arrest warrants for almost two months. They only found out about the arrest warrants because they were reported the day after the hearing on every major Mexican media outlet—despite Judge Garduño's indication during the hearing that the arrest warrants remain strictly confidential. Messrs. Gil, Cañedo, Villegas, and Williamson were only able to obtain a copy of the recording of the hearing two months after it took place, as a result of their filing an *amparo* with the Mexican Appellate Court.

395. In August 2019, México requested—and obtained—international arrest warrants against Messrs. Gil, Cañedo, Villegas, and Williamson from the International Criminal Police Organization ("INTERPOL").[1049] Known as Red Notices, the international arrest warrants are generally issued for wanted fugitives in order to allow law enforcement worldwide to locate and provisionally arrest fugitives, pending extradition, surrender, or similar legal action. As discussed in further detail below, INTERPOL recently cancelled the Red Notices against all four individuals, indicating the baselessness of the charges against them.

396. In September 2019, the Bondholders colluded with Mexican officials to file another complaint against Messrs. Gil and Villegas, as well as Cynthia DeLong, the former Head of Human Resources at Oro Negro ("Ms. DeLong") (the "September 2019 Complaint").[1050] The September 2019 Complaint accused these individuals of failing to properly disburse approximately USD 8 million that Perforadora obtained from the Mexican Trust to pay its value-added tax and expenses. Like the baseless criminal complaints before it, this complaint is also frivolous because Integradora fully paid the value-added tax, and all the money that it received from the Mexican

[1049] México's petition to Interpol (Aug. 12, 2019), Exhibit **C-482**; Second Gil Statement, **CWS-5**, ¶¶ 5, 84-87.

[1050] The case number of this criminal investigation is CI-FDF/T/UI-1 S/D/00774/09-2019. As of the date of this filing Claimants have not been provided a copy of the September 2019 Complaint.

Trust was used to pay expenses that were directly related to the conservation of Oro Negro's assets. Moreover, just as with the other criminal complaints, this complaint did not describe how the individuals named therein were actually involved in the alleged wrongdoing.[1051]

397. Nonetheless, Mexican officials, specifically Prosecutor Pérez, used the September 2019 Complaint as a basis to seek—and obtain—a second set of arrest warrants in November 2019, against Messers. Gil, Villegas, and Ms. DeLong.[1052] In a hearing on November 2019,[1053] of which the individuals again were unaware, Judge Garduño ordered the arrest warrants against them. The arrest warrants alleged that the Messrs. Gil and Villegas and Ms. DeLong committed abuse of trust (*abuso de confianza*) because in September 2018 they allegedly improperly disbursed approximately USD 8 million that Integradora obtained from the Mexican Trust to pay its value-added tax and expenses.[1054] As was the case in the July 2019 arrest warrants, these allegations are false, and factually and legally baseless for the same reason asserted above for the July 2019 arrest warrants.

398. Notably, in the document production phase of these proceedings, Claimants requested the documents or communications related to the issuance of the arrest warrants in November 2019.[1055] In violation of Procedural Orders Nos. 8 and 9, which expressly ordered production of these documents, México did not produce any responsive documents to Claimants' requests alleging that they are confidential and that there is a "legal impediment under the Mexican judicial system" that does not allow the production of these documents.[1056] In light of this, the Tribunal should

[1051] Second Izunza Expert Report, **CER-5**, ¶¶ 67-68.

[1052] Hearing in which the November 2019 arrest warrants were issued (Nov. 2019), Exhibit **C-483**.

[1053] Hearing in which the November 2019 arrest warrants were issued (Nov. 2019), Exhibit **C-483**.

[1054] Second Izunza Expert Report, **CER-5**, ¶ 65.

[1055] Claimants' Request for Production of Documents (July 20, 2020), Request No. 72.

[1056] Letter from Orlando Pérez Gárate to Dawn Yamane Hewett and others (Jan. 8, 2021), p. 16, Exhibit **C-314**.

draw adverse inferences that responsive documents do exist, but do not support México's case and conclude that México's failure to produce documents is evidence that México colluded with the Bondholders to initiate meritless criminal proceedings against Oro Negro and its employees, including those leading to the issuance of the November 2019 arrest warrants, in order to harass and intimidate Claimants and their witnesses.

399. Most recently, the Bondholders and México colluded to issue a third set of arrest warrants against Messrs. Gil, Williamson, Villegas, and Ms. DeLong in August 2020 on the basis of the allegations contained in a complaint filed by GGB on behalf of Oro Negro Drilling on May 3, 2019.[1057] Just as the others before it, these arrest warrants are baseless. They accuse these four individuals of abuse of trust (*abuso de confianza*) in connection with the transfer of approximately USD 19 million from Oro Negro Drilling to Perforadora in October 2017.[1058] According to the May 3, 2019 complaint, the transfer of the money was illegal, as the Bondholders had allegedly taken control of Oro Negro Drilling prior to when the transfer was made, so the individuals were purportedly not authorized to execute the transfer. However, the Bondholders had taken control of Oro Negro Drilling in violation of an injunction by the *Concurso* Court, so the Bondholders did not have legal control over Oro Negro Drilling at the time the transfer was made. Moreover, the transfer was a loan made pursuant to a written agreement entered into prior to any purported takeover of Oro Negro Drilling by the Bondholders, and the money was used for working capital and maintenance of the Rigs. As with the other complaints and arrest warrants, they fail to allege how the particular individuals accused were involved in the transfers.[1059] Nonetheless, Prosecutor

[1057] The case number of this criminal investigation is CI-FCH/CUH-2/UI-4 S/D/03313/05-2019. Hearing in which the August 2020 arrest warrants were issued (Aug. 2020), Exhibit **C-484**.

[1058] Hearing in which the August 2020 arrest warrants were issued (Aug. 2020), Exhibit **C-484**; Second Izunza Expert Report, **CER-5**, ¶ 70.

[1059] Second Izunza Expert Report, **CER-5**, ¶¶ 71-75.

Pérez used the May 3, 2019 complaint as a basis to seek arrest warrants in August 2020 against these three individuals, which a local Mexican judge, Judge Augustine Moreno Gaspar, ordered. Today—on the day Claimants submit their Reply—Claimants' Counsel learned that México issued a fourth set of arrest warrants against Messrs. Gil, Williamson, and Villegas, and Ms. DeLong in December 2020 on the basis of allegations contained in a complaint filed by GGB on behalf of the Singapore Rig Owners on October 30, 2020. It accuses these four individuals of abuse of trust (*abuso de confianza*) in connection with the transfer of approximately USD 4.5 million from the Mexican Trust to Perforadora in order for Perforadora (through ON Costa Afuera, S. de R.L. de C.V., another subsidiary of Integradora) to pay an outside company—which the complaint alleges is a "sham" company listed as an EFOS by the Mexican government—for services provided between March 2014 and March 2015 by such company to Perforadora for maintenance of the Rigs. The accusations are demonstrably false because the services which the complaint alleges were not provided were in fact provided by a legitimate outside company which is not an EFOS, and there is even evidence that the services were provided at Pemex's request and that Pemex confirmed that these services paid for by Perforadora for maintenance of the Rigs were in fact rendered by the legitimate outside company in question, which, as explained, is not listed on the Mexican government's list of EFOS. Nevertheless, Prosecutor Pérez again used a baseless complaint as a basis to seek a new set of arrest warrants against Claimants, which Judge Augustine Moreno Gaspar—the same judge who ordered the August 2020 arrest warrants and granted the second extension of the Seizure Order—ordered.[1060]

[1060] As a result of Claimants' Counsel learning about this new set of arrest warrants on the date of the filing of their Reply, Claimants' Counsel has been unable to obtain the relevant documents concerning these new arrest warrants, but reserve their right to submit any relevant documents, evidence, and/or analysis at a later stage in these proceedings.

(iii) The Investigations and Criminal Complaints Have Caused Oro Negro's Shareholders and Managers Substantial Losses to their Business and Reputations, and Have Forced Them To Live in Fear of Being Extradited, Separated from their Families and Imprisoned in México

400. As explained above, since 2018 following the filing of this case, México has launched and aggressively pursued a significant number of meritless investigations against Integradora, Perforadora, their directors, employees and lawyers for criminal and tax charges. As explained in detail below, these criminal and tax complaints—some of which resulted in the issuance of several arrest warrants against Integradora and Perforadora's executives and employees—have caused Oro Negro's shareholders and managers substantial losses to their business and reputations, and have forced them to live in fear of being extradited, separated from their families and imprisoned in México. Importantly, despite Claimants' allegations and numerous requests for documents supporting these criminal and tax investigations, México has produced no evidence in this proceeding to support any of these charges.

401. Notably, in addition to the requests for production of documents detailed above, in the document production phase of these proceedings, Claimants requested "[t]he documents or communications related to or prepared in connection to the initiation of Mexican criminal proceedings against Oro Negro, its directors, executives and employees, including any internal or external government correspondence, memoranda, official resolutions, reports, or analyses regarding the same."[1061] México did not produce any responsive documents, claiming that it was unable to locate any and that it does not know to which investigations Claimants' request refers. Despite the Tribunal's direct orders and in violation of Procedural Order No. 8, in which the Tribunal ruled that Claimants' request was sufficiently specific, México still failed to produce any

[1061] Claimants' Request for Production of Documents (July 20, 2020), Request No. 23.

responsive documents to this request. Claimants thus reiterate their aforementioned requests for adverse inferences.

402. México's numerous criminal complaints, and resulting arrest warrants, have caused substantial losses to the accused Oro Negro shareholders and former employees, including losses to their reputations and their businesses. The arrest warrants were immediately made public and were reported through numerous Mexican media outlets,[1062] causing instant reputational and other serious harm to the individuals. As a result of the public knowledge of the arrest warrants, companies have refused to engage with the accused individuals' businesses, including Axis and Navix, causing the collapse of these businesses.[1063] The individuals have also been unable to find employment or obtain bank accounts as a result of the existence of the arrest warrants against them.[1064]

403. The arrest warrants have also caused severe mental anguish to Messrs. Gil, Cañedo, Villegas and Williamson, and Ms. DeLong.[1065] The five individuals live in constant fear of being captured, separated from their families, and imprisoned in México for crimes that they did not commit.[1066] All of the individuals had to relocate from México, leaving behind their homes, friends, job, and familiar surroundings.[1067] Prior to the cancellation of the Red Notices, as

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[1062] *See Liberan nueva orden de aprehensión contra directivos de Oro Negro*, EL HERALDO de México (Nov. 28, 2019), Exhibit **C-485**; Elba Mónica Bravo, *Gira juez nueva orden de detención contra Gil While*, LA JORNADA (Dec. 17, 2020), Exhibit **C-486**.

[1063] Second Gil Statement, **CWS-5**, ¶ 85.

[1064] *Id*. at

[1065] *Id*. at ¶¶ 4, 85.

[1066] *Id*.

[1067] *Id*.

discussed in Section II.I.1(iv) below, Messrs. Gil, Cañedo, Villegas, and Williamson have also been unable to travel.[1068]

404. These actions by the Respondent also have made it materially more difficult for Claimants to convince witnesses to participate in this case given their knowledge that México has retaliated against certain of the individual associated with this case and others that were very closely involved with Oro Negro's operations. Various witnesses have in fact declined to come forward and attest to their knowledge, which would have further strengthened Claimants' case, due to this fear of retaliation by México. Claimants cannot name those witnesses here, nor provide a proffer of what they would have testified to in their declarations due to their very strong interest in ensuring that their identities not be disclosed to México.

(iv) Cancellation of INTERPOL Arrest Warrants

405. On December 6, 2019, Messrs. Gil, Cañedo, Villegas, and Williamson filed a petition with INTERPOL requesting cancellation of the Red Notices against them.[1069] In the petition, they described the actions by the Bondholders and México, including the forcing of Oro Negro into bankruptcy, attempts to forcefully take over the Rigs, and the filing of numerous baseless criminal complaints against Oro Negro and its former employees and shareholders, including the one that led to the Mexican arrest warrants and Red Notices.[1070] They explained how the complaints were baseless, and filed in an effort to extort and intimidate Messrs. Gil, Cañedo, Villegas, and Williamson, and in retaliation for the filing of this arbitration.[1071] Messrs. Gil, Cañedo, Villegas, and Williamson argued that the Red Notices violated INTERPOL's Constitution and Data Rules

[1068] *Id*.

[1069] INTERPOL Petition (Dec. 6, 2019), Exhibit **C-487**; Second Gil Statement, **CWS-5**, ¶ 86.

[1070] *See generally* INTERPOL Petition (Dec. 6, 2019), Exhibit **C-487**; Second Gil Statement, **CWS-5**, ¶ 86.

[1071] *See generally* INTERPOL Petition (Dec. 6, 2019), Exhibit **C-487**; Second Gil Statement, **CWS-5**, ¶ 86.

because, among other things, they were premised on false and legally unsubstantiated allegations, were obtained in violation of Mexican laws, violate the human rights of Messrs. Gil, Cañedo, Villegas, and Williamson, and were the result of political persecution against them.[1072]

406. In the fall of 2020, in response to the petition, INTERPOL cancelled the Red Notices against Messrs. Gil, Cañedo, Villegas, and Williamson.[1073] The decision was an extraordinary and unprecedented measure by INTERPOL, and attests the credibility of Messrs. Gil, Cañedo, Villegas, and Williamson, as well as the frivolousness of the criminal complaints and the actions that Respondent took against them.

2. New York Court Proceedings

407. In June and September 2019, the Foreign Representative of Oro Negro, together with certain of Oro Negro's former employees and shareholders, filed lawsuits against the Ad-Hoc Group, owners of Seamex, and related parties, in the Chapter 15 Proceeding. In Section II.U of the Statement of Defense, México describes these legal proceedings. Any suggestion by México that the existence of these lawsuits precludes this arbitration should be disregarded for the reasons set forth below.

(i) México Is not a Party to the New York Lawsuits

408. First, as México admits, it is not a party to any of these legal proceedings. As discussed in the Statement of Claim[1074] and in the Statement of Defense,[1075] the New York Lawsuits, which were filed as part of the Chapter 15 Proceeding, were against the Ad-Hoc Group and its agents as

[1072] *See generally* INTERPOL Petition (Dec. 6, 2019), Exhibit **C-487**; Second Gil Statement, **CWS-5**, ¶ 86.

[1073] INTERPOL Decision (Oct. 7, 2020), Exhibit **C-488**; Second Gil Statement, **CWS-5**, ¶ 87.

[1074] SOC, ¶¶ 147-51.

[1075] SOD, ¶ 395.

well as the owners of Seamex. Neither México, Pemex, any divisions of México or other Mexican-owned companies, nor any Mexican officials are parties to the New York Lawsuits.[1076]

409. Indeed, while the Foreign Representative of Oro Negro did seek discovery from Pemex in the Chapter 15 Proceeding, that does not make México a party in the Chapter 15 Proceeding, and in any event, the Chapter 15 Court denied that discovery request after Pemex invoked a sovereign immunity defense to the claim.[1077] Moreover, the Foreign Representative's inability to obtain discovery from Pemex in the Chapter 15 Proceeding does not, and should not, shield México from liability under the NAFTA. NAFTA Chapter 11 specifically permits U.S. investors to bring claims for México's illegal expropriation, and unfair and inequitable treatment, of their investments in México. Any suggestion by México that this Tribunal should be bound by the same rules with respect to jurisdiction as the Chapter 15 Court lacks any merit. The existence of the New York Lawsuits should not permit México to escape the consequences of its wrongdoing.

(ii) The Damages that the Claimants Seek Against México Differ from the Damages in the New York Lawsuits

410. The damages that Claimants seek in this arbitration are not identical to the damages sought in the New York Lawsuits, and they are against a different party (*i.e.*, the Respondent) for different wrongs caused by it. In the Releases Action, the plaintiffs, which differ in composition from the

[1076] México is also not a party to the lawsuit that the Singapore Rig Owners (under the unlawful control of the Ad-Hoc Group) filed in New York against Perforadora. *See* Complaint, *Oro Negro Decus Pte. Ltd. et al. v. Perforadora Oro Negro, S. de R.L. de C.V.*, No. 1:18-cv-02301, S.D.N.Y. , ECF No. 1 (Mar. 15, 2018), Exhibit **C-489**. And, in any event, the Singapore Rig Owners—likely in an effort to evade jurisdiction in the Chapter 15 Proceeding—voluntarily dismissed that lawsuit on October 12, 2018 before Perforadora even made an appearance in it. Notice of Voluntary Dismissal Without Prejudice, *Oro Negro Decus Pte. Ltd. et al. v. Perforadora Oro Negro, S. de R.L. de C.V.*, No. 1:18-cv-02301, S.D.N.Y., ECF No. 13 (Oct. 12, 2018), Exhibit **C-490**.

[1077] Order Granting in Part and Denying In Part Foreign Representative's Request for Discretionary Relief, *In re Perforadora Oro Negro S. de R.L. de C.V.*, No. 18-11094, Bankr. S.D.N.Y., ECF No. 85, at 6 (July 11, 2018), Exhibit **C-491**; Transcript of Hearing, *In re Perforadora Oro Negro S. de R.L. de C.V.*, No. 18-11094, Bankr. S.D.N.Y., ECF No. 87, at 209:8-13 (June 27, 2018), Exhibit **C-492** (denying discovery of Pemex on the basis that it is better directed to a Mexican court).

Claimants, seek damages from the Ad-Hoc Group stemming from the Ad-Hoc Group's filing of criminal proceedings against Oro Negro and the individual plaintiffs, which led to México's issuance of an extension of the Seizure Order, as well as arrest warrants against the individuals. The damages sought are those that resulted from the blocking of Oro Negro's access to its cash, as well as damages suffered by the individuals through the destruction of their livelihoods and reputations via the issuance of the arrest warrants.[1078] These are violations of New York law, and thus, these are damages that are recoverable under New York law. Thus, the responding party is different, the claiming parties are mostly different, the applicable law is different, and therefore the claims are different. There is no overlap between these damages and the damages sought by the Claimants in this arbitration.

411. In the Tortious Interference Actions, the Foreign Representative—Mr. Gil, at the time of the filing of the Tortious Interference Actions—seeks damages that the Ad-Hoc Group caused by its abuse of process and tortious interference with the Oro Negro Contracts, which consist of damages to Mr. Gil's reputation and livelihood that resulted from the Ad-Hoc Group's initiation of baseless criminal proceedings in México against Mr. Gil.[1079] Mr. Gil is not a Claimant in this arbitration, and the damages he suffered to his reputation and livelihood based on actions taken by the Ad-Hoc Group are wholly different from the damages sought here.

412. In the Tortious Interference Actions, the Foreign Representative also seeks damages on behalf of Oro Negro that stem from the Ad-Hoc Group's tortious interference with the Oro Negro

[1078] *See* Complaint, *Perez-Correa v. Asia Research and Capital Management Ltd.*, No. 19-01360, Bankr. S.D.N.Y., ECF No. 1, at 41-43 (Sept. 26, 2019), Exhibit **C-467**. As México acknowledged in the Statement of Defense, the fourth New York Lawsuit was dismissed on June 6, 2019. *See* Notice of Voluntary Dismissal, *Del Val-Echeverria v. AMA Capital Partners, LLC*, No. 18-01693, Bankr. S.D.N.Y.), ECF No. 31 (June 6, 2019), Exhibit **C468**.

[1079] *See* Complaint, *Gil-White v. Ercil*, No. 19-01294, Bankr. S.D.N.Y., ECF No. 1, at 100-101 (June 6, 2019), , Exhibit **C-465**; Complaint, *Gil-White v. Contrarian Capital Management, LLC*, No. 19-01301, Bankr. S.D.N.Y. ECF No. 1, at 84-85 (June 24, 2019), Exhibit **C-466**.

Contracts. This too does not preclude this arbitration from proceeding. *First*, NAFTA Article 1116 permits a claim by an investor of a party on its own behalf, for damages or loss that the investor incurred.[1080] This is a separate claim than one made for loss or damages by an investor on behalf of an enterprise, which is permitted under NAFTA Article 1117,[1081] and the existence of claims under Article 1117 does not bar bringing a claim under Article 1116.[1082] Moreover, international investment tribunals have permitted investment claims brought by shareholders for losses they suffered to proceed in international arbitration, even where the company itself brought a claim on its own behalf in a country's court, because while an arbitration claim is only asserted on behalf of the particular shareholders bringing it, a claim by the company is made on behalf of all shareholders, employees, creditors, and others damaged in connection with the dispute.[1083]

413. *Second*, the rule against double recovery prevents a Claimant from recovering more than the damages actually suffered, but it does not prevent said Claimant from seeking to recover damages in full from multiple parties, and international tribunals have left it up to the Claimants to disclose their awards as appropriate and not recover more than to which they are entitled.[1084]

[1080] NAFTA Article 1116(1).

[1081] *Id.* Article 1117(1).

[1082] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Respect of Damages (May 31, 2002), ¶ 80, **CL-72** ("the existence of Article 1117 does not bar bringing a claim under Article 1116").

[1083] *See Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (June 25, 2001), ¶ 332, **CL-76** ("The effort by EIB to have the Bank of Estonia's decision overturned, and its license restored, was in effect undertaken on behalf of all the Bank's shareholders (including minority shareholders), as well as on behalf of its depositors, borrowers and employees, all of whom were damaged by the cessation of EIB's activities. … The 'investment dispute' submitted to ICSID arbitration, on the other hand, relates to the losses allegedly suffered by the Claimants alone, arising from what they claim were breaches of the BIT."). New York law dictates the same. *See Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 136, 145 (S.D.N.Y. 2000), **CL-285** ("In determining whether the two damages awards are coextensive, however, the key inquiry is whether the awards address the same injury.")

[1084] *See Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision of Liability (Dec. 29, 2014), ¶¶ 305-06, **CL-286** ("Other shareholders and creditors of PdL may have claims on sums paid by way of reparation. The question is, whether this is a matter for the Tribunal in this case, or whether any such claims are a matter between Claimant and persons not party to these proceedings. The Tribunal has decided that it is beyond both its responsibilities and its powers to make dispositive orders in this respect. Neither PdL nor any other persons are parties

Thus, any potential overlap in damages, if any, has no impact on the determination of México's liability, and the determination as to any potential duplicity of damages is done after the issuance of the award.[1085] Moreover, because the New York Lawsuits have not resulted in any recovery by the plaintiffs to those lawsuits at this time, there can be no windfall to the Claimants.

414. Indeed, as México states in the Statement of Defense, the New York Lawsuits are currently stayed, have been subject to a stay since November 12, 2019, and are unable to proceed forward.[1086] If the New York Lawsuits have any impact on this arbitration, it is only that Oro Negro and certain of its former employees and shareholders have been precluded for more than a year now from being able to pursue their claims against the Ad-Hoc Group and its agents, and the owners of Seamex, through the Chapter 15 Proceeding. This arbitration currently remains the only avenue through which the Claimants can seek justice from México for it actions in violation of the NAFTA.

415. Furthermore, México's assertion that this arbitration was filed as a "tactic" to obtain an "advantage" against the Bondholders is pure conjecture and without any merit.[1087] As Claimants

to this arbitration or subject to its jurisdiction. The Tribunal accordingly proceeds on the basis of the approach adopted by other tribunals, and makes an award for reparation of which Claimant will be entitled to a share corresponding to the proportion of its shareholding. But it does so with the provison that Claimant must disclose this award to the board of PdL…"); *see also* Wright & Miller § 4476 Election of Remedies, 18B Fed. Prac. & Proc. Juris. § 4476 (2d ed.), **CL-287** ("The doctrine of double recovery seeks to prevent a windfall by recovering more than the damages actually suffered.").

[1085] *See ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award (Mar. 8, 2019), ¶¶ 961, 965, **CL-288** ("The Claimants have declared on several occasions and in relation to the ICC Arbitration that they intend to comply with the principle that there should not be any double recovery. … the Claimants have added that if they obtain payment from the relevant governmental actor through the other remedies expressly contemplated in the compensation provisions, they must provide an offset to the PDVSA subsidiaries through an appropriate credit or reimbursement… The Tribunal therefore endorses the Claimants' undertaking and will declare that the Claimants are under a duty of good faith not to seek double recovery when seeking enforcement, in full or in part, of the Award rendered by this ICSID Tribunal.").

[1086] *See* Fifth Stipulation and Order, *In re Perforadora Oro Negro S. de R.L. de C.V.*, No. 18-11094, Bankr. S.D.N.Y., ECF No. 295 (Mar. 1, 2021), Exhibit **C-493**. At a hearing in the Chapter 15 Proceeding on March 18, 2021, the Chapter 15 Court further extended the stay through May 25, 2021.

[1087] *See* SOD, ¶ 398.

extensively argued in their Notice of Arbitration and Statement of Claim, México caused grave harm and substantial deprivation to Claimants' investment. These actions are independent violations of the NAFTA, and Claimants' decision to bring the NAFTA case is independent of actions in New York to also hold the Ad-Hoc Group accountable for its violations of New York and Mexican law.

416. México's citation to the Motion by Frederick J. Warren for Authorization to Use Evidence Produced in the Chapter 15 Proceeding is inapposite. The publicly filed information in the Paragraphs cited by México merely states, in the context of Mr. Warren seeking discovery produced in the Chapter 15 Proceeding that would support Claimants' claims in this arbitration, that the Claimants' interests are aligned with those of Oro Negro.[1088] All this means is that the Ad-Hoc Group and other defendants in the New York Lawsuits produced discovery to Oro Negro that would also help prove Claimants' case against México in this arbitration. However, while containing overlapping facts, this arbitration is completely separate from the lawsuits filed on behalf of Oro Negro and certain former employees and shareholders against the Ad-Hoc Group, and alleges distinct misconduct by México—namely violations of NAFTA due to México's illegal expropriation of Claimants' investment and the disparate and unfair treatment of Oro Negro by Pemex and other Mexican officials by virtue of its refusal to pay bribes.

3. The Decisions in the Singapore Court Proceeding Should Bear No Weight Here

417. The decisions issued by the Singapore courts in the legal proceeding pending in Singapore should bear no weight on the claims sought and issues presented in this arbitration. *First*, the lawsuit in Singapore (the "Singapore Proceeding") is between Oro Negro Drilling and the

[1088] *See* Frederick J. Warren's Motion for Authorization to Use Evidence Produced in the Chapter 15 Proceeding, *In re Perforadora Oro Negro, S. de R.L. de C.V.*, No. 18-11094, Bankr. S.D.N.Y., ECF No. 202, at 5 (June 3, 2019), Exhibit **C-494**.

Singapore Rig Owners, as plaintiffs, and Integradora, Mr. Del Val, and Mr. Gil, as defendants. As with the Chapter 15 Proceeding and the New York Lawsuits, México is not a party to the Singapore Proceeding. Accordingly, the parties here are different, the claims are different, the law is different, and the jurisdiction of the Tribunal is different from the jurisdiction of the Singapore High Court.

418. *Second*, as to the content of the Singapore Proceeding, this Tribunal should not grant any weight to the decisions in Singapore because they were recently superseded by decisions issued by the courts in México. Specifically, as México describes in the Statement of Defense, on January 30, 2018, the High Court of the Republic of Singapore granted injunctions requested by Oro Negro Drilling and the Singapore Rig Owners, controlled by the Ad-Hoc Group, ordering Integradora and Messrs. Del Val and Gil to refrain from taking any actions in México on behalf of Oro Negro Drilling and the Singapore Rig Owners, including filing for *Concurso* on behalf of these entities.[1089]

419. On November 27, 2019, the Court of Appeal of the Republic of Singapore confirmed the injunction.[1090] The Court of Appeal reasoned that Integradora, and Messrs. Del Val and Gil did not have the authority to file for *Concurso* on behalf of Oro Negro Drilling and the Singapore Rig Owners because they did not obtain the signature of an independent director.[1091] Notably, on the issue of jurisdiction, the Court of Appeal noted that "the *concurso* court in México had . . . decided on 11 October 2018 that it did not have the authority to rule on the applicability of Art 87 to the

[1089] *See* SOD, ¶¶ 403-04.

[1090] *See id.*, ¶ 404; Grounds of Decision, *Oro Negro Drilling Pte Ltd. v. Integradora de Servicios Petroleros Oro Negro SAPI de CV*, Civil Appeal No. 194 of 2018, In the Court of Appeal of the Republic of Singapore (Nov. 27, 2019), Exhibit **C-495**.

[1091] Grounds of Decision, *Oro Negro Drilling Pte Ltd. v. Integradora de Servicios Petroleros Oro Negro SAPI de CV*, Civil Appeal No. 194 of 2018, In the Court of Appeal of the Republic of Singapore (Nov. 27, 2019), at 35-37, Exhibit **C-495**.

Bond Agreement as the latter was subject to Norwegian law and the Norwegian courts' exclusive jurisdiction."[1092]

420. However, as discussed in Section II.G.4(i) above, Oro Negro had appealed the *Concurso* Court's decision that it did not have jurisdiction to rule on the applicability of Article 87 of the LCM because the Bond Agreement is subject to Norwegian law. And, in October 2020, the *Octavo Tribunal Colegiado* held that the *Concurso* Court does in fact have jurisdiction to rule on the applicability of Article 87 of the LCM to the Bond Agreement.[1093]

421. Moreover, in February 2021, the *Concurso* Court followed the decision of the *Octavo Tribunal Colegiado* and held that the effect of the Bondholders' declaration of an event of default under the Bond Agreement is void pursuant to Article 87 of the LCM, because Article 87 invalidates a contract provision that is detrimental to a debtor, which would include a provision stating that an insolvency filing constitutes an event of default, such as that in Section 15.1(g)(i) of the Bond Agreement.[1094] As such, the *Concurso* Court held that the actions taken by the Ad-Hoc Group as a result of the declaration of the event of default are also void, including the change of directors of the Singapore Rig Owners and Oro Negro Drilling, and any actions carried out as a consequence thereof.

422. Accordingly, the Singapore injunction now conflicts with the decisions issued by the *Octavo Tribunal Colegiado* and the *Concurso* Court. Therefore, México's statements in the Statement of Defense, such as that the decisions in the Singapore Proceeding demonstrate that Oro Negro does not have the legitimacy to act on behalf of Oro Negro Drilling and the Singapore Rig

[1092] *Id.* at 50, Exhibit **C-495**.

[1093] *Octavo Tribunal Colegiado* Order (Oct. 1, 2020), Exhibit **C-387**.

[1094] *Concurso* Order (Feb. 22, 2021), Exhibit **C-386**.

Owners, and that Integradora and Mr. Gil improperly attempted to maintain control of Oro Negro Drilling and the Singapore Rig Owners,[1095] should be discounted.

J. The Black Cube Evidence Was Obtained Legally and Should Be Admitted Under a More Probable Than Not Standard

1. The Appropriate Standard for Corruption Allegations Is the Same for All Factual Allegations: More Probable Than Not

423. Respondent contends that the standard for proving corruption allegations is especially high and that Claimants have not met it here. Respondent is incorrect as a matter of law. The appropriate evidentiary standard to apply to corruption allegations is the standard of "more probable than not."[1096] The application of this standard reflects two key considerations: *first*, this is not a criminal proceeding and the purpose of proving corruption in this proceeding is not to establish criminal liability. Rather, the Tribunal is charged with determining whether, as Claimants allege and the evidence amply demonstrates, México's frustration with Oro Negro's refusal to pay bribes to Pemex led to Oro Negro's disparate and unfair treatment.[1097] Tribunals are accustomed to applying this standard when determining the impact of corruption on the events under consideration. For example, in *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, the tribunal applied the balance of probabilities standard to evaluate the existence of claimants' investment, and notably whether its mining licenses were authentic. The tribunal rejected claimants' arguments that, due to the seriousness of respondent's allegations of forgery of

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[1095] SOD, ¶ 406.

[1096] *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia* ("*Churchill Mining*"), ICSID Case No. ARB/12/40 and 12/14, Award (Dec. 6, 2016), ¶ 244, **CL-272**; *Libananco Holdings Co. Limited v. Republic of Turkey* ("*Libananco*"), ICSID Case No. ARB/06/8, Award (Sept. 2, 2011), ¶ 125, **CL-273**; *Rutas de Lima v. Metropolitan Municipality of Lima* ("*Rutas de Lima*"), Award (May 11, 2020), ¶ 402, **CL-274**; *Unión Fenosa Gas v. Egypt*, "*Union Fenosa Gas*"), ICSID Case No. No. ARB/14/4, Award (Aug. 31, 2018), ¶ 7.52, **RL-0099** (holding that the standard of proof is "balance of probabilities").

[1097] *Churchill Mining*, Award ¶¶ 243-44 (applying a standard of balance of probabilities or its civil law counterpart of *intime conviction* to a determination of forgery or fraud), **CL-272**.

claimants' mining licenses and fraud, the tribunal should apply the "clear and convincing" evidence standard.[1098] Finding that "a fraudulent scheme permeated the Claimants' investments," the tribunal explained that higher standard of proof should not apply because the tribunal was not aiming to establish criminal liability.[1099]

424. *Second*, the "more probable than not" standard accounts for the inherent complexities of proving corruption which is clandestine by nature. For this reason, tribunals consider circumstantial evidence "as good as direct evidence" in proving corruption because "corruption is rarely proven by direct cogent evidence; but, rather, it depends upon an accumulation of circumstantial evidence."[1100] This is a particularly relevant consideration because, as corruption detection efforts increased, perpetrators have increasingly developed mechanisms to avoid detection when arranging and passing bribes.[1101] The same standard is appropriate here.

425. Summarizing these considerations, the recent international tribunal in *Rutas de Lima v. Municipalidad Metropolitana de Lima* explained that "*en materia de corrupción internacional, el Tribunal no puede y no debe aplicar un estándar de prueba elevado, por cuanto los actos corruptos son necesariamente objeto de simulación, por lo que puede resultar imposible probar con certeza la existencia de dichas actuaciones*."[1102] Thus, "*el Tribunal estima oportuno aplicar un estándar basado en la preponderancia de la prueba, y ver si, con base en todas las circunstancias alegadas y los indicios existentes, resulta más probable que su contrario*" that the

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[1098] *Churchill Mining*, Award ¶ ¶ 238, 244, **CL-272** .

[1099] *Id.* at ¶¶ 234, 507, **CL-272** .

[1100] *See Unión Fenosa Gas*, Award, ¶ 7.52, **RL-0099**.

[1101] *See, e.g.* TRACE Global Enforcement Report (2017-2018), https://info.traceinternational.org/trace-2018-ger-report (describing a notable increase in the number of open investigations into foreign and domestic bribery worldwide), Exhibit **C-496**.

[1102] *Rutas de Lima*, Award, ¶ 402, **CL-274**.

contracts and official acts in question were procured through corruption.[1103] In concluding that a preponderance of the evidence standard was appropriate, the tribunal noted that corruption is "*contraria al orden público internacional, y en menoscabo del interés público del Estado y de los ciudadanos*" of the State, and explained that it was not a criminal court but rather a tribunal formed by contract.[1104]

426. Respondent finds little support in the cases that it cites. Respondent incorrectly characterizes *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic* as promoting its preferred standard of proof, and quotes at length from a portion of that award concluding that the claimant had failed to present sufficient facts to substantiate its corruption allegation.[1105] In reality, the *ECE* tribunal declined to apply a high standard for proving corruption in international arbitration, determining instead that "it must examine with care the facts alleged to prove corruption."[1106] The tribunal thus opined:

> Corruption is a serious matter and when it is alleged, a tribunal must weigh the evidence with care, both to see whether the allegation is made out (and if it is, to then determine the legal consequences that follow) and at the same time to safeguard those against whom corruption is alleged, if the allegations turn out to be unproven.[1107]

427. Respondent's remaining citations are likewise inapposite.[1108] The tribunal in *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic* did not prescribe a standard of proof

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[1103] *Id.* at ¶ 400, **CL-274**.

[1104] *Id.* at ¶ 400, **CL-274**.

[1105] SOD, ¶¶ 740-42; 741 n.881.

[1106] *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic ("ECE")*, Final Award (Sept. 19, 2013), ¶ 4.873, **RL-0098**.

[1107] *ECE*, Final Award, ¶ 4.872, **RL-0098**.

[1108] *See* SOD, ¶ 747n.893.

applicable to the corruption allegation. Rather, the tribunal noted that it "would not have hesitated to attach the appropriate legal consequences to any proven instance of bribery or corruption," and rejected the allegation after it found "no such proof."[1109] On the other hand, in *Getma International and Others v. Republic of Guinea*, the tribunal concluded "that there are no valid precedents for contending . . . that the level of proof required must be higher for corruption than for other deeds."[1110] Notably, the *Getma International* tribunal considered relevant the holding of *Libonanco* that "a very serious deed does not suffice in itself to require a higher level of proof."[1111] The *Getma International* tribunal also considered relevant the holding of *Tokios Tokeles v. Ukraine* that the standard of proving a serious allegation—there, a concerted course of retaliatory state conduct against an individual—required only that a party prove its allegation to be "more probably correct than incorrect."[1112] That reasoning is reminiscent of the tribunal's statement in *EMV v. Czech Republic*, also cited by México,[1113] that "[w]hatever standard of proof is required to establish an assertion of contemplated blackmail, it must at least be for the party who asserts such conduct to show *that it is more likely than not to be true*."[1114]

428. Not only does México wrongly argue for a heightened (and incorrect) evidentiary standard, it then arbitrarily points to Claimants' conduct—*i.e.*, not presenting the evidence to Mexican

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[1109] *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB (AF)/06/ 1, Award (Sept. 9, 2009), ¶ 41, **CL-125**.

[1110] *Getma International and others v. Republic of Guinea (II)* ("*Getma*"), ICSID Case No. ARB/11/29, Award (Aug. 16, 2016), ¶ 184, **RL-0097**.

[1111] *Getma*, Award, ¶ 183 (citing *Libananco*, Award, **CL-273**), **RL-0097**.

[1112] *Id.* at ¶ 183 (quoting *Tokios Tokelès v. Ukraine,* ICSID Case No. ARB/02/18, Award (July 26, 2007), ¶ 124), **RL-0097**.

[1113] SOD, ¶ 742 n.883.

[1114] *EMV v. Czech Republic*, Partial Award on Liability, ¶ 35, **RL-0100**.

authorities—to suggest that the Black Cube recordings were not "clear" evidence of a crime.[1115] The validity of evidence of corruption does not depend on whether the victims chose to present evidence of the corruption to the authorities they claim to be perpetrating the corruption—such a requirement would be self-defeating, particularly when the corruption in the organization is well-known to be pervasive.[1116] Claimants' conduct is instead consistent with the claims they have made all along – that despite their efforts to run only clean business operations, they were solicited for bribes on various occasions and, upon refusal, discriminated against.[1117]

429. Claimants note, however, that the Tribunal need not necessarily select among dueling standards of proof in assessing Claimants' corruption allegations. Numerous investment tribunals have declined to select among various standards of proof offered by the parties where the corruption allegation was proven under any applicable standard, as Claimants have done here.[1118]

[1115] SOD, ¶ 453.

[1116] *See* Gabriel Toledo Guerrero, *Corrupción en el Sector Energético Mexicano: Propuestas y Recomendaciones.* https://www.wilsoncenter.org/sites/default/files/media/documents/publication/corrupcion_en_el_sector_energetico_mexicano_propuestas_y_recomendaciones.pdf, Exhibit **C-497**; *Tribunal español autoriza la extradición de Emilio Lozoya a México*, https://www.eleconomista.com mx/internacionales/Tribunal-espanol-autoriza-la-extradicion-de-Emilio-Lozoya-a-México--20200706-0027.html, Exhibit **C-253**.

[1117] First Cañedo Statement, **CWS-2**, ¶ 17; Second Cañedo Statement, **CWS-6**, ¶¶ 74-80 ; SOC, ¶¶ 179-182; First Black Cube Statement, **CWS-4**, ¶¶ 37, 39; **Appendix H**, Excerpt 20.

[1118] *See, e.g.*, *ECE*, Final Award, ¶ 4.873 ("Irrespective of the standard of proof adopted by the Tribunal, it must examine with care the facts alleged to prove corruption."), **RL-0098**; Metal-*Tech v. Uzbekistan*, Award, ¶243 ("[T]he present factual matrix does not require the Tribunal to resort to presumptions or rules of burden of proof where the evidence of the payments came from the Claimant and the Tribunal itself sought further evidence of the nature and purpose of such payments. Instead, the Tribunal will determine on the basis of the evidence before it whether corruption has been established with reasonable certainty. In this context, it notes that corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence."), **CL-275**; *World Duty Free Company Limited v. Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006), ¶ 166 ("The relevant facts are indisputable on the evidence adduced before this Tribunal: this is not a case which turns on legal presumptions, statutory deeming provisions or different standards of proof under English or Kenyan law. "), **CL-199**; *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction (Mar. 8, 2017) , ¶ 545 ("[A]s will become clear in the following sections, regardless of whether the standard of proof is "reasonable certainty" or "clear and convincing evidence", the Tribunal holds that the allegations of bribery and corruption have not been established by the evidence presented in this proceeding."), **CL-276**.

430. There is no reason to apply a heightened evidentiary standard for corruption allegations as compared to other allegations, and Tribunals have consistently avoided doing so. As México rightly recognizes,[1119] corruption allegations are serious, but the standards of proof applicable in criminal proceedings do not apply here.[1120] Moreover, corruption is notoriously difficult to prove as such arrangements are, for obvious reasons, made and executed in secret.[1121] As will be explained in more detail below, Claimants have more than met their burden to prove corruption in this case.

2. Claimants Have Established the Link Between the Corruption They Proved and Pemex's Amendments and Termination of Oro Negro's Contracts

431. Tribunals also require a showing of a causal link between the corruption and the event under analysis.[1122] Here, Claimants have established that there was corruption according to the requisite evidentiary standard and shown the causal link between the corruption within and corrupt acts by Pemex and the unfair treatment that Claimants received with primary accounts from witnesses and direct evidence from Black Cube, which includes recordings from current and former Pemex officials.[1123] Claimants' witness statements also support that bribe requests were made by *operadores* as well as Claimants' unwillingness to engage in Pemex's pay-for-play

[1119] SOD, ¶ 481.

[1120] *Unión Fenosa Gas*, Award, ¶ 7.52, **RL-0099**; *Libananco Holdings*, Award, ¶125 ("the Tribunal accepts that fraud is a serious allegation, but does not consider that this (without more) requires it to apply a heightened standard of proof"), **CL-273**. *See also Getma*, Award, ¶ 184. ("*Ce Tribunal arbitral conclut qu'il n'y a pas de précédent valable pour soutenir, comme le font les Demanderesses, que le degré de preuve requis doit être plus élevé pour la corruption que pour d'autres faits*.") ["This Arbitral Tribunal concludes that there are no valid precedents for contending, as the Claimants do, that the level of proof required must be higher for corruption than for other deeds."], **RL-0097**.

[1121] *Unión Fenosa Gas*, Award, ¶ 7.52, **RL-0099**; *Libananco Holdings*, Award, p. 125, **CL-273**.

[1122] *Rutas de Lima*, Award, ¶ 296, **CL-274**.

[1123] *See e.g.*, First Black Cube Statement, **CWS-4**, ¶¶ 37, 39. Mr. Pacheco explained that Oro Negro's "main problem" was that it had failed to pay bribes. Mr. Pacheco understood that at least one key decision-maker with regard to the termination, Mr. Servín, pushed for the termination of the Oro Negro Contracts because he is one of those who normally gets a "cut" or "a benefit" from the contract process, and Oro Negro's refusal to pay bribes meant that Mr. Servín had not gotten the payments he normally expected.

scheme.[1124] The recordings show the pervasive system of corruption within Pemex, highlighting that competitors did engage in corruption in order to receive more favorable treatment from Pemex.[1125] The recordings and testimony from Messrs. Gil and Cañedo also explain the basis for the unfair treatment that Claimants received: they were unwilling to engage in the established system of bribery and corruption.[1126] The patterns that Claimants have effectively proven in this case are consistent with the mechanisms used by Pemex in other situations where bribery has been alleged, such as the case of Odebrecht and the bribes detailed by Mr. Lozoya in his declaration provided to Mexican authorities after he was extradited to México on corruption charges.[1127]

3. Black Cube Evidence

(i) Black Cube Complied with Relevant Mexican Law as well as the Law of Other Jurisdictions Where It Operates

432. As explained in Claimants' Statement of Claim in detail, Black Cube is an elite intelligence-gathering enterprise at the forefront of its field.[1128] Founded in 2012 by Avi Yanus ("Mr. Yanus"), Black Cube is comprised largely of former Israeli military intelligence professionals.[1129] Black Cube develops intelligence for use in litigation proceedings around the world.[1130] Black Cube's focus is on developing human intelligence, or information gathering from knowledgeable individuals.[1131]

[1124] Second Cañedo Statement, **CWS-6**, ¶¶ 74-80 .

[1125] First Black Cube Statement, **CWS-4**, ¶¶ 35-37; **Appendix H**, Excerpts 1-10.

[1126] First Black Cube Statement, **CWS-4**, ¶¶ 37.2, 39; **Appendix H**, Excerpts 20.

[1127] *See supra* Section II.A; *Lozoya Denuncia*, p. 4, *Denuncia de Emilio Ricardo Lozoya Austin* (Aug. 11, 2020), p. 4, Exhibit **C-254**.

[1128] First Black Cube Statement, **CWS-4**, ¶¶ 5–6; SOC, ¶¶ 193-199.

[1129] First Black Cube Statement, **CWS-4**, ¶¶ 4–6.

[1130] First Black Cube Statement, **CWS-4**, ¶ 7.

[1131] First Black Cube Statement, **CWS-4**, ¶¶ 7–10; Black Cube's methods are explained in detail in Claimants' SOC, ¶¶ 194-199.

433. As Mr. Yanus stated in his First Witness Statement (**CWS-4**) and reiterated in his Second Witness Statement (**CWS-7**), Black Cube conducts research on potential individuals, instructs its agents regarding the Engagement, and then the agents seek to meet with the individuals in person in public places.[1132] Black Cube makes recordings only in jurisdictions where it is lawful to record a conversation with consent from only one of the parties to the conversation ("one-party consent states").[1133] In this matter, Black Cube met with individuals in the United Kingdom, the United States (New York), and México.[1134] For the avoidance of doubt, each of these jurisdictions is a one-party consent jurisdiction.[1135] Black Cube recorded all of the conversations with the individuals in this case after being satisfied that it was legal to do so in each of the jurisdictions where meetings took place.[1136]

434. Furthermore, Black Cube obtains legal opinions from top law firms regarding the legality of its methods in the jurisdictions where it operates.[1137] Black Cube has obtained legal opinions confirming the legality of its operations in the United Kingdom, the New York, and México.[1138] The legal opinions confirm not only the legality of recording the individuals, but also the legality of Black Cube's methodologies and investigative techniques, including using various online sources to conduct research on individuals, profiling individuals to meet with, constructing cover

[1132] First Black Cube Statement, **CWS-4**, ¶¶ 7–10; Black Cube's methods are explained in detail in Claimants' SOC, ¶¶ 194-199.

[1133] Second Black Cube Statement, **CWS-7**, ¶ 18.

[1134] Second Black Cube Statement, **CWS-7**, ¶ 19.

[1135] Second Black Cube Statement, **CWS-7**, ¶ 19.

[1136] Second Black Cube Statement, **CWS-7**, ¶ 15.

[1137] Second Black Cube Statement, **CWS-7**, ¶ 15.

[1138] Second Black Cube Statement, **CWS-7**, ¶ 15.

stories, and arranging in person meetings.[1139] Based upon the legal opinions it has received, Black Cube has affirmed the legality of its methods.[1140]

435. In his Second Report, Mr. Izunza also independently confirms that Black Cube's engagement and methods were legal under Mexican law and as such, he confirms that the Black Cube evidence was obtained legally. Rebutting Mr. Paz's report, Mr. Izunza states that the attempt to undermine the Black Cube evidence based upon Black Cube's access to individuals' financial information is not sound.[1141] Specifically, Black Cube's methods do not include access to individuals' bank accounts, but instead, they may use land records, real property records, and personal property records, which are public sources of information, to support their work.[1142] He concludes that the use of this information is appropriate and not illegal under Mexican law, as Mr. Paz states.[1143] Additionally, Mr. Izunza emphasizes that Mr. Paz's conclusions with respect to violations of privacy under Mexican law are inconsistent.[1144] For example, Mr. Paz states that the identities of the Black Cube agents must be revealed, but that the right to privacy of the individuals whom Black Cube recorded has been violated.[1145] Mr. Izunza also points out that taken alone, recording individuals without their consent is not unlawful under Mexican law.[1146] Mexican law requires more; for example, the receipt of undue profit, which did not occur in this case.[1147]

[1139] Second Black Cube Statement, **CWS-7**, ¶ 15.

[1140] Second Black Cube Statement, **CWS-7**, ¶¶ 15-19.

[1141] Second Izunza Expert Report, **CER-5**, ¶ 17.

[1142] Second Izunza Expert Report, **CER-5**, ¶ 17.

[1143] Second Izunza Expert Report, **CER-5**, ¶ 17.

[1144] Second Izunza Expert Report, **CER-5**, ¶ 18.

[1145] Second Izunza Expert Report, **CER-5**, ¶ 18.

[1146] Second Izunza Expert Report, **CER-5**, ¶ 19.

[1147] Second Izunza Expert Report, **CER-5**, ¶ 19.

The fact that the information was obtained through apparent deception is itself insufficient to establish illegality under Mexican law.[1148]

436. In his Second Expert Report, Mr. Izunza confirms that because the Black Cube agents were acting pursuant to a cover story, and the identities the agents used for purposes of the cover do not really exist, it is not possible under Mexican law for there to be any crime.[1149] With respect to Mr. Paz's point that the information Black Cube obtained violates the individuals' privacy rights, Mr. Izunza notes that Mr. Paz fails to identify which aspects, if any, of their private lives, have been revealed. Specifically, he notes: "*Sin embargo, no aclara de qué personas se está comentando, cuáles son los aspectos de sus vidas 'privadas' que se están divulgando y afectando, y de qué manera se dice, afectaron su 'reputación' e 'intimidad*.'"[1150] Mr. Paz also fails to identify which, if any, fundamental rights of the individuals have been supposedly violated.[1151] Generalized assertions, like those in Mr. Paz's report, are not sufficient to state that the evidence was obtained illegally. Mr. Izunza also notes that Mr. Paz refers to Black Cube's work as a covert operation, and to Mr. Yanus as an "*agente provocador*," without any evidence or basis in Mexican law for doing so.[1152] Furthermore, under Mexican law, Black Cube's work cannot be considered a covert operation because it is not aimed at controlling illegal activity.[1153] Therefore, Mr. Izunza confirms that there is no basis under Mexican law to find that Black Cube's methods, or the underlying evidence are illegal under Mexican law.

[1148] Second Izunza Expert Report, **CER-5**, ¶ 19.

[1149] Second Izunza Expert Report, **CER-5**, ¶ 20.

[1150] Second Izunza Expert Report, **CER-5**, ¶ 20.

[1151] Second Izunza Expert Report, **CER-5**, ¶ 20.

[1152] Second Izunza Expert Report, **CER-5**, ¶ 24.

[1153] Second Izunza Expert Report, **CER-5**, ¶ 22.

(ii) International Arbitration Standards

(a) The Tribunal Has Wide Discretion with Respect to the Admissibility of Evidence

437. International tribunals have wide discretion with respect to the admission of evidence in international arbitration. The UNCITRAL Model Law and Arbitration Rules provide that the power conferred upon the arbitral tribunal includes the power to determine the "admissibility, relevance, materiality and weight of any evidence."[1154]

438. In accordance with Procedural Order 1, the Tribunal may refer to the *IBA Rules on the Taking of Evidence in International Arbitration* (2010) (the "IBA Rules") for guidance as to the practices commonly accepted in international arbitration, but it shall not be bound to apply them.[1155] The IBA Rules provide various reasons that tribunals may exclude evidence. These grounds include: "lack of sufficient relevance to the case or materiality to its outcome" (9.2.a), "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable" (9.2.b), "unreasonable burden" (9.2.c), "loss or destruction" (9.2.d), "commercial or technical confidentiality" (9.2.e), "special political or institutional sensitivity" (9.2.f), and "procedural economy," "proportionality," and "fairness or equality" (9.2.g).[1156]

439. None of the factors in the IBA Rules for excluding evidence are present in this case. The corruption evidence that Black Cube obtained is directly relevant to the case and material to its outcome. Various interviewees confirmed the existence of bribery, a pay-to-play scheme within Pemex, and that Seamex directly benefited as a result of paying bribes to Pemex.[1157]

[1154] UNCITRAL Model Law, 2006, Article 19(2), **CL-277**; UNCITRAL Arbitration Rules, 1976, Article 25(6), **CL-278**.

[1155] Procedural Order 1, Section 16.1.

[1156] IBA Rules on the Taking of Evidence, Article 9, **CL-279**.

[1157] First Black Cube Statement, **CWS-4**, ¶¶ 28-37; *see generally* **Appendix H**.

440. There is also no legal impediment or privilege that impacts the Black Cube evidence. Black Cube has confirmed that it obtains legal opinions affirming the legality of its operations in all of the jurisdictions where it operates.[1158] Furthermore, Mr. Izunza, affirms that under Mexican law (*assuming without conceding that Mexican criminal law is a relevant standard for the Tribunal to consider*), Black Cube's methods, including recording without consent of one party and assuming a false identity for the purposes of an investigation, are legal.[1159] Black Cube confirmed in its first witness statement that Black Cube is careful to avoid eliciting any information from the individuals that may be protected by attorney-client privilege—if the individual seems to be divulging such information, Black Cube agents will attempt to change the conversation to steer away from these revelations.[1160] In this investigation, the targets did not share protected or privileged material to Black Cube's knowledge.[1161]

441. Moreover, while Black Cube may investigate and research private aspects of the sources' lives using online databases and open source information in order to effectively approach each source, the substance of the meetings with the individuals (and therefore the recordings of those meetings) related primarily to trying to understand the basis for the treatment that Oro Negro received, including the reason for the cancellation of the Oro Negro Contracts.[1162] Black Cube also does not intentionally reveal private or personal information about the individuals, nor did it question the sources about embarrassing and/or private information as a part of this investigation.[1163] There is no unreasonable burden here, as Claimants have already produced this

[1158] Second Black Cube Statement, **CWS-7**, ¶¶ 15-19.

[1159] Second Izunza Expert Report, **CER-5**, ¶¶ 8-26.

[1160] First Black Cube Statement, **CWS-4**, ¶ 14.

[1161] First Black Cube Statement, **CWS-4**, ¶ 14.

[1162] Second Black Cube Statement, **CWS-7**, ¶ 25.

[1163] Second Black Cube Statement, **CWS-7**, ¶ 25.

evidence, and there is no possibility or evidence of loss or destruction of relevant evidence. There is also no commercial or technical confidential information that has been disclosed.

442. There is also no special political or institutional sensitivity with respect to disclosing corruption within Pemex. On the contrary, as explained above in Section II.A, the culture of corruption within Pemex is known globally and its former CEO has been arrested on charges of corruption.[1164] The Black Cube evidence corroborates what is publicly known about Pemex. Black Cube's work is akin to that of a whistleblower who uncovers and exposes illicit or improper behavior that otherwise would go undiscovered.[1165] Additionally, procedural economy, proportionality, fairness, and equality weigh in favor of admitting the Black Cube evidence. Tribunals have agreed that corruption is extremely difficult to prove, considering there is often little or no physical evidence.[1166] As Claimants' witnesses have explained, the individuals who engage in corruption within Pemex are sophisticated actors and will not leave a clear paper trail to highlight their unlawful behavior.[1167] The Black Cube evidence helps to prove the pervasive culture of corruption within Pemex and therefore is directly relevant and material to the outcome of this case. Thus, the Black Cube evidence does not fall within any of the categories under the IBA Rules under which tribunals may exclude evidence.

[1164] Ardigo, Inaki A., U4 Transparency, Corruption in México (Oct. 21, 2019), p. 6, 11. ("the lack of contract transparency and the wide use of post-adjudication modifications to contracts make citizen oversight of the energy sector extremely difficult"), Exhibit **C-248**; Gabriel Toledo Guerrero, *Corrupción en el Sector Energético Mexicano: Propuestas y Recomendaciones.* *https://www.wilsoncenter.org/sites/default/files/media/documents/publication/corrupcion_en_el_sector_energetico_mexicano_propuestas_y_recomendaciones.pdf.* at 5, Exhibit **C-497**.

[1165] Second Black Cube Statement, **CWS-7**, ¶ 4.

[1166] *Liman Caspian Oil and NCL Dutch Investment v. Kazakhstan*, ICSID Case No. ARB/07/14, Award (June 22, 2010), ¶ 423 ("The Tribunal is aware that it is very difficult to prove corruption because secrecy is inherent in such cases. Corruption can take various forms but in very few cases can reliable and valid proof of it be brought which is sufficient as a basis for a resulting award declaring liability."), **CL-201**.

[1167] Second Cañedo Statement, **CWS-6**, ¶¶ 74-80 ; First Gil Statement, **CWS-1**, ¶ 101.

443. Furthermore, the interest of justice favors the admission of the Black Cube evidence. As numerous tribunals have acknowledged, proving corruption is a challenging task.[1168] Given political factors and fear of reprisals, it is rare that an individual who received bribes within Pemex would testify or admit to having done so.[1169] And particularly after many bribery and corruption scandals around the world, it is even rarer these days that an individual receiving bribes would provide receipts, enter the bribe onto any kind of ledger, or directly deposit the money in an easily traceable account. As such, the admission of the Black Cube evidence, along with the testimony of Claimants and circumstantial evidence, is the only way to prove corruption in this case. Importantly, Black Cube was able to elicit testimony in which Pemex officials not only admitted to bribery and corruption within Pemex, but also explained how the bribery scheme worked in detail.[1170] If the Tribunal were to fail to consider the freely given testimony of former Pemex officials, it would not make for a just resolution of the case and would lead to an award that is factually wrong and/or incomplete.

(b) Black Cube's Fee Arrangement Is Proper and Not a Basis on Which To Exclude Evidence

444. México's arguments with respect to Black Cube's fee arrangement fail when considered in context. Black Cube was retained in the fall of 2017 and completed its investigation as of

[1168] *EDF v. Romania*, Award, ¶ 221 ("corruption is "notoriously difficult to prove, since typically, there is little or no physical evidence"), **CL-169**.

[1169] Uniquely, in this case, there is also the testimonial statement of Emilio R. Lozoya, naming numerous of his former colleagues within Pemex and members of the Mexican government as recipients of bribes.

[1170] Mr. Pacheco, a longtime veteran of Pemex, explained Pemex's bribery scheme to the Black Cube agents. He explained that Pemex directors in the past had received up to USD 5 million in connection with a contract, some of which "flow[s] downwards" in "smaller amounts" to less senior officials. Pacheco went on to explain in detail, and with examples, how Pemex officials conceal bribe payments. He explained that payments are generally in the form of a simple "success fee," rather than a percentage of the contract, which would be more likely to raise suspicion, and that these fees are collected through "allies," including friends and family members of the Pemex officials. First Black Cube Statement, **CWS-4**, ¶¶ 32–33, **Appendix H**, Excerpts 2, 3, and 4.

December 2017, months before this proceeding was initiated.[1171] Black Cube was not retained as an expert, it was retained to collect evidence.[1172] Black Cube was paid a fee for its services, in installments, and the final payment was made at the time the investigation was completed, in December 2017.[1173] Black Cube was paid another fee at the time its First Witness Statement was submitted, a standard practice for Black Cube.[1174] The Engagement Letter provides that Black Cube receives a payment when the Black Cube evidence is used in a legal proceeding.[1175] Importantly, this fee was not connected to the substance of Mr. Yanus' First Witness Statement.[1176] Black Cube may also receive a success fee if Claimants are successful in this arbitration.[1177] Mr. Yanus' oral testimony will not include a detailed analysis of the content of the Black Cube recordings and its relationship to Claimants' legal arguments, as Black Cube does not analyze the content of the recordings.[1178] His testimony will only explain and affirm the legality of Black Cube's investigation and methods.[1179] Black Cube's success fee is not connected to the substance of Black Cube's investigation, which is long completed, nor is it connected to Black Cube's testimony.[1180]

[1171] Second Black Cube Statement, **CWS-7**, ¶¶ 6,12.

[1172] Second Black Cube Statement, **CWS-7**, ¶ 14.

[1173] Second Black Cube Statement, **CWS-7**, ¶ 8.

[1174] Second Black Cube Statement, **CWS-7**, ¶ 9.

[1175] Second Black Cube Statement, **CWS-7**, ¶ 9.

[1176] Second Black Cube Statement, **CWS-7**, ¶ 9.

[1177] Second Black Cube Statement, **CWS-7**, ¶ 11.

[1178] Second Black Cube Statement, **CWS-7**, ¶ 14.

[1179] Second Black Cube Statement, **CWS-7**, ¶ 14.

[1180] Second Black Cube Statement, **CWS-7**, ¶ 13.

445. In this context, Black Cube is essentially doing the work of a whistleblower, uncovering and exposing unlawful and improper behavior that would otherwise go unreported.[1181] The OECD recognized that the "protection of whistleblowers who disclose misconduct in the civil service should be a core component of any public sector integrity framework."[1182] The NAFTA parties also recognize the importance of whistleblowers in exposing this damaging behavior both in the public and private sectors and incentivize whistleblowers with protection from retaliation and financial remuneration. In the United States, various whistleblower laws protect individuals who report wrongdoing in the public and the private sectors. By way of example, Section 922 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* provides that if an individual provides information to the Securities and Exchange Commission ("SEC") that leads to a successful enforcement action over USD 1 million, the award to the individual is required to be between 10 percent and 30 percent of the total monetary sanctions collected, while also protecting whistleblowers from retaliation.[1183] Similar compensation is available under other whistleblower reward programs.[1184]

446. Similarly, in Canada, the Canadian Revenue Agency has an Offshore Tax Informant Program, which awards whistleblowers if they provide information which leads to a compliance

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[1181] Second Black Cube Statement, **CWS-7**, ¶ 4.

[1182] OECD, OECD Integrity Review of México: Taking a Stronger Stance Against Corruption, OECD Public Governance Reviews, OECD Publishing, Paris, p. 124 (2017), https://www.oecd-ilibrary.org/docserver/9789264273207-7-en.pdf?expires=1615899042&id=id&accname=guest&checksum=1F829D98A85F905511742D85723B4A5C#:~:text=Mexico%20should%20consider%20protecting%20the,disclose%20misconduct%20under%20the%20Agreement.&text=Confidentiality%20is%20one%20of%20the federal%20public%20servant%20or%20citizen, **CL-270**.

[1183] Securities and Exchange Commission, Dodd-Frank Act Rulemaking: Whistleblower Program, https://www.sec.gov/spotlight/dodd-frank/whistleblower.shtml, Exhibit **C-498**.

[1184] For example, the IRS also has a similar whistleblower program. If the taxes, penalties, interest and other amounts in dispute exceed $2 million, and a few other qualifications are met, the IRS will pay 15 percent to 30 percent of the amount collected. *See* Internal Revenue Code 7623-(b), https://www.irs.gov/compliance/internal-revenue-code-irc-7623b, Exhibit **C-499**.

or enforcement action that results in the collection of more than CAD 100,000 of federal tax.[1185] The award amount will be between 5% and 15% of the tax collected.[1186] The Ontario Securities Commission Office of the Whistleblower also offers awards for whistleblowers who provide information regarding violations of Ontario securities law. The whistleblower may collect between 5% and 15% of the total monetary sanctions ordered and/or voluntary payments made, up to a maximum of CAD 5 million.[1187] Legal protection and the financial remuneration in the whistleblower context are akin to a success fee, because governments want to incentivize individuals with information of wrongdoing to come forward. México also recently passed the general law on Administrative Responsibility, which strengthened prior whistleblower protections.[1188] However, the OECD reports that culture in México may deter individuals from disclosing misconduct, and the law could do more to protect whistleblowers from dismissal and other work-related sanctions.[1189]

[1185] Government of Canada, Canada Revenue Agency, Offshore Tax Informant Program (OTIP) v 2.0 – Privacy impact assessment summary (Apr. 3, 2020), https://www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/protecting-your-privacy/privacy-impact-assessment/offshore-tax-informant-program-v2.html, Exhibit **C-500**.

[1186] Government of Canada, Canada Revenue Agency, Offshore Tax Informant Program (OTIP) v 2.0 – Privacy impact assessment summary (Apr. 3, 2020), https://www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/protecting-your-privacy/privacy-impact-assessment/offshore-tax-informant-program-v2.html, Exhibit **C-500**.

[1187] Ontario Securities Commission, Award Eligibility and Process, https://www.osc.ca/en/enforcement/osc-whistleblower-program/award-eligibility-and-process, Exhibit **C-501**.

[1188] OECD, OECD Integrity Review of México: Taking a Stronger Stance Against Corruption, OECD Public Governance Reviews, OECD Publishing, Paris, p. 124 (2017), https://www.oecd-ilibrary.org/docserver/9789264273207-7-en.pdf?expires=1615899042&id=id&accname=guest&checksum=1F829D98A85F905511742D85723B4A5C#:~:text=Mexico%20should%20consider%20protecting%20the,disclose%20misconduct%20under%20the%20Agreement.&text=Confidentiality%20is%20one%20of%20the federal%20public%20servant%20or%20citizen, **CL-270**.

[1189] OECD, OECD Integrity Review of México: Taking a Stronger Stance Against Corruption, OECD Public Governance Reviews, OECD Publishing, Paris, p. 124 (2017), https://www.oecd-ilibrary.org/docserver/9789264273207-7-en.pdf?expires=1615899042&id=id&accname=guest&checksum=1F829D98A85F905511742D85723B4A5C#:~:text=Mexico%20should%20consider%20protecting%20the,disclose%20misconduct%20under%20the%20Agreement.&ext=Confidentiality%20is%20one%20of%20the,federal%20public%20servant%20or%20citizen, **CL-270**.

447. As such, all of the relevant factors point towards the admission of the Black Cube evidence in this case and the evidence should not be excluded from the proceeding.

(c) The Black Cube Evidence Is Relevant and Material to the Outcome of the Case. The Testimony of the Former Pemex Officials Directly Point to the Rampant Corruption Within the Pemex Administration, and Has Significant Evidentiary Value

448. The Black Cube evidence is also highly relevant to key issues in this proceeding. Black Cube agents met with five current and/or former Pemex officials who made various statements that strongly support Claimants' arguments in this case. Specifically, the Black Cube evidence submitted with the Statement of Claim explained that (i) there is a pervasive culture of corruption within Pemex, involving numerous high-level Pemex officials who solicit bribes (in cash and other forms) in exchange for favorable treatment by Pemex, and launder those payments (including through offshore companies);[1190] (ii) Pemex officials accepted bribes from Seadrill, Fintech and/or Seamex in exchange for the preferential contract terms contained in the Seamex Contracts;[1191] and (iii) Pemex officials retaliated against Oro Negro, including by cancelling the Oro Negro Contracts, as a result of Oro Negro's refusal to pay expected bribes.[1192]

449. Claimants have successfully established the truthfulness and genuine character of the Black Cube Evidence because Black Cube made recordings of the conversations from start to finish and because Black Cube retains unaltered originals of the recordings.[1193] As. Mr. Yanus explained in his First Witness Statement and has confirmed in his Second Witness Statement, each conversation was recorded from start to finish, without breaks, and multiple recording devices were used to

[1190] First Black Cube Statement, **CWS-4**, ¶¶ 34.1-34.2; **Appendix H**, Excerpts 1-10.

[1191] First Black Cube Statement, **CWS-4**, ¶¶ 37.1-37.3; **Appendix H**, Excerpts 11-18.

[1192] First Black Cube Statement, **CWS-4**, ¶¶ 37.2, 39; **Appendix H**, Excerpts 19-22.

[1193] First Black Cube Statement, **CWS-4**, ¶ 12; Second Black Cube Statement, **CWS-7**, ¶ 20.

ensure that all statements were captured during the meetings.[1194] Black Cube preserves each of the audio recordings in its entirety and does not alter the original recordings in any way.[1195] For purposes of producing copies of the recordings to the Tribunal, Black Cube used software to distort the voices of the agents in order to protect their identities and ensure that they are not subject to retaliation.[1196] Black Cube made no other alterations to the recordings submitted in this case.[1197]

450. Mr. Yanus, who is the CEO of Black Cube, was appropriately presented as a fact witness in this proceeding. Mr. Yanus himself is not an investigator – he did not meet with any of the individuals.[1198] His role is purely to explain Black Cube's engagement and its investigation in this case, to explain Black Cube's investigative methods, to confirm the validity and authenticity of the recordings, and to confirm that the investigation was conducted in accordance with applicable law, all of which he has done in his witness statements.[1199]

(d) The Cases Respondent Cites Weigh in Favor of Admitting the Black Cube Evidence

451. The cases that Respondent cites as supposed support for striking the Black Cube evidence are factually distinct from the current case and actually weigh in favor of admitting the evidence. In *Methanex*, claimant obtained various documents "by deliberately trespassing onto private property and rummaging through dumpsters inside the office-building for other persons' documentation."[1200] In contrast, here, there were no crimes committed, no trespass, and no

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1194 First Black Cube Statement, **CWS-4**, ¶ 12; Second Black Cube Statement, **CWS-7**, ¶ 20.

1195 First Black Cube Statement, **CWS-4**, ¶ 13; Second Black Cube Statement, **CWS-7**, ¶ 21.

1196 First Black Cube Statement, **CWS-4**, ¶ 13; Second Black Cube Statement, **CWS-7**, ¶ 21.

1197 First Black Cube Statement, **CWS-4**, ¶ 13; Second Black Cube Statement, **CWS-7**, ¶ 21.

1198 Second Black Cube Statement, **CWS-7**, ¶ 26.

1199 First Black Cube Statement, **CWS-4**, ¶¶ 11, 15; Second Black Cube Statement, **CWS-7**, ¶¶ 15-21.

1200 *Methanex Corporation v. United States of America*, UNCITRAL, Final Award (August 3, 2015) Part II, Ch. I, ¶ 55, **RL-0008.**

"reckless indifference"[1201] as to whether a crime occurred. Black Cube sought and obtained legal opinions supporting its activities in various jurisdictions, and Mr. Izunza confirms that there was no unlawful conduct.[1202]

452. Furthermore, the situation in *EDF v. Romania* is also factually distinct, as the Tribunal there declined to admit a recording, submitted one week before the hearing in the case, because it lacked various indicia of reliability and authenticity after the tribunal received expert evidence that the recording had been manipulated.[1203] Here, in contrast, the Black Cube evidence was submitted in a timely fashion, and Mr. Yanus has testified to the fact that there has been no manipulation of the recordings,[1204] other than the distortion of the agents' voices in order to protect their identities.[1205] Black Cube has stated that it will comply with a request by the Tribunal to disclose the identities of the agents, provided that their identities are disclosed only to the members of the Tribunal.[1206]

453. Additionally, *Libananco Holdings Co. v. Republic of Turkey* and *OOO Manolium-Processing v. Belarus* relate to factually distinct circumstances that are inapplicable here and furthermore, are based upon the premise that the evidence was obtained through improper means, which is not the case here.[1207] Respondent also cites *Ahongalu Fusimalohi v. FIFA*, where illicit

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1201 *Methanex Corporation v. United States of America*, Final Award, Part II, Ch. I, ¶ 55, **RL-0008.**

1202 Second Izunza Expert Report, **CER-5**, ¶¶ 8-26.

1203 *EDF v. Romania*, Procedural Order No. 3 (Aug. 29, 2008), ¶¶ 29, 48, 49, **RL-0011**

1204 First Black Cube Statement, **CWS-4**, ¶ 13; Second Black Cube Statement, **CWS-7**, ¶ 21.

1205 First Black Cube Statement, **CWS-4**, ¶ 13; Second Black Cube Statement, **CWS-7**, ¶ 21.

1206 First Black Cube Statement, **CWS-4**, ¶ 27.

1207 *Libananco,*Decision on Preliminary Issues (June 23, 2008) , ¶ 78 (excluding confidential emails and text messages from Claimant and with those associated with Claimant after Respondent requested and obtained Turkish court orders to intercept these communications), **RL-0012**; *OOO Manolium-Processing v. Belarus*, PCA Case No. 2018-06, Decision on Claimant's Request for Provisional Measures, (December 7, 2018), ¶ 154, declining Claimants' request for preliminary measures ordering Respondent to abstain from initiating criminal proceedings and/or to

recordings revealing acts of corruption were admitted.[1208] In that case, the tribunal was persuaded to admit the evidence, obtained by a journalist, who then shared the information with FIFA, finding that the recordings were "admissible and reliable evidence."[1209] Similarly, here, Black Cube is a third party who was hired by the Claimants and who was able to elicit statements from current and former Pemex officials revealing specific information about corruption within Pemex.[1210] The information Black Cube obtained specifically relates to the Claimants in this case and is corroborated by public information, specifically by international watchdog agencies as well as the testimony of Mr. Lozoya, former CEO of Pemex.

454. Therefore, the relevant case law also supports the admission of the Black Cube evidence in this case.

(e) México Produced No Evidence Related to the Conclusions in the Black Cube Recordings and the Tribunal Should Draw an Adverse Inference

455. Furthermore, México has produced no evidence related to and/or to rebut the Black Cube evidence. In fact, in their Document Request No. 67, Claimants requested various documents from the individuals in the Black Cube recordings[1211] and México produced no documents, claiming that it was unable to locate any. Respondent's claimed inability to locate any responsive

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suspend current criminal proceedings against Claimants and declining to order Respondent to refrain from contacting shareholders, officials and employees of Claimant), **RL-0013**.

1208 *Ahongalu Fusimalohi v. FIFA*, CAS 2011 / A / 2425, Award (March 8, 2012), ¶¶ 21-34. **RL-0014**.

1209 *Ahongalu Fusimalohi v. FIFA*, Award, ¶ 111, **RL-0014**.

1210 Second Black Cube Statement, **CWS-7**, ¶ 7; **Appendix H**, Excerpts 1-10.

1211 The full text of Claimants' Document Request No. 67 is: "All communications, including emails and messages sent via WhatsApp, text message, iMessage, WeChat, Signal Messenger, Telegram, or any other cloud-based messaging service, from any/all of the individuals recorded in the Black Cube Recordings, including Luis Sergio Guaso Montoya, Jose Carlos Pacheco, Gustavo Escobar Carré, and Arturo Henríquez Autrey, regarding: 1) any bribe requests to Oro Negro; 2) any strategy to retaliate against Oro Negro; 3) the Concurso Proceeding; 4) the Oro Negro Contract terminations; 5) Mexican criminal proceedings against Oro Negro, and 6) the Seamex Contracts and their amendments between January 1, 2015 and the present."

documents is implausible, as many of the individuals are current and former Pemex employees who had knowledge of the corruption within Pemex, the favorable treatment of Seamex, and the mistreatment of Oro Negro due to its unwillingness to pay bribes.[1212] Therefore, it is highly probable that Respondent is in possession of further communications with these individuals on this topic, which is at the center of Claimants' case. As such, Claimants request that the Tribunal draw an adverse inference, as supported by the Black Cube recordings, that responsive documents do exist, but do not support México's case. This leads to one conclusion: Respondent treated Oro Negro unfairly and arbitrarily based on Oro Negro's unwillingness to pay bribes, and colluded with the Ad-Hoc Group to drive Oro Negro out of business so that the Bondholders could take over the Rigs [redacted].

III. ARGUMENT

A. Claimants' Ownership in Oro Negro

456. Claimants explained in the Statement of Cliam that the Tribunal's jurisdiction in this arbitration is straightforward, notwithstanding that there are 27 Claimants in this case.[1213] Each of the Claimants made qualifying investments under Chapter 11 of NAFTA by acquiring their shares in Oro Negro before 2017.[1214] Each of the Claimants is a U.S. qualified investor within the meaning of Article 201 of the NAFTA, because they are either a natural person with U.S. citizenship or permanent residency or an entity constituted under U.S. law.[1215] As U.S. investors,

[1212] *See generally* **Appendix H**.

[1213] SOC, Section III(A).

[1214] SOC, ¶¶ 15, 327-29.

[1215] SOC, ¶¶ 15, 327-43; *see also* **Appendix M** to the Reply, which is a chart listing Claimants' exhibits tendered thus far to prove the U.S. nationality of each of the 27 Claimants and their ownership of 43.2% of the shares of Oro Negro.

Claimants held approximately 43.2% of the shares of Oro Negro at the time of México's breaches – and still do today.

457. In its Statement of Defense, México appears to suggest that Claimants have not brought sufficient evidence that they hold investments (although México does not specify whether this objection is an objection to *ratione personae* jurisdiction, a standing objection, or otherwise). México argues that "*[a]lgunas Demandantes no son en realidad inversionistas, y su participación accionaria en Integradora es inferior a la que señalan*,"[1216] but, on the facts alone, that assertion is merely guesswork and cannot overcome the clear evidence on record. In an effort to confuse the genuine issues before this Tribunal, México spills much ink on (what it calls) an effort to provide "greater context" regarding Claimants' shareholding in Oro Negro,[1217] in particular with respect to (i) CKD Trust, (ii) Temasek Holdings and Ares Management, and (iii) Oro Negro's Shareholder Structure.[1218] Yet, México's discussion does little to assist the Tribunal. Nothing in this "greater context" is relevant to the present dispute, much less the Tribunal's jurisdiction.

458. There can be no doubt that Claimants hold 43.2% ownership in Oro Negro.

1. Claimants Hold 43.2% Ownership in Oro Negro

459. Central to México's objection is its bid to paint Oro Negro "*como una empresa mayoritariamente propiedad de trabajadores mexicanos a través de sus ahorros en fondos de pensiones*."[1219] That statement is mere rhetoric not based in fact. In reality, Claimants have maintained their 43.2% ownership in Oro Negro since August and September 2016, when Claimants Vista Pros, LLC and Genevieve T. Irwin 2002 Trust respectively acquired 201,601

[1216] SOD, ¶ 486.

[1217] SOD, ¶ 53 ("*mayor contexto*").

[1218] SOD, ¶¶ 54-77.

[1219] SOD, ¶ 64.

shares (0.64%) and 106,550 shares (0.34%) in Oro Negro.[1220] Prior to that, Claimants collectively held 42.22% of Oro Negro.[1221] México's suggestion that Mexican pension funds (known in México as *afores*) have also owned approximately 47% of Oro Negro is irrelevant for the Tribunal's jurisdiction.

460. The Tribunal's analysis could stop here. However, to put to rest México's "concerns," Claimants explain their shareholding in Oro Negro with reference to evidence on record: namely, the shareholdings of: (i) Direct Shareholder Claimants; (ii) the Grace Family Claimants, members of the Grace family who are sole beneficiaries of a Bermuda trust that holds shares in Oro Negro; (iii) the Mexican Enterprises (Clue, S.A. de C.V. ("Clue"), Axis Oil Field Services, S. de R.L. de C.V. ("Axis Services"), Axis Oil Field Holding, S. de R.L. de C.V. ("Axis Holding"), and Fideicomiso 305952 ("F. 305952")); and (iv) Messrs. Cañedo and Williamson.

(i) Direct Shareholder Claimants

461. Claimants Brentwood Associates Private Equity Profit Sharing Plan ("Brentwood"),[1222] Frederick J. Warren IRA (the "Warren IRA"),[1223] Genevieve T. Irwin 2002 Trust (the "Irwin

[1220] Oro Negro's Stock Registry Book (*Libro de Registro de Acciones de Integradora de Servicios Petroleros Oro Negro, S.A.P.I. de C.V.*), at *Asiento* Nos. 30 and 31, Exhibits **C-502** and **C-84**. As further discussed *infra* Section III.A.1(i), Exhibits **C-502** and Exhibit **C-84** are identical copies of Oro Negro's Stock Registry Book. *See also* copies of share certificates of Oro Negro issued to Irwin Trust, Exhibit **C-503**.

[1221] *See* Oro Negro's Stock Registry Book, at *Asiento* No. 28, Exhibits **C-502** and **C-84**.

[1222] Claimant Mr. Warren, a U.S. citizen, is the sole and ultimate beneficial owner of Brentwood. Exhibit **C-B.4** is a copy of a statement reflecting Brentwood's existence and Frederick J. Warren's beneficial ownership of Brentwood. Exhibit **C-B.15** is a copy of Mr. Warren's U.S. passport. Exhibit **C-504** is a redacted copy of a summary profit sharing plan description of Brentwood, reflecting the names of the plan sponsor, plan trustee and plan administrator.

[1223] Claimant Mr. Warren is the sole and ultimate beneficial owner of the Warren IRA. Exhibit **C-B.16** is a copy of a statement reflecting the Warren IRA's existence and Mr. Warren's beneficial ownership of the Warren IRA.

Trust"),[1224] Rainbow Fund, L.P. ("Rainbow"),[1225] Ampex Retirement Master Trust ("Ampex Trust"),[1226] Apple Oaks Partners, LLC ("Apple Oaks"),[1227] Gerald L. Parsky IRA (the "Parsky IRA"),[1228] Floradale Partners, LLC ("Floradale"),[1229] John N. Irwin III ("Mr. Irwin"),[1230] Cambria Ventures, LLC ("Cambria"),[1231] Gary Olson ("Mr. Olson"),[1232] Robert M. Witt IRA (the "Witt IRA"),[1233] ON5 Investments, LLC ("ON5"),[1234] and Vista Pros, LLC ("Vista Pros")[1235] (collectively, the "**Direct Shareholder Claimants**") hold 3,486,283 shares (11.079%) in total. México raises two objections in relation to the Direct Shareholder Claimants.

[1224] Claimant Genevieve T. Irwin ("Ms. Irwin") is the sole beneficiary of the Irwin Trust. Exhibit **C-B.19** is a copy of the Irwin Trust's trust agreement and some of its amendments, reflecting the name of the trust, the governing law of the trust and the name of the trustee. Exhibit **C-B.18** is a copy of Ms. Irwin's U.S. passport.

[1225] Exhibit **C-B.27** is a copy of a certificate issued by the state of California reflecting Rainbow's name, address and place of constitution or organization.

[1226] Exhibit **C-505** is a redacted copy of Ampex Trust's trust agreement, reflecting the name of the trust, the governing law of the trust and the name of the trustee; Exhibit **C-B.2** is a redacted copy of the first amendment to Ampex Trust's trust agreement; Exhibit **C-506** is a redacted copy of the second amendment to Ampex Trust's trust agreement.

[1227] Exhibits **C-B.3** and **C-507** are copies of certificates issued by the state of California reflecting Apple Oaks' name and the state of organization.

[1228] Claimant Gerald L. Parsky ("Mr. Parsky"), a U.S. citizen, is the sole and ultimate beneficial owner of the Parsky IRA. Exhibit **C-B.21** is a copy of a statement reflecting the Parsky IRA's existence and Mr. Parsky's beneficial ownership of the Parsky IRA. Exhibit **C-B.20** is a copy of Mr. Parsky's U.S. passport.

[1229] Exhibit **C-508** is a redacted copy of Limited Liability Company Agreement for Floradale, showing that it is a limited liability company organized under the laws of the state of Delaware; Exhibit **C-B.13** is a copy of a certificate issued by the state of California reflecting Floradale's name, address and place of constitution or organization.

[1230] Exhibit **C-B.22** is a copy of Mr. Irwin's U.S. passport.

[1231] Exhibit **C-B.5** is a copy of a certificate issued by the state of Delaware reflecting Cambria's name, address and place of constitution or organization.

[1232] Exhibit **C-B.17** is a copy of Claimant Gary Olson's U.S. passport.

[1233] Claimant Robert M. Witt ("Mr. Witt"), a U.S. citizen, is the sole and ultimate beneficial owner of the Witt IRA. Exhibit **C-B.29** is a copy of a statement reflecting the Witt IRA's existence and Mr. Witt's beneficial ownership of the Witt IRA. Exhibit **C-B.28** is a copy of Mr. Witt's U.S. passport.

[1234] Exhibit **C-509** is a copy of ON5 Articles of Organization; Exhibit **C-B.26** is a copy of a certificate issued by the state of Florida reflecting ON5's name, address and place of constitution or organization.

[1235] Exhibit **C-510** is a redacted copy of Articles of Organization of Vista Pros, LLC, showing its incorporation in the state of Florida; *see also* Exhibit **C-B.30**, which is a copy of a certificate issued by the state of Florida reflecting Vista Pros' name, address and place of constitution or organization.

462. *First*, México raises a general "concern" about the evidence showing the ownership of the Direct Shareholder Claimants. While México does not deny that these Direct Shareholder Claimants are U.S. nationals within the meaning of NAFTA Article 201,[1236] it still seeks to question their ownership of the respective shares on the false basis that they "*no han presentado ninguna otra evidencia de su respectiva participación accionaria, como por ejemplo certificados de acciones o declaraciones de impuestos que demuestren que poseen acciones en una compañía extranjera*."[1237]

463. That assertion, however, is not a serious one. Claimants submitted with their Statement of Claim a copy of Oro Negro's Stock Registry Book (*Libro de Registro de Acciones de Integradora de Servicios Petroleros Oro Negro, S.A.P.I. de C.V.*), evidencing precisely the direct ownership alleged by Claimants.[1238]

464. Pursuant to Article 129 of the Mexican General Law of Mercantile Companies (*Ley General de Sociedades Mercantiles*), a stock registry book is considered official proof of a company's shareholding.[1239] Thus, any relevant analysis of whether the Direct Shareholder Claimants own 11.08% of the shares in Oro Negro should stop here as a matter of Mexican law.

465. México's disingenuous concern that Exhibit C-84 may not be up to date (based on its last entry (*Asiento* No. 33) dated April 1, 2017 is now moot.[1240] For the purpose of document production, Claimants obtained a current copy of Oro Negro's Stock Registry Book from the

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[1236] SOD, ¶ 488.

[1237] SOD, ¶ 489.

[1238] Oro Negro's Historic Shareholder Log, Exhibit **C-84**.

[1239] Mexican General Law of Mercantile Companies, Article 129 ("*La sociedad considerará como dueño de las acciones a quien aparezca inscrito como tal en el registro a que se refiere el artículo anterior*."), **CL-289**.

[1240] SOD, ¶ 489.

Liquidator (*síndico*) of Oro Negro, and produced the same to México on January 8, 2021 (Exhibit C-502).[1241] This document confirms that *Asiento* No. 33 is still the last entry made on Oro Negro's Stock Registry Book, and thus the Direct Shareholder Claimants' 11.079% shareholding in Oro Negro remains the same:[1242]

Direct Shareholder Claimants	**Fixed Capital**	**Variable Capital**					**Total**	**31,464,990 (% Shares)**
	Series I Class D-1	Series II Class A	Series II Class B	Series II Class C	Series II Class D-1	Series II Class D-2		
Brentwood				70,637			70,637	0.224%
Warren IRA				36,486			36,486	0.116%
Irwin Trust				106,550			106,550	0.339%
Rainbow		345,992		84,887			430,879	1.369%
Ampex Trust		239,071		58,630			297,701	0.946%
Apple Oaks		252,803		61,977			314,780	1.000%
Parsky IRA		72,343		17,807			90,150	0.287%
Floradale		57,872		14,247			72,119	0.229%
Mr. Irwin		163,003		39,884			202,887	0.645%
Cambria		21,734		5,357			27,091	0.086%
Mr. Olson		14,431		3,552			17,983	0.057%
Witt IRA		288,981		70,856			359,837	1.144%
ON5		1,257,582		201,601			1,459,183	4.637%
Total							**3,486,283**	**11.079%**

466. México suggests that the Tribunal would lack jurisdiction of claims by Claimant Vista Pros because it is not currently a shareholder.

467. As *Asiento* No. 30 of Oro Negro's Stock Registry Book shows, Vista Pros acquired 201,601 Series II – Class C shares (0.640%) from a previous shareholder, Progeny Plus, LLC on August

[1241] *See* Oro Negro's Stock Registry Book, Exhibit **C-502**.

[1242] Oro Negro's Stock Registry Book, at *Asiento* No. 33, Exhibits **C-502** and **C-84**. Attached as Exhibits **C-512**- **C-533** are copies of stock certificates issued by Oro Negro to Brentwood, Warren IRA, Irwin Trust, Rainbow, Ampex Trust, Apple Oaks, Parsky IRA, Floradale, Mr. Irwin, Cambria, Mr. Olson, Witt IRA, and ON5.

18, 2016.[1243] It remained the owner of the same shares until March 1, 2017, when it sold them to another, Claimant ON5.[1244]

468. Vista Pros is a U.S. "national" within the meaning of NAFTA Article 201 – even though it is no longer a shareholder in Oro Negro – as it is an entity incorporated in Florida, United States.[1245] As well settled in NAFTA jurisprudence, the only relevant time to show ownership or control of the investment to bring a claim under Article 1116 is at the time of the alleged treaty breaches. As the tribunal in *Mondev* explained:

> To require the claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11, which is to provide protection to investors against wrongful conduct including uncompensated expropriation of their investment and to do so throughout the lifetime of an investment up to the moment of its "sale or other disposition" (Article 1102(2)). On that basis, the Tribunal concludes that NAFTA should be interpreted broadly to cover any legal claims arising out of the treatment of an investment as defined in Article 1139, whether or not the investment subsists as such at the time of the treatment which is complained of. [1246]

469. The tribunal in *B-Mex v. México* affirmed this conclusion by stating: "Article 1116 does not require subsistence of the investment at the time a claim is submitted."[1247]

470. Although Vista Pros did not hold shares in Oro Negro when the Notice of Arbitration was filed on June 19, 2018, it did so after México's retaliatory and corrupt scheme to drive Oro Negro out of business had already commenced. It suffered losses from the repeated draconian rate

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[1243] Oro Negro's Stock Registry Book, at *Asiento* No. 30, Exhibits **C-502** and **C-84**.

[1244] Oro Negro's Stock Registry Book, at *Asiento* No. 33, Exhibits **C-502** and **C-84**.

[1245] Exhibit **C-510** is a redacted copy of Articles of Organization of Vista Pros, LLC, showing its incorporation in the state of Florida; *see also* Exhibit **C-B.30**, which is a copy of a certificate issued by the state of Florida reflecting Vista Pros' name, address and place of constitution or organization.

[1246] *Mondev International Ltd. v. United States of America* ("*Mondev*"), ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶ 91 (emphasis added), **CL-73**.

[1247] *B-Mex, LLC and Others v. United Mexican States* ("*B-Mex v. Mexico*"), ICSID Case No. ARB(AF)/16/3, Partial Award (July 19, 2019), ¶ 152, **CL-290**.

reductions and suspensions on the Oro Negro Contracts on November 14, 2016.[1248] That, for the purposes of Article 1116, is all that must be shown.

471. In any event, Vista Pros' shareholding was transferred to another Claimant: ON5. As such, this transfer did not affect the total percentage of shareholding held by Claimants in Oro Negro.

(ii) Grace Family Claimants

472. Second, Claimants Alicia Grace,[1249] Carolyn Grace Baring,[1250] Diana Grace Beard,[1251] Frederick Grace,[1252] Nicholas Grace,[1253] Oliver R. Grace III,[1254] and Virginia Grace[1255] (collectively, the "**Grace Family Claimants**")—all U.S. citizens—indirectly own 434,676 shares in Oro Negro (1.381%).[1256]

473. The Grace Family Claimants are the sole beneficiaries of a Bermuda trust named Lorraine Grace Trust—Oliver 2311 (the "**Lorraine Grace Trust**"), which in turn holds 434,676 shares in Oro Negro through a nominee arrangement with another Bermuda entity called Field Nominees Limited (the "**Nominee Company**").[1257] Along with this submission, Claimants submit the

[1248] *See* Exhibit **C-I.1**- **C-I.5**.

[1249] Exhibit **C-B.1** is a copy of Ms. Alicia Grace's U.S. passport.

[1250] Exhibit **C-B.11** is a copy of Ms. Carolyn Grace's U.S. passport.

[1251] Exhibit **C-B.12** is a copy of Ms. Diana Grace's U.S. passport.

[1252] Exhibit **C-B.14** is a copy of Mr. Frederick Grace's U.S. passport.

[1253] Exhibit **C-B.24** is a copy of Mr. Nicholas Grace's U.S. passport.

[1254] Exhibit **C-B.25** is a copy of Mr. Oliver Grace's U.S. passport.

[1255] Exhibit **C-B.31** is a copy of Ms. Virginia Grace's U.S. passport.

[1256] *See* copies of the notarized statements from the trustee of the Lorraine Grace Trust and from Field Nominees Limited, both dated February 3, 2021, confirming that the Grace Family Claimants are the sole beneficial owners of the Lorraine Grace Trust ("Beneficiary Confirmation Statement") and that the ownership and control of 434,767 shares of Oro Negro are exclusively vested in the Lorraine Grace Trust ("Nominee Declaration"), Exhibit **C-511**.

[1257] Claimants had previously indicated in their Statement of Claim that the Grace Family Claimants are the beneficiaries of "Field Nominee Trust" and that "Field Nominee Trust" is a direct shareholder of 434,676 shares of Oro Negro. *See* SOC, ¶ 15 n. 4. As clarified herein, the Grace Family Claimants are the beneficiaries of the Lorraine Grace Trust. Given that the Lorraine Grace Trust cannot directly own shares per Bermuda law, said trust owns and

notarized statements from the Trustee of the Lorraine Grace Trust and from the Nominee Company attesting to the following:

- The Nominee Company has been the registered owner of 434,676 shares in Oro Negro since May 2016, and despite its nominal ownership under the name of Field Nominee Limited, the Lorraine Grace Trust has been vested with the exclusive ownership and control of the said shares;[1258]

- The beneficiaries of the Lorraine Grace Trust, in turn, consist of the Grace Family Claimants exclusively and the Grace Family Claimants have remained the sole beneficiaries of the said Trust from fiscal year 2010 through the present.[1259]

474. Thus, each of the Grace Family Claimants is a U.S. investor with a qualifying investment in México (*i.e.*, indirect shareholding in Oro Negro) to bring claims on their own behalf under NAFTA Article 1116; and that their shareholding in Oro Negro, held via the Lorraine Grace Trust and the Nominee Company, amounts to 1.381%.

(iii) Mexican Enterprises

475. 9,671,690 shares in Oro Negro (30.737%) are held by Clue, Axis Services, Axis Holding, and F. 305952. In addition to bringing claims in their own rights under Article 1116 of the NAFTA, Claimants Messrs. Williamson and Cañedo advance claims on behalf of these Mexican entities which they own and control under Article 1117.

476. As summarized in the chart below, Mr. Williamson (through his virtually wholly owned entity, Clue) and Mr. Cañedo (directly) own 66.666% interest in each of Axis Services, Axis Holding, and F. 305952 (collectively, the "Mexican Enterprises"), which in turn directly or indirectly hold 30.737% shareholding in Oro Negro.

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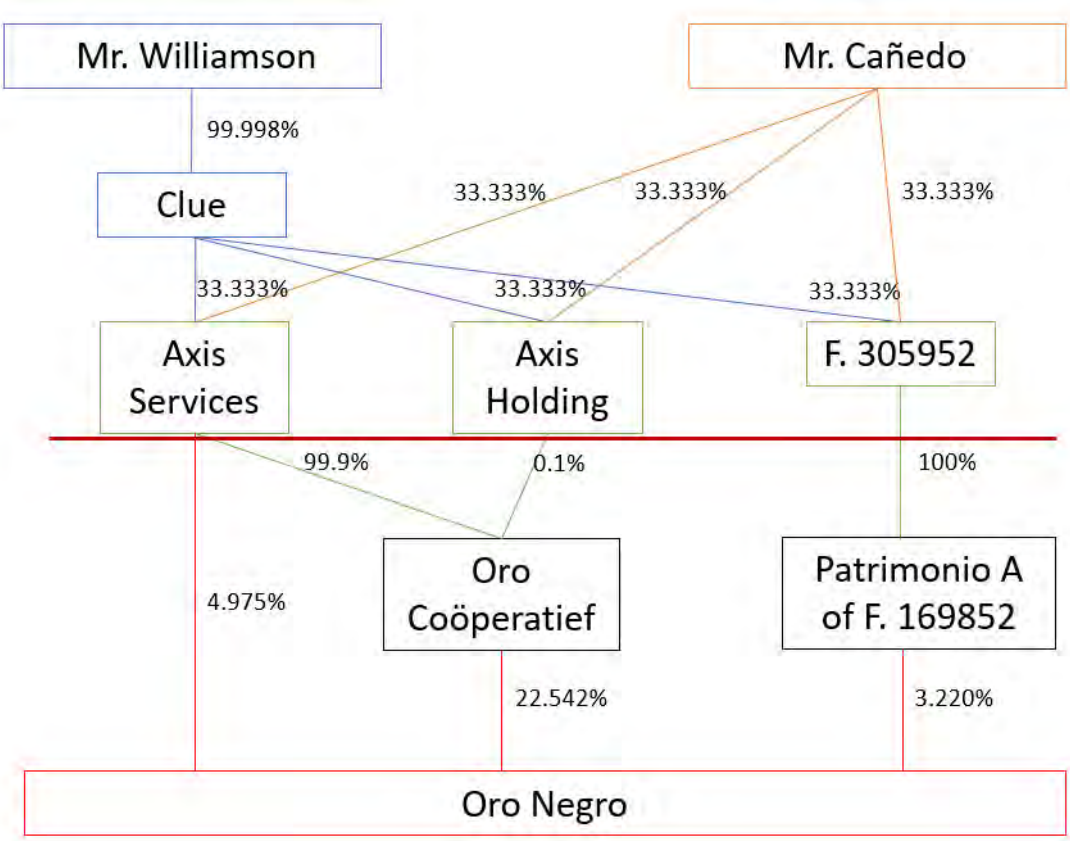
controls the 434,767 shares in Oro Negro through the Nominee Company that serves as a nominal owner of the same shares in Oro Negro.

[1258] Nominee Declaration (Feb. 3, 2021), Exhibit **C-511**; *see also* Oro Negro's Stock Registry Book, at *Asiento* Nos. 28 and 33 (showing that the Nominee Company has been the registered holder of 434,767 shares of Oro Negro since May 30, 2016 to this day), Exhibits **C-502** and **C-84**.

[1259] Beneficiary Confirmation Statement (Feb. 3, 2021), Exhibit **C-511**.



477. México disputes, again without any proof, each and every chain of ownership established between Messrs. Williamson and Cañedo and the ultimate shareholding of 30.737% in Oro Negro. As explained below, México's objections cannot overcome the obvious reality that Claimants' Mexican Enterprises own—and have owned since May 2016—30.373% shareholding in Oro Negro.

(a) Clue (on Behalf of which Mr. Williamson Brings a Claim Under Article 1117)

478. Claimant Mr. Williamson brings a claim in his own capacity under Article 1116 and, under Article 1117, on behalf of Clue, a Mexican corporation in which he holds 99.998% of the shares. México, however, claims that Mr. Williamson "*parece ser propietario únicamente del 50% de*

Clue,"[1260] not 99.99%. Its justification: in México's view, there has been no evidence presented to demonstrate the transfer of shares from Ms. María Clara Lloreda Gomez ("Ms. Gomez") to Mr. Williamson in 2016.[1261]

479. Ms. Gomez is Mr. Williamson's wife.[1262] From August 15, 2000, when Clue was incorporated, to November 15, 2016, Mr. Williamson *and* Ms. Gomez each held 25,000 shares (50%) of Clue.[1263] Then, on November 15, 2016, Ms. Gomez relinquished all but one of the shares in Clue to Mr. Williamson,[1264] and Mr. Williamson thereby became the 99.998% owner of Clue.[1265] Mr. Williamson was the owner of the same shares when Claimants initiated this arbitration on June 19, 2018 by filing the Notice of Arbitration, and he still remains so today.

480. This fact, including the stock transfer between Ms. Gomez and Mr. Williamson on November 15, 2016, is duly recorded in a complete and current copy of Clue's stock registry book (submitted herewith as Exhibit C-534) that Claimants produced to México during the document production phase, and in response to México's Request No. 3. As explained above, a stock registry

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[1260] SOD, ¶ 542.

[1261] SOD, ¶ 503. México also contends that Claimants' Exhibit **C-85**—a certification from Clue's Attorney-in-Fact certifying that Mr. Williamson and Ms. Gomez have been the shareholders of Clue since its incorporation—is not "credible," because the certification contains an incorrect date of incorporation and because there has been no evidence produced to show that Gustavo Armando Mondragón Marquez, who issued the certification on behalf of Clue, is indeed an attorney-in-fact of Clue. *See* SOD, ¶¶ 500-01. While Exhibit **C-85** contains several minor typographical errors – for example, it refers to the date of incorporation as "August 15, 2002" rather than August 15, 2000 – those negligible clerical errors are hardly enough to support the bold suggestion that the document is somehow false. Moreover, Claimants have already submitted along with its Notice of Arbitration a copy of Clue's incorporation deed (Exhibit **C-B.9**) showing that Gustavo Armando Mondragón Marquez is an attorney-in-fact of Clue. He also is CFO (*Director de Finanzas*) of Clue. *See* Williamson Statement, **CWS-8** , ¶ 67.

[1262] Williamson Statement, **CWS-8** , ¶¶ 14, 68.

[1263] Exhibit **C-534** is a copy of the historic log of shareholders of Clue (hereinafter, "Clue Stock Registry Book"), reflecting its shareholders and the amount of shares held by each shareholder since Clue's establishment to date. *See* Clue Shareholder Registry, at *Asiento* No. 1, Exhibit **C-534**; *see also* Williamson Statement, **CWS-8**, ¶ 70.

[1264] Williamson Statement, **CWS-8** , ¶¶ 69-70.

[1265] *See* Clue Stock Registry Book, at *Asiento* No. 3, Exhibit **C-534**.

book is deemed as conclusive evidence of share ownership as a matter of Mexican law. Thus, Mr. Williamson has demonstrated his 99.99% ownership in Clue.

(b) Axis Services (on Behalf of which Messrs. Williamson and Cañedo Bring a Claim Under Article 1117)

481. As explained in the Statement of Claim, Mr. Williamson (through Clue) and Mr. Cañedo each own one third of Axis Services, which in turns directly holds 4.975% shareholding in Oro Negro.[1266] Oro Negro's Stock Registry Book shows that Axis Services became the registered owner of 1,565,462 Series II – Class A shares of Oro Negro (4.975%) as of May 30, 2016 and remains a shareholder to date.[1267] With the Statement of Claim, Claimants also submitted Exhibit C-86, a copy of certification from the Attorney in Fact of Axis Services, Gustavo Armando Mondragón Marquez ("Mr. Mondragón"), certifying that Mr. Williamson (through Clue) and Mr. Cañedo have majority owned Axis Services (66.666%) since the incorporation of the company.[1268]

482. Unsurprisingly, México alleges that Exhibit C-86 cannot be trusted. It makes this very serious allegation on little more than purported technicalities: the document, México says, was not notarized or registered and, it says, there is no evidence on record demonstrating that Mr. Mondragón who signed the certification, is indeed an Attorney-in-Fact of Axis Services.[1269]

[1266] SOC, ¶¶ 15, 346.

[1267] Oro Negro's Stock Registry Book, at *Asiento* Nos. 26 and 33, Exhibits **C-502** and **C-84**. Claimants further introduce into the record the copies of stock certificates issued to Axis Services, which have been previously provided to México during the document production phase. *See* copies of share certificates of Oro Negro issued to Axis Services, Exhibits **C-535 - C-536**.

[1268] Exhibit **C-86** is a certificate from the Attorney-in-Fact of Axis Services certifying that Mr. Cañedo and Clue have been the 66.666% owners of Axis Services since November 14, 2011 to the date thereon (July 9, 2019).

[1269] SOD, ¶¶ 508-09.

483. That objection is not a serious one. México's own exhibit (Exhibit R-0213) documents the ownership of Axis Services by Clue and Mr. Cañedo.[1270] This exhibit is a copy of concentration notice filed on March 15, 2016 before the Mexican Federal Economic Competition Commission (COFECE) (the "Concentration Notice"), in relation to Temasek Holdings and Ares Management's sale of Oro Negro shares to Axis Services and Axis Holding.[1271] On this basis alone, Mexico's objection must fail.

484. Even without that document however, there could still be no doubt that this objection is now moot. With this submission, Claimants put on record a copy of Axis Services' incorporation deed and bylaws, which shows that Mr. Mondragón is an Attorney-in-Fact of Axis Services.[1272] The document also shows that he has general power of attorney for litigation and collections (*poder general para pleitos y cobranzas*) and thus authorized to act as a legal representative in judicial and extra-judicial proceedings.[1273]

485. In addition, Claimants put on record a complete and current copy of Axis Services' stock registry book (a document in México's possession as it was produced during the document production phase), again evidencing that Clue and Mr. Cañedo each own one third of Axis Services and that their respective ownership amounts remain the same since November 14, 2011 (date of incorporation) through the present.[1274]

[1270] Concentration Notice, at p. 29, Exhibit **R-0213**.

[1271] Concentration Notice, at pp. 4-6, Exhibit **R-0213**.

[1272] Axis Services Incorporation Deed and Bylaws, at pp. 21-22, Exhibit **C-537**. Mr. Mondragón also is CFO (*Director de Finanzas*) of the company. *See* Williamson Statement, **CWS-8**, ¶ 76.

[1273] Axis Services Incorporation Deed and Bylaws, at pp. 21-22, Exhibit **C-537**.

[1274] Axis Services Stock Registry Book, Exhibit **C-538**.

(c) Axis Holding (on Behalf of which Messrs. Williamson and Cañedo Bring a Claim Under Article 1117)

486. México alleges that Claimants have failed to produce any evidence demonstrating that Mr. Williamson (through Clue) and Mr. Cañedo each own one third of Axis Holding.[1275]

487. That objection is no more serious than the preceding ones. México's own exhibit—the concentration notice produced as Exhibit R-213—shows that Clue and Mr. Cañedo each owned one-third of Axis Holding as of March 15, 2016.[1276]

488. In addition, Exhibit C-539, a copy of the certification dated July 9, 2019 from the Attorney-in-Fact of Axis Holding (Mr. Mondragón), certifies that Mr. Cañedo and Clue have been the shareholders of Axis Holding since November 14, 2011 (date of incorporation) until the certification date, each owning 33.33% equity interest in Axis Holding throughout this period.[1277]

489. Claimants have also produced a copy of Axis Holding's incorporation deed and bylaws, showing that Mr. Mondragón, who signed the certification on behalf of Axis Holding, is an attorney-in-fact of Axis Holding granted with the general power of attorney for litigation and collections (*poder general para pleitos y cobranzas*) and is thus authorized to act as a legal representative in judicial and extra-judicial proceedings.[1278] Mr. Mondragón also is a *Director de Finanzas* of the company.[1279]

490. Finally, Claimants produce a complete and current copy of Axis Holding's stock registry book, conclusively proving that Clue and Mr. Cañedo each own one third of Axis Holding and that

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[1275] SOD, ¶¶ 511, 517.

[1276] Concentration Notice, at p. 30, Exhibit **R-0213**.

[1277] *See* Exhibit **C-539**, which is a copy of certification from the Attorney-in-Fact of Axis Holding certifying that Mr. Cañedo and Clue have been the 66.666% owners of Axis Holding since November 14, 2011 to the date thereon (July 9, 2019).

[1278] Axis Holding Incorporation Deed and Bylaws, at pp. 21-22, Exhibit **C-540**.

[1279] Williamson Statement, **CWS-8**, ¶ 76.

their respective ownership amounts remain the same since November 14, 2011 through the present.[1280]

(d) F. 305952 (on Behalf of which Messrs. Williamson and Cañedo Bring a Claim Under Article 1117)

491. Clue (thus Mr. Williamson) and Mr. Cañedo have both been the 33.3% beneficial owner of F. 305952 since the creation of the *fideicomiso*. On December 14, 2011, Mr. Williamson (through Clue) and Mr. Cañedo created F. 305952, along with Mr. Gil (through his wholly owned company, Orobas), with the settlement of the fixed capital shares that they owned in Oro Negro in equal parts.[1281] F. 305952 in turn placed these shares in another Mexican trust, Fideicomiso 169852 ("F. 169852"), which has held to date Messrs. Williamson, Cañedo, and Gil's fixed capital shares, as well as additional shares that F. 169852 acquired in trust for F. 305952 (and thus ultimately for the benefit of Messrs. Williamson, Cañedo, and Gil) over time.[1282]

492. To prove Messrs. Williamson and Cañedo's 66.666% beneficial ownership of F. 305952, Claimants submitted with the Statement of Claim Exhibit C-B.10, a redacted copy of the F. 305952 Trust Agreement.

493. Not surprisingly, México again found fault with this document, arguing that Exhibit C-B.10 is too "*severamente testadas*" to allow it to confirm Clue and Mr. Cañedo's beneficial ownership in F. 305952.[1283] That is not true. Page 10 of Exhibit C-B.10 shows that Clue and Mr. Cañedo each hold 33.33% beneficial ownership. Nonetheless, to put México's concerns to rest, Claimants voluntarily produced to México an unredacted copy of the F. 305952 Trust Agreement,

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[1280] Axis Holding Stock Registry Book, Exhibit **C-541**.

[1281] SOD, ¶ 73; *see also* Oro Negro's Stock Registry Book, at *Asiento* Nos. 3-5, Exhibits **C-502** and **C-84**; Second Gil Statement, **CWS-5**, ¶¶ 94-95; Second Cañedo Statement, **CWS-6**, ¶¶ 41, 49; Williamson Statement, **CWS-8**, ¶¶ 79-80.

[1282] *See infra* Section III.A.1(iii)(f).

[1283] SOD, ¶ 514.

dated December 14, 2011, in response to México's Request No. 4 during the document production phase. And there has been no subsequent amendment made to the F. 305952 Trust Agreement. This objection thus is moot.

(e) Oro Cooperatief (a Dutch Cooperative Wholly Owned by Axis Services and Axis Holding Through Which Claimants Hold Shares in Oro Negro)

494. Axis Services and Axis Holding (collectively, the "Axis Companies") indirectly own 7,092,883 Series II-Class B shares of Oro Negro (22.542%) through Oro Cooperatief U.A. ("Oro Cooperatief"), a Dutch cooperative that directly holds said shares in Oro Negro and that is wholly owned by the Axis Companies (*i.e.*, 99.9% by Axis Services and 0.1% by Axis Holding). México does not dispute that Oro Cooperatief appears as the registered owner of the same shares in Oro Negro's Stock Registry Book.[1284] With the Statement of Claim, Claimants also submitted Exhibit C-87, a copy of the Member's Register of Oro Cooperatief demonstrating that since May 2, 2016, Axis Services and Axis Holding have remained the sole Members of Oro Cooperatief, respectively holding 99.9% and 0.1% membership rights in the cooperative.

495. México seeks to defeat the claims of Messrs. Williamson and Cañedo (in their own names under Article 1116 and on behalf of the Mexican Enterprises) by arguing that Claimants have not proved the full chain of ownership to Oro Negro. Despite the clear evidence on record, México still demands "additional evidence" showing Axis Services and Axis Holding's rights as members of Oro Cooperatief.[1285] It also speculates—on the basis of no evidence—that Axis Services and Axis Holding may not have maintained their 100% membership rights in Oro Cooperatief "on all

[1284] SOD, ¶ 520. As proof of Oro Cooperatief's ownership of 7,092,883 shares in Oro Negro, Claimants further introduce into the record the copies of share certificates issued by Oro Negro to Oro Cooperatief, Exhibits **C-543-C-544**.

[1285] SOD, ¶ 520.

relevant dates for this arbitration."[1286] The evidence on record is sufficient to dismiss any such speculation.

496. According to the Articles of Association of Oro Cooperatief, Axis Services and Axis Holding, as members of Oro Cooperatief, enjoy a wide range of rights, including, *inter alia*, voting rights and rights to distributions, the same set of rights a shareholder of a stock corporation would have.[1287] The Articles of Association also confirm that Exhibit C-87 records all required information: "the names and addresses of the Members of the Cooperative, the dates of commencement and termination of the Membership, the amounts of the contribution paid to the Cooperative, and the manner in which the Membership has terminated."[1288]

497. Thus, as with Oro Negro's Stock Registry, the Member's Register is a living document that only reflects changes to the membership of the cooperative, again demonstrating México's "concerns" with Exhibit C-87 are disingenuous. In any event, Claimants again confirm that the membership information as registered in Exhibit C-87 has not changed and that the Axis Companies have remained the sole members of Oro Cooperatief since May 2, 2016 through the present date, including as of June 19, 2018 when Claimants filed their Notice of Arbitration.[1289]

498. In addition, Claimants produced a copy of the Board resolution of Oro Cooperatief dated May 2, 2016 (Exhibit C-546). In this document, the Board admitted Axis Services and Axis Holding as the sole members of Oro Cooperatief with all attendant membership rights.[1290] Also submitted as Exhibit C-548 is a certification from a managing director of Oro Cooperatief that

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[1286] SOD, ¶ 520.

[1287] Articles of Association of Oro Cooperatief, Exhibit **C-545**.

[1288] Articles of Association of Oro Cooperatief, Exhibit **C-545**.

[1289] Second Cañedo Statement, **CWS-6**, ¶ 47.

[1290] *See* Board Resolution of Oro Cooperatief (May 2, 2016), Exhibit **C-546**.

certifies that Axis Services and Axis Holding's membership rights have not changed since their admission of the sole members of Oro Cooperatief on May 2, 2016.[1291]

(f) Patrimonio A of F. 169852 (Whose Beneficial Ownership and Control Lies with F. 305952 on Behalf of which Messrs.Williamson and Cañedo Bring a Claim Under Article 1117)

499. As explained in the Statement of Claim, F. 305952, which is beneficially owned and controlled by Messrs. Williamson (through Clue) and Cañedo, holds shares in Oro Negro through another Mexican trust named F. 169852.[1292] Banco Nacional de México, S.A. de C.V. ("Banamex") is a trustee of F. 169852 and in that capacity, Banamex has held since May 28, 2014 15,533,514 shares in Oro Negro (49.347%), which comprise the trust estate of F. 169852.[1293] The trust estate is further divided into Estate A (*Patrimonio A*) and Estate B (*Patrimonio B*), whose

[1291] Exhibit **C-548** is a copy of a certification from Mr. Mondragón, a managing director of Oro Cooperatief, certifying that Axis Services and Axis Holding have respectively maintained 99.9% and 0.1% membership rights in Oro Cooperatief since May 2, 2016 through the date thereon (March 10, 2021). Attached as Exhibit **C-549** is an extract from the Netherlands Chamber of Commerce (KVK) showing that Mr. Mondragón is a managing director of Oro Cooperatief.

[1292] Claimants had previously indicated in their Statement of Claim that F. 305952 indirectly owns shares in Oro Negro by holding the beneficial interest of 3.2618% of F. 169852, which in turn owns 15,533,514 shares of Oro Negro. *See* SOC, ¶ 15 n. 19. As clarified herein, F. 305952 indirectly owns 1,013,345 shares of Oro Negro (3.22%) as a beneficiary of *Patrimonio A* of F. 169852.

Attached as Exhibit **C-550** is an unredacted copy of the First Amended Trust Agreement of F. 169852, dated March 8, 2013. With the Statement of Claim, Claimants produced a redacted copy of the First Amended Trust Agreement of F. 169852 as Exhibit **C-88**. During the document production phase, in response to México's complaint that this redacted copy is not legible, Claimants voluntarily provided México with Exhibit **C-550**.

Claimants further produced to México, in response to its Request No. 5, a copy of the Second Amended Trust Agreement of F. 169852, dated October 1, 2013, which incorporates the First Amended Trust Agreement of F. 169852 by reference. Claimants are introducing the same into the record as Exhibit **C-551**. Claimants confirm that there has been no subsequent change made to the trust agreement of F. 169852 since October 1, 2013.

[1293] *See* Oro Negro's Stock Registry Book, at *Asiento* No. 19, Exhibits **C-502** and **C-84**. F. 169852 still holds the same shares to date. *See* Oro Negro's Stock Registry Book, at *Asiento* No. 33, Exhibits **C-502** and **C-84**.

beneficial ownership and control lie with F. 305952[1294] and Fideicomiso 17272-1 ("F. 17272-1," a trust beneficially owned by Mexican pension funds)[1295] respectively:

F. 169852	**Beneficial Owner**	**Shares in Oro Negro**			**Total**	**% Shares**
		Series I Class D-1	Series II Class D-1	Series II Class D-2		
Patrimonio A	F. 305952	50,000	963,345		1,013,345	3.220%
Patrimonio B	F. 17272-1			14,520,169	14,520,169	46.147%
Total					**15,553,514**	**49.347%**

500. As indicated in the chart above, F. 305952, as a beneficiary of *Patrimonio A* of F. 169852, owns and controls 1,013,345 shares of Oro Negro (3.22%). México seeks to dispute this fact based on unfounded assertions buried in footnotes.[1296]

501. México itself does not deny that "50,000 Series I – Class D-1 shares"—which represent the fixed capital shares that Messrs. Williamson (through Clue), Cañedo (directly), and Gil (through Orobas) owned in Oro Negro—belong to F. 305952.[1297] However, it mistakenly asserts that *Patrimonio B* of F. 169852 encompasses both "*acciones Serie II Clase D-1 y Serie II Clase D-2 de Integradora*," thereby belonging to F. 17272-1.[1298]

[1294] First Amended Trust Agreement of F. 169852 (Mar. 8, 2013), at Clause 3(a) ("***Fideicomitente y Fideicomisario A:*** *HSBC México, S.A., Institución de Banca Múltiple, Grupo Financiero HSBC, División Fiduciaria, en ejecución y cumplimiento del fideicomiso identificado con el número F/305952, como fideicomitente y como fideicomisario del Patrimonio A*."), Exhibit **C-550**; Second Amended Trust Agreement of F. 169852 (Oct. 1, 2013), at p. 2 ("*HSBC México, S.A., Institución de Banca Múltiple, Grupo Financiero HSBC, División Fiduciaria, en ejecución y cumplimiento del fideicomiso identificado con el número F/305952 (en lo sucesivo el* ***"Fideicomiso HSBC"),*** *como fideicomitente y fideicomisario del Patrimonio A (en lo sucesivo, indistintamente, el* ***"Fideicomitente A"*** *o el* ***"Fideicomisario A")*** . . . ."), Exhibit **C-551**.

[1295] First Amended Trust Agreement of F. 169852 (Mar. 8, 2013), at Clause 3(b), Exhibit **C-550**; Second Amended Trust Agreement of F. 169852 (Oct. 1, 2013), at p. 2, Exhibit **C-551**.

[1296] SOD, ¶ 61 n. 70, ¶ 515 n. 614.

[1297] SOD, ¶ 73.

[1298] SOD, ¶ 61 n. 70.

502. That is wrong. The plain language of the Trust Agreement of F. 169852 makes clear that *Patrimonio A* of F. 169852 consist of all Class D-1 shares (*i.e.*, 50,000 Series I – Class D-1 shares and 963,345 Series II – Class D-1 shares),[1299] while *Patrimonio B* is limited to Class D-2 shares (*i.e.*, 14,520,169 Series II – Class D-2 shares).[1300] As a corollary, the Trust Agreements of F. 169852 further provides that the authority of F. 17272-1 to instruct Banamex, the trustee of F. 169852, is limited to Class D-2 shares of Oro Negro[1301] and that F. 305952 has the sole authority to instruct Banamex with respect to Class D-1 shares of Oro Negro.[1302]

503. In light of this plain language of the Trust Agreement of F. 169852, there can be no further dispute that F. 305952 is a beneficial owner and controller of 1,013,345 shares of Oro Negro (3.22%), which comprise *Patrimonio A* of F. 169852.

[1299] First Amended Trust Agreement of F. 169852 (Mar. 8, 2013), at Clause 7(b)(i) (*"**Patrimonio A**. El Fiduciario, previas instrucciones por escrito del·Fideicomisario A, suscribirá y pagará Acciones de la Clase 'D-1' del capital social de Oro Negro para que formen parte del Patrimonio A. Las Acciones de la Clase 'D-1' deber n ser pagadas (o capitalizadas cuando las Aportaciones Adicionales sean derechos de cobro frente a Oro Negro) con Aportaciones Adicionales hechas por el Fideicomisario A o por Rendimientos correspondientes al Patrimonio A. Lo anterior, en el entendido que las Acciones Clase 'D' que han sido ya adquiridas con Aportaciones Adicionales hechas por el Fideicomisario A deberán ser canjeadas por igual número de acciones Clase 'D-1' y ser registradas por el Fiduciario como parte del Patrimonio A.*") (emphasis added), Exhibit **C-550**; Second Amended Trust Agreement of F. 169852 (Oct. 1, 2013), at Clause 7(b)(i) (*"**Patrimonio A**. El Fiduciario, previas instrucciones por escrito del Fideicomisario A, suscribira y pagara Acciones de la clase 'D-1' del capital social de Oro Negro para que formen parte del Patrimonio A. Las Acciones de la clase 'D-1' deberan ser pagadas (o capitalizadas cuando las Aportaciones Adicionales sean derechos de cobra frente a Oro Negro) con Aportaciones Adicionales hechas por el Fideicomisario A o por Rendimientos correspondientes al Patrimonio A. Lo anterior, en el entendido que las Acciones clase 'D' que han sido ya adquiridas con Aportaciones Adicionales hechas por el Fideicomisario A, deberán ser canjeadas por igual número de Acciones clase 'D-1' y ser registradas por el Fiduciario como parte del Patrimonio A.*") (emphasis added), Exhibit **C-551**.

[1300] First Amended Trust Agreement of F. 169852 (Mar. 8, 2013), at Clause 7(b)(ii), Exhibit **C-550**; Second Amended Trust Agreement of F. 169852 (Oct. 1, 2013), at Clause 7(b)(ii), Exhibit **C-551**.

[1301] Second Amended Trust Agreement of F. 169852 (Oct. 1, 2013), at Clause 9 ("*El Fiduciario ejercerá los derechos corporativos y patrimoniales inherentes a las Acciones que formen parte del Patrimonio Fideicomitido conforme a lo dispuesto en la presente Cláusula Novena. Sujeto a lo dispuesto en la presente Cláusula, el Fideicomisario A sólo podrá instruir al Fiduciario respecto de las Acciones clase 'D-1' de Oro Negro, y el Fideicomisario B sólo podrá instruir al Fiduciario respecto de las Acciones clase 'D-2' de Oro Negro.*") (emphasis added), Exhibit **C-551**; First Amended Trust Agreement of F. 169852 (Mar. 8, 2013), at Clause 9 (same), Exhibit **C-550**.

[1302] *See* Second Amended Trust Agreement of F. 169852 (Oct. 1, 2013), at Clause 9, Exhibit **C-551**; First Amended Trust Agreement of F. 169852 (Mar. 8, 2013), at Clause 9, Exhibit **C-550**.

(iv) Mr. Williamson and Mr. Cañedo

504. In addition to their claims on behalf of the Mexican Enterprises and Clue, Messrs. Williamson and Cañedo bring claims in their own names under Article 1116 as shareholders of Oro Negro. In its Statement of Defense, México offers the irrelevant argument that Messrs. Williamson and Cañedo "*no se les puede pagar ninguna compensación directamente*" because of their "*reclamación presentada conforme el Artículo 1117*" on behalf of the Mexican Enterprises.[1303] But that makes no difference in the amount of damages that México is required to pay for its breaches of the NAFTA because the Mexican Enterprises are entitled to collect the damages in the amount that will make them whole, including the recovery of the value of their shares held in Oro Negro (30.737%). That is the basis of the claims Claimants pursue under Article 1117.

505. México seeks to confuse this reality with a discursive analysis about how many shares Mr. Williamson (or Mr. Cañedo) individually own in Oro Negro as an indirect shareholder. It engages in a strained calculation in its Statement of Defense,[1304] which leads it to the ultimate conclusion that "*conjunto, bajo estos distintos componentes de la presunta participación accionaria indirecta del Sr. Williamson en Oro Negro ascendería aproximadamente a 9.75%*"[1305] and that "*la presunta participación indirecta del Sr. Cañedo White en Integradora Oro Negro sería equivalente a la del Sr. Williamson (es decir, 9.71%)*."[1306]

506. Both figures are wrong. Messrs. Williamson and Cañedo each own one-third of the Mexican Enterprises that in turn hold 9,671,690 shares in Oro Negro (30.737%). By simple math,

[1303] SOD, ¶ 494.

[1304] SOD, ¶¶ 491-517.

[1305] SOD, ¶ 498 (emphasis added).

[1306] SOD, ¶ 516 (emphasis added).

Mr. Williamson and Mr. Cañedo individually own one third of 9,671,690 shares, *i.e.*, 3,368,788.677 shares (10.706%).

507. That, of course, is, in any event, irrelevant because Mr. Williamson and Mr. Cañedo are seeking damages on behalf of the Mexican Enterprises, which own 30.737% of Oro Negro's shares. If anything, it underlines the frivolous nature of México's scattershot bid to avoid adjudication of the merits. As México admits, "an award in the claimants' favor [under Article 1117] will make the enterprise whole," [1307] meaning that the Mexican Enterprises will be entitled to the compensation for their full injury (*i.e.*, their complete loss in value of 30.737% shares in Oro Negro). Messrs. Williamson and Cañedo do not seek double recovery in relation to their claims made on their own rights under Article 1116.

(v) Conclusion

508. Claimants directly and indirectly own approximately 43.2% of the shares of Oro Negro.[1308]

509. **The Direct Shareholder Claimants** (who are U.S. nationals) directly own 3,486,284 shares in Oro Negro (11.079%) and have maintained continuous ownership of the same shares since September 2016 through the present.

510. **The Grace Family Claimants** indirectly own 434,676 shares in Oro Negro (1.381%) through the Lorraine Grace Trust and the Nominee Company.[1309] Claimants have produced conclusive evidence showing that these Grace Family Claimants have been the sole and ultimate beneficiaries of the Lorraine Grace Trust since 2012, including as of May 30, 2016 when the Nominee Company became the registered holder of 434,676 shares in Oro Negro (1.381%) on

[1307] SOD, ¶ 536.

[1308] *See* **Appendix M** to this Reply.

[1309] Beneficiary Confirmation Statement and Nominee Declaration (Feb. 3, 2021), Exhibit **C-511**.

behalf of the Lorraine Grace Trust.[1310] The Nominee Company remains the owner of the same shares to date,[1311] so do the Grace Family Members, all U.S. citizens, remain the beneficial owners of the Lorraine Grace Trust to this day.[1312]

511. **The Mexican Enterprises**—*i.e.*, Axis Services, Axis Holding, and F. 305952—which **Messrs. Williamson and Cañedo** have owned and controlled at all times[1313] have maintained a continuous ownership of 9,671,690 shares in Oro Negro (30.737%) since May 2016 through the present. Axis Services became the registered shareholder of 1,565,462 shares in Oro Negro (4.975%) on May 30, 2016[1314] and remains so today.[1315] F. 305952 indirectly owns 1,013,345 shares of Oro Negro (3.220%) through F. 169852 (which has held said shareholding in Oro Negro in trust for F. 305952 since May 2014[1316]). Axis Services and Axis Holding indirectly own 7,092,883 shares in Oro Negro (22.542%) through Oro Cooperatief; the Axis Companies have remained the 100% owners of Oro Cooperatief since May 2, 2016.

B. México's "Standing" Objections Are Meritless

512. In its Statement of Defense, México raises a litany of objections that appear to contest Claimants' "standing" (or "*legitimidad procesal*") to pursue a claim against México for its breaches of the NAFTA under Articles 1116 and 1117, each of which is meritless.

[1310] *Id*., Exhibit **C-511**.

[1311] *See* Oro Negro's Stock Registry Book, at *Asiento* No. 33, Exhibits **C-502** and **C-84**.

[1312] Beneficiary Confirmation Statement and Nominee Declaration (Feb. 3, 2021), Exhibit **C-511**.

[1313] *See infra* Section III.B.3.

[1314] *See* Oro Negro's Stock Registry Book, at *Asiento* No. 26, Exhibits **C-502** and **C-84**.

[1315] *See* Oro Negro's Stock Registry Book, at *Asiento* No. 33, Exhibits **C-502** and **C-84**.

[1316] *See* Oro Negro's Stock Registry Book, at *Asiento* No. 19 (showing that as of May 28, 2014, F. 169852 held (i) 50,000 Series I – Class D-1 shares; (ii) 963,345 Series II – Class D-1 shares; and (iii) 14,520,169 Series II – Class D-2 shares), Exhibits **C-502** and **C-84**. F. 169852 still holds the same shares to date. *See* Oro Negro's Stock Registry Book, at *Asiento* No. 33, Exhibits **C-502** and **C-84**.

513. México's first objection is a "reflective loss" objection (in reality, not a standing objection, but a damages objection). It argues that, under NAFTA Article 1116, Claimants cannot claim "reflective losses," *i.e.*, the decrease in value of the Claimants' shares in Oro Negro.[1317] México's reflective loss objection is legally inchoate. In essence, it seeks to stretch the meaning of the NAFTA beyond what the treaty's language can allow.

514. México's second "standing" objection is that the Grace Family Claimants lack standing to assert a claim under NAFTA Article 1116 because their investments are held through an intermediate entity that is not based in a NAFTA state.[1318] That, of course, is really a *ratione personae* objection that seeks to read into the NAFTA's definition of an investor a requirement that any intermediate entities by which an investment is held be an entity constituted or organized in a Contracting State. Yet, the nationality of an intermediate entity through which Claimants hold shares in Oro Negro is immaterial on any understanding of Article 1116 or Article 1117, as ownership can be direct or indirect.

515. México third "standing" objection argues that Messrs. Williamson and Cañedo lack standing to advance claims on behalf of their local enterprises (*i.e.*, Clue, Axis Services, Axis Holding, and F. 305952) under Article 1117 because Messrs. Williamson and Cañedo have failed to show that they own or control them. [1319] That objection has no foundation in any facts, which indisputably establish that Messrs. Williamson and Cañedo collectively own *and* control the Mexican Enterprises and that Mr. Williamson own and control Clue.

[1317] SOD, ¶ 529.

[1318] SOD, ¶ 523 ("*En estas circunstancias, la Demandada sostiene que estas Demandantes no han cumplido con la carga de probar que tienen legitimación procesal para someter una reclamación a arbitraje*.").

[1319] SOD, ¶ 486 ("*Los Demandantes Williamson Nasi y Cañedo White, en calidad de accionista indirectos, carecen de legitimidad para presentar una reclamación conforme al Artículo 1117 al no cumplir con el requisito de propiedad o control de las Entidades Mexicanas*.").

516. Lastly, México alleges that Mr. Warren, Mrs. Irwin, Mr. Parsky and Mr. Witt (the "**Individual Claimants**") are not "investors" because they "*han presentado reclamaciones a nombre propio y en nombre de alguna cuenta de retiro individual, conocidas como 'Individual Retirement Account' (IRA) o en nombre de algún fideicomiso (trust) del que afirman ser 'propietarios' o controlar*"[1320]—*i.e.*, the Warren IRA, the Irwin Trust, the Parsky IRA, and the Witt IRA. That, of course, is false, because the Individual Claimants advance a claim in their own rights under Article 1116, and not on behalf of their respective IRAs and trust. While they cannot collect twice, nothing bars the Individual Claimants from exercising their rights granted under the NAFTA to pursue a claim against México for its breaches of the NAFTA under Article 1116.

1. The NAFTA Does Not Bar Claims for Reflective Loss

517. México's "reflective loss" objection is not a jurisdictional objection but a merits objection that goes to the extent of the recoverable damages. It seeks to prevent Claimants from recovering damages for the loss in value of their shares in a local company, Oro Negro, because, in México's submission, this would constitute impermissible "reflective loss." While México labels this as an objection to jurisdiction, it is ultimately a quantum argument: México does not deny that, even on its own farfetched reading of the NAFTA, Claimants could still bring claims (it simply suggests that they would not be able to claim damages for those claims).

518. México relies on an improbable argument: that because the NAFTA allows an investor to bring a claim in its own right (under Article 1116) as well as on behalf of a local enterprise that it owns or controls (under Article 1117), the Tribunal must therefore read into the NAFTA a restriction on "reflective loss" (*i.e.* a claim for the lost value of Claimants' Oro Negro shares). It does not seek to base this argument on any international law rules of treaty interpretation, but

[1320] SOD, ¶ 525.

merely its own submissions in this case and little more than one off-point NAFTA award. México's position fails as a matter of international law and has been rejected by the overwhelming majority of investor-State tribunals.

519. Under international law rules of treaty interpretation, neither Article 1116 nor Article 1117 can be read to prevent claims by Claimants for the loss in value of their shares in Oro Negro. Those provisions must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[1321]

520. Articles 1116 and 1117 could not be clearer. The former states in relevant part:

> An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under [the NAFTA] . . . and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

521. For its part, Article 1117 states in relevant part:

> An investor of a Party, on behalf of an enterprise of another 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 Party has breached an obligation under [the NAFTA].

522. There is simply no basis for reading into these provisions an additional restriction preventing investors from claiming "reflective loss."

523. *First*, the ordinary meaning of these provisions needs no gloss. Nowhere in Article 1116 or 1117 is the restrictive language that México seeks to read into these provisions found. Moreover, the phrase "loss or damage" contains no restriction (such as, "direct loss" or "non-reflective loss"). In accordance with Article 31(1) of the Vienna Convention, a good faith interpretation must take into account the consequences of the "commitments the [state] parties may be considered as having

[1321] Vienna Convention, Article 31(1), **CL-58**.

reasonably and legitimately envisaged."[1322] Accordingly, investment arbitration tribunals have consistently rejected attempts to read limiting terms into the language of treaty provisions that were not found in the text of the provisions or their contexts.[1323] NAFTA tribunals also have explicitly confirmed that Articles 1116 and 1117 provide the exclusive rules for determining standing under Chapter 11 of the NAFTA and that limiting terms that do not appear in the text of Articles 1116 and 1117 should not be read into the Treaty to "restrict[] claims of loss or damage."[1324] There is thus no basis to read additional language into that term to restrict it to "*daños directos*" or "*pérdidas sufridas por los accionistas como accionistas, y no por pérdidas reflejas o 'reflective loss*.'"[1325]

[1322] *Amco Asia Corp. and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (Sept. 25, 1983), ¶ 14(i) ("[A]ny convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged."), **CL-291**; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of Tribunal on Objections to Jurisdiction (May 24, 1999), ¶ 34, **CL-292**.

[1323] *See, e.g.*, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004), ¶¶ 36, 52 ("[I]t is not for tribunals to impose limits on the scope of BITs not found in the text . . . . [W]e do not believe that arbitrators should read in to BITs limitations not found in the text . . . ."), **CL-293**; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction (Apr. 30, 2010), ¶ 158 ("[H]ad the Parties wished to limit the definition of investment to particular types of assets or, to exclude certain assets such as loans, they could have embodied such restriction in this provision."), **CL-294**.

[1324] *Waste Management, Inc. v. United Mexican States II* ("*Waste Management II*"), ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 85 ("Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise. If the NAFTA Parties had wished to limit their obligations of conduct to enterprises or investments having the nationality of one of the other Parties they could have done so. Similarly they could have restricted claims of loss or damage by reference to the nationality of the corporation which itself suffered direct injury. No such restrictions appear in the text."), **CL-113**; *Mondev,* Award, ¶ 79 ("The Tribunal notes that Chapter 11 specifically addresses issues of standing and scope of application through a series of detailed provisions, most notably the definitions of 'enterprise', 'investment', 'investment of an investor of a Party' and 'investor of a Party' in Article 1139. These terms are used with care throughout Chapter 11. . . . Faced with this detailed scheme, there does not seem to be any room for the application of any rules of international law dealing with the piercing of the corporate veil or with derivative actions by foreign shareholders. The only question for NAFTA purposes is whether the claimant can bring its interest within the scope of the relevant provisions and definitions."), **CL-73**.

[1325] SOD, ¶¶ 529, 531.

524. Furthermore, the words "by reason of, or arising out of that breach" immediately following the phrase "loss or damage" also support a broad meaning. As the tribunal in *Methanex v. USA* observed, Articles 1116 and 1117 require only that "a claim of loss or damage . . . originates in the measure adopted or maintained by the NAFTA Party."[1326] This comprehensive language further undermines México's contention that shareholders asserting a claim under Article 1116 are *per se* prohibited from seeking the recovery of "reflective loss," irrespective of whether their loss has origin in the State's own wrongful measures. Faced with the exact same argument that México is advancing here, the tribunal in *Kappes v. Guatemala* found, in relation to nearly identical provisions of the DR-CAFTA, that the Contracting Parties could have "include[d] a reference to direct injury or direct causation in the Treaty provision, but they did not do so" and thus "the text of this provision would not support a conclusion that an investor is barred even from trying to establish, through a chain of causation, that it suffered injury in consequence of State conduct that immediately impacted at a downstream entity in which it holds shares."[1327]

525. *Second*, the context of these provisions confirms their non-restrictive nature. Each of these provisions expressly allows an investor to submit to arbitration a claim that a NAFTA party has breached one of its obligations under the NAFTA in the treatment of the investor's investment (for example, Article 1105's obligation to treat investments "in accordance with international law, including fair and equitable treatment and full protection and security"). An "investment" is defined broadly in Article 1139 (as an investment "owned or controlled directly or indirectly by

[1326] *Methanex Corp. v. United States of America* ("*Methanex*"), UNCITRAL, Final Award on Jurisdiction and Merits (Aug. 3, 2005), ¶ 26, **CL-151**.

[1327] *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemaa* ("*Kappes*"), ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections (Mar. 13, 2020), ¶ 130, **CL-295**.

an investor"[1328] and includes "an equity security of an enterprise," including "voting and non-voting shares," as well as "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise."[1329]

526. It would not have made any sense for the NAFTA Contracting Parties to have extended the Treaty protection to shares in a local enterprise, and to have granted an investor that has made a protected investment the ability to claim for damages, if that investor was prohibited from making claims to recover for the so-called "reflective loss." Indeed, the most common place loss that an investor will suffer as an owner of shares in an enterprise would be the loss in value of those shares. An artificial reading like México's was expressly rejected by the tribunal in the *Bogdanov* case. Faced with language similar to the NAFTA, the *Bogdanov* tribunal found that "damage inflicted on such company, which indirectly concerns the investor [as a shareholder], entitles the investor to seek treaty protection," noting that "[i]f not, the protection offered by bilateral and multilateral investment treaties would become rather illusory."[1330]

527. *Third*, México's reading of Articles 1116 and 1117 is inconsistent with the object and purpose of the NAFTA. Article 102 of the NAFTA lists as an objective of the treaty "to . . . increase substantially investment opportunities in the territories of the Parties."[1331] Chapter 11's protections are designed to further this objective and should be interpreted in light of this objective.[1332] Yet, if México's interpretation of Article 1116 of the NAFTA were correct, it would

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[1328] NAFTA, Article 1139 (emphasis added).

[1329] NAFTA, Article 1139 (emphasis added).

[1330] *Yury Bogdanov v. Republic of Moldova*, SCC Arbitration No. V(114/2009), Final Arbitral Award (Mar. 30, 2010), ¶ 67, **CL-296**.

[1331] NAFTA, Article 102(c).

[1332] *See Pope & Talbot v. Government of Canada,* ("*Pope & Talbot*"), Award on the Merits of Phase 2 (Apr. 10, 2001), ¶ 115 ("Article 102(2) of NAFTA itself requires the Parties 'to interpret and apply the provisions of this Agreement in light of the objectives set out in paragraph 1' thereof, which include 'increas[ing] substantially

leave a key category of investors—minority shareholders—entirely unprotected, unable ever to bring claims for the diminished value of their shares attributable to wrongful State conduct, because minority shareholders, unlike controlling shareholders, could not pursue Article 1117's alternative path of bringing claims on behalf of the local enterprise. This, of course, would defeat the object and purpose of the NAFTA, which is to protect foreign investors and their investments in the host State and provide effective recourse to investment arbitration. Indeed, should the Treaty be interpreted in a manner proposed by México, the NAFTA would provide considerably less protection to foreign investors than any of the multitude of bilateral and multilateral investment treaties.[1333] Thus, the international law rules of interpretation cannot support a bar to claims for "reflective loss."

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investment opportunities.'"), **CL-297**; *see also S.D. Myers, Inc. v. Government of Canada* ("*S.D. Myers*"), UNCITRAL, Second Partial Award (Oct. 21, 2002), ¶¶ 119-22 (observing that "[t]he purpose of virtually any investment in a host state is to produce revenue for the investor in its own state" and concluding in light of the objective stated in Article 102(2) that "[t]he investor may recover losses it sustains when, as a proximate cause of Chapter 11 breach, there is interference with the investment and the financial benefit to the investor is diminished."), **CL-298**.

[1333] Dolzer, R. and Schreuer, C., *Principles of International Investment Law*, 2012, p. 58 ("Minority shareholders too have been accepted as claimants and have been granted protection under respective treaties".), **CL-299**; *CMS Gas Transmission Company v. Argentine Republic* ("*CMS Gas v. Argentina*"), ICSID Case No. ARB/01/8, Decision on Jurisdiction (July 17, 2003), ¶ 48 ("The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders. . . . this is mostly the result of *lex specialis* and specific treaty arrangements that have so allowed, the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments . . . ."), **CL-78**; *RosInvestCo UK Ltd. v. Russia*, SCC Case No. V079/2005, Final Award (Sept. 12, 2010), ¶ 608 ("[M]odern investment treaty arbitration does not require that a shareholder can only claim protection in respect of measures that directly affect shares in their own right, but that the investor can also claim protection for the effect on its shares by measures of the host state taken against the company."), **CL-300**; *see also ST-AD GmbH v Republic of Bulgaria*, PCA Case No. 2011-06, Decision on Jurisdiction (July 18, 2013), ¶ 282, **CL-301**; *Suez, Sociedad General de Aguas de Barcelona S.A. & Inter Aguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (May 16, 2006), ¶ 51, **CL-302**; *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim) (Aug. 2, 2004), ¶¶ 39, 49, **CL-303**; *Lanco International Inc. v. Argentine Republic* ("*Lanco v. Argentina*"), ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal (Dec. 8, 1998), ¶¶ 12-14, **CL-304**; *Azurix Corp. v. Argentine Republic* ("*Azurix v. Argentina*"), ICSID Case No. ARB/01/12, Decision on Jurisdiction (Dec. 8, 2003), ¶ 62, **CL-305**; *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum (Feb. 19, 2019), ¶¶ 178, 202, **CL-306**; *RREEF Infrastructure (G.P.) Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/13/30 (June 6, 2016), ¶ 120, **CL-307**.

528. México does not even attempt to seek to justify its gloss on Articles 1116 and 1117 in relevant international law principles. Instead, it offers a series of irrelevant, uncompelling, and simply wrong arguments.

529. *First*, México contends that its reflective loss objection is consistent with the jurisprudence of the NAFTA. This is incorrect.

530. As explained in the Statement of Claim,[1334] NAFTA tribunals have overwhelmingly declined to adopt the restrictive interpretation of Articles 1116 and 1117 advocated by México. For instance, the *Pope & Talbot* tribunal found that "it could scarcely be clearer that claims may be brought under Article 1116 by an investor who is claiming for loss or damage to its interest in the relevant enterprise."[1335] Likewise, the *GAMI v. México* tribunal rejected México's objection, finding that "[t]he fact that a host state does not explicitly interfere with share ownership is not decisive," but that "[t]he issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment."[1336] Notably, in *GAMI v. México*, the claimant only held 14.18% shares in a local enterprise, and yet, the tribunal still explicitly affirmed that its claim under Article 1116 for reflective loss is not barred, stating that "the fact that GAMI is only a minority shareholder does not affect its right to seek the international arbitral remedy."[1337]

531. In the same vein, tribunals interpreting Articles 10.16.1(a) and (b) of the DR-CAFTA (which are largely identical to NAFTA Articles 1116 and 1117) also reached the same conclusion. For example, in *TECO v. Guatemala*, TECO owned a minority (and indirect) shareholding in a

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[1334] SOC, ¶¶ 354-57.

[1335] *Pope & Talbot*, Award in Respect to Damages (May 31, 2002), ¶ 80, **CL-72**; *see also United Parcel Service of America Inc. v. Government of Canada* ("*UPS*"), UNCITRAL, Award on the Merits (May 24, 2007), ¶¶ 32, 35, **CL-74**.

[1336] *GAMI Investments Inc. v. United Mexican States* ("*GAMI v. Mexico*"), UNCITRAL, Final Award (Nov. 15, 2004), ¶ 33, **CL-71**.

[1337] *GAMI v. Mexico*, Final Award, ¶ 37, **CL-71**.

Guatemalan enterprise, EEGSA and advanced a claim pursuant to Article 10.16.1(a), alleging that Guatemala had breached the FET obligation in connection with the manner in which it had imposed EEGSA's electricity tariffs. Though TECO remained in possession of its shares in EEGSA and TECO's shareholder rights were not interfered with by Guatemala, the tribunal still awarded TECO damages based on its portion of the loss of revenue that the tribunal concluded it would have obtained had EEGSA's tariffs been set in accordance with the FET obligation.[1338] In *Kappes v. Guatemala*, the tribunal, after extensively reviewing relevant CAFTA and NAFTA jurisprudence, concluded that there is no support for Guatemala's argument, textual or otherwise, that shareholders could not claim to recover reflective loss under Article 10.16.1(a) of the CAFTA (equivalent to NAFTA Article 1116).

532. México simply refuses to engage with this case law. Instead, it resorts to the State Parties' submissions under NAFTA Article 1128,[1339] including in *Pope & Talbot* and *GAMI*, where tribunals explicitly held that Article 1116 does not preclude recovery of reflective loss. In any event, Article 1128 only allows Contracting Parties to "make submissions to a Tribunal on a question of interpretation of this Agreement."[1340] It does not allow Contracting Parties to make binding interpretations of the NAFTA. Without more, the *ex post* views of a Contacting Party are of no relevance to the interpretation of the ordinary meaning of treaty terms under the NAFTA. That States would seek to limit their liability in arbitration proceedings by arguing that investors cannot claim for reflective loss should be no surprise. But it should not—and cannot—lead to the

[1338] *TECO Guatemala Holdings, LLC v. Republic of Guatemala* ("*TECO v. Guatemala*"), ICSID Case No. ARB/10/17, Award (Dec. 19, 2013), ¶ 742, **CL-147**.

[1339] SOD, ¶ 531.

[1340] NAFTA, Article 1128 (emphasis added), **CL-59**.

distortion of the clear meaning of the NAFTA's terms. That, of course, would require an amendment under the international law rules applicable to treaties.[1341]

533. Notwithstanding clear precedent against its position, México doubles down on its misstatement of NAFTA case law by relying exclusively on the *Bilcon* damages award. México's reliance on that award, however, is flawed.

534. To begin, México fails to acknowledge that, although the *Bilcon* tribunal found "in principle" that Article 1116 does not allow reflective loss claims, the tribunal actually rejected Canada's objection that the claimants should have filed an Article 1117 claim on behalf of their wholly-owned enterprise (Bilcon) and awarded claimants damages under Article 1116.

535. In any event, however, the *Bilcon* tribunal's reasoning relies on a confusion of derivative loss (*i.e.*, a claim on behalf of an enterprise for losses suffered by that enterprise, for example, through Article 1117) with reflective loss (*i.e.*, a claim for loss in the investor's own interest in an enterprises for actions taken against that enterprise, for example, through Article 1116)—a confusion that has been criticized in commentary.[1342]

[1341] Vienna Convention, Articles. 39-41, **CL-58**.

[1342] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, pp. 133-34 ("[A]rticle 1117 does *not* create a mechanism to claim for reflective loss but rather for the direct loss arising from a damage directly incurred by the company. The difference between article 1116 and article 1117 is that in the context of an article 1117 claim, the claim is not submitted by the afflicted company but by a third-party investor such as a shareholder. If damages are awarded to the claimant, they must be paid directly to the company that incurred the direct loss and not to the third-party investor that brought the claim. . . . [T]his mechanism of derivate actions must be distinguished from shareholders' claims for reflective loss which are *direct* claims of shareholders for their personal loss (i.e., the reduction in share value) caused to their own investment (i.e., their shares) by virtue of their own rights which are conferred upon them by the applicable IIA. The *reflective* nature of these claims arises from the fact that the loss was caused as a consequence of a measure initially affecting the locally incorporated company. Accordingly, not only it is erroneous to identify article 1117 as creating a mechanism to claim reflective loss but, in addition, if such claims are allowed under the NAFTA, as has been held by the vast majority of NAFTA Chapter 11 Tribunals, such claims, by definition, can only be brought under article 1116 of the NAFTA."), **CL-308**.

536. Further, the *Bilcon* tribunal addressed *only* the case of a majority or controlling shareholder (who thus has the choice to bring a claim under Article 1116 or Article 1117).[1343] Thus, its finding that permitting a reflective loss claim (in that case) under Article 1116 "would raise questions about the relationship" between that Article 1116 and Article 1117, "perhaps rendering Article 1117 inutile"[1344] is inapplicable in respect to this case where claimants could not bring a claim on behalf of Oro Negro (because they are not majority or controlling shareholders of Oro Negro).

537. Not only is it inapplicable to the present case, the *Bilcon* tribunal's reasoning in this regard is also incorrect. The NAFTA does not require an investor that may bring a claim under Article 1116 or Article 1117 to choose one or the other. Article 1117 offers a bespoke method for recovery by an investor on behalf of a local enterprise. As the *Kappes* tribunal explained in respect to virtually identical provisions of the DR-CAFTA, where the local enterprise remains a going concern, the controlling or majority shareholder (even with only a 51% shareholding) may choose to bring a claim "on behalf of" that enterprise or in its own name. The NAFTA offers two separate routes because making a claim under Article 1117 "could provide the going-concern enterprise with a potential route to far greater damages recovery, and therefore greater restored health, precisely because the claim could be brought for the enterprise's full injury regardless of its upstream shareholding structure."[1345]

538. *Second*, México argues that international law bars recovery of "reflective loss," invoking (what it says are) international law rules of diplomatic protection.

[1343] *Bilcon of Delaware et. al. v. Government of Canada* ("*Bilcon*"), PCA Case No. 2009-04, Award on Damages (Jan. 10, 2019), ¶ 77 ("[T]he Tribunal invited the Parties to consider the following points . . . : [C]ould the Parties please elaborate on the merits of the argument that the distinction between Articles 1116 and 1117 is, at least in cases where the investment is wholly owned and controlled by the investors, a 'formality' . . . ."), **RL-0029**.

[1344] *Bilcon*, Award on Damages, ¶ 371, **RL-0029**.

[1345] *Kappes*, Decision on Respondent's Preliminary Objections, ¶ 147, **CL-295**.

539. That approach, however, has been rejected by numerous tribunals. Since the award rendered in *Lanco v. Argentina* in 1998,[1346] investment treaty tribunals have consistently recognized the right of a shareholder, whether a majority or a minority shareholder, to bring a claim for reflective loss and that this right of action is separate and independent from the rights of the affected local enterprise.[1347] Revealingly, México fails to find a single decision that would support its assertion. That is because it has been categorically rejected. Notably, the *CMS* tribunal found that there was "no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders."[1348] It explained that "the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments."[1349]

540. Of course, even if such a rule could be said to exist as a matter of the customary international law of diplomatic protection, such rules would be displaced by the NAFTA's *lex specialis*. Even the ICJ in its *Diallo* decision (on which México relies) explicitly recognized that it was "bound to note that, in contemporary international law, the protection of the rights of

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[1346] *Lanco v. Argentina*, Preliminary Decision: Jurisdiction of the Arbitral Tribunal, ¶¶ 12-14, **CL-304**.

[1347] *See, e.g.*, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Decision on Jurisdiction (July 18, 2013), ¶ 282, **CL-301**; *Suez, Sociedad General de Aguas de Barcelona S.A. & Inter Aguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (May 16, 2006), ¶ 51, **CL-302**; *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), (Aug. 2, 2004), ¶¶ 39, 49, **CL-303**; *Azurix v. Argentina*, Decision on Jurisdiction, ¶ 62, **CL-305**; *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum (Feb. 19, 2019), ¶¶ 178, 202, **CL-306**; *RREEF Infrastructure (G.P.) Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/13/30 (June 6, 2016), ¶ 120, **CL-307**.

[1348] *CMS Gas v. Argentina*, Decision on Jurisdiction, ¶ 48, **CL-78**.

[1349] *CMS Gas v. Argentina*, Decision on Jurisdiction, ¶ 48, **CL-78**; *see also RosInvestCo UK Ltd. v. Russia*, SCC Case No. V079/2005, Final Award (Sept. 12, 2010), ¶ 608 ("[M]odern investment treaty arbitration does not require that a shareholder can only claim protection in respect of measures that directly affect shares in their own right, but that the investor can also claim protection for the effect on its shares by measures of the host state taken against the company."), **CL-300.**

companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments."[1350] Thus, "[i]n that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative."[1351] Tellingly, the NAFTA tribunals in *Mondev*, *Waste Management II*, and *GAMI* have explicitly concluded that the customary international law of diplomatic protection has no bearing in interpreting Articles 1116 and 1117 since said Articles provide the exclusive rules for determining standing under the NAFTA.[1352]

541. *Finally*, México offers one last-ditch attempt to get around the clear language of Articles 1116 and 1117. It claims that allowing Claimants to recover reflective losses "*interferiría con los procedimientos concursales aún pendientes*" and "strip [] away a corporate asset (the claim) to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors."[1353]

542. That makes no sense. In this arbitration, Claimants seek compensation from México and not from Oro Negro or its creditors. By allowing shareholders to bring claims for reflective loss on their own behalf, shareholders thus do not recover at the expense of creditors.

543. But even if a modicum of logic could be teased from this unrealistic policy argument, it would be entirely irrelevant to the interpretation of the NAFTA under international law rules.

[1350] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment (Preliminary Objections) dated 24 May 2007, 2007 I.C.J. Rep. 582, ¶ 88, **RL-0032**.

[1351] *Id*., **RL-0032**.

[1352] *GAMI v. Mexico*, Final Award, ¶ 30 ("The Tribunal however does not accept that *Barcelona Traction* established a rule that must be extended beyond the issue of the right of espousal by diplomatic protection. The ICJ itself accepted in *ELSI* that US shareholders of an Italian corporate entity could seise the international jurisdiction when seeking to hold Italy liable for alleged violation of a treaty by way of measures *imposed on that entity*."), **CL-71**; *see also Mondev* Award, ¶ 79, **CL-73**; *Waste Management II*, Award, ¶¶ 80, 85, **CL-74**.

[1353] SOD, ¶ 537.

There is no indication anywhere in the text of the NAFTA that an object and purpose of the Treaty is to provide protection to creditors.

544. México's "reflective loss" objection only serves to underscore just how desperate México's attempt to escape adjudication of Claimants' claims really is.

2. The Nationality of an Intermediate Company Is Irrelevant

545. México's second alleged "standing" objection argues that the Grace Family Claimants lack "standing" to assert a claim against México under Article 1116 because they own shares in Oro Negro through intermediate entities based in Bermuda (*i.e.*, the Lorraine Grace Trust and the Nominee Company, both incorporated in Bermuda)[1354] and also that Messrs. Williamson and Cañedo's and the Mexican Enterprises' shareholding through the Dutch entity Oro Cooperatief should have been put forward under the Netherlands-México BIT.[1355]

546. Yet, México fails to cite any serious sources in support of its striking assertion—not a single NAFTA decision (much less *any* decision rendered in an investor-State case (even outside the NAFTA context) or any international law case). The reason is obvious: there is no support.

547. To the contrary, numerous NAFTA tribunals have affirmed that the nationality of an intermediate entity is irrelevant under the NAFTA. The *Waste Management II* tribunal rejected such an objection by México under the NAFTA[1356] and found that "nationality of any intermediate holding companies is irrelevant to the present claim."[1357] It explained: "If the NAFTA Parties had wished to limit their obligations of conduct to enterprises or investments having the nationality of

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[1354] SOD, ¶ 524.

[1355] SOD, ¶¶ 521, 541.

[1356] *Waste Management II*, Award, ¶ 76, **CL-74**. There, the claimant, Waste Management, Inc., was a company incorporated in the United State which indirectly owned a Mexican subsidiary through intermediate holding companies incorporated in the Cayman Islands.

[1357] *Id*. at ¶ 85, **CL-74**.

one of the other Parties they could have done so."[1358] Numerous other tribunals have confirmed that if an investment treaty stipulates that the investment can be held directly or indirectly by the claimant—as it is the case in the NAFTA—then it is immaterial that the investment is held through an intermediate legal entity with the nationality of a third state.[1359]

548. Thus, there can be no doubt that indirect equity interests in Oro Negro are covered investments under Article 1139 of the NAFTA. Nothing in the NAFTA (in particular, Article 1139) supports the prohibition on indirect holdings through interposed entities in third countries.

3. Claimants Own and Control Clue, Axis Services, Axis Holding and F. 305952 and Have Standing To Assert Claims on Their Behalf Under NAFTA Article 1117

549. In this arbitration, Claimants bring claims on behalf of Clue, Axis Services, Axis Holding and F. 305952 pursuant to Article 1117 of the NAFTA. Article 1117 allows an investor to bring claims on behalf of a local enterprise if the investor "owns *or* controls directly *or* indirectly" that local enterprise.[1360] Claimants showed in their Statement of Claim that (i) Mr. Williamson owns *and* controls Clue by virtue of his 99.99% shareholding in that company and (ii) Messrs. Williamson and Cañedo collectively own *and* control Axis Services, Axis Holding, and F. 305952 (*i.e.*, the Mexican Enterprises) by virtue of their two-third shareholding and/or beneficial ownership in each of these Mexican Enterprises, which in turn own 30.737% of Oro Negro's shares.

[1358] *Id*., **CL-74**. The tribunal in *Waste Management II* also found that this conclusion would equally apply to claims made under Articles 1116 and 1117. *Id*. at ¶¶ 83-84, **CL-74**.

[1359] *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award (Oct. 7, 2003), ¶ 9.4.8, **CL-309**; *Mr. Franz Sedlemayer v. The Russian Federation*, SCC, Arbitration Award (July 7, 1998), ¶ 2.1.5, **CL-310**; *Ronal S. Lauder* v. *The Czech Republic* ("*Lauder v. Czech Republic*"), UNCITRAL, Final Award (Sept. 3, 2001), ¶ 47, **RL-0119**; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, (July 6, 2007), ¶¶ 121-24, **CL-311**; *Azurix v. Argentina*, Decision on Jurisdiction, ¶¶ 73-74, **CL-305**; *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award (Feb. 3, 2006), ¶¶ 115-22, **CL-312.**

[1360] NAFTA, Article 1117 (emphasis added), **CL-59**.

550. México (of course) contends that Claimants neither own nor control these Mexican entities.[1361]

551. On the law, México argues that the ownership of an (only) 66.66% interest is not sufficient for Messrs. Williamson and Cañedo to assert a claim on behalf of Axis Services, Axis Holding, and F. 305952, because the ownership limb of NAFTA Article 1117 requires the showing of "full" or "virtually full" of an enterprise[1362]—ignoring, of course, that Article 1117 may be satisfied with a showing of *de facto* or *de jure* control.

552. On the facts, México simply ignores that, even if the Article 1117's "ownership" condition required full ownership, Messrs. Williamson and Cañedo still have controlled the Mexican Enterprises and thus have standing to bring claims on behalf of them under Article 1117.

(i) Either a Shareholding Greater Than 50% or (as México Does Not Deny) De Facto or De Jure Control Will Satisfy the Conditions of Article 1117

553. México's attempt to bar jurisdiction as a matter of Article 1117 relies on one narrow (and implausible) ground. It does not deny that investors may demonstrate *de jure* control by showing that they have a controlling voice in the enterprise's decision-making bodies. Nor does it deny that investors may show *de facto* control by showing that they exercise control other than strictly through their legal ownership rights (*i.e.*, by bringing key know-how or controlling the enterprise's decision-making processes in other ways). Rather, México merely asserts that "ownership" requires nothing less than 100% ownership of a local enterprise. In support of this position, México relies on a single decision, the *B-Mex v. Mexico* decision.[1363]

[1361] SOD, Section IV(A)(3).

[1362] SOD, ¶ 540 ("*propiedad total o propiedad virtualmente total*").

[1363] *See* SOD, ¶ 540.

554. México's contention, of course, is wrong. As explained below, México's contention would effectively read into the NAFTA two definitions for "ownership" under Article 1117 – one that would require "full ownership" for the ownership condition under the provision and another that would only require majority ownership for the control condition. When called upon to clarify what qualifies as "ownership," México itself has defined ownership in its more recent treaties that (unlike the NAFTA) define "ownership" as "more than 50 per cent of the equity interest in [an enterprise]."[1364] There is no reason for it to adopt in this arbitration a position of convenience contrary to its prior position.

555. Even if México were correct, however, that would not bar jurisdiction in respect to claims brought on behalf of Clue (in which Mr. Williamson maintains 99.998% ownership). Rather, the only Article 1117 claims that this objection seeks to dismiss on ownership grounds are those advanced by Axis Services, Axis Holding, and F. 305952, in which Messrs. Williamson and Cañedo maintain 66.666% ownership. Even then, however, México does not deny that those two Claimants would still be able to bring Article 1117 claims on behalf of the Mexican Enterprises if they could establish *de jure* or *de facto* control.

556. Every NAFTA tribunal that has addressed the issue to date confirms that a mere showing of *de facto* or *de jure* control is sufficient to satisfy Article 1117.

557. The *Thunderbird* tribunal embraced a broad understanding of *de facto* control because "without owning the majority voting rights in shareholders meetings[,] [c]ontrol can also be achieved by the power to effectively decide and implement the key decisions of business activity of an enterprise."[1365]

[1364] Mexico – Sweden Bilateral Investment Treaty of 2000, Protocol, **CL-313**.

[1365] *Thunderbird*, Arbitral Award, ¶ 108, **CL-70**.

558. This was confirmed by the *B-Mex* tribunal, which found that "[t]here is no specific manner or form that 'control' must take."[1366] It specified that "[i]n the context of Article 1117, any ability to 'exercise restraining or directing influence over' or to 'have power over' a company would satisfy the ordinary meaning of control."[1367] This, according to the *B-Mex* tribunal, did not require that control be exercised by only one investor, but that multiple investors could show collective control: "Where they can show that their collective shareholding and voting rights confer upon them the legal capacity to control the Mexican Companies by aligning their votes, there is no further requirement that they are legally bound to do so."[1368] That is relevant here where Messrs. Williamson and Cañedo exercise control through collective shareholding and voting rights.

559. In *Joshua Nelson v. Mexico*, the tribunal found that Mr. Nelson, the claimant, had legal control over the local enterprise simply because he was a majority shareholder.[1369] In that case, México itself did not dispute that "majority ownership is a manner of legal control for purposes of NAFTA Article 1117."[1370] Its suggestion in this case that "ownership" would effectively have two meanings under Article 1117—*i.e.*, "virtually full ownership" for the "ownership" condition of Article 1117 and "majority ownership" for the "control" prong—is absurd. The *Nelson* tribunal also found that the claimant exercised *de facto* control because he was "the sole provider of crucial

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[1366] *B-Mex v. Mexico*, Partial Award, ¶ 212 (emphasis added), **CL-290**.

[1367] *Id*. (emphasis added), **CL-290**.

[1368] *Id.* at ¶¶ 223-24 (emphasis added), **CL-290**.

[1369] *Mr. Joshua Dean Nelson v. The United Mexican States, ("Joshua Nelson v. México")*, ICSID Case No. UNCT/17/1, Final Award (June 5, 2020), ¶ 163("[T]he Tribunal concludes that Mr. Nelson acquired majority ownership of Tele Fácil on 29 March 2016 and since that date, had legal control for purposes of NAFTA Article 1117."), **CL-314**.

[1370] *Id*. at ¶ 198 ("[I]t is undisputed by the Parties that majority ownership is a manner of legal control for purposes of NAFTA Article 1117."), **CL-314**.

technology for Tele Facil's corporate purposes" and because, as the funder of the company, Mr. Nelson controlled "the money spending and correlatively the company's actions."[1371]

560. As discussed in the following sections, any measured view of the facts will confirm that Messrs. Williamson and Cañedo can pursue Article 1117 claims on behalf of the Mexican Enterprises and Clue because they have maintained ownership and exercised control of those enterprises at all times, including when the Notice of Arbitration was filed on June 19, 2018. Tellingly, México does not deny that they do.

(ii) Clue Is Owned and Controlled by Mr. Williamson Under Article 1117

561. Mr. Williamson has standing to assert a claim on behalf of Clue under Article 1117 because he has owned or controlled Clue since its incorporation on August 15, 2000.

562. *First*, as of November 15, 2016, Mr. Williamson became the 99.998% owner of Clue and he has remained an owner at that level since.[1372] Thus even under México's "full or virtually full" ownership standard, Mr. Williamson has standing to assert a claim on behalf of Clue as he "owns" Clue.

563. *Second*, Mr. Williamson has exercised *legal control* because by virtue of his 99.998% ownership of Clue's capital stock—i.e., 49,999 out of all 50,000 outstanding shares—he has the legal capacity to control Clue through the company's General Shareholders' Meetings.[1373] Under

[1371] *Id.* at ¶¶ 202-03, **CL-314**.

[1372] Stock Registry Book of Clue, Exhibit **C-534**; Williamson Statement, **CWS-8**, ¶ 70.

[1373] As México acknowledges in *Joshua Nelson v. Mexico*, the shareholder who controls the General Shareholder's Meetings of a company shall be considered to have all requisite control over the company under Mexican corporate law and thus for purposes of NAFTA Article 1117. *See Joshua Nelson v. Mexico*, Respondent's Objection to the Jurisdiction of the Tribunal (June 13, 2018), ¶¶ 74-75 ("Pursuant to Article 178 of the GLMC [General Law of Mercantile Companies], legal control of an anonymous corporation resides in the General Shareholders Meeting . . . . Hence, whoever controls the General Shareholders Meeting has legal control of the company."), **CL-315**; *see also* Mexican General Law of Mercantile Companies (*Ley General de Sociedades Mercantiles*), Article 178 ("*La Asamblea General de Accionistas es el Organo Supremo de la Sociedad; podrá acordar y ratificar todos los actos y*

Clue's bylaws, a mere ownership of 50% of the company's capital stock is all that is required to call for and adopt any resolutions at Clue's Ordinary Shareholders' Meetings.[1374] For a narrow set of issues such as dissolution of the company and change of the name of the company, a holding of an Extraordinary Shareholders' Meeting is required,[1375] the quorum required for which being 65% of the capital stock on a first call and 50% of the capital stock on a second call.[1376] Resolutions at such Meetings can be adopted by the vote of 50% of the capital stock.[1377] All this means is that Mr. Williamson's ownership of 99.998% of Clue's capital stock has allowed him to legally control Clue's Shareholders' Meetings (*i.e.*, the company's "Supreme Governing Body"[1378]) for all purposes, without an exception.

564. *Third*, Mr. Williamson exercises *de facto* control of Clue because he "wield[s] pervasive influence over the decision-making" in Clue.[1379] Even prior to November 15, 2016, when Clue's shareholding was split equally between Mr. Williamson and his wife, Ms. Gomez, Mr. Williamson's 50% shareholding was sufficient to call for and adopt any resolutions at Ordinary Shareholders Meetings and to convene Extraordinary Shareholders Meetings on second calls and adopt any resolutions therein.[1380] In addition, Ms. Gomez has always followed the decisions that Mr. Williamson made in regard to Clue's businesses and investments and had always

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operaciones de ésta y sus resoluciones serán cumplidas por la persona que ella misma designe, o a falta de designación, por el Administrador o por el Consejo de Administración."), **CL-289**.

1374 *See* Bylaws of Clue (*Estatutos Sociales de "Clue", S.A. de. C.V.*), p. 21, Article 18, Exhibit **C-552**.

1375 *See id*. at p. 18, Article 9, Exhibit **C-552**.

1376 *Id*. at p. 21, Article 19, Exhibit **C-552**.

1377 *Id*., Exhibit **C-552**.

1378 *Id*. at p. 18, Article 8, Exhibit **C-552.**

1379 *B-Mex v. Mexico*, Partial Award, ¶ 240, **CL-290**.

1380 *See* Bylaws of Clue, p. 21, Article 18 and p. 21, Article 19, Exhibit **C-552**.

voted her shares with her husband, [1381] thereby allowing Mr. Williamson to effectively control all 100% of shareholder votes at all times and for all relevant purposes.

565. Likewise, Mr. Williamson has always had control of managerial decisions of Clue as the company's Chief Executive Officer and the Board of Director.[1382] Given the broad set of powers vested in him, [1383] Mr. Williamson has always had the authority to make key decisions in relation to Clue's administration and operation, and to the extent necessary, the remaining Board of Directors of Clue, *i.e.*, Ms. Gomez, and Mr. Felipe Williamson-Nasi, Mr. Williamson's brother,[1384] have always followed and endorsed Mr. Williamson's decisions.[1385]

566. As such, Mr. Williamson has always been the "driving force" in Clue and effectively controlled every decision, every investment, every move by Clue at all times.[1386]

[1381] Williamson Statement, **CWS-8**, ¶¶ 70-71.

[1382] Incorporation Deed of Clue, *Acuerdo Primero* (showing that Mr. Williamson, Ms. Gomez and Mr. Felipe Williamson-Nasi have sat on the Board of Clue since the company's incorporation), pp. 3-4, Exhibit **C-552**; Clue Attorney-In-Fact Certification, Exhibit **C-85**; Williamson Statement, **CWS-8**, ¶ 71.

[1383] As stated in Clue's incorporation deed, Mr. Williamson has been vested with a broad set of powers as an attorney-in-fact of the company which he can individually or jointly exercise with Ms. Gomez, including (i) General Power of Attorney For Litigation and Collections (*Poder General Para Pleitos y Coranzas*); (ii) General Power of Attorney for Acts of Administration (*Poder General Oara Actos de Aministracion*); General Power of Attorney for Administrative Acts in Labor Matters (*Poder Para Actos de Administración en Materia Laboral)*; General Power of Attorney to Open and Cancel Bank and Investment Accounts and to Draw Against the Same (*Poder Para Abir y Cancelar Cuentas Bancarias y de Inversion, y Girar Contra las Mismas*). Incorporation Deed of Clue, *Acuerdo Segundo*, pp. 4-7, Exhibit **C-552.**

[1384] Incorporation Deed of Clue, *Acuerdo Primero*, pp. 3-4, Exhibit **C-552**; Williamson Statement, **CWS-8**, ¶ 68.

[1385] Williamson Statement, **CWS-8**, ¶ 71.

[1386] *Thunderbird*, Arbitral Award, ¶ 107, **CL-70**.

(iii) Axis Services and Axis Holding Are Owned and Controlled by Messrs. Williamson and Cañedo Under Article 1117

567. Mr. Williamson (through Clue) and Mr. Cañedo collectively own and control 66.666% shares in each of Axis Services and Axis Holding, with Mr. Gil, their business partner, holding the remaining 33.333%.[1387]

568. By virtue of their majority shareholding, Messrs. Williamson and Cañedo hold legal control of the Axis Companies. The bylaws of both companies provide that resolutions at a General Members' Meeting (*Asamblea General de Socios*)—which is the "supreme governing body of the company"—can be adopted with a simple majority of the shares of the company, [1388] with three discrete decisions (amendments to the bylaws, change of corporate purpose, and increase in the obligations of members) requiring unanimous consent.[1389] In a nearly identical situation, the *B-Mex* tribunal found that the claimants there had the legal capacity to control their Mexican gaming companies, because they, by virtue of their majority ownership, had the power to, among others, "adopt shareholder resolutions for most of the company's affairs" and "veto all but a limited number of resolutions."[1390] Moreover, the *B-Mex* tribunal also found that legal control can be collectively maintained and exercised by a group of shareholders, notwithstanding that there is no binding agreement among them requiring them to vote their shares as a bloc.[1391]

[1387] For the avoidance of doubt, Claimants remind the Tribunal that Mr. Williamson has maintained and exercised control of Clue at all times including from the date of its incorporation to the present. By virtue of his control of Clue, Mr. Williamson has exercised control over Clue's 33.333% interest in each Mexican Enterprise (*i.e.*, Axis Services, Axis Holding, and F. 305952) at all times and even before he became the 99.998% owner of Clue in November 2016.

[1388] Bylaws (*Estatutos*) of Axis Holding, pp. 6-7, Article 13, Exhibit **C-540**; Bylaws (*Estatutos*) of Axis Services, pp. 6-7, Article 13, Exhibit **C-537**.

[1389] Bylaws of Axis Holding, pp. 6-7, Article 13, Exhibit **C-540**; Bylaws of Axis Services, pp. 6-7, Article 13, Exhibit **C-537**.

[1390] *B-Mex v. Mexico*, Partial Award, ¶ 228, **CL-290**.

[1391] *B-Mex v. Mexico*, Partial Award, ¶¶ 222-25, **CL-290**.

569. Messrs. Williamson and Cañedo have also exercised *de facto* control. Even with respect to those limited number of decisions requiring a unanimous vote, Messrs. Williamson and Cañedo have always been able to align the votes of Mr. Gil and will continue to do so, as the "majority rule" has been the foundational understanding and long-established business practice underlying their partnership arrangement.[1392] Messrs. Williamson, Cañedo, and Gil explain in their witness statements that, given the mutual understanding, they are generally aligned in relation to the management of their businesses and investments; and, in particular, that they did not have any disagreement with respect to decisions regarding the Axis Companies (and F. 305952 as well).[1393] To the extent that there will be any disagreement amongst the three partners regarding the Mexican Enterprises, they will follow their cherished majority rule, *i.e.*, if any two of them agree, the remaining person will accept and follow the majority decision.[1394] Thus, while Mr. Gill has freedom in making voting decisions, he has always voted—and would continue to vote—with Messrs. Williamson and Cañedo on decisions related to the Axis Companies.[1395]

570. Further, Messrs. Williamson and Cañedo constitute a majority of the Boards of Managers (*Consejo de Gerentes*) of both Axis Companies,[1396] where they have sat on since the incorporation of the companies, along with Mr. Gil. Pursuant to the bylaws governing the Board Meetings and

[1392] Second Gil Statement, **CWS-5**, ¶¶ 97-98; Second Cañedo Statement, **CWS-6**, ¶¶ 44-45; Williamson Statement, **CWS-8**, ¶¶ 87, 93. *See also B-Mex v. Mexico*, Partial Award, ¶ 240 (finding that the claimant-shareholders had *de facto* control of E-Games, because, among others, they were able to align the votes of the non-Claimant shareholders), **CL-290**.

[1393] Second Gil Statement, **CWS-5**, ¶¶ 97-98; Second Cañedo Statement, **CWS-6**, ¶ 44; Williamson Statement, **CWS-8**, ¶¶ 93, 96.

[1394] Second Gil Statement, **CWS-5,** ¶ 97; Second Cañedo Statement, **CWS-6**, ¶ 44; Williamson Statement, **CWS-8**, ¶ 87.

[1395] Second Gil Statement, **CWS-5**, ¶ 98.

[1396] Bylaws of Axis Services, p. 12, Article 21, Exhibit **C-537**; Bylaws of Axis Holding, p. 12, Article 21, Exhibit **C-540**; *see also* Second Gil Statement, **CWS-5**, ¶ 95; Second Cañedo Statement, **CWS-6**, ¶ 46; Williamson Statement, **CWS-8**, ¶¶ 88-89.

resolutions, being a majority of the Boards on their own, Messrs. Williamson and Cañedo have the authority to issue *all* Board Resolutions related to the administration of Axis Services and Axis Holding,[1397] again evidencing their "ability to exercise a significant influence on the decision-making" in Axis Services and Axis Holding.[1398]

571. Moreover, in both Axis Services and Axis Holding, Messrs. Williamson, Cañedo and Gil are vested with a broad set of powers as attorneys-in-fact of the companies, granting any two of them acting together the power to conclude "all kinds of agreements and perform any acts, even when they imply disposition or encumbrance of movable or immovable property of the company."[1399]

572. All of the above clearly establishes that Messrs. Williamson and Cañedo hold *de facto*, if not legal, control of the Axis Companies. In *B-Mex,* the tribunal concluded that investors exercised *de facto* control over a local enterprise for the purposes of Article 1117, even though (unlike here) the claimants' collective shareholding was insufficient to adopt "any resolution" at shareholder's meetings.[1400] This was because (according to the tribunal) (i) they had the veto power (*i.e.*, "sufficient shares (more than 25% or 30%) to veto any proposed shareholder resolutions. . . . [and]

[1397] Bylaws of Axis Services, p. 12, Article 21, Exhibit **C-537**; Bylaws of Axis Holding, p. 12, Article 21, Exhibit **C-540**.

[1398] *Thunderbird*, Arbitral Award, ¶ 107, **CL-70**.

[1399] Axis Services General Members' Meeting Minutes Book, p. 6 ("*Se otorga en favor de los señores José Antonio Cañedo White, Gonzalo Gil White y Carlos Enrique Williamson Nasi, para ser ejercido conjuntamente por cualesquiera dos de elfos, un Poder General amplísimo para Actos de Dominio, de conformidad con el tercer párrafo del artículo dos mil quinientos cincuenta y cuatro del Código Civil Federal y de sus artículos correlativos en todos y cada uno de los códigos civiles de las entidades federativas de los Estados Unidos Mexicanos, con todas las facultades de dueño, entre las que de manera enunciativa, mas no limitativa, se mencionan las de celebrar toda clase de convenios y realizar cualesquier actos, aun cuando impliquen disposición o gravamen de bienes muebles o inmuebles de la Sociedad.*"), Exhibit **C-553**; Axis Holding General Members' Meeting Minutes Book, p. 3 (same), Exhibit **C-554**.

[1400] *B-Mex v. Mexico*, Partial Award, ¶¶ 229, 236, **CL-290**.

to prevent a quorum from ever being reached for any Board meeting"[1401]); (ii) the claimants "wielded pervasive influence over the decision-making in" the local enterprise because, among others, the claimants controlled the Board; (iii) the claimants were able to always align the vote of the non-claimant shareholders; and (iv) the claimants had control over the incorporation of E-Games, as well as control over direction and purpose of the company.[1402]

(iv) Messrs. Williamson and Cañedo Have Standing To Assert a Claim on Behalf of F. 305952

573. México's claim that Messrs. Williamson and Cañedo cannot assert claims on behalf of F. 305952 is equally unfounded. México argues that only a trustee of a trust (in this case, HSBC) can control the trust and thus that Claimants lack standing to advance a claim on behalf of F. 305952 under Article 1117.[1403] That is wrong. As the tribunal in *B-Mex* stated: "In the context of Article 1117, any ability to 'exercise restraining or directing influence over' or to 'have power over' a company would satisfy the ordinary meaning of control" is sufficient, given that "[t]here is no specific manner or form that 'control' must take."[1404]

574. México's attempt to defeat jurisdiction over the claim of Messrs. Williamson and Cañedo on behalf of F. 305952 under Article 1117 does not withstand scrutiny. Not only do Messrs. Williamson and Cañedo clearly "own" F. 305952 as beneficiaries of 66.666%, they also "control" F. 305952 under the meaning of Article 1117.

575. *First*, Messrs. Williamson and Cañedo control F. 305952 through their authority to instruct the trustee in the administration of the trust and disposition of the trust estate. In particular, Clause

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[1401] *B-Mex v. Mexico*, Partial Award, ¶ 237, **CL-290**.

[1402] *B-Mex v. Mexico*, Partial Award, ¶ 240, **CL-290**.

[1403] SOD, ¶ 515 ("*[B]ajo su supuesta calidad de fideicomisario, carece de legitimidad para ejercer acciones en nombre y representación del Fideicomiso F-30592, ya que sólo el fiduciario (trustee) puede hacerlo.*").

[1404] *B-Mex v. Mexico*, Partial Award, ¶ 212, **CL-290**.

10(a) of the Trust Agreement of F. 305952 provides for the settlors' (*i.e.*, Clue, Orobas, and Mr. Cañedo) authority to jointly instruct the trustee (*i.e.*, HSBC)[1405] and Clause 6 of the Trust Agreement further stipulates that the trustee can only act pursuant to the terms set forth in the Trust Agreement and in accordance with the joint instructions of the settlors.[1406] Should HSBC act in disregard of instructions from the settlors, it will be then in breach of the provisions of the Trust Agreement, as well as the Mexican General Law of Credit Instruments and Operations, which obliges a trustee to fulfil the provisions of a trust agreement.[1407]

576. Messrs. Williamson, Cañedo, and Gil exercised such authority to instruct HSBC based on majority rule (as they have done for Axis Services and Axis Holding).[1408] Hence, Messrs. Williamson and Cañedo have always maintained and exercised control of F. 305952 through their authority to instruct HSBC, which then controlled *Patrimonio A* of F. 169852 through the latter's authority to instruct the trustee of F. 169852 (*i.e.*, Banamex).[1409]

577. Additionally, Messrs. Williamson and Cañedo, and not HSBC, formed F. 305952 and set the direction and purpose of the same by entrusting their shares of Oro Negro in F. 305952 and

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[1405] Trust Agreement of F. 305952 (Dec. 14, 2011), at Clause 10(a), Exhibit **C-542**.

[1406] Trust Agreement of F. 305952 (Dec. 14, 2011), at Clause 6 ("*el Fiduciario únicamente actuará en los términos establecidos en este Contrato y conforme a las instrucciones conjuntas que por escrito reciba de los Fideicomisarios*"), Exhibit **C-542**.

[1407] Mexican General Law of Credit Instruments and Operations (*Ley General de Títulos y Operaciones de Crédito*), Artcle 391 ("*La institución fiduciaria tendrá todos los derechos y acciones que se requieran para el cumplimiento del fideicomiso, salvo las normas o limitaciones que se establezcan al efecto, al constituirse el mismo; estará obligada a cumplir dicho fideicomiso conforme al acto constitutivo; no podrá excusarse o renunciar su encargo sino por causas graves a juicio de un Juez de Primera Instancia del lugar de su domicilio, y deberá obrar siempre como buen padre de familia, siendo responsable de las pérdidas o menoscabos que los bienes sufran por su culpa.*"), **CL-316**; Mexican Credit Instituions Law (*Ley de Instituciones de Crédito*), Article 80 ("*La institución responderá civilmente por los daños y perjuicios que se causen por la falta de cumplimiento en las condiciones o términos señalados en el fideicomiso, mandato o comisión, o la ley.*"), **CL-317**.

[1408] Second Gil Statement, **CWS-5**, ¶¶ 97-98; Second Cañedo Statement, **CWS-6**, ¶ 49; Williamson Statement, **CWS-8**, ¶¶ 95-96.

[1409] Second Cañedo Statement, **CWS-6**, ¶ 49.

further directing HSBC to place them in F. 169852 in trust for F. 305952. HSBC bears no economic risks and benefits of said shares in Oro Negro; nor will it be responsible for any actions taken pursuant to Claimants' instructions.[1410] This is significant because NAFTA tribunals have taken into account factors like exposure to economic consequences of decisions in an enterprise and control over the incorporation, direction, and purpose of an enterprise are relevant to deciding whether investors exert *de facto* control. [1411]

578. Thus, there can be no doubt that Messrs. Williamson and Cañedo can pursue a claim on behalf of F. 305952 under Article 1117.

4. Individual Claimants Have Made Protected Investments in México and Can Bring Claims Under Article 1116.

579. In its final "standing" objection, México argues that Claimants Mr. Warren, Mrs. Irwin, Mr. Parsky and Mr. Witt (collectively, the "**Individual Claimants"**), who own shares in Oro Negro through the individual retirement accounts (IRAs) and trust to which they are sole beneficiaries[1412] are not "investors," because they have "*[r]eclamaciones [d]uplicadas*" with Frederick J. Warren IRA, Genevieve T. Irwin 2002 Trust, Gerald L. Parsky IRA, and Robert M. Witt IRA.[1413]

[1410] Trust Agreement of F. 305952 (Dec. 14, 2011), at Clause 12(f), Exhibit **C-542**.

[1411] *Thunderbird*, Arbitral Award, ¶ 108 (if a person made key decisions with an "expectation to receive an economic return for its efforts and eventually be held responsible for improper decisions," one could "conceive the existence of a genuine link yielding the control of the enterprise to that person"), **CL-70**; *see also B-Mex v. Mexico*, Partial Award, ¶¶ 239-40, **CL-290**.

[1412] Warren IRA Account Statement, Exhibit **C-B.16**; Irwin Trust Trust Agreement, Exhibit **C-B.19**; Parsky IRA Account Statement, Exhibit **C-B.21**; Witt IRA Account Statement, Exhibit **C-B.29**.

[1413] *See* SOD, ¶ 525.

580. For the avoidance of doubt, and as stated in Claimants' Statement of Claim,[1414] the Individual Claimants and their respective IRAs and trust do not seek double recovery in respect of their overlapping equity interest in Oro Negro.

581. Yet, why México would claim that these Individual Claimants are not "actual investors" remains a mystery, especially given that it does not contest the U.S. nationality of the Individual Claimants nor their beneficial ownership of the respective IRAs and trust. As explained, Individual Claimants' indirect equity interest in Oro Negro undoubtedly qualify as "investment" under NAFTA Article 1139, whether it's characterized as "an equity security of an enterprise"[1415] or "an interest in enterprise that entitles the owners to share in income or profits of the enterprise."[1416] As a U.S. investor with protected investment in México, each Individual Claimant mostly definitely can pursue a claim in their own rights under Article 1116, irrespective of their respective IRAs and trust's participation in this proceedings. Article 1116 states "[a]n investor of a Party *may* submit to arbitration under this Section a claim that another Party has breached an obligation" under various provisions of the NAFTA.[1417] Given this permissive language of Article 1116 of the NAFTA, and given the facts that each Individual Claimant independently satisfy all jurisdictional requirements, México's purported jurisdictional objection to the Individual Claimants must be rejected.

C. Messrs. Williamson and Cañedo Are U.S. Nationals Who May Bring Claims Against México Under the NAFTA

582. In the Statement of Defense, México objects to the Tribunal's jurisdiction *ratione personae* over Messrs. Williamson and Cañedo on the grounds that they hold Mexican citizenship. A plain

[1414] SOC, ¶ 15.

[1415] NAFTA, Article 1139(b), **CL-59**.

[1416] NAFTA, Article 1139(e), **CL-59**.

[1417] NAFTA, Article 1116 (emphasis added), **CL-59**.

reading of the NAFTA as well as international law demonstrates that Messrs. Williamson and Cañedo qualify as U.S. nationals under the NAFTA with jurisdiction *ratione personae* to bring this arbitration against México.

583. México ignores the dispute-resolution regime established by the NAFTA and misstates international jurisprudence to argue that Messrs. Williamson and Cañedo cannot bring a claim against México under NAFTA because, in addition to being a U.S. citizen and permanent resident, respectively, each is also a Mexican national. The Tribunal has jurisdiction *ratione personae* over both Messrs. Williamson and Cañedo. Neither the NAFTA nor the UNCITRAL Rules prevent persons with multiple nationalities from protections afforded to U.S. nationals under the Treaty, nor do they exclude claims by natural persons holding the nationalities of multiple Treaty Parties. To the contrary, governing international law allows Messrs. Williamson's and Cañedo's claims against México. As does the NAFTA. Accordingly, Respondent's litany of factual assertions apparently designed to prove the undisputed fact that Messrs. Williamson and Cañedo are also Mexican nationals is irrelevant. Further, Respondent's plea that the Tribunal revise the NAFTA to incorporate a dominant and effective nationality test defies international law, as this Tribunal cannot read into the Treaty a jurisdictional requirement that the contracting States did not include. México also ignores that Messrs. Williamson and Cañedo's dominant and effective nationalities are their United States nationalities.

1. The NAFTA Permits Claims by Dual Nationals, and Respondent's Legal Arguments to the Contrary Are Unpersuasive

584. It is indisputable that the text of the NAFTA, as *lex specialis* of this case, governs interpretive disputes, and that the Treaty must be interpreted as directed by Article 31 of the Vienna

Convention.[1418] Under NAFTA Article 1116, "[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation" under various provisions of the NAFTA.[1419] NAFTA Article 1139 defines an "investor of a Party" as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment."[1420] Article 201 of the NAFTA clearly defines "national" as "a natural person who is a citizen or permanent resident of a Party."[1421] The NAFTA does not condition a national's right to bring a claim on his holding only one nationality nor on holding the nationality of only one Treaty Party and not another. Nor does the NAFTA contain any language prohibiting claims by dual nationals. Rather, the Treaty here "contains a clear definition of who is to be considered a national." [1422] In this case, as conclusively established by Claimants' submissions, Mr. Williamson, a "citizen" of the United States, and Mr. Cañedo, a "permanent resident" thereof, are "national[s]" of a Party, here the United States. Thus, both men satisfy the definition of "national" in the NAFTA, plain and simple. Importing a restriction on claims by dual nationals or denying a claim by a dual national because of his dual nationality would fly in the face of the straightforward language of the Treaty, which plainly allows claims by "a national . . . of such Party."[1423]

[1418] Vienna Convention, Article 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treat in their context and in the light of its object and purpose."), **CL-58**.

[1419] NAFTA Article 1116, **CL-59**.

[1420] NAFTA Article 1139, **CL-59**.

[1421] NAFTA Article 201, **CL-67** (emphasis added).

[1422] *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt ("Siag v. Egypt")*, ICSID Case No. ARB/05/15, Decision on Jurisdiction (Apr. 11, 2007), ¶ 198, **CL-318**.

[1423] NAFTA Articles 1116, 1139, **CL-59**.

585. México's cursory suggestion that, as nationals of México, Messrs. Williamson and Cañedo are not entitled to file an international investment claim against México,[1424] completely inverts the plain text of the NAFTA. Under México's interpretation, a person holding nationalities of two Treaty Parties, such as Messrs. Williamson or Cañedo, would not be a national of *either* Party *under any circumstances*, despite that he is plainly "a natural person who is a citizen or permanent resident of a Party"[1425] and thus, under the NAFTA, "a national . . . of such Party."[1426] That interpretation is nonsensical.

586. To achieve its desired result, México would have the Tribunal read, *sub silentio*, the restrictive words "and only of that Party" into the Treaty so that the definition of "national" would read: "a natural person who is a citizen or permanent resident of a Party *and only of that Party*." Such a rewriting of the NAFTA would exceed the Tribunal's power and constitute an "illegitimate revisions of the terms of the [investment treaty] and the [domestic law as to nationality]."[1427] Whether Messrs. Williamson and Cañedo are Mexican nationals or nor is immaterial to whether they are "citizen[s] or permanent resident[s] of [the United States]."[1428]

587. The absence of any exclusion of claims by dual nationals is consistent with express language in, and the structure of, Article 1120 of the NAFTA that by necessity permit such claims. NAFTA Article 1120 explicitly and equally allows investors to submit claims under either

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[1424] SOD, ¶ 574.

[1425] NAFTA Article 201, **CL-67**.

[1426] NAFTA Article 1139, **CL-59**.

[1427] *Siag v. Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction , ¶ 201 ("The Tribunal finds that this case does not present a situation where there is scope for international law principles to override the operation of Egyptian domestic law as to nationality. To do so would in effect involve the illegitimate revision of the terms of the BIT and the Nationality Law by the Tribunal."), **CL-318**.

[1428] NAFTA Article 201, **CL-67**.

UNCITRAL Rules *or* the ICSID Convention, at the disputing investor's choice.[1429] While the ICSID Convention expressly restricts claims by dual nationals,[1430] the UNCITRAL Rules contain no such jurisdictional restriction. Specifically, the ICSID Convention restricts jurisdiction to "any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State,"[1431] and not only defines "national of another Contracting State" as "any natural person who had the nationality of a Contracting State *other than the State party to the dispute*" on the relevant dates, but also affirmatively states that the definition "*does not include any person who on either date also had the nationality of the Contracting State party to the dispute*."[1432] In stark contrast, the UNCITRAL Rules contain no language hinting, or even amenable to an interpretation, that claims brought by dual nationals are barred, leading to the natural conclusion that they are thus permitted, provided the applicable investment instrument does not bar them. The availability of both arbitral fora in the NAFTA means a disputing investor may choose the rules applicable in an arbitration that he/she initiates, and any consequences flowing from that selection. In this case, Claimants made a valid and binding choice to proceed against México under the UNCITRAL rules, which contain no jurisdictional restriction on dual nationals. Given the choice provided in Article 1120 of the NAFTA and the absence of any express prohibition on dual nationals bringing claims in either the Treaty or the UNCITRAL Rules, the only logical conclusion supported by the structure of the NAFTA itself is that claims by dual nationals are permitted.

[1429] NAFTA, Article 1120, **CL-59**.

[1430] ICSID Convention, Article 25(2), **CL-60**.

[1431] ICSID Convention, Article 25(1), **CL-60**.

[1432] ICSID Convention, Article 25(2) (emphasis added), **CL-60**.

(i) The Broader Context of the NAFTA Parties' Contracting History Demonstrates that Dual Nationals May Bring Claims Under the NAFTA and UNCITRAL Rules

588. *First*, the NAFTA Parties have shown that when they intend to restrict claims by dual nationals under a Treaty, they will include language to that effect in the Treaty. The United States-México-Canada Agreement ("USMCA"), which replaced NAFTA, was adopted in November 2018 and entered into force in July 2020. The USMCA states in Chapter 14, Investment, that *"*investor of a Party means a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party, provided however that: *(a) a natural person who is a dual citizen is deemed to be exclusively a national of the State of his or her dominant and effective citizenship*."[1433] Unlike the NAFTA, the USMCA's investor-state dispute settlement system is limited by its Annex 14-D only to disputes involving the United States and México.[1434] In effect, this means that as recently as 2018, México negotiated and executed an investor-state dispute settlement regime with the United States that expressly allows claims by dual nationals but restricts the pool of dual nationals who can advance those claims to those who have the dominant and effective citizenship of the other contracting State that is not a party to the dispute. In light of the USMCA's plain language restricting claims by dual nationals, México cannot now argue that the NAFTA, which contains no such language, secretly *does* restrict claims by dual nationals as well.

589. It should be noted that while the NAFTA Parties drafted and signed the USMCA, that agreement was designed to *replace* the NAFTA and provide materially different protections. Thus, the provisions therein do not apply retroactively to restrict dual national claims under the NAFTA.

[1433] USMCA, Article 14.1 (emphasis added), **CL-319**.

[1434] USMCA, Annex 14-D, **CL-319**.

Similarly, the USMCA does not evidence the intent that the Parties had in drafting the NAFTA, except insofar as to show that if the Parties had intended to restrict claims by dual nationals in the NAFTA, they would have done so with express language.

590. *Second*, the NAFTA contracting parties have not negotiated and issued any interpretive note that would advise Tribunals adjudicating claims in future investment disputes of the proper treatment of dual nationals under the NAFTA's nationality provisions. The interpretive notation procedure is contemplated in Article 2001 of the NAFTA, which creates the Free Trade Commission and declares that it "shall: . . . supervise the implementation of this Agreement; oversee its further elaboration; [and] resolve disputes that may arise regarding its interpretation or application."[1435] Being so empowered, in 2001 the Free Trade Commission, representing all three NAFTA Parties, famously issued an interpretive note regarding the minimum standard of treatment codified by the Treaty.[1436] México offers no explanation as to why it and the NAFTA parties did not opt to use that procedure here. As one of only three NAFTA Parties, México has had access to the interpretive tools of the Free Trade Commission for nearly thirty years, but never elected to use them to explain its view that the NAFTA barred investment claims brought by dual nationals. México cannot now ask the Tribunal to rewrite the NAFTA to exclude dual nationals—which standing alone would be an impermissible revision of the *lex specialis*—when it has had ample opportunity, both during negotiation of the Treaty and afterwards, to codify its desired interpretation.

[1435] NAFTA, Article 2001(2).

[1436] NAFTA, Free Trade Commission: Notes of interpretation of certain Chapter 11 provisions (July 31, 2001), **CL-320**.

591. *Third*, when México has intended to exclude dual nationals from investment treaties, it has done so with express language. For example, the México-Australia BIT of 2005 and the México-Uruguay BIT of 1999 expressly prohibit dual nationals holding the nationalities of both contracting Parties from filing arbitral claims.[1437] México has also limited claims by dual nationals under investment treaties by expressly including a dominant and effective nationality test. In addition to doing so in the USMCA, México implemented such a test in the 2014 México-Panama FTA, as well in multilateral agreements such as the Pacific Alliance Additional Protocol of 2014 (signed by México, Peru, Chile and Colombia), and the Central America-México FTA of 2011, signed by México and the Central American Common Market (consisting of Guatemala, Honduras, El Salvador, Nicaragua and Costa Rica), all of which expressly define "*inversionista de una Parte . . . considerando, sin embargo, que una persona natural que tiene doble nacionalidad se considerará exclusivamente un nacional del Estado de su nacionalidad dominante y efectiva*."[1438] At the same time, México has negotiated other equivalent treaties without a restriction on dual nationals. For example, the nearly concurrent México-Turkey BIT and Kuwait-México BIT of 2013, as well as the Bahrain-México BIT of 2012 all provide, in relevant part, that "'*inversionista de una Parte Contratante' significa: . . . una persona fisica que tenga la nacionalidad de una Parte Contratante de conformidad con su legislación aplicable*."[1439] There is no mention of dual nationals in these treaties, indicating that dual nationals are permitted to bring claims under them. Given that México

[1437] México-Australia Bilateral Investment Treaty, Article 1(c)(i)(3) ("This Agreement shall not apply to a natural person having nationality or citizenship of both Contracting Parties in accordance with their applicable laws.") (terminated Dec. 30, 2018), **CL-61**; México-Uruguay Bilateral Investment Treaty, Article 1(3)(b) ("*Sin embargo, este Acuerdo no se aplicará a inversiones realizadas por personas físicas que sean nacionales de ambas Partes Contratantes*."), **CL-62**.

[1438] Free Trade Agreement between the United Mexican States and the Republic of Panama, Article 10.1, **CL-412**; Additional Protocol to the Framework Agreement of the Pacific Alliance, Article 10.1, **CL-203**; Free Trade Agreement between México and Central America México, Article 11.1, **CL-321**.

[1439] México-Turkey Bilateral Investment Treaty, Article 1, **CL-322**; Kuwait-México Bilateral Investment Treaty, Article 1.6(b), **CL-323**; Bahrain-México Bilateral Investment Treaty, Article 1.6(b), **CL-324**.

has signed treaties that do not have the dual nationals restriction both before and after signing treaties that do have the restriction, this necessarily means that the inclusion, or lack thereof, of a limiting phrase with regard to dual nationality has meaning. Here, we must give meaning to the fact that the drafters did not include an exclusion for dual nationals in the text of the NAFTA.

592. In addition, México knows how to negotiate and sign an investment treaty that does not permit arbitration claims to be filed under the UNCITRAL Rules, which permit claims by dual nationals. For instance, the United-Kingdom-México BIT of 2006 expressly permits investors to submit a claim to arbitration under the ICSID Convention, but not under UNCITRAL Rules,[1440] whereas fundamentally all of México's other BITs do expressly permit arbitration under the UNCITRAL Rules.

593. *Fourth*, the United States too has signed other investment treaties that include a restriction against claims by dual nationals, typically in the form of a dominant and effective nationality test. For instance, Article 10.28 of the DR-CAFTA, signed by the United States in 2005, states that "investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality."[1441] In bilateral examples, the 2005 United States-Uruguay BIT, the 2006 Peru-United States FTA, the 2007 Korea-United States FTA, and the 2007 Panama-United States TPA, among others, all provide that "investor of a Party" means "a Party or state enterprise thereof, or a national or an enterprise of a Party, that

[1440] *See* United Kingdom-México Bilateral Investment Treaty, **CL-325**. This Treaty also permits claims pursuant to the PCA Arbitration Rules.

[1441] The Dominican Republic – Central America – United States Free Trade Agreement, Article 10.28, **CL-326**.

attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, *that a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship*."[1442] Even the U.S. 2012 Model BIT provides in its definition of "investor of a Party" "that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality."[1443] These examples demonstrate that the United States knows how to incorporate a restriction on dual nationals into its investment treaties, and will expressly do so when it wants to do so.

594. On the other hand, the United States has also entered into investment treaties that do not include any restriction on the basis of dual nationality, such as the United States-Bolivia and the United States-Jordan BITs, among others.[1444]

595. The United States has also entered into several bilateral investment treaties that do not offer investors recourse under the UNCITRAL Rules.[1445]

596. *Fifth*, the treaty practice of Canada, the third NAFTA Party, also demonstrates that the Parties know how to and will preclude claims by dual nationals through explicit language when they so desire. No fewer than *fifteen* of the BITs that Canada has concluded have excluded

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[1442] *See* United States-Uruguay Bilateral Investment Treaty, Article 1 (emphasis added), **CL-327**; Free Trade Agreement between the United States of America and Peru, Article 10.28, **CL-328**; Trade Promotion Agreement between the United States and Panama, Article 10.29, **CL-329**; Free Trade Agreement between the United States and the Republic of Korea, Article 11.28, **CL-330**.

[1443] United States Model Bilateral Investment Treaty, Article 1, **CL-331**.

[1444] *See* United States-Bolivia Bilateral Investment Treaty, **CL-332**; United States-Jordan Bilateral Investment Treaty, **CL-333**.

[1445] *See, e.g.*, Senegal -United States Bilateral Investment Treaty, **CL-334**; Democratic Republic of the Congo - United States Bilateral Investment Treaty, **CL-335**; Morocco - United States Bilateral Investment Treaty, **CL-336**; Turkey - United States Bilateral Investment Treaty, **CL-337**; Cameroon - United States Bilateral Investment Treaty, **CL-338**; Bangladesh - United States Bilateral Investment Treaty, **CL-339**; Grenada - United States Bilateral Investment Treaty, **CL-340**; Congo - United States Bilateral Investment Treaty, **CL-341**; Tunisia - United States Bilateral Investment Treaty, **CL-342**; Sri Lanka - United States Bilateral Investment Treaty, **CL-343**.

nationals of both contracting parties from the relevant definition of "investors" and thereby expressly prohibited claims brought by dual nationals.[1446] One of these BITs predates the NAFTA, and several others were concluded within a few years of the NAFTA's enactment. Moreover, Canada has entered into at least *twelve* BITs that expressly impose a dominant and effective nationality test.[1447] These examples indicate that Canada's investment treaties also do not automatically imply restrictions on dual nationals bringing arbitral claims. Any contrary interpretation would implicate an absurd position: that these nuanced differences among its many investment treaties are extraneous and contradictory.

597. *Sixth*, México and Canada, along with several other countries, signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership in 2018 ("CPTPP"). The CPTPP incorporates by reference the majority of provisions of the aborted Trans-Pacific Partnership ("TPP") agreement signed by several states including all three NAFTA Parties in 2016.[1448] Neither the TPP nor the CPTPP contains *any restriction on dual nationals bringing arbitral claims*, whether as an outright prohibition or as a dominant and effective nationality test. This stands in

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[1446] *See* Canada-Uruguay Bilateral Investment Treaty of 1991, Article I(e), **CL-344**; Canada - South Africa Bilateral Investment Treaty, Article I(g), **CL-345**; Canada - Romania Bilateral Investment Treaty of 1996, Article I(f), **CL-346**; Canada – Venezuela Bilateral Investment Treaty, **CL-347**; Canada - Ecuador Bilateral Investment Treaty, Article I(g), **CL-348**; Barbados - Canada Bilateral Investment Treaty, Article I(g), **CL-349**; Canada - Croatia Bilateral Investment Treaty, Article I(e), **CL-350**; Canada - Lebanon Bilateral Investment Treaty, Article I(e), **CL-351**; Armenia - Canada Bilateral Investment Treaty, Article I(g), **CL-352**; Canada - Uruguay Bilateral Investment Treaty of 1997, Article I(e), **CL-353**; Canada - Peru Bilateral Investment Treaty, Article I, **CL-354**; Canada - Romania Bilateral Investment Treaty of 2009, Article I(h), **CL-355**; Canada - Jordan Bilateral Investment Treaty, Article I(w), **CL-356**; Canada - Kuwait Bilateral Investment Treaty, Article I, **CL-357**; Canada - Tanzania Bilateral Investment Treaty, Article I, **CL-358**.

[1447] *See* Canada - Peru Bilateral Investment Treaty, Article I, **CL-354**; Canada - Jordan Bilateral Investment Treaty, Article I(w), **CL-356**; Benin - Canada Bilateral Investment Treaty, Article I, **CL-359**; Canada - Nigeria Bilateral Investment Treaty, Article I, **CL-360**; Canada - Serbia Bilateral Investment Treaty, Article I, **CL-361**; Canada - Senegal Bilateral Investment Treaty, Article I, **CL-362**; Canada - Mali Bilateral Investment Treaty, Article I, **CL-363**; Canada - Côte d'Ivoire Bilateral Investment Treaty, Article I, **CL-364**; Burkina Faso - Canada Bilateral Investment Treaty, Article I, **CL-365**; Canada - Guinea Bilateral Investment Treaty, Article I, **CL-366**; Canada - Hong Kong, China SAR Bilateral Investment Treaty, Article I, **CL-367**; Canada – Moldova Bilateral Investment Treaty, Article I, **CL-368**.

[1448] The United States joined TPP negotiations in 2008, while México and Canada joined negotiations in 2012.

contrast to the USMCA, which does impose a dominant and effective nationality test and was signed by the three NAFTA contracting Parties, all of whom negotiated the TPP from 2008 to 2016, and two of whom—México and Canada—signed the CPTPP in 2018. Indeed, México and Canada signed the CPTPP *in the same year* they signed the USMCA, and yet the two multilateral agreements contain materially different provisions regarding dual nationals bringing arbitral claims.

598. As the foregoing shows, if the NAFTA Parties had intended to include a prohibition or limitation on dual nationals bringing claims under the Treaty, they could have and would have done so with express language. They did not. México thus essentially argues that any language in these dozens of treaties negotiated and signed by the NAFTA Parties that expressly imposes some kind of a restriction on dual nationals should be ignored as meaningless, while the Parties' many other treaties containing no such language should be revised *ad hoc* to include a restriction on dual nationals. Beyond the fact that México's argument ignores the primacy of *lex specialis* and the rules of interpretation set forth in Article 31 of the Vienna Convention, it is also nonsensical, and does not accord with any rule of contract or treaty interpretation, nor with the well documented treaty practice of any of the three NAFTA Parties—including México.

(ii) Governing International Law Permits Dual Nationals To Bring Claims under the UNCITRAL Rules When There Is No Express Limitation on Such Claims

599. Turning to international jurisprudence, recent arbitral reasoning confirms that dual nationals may bring claims under the UNCITRAL Rules. In *Serafín García Armas v. Venezuela*, the tribunal analyzed the Spain-Venezuela BIT, which, like the NAFTA, does not contain an express restriction against dual nationals bringing claims against one of their own states. The tribunal reasoned that given the absence of any express limitations in the BIT prohibiting dual nationals from advancing claims against their own states, it was sufficient that the Claimants had

Spanish nationality. To hold otherwise, according to the tribunal, would be to revise the text of the BIT by adding a restriction that could have been included (as it was in other BITs) but was not. The tribunal also rejected Venezuela's request to apply a dominant and effective nationality test, because just as the BIT contained no restrictions against claims by dual nationals, it also did not contain any requirement to apply such a test. In holding that it had jurisdiction over the case, the tribunal reinforced that the express language of the treaty controlled in permitting claims by dual nationals.[1449]

600. The tribunal in *Rawat v. Mauritius* reached the same conclusion through a different route. In *Rawat*, the relevant BIT required France and Mauritius to insert a clause consenting to ICSID arbitration into any investor-state contract that either State concluded with nationals of the other State. The tribunal therefore reasoned that because ICSID arbitration excludes claims by dual nationals, France and Mauritius must have intended to exclude claims by dual nationals in the treaty. At the same time, the tribunal held that there is no "express exclusion of dual nationals" in the BIT and that it should not add implicit conditions to the BIT as a general matter.[1450] In fact, according to the *Rawat* tribunal, the lack of an express bar "seem[s] to point to the inclusion, rather than the exclusion, of dual nationals."[1451] The *Rawat* tribunal also confirmed that the object and purpose of the BIT was to promote and encourage investment, and concluded that "including, rather than excluding, dual nationals" fulfills that objective.[1452]

[1449] *Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela ("García Armas and García Gruber v. Venezuela")*, PCA Case No 2013-3, Decision on Jurisdiction (Dec. 15, 2014), ¶¶ 176-181 (annulled on other grounds, *García Armas and García Gruber v. Venezuela*, PCA Case No. 2013-03, Judgment of the Paris Court of Appeal (June 3, 2020)), **CL-64**.

[1450] *Dawood Rawat v. The Republic of Mauritius ("Rawat v. Maritius")*, UNCITRAL, PCA Case No. 2016-20, Award on Jurisdiction (Apr. 6, 2018), ¶ 170, **CL-370**.

[1451] *Id*. at ¶ 170 (emphasis added), **CL-370**.

[1452] *Id*. at ¶ 172, **CL-370**.

601. México's legal citations do not support the theory that dual nationals may not bring claims against a state of one of their nationalities. First, *Bayview v. México* does not opine on dual nationality, as Respondent suggests it does, but rather concerns the definition of "investment" under NAFTA Article 1139. The tribunal determined that United States claimants could not proceed with their claims against México where they had no actual investments in México, but only possessed water rights in México and actual investments in Texas. Accordingly, the tribunal explained that "it is quite plain that NAFTA Chapter Eleven was not intended to provide substantive protections or rights of action to investors whose investments are wholly confined to their own national States."[1453] The tribunal thus dismissed the case for lack of jurisdiction because "it has not been demonstrated that any of the Claimants seeks to make, is making or has made an investment *in México*."[1454] Notably, to reach that conclusion, the tribunal assumed that there was no jurisdictional issue with respect to the NAFTA's nationality requirements, stating that though "[d]oubts have been raised as to whether all of the Claimants are qualified investors, in terms of their nationality," it would "set[] those doubts to one side, because it is clear that there are at least some Claimants who meet the requirement that they be nationals or enterprises of a Party, in this case the United States."[1455] *Bayview* therefore stands for the uncontroversial proposition that investor-state claims may be brought by an investor of one Party against another Party, and that the relevant investments must be located in the latter Party. *Bayview* says nothing about the question of whether an investor of one Party may not bring claims against another Party in which they have invested simply because they happen to have citizenship in both Parties.

[1453] *Bayview Irrigation District and others v. United Mexican States ("Bayview v. México")*, ICSID Case No. ARB(AF)/05/1, Award (June 19, 2007), ¶ 103, **RL-0045**.

[1454] *Id*. at ¶ 122, **RL-0045**.

[1455] *Id*. at ¶ 89, **RL-0045**.

602. The instant proceeding is a far cry from the circumstances in *Bayview*. Here, Messrs. Williamson and Cañedo are nationals of the United States, and their primary investment—in the Oro Negro companies—were investments in México under the NAFTA. To read *Bayview* as México suggests would eviscerate not only the text of the NAFTA, which does not bar dual nationals nor impose a dominant and effective nationality test, but also undermine the *Bayview* tribunal's careful analysis concerning the protection of investments and investors under the NAFTA's substantive provisions.

603. Next, Respondent cites *Heemsen v. Venezuela* to argue that NAFTA's offering the ICSID as an arbitral forum somehow means that the NAFTA itself disallows claims by dual nationals. But in making this argument, Respondent even concedes that the NAFTA does not contain "*un lenguaje explícito contra las reclamaciones de ciudadanos con doble nacionalidad*."[1456] In reality, *Heemsen v. Venezuela* does not support Respondent's argument, and in fact it supports Claimants' position. In *Heemsen*, the contracting parties—Germany and Venezuela—had allowed arbitration under the UNCITRAL rules, but only *before* Venezuela acceded to the ICSID Convention. In effect, UNCITRAL arbitration was never available to investors because Venezuela ratified the ICSID Convention in 1995 and the BIT came into force three years later in 1998. Thus, the UNCITRAL tribunal determined that it lacked jurisdiction *ratione voluntatis*. The tribunal further explained that the parties' choice of the ICSID Convention as the primary dispute resolution forum was a "clear indicator" that the BIT had not intended to grant protections for dual nationals.[1457] *Heemsen* thus simply demonstrates that where two States limit an investor's choice to only ICSID

[1456] SOD, ¶ 575 ("*[E]l TLCAN, no contenía un lenguaje explícito contra las reclamaciones de ciudadanos con doble nacionalidad*.").

[1457] *Enrique and Jorge Heemsen v. the Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award on Jurisdiction (Oct. 29, 2019), ¶ 442 ("*la elección del CIADI como foro principal es un claro indicador de que las Partes Contratantes excluyeron la protección a los dobles nacionales*"), **RL-0047**.

arbitration, whether expressly or by the structure of the treaty, then the States meant to exclude protection to dual nationals, because the ICSID rules limit claims by dual nationals. Accordingly, Respondent's citation to *Heemsen* is unpersuasive and willfully ignores the fact that the NAFTA explicitly permits process under UNCITRAL rules to the same extent as the ICSID rules, which the treaty in *Heemsen* did not.

604. Respondent's citation to *Manuel García Armas v. Venezuela* is also unavailing. *Manuel Garcia Armas* is inapposite because, as that tribunal found, the treaty at issue in that case, the Spain-Venezuela BIT, prioritized recourse to the ICSID Convention and only offered UNCITRAL arbitration as a "*jurisdicción secundaria*" when the ICSID was unavailable or both parties opted out of it.[1458] The tribunal determined that because of this hierarchical structure, the definition of "investor" in the BIT "*incorpora el tratamiento relativo a los dobles nacionales* [in the ICSID system]."[1459] The tribunal's statement was no broader than that. It is thus similar to *Heemsen*, as both cases depended on the primacy of the ICSID Convention in the structure of the relevant treaty. The NAFTA, in contrast, affirmatively permits investors to file claims under either the ICSID Convention or the UNCITRAL Rules, which, as arbitral jurisprudence consistently affirms, permit claims by dual nationals, as explained above.

[1458] *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction (June 1, 2015), ¶ 714 ("*Esta estructura, elegida por España y Venezuela en el artículo XI del Tratado, no puede ser pasada por alto por el Tribunal; debe ser respetada y darle el debido efecto. El Tribunal entiende que dicha estructura y los términos utilizados, en el sentido corriente que hay que atribuirles, y en su contexto y teniendo en cuenta su objeto y fin, evidencian una intención de establecer una determinada jerarquía entre los foros arbitrales mencionados. En otras palabras, al igual que en el caso Nova Scotia c. Venezuela, bajo el Reglamento CNUDM, el tratado estableció una jurisdicción primaria que sería la del Sistema CIADI, y una jurisdicción secundaria que sería la del Reglamento CNUDMI.* "), **RL-0048**.

[1459] *Id*. at ¶ 723, **RL-0048**.

605. Finally, Respondent's quotation from *Phoenix v. Czech Republic* is misleading and does not support Respondent's argument.[1460] *Phoenix* does not concern jurisdiction *ratione personae*, let alone dual nationals bringing investment treaty claims.[1461] Rather, *Phoenix* concerns *ratione materiae* jurisdiction and an analysis of the definition of "investment" in the ICSID Convention and the Czech Republic-Israel BIT.[1462] In the background of that case, two ferroalloy companies—a parent and a subsidiary—had been involved in extensive civil litigation and criminal investigations in the Czech Republic. The executive officer of the subsidiary was arrested in the Czech Republic, fled to Israel and there established a firm called Phoenix, which he used to purchase shares in the two Czech companies. Phoenix subsequently filed an arbitral claim against the Czech Republic under the Czech Republic-Israel BIT, which permits claims under the ICSID Convention but not the UNCITRAL Rules. The tribunal observed that the purported treaty dispute was simply a continuation of the preexisting legal dispute in the Czech Republic, and that claimant's creation of a legal fiction to continue its dispute in an international arbitration was "an abuse of the system of international ICSID investment arbitration."[1463] Accordingly, the tribunal declared it must "ensure that the ICSID mechanism does not protect investments that it was not designed to protect, because they are in essence domestic investments disguised as international investments for the sole purpose of access to this mechanism."[1464]

[1460] SOD, ¶ 584.

[1461] *See Phoenix Action Ltd v. Czech Republic*, Award , ¶ 65 ("At the outset, the Tribunal notes that in this case, for the jurisdiction *ratione personae*, there is no discussion about the Israeli nationality of Phoenix, which has been registered in Israel on 14 October 2001, and has its permanent seat in Tel Aviv, Israel."), **RL-0049**.

[1462] *See Id*. at ¶¶ 72-147, **RL-0049**.

[1463] *Phoenix Action Ltd v. Czech Republic*, Award, ¶ 144, **RL-0049**.

[1464] *See id*., **RL-0049**.

606. The *Phoenix* tribunal's condemnation of abuse of the ICSID mechanism is inapposite in this case. As an initial matter, Respondent should not be permitted to disguise an element of its *ratione materiae* objection as relevant to its *ratione personae* objection. But setting this misdirection aside, Messrs. Cañedo and Williamson were U.S. nationals before, during, and after they made their investments in México and before, during, and after México violated the NAFTA. There is no serious suggestion in this case that Claimants pursued international arbitration in order to continue an essentially domestic dispute. Further, while the treaty does not impose a dominant and effective nationality test, even if one were applicable (*quod non*), Messrs. Cañedo and Williamson's dominant and effective nationalities are their U.S. nationalities. They are, quite simply, U.S. nationals under the NAFTA, and are permitted under the NAFTA and the UNCITRAL rules to bring arbitral claims against México

607. Unlike the treaties in *Rawat*, *Heemsen*, or *Manuel Garcia*, the NAFTA expressly allows investor-state dispute settlement under either the ICSID Convention or the UNCITRAL Rules on equal footing. Thus, the *Rawat* tribunal's default analysis that the treaty "includes, rather than excludes, dual nationals" applies here. Therefore, under a treaty that does not bar claims by dual nationals and does allow claims to be brought under the UNCITRAL Rules, claims by dual nationals are necessarily permitted.

608. And, notably, the prohibition on dual nationals that Respondent seeks to insert exists only as a jurisdictional provision in the ICSID Convention and not in the UNCITRAL Rules or the NAFTA itself. In other words, the jurisdictional provision in the ICSID Convention concerns standing to access ICSID as an arbitral forum but does not define who is or is not a national under the underlying treaty under which a claimant is proceeding. The jurisdictional provision only restricts access to the treaty's investment dispute provisions when it is effectively the only arbitral

forum available to the claimant under a treaty—but on its own, the ICSID Convention does not and cannot rewrite the NAFTA. Above all, it must be repeated that if the Parties to the NAFTA had wanted to incorporate ICSID's prohibition of claims by dual nationals, they could have (and, as is clear from other Treaties negotiated by these Parties, would have) either written in such a limitation or restricted the arbitral forum to ICSID only. They did not.

609. In the absence of the express prohibition México now appears to wish were in the NAFTA, México urges the Tribunal to import an outdated customary international law principle from the realm of diplomatic protection to reach the same effect. Contrary to Respondent's assertion, the principle of "non-responsibility" was long-since antiquated in 1992 when the Treaty was concluded. There is neither a need nor a legal basis to import an outdated customary international law principle regarding diplomatic protection into this investment treaty when the Treaty itself is clear that a "national" of the United States is "a natural person who is a citizen or permanent resident of" the United States, and that a U.S. national may bring a claim against México. The *lex specialis*, here the text of the NAFTA, must control and cannot be altered by the outdated principle cited by Respondent, as noted in more detail below. As Professor Dolzer underscored in an expert opinion submitted in *Saba Fakes v. Turkey*, "the rules of nationality in a BIT do not follow the rules of as they pertain to the right of diplomatic protection between two states which have both granted nationality to the same person."[1465] And as the *Saba Fakes* tribunal concluded, "[t]he rules of customary international law applicable in the context of diplomatic protection do not apply as such to investor-State arbitration."[1466]

[1465] *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20 , Award (July 14, 2010), ¶ 69, **CL-371**.

[1466] *Id*., **CL-371**.

610. Furthermore, the vast majority of arbitral tribunals have held that the general customary international law of diplomatic protection should not be arbitrarily incorporated into investor-state law.[1467] For example, in *KT Asia v. Kazakhstan*, the tribunal stated that it "sees no basis for applying a rule of diplomatic protection that would trump the specific regime created by the Treaty."[1468] Similarly, as the tribunal explained in *El Paso v. Argentina*, "BITs . . . do not pertain to diplomatic protection, nor do they reflect the rules of general international law in matters of investment protection."[1469]

611. Not only have tribunals held that the "rules of customary international law applicable in the context of diplomatic protection do not apply as such to investor-State arbitration,"[1470] but tribunals have also explicitly held that customary international law contains no prohibition against claims by dual nationals against the state of one of their nationalities. As the tribunal in *Bahgat v. Egypt* explained:

> The Tribunal cannot discern from relevant jurisprudence any clear, applicable general principle of international law that would prohibit a dual national in his or

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[1467] *KT Asia Investment Group B.V. v. Republic of Kazakhstan (" KT Asia v. Kazakhstan")*, ICSID Case No. ARB/09/8, Award (Oct. 17, 2013), ¶¶ 127-128, **CL-372**; *El Paso Energy International Company v. Argentine Republic ("El Paso v. Argentina")*, ICSID Case No ARB/03/15, Award (Oct. 31, 2011), ¶ 213 ("BITs do not concern situations such as that addressed in Barcelona Traction'. they do not pertain to diplomatic protection, nor do they reflect the rules of general international law in matters of investment protection. Interpreted in conformity with the canons of treaty law, they prescribe that rights and interests of foreign shareholders"), **CL-155**; *Siag v. Egypt*, Decision on Jurisdiction, ¶¶ 172-173, 198("While it may be asserted that if this were a diplomatic protection case it could be argued differently, the parties have consented to have their dispute resolved under the ICSID Convention and it sets out a particular regime for the determination of jurisdiction."), **CL-318**; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004), ¶ 141 ("The issues before this Tribunal concern not diplomatic protection under customary international law but the rights of investors, including shareholders, as determined by the Treaty."), **CL-373**; *Víctor Pey Casado and President Allende Foundation v. Republic of Chile I ("Pey Casado")*, ICSID Case No. ARB/98/2, Award (May 8, 2008), ¶ 415 ("*El APPI no aborda expresamente la cuestión de si los dobles nacionales hispano-chilenos quedan cobijados o no bajo su ámbito de aplicación. En opinión del Tribunal de arbitraje, no estaría justificado (basándose en unas pretendidas normas de derecho internacional consuetudinario) añadir un requisito de aplicación que no se desprenda ni su letra o ni su espíritu*."), **CL-413**.

[1468] *KT Asia v. Kazakhstan*, Award, ¶ 128, **CL-372**.

[1469] *El Paso v. Argentina*, Award, ¶ 213, **CL-155**.

[1470] *Saba Fakes v. Republic of Turkey*, Award, ¶ 69, **CL-371**.

> her private capacity from bringing a claim against a State of his or her nationality pursuant to an investment treaty.[1471]

612. The tribunal noted that in any event, "any developments in international law must yield to the *lex specialis* of the investment treaty."[1472] The tribunal in *Pey Casado* similarly held that "*el hecho de que la Demandante posea doble nacionalidad, que comprende la nacionalidad de la Demandada, no la excluye del ámbito de aplicación del [tratado]*."[1473] The tribunal further explained that in the absence of any express provisions on dual nationals in the Treaty, "*no estaría justificado (basándose en unas pretendidas normas de derecho internacional consuetudinario) añadir un requisito de aplicación que no se desprenda ni su letra o ni su espíritu*."[1474]

613. The United States, México, and Canada are sophisticated treaty drafters and were aware of both the ICSID Convention and other treaties that they had signed that contained restrictions on claims by dual nationals. Despite this knowledge, the NAFTA Parties made an express decision to include a choice of arbitral fora under which an investor may proceed, at the investor's election, under rules that allow and do not prohibit a dual national from filing claims against a state of which also is a national. If the NAFTA Parties had intended to restrict claims by dual nationals, they would have 1) included an express restriction or prohibition, as the NAFTA Parties have done in other treaties, or 2) restricted the ability of disputing investors to bring claims only under the ICSID Convention, either expressly or through the NAFTA's structure. They did neither of these in

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[1471] *Mohamed Abdel Raouf Bahgat v. The Arabic Republic of Egypt*, PCA Case No. 2012-07, Decision on Jurisdiction, (Nov. 30, 2017), ¶ 230, **CL-374**.

[1472] *Id*. at ¶ 231, **CL-374**; *see also García Armas and García Gruber v. Venezuela*, Decision on Jurisdiction, ¶¶ 54, 176-181 (annulled on other grounds, *García Armas and García Gruber v. Venezuela*, Judgment of the Paris Court of Appeal (June 3, 2020)), **CL-64**. Although the *García Armas and García Gruber v. Venezuela* decision was annulled by The International Chamber of the Paris Court of Appeal, the annulment dealt more with whether claimants had the requisite nationality at the time of the investment, rather than whether dual nationals may sue the country of one of their nationalities.

[1473] *Pey Casado*, Award, ¶ 415, **CL-413**.

[1474] *Id*., **CL-413**.

negotiating the NAFTA. Additionally, the Parties have never issued any interpretive note regarding the treatment of dual nationals under the Treaty, despite that process always having been available to them. The specific treaty language chosen was a choice by the Parties, and the Tribunal must give effect to that choice in accordance with the *lex specialis* of the NAFTA. Given that the Treaty does not bar on claims by dual nationals and allows claims under the UNCITRAL Rules, the Tribunal may not now read new prohibitions into the UNCITRAL Rules nor into the Treaty itself. This same principle also applies to prohibit this Tribunal from reading into the NAFTA a dominant and effective nationality test.

2. The Dominant and Effective Nationality Test Is Inapplicable Under the Treaty, and In Any Event, of No Help to México Because Messrs. Williamson and Cañedo's Dominant and Effective Nationalities Are U.S.

614. Messrs. Williamson and Cañedo have standing to bring the claims under the NAFTA because dual nationals satisfy the Treaty's definition of "national" under the, and the Treaty does not prohibit dual nationals from bringing claims. The plain language of the Treaty further contains no restrictions such as a "dominant and effective nationality test" that the Respondent suggests should now be written in, and no such test from any customary international law is applicable here. Just as the NAFTA, as *lex specialis*, contains no prohibition on claims by dual nationals, it also does not contain a dominant and effective nationality test. Again, Respondent cannot simply write in a different restriction on claims brought by dual nationals because its first argument failed. Thus, the Tribunal should again decline Respondent's invitation to rewrite the Treaty 27 years after its entry into force.

(i) The Dominant and Effective Nationality Test Does Not Appear Anywhere in the Text of the Treaty and Is Inapposite to this Case

615. The dominant and effective nationality test is inapposite when the text of the treaty is clear as to nationality, as it is in this case. Article 201 of the NAFTA clearly defines "national" as "a

natural person who is a citizen or permanent resident of a Party."[1475] The NAFTA does not condition this definition on that nationality being the person's "dominant" or the "effective" nationality. As discussed above, the individual simply must have the nationality or permanent residence of a party under that Party's applicable laws. Messrs. Williamson and Cañedo both satisfy this definition, and the inquiry should go no further. Respondent fails to explain that the dominant and effective nationality test is a test from the realm of diplomatic protection recognized by the ICJ in 1955. As discussed above, concepts from diplomatic protection have no applicability to the investor-state dispute settlement realm where the treaty does not import these concepts specifically. As the recent tribunal in *Bahgat v. Egypt* held after considering whether "principles of international law on effective nationality might be considered by a tribunal in order to determine its jurisdiction based on the dominant nationality" or the investor, "any developments in international law must yield to the *lex specialis* of the investment treaty," as noted above.[1476] Thus, that tribunal held that "an analysis of the applicable [treaty] . . . should be dispositive of the issue of whether a dual . . . national may bring claims under the [treaty]," and that a dominant nationality analysis was inapplicable.[1477] Similarly, the recent investment tribunal in *KT Asia v. Kazakhstan* held that there is "no basis for applying a rule of diplomatic protection that would trump the specific regime created by the Treaty."[1478] Where states do want to import such a concept as a dominant and effective nationality test, they can and would do so explicitly through language in the applicable treaty.

[1475] NAFTA Article 201, **CL-67**.

[1476] *Mohamed Abdel Raouf Baghat v. The Arabic Republic of Egypt*, Decision of Jurisdiction, ¶ 231, **CL-374**.

[1477] *Id*., **CL-374.**

[1478] *KT Asia v. Kazakhstan*, Award, ¶ 128, **CL-372**.

616. The NAFTA's lack of any dominant and effective nationality clause starkly contrasts with the USMCA's inclusion of one. As explained above, the USMCA is designed to replace the NAFTA, was signed by all three NAFTA Parties in 2018, and features an investor-state dispute settlement regime applicable solely to México and the United States.[1479] The Parties signed the USMCA in the same year that México and Canada signed the CPTPP, based on the TPP, which all three NAFTA Parties had signed. Unlike the USMCA, these treaties contain no dominant and effective nationality restriction. That material difference in simultaneously concluded treaties must be given meaning.

617. Further, as stated above, the NAFTA is the investment treaty for which the contracting Parties issued an interpretive note regarding the minimum standard of treatment under the treaty in order to advise future tribunals of their intent.[1480] Respondent offers no explanation for why the NAFTA Parties—of which Respondent is one—have not or could not have done so here. The simple explanation is that doing so in regard to a dominant and nationality test would have contravened the Parties' intent in the NAFTA.

618. As with any general restriction on claims by dual nationals, if the Parties had wanted tribunals to apply the dominant and effective nationality test to determine the applicable citizenship of claimants for a NAFTA claim, they would have written such a test into the Treaty. This is a basic tenet of treaty interpretation enshrined in Articles 31 and 32 of the Vienna Convention. However, the Parties here have done no such thing in regard to the "dominant and effective nationality" test. To read that test in here would constitute an impermissible revision of the treaty.

[1479] *See* USMCA, Article 14.1, **CL-319**.

[1480] NAFTA, Free Trade Commission: Notes of interpretation of certain Chapter 11 provisions (July 31, 2001), **CL-320**.

619. Moreover, each of the NAFTA Parties has signed *several* investment treaties other than the USMCA that have expressly included a dominant and effective nationality test. México, for instance, has negotiated and signed both bilateral and multilateral agreements, such as the Pacific Alliance Additional Protocol of 2014, that impose a dominant and effective nationality test on dual nationals bringing arbitral claims, as well as two BITs that prohibit claims by dual nationals altogether, and several other investment treaties containing no limitations on dual nationals.[1481] For its part, the United States negotiated and signed BITs, such as the U.S.-Uruguay BIT, and multilateral agreements, such as the DR-CAFTA, which specify that a dual national may bring a claim against one of the countries of their nationality (the host country) if the claimant's "dominant and effective nationality" is that of the non-host country.[1482] Moreover, the 2012 U.S. Model BIT—the essential blueprint for U.S. BITs—also contains a dominant and effective nationality test.[1483] However, the United States has also negotiated treaties lacking any restrictions on dual nationals, such as the U.S.-Bolivia BIT.[1484] Additionally, Canada has negotiated and signed at least one dozen BITs that impose a dominant and effective nationality test, as well as thirteen that prohibit claims by dual nationals altogether, whereas it has concluded approximately twenty other BITs containing no restrictions on claims by dual nationals.[1485]

620. The logical conclusion to be drawn from these many examples is that each of the NAFTA Parties sees restrictive language as necessary when it intends to limit dual nationals to their

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[1481] *See* Additional Protocol to the Framework Agreement of the Pacific Alliance, Article 10.1, **CL-203**; México-Australia Bilateral Investment Treaty, Article 1(c)(i)(3) (terminated Dec. 30, 2018), **CL-61**; México-Uruguay Bilateral Investment Treaty, Article 1(3)(b), **CL-62**.

[1482] The Dominican Republic – Central America – United States Free Trade Agreement, Article 10.28, **CL-326**.

[1483] *See* United States Model Bilateral Investment Treaty, Article 1, **CL-331**.

[1484] *See* United States-Bolivia BIT, Article I, **CL-332**.

[1485] *See generally* Canada Bilateral Investment Treaties, UNCTAD, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/countries/35/canada, **CL-375**.

dominant and effective nationality as to claims against one of the states of their nationality. Otherwise, if the test were automatically implied into *every* treaty, as Respondent suggests it must be, the "dominant and effective nationality test" language in these several treaties would be superfluous, contravening common sense and the rules of interpretation set forth in Article 31 of the Vienna Convention. In short, if the parties had intended to include this test in the Treaty, they would have done so. As the tribunal in *Saba Fakes* explained,

> This Article [defining national in the BIT] is the only relevant provision in the BIT that deals with the issue of nationality. Had the Contracting Parties intended to set additional limitations as regards jurisdiction *ratione personae*, no doubt they would have expressly stated such limitations in the text of the BIT.[1486]

621. More broadly, Tribunals considering claims by dual nationals under a variety of treaties have been reluctant to apply the dominant and effective nationality test in the absence of a specific provision in the treaty directing the application of that test.[1487] Even tribunals analyzing claims under treaties that allow recourse only to ICSID have rejected the dominant and effective nationality test. For example, the tribunal in *Siag* noted that

> the regime established under Article 25 of the ICSID Tribunal does not leave room for a test of dominant or effective nationality. The BIT contains a clear

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[1486] *Saba Fakes v. Republic of Turkey*, Award, ¶ 70, **CL-371**.

[1487] *See KT Asia v. Kazakhstan*, Award, ¶¶ 127-28, **CL-372**; *Saba Fakes v. Republic of Turkey*, Award, ¶¶ 69-70, **CL-371**; *El Paso v. Argentina*, Award, ¶ 213 ("BITs do not concern situations such as that addressed in *Barcelona Traction:* they do not pertain to diplomatic protection, nor do they reflect the rules of general international law in matters of investment protection. Interpreted in conformity with the canons of treaty law, they prescribe that rights and interests of foreign shareholders."), **CL-155**; *Siag v. Egypt*, Decision on Jurisdiction, ¶ 198 ("The Tribunal concurs with the finding of the ICSID Tribunal in the *Champion Trading* case that the regime established under Article 25 of the ICSID Tribunal does not leave room for a test of dominant or effective nationality. The BIT contains a clear definition of who is to be considered a national. . . . While it may be asserted that if this were a diplomatic protection case it could be argued differently, the parties have consented to have their dispute resolved under the ICSID Convention and it sets out a particular regime for the determination of jurisdiction."), **CL-318**; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004), ¶ 141 ("The issues before this Tribunal concern not diplomatic protection under customary international law but the rights of investors, including shareholders, as determined by the Treaty."), **CL-373**; *Pey Casado*, Award, ¶ 415 ("*El APPI no aborda expresamente la cuestión de si los dobles nacionales hispano-chilenos quedan cobijados o no bajo su ámbito de aplicación. En opinión del Tribunal de arbitraje, no estaría justificado (basándose en unas pretendidas normas de derecho internacional consuetudinario) añadir un requisito de aplicación que no se desprenda ni su letra o ni su espíritu*."), **CL-413**.

> definition of who is to be considered a national. Article 1(3) defines a "natural person" as "with respect to either Contracting State, a natural person holding the nationality of that State in accordance with its laws" (underlining added). . . . While it may be asserted that if this were a diplomatic protection case it could be argued differently, the parties have consented to have their dispute resolved under the ICSID Convention and it sets out a particular regime for the determination of jurisdiction.[1488]

622. The *Siag* tribunal concluded that international law principles from diplomatic protection should not override the operation of the domestic law of the Parties as to nationality.[1489] Similarly, here, there is no reason for the Tribunal to override the domestic law of the United States by inserting a jurisdictional test above and beyond the plain language of the NAFTA providing that "national means a natural person who is a citizen or permanent resident of a Party."

(ii) Even if the Dominant and Effective Nationality Test Were To Apply, Messrs. Williamson's and Cañedo's Dominant and Effective Nationalities Are U.S.

623. Even if the Tribunal were to apply the dominant and effective nationality test (*quod non*), the dominant and effective nationality of both Messrs. Cañedo and Williamson is United States. The tribunal in *Ballantine v. Dominican Republic* noted that the "effective nationality refers to whether there is a genuine connection between the person and the State [and] [t]he dominant nationality refers to which nationality is stronger."[1490] Tribunals legitimately applying the dominant and effective nationality test (because it was specified in the treaty) have looked to the following general factors to determine the claimant's "dominant" nationality: "(a) habitual residence, (b) the individual's personal attachment for a particular country, (c) the center of the person's economic, social and family life, and (d) the circumstances in which the second

[1488] *Siag v. Egypt*, Decision on Jurisdiction, ¶ 198, **CL-318**.

[1489] *Id*. at ¶ 201, **CL-318**.

[1490] *Michael Ballantine and Lisa Ballantine v. The Dominican Republic ("Ballantine v. Dominican Republic")*, UNCITRAL, PCA Case No. 2016-17, Final Award (Sept. 3, 2019), ¶ 172, **CL-376**.

nationality was acquired, bearing in mind the specific context of this dispute."[1491] This analysis is necessarily fact-intensive and fact-dependent.

624. Claimants demonstrated in their Statement of Claim that the dominant and effective nationality of both Messrs. Williamson and Cañedo is United States, and, in light of Respondent's misleading assertions, submit with this Reply a Second Witness Statement of Mr. Cañedo and a First Witness Statement of Mr. Williamson demonstrating beyond any doubt that both men are domiciled in the United States, that (i) they and their families primarily reside in the United States, have done so for a considerable period of time, and they intend to reside in the U.S. permanently, (ii) their lives are centered in the United States, and (iii) they do not intend to return to México. This is more than sufficient to prove their dominant and effective nationality is United States.

(a) Mr. Williamson's Dominant and Effective Nationality is United States

625. To begin, Mr. Williamson's United States nationality is clearly "effective." To have an effective nationality, a person merely must have a "genuine connection" to the state of his/her nationality. Respondent concedes that Mr. Williamson is a U.S. citizen, having naturalized in 1989, and that he possesses a United States passport.[1492] Respondent makes no specific argument that Mr. Williamson's United States nationality is not "effective" or that his connection to the United States is not "genuine," and therefore Respondent waives any argument to that effect. In any event, Mr. Williamson has been a U.S. citizen since 1989, never lost or renounced his U.S. citizenship, and was a U.S. citizen throughout México's campaign of abuse and retaliation against Claimants that violated the NAFTA.

[1491] *Id*. at ¶ 559, **CL-376**.

[1492] *See* SOD, ¶ 567.

626. Mr. Williamson's United States nationality was also dominant.[1493] Before engaging in that analysis, however, Claimants wish to emphasize that Mr. Williamson is domiciled in Miami, Florida, in the United States, where he settled permanently in June 2019. He does not intend to return to México for any reason.[1494] Thus, México's suggestion that Mr. Williamson's "permanent domicile" is in México City, based on a self-serving statement made by the PGJCDMX in a retaliatory and baseless criminal proceeding, is false, as discussed further below. In making this false assertion, Respondent also cites paragraph 3 of the Confidential Witness Statement of Carlos Williamson-Nasi dated July 18, 2019, submitted with Claimants' Application for Interim Measures.[1495] But that document states no such thing, and paragraph 3 actually reads: "I am a U.S. citizen."[1496] Turning to the facts, Mr. Williamson's dominant nationality is United States.

1) Mr. Williamson Has Been Strongly Connected to the United States Since Before He Was Born

627. Mr. Williamson's connection to the United States predates his birth, as Mr. Williamson's mother was born in New York City in 1940 and was a U.S. citizen throughout her entire life.[1497] She married Mr. Williamson's father, a Colombian citizen, in 1959, and gave birth to Mr. Williamson in 1960 in Colombia.[1498]

628. Mr. Williamson developed a fondness for the United States as a child, thanks to his mother's U.S. heritage and his family's frequent travels to Miami, Florida for vacation and to visit

[1493] México does not argue, and the evidence does not support a conclusion, that Mr. Williamson's dominant nationality is Colombian. Therefore, Mr. Williamson's Colombian citizenship is immaterial to this analysis.

[1494] Williamson Statement, **CWS-8**, ¶ 51.

[1495] *See* SOD, ¶¶ 564, 568 & n. 680.

[1496] *See* Carlos Williamson's witness statement submitted with Claimants' RFIM, ¶ 3.

[1497] Williamson Statement, **CWS-8**, ¶¶ 4-5.

[1498] *Id*. at ¶¶ 6-7.

his mother's many family members who lived there. No fewer than six of his mother's cousins continue to live in Miami to this day.[1499]

629. After Mr. Williamson graduated high school, at approximately 18 years of age, he spent six months living with a U.S. family in Kalamazoo, Michigan on an exchange program. This very positive experience cemented his desire to relocate to the United States after college.[1500]

630. Accordingly, following college, Mr. Williamson moved to New York City at the end of 1983, at roughly age 23, to seek new opportunities in life and employment. Mr. Williamson applied for a Green Card as soon as possible, and obtained one in 1984, establishing his status as a permanent resident. He distinctly recalls having had the impression that the process of obtaining permanent resident status was accelerated for him because of his mother's U.S. citizenship.[1501]

631. Mr. Williamson worked at Hanover Trust Bank in New York City from 1984 until 1986. He attended the Wharton School of Business at the University of Pennsylvania from 1987 to 1988 and obtained a Master of Business Administration degree.[1502]

632. Mr. Williamson married his wife, María Clara Lloreda, who is originally from Colombia, in 1984. After they were married, she also moved to the United States and began attending New York University in New York City.[1503]

633. In the mid-1980s, Mr. Williamson and his wife decided to settle in the United States. Therefore, as soon as he was eligible, Mr. Williamson applied for U.S. citizenship and naturalized

[1499] *Id*. at ¶ 8.

[1500] *Id*. at ¶ 10.

[1501] *Id*. at ¶ 13.

[1502] *Id*. at ¶¶ 12, 15.

[1503] *Id*. at ¶ 14.

in 1989. Immediately after, the couple applied for and obtained Mrs. Williamson's Green Card. She has maintained permanent resident status to this day.[1504]

2) Mr. Williamson's Family Is Centered in the United States

634. Mr. Williamson's family is, and for decades has been, rooted primarily in the United States.[1505]

635. Mr. Williamson and his wife have three children: a son born in May 1995, a son born in October 1996 and a daughter born in April 2005, all of whom are dual citizens of the United States and México. Although each child was born in México because his family's primary residence was in México at the relevant times, after each child was born Mr. Williamson had their United States birthright citizenship certified at the United States Embassy in México City due to their having been born to a U.S. citizen abroad, *i.e.*, him.[1506]

636. Mr. Williamson's two sons work in the financial services sector. They both live for about half of the year in Miami, in the United States, and for half of the year in México for work. Mr. Williamson's daughter lives in Deerfield, Massachusetts.[1507]

637. All three of Mr. Williamson's children attended secondary school in the United States. The youngest child, Mr. Williamson's daughter, currently attends secondary boarding school in Deerfield. In addition, the two older children attended the University of Southern California for college.[1508]

[1504] *Id*. at ¶¶ 16-18.

[1505] *Id*. at ¶ 19.

[1506] *Id*. at ¶ 20.

[1507] *Id*. at ¶ 20.

[1508] *Id*. at ¶ 21.

638. Before they lived fulltime in the United States, Mr. Williamson's family had been traveling between the United States and México throughout the children's lives. Notably, the family was never outside of the United States long enough for Mrs. Williamson to lose her U.S. permanent residency status.[1509]

639. Mr. Williamson has four siblings, two of whom are U.S. citizens and two of whom are U.S. permanent residents.[1510]

640. Mr. Williamson's sister Ana Maria lives in Palo Alto, California and is a U.S. citizen. As a teenager, she attended Marymount School of Medellin, a U.S. high school in Colombia. She attended college in the United States and has been living in the United States since that time for approximately thirty years. She has two children, both U.S. citizens who were born in the United States.[1511]

641. Mr. Williamson's brother Andres lives in Boca Raton, Florida and is a U.S. citizen. He has lived in Florida for eleven years. His wife is also a U.S. citizen. They have three children, two of whom are also U.S. citizens, and one of whom is a U.S. permanent resident for whom the couple has applied for U.S. citizenship.[1512]

642. Mr. Williamson has two more brothers, Felipe and Jorge, both of whom are U.S. permanent residents. Jorge owns an apartment in Miami, where he regularly stays for extended periods.[1513]

[1509] *Id*. at ¶ 22.

[1510] *Id*. at ¶ 23.

[1511] *Id*. at ¶ 24.

[1512] *Id*. at ¶ 25.

[1513] *Id*. at ¶ 26.

3) Mr. Williamson's Residence and Properties Are Entirely in the United States

643. Since June 2019, Mr. Williamson's primary residence has been an apartment that he rents in Miami.[1514]

644. Mr. Williamson has never owned real estate in Mexico. In comparison, he has owned real estate in the United States. Mr. Williamson owned a house in Los Angeles, California, from about 1988 to 1994. He sold the house in 1994.[1515]

645. From around 1990 to June 2019, Mr. Williamson kept his primary residence in México solely for professional and business reasons. However, during these years, he actually spent approximately 40% of the year in the United States, half of the year in México, and a few weeks in other countries. Thus, during México's violations of the NAFTA that are at issue in this case, Mr. Williamson was effectively living between México and the United States. Notably, the couple was never continuously outside of the United States for the amount of time that would have caused Mr. Williamson's wife to lose her permanent resident status—six months, under United States law.[1516]

646. During this period, Mr. Williamson spent time in the United States for both business and personal reasons, and he would often travel to the United States with his family. When Mr. Williamson's children were younger, the family visited Miami for several weeks at a time during each summer for approximately ten years. While in Miami, the family would typically rent an apartment for the duration of their stay. The family also spent several weeks of each winter for

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[1514] *Id*. at ¶ 27.

[1515] *Id*. at ¶ 28.

[1516] *See* 8 U.S.C. § 1101(a)(13)(C)(ii) ("An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien . . . has been absent from the United States for a continuous period in excess of 180 days[.]"), **CL-377**.

approximately five years in the United States, in places such as Colorado. The family also occasionally visited California for several weeks at a time.[1517]

647. Mr. Williamson's children also attended summer camps in the United States that ranged from two to eight weeks in duration throughout their childhoods. These summer camps were in New York, North Carolina, Indiana, Maine, and Florida. In addition, Mr. Williamson's daughter attended summer semesters at Choate Rosemary Hall in Connecticut and Phillips Academy in Massachusetts. Mr. Williamson and his wife traveled with the children to the United States on virtually all of these occasions to drop them off at and pick them up.[1518]

648. Mr. Williamson and his wife also traveled to the United States for several weeks at a time to spend time with the children when they were attending secondary boarding school and college there.[1519]

649. Mr. Williamson also traveled to the United States on his own throughout this time period, often for business reasons. His business travels typically brought him to New York for several weeks at a time, multiple times a years. While in New York, Mr. Williamson stayed in hotels.[1520]

650. In addition, Mr. Williamson spent a number of weeks each year in California from 1990 to 1994, during which time he owned the aforementioned house in Los Angeles.[1521]

651. As stated above, Mr. Williamson's mother, a U.S. citizen, has had many family members living in Miami throughout his life. Her cousins, aunts and uncles have been living in Miami and nearby parts of Florida for approximately thirty to forty years. Currently, at least six of his

[1517] *Id*. at ¶ 30.

[1518] *Id*. at ¶ 31.

[1519] *Id*. at ¶ 32.

[1520] *Id*. at ¶ 33.

[1521] *Id*. at ¶ 34.

mother's close relatives continue to live in Miami and nearby parts of Florida after having lived there for many years.[1522]

652. Mr. Williamson's strong family ties to Miami, as well as his many visits to Miami as a child, motivated him to settle in Miami when he moved his primary residence to the United States in June 2019.[1523]

4) Mr. Williamson Personal and Financial Life is Entirely in the United States

653. Beyond his many family members in the United States, Mr. Williamson's remaining personal and financial connections are entirely located in the United States.[1524]

654. All of Mr. Williamson's personal financial accounts are located in the United States. Mr. Williamson's personal investment portfolio has always been primarily invested in American and European securities, and not in Mexican securities. He did this intentionally based on his knowledge that the Mexican financial sector has been volatile throughout his professional life. Even when Mr. Williamson invested in Mexican companies—such as Oro Negro and Navix—he was sure that the investment primarily involved U.S. investors and U.S. capital to help ensure that the companies he invested in would be run in a proper, transparent way, free from corruption and any illicit activities.[1525]

655. Mr. Williamson has paid taxes in the United States since 1984, the year that he began working in the United States and obtained permanent resident status. In compliance with the law, Mr. Williamson also paid taxes in México when obligated to do so. However, he filed for removal

[1522] *Id*. at ¶ 35.

[1523] *Id*. at ¶ 36.

[1524] *Id*. at ¶¶ 42-43.

[1525] *Id*. at ¶¶ 43-44.

of his *Registro Federal de Contribuyentes* ("RFC") from the SAT in November 2020. Therefore, Mr. Williamson's RFC should no longer be active in México's national taxation system.[1526]

656. Mr. Williamson is a member of the Key Biscayne Yacht Club, attends a local church, St. Agnes Catholic Church in Key Biscayne, and has his personal doctor located in the United States.[1527]

5) Mr. Williamson Acquired Mexican Citizenship for Convenience, and Respondent's Assertions are Unremarkable and Irrelevant

657. Mr. Williamson naturalized as a Mexican citizen in 2002 in order to facilitate his movement in and out of the country. Specifically, he wished to avoid immigration difficulties that would arise upon his frequent reentries into México from the United States.[1528]

658. México, conceding that Mr. Williamson was already a U.S. citizen prior to his Mexican naturalization,[1529] presents several facts that merely reflect that Mr. Williamson was undisputedly a Mexican citizen from 2002 onward. Respondent highlights that Mr. Williamson obtained his Mexican passport in January 2003 and renewed it in January 2013.[1530] These facts are meaningless. A passport is simply a credential to which citizens are entitled. In fact, Mr. Williamson obtained Mexican citizenship *specifically to obtain a passport*, which would ease the burdens of traveling

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[1526] C. Williamson RFC Suspension, Exhibit **C-567**; Williamson Statement, **CWS-8**, ¶¶ 45, 54.

[1527] Williamson Statement, **CWS-8**, ¶¶ 46-48.

[1528] *Id*. at ¶ 41.

[1529] Respondent states "*el señor Carlos Williamson manifestó ser nacional estadounidense*" when he created Clue, and also notes that "*[e]l 19 de noviembre de 2002, el Sr. Williamson obtuvo su carta de naturalización, expedida en su favor por la SRE. En tal documento, se establece que su nacionalidad anterior fue la americana*." SOD, ¶ 564 (emphasis in original). Claimants are not certain what Respondent attempts to suggest by conceding with emphasis that Mr. Williamson's "*nacionalidad anterior*" was United States. To the extent Respondent is arguing that Mr. Williamson somehow stated, through this formulaic government document, that he was *formerly* a U.S. citizen, that suggestion is incorrect and contravened by the record. Mr. Williamson is and has been a U.S. citizen continuously since 1989.

[1530] *See* SOD, ¶ 564.

internationally to and from México. By the same token, it is irrelevant that Mr. Williamson possess a CURP—a simple identifier to which Mexican citizens are entitled—as respondent concedes that "*le permite al Sr. Williamson Nasi realizar una pluralidad de trámites y gestiones en México (e.g., tramitar su pasaporte mexicano, tener acceso a servicios de salud, entre otras actividades)*."[1531] If anything, under a holistic review of the circumstances of Mr. Williamson's life, his proper maintenance of his passport to facilitate international travel and his possession of a CURP make it *less* likely that his dominant citizenship is Mexican, not more likely.

659. Similarly, Mexican citizenship accorded upon Mr. Williamson the right to vote. Respondent's assertion that Mr. Williamson's resultant possession of an INE credential, "*la cual le permite ejercer derechos políticos en México*," is therefore irrelevant, as the credential is simply another reflection of Mr. Williamson's undisputed Mexican citizenship.[1532] Indeed, México concedes that an INE credential simply "*es la identificación oficial por excelencia, y es equivalente a la 'identity card' o 'carte d'identité' de otros países*."[1533] Assuming that is true, there is no reason why Mr. Williamson should *not* have one.

660. Respondent also submits that while performing business and legal actions under the laws of México or directly affecting Oro Negro, on a handful of occasions in 2007, 2009 and from 2011 to 2014, Mr. Williamson identified himself as a Mexican citizen by naturalization, and stated that he had a domicile in México City.[1534] As an initial matter, the examples submitted by Respondent all predate Respondent's violations of the NAFTA at issue in this case, and are thus irrelevant to

[1531] SOD, ¶ 567.

[1532] SOD, ¶ 567.

[1533] SOD, ¶ 565.

[1534] *See* SOD, ¶ 564.

a dominant nationality analysis. Regardless, these mundane facts do not indicate, let alone establish, that Mr. Williamson's "dominant" nationality is Mexican.

661. Respondent fails to explain why a person who has obtained Mexican citizenship for practical and business purposes should not have identified himself as a Mexican citizen while performing official business functions in, or for an investment in, México. It simply is unremarkable that a sophisticated businessperson possessing the nationality of a particular legal forum would identify themselves as such in corporate documents or legal proceedings affecting or occurring in that forum. However, it *would* be remarkable if Mr. Williamson had not identified himself as a Mexican citizen in a commercial lawsuit that he initiated before the courts in México City—yet Respondent apparently believes he should have done just that.[1535]

662. Similarly, Respondent suggests that Mr. Williamson's lawful possession of a RFC while he was receiving income in México is noteworthy.[1536] Quite apart from the fact that Mr. Williamson had his RFC suspended in November 2020, paying taxes in México again reflects only the fact that Mr. Williamson spent a portion of each year and obtained income in México, and his possession of an RFC simply represents his compliance with the corresponding legal requirements.

663. Finally, Respondent argues that Mr. Williamson is domiciled in México City because on July 16, 2019, PGJCDMX requested arrest warrants against Oro Negro executives, including Mr. Williamson, and indicated that he was domiciled there.[1537] México assertion is false. The address that PGJCDMX associated with Mr. Williamson in that hearing—"*calle Sierra Vertiente*

[1535] *See* SOD, ¶ 564.

[1536] SOD, ¶ 567.

[1537] *See* SOD, ¶ 564.

número 823 colonia Lomas de Chapultepec en la alcaldia Miguel Hidalgo"—belongs to an apartment that Mr. Williamson lived in for about one year in around 2010.[1538] In reality, Mr. Williamson permanently settled in the United States in June 2019, and under these circumstances he does not intend to return to México for any reason.[1539]

664. More broadly, the Tribunal should not countenance Respondent's self-serving assertion that a frivolous and retaliatory criminal proceeding undertaken against Claimants in violation of the NAFTA for their refusal to pay PEMEX bribes could serve as probative evidence in this proceeding.

665. Mr. Williamson's connection to the United States—where he is permanently domiciled, has owned a house, keeps his finances, maintains his social connections, and the majority of his family lives—has always been deeper than his connection to México, a country where he resided temporarily for business purposes, whose citizenship he acquired for convenience and to which he will not return. Thus, Mr. Williamson's dominant and effective nationality is United States.

(b) Mr. Cañedo's Dominant and Effective Nationality Is United States

666. Mr. Cañedo's United States nationality too is genuine and therefore "effective."[1540] Respondent, "*suponiendo sin conceder*" that Mr. Cañedo is a U.S. permanent resident, does not actually argue that he does not possess permanent resident status.[1541] Nor could it, as Claimants

[1538] Williamson Statement, **CWS-8**, ¶ 39.

[1539] *Id*. at ¶¶ 49-51.

[1540] *Ballantine v. Dominican Republic*, Final Award, ¶ 172, **CL-376**.

[1541] SOD, ¶ 570.

furnished proof that Mr. Cañedo has been living in the United States since 2012 and became a U.S. permanent resident in 2014.[1542]

667. Respondent attempts to rely on Mr. Cañedo having been born in México in order to establish that his dominant nationality cannot be United States.[1543] However, this fact is inconsequential in analyzing the dominant and effective nationality of a claimant who possesses the nationality of their country of birth but obtained an alternate nationality upon relocating. As the tribunal in *Ballantine* explained, "a person that was born and lived in a particular country during a long period of his or her life will have many attachments, connections and closeness with that country," and therefore:

> [an] holistic assessment must be performed in order to discern which nationality was dominant and effective at the relevant time considering all the facts of the case. Taking into account a claimant's entire life within the analysis of dominance and effectiveness *at a particular time* does not necessarily entail ascribing more weight to one nationality over the other due to the amount of time each of them has been held. Rather an analysis should be performed to examine how, *at that particular time*, the connections to both States could be characterized in terms of dominance and effectiveness.[1544]

[1542] SOC, ¶¶ 15(t), 333; José Antonio Cañedo White U.S. Permanent Resident Permit, **C-B.23**; Second Cañedo Statement, **CWS-6,** ¶¶ 6-8. Similarly, the Tribunal should reject Respondent's glib assertion that Mr. Cañedo "*no cuenta con ninguna otra nacionalidad*." SOD, ¶ 570. While Mr. Cañedo is not yet a U.S. citizen, he is, in fact, a United States "national" under the NAFTA as a permanent resident of the United States. *See* NAFTA Article 201, **CL-67**. Respondent's suggestion to the contrary defies the essential tenet that the *lex specialis* cannot be read in such a way that its text—here, including permanent residents as nationals—becomes meaningless. *See Rawat v. Mauritius*, Award on Jurisdiction, ¶182 ("*Effet utile*, although not expressly set out in the VCLT, is generally accepted to flow from the principle of interpretation of treaties in good faith as envisioned in VLCT Article 31 (1). The *Cemex v Venezuela* tribunal described the principle of *effet utile* as 'exclud[ing] interpretations which would render the text meaningless, when a meaningful interpretation is possible'."), **CL-378**; *Eureko B.V. v. Republic of Poland*, Ad Hoc Arbitration, Partial Award (Aug. 19, 2005), ¶ 248 ("It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective."), **CL-379**.

[1543] SOD, ¶ 560.

[1544] *Ballantine v. Dominican Republic*, Final Award, ¶ 556, **CL-376**.

668. A holistic assessment of Mr. Cañedo's life as guided by Claimants' submissions shows that his dominant nationality was United States during the time period that México violated the NAFTA.

669. As a preliminary matter, Respondent again refers to the baseless July 16, 2019 PGJCDMX hearing to assert that Mr. Cañedo is domiciled in México City, as it did for Mr. Williamson. Respondent's assertion and the "evidence" it is based on are false. Mr. Cañedo has been domiciled in Florida, in the United States, since 2012. He does not intend to return to México for any reason. Below, after demonstrating that Mr. Cañedo's dominant nationality is United States, Claimants explain exactly how Respondent's assertion is a fabrication.

1) Mr. Cañedo Has Been Connected to the United States Almost Exclusively Throughout the Time Period Relevant to this Proceeding

670. As set forth in his first witness statement, in the summer of 2012, Mr. Cañedo moved with his wife and their two young children to the United States for reasons related to the health of their youngest son, José Antonio Cañedo Jr. ("José Antonio"). Since then, the family has lived in greater Miami, Florida. Specifically, they lived in Fisher Island from 2012 to 2018—in an apartment that Mr. Cañedo had owned since 1993—and in Key Biscayne from 2018 on.[1545]

671. Mr. Cañedo moved to the United States in 2012 with the intention of becoming a permanent resident and eventually obtaining U.S. citizenship. Therefore, shortly after his family moved to the United States—in 2013—Mr. Cañedo and his wife began the necessary procedures to obtain permanent residence in the United States. The couple obtained Green Cards, which gave

[1545] Second Cañedo Statement, **CWS-6**, ¶ 16.

them the status of permanent residents in the United States, in 2014. Mr. Cañedo's current Green Card is valid until 2027 and allows him to live and work permanently in the United States.[1546]

672. Since they moved to the United States, Mr. Cañedo and his wife have been working with immigration attorneys to carry out the necessary procedures to become U.S. citizens. Both applied for U.S. citizenship in May 2020. Mrs. Cañedo obtained her U.S. citizenship in January 2021.[1547] Mr. Cañedo currently is waiting to hear from the United States government on the status of his application for U.S. citizenship, and he firmly believes that the delay in receiving his citizenship is due to the INTERPOL Red Notice that México obtained against him in August 2019 based on the frivolous arrest warrant obtained by the PGJCDMX in July 2019, as described above.[1548]

673. Upon receiving U.S. citizenship, Mr. Cañedo intends to renounce any and all allegiance to México consistent with the legal requirements for naturalization as a U.S. citizen. Specifically, when executing the application for naturalization as a U.S. citizen, an applicant must acknowledge their willingness and ability to swear the following oath of allegiance immediately prior to becoming a naturalized citizen: "I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen[.]"[1549] Mr. Cañedo acknowledged his willingness to swear this oath when he executed his application for naturalization. His wife made the same acknowledgment on her application, and she swore this oath of allegiance when she became a U.S. citizen.[1550]

[1546] *Id*. at ¶¶ 5-8.

[1547] *See* Second Cañedo Statement, **CWS-6**, ¶¶ 9-10; Maria Lemus Gonzales U.S. Passport, Exhibit **C-564**.

[1548] Second Cañedo Statement, **CWS-6**, ¶¶ 11-13.

[1549] *See* USCIS Form N-400, Application for Naturalization, **CL-380**.

[1550] Second Cañedo Statement, **CWS-6**, ¶ 14.

2) Mr. Cañedo's Family is Centered in the United States and He Has Been Connected to the United States for Decades

674. Mr. Cañedo has been connected to the United States since he was a child. From ages 13 to 14, he was a boarding student at Nazareth Hall in Grand Rapids, Ohio, a military academy. He was the standard-bearer of the flag, and he learned there to respect and love the flag of the United States of America. Thus, when he became an adult, Mr. Cañedo returned often to the United States, for long periods of time, before permanently settling in Florida in 2012.[1551]

675. Mr. Cañedo and his wife's two children—U.S. citizens by birth—go to school in Miami. Their daughter Mariana Cañedo ("Mariana") was born in Florida, United States, in 2008, and their son José Antonio was born in Colorado, United States, in 2010. Despite the fact that in 2008 and 2010 Mr. Cañedo and his wife resided primarily in México, their children were born in the United States because they had been regularly traveling to the United States for weeks or months at a time for several years.[1552]

676. Specifically, for the past eighteen years, Mr. Cañedo and his wife have spent about one month of every winter in Colorado, where they own a home. During the preceding twelve years—before they bought their house—Mr. Cañedo also spent about one month of every winter in Colorado, and during those trips he stayed in a hotel. In addition, during the nine years preceding the family's move to Florida in 2012, Mr. Cañedo and his wife spent three to four weeks of every summer and one week of every spring in Miami. Before then, Mr. Cañedo regularly visited Miami from the time he purchased his apartment in Fisher Island in about 1993 onward. Thus, their

[1551] *Id*. at ¶ 15.

[1552] *Id*. at ¶ 17.

daughter Mariana was born at the end of May 2008 in Florida, and their son José Antonio was born in mid-December 2010 in Colorado.[1553]

677. Mr. Cañedo also regularly visited San Diego, California, and he owned an apartment in La Jolla from 1990 to 1993.[1554]

678. Mr. Cañedo also has three older children, ages 33, 31, and 28, from his prior marriage. The oldest of these children, a daughter, is living and working toward her doctoral degree in Austin, Texas. She previously obtained two masters degrees in Ithaca, New York.[1555]

679. In addition, two of Mr. Cañedo's four siblings—a brother named Guillermo and a sister named Andrea—are U.S. citizens and live in Miami. Guillermo became a U.S. citizen in 2016, and Andrea became a U.S. citizen in 2020.[1556]

680. Mr. Gil, the former CEO of Integradora, is Mr. Cañedo's cousin, and also currently resides in Miami. He obtained his U.S. permanent residence in April 2016.[1557]

681. Therefore, Mr. Cañedo's family connections are primarily in the United States. His wife and their two children are all U.S. citizens, and Mr. Cañedo expects to receive his U.S. citizenship soon.[1558]

3) Mr. Cañedo's Residence and Properties Are Entirely in the United States

682. Mr. Cañedo has continuously owned property in the United States since 1990. As noted above, he owned an apartment in La Jolla, outside of San Diego, California, from 1990 until 1993.

[1553] *Id*. at ¶ 17.

[1554] *Id*. at ¶ 18.

[1555] *Id*. at ¶ 19.

[1556] *Id*. at ¶ 20.

[1557] *Id*. at ¶ 21.

[1558] *Id*. at ¶ 22.

In order to be closer to his father and siblings who had moved to Miami, in about 1993 Mr. Cañedo moved to Fisher Island, where he purchased an apartment that he owned until 2018. In 2018, Mr. Cañedo and his wife exchanged the property in Fisher Island for the house that they currently own in Key Biscayne through an in-kind trade. In addition to the Key Biscayne house, they also own the aforementioned house in Colorado. Mr. Cañedo does not currently own a house in México, and has not owned one there for many years.[1559]

4) Mr. Cañedo's Personal and Financial Life is Entirely in the United States

683. Beyond his family being in the United States, Mr. Cañedo's remaining personal and financial connections are located in the United States.[1560]

684. Since about 1998, almost none of Mr. Cañedo's finances have been kept or managed in México. Rather, the majority of his finances have been held in the United States, Europe and elsewhere. Mr. Cañedo's personal investments have always primarily been in American and Dutch investment vehicles, as well as in publicly traded instruments in the United States and Europe, and not in Mexican stocks or businesses. When he did invest in companies in Mexico—specifically, Oro Negro and Navix—he made sure that the companies had substantial U.S. investors and capital, as was the case with both firms. Mr. Cañedo was sure never to invest in Mexican businesses without U.S. investors and capital because throughout his professional career, he has known the Mexican private and financial sectors to be extremely volatile and their relationships with the Mexican government to be corrupt. He was also well aware that the justice

[1559] *Id*. at ¶ 28.

[1560] *Id*. at ¶¶ 23-26, 33-35.

system in Mexico does little to protect people from corruption and was unwilling to invest in companies under those circumstances.[1561]

685. Mr. Cañedo's pro-U.S. financial outlook was reflected in the early years of Axis Capital Management, which Mr. Cañedo founded with Mr. Williamson in 1990, which originally focused on transposing Mexican companies into the U.S. market.[1562]

686. Mr. Cañedo has not paid taxes in México for the last three years. He suspended his RFC with the SAT in November 2020, and therefore his RFC should no longer be active in México's national taxation system.[1563]

687. All of Mr. Cañedo's institutional connections are in the United States. He and his wife have been parishioners of St. Agnes Catholic Church in Key Biscayne for about four and a half years. Before then, they were members of St. Patrick's Catholic Church in Miami Beach, Florida. Mr. Cañedo, his wife and his sister have been involved in community and charity work through the churches throughout that time.[1564] Mr. Cañedo is also a member of Grand Bay Beach Club in Key Biscayne, and he was previously a member of the Fisher Island Club when he lived in Fisher Island. His physician is also in the United States.[1565]

688. Mr. Cañedo possesses a valid Florida driver's license, but not a valid Mexican driver's license.[1566]

[1561] *Id*. at ¶ 35.

[1562] *Id*. at ¶ 35.

[1563] *See* J.A. Cañedo White RFC Suspension, Exhibit **C-568**; Second Cañedo Statement, **CWS-6**, ¶ 36.

[1564] *See* J.A. Cañedo White Mercy Hospital I.D. Badge, Exhibit **C-565**; Second Cañedo Statement, **CWS-6**, ¶ 23.

[1565] Second Cañedo Statement, **CWS-6**, ¶¶ 24-25.

[1566] *Id*. at ¶ 26.

689. Mr. Cañedo also has not voted in the last two Mexican presidential elections in 2012 and 2018. However, he intends to vote in U.S. elections after he obtains his citizenship.[1567]

5) Mr. Cañedo Has Not Been to Mexico in Years, and His Trips to Mexico Before Then Were Rare, Brief and for Work or Formal Occasions

690. Mr. Cañedo has not even left the United States in approximately one and a half years. Prior to that time, while residing in the United States, he never spent more than fifty days per year outside of the United States. Those international trips were primarily to Europe and not México.[1568]

691. As set forth in Mr. Cañedo's first witness statement, from 2012 until 2019, he traveled to México about twenty times for time periods of about four days on average and in no case more than fifteen days.[1569] During these years, most of Mr. Cañedo's meetings and business related to Oro Negro were conducted by telephone and did not require travel to México. However, a small number of those meetings did require travel to México. Thus, his trips to México primarily were for work and not for leisure, and a small fraction of these trips were for formal ceremonies such as weddings. The last time Mr. Cañedo traveled to México was well before PGJCDMX obtained the baseless arrest warrant against him in July 2019.[1570]

692. Mr. Cañedo does not intend to visit México, even if the Mexican government were to lift its arrest warrant against him, because he does not believe that he would be safe there. Mr. Cañedo strongly feels that his life and freedom would be at risk in México because of potential reprisals from persons affiliated with the Mexican government who will have remembered Oro Negro's

[1567] *Id*. at ¶¶ 37-38.

[1568] *Id*. at ¶ 30.

[1569] First Cañedo Statement, **CWS-2**, ¶ 13.

[1570] Second Cañedo Statement, **CWS-6**, ¶ 31.

unwillingness to pay bribes and Claimants' assertion of their rights in this proceeding. He also fears their continued persecution of himself and Oro Negro.[1571] Quite simply, Mr. Cañedo has no substantial personal or institutional connections to México, has not had a home in México for nine years and does not intend to have a home in México in the future.[1572]

6) Respondent's Assertions are Misleading and Irrelevant to Mr. Cañedo's Dominant Nationality

693. Ignoring these facts, Respondent again relies on an array of trivia proving only that Mr. Cañedo is a Mexican citizen, which is undisputed. Once again, the examples submitted by Respondent predate Respondent's violations of the NAFTA at issue in this case and are irrelevant.

694. Respondent first notes that Mr. Cañedo declared himself to be a Mexican with a domicile in México City when the Axis companies were incorporated in 2006 and 2011.[1573] This is a simple misdirection that the Tribunal should disregard. The incorporating documents cited by Respondent predate not only Mexico's NAFTA violations, but also both Mr. Cañedo's 2012 move to the United States and his 2014 obtainment of U.S. permanent residence.[1574]

695. Respondent contends that between 2012 and 2014 Mr. Cañedo identified himself with his Mexican passport on certain Singaporean powers of attorney related to Oro Negro.[1575] The Tribunal should ignore this misdirection as well. As an initial matter, Mr. Cañedo did not sign or identify *himself* on these materially identical documents, and all but one of them predate July 2014, when Mr. Cañedo obtained his U.S. permanent residence. But more substantively, Respondent

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[1571] *Id*. at ¶ 32.

[1572] *Id*. at ¶ 33.

[1573] *See* SOD, ¶ 569.

[1574] *See* Axis Services, (2011) p. 25, **R-0054;** Axis Holdings Document of Incorporation (2011), p. 25, **R-0056**; Axis Capital Document of Incorporation (2006), p. 47, **R-00215**.

[1575] *See* SOD, ¶ 569 ("*En cada acto el Sr. Cañedo White se identificó con su pasaporte mexicano.*").

fails to explain why it is noteworthy or relevant that a recipient of contractual rights would be identified with his only passport in official legal documents formalizing an *international* transaction. This is irrelevant to Mr. Cañedo's dominant nationality.

696. Respondent additionally "assumes" that Mr. Cañedo has an INE credential and states that he has a CURP.[1576] As explained above, these are merely credentials to which Mexican citizens are entitled—the INE credential being the equivalent of an identity card, as Respondent concedes—and so Respondent's reliance on them is mistaken. Again, it is undisputed that Mr. Cañedo is a Mexican citizen, a fact that standing alone is irrelevant to a dominant nationality analysis. That being said, Mr. Cañedo does have an INE credential: it lists Florida as his domicile, which, as has been well established, it has been since 2012.[1577]

697. Similarly, Respondent asserts that Mr. Cañedo has an RFC and is therefore taxed in México.[1578] As noted above, Mr. Cañedo suspended his RFC in November 2020. But regardless, Respondent's assertion is yet another attempt to suggest that a Mexican citizen complying with México's taxation laws is suspect.

698. Finally, Respondent argues that Mr. Cañedo is domiciled in México City because at the July 16, 2019, arrest warrant hearing, the PGJCDMX indicated that he had "*tres domicilios registrados en la Ciudad de México*."[1579] This again is wrong and is based on allegations made by México in its baseless criminal investigation against Mr. Cañedo. Substantively, Respondent's argument relies on erroneous information. The first two addresses referred to in the hearing are

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[1576] *See* SOD, ¶ 569 ("*supone*").

[1577] *See* J.A. Cañedo White INE Voter Card Credential, Exhibit **C-555**.

[1578] *See* SOD, ¶ 569.

[1579] *See* SOD, ¶ 569 ("*De la audiencia realizada el 16 de julio de 2019, en la que la FGJCDMX solicitó una orden de aprehensión en contra del Sr. Cañedo White, se pudo corroborar que El Sr. Cañedo White cuenta con, al menos, tres domicilios registrados en la Ciudad de México*.").

fictitious, and Mr. Cañedo has no recollection of ever having had any affiliation with them.[1580] The third address is a house that Mr. Cañedo used to live in before moving to the United States nine years ago.[1581] Thus, Mr. Cañedo left that address in the United States years before the unwarranted criminal proceeding that Respondent cites. Once again, Mr. Cañedo's permanent domicile is in Florida, where he has lived for the past nine years, and he does not intend to return to México.

3. Conclusion

699. Messrs. Williamson and Cañedo are U.S. nationals under the NAFTA and validly brought their claims against México under the NAFTA. Dual nationals can bring claims under the NAFTA, and the dominant and effective nationality test is irrelevant to this Tribunal's determination of Claimants' nationality. This having been said, even if the dominant and effective nationality were applied, the evidence presented in this proceeding makes clear that United States nationality is the dominant and effective nationality of both Messrs. Williamson and Cañedo. Respondent's misdirections cannot deter that conclusion. Therefore, even were the NAFTA to impose a dominant and effective nationality test (*quod non*), it would be no impediment here. Under any metric, the Tribunal has jurisdiction *ratione personae* over Claimants.

D. Messrs. Williamson and Cañedo Fulfilled the Waiver Requirement Under Article 1121

700. In the Statement of Defense, México raises another meritless objection to the Tribunal's jurisdiction *ratione personae* over Messrs. Williamson and Cañedo on the grounds that they have violated the waiver requirement in Article 1121 of the NAFTA. That provision requires investors

[1580] Second Cañedo Statement, **CWS-6**, ¶ 29. The transcript itself demonstrates that the agents investigating these addresses could not even find them. *See* Transcript of criminal hearing provided by Claimants, pp. 6-7, **R-0203**.

[1581] Second Cañedo Statement, **CWS-6**, ¶ 29.

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."[1582]

701. According to México, the participation of Messrs. Williamson and Cañedo in the "Releases Action,"[1583] a series of claims in Oro Negro's Chapter 15 Proceeding, is a violation of their waiver because, México claims, the Releases Action is "*basada[] en las mismas medidas presentadas en el Escrito de Demanda.*"[1584]

702. México's objection fails because the Releases Action does not involve the same "measures" (under NAFTA) as those involved in this arbitration.

703. The sources on which México relies confirm the "measures" at stake in the Releases Action must be "the same as those at stake in this arbitration" in order for there to be a breach of a waiver under Article 1121.[1585] Article 201 of the NAFTA provides that a "measure" "includes any law, regulation, procedure, requirement or practice."[1586] For the purposes of Article 1121, NAFTA tribunals have looked specifically to the government role in any measure; as the *Detroit International Bridge Company* case explained, "the formulation in Article 1121 focuses on the State measure—the governmental act—which has given rise to the dispute."[1587] Likewise, the tribunal in *KBR v. México* observed that the drafters of the NAFTA, for purposes of the entire

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[1582] NAFTA, Article 1121 (1) (emphasis added).

[1583] *See* Complaint, *Perez-Correa v. Asia Research and Capital Management Ltd.*, No. 19-01360, Bankr. S.D.N.Y. (Sept. 26, 2019), ECF No. 1, at 41, **R-0048**.

[1584] SOD, ¶ 545.

[1585] *Detroit International Bridge Company v. Government of Canada ("Detroit v. Canada")*, PCA Case No. 2012-25, Award on Jurisdiction (Apr. 2, 2015), ¶ 301, **RL-0038**.

[1586] NAFTA, Article 201; *see Detroit v. Canada*, Award on Jurisdiction, ¶ 302, **RL-0038**.

[1587] *Detroit v. Canada*, Award on Jurisdiction, ¶ 303 (emphasis added), **RL-0038**.

Chapter 11 (including Article 1121), intended the word "measure" to mean "the State measure (or act) that the investors claim to constitute a breach of NAFTA."[1588]

704. México, however, is not a party to the Releases Action and no specific acts of México are at issue in that lawsuit.

705. In the Releases Action, the plaintiffs alleged breaches by several members of the Ad-Hoc Group and the Singapore Rig Owners ("Releases Action Defendants")—not México—of releases that the Bondholders provided to Oro Negro, its shareholders, directors, and employees in April 2016 (the "2016 Releases")—not breaches of international law, the Treaty, Mexican law, or any other instrument to which México is a party or which emanates from México. As explained in the Statement of Claim, through the 2016 Releases, in connection with an audit that the Bondholders conducted of Oro Negro, the Releases Action Defendants broadly released Oro Negro, its shareholders, directors, and employees, from any claims, causes of action, or liabilities, arising from any circumstances existing prior to April 2016.[1589] Notwithstanding the 2016 Releases, however, the Releases Action Defendants (through the Singapore Rig Owners) initiated a baseless criminal proceeding against Oro Negro's employees based on conduct that the 2016 Releases had released and discharged. For this reason and on this basis alone, the Releases Action plaintiffs pursued a claim against the Releases Action Defendants (again, several members of the Ad-Hoc Group and the Singapore Rig Owners, but not México), seeking damages for their breach of the

[1588] *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Final Award (Apr. 30, 2015), ¶ 114 ("*una medida (o acto) del estado que un inversionista alega constituye una violación del TLCAN*") (emphasis added), **CL-381**.

[1589] SOC, ¶ 297; *see also* Complaint, *Perez-Correa v. Asia Research and Capital Management Ltd.*, No. 19-01360, Bankr. S.D.N.Y. (Sept. 26, 2019), ECF No. 1, at 21-22 (quoting the 2016 Releases), **R-0048**.

2016 Releases[1590] and requesting the U.S. Bankruptcy Court to order the specific performance of the 2016 Releases by the Releases Action Defendants.[1591]

706. That has nothing to do with the "measures" that gave rise to this arbitration—*inter alia*, México's illegal expropriation of Claimants' investment, Mexico's arbitrary, discriminatory and retaliatory actions with respect to the Oro Negro Contracts, its solicitation of bribes from Oro Negro, and its retaliation against Claimants and principals of Oro Negro for refusing to pay bribes and bringing this arbitration. The entire factual and legal basis for the plaintiffs' claims in the Releases Action arose from the Releases Action Defendants' conduct, *i.e.*, their initiation of a criminal proceeding against Oro Negro's employees in violation of the 2016 Releases.[1592] The measures that Claimants allege breached the NAFTA, including México's collusion with the Ad-Hoc Group to allow the Bondholders to take over the Rigs, were neither put into question nor relevant to the determination of the Releases Action. As such, México's argument that the Releases Action was based on the same measures challenged in this arbitration is simply incorrect.

707. México cites misleadingly to two paragraphs from the factual section in the Statement of Claim, which, it claims, are "*casi una copia exacta*" of two paragraphs of the factual section in the Releases Action complaint.[1593] However, a waiver does not emerge from two lawsuits having the same factual background. The two paragraphs (out of hundreds) that describe the factual background of Oro Negro's commercial activity in México are entirely irrelevant. What matters is whether, in the Releases Action, two of the Claimants seek compensation in relation to any measures taken by México. They do not.

[1590] Complaint, *Perez-Correa v. Asia Research and Capital Management Ltd.*, No. 19-01360, Bankr. S.D.N.Y. (Sept. 26, 2019), ECF No. 1, at 42-44, **R-0048**.

[1591] *Id*. at 43-44, **R-0048**.

[1592] *Id*. at 42-44, **R-0048**.

[1593] SOD, ¶ 554.

708. México also seeks support in decisions from the *Waste Management v. México I* and *Detroit v. Canada* cases. However, those decisions are entirely inapposite as, in both cases, claimants initiated or continued legal actions *against* the host States in parallel with NAFTA arbitrations.[1594]

709. In *Waste Management I*, the claimant pursued local proceedings against the Municipality of Acapulco de Juarez and Banobras (a State-owned bank)—both state organs and thus emanations of the State.[1595] The tribunal found that the claimant's local proceedings fell within the prohibition of Article 1121 because those proceedings "directly affected the international obligations assumed by the Mexican government, given that they had their origin in the same measures invoked by the Claimant."[1596]

710. Likewise, in *Detroit v. Canada*, the U.S. domestic litigation at issue was directly between the claimants and Canada, containing a request for damages against Canada.[1597] Notably, México made an Article 1128 Non-Party submission in that case, expressing its view that the situation of *Detroit v. Canada* "appears analogous" to that of *Waste Management I*, because "Canada is the defendant in the litigation proceedings as well as in the NAFTA arbitration."[1598]

711. This, as shown, is a far cry from the present case where local proceedings are against certain Ad-Hoc Group members and the Singapore Rig Owners, not México. Therefore, Messrs.

[1594] *Detroit v. Canada*, Award on Jurisdiction, ¶¶ 331, 336, **RL-0038**; *Waste Management Inc. v. United Mexican States I ("Waste Management I")*, ICSID Case No. ARB(AF)/98/2, Arbitral Award (June 2, 2000), ¶ 29, **RL-0043**.

[1595] *Waste Management I,* Arbitral Award, ¶ 1, **RL-0043**.

[1596] *Id.* at ¶ 28 ("*sí afectaban directamente a las obligaciones internacionales asumidas por el Gobierno Mexicano puesto que tenían su origen en la misma medida invocada por la Demandante*"), **RL-0043**.

[1597] *Detroit v. Canada*, Award on Jurisdiction, ¶¶ 331, 336, **RL-0038**.

[1598] *Detroit v. Canada*, PCA Case No. 2012-25, México's NAFTA Article 1128 Submission (Feb. 14, 2014), ¶ 13, **CL-382**.

Williamson and Cañedo have complied with Article 1121 of the NAFTA, which presents no jurisdictional impediments to their participation as Claimants in this NAFTA arbitration.

E. Claimants' Claims Clearly Arise Under the Treaty

712. México's objection that the Tribunal lacks *ratione materiae* jurisdiction over Claimants' claims is not a serious one.

713. *First*, Claimants' claims are not (as México claims) "*basada[s] en señalamientos de violaciones contractuales*."[1599] Claimants argue, for example, that México failed to root out and instead fostered and encouraged the corruption practices within Pemex, sought bribes from Claimants and Oro Negro in order to facilitate and obtain better treatment from Pemex, engaged in a campaign of retaliation when payment of bribes was refused, colluded with the Ad-Hoc Group to destroy Oro Negro, and used the power of its tax, criminal, and judicial entities to retaliate and further this agenda. None of those have anything to do with contract breaches—and México knows this. That is why it offers the hollow criticism that Claimants "*buscan 'disfrazar' sus alegaciones añadiendo teorías extravagantes sobre las motivaciones de Pemex, incluyendo conspiraciones*."[1600] This argument, however, is nonsense. Critically, it fails to engage with the multitude of evidence now on record establishing "*conspiraciones*" and more.

714. *Second*, even those claims that flow from México's interference with the Oro Negro Contracts—*i.e.*, Claimants' claims that México arbitrarily refused to pay sums due, imposed abusive amendments, and terminated the Oro Negro Contracts for no justified commercial reason—are not claims for breach of contract; they are treaty breach claims based on the conduct

[1599] SOD, ¶ 585.

[1600] SOD, ¶ 585.

of México and its use and invocation of governmental power and prerogatives to harm and eventually destroy Claimants' investments in Oro Negro.

715. México knows this. That is why—in the very first (of only four) paragraphs – it seeks to move the goal posts. While its objection rests on the (false) assertion that Claimants' claims are really mere "*violaciones contractuales*" (and thus the Tribunal lacks jurisdiction), it argues that the Tribunal lacks jurisdiction over alleged breaches that "*versan sobre la relación contractual existió entre Oro Negro y Pemex*."[1601] In other words, México seeks to read into the Treaty a limitation on jurisdiction that would bar any claims that address a contractual relationship, not just claims that are really contract breach claims instead of treaty breach claims. The two, however, are obviously not the same.

716. As Claimants have already shown, tribunals have adjudicated claims that a host State breached substantive treaty protections by interfering with an investor's contract rights.[1602] That is precisely the case here. The authorities that México cites in its Statement of Defense for its contrary assertion do it no favors. At best, they are inapposite; at worst, they underscore the reality

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[1601] SOD, ¶ 585.

[1602] *See, e.g.*, *AES and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB 10/16, Award (Nov. 1, 2013), ¶ 192 ("It is . . . also widely accepted that a breach of contract may under certain circumstances also constitute a breach of treaty, where the standard breached and the rights affected by such breach fall within the scope of protection of the treaty."), **CL-383**; *Gemplus S.A., et. al v. United Mexican States*, ICSID Cases Nos. ARB (AF)/04/3, Award (June 16, 2010), ¶ 6–25 ("It is clear that a contractual breach cannot simply be converted judicially into a treaty breach, but equally it is clearly necessary for a claimant to recite the factual basis for a treaty breach which may, in appropriate cases, include allegations of fact amounting also to a contractual breach . . . ."), **CL-224**; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction (May 29, 2009), ¶ 127 ("We see no other bar to the admissibility of the claim. . . . It is well established that there is a significant distinction to be drawn between a treaty claim and a contract claim, even if there may be a significant interplay between the underlying factual issues."), **CL-384**; *Impregilo S.p.A. v. Argentine Republic (I)*, ICSID Case No. ARB/07/17, Award (June 21, 2011), ¶ 182 ("Impregilo's main claims in this arbitration concern acts that are alleged to constitute expropriation, unfair treatment and discrimination, which are all claims that go beyond mere contractual breaches even if the factual basis of the two types of claims may to a large extent coincide."), **CL-253**; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (Aug. 6, 2003), ¶ 147 ("As a matter of general principal, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders."), **CL-385**.

that the mere fact that some of Claimants' claims relate to a contractual relationship is no bar to jurisdiction.

717. For example, México cites *Waste Management II* for the assertion that "*el Capítulo XI del TLCAN no otorga jurisdiccíon en relación con las violaciones de contratos de inversion*,"[1603] but Claimants do not raise claims for contract breach. And, in any event, the tribunal in *Waste Management II* actually held that "conduct (e.g. an expropriation) may at the same time involve a breach of NAFTA standards and a breach of contract" and that these "two categories are distinct."[1604]

718. Similarly, México claims that *Impregilo* stands for the principle that a tribunal "*has no jurisdiction . . . to entertain [claimant]'s claims based on alleged breaches of Contracts.*"[1605] Yet, in *Impregilo* as well, the tribunal reaffirmed that "the fact that a breach may give rise to a contract claim does not mean that it cannot also—and separately—give rise to a treaty claim. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries."[1606]

719. For all the reasons stated above, the Tribunal must dismiss México's objection and find that it has jurisdiction to decide Claimants' claims that indisputably arise under Articles 1110 and 1105 of the NAFTA and are not breach of contract claims.

[1603] SOD, ¶ 586.

[1604] *Waste Managemen II*, Award, ¶ 73, **CL-113**.

[1605] SOD, ¶ 587.

[1606] *Impregilo S.p.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/3, Decision on Jurisdiction (Apr. 22, 2005), ¶ 258, **CL-175**.

F. México's "Proximate Cause" Objection Lacks Any Legal or Factual Basis

720. In its last attempt to avoid the Tribunal's jurisdiction, México also claims that its consent to arbitration in the NAFTA is subject to an unwritten requirement that "*la supuesta violación de tratado sea la causa próxima ('proximate cause') de la presunta pérdida o daño, y ese requisito no se cumple con la reclamación en este caso*."[1607] In support of that argument, México draws from case law that, it says, demonstrates that proximate cause—which, by any other account, is a question for quantum—is *here* a bar to jurisdiction. To do so, however, México provides the Tribunal with selective quotations from these sources and avoids addressing other sources that clearly establish that México is wrong: proximate cause is not a bar to jurisdiction, but (at best) an element of damages. Moreover, México's attempt to cast responsibility for the targeted destruction of Oro Negro on a panoply of alleged causes—volatility in the energy sector, the nature of México's energy market with Pemex as the dominant actor, the fact that the shareholders resorted to debt financing (none of which, incidentally, absolves México for its bribe solicitations or retaliatory conduct toward Claimants)—does not pass muster.

1. Proximate Cause May Be an Element of Damages, But It Is Not Relevant to Jurisdiction

721. México is simply wrong to suggest that proximate cause could be relevant to anything but damages. To make its case that a "proximate cause" objection to jurisdiction may exist, México seeks to rely on a number of decisions from other investor-State tribunals, but its treatment of those cases is riddled with misstatements, inaccuracies, and an unfortunate failure to disclose key aspects of those cases.

[1607] SOD, ¶ 589.

722. *Methanex*: In its Statement of Defense, México relies on the respondent's memorial in *Methanex v. United States*.[1608] The respondent there had argued that, because Article 1116 allows an investor to submit a claim (i) that the Contracting Party has breached the NAFTA and (ii) that it has suffered damages "by reason of, or arising out of" that breach, the NAFTA includes an implicit "proximate cause" condition to consent.[1609] What México fails to explain, however, is that the *Methanex* tribunal squarely rejected the respondent's challenge. It explained that "the plain meaning of this provision does not require, as a jurisdictional matter, the claimant to prove loss and damage."[1610]

723. México further suggests that the *Methanex* tribunal interpreted the term "relating to" in Article 1101(1) as a requirement that there be a "'*conexión legalmente significativa' entre las medidas impugnadas y el inversionista o la inversion*"—which México reads to mean "proximate cause."[1611] Not so. Article 1101(1) states that Chapter 11 of the NAFTA applies to "measures adopted or maintained by a Party relating to (a) investors of another Party [or] (b) investments of investors of another Party in the territory of a Party."[1612] Interpreting that language in accordance with the Vienna Convention, the *Methanex* tribunal found that, for Chapter 11 to apply, the words "relating to" require some link between the measure that is alleged to breach the NAFTA and either the investor or its investment—not that the measures must be the "proximate cause" of the

[1608] SOD, ¶¶ 591-92.

[1609] *Methanex*, UNCITRAL, Partial Award (Aug. 7, 2002), ¶¶ 85-86, **RL-0057**.

[1610] *Methanex*, Partial Award, ¶ 86, **RL-0057**.

[1611] SOD, ¶ 594.

[1612] NAFTA, Article 1101(1) (emphasis added).

investor's damages.[1613] Here, that low bar is easily met, as the actions alleged to be NAFTA breaches directly affected Claimants and their investment.

724. Bayview: Similarly, México claims that the *Bayview* decision supports México's reading of Article 1101(1).[1614] Yet, the *Bayview* tribunal merely cites the *Methanex* tribunal's findings, which, as shown, are entirely irrelevant. The *Bayview* tribunal ultimately declined jurisdiction because it found that investors had not established a sufficient connection between the measure at issue (in *Bayview*, the impounding of water by México in México) and the investor or its investment (Texas irrigation companies operating in Texas, not México).[1615] Finding that the investors were not "foreign investors," the *Bayview* tribunal stated that the NAFTA was "not intended to provide substantive protections or rights of action to investors whose investments are wholly confined to their own national States, in circumstances where those investments may be affected by measures taken by another NAFTA State Party."[1616] Claimants' investment was unmistakably in México and easily satisfies the issue identified by the *Bayview* tribunal.

725. Other Sources: México also points to *Provident Mutual Life Insurance Company v. Germany*, *Burimi SRL v. Alabania*, and a scholarly work by Stanimir Alexandrov and Joshua Robbins in order to contend that proximate causation is a bar to jurisdiction. México's reliance on them is again misplaced. These sources only confirm that the issue of causation is an issue of quantum. In their work, Stanimir Alexandrov and Joshua Robbins explain that the doctrine of proximate causation is "most clearly codified" in Article 31 of the ILC Articles on State

[1613] *Methanex*, Partial Award, ¶ 147, **RL-0057**.

[1614] SOD, ¶ 596.

[1615] *Bayview v. México*, Award, ¶ 101, **RL-0045**.

[1616] *Bayview v. México*, Award, ¶ 103, **RL-0045**.

Responsibility, which sets out the principle of 'full reparation' that should govern the assessment of damages.[1617] The quoted passage from *Provident Mutual Life Insurance v. Germany* again has nothing to do with the jurisdiction of the U.S.-Germany Mixed Claims Commission. And despite México's mischaracterization, the decision in *Burimini SRL v. Albania* did not even address the issue of causation, because the tribunal declined jurisdiction on the grounds that the investor did not own the claimed shareholding in a local enterprise.[1618]

726. The undeniable reality is that "[c]ausation between injury and the internationally wrongful conduct is relevant for quantifying damages," not for jurisdiction.[1619]

727. Thus, México's "proximate cause" objection to jurisdiction has no merit and must be rejected by the Tribunal.

2. México's NAFTA Breaches Were the Proximate Cause of Claimants' Loss

728. Even if the Tribunal were to find that "proximate cause" were a condition to México's consent, that would get México no further. There can be no doubt that México's breaches are the proximate cause of Claimants' loss.

729. Proximate causation means simply that Claimants' loss was the objectively foreseeable outcome of México's breaches of the NAFTA.[1620] As the tribunal in *S.D. Myers* explained, another

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[1617] Stanimir A. Alexandrov & Joshua M Robbins, *Proximate Causation in International Investment Disputes*, in Yearbook on International Investment Law & Policy 2008-2009 (2009), p. 321**, CL-386**.

[1618] *Burimi SRL and Eagle Games v. Republic of Albania*, ICSID Case No. ARB/11/18, Award (May 29, 2013), ¶ 143-44, **RL-0060.**

[1619] Josefa Sicard-Mirabal and Yves Derains, *Chapter 9: Damages and Costs*, in Introduction to Investor-State Arbitration (Kluwer Law International, 2018), at p. 218, **CL-387**; *see also S.D. Myers*, Second Partial Award, ¶ 140 ("[D]amages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor."), **CL-298**; *UPS*, Award on the Merits, ¶ 37 ("Canada separates damage and causation in its analysis. These are not separate aspects of a claim of damage. Rather, these are inseparable, as damage must flow from some cause."), **CL-74**.

[1620] *Burlington Resources v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (Feb. 7, 2017), ¶ 333, **CL-266**; *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award (Mar. 28, 2011), ¶ 169, **CL-225**.

way of expressing the same concept would be that "the harm must not be too remote."[1621] Again, the tribunal in *S.D. Myers* made it clear that the principle of proximate causation concerns the assessment of compensation, and consistent with the well-established principle of "full reparation," the tribunal further stated: "The purpose of virtually any investment in a host state is to produce revenue for the investor in its own state. The investor may recover losses it sustains when, as a proximate cause of a Chapter 11 breach, there is interference with the investment and the financial benefit to the investor is diminished."[1622]

730. In the present arbitration, there can be no dispute that Claimants' loss of their investments (*i.e.*, 43.2% equity interest in Oro Negro) was both caused by, and was the foreseeable consequences of, México's measures, which completely destroyed the viability of Oro Negro and directly prevented Oro Negro from collecting or generating any revenue from the Rigs. México unlawfully terminated the Oro Negro Contracts in retaliation principally for Oro Negro's failure to pay bribes, and then further colluded with the Ad-Hoc Group to ensure that Oro Negro would not be able to survive and that the Bondholders would take possession and ownership of the Rigs. These measures directly caused the loss of the full value of the company and necessarily the complete loss of value in Claimants' 43.2% equity interest in Oro Negro.

731. In a bid to escape liability, México denies this. It claims that (i) the termination of Oro Negro Contracts, (ii) the loss of the Rigs, and (iii) the loss of the down payment on the New Rigs were equally the result of "*los problemas auto-infligidos por Oro Negro*."[1623] The facts, however, tell a different story.

[1621] *S.D. Myers*, Second Partial Award, ¶ 140, **CL-298**.

[1622] *S.D. Myers*, Second Partial Award, ¶¶ 121, 140-60, **CL-298**.

[1623] SOD, ¶ 602.

(i) The Oro Negro Contracts: México Did Not Terminate the Oro Negro Contracts for Any Reasonable Commercial or Economic Purpose, But To Retaliate Against Oro Negro for the Refusal To Pay Bribes

732. México seeks to defend Pemex's unexplained non-payment of contract amounts, its imposition of abusive amendments, and its termination of the Oro Negro Contracts as "*necessaria*" and "*una decisión prudente en el contexto*."[1624] It suggests that Pemex's unilateral renegotiation of the Oro Negro Contracts and its unilateral termination of them was simply the result of its superior bargaining power and consistent with those contracts.[1625] But México's bid to escape liability cannot overcome three major weaknesses that México fails to address.

733. *First*, México offers no justification for *why* Pemex engaged in abusive, unreasonable, arbitrary, discriminatory and unilateral conduct. Tellingly, México does not even attempt to address Claimants' showing that México singled out Oro Negro for harsher treatment than all other contractors and therefore that México's justifications for the unilateral modifications in 2015 and 2016 and termination in 2017—*i.e.*, budget reductions and the falling global price of oil[1626]—were false. This explanation is as lacking now as it was then. While it may have partially been a motivation for its conduct, the budget shortfalls and falling global prices do nothing to explain México's provision of better contracts and better treatment to Seamex when those same macroeconomic conditions were present. These two supposed justifications do not explain México's collusion with and aid to the Bondholders in terminating the Oro Negro Contracts and then starving the company of cash so as to pave the way for its demise. They also do nothing to explain the corrupt judicial proceedings that resulted in the Rigs Takeover Order or the other

[1624] SOD, ¶ 603.

[1625] SOD, ¶ 604.

[1626] *See* SOC, ¶ 82.

arbitrary judicial proceedings that led to Oro Negro's being depleted of all cash and ultimately being forced to turn over the Rigs to the Bondholders in the *Concurso* proceeding. And finally, these two factors do not explain México's failure to root out the corruption in Pemex and its fostering of and benefitting from that illegal practice and the resulting harsh measures imposed on Oro Negro for failing to accede to the bribe requests.

734. *Second*, despite being twice ordered by the Tribunal to produce such evidence, México has failed to produce any meaningful evidence of the *more than 300 examples* of contract amendments with other contractors, which, it claimed, suffered similar treatment.[1627]

735. This can only be for one reason: there is no evidence to support México's hollow claims and the documents requested, if produced, would have perfectly supported Claimants' allegations. During the document production phase of this arbitration, Claimants requested that México produce "[t]he documents related to the negotiations conducted by the Pemex 'Working Group' between 2015 and 2017, including internal correspondence, reports, notes, memoranda, analyses, emails or messages sent via Whatsapp, text message, iMessage, WeChat, Signal Messenger, Telegram, or any other cloud-based messaging service, prepared between January 1, 2015 and December 31, 2017" (Request No. 43); and "[t]he documents related to Pemex's contracts, contract suspensions, and contract amendments with all its jack-up rig providers, including any correspondence, notes, reports, or analyses related to the reasons and terms of these contracts and amendments prepared between January 1, 2015 and December 31, 2017" (Request No. 51).

736. The Tribunal granted both of Claimants' requests, finding that they "relate[] to a relevant issue in this arbitration and [are] sufficiently specific."[1628] México then submitted an unsolicited

[1627] SOD, ¶ 768 (arguing that "*Pemex trató a todos los contratistas de la misma manera*").

[1628] Procedural Order No. 8, Annex A, Requests 43 and 51.

objection to the Tribunal's order, asking if the Tribunal actually ordered it to produce the documents requested by Request 43, noting that it would take "months of work and a laborious coordination between Pemex, different administrative areas, and the defense team of México in order to compile the documents ordered by the Tribunal."[1629] It also challenged the Tribunal's order for Request 51, asking if the Tribunal might have ordered these documents "in error."[1630] In response the Tribunal "maintain[ed] its decision on the relevance and specificity of the documents included in requests 43 and 51" and hence maintained its order to México to produce the requested documents.[1631]

737. In blatant disregard of the Tribunal's decisions and despite actually having months to compile the documents,[1632] México did not produce a single document to evidence the *more than 300 examples* of other contractors receiving supposed equal treatment—*i.e.*, forced contract amendments, suspensions and terminations from 2015 to 2017 (Request 43). And in response to Request 51, México only produced 34 documents, the majority of which are contract amendments with other jack-up rig providers.

738. Not only does México produce no evidence to the contrary, but also México fails to explain, for example, why Pemex imposed more severe amendments on the Oro Negro Contracts than any

[1629] México's Letter to the Tribunal (Oct. 20, 2020), at p. 5 ("*Buscar y exhibir 'internal correspondence, reports, notes, memoranda, analyses or emails related to the negotiations conducted by the Pemex "Working Group" between 2015 and 2017' sobre estas negociaciones implicaría meses de trabajo y una laboriosa coordinación entre Pemex, diferentes áreas administrativas de Pemex y el equipo de defensa de México, con la finalidad de recopilar la documentación ordenada por el Tribunal.*").

[1630] *Id.* at p. 6 ("*La Demandada quisiera confirmar con el Tribunal el alcance de su decisión y entender si por error ordenó a la Demandada exhibir documentación relacionada con todos los proveedores de plataformas de Pemex.*").

[1631] Procedural Order No. 9 (Nov. 11, 2020), ¶ 26(ii).

[1632] The Tribunal issued Procedural Order No. 8 on October 9, 2020 and Procedural Order No. 9 on November 11, 2020. As mutually agreed by the parties, the parties exchanged documents on a rolling basis with the final productions to be made on January 8, 2021, three months after the issuance of Procedural Order No. 8 and two months after the issuance of Procedural Order No. 9. México, in its own objections, stated that it would take "months of work," yet even having those "months," it refused to produce any documents.

competitors' contracts. Nor does it explain why it improperly withheld massive sums of money that were due and owed to Oro Negro, starving the company of cash while planning the demise of the company with its creditors, but did not do this to any other contractor. While México suggests cryptically that other service providers suffered similar payment delays, it does not even attempt to provide an example—with evidence—much less the timespan of those supposed delays or the amount of payments supposedly withheld.[1633]

739. In fact, the evidence on record cuts against México. As, according to México, the market downturn forced Pemex to negotiate new commercial terms with all its contractors, Seamex remained inexplicably untouched and largely unscathed. In 2014 and 2015, Pemex contracted five inferior rigs from Seamex for *higher* rates than it would have paid to contract the state-of-the-art New Rigs from Oro Negro.[1634] And while Seamex also had some rate cuts in their lease payments, the cuts they agreed to were not unilaterally imposed on them and were far less harsh than those imposed on Oro Negro, even though Oro Negro's Rigs were of a better quality and the Oro Negro Contracts were commercially much better for Pemex than the Seamex ones. And Seamex did not have any of its contracts suspended, while Pemex suspended two of Oro Negro's.

740. While México has no adequate explanation for this disparate treatment, Claimants do. The evidence can hardly be questioned now. Pemex retaliated against Oro Negro for its refusal to pay bribes to Pemex, whereas Seamex did pay bribes and was rewarded for doing so.[1635] The Black

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[1633] SOD, ¶ 614.

[1634] **Appendix G** to the Statement of Claim; Exhibits **C-F.1 to C-F.5**.

[1635] *See* First Black Cube Statement, **CWS-4,** ¶¶ 35-41; **Appendix H** to the Statement of Claim, Excerpt No. 15 ("*Emilio Lozoya fue el que le dio la indicación junto con Carlos Morales* [former CEO of PEP] *de que firmara esos contratos*."), Excerpt No. 11 ("*Oro Negro tiene un contrato así con una sola plataforma, de las otras cinco que tiene, pero Seadrill, este, sí son contratos que están protegidos*."); *see also* Second Gil Statement, **CWS-5**, ¶¶ 50-51, 53, 66; Second Cañedo Statement, **CWS-6**, ¶¶ 65-66, 76, 78-79; Williamson Statement, **CWS-8**, ¶ 62.

Cube Recordings prove that Seamex had "protected contracts" with Pemex as well as a corrupt financial arrangement with Pemex and Mr. Lozoya that permitted Seamex to obtain its contracts with preferential terms and without competitive bidding.[1636] Seadrill is currently under investigation for bribery in Brazil's massive *Lava Jato* anticorruption investigation, in which the company is alleged to have paid bribes to the Brazil's state-run oil firm Petrobras in order to obtain supply contracts.[1637] Mr. Lozoya, for his part, was arrested in February 2020 after having been a fugitive from the law since May 2019. In his official declaration, he admitted and described in detail the rampant bribery at Pemex in which he participated, including soliciting bribes in exchange for contracts.[1638]

741. Given the serious deficiencies in México's production and its refusal to produce documents responsive to Claimants' requests and given Claimants' evidence supporting its claims, Claimants request that the Tribunal draw an adverse inference that México did not treat Oro Negro similarly to its other contractors and discriminated and retaliated against Oro Negro because of its refusal to pay bribes.

742. *Third*, México raises a number of purported justifications for Claimants' losses that unsuccessfully seek to shift the blame to other parties or factors. In each case, that excuse is contradicted by facts on record, México's own statements, or simple logic.

743. México's bid to blame its abusive treatment on business risk (*i.e.*, that Pemex was Oro Negro's sole client or that Oro Negro was a relatively new company) misses the point.[1639] On the

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[1636] *See* First Black Cube Statement, **CWS-4**, ¶¶ 28, 35-41; **Appendix H** to the Statement of Claim, Excerpt Nos. 8 and 15.

[1637] *Seadrill, Sapura latest firms targeted in Brazil's 'Car Wash' Probe,* REUTERS (Sept. 24, 2020), https://www.reuters.com/article/us-brazil-corruption-seadrill-idUSKCN26F12A., Exhibit **C-268**.

[1638] *See Denuncia de Emilio Ricardo Lozoya Austin* (Aug. 11, 2020), Exhibit **C-254**.

[1639] SOD, ¶¶ 605, 607, 619.

one hand, based on México's express representations, Oro Negro had every reason to legitimately expect that it would not be subject to corruption and arbitrary practices—even if Pemex was virtually the only client that Oro Negro could have in the Mexican market. On the other hand, Oro Negro's status as a new player on the market does not explain Pemex's distinctly harsh and abusive treatment of Oro Negro or its beneficial treatment of Seamex. Seamex was also a new player on the market. Given the fact that none of Oro Negro's competitors had their contracts suspended in the context of the 2015 through 2017 negotiations,[1640] México's attempt to normalize its disparate treatment of Oro Negro on the basis of Pemex's budget reductions also fails for the reasons stated above.

744. Similarly, México's suggestion that Oro Negro could have sought to strong arm Pemex by renegotiating the contracts, cancelling its own contracts, searching for new clients, or filing a lawsuit to demand payment[1641] is absurd. As México concedes, Pemex is virtually the only client for high-cost oil and gas services such as offshore drilling. None of the tactics that México suggests could have moved Pemex—particularly because, as Claimants have demonstrated with evidence, Pemex's motives were not commercial or economic, but motivated by pursuing corrupt, political and other improper ends. As for the last suggestion that Claimants or Oro Negro could have brought a lawsuit to recoup their losses, well, that is precisely what this arbitration is. And the NAFTA does not call for Claimants' prior recourse to local remedies—much less their exhaustion—in order to seek redress for their grievances from a Chapter 11 tribunal.

745. Additionally, México's bald claim that the bankruptcy of Oro Negro was due to disagreement with the Bondholders over proposed restructuring plans is false. The record is now

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[1640] *See* Second Gil Statement, **CWS-5**, ¶¶ 54-55, 58, 65; Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex (May 17, 2017) at 9, Exhibit **C-283**.

[1641] SOD, ¶¶ 604, 618.

replete with evidence of México's deep collusion with the Ad-Hoc Group to destroy Oro Negro. For example, it is now beyond question that, just as Pemex reneged on its promise to reinstate abusive amendments in March 2017, suspended other Oro Negro Contracts, and reduced compensation, [redacted][1642] [redacted][1643] [redacted][1644]

746. In the Statement of Defense, México argue that "*la solicitud de concurso mercantil de Oro Negro no fue causada por la propuesta de modificaciones a los Contratos Perforadora-PEP por*

[1642] *See* [redacted] Exhibit **C-270 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**; [redacted] Exhibit **C-271 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[1643] *See* [redacted] Exhibit **C-343 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**; [redacted] Exhibit **C-273 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[1644] *See* [redacted] Exhibit **C-274**; [redacted] Exhibit **C-272 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

parte de Pemex," but "*el fracaso de Oro Negro en alcanzar un acuerdo con los Tenedores de Bonos*."[1645] However, the documents that it presents to the Tribunal actually confirm that the Ad-Hoc Group insisted that Oro Negro accept the abusive 2017 Proposed Amendments ("the Ad Hoc Group supports Pemex's requested amendments to the Drilling Contracts and requests that the Company inform Pemex of the Ad Hoc Group's support"[1646]) while refusing to share the financial consequences of those Amendments ("The Company Proposal is not a viable restructuring proposal as there is no justification for holders of the Bonds to undertake a material debt for equity conversion given the Company's current financial and operational condition"[1647]). The reason for these seemingly contradictory positions is now clear.

747. México's suggestion that evidence indicates that Oro Negro's bankruptcy was a strategic corporate decision to force Pemex to pay a higher rate[1648] is an argument of convenience without any factual merit. The evidence on which México relies—a coerced statement presented to the PGJCDMX by Mr. Del Val[1649]—shows no such thing. This statement was extorted from him by México, which issued arrest warrants against Mr. Del Val based on baseless accusations. Critically, the statement is supported by no other evidence on record and belied by the facts of this case, which are that México's refusal to execute the 2017 Proposed Amendments and the Bondholders' refusal to re-negotiate the Bond Agreement left Oro Negro with no choice but to file for bankruptcy protection.[1650] In any event, filing for bankruptcy would not force Pemex to pay a higher rate—

[1645] SOD, ¶ 628.

[1646] Letter from Bondholders (Aug. 23, 2017), at p. 4, **C-144**.

[1647] Letter from Bondholders (Aug. 28, 2017), **C-145**.

[1648] SOD, ¶ 629.

[1649] SOD, ¶ 630.

[1650] Second Gil Statement, **CWS-5**, ¶75.

particularly, as the now proven objective of Pemex (and the Ad-Hoc Group) was to destroy Oro Negro.

748. México's assertion that the termination of the Oro Negro Contracts was not due to retaliation from Pemex but rather the result of Oro Negro's refusal to accept the 2017 Proposed Amendments is equally absurd. This relies on a demonstrably false assumption: that Pemex sent the 2017 Proposed Amendments to Oro Negro on September 20, 2017 but received no response.[1651] In fact, Pemex and Oro Negro were still negotiating the amendments at that time, even after Perforadora had filed for *Concurso*.[1652] Notably, on September 29, 2017, Oro Negro sent revised drafts of the Contracts to Pemex, which were updated versions of drafts that the parties had exchanged since August. However, instead of continuing to negotiate with Oro Negro, Pemex quickly purported to terminate the Oro Negro Contracts. [redacted][1653]

749. México's suggestion that Oro Negro did not accept the 2017 Proposed Amendments because negotiations between Oro Negro and the Bondholders broke down[1654] is no more logical. México again ignores that, when negotiations broke down in late August 2017, Oro Negro had already accepted the 2017 Proposed Amendments under duress in early August (although this acceptance was the result of Pemex's repeated threats of illegal termination of the Oro Negro Contracts and its refusal to pay over 100 USD million in past due rates to coerce Oro Negro to

[1651] SOD, ¶ 627.

[1652] *See* Email from L. Sanchez to A. Del Val (Sept. 20, 2017), Exhibit **C-277**; Email from A. Del Val to Oro Negro Executives (Sept. 29, 2017), Exhibit **C-278**; *see also* Second Gil Statement, **CWS-5**, ¶ 78.

[1653] [redacted] Exhibit **C-372 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[1654] SOD, ¶¶ 624-26.

accept the amendments). The evidence on record now reveals that, [redacted][1655] while fully aware that Oro Negro's inability to restructure the Bonds, combined with the forced acceptance of the 2017 Proposed Amendments, meant a death sentence to Oro Negro.

750. México's argument that Clause Eighteen in the Oro Negro Contracts gave Pemex *carte blanche* to terminate the Oro Negro Contracts at will[1656] omits to mention that Clause Eighteen only permitted early termination (i) for breach, (ii) for *force majeure*, or (iii) for "duly justified reasons." Pemex has still failed to identify a true "duly justified reason." As explained above, the suggestion that budget reductions and the falling global price of oil[1657] were behind the terminations simply cannot be squared with Pemex's [redacted], the facts on the ground in relation to negotiations between Pemex and Oro Negro, or the treatment that other competitors (like Seamex) received.

751. Finally, México's speculation that, even if Pemex had not terminated the Contracts on October 3, 2017, the *concurso* application would have permitted termination under Article Seventeen of the Oro Negro Contracts or constituted a default event under the 2016 Bond Agreement Amendments[1658] is a smokescreen. Beyond being speculative, México's assertion runs afoul of the law. Provisions permitting termination of contracts due to a bankruptcy proceeding application are unenforceable under Mexican law—specifically, Article 87 of the *Ley de*

[1655] [redacted] Exhibit **C-359 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**; Second Gil Statement, **CWS-5**, ¶¶ 75-76; SOC, ¶ 106; *see also* [redacted] Exhibit **C-362 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[1656] *See* SOD, ¶ 633.

[1657] *See* SOC, ¶ 82.

[1658] *See* SOD, ¶¶ 636-38.

Concursos Mercantiles—because they worsen the condition of the debtor.[1659] This was confirmed with respect to the Oro Negro Contracts by decisions of Mexican courts.[1660] For the same reason, Mexican law provides that taking any actions to worsen a debtor's condition, such as declaring an event of default due to the commencement of insolvency proceedings, is unenforceable as a violation of Mexican public policy because it impairs the debtor's ability to successfully reorganize.[1661] Indeed, on February 22, 2021, the *Concurso* Court ruled that the event of default declared by the Nordic Trustee is contrary to Article 87 of the *Ley de Concursos Mercantiles* and Mexican public policy.[1662]

752. In short, México seems to believe that any and every conceivable event has contributed to the termination of the Oro Negro Contracts—except for Pemex's targeted retaliatory hunt to destroy Oro Negro, undertaken in collusion with the Ad-Hoc Group. This is obviously wrong, as Claimants have demonstrated above with indisputable evidence. Thus, there is simply no denying that México's breaches are the proximate cause of Claimants' damages.

(ii) Loss of the Rigs: Respondent's Actions, Including Those Taken in Collusion with the Bondholders, Foreseeably Caused Oro Negro To Lose the Rigs

753. With respect to the Rigs, México again offers a defense that is divorced from the facts: México claims that fault for Oro Negro's loss of the Rigs lies with Oro Negro because Oro Negro

[1659] As explained *supra* Section II.G.6(ii), the *Concurso Court* issued an order holding this on December 29, 2017. *See Concurso* Court Order (Dec. 29, 2017), Exhibit **C-P**.

[1660] *See* SOC, ¶¶ 118-20.

[1661] First Lopez Expert Report, **CER-1**, ¶¶ 22-23, 33. Even though the Bond Agreement states that it is governed by Norwegian law, Nordic Trustee's right to declare an event of default under the Bond Agreement is subject to Mexican law. First Lopez Expert Report, **CER-1**, ¶ 32.

[1662] *Concurso* Court Order (Feb. 22, 2021), Exhibit **C-386**; *see also supra* Section II.G.4(i).

decided to finance the purchase of the Rigs through the issuance of bonds, which allowed the Bondholders to recover the Rigs in the event of default.[1663]

754. But the Bondholders' invocation of the bond conditions is only a symptom of a much more problematic reality that México ignores entirely: the Ad-Hoc Group's collusion with México to financially starve Oro Negro and force it into liquidation. The Ad-Hoc Group's attempts to seize the Rigs were not a reaction to an external event. They were the execution of a calculated effort devised in conjunction with and with the support of México.

755. This is now clear from the evidence.

756. [redacted][1664] [redacted][1665]

757. Other than Pemex, which badly desired to punish Oro Negro for its failure to bribe, the Ad-Hoc Group also recruited various other Mexican officials and authorities, including corrupt local prosecutors and judges, in its ill-intended scheme to take over the Rigs. In a concerted effort to financially starve Oro Negro, México and the Ad-Hoc Group initiated baseless criminal actions based on fabricated evidence and obtained the Seizure Order that froze all of Oro Negro's bank accounts in the Mexican Trust for 300 days. This caused Oro Negro to run out of the funds to

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[1663] SOD, ¶ 641.

[1664] [redacted] Exhibit **C-424 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[1665] [redacted] Exhibit **C-344 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**; [redacted] Exhibit **C-276 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

continue maintaining the Rigs, directly leading to Oro Negro's liquidation and loss of the Rigs. In this process, the Ad-Hoc Group also attempted a physical take-over of the Rigs by force, again in close coordination with Mexican authorities, including the very judge who issued the Rigs Takeover Order authorizing the Ad-Hoc Group to seize the Rigs, as well as the Seizure Order that cut off Oro Negro's access to the funds. [redacted] [1666] It also bears mentioning again that Judge Cedillo issued the Rigs Takeover Order after only a 40-minute presentation from the Ad-Hoc Group's counsel without any questioning or evidentiary review.

758. In light of this overwhelming evidence, México's contention that its actions did not result in Oro Negro losing the Rigs rings hollow. Indeed, Oro Negro's loss of the Rigs was the precise outcome intended and engineered by México in conspiracy with the Ad-Hoc Group.

(iii) Loss of Down Payments on New Rigs: Pemex's Actions, Including Those Taken in Collusion with the Bondholders, Foreseeably Caused Oro Negro To Lose the Down Payments on the New Rigs

759. México also claims that Oro Negro's loss of the USD 125 million down payment on the three New Rigs was the result of commercial circumstances. In light of the evidence on record, this is simply not credible.

760. At the very same time as Pemex arbitrarily refused to contract for those New Rigs, despite its repeated promises to do so, it contracted five new rigs—which were inferior to Oro Negro's—from Seamex with higher day rates and worse contract terms for Pemex. That makes no commercial sense from Pemex's standpoint, and this is because the Seamex Contracts were

[1666] *See* [redacted] Exhibit **C-429 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

ordered from the top and were the result of political favoritism to Mr. Martínez and bribes paid by Seamex.

761. Even after entering into new contracts with Seamex, during 2015 and 2016, Pemex continued to represent to Oro Negro that it was interested in leasing the New Rigs. Pemex at no time stated that it would not contract the New Rigs, which would have disabused Oro Negro of its understanding that Pemex would contract them. Additionally, during 2016, Pemex's CEO repeatedly and publicly represented to the market that Pemex would not reduce its drilling capacity and merely needed to re-adjust its finances due to a temporary cash shortage. Had Pemex at any time informed Oro Negro that it would not hire the New Rigs, Oro Negro would have sought to sell its purchase option of the New Rigs to a third party or would have attempted to find work for the New Rigs outside of México.[1667] Indeed, due to Pemex's repeated representations to Oro Negro that it would contract the New Rigs, Oro Negro amended on six occasions the construction contracts of the New Rigs to extend the deadline for Oro Negro to complete payment and take delivery until November 30, 2017.[1668]

762. In the meantime, Pemex undertook additional actions against Oro Negro—such as withholding payments, suspending contracts, modifying contracts—in retaliation for its refusal to pay bribes and in collusion with the Ad-Hoc Group to destroy Oro Negro and seize the Rigs. Collectively, these actions forced Oro Negro to declare bankruptcy.

763. On October 3, 2017, after Oro Negro filed for bankruptcy protection, the shipyard sent a letter terminating the contracts, and informing Oro Negro that it would appropriate the USD 125 million down-payment and sell the New Rigs to a third party, without any compensation to Oro

[1667] First Gil Statement, **CWS-1**, ¶ 47.

[1668] First Gil Statement, **CWS-1**, ¶ 47.

Negro.[1669] They were then swooped up by one of Oro Negro's Bondholders, Borr.[1670] This, of course, is no coincidence. [redacted][1671]

764. In short, Pemex reneged on its repeated representations to Oro Negro that it would contract the New Rigs, and instead contracted rigs from Seamex thanks to its compliance with Pemex's bribery regime. Pemex's refusal to contract the New Rigs and its retaliatory actions, in addition to collusion with the Ad-Hoc Group, drove Oro Negro into bankruptcy, and as a result, Oro Negro was unable to pay for the New Rigs and take delivery. The loss of the USD 125 million down payment on the New Rigs was the direct and foreseeable result of Pemex's actions.

3. Conclusion

765. México, through Pemex, the judiciary, and other instrumentalities, undertook actions that directly and foreseeably caused damage and loss to Claimants' investment in Oro Negro. Accordingly, Claimants have demonstrated that México's breaches of the NAFTA were the proximate cause of their loss. The Tribunal thus must find jurisdiction over Claimants' claims, even if it were to find that its jurisdiction is subject to a purported proximate causation requirement, as argued by México.

[1669] First Gil Statement, **CWS-1**, ¶ 49; *see also* Exhibit **C-130**. Exhibit **C-130** is the October 3, 2017 termination letter by the shipyard.

[1670] *See* Offshore Rig Transaction Database, Bassoe Analytics, https://www.bassoe.no/rigsales/, Exhibit **C-131**, at p. 6.

[1671] *See* [redacted] Exhibit **C-311 (Highly Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3).**

G. México Is Liable Under the NAFTA and International Law for Pemex's Acts Because Pemex Exercised Its Delegated Governmental Authority in its Conduct Toward Oro Negro

766. All of the acts by Pemex invoked by Claimants for their claims are attributable to México. These acts are attributable to México for all of the reasons noted below and throughout this Reply, but importantly these acts by Pemex are different than México's separate and distinct duty and resulting liability for its actions independent of those of Pemex, including its failing to ferret out, control and eliminate the corruption that was endemic within Pemex and that affected Oro Negro and Claimants' investments.

767. Before addressing the attribution arguments, it is important to underscore that Claimants have proven that México has breached the NAFTA in its own right through several other measures independent of Pemex's actions. Acting through various organs of the State, including, among others, its prosecutorial bodies, courts, tax authorities, and police, México initiated numerous baseless criminal investigations against Oro Negro, its employees, and its shareholders (including some of the Claimants); assisted the Ad-Hoc Group to procure the Rigs Takeover Order based on fabricated evidence and to enforce that order through the use of police force; and continued retaliatory attacks against Oro Negro and Claimants by initiating baseless tax audits against Oro Negro, issuing arrest warrants against Claimants and their witnesses, and requesting the Interpol Red Notices against them. There can be no doubt that México is directly responsible for all of these unlawful acts as well as for its failure to eliminate, and in fact its support and fostering of, the corruption within Pemex that directly caused the destruction and the demise of Oro Negro and of Claimants' investments. As noted elsewhere in this Reply, these various other measures and omissions by México give rise to separate and distinct sources of liability for the Respondent under the NAFTA as argued herein.

768. Turning to attribution, México does deny responsibility for the acts of Pemex and Pemex officials in relation to the Oro Negro Contracts—the solicitation of bribes, non-payment of due amounts, forced amendments, illegitimate termination, impugning Oro Negro's reputation, and collusion with the Ad-Hoc Group to destroy Oro Negro. In its Statement of Defense, México seeks to narrow the scope of its potential liability in a way that would render the NAFTA a safeguard for public officials to solicit bribes and collude with corrupt parties to destroy those who refuse to pay bribes *so long as* those public officials act under the guise of a private entity owned by the State – even where that conduct is *in connection with* government authority delegated to the private entity created to exploit México's oil reserves, which under the Mexican Constitution, belong to the nation.[1672] That, of course, would be absurd. It is clearly wrong, but, even more troubling, while México represents to this Tribunal that Pemex is a private entity engaged in purely commercial conduct (and thus beyond this Tribunal's reach), it has told U.S. courts (through Pemex) that Pemex is a state instrumentality outside of U.S. Courts' jurisdiction and has successfully invoked that argument various times claiming immunity for Pemex under the foreign sovereign immunities laws of the United States. These disingenuous submissions lay bare what México's defense on attribution really is: a hopeless bid to escape liability.

1. México's Bid To Confuse the Applicable Rules of State Responsibility

769. In the Statement of Claim, Claimants demonstrated that the acts of Pemex are attributable to México under NAFTA Article 1503(2)—a solution that is confirmed under the ILC Articles.[1673] In its Statement of Defense, México offers two hollow responses.

[1672] Mexican Constitution at Article 27, **CL-89**.

[1673] *See* SOC, Section III.B.

770. *First*, México criticizes Claimants' reference to the ILC Articles because, it says, the NAFTA "*creó una lex specialis con respecto a esas entidades*."[1674] That argument, however, is irrelevant and incorrect.

771. Claimants have not sought to demonstrate that Pemex's acts are attributable to México *solely* on the basis of the ILC Articles. Rather, Claimants have shown that the analysis under Article 1503(2)'s "NAFTA-specific rules for state responsibility" is "consistent with" the ILC Articles.[1675] This is the same approach taken by other tribunals. For example, the *UPS* tribunal analyzed liability under Chapter 15 as well as the ILC Articles, even though it found that the ILC Articles did not apply to that specific case.[1676]

772. In any event, México's argument is incorrect because, even if Chapter 15 did create a *lex specialis*, that does not mean that the ILC Articles would be of no application. The ILC Articles would still be of a "residual character" (in the words of México's own source)[1677]—meaning that they apply to the extent that Chapter 15's *lex specialis* has not displaced them. Articles 1502 and 1503 of the NAFTA only apply where "state monopolies" (*i.e.*, "an entity . . . that . . . is designated as the sole provider or purchaser of a good or service") and "state enterprises" (*i.e.*, "an enterprise owned, or controlled through ownership interests, by a Party") have received a delegation of authority from the Contracting Parties. In that discrete case, Articles 1502 and 1503 impose a

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[1674] SOD, ¶ 658.

[1675] SOC, ¶¶ 371, 391.

[1676] *See United Parcel Service of America Inc. v. Government of Canada,* ICSID Case No. UNCT/02/1, Award on the Merits (May 24, 2007), ¶¶ 55, 62, **CL-74**.

[1677] *See, e.g.*, *United Parcel Service of America Inc. v. Government of Canada,* ICSID Case No. UNCT/02/1, Award on the Merits (May 24, 2007), ¶ 55, **CL-74**.

positive obligation: the Contracting Party must ensure that those enterprises act "in a manner that is not inconsistent with the Party's obligations."[1678]

773. *Second*, México suggests that Article 1502 of the NAFTA applies (and not Article 1503) because Pemex is a State monopoly (not a State enterprise).[1679]

774. That argument is wrong. Article 1502(3)(a) provides:

> Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately owned monopoly that it designates and any government monopoly that it maintains or designates:
>
> (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges . . . .[1680]

775. This provision does not apply because Pemex is not a monopoly under the NAFTA. In particular, it has not been "designated as the sole provider or purchaser of a good or service" as Article 1505 defines a "monopoly."[1681] In reality, the 2014 energy reforms put an end to Pemex's monopoly over oil and gas exploration and production in México.[1682] While Pemex remains one of the only actors in this sector (and certainly the most important) it is not "the sole provider or

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[1678] NAFTA, Articles 1502(3)(a) and 1503(2).

[1679] SOD, ¶¶ 654-56.

[1680] NAFTA, Article 1502(3)(a) (emphasis added).

[1681] NAFTA, Article 1505.

[1682] Second Lopez Expert Report, **CER-4**, ¶¶ 9-10 ("*El 20 de diciembre de 2013, se publicó el Decreto por el que se reformaron y adicionaron diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos en Materia de Energía. Esta Reforma Energética establece que el sector público tendrá a su cargo, de manera exclusiva, las áreas estratégicas que se señalan en el artículo 28 constitucional manteniendo siempre el Gobierno Federal la propiedad y el control sobre los organismos y empresas productivas del Estado que en su caso se establezcan. De los artículos 25 y 27 de la Constitución Política de los Estados Unidos Mexicanos ("CPEUM") y transitorios Tercero y Vigésimo del Decreto, se desprende que por mandato constitucional Pemex y sus organismos subsidiarios – incluyendo a Pemex Exploración y Producción ("PEP")–se convirtieron en empresas productivas del Estado que, si bien son propiedad del Gobierno Federal Mexicano, en su operación están sujetas al imperio del derecho privado, específicamente el derecho mercantil, adoptando una verdadera figura empresarial que les permita un actuar flexible y eficiente en el mercado*.") (internal footnotes omitted).

purchaser of a good or service." Article 1502, therefore, cannot apply. Remarkably, in its Statement of Defense, México does not even address this uncomfortable reality, even though the State itself admits: "*A partir de la Reforma Energética, la exploración y explotación de yacimientos petroleros se abrió al sector privado y Pemex se ha convertido en un 'jugador adicional' en el mercado energético mexicano*."[1683]

776. If anything, Article 1503 would apply because Pemex falls under the NAFTA Chapter 15 definition of a state enterprise. It is both "owned" and "controlled through ownership interests" by the Mexican State. Again, the 2014 Pemex Law provides that Pemex is "*de propiedad exclusiva del Gobierno Federal*."[1684] It also bears noting that, as will be explained below, Pemex is a state organ under the ILC Articles because it is controlled by the Mexican State not only as a result of the State's ownership, but also by virtue of specific provisions of Mexican law that ensure such control.

777. In any event, however, México's argument ultimately raises a distinction without significance to any question before the Tribunal. Even if México were correct, application of Article 1502 would not lead to a different conclusion than if Article 1503 were applied: México is liable for the acts of Pemex under Chapter 15.

778. The reason is simple: Article 1503(2) is functionally identical to Article 1502(3)(a). It provides:

779. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a

[1683] SOD, ¶ 26.

[1684] Pemex Law at Article 2, **CL-83**; *see also* Sentencia de Amparo de Mario Alberto Hernandez de la Rosa, 1131/2017, ¶¶ 31, 39, 52(a) (recognizing that *empresas productivas del Estado*, such as Pemex, participate, pursuant to the Mexican Constitution, in strategic state activities and that they are part of the Mexican federal government's property, over which the Mexican federal government shall maintain its ownership and control), **C-556**.

manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.[1685]

780. The relevant inquiry under both provisions, therefore, is whether Pemex's conduct in respect to breaches of NAFTA obligations involves a delegation of "regulatory, administrative or other governmental authority." In this case, it clearly does.

2. México's Failure to Seriously Contest its Liability for the Acts of Pemex

781. In the Statement of Claim, Claimants demonstrated that México is responsible for the acts of Pemex under NAFTA Chapter 15, because México delegates authority to Pemex.[1686] They also showed that México failed to ensure, through regulatory control, administrative supervision, or the application of other measures, that (i) its officials did not solicit bribes in connection with the Oro Negro Contracts and that (ii) Pemex did not carry out prejudicial actions on entirely arbitrary, discriminatory, and retaliatory bases in relation to those contracts.[1687] Claimants also showed that this is consistent with the ILC Articles because, *inter alia*, Pemex is a state organ under ILC Article 4 and Pemex and its agents' conduct falls under México's responsibility under ILC Article 7.[1688]

782. México's response is largely formalistic. It does not seek to engage with the facts of these assertions, but instead advances one uncompelling legal argument. México argues that "*de conformidad con el texto del mismo Artículo 1503(2), es el ejercicio de una facultad regulatoria,*

[1685] NAFTA, Article 1502(3)(a) (emphasis added).

[1686] SOC, ¶¶ 379-388.

[1687] *See, e.g.*, SOC, ¶¶ 506-527.

[1688] SOC, ¶¶ 392-396, 402-403.

administrativa u otras funciones gubernamentales que hace que la conducta sea atribuible al Estado, y no la simple posibilidad de ejercer dicha facultad."[1689] In other words, México seeks to narrow the scope of its potential responsibility for acts by Pemex to those that are strictly an exercise of a "regulatory, administrative, or other governmental function" delegated by the State. On this basis, it suggests that the acts of Pemex that Claimants invoke as a breach of the NAFTA are simply commercial acts.[1690]

783. That argument, however, does not get México very far.

(i) Pemex's Acts Flow from the Exercise of a Delegation of a Quintessential Government Function

784. *First*, there can be no doubt that Pemex's acts flow from the exercise by México to it of a delegation of a quintessential governmental function—*i.e.*, the conclusion of procurement contracts for the exploration and extraction of petroleum products in furtherance of the economic development of the Mexican state.[1691] In the text of the NAFTA, "the power to . . . approve commercial transactions" is one concrete example of "regulatory, administrative or other government authority" that the State can delegate to monopolies and state-enterprises.[1692] According to Note 45 of the NAFTA, a delegation for the purposes of Article 1502(3) (but no doubt also for Article 1503(2)) "includes a legislative grant, and a government order, directive or other act transferring to the monopoly [or enterprise], or authorizing the exercise by the monopoly [or enterprise] of, governmental authority."[1693]

[1689] SOD, ¶ 663.

[1690] SOD, ¶¶ 656, 670.

[1691] Pemex Law at Article 4, **CL-83**.

[1692] NAFTA, Articles 1502(3)(a), 1503(2).

[1693] NAFTA, Notes, **CL-388**.

785. In the present case, Pemex's delegated governmental authority is squarely found in the 2014 Pemex Law, which itself is defined as a "public interest" law.[1694] Article 5 of the Pemex Law defines the company's purpose as "*la exploración y extracción del petróleo y de los carburos de hidrógeno sólidos, líquidos o gaseosos, así como su recolección, venta y comercialización*."[1695] And these oil reserves are explicitly part of the national patrimony under Article 27 of the Mexican Constitution.[1696] As aforementioned, Pemex's monopoly in the petroleum sector has ended as a result of the Energy Reform. However, unlike any other private company that may engage in exploration and extraction of oil, Pemex's purpose is explicitly a public one according to Article 4 of the Pemex Law: "*procurar el mejoramiento de la productividad para maximizar la renta petrolera del Estado y contribuir con ello al desarrollo nacional*."[1697] To achieve its public purpose, Pemex is expressly granted the authority by the Mexican State to enter into contracts with private parties, like Oro Negro:

> Para cumplir con su objeto, Petróleos Mexicanos podrá celebrar con el Gobierno Federal y con personas físicas o morales toda clase de actos, convenios, contratos, suscribir títulos de crédito y otorgar todo tipo de garantías, manteniendo el Estado Mexicano en exclusiva la propiedad sobre los hidrocarburos que se encuentren en el subsuelo, con sujeción a las disposiciones legales aplicables.[1698]

786. This is confirmed by Claimants' expert, Mr. López Melih, who notes that, even though the 2014 Pemex Law led to a change in paradigm, it did not modify the reality that Pemex operates

[1694] Pemex Law at Article 1, **CL-83**.

[1695] Pemex Law at Article 5, **CL-83**.

[1696] Mexican Constitution at Article 27, **CL-89**.

[1697] Pemex Law at Article 4 (emphasis added), **CL-83**; *see also* Sentencia de Amparo de Mario Alberto Hernandez de la Rosa, 1131/2017, ¶¶ 38(a), 42, 52(c) (finding that the purpose of *empresas productivas del Estado*, such as Pemex, is "*la creación de valor económico e incrementar los ingresos de la Nación, con sentido de equidad y responsabilidad social y ambiental*"), **C-556**.

[1698] Pemex Law at Article 7, **CL-83**; *see also* Pemex Law at Article 6, **CL-83**.

under the full control of the Mexican State with authority delegated to it by the State.[1699] The Mexican State remains the sole entity with the ability to direct the activities of Pemex and dictates its administration, management, strategy, and policies.[1700]

787. In carrying out that power that the Mexican legislature expressly entrusted to Pemex, the company must work "*a efecto de asegurar al Estado las mejores condiciones disponibles en cuanto a precio, calidad, financiamiento, oportunidad y demás circunstancias pertinentes de acuerdo con la naturaleza de la contratación*"[1701] and must follow Article 134 of the Mexican Constitution, a public contracting provision.[1702] As México itself has argued, claims arising from Pemex procurement are not heard by regular, civil courts, but by an administrative court whose function is to hear disputes of private parties affected by the actions of governmental and parastatal bodies, the "Tribunal Federal de Justicia Fiscal y Administrativa."[1703] There is thus no doubt that the all acts of Pemex committed in the course of its dealings with Oro Negro were carried out in the exercise of the government authority that the Mexican legislature expressly entrusted with Pemex—i.e., the authority to enter into contracts for the benefit of the State and its people.

788. México argues that Claimants' reliance on *Mesa v. Canada* is inapposite because that case does not support "*la noción en que el mero hecho de poder celebrar contratos constituye un 'ejercicio' atribuible al Estado*."[1704] In so doing, México misreads not only Claimants' argument

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[1699] Second Lopez Expert Report, **CER-4**, ¶¶ 105-06; *see also* Sentencia de Amparo de Mario Alberto Hernandez de la Rosa, 1131/2017, ¶ 43 (explaining that certain "*'flexibilidad y autonomía' operativa*" was given to *empresas productivas del Estado*, such as Pemex in order to "*les permitiera ser económicamente rentables para el Estado*"); ¶ 46 ("*dado que el artículo 25 constitucional señala en su párrafo quinto que la propiedad y control le corresponden al Gobierno Federal, es indudable que las empresas productivas del Estado se encuentra en el ámbito de la Administración Pública Federal*."), **C-556**.

[1700] Second Lopez Expert Report, **CER-4**, ¶ 107.

[1701] Pemex Law at Article 75, **CL-83**.

[1702] Pemex Law at Article 75, **CL-83**.

[1703] Sentencia de Apelación 654/2019, p. 11, **R-0183**; Pemex Law at Article 81, **CL-83**.

[1704] SOD, ¶ 665.

but also its own law, which expressly states that Pemex's goal is to maximize the State's oil revenue and contribute to the nation's development. Thus, in contracting with parties like Oro Negro, México is performing a governmental function. In *Mesa Power*, the tribunal found that, where a state enterprise was granted the authority to enter into contracts for the procurement and supply of electricity, it was acting under authority delegated by a Contracting Party under Article 1503(2) "to assist the Government of Ontario in achieving goals in the development and use of alternative or renewable energy technology and resources . . . and for the ultimate benefit of the people of Ontario."[1705] As explained above, the same is true here. Pemex has even represented under oath to U.S. courts that "Pemex's function, through Pemex Exploración y Producción, ("PEP") is to "explore and develop México's hydrocarbons for the benefit of its people in conformity with Article 27 of the Mexican Constitution, which states that all hydrocarbons in México are owned by the Mexican People . . . ."[1706]

789. Despite this, México denies that, in complying with directives from the Mexican executive and legislative branches to reduce its budget drastically between 2015 and 2017 and its resulting actions in refusing to pay past due amounts to Oro Negro, forcing abusive amendments, colluding with competitors, ignoring the orders of its own Courts and terminating the Oro Negro Contracts (all in retaliation for the refusal to pay a bribe), Pemex was exercising governmental authority. Yet that is simply not credible given that, to terminate the Oro Negro Contracts, Pemex itself cited

[1705] *Mesa Power Group, LLC v. Government of Canada,* UNCITRAL, PCA Case No. 2012-17, Award (Mar. 24, 2016), ¶¶ 368, 372-75, 445, 448, **CL-86.**

[1706] *See* Declaration of Juan Carlos Gonzales Magallanes, *Castillo, et al. v. P.M.I. Holdings, N.S., Inc., et al.*, No. 4:14-cv-03435, ECF 160-2, at ¶ 4 (S.D. Tex. Feb. 16, 2016), Exhibit **C-90**.

"reasons of public interest."[1707] Further, Pemex relied on governmental authority bestowed on it through the *Disposiciones Generales de Contratación para Petróleos Méxicanos y sus Empresas Productivas Subsidiarias* ("DACS"), administrative rules that apply exclusively to Pemex and confer upon it special powers that no private entity in México's oil industry has.[1708] Moreover, México insists to this day that Pemex's contracts with Oro Negro were administrative in nature and governed by the DACS and administrative law generally for its incorrect claim that Pemex's unilateral and extra judicial terminations of the Oro Negro Contracts were legal.[1709]

790. In turn, for its claim that Pemex's unilateral terminations were legal, México relies on the October 25 Order. The October 25 Order revoked the February 20, 2019 decision, which had found that Pemex breached the Oro Negro Contracts and ordered Pemex to pay damages, on the procedural grounds that Oro Negro should have challenged Pemex's terminations in administrative courts ("*por la vía administrativa*") rather than in commercial courts ("*por la vía comercial*").[1710] México's reliance on the October 25 Order, as well as its argument in this arbitration that the Oro Negro Contracts were administrative contracts, is an admission by México that Pemex terminated the Oro Nero Contracts in exercise of its sovereign power; and that the terminations themselves amount to governmental actions (and not "*actos comerciales*" as México unavailingly seeks to characterize them for the sole purposes of deflecting its responsibility under Chapter 15 of the NAFTA[1711]). México simply cannot have it both ways.

[1707] Attached as Exhibit **C-93** is the authorization of Pemex's Board of Directors resulting in the termination of the Oro Negro Contracts. Each of Pemex's letters terminating the Oro Negro Contracts (Exhibits **C-M.1 – C-M.5**) cite to that authorization.

[1708] *See* Exhibits **C-M.1 – C-M.5**.

[1709] Expert Report of Mr. Jorge Asali, ¶¶ 64-69, 71.

[1710] Sentencia de Apelación 654/2019, p. 11, **R-0183**.

[1711] SOD, ¶ 656.

791. Likewise, while emphasizing throughout the Statement of Defense that Pemex's destructive amendments to the Oro Negro Contracts and eventual terminations of the same were an inevitable consequence of Pemex's need for budget reductions (imposed on Pemex by México's legislature and executive branches) due to declining oil prices in global markets, México omits to mention the fact that Pemex's budget is considered public expenditure under Mexican law. According to Article 75 of the Pemex Law, "*Petróleos Mexicanos y sus empresas productivas subsidiarias realizarán las adquisiciones, arrendamientos, contratación de servicios y obras que requieran en términos de lo dispuesto en el artículo 134 de la Constitución Política de los Estados Unidos Mexicanos*."[1712] Article 134 of the Mexican Constitution in turn governs management of *public* funds: "*[l]os recursos económicos de que dispongan la Federación, las entidades federativas, los Municipios y las demarcaciones territoriales de la Ciudad de México, se administrarán con eficiencia, eficacia, economía, transparencia y honradez para satisfacer los objetivos a los que estén destinados*."[1713] In other words, Pemex's budget is set and controlled by the Mexican government, including the drastic reductions in its budget between 2015 and 2017 that Pemex invoked to dishonor its contracts with Oro Negro and to eventually terminate them illegally in furtherance of the "public interest".[1714]

792. Thus, even according to México's own contention, Pemex was indisputably exercising "sovereign power" when it suspended the payment of past due rates, imposed onerous conditions on the Oro Negro Contracts, and unilaterally terminated the same, because in doing so, Pemex was

[1712] Pemex Law at Article 75(emphasis added), **CL-83**.

[1713] Mexican Constitution at Article 134, **CL-89**.

[1714] Pemex Law at Article 100 (emphasis added), **CL-83**.

purportedly seeking to "promote efficiency in the exercise of public spending," [1715] which is undoubtedly one of the "*prérogatives de puissance publique*"[1716] that no private entity enjoys.

793. Claimants' expert, Mr. López Melih, confirms that Pemex acts under delegated authority when it contracts with private companies, like Oro Negro.[1717] As Article 27 of the Mexican Constitution provides, petroleum and other fossil fuels are "*la propiedad de la Nación*," and when entering into contracts with private parties in relation to such property, "*Pemex actúa como un órgano del Estado y en ejercicio de la autoridad gubernamental respectiva, en la medida en que lo hace por orden y cuenta de la Nación mexicana*."[1718] Thus, even as a matter of Mexican law, Pemex acts with delegated authority when it contracts with companies like Oro Negro.

794. In a bid to hide this uncomfortable truth, México claims that Pemex's negotiations regarding the Oro Negro Contracts were to comply "with the instructions of [Pemex's] Board of Directors."[1719] This does not get México any further in evading international responsibility for the conduct of Pemex. As explained in the Statement of Claim, Pemex's ten-member Board of Directors are all government appointees, designated by government title or by the President of México.[1720] Further, Pemex's Board of Directors issued "*acuerdos*" in 2015-2017 that (a) reduced Pemex's budget; and (b) authorized Pemex to amend its pre-existing contracts with suppliers to

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[1715] Expert Report of Mr. Jorge Asali, ¶¶ 71-74 ("*promover la eficiencia en el ejercicio del gasto público*").

[1716] *Mesa Power Group, LLC v. Government of Canada,* UNCITRAL, PCA Case No. 2012-17, Award (Mar. 24, 2016), ¶ 367 ("The term 'governmental authority' is not defined in the NAFTA. In the context of ILC Article 5, the tribunal in *Jan de Nul* held that 'governmental authority' meant the use of '*prérogatives de puissance publique.*' As the reference to governmental authority appears in Article 1503(2) as well as in Article 5, it seems appropriate to rely on the meaning so circumscribed."), **CL-86.**

[1717] Second Lopez Expert Report, **CER-4**, ¶¶ 109-11.

[1718] Second Lopez Expert Report, **CER-4**, ¶ 110.

[1719] SOD, ¶ 163 ("*en cumplimiento de las instrucciones del Consejo de Administración*").

[1720] SOC, ¶ 383.

meet the reduced budget.[1721] These express orders from Pemex's Board of Directors are cited in the 2015 and 2016 Amendments and Pemex's termination letters, as their basis. The Secretary of Energy of México,[1722] who presides over Pemex's Board of Directors as Chairman, participated in all the Board meetings and signed all the *acuerdos*, resulting in the amendments and terminations of the Oro Negro Contracts.[1723] The Secretary of Treasury of México, who also sits on Pemex's Board, explained in a public statement that the "expenditure adjustments" were for the Mexican people and of the "Public sector":

> Pemex must use all instruments that the Energy Reform granted it to operate with more efficiency, increasing its profits, in benefit of all Mexicans. . . . **For these reasons, pursuant to the provisions in the LFPRH, the Government of the Republic redoubles efforts for the required additional strengthening of the public finance to be made through an expenditure adjustment of the Public sector**, without tax increases and without a higher indebtedness level. Therefore, **the preventive adjustment to the public expenditure of the agencies and entities of the Federal Public Administration (*Administración Pública Federal*, APF) amounts to 132.3 billion pesos**, amount that represents 0.7% of the GDP. **This amount includes adjustments of 100 billion pesos in PEMEX pursuant to what the Managing Director of the State-owned Productive Company has informed to this Ministry that it will submit to the approval of its Board**.[1724]

795. Again, this public statement from the Secretary of Treasury is cited in Pemex's termination letters, which are replete with references to Pemex's responsibility to ensure the efficient "management of the federal public resources."[1725] As fully explained above, Pemex simply did

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[1721] *See* Acuerdo CA-001/2015 (Feb. 13, 2015), Exhibit **C-217**; Acuerdo CA-013/2016 (Feb. 26, 2016), Exhibit **C-218**; Acuerdo CA-019/2016 (Mar. 4, 2016), Exhibit **C-219**; Acuerdo CA-016/2017 (Mar. 1, 2017), Exhibit **C-93**.

[1722] SOC, ¶ 383 ("Under Mexican law, the Minister of Energy is appointed by and reports to the President of México." (citing to Mexican Constitution, Article 89, **CL-89**)).

[1723] Attached as Exhibit **C-93** is the March 1, 2017 authorization of Pemex's Board of Directors that resulted in the termination of the Oro Negro Contracts. Each of Pemex's letters terminating the Oro Negro Contracts (Exhibits **C-M.1**–**C-M.5**) cite to that authorization.

[1724] Laurus Contract Termination Notice, p. 14, Exhibit **M.2-T**; *see also* Exhibits **C-M.1**, **C-M.3**–**C-M.4** (emphasis added).

[1725] *Laurus* Contract Termination Notice, p. 24 (citing to Article 134 of the Mexican Constitution and Article 1 of the Federal Law on Budget and Fiscal Responsibility), Exhibit **M.2-T**; *see also* Exhibits **C-M.1**, **C-M.3**–**C-M.4**.

not have any legal basis to issue these unilateral, illegal termination letters, because (i) it had failed to fulfill its own contractual obligations (*i.e.*, failure to pay past due daily rates); (ii) per the principle of contract preservation and Mexican law, Pemex should have sought a judicial decision adjudicating the hypothetical legality of the terminations of the Oro Negro Contracts, before acting extrajudicially and merely based on the unilateral opinion of its own and (iii) there was no duly justified reason for termination under Mexican law.[1726] Nonetheless, Pemex still did so—again, invoking its governmental prerogatives—and it insists to this day (as does México in this arbitration) on the legality of the terminations, which, in addition to being in violation of Mexican law, were also in plain disregard of the various orders issued by the *Concurso* Court (*i.e.*, the October 5 and October 11 Orders) preventing Pemex from taking any steps to terminate the Oro Negro Contracts.[1727] Pemex then sought to subvert the *Concurso* Proceedings, [redacted] [1728] and continues to act today in complete defiance of the *Concurso* Court's orders with no apparent consequences. Undoubtedly, no "additional player in the Mexican energy market"[1729] acting in "their commercial capacity"[1730] can do this. Pemex has invoked and utilized governmental prerogatives at every turn in dealing with Oro Negro and Claimants' investments—it simply cannot escape that very telling reality that

[1726] *See supra* Section II.G.6.

[1727] *See supra* Section II.G.4(ii).

[1728] [redacted]
Exhibit **C-276 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[1729] SOD, ¶ 26 ("*Pemex se ha convertido en un 'jugador adicional' en el mercado energético mexicano*").

[1730] SOD, ¶ 656 (quoting Meg Kinnear, Andrea Bjorklund & John Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer 2006), p. 1116-34 ("[R]esponsibility attaches to State enterprises and monopolies under Chapter 15 [only] when the entities in question are exercising 'regulatory, administrative or other governmental authority,' but not when they are acting in their commercial capacity."), **RL-0046**).

undermines its arguments now to try to separate Pemex's action from the international responsibility of the Mexican State.

796. In short, México acknowledges as much that under Chapter 15, "*es el ejercicio de una facultad regulatoria, administrativa u otras funciones gubernamentales lo que hace que la conducta sea atribuible al Estado*."[1731] This is precisely what happened in this case. The acts Pemex committed in the course of its dealings with Oro Negro were carried out in the exercise of the governmental authority, delegated by the Pemex Law, to enter into contracts with parties like Oro Negro for exploration and extraction of oil in furtherance of the nation's development and the benefits of Mexican people. To terminate the Oro Negro Contracts, Pemex invoked the reasons of "public interest," relied on its special powers granted under the DACS and administrative law, and acted under express orders from high-ranking government officials, all in exercise of sovereign power to adjust public spending. Then, having flouted the requirements of Mexican law and validly-issued court orders in terminating the Oro Negro Contracts and maintaining steadfast in its illegal decisions, Pemex has further proved itself capable of operating in México with impunity, a prerogative that presumably only applies to organs of the Mexican State and parastatal bodies and that does not exist for private actors. México lacks any response to this, except for its conclusory assertion that Pemex did not exercise its delegated governmental authority, which is contrary to the facts on record as well as its own admission that Pemex's terminations of the Oro Negro Contracts were governemntal acts.

797. There is thus simply no denying that all of the unlawful acts committed by Pemex in its quest to cripple Oro Negro were attributable to México under Chapter 15 of the NAFTA.

[1731] SOD, ¶ 663.

(ii) Even in the Absence of Liability Under Articles 1502 and 1503 (Quod Non), México Would Still Be Liable Under the ILC Articles

798. *Second*, even if México were correct that Articles 1502 and 1503 only attribute to a State Party discrete acts that are an exercise of an express delegation of government authority, and that its actions at issue here do not meet that test (something which Claimants strongly dispute), México still would not escape liability because the ILC Articles would apply residually.

799. Three of the ILC Articles, in particular, are relevant to this analysis.

800. Article 4 of the ILC Articles: Article 4 provides that the conduct of a state organ shall be considered an act of that State under international law.[1732] A state organ is construed broadly to constitute "all the individual or collective entities which make up the organization of the State and act on its behalf. . . . whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy."[1733] The classification of the organ under internal law (for example, as a productive enterprise) is not determinative.[1734]

801. The ICJ and other international tribunals have found that entities that have a separate legal personality are nonetheless state organs where they act "in 'complete dependence' on the State, of

[1732] ILC Articles, Article 4, **CL-81**.

[1733] Commentary on the ILC Articles, Article 4, Sections 1, 6, 12, **CL-81**.

[1734] *See, e.g.*, *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland*, PCA Case No 2015-13, Award (June 27, 2016), ¶ 207 ("[I]nternal status does not necessarily imply that an entity is not a State organ if other factors, such as the performance of core governmental functions, direct day-to-day subordination to central government, or lack of all operational autonomy, point the other way."), **CL-389**; "Chapter 5: The Sources of Attribution in International Investment Law," in Csaba Kovács, Attribution in International Investment Law, International Arbitration Law Library, Volume 45, p. 58 ("The basic rule of attribution in ILC Article 4 is ultimately concerned with the reality of any given situation alleged to involve internationally wrongful State conduct. Therefore, even if a person or entity does not have the formal status of a State organ under internal law, the actual degree of dependence of that person or entity on the State or an overall assessment of the legal framework governing the relationship with the State may still lead to a classification of State organ under international law. In simple terms, it is the triumph of substance over form."), **CL-93**.

which they are ultimately merely the instrument."[1735] This, according to the ICJ in the *Bosnia Genocide* case, means looking to "the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious."[1736]

802. In the *Ampal* case, for example, an investor-State tribunal found that the Egyptian national energy company EGPC qualified as a state organ under Article 4 of the ILC Articles because *inter alia* (i) its budget was set and supervised by the Egyptian State and (ii) the Egyptian State also named the Chairman and all members of the Board of Directors.[1737] Similarly, in the *Deutsche Bank* case, a tribunal found that another national energy company, Sri Lanka's CPC, was a state organ under Article 4 because (i) it was owned by the State, (ii) the State invoked sovereign immunity in relation to the entity, (iii) the State appointed and had the power to remove all directors, (iv) the purpose of the company was to conduct Sri Lanka's oil business in the national interest, and (v) the State had full control over CPC's personnel, finances, and decision making.[1738] Likewise, in *Flemingo Duty Free*, a tribunal found that a Polish airports company called PPL was a state organ because *inter alia* (i) "PPL operates under the auspices of the Ministry of Transport (and its successor the Ministry of Infrastructure and Development) and is undoubtedly controlled by that Ministry," (ii) "PPL reports intensively to the Ministry," (iii) the "Minister appoints,

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[1735] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment (Feb. 26, 2007), I.C.J. Reports 2007, p. 43, ¶ 392, **CL-390**.

[1736] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment (Feb. 26, 2007), I.C.J. Reports 2007, p. 43, ¶ 392, **CL-390**.

[1737] *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (Feb. 21, 2017), ¶¶ 138-39, **CL-391**.

[1738] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka,* ICSID Case No. ARB/09/2, Award (Oct. 31, 2012), ¶ 405, **CL-392**.

suspends, and dismisses the management of PPL and audits and assesses the General Director's performance and PPL's operations," and (iv) its "property is 'part of national property,' which it has to protect."[1739]

803. This is in contrast to Article 5, which covers "a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority"—*i.e.*, a state enterprise or state monopoly.

804. Pemex is a State organ for the reasons set out in the Statement of Claim and herein. First among them, Pemex is a state organ under internal law. Pemex's acts are attributable to México even under Mexican law (*i.e.*, *Ley Federal de Responsabilidad Patrimonial del Estado*), as Pemex is considered part of "*Administración Pública Federal*."[1740] The *Ley Federal de Responsabilidad Patrimonial del Estado* is a piece of legislation that governs "*el derecho a la indemnización a quienes, sin obligación jurídica de soportarlo, sufran daños en cualquiera de sus bienes y derechos como consecuencia de la actividad administrativa irregular del Estado."*[1741] This alone is sufficient for the Tribunal's Article 4 analysis. Yet, that is not all.

805. Pemex is not only under the full ownership and control of the Mexican State, but its Chairman of the Board is the Minister of Energy and its Board members are political appointees (three are appointed by the President and five are named by the President and approved by the Senate) according to Mexican law.[1742] This body sets the companies policies, alignments, and strategic vision, but it also fixes and adjusts the prices of goods and services, approves guidelines

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[1739] *Flemingo DutyFree Shop Private Ltd. v. Poland,* UNCITRAL, Award (Aug. 12, 2016), ¶ 430, **CL-205**.

[1740] Second Lopez Expert Report, **CER-4**, ¶ 101.

[1741] Second Lopez Expert Report, **CER-4**, ¶ 99.

[1742] Pemex Law at Article 15, **CL-83**.

for contract negotiation and oversees its activity.[1743] In addition, Pemex's top manager—its Director General—is *also* appointed directly by the President.[1744]

806. Further, as discussed above, Pemex is "exclusive property of the Federal Goverment"[1745] and its assets are considered "*sujetos al régimen de dominio público de la Federación*."[1746] According to the Pemex Law, "*Petróleos Mexicanos y sus empresas productivas subsidiarias realizarán las adquisiciones, arrendamientos, contratación de servicios y obras que requieran en términos de lo dispuesto en el artículo 134 de la Constitución Política de los Estados Unidos Mexicanos*."[1747] Pemex's budget is set and controlled by the Mexican legislature and executive, as it is subject to the financial balance sheet and to the ceiling on spending for personal services introduced by the Department of the Treasury and Public Credit to the Congress of the Union for approval.[1748] All of these factors—based upon which the tribunals in *Flemingo Duty* and *Ampal* found a state enterprise in dispute to be an organ of the state—single handedly point to the conclusion that Pemex also is a state organ, all of whose acts are attributable to México under ILC Article 4.

807. México does not seriously deny this. It does not engage with the evidence put forward by Claimants. It merely states that *"[n]o hay un argumento convincente en apoyo a la postura de que Pemex es un órgano del Estado conforme a la definición del Articulo 4 de la CDI.*"[1749] That

[1743] Pemex Law at Article 13, **CL-83**.

[1744] Pemex Law at Article 47, **CL-83**.

[1745] Pemex Law at Article 2 ("*de propiedad exclusiva del Gobierno Federal*"), **CL-83**.

[1746] Pemex Law at Article 88, **CL-83**.

[1747] Pemex Law at Article 75 (emphasis added), **CL-83**.

[1748] Pemex Law at Article 100, **CL-83**.

[1749] SOD, ¶ 661.

hollow statement, however, is hardly sufficient to overcome the overwhelming evidence to the contrary.

808. Article 7 of the ILC Articles: Article 7 notes that, where an entity or individual falls under Article 4 or Article 5, its conduct will be considered an act of State *even where* the conduct is *ultra vires*.[1750] Thus, to the extent that Pemex officials' solicitation of bribes, collusion with bondholders, and other acts are outside of the purpose or mandate of a state organ, person or entity.

809. Article 8 of the ILC Articles: Under Article 8, the conduct of any person (state organ, state enterprise, or other) will be considered an act of State where it is "acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[1751] As México admits, when Pemex entered into the Oro Negro Contracts, amended them and purported to terminate them, it was acting under the marching orders (*i.e.*, *acuerdos*) from Pemex's Board of Directors, all of whom are appointed and controlled by México's President, including Secretary of Energy and Secretary of Treasury. Under a nearly identical situation, the tribunal in *Ampal* found that Egypt is liable for the acts of Egypt General Petroleum Corporation (EGPC) and Egyptian Natural Gas Holding Company (EGAS), because "there is overwhelming evidence that the decisions of EGPC and EGAS to conclude and terminate the GSPA [General Sale and Purchase Agreement] were all taken with the blessing of the highest levels of the Egyptian Government."[1752]

810. In addition, since the Statement of Claim, new evidence has emerged that removes all doubt that Mexico was acting on instructions at some of the highest levels of the Mexican State in carrying out its retaliatory measures against Oro Negro and its investors. As explained by Mr. Gil,

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[1750] ILC Articles at Article 7; Commentary on the ILC Articles, Article 7, Sections 1, 9, **CL-81**.

[1751] ILC Articles at Article 7; Commentary on the ILC Articles, Article 8, **CL-81**.

[1752] *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (Feb. 21, 2017), ¶ 146, **CL-391**.

as instructed from the highest levels of government, Mr. González Anaya, Pemex's CEO, escalated the discriminatory treatment against the Claimants (proposing more aggressive amendments to the contracts, withholding payment to Oro Negro, and threatening to terminate the contracts).[1753] The Peña Nieto administration rewarded him for his loyalty by appointing him as Secretary of Treasury, in which role Mr. González Anaya oversaw the SAT that furnished demonstrably false tax information to PGR and the Ad-Hoc Group, from which the Sham Companies Investigation ensued.

811. Similarly, when discriminating against Oro Negro and awarding more favorable contracts with more favorable terms, and in doling out less onerous treatment to Seamex when Pemex was imposing cuts to lower its budget, Pemex was acting on instructions "from the top." [1754] Its own executives were told they could not negotiate or alter the terms of the Seamex Contracts that had been set by Pemex's CEO and top officials from México's Ministry of Energy.[1755] Again, México cannot craft any argument to escape liability for these actions that were another direct cause of the demise of Oro Negro and that led to the complete destruction of Claimants' investments.

812. Therefore, even if Article 1502 or Article 1503 could be said to exclude liability for certain conduct invoked by Claimants (and it cannot), México cannot escape liability for its NAFTA breaches under controlling public international law.

[1753] *See* Second Gil Statement, **CWS-5**, ¶¶ 50-51, 66; Second Cañedo Statement, **CWS-6**, ¶¶ 65-66.

[1754] Second Gil Statement, **CWS-5**, ¶¶ 50-53; Second Cañedo Statement, **CWS-6**, ¶¶ 62-66; Williamson Statement, **CWS-8**, ¶ 62; *see* First Black Cube Statement, **CWS-4**, ¶ 37; **Appendix H** to the Statement of Claim, Excerpt No. 15 ("*Emilio Lozoya fue el que le dio la indicación junto con Carlos Morales* [former CEO of PEP] *de que firmara esos contratos*.") ; Excerpt No. 11 ("*Oro Negro tiene un contrato así con una sola plataforma, de las otras cinco que tiene, pero Seadrill, este, sí son contratos que están protegidos*.").

[1755] Second Gil Statement, **CWS-5**, ¶¶ 50-53, 58, 64-66; Second Cañedo Statement, **CWS-6**, ¶¶ 62-66; Williamson Statement, **CWS-8**, ¶ 62 ; **Appendix H** to the Statement of Claim, Excerpt Nos. 8, 11, 15.

3. México Cannot Use Its Sovereignty as a Sword and as a Shield, and It Should Be Estopped From Doing So.

813. In the Statement of Claim, Claimants explained that México (through Pemex) has—on numerous occasions—sought to shield Pemex from liability by claiming it is an organ of the State. In the New York bankruptcy proceedings relating to Oro Negro, Pemex claimed to be "an instrumentality of a foreign state" and thus immune from jurisdiction.[1756] In another case, Pemex's subsidiary PEP claimed to be a "decentralized agency of the Mexican federal government with exclusive rights to explore and produce hydrocarbons in Mexico . . . controlled by appointees of the Mexican federal government" all of whose employees are civil servants.[1757]

814. This is significant because it means that México is putting forward one argument to U.S. courts invoking that should be treated as a foreign sovereign in order, for example, to avoid producing documents to Claimants in this arbitration (which it successfully did), but putting forward an entirely different—and contradictory—argument to this Tribunal in a bid to avoid liability for the acts of Pemex and its officials.

815. México does not engage in earnest with the very serious demonstration that its representations to this Tribunal lack candor. Instead, it puts forward a series of frivolous arguments that seek to highlight that the Foreign Sovereign Immunities Act (FSIA) is domestic legislation and does not apply in this case. That argument, however, does its credibility no favors.

816. *First*, México suggests that, unlike under the NAFTA, the FSIA contains an exception to immunity for commercial activity, which means that a U.S. court may have jurisdiction over a

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[1756] Notice of Filing of Objection and Joinder of Petróleos Mexicanos to Oro Negro Entities' Requested (I) Recognition of Foreign Proceeding and (II) Discretionary Relief (Bankr. S.D.N.Y. May 9, 2018), Exhibit **C-1**.

[1757] *See* Declaration of Juan Carlos Gonzales Magallanes, *Castillo, et al*. v. P *M.I. Holdings, N.S., Inc., et al.*, No. 4:14-cv-03435, ECF 160-2, at ¶ 4 (S.D. Tex. Feb. 16, 2016), Exhibit **C-90**.

foreign government for breach of contract.[1758] However, that reality does not assist México's case. It discredits it. Pemex argued before a U.S. court that that court lacked jurisdiction because the very same acts that it claims to this Tribunal were commercial acts were, in fact, sovereign acts. It cannot now argue the opposite. As the ICJ has established: "inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*)."[1759]

817. Second, México argues that, under the FSIA, "*es suficiente que una entidad tenga participación estatal mayoritaria para estar dentro del ámbito de aplicación de la FSIA*" and "*[n]o es necesario establecer que la entidad está involucrada en funciones gubernamentales*."[1760] That, however, is again irrelevant. Regardless of how "agency or instrumentality of a foreign state" is defined under the FSIA, Pemex claimed immunity under said statute by representing that it is "under the total control and exclusive ownership of the Mexican government"[1761]; Pemex and its subsidiaries are "all organs of the federal government of México"[1762]; and that Pemex's function is to "explore and develop México's hydrocarbons for the benefit of its people in conformity with Article 27 of the Mexican Constitution,"[1763] which, as noted above, is undoubtedly a governmental task that the 2014 Pemex law expressly entrusted Pemex to perform with delegated governmental authority.

[1758] SOD, ¶¶ 672-73.

[1759] *Temple of Preah Vihear Case (Cambodia v. Thailand, Merits)*, Separate Opinion of Vice-President Alfaro (June 15, 1962), ICJ Reports (1962), p. 40, **CL-393**.

[1760] SOD, ¶ 675.

[1761] *See* Declaration of Julio Mora Salas, *Castillo, et al. v. P.M.I. Holdings, N.S., Inc., et al.*, No. 4:14-cv-03435, ECF 174-1, at ¶¶ 2-5 (S.D. Tex. Apr. 25, 2016) (emphasis in original), Exhibit **C-92**.

[1762] *Alvarez del Castillo et al. v. P.M.I. Comercio Internacional, S.A. de C.V.*, Motion to Dismiss (Feb. 16, 2016), pg. 9 (emphasis added), **CL-91**.

[1763] Declaration of Juan Carlos Gonzales Magallanes, *Castillo, et al*. v. P.*M.I. Holdings, N.S., Inc., et al.*, No. 4:14-cv-03435, ECF 160-2, at ¶ 4 (S.D. Tex. Feb. 16, 2016), Exhibit **C-90**.

818. *Third*, México seeks to distinguish the U.S. cases in which it invoked immunity, claiming, for the discovery requests, that "*Pemex no era parte de dicho procedimento*."[1764] Yet, neither the claims raised nor the procedural posture of these proceedings are of any import.

819. These hopeless arguments lay bare the futility of México's attempt to eschew liability for Pemex's conduct. Given that it has argued in the U.S. courts, including in proceedings related to this case in which Oro Negro was involved, that its actions were sovereign acts and that it should be immune from participating in the U.S. court cases given the sovereign nature of its actions and responsibilities, the Tribunal should find that it is estopped from arguing otherwise in this case.[1765]

H. Claimants Have Proven that México Illegally Expropriated Their Investments Pursuant to Article 1110 of the NAFTA

820. In its Statement of Defense, México does not refute Claimants' detailed explanation of the legal standard applicable to their expropriation claim. It does not deny, for example, that an expropriation may be effected indirectly or through measures tantamount to expropriation (*i.e.*, through a creeping expropriation).[1766] Nor does it deny that the relevant factor for such expropriation is the economic impact on the investment, not the State's intent or motive.[1767]

[1764] SOD, ¶ 679.

[1765] *See Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award (Aug. 22, 2017), ¶¶ 626-628 (finding that Pakistan is "estopped" from arguing that the claimants' investment must be deemed invalid on the basis of an alleged breach of domestic law, because "Pakistan has consistently maintained that [the claimant's] investment was established in accordance with Pakistani laws", including by "maintaining before the Supreme Court" to the same effect), **CL-407**. *See also Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines I*, ICSID Case No. ARB/03/25, Dissenting Opinion of Mr. Bernardo M. Cremades (Aug. 16, 2007), ¶ 28 (explaining that "the principle of good faith in international law" extends to the principle "that a State cannot adopt inconsistent positions in respect of the same state of facts (an application in the international sphere of the principle known in Anglo-Saxon jurisdictions as estoppel)"), **CL-408**; *ADC Affiliate Ltd. et. al. v. Hungary*, ICSID Case No. ARB/03/16, Award (Oct. 2, 2006), ¶ 475 ("Almost all systems of law prevent parties from blowing hot and cold."), **CL-120**.

[1766] SOC, Section III(C)(1)(i)-(ii).

[1767] SOC, Section III(C)(1)(iii).

821. Instead, México oddly argues that there was no expropriation because nothing was "taken," ignoring altogether the concept of indirect expropriation in that response.[1768] There can be no doubt that – on the basis of the legal standard that México itself does not dispute – México has expropriated the Claimants' investments in México (*i.e.*, their shares in Oro Negro, their contractual rights under the Oro Negro Contracts, the Rigs, Oro Negro's brand name and ability to operate in México, etc.).[1769] México does not even attempt to engage with any of the four conditions listed in Article 1110 of the NAFTA or deny that expropriation was illegal.[1770] México's hollow response in the Statement of Defense leaves no doubt that México has illegally expropriated Claimants' investments.

1. México Cannot Deny that It Has Expropriated Claimants' Investments

822. México seeks to defend its expropriation of Claimants' investments with two unavailing arguments. First, it claims that there can be no expropriation because nothing was "taken" from Claimants.[1771] Second, México claims that there was no creeping expropriation because the regulatory and judicial measures that led to that taking cannot be elements of a creeping expropriation.[1772] Those arguments do not engage with either the facts laid out in the Statement of Claim or the relevant legal sources.

[1768] SOD, Section IV(B)(2)(a).

[1769] SOC, Section III(C)(2).

[1770] SOC, Section III(C)(3).

[1771] SOD, Section IV(B)(2)(a).

[1772] SOD, Section IV(B)(2)(a)-(b).

(i) There Can Be No Doubt that Claimants Have Been Substantially Deprived of Their Investments in México

823. In the Statement of Claim, Claimants demonstrated that their investment consisted of *inter alia* shares in Oro Negro.[1773] Claimants further documented their investment in Section III.A of this Reply. The value of Claimants' investment consisted in the value of those shares, which is in turn based on the value of Oro Negro, its contracts, its rigs, and its reputation for future business. Given that Oro Negro no longer has the Oro Negro Contracts or the Rigs, and its reputation has been ruined by México, Claimants' investment is worth zero. Therefore, Claimants have been substantially deprived of the use and enjoyment of their investment.

824. Further, Claimants demonstrated in the Statement of Claim that México's actions – its discriminatory treatment of Oro Negro, its imposition of illegal amendments and refusal to pay day rates, its arbitrary and illegal termination of the Oro Negro Contracts in careful coordination with the Ad-Hoc Group, and its targeted retaliation and defamation campaign – substantially deprived the Claimants of the use and enjoyment of their investment in México.[1774]

825. In its Statement of Defense, México does not seriously engage with that showing. Instead, it argues disingenuously that Claimants' detailed expropriation claim (which is set out in no fewer than 22 pages in the Statement of Claim) is "vague" and does not sufficiently identify "what was taken and who took it."[1775] But México's own submission reveals that it knows full well "what was taken" (it lists Claimants' expropriated investments at paragraphs 691-724 of its Statement of Defense) and "by whom" (in the Statement of Defense, México acknowledges that Claimants' expropriation claim is directed against México as, in summarizing Claimants' expropriation case,

[1773] SOC, Section III(A)(2).

[1774] SOC, Sections II(H)-(M); IV(C)(2).

[1775] SOD, ¶ 684.

it states—although not accurately capturing the scope of Claimants' expropriation case—that "*México supuestamente prohibió a Perforadora mantener una relación contractual con Pemex*"[1776]).

826. An expropriation encompasses not only a forced transfer of title, but also other interferences with the use, enjoyment, or disposal of property that are substantial and deprive the owner of all or most of the benefits of that investment.[1777] This much is clear from Article 1110 of the NAFTA itself, which provides: "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment . . ."

827. Despite, or perhaps because of, this obvious language, however, México's defenses to Claimants' expropriation claims rest on grounds divorced from any legal or factual reality.

828. For clarity, Claimants explain below "what was taken" by México, how México effected its expropriation, and again why México's expropriation was illegal.

(ii) Mexico Indirectly Expropriated the Value of Claimants' Shares in Oro Negro by Assisting in the Taking of Oro Negro's Jack-Up Rigs, Termination of Oro Negro's Contracts, and Destroying Oro Negro's Reputation, thus Substantially Depriving Claimants of the Value of Their Investment

829. **Claimants' Shares in Oro Negro**: México argues that Claimants' shares in Oro Negro have not been expropriated because Claimants retain title to those shares ("*no afirman que la Demandada tomó ninguna de sus acciones o derechos de propriedad en Integradora Oro Negro*").[1778]

[1776] SOD, ¶ 687.

[1777] SOC, Section III(C)(1)(i)-(ii).

[1778] SOD, ¶ 691.

830. Yet, even though Claimants *do* retain legal title to their Oro Negro shares, there can be no doubt that they have been substantially deprived of the value of those shares, which now are essentially worthless due to México's actions.

831. México conveniently ignores the numerous awards finding that shares had been expropriated – even where investors retained title to them – because the investors had been substantially deprived of the value or the use of the shares. In the *Quiborax* case, for example, the tribunal found that, even though the investors continued to hold legal title to shares in a local company, those shares were "virtually worthless" after a number of mining concessions – the company's only going concern – were revoked.[1779] The tribunal agreed with the claimants in that case that, as a consequence of the expropriation of the concessions, the investor had lost "the economic use and enjoyment of its investments."[1780] Such loss "had the effect of depriving [the investor] of its property in a manner equivalent to an expropriation, thus constituting an indirect expropriation."[1781]

832. Similarly, in *CME*, where a media regulator substantially altered the regulatory environment so that an investor's local partner suddenly terminated the contract on which the investment depended, the tribunal found that the state's action "destroyed . . . the commercial value of the investment" by the claimant in a local company.[1782] In so ruling, the tribunal rejected respondent's view that there was no taking by the state because "there has been no physical taking of the property by the State or because the original License granted to CET 21 always has been

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[1779] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (Sept. 16, 2015), ¶ 239, **CL-245**.

[1780] *Id*. at ¶ 235, **CL-245**.

[1781] *Id*., **CL-245**.

[1782] *CME Czech Republic BV v Czech Republic* ("*CME v. Czech Republic*"), UNCITRAL, Partial Award (Sept. 13, 2001), ¶ 591, **CL-118**.

held by the original Licensee and kept untouched," finding these arguments "irrelevant" to the indirect expropriation claim.[1783]

833. This is precisely what happened to Claimants' Oro Negro shares because of México's actions. Pemex was Oro Negro's only client and its contracts with Pemex constituted Oro Negro's entire business.[1784] Indeed, the formation of Oro Negro itself was linked to Pemex's stated need to increase its oil and gas output and México's efforts to attract foreign investment in this area.[1785] México's illegal termination of the Oro Negro Contracts completely destroyed Oro Negro's business and consequently, Claimants lost any economic use and enjoyment of their investment in Oro Negro. Further, México conducted a politically motivated campaign aimed at ruining the reputation of Oro Negro and its leadership, making it impossible for Oro Negro to conduct business in the country.[1786] As explained by the *Quiborax* and the *CME* tribunals, the fact that Claimants are still in possession of Oro Negro shares is irrelevant in this context, as México's illegal actions rendered those shares valueless.

834. The decisions that Claimants have cited are just a small selection of the myriad decisions and commentaries supporting the undeniable reality that, under international law (and particularly under the NAFTA), an expropriation need not result from a direct taking of property.[1787] México's position – by contrast – is without any support.

[1783] *Id.* at ¶ 591, **CL-118**.

[1784] First Gil Statement, **CWS-1**, ¶ 34.

[1785] *Id.* at ¶ 12.

[1786] SOC, ¶ 434(a).

[1787] *Pope & Talbot*, Interim Award, ¶ 102, **CL-394**; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award (Nov. 21, 2007), ¶ 240, **CL-100**; *Técnicas Medioambientales Tecmed S.A. v. United Mexican States* ("*Tecmed v. México*"), ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), ¶ 114, **CL-101**; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (Apr. 12, 2002), ¶ 107, **CL-96**; *Metalclad Corporation v United Mexican States* ("*Metalclad*"), ICSID Case No ARB(AF)/97/1, Award (Aug. 30, 2000), ¶ 103, **CL-95**; *Compañía del*

835. México's reliance on a single source – the award in *GAMI v. México* – cannot overcome the overwhelming evidence.

836. *First,* México suggests (citing a treatise that comments on the *GAMI* award) that the *GAMI* tribunal took a very strict stance in defining the substantive rights a minority shareholder could assert because (in the words of the *GAMI* tribunal) "*no es concebible que una corporación mexicana tenga el derecho a la protección contra la discriminación otorgada por el derecho internacional por el solo hecho que un extranjero compre una porción de la misma*."[1788] But as México recognizes, both the *GAMI* tribunal and the cited treatise address the *GAMI* claimant's national treatment claim (albeit Claimants do not agree with the *GAMI* holding on that issue either and it is not a well-accepted position in public international law), not its expropriation claim.[1789] The *GAMI* tribunal found that a U.S. investor in a Mexican company could not claim that acts by the host State violated Article 1102's prohibition against discrimination based on national treatment "because, by definition, they were acts taken against a Mexican company."[1790] That, of course, has no relevance to Claimants' expropriation claim under Article 1110.

837. *Second*, México ignores that the *GAMI* tribunal actually recognized that "[o]ther NAFTA awards have given support for the proposition that *partial* destruction of the value [of an investment] may be tantamount to expropriation"[1791] (a proposition that México has rejected). For

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Desarrollo de Santa Elena SA v. Republic of Costa Rica, ICSID Case No ARB/96/1, Final Award (Feb. 17, 2000), ¶ 77, **CL-97**.

[1788] SOD, ¶ 692.

[1789] *GAMI v. México*, Final Award, ¶ 115, **CL-71**.

[1790] Campbell McLachlan, Laurence Shore & Matt Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2017), p. 253, **RL-0037**.

[1791] *GAMI v. México*, Final Award, ¶ 130, **CL-71**.

example, the *GAMI* tribunal relied on the award in *Metalclad*[1792] which, as discussed in the Statement of Claim, held that "covert or incidental interference with the use of property [] has the effect of depriving the owner, in whole or in significant part of the use or reasonably-to-be expected economic benefit of property . . . ."[1793] Likewise, the *GAMI* tribunal confirmed the conclusion of the *Santa Elena* award, which found that expropriation takes place "[w]henever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral"[1794] – including where a governmental measure "effectively freezes or blights the possibility for the owner reasonably to exploit the economic potential of the property."[1795]

838. *Finally*, México's attempt to draw a parallel between the *GAMI* case and this one on expropriation rests on a misapprehension of the facts. In *GAMI*, as México points out rightly, the tribunal found that the claimant had failed to demonstrate that the investment's "value as an enterprise had been destroyed or impaired."[1796] This was for two reasons: (i) the expropriation decree in that case had been annulled by a Mexican court and (ii) the Mexican Government had assured the *GAMI* tribunal that it would "give . . . compensation as required by Mexican Law with respect to" the expropriated investment.[1797] These remedies, the *GAMI* tribunal found, made it impossible for it to find that GAMI's investment in GAM has been destroyed and thus in that case

[1792] *Metalclad,* Award, **CL-95**.

[1793] *GAMI v. México*, Final Award, ¶ 131, **CL-71**. While the *Metalclad* award was annulled, as the *GAMI* tribunal explained, this passage was left undisturbed as annulment was on other grounds.

[1794] *Id.*, **CL-71**.

[1795] *Id.*, **CL-71**.

[1796] *Id.* at ¶ 132, **CL-71**.

[1797] *Id.* at ¶¶ 35, 122, 133, **CL-71**.

the "true effect on the value of the investment of the allegedly wrongful act" did not amount to an expropriation.[1798]

839. México's reliance on *GAMI* to argue that this Tribunal should also find that Claimants have failed to show that the value of their shares has been impaired or destroyed because "*los Concursos Mercantiles siguen pendientes, se está llevando a cabo un proceso de subasta para la venta de las Plataformas*"[1799] is wrong. México ignores that the *GAMI* tribunal in that case actually recognized the right of a minority shareholder to "seek international relief from a NAFTA tribunal on account of a wrongful expropriation," even when the company is seeking relief in a different forum.[1800] Further, as explained above, México misreads the *GAMI* award, which based its conclusion on the reversal of the expropriation and thus on the fact that the value of GAMI's shares was not impacted in a way that would have amounted to an expropriation, and not simply because "the controlling shareholder caused GAM to seek redress in the Mexican courts."[1801] That is not the case here. México not only financially suffocated Oro Negro by unilaterally imposing amendments that drastically reduced the value of the Oro Negro Contracts and, eventually, illegally terminating them, but has destroyed Oro Negro's ability to operate in México altogether.[1802] The *Concurso* proceedings will not return any value to Claimants' Oro Negro shares, as the proceeds of any sales of Oro Negro's assets will go to the Bondholders and other creditors first (and in any event, the purpose of the *Concurso* proceedings is to wind down the company). Indeed, México ignores its illegal actions in colluding with the Ad-Hoc Group and working with it to implement and execute

[1798] *GAMI v. México*, Final Award, ¶¶ 132-133, **CL-71**.

[1799] SOD ¶ 693; *see also id.* at ¶ 351 (noting that the Rigs are currently subject to a public auction process in the Bahamas).

[1800] *GAMI v. México*, Final Award, ¶ 38 , **CL-71**.

[1801] *Id.*, **CL-71**.

[1802] *See* SOC, ¶ 434.

a series of measures that led to the Bondholders taking possession of the Rigs and conducting a sham auction wherein they sold the Rigs to themselves for pennies on the dollar compared to their actual worth, and now continue to own those Rigs following the actions taken by them and México (see immediately below). Unlike in *GAMI*, Oro Negro is not in a position to continue its operations or to recoup any of its assets.

840. **The Jack-Up Rigs**: México argues that the Jack-Up Rigs were not expropriated because "las plataformas no fueron tomadas en última instancia,"[1803] but that tells an incomplete story. Although the Chapter 15 Court and the *Concurso* Judge ordered the Ad-Hoc Group to cease their attempts to take over the Rigs and instructed Judge Cedillo to withdraw the Rigs Takeover Order, on May 15, 2019, the *Concurso* Court ordered Oro Negro to deliver the Rigs to the Bondholders, and on June 13, 2019, it ordered Oro Negro into liquidation.[1804] Although Oro Negro obtained a stay of that order pending appeal, on November 25, 2019, Oro Negro learned that the Ad-Hoc Group had ignored the pending stay request and transported the Rigs out of Mexican waters without México taking action to prevent this transfer from happening.[1805] The Ad-Hoc Group then promptly sold the Rigs in December 2019 to itself in a sham auction in the Bahamas.[1806]

841. As discussed in Section II.H.3, this completed the plan México and the Ad-Hoc Group have devised since at least 2017. The evidence leaves no room for doubt. [redacted]

[redacted]

[1803] SOD, ¶ 695.

[1804] *See* SOC, ¶¶ 145-146.

[1805] *See supra* Section II.H.2.

[1806] Letter from Nordic Trustee to Bondholders (Apr. 17, 2020), Exhibit **C-423**.

[redacted][1807] [redacted][1808]

México facilitated the Ad-Hoc Group's attempts to take over the Rigs in its judiciary, with Prosecutor Perez obtaining—and Judge Cedillo granting—the Seizure Order and the Rigs Takeover Order solely based on information provided in the interview to Prosecutor Perez by GGB associate, Mr. Contreras and fabricated evidence.[1809] Contemporaneous documents show that [redacted][1810] [redacted][1811] [redacted][1812] [redacted][1813] Even as their original plan had failed as the Chapter 15 Court entered a temporary restraining order stopping the Ad-Hoc Group's attempt to take over the Rigs in October 2018, the Ad-Hoc Group and México continued to plot ways to financially strangle Oro Negro. They eventually achieved their goal in 2019, when unable

[1807] [redacted] Exhibit **C-424 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[1808] *Id*. at 538, Exhibit **C-424 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[1809] *See supra* Section II.H.3.

[1810] [redacted] Exhibit **C-432**. **(Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[1811] *Id*., Exhibit **C-432**. **(Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[1812] [redacted] Exhibit **C-433 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[1813] [redacted] Exhibit **C-434 (Highly Confidential - Subject to Protective Order** [redacted] Exhibit **C-435 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

to pay the Rigs' expenses, the *Concurso* Court ordered that the Rigs be delivered to the Bondholders.[1814]

842. **Oro Negro Contracts**: México does not deny that contractual rights may be expropriated. Instead, it offers three uncompelling arguments why (in its view) Claimants' contractual rights were not expropriated *in this case*.

843. *First*, it claims that "[a] simple breach of contract at the hands of the state is not an expropriation."[1815] Yet, that argument is irrelevant. Claimants do not allege a "simple breach of contract"; they have shown that México (i) not only failed to root out and eliminate, but in fact fostered, encouraged, and benefitted from, the corruption and policies of discrimination within Pemex that resulted in the severe reduction in value and later the termination of the Oro Negro Contracts; (ii) engaged in a coordinated campaign, along with the Ad-Hoc Group, to deprive Claimants of their investments, including their indirect contract rights. As detailed above in Section II.E.1, [redacted][1816] Although México argues that one of the Bondholders sought to persuade Pemex not to lower the rates of the Oro Negro Contracts, documents show that this is not true and that the Ad-Hoc Group agreed with Pemex's decision to impose the 2017 Proposed Amendments, even

[1814] *See* SOC, ¶¶ 145-146.

[1815] SOD, ¶ 697.

[1816] [redacted], Pemex has barely produced any documents regarding [redacted]. Claimants thus request that the Tribunal draw adverse inferences based on Pemex's failure to produce these documents and find that, during these meetings, Pemex and the Ad-Hoc Group devised strategies to destroy Oro Negro and take over the Rigs. [redacted]

issuing a press release supporting the amendments in August 2017.[1817] For instance, on August 3, 2017, Mr. Ercil directed Mr. Gil to "sign with Pemex as soon as possible," threatening him that "[g]iven the bid for jack ups and excitement around México, creditors are not afraid to call a default in this market."[1818] [redacted][1819] México and the Ad-Hoc Group's coordinated efforts eventually led Oro Negro into bankruptcy.

844. Second, México argues that there has been no expropriation of Claimants' rights under the Oro Negro Contracts because "Pemex terminó los Contratos Perforador-PEP de acuerdo con sus términos aplicables" and "no existe medida cautelar o resolución judicial que haya declarado como ilegales o nulas las terminaciones anticipadas de los Contratos Perforadora-Oro Negro, o haya suspendido sus efectos."[1820]

845. That, however, is irrelevant. The "decisive issue," as the treatise upon which México itself relies confirms, is whether "the nullification of a contractual clause by the Mexican Government was 'effected arbitrarily by means of a governmental power illegal under international law.'"[1821] There is no doubt that the amendments and the subsequent termination of the Oro Negro Contracts were a direct consequence of illegal governmental acts that were effected arbitrarily to punish Oro Negro and Claimants for not acceding to México's bribe requests, to benefit other competitors,

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[1817] Letter from A. Rosenberg to Oro Negro (Aug. 11, 2017), Exhibit **C-336**.

[1818] Email from A. Ercil to G. Gil (Aug. 3, 2017), Exhibit **C-274**.

[1819] [redacted] Exhibit **C-343 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[1820] SOD, ¶ 701.

[1821] Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford 2012), p. 128. **RL-0061.**

like Seamex who did not receive such treatment, [redacted] While requesting the 2015 and 2016 amendments, Pemex invoked budget reductions due to the global decline in the price of oil.[1822] Pemex's budget "is drafted by the Federal Executive Branch and authorized by the Congress of the Unión,"[1823] and approved by the President of México.[1824] Further, in terminating the Oro Negro Contracts, Pemex specifically stated that it was terminating them for "reasons of *public interest*,"[1825] and relied on the governmental authority bestowed on it through the *Disposiciones Generales de Contratacion para Petróleos Méxicanos y sus Empresas Productivas Subsidiarias*—a statute that applies only to Pemex and confers special powers upon it.[1826]

846. The adjustments to the budget, as well as the termination of the Oro Negro Contracts, were approved by Pemex's Board of Directors,[1827] whose members are all government officials and/or appointed by the government. Specifically, the Board is comprised of members of the Mexican Government, government officials appointed by the President of México, and directors nominated by the President of México and approved by the Mexican Federal Senate.[1828] The Chairman of

[1822] First Gil Statement, **CWS-1**, ¶¶ 52-54; Acuerdo CA-010/2015 (Feb. 13, 2015), Exhibit **C-217**; SOD, ¶¶ 145-148.

[1823] *See* Declaration of Julio Mora Salas, *Castillo, et al.* v. *P.M.I. Holdings, N.S., Inc., et al.*, No. 4:14-cv-03435, ECF 174-1, at ¶¶ 2-5 (S.D. Tex. Apr. 25, 2016), Exhibit **C-92**.

[1824] *Decreto que crea la institución Petróleos Mexicanos* [Decree by which the institution Petróleos Mexicanos is created], *Diario Oficial de la Federación* [DOF] [Official Journal of the Federation] 20-07-1938, Article 7, **CL-90**.

[1825] Exhibit **C-93** is the authorization of Pemex's Board of Directors resulting in the termination of the Oro Negro Contracts. Each of Pemex's letters terminating the Oro Negro Contracts (Exhibits **C-M.1 – C-M.5**) cite to that authorization.

[1826] SOC, ¶ 401.

[1827] SOD, ¶¶ 145-48; Authorization of Pemex's Board of Directors resulting in the termination of the Oro Negro Contracts, Exhibit **C-93**.

[1828] SOC, ¶ 17.

the Board of Directors is México's Energy Minister (*Secretario de Energía*), the head of México's Ministry of Energy, and México's Treasury Secretary (*Secretarío de Hacienda y Crédito Público*) served on the Board as well.[1829] As noted earlier, these two powerful Secretaries are appointed by the Mexican President and directly report to him as well.

847. Finally, Pemex itself represents to its creditors that it is "controlled by the Mexican Government,"[1830] and its establishing statute states that Pemex's "objective is the development of business, economic, industrial and commercial activities in terms of its purpose, generating economic value and profitability for the Mexican State as its owner . . . and to seek the improvement of productivity so as to maximize the State's oil revenue and contribute, in this way, to the nation's development."[1831]

848. Indeed, in a resolution issued by the *Segunda Suprema Corte de Justicia de la Nación* in an appeal against the Mexican *Comisión Federal de Electricidad*, the Mexican court recognized that *empresas productivas del Estado*, such as Pemex, are part of the Federal Public Administration, are owned and controlled by the Government, and their objective is to generate economic value for the Mexican government.[1832] Among other things, the *Segunda Suprema Corte de Justicia* noted:

- *Empresas productivas del Estado* participate, pursuant to the Mexican Constitution, in strategic state activities, and it is the Mexican federal government's property, over which it shall maintain its ownership and control.[1833]

[1829] SOC, ¶ 17.

[1830] *See, e.g.*, Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2017), at p. 14, http://www.pemex.com/ri/reguladores/ReportesAnuales_SEC/20F%202017.pdf ("Pemex 2017 Annual Report"), Exhibit **C-89G**.

[1831] Pemex Law at Article 4, **CL-83**.

[1832] Sentencia de Amparo de Mario Alberto Hernandez de la Rosa, 1131/2017, **C-556.**

[1833] *Id*. at ¶¶ 31, 39, 52(a), Exhibit **C-556.**

- The purpose of these entities is "*la creación de valor económico e incrementar los ingresos de la Nación, con sentido de equidad y responsabilidad social y ambiental*."[1834]
- Even though the Mexican government allowed more "flexibility and autonomy" to these entities, it did so solely because this structure "*les permitiera ser económicamente rentables para el Estado*."[1835]
- "*Ahora bien, dado que el artículo 25 constitucional señala en su párrafo quinto que la propiedad y control le corresponden al Gobierno Federal, es indudable que las empresas productivas del Estado se encuentra en el ámbito de la Administración Pública Federal*."[1836]

849. Therefore, Pemex, like other *empresas productivas del Estado*, is controlled by the Mexican government and, even when performing functions more akin to a private enterprise, functions with the purpose of maximizing the economic value it provides to the Mexican government. There is no question that Pemex relied on its government authority in conducting the negotiations and terminating Oro Negro's contracts and that these were government actions pursuant to governmental prerogatives.[1837]

850. Pemex's implementation of these governmental directives was also "effected arbitrarily by means of a governmental power illegal under international law."[1838] The evidence shows that high-ranking Mexican officials, including a former Minister of Energy, the President of the Board of Directors of Pemex, frequently requested bribes and retaliated against those who refused to pay

[1834] *Id*. at ¶¶ 38(a), 42, 52(c), Exhibit **C-556.**

[1835] *Id*. at ¶ 43, Exhibit **C-556.**

[1836] *Id*. at ¶ 46, Exhibit **C-556**; *see also id.* at ¶ 50, Exhibit **C-556**.

[1837] México itself recognized that its actions regarding Oro Negro were official government actions during Oro Negro's Chapter 15 Proceeding, where Pemex successfully opposed Oro Negro's discovery requests by arguing that it is entitled to protection pursuant to the Foreign Sovereign Immunities Act ("FSIA") because it is part of the Mexican government and its actions regarding Oro Negro were official government actions (Exhibit **C-4** is Pemex's discovery opposition). Pemex cannot invoke sovereign protections in one case and be considered an independent business entity in another.

[1838] Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford 2012), p. 128. **RL-0061.**

them.[1839] Because Oro Negro never paid those bribes, México then retaliated against Oro Negro by imposing the drastic amendments to the Oro Negro Contracts and ultimately by unlawfully cancelling the Oro Negro Contracts. Indeed, Oro Negro executives were told on multiple occasions that the decision to favor Seamex although its contracts had higher rates and more unfavorable terms to Pemex was politically motivated and came "from the top" of Pemex and the Mexican government, including because one of Seamex's owners is a long-time financer of President Peña Nieto and a business partner of Mr. Lozoya, a former Pemex CEO.[1840] The decision to treat Seamex more favorably lacks any business or legitimate commercial justification and shows a clear pattern of discrimination against Oro Negro and Claimants for failing to pay bribes to Mexican officials.[1841]

851. Although the State's intention is not determinative of whether there has been an expropriation, where there is political and/or other illegal motivation to destroy an investment, this is certainly relevant to the analysis.[1842] México lacked any reasonable basis for the illegal amendment and then termination of the Oro Negro Contracts. México's expropriation was clearly discriminatory and therefore illegal, motivated not by simple budgetary crunch, as México argues, but by Oro Negro's refusal to pay bribes and México's desire to terminate the Oro Negro Contracts so as to lease the Rigs to the Bondholders [redacted][1843] For example, México did not terminate the Seamex Contracts,

[1839] First Black Cube Statement, **CWS-4**, ¶¶ 32, 33, 39.

[1840] Second Gil Statement, **CWS-5**, ¶¶ 50, 53, 66; Second Cañedo Statement, **CWS-6**, ¶ 63.

[1841] *See infra* Section III.I.

[1842] *Biloune and Marince Drive Complex Ltd. v. Ghana*, Award on Jurisdiction and Liability (Oct. 27, 1989), ICJ Reports 1993, p. 209, **CL-133**.

[1843] SOC, ¶ 452.

although they were more expensive to Pemex and Seamex's rigs were of inferior quality.[1844] According to the Black Cube evidence, Pemex favored Seamex nevertheless because Seamex paid bribes.[1845] [redacted][1846] [redacted][1847]

852. México also engaged in harassing and coercive treatment, withholding overdue payments to force upon Oro Negro detrimental amendments. For example, to force Perforadora to accept the 2017 Proposed Amendments, from April to September 2017, Pemex repeatedly threatened to terminate all of the Oro Negro Contracts.[1848] In addition, Pemex refused to approve and pay Perforadora's outstanding invoices even though the Rigs remained in operation and Pemex continued to pump oil using the Rigs.[1849] During 2017, while Pemex pressured Perforadora to accept the 2017 Proposed Amendments, Pemex incurred close to USD 90 million in unpaid daily rates owed to Perforadora.[1850] Pemex used this abusive and illegal tactic repeatedly to coerce Oro

[1844] SOC, ¶ 452; *see also supra* Section II.D; Second Gil Statement, **CWS-5**, ¶ 50.

[1845] SOC, ¶ 452; Exhibits **C-F.1 to C-F.5**.

[1846] [redacted] Exhibit **C-310 (Highly Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[1847] [redacted] Exhibit **C-311 (Highly Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[1848] First Gil Statement, **CWS-1**, ¶ 60.

[1849] First Gil Statement, **CWS-1**, ¶ 61; Exhibits **C-133-C-136** are the return certificates Pemex issued to Oro Negro, which reflect that Pemex continued to use the Rigs through October and November 2017.

[1850] First Gil Statement, **CWS-1**, ¶ 62; *see also* Unpaid Invoices, Exhibit **C-137**; Order to Pemex to Pay Prior Invoices, Exhibit **C-138**.

Negro. Tellingly, at the inception of the Oro Negro Contracts, Pemex paid for some services in as quickly as 20 days—by the time Oro Negro filed for *concurso*, Pemex had delayed payment of some services for over 900 days and owed Perforadora approximately USD 113 million in past due daily rates.[1851] Nevertheless, when terminating other vendors due to budget cuts, Pemex has paid them the day rates due through the end of the contract upon unilateral termination—as much as USD 230 million.[1852]

853. Lastly, the lack of consequences for Pemex's illegal acts shows that its actions were the exercise of governmental prerogatives supported by and part and parcel with the Mexican Government's agenda. For example, Pemex defied the *Concurso* Court's October 5 and 11, 2017 Orders, which prohibited it from terminating the Oro Negro Contracts or acting in furtherance of any purported terminations.[1853] Yet, for this express act of contempt, Pemex suffered no consequences, something no private party could do. Pemex exercised governmental prerogatives while retaliating against Oro Negro, ignoring various orders and decisions of the Mexican judiciary and issuing the illegal, unilateral terminations.[1854]

854. Further, the Oro Negro Contracts were not, as México claims, "legally and validly terminated,"[1855] but were the result of an exercise of arbitrary governmental power that is illegal under international law. As detailed in the Statement of Claim and further in Section II.G.6, México's termination of the Oro Negro Contracts was unlawful for several reasons. *First*, under the *Fortius*, *Decus*, *Laurus*, and *Primus* Oro Negro Contracts, Pemex was not allowed to

[1851] First Gil Statement, **CWS-1**, ¶ 57; SOC, ¶ 93.

[1852] SOC, ¶ 135.

[1853] First Gil Statement, **CWS-1**, ¶¶ 57, 140-141.

[1854] *See supra* Section II.H.

[1855] SOD, ¶ 701.

unilaterally terminate these contracts on the basis that it was in the "public interest" and able to obtain better rates from Perforadora's competitors—the justification Pemex has invoked in the Termination Letters.[1856] *Second*, Mexican law also does not recognize such grounds as "duly justified reasons" for termination under Mexican law.[1857] Indeed, México's expert fails to provide any explanation as to why the early termination grounds México invoked were legal.[1858] *Third*, under Mexican law, only a party in fulfillment of all of its contractual obligations may unilaterally terminate a contract.[1859] That is not the case here, as Pemex owed Oro Negro approximately USD 113 million in past due daily rates when Oro Negro filed its *concurso* petition.[1860] *Lastly*, under Mexican law, Pemex should have brought an action against Perforadora in Mexican civil courts to terminate the Oro Negro Contracts early.[1861]

855. Further, México's claim that the Oro Negro Contracts are terminated as of October 3, 2017 because there is currently no court ruling declaring Pemex's terminations of the *Fortius*, *Decus*, *Laurus*, and *Primus* contracts unlawful is misleading and unavailing.[1862] Although there is no final decision declaring Pemex's unilateral terminations of the *Fortius*, *Decus*, *Laurus*, and *Primus* contracts illegal at the moment, there is also no ruling or resolution whatsoever declaring such

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[1856] First Lopez Expert Report, **CER-1**, ¶ 53; *See* Exhibits **C-E.1-E.5**, Cl. 17-18.

[1857] First Lopez Expert Report, **CER-1**, ¶¶ 48-50; *See Código Civil Federal* [CCF] [Federal Civil Code], art. 1797, *Diario Oficial de la Federación* [DOF] [Official Journal of the Federation] 03-06-2019 (Mex.), **CL-195**.

[1858] *See supra* Section II.G.6(i).

[1859] Second Lopez Expert Report, **CER-4**, ¶ 34; Article 1949 of the Federal Civil Code ("*La facultad de resolver las obligaciones se entiende implícita en las recíprocas, para el caso de que uno de los obligados no cumpliere lo que le incumbe. El perjudicado podrá escoger entre exigir el cumplimiento o la resolución de la obligación, con el resarcimiento de daños y perjuicios en ambos casos. También podrá pedir la resolución aún después de haber optado por el cumplimiento, cuando éste resultare imposible*"), **CL-195**.

[1860] SOC, ¶ 114.

[1861] Second Lopez Expert Report, **CER-4**, ¶ 36.

[1862] SOD, ¶ 299.

terminations legal and appropriate.[1863] But the Tribunal can examine for itself the grounds invoked by Pemex and the surrounding circumstances and conclude, as have Claimants, that the terminations were arbitrary and did not comply with Mexican law.

856. Pemex's termination of the *Impetus* Oro Negro Contract was similarly unlawful and invalid under Mexican law.[1864] This was determined on December 29, 2017, by the *Concurso* Court.[1865] México's Statement of Defense completely fails to address or rebut Claimants' claims regarding the *Impetus* Contract in any significant manner.[1866] This is not surprising, because the termination of the *Impetus* Contract after Perforadora filed for bankruptcy is a straightforward violation of Article 87 of the Mexican Bankruptcy Code, which voids the termination of a contract (or taking any actions to worsen the debtor's condition) based on a *concurso* filing.[1867]

857. Further, Pemex's termination of the Oro Negro Contracts, as well as pressuring Oro Negro into accepting the 2015 and 2016 Amendments, lacked any *legitimate* business justification and showcased Pemex's discriminatory treatment of Oro Negro.

858. Pemex unilaterally modified the Oro Negro Contracts in 2015 and 2016 not only to lower the rates it paid to Oro Negro, but also to modify payment terms and in turn, to further use these

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[1863] *See supra* Section II.G.6.

[1864] *See generally supra* Section II.G.6(ii).

[1865] Exhibit **C-P**. This is the same order which revised the scope of the October 5 and 11 Orders, Exhibit **C-N** and Exhibit **C-O**, respectively.

[1866] *See generally supra* Section II.G.6(ii).

[1867] Pemex asserted in the Termination Letter that its reasons for termination were that Perforadora had filed for *concurso*, which constituted grounds for termination under Clause 30.3.2.3 of the *Impetus* Contract. Commercial Insolvency Law, Offical Journal of the Federation, Article 87 (Aug. 9, 2019) ("*Se tendrá por no puesta, salvo las excepciones expresamente establecidas en esta Ley, cualquier estipulación contractual que con motivo de la presentación de una solicitud o demanda de concurso mercantil, o de su declaración, establezca modificaciones que agraven para el Comerciante los términos de los contratos.*"), **CL-261**; *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, Stockholm Chamber of Commerce, Arbitral Award (Dec. 16, 2003), **CL-262**; First Lopez Expert Report, **CER-1**, ¶ 55.

terms to pressure Oro Negro to agree to subsequent modifications by withholding payment to Oro Negro.[1868] Further, although Pemex justified the need for the amendments on the drop of oil prices, none of Oro Negro's competitors had their contracts suspended for such long periods of time.[1869] Throughout the negotiations for the 2015 and 2016 Amendments, Pemex falsely maintained that these reductions were temporary.[1870]

859. In 2017, despite its prior assurances that the amendments would be temporary and that it needed only temporary support for liquidity purposes, Pemex unilaterally and through coercive measures insisted that the temporary rate reductions to the contracts would be permanent and imposed additional terms that would ensure the demise of Oro Negro and would pave the way for the Bondholders to seize the company's assets.[1871] At the same time, Pemex was planning the imposition of financially unsustainable terms on Oro Negro and threatening termination of the Oro Negro Contracts, while [redacted][1872] As the amendments Pemex was proposing were not financially sustainable, Oro Negro would have not been able to meet its obligations to the Bondholders based upon the reduced rates, requiring the renegotiation of its Bond Agreement with the Bondholders.[1873]

[1868] *See supra* Section II.D.4.

[1869] Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex (May 17, 2017), p. 9, Exhibit **C-283**.

[1870] First Gil Statement, **CWS-1**, ¶ 52; *Pemex Tiene Problemas de Liquidez: Gonzalez Anaya*, MVS NOTICIAS (Mar. 8 2016, 11:27 AM), https://mvsnoticias.com/noticias/economia/pemex-tiene-problemas-de-liquidez-gonzalez-anaya-166/, Exhibit **C-128**; *Entrevista con Gonzalez Anaya: Pemex es Solvente, Le Falta Liquidez*, EXCELSIOR (Jan. 3, 2016, 6:31 AM) https://www.excelsior.com mx/nacional/2016/03/01/1078124, Exhibit **C-129**.

[1871] Second Gil Statement, **CWS-5**, ¶ 63; Email from A. Musalem to A. Del Val (Apr. 7. 2017), Exhibit **C-330**; Oro Negro Press Release (Aug. 11, 2017), Exhibit **C-266**.

[1872] [redacted] Exhibit **C-342 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**; Letter from A. Rosenberg to Oro Negro (Aug. 11, 2017), Exhibit **C-336**.

[1873] Second Gil Statement, **CWS-5**, ¶ 75.

860. Pemex also repeatedly represented to Oro Negro that it would contract the New Rigs, leading Oro Negro to amend on six occasions the construction contracts of the New Rigs to extend the deadline for Oro Negro to complete payment and take delivery.[1874] Throughout this process, Pemex officials, including Rafael Aguilar and Gustavo Hernandez, confirmed Pemex's intention to contract the New Rigs.[1875] Contemporaneous emails show the same assurances on behalf of Pemex and its officials.[1876] But instead of following through on its commitment to Oro Negro, Pemex contracted five older, lower quality rigs from Seamex—at higher rates and on highly favorable terms to Seamex (and therefore unfavorable to Pemex). This decision—lacking any logical business justification—was politically motivated and came "from the top" of Pemex and the Mexican government.[1877]

861. On this basis, Pemex unilaterally terminated the Oro Negro Contracts by making use of its quasi-governmental prerogatives and in violation of Mexican law and without compensation, effectively and entirely destroying Oro Negro, and consequently, Claimants' investment in the company.

862. Finally, México claims that "*no hubo discriminación en el tratamiento de contratistas*" because "*Perforadora Oro Negro era la única operadora de plataformas auto-elevables de 400 pies que contaba con cinco contratos celebrados con Pemex*."[1878] Besides failing to explain why being the only operator of 400-foot self-elevating platforms with five contracts necessarily means

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[1874] SOC, ¶ 76; *see also supra* Section II.D.3; First Gil Statement, **CWS-1**, ¶ 47; Second Gil Statement, **CWS-5**, ¶¶ 42-47.

[1875] Second Gil Statement, **CWS-5**, ¶¶ 42, 44.

[1876] *See supra* Section II.D.III(iii) (quoting January 14, 2015 email from G. Gil to Oro Negro Board, Exhibit **C-307**, and January 14, 2015 email from F. Warren to Oro Negro Board, Exhibit **C-308**).

[1877] Second Gil Statement, **CWS-5**, ¶ 50; *see also supra* II.D.3(vi).

[1878] SOD, ¶ 702.

that there was no discrimination, that argument also has nothing to do with whether an expropriation actually took place, but is simply one of four elements a tribunal must weigh in determining whether the expropriation is lawful. It is not only entirely wrong (as will be explained below), it is irrelevant.

863. **Oro Negro's Brand Name and Unique Ability to Operate in México**: México argues that Claimants' "*capacidad de celebrar contratos futuros no es un derecho de propiedad susceptible de ser expropiado*."[1879] However, that argument misses the point. Claimants never claimed that their capacity or right to enter into future contracts was an investment that had been expropriated. Rather, by attacking Oro Negro's reputation as a supplier of first class Rigs, including through the issuance of baseless arrest warrants and criminal investigations against Oro Negro executives and shareholders and through a politically motivated smear campaign against Oro Negro, México further destroyed Claimants' investment in Oro Negro.[1880] México's retaliation included running a nationwide 10-minute television clip containing untrue, outrageous, incendiary and defamatory accusations against Integradora, Perforadora, and Mr. Gil and his father, including that they are engaged in influence peddling and money laundering and that they have defrauded the Bondholders.[1881] Pemex's general counsel at the time personally appeared in the clip, falsely claiming that Perforadora is corrupt and incompetent and has been a deficient service provider to Pemex.[1882]

[1879] SOD, Section IV(B)(2)(b)(iv).

[1880] SOC, ¶ 434.

[1881] *See* TV Azteca clip entitled "Corrupción y Fraude: La Historia De Oro Negro," Exhibit **C-32**.

[1882] *See* TV Azteca clip entitled "Corrupción y Fraude: La Historia De Oro Negro," Exhibit **C-32**.

864. Similarly, México's suggestion that Oro Negro's investors could not expect that Oro Negro would have entered into further contracts because "*no había nada especial en las Plataformas de Oro Negro*"[1883] is not only off point, it is contradicted directly by México's own argument in respect to the Oro Negro Contracts (*i.e.*, that other rig operators are not proper comparators because Oro Negro was "*la única operadora de plataformas auto-elevables de 400 pies*"[1884]). This, again, is contradicted by the facts.

865. As explained in Section II.D.2, the Oro Negro Rigs are not only valuable, but superior to those of its competitors in several ways. *First*, the larger size of the Rigs provide many benefits, including greater efficiency, more space on the drill floor, more variable load capacity, more storage capacity, and greater bed capacity, resulting in decreased operating costs for Pemex and more opportunities for Pemex personnel to stay on the Rigs.[1885] *Second*, the Oro Negro Rigs could also reach into deeper rows of wells than those of Oro Negro's competitors.[1886] *Third*, the Rigs, unlike those of Oro Negro's competitors, have the ability to take a core sample of the seabed without being anchored, thus being able to survey the seabed without the need for a separate barge to come to the site to perform this task.[1887] *Fourth*, the Rigs employed more efficient drills with 3,000 horsepower that could reach 30,000 feet of drilling depth.[1888] *Fifth*, due to their operational organization, the Rigs were the most efficient in the Mexican market, with one of the highest utilization rates anywhere in the world.[1889] Thus, although Oro Negro's product and service was

[1883] SOD, ¶ 704.

[1884] SOD, ¶ 702.

[1885] Second Gil Statement, **CWS-5**, ¶ 16; Weir Expert Report, **CER-7**, ¶¶ 26, 33.

[1886] Second Gil Statement, **CWS-5**, ¶¶ 15, 19; Weir Expert Report, **CER-7**, ¶¶ 30-31.

[1887] Second Gil Statement, **CWS-5**, ¶ 20; Weir Expert Report, **CER-7**, ¶ 52.

[1888] Second Gil Statement, **CWS-5**, ¶ 19; Weir Expert Report, **CER-7**, ¶ 31.

[1889] Second Gil Statement, **CWS-5**, ¶¶ 17-18; Weir Expert Report, **CER-7**, ¶ 55 & **CDW-4**.

first class, by destroying Oro Negro's reputation, México cemented the destruction of Claimants' investment in Oro Negro.

(iii) México's Actions Constitute a Creeping Expropriation

866. In the Statement of Claim, Claimants demonstrated that México's actions constituted an expropriation of Claimants' investments. As further elaborated in this Reply, México carried out a political campaign to destroy Oro Negro after Oro Negro and its investors refused to pay bribes to Government officials, using its State-owned entity (Pemex), its judiciary, its police, its administrative officers, and the media to do so. It did so, in part, to benefit the Bondholders [redacted], and did all of this in very close coordination with the Ad-Hoc Group.

867. While México does not deny that a host State's actions, together or separately, may constitute an expropriation, it argues that, in this case, the standard for creeping expropriation has not been met for two unconvincing reasons.

868. *First*, México appears to argue that the measures invoked by Claimants do not constitute a "creeping expropriation" because those measures are too "separate and independent" to constitute a unitary expropriation.[1890] This argument, however, is not a serious one – and México itself does not seem fully convinced because it never offers a full-throated endorsement of it, instead providing little more than a meandering review of unconnected cases, from which it purports to draw a rule of law that it then never applies to the facts of this case. A mere claim that measures are too "separate and independent" is not enough to demonstrate that the actions which Claimants invoke was not an expropriation. Clearly, they are.

[1890] SOD, ¶¶ 706-714.

869. To begin, on the law, México's confused allusion to "remoteness" is unmoored from any legal principle.

870. None of the cases México discusses set a standard based on the "remoteness" of the measures taken against the claimants.[1891] In *Valores Mundiales*, for example, the tribunal rejected claimants' creeping expropriation claim, because it found that one of the governmental measures did not have the effect claimants argued it did and claimants had conceded that the actions taken before that measure were not sufficient to give rise to an expropriation.[1892] In *Generation Ukraine*, the tribunal rejected the expropriation claim, because claimants failed to set forth the necessary facts, including establishing when the property right vested in claimant, and because the alleged acts in any event did not create a "persistent or irreparable obstacle to the [c]laimant's use, enjoyment or disposal of its investment."[1893] And *SD Myers* did not involve a claim of "creeping expropriation" at all; the claim failed because the measures at issue were temporary.[1894]

871. Instead, as explained in the Statement of Claim, the key for a creeping expropriation is whether "measures significantly reduce[d] an investor's property rights or render them practically useless."[1895] The only requirement is that the "series of acts over a period of time," together,

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[1891] SOD, ¶ 714.

[1892] *Valores Mundiales, SL and Consorcio Andino SL v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award (July 25, 2017), ¶¶ 413-415, **RL-0074**.

[1893] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003), ¶ 20.23, **CL-107**.

[1894] *S.D. Myers*, Partial Award, ¶¶ 286-287, **CL-75**.

[1895] M. W. Reisman & R. D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation,* 1002 FACULTY SCHOLARSHIP SERIES 123 (2004) ("Reisman & Sloane"), **CL-103**.

"produce the effects of expropriation."[1896] Indeed, by definition, creeping expropriation involves "distinct acts and omissions."[1897]

872. México's argument that the measures are somehow "too remote" because in its view, Claimants did not provide sufficient evidence that the 2015 and 2016 Amendments were related to the Bondholders is similarly refuted by Claimants' evidence.[1898] [redacted] But Pemex was having meetings and communications with the Bondholders in 2016 [redacted].[1899] In an April 2016 letter from Mr. Ercil, the CEO of ARCM, to the Director General of Pemex, Mr. Ercil thanked Pemex executives for meeting with him and proposed "[l]owering jack-up dayrates."[1900] Claimants note that México did not produce any additional communications with ARCM from 2015-2016, as requested by Claimants in Request No. 39. México cannot refuse to produce the evidence requested and then complain about the lack of the same evidence that is almost exclusively in its possession. Therefore, due to México's deficient production and deliberate withholding of evidence, Claimants respectfully request an adverse inference that México and ARCM were colluding to lower Oro Negro's rates in order to financially strangle Oro Negro during the negotiations of the 2015 and 2016 Amendments [redacted].

873. And in any event, even if the Tribunal were to conclude that México's measures in 2015-2016 were unconnected to the later collusion between México and the Ad-Hoc Group to destroy

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[1896] *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award (Sept. 13, 2006), ¶ 63, **CL-129**.

[1897] *Eureko B.V. v. Republic of Poland*, Partial Award, ¶ 227, **CL-379**.

[1898] SOD, ¶ 714.

[1899] Email from A. Ercil to J.P. Aguilar(Apr. 11, 2016), **R-0229**.

[1900] *Id.* at 5, **R-0229**.

Oro Negro, that would not mean that it could not conclude that these measures, when taken together, constituted an indirect, creeping expropriation. There is no requirement under international law that the various measures all have one common purpose or motive, especially for expropriation, which does not require a particular intent to expropriate at all.

874. Finally, México's vain attempt to undermine Claimants' creeping expropriation claim with the argument that cases on which Claimants relied did not find that an expropriation had taken place is entirely irrelevant. Each of the awards upon which México purports to rely were cited by Claimants to lay out various aspects of the legal standard, not to serve as an analogy to the facts in the instant case. Indeed, upon closer inspection, the facts in those cases are entirely inapposite to the facts in the instant case. *Feldman v. Mexico*, for example, involved the state's interference with the claimant's ability to engage in the "gray market" export of cigarettes, and the tribunal found that the claim did not involve any right or asset to be expropriated.[1901] And *Fireman's Fund* involved a recapitalization plan of claimant's dollar debentures, which had already significantly decreased in value *prior* to the state's action.[1902]

875. Second, México argues that "*no ha habido 'expropiación judicial',*" and that Claimants *"no identifican, y mucho menos explican, las acciones judiciales que sustentan que constituyen una expropiación judicial.*"[1903] That is incorrect. While Claimants' creeping expropriation claim does not depend exclusively on judicial actions, Claimants' Statement of Claim clearly refers to

[1901] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), ¶ 111, **CL-109**.

[1902] *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award (July 17, 2006), ¶¶ 182-183, **CL-104**.

[1903] SOD, Section IV(B)(2)(c).

conduct of México's criminal, administrative, and even judicial authorities that contributed to the expropriation of their investments.

876. México breached the NAFTA, *inter alia*, when its court authorized the illegal seizure and take-over of the Oro Negro Rigs on the basis of fabricated evidence in corrupt proceedings before Judge Cedillo,[1904] when it hired and protected helicopters in an attempt to seize the Rigs by force,[1905] and when it opened sham criminal and tax investigations into Oro Negro.[1906] Although there are judicial elements to their claims, Claimants have shown that México expropriated their investments in México through a series of arbitrary acts outside of the judicial branch as well, as detailed above.

877. Finally, México argues that any "*expropiación judicial*" "*requiere que una administración de justicia sea* '*notoriously unjust' or 'egregious' administration of justice 'which offends a sense of judicial propriety.* "'[1907] But this recent approach to judicial expropriation has been rejected by academics, which note that tribunals adopting it confused the standards of judicial expropriation with that of denial of justice.[1908] And in any event the corrupt proceedings before Judge Cedillo with the complete lack of due process and the entirely arbitrary nature of those proceedings would meet this heightened standard that México cites.

[1904] SOC, ¶¶ 145-146.

[1905] *Supra* Section II.H.

[1906] SOC, Sections II.M.1-5, 10-16.

[1907] SOD, ¶ 722.

[1908] Hamid G. Gharavi, *Discord Over Judicial Expropriation*, ICSID Review – Foreign Investment Law Journal, Oxford University Press 2018, Volume 33 Issue 2, pp. 349 – 357, **CL-395**.

878. Having said that, this erroneous approach stems from a misinterpretation of *Azinian v. Mexico*,[1909] but nowhere in the *Azinian* award does the tribunal state that denial of justice is the only basis to challenge a national court's decision under international law.[1910] To the contrary, the *Azinian v. Mexico* tribunal recognized that "[t]he responsibility of the State for acts of judicial authorities may result from . . . a decision of a municipal court [that is] *clearly incompatible with a rule of international law*," even when such decision does not amount to "denial of justice."[1911] The tribunal made clear that what needs to be shown in that case is simply that "*the court decision itself constitutes a violation of the treaty.*"[1912]

879. In any event, there is no question that, under either standard, the acts of the Mexican judiciary amount to an expropriation, are egregious, and offend the sense of judicial propriety. These acts include Judge Cedillo's arbitrary and corrupt issuance of the Seizure Order of all the bank accounts of the Mexican Trust and of Perforadora with no supporting evidence and based solely on Mr. Contreras's *ex parte* and unsupported statements.[1913] This Order was sought by Andres Maximino Perez-Hicks, the same prosecutor who aided the Ad-Hoc Group in taking over the Rigs and was responsible for issuing arrest warrants against Claimants and their witnesses.[1914] The Seizure Order was issued a mere three weeks after Pemex paid into the Mexican Trust the payments that were overdue for over a year and which the *Concurso* Judge had ordered it to pay

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[1909] *See Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States,* ICSID Case No. ARB (AF)/97/2, Award (Nov. 1, 1999), ¶¶ 93-124, **CL-178.**

[1910] Hamid G. Gharavi, *Discord Over Judicial Expropriation*, ICSID Review – Foreign Investment Law Journal, Oxford University Press 2018, Volume 33 Issue 2, pp. 349 – 357, **CL-395**.

[1911] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States,* Award, ¶ 98 (emphasis in original), **CL-178.**

[1912] *Id*. at ¶ 99 (emphasis in original), **CL-178.**

[1913] SOC, ¶¶ 246-252.

[1914] SOC, ¶ 248.

no less than six times.[1915] Judge Cedillo provided Perforadora with no notice of this order—and no opportunity to be heard.[1916]

880. These acts also include Judge Cedillo's issuance of the Rigs Takeover Order authorizing the seizure of the Rigs—valued close to USD 750 million—in relation to an unrelated accusation related to invoices allegedly issued to "sham" companies totaling USD 500,000.00.[1917] Judge Cedillo issued the Rigs Takeover Order despite the fact that Perforadora had already confirmed to the Bondholders, the *Concurso* Judge, and the Chapter 15 Court that the accusations were false and despite that the PGJCDMX had already sent a letter to Perforadora giving it access to the case file.[1918] Egregiously, Judge Cedillo issued the Rigs Takeover Order based on a 40-minute summary of the purported facts, without asking any questions or reviewing any evidence.[1919]

881. Therefore, Claimants also proved an expropriation claim against the Mexican judiciary, in addition to showing that México expropriated their investments in México through a series of arbitrary acts outside of the judicial branch.

2. México Does Not Deny That Its Expropriation Is Illegal

882. Nowhere does México deny that, if, as shown, Claimants' investments were expropriated, that expropriation would be illegal. This is a stunning admission on México's part, but one that makes perfect sense. None of the elements of a legal expropriation under Article 1110 have been demonstrated by México.

[1915] SOC, ¶ 250.

[1916] SOC, ¶ 251.

[1917] SOC, ¶¶ 228, 246, 253-260.

[1918] SOC, ¶ 253.

[1919] SOC, ¶ 257.

883. *First*, México has not paid compensation for its expropriation. This is beyond dispute. This, in and of itself, renders the expropriation illegal. Not only did México not recognize its obligation to compensate Claimants at the time of the expropriation, but Claimants lacked access to a procedure that they could have invoked in order to ensure compensation. The *Concurso* proceedings are not meant to constitute compensation for expropriation in the first place and will in any event not compensate Oro Negro. The Bondholders have sold Oro Negro's Rigs, its most valuable assets, over a year ago, to themselves, for substantially less than their value, and Oro Negro has yet to receive compensation and has only learned of the sale itself just recently.[1920]

884. *Second*, México's expropriation was not for a public purpose. As explained in the Statement of Claim and above, Pemex acted out of a desire to retaliate against Oro Negro for its refusal to pay bribes. Further, Pemex's terminations of Oro Negro's contracts made no commercial or economic sense given the quality of Oro Negro's rigs and the low rates of Oro Negro's contracts. Therefore, México's rationale that the terminations were due to a budget shortfall is hollow. México fails to advance in its Statement of Defense any legitimate basis for its decision to terminate the Oro Negro Contracts while favoring contracts to lease lesser quality equipment on terms that are less favorable to Pemex.

885. *Third*, México's expropriation was clearly discriminatory. Pemex treated Seamex much more favorably than it did Oro Negro, even though the terms of the Pemex-Seamex Contracts are significantly more expensive for Pemex than the Oro Negro Contracts. Further, recordings of Pemex officials confirm that Pemex singled out and discriminated against Oro Negro because it never paid bribes to Pemex. It also coordinated with the Ad-Hoc Group in effectuating the

[1920] *See supra* Section II.H.2.

expropriation to the benefit of the Bondholders, who now own the Rigs after sham auction they conducted in Bermuda.

886. *Finally*, México's expropriation did not accord with due process or Article 1105(1). As explained above, México's termination of the Oro Negro Contracts were contrary to Mexican law. Further, Pemex's actions in defiance of the *Concurso* Court's Orders, including the October 5 and 11 Orders and the stay pending Oro Negro's appeal violated Claimants' due process rights.

I. Claimants Have Proven that Respondent Violated the Obligation To Accord Fair and Equitable Treatment under Article 1105 of the NAFTA

887. In the Statement of Claim and in this Reply, Claimants detail the multitude of México's acts that, separately and together, breached its fair and equitable treatment obligation under Article 1105 of the NAFTA:

a. México, through its State organ Pemex and otherwise, solicited bribes from Oro Negro;

b. México, through its State organ Pemex, imposed increasingly onerous contract terms on Oro Negro after Oro Negro and its investors refused to pay bribes, disregarded its commitments in relation to the Oro Negro Contracts, and ultimately terminated those contracts for no legitimate reason;

c. México discriminated against Oro Negro in comparison to competitors Seamex and ODH;

d. México colluded with the Ad-Hoc Group in a bid to drive Oro Negro out of business and award the Oro Negro Contracts to the Bondholders [redacted];

e. México's arbitrary, discriminatory, and abusive actions can only be explained by the fact Oro Negro refused to pay bribes to Mexican officials; and

f. México pursued numerous meritless criminal investigations and tax audits in México, and unlawfully obtained Interpol Red Notices, in retaliation against Claimants for failing to participate in México's corrupt system and filing this NAFTA claim.

888. In its Statement of Defense, México does not seriously engage with Claimants' evidence. Instead, México seeks to recast the legal standard—and Claimants' case—in a bid to avoid liability.

However, it is without serious debate that México has breached the minimum standard of treatment under international law—and thus its obligation to provide fair and equitable treatment under Article 1105 the NAFTA.

1. México's Attempt To Construct an Artificial NAFTA Standard for Fair and Equitable Treatment Ignores the Current State of the Minimum Standard of Treatment

889. In the Statement of Claim, Claimants provided a detailed explanation (in no less than 25 pages) of the applicable legal standard to their fair and equitable treatment claims.[1921] México does not address that explanation in its Statement of Defense. Rather, it seeks to improperly raise the bar on the legal standard under Article 1105, making it impossible, for all practical purposes, to establish a breach.[1922] Yet, México's attempt to recast its fair and equitable treatment obligation does not withstand scrutiny.

890. *First*, México relies on vague assertions, such as the cryptic suggestion that the fair and equitable treatment standard under the NAFTA is "*muy específico*."[1923] However, México never actually seeks to define the specific content of the allegedly distinct NAFTA standard. México's equivocation is a clear indication that its artificial standard does not exist.

891. *Second*, México fails to engage with Claimants' showing in the Statement of Claim that the minimum standard of treatment under customary law is not a static one, but has evolved since the NAFTA FTC's 2001 interpretation.

892. México studiously avoids the NAFTA Contracting Parties' own acceptance "that the customary international law referred to in Article 1105(1) is not 'frozen in time' and that the

[1921] SOC, Sections III (D)(1)-(6).

[1922] SOD, ¶¶ 734-738.

[1923] SOD, p. 229.

minimum standard of treatment does evolve."[1924] Nor does México acknowledge that it itself conceded "that the standard is relative and that conduct which may not have violated international law [in] the 1920's might very well be seen to offend internationally accepted principles today."[1925]

893. That, no doubt, is why México does not argue in its Statement of Defense that what the minimum standard of treatment requires is identical to the standard articulated in the *Neer* case from 1926. However, México cannot have it both ways. It cannot concede that the minimum standard under international law is evolving, but avoid identifying in any detail the point to which it has evolved, and only allege that its conduct has satisfied that cryptic standard.

894. *Third*, México also does not engage with the numerous NAFTA and other decisions that have found that the minimum standard of treatment is "indistinguishable" from or materially identical to that of the fair and equitable treatment standard found in other treaties.[1926] This is even

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[1924] *ADF Group Inc. v. United States of America,* ICSID Case No. ARB (AF)/00/1, Award (Jan. 9, 2003), ¶ 179, **CL-136**.

[1925] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award (Jan. 9, 2003), ¶ 179 n. 171, **CL-136**.

[1926] *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5*,* Award (Aug. 22, 2016) ¶ 520 (The customary international minimum standard "has developed and today is indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter. The whole discussion of whether […] the BIT incorporates or fails to incorporate the [customary international minimum] Standard when defining FET has become dogmatic: there is no substantive difference in the level of protection afforded by both standards"), **CL-139**; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan ("Rumeli")*, ICSID Case No. ARB/05/16, Award (July 29, 2008), ¶ 611, ("[The tribunal] shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law."), **CL-124**; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* ("*Biwater Gauff v. Tanzania*"), ICSID Case No. ARB/05/22, Award (July 24, 2008), ¶ 592 ("[T]he Arbitral Tribunal also accepts, as found by a number of previous arbitral tribunals and commentators, that the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law."), **CL-140**; *Azurix v. Argentina*, Award, ¶ 361 ("[T]he minimum requirement to satisfy this standard [fair and equitable treatment] has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law."), **CL-141**; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (Aug. 18, 2008), ¶¶ 335-337, **CL-142**; *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (Mar. 17, 2006), ¶ 291 ("[I]t appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied."), **CL-**

true of the cases upon which México itself relies. For example, the NAFTA tribunal in *Waste Management v. México II*, found that "despite certain differences of emphasis a general standard for Article 1105 is emerging."[1927] Likewise, in *Merrill & Ring v. Canada*, a NAFTA tribunal confirmed that the minimum standard of treatment has evolved so as to include the autonomous fair and equitable treatment standard: "But against the backdrop of the evolution of the minimum standard of treatment discussed above, the Tribunal is satisfied that fair and equitable treatment has become a part of customary law."[1928]

895. *Finally*, the cases on which México relies actually lay out traditional elements of a minimum standard of treatment that are hardly different from the ones that Claimants laid out in their Statement of Claim. For example, the *Waste Management* decision (upon which México relies) found that "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,"

143; *Waste Management II*, Award, ¶ 98, **CL-113**; *Merrill & Ring v. Canada*, Award, ¶ 211, **CL-138**; *Cargill v.Mexico*, Award (Sept. 18, 2009), ¶ 283 ("The central inquiry therefore is: what does customary international law *currently* require in terms of the minimum standard of treatment to be accorded to foreigners? The *Waste Management II* tribunal concluded that a general interpretation was emerging from NAFTA awards."), **CL-150**; *Methanex Corp. v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits (Aug. 3, 2005), Part IV, Chapter C, ¶ 12, Chapter D, ¶ 8 (referring to the fair and equitable treatment standard articulated in *Waste Management II* with approval), **CL-151**; *GAMI*, Final Award, ¶ 95 ("The ICSID tribunal in *Waste Management II* made what it called a 'survey' of standards of review applied by international tribunals dealing with complaints under Article 1105. It observed the emergence of a 'general standard for Article 1105.'"), **CL-71**; *Mobil Investments Canada Inc. and Murphy Oil Corp. v. Government of Canada*, , Decision on Liability and on Principles of Quantum, ¶ 141 ("The [*Waste Management*] tribunal identified the customary international law standard."), **CL-146**; see *also Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007), ¶ 291, **CL-105**; *CMS Gas v. Argentina,* Award, ¶ 284, **CL-221**; *Occidental Exploration and Production Company v. The Republic of Ecuador* ("*Occidental v. Ecuador*"), LCIA Case No. UN3467, Final Award (July 1, 2004), ¶¶ 188-90, **CL-144**.

[1927] *Waste Management II*, Award, ¶ 98, **CL-113**.

[1928] *Merrill & Ring v. Canada*, Award, ¶ 211, **CL-138**.

in particular, where " the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[1929]

896. These are precisely the traditional elements that Claimants argued—*i.e.*, that fair and equitable treatment entails an obligation *inter alia* (i) to refrain from unreasonable and arbitrary measures,[1930] (ii) to refrain from discriminatory conduct as well as harassment, coercion and abusive treatment,[1931] (iii) to provide due process and transparency,[1932] and (iv) to safeguard legitimate expectations.[1933]

897. Thus, notwithstanding México's denegation, as a matter of fact, the parties do not disagree that the minimum standard of treatment under international law is no different from the fair and equitable treatment standard recognized by numerous tribunals (including NAFTA tribunals). This is crucially important because México attempts to limit the scope of that standard with no real support, rejecting many of the legal authorities upon which Claimants rely because they are not NAFTA authorities. That, however, is no defense to México's breaches of Article 1105(1).

2. Legitimate Expectations: México's Attempt To Narrow the Scope of Protected Legitimate Expectations Does Not Withstand Scrutiny

898. In the Statement of Claim, Claimants explained that a cornerstone of the fair and equitable treatment standard is the requirement that a State safeguard investors' legitimate expectations and thus accord investors a stable and predictable investment framework.[1934] México's conduct breached Claimants' legitimate expectations, for example, that contracting would be conducted

[1929] *Waste Management II*, Award, ¶ 98 (emphasis added), **CL-113**.

[1930] SOC, Section III(D)(ii).

[1931] SOC, Sections III(D)(ii) and (iv).

[1932] SOC, Section III(D)(i).

[1933] SOC, Section III(D)(iii).

[1934] SOC, Section III(D)(iii).

properly on a non-arbitrary and non-discriminatory basis and in good faith in accordance with specific assurances by Pemex, in domestic law, and public statements regarding anti-corruption and good governance and thus free from government-initiated and/or supported corruption.

899. México's does not seriously engage with that showing. Instead, it seeks to limit artificially the scope of any legitimate expectations that could be protected by the NAFTA. That bid cannot overcome the legal authorities and factual evidence on record.

900. *First*, México does not deny that legitimate expectations need not result from discrete representations to the investor, but criticizes Claimants' reliance on one award: the award in *Tecmed v. México*. That award articulated legitimate expectations under the fair and equitable treatment standard as follows:

> The foreign investor expects 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, to be able to plan its investment and comply with such regulations.[1935]

901. México complains that the *Tecmed* award is (in its view) irrelevant to this arbitration because it was not a NAFTA case and because the award interpreted an "autonomous" fair and equitable treatment provision.[1936] Yet, even if México's criticisms were true (which they are not), NAFTA tribunals have also recognized that the breach of a claimant's legitimate expectations (for example, in a stable and predictable investment framework) may lead to a breach of the fair and equitable treatment standard.[1937] In any event, however, *Tecmed* provides a seminal recitation of

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[1935] *Tecmed v. México*, Award, ¶ 154, **CL-101**.

[1936] SOD, ¶ 736.

[1937] *Merrill & Ring v. Canada*, Award ¶ 233 ("[A]ny investor will have an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy objectives."), **CL-138**; *Bilcon*, Award on Jurisdiction and Liability, ¶ 572 ("[B]reaches of the international minimum standard might arise in some special circumstances—such as changes in a legal or policy

a claimant's legitimate expectations, which is no different from the articulation of that standard under the minimum standard[1938]—and thus is directly relevant to this case.

902. México also attempts to undermine *Tecmed* by calling it "widely criticized."[1939] But ironically it cites for such "wide" criticism only one non-NAFTA decision: the annulment committee's decision in *MTD v. Chile*.[1940] However, even the *MTD v. Chile* committee adopted an understanding of "legitimate expectations" far broader than the one *México* seeks to impose implicitly by rejecting the *Tecmed* decision. For example, the *MTD v. Chile* committee recognized "legitimate expectations generated as a result of the investor's dealings with the competent authorities of the host State."[1941] The reality is that numerous investor-State tribunals have recognized that (in the words of one tribunal) "any investor will have an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy objectives."[1942]

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framework that have retroactive effect, are not proceeded by reasonable notice, are aimed or applied in a discriminatory basis or are contrary to earlier specific assurances by state authorities that the regulatory framework would not be altered to the detriment of the investor."), **CL-396**.

[1938] *See Tecmed v. México*, , Award, ¶ 154, **CL-101**; *see also Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (Mar. 3, 2010), ¶441 (finding that an investor held "throughout the term of his investment the legitimate expectation that Georgia would conduct itself vis-à-vis his investment in a manner that was reasonably justifiable and did not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination"), **CL-134**; *CMS Gas v. Argentina*, Award, ¶ 274 ("There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment."), **CL-221**; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), ¶131 ("Thus, this Tribunal, having considered, as previously stated, the sources of international law, understands that the fair and equitable standard consists of the host State's consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor."), **CL-156**.

[1939] SOD, ¶ 736.

[1940] SOD, ¶ 736.

[1941] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* ("*MTD v. Chile*"), ICSID Case No. ARB/01/7, Decision on Annulment (Mar. 21, 2007), ¶¶ 68-69, **RL-94**.

[1942] *Merrill & Ring v. Canada*, Award, ¶ 233, **CL-138**; *see also Bilcon*, Award on Jurisdiction and Liability, ¶ 572 ("That freedom is not absolute; breaches of the international minimum standard might arise in some special circumstances—such as changes in a legal or policy framework that have retroactive effect, are not proceeded by

903. *Second*, México fails in its attempt to recast Claimants' legitimate expectations claims as claims for a simple breach of contract to recover losses for which Claimants bore full risk.

904. To begin, México's repeated insistence that "simple breach of contract by a state would not trigger a violation of the FET standard"[1943] ignores the reality that México's conduct in relation to the Oro Negro Contracts was not a "mere contractual breach," but a flagrant disregard of Claimants' legitimate expectations, including one in which Claimants could do business transparently with Pemex free from government-led and sponsored corruption, discrimination and reprisals for failing to accede to the government's bribe requests through known government intermediaries.

905. México's reliance on decisions in *Impregilo v. Pakistan*,[1944] *Consortium RFCC v. Morocco,*[1945] *Waste Management,*[1946] *Hamester v. Ghana*,[1947] *Parkerings v. Lithuania*,[1948] and *Glamis Gold v. USA*[1949] for this proposition is irrelevant as none of those cases suggests that a

reasonable notice, are aimed or applied in a discriminatory basis or are contrary to earlier specific assurances by state authorities that the regulatory framework would not be altered to the detriment of the investor."), **CL-396**; *CMS Gas v. Argentina*, Award, ¶ 274 ("There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment."), **CL-221**; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), ¶ 131 ("Thus, this Tribunal, having considered, as previously stated, the sources of international law, understands that the fair and equitable standard consists of the host State's consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor."), **CL-156**.

[1943] SOD, ¶ 749.

[1944] SOD, ¶ 750; *Impregilo S.p.A. v. Islamic Republic of Pakistan* ("*Impregilo v. Pakistan*"), ICSID Case No. ARB/03/3, Decision on Jurisdiction (Apr. 22, 2005), ¶¶ 266-70, **CL-175**.

[1945] SOD, ¶ 750; *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB / 00/6, Award (Dec. 22, 2003), ¶¶ 33-34, **CL-174**.

[1946] SOD, ¶ 751.

[1947] SOD, ¶ 753; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (June 18, 2010), ¶ 337, **RL-0066**.

[1948] SOD, ¶ 753; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), ¶ 344, **RL-0106**.

[1949] SOD, ¶ 754.

State's conduct in relation to a contract could not constitute a violation of an investor's legitimate expectations where, as here, the State acted in its sovereign capacity.

906. In addition to the undeniable reality that Pemex's activities are attributable to México, México's conduct in relation to the Oro Negro Contracts was quintessentially governmental and sovereign—according to Pemex itself. For example, Pemex did not invoke commercial reasons for its termination of the Oro Negro Contracts, but "reasons of public interest"—that is a quintessential governmental prerogative, not one invoked by a private, commercial actor. It did not invoke contract provisions or provisions from commercial law for its authority to do so, but instead relied on the administrative rules in the DACS that confer special powers on state entities that commercial parties cannot and do not exercise.

907. Further, rather than comply with the law and follow the requirements of Mexican law for terminating the Oro Negro Contracts, Pemex acted in a governmental manner and exercised governmental prerogatives and authority to issue the illegal, unilateral terminations. Following the illegal terminations, Pemex has continued to exercise governmental prerogatives, ignoring the various orders and decisions of the Mexican judiciary and maintaining its illegal decisions to the detriment of Claimants and Oro Negro. Notably, Pemex flouted a commercial court's decision that found it in breach of the Oro Negro Contracts on grounds that jurisdiction lay with administrative courts (which are meant only for dealing with governmental administrative action that affects private parties), not commercial courts. Indeed, Mexico's argument that challenges to Pemex's terminations should have been made in the Mexican administrative courts is an admission by México that the Contracts for the Rigs are *administrative* contracts, and therefore that its action to terminate them was a governmental action, as only governmental administrative actions relating

to *administrative* contracts with the Mexican government can be challenged in the Mexican administrative courts.

908. Moreover, as shown, the termination of the Oro Negro Contracts, according to Pemex, were the result of, directed by targeted budget cuts imposed on Pemex by the highest levels of the Mexican Government. And the actions of Pemex are directed by a Board of Directors composed entirely of government officials and persons appointed by government, including the Minister of Energy (Board Chair) and the Minister of Treasury.

909. Pemex exercised governmental prerogative in its collusion with the Ad-Hoc Group as well. As noted above in Section II.E, [redacted][1950] [redacted][1951] [redacted][1952]

910. *Third,* México does not rebut the facts of Claimants' legitimate expectations claim.

[1950] [redacted] Exhibit **C-276 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[1951] [redacted] Exhibit **C-276 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[1952] [redacted] Exhibit **C-276 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

911. Legitimate Expectation: Claimants have explained that they legitimately expected that contracting with Pemex would be conducted properly, on a non-arbitrary and nondiscriminatory basis and in good faith in accordance with Pemex's assurances to the U.S. investors, Mexican domestic law, and public statements regarding anti-corruption and good governance and free from government-led and sponsored corruption, discrimination and reprisals for failing to accede to the government's bribe requests through known government intermediaries.[1953] Those legitimate expectations were the product of specific assurances:

- Oro Negro was established against the backdrop of a large-scale reform of México's oil and gas industry and México's promises of transparency and fairness to foreign investors as part of its effort to attract foreign investment to the Mexican oil and gas industry.[1954]

- Pemex's CEO in 2011, Juan José Suárez-Coppel, represented to one of the Claimants, Mr. Fred Warren, that Pemex was committed to being a productive and efficient entity and that suppliers such as Oro Negro would be key for Pemex's success.[1955] Mr. Suárez stated that Pemex viewed Oro Negro as an example that other Pemex suppliers should follow: a company with advanced technical expertise, prepared to acquire premium assets, subject to high corporate governance standards, and with international capital from reputable investors.[1956] Implicit in his statements to Mr. Warren about Pemex eventually becoming a public company and México's initiatives to attract U.S. and other foreign investors to make investments to increase oil and gas production in the

[1953] SOC, ¶ 507.

[1954] *See, generally, Reforma Energética – Resumen Ejecutivo* [Energy Reform – Executive Summary], Gobierno de la República [Government of the Republic], https://www.gob.mx/cms/uploads/attachment/file/164370/Resumen_de_la_explicacion_de_la_Reforma_Energetica11_1_.pdf, Exhibit **C-94**; *Palabras del Presidente Enrique Peña Nieto, Durante la Ceremonia Conmemorativa al 76º Aniversario de la Expropiación Petrolera* [Address of President Enrique Peña Nieto During the Commemorative Ceremony for the 76th Anniversary of the Mexican Oil Expropriation], Presidencia de la República [Presidency of the Republic] (Mar. 24, 2014), https://www.gob.mx/presidencia/prensa/palabras-del-presidente-enrique-pena-nieto-durantela-ceremonia-conmemorativa-al-76-aniversario-de-la-expropiacion-petrolera, Exhibit **C-95**; *La Ley de la Inversión Extranjera en México Promueve Facilidades y Garantías que Ofrece Nuestro País a los Inversionistas* [The Mexican Foreign Investment Act Promotes Convenience and Guarantees that Our Country Offers to Investors], Secretaría de Economía [Ministry of Economy] (Nov. 11, 2011), http://www.siam.economia.gob mx/work/models/siam/posicionamiento/articulos_posicionamiento/La%20Ley%20de%20inversi%C3%B3n%20extranjera%20en%20M%C3%A9xico%20promueve%20facilidades%20y%20garant%C3%ADas%20que%20ofrece%20nuestro%20pa%C3%ADs%20a%20los%20inversionistas.pdf, Exhibit **C-96**.

[1955] First Warren Statement, **CWS-3**, ¶ 10.

[1956] *Id.* at ¶ 11.

country was México's commitment to comply with U.S. laws for foreign investors, including compliance with U.S. anticorruption laws.[1957] Having previously been the CFO of Pemex, Mr. Suárez knew that compliance with anticorruption policies would be an essential requirement of such investments. That is what Mr. Warren understood Mr. Suárez's statements to be conveying.[1958] Accordingly, Mr. Warren would not have invested in Oro Negro, nor invited friends, relatives, and business associates to invest, but for Mr. Suárez's representations that Pemex would engage with Oro Negro ethically and in adherence to anticorruption principles.[1959]

- Consistent with its public assurances and its representations to Oro Negro, since 2011 Pemex has claimed in its annual reports to regulators and investors, and thus the oil industry more broadly, that it maintains strict policies and controls to prevent and combat corruption.[1960]

- México is also a party to numerous international agreements in which it represents that it has and will continue to implement effective anti-bribery policies and controls.[1961]

912. Moreover, Claimants were entitled to expect that México would honor basic principles of natural justice, including not soliciting bribes in order to allow investments to proceed or to proceed on equal terms as similarly situated enterprises.[1962] In the words of the *MTD v. Chile*

[1957] *Id.* at ¶ 13.

[1958] *Id.*

[1959] *Id.* at ¶ 14.

[1960] *See, e.g.*, Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2011), at 169, Exhibit **C-89A**; Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2012), at 162, Exhibit **C-89B**; Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2013), at 186, Exhibit **C-89C**; Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2014), at 19, 90, Exhibit **C-89D**; Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2015), at 20, 100, Exhibit **C-89E**; Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2016), at 101, Exhibit **C-89F**; Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2017), at 103, Exhibit **C-89G**; Pemex Annual Report Form 20F (2018), at 82-83, 105-06, Exhibit **C-557**; Pemex Annual Report Form 20F (2019), at 88, 91-92, 116-17, 193, 195, , Exhibit **C-558**; *see Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (Mar. 3, 2010), ¶ 441 (holding it is a legitimate expectation under the fair and equitable treatment obligation that a State "conduct itself vis-à-vis [its] investment in a manner that [is] reasonably justifiable and [does] not manifestly violate basic requirements of consistency, transparency, even-handedness and nondiscrimination"), **CL-134**.

[1961] *See, e.g.*, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, **CL-192**; Inter-American Convention Against Corruption, Organization of American States (Mar. 29, 1996), **CL-222**.

[1962] SOC, ¶ 507.

committee, these were the paradigmatic "legitimate expectations generated as a result of the investor's dealings with the competent authorities of the host State" that are "relevant to the application of the guarantees contained in an investment treaty."[1963] In *CME*, for example, a tribunal found that a state's regulatory interference in a contract destroyed the commercial value of the claimant's investment and led to a treaty breach.[1964] Similarly, in *Rumeli*, a tribunal found that a contract breach by a state organ "amounts to a breach of the BIT by the Republic" where that breach was "arbitrary, unfair, unjust, lacked in due process and did not respect the investor's reasonable and legitimate expectations."[1965] In that case (like here), the breach was the product of collusion between the government of Kazakhstan and partners designed to oust the other investors. Similarly, in *Alpha Projektholding*, a breach of a contract with a State-owned enterprise (*e.g.*, the abrupt cessation of payments under that contract) was considered a breach of the treaty because the investors "did possess a legitimate expectation that the government would not interfere with the contractual relationship between Claimant and the Hotel, and that the agreements would be honored."[1966]

913. México's Breach: There can be no doubt that those legitimate expectations were breached when Mexican officials solicited bribes from Oro Negro and its investors and, after those bribes were refused, the State organ under their authority disregarded its commitments in relation to the Oro Negro Contracts and illegitimately terminated them, colluded with the Ad-Hoc Group to drive

[1963] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (Mar. 21, 2007), ¶ 69, **RL-0094**.

[1964] *CME Czech Republic B.V. v. The Czech Republic* ("*CME*"), UNCITRAL, Partial Award (Sept. 13, 2001), ¶ 591, **CL-118**.

[1965] *Rumeli*, Award, ¶ 615, **CL-124**.

[1966] *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award (Nov. 8, 2010), ¶422, **CL-173**.

Oro Negro out of business, provided unreasonably and arbitrarily preferential treatment to Oro Negro's competitors, and pursued bogus criminal and tax investigations in México.

914. México seeks to undermine Claimants' legitimate expectations and downplay its own actions by claiming that any damages were attributable to "*riesgos en la industria energética relacionados con las posibles caídas en el precio del petróleo*,"[1967] but that is clearly not true. Neither the economic situation in México at that point in time nor the drop in global oil prices during the relevant timeframe caused México's fair and equitable treatment violations. These macroeconomic conditions do not explain or excuse the corruption in Pemex that materially and negatively affected Claimants' investments. Nor do these macroeconomic issues explain or excuse Mexico's collusion with the Ad-Hoc Group to destroy Oro Negro's business with the intention to have that business handed over to the Bondholders, [redacted].

915. And yet another of the many holes in México's argument is the following: México does not and cannot explain México's preferential treatment it granted to Seamex, a competitor in like circumstances, over Oro Negro, a company with superior rigs, reliability, and performance. As explained in detail at Section II.D.3 above, the Seamex Contracts—executed during the fall in oil prices that México highlights—were more expensive and less advantageous to Pemex from a legal and commercial standpoint than Oro Negro's were. Entering the Seamex Contracts did not make business sense for Pemex, especially if Pemex was undergoing a liquidity crisis. In reality, as Pemex officials indicated to Oro Negro's representatives, the Seamex Contracts were negotiated with unusual speed and came "from the top," that is, from Mr. Lozoya, who had issued them in

[1967] SOD, ¶¶ 761-62.

exchange for bribes.[1968] Mr. Lozoya, for his part, was arrested in Spain in February 2020 and subsequently extradited to México after having been a fugitive since México issued a warrant for his arrest in May 2019.[1969] México's assertion is threadbare cover for the real motivation behind its retaliatory and discriminatory campaign against Oro Negro and its investors—*i.e.*, the company's refusal to participate in a system of corruption and the government's desire to benefit Seamex, a foreign competitor who had as one of its main investors one of Mexico's wealthiest and most influential businessmen, Mr. Martínez.

916. México's Sovereign Conduct: There can be no doubt that México's conduct was an exercise of its sovereign power. México does not even attempt to argue that, for the purposes of Claimants' Article 1105 claim, its conduct through Pemex was not conduct in the exercise of sovereign power. As explained above at Section III.G, México is liable under the NAFTA for Pemex's acts, and Pemex undoubtedly acted in governmental capacity in its conduct toward Oro Negro. The *acuerdos* and budget adjustments issued by the Pemex Board of Directors, which Mexico now attempts to hide behind, are themselves clear examples of government prerogative.[1970] Numerous other *acuerdos* demonstrate that Pemex operates at the direction of and for the benefit of the Mexican state.[1971] Indeed, the *acuerdo* to terminate the Contracts came from the Pemex Board of Directors, which comprises government officials, including the Ministers of

[1968] Second Gil Statement, **CWS-5**, ¶¶ 50, 53; Second Cañedo Statement, **CWS-6**, ¶¶ 63-64; Williamson Statement, **CWS-8**, ¶ **62**; *see* First Black Cube Statement, **CWS-7**, ¶ 37; **Appendix H** to the Statement of Claim, Excerpt 15 ("*Emilio Lozoya fue el que le dio la indicación junto con Carlos Morales* [former CEO of PEP] *de que firmara esos contratos*.").

[1969] *Denuncia de Emilio Ricardo Lozoya Austin* (Aug. 11, 2020), Exhibit **C-254**.

[1970] *See* SOD, ¶¶ 11, 115-16, 149.

[1971] *See supra* Section III.G.2(i).

Energy and Treasury.[1972] The termination notices themselves stated that Pemex was terminating the Contracts for "reasons of public interest,"[1973] and Pemex issued them relying on the governmental authority bestowed by the *Disposiciones Generales de Contratacion para Petróleos Méxicanos y sus Empresas Productivas Subsidiarias*—again, a statute that applies only to Pemex, as a parastatal Mexican entity, and confers special powers upon it. In addition, Pemex's beneficial treatment of Seamex was directed and ordered by high-ranking officials in the Mexican government, including Mr. Lozoya, who received bribes from Seamex, and President Peña Nieto, who had a close and longstanding relationship with Mr. Martínez.[1974] México's collusion with the Ad-Hoc Group [redacted], and to starve the company of cash to ensure and hasten its demise, also was directed from the top and is another governmental intrusion into Oro Negro's contracts with Pemex that caused harm to Claimants' investments. México's other acts against Oro Negro and Claimants, including retaliatory criminal and tax proceedings,[1975] as well as the request of Red Notices from INTERPOL, were quintessentially sovereign expressions of its police power.

917. This is critical because México itself does not deny that a violation of contractual rights may lead to a breach of fair and equitable treatment where a State acts in its sovereign capacity, as it did here. This has been established by numerous tribunals. For example, the *Impregilo v. Argentina* tribunal (on which México relies) established that "contractual breaches . . . could affect [the state's] responsibility under the [investment treaty] because they were a misuse of public

[1972] *See* SOC, Sections III.B.3; Authorization of Pemex's Board of Directors resulting in the termination of the Oro Negro Contracts, Exhibit **C-93**.

[1973] Each notice cites to cite to the Authorization in Exhibit **C-93**. *See* Termination Notices, Exhibits **C-M.1 – C-M.5**.

[1974] *See supra* Section II.A.2; Second Warren Statement, **CWS-9**, ¶ 4; Second Cañedo Statement, **CWS-6**, ¶ 65.

[1975] *See supra* Section II.I.

power or reveal a pattern directed at [the counterparty]."[1976] The tribunal used that rubric to determine whether Argentina had violated the FET obligation by breaching a contract for a concession of water and sewage services in contravention of claimant's legitimate expectations under the investment treaty. It concluded "that Argentina, by failing to restore a reasonable [economic and financial] equilibrium in the concession, aggravated its situation to such extent as to constitute a breach of its duty under the BIT to afford a fair and equitable treatment to [claimant's] investment."[1977] NAFTA tribunals have made similar findings where a host State's breach "amount[ed] to an outright and unjustified repudiation of the transaction," even where such repudiation is the non-payment of the contract amount.[1978]

918. There can be no doubt that the above acts undertaken in retaliation for Oro Negro's refusal to pay bribes, "amount[ed] to an outright and unjustified repudiation of the transaction," and left Claimants with no remedy.

[1976] *Impregilo S.p.A. v. The Argentine Republic ("Impregilo v. Argentina")*, ICSID Case No ARB/07/17, Award (June 21, 2011), ¶ 299, **CL-253**.

[1977] *Impregilo v. Argentina*, Award, ¶ 331, **CL-253**.

[1978] *Waste Management II*, Award, ¶ 115, **CL-113**; *Mondev*, Award, ¶ 134 ("Indeed a governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1105 and with contemporary standards of national and international law concerning governmental liability for contractual performance."), **CL-73**; *see also SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (Jan. 29, 2004), ¶ 162 ("[A]n unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under [the FET obligation]."), **CL-397**; *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (Feb. 12, 2010), ¶ 146 ("[A] State's non-payment of a contract is, in the view of the Tribunal, capable of giving rise to a breach of fair and equitable treatment requirement, such as, perhaps, where the non-payment amounts to a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of its value."), **CL-176**.

3. Bribery & Corruption: México Does Not Deny a Customary International Law Prohibition Against Bribery and Corruption and Cannot Deny that It Breached That Prohibition

919. Claimants showed in the Statement of Claim that México breached a customary international law prohibition against bribery and corruption included in the minimum standard of treatment.[1979]

920. In the Statement of Defense, México does not deny that such a prohibition exists. Nor does it deny that this prohibition means that a showing that State officials have solicited a bribe, participated in corruption, or retaliated against an investor that has refused to pay a bribe is in itself a showing of a breach of fair and equitable treatment under international law.

921. Instead, it merely argues *generally* that Claimants must meet "a high standard of proof of corruption."[1980] That, however, has nothing to do with Claimants' fair and equitable treatment claims, but instead relates to the standard of proof that Claimants must meet for factual allegations. As shown above at Section II.A, on any colorable standard, Claimants have clearly established that México has engaged in corruption and that México has retaliated against it for such reasons.

922. The evidence is now abundant that México has breached international law prohibitions on bribery and corruption. México's attempts to overcome that evidence are uncompelling.

923. *First*, México's claim that allegations by Messrs. Gil and Cañedo are "*extremadamente vagas*" (México's usual refrain when it does not wish to engage with the facts or law) is incorrect.[1981]

[1979] SOC, Sections III(D)(4).

[1980] SOD, ¶ 740.

[1981] SOD, ¶ 748.

924. In his witness statement, Mr. Cañedo explained that he entered Oro Negro possessing deep personal knowledge of the corruption endemic to Mexican government and business that he had accumulated over the span of his career in the Mexican managerial sector.[1982] He described how while he was on the Board of Oro Negro and once it had its contracts in place with Pemex, persons representing or allied with the Mexican government contacted him to offer their services as "operators" or provide "advice" to resolve escalating difficulties between Oro Negro and Pemex.[1983] He and Mr. Gil described three discrete occasions occurring in 2015 and 2016 where persons acting for Pemex solicited bribes from them; Mr. Cañedo submits with this Reply additional details regarding those three instances.

- On the first occasion in 2015, Mr. Andrés Caire emailed Mr. Cañedo, asking to discuss something "very important and urgent," though they had not spoken in over twelve years.[1984] In a subsequent phone call, Mr. Caire described with a suspicious level of detail Oro Negro's problems with Pemex over the latter's delayed payments, even though that information was not publicly known.[1985] Mr. Caire offered to arrange meetings with people who could solve these problems, and noted that Mr. Gil was "inexperienced" in how to work with Pemex.[1986] Understanding Mr. Caire to be indicating that it was necessary to bribe Pemex officials, Mr. Cañedo stated that the Board of Integradora had determined since its founding to comply with the United States FCPA, which outlaws bribery and other corrupt acts.[1987] Mr. Caire told Mr. Cañedo not to worry about the FCPA.[1988] Mr. Caire's specific instruction that Mr. Cañedo not worry about the FCPA implied that bribery was necessary to securing a successful relationship with Pemex, and that it would be possible to

[1982] First Cañedo Statement, **CWS-2**, ¶¶ 14-16.

[1983] First Cañedo Statement, **CWS-2**, ¶ 17.

[1984] Second Cañedo Statement, **CWS-6**, ¶ 75; Email Exchange between J.A. Cañedo White and A. Caire (Feb. 11, 2015) ("*Me gustaria saber si de repente vienes a Maxico* [sic] *se trata de algo muy importante y urgente*"), Exhibit **C-260**.

[1985] Second Cañedo Statement, **CWS-6**, ¶ 75.

[1986] *Id*. at ¶ 76.

[1987] *Id*. at ¶ 77.

[1988] *Id*. at ¶ 77.

make a bribe appear to be a legitimate payment and thereby avoid criminal prosecution.[1989]

- On the second occasion, in 2016, Mr. Cañedo met with an important Mexican businessman who was seeking to negotiate with Oro Negro to merge his company, Latina, with Oro Negro.[1990] This man told Mr. Cañedo that Oro Negro did not know how to "operate" with Pemex and did not understand the culture and way of doing things with Pemex.[1991] He also stated that in the event of a merger between Oro Negro and Latina, the "operation" should be carried out by Latina.[1992] He stated that he also required control of the company resulting from the merger because he could not depend on or wait for authorizations for operating decisions. In other words, this man was indicating that he did not want to allow Oro Negro's Board to prevent him from paying the necessary bribes to Pemex.[1993] That conclusion is supported by the fact that even though Oro Negro had more active contracts with Pemex (five) than Latina did (two), this man was confident that he nevertheless had a skill so valuable to offer that he would be entitled to take operational control of the merged company.[1994] He also made it clear that the check of Oro Negro's Board would prevent him from effectively utilizing his influence.[1995]

- On the third occasion, in 2016, Mr. Cañedo and Mr. Gil met with Javier López Madrid, a Spanish businessman who is close to Mr. Lozoya and Carlos Roa—Mr. Lozoya's Advisory Coordinator.[1996] Toward the end of their otherwise informal meeting, Mr. López Madrid pointedly told Mr. Cañedo that he had heard that the best way to have a good relationship with Pemex was through Froylan Gracia García—the Executive Coordinator for Mr. Lozoya.[1997] Following the meeting, Mr. Cañedo performed due diligence and learned that Mr. Gracia García has been widely accused of corruption. He also learned that Mr. Gracia García has a house in the wealthy Polanco neighborhood of México City where companies schedule meetings with him to resolve their problems with Pemex.[1998] He similarly learned that Mr. López Madrid has been publicly accused of engaging in corruption,

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[1989] *Id*. at ¶ 77.

[1990] *Id*. at ¶ 78.

[1991] *Id*. at ¶ 78.

[1992] *Id*. at ¶ 78.

[1993] *Id*. at ¶ 78.

[1994] *Id*. at ¶ 78.

[1995] *Id*. at ¶ 78.

[1996] First Gil Statement, **CWS-1**, ¶ 101; Second Cañedo Statement, **CWS-6**, ¶ 79.

[1997] Second Cañedo Statement, **CWS-6**, ¶ 79.

[1998] *Id*. at ¶ 79.

> including with Pemex.[1999] Thus, Mr. López Madrid's statement meant that Oro Negro would need to pay bribes to Pemex and/or Mr. Lozoya through Mr. Gracia García.[2000] Claimants' investigatory evidence corroborates Mr. Gracia García's role as the facilitator of bribes to Mr. Lozoya—the "mastermind of the external finances to the CEO" who received "millions of dollars" by charging USD 50,000 to USD 100,000 for meetings with the CEO of Pemex.[2001]

925. Far from "extremely vague," these descriptions of bribery solicitations are specific, detailed, and consistent with the Messrs. Cañedo and Gil's knowledge that bribery is endemic to the interactions between Mexican business and government as well as the documented manner in which corrupt transactions and bribes are done in México, as described above.[2002]

926. It is also consistent with the knowledge of Pemex officials, who confirm the existence of México's pay-to-play system at Pemex.[2003]

927. *Second*, México seeks to downplay this reality with the vague assertion that the Black Cube recordings do not prove that other Pemex contractors paid bribes.[2004] That is not true. They contain admissions by Pemex officials that Pemex officials solicit bribes from contractors and they also indicate that Pemex, its CEO, and the Mexican Energy Minister accepted bribes from Seadrill, Fintech, and/or Seamex in exchange for the preferential contract terms in the Seamex Contracts. This not only establishes the corruption that Claimants have alleged, but it also proves that the corruption was directed by officials within the Mexican government, laying to rest any defense by

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[1999] *Id*. at ¶ 79.

[2000] *Id*. at ¶ 79.

[2001] First Black Cube Statement, **CWS-4**, ¶ 33.1; **Appendix H** to the Statement of Claim, Excerpt 8 ("*Pero Froylan era el mastermind de las finanzas externas del director. Entonces él por ejemplo llegaba una compañía y le decía: ¿Pues quieres hablar con el director? 50.000 dólares, 100.000 dólares . . . Nada más para conseguir la cita. Hubo una compañía china que se quejó. . . . Pero Froylan era el que le hacía las tareas a Emilio. Él recibió los millones de dólares . . . .*").

[2002] *See supra* Section II.A.

[2003] *See generally* First Black Cube Statement, **CWS-4**; **Appendix H** to the Statement of Claim.

[2004] SOD, ¶ 748.

México that this case is only about contractual breaches. Moreover, it proves the discrimination and lack of transparency that Claimants have alleged took place and destroyed their investments.

928. For example, in a recorded conversation of September 27, 2017, Luis Sergio Guaso Montoya, a Pemex employee from 1990 to 2016 who had been Deputy Director of Strategic Planning for Pemex Exploración y Producción, answered yes to Black Cube's question whether companies commonly offer "*algún tipo de remuneración para recibir mejores condiciones*" and confirmed that companies paid bribes to receive contracts.[2005] Similarly, on October 23, 2017, Mr. Jose Carlos Pacheco, then the Vice President of Pemex Perforación y Servicios, and Mr. Guaso explained that when working with Pemex, all businesses must follow a certain "protocol" involving the payment of bribes.[2006]

929. The Black Cube recordings even confirm that Seadrill's preferential treatment was linked to its participation in the pay-to-play system. For example, in a conversation recorded on September 26, 2017, Gustavo Escobar Carré, who worked at Pemex from 2013 to 2016 and was Pemex's Chief Procurement Officer from late 2015 to April 2016, explained that Seadrill had "protected contracts" with Pemex.[2007] Mr. Escobar also confirmed that Seadrill entered México and obtained its favorable contracts through Mexican billionaire Mr. Martínez.[2008]

[2005] **Appendix H** to the Statement of Claim, Excerpt 1 ("*Sí, sí, ocurre. . . . . Ah es muy probable. Sí, sí, sí. Al menos que* [inaudible]."); *see* First Black CubeStatement, **CWS-4,** ¶ 32.1.

[2006] **Appendix H** to the Statement of Claim, Excerpt 2 ("*Protocolo. . . . Se apoya, ¿no? Se apoya a la iniciativa.*").

[2007] **Appendix H** to the Statement of Claim, Excerpt 11 ("*Oro Negro tiene un contrato así con una sola plataforma, de las otras cinco que tiene, pero Seadrill, este, sí son contratos que están protegidos*.").

[2008] **Appendix H** to the Statement of Claim, Excerpt 12 ("*No, de hecho te digo: Seadrill entró a México por esta persona. David Martínez, esa es la única razón por la que entró a México, Seadrill. . . . Sí. Es la misma historia que yo sé, por ahí, que él fue quien empujó. Ahora está metido en, con ICA*."); *see* First Black Cube Statement , **CWS-4**, ¶ 37.3.

930. Additional evidence regarding the views of Pemex workers corroborates the corrupt activities of Seadrill, Seamex, and Mr. Lozoya. As explained above, the process through which the Seamex Contracts were issued was highly irregular. It occurred with remarkable speed and culminated in a luxurious, formal signing ceremony, whereas the Oro Negro Contracts took months to negotiate and were executed without ceremony.[2009] As Mr. Olea—Oro Negro's Deputy CFO—had relayed to Mr. Gil, Pemex officials including Mr. Luis Ignacio Garcia Mendoza, with whom Mr. Olea had negotiated to contract the New Rigs, were told that they were not permitted to negotiate the terms of the Seamex contracts and they needed to sign them as written.[2010] Mr. Garcia was upset about the Seamex contracts and did not want to finalize and sign them.[2011] However, he had received explicit instructions "from the top" telling him he had to sign them and attend the formal signing ceremony.[2012] Mr. Carlos Morales, the former General Director of Pemex Exploration and Production until February 2014, also indicated to Mr. Gil that the order with respect to Seamex and its more favorable contracts with Pemex came from the top of Pemex and the Mexican government.[2013] Pemex representatives later would not discuss the Seamex Contracts with Mr. Gil, indicating that they felt uneasy about the entire process of Pemex's contracting with Seamex.[2014]

931. The corrupt practices identified in the Black Cube records have even been confirmed by law enforcement authorities. For example, Seadrill's corrupt methods have drawn the attention of

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2009 Second Gil Statement, **CWS-5**, ¶¶ 50-51.

2010 *Id*. at ¶¶ 50-51.

2011 *Id*. at ¶ 50.

2012 *Id*. at ¶ 50.

2013 *Id*. at ¶ 51.

2014 *Id*. at ¶ 52.

Brazilian and Dutch police.[2015] Mr. Lozoya, as noted above, was arrested in Spain in February 2020 and extradited to México after having been a fugitive from Mexican authorities since May 2019.[2016]

932. *Third*, México argues that Claimants' very serious assertion that the SAT was bribed to fabricate evidence and to obtain the Seizure Order and the Rigs Take-Over Order is mere speculation.[2017] However, México cannot escape the numerous elements showing that México's investigations are highly irregular, very strongly suggesting corruption, nor that these investigations show a clear pattern of retaliation and misuse of government authority, including:

- the SAT delivered fabricated evidence to the PGR;[2018]
- During this time, SAT auditors were acting under instructions to find criminal tax liability against Oro Negro and affiliated individuals;[2019]
- the SAT sent to the PGR broad tax information regarding Perforadora in violation of Mexican law;[2020]
- the SAT granted the PGR's request for broad tax information even though it routinely denies such requests;[2021]
- GGB "found" that fabricated evidence, imbedded in the numerous records provided by the SAT to the PGR;[2022]

[2015] *Seadrill, Sapura latest firms targeted in Brazil's 'Car Wash' Probe*, REUTERS (Sept. 24, 2020), https://www.reuters.com/article/us-brazil-corruption-seadrill-idUSKCN26F12A, Exhibit **C-268**.

[2016] *Denuncia de Emilio Ricardo Lozoya Austin* (Aug. 11, 2020), Exhibit **C-254**.

[2017] SOD, ¶ 748.

[2018] *See supra* Section II.I; SOC, ¶ 228.

[2019] *See supra* Section II.I; SAT Informative Note (Nov. 28, 2018), Exhibit **C-477**; Internal SAT Communications, Exhibit **C-478**; Second Cañedo Statement, **CWS-6**, ¶ 72.

[2020] *See supra* Section II.I; SOC, ¶¶ 226-27; Federal Tax Law, Official Journal of the Federation, Article 69 (2018), **CL-264**; First Izunza Expert Report, **CER-2**, ¶ 25; Second Izunza Expert Report, **CER-5**, ¶ 37.

[2021] *See supra* Section II.I; First Izunza Expert Report, **CER-2**, ¶ 25; Second Izunza Expert Report, **CER-5**, ¶ 37.; Exhibit **C-177** is the November 2018 denial of information by the SAT; SOC, ¶ 227.

[2022] *See supra* Section II.I; SOC, ¶ 228; Contreras Interview, Exhibit **C-2** at 3-7 .

- the evidence that GGB "found" was one spreadsheet allegedly reflecting that from 2014 to 2017, Perforadora had issued invoices totaling approximately USD 500,000 to 16 sham companies, despite that Oro Negro only ever had cause to invoice Pemex;[2023]

- there is no record in the SAT's electronic database of Perforadora ever issuing an invoice to these sham companies or of these companies ever issuing an invoice to Perforadora, even though such invoices must be uploaded to that database under Mexican law;[2024]

- Perforadora reviewed all its internal accounting records, which are electronically stored in SAP, a standard software that companies use to keep all their business and accounting records, and found no records related to the sham companies;[2025]

- GGB knew or should have known that the information was false, because other documents that it reviewed indicated that Perforadora did not have any relationship of any kind with the "sham" companies, and GGB made no attempt to verify the false information;[2026]

- on the request of the Singapore Rig Owners (controlled by the Ad-Hoc Group), the PGR used the SAT's fabricated evidence to seek a court order from a Mexican federal judge seizing the Mexican Trust and Perforadora's bank accounts, but the Mexican federal judge denied the PGR's request the following day as baseless and gave no weight to the SAT's false evidence;[2027]

- the Singapore Rig Owners transferred their criminal complaint against Perforadora to the PGJCDMX, and within only eleven days after launching the investigation there, GGB obtained Judge Cedillo's Seizure Order, seizing all the bank accounts of the Mexican Trust and of Perforadora;[2028]

- the Seizure Order seized USD 84 million, while the accusation against Perforadora is that it issued invoices for USD 500,000 to 16 companies, an accusation that has nothing to do with and is blatantly and wildly disproportionate to the Seizure Order;[2029]

[2023] *See supra* Section II.I; SOC, ¶¶ 241, 243.

[2024] *See supra* Section II.I; SOC, ¶ 243.

[2025] *See supra* Section II.I; SOC, ¶ 243.

[2026] *See supra* Section II.I; SOC, ¶¶ 239-43.

[2027] *See supra* Section II.I; SOC, ¶¶ 230-31.

[2028] *See supra* Section II.I; SOC, ¶ 247.

[2029] *See supra* Section II.I; SOC, ¶¶ 243-52; Seizure Order, Exhibit **C-23** at p. 7.

- Judge Cedillo issued the Seizure Order with no supporting evidence and based solely on Mr. Contreras' ex parte and unsupported statements;[2030]
- the Rigs Takeover Order authorized the seizure of close to USD 750 million in value, while the accusation against Perforadora has nothing to do with and is again blatantly and wildly disproportionate to the Rigs Takeover Order;[2031]
- [redacted][2032] and,
- GGB obtained the Rigs Takeover Order based solely on a short, 40-minute summary at a hearing, without providing or Judge Cedillo requesting any evidence.[2033]

933. Far from "speculation," these red flags of corruption remain unjustified by Respondent and are consistent with and supportive of investigatory and circumstantial evidence submitted by Claimants proving that corruption amongst Mexican officials permeated the campaign to destroy Oro Negro in violation of NAFTA Article 1105.

934. *Fourth*, México contends that Claimants have not established that government authorities retaliated against Oro Negro, and even go so far as to accuse Claimants of doing "*todo lo posible*

[2030] *See supra* Section II.I; SOC, ¶ 247; García González y Barradas Abogados Request to Mexican Federal Judge (Sept. 6, 2018), Exhibit **C-415**; Seizure Order (Sept. 25, 2018), Exhibit **C-23**.

[2031] *See supra* Section II.I; SOC, ¶ 253; Exhibit **C-26 (**October 18 Hearing Recording); Exhibit **C-27** (October 19 Hearing Recording).

[2032] *See supra* Section II.I; [redacted] Exhibit **C-428 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)** [redacted]; [redacted] Exhibit **C-429 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)** [redacted]; [redacted] Exhibit **C-431 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3** [redacted] Exhibit **C-435 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)** [redacted].

[2033] *See supra* Section II.I; SOC, ¶ 257; Exhibit **C-26 (**October 18 Hearing Recording); Exhibit **C-27** (October 19 Hearing Recording).

para ser provocativos, aparentemente con la esperanza de generar respuestas que puedan usar en este procedimiento."[2034] This allegation is absurd, and frankly, quite rich, considering México's targeted retaliation against Claimants. Claimants have been subject to bogus arrest warrants and Interpol Red Notices that have caused them to fear for their personal safety and liberty. Of course, they would not have sought out such brutal treatment. México's *ad hominem* attack only serves to emphasize just how hollow México's defense is. Notably, México hardly attempts to engage with the evidence, which establishes under any plausible standard of proof that Pemex and Mexican officials retaliated against Oro Negro for its unwillingness to participate in Pemex's bribery regime. México's bare assertion to the contrary is unpersuasive.

935. *Finally*, México argues that Claimants' only evidence that the Ad-Hoc Group conspired with Pemex is Mr. Gil's witness statement.[2035] Not so. In addition to the first-hand statements from Pemex officials in the Black Cube recordings, which Claimants filed with its Statement of Claim, following that filing, Claimants received approval to submit with this Reply additional evidence [redacted]. Claimants' evidence, which is described in detail in Sections II.E and II.G above, shows, among other things, the following facts:

- [redacted][2036]

[2034] SOD, ¶ 748.

[2035] SOD, ¶ 748.

[2036] *See* [redacted] Exhibit **C-270 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**; [redacted] Exhibit **C-271 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[redacted][2037] Rather, the Ad-Hoc Group tried to convince Oro Negro to accept the 2017 Proposed Amendments.[2038]

- The Ad-Hoc Group knew that Oro Negro would not be able to make its payments on the Bonds if it accepted the 2017 Proposed Amendments without a restructuring of the Bonds.[2039] [redacted][2040]
- [redacted][2041] [redacted][2042]
- [redacted][2043]

[2037] *See* [redacted] Exhibit **C-343 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**; [redacted] Exhibit **C-273 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[2038] *See* Email from A. Ercil to G. Gil (Aug. 3, 2017) (stating "Please sign with Pemex as soon as possible. Given the bid for jack ups and excitement around México, creditors are not afraid to call a default in this market."), Exhibit **C-274**.

[2039] Oro Negro Press Release (Aug. 11, 2017), Exhibit **C-266**; Letter from A. Rosenberg to Oro Negro (Aug. 11, 2017) ("The Ad Hoc Group is aware that implementation of Pemex's proposed amendments will also require certain amendments to the Bond documents."), Exhibit **C-336**.

[2040] *See* [redacted] Exhibit **C-272 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[2041] *See* [redacted] Exhibit **C-345 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)** .

[2042] [redacted] Exhibit **C-346 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[2043] *See* [redacted] Exhibit **C-281 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**; [redacted] Exhibit **C-280 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

- [redacted][2044] [redacted][2045]
- [redacted][2046] [redacted][2047]
- [redacted][2048] [redacted][2049]
- [redacted][2050]

[2044] [redacted] Exhibit **C-344 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**; [redacted] Exhibit **C-276 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[2045] *See* [redacted] Exhibit **C-372 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[2046] *See, e.g.*, [redacted] Exhibit **C-351 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[2047] *See* [redacted] Exhibit **C-380 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[2048] *See* [redacted] Exhibit **C-281 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[2049] *See* [redacted] Exhibit **C-374 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[2050] *See* [redacted] Exhibit **C-281 (Confidential - Subject to Protective Order and Procedural**

936. Accordingly, Respondent's attempt to reimagine [redacted] as a creation of Mr. Gil's imagination is itself wishful thinking and ignores the substantial evidence submitted by Claimants. This evidence leads to only one plausible conclusion: Mexican officials retaliated against Oro Negro because it refused to pay bribes and colluded with the company's lenders to terminate Oro Negro's contracts and starve it of much-needed cash to keep it operations going, and thus worked together with the Bondholders to put Oro Negro out of business.

937. This is significant. Tribunals have found that the existence of corruption may taint an otherwise legitimate action and cause that action to be a breach of fair and equitable treatment. For example, in the *ECE Projektmanagement* case, "if the Claimants were able to establish that they had been adversely affected by an otherwise defensible key decision adopted by the authorities which had been tainted by corruption, the decision in and of itself is likely to give rise to a breach of the requirements of fair and equitable treatment."[2051] Likewise, in *Lao Holdings*, the tribunal found that the existence of corruption "relevant to the issue of the claimants' good faith and the legitimacy of the claimants' alleged legitimate expectations of fair and equitable

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Order Nos. 1 and 3). [redacted] Exhibit **C-282 (Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)**.

[2051] *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award (Sept. 19, 2013), ¶ 4.738, **RL-0098**.

treatment."[2052] Similarly, in the *Grynberg* case, a tribunal found that, where a contract is involved, corrupt conduct could lead to a treaty breach, even if there was no breach of a relevant contract, so long as there is a link with an alleged treaty breach.[2053]

938. In addition, México's failure to prosecute other individuals evidenced in this proceeding to have participated in corruption is conspicuous, and further demonstrates its liability for violating the customary international law prohibition on corruption and the obligation to accord Claimants and their investment fair and equitable treatment. That obligation is consistent with México's commitments under various anti-corruption and bribery conventions, including, notably, the United Nations Convention Against Corruption ("UNCAC"), the legally binding universal anticorruption instrument.[2054] As recognized by the tribunal in *Lao Holdings*, the UNCAC "embodies what has become a principle of customary international law applicable . . . to root out corruption used 'to obtain or retain business or other undue advantage in relation to the conduct of international business.'"[2055] Thus, that tribunal found it "disturbing that no prosecutions ha[d] been brought against any persons alleged to have accepted bribes" in that case, "nor ha[d] there been evidence of due diligence in any investigation."[2056] Those words are apt here, as México has continued to fail in its obligation to root out and punish corruption, even though Claimants have

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[2052] *Lao Holdings N.V. v. Lao People's Democratic Republic I ("Lao Holdings v. Laos")*, ICSID Case No. ARB(AF)/12/6, Award (Aug. 6, 2019), ¶162, **CL-398**.

[2053] *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v. Grenada*, ICSID Case No. ARB/10/6, Award (Dec. 10, 2010), ¶¶ 7.2.20-7.2.25, **RL-0101**.

[2054] *See* SOC, ¶¶ 492-502; United Nations Convention Against Corruption (2003), **CL-190**.

[2055] *Lao Holdings v. Laos*, Award ¶ 105, **CL-398**.

[2056] *Lao Holdings v. Laos,* Award ¶ 112, **CL-398**; *see World Duty Free Company Limited v. Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006), ¶ 180 (remarking in light of "disturbing" corruption that "[a]lthough the Kenyan President has now left office and is no longer immune from suit under the Kenyan Constitution, it appears that no attempt has been made by Kenya to prosecute him for corruption or to recover the bribe in civil proceedings."), **CL-199**.

delivered actionable evidence of rampant corruption in Pemex and elsewhere in the Mexican government with its submissions in this arbitration.

939. Thus, there can be no question that México breached its FET obligation under NAFTA Article 1105.

4. Discriminatory Conduct: México's Attempt To Strike the Obligation Not To Engage in Discriminatory Conduct from Its Fair and Equitable Treatment Obligation Cannot Succeed

940. México seeks to strike any suggestion that its patent discrimination against Oro Negro and its investors can amount to a breach of Article 1105. It alleges that Claimants' claim is in fact a National Treatment (Article 1102) or Most Favorable Nation claim (Article 1103), which is prohibited under Article 1108(7)'s exception for procurement.[2057] That argument fails for a number of simple reasons.

941. *First*, Claimants' discrimination claim is not an Article 1102 or Article 1103 claim. If it were, Claimants would have argued that México discriminated against them on the basis of their (or Oro Negro's) nationality. But that is not their claim. Instead, Claimants have argued and shown that México discriminated against them principally because they did not pay bribes to Mexican officials who sought bribes in order to "smooth things over" with Pemex and to obtain "better treatment" for Oro Negro from Pemex.

942. México discriminated against Oro Negro by granting Seamex preferential contract terms for inferior rigs while suspending payment on 40% of the Oro Negro Contracts and subsequently terminating those Contracts. México has not provided a commercially reasonable justification for its discriminatory treatment of Oro Negro. Rather, Claimants' investigatory evidence demonstrates that corruption motivated México's discrimination against Oro Negro—which was

[2057] SOD, ¶¶ 763, 766-67.

directed from the highest levels of México's government—primarily in retaliation for Oro Negro's refusal to pay bribes to Pemex officials. Seamex, in contrast, was a "protected" company, thanks to its bribery of Pemex officials and its financial arrangement with Mr. Lozoya.

943. México also discriminated against Claimants and Oro Negro when it colluded with the Ad-Hoc group to put Oro Negro out of business and hand its assets over to the Ad-Hoc Group. As described in full in Section II.E and recounted briefly under Section II.G above, Claimants' evidence demonstrates that [redacted].

944. In addition, México discriminated against Oro Negro in favor of ODH, one of the few competitors that, like Oro Negro, had contracts cancelled by Pemex. However, Pemex paid ODH liquidated damages as required for the termination of its contract, and did not pay such damages to Oro Negro even though the Oro Negro Contracts contain equivalent liquidated damages provisions. Respondent has provided no commercial justification for that discriminatory treatment, nor can it do so.

945. While México has claimed that the discriminatory treatment that it provided Oro Negro was applied across the board, that is false. The two aforementioned examples are proof in point. However, beyond those two examples, the proof is shown by the fact that, despite claiming that there were 300 examples of similar contractual modifications with other service providers, and being ordered twice to documents relevant to those examples, México has declined to provide proof of a single example, as explained above in Section II.D.5.

946. *Second*, México's suggestion that finding for Claimants on their discrimination claim would contravene the *effet utile* principle by rendering Article 1108 redundant is nonsense.

947. A state's obligation to refrain from treating an investor in a discriminatory fashion is one of the core elements of the fair and equitable treatment standard.[2058] As stated by the tribunal in *Merrill v. Canada*, "[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention on the part of the state," an obligation that is intertwined with the obligation to respect an investor's legitimate expectations.[2059] More broadly, most arbitral tribunals agree that discrimination is a *per se* violation of the fair and equitable treatment standard.[2060] For instance, the tribunal in *CMS Gas v. Argentina* noted that "[a]ny measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment."[2061] Today, it is well established that, in the words of one NAFTA tribunal, "under the NAFTA, there are two types of discrimination: nationality-based discrimination and discrimination that is founded on the targeting of a particular investor or investment."[2062]

948. That being the case, the minimum standard of treatment cannot expand and contract as México wishes it to. While the Contracting Parties may exclude application of Article 1102 and Article 1103, they have not sought to alter the content of the minimum standard of treatment to exclude all types of discrimination. Had the NAFTA's Contracting Parties wanted to do so, they

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2058 *See* SOC, ¶¶ 460, 471-474.

2059 *Merrill & Ring v. Canada*, Award, ¶ 208, **CL-138**.

2060 *See*, *e.g.*, UNCTAD, *Fair and Equitable Treatment*, 37, UNCTAD/ITE/IIT/11 (Vol. III) (1999), p. 37, **CL-167**.

2061 *CMS Gas v. Argentina*, Award, ¶ 290, **CL-221**.

2062 *Glamis Gold, Ltd. v. The United States of America* ("*Glamis Gold v. USA*"), UNCITRAL, Award (June 8, 2009), ¶ 542 n.1087, **RL-0090**.

could have—and should have—specified this, or, at the very least, issued an interpretation under Article 102 of the NAFTA. They did not.

5. Due Process & Transparency: There Can Be No Doubt that México's Judicial Conduct Breached its Fair and Equitable Treatment Obligation

949. In the Statement of Claim, Claimants explained that México breached its fair and equitable treatment obligation when its judicial organs violated the due process rights of Oro Negro and its employees.[2063] It did so by commencing investigations based on bogus and fabricated evidence, issuing baseless arrest warrants, obtaining similarly unfounded INTERPOL Red Notices against two Claimants and three key witnesses, and refusing Oro Negro's basic due process rights throughout these investigations.[2064] It also did this by conducting various cases, most notably the proceedings before Judge Cedillo, that were very apparently tainted by corruption.

950. Numerous tribunals have found a breach of fair and equitable treatment, for example, where a government influences administrative or court procedures, where a judicial body misapplies the law in a malicious manner, where criminal or civil judicial authorities are used for an improper purpose, or where the state has acted intentionally, through its judicial bodies, to harm the investor's investment intentionally.[2065] In *Deutsche Bank*, for example, the tribunal found that a Supreme Court decision without a proper examination and without properly informing the claimant's investment was motivated by political reasons and constituted a breach of fair equitable treatment in the form of a due process violation.[2066]

[2063] SOC, ¶¶ 475-79, 522-24.

[2064] *See supra* Section II.I; SOC, ¶¶ 522-24.

[2065] *See Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan* ("*Al-Bahloul*"), SCC Case No. 064/2008, Partial Award on Jurisdiction and Admissibility (Sept. 2, 2009), ¶ 221, **CL-217**.

[2066] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* ("*Deutche Bank*"), ICSID Case No. ARB/09/2, Award (Oct. 31, 2012), ¶¶ 478-80, **CL-392**.

951. México does not contest the legal standard, but simply engages in the same blanket approach that it adopts for the facts and evidence supporting the rest of Claimants' fair and equitable treatment claim, arguing that Claimants' assertions are "*generales y vagas*" and "*extremadamente debiles*."[2067] It devotes no more than two paragraphs to the assertion that there were "no irregularities" in the judicial proceedings in México involving Oro Negro.[2068]

952. México's cursory attempt to escape liability is flatly contradicted by the record. The irregularities in Mexican court proceedings are explained fully above in Section II.I. In summary, they included the following:

- In the 2018 PGR Investigation, Perfadora and its employees requested that the PGR (a) allow them to provide exculpatory evidence; and (b) give them access to the case file. PGR did not even acknowledge this request for many months despite a constitutional obligation to provide this information.[2069] México's retort that Claimants were eventually given the case file is false—no Claimants have been given access to the case file.[2070]

- In the PGR Investigation, the SAT illegally provided the PGR with an extraordinary amount of confidential documents with such speed that there could only have been an ulterior motive.[2071] The criminal complaint lodged by the Singapore Rig Owners, under the purported control of the Ad-Hoc Group, and the Alleged Sham Companies Investigation, remain pending despite being based on flimsy and illogical evidence.[2072]

953. México takes issue with Claimants' highlighting that it rewarded Judge Cedillo for issuing the baseless orders by promoting him from trial judge to appellate judge in December 2018, just a

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[2067] SOD, ¶ 769.

[2068] SOD, p. 246 ("*No hubo irregularidades en los procedimientos judiciales*.").

[2069] *See* First Izunza Expert Report, **CER-2**, ¶¶ 20, 22; Second Izunza Expert Report, **CER-5**, ¶ 39; Constitución Política de los Estados Unidos Mexicanos [CP] [Mexican Constitution], Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 09-08-2019, Articles 8, 20, **CL-89;** *see generally* PGR Investigation *Amparos* (Exhibits **C-9** – **C-13**), which describe the constitutional rights that the PGR is violating.

[2070] SOD, ¶ 769.

[2071] *See* First Izunza Expert Report, **CER-2**, ¶ 25; Second Izunza Expert Report, **CER-5**, ¶ 37.

[2072] *See supra* Section II.I; SOC, ¶ 523.

few months after he issued the Seizure and Rigs Takeover Orders. However, México does not explain upon what legitimate bases he was promoted.[2073] And as when Claimants filed their Statement of Claim, there are no publicly available records justifying his promotion.[2074] Nor can México explain how it is that [redacted][2075] There is but one plain answer: he was bribed to issue the order the Rigs Takeover Order.

954. Since the filing of the Statement of Claim, México has engaged in additional denials of due process and justice against Oro Negro's employees and Claimants, which are described in detail in Section II.I above:

- In late November 2019, Mexican Prosecutor Pérez used the September 2019 Complaint—filed by the Singapore Rig Owners under the purported control of the Ad-Hoc Group in collusion with Mexico—to obtain a fresh set of arrest warrants against Messers. Gil, Villegas, and Ms. DeLong, without those individuals' knowledge.[2076]

- In August 2020, the Ad-Hoc Group and México colluded to issue yet another set of baseless arrest warrants against Messrs. Gil, Williamson, and Villegas, and Ms. DeLong in August 2020 based on allegations contained in a complaint filed by

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[2073] SOD, ¶ 769.

[2074] Jan. 7, 2019 Superior Tribunal of Mexico City Judicial Bulletin, http://www.poderjudicialcdmx.gob.mx/wp-content/PHPs/boletin/boletin_repositorio/070120191.pdf, (reporting Judge Cedillo's appointment as an appelate judge), Exhibit **C-81**.

[2075] *See supra* Section II.H.3; [redacted] Exhibit **C-428 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)** [redacted]; [redacted] Exhibit **C-429 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3** [redacted]; [redacted] Exhibit **C-431 (Confidential – Subject to Protective Order and Procedural Order Nos. 1 and 3)** [redacted] Exhibit **C-435 (Highly Confidential - Subject to Protective Order and Procedural Order Nos. 1 and 3)** [redacted].

[2076] *See supra* Section II.I.1(ii); Hearing in which the November 2019 arrest warrants were issued (Nov. 2019), Exhibit **C-483**.

GGB on behalf of Oro Negro Drilling on May 3, 2019.[2077] Just as the others before it, these arrest warrants are baseless.

- Demonstrating the irregularity and baselessness of Mexico's arrest warrants and persecution of Oro Negro and Claimants, as explained above, INTERPOL recently cancelled the Red Notices that Mexico had obtained against Messrs. Gil, Cañedo, Villegas, and Williamson on the basis of the July 2019 arrest warrants.[2078]

- And on the very day Claimants submit their Reply in this arbitration, Claimants' counsel learned that México issued a *fourth* set of arrest warrants against Messrs. Gil, Williamson, Villegas, and Ms. DeLong in December 2020 on the basis of allegations contained in a complaint filed by GGB on behalf of the Singapore Rig Owners on October 30, 2020.[2079] Notably, the warrants were issued by the same judge who ordered the August 2020 arrest warrants and granted the second extension of the Seizure Order. Once again, these accusations are not only baseless, but demonstrably false.

955. These actions amount to clear breaches of the fair and equitable treatment obligation. The facts speak for themselves. México has initiated and pursued a number of sham criminal proceedings aimed at punishing Claimants and retaliating against them for their refusal to pay a bribe and for their audacity to pursue their rights in arbitration. It has likewise coopted a local judge in order to obtain a decision from its judiciary with no legal basis. These acts, of course, are part of a greater campaign of persecution against Oro Negro and Claimants.

[2077] *See supra* Section II.I.1(ii); Hearing in which the August 2020 arrest warrants were issued (Aug. 2020), Exhibit **C-484**.

[2078] *See supra* Section II.I.1(iv); INTERPOL Petition (Dec. 6, 2019), Exhibit **C-487**; INTERPOL Decision (Oct. 7, 2020), Exhibit **C-488**; Second Gil Statement, **CWS-5**, ¶¶ 84-87; Second Cañedo Statement, **CWS-6,** ¶¶ 12-13; Williamson Statement, **CWS-8**, ¶¶ 52-53.

[2079] *See supra* Section II.I.1(ii). As noted above, because Claimants' counsel learned about this recent set of arrest warrants on the date of the filing of this Reply, Claimants' counsel has not been able to obtain the relevant documents concerning these warrants, but Claimants reserve their right to submit any relevant documents, evidence, and/or analysis at a later stage in these proceedings.

6. Abusive & Unreasonable Treatment and Other Elements of Fair and Equitable Treatment: México's Restrictive Reading of the Minimum Standard Cannot Ignore the Fact-Specific Nature of the Standard

956. In the Statement of Claim, Claimants explained that a breach of Article 1105(1) is highly fact-dependent and involves a consideration of the cumulative effects of the State's breaches.[2080] In addition to the specific traditional elements of fair and equitable treatment listed in the *Waste Management* decision, fair and equitable treatment protects against conduct that falls below the minimum standard of treatment, but would not otherwise breach another treaty obligation. Claimants showed, for example, that México's disregard of its commitments in relation to the Oro Negro Contracts that were motivated in principal part because the company would not accede to the government's bribe requests as well as its collusion with the bondholders was abusive and unreasonable, a breach of Claimants' legitimate expectations, and discriminatory (all traditional elements of fair and equitable treatment), but also an act in pursuit of a campaign of retaliation and harassment against Claimants for their refusal to pay a bribe—its own breach of the fair and equitable treatment standard.

957. México does not deny that fair and equitable treatment is fact-specific, but nonetheless refuses to engage with the facts. Instead it seeks to restrict the scope of any fair and equitable treatment obligation to the traditional elements in *Waste Management* and attempts (again) to recast Claimants' Article 1105 claim as one based on "*nociones vagas como 'motivado políticamente' y 'falta de buena fe' como supuestos principios del derecho internacional consuetudinario*" for which, it falsely claims, "*no citan ningún caso de práctica estatal, y mucho*

[2080] SOC, Section III(D)(5).

menos de opinio juris*, como evidencia de tales estándares de derecho internacional consuetudinario*."[2081] That, however, is wrong on the law and the facts.

958. First, Claimants actually did document state practice and *opinio juris* that demonstrates a consensus on the prohibition of solicitation of bribes.[2082] Claimants also showed how México itself had internalized this norm.[2083] Again, rather than taking the untenable position that customary international law does not prohibit the solicitation of bribes, México merely argues for an extremely high bar for proving corruption and then states in a conclusory fashion that none existed in this case.

959. Beyond all of the breaches of the traditional elements cited above, Claimants point to additional breaches of México's obligation not to engage in arbitrary and unreasonable conduct (for example, México's conduct in relation to the Oro Negro Contracts stated above, not to mention the arbitrary, non-transparent and corrupt decisions of its courts, prosecutors and tax authorities). México does not even attempt to engage with Claimants' showing that México has breached its fair and equitable treatment standard obligation by engaging in conduct that is arbitrary and unreasonable (and also in violation of other elements of the NAFTA's Article 1105).

960. Yet, putting those breaches to one side, México's attempt to restrict the fair and equitable treatment standard to traditional elements does not withstand scrutiny. As explained in the Statement of Claim (and as México does not seriously contest), the fair and equitable treatment standard is broadly designed to "fill gaps which may be left by the more specific standards" of international investment treaties, and the principle of good faith is the "common guiding beacon"

[2081] SOD, ¶ 733.

[2082] SOC, ¶¶ 492-96, 502.

[2083] SOC, ¶¶ 497-501.

orienting the understanding and interpretation of the obligation.[2084] It is specifically designed to address conduct that may not fall under other treaty obligations, such as expropriation. In this vein, other NAFTA tribunals have held the standard to proscribe conduct that is "improper and discreditable,"[2085] but would not otherwise amount to a breach of the NAFTA's other obligations. This, after all, flows from a traditional element of the fair and equitable treatment standard: the prohibition against arbitrary or unreasonable conduct.

961. This is no novel approach. It is expressly endorsed by the lion's share of NAFTA tribunals that address this issue. For example, the *S.D. Myers* tribunal stated that "the inclusion of a 'minimum standard' provision is necessary to avoid what might otherwise be a gap [in treaty protection]. A government might treat an investor in a harsh, injurious and unjust manner, but do so in a way that is no different than the treatment inflicted on its own nationals."[2086] In *Abengoa*, the tribunal confirmed that the minimum standard of treatment under customary international law is an expression and integral part of the principle of good faith.[2087] Therefore, tribunals (including NAFTA tribunals) have found breaches of the fair and equitable treatment standard, even where the breaches do not fall under the traditional elements. In *Metalclad*, for example, the tribunal found that the idea that all relevant legal requirements for the purpose of initiating, completing, and successfully operating investments made, or intended to be made, under the NAFTA should

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[2084] SOC, ¶ 459 (quoting Dolzer & Schreuer at 132 (The clause is broadly designed "to fill gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties." The principle of good faith is the "common guiding beacon" that will orient the understanding and interpretation of the obligations), **CL-135**); *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), ¶ 297, **CL-164**.

[2085] *Mondev*, Award ¶ 127, **CL-73**; *The Loewen Group, Inc and Raymond L. Loewen v. United States of America,* ICSID Case No. ARB (AF)/98/3, Award (June 26, 2003), ¶ 133 (in reference to *Mondev*), **CL-166**; *see also* UNCTAD, *Fair And Equitable Treatment*, 20-29, II.UNCTAD/DIAE/IA/2011/5 (2012), **CL-167**.

[2086] *S.D. Myers,* Partial Award, ¶ 259, **CL-75**.

[2087] *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States* ("*Abengoa*"), ICSID Case No. ARB(AF)/09/2, Award (Apr. 18, 2013), ¶ 643, **CL-148**.

be capable of being readily known to all affected investors of another Party.[2088] Similarly, the *Pope & Talbot* tribunal found that Canada breached the fair and equitable treatment standard in its implementation of an agreement, in which Canada agreed to charge a fee on exports of softwood lumber in excess of a certain number of board feet. A state organ required the claimant to relocate thousands of documents to Canada with no explanation and encouraged the relevant Minister to reduce the claimant's export quota, deliberately misleading him into thinking that the company had been uncooperative. The *Pope & Talbot* tribunal found that Canada had breached its obligations under the NAFTA because its implementation was "more like combat than cooperative regulation," and went "well beyond the glitches and innocent mistakes that may typify the process" of administration.[2089]

962. Claimants' evidence shows that México engaged in an extensive campaign of retaliation against Oro Negro, whose objective was the financial strangulation of the company.

963. From 2013 on, Pemex represented to Oro Negro that it was looking to increase production substantially and, specifically, that it would contract the New Rigs from Oro Negro.[2090] Those representations caused Oro Negro to commission the New Rigs and make a down payment of USD 125 million.[2091] Disregarding its commitment to lease the New Rigs from Oro Negro, Pemex instead contracted five inferior rigs from Seamex at terms that were more expensive and disadvantageous to Pemex.[2092] Even so, during 2015 and 2016, Pemex continued representing to

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[2088] *Metalclad*, Award, ¶ 88, **CL-95**.

[2089] *Pope & Talbot*, Award on the Merits of Phase 2, ¶ 181, **CL-297**.

[2090] *See supra* Section II.D.3; SOC, ¶¶ 70-80; First Gil Statement, **CWS-1**, ¶¶ 38-52; Second Gil Statement, **CWS-5**, ¶¶ 35-56, 42-47; Second Cañedo Statement, **CWS-6**, ¶ 59; Letter and Presentation from the Grupo Mexicano de Empresas de Perforación to Pemex at p. 7 (May 17, 2017), Exhibit **C-283**.

[2091] *See supra* Section II.D.3; Second Gil Statement, **CWS-5**, ¶ 43; Second Cañedo Statement, **CWS-6**, ¶¶ 59-60.

[2092] *See supra* Section II.D.3; Second Gil Statement, **CWS-5**, ¶¶ 49-52; Second Cañedo Statement, **CWS-6**, ¶¶ 60-61.

Oro Negro that it would lease the New Rigs.[2093] Pemex never expressly revoked its representations, and if it had, Oro Negro would have sold its purchase option of the New Rigs to a third party or would have attempted to find work for the New Rigs outside of México.[2094] Thus, as a result of Pemex's failure to contract the New Rigs, Oro Negro lost its USD 125 million down payment on the New Rigs as well as personnel costs associated with the project management team in Singapore who were supervising their construction.[2095]

964. In 2015 and 2016, in response to the company's refusal to pay bribes, Pemex subjected Oro Negro to increasingly onerous unilateral contract amendments and withholding of day rates that financially crippled the company. [redacted], México colluded with the Ad-Hoc Group to financially strangle Oro Negro, [redacted] and push the Company into bankruptcy.

965. Even after filing the *concurso* petition, Oro Negro was still negotiating the 2017 Proposed Amendments with Pemex in good faith, only for Pemex to suddenly and unlawfully purport to terminate the Oro Negro Contracts, [redacted].[2096]

966. México subsequently colluded with the Ad-Hoc Group to attempt to take over the Rigs in October 2018. In 2019, the Ad-Hoc Group and Mexico successfully seized the Rigs and transported them from Mexican waters, in violation of Mexican law and the order of the *Concurso* Court. México also colluded with the Ad-Hoc Group to seize the cash that was in the Mexican

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2093 *See supra* Section II.D.3.; Second Gil Statement, **CWS-5**, ¶ 45.

2094 *See supra* Section II.D.3; Second Gil Statement, **CWS-5**, ¶ 47.

2095 *See supra* Section II.D.3; First Gil Statement, **CWS-1**, ¶ 51; Second Gil Statement, **CWS-5**, ¶ 42

2096 *See supra* Section II.D.3; Second Gil Statement, **CWS-5**, ¶ 74.

Trust for the benefit of the Ad-Hoc Group and to continue to starve Oro Negro so as to destroy the company.

967. México's retaliatory criminal and tax investigations against Oro Negro and its personnel, which are baseless, continue to this day.[2097]

7. Conclusion

968. Claimants have proven that Mexico violated its obligation to accord fair and equitable treatment. México does not seriously engage with the law or the evidence but attempts to hide behind fictive legal standards and cursory allegations of vagueness. These attempts fail. Claimants have provided the correct legal standards for proving violations of fair and equitable treatment under NAFTA Article 1105 and have proven with extensive and specific evidence that México committed numerous violations thereof by *inter alia* retaliating against Oro Negro for its refusal to pay bribes, violating Claimants' legitimate expectation not to be subjected to corruption, discriminating against Oro Negro in comparison to its competitors and Seamex in particular, colluding with the Ad-Hoc Group to financially strangle Oro Negro, [redacted] and seize its assets, and denying Oro Negro and Claimants justice, due process and transparency.

J. Claimants Have Proven that México Breached Its Obligations To Provide Claimants' Investments Full Protection and Security Under Article 1105 of the NAFTA

969. In the Statement of Claim, Claimants explained how Mexico breached its obligation under Article 1105(1) of the NAFTA to provide full protection and security to Claimants' investments.[2098] That obligation, as the majority of tribunals have found, extends beyond the mere physical protection of an investment, but also includes the legal protection and security of

[2097] *See supra* Section II.I.

[2098] *See* SOC, ¶¶ 543-48.

investments and protects from both acts of third parties and the State itself. Claimants showed that México failed to provide physical as well as legal protection and security by using demonstrably false information to initiate a meritless criminal investigation that resulted in seizure of Oro Negro's cash and a court order authorizing the Ad-Hoc Group to take over the Rigs, and failed to protect the Rigs from third party intrusions (including by a Mexican police officer).[2099] They also demonstrated that México breached its obligation to provide legal protection and security by colluding with the Ad-Hoc Group to take the Rigs from Oro Negro [redacted] failing to stop – and in fact, participating in – spurious reputational attacks against Claimants and their investments, initiating baseless tax audits and criminal investigations, and refusing to pay Oro Negro tens of millions of dollars in past due daily rates.[2100]

970. Once again, México does not engage with the facts, but seeks simply to impose a narrow—and outdated—understanding of the applicable legal standard. It argues that its obligation to provide full protection and security to Claimants' investments only extends to the physical protection of those investments, and not their legal protection to investments.[2101]

971. That argument, however, is outdated and does not overcome Claimants' full protection and security claim. The majority of tribunals today make clear that – notwithstanding past interpretations—the full protection and security obligation encompasses both physical *and* legal protection. But even if México were correct as to the legal standard, it would still fail on the facts because Claimants have demonstrated—and México has not contested—that México has failed to provide *physical* protection and security to Claimants' investments (in addition to *legal* protection).

[2099] *See* SOC, ¶ 543.

[2100] *See* SOC, ¶ 544.

[2101] *See* SOD, ¶¶ 775-83.

1. The Full Protection and Security Standard Provides Protection from Both the State and Third Parties

972. As an initial matter, México does not contest Claimants' explanation that the full protection and security obligation requires the State to enforce its laws in a manner reasonably expected to protect covered investments and to refrain from colluding with third parties to destroy an investment through both legal and physical means.[2102] This additional requirement to protect from third parties is not necessarily included in the fair and equitable treatment obligation, and Mexico's unsupported assertion that Claimants seek to merge the two obligations is defeated on that basis alone.[2103] Thus, arbitral tribunals have consistently held that "[f]ull protection and security is a standard of treatment other than fair and equitable treatment," even while a violation of the latter may overlap with a violation of the former, as discussed below.[2104] Further, where the relevant treaty requires treatment no "less than that required by international law"—as the NAFTA does—host States have a "duty of due diligence for the prevention of wrongful injuries inflicted by third parties to persons or property."[2105] The obligation to accord full protection and security also requires due diligence around State actions themselves in the protection of a foreign investment. As stated by the tribunal in *Biwater Gauff v. Tanzania,* "[t]he Arbitral Tribunal also does not consider that the 'full security' standard is limited to a State's failure to prevent actions by third

2102 *See* SOC, ¶¶ 532, 540-43.

2103 *See* SOD, ¶ 774.

2104 *Ulysseas, Inc. v. The Republic of Ecuador*, PCA No. 2009-19, Final Award (June 12, 2012), ¶ 272, **CL-208**.

2105 *Ulysseas, Inc. v. The Republic of Ecuador*, Final Award, ¶¶ 271-74, (citing *El Paso v. Argentina*, ¶¶ 522–23) (full protection and security entails "vigilance and care by the State under international law comprising of a duty of due diligence for the prevention of wrongful injuries inflicted by third parties to persons or property of aliens in its territory or, if not successful, for the repression and punishment of such injuries."), ¶ 245 ("What matters in our case is that the treatment of foreign investors do not fall below this minimum international standard, regardless of the protection afforded by the Ecuadorian legal order."), **CL-208**.

parties, but also extends to actions by organs and representatives of the State itself."[2106] By failing to contest these points, México concedes them.

2. The Full Protection and Security Standard Provides Both Legal and Physical Protection to Investments as a Matter of Law

973. In the Statement of Claim, Claimants also explained that no good faith reading of the words "full protection and security" in the NAFTA or any other treaty could limit the protection required by México to *physical* protection. Claimants cited no fewer than eight decisions of arbitral tribunals, which have applied the rules of international law and found, for example, that "when the terms 'protection and security' are qualified by 'full' and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security."[2107]

974. Try as it might, México cannot overcome this obvious reality. Each of the arguments it advances in its bid to do so fails.

975. México does not attempt seriously to identify any rules of interpretation that would limit "full protection and security" to *physical* protection and security. Under international law, the Tribunal must interpret Article 1105(1) "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[2108] However, no good faith interpretation of Article 1105(1) could support an implicit exclusion of *legal* protection and security. Rather, the use of the word "full" compels the conclusion that the Contracting Parties meant to include *all types of* protection and security – physical *and* legal.

976. México attempts to counter this reality with one unconvincing argument (divorced from any concrete international law rules): "*dado que los tratados de inversión brindan un tratamiento*

[2106] *Biwater Gauff v. Tanzania*, Award, ¶ 730, **CL-140**.

[2107] *Azurix v. Argentina*, Award, ¶ 408, **CL-141**.

[2108] VCLT, Article 31(1), **CL-58**.

justo y equitativo y protección contra la expropriación, tratar el estándar FPS de la misma manera que los otros dos lo harían redundante."[2109] Yet, the mere fact that the protections of two treaty provisions may overlap does not mean that the scope of one of those treaty obligations must be limited artificially beyond what its ordinary meaning would require. For example, even México does not suggest that NAFTA Article 1110's expropriation protection should be read so narrowly as to apply only to those cases that would not fall within the scope of protection offered by Article 1105(1)'s fair and equitable treatment provision. Breach of Article 1105(1) is actually a criterion for an illegal expropriation under Article 1110(1)(c). Indeed, one of the sources upon which México itself relies, the award in Wena Hotels, confirms that a failure to accord full protection and security is also a breach of fair and equitable treatment, a holding endorsed by subsequent tribunals.[2110]

977. Moreover, México fails to acknowledge two critical aspects of Article 1105(1). *First*, tribunals (including the *Suez* decision upon which México relies heavily) have found that where the full protection and security and fair and equitable treatment obligations are linked in the same provision, the effectiveness principle does not require that the two provisions be given an entirely separate scope.[2111] This is the case for Article 1105(1), which reads: "Each Party shall accord to

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[2109] SOD, ¶ 777.

[2110] *See Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (Dec. 8, 2000), ¶¶ 84, 95, 110, **CL-200**; *Azurix v. Argentina*, Award, ¶ 406, **CL-141**; *Occidental v Ecuador*, Final Award, ¶ 187 ("Treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment."), **CL-144**.

[2111] *See Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID No. ARB / 03/19, Decision on Liability (July 30, 2010), ¶ 166 ("The fact that the French BIT employs the fair and equitable treatment standard and the full protections and security standard *in two distinct articles* and refers to them as separate and distinct standards leads to the conclusion that the Contracting Parties must have intended them to mean two different things." (emphasis added)), **RL-0115**; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (Dec. 27, 2010), ¶ 343 ("A plain reading of [full protection and security], in accordance with Article 31 VCLT, shows that the protection provided for by [the treaty] to covered investors and their assets is not limited to physical protection but includes also legal security. The explicit linkage of this standard to the

investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." *Second*, tribunals have found where – like in the NAFTA – the investment definition includes both tangible and intangible assets, the full protection and security obligation must cover both physical and legal protection.[2112]

978. This is consistent with the findings of at least seventeen other tribunals, which have found that a full protection and security obligation requires both physical and legal protection and security, particularly where the obligation is qualified by the word "full."[2113] For instance, the

fair and equitable treatment standard supports this interpretation."), **CL-214**; *Azurix v. Argentina*, Award, ¶ 406, **CL-141**; *Occidental v. Ecuador*, Final Award, ¶ 187, **CL-144**.

[2112] *See Siemens A.G. v. Argentine Republic*, Award, ¶ 303 ("As a general matter and based on the definition of investment, which includes tangible and intangible assets, the Tribunal considers that the obligation to provide full protection and security is wider than physical" protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved."), **CL-105**.

[2113] *See Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award (Mar. 27, 2020), ¶ 664 ("The Tribunal has reviewed the terms of the BIT in accordance with Article 31 of the VCLT and in light of the authorities adduced by the Parties, and has noted that the terms "protection" and "security" in [the BIT] are qualified by "full" without any exclusion or limitation. The Tribunal therefore agrees with [claimant] that the standard of "full protection and security" as set in the BIT is not limited to safeguards against physical interference by State organs and private persons, but extends to accord legal safeguard for the investment and the returns of the investor."), **CL-399**; *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award (Jan. 18, 2019), ¶ 482 ("The Tribunal shares the Claimant's position that, if there are no express limits in the Treaty, this obligation is not limited to physical security, but also comprises a duty to afford legal security to investments. This interpretation has been confirmed by various tribunals."), **CL-400**; *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award (July 2, 2018), ¶ 652, **CL-401**; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award (July 21, 2017), ¶ 905, **CL-402**; *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos ARB/08/1 and ARB/09/20, Award (May 23, 2012), ¶ 281, **CL-244**; *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award (Nov. 12, 2010), ¶ 263 ("[I]t is apparent that the duty of protection and security extends to providing a legal framework that offers legal protection to investors - including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights."), **CL-184**; *Total S.A. v. The Argentine Republic*, Decision on Liability, ¶ 343, **CL-214**; *Al-Bahloul*, Partial Award on Jurisdiction and Liability, ¶ 246 (noting that other "tribunals have applied [protection and security] more broadly to encompass legal security as well. Therefore, it could arguably cover a situation in which there has been a demonstrated miscarriage of justice."), **CL-217**; *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award (Nov. 3, 2008), ¶¶ 144-45 (finding that Full Protection and Security is not inherently limited to protection and security of physical assets and that it would be "unduly artificial to confine the notion of '*full security*' only to one aspect of security, particularly in light of the use of this term in a [treaty] directed at the protection of commercial and financial investments."), **CL-162**; *Biwater Gauff v. Tanzania*, Award, ¶ 729 (holding that Full Protection and Security "implies a State's guarantee of stability in a secure environment, both physical, commercial and legal."), **CL-140**; *Ares International S.r.l. and MetalGeo S.r.l. v. Georgia*, ICSID Case No. ARB/05/23, Award (Feb. 26, 2008), ¶ 10.3.4, **CL-403**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶¶ 7.4.15-7.4.16, **CL-79**; *Azurix v. Argentina*, Award, ¶ 408 ("[F]ull protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important

tribunal in the recent *Global Telecom Holding v. Canada* case found that the full protection and security obligation in the relevant BIT "is not limited to safeguards against physical interference by State organs and private persons, but extends to accord legal safeguard for the investment and the returns of the investor."[2114]

979. By contrast, México relies on just three awards in support of its restrictive interpretation. Despite México's labeling them as "[c]*asos emblemáticos*,"[2115] they are of no assistance to this Tribunal.

980. México fails to disclose that those decisions – *i.e.*, the awards in *AAPL v. Sri Lanka* (1990); *AMT v. Zaire* (1997); and *Wena Hotels Ltd. V. Egypt* (2000)[2116]—are all over 20 (and as much as 31) years old. Even if México could argue that, at some time in the past, these awards reflected the minimum standard of treatment under NAFTA Article 1105(1), México fails to engage with Claimants' showing that "like all customary international law, the international minimum standard has evolved and can evolve . . . the sets of standards which make up the international law minimum standard, including principles of full protection and security, apply to investments."[2117]

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from an investor's point of view . . . [W]hen the terms "protection and security" are qualified by "full" and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security."), **CL-141**; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, Award, ¶ 170, **CL-404**; *Occidental v Ecuador*, Final Award, ¶ 187, **CL-144**; *Tecmed v. México*, Award, ¶ 177 (indicating that dysfunction of the host State authorities and their active encouragement of adverse actions can violate the minimum requirements of the full protection and security standard), **CL-101**; *CME v. Czech Republic*, Partial Award, ¶ 613 ("The Media Council's actions in 1996 and its actions and inactions in 1999 were targeted to remove the security and legal protection of the Claimant's investment in the Czech Republic. . . . The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued. This is not the case. The Respondent therefore is in breach of this obligation."), **CL-118**.

2114 *See Global Telecom Holding S.A.E. v. Canada*, Award , ¶ 664, **CL-399**.

2115 *See* SOD, ¶ 776.

2116 *See* SOD, ¶ 776.

2117 *See* SOC, ¶ 530 (quoting *GAMI v. Mexico*, Final Award, ¶ 98, **CL-71**).

981. However, none of these awards can support the restrictive gloss that México seeks to read into them. Rather, the awards made no finding that "full protection and security" included legal protection and security because the claimants in those cases only invoked the *physical* security of investments.[2118] In other words, the *AAPL*, *AMT*, and *Wena* tribunals made no finding that the full protection and security obligation is restricted to physical security as a matter of law. México presumably knows this—which is why it cites from no portions of those awards and only hints that these awards "*están relacionados con la afectación de personas y destrucción de propiedades durante conflicts armados internos, disturbios y actos de violencia*,"[2119] but does not even claim that they stand for some categorical exclusion of legal protection and security.

982. The only other award upon which México seeks to rely, the *Suez* Decision on Liability, is of no further assistance. While the *Suez* tribunal did find that, in the France-Argentina BIT, "the full protection and security standard primarily seeks to protect investment from physical harm," that analysis is irrelevant to the present case.[2120] As the tribunal explained in the paragraph before the one in which this passage is found, "[t]he fact that the French BIT employs the fair and equitable treatment standard and the full protections and security standard in two distinct articles and refers to them as separate and distinct standards leads to the conclusion that the Contracting

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[2118] In *AAPL*, the tribunal determined that under Sri Lanka-U.K. BIT, the physical destruction of AAPL property and the killing of a farm manager and permanent staff members violated the full protection and security obligation. *See Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), ¶¶ 85-86, **RL-0112**. In *AMT*, the tribunal determined that under the U.S.-Zaire BIT, Zaire had violated the obligation in relation to lootings carried out against AMT's investment. *See American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997), ¶¶ 6.02-6.19, **RL-0113**. In *Wena Hotels*, the tribunal determined that under the Egypt-United Kingdom BIT, Egypt violated the obligation by seizing claimant's hotels. *See Wena Hotels Ltd. v. Arab Republic of Egypt*, Award, ¶¶ 84-95, **CL-200**.

[2119] *See* SOD, ¶ 776.

[2120] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, Decision on Liability, ¶ 173, **RL-0115**.

Parties must have intended them to mean two different things."[2121] That, however, is not the case of the NAFTA, where both fair and equitable treatment and full protection and security appear in Article 1105(1) as aspects of "treatment in accordance with international law."

983. México also seeks to argue that four of Claimants' citations are inapposite, but here it misstates each case, but cannot escape each case's persuasive force.

984. *First*, México contends that *Tecmed* is "*inapropiado*" because the provision of the relevant treaty in that case is worded differently.[2122] The relevant treaty in *Tecmed*, the Mexico-Spain BIT, provides that "[e]ach Contracting Party shall accord full protection and security . . . in accordance with international law" *and also that* each Contracting Party "shall not, through legally groundless action of discriminatory measures hinder the management, maintenance, development, usage, enjoyment, expansion, sale, or, where applicable, disposition of such investments"[2123] But there is no relevant difference between the full protection and security standard in *Tecmed* and the one here. The *Tecmed* tribunal rightly read the first part of the provision as a full protection and security obligation and the second part of the provision as a non-discrimination obligation (just as Article 1105(1) contains distinct full protection and security and fair and equitable treatment obligations).[2124] The full protection and security provision, therefore, was largely the same.

985. Similarly, México argues that the fact that the *Tecmed* tribunal found that the relevant treaty had not been breached "*demuestra la extrema difficultad del estándar que aplican los*

[2121] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, Decision on Liability, ¶ 172, **RL-0115**.

[2122] SOD, ¶ 780.

[2123] *See Tecmed v. México*, Award, ¶ 175, **CL-101**.

[2124] *See Tecmed v. México*, Award, ¶ 177, **CL-101**.

tribunales."[2125] Yet, the mere fact that a tribunal rejected a full protection and security claim is not sufficient to show an "extremely" high standard. The *Tecmed* tribunal indicated that claimants could have met their burden of proving a full protection and security violation by furnishing sufficient evidence of collusion between governmental authorities and private parties (in the *Tecmed* case, political movements against the investors' landfill project).[2126] This was for a good reason: the *Tecmed* award does not suggest that the investor in *Tecmed* did anything more than allege that state authorities had encouraged adverse movements.[2127] That is not the case here. Claimants have proven that Pemex colluded with the Ad-Hoc Group [redacted] to financially strangle Oro Negro, [redacted] and seize the Rigs. Specifically, as described in Sections II.E.2-E.3, G.1-G.3 and H above, the record demonstrates [redacted] that México coordinated with the Ad-Hoc Group to bring baseless criminal actions against Oro Negro in order to seize its funds, and that México assisted the Ad-Hoc Group in their joint attempt to physically seize the Rigs by force. The evidence of México's collusion here is inescapable and proves a clear violation of the full protection and security standard.

986. *Second*, México alleges that the mere fact that the *Al-Bahloul* tribunal found that there was no violation of the full protection and security obligation *in that case* "*apunta de nuevo la incapacidad de las demandantes de cumplir con la carga de la prueba*."[2128] Nothing, however,

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[2125] SOD, ¶ 780.

[2126] *See Tecmed v. México*, Award, ¶ 177, **CL-101**.

[2127] *See Tecmed v. México*, Award, ¶ 175, **CL-101**.

[2128] SOD, ¶ 781.

could be further from the truth. Not only does the *Al-Bahloul* award *not* articulate some sort of heightened standard for full protection and security breaches, it actually supports Claimants' contentions that (in the words of the *Al-Bahloul* tribunal) "tribunals have applied [the full protection and security standard] more broadly to encompass legal security as well"[2129] and that a State could breach its full protection and security obligation where a State's courts "could not legitimately reach the substantive law conclusions which they did."[2130]

987. *Third*, México argues that *Azurix v. Argentina* is inapposite because that tribunal (i) determined that the fair and equitable treatment and full protection and security obligations were identical and (ii) did not analyze the full protection and security obligation (after it had already found that the fair and equitable treatment obligation had been breached).[2131] Both assertions are untrue. To begin, the *Azurix* tribunal found that, in the relevant article of the BIT, the two obligations "appear[ed] sequentially as <u>different</u> obligations,"[2132] much like they do in NAFTA Article 1105. In addition, it found that <u>both</u> obligations were breached: "the Respondent failed to provide fair and equitable treatment to the investment . . . the Respondent also breached the standard of full protection and security under the BIT."[2133] Critically, the *Azurix* tribunal found that the full protection and security obligation "was understood to go beyond protection and security ensured by the police" and that "[i]t is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view."[2134] In this case, México's failure to ferret out and eliminate the rampant corruption within Pemex, and

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2129 *Al-Bahloul*, Partial Award on Jurisdiction and Liability, ¶ 246, **CL-217**.

2130 *Al-Bahloul*, Partial Award on Jurisdiction and Liability, ¶ 247, **CL-217**.

2131 *See* SOD, ¶ 782.

2132 *Azurix v. Argentina*, Award, ¶ 407 (emphasis added), **CL-141**.

2133 *Azurix v. Argentina*, Award, ¶ 408, **CL-141**.

2134 *Azurix v. Argentina*, Award, ¶ 408, **CL-141**.

its apparent fostering of that activity at the highest levels of the government, as demonstrated above in Section II.A, prove that México has failed to provide Claimants with a "secure investment environment" as was called for in *Azurix*. Of course, México's active collusion with the Ad-Hoc Group to harm Claimants and their investments also establishes a violation of the standard adopted in *Azurix*.

988. *Finally*, México seeks to undermine Claimants' reliance on *CME v. Czech Republic*, in which the tribunal found that a full protection and security obligation extended beyond physical protection to legislative and administrative acts. It argues that a later tribunal in a related case, *Lauder v. Czech Republic*, determined that "protection and security" was limited to providing the investor with access to the State judicial system.[2135] This argument gets México nowhere. To begin, the *Lauder* decision actually serves to underscore just how unsupported México's position (*i.e.*, that full protection and security is limited to physical protection) really is. The *Lauder* tribunal confirmed that the full protection and security obligation extends beyond that.[2136] Moreover, México ignores that numerous tribunals have approvingly cited the *CME*'s tribunal's articulation of the "protection and security" obligation[2137] and provides no examples of tribunals approvingly citing the *Lauder* tribunal's articulation.[2138]

989. México's attempts to narrow its full protection and security obligation under Article 1105(1) thus get it nowhere.

[2135] *See* SOD, ¶ 783.

[2136] *See Ronald S. Lauder v. The Czech Republic*, Final Award, ¶ 314, **RL-0119**.

[2137] *See Global Telecom Holding S.A.E. v. Canada*, Award, ¶ 664, **CL-399**; *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award (Aug. 6, 2019), ¶¶ 457, 621, **CL-405**; *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Final Award (Jan. 18, 2019), ¶ 482, **CL-400**; *Ares International S.r.l. and MetalGeo S.r.l. v. Georgia*, ICSID Case No. ARB/05/23, Award (Feb. 26, 2008), ¶ 10.3.4, **CL-403**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Award, ¶¶ 7.4.15-7.4.16, **CL-79**.

[2138] *See* SOD, ¶ 783.

3. Respondent Failed To Provide Legal and Physical Protection in Violation of the Full Protection and Security Obligation of NAFTA Article 1105

990. México does not seek to engage in earnest with the myriad actions that (taken separately and together) breach its full protection and security obligation. Instead, it raises two artificial objections.

991. *First*, México does not seriously contest the numerous violations of its *physical* protection and security obligation invoked in Claimants' Statement of Claim. Instead, México seeks to reframe Claimants' full protection and security claim to fit its artificial legal standard, truncating the long list of violations of the physical *and* legal protection invoked in Claimants' Statement of Claim to only five reductive sentences that minimize its role in the violations.[2139] This, of course, could only be deliberate. As México knows full well, even if it were correct that the full protection and security obligation in the NAFTA were limited only to *physical* protection (it is not), its actions would still be in breach of Article 1105.

992. In México's version, Claimants merely allege that "*Pemex y los Tenedores de Bonos usaron información falsa para iniciar investigaciones penales" and that "México no protegió las Plataformas de intrusiones físicas por parte de terceros*." [2140] These are remarkable understatements. To the first point, México and the Ad-Hoc Group used information from a fictive spreadsheet—which reflects that from 2014 to 2017, Perforadora had supposedly issued invoices to 16 blacklisted companies known to facilitate tax evasion—to initiate another meritless criminal investigation in September 2018, which resulted in the seizure of all of Perforadora's cash, through the Seizure Order, and in the Rigs Takeover Order authorizing the Ad-Hoc Group to physically

[2139] *See* SOD, ¶ 784.

[2140] SOD, ¶ 784.

board and abscond with the Rigs.[2141] To the second point, México not only failed to protect the Rigs from third parties, but actively assisted them in physically assaulting the Rigs and in taking actions to harm the reputation and well-being of certain Claimants. As explained in Section II.E above, Mexico colluded with the Ad-Hoc Group to arrange the takeover of the Rigs. In addition to the Rigs Takeover Order, Judge Cedillo also issued orders to the AIC to provide all possible assistance to the Ad-Hoc Group in taking over the Rigs. An AIC officer was present on the Ad-Hoc Group's helicopter that attempted to land on the Decus Rig by force, and one of three men to jump from the helicopter onto the Decus on October 21, 2018 was the AIC officer. Tellingly, México does not even attempt to demonstrate that its actions were not in violation of its obligation to provide physical protection to Claimants' investment.

993. Second, México appears to suggest that the Tribunal should dismiss Claimants' full protection and security claim because Claimants "*simplemente han repetido las mismas acusaciones en apoyo de su reclamo de denegación de protección y seguridad plena como afirmaron para su reclamo de denégacion de trato justo y equitativo*."[2142] That is incorrect, as arbitral jurisprudence and Claimants' claims demonstrate that these obligations are distinct and that México violated each obligation independently. Yet even assuming México's assertion were correct, any overlap in facts invoked to raise two separate claims would not weaken either claim. México cites no arbitral jurisprudence in support of that proposition. To the contrary, as noted, several arbitral decisions stand for the proposition that breach of the fair and equitable treatment obligation may also constitute a breach of the full protection and security obligation.[2143]

[2141] *See* SOC, ¶ 543.

[2142] SOD, ¶ 784.

[2143] *See, e.g.*, *Total S.A. v. The Argentine Republic*, Decision on Liability, ¶ 343, **CL-214**; *Azurix v. Argentina*, Award, ¶¶ 406-08, **CL-141**; *Occidental v. Ecuador*, Final Award, ¶ 187 ("Treatment that is not fair and equitable automatically

994. More broadly, Respondent's reduction of Claimants' full protection and security claim to five short bullet points is disingenuous and does not excuse its role in failing to protect and affirmatively harming Claimants' investment. In their Statement of Claim, Claimants not only explained how "the record as a whole" shows that Mexico denied physical and legal protection to Claimants' investment,[2144] but also described several discrete instances in which Mexico failed to provide physical and/or legal protection and security to Claimants' investment from actions taken by Mexican instrumentalities as well as third parties in collusion with or with the tacit approval of México.[2145]

995. México's failure to provide *physical* and *legal* protection and security included the following acts and omissions:

(a) México and the Ad-Hoc Group used information from a demonstrably false spreadsheet which reflects that from 2014 to 2017, Perforadora had supposedly issued invoices to 16 companies that are blacklisted by the Mexican government as companies that facilitate tax evasion. México and the Ad-Hoc Group used that information to initiate another meritless criminal investigation in September 2018, which resulted in orders permitting the seizure of all of Perforadora's cash and authorizing the Ad-Hoc Group to physically take over the Rigs.[2146] Respondent is unable to counter Claimants' explanation that México's role in fabricating or perpetrating the use of fabricated evidence and initiating frivolous investigations against Claimants are blatant violations of Mexican law.[2147]

(b) México failed to protect the Rigs from—and in fact, actively assisted—third parties who physically stormed the Rigs in October 2018. Respondent falsely reimagines its role in the takeover as a passive failure to protect the Rigs from intrusion by third parties.[2148] In reality, México was an active participant in the takeover

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entails an absence of full protection and security of the investment."), **CL-144**; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (Dec. 8, 2000), ¶¶ 84-95, **CL-200**.

2144 *GAMI v. México*, Final Award, ¶ 103, **CL-71**.

2145 *See* SOC, ¶ 543.

2146 *See* SOC, ¶ 543.

2147 *See* First Izunza Expert Report, **CER-2**, ¶ 18; *see also* Second Izunza Expert Report, **CER-5**, ¶¶ 7, 49-50.

2148 *See* SOD, ¶ 784.

scheme. As explained above, México colluded with the Ad-Hoc Group for months to arrange the takeover of the Rigs.

(c) In addition to the Rigs Takeover Order, Judge Cedillo issued orders to the AIC to provide all possible assistance to the Ad-Hoc Group in taking over the Rigs.[2149]

(d) The physical takeover of the Rigs included an officer from the AIC on a helicopter sent by the Ad-Hoc Group. On October 21, 2018, the helicopter flew dangerously close to the *Decus* Rig in an attempt to land by force, nearly killing one of the *Decus*' crewmembers. Three men, one of them the AIC police officer, jumped from the helicopter onto the Rig.

(e) The other two men—one a purported private security guard hired by the Ad-Hoc Group and the other Mr. Contreras, the GGB associate who provided to PGJCDMX the interview that served as the sole basis for the Seizure and the Rigs Takeover Orders—refused to leave the *Decus* for almost a week, even after the Chapter 15 Court issued a temporary restraining order ordering the Ad-Hoc Group and its agents to retreat from their efforts to physically board the Rigs.

(f) México and the Ad-Hoc Group subsequently completed their scheme. As a result of the Seizure Order freezing all of Oro Negro's funds, Perforadora was unable to maintain the Rigs, and the *Concurso* Court ordered it to turn over the Rigs to the Singapore Rig Owners, who were unlawfully controlled by the Ad-Hoc Group. The Ad-Hoc Group removed the Rigs from Mexican waters in September 2019. On December 23, 2020, the *Concurso* Court ordered that the Rigs be returned to Mexican Waters within eight days. However, the Ad-Hoc Group refused to comply with the order.

996. In addition, México 's failure to provide Claimants' investment *legal* protection and security included the following acts and omissions:

(a) México, being fully aware of the rampant corruption within Pemex, has failed to root out and eliminate that illicit behavior within its parastatal agency. Not only has México failed to root out that corruption, but the Peña Nieto administration actively encouraged it and penalized those companies, like Oro Negro, who would not participate in the agency's corruption. It also provided special and discriminatory benefits to those companies, like Seamex, who would participate. As detailed throughout this Reply, these actions by México led to the destruction of Claimants' investments.

(b) Pemex colluded with Ad-Hoc Group to financially strangle Oro Negro, [redacted], and seize the Rigs and then lease them back to Pemex [redacted]

[2149] *See* SOC, ¶ 543.

(c) On October 23, 2018, in the middle of the Ad-Hoc Group's attempts to take over the Rigs, one of the largest media conglomerates in México ran a nationwide 10-minute television clip attacking Integradora, Perforadora, Mr. Gil and Mr. Francisco Gil (Mr. Gil's father). México downplays its role in this smear campaign.[2150] In reality, México not only failed to stop these attacks, but was a participant in them. The then-General Counsel of Pemex, Mr. Kim, personally appeared in the clip and falsely stated that Perforadora is corrupt and incompetent and that it had been a deficient service provider to Pemex. This was false, and Claimants' evidence demonstrates that Mr. Kim had been taking bribes.[2151]

(d) México initiated seven baseless tax audits against Integradora and four of its subsidiaries, including Perforadora, which are still pending. These are comprehensive investigations into the finances and operations of Integradora and its subsidiaries. Moreover, the treatment of Oro Negro by the SAT has been highly irregular and aggressive, including refusing to accept Oro Negro's documentation,[2152] making baseless accusations that Oro Negro acted in bad faith, and refusing to enter a mediation with Oro Negro, which is otherwise standard practice. Also, notably, one of these tax audits began in April 2018, one month after Claimants delivered to México their Notice of Intent to initiate this arbitration, and four of these seven tax audits began in August 2018, two months after Claimants delivered to México their Notice of Arbitration. The SAT's internal documents demonstrate that there was an instruction within the SAT to determine criminal tax liability against several individuals, including Claimants and key witnesses.[2153] México therefore abused its sovereign police powers to harass and intimidate Claimants and their investments.

(e) Pemex has also refused to pay Perforadora approximately USD 24 million in past due daily rates even though it had a legal obligation to do so. Respondent downplays the seriousness of this violation.[2154] Pemex's refusal to pay Perforadora contributed to the Company's demise and forced it into bankruptcy, eroding the value of Claimants' investment.

997. Even more fatal to México's attempted defense, however, is its sheer failure to so much as attempt to defend the facts underlying its breaches. For example, México does not address the numerous "miscarriages of justice" or situations where its courts could not "legitimately reach the

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[2150] *See* SOD, ¶ 784 ("*México no detuvo una cobertura mediática de índole crítico en contra de las Demandantes*.").

[2151] *See* First Black Cube Statement, **CWS-4**, ¶ 43; **Appendix H**, Excerpt 6 ("*Es Jorge Eduardo Kim Villatoro. Es el Director Jurídico*.").

[2152] *See* Second Gil Statement, **CWS-5**, ¶ 83.

[2153] *See* SAT Informative Note (Nov. 28, 2018), Exhibit **C-477**; Internal SAT Communications, Exhibit **C-478**.

[2154] *See* SOD, ¶ 784.

substantive law conclusions which they did."[2155] Such illegitimate conclusions were rampant in this case. For instance, recordings of the hearings in which the Ad-Hoc Group sought to take over the rigs reflect that GGB simply provided an approximately 40-minute summary of the purported facts and then, despite the lack of any supportive evidence and without asking any questions, Judge Cedillo granted the Rigs Takeover Order. Judge Cedillo later unlawfully refused to withdraw the Rigs Takeover Order on the instruction of the *Concurso* judge. The substantive legal conclusions underlying these baseless decisions were illegitimate and ran afoul of México's obligation to provide full protection and security.

998. On the issue of the endemic corruption within the Pena Nieto administration and within Pemex, both during its control by Mr. Lozoya and after, México's current president has admitted that all of this has taken place. The Black Cube evidence also corroborates this. There can be no serious debate that Claimants have established the culture of corruption within Pemex and that they were discriminated against when they failed to accede to this illicit behavior.

999. In sum, Claimants have proven that Respondent violated its obligation under NAFTA Article 1105 to provide physical and legal protection to Claimants' investment.

IV. DAMAGES

1000. As explained in the Statement of Claim, Claimants are entitled to compensation for damages suffered as a result of México's violations of the NAFTA. Under well-settled principles of international law, the standard of compensation is full reparation.[2156] This standard applies to all of México's breaches of the NAFTA proved above in Section III, including México's violation of the NAFTA provisions prohibiting unlawful expropriation without compensation, as well as of

[2155] *Al-Bahloul*, Partial Award on Jurisdiction and Liability, ¶¶ 246-47, **CL-217**.

[2156] SOC, ¶¶ 550, 553-56.

the provisions requiring México to afford Claimants fair and equitable treatment and full protection and security. Although México claims that Claimants do not address the damages associated with their claims outside of the expropriation claim,[2157] Claimants clearly explained that the full compensation standard applies to all of their claims, with an entire subsection devoted to its discussion.[2158] As Ripinsky and Williams explain, "the exact type of a violated obligation has proven to be largely irrelevant to the matter of compensation . . . because the object of compensation is to make good on the damage suffered as a result of [a] particular State measure, regardless of what rule this measure has violated."[2159]

1001. México does not contest that full compensation is the proper compensation standard for the fair and equitable treatment and full protection and security claims. However, México argues that this standard does not apply to its unlawful expropriation of Claimants' investment in Oro Negro and claims that the date of the valuation should be the date of breach. As explained below, it is beyond debate that the NAFTA Article 1110(2) standard applies only to *lawful* expropriations and that, as is the case here and for any unlawful expropriation, Claimants may choose between the date of breach and the date of the Final Award.[2160]

1002. México also argues that Claimants' loss was not caused by its illegal actions, but its arguments are unavailing. Claimants have demonstrated that México solicited bribes from Oro Negro and retaliated against Oro Negro for not paying bribes, and that it colluded with the Ad-

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[2157] SOD, ¶ 791.

[2158] SOC, Section IV.B.2 ("The NAFTA Provides a Compensation Standard for Lawful Expropriations Only, and No Standard for Unlawful Expropriations or Breaches of FET or FPS; Thus the Customary International Law Standard Applies").

[2159] S. Ripinsky & K. Williams, *Damages in International Investment Law*, p. 14 (2008), **CL-409**.

[2160] *See infra* Section IV.B.

Hoc Group to destroy Oro Negro and deprive Claimants of their investment for various illegal and illegitimate reasons.

1003. Lastly, México and its expert, Dr. José Alberro, challenge the damages calculation of Claimants' experts, Dr. Pablo T. Spiller and Ms. Carla Chavich. But as explained below and in Dr. Spiller and Ms. Chavich's first report (the "First Compass Lexecon Report" or "First Spiller-Chavich Report"), Dr. Alberro's proposed adjustments are erroneous and his alternative valuation is incorrect. The Tribunal should therefore not adopt it.

1004. México's arguments to the contrary fail as a matter of law and expert economic analysis.

A. Full Compensation Is the Correct Damages Standard Under Customary International Law in Cases Concerning Unlawful Expropriations

1005. The standard for compensation in NAFTA Article 1110(2) only applies to lawful expropriation – otherwise, the NAFTA does not provide a standard of compensation for unlawful expropriation. This, as Claimants explained in the Statement of Claim, is universally accepted.[2161] México nevertheless argues that Article 1110(2) of the NAFTA should provide the compensation standard in this case. That argument, however, is wrong, and ignores established international law principles.

1006. Specifically, México completely ignores the standard established in *Chorzów Factory*,[2162] and instead cites two awards that state – as a general manner – the applicability of Article 1110(2) in cases of expropriation.[2163] But as México itself recognizes, in one of those cases, *Archer Daniels Midland Company v. Mexico*, the tribunal did not even find that there was an

[2161] SOC, ¶ 558.

[2162] *Case Concerning the Factory at Chorzów (Germany/Poland) (Merits)*, PCIJ Series A. No. 17, Judgment (Sept. 13, 1928), **CL-223**.

[2163] SOD, ¶¶ 798-799.

expropriation.[2164] And even so, the *Archer Midlands* tribunal noticed that Article 1110(2) is "only applicable to cases of expropriation."[2165] It did not find that Article 1110(2) applies to all cases of expropriation (i.e. both legal and illegal expropriations), as México tries to argue.[2166] In any event, *Metalclad Corporation v. United Mexican States* is distinguishable on its facts, because in that case, the investment, a landfill, was never operative.[2167]

1007. Indeed, México does not identify any cases of unlawful expropriation where tribunals applied Article 1110(2) or explain why the *Chorzów Factory* standard would not apply to this case if the Tribunal finds that México unlawfully expropriated Claimants of their interest in Oro Negro. Although México seemingly tries to distinguish this case from the established international law principles on the basis that it involves an indirect expropriation, México advances no actual legal support for this proposition. Whether the expropriation is direct or indirect, if it was unlawful, as here, the standard for compensation under Article 1110(2) does not apply and the Tribunal should apply the standard for full reparation set forth in *Chorzów Factory*.

1008. Contrary to México's arguments,[2168] in the Statement of Claim, Claimants have explained in detail the reason why the proper compensation standard applicable to all their claims is the *Chorzów Factory* standard and not Article 1110(2).[2169] NAFTA Article 1110(1) establishes the criteria for a *lawful* expropriation. If those criteria are met (*i.e.*, the expropriation is for a public

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[2164] SOD, ¶ 799 (noting that the tribunal dismissed the claim for expropriation (quoting *Archer Daniels Midland Company and Tate Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF) /04/5, Award (Nov. 21, 2007), ¶ 283, **CL-100**)).

[2165] *Archer Daniels Midland Company and Tate Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF) /04/5, Award (Nov. 21, 2007), ¶ 283, **CL-100**.

[2166] SOD, ¶ 799.

[2167] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB (AF) /97/1, Award (Aug. 30, 2000), ¶ 121, **CL-95**.

[2168] SOD, ¶¶ 801-802.

[2169] *See* SOC, ¶¶ 553-561.

purpose, on a non-discriminatory basis, and in accordance with due process of law and Article 1105(1), Article 1110(1) states that "payment of compensation" must be "in accordance with" Article 1110(2).[2170] Article 1110(1), however, is silent on compensation in the event of *unlawful* compensation. Thus, as numerous NAFTA tribunals have confirmed, the NAFTA does not provide a standard of compensation for unlawful expropriations, such as the one before the Tribunal.[2171] In the absence of such an express provision, the compensation must be assessed with reference to applicable principles of customary international law. Claimants have laid out the "factual basis on which to award such higher recovery,"[2172] by proving that México unlawfully deprived them of the value of their investment in Oro Negro.[2173]

1009. The *Chorzów Factory* standard similarly applies to violations of fair and equitable treatment. Just as in the case of unlawful expropriations, the NAFTA does not provide a compensation standard for such violations, and thus the tribunal must look at principles of customary international law.[2174] México does not argue otherwise, which is a tacit admission that the same standard should apply for violations of fair and equitable treatment.

[2170] NAFTA Article 1110(1), **CL-59**.

[2171] SOC, ¶ 559 (citing *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016), ¶ 846, **CL-108**; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Reconsideration and Award (Feb. 7, 2017), ¶ 160, **CL-266**; *ADC Affiliate Ltd. et. al. v. Hungary*, ICSID Case No. ARB/03/16, Award (Oct. 2, 2006), ¶¶ 481, 483, **CL-120**; *Amoco Int'l Finance Corp. v. Iran*, Iran-US Claims Tribunal, Partial Award (Jul. 14, 1987), 15 IRAN-U.S. C.T.R., ¶¶ 189, 191-93, **CL-117**; *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, Stockholm Chamber of Commerce, Arbitral Award (Dec. 16, 2003), ¶ 5.1, **CL-262**).

[2172] *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award (Mar. 3, 2010), ¶¶ 507-513, **CL-134** (collecting cases where the tribunals permitted a higher recovery under the customary international standard of compensation because there was "a factual basis on which to award such higher recovery").

[2173] *See supra* Section III.

[2174] *See MTD Equity Sdn. Bhd. & Anor. v. Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004), ¶ 238 (applying the "the classic standard enounced by the Permanent Court of Justice in the Factory at *Chorzów*" when the BIT did not provide for a standard of compensation for violations of the fair and equitable treatment requirement), **CL-165**;

B. Under International Law, Claimants Are Entitled To Choose the Valuation Date

1010. México agrees with Claimants' use of Fair Market Value ("FMV") to quantify their losses, but challenges Claimants' decision to use the date of the award as the valuation date instead of the expropriation date, as required by Article 1110(d)(2) for a *lawful* expropriation.[2175] But as explained in the Statement of Claim and in the Journal of Damages in International Arbitration, the current state of the law allows claimants who have been victims of unlawful state action to "select either the date of expropriation or the date of the award as the date of valuation," whichever provides them with a higher recovery.[2176] Were it otherwise, the Tribunal would not be providing an award that fully compensates Claimants and that wipes out the consequences of the State's illegal measures. Allowing Respondent to choose the date of valuation would also mean essentially rewarding Respondent for failing to comply with its obligation under the NAFTA to have effectuated the expropriation in a lawful way and for its other treaty violations.

1011. In light of the current market environment and the once-in-a-century COVID-19 pandemic, market forecasting would not provide an accurate picture of damages at the date of the award. The pandemic has significantly increased volatility, making any valuation subject to short-term fluctuations which may not reflect the long-term value of Claimants' investment.[2177]

1012. Therefore, as discussed in the Second Spiller-Chavich Report (cited as the "Second Compass Lexecon Report"), Claimants and their experts will update their damages estimate closer

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[2175] SOC, ¶ 562.

[2176] SOC, ¶ 597 (quoting Lavaud, Floriane and Guiherme Recena Costa, "Valuation Date in Investment Arbitration: A Fundamental Examination of Chorzow's Principles," in The Journal of Damages in International Arbitration, p. 34, **CL-240)**; *see also Yukos Universal Ltd. (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award (Jul. 18, 2014), ¶¶ 1763-9, **CL-241**; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award (Mar. 3, 2010), ¶ 514, **CL-134**.

[2177] Second Compass Lexecon Report, **CER-6**, ¶ 1, n.1.

to the date of the hearing, once the short-term impact of the pandemic has subsided, or at least hopefully lessened, which would be closer to the date of the award.[2178] Claimants reserve their right to request that damages be calculated as of the date of the taking, or closer to the date that this Tribunal issues its award after the merits hearing, if such valuation is higher than the valuation as of the date of the award near the time of the hearing.

1013. This is within their discretion, as Claimants are entitled to choose the valuation as of the date of the award so that it entirely wipes out the illegal acts of the State.[2179] Many tribunals have recognized that ex-post valuations allowing the calculation of "the value of [claimants'] losses on the date of the judgment," can serve to undo to the extent possible the consequences of the illegal actions of a State.[2180]

1014. An increased ex-post valuation is allowed not only when the value of the assets has increased, but also when Claimants show that the "value of their investment *would have* increased after expropriation."[2181] For example, in *Quiborax*, the tribunal found that valuation was proper as of the date of the award because:

> [h]ad the expropriation not occurred, the Claimants would still be in possession of their investment. Consequently, they would have collected cash flows for their

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[2178] Second Compass Lexecon Report, **CER-6**, ¶ 1, n.1.

[2179] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (Sept. 16, 2015), ¶ 370 ("The Tribunal has already held that the standard of compensation in this case is not the one set forth in Article VI(2) of the BIT, but the full reparation principle under customary international law as enunciated by the PCIJ in *Chorzów* and restated in Article 31 of the ILC Articles, because it is faced with an expropriation that is unlawful not merely because compensation is lacking . . . . As explained in the following paragraphs, the majority of the Tribunal considers that this requires an *ex post* valuation, *i.e.*, valuing the damage on the date of the award and taking into consideration information available then."), **CL-245**.

[2180] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (Sept. 16, 2015), ¶ 374, **CL-245**; *see also Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007), ¶ 352 ("Under customary international law, [the claimant] is entitled not just to the value of its enterprise as of . . . the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages."), **CL-105**.

[2181] *Quiborax v. Bolivia*, Award, ¶ 378 (emphasis added), **CL-245.**

> mining activities until today, and would have had the right to continue collecting them until the depletion of the concessions.[2182]

1015. This approach is consistent with the *Chorzów Factory* standard, which dictates that reparation must "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."[2183] Compensation includes "any financially assessable damage *including loss of profits* insofar it is established."[2184]

1016. México's argument that using the date of judgment to calculate damages is "*oportunista pues . . . la inversión no incrementó su valor entre la fecha de la presunta expropiación y la fecha del laudo*"[2185] ignores the fact that, "but for" the unlawful expropriation, Claimants' investment in Oro Negro would have increased in value as the company accrued further profits. Oro Negro had premium, state-of-the-art jack-up rigs that were in high demand throughout the world, and Oro Negro could have moved the rigs to any number of other markets and continued to earn profits throughout the life of the Rigs following the end of their relationship with Pemex.[2186]

1017. México fails to present any cases or other support for their position that the date of the taking should apply. Instead, it merely attempts to distinguish the cases Claimants cite and narrowly focuses on the fact that while its unlawful actions have destroyed the value of Oro Negro shares, Claimants are still in possession of their shares.[2187] But, as explained above, the Chorzów

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[2182] *Quiborax v. Bolivia*, Award, ¶ 385, **CL-245**.

[2183] *Case Concerning the Factory at Chorzów (Germany/Poland) (Merits)*, PCIJ Series A. No. 17, Judgment (Sept. 13, 1928), p. 47 (emphasis added), **CL-223**; *see also* ILC Articles, Article 34 ("Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination . . . ."), **CL-81**.

[2184] ILC Articles, Article 36 (emphasis added), **CL-81**; *see also* SOC ¶ 573 (quoting *Phillips Petroleum Company Iran v. Islamic Republic of Iran and the National Iranian Oil Company*, Award (June 29, 1989) (1989-Volume 21) Iran-U.S. Claims Tribunal Report, ¶ 111, **CL-239**).

[2185] SOD, ¶ 806.

[2186] Second Gil Statement, **CWS-5**, ¶¶ 11, 14; Weir Expert Report, **CER-7**, ¶ 45.

[2187] SOD, ¶¶ 814-816.

Factory standard aims to "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."[2188] That requires an inquiry into the potential increases in the value of the company but for the expropriation before the date of the award.[2189]

1018. México also argues Claimants' "but for" scenario includes events outside of its responsibility and speculates that Oro Negro would not have continued to operate and gain profits in the absence of its wrongful acts.[2190] But that is not true. For example, México points to Oro Negro's high leverage ratio to suggest that Claimants' investment in Oro Negro would have lost its entire value regardless of México's actions. However, this fails to acknowledge that Oro Negro's leverage increased dramatically only after Pemex pushed Oro Negro into unlawful amendments lowering the rates applicable to its Rigs and decreasing Oro Negro's revenues by over 50%.[2191]

1019. Further, while México merely hypothesizes that Oro Negro "would have continued to be a company with little experience and no clients in the world market,"[2192] Dr. Spiller and Ms. Chavich projected Oro Negro's potential utilization and day rates after the expiration of the Oro Negro Contracts using forecasts from several analysts in the industry.[2193] Oro Negro's continued operations in the scenarios set forth in the First Spiller-Chavich Report are further supported by the fact that Oro Negro's five Rigs are among the best jack-up rigs in México,

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[2188] *Case Concerning the Factory at Chorzów (Germany/Poland) (Merits)*, PCIJ Series A. No. 17, Judgment (Sept. 13, 1928), **CL-223**.

[2189] SOC, ¶ 582.

[2190] SOD, ¶¶ 828-829.

[2191] Expert Report of José Alberro, ¶ 76.

[2192] SOD, ¶ 829.

[2193] SOC, ¶ 587.

including because they extract oil in deeper water, are of superior quality to most of the rigs provided by its competitors,[2194] are mobile, and could have operated globally after the expiration of the Oro Negro Contracts.[2195] They also are supported by the fact that Seamex, one of the principal benefactors of the Respondent's illegal conduct, continues to lease their rigs to México on very favorable terms.

C. To the Extent that This Was Necessary, Claimants Have Proved that México Caused Claimants' Damages

1020. As explained in Section III, Claimants have proven, when necessary, that they "incurred loss or damage by reason of, or arising out of," México's breaches of the NAFTA. Claimants responded to México's arguments in full in the legal section, showing that México's illegal conduct is indeed the sufficient, immediate, adequate, foreseeable, and direct cause of Claimants' losses.

1021. By way of reminder, causation is irrelevant to an expropriation claim. If the asset was indeed expropriated, the only remaining issue is the valuation of the asset and associated damages in the event of illegal expropriation.

1022. In addition, for the other claims, México's attempt to rehash in the Damages Section of its brief its argument that the losses Claimants incurred were not caused by its actions does not withstand scrutiny.

1023. **Cancellation of Pemex's Contracts.** México again argues that the cancellation of the Oro Negro Contracts was not a consequence of México's retaliatory actions after Oro Negro officials refused to pay bribes, but of a combination of factors, including Pemex's need to renegotiate contracts due to the oil crisis and Oro Negro's alleged reluctance to formalize the last round of

[2194] Second Gil Statement, **CWS-5**, ¶¶ 11-12, 23-24, 54; Weir Expert Report, **CER-7**, ¶ 30; *see also supra* Section II.D.2.

[2195] Second Gil Statement, **CWS-5**, ¶ 41; Weir Expert Report, **CER-7**, ¶ 45.

proposed amendments.[2196] But while invoking economic conditions to renegotiate and then terminate the Oro Negro Contracts, Pemex contracted five inferior rigs from Seamex for *higher* rates than it would have paid to contract the state-of-the-art New Rigs from Oro Negro, and on worse terms than the Oro Negro Contracts.[2197] As the Black Cube Recordings showed, Seamex had "protected contracts" with Pemex as well as a corrupt financial arrangement with Pemex and Mr. Lozoya that permitted Seamex to obtain its contracts with uniquely preferential terms.[2198] México also fails to explain why Pemex imposed more severe amendments on the Oro Negro Contracts than any competitors' contracts or why it withheld massive sums of money that were due and owed to Oro Negro.[2199] México cannot justify its illegal actions by invoking economic conditions and fails to explain why Pemex's actions disproportionally affected Oro Negro, although the company had an almost perfect performance and some of the lowest daily rates, particularly considering the additional services that it provided to Pemex, including staffing on the Rigs.[2200]

1024. México's attempt to blame Oro Negro's alleged refusal to accept the 2017 Proposed Amendments for the termination of the Oro Negro Contracts is also baseless. As explained above, that is simply not true. In fact, Pemex and Oro Negro were still negotiating the amendments at that time, even after Perforadora had filed for *Concurso*.[2201] As late as September 29, 2017, Oro

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[2196] SOD, ¶ 841.

[2197] **Appendix G** to the Statement of Claim; Exhibits **C-F.1 to C-F.5**.

[2198] *See* First Black Cube Statement, **CWS-4**, ¶¶ 28, 35-41; **Appendix H** to the Statement of Claim, Excerpt Nos. 8 and 15.

[2199] SOC, ¶ 135.

[2200] Further, the drop in oil prices México invokes does not explain Pemex's behavior. At around the same time Pemex was telling Oro Negro that that it needed to cut daily rates due to drops in oil prices and liquidity issues, it was contracting inferior jack-ups from Seamex and from Oro Negro's competitors. Second Gil Statement, **CWS-5**, ¶¶ 52-53.

[2201] *See supra* Section II.D.4.

Negro was exchanging draft amendments with Pemex—which quickly purported to terminate the Oro Negro contracts just a few days later.[2202]

1025. México also tries to deflect blame by stating that it should not be held responsible for the illegal termination of the Oro Negro Contracts because Oro Negro should have been in the financial position to withstand such loss.[2203] It was Pemex's unlawful amendments to the Oro Negro Contracts that decreased Oro Negro's revenues by over 50%.[2204] But Oro Negro's financial position or status as a new player in the market does not excuse Pemex's discriminatory treatment of Oro Negro in favor of competitors with offerings of lesser quality, particularly when the reason for that discriminatory treatment involves Oro Negro's refusal to pay bribes and Seamex's willingness to do so. México cannot choose its claimants, and points to no authority supporting a finding that the financial state of a claimant is relevant in a causation inquiry. Moreover, if México had not acted illegally, as it did, Oro Negro would have had no problems paying its debts and making a handsome profit from its operations. Finally on this point, if México's contention in this respect were accepted by the investment arbitration community, then States could act illegally against start-ups with impunity.

1026. México goes as far as arguing that Oro Negro's overleverage was the cause for Claimants' losses.[2205] México fails to acknowledge, however, that the increasing leverage was caused in large part by México's own imposition of increasingly unfavorable terms through the 2015 and 2016 Amendments and then the illegal termination of the Oro Negro Contracts and withholding of

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[2202] *See supra* Section II.D.4.

[2203] SOD, ¶¶ 842-843.

[2204] SOC, ¶ 87.

[2205] SOD, ¶ 843.

payments due to Oro Negro for work it had already performed. México's own analysis shows that Oro Negro's leverage had doubled in 2017 and tripled from 2017 to 2018 as a result of México's illegal acts.[2206]

1027. Therefore, México fails to prove that factors other than its illegal, retaliatory actions against Oro Negro caused Claimants' losses and the demise of the Oro Negro company.

1028. **Loss of the Rigs.** México further argues that the loss of the Rigs was caused by Oro Negro's own actions (not México's treaty breaches). Specifically, México claims that the Rigs were lost because "*Oro Negro las ofreció como garantía a los Tenedores de Bonos y sujetó cualquier decisión en relación con los contratos de Pemex al visto bueno de los Tenedores de Bonos*" and that "*Oro Negro no habría perdido las plataformas si no hubiera decidido financiarlas con la emisión de bonos y/o ofrecerlas como garantía de la deuda*."[2207] This argument is incorrect and plainly nonsensical.

1029. The loss of the Rigs is a natural and foreseeable consequence of México's sustained assault on Oro Negro in collusion with the Ad-Hoc Group. Claimants' evidence demonstrates that México and the Ad-Hoc Group colluded to starve Oro Negro of cash and to take possession of the Rigs, including through the issuance of baseless and corrupt judicial orders authorizing the Ad-Hoc Group to seize the Rigs.[2208] Additionally, there is no question that Pemex's deliberate actions seeking to financially strangle Oro Negro pushed the company into bankruptcy and facilitated the Ad-Hoc Group's take-over of the Rigs. To claim that the chain of events was interrupted because it was Oro Negro's choice to issue bonds that offered the Rigs as collateral is illogical, as Oro

[2206] SOD, ¶ 843, Table 6.

[2207] SOD, ¶¶ 846, 848.

[2208] *Supra* Section II.H.

Negro would have not lost the Rigs in the absence of México's illegal acts, even though it chose to finance the Rigs through bonds.

1030. Therefore, México's actions against Oro Negro, including those in collusion with the Ad-Hoc Group, directly and foreseeably resulted in Oro Negro's loss of the Rigs.

1031. **Loss of the Down Payments on the New Rigs**. Lastly, México argues that Claimants have not shown that México caused Oro Negro to lose the down payment on the New Rigs.[2209] Yet, that is not true. Pemex continuously represented to Claimants that it would contract the New Rigs and Oro Negro relied on those representations to construct the New Rigs, paying a USD 125 million down payment on them.[2210] At the same time, Pemex not only contracted rigs from competitors, but did so on less favorable delivery terms for Pemex.[2211] In particular, Pemex's contracting of five rigs from Seamex is highly suspicious because (1) the daily rates under the Seamex Contracts are higher than daily rates under all other jack-up rig lease agreements; (2) the Seamex Contracts are generally longer than all other jack-up rig lease agreements; (3) unlike the other Pemex contracts, they provide for almost no penalties for the deficient maintenance and operation of the rigs and do include a productivity bonus; and (4) they have much more favorable termination provisions in favor of Seamex, prohibiting Pemex from terminating the Seamex contracts barring breach or *force majeure*.[2212] All the while, Oro Negro continued delaying the delivery dates for the New Rigs *at the continued request of Pemex* with the understanding that Pemex planned to contract them—which ultimately caused Oro Negro to lose the USD 125 million

[2209] SOD, ¶ 850.

[2210] *See supra* Section II.D.3(vi).

[2211] **Appendix G** to the Statement of Claim; Exhibits **C-F.1 to C-F.5**.

[2212] SOC, ¶ 161.

down payment when the shipyard selling the New Rigs terminated the sale contracts without compensation to Oro Negro when Oro Negro filed for bankruptcy.

1032. Therefore, the loss of the USD 125 million down payment on the New Rigs was the direct and foreseeable result of Pemex's actions.

D. There Is No Risk of Double Recovery

1033. México lastly argues that there is a possibility that Claimants could obtain a double recovery if Oro Negro prevails in proceedings pending before Mexican courts regarding Pemex's cancellation of the Oro Negro Contracts.[2213]

1034. However, those proceedings are completely different from this arbitration: they involve a different defendant, different injuries, different theories of liability, different wrongful acts, and different laws. In the Mexican litigation, Oro Negro is suing *Pemex* for breach of the Oro Negro Contracts under Mexican law, seeking to recover the amounts due to Oro Negro under these contracts. In contrast, here, the minority shareholders are suing *México* for breaches of its obligations under the NAFTA that led to the loss of Claimants' investment in Oro Negro and for damages under public international law and the Treaty. This is relevant because, as discussed below, Claimants' claims enforcing their rights under the NAFTA are independent from contractual claims that can be brought by Oro Negro. México relies on *Venezuela Holdings v. Venezuela* to argue that "[t]he prohibition of double recovery for the same loss is a well-established principle."[2214] But that case concerned a parallel matter where one of the Claimants already recovered for the same governmental measure.[2215] But this is not the case here, where the two

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[2213] SOD, ¶ 853.

[2214] SOD, ¶ 852.

[2215] *Venezuela Holdings BV and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB / 07/17, Award (Oct. 9, 2014), ¶ 379, **RL-123**.

proceedings involve completely different parties and there has been no recovery against México by any of the Claimants.

1035. More pertinent to the Tribunal's analysis are cases where shareholders or investors bring a claim under NAFTA or investment treaties and there are parallel proceedings involving the companies they invested into. In such cases, as summarized below, tribunals find that the two proceedings are different and there is no basis to deprive the investors of their rights under NAFTA and other treaties.

1036. For example, in *GAMI v. México*, a U.S. minority shareholder, GAMI Investments, Inc. ("GAMI") sued México under Article 1116 for losses of the value of its 14.18% equity shares in Grupo Azucarero Mexico S.A. de C.V. ("GAM"), a Mexican company. GAM continued to litigate *amparo* proceedings before Mexican courts.[2216] The *GAMI v. México* tribunal explained:

> It is difficult to see why GAMI's position under NAFTA should be impaired because the controlling shareholder caused GAM to seek redress in the Mexican courts . . . . Clearly GAMI would not lose its rights if the outcome had been that the local courts upheld the expropriation and fixed a derisory amount of compensation. It is in the very nature of NAFTA to create a regime in which a foreigner's entitlements do not necessarily coincide with those of a citizen even with respect to ownership of identical types of assets . . . . GAMI . . . is entitled to seek international relief from a NAFTA Tribunal on account of a wrongful expropriation. It is difficult to see why GAMI's claim should flounder because the Mexican courts have *agreed* with GAMI's thesis. GAMI did not put its thesis to those courts. GAMI pursued an international action which it was entitled to bring.[2217]

1037. Similarly, the *Genin et al. v. Estonia* tribunal found in favor of the shareholders of Estonian Innovation Bank ("EIB") under the U.S.-Estonia BIT. The shareholders claimed that Estonia had

[2216] *GAMI v. México*, UNCITRAL, Final Award, ¶ 38, **CL-71**.

[2217] *GAMI v. México*, UNCITRAL, Final Award, ¶ 38 (emphasis added), **CL-71**.

breached that treaty by revoking EIB's banking license – an act that EIB also challenged before Estonian Administrative Courts.[2218] The Genin tribunal explained:

> The distinction between the causes of action brought by EIB, in Estonia, and by the Claimants, here, is perhaps best illustrated by the circumstances of EIB's recourse to the courts in the matter of its license revocation. The effort by EIB to have the Bank of Estonia's decision overturned, and its license restored, was in effect undertaken on behalf of all the Bank's shareholders (including minority shareholders), as well as on behalf of its depositors, borrowers and employees, all of whom were damaged by the cessation of EIB's activities. . . . The "investment dispute" submitted to ICSID arbitration, on the other hand, relates to the losses allegedly suffered by the Claimants alone, arising from what they claim were breaches of the BIT. Although certain aspects of the facts that gave rise to this dispute were also at issue in the Estonian litigation, the "investment dispute" itself was not, and the Claimants should not therefore be barred from using the ICSID arbitration mechanism.[2219]

1038. These decisions are now common place. As one tribunal found, "[d]ecisions of several ICSID tribunals have held that as contractual claims are different from treaty claims even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration."[2220]

1039. Just as in the cases above, here, Claimants are entitled to bring their claim under the NAFTA because the contractual case Oro Negro brings against Pemex is different and does not involve the breaches of the NAFTA that Claimants are entitled to bring and for which they are entitled to recovery under international law standards for breaches of the NAFTA.

[2218] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (June 25, 2001), ¶¶ 331–332, **CL-76**.

[2219] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, Award, ¶ 332 (emphasis added), **CL-76**.

[2220] *CMS Gas v. Argentina*, Decision on Jurisdiction, ¶ 80, **CL-78**; *see also Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction (Oct. 21, 2003), ¶ 3.4.3, **CL-77**; *Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentina*, ICSID Case No. ARB/97/3, Award (Nov. 21, 2000), ¶ 55, **CL-106**.

E. México's Proposed Adjustments to Claimants' Damages Are Inapposite and México's Expert's Proposed Valuation Is Incorrect

1040. México seeks to adjust damages on the basis of its challenges to the Tribunal's jurisdiction over some claimants.[2221] As explained above in Section III, México's jurisdictional arguments are baseless.

1041. México finally challenges the damages valuation by Dr. Spiller and Ms. Chavich based on its own expert's analysis. That analysis, however, is based on incorrect assumptions and skewed data.

1042. First, México's claim that "*no es claro que los flujos que estima [Compass Lexecon] habrían fluido a las Demandantes en el escenario contrafáctico que plantea*" because it did not have a chance to review documents related to Oro Negro's dividend and profit distribution[2222] misses the point. Dr. Spiller and Ms. Chavich calculate the equity value of Claimants' investment in Oro Negro at the projected date of the award under the two scenarios: the No Termination Scenario and the Termination with Liquidated Damages Scenario. As the treatise México itself cites in support of its argument states, one of the "principal ways of compensating shareholders' losses [is] . . . computing the loss in the value of the shares."[2223] As discussed above, México's actions have destroyed the value of Oro Negro's shares, and this loss is reflected in the loss of all future cash flows which would have been available to Claimants as equity holders.

1043. *Second*, México's argument that damages related to future use of the Rigs are speculative[2224] is equally misguided. Such determination of future damage is not unusual in

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[2221] SOD, ¶ 728.

[2222] SOD, ¶ 862.

[2223] S. Ripinsky & K. Williams, *Damages in International Investment Law*, p. 161 (2008), **RL-120**.

[2224] SOD, ¶¶ 866-869.

NAFTA cases, where "no strict proof of the amount of future damages is required."[2225] As tribunals recognized, "'a sufficient degree' of certainty or probability is sufficient."[2226] That is the case here because Dr. Spiller and Ms. Chavichs' analysis relies on forecasts from several reputable industry analysts to study market expectations and project revenues, day rates, and utilization.[2227] As Dr. Spiller and Ms. Chavich explain, "[a]ny forward-looking valuation methodology requires the projection of fundamental variables, such as production, prices and costs," and "prices and to a large extent costs, are largely independent of the action of the target company, but rather depend on the market as a whole."[2228]

1044. Oro Negro was also a "going concern." As the tribunal in *Metalclad*, a case México cites for its damages arguments, noted, "[n]ormally, the fair market value of a going concern which has a history of profitable operation may be based on an estimate of future profits subject to a discounted cash flow analysis."[2229]

1045. México also seems to suggest that the valuation is improper and speculative simply because "*se extiende a un periodo de hasta 227 meses*."[2230] But the Rigs had a 30-year (or 360-month) life.[2231] México does not argue that the Rigs will not continue to operate until 2046 and advances

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[2225] *Mobil Investments Canada Inc. and Murphy Oil Corp. v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (May 22, 2012), ¶ 437, **CL-146**.

[2226] *Mobil Investments Canada Inc. and Murphy Oil Corp. v. Government of Canada*, Decision on Liability and on Principles of Quantum, ¶ 437, **CL-146**.

[2227] First Compass Lexecon Report, **CER-3**, ¶ 48; Second Compass Lexecon Report, **CER-6**, ¶ 17 n.32.

[2228] Second Compass Lexecon Report, **CER-6**, ¶ 17 n.32.

[2229] *Metalclad*, Award, ¶ 119, **CL-95** (citing *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award (August 8, 1980), ¶ 4.78, **CL-410;** *AGIP S.p.A. v. People's Republic of the Congo*, ICSID Case No. ARB/77/1, Award (Nov. 30, 1979), ¶ 98, **CL-411)**.

[2230] SOD, ¶¶ 866-867. The Oro Negro Contracts extended as far as 2022, and Dr. Alberro and Compass Lexecon agree on how to calculate the projected revenues under the contracts. Second Compass Lexecon Report, **CER-6**, ¶ 17.

[2231] Second Gil Statement, **CWS-5**, ¶ 38.

no support for its argument that it is entitled to a discount to the amount of damages Claimants have incurred because Claimants expected to profit from their investment over a long period of time.

1046. In addition, Dr. Alberro applies an incorrect utilization rate, using historic utilization rates *that improperly include rigs other than jack-ups*, thus leading to lower utilization rates.[2232] He also uses incorrect historic day rates—including inconsistent averages[2233]—and overstates liquidity requirements by including an unwarranted inflation adjustment.[2234]

1047. *Third*, Dr. Alberro's adjustments to the cost, tax, and interest estimates in the First Spiller-Chavich Report are improper for several reasons:

- Dr. Alberro overestimates operating costs by assuming that the Rigs were idle from October 2017 on.[2235] That assumption is incorrect, as the effective date of the Termination was not immediate for *Decus* or *Fortius*, and the Rigs continued operating in the interim.[2236] Further, the Rigs did not immediately become idle upon Termination, and so the costs in the last quarter of 2017 do not reflect idle costs.[2237]

- Dr. Alberro incorrectly applies the payment of the taxable base to employees ("PTU") to Claimants, as well as the Mexican tax rate throughout the life of the Rigs.[2238] First, because Integradora, Perforadora, and Operadora do not employ any personnel, the 10% PTU should not be calculated over the total profits of the company, but only over the profits of the specific entities responsible for personnel services.[2239] Second, the mobility of the Rigs allows them to operate globally, and

[2232] Second Compass Lexecon Report, **CER-6**, ¶ 16(a).

[2233] Second Compass Lexecon Report, **CER-6**, ¶¶ 16-18.

[2234] Second Compass Lexecon Report, **CER-6**, ¶ 33.

[2235] Second Compass Lexecon Report, **CER-6**, ¶ 20.

[2236] Second Compass Lexecon Report, **CER-6**, ¶ 21.

[2237] Second Compass Lexecon Report, **CER-6**, ¶ 21.

[2238] Second Compass Lexecon Report, **CER-6**, ¶¶ 24, 26; First Expert Report of Manuel E. Tron, **CER-8**, ¶¶ 32-36.

[2239] Second Compass Lexecon Report, **CER-6**, ¶ 24, 26; First Tron Report, **CER-8**, ¶¶ 32-34.

there is no basis to conclude that the Rigs will remain in Mexican waters throughout their life.[2240]

- Dr. Alberro erroneously uses the cost of debt of Oro Negro under a distress situation—which is the Respondent's own doing. As explained in the First Spiller-Chavich Report, the interest rate should reflect Oro Negro's financial situation *in the but-for scenario*, where México did not illegally terminate the Oro Negro Contracts, cause the loss of the Prepayment, or destroy the value of Oro Negro and Claimants' investment in the company.[2241] Further, as Dr. Spiller and Ms. Chavich explain, Dr. Alberro's interest rate is wrong for additional reasons, as it relies on the upper-bound of the estimate range for interest rates and includes items other than interest, such as amortization of transaction costs, withholding taxes, foreign exchange losses, and default interest.[2242]

- Dr. Alberro double counts expenses related to overhead and maintenance costs and interest expenses between October and December 2017 in his valuation: once by directly deducting them from his valuation and again by including the cash and accounts payable balance as of December 2017.[2243]

1048. *Fourth*, Dr. Alberro's criticism of the discount rate utilized in the First Spiller-Chavich Report is inapposite, and his proposed alternative discount rate is erroneous. Dr. Alberro criticizes Dr. Spiller and Ms. Chavich's use of the CAPM methodology, but that approach is widely applied and recommended by scholars of financial economics without further adjustments.[2244] Indeed, Dr. Alberro himself explained the CAPM methodology in a 2015 paper, without any premiums other than the market risk premium and sometimes a country risk premium.[2245] Further, Dr. Alberro's discount rate exaggerates Oro Negro's cost of raising funds by including

[2240] SOC, ¶ 587; *see also* First Tron Report, **CER-8**, ¶¶ 26-27.

[2241] Second Compass Lexecon Report, **CER-6**, ¶ 28.

[2242] *Id*. at ¶ 29.

[2243] *Id*. at ¶¶ 30-31.

[2244] *Id*. at ¶ 39.

[2245] *Id*. at ¶ 40.

unsubstantiated and ad hoc size and company-specific premiums. Dr. Alberro also erroneously discounts all cash flows to December 2016 instead of the date of his valuation, October 3, 2017.[2246]

1049. *Finally*, México asks Dr. Alberro to assume, for his third scenario, that the loss of the Rigs is not attributable to México, and in this case, Dr. Alberro argues that his damages would be limited to damages to those arising from the Oro Negro Contracts.[2247] Respondent claims those damages would be zero because the excess cash would be used to pay debt, and instructs its expert accordingly.[2248] However, México's instruction is fundamentally flawed, as it overlooks the fact that México's financial strangulation is part and parcel of the terminations themselves—as well as Pemex's imposition of illegal amendments and its coercive withholding of payments due to Oro Negro. In sum, Pemex caused—and indeed orchestrated with the Ad-Hoc Group—the financial destruction of Oro Negro, as well as the loss of the Rigs.

F. Full Compensation Requires that Any Award of Damages Be Net of Tax

1050. México does not challenge the fact that the award should be net of tax. This is not surprising considering that the valuations set out in the First Spiller Chavich Report reflect the corporate taxes paid or due for the entire period for which damages would have been calculated.[2249] México's expert himself, in a 2015 article, explains that an arbitral award should be net of taxes "if taxes are subtracted when calculating the [cash flow]."[2250]

[2246] *Id*. at ¶ 34.

[2247] SOD, ¶ 879.

[2248] SOD, ¶ 880.

[2249] *See* SOC, ¶ 607; *see also* First Tron Expert Report, **CER-8**, ¶ 37.

[2250] J. Alberro & S.B. Johnson, *Controversial Topics in Damage Valuation: Complex Issues Require Sophisticated Analytical Methods*, in International Comparative Legal Guide to: International Arbitration (2015), p. 38, **CL-406**.

1051. Nevertheless, should México try to tax Claimants' (or Oro Negro's) income from the Award—which is far from just a remote possibility considering México's history of using its tax authorities to harass and intimidate Claimants and Oro Negro[2251]—the Tribunal should then gross up the Award by a factor that would remove the additional tax liability México would try to impose. As explained by the tribunal in *Rusoro v. Venezuela*, México could "practically avoid the obligation to pay [Claimants] the compensation awarded by fixing a 99% tax rate on income derived from compensations issued by international tribunals."[2252] Therefore, Claimants respectfully ask this Tribunal to declare that: (i) its Award is made net of all applicable taxes; and (ii) México may not tax or attempt to tax the Award.

V. REQUEST FOR RELIEF

1052. On the basis of the foregoing, without limitation and reserving Claimants' right to supplement these prayers for relief, including without limitation in the light of further action that may be taken by México, Claimants respectfully request that the Tribunal:

(i) DECLARE that México has breached Article 1110 (Expropriation) and Article 1105 (Fair and Equitable Treatment and Full Protection and Security) of the Treaty;

(ii) ORDER México to compensate Claimants fully for their losses resulting from México's breaches of the Treaty and international law at whatever valuation is higher between valuation on the date of expropriation or on the date of the award (for reference calculated as at least USD 270 million as of October 1, 2019), to be supplemented as of the date of the hearing and/or the date that this Tribunal issues its Final Award, plus interest until payment at a commercially reasonable rate, compounded annually;

(iii) ORDER México to pay all applicable pre- and post-Award interest;

2251 *See* SOC, Sections II.M.12, II.M.16.

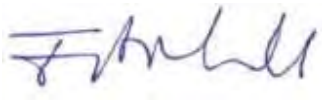
2252 *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/12/5*,* Award, ¶ 853, **CL-139**. *See also Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata BV v. Petróleos de Venezuela SA*, ICC Case No 16848/JRF/CA, Final Award (Sept. 17, 2012), ¶¶ 313, 333(1)(vii), **CL-256**; *Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/23, Award (Dec. 12, 2016), ¶¶ 788-792, **CL-257**.

(iv) DECLARE that: (a) the award of damages and interest be made net of all taxes; and (b) México may not deduct taxes in respect of the payment of the award of damages and interest;

(v) AWARD such other relief as the Tribunal considers appropriate; and

(vi) ORDER México to pay all of the costs and expenses of these arbitration proceedings.

Respectfully submitted on behalf of Claimants,



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