ICSID Case No. ARB/19/1

Administered by the

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

LEGACY VULCAN, LLC

Claimant

v.

UNITED MEXICAN STATES

Respondent

CLAIMANT'S POST-HEARING REPLY

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I. INTRODUCTION

1. Mexico's Post-Hearing Brief largely repeats arguments that Claimant Legacy Vulcan LLC ("Legacy Vulcan") refuted in its Post-Hearing Brief and resorts to mischaracterizations of the Hearing testimony and Claimant's arguments in a futile effort to rebut Claimant's showing that, by arbitrarily precluding Legacy Vulcan from quarrying over [redacted] of its Mexican reserves, Mexico has failed to accord fair and equitable treatment ("FET") in accordance with NAFTA Article 1105.

2. In its Post-Hearing Brief, Mexico frames Legacy Vulcan's case as an attempt to transform this Tribunal into a domestic court or agency, but this framing is disconnected from reality. Legacy Vulcan is seeking compensation for specific breaches of NAFTA arising from specific governmental measures. As is typical in investor-state arbitration, those measures arose against a factual backdrop involving administrative acts purportedly carried out within the framework of domestic laws. This Tribunal does not become a *de facto* domestic court or usurp the powers of an administrative agency by assessing whether, against this factual backdrop, Mexico breached its international obligations and owes compensation as a result.

3. Beyond the rhetorical reframing of this case, Mexico's Post-Hearing Brief attacks a parade of strawmen, mischaracterizes Hearing testimony, and skirts core issues that were the focus of Legacy Vulcan's presentation at the Hearing.

- Regarding La Adelita, Mexico again focuses on the bindingness of the 2014 Agreements, ignoring that a showing that they are binding is not necessary for Legacy Vulcan to prevail in its claim. The facts confirmed at the Hearing show that Mexico undertook to "take all necessary actions" to amend La Adelita's zoning regime to make explicit what had already been implicit and reiterated by relevant authorities: La Adelita's reserves could be quarried. The record shows that Legacy Vulcan and CALICA reasonably relied on this commitment and Mexico repudiated it for no valid reason, effectively blocking quarrying operations in La Adelita.
- Regarding El Corchalito, Mexico resorts to debunked arguments and mischaracterizations of Hearing testimony, failing to refute Legacy Vulcan's showing that PROFEPA arbitrarily blocked quarrying operations in that lot.
- Regarding port fees, Mexico repeats arguments that Legacy Vulcan has rebutted elsewhere; those fees were not tax measures, and they were conclusively determined by Mexico's judiciary to be illegal — a fact Respondent continues to disregard.
- Regarding damages, Mexico continues to advance artificial limitations to the scope of recoverable damages that are nowhere to be found in NAFTA and disregard the plain text of that treaty to misconstrue Legacy Vulcan's damages case and the evidence supporting it, while advancing a series of speculative arguments.

4. In sum, Mexico has failed to rebut Legacy Vulcan's showing that Mexico breached NAFTA and that Legacy Vulcan is entitled to compensation for the resulting damages.[1]

II. THE HEARING CONFIRMED THAT MEXICO BREACHED ITS NAFTA OBLIGATIONS, AND MEXICO HAS NOT SHOWN OTHERWISE

A. MEXICO'S EFFORT TO DEFEND ITS CONDUCT WITH RESPECT TO LA ADELITA FAILS

1. Mexico Sidestepped Core Facts Underpinning Legacy Vulcan's and CALICA's Expectations Regarding La Adelita

5. Mexico contends that Legacy Vulcan and CALICA lacked legitimate expectations to quarry La Adelita mainly by questioning the bindingness of the 2014 Agreements and the POEL-amendment process.[2] In doing so, Mexico sidesteps key facts showing that Mexico's numerous representations to Legacy Vulcan and CALICA — even before the 2014 Agreements — generated reasonable expectations that they would be able to exercise their rights to quarry La Adelita.

6. Consistent with Mexico's commitment in the 1986 Investment Agreement to "provide the accommodations [*facilidades*] to obtain the permits required to carry out the Project,"[3] for well over a decade, Mexico represented to Legacy Vulcan and CALICA that CALICA could quarry the reserves they own in La Adelita.[4] After Mexico confirmed that it had no objection to CALICA's planned quarrying operations in La Adelita, Mexico issued and renewed numerous environmental permits, including a land-use license and authorizations to quarry above and below the water table.[5]

7. Throughout the years, Mexico also confirmed that CALICA's quarrying operations complied with Mexican law. Since 2001, CALICA has provided to PROFEPA detailed environmental compliance reports every four months.[6] PROFEPA never raised any concerns, despite being obligated to enforce federal environmental laws upon detecting potential

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[1] Pursuant to the Tribunal's instructions of 1 December 2021, the Appendix to this Post-Hearing Reply contains targeted responses to Mexico's answers to the Tribunal's questions.

[2] Post-Hearing Brief-Respondent-SPA, ¶ 5, Parts II.A-B. Undefined terms herein have the same meaning provided in Claimant's Memorial, Reply, and Post-Hearing Brief.

[3] C-0010-SPA.16 ("SEDUE, the SCT and the STATE GOVERNMENT undertake, within the scope of their respective competences, to coordinate their functions and to provide the accommodations [*facilidades*] to obtain the permits required to carry out the [CALICA] Project.") (free translation).

[4] Post-Hearing Brief-Claimant-ENG, Part III.B.1.

[5] Tr. (English), Day 1, 90:12-93:18 (Claimant's Opening Statement); Memorial, ¶¶ 230-235; Reply ¶ 144; Post-Hearing Brief-Claimant-ENG, ¶¶ 43-44, 47-63.

[6] *See e.g.*, C-0113-SPA. *See also*, Memorial, ¶ 138; Reply, ¶ 92.

violations.[7] In 2012, PROFEPA inspected CALICA's quarrying operations and found that CALICA complied with environmental laws and regulations.[8] Between 2003 and 2016, PROFEPA granted six Clean Industry Certificates to CALICA in recognition of CALICA's compliance with its environmental commitments.[9]

8. Legacy Vulcan's and CALICA's reasonable expectation of quarrying in La Adelita was not defeated by the 2009 POEL or SEMARNAT's 2013 suggestion that the POEL would need to be amended for CALICA to receive the CUSTF.[10] When the POEL replaced the POET in 2009,[11] it provided that it did not apply retroactively and did not affect vested rights, such as CALICA's entitlement to quarry La Adelita.[12] Mexican instrumentalities thereafter confirmed CALICA's vested rights to quarry La Adelita, including through additional environmental permits as well as court filings and judicial decisions.[13]

9. In light of the multiple official recognitions of CALICA's vested rights to quarry La Adelita, CALICA pursued and secured express commitments from relevant state and municipal authorities to make explicit what the POEL made implicit regarding CALICA's right to quarry La Adelita. The only reason why CALICA pursued this amendment was SEMARNAT's indication to CALICA that such an amendment would be necessary to issue a permit for removal of

[7] Post-Hearing Brief-Claimant-ENG, ¶ 124; [redacted]-0015.53-55 (setting forth PROFEPA's duties).

[8] *See* Post-Hearing Brief-Claimant-ENG, ¶¶ 61, 125; Memorial, ¶ 57; Reply, ¶ 92; C-0043-SPA.2, 57.

[9] *See* Memorial, ¶ 57 (citing C-0037-SPA through C-0042-SPA). *See also* Reply, ¶ 92; Post-Hearing Brief-Claimant-ENG, ¶ 126.

[10] Post-Hearing Brief-Claimant-ENG, ¶¶ 57-64.

[11] In its Post-Hearing Brief, Mexico claims that CALICA "actively participated" in the process that established the POEL. Post-Hearing Brief-Respondent-SPA, Annex A – Question 5, ¶ 29. As Claimant explained in its response to the Tribunal's Question No. 5, however, the document Mexico referenced to support this argument — Annex 2 of the Decree of the Executive of the State of Quintana Roo — is merely a list of persons and entities whose input was considered in the preparation of the POEL, in an apparent reference to the written comments that CALICA had submitted to the committee developing the POEL once a draft of the POEL became publicly available.

[12] C-0080-SPA.69 (stating that the POEL "shall not apply retroactively") (free translation). *See also id.* at 20 (providing that the POEL "will not apply retroactively in those specific cases where official and valid documents had been issued before its entry into force, either generally or in the renewal thereof.") (free translation); Reply, ¶ 24.

[13] *See*, *e.g.*, C-0083-SPA.6 (Quintana Roo opposing CALICA's legal challenge to the POEL in 2009, arguing that CALICA is unaffected by the POEL because it has vested rights). *See also* C-0084-SPA.4; C-0085-SPA.5; C-0086-SPA.9; C-0087-SPA.19-22; C-0075-SPA.26-27 (*see* pp. 4-5 for clearer legibility); R-0124-SPA, ¶¶ 91, 106-109 (2021 *Sentencia* confirming that CALICA has "a vested right, which is the authorization to quarry" La Adelita and that this right "cannot be ignored by any person, or by any law").

vegetation (the CUSTF).[14] As explained in Part II.A.2 and 3 below, such a straightforward and discrete amendment seemed more than achievable given these contextual facts.

2. Legacy Vulcan and CALICA Reasonably Expected that CALICA Would Be Able to Quarry La Adelita in Light of the 2014 Agreements and Mexico's Conduct

10. In Mexico's telling, the Hearing showed that the 2014 Agreements did not create legitimate expectations because these agreements were allegedly not binding or were invalid under Mexican law.[15] This argument misses the mark. Even if the 2014 Agreements were not binding under Mexican law (they were[16]), they still gave rise to legitimate expectations on the part of Legacy Vulcan and CALICA that Mexico's instrumentalities would comply with them and thus enable CALICA to secure the CUSTF.[17] At least five proven facts that Mexico ignored in its Post-Hearing Brief illustrate that the 2014 Agreements generated legitimate expectations on Legacy Vulcan and CALICA.

11. *First*, Mexico's instrumentalities had the authority to enter into the 2014 Agreements.[18] As Claimant's constitutional law expert, [redacted] explained, Mexican law allows Mexico's instrumentalities to enter into agreements — such as the 2014 Agreements — with private parties.[19] This is supported both by the regulatory framework underpinning the POEL and the text of the POEL itself.[20] As [redacted] confirmed at the Hearing, no government official had ever suggested that the 2014 Agreements were invalid or not

[14] *See* Post-Hearing Brief-Claimant-ENG, ¶ 63 (citing [redacted] testimony at the Hearing).

[15] Post-Hearing Brief-Respondent-SPA, Part II.A.

[16] *See* Reply, ¶¶ 37-40. *See also* Tr. (Spanish), Day 3, 759:6-13 ([redacted] presentation, explaining that the 2014 Agreements contained "compromisos muy concretos") [English, 654:4-9]; Expert Report-[redacted]-Constitutional Law-Claimant's Reply, ¶¶ 70-71. Mexico contends that the 2014 Agreements are "documentos con un alcance legal limitado [...] solo pueden ser considerados actos de la administración que manifiestan declaraciones de intenciones mutuas, pero sin ser vinculantes." Post-Hearing Brief-Respondent-SPA, ¶ 10.

[17] *See* Post-Hearing Brief-Claimant-ENG, ¶¶ 64-77, 87-88; *id.* Appendix A – Question 14, pp. 32-36 (explaining that the binding/non-binding nature of the 2014 Agreements under Mexican law is not determinative of Legacy Vulcan's claim that Mexico breached NAFTA Article 1105).

[18] Reply, ¶ 38; Expert Report-[redacted]-Constitutional Law-Claimant's Reply, ¶¶ 12, 41-44, 52-54, 62-65; Expert Report-[redacted]-Environmental Law-Claimant's Reply-Second Report-SPA, ¶¶ 138-145; Post-Hearing Brief-Claimant-ENG, ¶ 72; [redacted] Presentation, Slides 4-6 (CD-0003).

[19] Tr. (Spanish), Day 3, 760:3-7 ([redacted] presentation: "¿Puede o no el Estado Mexicano llegar a convenios [...] como lo son los Acuerdos 2014, con particulares? La respuesta es sí.") [English, 654:18-21]. *See also id.* at 767:16-21 ([redacted] presentation) [English, 660:19-661:1]; [redacted] Presentation, Slides 4-6, 12 (CD-0003).

[20] *See* [redacted]-0015.12 (Article 12, empowering state and municipal authorities to enter into agreements with the private sector regarding environmental management programs); C-0080-SPA.19-20 (Article 9, reflecting that same power). *See also*, Tr. (Spanish), Day 3, 761:6-763:1 ([redacted] presentation explaining these provisions) [English, 655:16-657:4].

binding.[21] To the contrary, Mexican officials told [redacted] that "the law is on CALICA's side" but that they preferred to act on court orders than to comply with the 2014 Agreements voluntarily and contrary to some local interests.[22] Mexico never disputed this fact.

12. *Second*, Mexico agreed to "update the POEL of the Municipality of Solidaridad [...] in order to acknowledge [(*reconocer*)] the use of quarrying and exploitation of stone material within the properties owned and/or possessed by CALICA and/or affiliates [...]."[23] To accomplish this, Mexico agreed to execute "*all necessary actions* until the approval and publication" of the revised POEL.[24] At a minimum, as Mexico's constitutional law expert, Dr. Javier Mijangos, admitted during cross-examination, Mexico obligated itself to work to comply with the timeline that the parties set forth in the 2014 Agreements: "Entiendo yo que *la obligación aquí asumida*, [...] es *cumplir con el calendario* [...] *que las partes habían establecido*."[25]

13. *Third*, the timeline that Mexico committed to follow to amend the POEL was consistent with Mexican law[26] — not a "summary procedure removed from the law," as Mexico claims.[27] It is undisputed that Mexico's instrumentalities were the ones who proposed the timeline that eventually was reflected in the 2014 Agreements.[28] It is also undisputed that the POEL-amendment process reflected in the 2014 Agreements contemplated all the steps required under Mexican law to amend that type of instrument, including, *inter alia*, (i) the creation of a committee comprised of public and private sector representatives (*i.e.*, the Committee to Amend the POEL); (ii) the completion of the four phases required by the General Law of Ecological Equilibrium and Environmental Protection (LGEEPA) and its regulations (*i.e.*, Characterization, Diagnostic, Forecast, and Modeling); (iii) public consultation; (iv) review and approval of the

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[21] Tr. (English), Day 2, 291:1-5 ([redacted] cross-examination); *id.* at 289:13-15; Witness Statement-[redacted]-Claimant's Reply-Second Statement-ENG, ¶ 6.

[22] *See* Memorial, ¶¶ 123, 131 (quoting Witness Statement-[redacted]-Claimant's Memorial-ENG, ¶¶ 45, 59).

[23] C-0022-SPA.10 (free translation).

[24] *Id.* at 11 (free translation) (emphasis added). *See also* [redacted] Presentation, Slides 8-11 (highlighting key language in the 2014 Agreements) (CD-0003).

[25] *See* Tr. (Spanish), Day 4, 971:12-972:17 (Mijangos cross-examination) [English, 826:2-827:3] (emphasis added).

[26] *See* Expert Report-[redacted]-Constitutional Law-Claimant's Reply, ¶¶ 62-66; Expert Report-[redacted]-Environmental Law-Claimant's Reply-Second Report-SPA, ¶ 147.

[27] Post-Hearing Brief-Respondent-SPA, ¶ 35.

[28] *See* Tr. (English), Day 2, 305:4-7 ([redacted] cross-examination: "during the negotiations of the 2014 Agreements, we requested for a timetable, and this timetable was provided to us from officials[.]"); Witness Statement-[redacted]-Claimant's Reply-Second Statement-ENG, ¶ 4; Reply, ¶ 53.

draft POEL by local and state authorities; and (v) publication of the revised POEL in the state's official gazette.[29]

14. *Fourth*, nothing in the nature of the 2014 Agreements suggested that Mexico would fail to comply with them. As a preliminary matter, labelling the 2014 Agreements in any particular way or declaring them non-binding — as Mexico emphasizes in its Post-Hearing Brief[30] — is irrelevant for purposes of NAFTA Article 1105. In any case, contrary to Mexico's assertion, [redacted] Hearing testimony was clear and consistent: the 2014 Agreements are akin to a settlement agreement[31] and may be characterized as *Convenios de Concertación*, not — as Mexico now states — *Convenios de Coordinación*.[32] [redacted] did not "change [redacted] position," as Mexico claims.[33]

15. *Finally*, the parties' initial compliance with the 2014 Agreements further shows the reasonableness of Legacy Vulcan's and CALICA's expectation that Mexico would fulfill its commitment regarding the POEL.[34] In accordance with, and in reliance on, the 2014 Agreements, Mexico's instrumentalities, *inter alia*, (i) extended the CALICA Port Concession until 2037; (ii) renewed the Corchalito/Adelita State Environmental Authorization until 2036; and

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[29] C-0022-SPA.11-12 (setting out each of these steps in the 2014 Agreements). *See also* [redacted].0016.4, 7-8 (enumerating members of the executive and technical bodies of the Committee to Amend the POEL).

[30] *See* Post-Hearing Brief-Respondent-SPA, ¶¶ 10-14; *see also* n.17 above.

[31] Expert Report-[redacted]-Constitutional Law-Claimant's Reply-SPA, ¶¶ 31-33 ("the 2014 Agreements are similar to the figure of the settlement agreement."); Tr. (Spanish), Day 3, 794:20-795:12 ([redacted] confirming this conclusion during cross-examination) [English, 682:11-683:1].

[32] Tr. (Spanish), Day 3, 781:15-782:5 ([redacted] cross-examination "[Counsel for Respondent]: ¿Su declaración ante este Tribunal es que el MOU es un convenio *de concertación* [...] que se inscribió en el marco del proceso de modificación del POEL? // [redacted]: Cabe dentro de esa acepción [...]. En mi opinión, [...] entra dentro de este concepto de 'convenio *de concertación*'. Así es.") (emphasis added) [English, 672:9-16]. *See also* [redacted]-0015.12 (authorizing Mexican instrumentalities to enter into *Convenios de Concertación* with the private sector); Post-Hearing Brief-Respondent-SPA, ¶¶ 11, 12 (quoting but misrepresenting this passage).

[33] Post-Hearing Brief-Respondent-SPA, ¶ 11. Moreover, contrary to Mexico's allegation that, if the 2014 Agreements were *Convenios de Concertación*, they were public documents (Post-Hearing Brief-Respondent-SPA, ¶ 13), as [redacted] explained, these agreements could remain confidential. Tr. (Spanish), Day 3, 782:12-783:11 ("[Counsel for Mexico]: [...] [S]i consideramos que este -- el MOU es un convenio de concertación [...] se trataría de un documento público cuya existencia sería reconocida por todos [...]? // [redacted]: No necesariamente. Básicamente, el convenio de concertación puede tener una naturaleza pública [...] o puede no tenerla. [...] [H]ay documentos que no necesariamente están publicados, digamos, en el Diario Oficial de la Federación, y sin embargo tienen perfecta validez. [...] Es decir, pensar que es un requisito, digamos, de validez eso, me parece muy complicado para sostener, digamos, una posible invalidez de lo acordado en el Memorándum de Entendimiento.") [English, 672:17-673:12].

[34] *See* Memorial, ¶¶ 115-119; Reply, ¶ 34; Post-Hearing Brief-Claimant-ENG, ¶¶ 70-71; *see also* Tr. (Spanish), Day 4, 924:17-18, 976:5-12 (Mijangos direct and cross-examination, asserting the relevance of parties' subsequent conduct in interpreting their intent regarding an agreement) [English, 786-787:1, 829:18-830:5]; Mijangos Report, ¶ 48 (same) (RE-006).

(iii) established the Committee to Amend the POEL, which held multiple sessions, coordinated technical workshops, and took several important steps in the POEL-amendment process.[35] In turn, CALICA: (i) renounced its rights over the public terminal, (ii) withdrew the challenges to the proceeding to revoke CALICA's Port Concession, and (iii) continued paying real estate taxes based on an appraisal that courts had declared invalid.[36] Even after the December 2015 deadline lapsed, it is undisputed that Mexico continued indicating to CALICA that it would comply with the 2014 Agreements.[37] It was only in July 2018 that the current Governor of Quintana Roo, Carlos Joaquín, unequivocally repudiated the 2014 Agreements when he told [redacted]: "You are not entering La Adelita – period."[38]

16. Mexico denies that its acts to comply with the 2014 Agreements were grounded (*fundamentados*) on the 2014 Agreements.[39] Mexico is wrong. It supports its allegation by quoting Dr. Mijangos' testimony,[40] but Dr. Mijangos admitted during cross-examination that *he had not seen* the relevant documents regarding the parties' compliance with the 2014 Agreements.[41] Besides, Mexico's argument directly contradicts its admission that its instrumentalities took into consideration, and acted as indicated by, the 2014 Agreements in their initial compliance with these agreements.[42]

17. In an attempt to distract the Tribunal from the parties' initial compliance with the 2014 Agreements, Mexico argues that CALICA's failure to fulfill *all* of its obligations thereunder evidences that the Agreements were *not binding*.[43] Again, Mexico's focus on the bindingness of the Agreements is immaterial.[44] Regardless, [redacted] explained at the Hearing that CALICA lived up to its core commitments under the 2014 Agreements, including by refraining from enforcing rights derived from litigation it agreed to relinquish in exchange for Mexico's

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[35] *See* Reply, ¶ 34. *See also* Memorial, ¶¶ 115-120; Witness Statement-[redacted]-Claimant's Reply-Second Statement-ENG, ¶ 6.

[36] Tr. (English), Day 2, 293:4-14 ([redacted] cross-examination).

[37] *See, e.g.*, C-0019-SPA.5 (amending the State EIA in February 2016 in compliance with the provisions of the 2014 Agreements).

[38] Witness Statement-[redacted]-Claimant's Memorial-ENG, ¶ 59.

[39] Post-Hearing Brief-Respondent-SPA, ¶ 25.

[40] *Id.*

[41] Tr. (Spanish), Day 4, 922:4-8, 974:6-15, 976:1-12 (Mijangos cross-examination) [English, 784:18-21, 828:6-14, 829:18-830:5]; Mijangos Report, ¶ 11 (RE-006).

[42] Counter-Memorial, ¶ 222; Rejoinder, ¶ 230.

[43] Post-Hearing Brief-Respondent-SPA, ¶¶ 18-23.

[44] Post-Hearing Brief-Claimant-ENG, ¶¶ 87-88; *id.* Appendix A – Question 14, pp. 32-36.

compliance.[45] CALICA only refrained from dismissing that litigation because Mexico did not hold its end of the bargain.[46] These facts in no way show that the 2014 Agreements were not binding.

18. Furthermore, once Mexico committed to "[z]oning [...] all CALICA properties for the extraction of limestone,"[47] Legacy Vulcan authorized additional investments worth approximately [redacted] which included, *inter alia*, (i) the acquisition of two custom-built Panamax vessels designed to meet the Project's specifications and built exclusively for transporting CALICA's exports, (ii) the purchase of heavy machinery, and (iii) the construction of a supplemental processing plant to expand the Project's production capacity.[48] Legacy Vulcan would not have authorized these investments had it expected Mexico not to abide by its commitments under the 2014 Agreements.[49]

19. For these reasons, Mexico has failed to refute Claimant's showing that Legacy Vulcan and CALICA reasonably expected that Mexico would comply with the 2014 Agreements so that CALICA could exercise its vested rights to quarry La Adelita.

3. Mexico's Abandonment of the POEL Amendment Process Frustrated Legacy Vulcan's Legitimate Expectations and Was Arbitrary

20. It is undisputed that the Mexican instrumentalities that signed the 2014 Agreements abandoned the POEL amendment process and that Quintana Roo Governor Joaquín repudiated Mexico's commitment to amend the POEL in July 2018.[50] This repudiation frustrated Legacy Vulcan's and CALICA's legitimate expectations and was arbitrary, in breach of Mexico's obligations under NAFTA Article 1105.[51] Mexico's attempt to downplay its failure to amend the POEL in accordance with the 2014 Agreements fails.

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[45] Tr. (English), Day 2, 293:4-14, 294:19-295:6 ([redacted] cross-examination).

[46] *Id.* at 298:12-21 ([redacted] cross-examination). In its Post-Hearing Brief, Mexico argues that CALICA's failure to seek redress in local court once Mexico failed to comply with the 2014 Agreements shows that these agreements were not binding. Post-Hearing Brief-Respondent-SPA, ¶¶ 15-17. This argument is nonsensical because it implies that any dispute over an agreement in Mexico that is resolved extrajudicially would suggest that the relevant agreement is not valid or binding.

[47] C-0088-ENG.1-2.

[48] *Id.* at 2-3, 10-12.

[49] *See* Witness Statement-[redacted]-Claimant's Memorial-ENG, ¶ 57; Witness Statement-[redacted]-Claimant's Memorial-ENG, ¶ 32.

[50] *See, e.g.*, Tr. (Spanish), Day 3, 877:21-879:6 (SOLCARGO cross-examination, admitting that the Committee to Amend the POEL has not held a meeting in years) [English, 750:20-752:3]; Witness Statement-[redacted]-Claimant's Memorial-ENG, ¶ 59 (quoting Governor Joaquín's emphatic assertion that "You are not entering La Adelita – period").

[51] Memorial, ¶¶ 227-237; Reply, ¶¶ 131-143; Post-Hearing Brief-Claimant-ENG, ¶¶ 85-90.

21. Mexico contends that "the objectives of the 2014 Agreements could not be achieved because they were beyond the control of the parties,"[52] but this is false. With regard to the POEL, the Mexican instrumentalities that signed the 2014 Agreements had the power to amend that zoning regime.[53] As [redacted] explained at the Hearing, Mexican law and the internal regulations issued by the State of Quintana Roo and the Committee to Amend the POEL established that the executive body of the Committee — composed of representatives of all three levels of the Mexican government — had the power to control the POEL-amendment process.[54] In particular, the Committee's executive body was empowered to, among other functions, take "the necessary actions for the implementation of the activities, procedures, strategies [...] and amendment to programs of the local environmental regulation."[55]

22. At the Hearing, Mexico's environmental law experts, SOLCARGO, acknowledged that the Mexican instrumentalities that signed the 2014 Agreements controlled the key positions of the executive body of the Committee to Amend the POEL — the *Coordinación General* and the *Secretaría Técnica* — and had decision-making power.[56] Specifically, under that Committee's internal regulations, the State of Quintana Roo — through the *Coordinación General* — was empowered to "coordinate regular and extraordinary meetings" and to "follow up on the agreements and the commitments reached in the Committee's sessions."[57] The Municipality of Solidaridad — through the *Secretaría Técnica* — was responsible for "conven[ing] regular and extraordinary meetings" and "execut[ing] [...] the agreements reached and the commitments undertaken in each [Committee] session."[58] Mexico's allegation that amending the POEL was beyond its control is therefore belied by the facts and the law.

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[52] Post-Hearing Brief-Respondent-SPA, ¶ 5.

[53] *See id.* ¶ 40 (acknowledging that Mexican authorities can amend a lot's UGA(s)). *See also* Post-Hearing Brief-Claimant-ENG, ¶¶ 72-76, 83 (explaining the authorities' power to enter into the 2014 Agreements and amend the POEL).

[54] Tr. (Spanish), Day 3, 761:6-763:1 ([redacted] presentation, explaining that the *Convenio de Coordinación* that underpinned the POEL — and eventually the Committee to Amend the POEL — allows the authorities to enter into *Convenios de Concertación* with the private sector "*para determinar la forma en la que van a ejercer sus atribuciones*," which is reflected in Article 9 of the POEL) [English, 655:16-657:5].

[55] [redacted]-0016.4 Article 6 (free translation). *See also* Counter-Memorial, ¶ 143 (explaining that under Mexican law, the executive body makes the decisions in processes to amend environmental management programs); [redacted] Presentation, Slide 12 (CD-0003); Post-Hearing Brief-Claimant-ENG, ¶¶ 73-75.

[56] *See* Post-Hearing Brief-Claimant-ENG, ¶¶ 74-75 (quoting SOLCARGO's admissions).

[57] [redacted]-0016.4-5, Article 8.I, 8.VIII (free translation).

[58] *Id.* at 5-6 Article 9.I, 9.VIII (free translation).

23. Mexico also argues that CALICA could not have reasonably expected that the POEL would be amended because a few social and environmental groups, including the influential Mexican Center for Environmental Law (*Centro Mexicano de Derecho Ambiental* or "CEMDA"), opposed CALICA's quarrying operations.[59] Not true. The letter from these groups that Mexico cites concerns the POEL-amendment process generally; it nowhere mentions CALICA.[60] The record also shows that CEMDA did *not* oppose the discrete amendment CALICA sought.[61]

24. Mexico similarly ignores the evidence when it suggests that CALICA could not have reasonably expected that the POEL would be amended because environmental groups had opposed CALICA's operations in the past.[62] This suggestion brushes aside CALICA's environmental compliance record, as Mexican authorities recognized throughout the years,[63] and a decades-long record of continuous operations. It also ignores the fact that the Committee's expert during the diagnostic phase determined that La Adelita was located in the most suitable area for quarrying in the entire Municipality of Solidaridad.[64]

25. Consistent with the power that the Mexican instrumentalities had to amend the POEL, and in compliance with the 2014 Agreements (*see* Part II.A.2 above), in less than two years, the Committee to Amend the POEL took several important steps in the amendment process. It held numerous sessions and technical workshops, and approved an expert report during the diagnostic phase.[65] Mexico does not dispute that the Committee held its last substantive meeting in April 2016, bringing the formal amendment process to an end.[66]

26. Mexico has never provided *any* technical or legal justifications for abandoning the POEL-amendment process.[67] It has also failed to refute the fact that this abandonment was

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[59] Post-Hearing Brief-Respondent-SPA, ¶ 32 (citing R-0052-SPA).

[60] R-0052-SPA.

[61] C-0092-SPA.6 ("Ms. Alejandra Serrano of CEMDA says that if there is already an authorization and they have an vested right, she does not see a problem in carrying out their exploitation activity, even if the POEL may not allow it.") (free translation).

[62] Post-Hearing Brief-Respondent-SPA, ¶ 33.

[63] *See* Post-Hearing Brief-Claimant-ENG, ¶¶ 124-126; Reply, ¶ 92.

[64] Memorial, ¶ 118; Tr. (English), 104:22-105:4 (Claimant's Opening Statement); Claimant's Opening Presentation, Slide 30 (CD-0001); C-0097-SPA.145.

[65] *See* Post-Hearing Brief-Claimant-ENG, ¶¶ 76, 79; C-0090-SPA to C-0096-SPA.

[66] *See* Memorial, ¶ 120; Witness Statement-[redacted]-Claimant's Memorial-ENG, ¶ 37; C-0096-SPA.

[67] In this arbitration, Mexico put forth a few alleged justifications for the Committee's failure to amend the POEL, without offering any contemporaneous evidence. It first suggested that the Committee to Amend the POEL lacked enough resources to conclude the POEL-amendment process, but was unable to support

politically motivated to favor local interests. It remains undisputed that, when prompted to comply with their POEL-related commitments, Mexico's instrumentalities demurred, stating that, although "the law is on CALICA's side," allowing CALICA to quarry La Adelita would be "unpalatable to the public [...] notwithstanding [CALICA's] environmental authorizations" and compliance record.[68] It similarly remains undisputed that, on the same day that the Committee to Amend the POEL approved the diagnostic report, Solidaridad councilwoman, and eventual Mayor, Laura Beristain, expressed her opposition to "land-use changes" in the POEL in favor of CALICA.[69] Thereafter, Quintana Roo's legislature approved a non-binding Point of Agreement introduced by Beristain, urging that the POEL not be amended to allow CALICA to quarry La Adelita because CALICA was allegedly supplying materials to build President's Trump "wall of hate."[70] Mexico has never contested that an ally and member of Mayor Beristain's team of advisors orchestrated a protest outside CALICA's facilities in January 2018, hoisting pejorative signs against CALICA and President Trump,[71] nor that Governor Joaquín thereafter told [redacted] that CALICA "[is] not entering La Adelita — period."[72]

27. Finally, Mexico attacks a strawman when it argues that Legacy Vulcan ignores the public-consultation process.[73] As explained in Part II.A.2 above, the 2014 Agreements specifically contemplated that there would be a public-consultation stage in the process to amend the POEL, consistent with Mexican law.[74] The Mexican instrumentalities responsible for advancing the Committee's work, however, abandoned the POEL-amendment process without completing the

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this. *See* Counter-Memorial, ¶¶ 355, 360; *cf.* Reply, ¶ 49. Mexico also asserted that the Committee "had to stop meeting [...] due to issues related to the change of government of the Municipality of Solidaridad," but could not refute the fact that this change of government occurred *after* the Committee was supposed to have completed its work. Counter-Memorial, ¶¶ 355, 360; *cf.* Reply, ¶¶ 46-47. Nor could Mexico explain why this would stop the POEL-amendment process altogether for years. Mexico's argument is irrelevant in any event, because the party that assumed the obligation was the Municipality, not a particular municipal administration. Mexico then argued that the timeline to amend the POEL was unrealistic, but its comparators were clearly distinguishable, and the timeline in the 2014 Agreement was proposed by Mexican officials, not CALICA. *See* Counter-Memorial, ¶¶ 240, 389; *cf.* Reply ¶¶ 55-57.

[68] *See* Memorial, ¶ 123, 125, 131 (quoting Witness Statement-[redacted]-Claimant's Memorial-ENG, ¶¶ 45, 48, 52, 59).

[69] C-0103-SPA.

[70] C-0102-SPA.40.

[71] C-0108-SPA.

[72] Witness Statement-[redacted]-Claimant's Memorial-ENG, ¶ 59.

[73] Post-Hearing Brief-Respondent-SPA, ¶¶ 34-35.

[74] C-0022-SPA.11, 13 (providing for two weeks of public consultations, which is even more time than the eleven days provided for the POEL itself. *See* C-0080-SPA.23, 25, 38).

remaining phases, let alone convening a public consultation.[75] Mexico has provided no evidence that the public-consultation process would have led to a rejection of CALICA's proposed amendment to the POEL. The record shows the opposite: CALICA presented its proposal without objection; even CEMDA, the most litigious environmental organization in Mexico, had no objection to CALICA's amendment request;[76] and the technical analysis of the environmental characteristics of Solidaridad commissioned by the Committee showed that CALICA's lots were located in the area best suited for quarrying in the whole Municipality.[77]

28. Because Mexico's abandonment of the POEL-amendment process was politically motivated and done to favor local interests, Mexico's conduct was arbitrary and failed to accord Legacy Vulcan and CALICA fair and equitable treatment in breach of NAFTA Article 1105.

4. Mexico's Repudiation of the 2014 Agreements Constitutes a "Measure" Under NAFTA Article 201

29. Mexico argues for the first time in this proceeding that the 2014 Agreements are not "measures" within the meaning of NAFTA Article 201 and do not implicate Mexico's obligations under the Treaty.[78] Mexico's eleventh-hour defense is a red herring: the measure at issue in this arbitration is Mexico's arbitrary *repudiation* of the 2014 Agreements, not the agreements themselves. Mexico's suggestion that this measure is excluded from NAFTA lacks any basis in the Treaty or international law and defies common sense.

30. Arbitral tribunals have confirmed that the ordinary meaning of the term "measures" in the context of investment treaties "is wide enough to cover *any* act, step or proceeding," and therefore encompasses "any action or omission" of a respondent State or its instrumentalities.[79] NAFTA tribunals have similarly found that "the term 'measures' in NAFTA Article 201 must be understood broadly," including State conduct resulting from, or relating to, memoranda of understanding and other agreements executed by the State.[80]

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[75] *See* Memorial, ¶¶ 120. *See also* Post-Hearing Brief-Claimant-ENG, Part III.B.2.

[76] *See* ¶ 23 above.

[77] *See* ¶ 24 above.

[78] Post-Hearing Brief-Respondent-SPA ¶¶ 5, 9; *id.* Annex A – Question 14, ¶ 103.

[79] *Saluka Investments B.V. v. Czech Republic,* Partial Award, ¶ 459 (17 March 2006) (Watts (P), Yves Fortier, Behrens) (CL-0027-ENG) (emphasis added). *See also* C-0139-ENG.7, Article 2 Comment (4) ("Conduct attributable to the State can consist of actions or omissions.").

[80] *Mesa Power Group, LLC. V. Government of Canada*, PCA Case No. 2012-17, Award, ¶¶ 254-256 (26 March 2016) (Kaufmann-Kohler (P), Brower, Landau) (CL-0015-ENG) (listing among the measures challenged by the claimant various memoranda of understanding, agreements, and contracts executed by

31. It is therefore clear that Mexicos' failure to perform and later repudiation of the 2014 Agreements constitute "measures" under NAFTA Article 201.[81]

5. Whether the CUSTF Was Required Before the POEL Came Into Effect Does Not Detract from Mexico's Wrongful Repudiation of the 2014 Agreements

32. Mexico's argument that CALICA was purportedly "negligent" for not obtaining the CUSTF before the POEL came into effect is wrong. It is also a distraction from the core issue that Mexico repudiated its commitment to take all necessary steps to achieve a discrete amendment of the POEL that would enable quarrying in La Adelita and merely confirm what Mexican instrumentalities had time and again represented beforehand: that quarrying was possible in that lot and CALICA had vested rights to do so.

33. Had Mexico truly believed that CALICA was "negligent" for failing to obtain the CUSTF, its instrumentalities presumably would not have (i) agreed in writing to amend the POEL to further "acknowledge" (*reconocer*) that quarrying was permitted in La Adelita[82]; and (ii) invested resources to begin that amendment process to satisfy the needs of a company that was purportedly at fault.[83]

34. Mexico's argument that CALICA should have obtained the CUSTF before the POEL was issued is belied by the law and Mexico's decades-long conduct in respect of El Corchalito, which shared the same zoning as La Adelita's pre-POEL zoning and was never claimed to require a CUSTF.[84] Even if it would have been *possible* for CALICA to obtain the CUSTF before the POEL came into effect, doing so would have been unnecessary at that time for two reasons: (i) Mexican law *did not require* CALICA to obtain it until the removal of vegetation was to be conducted, and (ii) this authorization is required only for "forested terrains," which La Adelita was not.[85]

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the Government of Canada, as well as actions relating to those agreements, and concluding that "the Tribunal is satisfied that the acts listed above fall within the ambit of Article 201").

[81] Mexico's suggestion that even the breach of a legally binding contract could not constitute a violation of Article 1105 is blatantly wrong. Post-Hearing Brief-Respondent-SPA, Annex A – Question 14, ¶ 104. As set forth in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, "the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act." C-0139-ENG.12, Article 4 Comment (6).

[82] *See* ¶ 12 above.

[83] *See* ¶¶ 15, 25 above.

[84] Post-Hearing Brief-Respondent-SPA, Annex A – Question 6, ¶ 34.

[85] *Id.*; Tr (English), Day 1, 39:10-20 (Claimant's Opening Statement); Tr. (Spanish), Day 3, 681:14-22 ([redacted] presentation) [English, 592:15-20].

35. Under Mexican law, the CUSTF is required only with respect to terrains that are considered to be "forested terrains."[86] In evaluating whether to grant the CUSTF, SEMARNAT must consider the applicable zoning regime and refuse to grant a CUSTF if doing so would be incompatible with that regime.[87] The CUSTF is therefore tied to the local zoning regime and is not independent from it. As Mexico points out, the law also has for decades defined a "forested terrain" in almost identical terms; as a "terrain" understood to be (i) covered by vegetation, and (ii) producing forestry goods and services.[88] Prior to the POEL, none of CALICA's lots was legally capable of producing forestry goods and services because they were zoned as incompatible for forestry.[89] Because whether a terrain qualifies as "forested" for purposes of the CUSTF is intertwined with the local zoning regime and La Adelita did not qualify as such prior to the POEL, CALICA was not required to obtain the CUSTF before the POEL came into effect.[90]

36. Mexico's contemporaneous conduct confirms that the CUSTF was *not* required so long as the UGAs applicable to CALICA's lots allowed quarrying and identified "forestry" (*forestal*) as an incompatible use. PROFEPA has been aware that CALICA has quarried La Rosita and El Corchalito for *decades* without a CUSTF, and it has never even suggested that this was a problem, despite being duty-bound under Mexican law to enforce environmental requirements.[91] In 2012, PROFEPA inspected CALICA's lots and concluded that CALICA's operations met all applicable environmental requirements.[92] Even after the flawed inspections of 2017, PROFEPA never raised the absence of a CUSTF for El Corchalito as a potential or actual violation.[93] In its

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[86] Tr. (Spanish), Day 3, 677:18-678:3, 702:12-704:18 ([redacted] presentation and cross-examination) [English, 589:9-16, 609:3-610:17]. This is undisputed. *See* Post-Hearing Brief-Respondent-SPA, Annex A – Question 7, ¶ 56.

[87] *See* Post-Hearing Brief-Respondent-SPA, Annex A – Question 7, ¶ 53 (stating that today SEMARNAT would deny an application for a CUSTF for La Adelita based on the applicable UGA). *See also* SOLCARGO Second Report, ¶ 74 (RE-003) ("la solicitud de []CUSTF que presente ante SEMARNAT implicara que dicha autoridad analice la procedencia conforme al marco legal vigente, es decir, [...] el POEL [.]").

[88] Post-Hearing Brief-Respondent-SPA, Annex A – Question 6, n.225 (citing [redacted]-0011.12, Article 7.LXXI); R-0026-SPA.13 (same). *See also* R-0124-SPA ¶¶ 65, 71.2, 109 (the *Sentencia* referring to this two-pronged definition).

[89] *See* Expert Report-[redacted]-Environmental-Claimant's Memorial-SPA, ¶ 44 (systematizing relevant portions of the POET in C-0078-SPA, which indicate that forestry activities cannot be carried out in UGA 30); C-0078-SPA.42.

[90] *See* Post-Hearing Brief-Claimant-ENG, Appendix A – Question 6, pp. 10-11.

[91] *See* [redacted]-0015.53-54, Article 45 I, XI, XVII, XXIII.

[92] *See* Post-Hearing Brief-Claimant-ENG, ¶¶ 61, 125; Memorial, ¶ 57; Reply, ¶ 92; C-0043-SPA.2, 57.

[93] *See* C-0117-SPA.291-294; R-0005-SPA.163-164. As Respondent has noted, the Corchalito/Adelita Federal Environmental Authorization required CALICA to comply with other environmental requirements. Post-Hearing Brief-Respondent-SPA, Annex A – Question 6, ¶ 34. If CALICA had been required to obtain

Post-Hearing Reply, Mexico surprisingly asserts for the first time in this proceeding and after so many decades that a CUSTF was required for La Rosita and El Corchalito.[94] This strains credulity.

37. To downplay its conduct regarding the CUSTF, Mexico makes the unremarkable point that those who are subject to a law must comply with that law even absent affirmative requests to do so by governmental authorities.[95] But — by the same token — those who are *not* subject to a law are not required to comply with it, as was the case with CALICA and the CUSTF before the POEL. The fact that no Mexican authority has ever enforced the federal forestry law against CALICA while knowing of its quarrying activities in La Rosita and El Corchalito without a CUSTF strongly indicates that no such permit was required.

38. The same is true with respect to La Adelita, whose UGA prior to the POEL identified forestry as an incompatible use, just like the UGAs applicable to La Rosita and El Corchalito.[96] In a conservative reading of the forestry law, SEMARNAT indicated in 2013 that it could not issue the CUSTF despite the POEL's non-retroactivity with respect to CALICA's vested quarrying rights, but could do so if the POEL expressly recognized those rights.[97] CALICA accordingly sought and secured Mexico's commitment to get the POEL amended in this way, but Mexico ultimately repudiated that commitment, effectively precluding CALICA from exercising its vested rights to quarry in La Adelita.

39. Finally, Mexico suggests — for the first time in this proceeding — that CALICA could obtain a CUSTF today regardless of the fact that the POEL prohibits quarrying in most of La Adelita.[98] This suggestion is at odds with Mexico's own arguments in this arbitration. As Mexico explained in its response to Tribunal Question No. 7, if CALICA were to request a CUSTF, "SEMARNAT would have to reject [that] request [...] because the 2009 POEL assigned a conservation policy (UGA 5) to the territory in which the La Adelita property is located, which

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a CUSTF for El Corchalito, PROFEPA would have flagged this as a purported non-compliance in breach of this provision of the Authorization. PROFEPA did not do this.

[94] Post-Hearing Brief-Respondent-SPA, Annex A – Question 7, ¶¶ 46—50.

[95] *Id.* Annex A — Question 8, ¶ 58.

[96] C-0078-SPA.13; Tr. (Spanish), Day 3, 681:6-11 ([redacted] presentation: "en [...] []el POET Corredor Cancún–Tulum 2001, se determinaba como uso incompatible el forestal para el predio La Adelita.") [English, 592:10-12]; Expert Report-[redacted]-Environmental-Claimant's Memorial-SPA, ¶ 44.

[97] Post-Hearing Brief-Claimant-ENG, Appendix A – Question 8, p. 20; Memorial, ¶ 85; Witness Statement-[redacted]-Claimant's Memorial-ENG, ¶¶ 23-25.

[98] Post-Hearing Brief-Respondent-SPA, Annex A – Question 9, ¶ 70 ("[se] podría dictaminar como favorable el proyecto de desarrollo *a pesar de lo que diga el programa de ordenamiento ecológico vigente* [(esto es, el POEL)]") (emphasis added).

implies that mining activity is incompatible with the land use vocation of that property."[99] As Legacy Vulcan has explained and Mexico's response to Question No. 7 confirms, applying for a CUSTF would have been futile.[100] CALICA thus pursued the POEL amendment — an amendment that the relevant state and municipal authorities deemed viable and expressly agreed to undertake in the 2014 Agreements. Mexico has repudiated that obligation and frustrated CALICA's expectation to exercise it vested rights to quarry La Adelita. That is the real issue before the Tribunal. Mexico's CUSTF-related arguments are a red herring and should be rejected.

B. MEXICO'S EFFORT TO DEFEND ITS CONDUCT WITH RESPECT TO EL CORCHALITO FAILS

40. Mexico's effort to defend its shutdown of quarrying operations in El Corchalito fails to disprove that PROFEPA, among other irregularities, arbitrarily (i) turned a blind eye to key evidence showing that the purported violation animating the shutdown — the alleged breach of the total 140-hectare area allowed for underwater quarrying — did not exist; (ii) sanctioned CALICA for purported violations that had not been identified as such in PROFEPA's charging document, and preserved the shutdown indefinitely by tying CALICA in bureaucratic knots; and (iii) did all of this on the premise of purported (and inexistent) environmental harm PROFEPA never even tried to prove.

1. PROFEPA Deliberately Turned a Blind Eye to CALICA's Evidence Regarding the Area of Underwater Extraction in El Corchalito

41. In its Post-Hearing Brief, Mexico persists in trying to defend its repeated rejection of CALICA's expert evidence to address PROFEPA's area measurements with arguments that were debunked at the Hearing and in Legacy Vulcan's Post-Hearing Brief.

42. According to Mexico, PROFEPA was justified in dismissing CALICA's proffered expert evidence after the November 2017 inspection because that evidence was identical to what CALICA proffered and PROFEPA admitted after the March 2017 inspection.[101] As Legacy Vulcan explained in its Post-Hearing Brief, however, this *post-hoc* rationale for PROFEPA's action — articulated for the first time in PROFEPA's October 2020 Resolution, not when PROFEPA

[99] Post-Hearing Brief-Respondent-SPA, Annex A – Question 7, ¶ 53 (free translation). This is in line with what both Parties have been asserting throughout these proceedings. *See* also Memorial, ¶ 85 (describing SEMARNAT's 2013 Indication); SOLCARGO Second Report, ¶ 74 (RE-003).

[100] *See* Post-Hearing Brief-Respondent-SPA, Annex A – Question 7, ¶ 53 (stating that an application for a CUSTF today would be rejected based on the applicable UGA).

[101] Post-Hearing Brief-Respondent-SPA, ¶¶ 78, 82.

rejected the evidence in 2018[102] — makes no sense because CALICA's proffered expert evidence related to the *new area measurements* taken in the November 2017 "supplemental" inspection.[103] In other words, the expert could not possibly have addressed in his first report — which covered the measurements taken in the March 2017 inspection — what PROFEPA did or failed to do in its "supplemental" inspection of November 2017 — when PROFEPA took a second set of measurements — the flawed findings of which constituted the sole basis for the 2018 shutdown.[104]

43. PROFEPA simply did not want to bother with inconvenient answers or opinions that would detract from its aggressive course of action against CALICA. If anything, the fact that PROFEPA *admitted* CALICA's expert evidence after the March 2017 inspection and refused to do so with respect to the same type of evidence after the November 2017 "supplemental" inspection confirms that this refusal was arbitrary and pretextual.[105]

44. Mexico's assertion that PROFEPA *did* admit CALICA's proffered evidence[106] is false. After PROFEPA's November 2017 inspection and area measurements, and again after the January 2018 Shutdown Order, CALICA offered to submit expert evidence in civil engineering to address those measurements.[107] PROFEPA did not allow the expert in civil engineering that CALICA proffered to address the specific measurements and spatial representations reflected in the November 2017 inspection report.[108] That evidence was plainly *not* admitted or even considered by PROFEPA.

45. Mexico also repeats the argument that PROFEPA's rejection of evidence was justified because its inspectors conducted a georeferenced survey of the underwater quarrying area, not a topographic survey, and CALICA's proffered expert would have purportedly addressed only a topographic survey.[109] As was confirmed at the Hearing and Legacy Vulcan explained in its

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[102] *Compare* R-0005-SPA.25 (stating the following as a reason for rejecting CALICA's proffered evidence: "aunado a que el contenido del cuestionario sobre el que se señaló debía versar, se identifica plenamente con aquel que sirvió de base para el desahogo de la misma prueba ofrecida el veintiséis de mayo de dos mil diecisiete"), *with* C-0117-SPA.191 (lacking that text) and C-0125-SPA.19 (same).

[103] Post-Hearing Brief-Claimant-ENG, ¶¶ 109-110.

[104] *Id.* ¶ 109; C-0146-SPA.40 (tying expert evidence proffered to the November 2017 inspection and specific pages of that inspection's report); C-0124-SPA.22 (same).

[105] *See* Tr. (English), Day 1, 52:5-53:19 (Claimant's Opening Statement).

[106] Post-Hearing Brief-Respondent-SPA, ¶ 77.

[107] C-0146-SPA.40, 42; C-0124-SPA.22.

[108] C-0117-SPA.191; C-0125-SPA.19. The word "*desechar*" (used by PROFEPA) means to (i) exclude (*excluir*) and (ii) not to admit something (*no admitir algo*). "Desechar," Real Academia Española, Diccionario de la Lengua Española, https://dle.rae.es/desechar?m=form.

[109] Post-Hearing Brief-Respondent-SPA, ¶¶ 79, 82.

Post-Hearing Brief, however, (i) there is no meaningful difference between a georeferenced and topographic survey in this context,[110] and (ii) for the avoidance of any doubt, CALICA made extra clear that its expert evidence would address PROFEPA's "measurements" of the area quarried in El Corchalito.[111] In a revealing display, PROFEPA's Deputy Counsel Silvia Rodríguez read away the word "measurements" from CALICA's proffer of proof during cross-examination, unwittingly confirming the arbitrary nature of PROFEPA's conduct:[112]

> "[Rodríguez:] La oferta de Calica es únicamente, únicamente, al levantamiento topográfico plasmado y/o mediciones de representaciones espaciales. Cuando dice 'únicamente al levantamiento topográfico', pues ya está catalogando que ofrece únicamente al levantamiento topográfico. [...].
>
> [Claimant's Counsel]: O sea que 'y/o mediciones', ¿ustedes no le dieron ningún tipo de peso a ese texto?
>
> [Rodríguez:] El texto pesa porque la empresa dice 'únicamente al levantamiento topográfico'."[113]

46. Because PROFEPA's action cannot reasonably be defended on its merits, Mexico tries to blame CALICA for the agency's failures. According to Mexico, CALICA is to blame for the shutdown because it did not adequately exercise its right to submit evidence within PROFEPA's administrative proceeding, as suggested by evidence submitted in this arbitration and the criminal proceeding but not in PROFEPA's administrative proceeding.[114] This argument ignores that, when CALICA tried to submit expert evidence at the proper procedural stage of the administrative proceeding — not once but twice (first after the November 2017 inspection and again after the Shutdown Order) — PROFEPA refused to allow it for no valid reason, as explained above. No such restriction has existed in the criminal proceeding or here.

47. Mexico's argument also ignores that the evidence submitted in this arbitration and in the criminal proceeding is meant to confirm the arbitrariness of PROFEPA's disregard for exculpatory evidence in its predetermined administrative proceeding against CALICA. Civil engineer [redacted] independently verified that PROFEPA's area measurements in November

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[110] Post-Hearing Brief-Claimant-ENG, ¶¶ 103-104; *see* Tr. (English), Day 1, 53:2-16 (Claimant's Opening Statement).

[111] Post-Hearing Brief-Claimant-ENG, ¶¶ 107-108; *see* Tr. (English), Day 1, 54:6-55:3 (Claimant's Opening Statement); C-0124-SPA.22 (offering "PERICIAL EN MATERIA DE INGENIERÍA CIVIL, con referencia únicamente al levantamiento topográfico plasmado *y/o mediciones* y las representaciones espaciales que obran en las hojas [...] 20 a 47 del Acta de Inspección [...]") (emphasis added).

[112] Post-Hearing Brief-Claimant-ENG, ¶ 108.

[113] Tr. (Spanish), Day 3, 629:11-630:5 (Rodríguez cross-examination) [English, 548:7-21].

[114] Post-Hearing Brief-Respondent-SPA, ¶ 76; *id*. Annex A – Question 12, ¶ 89.

2017 were "sloppy" and thus unreliable[115] — exactly what CALICA's expert would have demonstrated in the administrative proceeding had PROFEPA not blocked him from doing so. It bears emphasis that CALICA's expert exposed errors in PROFEPA's work after the March 2017 inspection, leading to PROFEPA's irregular do-over of area measurements in November 2017.[116]

48. The evidence gathered in the criminal investigation — *three* independent area measurements showing that CALICA *did not* quarry more than [redacted] hectares under the water table in El Corchalito[117] — only illustrates that basing an indefinite shutdown on "sloppy" area measurements while failing to hear or dismissing contrary evidence in the administrative proceeding was unjustified and arbitrary. The contrary evidence in PROFEPA's administrative record included independent expert reports submitted as "corrective measures" (*e.g.*, a bathymetric study and georeferenced surveys of the quarried area) showing underwater quarrying of less than [redacted] hectares, to which PROFEPA gave no weight.[118] As shown by its rejection of CALICA's proffered expert evidence, its disregard of "corrective measures" evidence, and its discounting of area measurements taken within the criminal proceeding, PROFEPA has doggedly and deliberately turned a blind eye to facts that confirm the inaccuracy of its area measurements, which are the basis of its indefinite shutdown of El Corchalito.

49. Mexico's suggestion that the Navy's measurements in the criminal proceeding "confirma[n] que CALICA efectivamente se excedió las 140 hectáreas permitidas"[119] underscores its deliberate disregard of the facts. Those measurements — concededly more precise than others taken previously and based on points agreed to by all relevant parties (including PROFEPA) —

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[115] Post-Hearing Brief-Claimant-ENG, ¶ 105.

[116] Tr. (English), Day 1, 50:14-21 (Claimant's Opening Statement); Reply, ¶¶ 63-66. Despite Mexico's assertions to the contrary, Post-Hearing Brief-Respondent-SPA, ¶¶ 57-60, PROFEPA's "supplemental" inspection *was* irregular and violated CALICA's due process rights. Tr. (Spanish), Day 3, 662:1-19 ([redacted] presentation) [English, 575:1-15]; *id.* at 773:17-774:6 ([redacted] presentation) [English, 665:21-666:3]. It is revealing that PROFEPA — in yet another *post-hoc* rationale — labeled its inspectors as "experts" in an apparent effort to bring their new measurements within the "means of proof" recognized under Mexican law, even though they were not designated as such and contemporaneous documents show they were not acting as "experts." *See id.* at 622:21-623:20 (Rodríguez cross-examination) [English, 543:14-544:11]; C-0118-SPA.2, 50 (2017 November inspection report referring to PROFEPA's inspectors only as "inspectors"); C-0110-SPA.14, Article 50 (law relied upon by PROFEPA for "supplemental" inspection, referring to "means of proof"); [redacted]-0041.4, Article 93 (law defining "means of proof" as including expert reports but *not* administrative inspections).

[117] *See* Post-Hearing Brief-Claimant-ENG, ¶ 113.

[118] *E.g.*, Reply, ¶¶ 79-80; Post-Hearing Brief-Claimant-ENG, ¶¶ 113-114; C-0126-SPA.15 (stating that the body of water in El Corchalito had an area of [redacted] hectares); R-0005-SPA.85-88, 109-110, 112-113 (refusing to give evidentiary value to this evidence).

[119] Post-Hearing Brief-Respondent-SPA, ¶ 96.

yielded an area of underwater extraction of [redacted] hectares.[120] As Legacy Vulcan explained in its Post-Hearing Brief, Respondent's effort to downplay this fact and to highlight a flawed *post-hoc* "adjustment" to a *previous* third-party area measurement that had also yielded less than [redacted] hectares fails.[121]

50. Mexico also blames CALICA for the shutdown by suggesting that any errors in PROFEPA's November 2017 measurements are CALICA's fault because the company purportedly pointed out the area to be measured and did not object to the inspectors' work during the inspection.[122] This argument misrepresents the facts. During the November 2017 inspection, CALICA pointed out that El Corchalito's body of water represented the underwater quarrying area, and PROFEPA's inspectors purported to measure that area.[123] This in no way means that CALICA consented to PROFEPA's flawed measurements. The law and inspection report are clear: CALICA had the right to comment and offer evidence five days after the inspection.[124] When CALICA timely tried to show that the inspectors' work was unreliable, PROFEPA prevented CALICA from doing so for no valid reason.[125] That is the real issue here.

51. Mexico also tries to defend PROFEPA's pretextual disregard of CALICA's evidence by distorting and downplaying the testimony of civil engineer [redacted] at the Hearing. For example, Respondent mischaracterizes [redacted] testimony to assert that PROFEPA's area measurement "was completely validated" by [redacted][126] when in reality [redacted] confirmed that PROFEPA's November 2017 measurements were "sloppy."[127] As [redacted] explained in [redacted] report, [redacted] verified that the coordinates in PROFEPA's November 2017 inspection report in fact yielded 142.15 hectares of underwater quarrying, as PROFEPA claimed.[128] The testimony Mexico quotes

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[120] Post-Hearing Brief-Claimant-ENG, ¶ 114; Claimant's Letter to the Tribunal, pp. 1-3 (25 October 2021).

[121] *Id.* ¶¶ 115-116.

[122] Post-Hearing Brief-Respondent-SPA, ¶ 92.

[123] C-0118-SPA.10 ("Continuando con el recorrido por el área de extracción, se observó un *espejo de agua* de forma irregular, que a dicho del visitado se formó como resultado de las áreas en las ya se llevó a cabo la extracción de material por debajo del manto freático.") (emphasis added).

[124] *Id.* p. 49 ("Una vez concluida la presente inspección, se hace constar que los inspectores actuantes comunicaron a 'EL VISITADO' que [...] tiene derecho [...] a formular observaciones y ofrecer pruebas en relación con los hechos u omisiones asentados en esta Acta, *o hacer uso de su derecho por escrito en el término de cinco días hábiles siguientes a la fecha de cierre de la presente diligencia* [...].") (emphasis added); C-0127-SPA.79 (LGEEPA, Article 164(2)).

[125] *See* Post-Hearing Brief-Claimant-ENG, ¶ 101.

[126] Post-Hearing Brief-Respondent-SPA, ¶ 84 ("Esta medición quedó plenamente validada por [redacted]).

[127] Tr. (English), Day 4, 886:14-20 ([redacted] responding to questions from the Tribunal).

[128] Expert Report-[redacted]-Civil Engineering-Claimant's Reply-SPA, ¶¶ 24-29.

in its Post-Hearing Brief to suggest that [redacted] validated PROFEPA's measurements merely confirms what [redacted] said in his report: that [redacted] verified that the coordinates in PROFEPA's inspection report corresponded to 142.15 hectares.[129] To suggest that [redacted] conceded the validity of PROFEPA's measurements is to grossly mischaracterize [redacted] testimony.[130]

52. Mexico similarly misrepresents [redacted] testimony at the Hearing to argue that [redacted] conclusions "reflect uncertainty" (*refleja incertidumbre*).[131] Yet [redacted] was again confirming what [redacted] said in [redacted] report: that the lack of pictures reflecting PROFEPA's precise measurements in its November 2017 inspection report generated uncertainty about PROFEPA's work, which — after [redacted] expert assessment — [redacted] concluded was imprecise and "sloppy."[132] As a civil engineer, [redacted] was qualified to so conclude, given that the issue assessed was the measurement of an area.[133] Contrary to what Mexico suggests, experience with PROFEPA proceedings or environmental issues was not required for such an assessment.[134]

53. As confirmed at the Hearing, the evidence in this case indicates that, based on pretextual reasons, PROFEPA prevented CALICA from showing that it was in compliance with the total area for underwater quarrying implied in the Corchalito/Adelita Federal Environmental Authorization. This fact, combined with the myriad other irregularities plaguing PROFEPA's administrative proceeding, show that PROFEPA arbitrarily shut down CALICA's operations in El Corchalito in violation of NAFTA Article 1105. Respondent has failed to show otherwise.

2. Mexico Offers No Credible Defense for the Myriad Other Irregularities Plaguing PROFEPA's Shutdown of El Corchalito

54. Mexico's Post-Hearing Brief makes no attempt to defend PROFEPA's sanctioning of CALICA for alleged violations that had never been identified as such in the Shutdown Order. As was confirmed at the Hearing, this action further shows that PROFEPA's measures against CALICA were arbitrary in violation of NAFTA Article 1105.[135]

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[129] Tr. (Spanish), Day 4, 1023:16-1025:5 ([redacted] Presentation) [English, 869:11-871:15]; *see* Post-Hearing Brief-Respondent-SPA, ¶ 84 (quoting part of this excerpt).

[130] *See, e.g.*, Tr. (English), Day 4, 886:14-20 ([redacted] responding to questions from the Tribunal).

[131] Post-Hearing Brief-Respondent-SPA, ¶ 90.

[132] Tr. (English), Day 4, 886:14-20 ([redacted] responding to questions from the Tribunal). *See also* Expert Report-[redacted]-Civil Engineering-Claimant's Reply, ¶¶ 63-66 (stating [redacted] conclusions).

[133] Tr. (English), Day 4, 854:7-855:6 ([redacted] direct examination, describing [redacted] qualifications); Expert Report-[redacted]-Civil Engineering-Claimant's Reply, ¶¶ 1-5, Exhibit 1.

[134] Post-Hearing Brief-Respondent-SPA, ¶ 94.

[135] Post-Hearing Brief-Claimant-ENG, ¶¶ 118-128.

55. Instead of addressing this issue, Respondent treats as "undisputed" PROFEPA's allegation that CALICA breached the Corchalito/Adelita Federal Environmental Authorization by failing to quarry El Corchalito and La Adelita simultaneously, and by purportedly quarrying at a faster pace per year than authorized.[136] This misses the mark: the issue is that, by not identifying these purported violations as such in the Shutdown Order, PROFEPA effectively deprived CALICA of an opportunity to defend itself and to show that the purported "violations" did not exist.[137]

56. Regardless, it is untrue that these purported violations occurred or are undisputed. As was confirmed at the Hearing, not even PROFEPA considered — before its Resolution of 2020 — that CALICA was obligated to quarry El Corchalito and La Adelita simultaneously.[138] It inspected CALICA's operations in 2012, expressly noted that CALICA was quarrying *only* El Corchalito, and found that CALICA was in full compliance with the Corchalito/Adelita Federal Environmental Authorization.[139] The reason is simple: that Authorization recognized CALICA's *right* to quarry those lots but nowhere imposed an *obligation* to quarry them simultaneously.[140] As explained at the Hearing, CALICA's environmental impact statement did not establish such an obligation, as Mexico suggests;[141] it generally illustrated the quarrying process in each lot without committing CALICA to quarrying both lots simultaneously.[142]

57. Regarding the pace of extraction, while Mexico recognizes that it authorized what CALICA's environmental impact statement states on this issue,[143] Mexico then ignores the environmental impact statement, which explains that CALICA would quarry an *average* of seven hectares per year under the water table.[144] CALICA was not in breach of this provision. After quarrying an area of [redacted] hectares on year 17 of the 20-year federal environmental authorization, CALICA would not have exceeded that area and instead would have quarried at

[136] Post-Hearing Brief-Respondent-SPA, ¶¶ 98-99.

[137] *See, e.g.*, Tr. (English), Day 1, 108:21-110:1 (Claimant's Opening Statement); Reply, Part II.C.4; *id.* ¶ 167.

[138] Post-Hearing Brief-Claimant-ENG, ¶¶ 124-125.

[139] *Id.* ¶ 125; C-0043-SPA.2-5, 57.

[140] Post-Hearing Brief-Claimant-ENG, ¶ 127.

[141] Post-Hearing Brief-Respondent-SPA, Annex A – Question 12, ¶ 86; *see* Rejoinder, ¶¶ 25-29.

[142] Tr. (English), Day 1, 59:11-60:14 (Claimant's Opening Statement); *see* C-0077-SPA.24, 51-52.

[143] Post-Hearing Brief-Respondent-SPA, Annex A – Question 12, ¶ 84 ("La AIA Federal estableció la obligación de explotar conforme a un ritmo o velocidad de extracción que fue establecida en los términos y condicionantes de la AIA Federal, y que *reflejaba lo que la empresa señaló en su Manifestación de Impacto Ambiental (MIA)*.") (emphasis added); *see* Post-Hearing Brief-Respondent-SPA, ¶ 74.

[144] Reply, ¶ 97; *see id.* n.206; C-0077-SPA.67, 82 (CALICA's environmental impact statement explaining that "se pretende explotar un promedio de 28 hectáreas anuales, de las cuales corresponden 7 hectáreas debajo del nivel freático") (emphasis added).

greater allowable depths within that area through year 20 (*i.e.*, 2020) — thus staying well within the authorized seven-hectare yearly average.[145]

58. Accordingly, absent PROFEPA's shutdown, CALICA could have continued quarrying El Corchalito without running afoul of the Corchalito/Adelita Federal Environmental Authorization. And, absent PROFEPA's specious finding that CALICA violated that Authorization, CALICA could have easily secured its renewal before its expiration in December 2020, especially given that — as the Parties' environmental law experts acknowledged (despite Ms. Rodríguez's dissent)[146] — SEMARNAT had already evaluated the environmental impacts of CALICA's quarrying activities for 42 years.[147] Respondent alleges that this renewal would not have been automatic and was still subject to SEMARNAT's analysis,[148] but it has offered no evidence to suggest that the renewal would have been denied absent PROFEPA's irregular finding. The record supports the opposite.[149]

59. Regarding Legacy Vulcan's showing that PROFEPA has preserved the shutdown and effectively impeded its removal through conditions that cannot be complied with,[150] Mexico again points to pending domestic litigation as precluding the relief sought in this arbitration for the El Corchalito dispute.[151] As Legacy Vulcan has explained, NAFTA expressly provides that a claimant or its enterprise may file or maintain domestic proceedings for injunctive or declaratory relief relating to the same measures claimed in an arbitration to be in violation of NAFTA.[152] That is the case here: CALICA has exercised its right to seek declaratory relief with respect to certain

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[145] Reply, ¶ 97; *id.* n.218. Extraction under the water table at El Corchalito was well below the depth and volume parameters set forth in the Corchalito/Adelita Federal Environmental Authorization. *Id.* ¶ 79. By 2017, CALICA had quarried no more than [redacted] of materials under the water table, *see* C-0126-SPA.15; C-0147-SPA.2, from a maximum authorized volume of [redacted] cubic meters, *see* R-0005-SPA.83. The depth of extraction ranged from [redacted], *see* C-0126-SPA.15, whereas the limit was 12 meters, C-0017-SPA.11, 33.

[146] SOLCARGO Second Report, ¶ 122 (RE-003) ("[redacted] está en lo correcto al señalar que la evaluación del impacto ambiental a partir del proyecto presentado en la MIA Federal comprendió los 42 años de la vida útil del proyecto, mientras que la AIA Federal únicamente autorizó 20 años."); Tr. (Spanish), Day 3, 637:7-18 (Rodríguez cross-examination) [English, 554:18-555:4].

[147] *See* C-0017-SPA.13, 35 (TÉRMINO SEGUNDO); Expert Report-[redacted]-Environmental-Claimant's Memorial-SPA, ¶¶ 248-250; Expert Report-[redacted]-Environmental Law-Claimant's Reply-Second Report-SPA, ¶¶ 64-66.

[148] Post-Hearing Brief-Respondent-SPA, ¶ 107.

[149] All of CALICA's state environmental authorizations have been renewed without exception — several times — and there is no evidence of a denied application for a permit, license, or authorization in the record. *See, e.g.*, Memorial, n.127, ¶ 75; C-0074-SPA.13, 16; C-0075-SPA.24, 31 (see pp. 3, 11 for clearer legibility).

[150] Post-Hearing Brief-Claimant-ENG, ¶¶ 129-134.

[151] *See* Post-Hearing Brief-Respondent-SPA, ¶¶ 100-104, 106, 110.

[152] Post-Hearing Brief-Claimant-ENG ¶ 22; NAFTA, Article 1121 (C-0009-ENG).

of Mexico's administrative actions in domestic courts, while Legacy Vulcan has exercised its right to seek compensation via arbitration for Mexico's breaches of NAFTA. Mexico's violations of domestic law are background facts that the Tribunal may consider, but the Tribunal is not required to find that Mexico violated Mexican law in order to find that Respondent breached NAFTA.[153] The argument that domestic litigation should lead the Tribunal to reject Legacy Vulcan's arbitral claim ignores the Treaty's text and the rulings of multiple tribunals, which have correctly rejected similar arguments.[154]

60. Mexico's speculation that domestic litigation might affect the measures relating to El Corchalito[155] fairs no better because, as [redacted] confirmed at the Hearing, the pending *nulidad* proceeding may take up to five more years to conclude,[156] and Legacy Vulcan would no longer have a viable Project in Mexico by then.[157]

61. Mexico is similarly off-track when it blames CALICA for SEMARNAT's indefinite "suspension" of CALICA's application to renew and — pursuant to PROFEPA's instruction in its October 2019 Resolution — modify the Corchalito/Adelita Federal Environmental Authorization.[158] While CALICA initiated a domestic proceeding to challenge this suspension,[159] the court has not enjoined SEMARNAT from processing or granting CALICA's application, which remains pending well over a year after its submission. This application also lacks a realistic prospect of being granted in light of PROFEPA's irregular finding that CALICA violated the Corchalito/Adelita Federal Environmental Authorization and PROFEPA's concomitant failure to "validate" CALICA's compliance with that Authorization.[160]

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[153] *See Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, ¶ 78 (16 December 2002) (Kerameus (P), Bravo, Gantz) (RL-008-SPA) ("Nor is an action determined to be legal under Mexican law by Mexican courts necessarily legal under NAFTA or international law. At the same time, an action deemed to be illegal or unconstitutional under Mexican law may not rise to the level of a violation of international law.") (English version of the Award).

[154] Post-Hearing Brief-Claimant-ENG, ¶¶ 22-23, 25-26.

[155] Post-Hearing Brief-Respondent-SPA, ¶ 102 ("los litigios nacionales pueden llegar a tener un impacto en las medidas que son disputadas dentro de este arbitraje").

[156] Tr. (Spanish), Day 3, 700:1-6 ([redacted] cross-examination) [English, 607:10-14]; Post-Hearing Brief-Respondent-SPA, ¶ 102 (quoting from [redacted] Hearing testimony).

[157] Post-Hearing Brief-Claimant-ENG, ¶ 22; *id.* Appendix A – Question 13, p. 29.

[158] Post-Hearing Brief-Respondent-SPA, ¶¶ 106, 110.

[159] *See* Tabla I: Impugnaciones de CALICA en contra de las Medidas de PROFEPA y SEMARNAT (RD-0003).

[160] Post-Hearing Brief-Claimant-ENG, Appendix A – Question 12, pp. 25-27.

3. Respondent's Assertions of Environmental Harm Are Baseless

62. Respondent insists in its Post-Hearing Brief that there was automatic environmental damage as a matter of law in light of CALICA's alleged violation of the Corchalito/Adelita Federal Environmental Authorization, that Claimant's environmental experts in this arbitration missed this legal point, and that their findings are irrelevant.[161] Mexico's arguments are based on an untenable reading of its own law.[162]

63. Legacy Vulcan has identified multiple irregularities underpinning PROFEPA's shutdown.[163] One such irregularity centered on PROFEPA's imposition of the shutdown without the requisite finding of impending and severe environmental harm from the purported breach of the 140-hectare total of underwater quarrying in El Corchalito.[164] Since one of Respondent's witnesses in this arbitration tried to defend this omission with speculative and unsupported assertions of possible environmental harm,[165] Legacy Vulcan submitted the independent assessment of environmental experts, who actually conducted a scientific study of the body of water at El Corchalito and determined there was *no* environmental damage.[166]

64. Respondent countered with its theory of automatic environmental damage as a matter of law in light of the demonstrated absence of such damage as a matter of fact. This theory is wrong and contrived. "Environmental damage" is specifically defined under Mexican law as the "adverse *and measurable* loss, change, deterioration, impairment, affectation or modification of habitats, ecosystems, natural elements or resources," etc.[167] PROFEPA never bothered to measure any such adverse effects from CALICA's quarrying activities in El Corchalito.

65. The provision Mexico cites to argue that violating an environmental authorization automatically constitutes "environmental damage" stands for no such thing; it is a safe harbor from a finding of environmental damage that *does not operate* if there is a violation of an environmental authorization.[168] At the Hearing, Respondent tried to support its interpretation

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[161] Post-Hearing Brief-Respondent-SPA, ¶¶ 63-73.

[162] Post-Hearing Brief-Claimant-ENG, Part III.C.4.

[163] *E.g.*, Memorial, ¶¶ 138-159; Reply, ¶¶ 58-98, 178.

[164] *E.g.*, Reply, ¶¶ 81-83.

[165] Reply, ¶ 174; Witness Statement of Margarita Balcázar, ¶¶ 91-96 (RW-001); Counter-Memorial, ¶¶ 338-340 (quoting this statement and asserting that there was environmental harm).

[166] Reply, ¶ 87; Expert Report-[redacted]-Environmental Sustainability-Claimant's Reply-SPA, ¶¶ 8-14; Tr. (Spanish), Day 4, 1065:14-1068:6 ([redacted] presentation) [English, 908:12-911:1].

[167] Rejoinder, n.96 (quoting the Federal Law on Environmental Liability (R-0080-SPA)) (emphasis added).

[168] Post-Hearing Brief-Claimant-ENG, ¶¶ 136-137.

by asking non-lawyer environmentalists about the intricacies of the Law of Environmental Liability,[169] but Claimant's legal expert on environmental law, [redacted], *confirmed* that Respondent's interpretation is not only wrong but makes no sense. As [redacted] explained:

> "[M]e parece que *su interpretación es totalmente errónea*. [...] [P]ara acreditar el daño, la autoridad tiene que acreditar que haya sido una pérdida, cambio, deterioro, menoscabo afectación o modificación adversa y *mensurable* [...] *lo que usted lee después en el artículo 6º no es la definición de daño, es la excepción a la definición de daño*. [...] Dentro de los términos y condicionantes de la autorización existen, por ejemplo, el colocar letreros, el sacar fotografías. [...] *No podría una autoridad decir que porque no se colocaron los letreros se causa un daño ambiental*."[170]

66. For all of these reasons and those explained in Legacy Vulcan's pleadings and at the Hearing, Respondent has failed to disprove Claimant's showing that PROFEPA's shutdown of El Corchalito breached its NAFTA obligations toward Legacy Vulcan's investment in Mexico.

C. MEXICO'S EFFORT TO DEFEND ITS DISREGARD OF JUDICIAL CONFIRMATION THAT IT ILLEGALLY COLLECTED PORT FEES FAILS

67. Mexico's Post-Hearing Brief reiterates the same meritless arguments about the port-fees dispute set forth in its pleadings and at the Hearing.[171] For the reasons Legacy Vulcan explained in its own pleadings and at the Hearing,[172] Mexico has disregarded a final, binding judgment of its own judiciary declaring that API Quintana Roo had illegally charged millions of dollars in port fees. Mexico's continued refusal to respect that judgment by reimbursing those ill-gotten fees constitutes a subversion of the rule of law and thereby a breach of NAFTA Article 1105.[173]

III. LEGACY VULCAN IS ENTITLED TO RECOVER FOR ALL LOSSES INCURRED BY REASON OF OR ARISING OUT OF MEXICO'S BREACHES

68. In its Post-Hearing Brief, Mexico argues — for the first time — that NAFTA deviates from the well-established full reparation standard, continues to advance limitations to the scope of recoverable damages nowhere to be found in NAFTA or international law, continues to

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[169] Post-Hearing Brief-Respondent-SPA, ¶ 68 (quoting from the [redacted] cross-examination including their disclaimer that they were not using legal terminology).

[170] Tr. (Spanish), Day 3, 690:22-695:1 ([redacted] cross-examination) (emphasis added) [English, 600:9-603:14].

[171] Post-Hearing Brief-Respondent-SPA, ¶¶ 112-116.

[172] *See* Memorial, ¶¶ 132-137, 224-226; Reply, ¶¶ 106-116, 179-182; Post-Hearing Brief-Claimant-ENG, Appendix A – Questions 2, 3, 16; Post-Hearing Reply-Claimant-ENG, Appendix – Questions 3, 16; Tr. (English), Day 1, 65:13-67:2 (Claimant's Opening Statement).

[173] *See* Memorial ¶¶ 224-226.

misconstrue Legacy Vulcan's claim for damages and the evidence supporting it, and advances a series of speculative arguments. None of Mexico's arguments withstands scrutiny.

A. LEGACY VULCAN IS ENTITLED TO FULL REPARATION

69. The *Chorzów Factory* principle that "the state must make 'full reparation' to compensate for the loss caused by its conduct" is applicable here.[174] Under that standard, Legacy Vulcan is entitled to be placed in the same position as it would have been, had Mexico's unfair and inequitable treatment of Legacy Vulcan's investment not occurred.[175]

70. Mexico argues — for the first time in this proceeding — that NAFTA deviates from the full reparation standard under customary international law. According to Mexico, "las disposiciones del TLCAN que limitan los daños indemnizables [...] prevalecen sobre las disposiciones del derecho internacional consuetudinario, incluido el estándar de reparación plena del caso Chorzów Factory."[176]

71. Mexico's new argument defies the Treaty's mandate to decide issues in dispute in accordance with NAFTA and "applicable rules of international law."[177] Indeed, several NAFTA tribunals have confirmed the applicability under NAFTA Chapter 11 of the standard of full reparation.[178] As Patrick Dumberry explains, "[NAFTA] tribunals have generally turned to customary international law [...] to determine appropriate compensation in cases not involving expropriation. The starting point of their analysis is [...] the *Chorzow Factory* case and the relevant provisions of the ILC Articles on State Responsibility."[179] In particular, Article 31 of the ILC Articles provides that: "[t]he responsible State is under an obligation to make *full* reparation for the injury caused by the internationally wrongful act."[180]

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[174] *Case Concerning the Factory at Chorzów*, PCIJ Judgment No. 13, Decision on the Merits, p. 47 (13 September 1928) (CL-0080-ENG).

[175] *See* Memorial, ¶¶ 251-252; Reply, ¶ 201.

[176] Post-Hearing Brief-Respondent-SPA, ¶ 123.

[177] NAFTA Article 1131(1) (C-0009-ENG).

[178] *See, e.g.*, *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL, Partial Award, ¶¶ 309-312 (13 November 2000) (Hunter (P), Chiasson, Schwartz) (CL-0059-ENG) (hereinafter "*S.D. Myers v. Canada* (Partial Award)"); *Archer Daniels Midland Co. v. United Mexican States,* ICSID Case No. ARB(AF)/04/05, Award, ¶¶ 278-282, (21 November 2007) (Cremades (P), Siqueiros, Rovine) (CL-0082-ENG) (hereinafter "*Archer v. Mexico* (Award)"); *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award, ¶ 122 (30 August 2000) (Lauterpacht (P), Siqueiros, Civiletti) (CL-0019-ENG).

[179] Patrick Dumberry, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105, 301 (Kluwer Law International 2013) (CL-0149-ENG).

[180] C-0139-ENG.63, Article 31.1 (emphasis added).

72. Mexico's new argument also contradicts its own position in this case, as set out in its Counter-Memorial: "La Demandada *está de acuerdo* que el estándar de compensación aplicable bajo el TLCAN por violaciones distintas a la expropiación es el de reparación plena, y que el caso Chorzow Factory correctamente articula ese estándar.'"[181]

73. Moreover, where the NAFTA Parties have sought to exclude damages categories, they have been explicit. For example, NAFTA Article 1135(3) expressly excludes punitive damages.[182] If the NAFTA Parties had wanted to restrict an investor's right to full reparation for a State's unlawful conduct, as otherwise protected under international law, they would have done so. They did not.

B. MEXICO'S ATTEMPT TO LIMIT THE SCOPE OF RECOVERABLE DAMAGES UNDER NAFTA ARTICLE 1116 FAILS

1. Article 1116 Allows Legacy Vulcan to Recover All Losses Incurred "By Reason of, or Arising out of" Mexico's Breaches

74. The plain and ordinary meaning of Article 1116 is straightforward: an "investor of a Party," here Legacy Vulcan, can claim for "loss or damage" incurred "by reason of, or arising out of" — that is, caused by — a breach of Section A of Chapter 11.[183]

75. Mexico does not dispute that Legacy Vulcan qualifies as an "investor of a Party" as defined in NAFTA Article 1139 (*i.e.*, "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"[184]). There is also no dispute that CALICA, its reserves, and the port concession, among other assets of Legacy Vulcan in Mexico, qualify as an "investment" of Legacy Vulcan within the meaning of Article 1139 (defining "investment" as encompassing an "enterprise" and "property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes"[185]). That NAFTA Chapter 11 applies to measures adopted or maintained by a Party relating to "investments of investors of another Party in the territory of the Party," as Mexico emphasizes in its Post-Hearing Brief, is also uncontroversial.[186]

76. Article 1116, read in light of Articles 1101(1) and 1139 of the Treaty, thus permits Legacy Vulcan, an "investor of a Party," to seek reparation for "loss or damage" incurred by reason

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[181] Counter-Memorial, ¶ 446 (emphasis added).

[182] *See* NAFTA Article 1135(3) ("A Tribunal may not order a Party to pay punitive damages.") (C-0009-ENG).

[183] NAFTA, Article 1116(1) (C-0009-ENG).

[184] *Id.* Article 1139 (C-0009-ENG).

[185] *Id.*

[186] NAFTA, Article 1101(1) (C-0009-ENG).

of, or arising out of measures adopted by Mexico against Legacy Vulcan's investments (*i.e.*, *inter alia*, CALICA, its reserves, or the port concession), in breach of NAFTA. Article 1116 must be interpreted to mean just what it says, without reading into its text limitations that are absent from the Treaty.

2. Mexico Seeks to Graft Onto the Treaty Limitations That Are Not There

77. Despite the plain, ordinary meaning of Article 1116, Mexico insists on imposing limitations on the scope of recoverable damages that are absent in NAFTA.

78. *First*, Mexico insists that Article 1116 limits recoverable damages to direct loss or damage suffered by Legacy Vulcan as shareholder of CALICA, such as the denial of the right to a declared dividend or to vote its shares, or where the shareholder's ownership interest is expropriated.[187] According to Mexico, damage to an investor, based on injury to an enterprise the investor owns or controls, is only recoverable under NAFTA Article 1117.[188] That is not so.

79. As Legacy Vulcan has explained, it asserts claims under Article 1116 on its own behalf for damages it has *itself* incurred "by reason of, or arising out of" Mexico's measures against its protected "investments" — including, *inter alia*, its reserves in Mexico — in violation of NAFTA.[189] Nothing in the text of Article 1116 supports a conclusion that an investor is barred from establishing, "through a chain of causation," that it has suffered loss or damage as a consequence of State conduct that immediately impacted an indirectly-owned downstream entity.[190] The issue, therefore, is one of causation, *i.e.*, whether there is a sufficient causal link between Mexico's wrongful measures against Legacy Vulcan's investment in Mexico, and the losses that Legacy Vulcan has sustained as a result thereof. That causal link has been established here.

80. *Second*, Mexico insists that NAFTA Article 1105(1) — guaranteeing fair and equitable treatment "to investments of investors of another Party"[191] — somehow limits Legacy Vulcan's entitlement to damages because it applies to "investments," not to "investors."[192]

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[187] Post-Hearing Brief-Respondent-SPA, ¶¶ 136-137.

[188] *Id.* ¶ 138.

[189] *See* Legacy Vulcan's Comments on NAFTA Article 1128 Submissions, ¶ 32.

[190] *See Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on the Respondent's Preliminary Objection, ¶ 130 (13 March. 2020) (Kalicki (P), Townsend, Douglas) (CL-0159-ENG) (interpreting Article 10.16 of the Dominican Republic-Central America FTA (CAFTA-DR), which is substantially similar to NAFTA Article 1116).

[191] Post-Hearing Brief-Respondent-SPA, ¶¶ 142-143.

[192] *Id.* ¶ 143.

While a claimant seeking to establish the host state's liability for a breach of Article 1105(1) must demonstrate that the adverse measure is directed to the relevant protected "investments," once that Treaty breach is established, compensation is to be determined in accordance with NAFTA and the full reparation standard under customary international law — without regard to any delineation between "investments" and "investors." This is clear from the text of Article 1116, which expressly permits an "investor of a Party" to recover losses or damages it suffered from violations of *any* substantive provision in Section A, irrespective of whether the specific substantive provision refers only to "investments."

81. In any event, Mexico's artificial distinction would not make any difference in this case. It is undisputed that Legacy Vulcan's reserves in Mexico are protected investments under NAFTA. It is also undisputed that, as a consequence of the measures at issue, Legacy Vulcan is unable to extract any value from its reserves in La Adelita and El Corchalito.

3. Mexico's Last-Ditch Appeal to "Systemic" Considerations Is Misguided

82. In a further effort to limit its damages, Mexico insists that Legacy Vulcan's claim is an attempt to improperly expand the territorial scope of the Treaty and recover losses suffered by independent components of Legacy Vulcan's global operations outside of Mexico.[193] According to Mexico, a ruling for the Claimant would "open the door for multinational corporations" to bring claims against states when only "one component of an integrated global operation is established."[194] That is not so.

83. Legacy Vulcan does not dispute that compensation under Article 1116 is "payable only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached."[195] The causation inquiry has two elements. *First*, the alleged wrongful conduct must satisfy the factual "but-for" test, *i.e.*, the claimant must show that its losses "'would in fact have been averted if the respondent had acted in compliance with its legal obligations' under NAFTA."[196] *Second*, the wrongful act and the loss must be sufficiently

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[193] *Id.* ¶ 126.

[194] *Id.*

[195] *S.D. Myers v. Canada* (Partial Award), ¶ 316 (CL-0059-ENG). *See also* C-0139-ENG.64, Article 31, Comment (9) (noting that the language of ILC Draft Article 31(2) providing that injury includes damage "caused by the internationally wrongful act of a State," "is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.").

[196] *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-4, Award on Damages, ¶ 114 (10 January 2019) (Simma (P), McRae, Schwartz) (CL-0172-ENG) ("the test is whether the Tribunal is 'able to conclude from the case as a whole and with a sufficient degree of certainty' that the damage or losses of the

proximate (*i.e.*, legal or proximate causation) to allow compensation.[197] The undisputed requirements of both factual and proximate causation guard against the alleged limitless responsibility of states that Mexico hyperbolically foreshadows.[198]

84. Both factual and proximate causation are satisfied here. *First*, the seamless integration and interdependence of the CALICA Network's downstream and upstream components show that any measure affecting the production component of the CALICA Network (*i.e.*, its quarrying operations) has direct and immediate repercussions in the network as a whole. Mexico does not dispute that Legacy Vulcan's inability to tap La Adelita and El Corchalito prevents access to [redacted][199] Legacy Vulcan's inability to extract those reserves due to Mexico's breaches causes losses across the full CALICA Network.[200] That some of those losses are ultimately sustained outside Mexico is of no consequence here. As the *S.D. Myers* tribunal explained, "[t]here is no provision that requires that all of the investor's losses must be sustained within the host state in order to be recoverable. The test is that the loss to the (foreign) investor must be suffered as a result of the interference with its investment in the host state."[201]

85. *Second*, as the Investment Agreement, and particularly Recital IV thereof, makes clear, Mexico knew from the outset that the purpose of the Project was to serve foreign markets by sea — not to serve the local Mexican market.[202] While Mexico admits in its Post-Hearing Brief that "CALICA se creó para producir materiales de construcción (*i.e.*, agregados) para la exportación, principalmente por vía marítima,"[203] it continues to ignore that the shipping and

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Investors 'would in fact have been averted if the Respondent had acted in compliance with its legal obligations' under NAFTA").

[197] *See, e.g.*, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award (Damages), ¶ 122 (21 October 2002) (Hunter (P), Chiasson, Schwartz) (hereinafter, "*S.D. Myers v. Canada* (Damages)") (CL-0132-ENG) ("compensation should be awarded for the *overall* economic losses sustained by [the investor] that are a proximate cause of [the host state's] measure, not only those that appear on the balance sheet of its investment.") (emphasis added); *id.* ¶ 140 ("Other ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm").

[198] *See, e.g.*, *Archer v. Mexico* (Award), ¶ 282 (CL-0082-ENG) (requiring a "sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such injury.").

[199] Post-Hearing Brief-Claimant-ENG, ¶ 152.

[200] Reply, ¶ 244; Expert Report-Darrell Chodorow-Claimant's Reply-Second Report-ENG, ¶ 56 (a "consequence of a shortfall in Calica Mexico's aggregates production due to the alleged breaches is the loss of profits along the full Calica Network.").

[201] *S.D. Myers v. Canada* (Damages), ¶ 118 (CL-0132-ENG).

[202] Post-Hearing Brief-Claimant-ENG, Appendix A – Question 1, p. 2.

[203] Post-Hearing Brief-Respondent-SPA, Annex A – Question 1, ¶ 2.

distribution components of the Network were created, developed, and operated for the *sole* purpose of giving CALICA aggregates access to highly profitable U.S. Gulf Coast markets.[204] Indeed, the Vulica vessels and the U.S. Yards are not independent components of Legacy Vulcan's "global operations," as Mexico claims.[205] Rather, they are [redacted] Therefore, a foreseeable consequence of a shortfall in CALICA's aggregates production due to Mexico's breaches is the loss of profits along the full CALICA Network.[208]

C. LEGACY VULCAN HAS ESTABLISHED THAT IT HAS INCURRED LOSS OR DAMAGE AS A RESULT OF MEXICO'S TREATY BREACHES

1. Legacy Vulcan Has Demonstrated That Its Losses Are Real

86. As Legacy Vulcan has established, Mexico's measures prevent it from monetizing [redacted] through exports to the U.S. Gulf Coast market.[209] Legacy Vulcan's expert calculated resulting damages in the amount of [redacted] (before pre-award interest and the necessary adjustment to avoid double taxation).[210] Nonetheless, Mexico contends that these damages are not "real" because [redacted][211] Also — for the first time in its Post-Hearing Brief — Mexico asserts that, [redacted][212] Mexico's arguments are meritless.

87. [redacted]

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[204] Post-Hearing Brief-Claimant-ENG, ¶ 171.

[205] Post-Hearing Brief-Respondent-SPA, ¶ 126.

[206] *See* Post-Hearing Brief-Claimant-ENG, ¶ 171.

[207] *See* Reply, ¶ 9; Post-Hearing Brief-Claimant-ENG, ¶ 154; *id.* Appendix A – Question 1, p. 2. Mexico has no response in its Post-Hearing Brief to the overwhelming evidence introduced in this arbitration, and discussed at the Hearing, demonstrating that Legacy Vulcan manages the business as a single integrated network, tracks the profitability of the Network as part of its normal course of business, and refers to the "CALICA Network" or "the Network" in several ordinary course documents that predate this arbitration. *See* Tr. (English), Day 1, 115:9-120:8 (Claimant's Opening Statement).

[208] *See* Post-Hearing Brief-Claimant-ENG, Appendix A – Question 1, p. 2.; Reply, ¶ 244; Tr. (English), Day 1, 122:3-9 (Claimant's Opening Statement); Expert Report-Darrell Chodorow-Claimant's Reply-Second Report-ENG, ¶ 14.

[209] Post-Hearing Brief-Claimant-ENG, ¶ 158.

[210] Expert Report-Darrell Chodorow-Claimant's Memorial-ENG, Tables 1 and 16; Claimant's Opening Presentation, Slide 115 (CD-0001); Post-Hearing Brief-Claimant-ENG, Appendix B — Question 15, No. 69.

[211] Post-Hearing Brief-Respondent-SPA, ¶¶ 147-158.

[212] *Id.*

[redacted]

As [redacted] explained, [redacted] While Mexico correctly states that [redacted]

88. Further, even if [redacted] As Mr. Chodorow has explained, [redacted]

[redacted]

213 Tr. (English), Day 1, 140:16-18 (Claimant's Opening Statement).

214 Witness Statement-[redacted]-Claimant's Reply-Second Statement-ENG, ¶ 31.

215 CRED-0058.3 (emphasis added).

216 Tr. (English), Day 1, 139:21-140:1 (Claimant's Opening Statement); Tr. (English), Day 5, 1042:4-1048:1 (Chodorow cross-examination).

217 Tr. (English), Day 5, 1030:12-17(Chodorow cross-examination).

218 CRED-0006.70.

219 Tr. (English), Day 1, 140:16-141:1 (Claimant's Opening Statement).

220 Post-Hearing Brief-Respondent-SPA, ¶ 149.

221 Witness Statement-[redacted]-Claimant's Reply-ENG, ¶ 24.

[redacted]

2. Legacy Vulcan's [redacted]

91. Mexico also insists in its Post-Hearing Brief that [redacted] But Mexico's assertion is speculative and ignores contemporaneous evidence showing that [redacted]

[222] Legacy Vulcan's request for relief makes clear that the Tribunal should give Mexico the option to pay less than the full amount of full reparation if, *inter alia*, Mexico, within three months from the issuance of the Award, were to amend the POEL to expressly allow quarrying in La Adelita. *See* Memorial, ¶ 347(e).

[223] [redacted]-0002.110.

[224] [redacted]-0002.26.

[225] *See* Tr. (English), Day 2, 429:4 ([redacted] Cross-Examination: [redacted]).

[226] [redacted]-0002.110.

[227] Post-Hearing Brief-Respondent-SPA, ¶ 162.

[228] *See* below ¶¶ 94-98.

a) Mexico's [redacted] Theory Is Speculative

92. In support of its [redacted] theory, Mexico cites to two pieces of evidence that do not prove its case. *First*, Mexico cites a map in VMC's annual reports that purportedly shows that [redacted] Yet, looking at the map is all that Mexico's experts did in speculating that [redacted]. Further, as [redacted] explained, [redacted]

93. *Second*, Mexico states that [redacted]

b) [redacted]

94. Mexico [redacted] theory is not only speculative but also ignores contemporaneous evidence that debunks it. In particular, Mexico disregards the probative value of [redacted]

[229] Post-Hearing Brief-Respondent-SPA, ¶¶ 171-172.
[230] Tr. (English), Day 2, 388:18-390:16 ([redacted] cross-examination).
[231] Post-Hearing Brief-Claimant-ENG, ¶ 160.
[232] Tr. (English), Day 2, 394:11-20 ([redacted] cross-examination).
[233] Post-Hearing Brief-Respondent-SPA, ¶ 168.
[234] *See* C-0089-ENG.6.

[redacted][6]

95. While Hart and Vélez acknowledge that [redacted]

96. Mexico also ignores that [redacted]

97. Mexico also claims that [redacted]

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[235] Tr. (English), Day 2, 389:14-390:16 ([redacted] cross-examination).

[236] *See* C-0089-ENG.6; Tr. (English), Day 5, 986:19-987:8 (Chodorow cross-examination).

[237] Tr. (English) Day 5, 1168:5-15 (Hart and Vélez cross-examination (Ms. Vélez)).

[238] Chodorow Presentation, Slide 3 (CD-0006).

[239] *Id.* Slide 14 (CD-0006); Tr. (English), Day 5, 986:19-987:8 (Chodorow presentation).

[240] Expert Report-Darrell Chodorow-Claimant's Memorial-ENG, ¶¶ 160-163.

[241] Witness Statement-[redacted]-Claimant's Memorial-ENG, ¶¶ 71-72.

[242] Tr. Day 5, 1145: 19-20 (Hart and Vélez direct examination (Ms. Vélez)).

[243] *Id.* at 1160:13-14 (Hart and Vélez cross-examination (Ms. Vélez)).

[244] First Credibility Report, ¶ 42 and Appendix C (RE-002). The name [redacted] does not appear in this report.

[245] Post-Hearing Brief-Claimant-ENG, Appendix B –Question 15, No. 74.

[redacted] Moreover, Mr. Chodorow's first report cited to [redacted]

98. Mexico also speculates in its Post-Hearing Brief that [redacted] Mexico never challenged this position until its Post-Hearing Brief. Moreover, [redacted]

D. LEGACY VULCAN'S DAMAGES CALCULATION IS REASONABLE

99. Mexico also insists that [redacted] That is not so.

100. *First*, [redacted]

246 Witness Statement-[redacted]-Claimant's Memorial-ENG, ¶ 39; Witness Statement-[redacted]-Claimant's Reply-ENG, ¶ 17.

247 Expert Report-Darrell Chodorow-Claimant's Memorial-ENG, Table 3 and ¶¶ 48, 53 (referencing C-0088-ENG.12).

248 C-0027-ENG.113.

249 Post-Hearing Brief-Respondent-SPA, ¶ 174.

250 Expert Report-Darrell Chodorow-Claimant's Memorial-ENG, ¶ 104.

251 *Id.*

252 *Id.* ¶ 104, n. 131.

253 Post-Hearing Brief-Respondent-SPA, ¶¶ 176-180.

254 *Id.* ¶¶ 181-190.

[redacted]

102. *Second*, [redacted]

[redacted]

[255] Witness Statement-[redacted]-Claimant's Reply-ENG, ¶ 28; Witness Statement-[redacted]-Claimant's Reply-Second Statement-ENG, ¶¶ 21-22; Tr. (English) Day 5, 1062:9-1063-6 (Chodorow cross-examination).

[256] Expert Report-Darrell Chodorow-Claimant's Memorial-ENG, ¶ 58.

[257] Tr. (English), Day 5, 1068:14-1069:17 (Chodorow cross-examination).

[258] Post-Hearing Brief-Respondent-SPA, ¶ 187.

[259] DC-0001, Table A-1 (located in the tab "A1_Variables vs. Inflation") shows that [redacted]

[redacted] As Mr. Chodorow explained in his first report, there are significant market fundamentals that support the continuation of that trend into the future.[264] Mexico has failed to show otherwise.

E. LEGACY VULCAN'S DAMAGES ARE THE SAME, REGARDLESS OF WHETHER THE RELEVANT BUSINESS IS CALICA OR THE CALICA NETWORK

105. While the Parties disagree on whether the relevant business for purposes of calculating damages is CALICA or the CALICA Network, this is a distinction without a difference. Legacy Vulcan has demonstrated that damages are the same regardless of whether the relevant measure of damages is based on the diminution in the FMV of the CALICA Network, or "on the impact [of Mexico's breaches] on the valuation of a hypothetical sale of the investment in Mexico, the CALICA business unit," as Mexico argues.[265]

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[260] Post-Hearing Brief-Respondent-SPA, ¶ 187.

[261] During the Hearing, Mexico's counsel modified Table A-1 in Exhibit DC-0001 to estimate the change in prices relative to inflation for the period from 2009 to 2014. *See* Tr. (English), Day 5, 1083:11-1087:8. The same approach can be used to determine the change in prices from 2010 to 2015, which would have been available as of the date. Using this same table (located in the tab "A1_Variables vs. Inflation"), the formula in cell G39 could be changed to =(G$32/G$27)^(1/(E32-E27))-1 to calculate the average inflation rate of 1.73% for the 2010 to 2015 period. The formula in cell J39 could be changed to =(J$32/J$27)^(1/(E32-E27))-1 to calculate the average price growth rate of 4.83% for the same period. The real annual growth rate implied by this is 3.05% as shown in cell J45.

[262] First Credibility Report, Figure 1.4 (RE-002).

[263] *See* Federal Reserve Bank of St. Louis, "Gross Domestic Product: Implicit Price Deflator, Index 2012 = 100, Annual, Seasonally Adjusted," accessed 12 February, 2020 (DC-0030) (The GDP Price Deflator was 112.35 in 2019 and 101.75 in 2013, resulting in an annual inflation rate of 1.67% (calculated as (112.35/101.75)^ (1/6)-1=1.67%)).

[264] Expert Report-Darrell Chodorow-Claimant's Memorial-ENG, ¶ 99.

[265] First Credibility Report, ¶ 21 (RE-002).

106. The reason is simple. [redacted]

108. Because [redacted]

IV. CONCLUSION

109. For the foregoing reasons and those set forth by Legacy Vulcan in its pleadings and at the Hearing, Legacy Vulcan respectfully requests that the Tribunal render an award in its favor, consistent with the request for relief set out Claimant's Memorial and Reply.[274]

[266] Post-Hearing Brief-Claimant-ENG, ¶ 171; Tr. (English), Day 5, 989:20-22 (Chodorow presentation).
[267] *Id.* ¶ 172.
[268] *Id.* ¶ 171.
[269] Tr. (English), Day 5, 988:22-990:6 (Chodorow presentation).
[270] *Id.* at 987:21-988:3 (Chodorow presentation).
[271] *Id.* at 988:3-8 (Chodorow presentation).
[272] *Id.* at 988:3-13 (Chodorow presentation).
[273] Post-Hearing Brief-Claimant-ENG, ¶ 179.
[274] Memorial, ¶ 347; Reply, ¶ 288.

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ICSID Case No. ARB/19/1

Administered by the

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

LEGACY VULCAN, LLC

Claimant

v.

UNITED MEXICAN STATES

Respondent

APPENDIX TO CLAIMANT'S POST-HEARING REPLY

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APPENDIX

CLAIMANT'S REPLIES TO RESPONDENT'S ANSWERS TO THE TRIBUNAL'S QUESTIONS TO THE PARTIES

1. With respect to Respondent's objection, in respect of both jurisdiction and damages, that Claimant may only claim losses in its capacity as investor in Mexico and may not claim losses such as those related to ships owned by Vulica Shipping Company Limited or the US Sales Yards (see Counter-Memorial ¶¶ 282-283; 457-458), what is the relevance, if any, of Recital IV of the Agreement between the Federal Government, the Government of the State of Quintana Roo and CALICA dated 6 August 1986 (Exh. C-010) stating that "[t]he Project also includes the construction, at the same site, of the port infrastructure works and facilities necessary for the handling and exportation of the products, through the use of vessels suitable for the transportation of large volumes"? 1

2. With respect to Claimant's claim for port fees, are those port fees to be considered (i) port fees (tarifas de puerto) as a service fee; (ii) port duties (derechos de puerto); or (iii) other (see Reply ¶ 125; Rejoinder ¶ 310)? 5

3. With respect to the Tribunal's jurisdiction over Claimant's claim for port fees, what is the relevance, if any, of Respondent's assertion that Claimant has sought recourse (recursos de revisión fiscal) against the Mexican authorities in relation to those fees (see Rejoinder ¶ 311)? 6

4. With respect to the legal standard under NAFTA Article 1105 and Claimant's argument that the MFN clause in NAFTA Article 1103 enables the importation of autonomous fair and equitable treatment standards under Mexico's BITs with Korea, Germany, Greece and the Netherlands (see Memorial ¶ 197; Reply ¶ 197), what is the relevance, if any, of the NAFTA Free Trade Commission's Note of Interpretation of 31 July 2001 (see Rejoinder ¶ 319)? 7

5. Please refer to any evidence on the record regarding whether Claimant was aware of the content of the Program for Local Environmental Regulation (Programa de Ordenamiento Ecológico Territorial) of 2009 ("POEL") before it came into effect. In particular, was Claimant aware that most of La Adelita would be classified under Unidad de Gestión (UGA) 5, including its applicable restrictions (see Counter-Memorial ¶¶ 187- 188)? 9

6. Please provide each Party's position as to whether, prior to the POEL coming into effect, Claimant (i) would have been required by applicable laws and regulations to apply for, and (ii) could have been granted, a CUSTF (Authorization for Soil-Use Change in Forested Terrains / Autorización de Cambio de Uso del Suelo en Terrenos Forestales) for the removal of vegetation at La Adelita, or other similar federal authorization, prior to undertaking quarrying activities in that lot (see Reply ¶ 22; Rejoinder ¶¶ 158-159). 10

7. Further to Question 6 above, please advise whether any CUSTF or similar federal authorization was (i) required by applicable laws and regulations before quarrying

at La Rosita and/or El Corchalito; (ii) was obtained by CALICA before quarrying at La Rosit and/or El Corchalito; and (iii) necessary for removal of vegetation in lots classified under UGA 5 (or in similarly classified lots), prior to the POEL of 2009 coming into effect. 12

8. Further to Questions 6 and 7 above, please indicate based on the evidence in the record when was the CUSTF or similar federal authorization first requested to Claimant in La Adelita, La Rosita and El Corchalito. 14

9. According to the Parties, was it possible or necessary for Claimant to challenge (i) the POEL upon it coming into effect; and/or (ii) SEMARNAT's indication, made according to Claimant in 2013, that a CUSTF would not be granted unless the POEL expressly allowed extraction activities in La Adelita (see Reply ¶ 22; Rejoinder ¶ 160). If Claimant wished to challenge either of those measures, what legal options under Mexican law were available to do so? 16

10. Further to Question 9 above, please advise whether any option to challenge the said measures remains available under Mexican law. 17

11. Please advise, on the basis of the evidence in the record, the respective periods of validity of the (i) Corchalito/Adelita Federal Environmental Impact Authorization; and (ii) Corchalito/Adelita State Environmental Impact Authorization; and any conditions for renewal of such Authorizations. 18

12. Please advise, on the basis of the evidence in the record, Claimant's position with regard to Respondent's argument that the shutdown of CALICA's operations was not total, but subject to accreditation of the excess extraction area and the completion of certain technical conditions (see Rejoinder ¶ 75) 20

13. What is the relevance, if any, of the fact that certain legal proceedings remain ongoing in Mexico in relation to measures adopted by PROFEPA and by SEMARNAT (see RD- 003; Rejoinder ¶ 43)? 21

14. What is the relevance, if any, of a factual determination that the pledge to complete the 2009 POEL's amendment process by 5 December 2015 is binding/non-binding and enforceable/unenforceable under Mexican law? 24

15. Please prepare, in joint consultation between the parties, a table summarizing the matters on which the Parties' quantum experts (i) agree; and (ii) disagree. 28

16. With respect to Claimant's claim for port fees, what is the evidence on record that such port fees were paid, and by whom (see Reply ¶ 237; Exh. DC-083; Exh. [redacted] 016; [redacted] Second Statement ¶ 35)? 29

17. Concerning Claimant's claim to an award adjusted to avoid double taxation under the principle of full reparation, please provide (based on the evidence on the record) a legal and economic comparison between the situation that Claimant's income resulting from the project in the regular course of business would encounter and that to be applied to a compensation awarded to Claimant by this Tribunal, if so decided. 30

1. With respect to Respondent's objection, in respect of both jurisdiction and damages, that Claimant may only claim losses in its capacity as investor in Mexico and may not claim losses such as those related to ships owned by Vulica Shipping Company Limited or the US Sales Yards (see Counter-Memorial ¶¶ 282-283; 457-458), what is the relevance, if any, of Recital IV of the Agreement between the Federal Government, the Government of the State of Quintana Roo and CALICA dated 6 August 1986 (Exh. C-010) stating that "[t]he Project also includes the construction, at the same site, of the port infrastructure works and facilities necessary for the handling and exportation of the products, through the use of vessels suitable for the transportation of large volumes"?

Legacy Vulcan's Reply to Mexico's Answer: Mexico contends that Legacy Vulcan's original investment excluded transportation of the materials to the United States or their sale in that market.[1] It artificially purports to support its argument by listing Project activities carried out in Mexico as listed in Recital IV, which reads as follows:

> "The Project prepared by the COMPANY includes the following: 1.- Exploitation of the deposit; 2.- Transportation of the extracted material for crushing; 3.- Installation of the crushing and sorting plant; 4.- Storage, and 5.- Loading onto ships."[2]

In asserting that the Project's activities stopped at the water's edge,[3] Mexico completely ignores the immediately preceding paragraph, which clearly includes the transport for export (*i.e.*, resale) via suitable vessels within the "Project":

> "The COMPANY has prepared and presented before SEDUE and the STATE GOVERNMENT, a Project for the exploitation of the materials bank, to obtain aggregates for the manufacture of construction materials and for the direct use of limestone for the same purposes. Such products are intended mainly for their exportation by sea. The Project also includes the construction, at the same site, of the port infrastructure works and facilities necessary for the handling and exportation of the products, through the use of vessels suitable for the transportation of large volumes."[4]

Accordingly, Mexico's contention that "the 'Project' ended with the loading of the vessels, and included neither transportation to the United States, nor resale in that market"[5] is forced and

[1] Post-Hearing Brief-Respondent-SPA, Annex A – Question 1, ¶¶ 2, 5.

[2] *Id*. Annex A – Question 1, ¶ 2 (quoting C-0010-SPA.4 (free translation)).

[3] *Id*. Annex A – Question 1, ¶ 2.

[4] C-0010-SPA.4 (free translation).

[5] Post-Hearing Brief-Respondent-SPA, Annex A – Question 1, ¶ 2.

unsupported by the plain text of Recital IV, which refers to those segments — which were critical for the viability of the Project.

The purpose of the 1986 Investment Agreement was not to describe the corporate ownership of each individual component of the Project but rather to describe the scope and nature of the Project, in order to authorize Legacy Vulcan's investment from an environmental standpoint and facilitate its development.[6] By describing the Project as including the construction of "port infrastructure works and facilities necessary for the handling and exportation of the products, through the use of vessels suitable for the transportation of large volumes,"[7] Recital IV makes clear that the investment was premised from the very beginning on Legacy Vulcan's ability to export the aggregates quarried in Mexico and that the Punta Venado port would serve as the link between CALICA's production from its quarries in Mexico and markets abroad.[8]

As Legacy Vulcan explained in its Post-Hearing Brief,[9] this conclusion is supported by additional provisions of the Investment Agreement, such as language describing the "Objectives of the Project" as including the "[e]xploitation, processing and shipment of construction aggregates for subsequent commercialization in the U.S. market."[10] Accordingly, and despite Mexico's arguments to the contrary, Recital IV and other provisions of the Investment Agreement confirm that Mexico knew from the outset that the objective of Legacy Vulcan's investment was the production of construction aggregates to serve customers in the United States. The Investment Agreement also reflects that Legacy Vulcan would need supportive infrastructure to realize this objective. Consistent with the Project envisioned in the Investment Agreement, Legacy Vulcan developed an integrated network involving the transportation of Legacy Vulcan's construction aggregates to the United States and their sale in the U.S. market, built around assets that were purchased for and fully dedicated to transporting Legacy Vulcan's product from Mexico to the United States.[11]

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[6] *See* Memorial, ¶¶ 25-28.

[7] C-0010-SPA.4, 12 (Recital IV, free translation).

[8] Post-Hearing Brief-Claimant-ENG, Appendix A – Question 1, p. 1.

[9] *See Id.* Appendix A — Question 1, p. 2.

[10] C-0010-SPA.47 (free translation, original reads: "Objetivos Del Proyecto: Explotación, procesamiento y embarque de agregados para la construcción para su posterior comercialización en el mercado de los Estados Unidos de Norteamérica.").

[11] Tr. (English), Day 1, 81:7-10 (Claimant's Opening Statement).

In this way, Recital IV of the Investment Agreement demonstrates that Mexico was aware that Legacy Vulcan would be required to acquire and develop the assets necessary to transport its aggregates to the United States and to sell its product in that market. These assets — which are reflected in Legacy Vulcan's Organizational Chart submitted at the Hearing[12] — include both the "port" and "vessels" specifically identified in Recital IV, as well as other assets necessary to achieve what the Investment Agreement identifies as "commercialization in the U.S. market."[13] While some of these assets are held by Legacy Vulcan through subsidiaries as a matter of convenience, the reason that Legacy Vulcan acquired these assets and developed the network was to transport construction aggregates from Mexico to the United States and commercialize its production in that market, as envisioned and stated in the Investment Agreement.[14]

By showing that Mexico understood from the outset that the purpose of the Project was to serve foreign markets by sea, not the local Mexican market, Recital IV confirms that the "loss or damage" Mexico inflicted on Legacy Vulcan in the form of loss of profits along the full CALICA Network was a foreseeable consequence of the shortfall in CALICA's aggregates production caused by Mexico's breaches of its NAFTA obligations. For these reasons, Mexico's assertion in its Post-Hearing Brief that the Tribunal has no jurisdiction over the shipping and distribution segments of the CALICA Network is misplaced.[15] NAFTA Article 1116 provides that Legacy Vulcan, as an "investor of a Party," can claim for "loss or damage" incurred "by reason of, or arising out of [...] [a] breach" of Section A of Chapter 11.[16] Because Legacy Vulcan has met both the factual and proximate causation requirements contained within NAFTA Article 1116, Legacy Vulcan is entitled to full reparation for all losses flowing from Mexico's breaches of NAFTA.[17] Mexico's

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[12] Email to the Tribunal from the Claimant (29 July 2021).

[13] C-0010-SPA.4, 12 (free translation).

[14] *See, e.g.*, Tr. (English), Day 1, 81:11-17 (Claimant's Opening Statement: "From a formal point of view, [the vessels] are owned by a Company that is constituted in the Bahamas, and that is for the flag-of-convenience issue as you may be aware that several shipowners flag their vessels in those jurisdictions. But the whole reason why Legacy Vulcan has those vessels is to provide transportation from Mexico to the United States."); *see also id*. at 111:16-20 ("[T]he CALICA Network is and has been from the outset a fully integrated business developed for the sole purpose of exporting construction aggregates from Mexico to the United States."). Mexico's argument that counsel for Claimant "recognized" that the vessels are not investments in Mexico is disingenuous. As the transcript shows, counsel submitted that even though they were not "formally an investment in Mexico" because they were titled abroad, they "were an investment in the sense that they are fully dedicated, and the whole purpose of those vessels is to transport the product from Mexico [...]." Tr. (English), Day 1, 81:7-10 (Counsel for Claimant responding to question from the Tribunal); *see* NAFTA Article 1139(g) (defining investments as "property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes [...]") (C-0009-ENG).

[15] Post-Hearing Brief-Respondent-SPA, Annex A – Question 1, ¶ 6.

[16] NAFTA, Article 1116(1) (C-0009-ENG).

[17] Post-Hearing Brief-Claimant-ENG, ¶¶ 167-168.

attempt to invoke a jurisdictional objection to limit damages to those suffered by CALICA within Mexico should therefore be rejected.

2. With respect to Claimant's claim for port fees, are those port fees to be considered (i) port fees (tarifas de puerto) as a service fee; (ii) port duties (derechos de puerto); or (iii) other (see Reply ¶ 125; Rejoinder ¶ 310)?

Legacy Vulcan's Reply to Mexico's Answer: Legacy Vulcan has nothing to add in reply to Respondent's answer to this question and refers the Tribunal to its pleadings, oral presentation at the Hearing, and response to this question in Appendix A of its Post-Hearing Brief.

3. With respect to the Tribunal's jurisdiction over Claimant's claim for port fees, what is the relevance, if any, of Respondent's assertion that Claimant has sought recourse (recursos de revisión fiscal) against the Mexican authorities in relation to those fees (see Rejoinder ¶ 311)?

Legacy Vulcan's Reply to Mexico's Answer: In its Post-Hearing Brief, Mexico argues that the alleged fiscal nature of the port fees that API Quintana Roo illegally charged for more than a decade can be *presumed* because CALICA supposedly filed "*recursos de revisión fiscal*" against API Quintana Roo.[18] The premise of this argument — that CALICA filed "*recursos de revisión fiscal*" — is wrong, and Mexico's argument fails.

As Legacy Vulcan explained in its Post-Hearing Brief, CALICA has never filed a *recurso de revisión fiscal*, nor could it. As Respondent is presumably aware, only Mexican authorities may file such actions under Mexican law.[19] Mexico's surprising assertion that CALICA has filed such an action is backed up by no citation to the record,[20] probably for the simple reason that it is false — CALICA has only filed "*recursos de revisión*." In any case, as Mexico concedes, *recursos de revisión fiscal* do not relate exclusively to tax issues, but may deal with a variety of topics.[21] Again, a *recurso de revisión fiscal* refers to an appeal by a Mexican government authority against a decision granting an *amparo* and does not imply that the underlying measure is a taxation measure.[22]

For these reasons, Mexico's purported "presumption" fails and should be rejected.

[18] Post-Hearing Brief-Respondent-SPA, Annex A – Question 3, ¶ 17.

[19] *See* R-0110-SPA.49-50, Article 63. Mexican jurisprudence is clear that a *recurso de revisión fiscal* is a term of art that describes the legal action that, under Article 63 of the Federal Law of Contentious-Administrative Procedure, only Mexican authorities have available to seek the appellate review of an unfavorable decision granting an *amparo*. An example of such jurisprudence could be submitted to the record of this arbitration if the Tribunal considered it necessary or helpful.

[20] Rejoinder, ¶ 311; Post-Hearing Brief-Respondent-SPA, Annex A – Question 3, ¶ 17.

[21] Post-Hearing Brief-Respondent-SPA, Appendix A – Question 3, ¶ 18. *See also* Post-Hearing Brief-Claimant-ENG, Appendix A – Question 3, p. 5.

[22] Post-Hearing Brief-Claimant-ENG, Appendix A – Question 3, p. 5.

4. With respect to the legal standard under NAFTA Article 1105 and Claimant's argument that the MFN clause in NAFTA Article 1103 enables the importation of autonomous fair and equitable treatment standards under Mexico's BITs with Korea, Germany, Greece and the Netherlands (see Memorial ¶ 197; Reply ¶ 197), what is the relevance, if any, of the NAFTA Free Trade Commission's Note of Interpretation of 31 July 2001 (see Rejoinder ¶ 319)?

Legacy Vulcan's Reply to Mexico's Answer: In its Post-Hearing Brief, Mexico asserts that Legacy Vulcan seeks to "impose a unilateral, indirect and vague interpretation that Article 1105 could be modified by Article 1103" in a manner that would be inconsistent with the NAFTA Free Trade Commission's ("FTC") Note of Interpretation of 31 July 2001 (the "Note").[23] This assertion mischaracterizes both Legacy Vulcan's claims and the scope of the Note.

As Legacy Vulcan explained in its Post-Hearing Brief, the Note does not interpret or impact NAFTA Article 1103 or NAFTA Annex IV, the text of which controls and supports Legacy Vulcan's claim.[24] Mexico relies on unilateral statements made by the NAFTA Parties in the course of other NAFTA arbitrations to read into the Note language that is conspicuously absent from it.[25] This attempt to broaden the meaning of the Note is unavailing. Unilateral statements by NAFTA Parties do not constitute an agreement on issues of treaty interpretation but rather are self-serving submissions made in response to individual investor claims.[26] The Tribunal should not accord them any special weight or authority in interpreting the Treaty or the Note.

The Note interpreted NAFTA Article 1105, not NAFTA Article 1103, so it has no bearing on Legacy Vulcan's claim under NAFTA Article 1103.[27] This conclusion is supported by decisions of NAFTA tribunals. As explained by the tribunal in *Pope & Talbot v. Canada*, for example, "every NAFTA investor is entitled, by virtue of Article 1103, to the treatment accorded to nationals of other states under BITs containing the fairness elements unlimited by customary international law. The [FTC Note of] Interpretation did not purport to change that fact, nor could it."[28]

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[23] Post-Hearing Brief-Respondent-SPA, Annex A – Question 4, ¶ 28.

[24] Post-Hearing Brief-Claimant-ENG, Appendix A – Question 4, p. 7.

[25] Post-Hearing Brief- Respondent-SPA, Annex A – Question 4, ¶¶ 22-27.

[26] Rudolph Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW pp. 31-32 (Oxford University Press, 2012) (CL-0147-ENG) ("Unilateral assertions of the disputing state party, on the meaning of a treaty provision, made in the process of ongoing proceedings are of limited value. Such statements are likely to be perceived as self-serving and determined by a desire to influence the tribunal's decision in favour of the state offering the interpretation.").

[27] Post-Hearing Brief-Claimant-ENG, Appendix A – Question 4, p. 7.

[28] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Damages Award, n.54 (31 May 2002) (Dervaird (P), Greenberg, Belman) (CL-0031-ENG). *See also United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Jurisdiction, ¶ 97 (22 November 2002) (Keith (P), Yves Fortier, Cass) (CL-0035-ENG) (emphasizing the "likely availability to the investor of the

For these reasons, the Tribunal should reject Mexico's argument, which seeks to broaden the scope of the Note and to distort its meaning.

protection of the most favoured nation obligation in article 1103, by reference to other bilateral investment treaties").

5. Please refer to any evidence on the record regarding whether Claimant was aware of the content of the Program for Local Environmental Regulation (Programa de Ordenamiento Ecológico Territorial) of 2009 ("POEL") before it came into effect. In particular, was Claimant aware that most of La Adelita would be classified under Unidad de Gestión (UGA) 5, including its applicable restrictions (see Counter-Memorial ¶¶ 187- 188)?

Legacy Vulcan's Reply to Mexico's Answer: Mexico's answer to this question contains a number of inaccuracies that merit correction, for the record.

First, the record does not show that CALICA was "ampliamente involucrada durante el desarrollo del POEL 2009," as Mexico contends.[29] CALICA was involved in the process to develop the POEL by providing observations to a draft version of the POEL that was made available to the general public online in early 2009. As Mexico acknowledges, CALICA's observations received no response.[30]

Second, Mexico suggests that CALICA's court challenge to the POEL shows that CALICA knew of the POEL's changes (without specifying when).[31] That challenge was filed in June 2009, a month *after* the POEL was issued, and therefore says nothing about when CALICA learned of the changes within the POEL.[32] The record evidence shows that CALICA learned of those changes during the public consultation phase in early 2009 and took diligent action to address those changes, both by submitting comments and — after the POEL was issued in May 2009 — confirming in court that the POEL did not retroactively impact CALICA's vested rights to quarry its lots.[33]

Third, contrary to Mexico's assertion,[34] CALICA was not part of the technical body of the committee for the development of the POEL, nor was it "parte del Comité de Ordenamiento Ecológico."[35]

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[29] Post-Hearing Brief-Respondent-SPA, Annex A – Question 5, ¶ 29.

[30] *See* C-0082-SPA.8-9 (Antecedentes 14-15); Post-Hearing Brief-Respondent-SPA, Annex A - Question 5, ¶ 32 ("CALICA impugnó sin éxito la supuesta omisión de las autoridades de dar respuesta a sus escritos presentados en el marco de las consultas públicas[.]"). As explained, CALICA's inclusion in a long list of persons and entities whose input was considered in the preparation of the POEL, is an apparent reference to CALICA's written submissions of January and March 2009. C-0080-SPA.33.

[31] Post-Hearing Brief-Respondent-SPA, Annex A – Question 5, ¶ 33.

[32] C-0082-SPA.32.

[33] Post-Hearing Brief-Claimant-ENG, Appendix A – Question 5, pp. 8-9.

[34] Post-Hearing Brief-Respondent-SPA, Annex A – Question 5, ¶ 31.

[35] The *Comité de Ordenamiento Ecológico* is formed by the technical and executive bodies. JAC-0015.6. The members of these bodies are enumerated in C-0080-SPA.28-30. CALICA is not part of either. *Id*.

6. Please provide each Party's position as to whether, prior to the POEL coming into effect, Claimant (i) would have been required by applicable laws and regulations to apply for, and (ii) could have been granted, a CUSTF (Authorization for Soil-Use Change in Forested Terrains / Autorización de Cambio de Uso del Suelo en Terrenos Forestales) for the removal of vegetation at La Adelita, or other similar federal authorization, prior to undertaking quarrying activities in that lot (see Reply ¶ 22; Rejoinder ¶¶ 158-159).

Legacy Vulcan's Reply to Mexico's Answer: Regarding whether CALICA would have been required to apply for a CUSTF prior to the POEL, Mexico strikes at a strawman by reframing Legacy Vulcan's claim as follows: "la Demandante ha pretendido hacer creer al Tribunal que [el CUSTF] surgió a partir del POEL de 2009[.]"[36] This has never been Claimant's argument. While there was a law prior to the POEL that required the CUSTF in specific circumstances, those circumstances did not apply to CALICA's lots, including La Adelita, before the POEL.[37] During the cross-examination of Legacy Vulcan's environmental law expert, [redacted] Respondent's counsel attempted the same strawman argument: when asked about the general existence of a CUSTF requirement since 1992, [redacted] said "[e]n términos generales, sí, existía,"[38] and later added:

> "[redacted]: [...] [E]se cambio de uso de suelo es [...] aplicable a los que se consideraran como terrenos forestales. Bajo esa consideración, efectivamente *existe desde el 92, aplicable a los que se consideren, como dice el artículo [19 de la Ley Forestal de 1992], terrenos forestales*.
>
> [Counsel for Respondent]: Okay. Muy bien. ¿Está usted de acuerdo entonces que, conforme a la ley forestal del 92, esta autorización CUSTF era aplicable legalmente a Calica cuando obtuvo su Autorización de Impacto Ambiental Federal en el año 2000?
>
> [redacted]: No, y he explicado la razón normativa y técnica por la cual. Porque los instrumentos normativos rectores identifican que este artículo que usted me acaba de leer no le aplica a Calica porque no es un terreno forestal, de acuerdo a la norma. Quisiera ser claro que no es una opinión personal, es la lectura de la norma."[39]

As explained in Legacy Vulcan's Post-Hearing Reply, under Mexican law, the CUSTF is required only with respect to terrains that are considered to be "forested terrains."[40] To determine

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[36] Post-Hearing Brief-Respondent-SPA, Annex A – Question 6, ¶ 35.

[37] Post-Hearing Brief-Claimant-ENG, Appendix A – Question 6, pp. 10-11.

[38] Tr. (Spanish), Day 3, 701:1-15 ([redacted] cross-examination) [English, 608:8-14].

[39] *Id.*at 703:3-704:2 ([redacted] cross-examination) [English, 609:11-610:5] (emphasis added).

[40] Post-Hearing Reply-Claimant-ENG, ¶¶ 34-38; Tr. (Spanish), Day 3, 677:18-678:3, 702:12-704:18 ([redacted] presentation and cross-examination) [English, 589:9-16, 609:3-610:17]. *See also* Post-Hearing

whether to grant the CUSTF, SEMARNAT must take into account the local zoning regime and may not grant a CUSTF if doing so would be incompatible with that regime.[41] As Mexico also points out, the law has for decades defined a "forested terrain" in almost identical terms.[42] It has therefore been understood that such a terrain is one that (i) is covered by forested vegetation, and (ii) produces forestry goods and services.[43] Prior to the POEL, none of CALICA's lots, including La Adelita, was legally capable of producing forestry goods and services because they were zoned to be incompatible for forestry in the local zoning regime.[44] Because whether a terrain qualifies as "forested" for purposes of the CUSTF depends in part on the classification of that soil in the local zoning regime and La Adelita did not qualify as such prior to the POEL, CALICA was not required to obtain the CUSTF before the POEL came into effect.[45]

Brief-Respondent-SPA, Annex A – Question 7, ¶ 56 ("la [CUSTF] debe tramitarse siempre que sea necesario ejecutar el desmonte de vegetación *en un terreno forestal*") (emphasis added).

[41] *E.g.*, [redacted]-0011, Article 93 ("Dichas autorizaciones [CUSTF] deberán sujetarse a lo que, en su caso, dispongan los programas de ordenamientos ecológicos correspondientes [...]"). *See also* Post-Hearing Brief-Respondent-SPA, Annex A – Question 7, ¶ 53 (stating that today SEMARNAT would deny an application for a CUSTF for La Adelita based on the applicable UGA). *See also* SOLCARGO Second Report, ¶ 74 (RE-003) ("la solicitud de []CUSTF que presente ante SEMARNAT implica[] que dicha autoridad analice la procedencia conforme al marco legal vigente, es decir, [...] el POEL [.]").

[42] Post-Hearing Brief-Respondent-SPA, Annex A – Question 6, n.225 (citing [redacted]-0011.12, Article 7.LXXI and noting that the provisions of the 2003 and 2018 federal forestry laws were "practically the same" (*prácticamente iguales*)).

[43] *Id.*; R-0026-SPA.13, Article 7.LXXI; [redacted]-0011.12 (same). *See also* R-0124-SPA ¶¶ 65, 71.2, 109 (the *Sentencia* referring to this two-pronged definition).

[44] Expert Report-[redacted]-Environmental-Claimant's Memorial-SPA, ¶ 44 (discussing relevant portions of the POET in C-0078-SPA, which indicate that forestry activities cannot be carried out in UGA 30); C-0078-SPA.42.

[45] *See, e.g.*, Post-Hearing Brief-Claimant-ENG, Appendix A – Question 6, pp. 10-11 (explaining that CALICA did not need to apply for a CUSTF for La Adelita prior to the POEL).

7. Further to Question 6 above, please advise whether any CUSTF or similar federal authorization was (i) required by applicable laws and regulations before quarrying at La Rosita and/or El Corchalito; (ii) was obtained by CALICA before quarrying at La Rosita and/or El Corchalito; and (iii) necessary for removal of vegetation in lots classified under UGA 5 (or in similarly classified lots), prior to the POEL of 2009 coming into effect.

Legacy Vulcan's Reply to Mexico's Answer:

(i) Whether a CUSTF was required by applicable laws and regulations before quarrying at La Rosita and/or El Corchalito

As explained above regarding the Tribunal's Question No. 6, Respondent confuses the general existence of the federal law requiring a CUSTF in specific circumstances with CALICA's need to obtain one for its lots. In its Response to Question No. 7(i), Mexico merely recites the existence of that law from the 1980s and 1990s.[46] But Mexico fails to show how that requirement purportedly applied to La Rosita or El Corchalito, if at all.

As explained in Legacy Vulcan's Post-Hearing Brief and Post-Hearing Reply, the CUSTF did *not* apply to La Rosita or El Corchalito.[47] Mexico's contemporaneous conduct confirms that the CUSTF was *not* required so long as the UGAs applicable to CALICA's lots allowed quarrying and identified "forestry" (*forestal*) as an incompatible use. CALICA has quarried La Rosita and El Corchalito for *decades* without a CUSTF. PROFEPA has known this and it has never even suggested that this was a problem, despite being duty-bound under Mexican law to enforce environmental requirements.[48] In 2012, PROFEPA inspected CALICA's lots and concluded that CALICA's operations met all applicable environmental requirements.[49] Even after the unlawful inspections of 2017, PROFEPA never raised the absence of a CUSTF for El Corchalito as a potential or actual violation.[50] In its Post-Hearing Reply, Respondent surprisingly asserts — for

[46] Post-Hearing Brief-Respondent-SPA, Annex A – Question 7, ¶¶ 47-50.

[47] Post-Hearing Brief-Claimant-ENG, Appendix A – Question 7, pp. 12-15; Post-Hearing Reply-Claimant-ENG, ¶¶ 34-37.

[48] *See* [redacted]-0015.53-54, Article 45.I, XI, XVII, XXIII (setting forth PROFEPA's duties in this regard); Tr. (English), Day 2, 303:4-7 ([redacted] cross-examination, stating that CALICA quarried La Rosita and El Corchalito without a CUSTF for decades in the full knowledge of both SEMARNAT and PROFEPA without any objection having ever been raised).

[49] *See* Post-Hearing Brief-Claimant-ENG, ¶¶ 61, 125; Memorial, ¶ 57; Reply, ¶ 92; C-0043-SPA.2, 57.

[50] *See* C-0117-SPA.291-294; R-0005-SPA.163-164. As Respondent has noted, the Corchalito/Adelita Federal Environmental Authorization required CALICA to comply with other environmental requirements. Post-Hearing Brief-Respondent-SPA, Annex A – Question 6, ¶ 34. If CALICA had been required to obtain a CUSTF for El Corchalito, PROFEPA would have flagged this as a purported non-compliance in breach of this provision of the Authorization. PROFEPA did not do this.

the first time in this proceeding and after so many decades — that a CUSTF was required for La Rosita and El Corchalito.[51] This strains credulity.

(ii) Whether a CUSTF was obtained by CALICA before quarrying at La Rosita and/or El Corchalito

As explained by [redacted] at the Hearing: "We carried out quarrying operations in La Rosita and El Corchalito without [a CUSTF] for decades in the full knowledge of both SEMARNAT and PROFEPA without any objection having ever been raised."[52] Mexico does not deny this, alleging instead that it "does not know" whether CALICA ever obtained a CUSTF for those lots.[53] Given that Mexico, through SEMARNAT, presumably knows (and should know) who has applied for a CUSTF and who has not, this allegation also strains credulity.

(iii) Whether a CUSTF was necessary for removal of vegetation in lots classified under UGA 5 (or in similarly classified lots), prior to the POEL of 2009 coming into effect.

Legacy Vulcan refers to and incorporates by reference its response to the Tribunal's Question No. 7 regarding this issue. As explained above, if an UGA 5 considered a terrain to be incompatible with forestry, that terrain could not lawfully produce forestry goods and services and thus did not qualify as a "forested terrain" subject to a CUSTF.

[51] Post-Hearing Brief-Respondent-SPA, Annex A – Question 7, ¶¶ 46, 50.

[52] Tr. (English), Day 2, 303:4-7 ([redacted] cross-examination).

[53] Post-Hearing Brief-Respondent-SPA, Annex A – Question 7, ¶ 51.

8. Further to Questions 6 and 7 above, please indicate based on the evidence in the record when was the CUSTF or similar federal authorization first requested to Claimant in La Adelita, La Rosita and El Corchalito.

Legacy Vulcan's Reply to Mexico's Answer: Mexico argues that, because the CUSTF was an applicable legal requirement, it was implicitly "requested" for La Rosita when CALICA entered into the Investment Agreement in 1986,[54] and for El Corchalito and La Adelita when the Corchalito/Adelita Federal Environmental Authorization was issued in November 2000 — since both instruments required CALICA to obtain applicable licenses, permits, and authorizations.[55] This is incorrect for two reasons.

First, no Mexican authority has actually requested the CUSTF or a similar federal authorization with respect to La Rosita and El Corchalito, and the record shows that SEMARNAT did so only with respect to La Adelita in 2013.[56] Mexico's generalized assertion of an implicit "request" by virtue of the forestry law being applicable presupposes that it was in fact applicable to CALICA's lots. As explained above, it was not with respect to the CUSTF prior to the POEL.

Second, Mexico asserts that those who are subject to a law must comply with that law even absent affirmative requests to do so by governmental authorities.[57] That is true but — by the same token — those who are *not* subject to a law are not required to comply with it, as was the case with CALICA and the CUSTF before the POEL. The fact that no Mexican authority has ever enforced the federal forestry law against CALICA while fully knowing of its quarrying activities in La Rosita and El Corchalito without a CUSTF strongly indicates that no such permit was required.

The same is true with respect to La Adelita, whose UGA prior to the POEL identified forestry as incompatible, just like the UGAs applicable to La Rosita and El Corchalito.[58] In a conservative reading of the forestry law, SEMARNAT indicated in 2013 that it could not issue the CUSTF despite the POEL's non-retroactivity with respect to CALICA's vested quarrying rights but

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[54] Post-Hearing Brief-Respondent-SPA, Annex A - Question 8, ¶ 61.

[55] *Id*. Annex A — Question 8, ¶ 62.

[56] Post-Hearing Brief-Claimant-ENG, Appendix A – Question 8, p. 16; Memorial, ¶ 85; Witness Statement-[redacted]-Claimant's Memorial-ENG, ¶¶ 23-25.

[57] Post-Hearing Brief-Respondent-SPA, Annex A — Question 8, ¶ 58.

[58] C-0078-SPA.13; R-0023-SPA.3; Tr. (Spanish), Day 3, 681:6-11 ([redacted] presentation: "en [...] []el POET Corredor Cancún–Tulum 2001, se determinaba como uso incompatible el forestal para el predio La Adelita.") [English, 592:10-12]; Expert Report-[redacted]-Environmental-Claimant's Memorial-SPA, ¶ 44.

could do so if the POEL expressly recognized those rights.[59] CALICA accordingly sought and secured Mexico's commitment to get the POEL amended in this way, but Mexico ultimately repudiated that commitment, effectively precluding CALICA from exercising its vested rights to quarry in La Adelita.[60]

[59] Post-Hearing Brief-Claimant-ENG, Appendix A – Question 8, p. 16; Memorial, ¶ 85; Witness Statement-[redacted]-Claimant's Memorial-ENG, ¶¶ 23-25.

[60] Post-Hearing Brief-Claimant-ENG, Part III.B.2.

9. According to the Parties, was it possible or necessary for Claimant to challenge (i) the POEL upon it coming into effect; and/or (ii) SEMARNAT's indication, made according to Claimant in 2013, that a CUSTF would not be granted unless the POEL expressly allowed extraction activities in La Adelita (see Reply ¶ 22; Rejoinder ¶ 160). If Claimant wished to challenge either of those measures, what legal options under Mexican law were available to do so?

Legacy Vulcan's Reply to Mexico's Answer: Mexico substantially agrees with Legacy Vulcan's response regarding (i) the fact that CALICA could — and did — challenge the POEL when it came into effect; and (ii) the impossibility of challenging the 2013 SEMARNAT indication that a CUSTF would not be granted.[61]

Mexico, however, adds — for the first time in this arbitration — the suggestion that CALICA could obtain a CUSTF today regardless of the fact that the POEL prohibits quarrying in most of La Adelita.[62] This suggestion is at odds with Mexico's own arguments in this arbitration. As Mexico explained in its response to Tribunal Question No. 7, if CALICA were to request a CUSTF, "SEMARNAT would have to reject [that] request [...] because the 2009 POEL assigned a conservation policy (UGA 5) to the territory in which the La Adelita property is located, which implies that mining activity is incompatible with the land use vocation of that property."[63] As Legacy Vulcan has explained — and Mexico's response to Question No. 7 confirms — applying for a CUSTF would have been futile.[64] Accordingly, CALICA pursued the amendment of the POEL — an amendment that the relevant state and municipal authorities deemed viable and expressly agreed to undertake in the 2014 Agreements. Mexico has repudiated that obligation and frustrated CALICA's expectation to exercise its vested rights to quarry La Adelita. That is the real issue before the Tribunal.

[61] *See* Post-Hearing Brief-Respondent-SPA, Annex A – Question 9, ¶¶ 64-68.

[62] Post-Hearing Brief-Respondent-SPA, Annex A – Question 9, ¶ 70 ("[se] podría dictaminar como favorable el proyecto de desarrollo *a pesar de lo que diga el programa de ordenamiento ecológico vigente* [(esto es, el POEL)]."") (emphasis added).

[63] *Id*. Annex A – Question 7, ¶ 53 (free translation, the original reads: "la SEMARNAT tendría que rechazar la solicitud de Autorización CUSTF porque el POEL de 2009 asignó una política de conservación (UGA 5) al territorio en el que se encuentra el predio La Adelita, lo cual implica que la actividad minera es un uso incompatible con la vocación de uso de suelo en ese predio.").

[64] Post-Hearing Brief-Claimant-ENG, Appendix A – Question 9, pp. 19-20. *See also* Expert Report-[redacted]-Environmental-Claimant's Memorial-SPA, ¶¶ 113-114.

10. Further to Question 9 above, please advise whether any option to challenge the said measures remains available under Mexican law.

Legacy Vulcan's Reply to Mexico's Answer: While Mexico contends that CALICA has "diverse legal options to challenge the POEL 2009" ("diversas opciones legales para impugnar el POEL 2009"), it provides only the option of challenging an official act of SEMARNAT premised on the POEL.[65] Mexico therefore seems to agree with Legacy Vulcan that such a challenge would be available only if CALICA filed a request for a CUSTF with SEMARNAT and SEMARNAT formally denied it based on the POEL.[66] Mexico also repeats the unfounded allegation that CALICA challenged the CUSTF in court (leading to the *Sentencia* Mexico introduced after the Hearing).[67] A simple reading of the *Sentencia*, however, shows that the *amparo* proceedings commenced by CALICA and RAPICA concerned a decree that enacted the 2018 Mexican General Law for Sustainable Forestry Development (Ley General de Desarrollo Forestal Sustentable), not the POEL or SEMARNAT's indication that a CUSTF would not be granted.[68]

Mexico also claims that there is no evidence showing that SEMARNAT indicated to CALICA in 2013 that the CUSTF would not be granted unless the POEL expressly allowed quarrying in La Adelita.[69] Mexico's argument fails for two reasons. *First*, it fails because SEMARNAT's 2013 indication to CALICA has been established through witness testimony[70] and what happened thereafter: the 2014 Agreements and the "disappeared" agreement between Quintana Roo and the Municipality to make possible the amendment SEMARNAT indicated was necessary to grant the CUSTF.[71] *Second*, it fails because the issue presented by Mexico is yet another straw man. As Mexico has confirmed in its response to Tribunal Question No. 7, if CALICA were to request a CUSTF, "SEMARNAT would have to reject [that] request [...]."[72]

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[65] Post-Hearing Brief-Respondent-SPA, Annex A – Question 10, ¶ 73.

[66] Post-Hearing Brief-Claimant-ENG, Appendix A – Question 10, p. 21; *see* Post-Hearing Brief-Respondent-SPA, Annex A – Question 10, ¶ 74.

[67] Post-Hearing Brief-Respondent-SPA, Annex A – Question 10, ¶ 73.

[68] Letter from Miguel López Forastier (Counsel to Claimant) to the Tribunal, pp. 1, 2 (16 November 2021).

[69] Post-Hearing Brief-Respondent-SPA, Annex A – Question 10, ¶ 75.

[70] Tr. (English), Day 2, 320:1-6 ([redacted] answering questions from the Tribunal); Witness Statement-[redacted]-Claimant's Memorial-ENG, ¶¶ 24-25, 29, 35.

[71] *See, e.g.*, C-0021-SPA.13; Tr. (Spanish), Day 2, 539:10-540:20 (Durán cross-examination) [English, 470:7-471:11].

[72] Post-Hearing Brief-Respondent-SPA, Annex A – Question 7, ¶ 53 (free translation, the original reads: "la SEMARNAT tendría que rechazar la solicitud de Autorización CUSTF [...]").

11. Please advise, on the basis of the evidence in the record, the respective periods of validity of the (i) Corchalito/Adelita Federal Environmental Impact Authorization; and (ii) Corchalito/Adelita State Environmental Impact Authorization; and any conditions for renewal of such Authorizations.

Legacy Vulcan's Reply to Mexico's Answer:

- Corchalito/Adelita Federal Environmental Authorization
  - Period of Validity: As Respondent points out in its answer to this question, CALICA received the Corchalito/Adelita Federal Environmental Authorization on 5 December 2000.[73] Accordingly, Respondent is correct that the initial 20-year term of this authorization expired on 6 December 2020,[74] not 1 December 2020, as Claimant stated in its answer to this question.
  - Conditions for Renewal: Mexico attempts to blame CALICA for the lack of progress in the renewal process by arguing that CALICA failed to submit its latest compliance report in a timely manner, as "validated" by PROFEPA, and that CALICA challenged this process in court.[75] However, it was not until Legacy Vulcan filed its Reply noting that PROFEPA had never "validated" any of CALICA's compliance reports that PROFEPA suddenly issued a supposed "validation" in May 2021 stating that CALICA did *not* comply with the Corchalito/Adelita Federal Environmental Authorization based on the findings of PROFEPA's irregular administrative proceeding.[76]
  - While CALICA has challenged PROFEPA's amendment renewal suspension in court, nothing — legally or judicially — prevents SEMARNAT from processing or granting CALICA's application, which remains pending since August 2020.[77]
- Corchalito/Adelita State Environmental Authorization: The Parties agree on the period of validity of the Corchalito/Adelita State Environmental Authorization, as well

[73] Post-Hearing Brief-Respondent-SPA, Annex A – Question 11, ¶ 76; *see* C-0017-SPA.23 (handwritten note over stamp stating "Recibido 05.dic.00").

[74] Post-Hearing Brief-Respondent-SPA, Annex A – Question 11, ¶ 76.

[75] *Id*. Annex A – Question 11, ¶¶ 77, 78.

[76] Post-Hearing Brief-Claimant-ENG, ¶ 134.

[77] Post-Hearing Reply-Claimant-ENG, ¶ 61.

as on the conditions for renewal so that this authorization may be renewed a fourth time after 2036.

12. Please advise, on the basis of the evidence in the record, Claimant's position with regard to Respondent's argument that the shutdown of CALICA's operations was not total, but subject to accreditation of the excess extraction area and the completion of certain technical conditions (see Rejoinder ¶ 75).

Legacy Vulcan's Reply to Mexico's Answer: Legacy Vulcan has nothing to add in reply to Respondent's answer to this question and refers the Tribunal to its pleadings, oral presentation at the Hearing, and response to this question in Appendix A of its Post-Hearing Brief.

13. What is the relevance, if any, of the fact that certain legal proceedings remain ongoing in Mexico in relation to measures adopted by PROFEPA and by SEMARNAT (see RD- 003; Rejoinder ¶ 43)?

Legacy Vulcan's Reply to Mexico's Answer: Mexico's insistence that the existence of two pending legal proceedings in Mexico regarding measures adopted by PROFEPA and SEMARNAT somehow have a bearing on this arbitration is entirely misplaced.

Mexico's argument is based on a blatant mischaracterization of Legacy Vulcan's claims in this arbitration. According to Mexico, Legacy Vulcan is pursuing a denial of justice claim,[78] but this is not true. Mexico argues that "there can be no denial of justice without a final judgment emanating from the highest judicial authority of the State"[79] and that, because there is no such final decision here, there is no "violation of Article 1105."[80] This argument conflates two distinct legal claims: (i) claims for a denial of justice based on the conduct of the judiciary, and (ii) claims that a State's executive has acted arbitrarily or denied an investor its right to due process in violation of the FET standard. Where — as here — a claim is based upon the administrative acts of a State's executive, "a violation of due process [...] would concern 'administrative due process' and not judicial due process. The violation of administrative due process does not lead to a denial of justice, as it does not concern the administration of justice and the judicial protection with regard to the rights of investors."[81] Because "[t]his breach would concern the administrative function of the state instead of its judicial function [...] it would hardly give rise to a denial of justice."[82]

As Legacy Vulcan explained in its Post-Hearing Brief and at the Hearing, Legacy Vulcan is "not asking [the Tribunal] judge the conduct of Mexico's judiciary in this case," but instead is only

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[78] *See* Post-Hearing Brief-Respondent-SPA, Annex A – Question 13, ¶¶ 94-102.

[79] Post-Hearing Brief-Respondent-SPA, Annex A – Question 13, ¶ 96 (citing *Corona Materials LLC c. República Dominicana*, ICSID Case No. ARB(AF)/14/3, Award, ¶ 248 (31 May 2016) (Dupuy (P), Mantilla-Serrano, Thomas) (RL-004-SPA)) (free translation, original reads: "no puede haber denegación de justicia sin una sentencia firme emanada de la autoridad judicial superior del Estado").

[80] Post-Hearing Brief-Respondent-SPA, Annex A– Question 13, ¶ 101 (free translation, original reads: "las decisiones de las autoridades mexicanas continúan siendo objeto de revisión ante tribunales nacionales, sin que exista un resultado final, las reclamaciones de la Demandante no pueden dar lugar a una violación del Artículo 1105.").

[81] BERK DEMIRKOL, JUDICIAL ACTS AND INVESTMENT TREATY ARBITRATION 178 (20 December 2017) (CL-0171-ENG).

[82] *Id. See also* CAMPBELL MCLACHLAN, LAURENCE SHORE, & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES ¶ 7.104 (Oxford, 2007) (CL-0003-ENG-Am) (distinguishing between administrative decision making and judicial proceedings for purposes of assessing a breach of international law).

asking the Tribunal to scrutinize "the administrative conduct" of Mexico's instrumentalities to find that that the actions of Mexico's executive agencies were arbitrary and/or lacking in due process.[83] Accordingly, Legacy Vulcan's claims should not be assessed for a showing of a denial of justice as Mexico confusedly advocates, but rather — as explained by the Tribunal in *Thunderbird v. Mexico* — "should be tested against the standards of due process and procedural fairness applicable to administrative officials."[84]

For these reasons and those explained in Legacy Vulcan's Post-Hearing Brief,[85] Mexico's argument that Legacy Vulcan's claims are precluded due to a failure to exhaust local remedies must fail. The requirement to exhaust local remedies that Mexico describes in its Post-Hearing Brief[86] applies to denial of justice claims based on judicial conduct.[87] Mexico relies on selective quotes from Professor McLachlan and others to assert that, where a respondent State's "decisions are not final and binding and can be corrected by the internal mechanisms of appeal, they do not deny justice,"[88] yet McLachlan also makes clear that such requirements apply only with respect "to cases of judicial treatment," which is plainly not at issue here.[89] In fact, these same sources make clear that no such requirement to exhaust local remedies exists for Legacy Vulcan's FET

[83] Tr. (English), Day 1, 74:15-18 (Claimant's Opening Statement); Post-Hearing Brief-Claimant-ENG, ¶ 26.

[84] *Int'l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, ¶ 200 (26 January 2006) (van den Berg (P), Wälde, Ariosa) (CL-0004-ENG) (hereinafter, "*Thunderbird v. Mexico* (Award)").

[85] Post-Hearing Brief-Claimant-ENG, ¶¶ 25-26.

[86] Post-Hearing Brief-Respondent-SPA, Annex A – Question 13, ¶¶ 95-99.

[87] *See* Post-Hearing Brief-Claimant-ENG, ¶ 26. *See also* CAMPBELL MCLACHLAN, LAURENCE SHORE, & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES ¶ 7.104 (Oxford, 2007) (CL-0003-ENG) ("[T]he investor may pursue a claim for breach of the treaty standards that is based directly upon allegations of administrative misconduct, irrespective of whether he has sought redress before the local courts. The claim cannot be impugned, either as a matter of jurisdiction or substance, solely on the ground of a failure to resort to national judicial remedies."); UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, FAIR AND EQUITABLE TREATMENT, n.87 (United Nations, 2012) (CL-0043-ENG) ("the due process requirement appears to be independent from denial of justice and thus there is no need to exhaust local remedies").

[88] Post-Hearing Brief-Respondent-SPA, Annex A – Question 13, ¶ 100 (citing CAMPBELL MCLACHLAN, LAURENCE SHORE, & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (Oxford 2007) (CL-0003-ENG-Am)).

[89] CAMPBELL MCLACHLAN, LAURENCE SHORE, & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES ¶ 7.144 (Oxford, 2007) (CL-0003-ENG-Am).

claims premised on administrative conduct that is arbitrary or lacking in due process.[90] Mexico's local-remedies argument is simply not applicable to Legacy Vulcan's claims.

Finally, Mexico's argument that pending legal proceedings in Mexico should have a bearing on this arbitration because they may have "effects with respect to the measures that are being disputed in parallel in the context of this arbitration" is also unavailing.[91] As Legacy Vulcan explained at the Hearing and in its Post-Hearing Brief, the pending proceedings in Mexico are proceedings "for injunctive, declaratory or other extraordinary relief, not involving the payment of damages," which claimants are explicitly permitted to pursue under NAFTA Article 1121.[92] NAFTA tribunals have repeatedly held that such pending domestic litigation does not prevent a tribunal from determining State liability for treaty claims premised on the same adverse measures, and that to find otherwise would mean that "any arbitral tribunal could be prevented from making a decision simply by delaying local court proceedings."[93] In addition, as [redacted] confirmed at the Hearing, the pending *nulidad* proceeding may take up to five more years to conclude,[94] and Legacy Vulcan would no longer have a viable Project in Mexico by then.[95]

In sum, the legal proceedings pending in Mexico do not have a bearing on the ability of this Tribunal to determine Mexico's liability under NAFTA and award the relief Legacy Vulcan requests.

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[90] *Id.* ¶ 7.104 (CL-0003-ENG) ("[T]he investor may pursue a claim for breach of the treaty standards that is based directly upon allegations of administrative misconduct, irrespective of whether he has sought redress before the local courts.").

[91] Post-Hearing Brief-Respondent-SPA, Annex A – Question 13, ¶ 91 (free translation, original reads: "son escenarios que pudieran tener efectos respecto de las medidas que se encuentran disputadas de forma paralela en el marco del presente arbitraje").

[92] Tr. (English), Day 1, 74:9-75:13, 75:22-76:13 (Claimant's Opening Statement); Post-Hearing Brief-Claimant-ENG, ¶¶ 21-23.

[93] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, ¶ 78 (16 December 2002) (Kerameus (P), Covarrubias Bravo, Gantz) (RL-008-SPA) (English version of the Award). *See also Detroit Int'l Bridge Co. v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction, ¶ 176 (2 April 2015) (Derains (P), Chertoff, Lowe) (CL-0168-ENG); *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, ¶ 303 (18 September 2009) (Pryles (P), Caron, McRae) (CL-0017-ENG).

[94] Tr. (Spanish), Day 3, 700:1-6 ([redacted] cross-examination) [English, 607:7-14]; Post-Hearing Brief-Respondent-SPA, ¶ 102 (quoting from [redacted] Hearing testimony).

[95] Post-Hearing Brief-Claimant-ENG, ¶ 22; *id.* Appendix A – Question 13, pp. 28-29.

14. What is the relevance, if any, of a factual determination that the pledge to complete the 2009 POEL's amendment process by 5 December 2015 is binding/non-binding and enforceable/unenforceable under Mexican law?

Legacy Vulcan's Reply to Mexico's Answer: Instead of answering the Tribunal's question, Mexico repeats its long-running argument that the 2014 Agreements were not binding under Mexican law and therefore could not create international obligations to which Mexico could be subject to liability under international law.[96] While Mexico is wrong about this, as explained in Legacy Vulcan's Post-Hearing Brief, a finding that the 2014 Agreements were binding is not necessary to hold Mexico liable for breaching NAFTA Article 1105.

First, Mexico's claim that "even the breach of a legally binding contract would not constitute a violation of Article 1105" is wrong.[97] As set out in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (the "ILC Articles"), "the term 'internationally wrongful act' includes an omission and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act."[98] The ILC Articles further provide that "the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act."[99] Here, Mexico's instrumentalities entered into a binding agreement in their sovereign capacity with the purpose of undertaking a sovereign function — the amendment of the POEL.[100] Thus, Mexico's blanket defense that it cannot be liable for its actions with respect to the 2014 Agreements is wrong as a matter of law.

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[96] Post-Hearing Brief-Respondent-SPA, ¶ 5.

[97] *Id*. Annex A – Question 14, ¶ 104.

[98] C-0139-ENG.3, n.33.

[99] *Id*. at 12, Article 4, Comment (6).

[100] The amendment of the POEL is a sovereign act, as it could only be carried out through the legislative authority of the Municipality of Solidaridad and the participation of the State of Quintana Roo. In failing to comply with its obligation to amend the POEL for political reasons, the Municipality was acting *iure imperii*. *See* Guido Santiago Tawil, *The Distinction Between Contract Claims and Treaty Claims: An Overview*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 492, p. 525 (A. J. van den Berg ed., 2007) (CL-0077-ENG) ("If the State adopted the measures in its sovereign capacity, the breach could not be equated, in principle, to an ordinary non-compliance of contract and, therefore, absent exculpatory circumstances, one could easily conclude that the State has committed a violation of the fair and equitable treatment standard by acting against the investor's legitimate expectations."). Tribunals have also equated active State measures with omissions for the purposes of breaching investors' legitimate expectations. *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, ¶¶ 226-235 (19 August 2005) (Yves Fortier (P), Schwebel, Rajski) (CL-0046-ENG); UNITED NATIONS CONFERENCE OF TRADE AND DEVELOPMENT, FAIR AND EQUITABLE TREATMENT, p. 63 (United Nations, 2012) (CL-0043-ENG) ("Essentially, any action or omission attributable to the host State can become a subject of an FET claim."). *See also* [redacted]-0015.12 (Article 12, empowering state and municipal authorities to enter into agreements with the private sector

Second, while Legacy Vulcan explained at the Hearing and in its written submissions that the 2014 Agreements are in fact binding,[101] Mexico's Post-Hearing Brief entirely sidesteps the fact that the binding nature of the Agreements is not determinative of Legacy Vulcan's claim that Mexico breached NAFTA Article 1105.[102] Rather, to show that Mexico frustrated Legacy Vulcan's and CALICA's legitimate expectations in violation of NAFTA Article 1105, all that is required is a showing that Mexico acted inconsistently with specific representations or assurances it provided to Legacy Vulcan and CALICA, on which they reasonably relied.[103] Legacy Vulcan has met this showing.

For well over a decade, Mexico repeatedly represented to Legacy Vulcan, via multiple permits, authorizations, and letters, that CALICA would be able to quarry La Adelita.[104] These representations culminated with the execution of the 2014 Agreements, in which Mexico undertook an explicit, written commitment to execute "all necessary actions until the approval and publication" of the revised POEL to "recognize" CALICA's vested rights to quarry La Adelita.[105] Mexico's own constitutional law expert, Dr. Javier Mijangos, admitted during cross-examination that the 2014 Agreements contained an obligation to work to comply with the

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regarding environmental management programs); C-0080-SPA.19-20 (Article 9, reflecting that same authority); Tr. (Spanish), Day 3, 761:6-763:1 ([redacted] presentation, explaining these provisions) [English, 655:16-657:4].

[101] *See* Reply, ¶¶ 37-40; Post-Hearing Brief-Claimant-ENG, ¶¶ 68-71; Tr. (Spanish), Day 3, 759:6-13 ([redacted] presentation, explaining that the 2014 Agreements contained "compromisos muy concretos") [English, 654:4-9].

[102] As Legacy Vulcan explained in its Post-Hearing Brief, a determination that the 2014 Agreements are binding is relevant only in respect of Legacy Vulcan's claim under NAFTA Article 1103 regarding Mexico's guarantee, in the Mexico-Switzerland BIT, to "observe any other obligation it has assumed with regard to investments in its territory by investors of [Switzerland]." Post-Hearing Brief-Claimant, Appendix A – Question 14, p. 32.

[103] *See* Post-Hearing Brief-Claimant-ENG, Appendix A – Question 14, p. 32; *see also Thunderbird v. Mexico* (Award), ¶ 147 (CL-0004-ENG) ("where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct' [...] a State may be tied to the objective expectations that it creates in order to induce investment"); *Glamis Gold, Ltd. V. United States of America*, UNCITRAL, Award, ¶ 621 (8 June 2009) (Young (P),Caron, Hubbard) (CL-0016-ENG) (hereinafter, "*Glamis Gold v. United States*, (Award)") (confirming that view in *Thunderbird*); *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability ¶ 572 (17 March 2015) (Simma (P), McRae, Schwartz) ("breaches of the international minimum standard might arise in some special circumstances—such as changes [...] contrary to earlier specific assurances by state authorities") (CL-0009-ENG).

[104] Post-Hearing Brief-Claimant-ENG, ¶¶ 43-63.

[105] C-0022-SPA.11 (free translation). *See also* [redacted] Presentation, Slides 8-11 (highlighting key language in the 2014 Agreements) (CD-0003); Post-Hearing Brief-Claimant-ENG, ¶¶ 64-77.

timeline that the parties set forth in the 2014 Agreements.[106] Mexico's representations constitute representations and "specific commitments directly made to the investor," and were therefore sufficient to give rise to Legacy Vulcan's and CALICA's legitimate expectations that CALICA would be able to commence quarrying operations in La Adelita in early 2016.[107] By repudiating the 2014 Agreements, Mexico therefore frustrated Legacy Vulcan's and CALICA's legitimate expectations, in breach of Mexico's obligations under NAFTA Article 1105.[108]

Finally, Mexico argues for the first time in its Post-Hearing Brief that the 2014 Agreements are not covered "measures" within the meaning of NAFTA Article 201.[109] Once again, Mexico is wrong. To begin with, the relevant measure at issue is Mexico's arbitrary failure to perform and later *repudiation* of the 2014 Agreements, not the Agreements themselves.[110] In addition, Mexico's suggestion that this measure is excluded from NAFTA is wholly unsupported by international law. Arbitral tribunals have confirmed that the ordinary meaning of the term "measures" in the context of investment treaties "is wide enough to cover *any* act, step or proceeding," and therefore encompasses "any action or omission" of a respondent State or its instrumentalities.[111] NAFTA tribunals have determined that "the term 'measures' in NAFTA Article 201 must be understood broadly," and includes State conduct resulting from, or relating

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[106] Tr. (Spanish), Day 4, 971:16-972:17 ("[Counsel for Claimant]: [...] [L]a obligación aquí asumida [en los Acuerdos del 2014] es la de gestionar todas las acciones necesarias. ¿Sí o no? // [Mijangos]: Entiendo yo que la obligación aquí asumida, en ese y en los ocho puntos -- en los siete puntos siguientes, es cumplir con el calendario propuesto en esos puntos. [...] // [Counsel for Claimant]: Bien. O sea que eso es una obligación de -- también, de ponerse a trabajar para cumplir con ese calendario que las partes habían establecido. ¿Correcto? // [Mijangos]: Correcto.") [English. 826:5-827:3]. *See also id*. at 966:11-18 ("[Counsel for Claimant]: [L]a obligación de hacer aquí [en el Adendum al MOU] que las partes se comprometen es a gestionar ante el Comité todas las acciones necesarias. ¿Correcto? // [Mijangos]: De acuerdo. // [Counsel for Claimant]: Y eso es una obligación de hacer. ¿Correcto? // [Mijangos]: Sí, por supuesto.") [English, 821:17-822:1].

[107] *See Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, ¶ 331 (11 September 2007) (Lévy (P), Lew, Lalonde) (CL-0107-ENG) ("The expectation is legitimate if the investor received an explicit promise or guaranty from the host-State[.]"); Post-Hearing Brief-Claimant-ENG, ¶ 77; Reply, ¶¶ 147-148.

[108] *Thunderbird v. Mexico* (Award), ¶ 147 (CL-0004-ENG); *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, ¶ 152 (22 May 2012) (van Houtte (P), Sands, Janow) (CL-0008-ENG); *Glamis Gold v. United States* (Award), ¶ 621 (CL-0016-ENG); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, ¶ 141 (12 January 2011) (Nariman (P), Crook, Anaya) (CL-0018-ENG).

[109] Post-Hearing Brief-Respondent-SPA, ¶¶ 5, 9; *id*, Annex A – Question 14, ¶ 103.

[110] Post-Hearing Reply-Claimant-ENG, Part II.A.3.

[111] *Saluka Investments B.V. v. Czech Republic,* Partial Award, ¶ 459 (17 March 2006) (Watts (P), Yves Fortier, Behrens) (CL-0027-ENG) (emphasis added). *See also* C-0139-ENG.7, Article 2, Comment (4) ("Conduct attributable to the State can consist of actions or omissions.").

to, memoranda of understanding and other agreements executed by the State.[112] For these reasons, Mexico is liable for the repudiation of the 2014 Agreements, which resulted from the conduct of Mexico's instrumentalities.[113]

Mexico is therefore liable for its conduct with respect to the 2014 Agreements, including the repudiation of those Agreements, and a showing that the 2014 Agreements were binding or enforceable under Mexican law is not necessary for Legacy Vulcan to prevail in its claim that Mexico breached NAFTA Article 1105.[114]

[112] *Mesa Power Group, LLC. v. Government of Canada*, PCA Case No. 2012-17, Award, ¶¶ 254-256 (26 March 2016) (Kaufmann-Kohler (P), Brower, Landau) (CL-0015-ENG) (listing among the measures challenged by the claimant various MOUs, agreements, and contracts executed by the Government of Canada, as well as actions relating to those agreements, and concluding that "the Tribunal is satisfied that the acts listed above fall within the ambit of Article 201").

[113] *See* Post-Hearing Brief-Claimant-ENG, ¶¶ 78-84.

[114] Post-Hearing Brief-Claimant-ENG, ¶¶ 87-88; *id*. Appendix A – Question 14, pp. 32-36.

15. Please prepare, in joint consultation between the parties, a table summarizing the matters on which the Parties' quantum experts (i) agree; and (ii) disagree.

Legacy Vulcan's Reply to Mexico's Answer: N/A.

16. With respect to Claimant's claim for port fees, what is the evidence on record that such port fees were paid, and by whom (see Reply ¶ 237; Exh. DC-083; Exh. [redacted]-016; [redacted] Second Statement ¶ 35)?

Legacy Vulcan's Reply to Mexico's Answer: In a reference to Exhibit DC-0083, Respondent asserts that "[l]a Demandante ni siquiera ha proporcionado un testimonio que señale que la información contenida en dicho anexo es correcta."[115] This assertion is patently false. [redacted] has explained that "[a]fter reviewing hundreds of banks statements, invoices and other records that Legacy Vulcan keeps in the normal course of business, [redacted] prepared a summary of all those payments, which was attached to the Brattle report as Exhibit DC-0083."[116] [redacted] also submitted a sample payment that illustrated how API Quintana Roo invoiced its port fees and how those payments were made.[117] At the Hearing, [redacted] confirmed — under oath — that all of the information included in [redacted] two witness statements were true and correct to the best of [redacted] knowledge and belief.[118]

Mexico also argues that Exhibit DC-0083 was not audited by an independent auditor.[119] While this is true, it is irrelevant. Mexico is in possession of similar information and has not asserted that [redacted] is misrepresenting the facts or inflating the payments. In any event, in December 2017, CALICA hired an independent certified public accountant in Mexico who audited the port fees that API Quintana Roo had illegally collected between 2007 and 2017.[120] Consistent with [redacted] calculations in DC-0083, this audit confirmed that CALICA, Vulica, and CSL paid API Quintana Roo at least [redacted] in port fees during that time.[121] The audit was attached to [redacted] second witness statement as exhibit [redacted]-0016-SPA.

[115] Post-Hearing Brief-Respondent-SPA, Annex A – Question 16, ¶ 110.

[116] Witness Statement-[redacted]-Claimant's Reply-Second Statement-ENG, ¶ 35.

[117] *Id.*; [redacted]-0015.

[118] Tr. (English), Day 2, 350:21-352:14 ([redacted] direct examination).

[119] Post-Hearing Brief-Respondent-SPA, Annex A – Question 16, ¶ 112.

[120] Post-Hearing Brief-Claimant-ENG, Appendix A – Question 16, p. 38.

[121] *Id*. *See also* Witness Statement-[redacted]-Claimant's Reply-Second Statement-ENG, ¶ 36; Tr. (English), Day 2, 405:16-21 ([redacted] responding to questions from the Tribunal: "The Port Fees [...] we had those payments audited by an independent auditor, and I believe that exhibit was submitted as well.").

17. Concerning Claimant's claim to an award adjusted to avoid double taxation under the principle of full reparation, please provide (based on the evidence on the record) a legal and economic comparison between the situation that Claimant's income resulting from the project in the regular course of business would encounter and that to be applied to a compensation awarded to Claimant by this Tribunal, if so decided.

Legacy Vulcan's Reply to Mexico's Answer: Legacy Vulcan has nothing to add in reply to Respondent's answer to this question and refers the Tribunal to its pleadings, oral presentation at the Hearing, and response to this question in Appendix A of its Post-Hearing Brief.