

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

*Legacy Vulcan, LLC*

v.

*United Mexican States*

**(ICSID Case No. ARB/19/1)**

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**PROCEDURAL ORDER NO. 7**

*Members of the Tribunal*

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

Prof. Sergio Puig, Arbitrator

Prof. Guido Santiago Tawil, Arbitrator

*Secretary of the Tribunal*

Ms. Sara Marzal

*Assistant to the Tribunal*

Ms. Emily Hay

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11 July 2022

**I. INTRODUCTION**

1. On 8 May 2022, Claimant filed its Requests for Provisional Measures and for Leave to Submit an Ancillary Claim (“**Application**”).
2. On 26 May 2022, Respondent filed its Response to Claimant’s Requests for Leave to Submit an Ancillary Claim and to Grant Provisional Measures (“**Response**”).
3. On 2 June 2022, Claimant filed its Reply to Respondent’s Response to its Request for Provisional Measures and for Leave to Submit an Ancillary Claim (“**Reply**”).
4. On 7 June 2022, Respondent filed its Rejoinder to Claimant’s Requests for Leave to Submit an Ancillary Claim and to Grant Provisional Measures (“**Rejoinder**”).
5. On 9 June 2022, the Tribunal invited the Parties to provide (i) their comments on whether the Parties’ respective submissions may be deemed to be applications pursuant to paragraph 16.3 of Procedural Order No. 1 to admit the documents listed in the index to each of the above referred submissions; and (ii) any observations on whether such documents should be admitted to the record.
6. Following receipt of the Parties’ comments, on 20 June 2022 the Tribunal decided that (i) the Parties’ respective submissions dated 8 and 26 May and 2 and 7 June 2022 are deemed to be applications pursuant to paragraph 16.3 of Procedural Order No. 1 to admit the documents listed in the index to each of the above-referred submissions; and (ii) those documents listed in each index should be admitted to the record, at this stage for the limited purpose of deciding on Claimant’s requests of 8 May 2022, pending such decision.
7. On 22 June 2022, the Parties filed the documents in the indices to their submissions in accordance with the Tribunal’s directions in ¶ 6 above.
8. In this Procedural Order, the Tribunal will decide upon Claimant’s Application, taking into account the detailed written submissions provided by the Parties which the Tribunal has carefully reviewed. To the extent any arguments put forward are not specifically referred to in this Order, they are to be considered subsumed in the Tribunal’s analysis.

**II. RELEVANT RULES**

9. As reflected in Section 1 of Procedural Order No. 1, these proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of 10 April 2006, except to the extent that they are modified by Section B of NAFTA Chapter Eleven. In that respect, NAFTA Article 1120(2) provides that “The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.”

10. NAFTA Article 1134 is entitled “Interim Measures of Protection” and states as follows:

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal’s jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal’s jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.

11. Article 46 of the ICSID Convention provides as follows:

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

12. Article 47 of the ICSID Convention provides:

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

13. Rule 39 of the ICSID Rules is entitled “Provisional Measures” and states as follows, in part:

(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the

recommendation of which is requested, and the circumstances that require such measures.

- (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
- (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
- (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

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14. Rule 40 of the ICSID Rules is entitled “Ancillary Claims” and further provides:

- (1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
- (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.
- (3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.

15. For convenience, in this Procedural Order the Tribunal uses the term “provisional measures” as referred to in the ICSID Rules. The Tribunal notes that NAFTA Article 1134 uses the term “interim measures”, which the Tribunal considers to be interchangeable for present purposes.

**III. REQUESTS**

16. In its Application and as confirmed in its Reply, Claimant requests that the Tribunal:<sup>1</sup>

- i.* Recommend as provisional measures pursuant to Article 47 of the ICSID Convention, Rule 39 of the ICSID Arbitration Rules, and NAFTA Article 1134 that Mexico take no action that denies due process to Legacy Vulcan or that might further aggravate or extend the dispute between the Parties, including further public attacks that exacerbate the dispute between the Parties, unduly pressure CALICA or Legacy Vulcan, or render the resolution of the dispute potentially more difficult;
- ii.* Permit Legacy Vulcan to present an ancillary claim concerning Mexico's wrongful shutdown of Legacy Vulcan's remaining quarrying operations in Mexico under a schedule to be discussed with Respondent and the Tribunal;
- iii.* Order Respondent to pay all costs and expenses related to this additional claim, including the fees and expenses of the Tribunal and the cost of legal representation, plus interest thereon; and
- iv.* Grant such other or additional relief as may be appropriate under the applicable law or that may otherwise be just and proper.

17. In its Response, Respondent requests the Tribunal to:<sup>2</sup>

- (i) desestimar la Solicitud de Medidas Provisionales presentada por la Demandante,
- (ii) desestimar la Solicitud para incorporar una nueva reclamación presentada por la Demandante, y
- (iii) ordenar a la Demandante a pagar los costos y gastos en los que ha incurrido a raíz de estas Solicitudes, incluidos los honorarios y gastos del Tribunal, del personal del CIADI involucrado en la administración del procedimiento y la representación legal de la Demandada, más los intereses correspondientes.

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<sup>1</sup> Application, ¶ 51; Reply, ¶ 63.

<sup>2</sup> Response, ¶ 168.

18. In its Rejoinder, Respondent further requests the Tribunal to:<sup>3</sup>

. . . desestimar en su integridad las Solicitudes de la Demandante. La Demandada se reserva su derecho de presentar de una reconvenición a fin de demostrar que la Demandante ha incumplido con diversos aspectos que reclama en este arbitraje. Además, México deja a salvo sus derechos para pronunciarse sobre las medidas que son nuevas para este Tribunal y respecto de las cuales debe tener la oportunidad de pronunciarse de fondo.

**IV. FACTUAL BACKGROUND**

19. In order to give an overview of the factual background to the Application, in this Section the Tribunal sets out a limited excerpt of the events leading to the Application. This account is not comprehensive. The Tribunal sets out these events for the purposes of giving context to and deciding upon the requests made in the Application based on the materials on the record at this time, and not for other purposes.

20. As of 31 January 2022, Claimant argues that the President of Mexico Andrés Manuel López Obrador began referring to CALICA in his *Mañaneras* (daily press conferences). One of his remarks on 31 January 2022 included:<sup>4</sup>

. . . Como no se les amplió la concesión porque estaban incumpliendo, bueno, violando, destruyendo el territorio, se fueron a una denuncia internacional, y están pidiendo una indemnización, no sé, de millones de pesos, o sea, que todavía nosotros les tenemos que pagar.

[E]n esa mina, que es una de las propuestas que les estamos haciendo, como ya escarbaron, el agua aquí es turquesa por la piedra, entonces, con un poco de imaginación y de talento se podría utilizar como zona turística, casi albercas naturales, buscando un acuerdo, pero que ya no se siga destruyendo y que retiren su demanda, porque no tiene fundamento legal.

21. According to Respondent, the President's declarations in the press conference in relation to CALICA's extractive activities were observations derived from a flight in relation to a

<sup>3</sup> Rejoinder, ¶ 108.

<sup>4</sup> Application, ¶ 13. *See also* Application, ¶ 16.

public investment project referred to as “*el tren maya*”, located next to the CALICA properties. During this flight, the President noted exploitation in the CALICA lots, without being able to identify in which lot the extraction had taken place.<sup>5</sup> According to Respondent, in his press conference the President indicated that it would be clarified if the extraction observed during the flight was being carried out in compliance with legislation, by way of an inspection and in accordance with procedures established by law.<sup>6</sup>

22. On 29 April 2022, Respondent states that PROFEPA (*Procuraduría Federal de Protección al Ambiente*) issued two inspection orders in relation to La Rosita, scheduled for 2 May 2022, in relation to (i) environmental impact; and (ii) forestry.<sup>7</sup>
23. According to Claimant, on 2 May 2022 President López Obrador criticized CALICA during his morning press conference and stated that he had ordered the immediate shutdown of CALICA’s remaining quarrying operations in La Rosita.<sup>8</sup> By Claimant’s account, later the same day Mexican officials forcibly entered the premises of La Rosita.<sup>9</sup> According to Respondent, the environmental authorities carried out preparatory work for this visit, which was derived from the orders of 29 April 2022 (see ¶ 22 above) and not the orders of the President that same day.<sup>10</sup>
24. The Parties disagree on the circumstances of the inspection, including whether CALICA was required to cooperate and give PROFEPA access to La Rosita, and the basis for the presence of SEMAR at the site, *i.e.*, federal agents of the *Secretaría de Marina*.<sup>11</sup>
25. Also on 2 May 2022, Claimant filed an *amparo* proceeding, seeking the provisional suspension of the government’s enforcement of Respondent’s shutdown order.<sup>12</sup> According to Respondent, this *amparo* 431/2022 was initially only requested in relation to

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<sup>5</sup> Response, ¶ 61.

<sup>6</sup> Response, ¶ 62.

<sup>7</sup> Response, ¶ 32.

<sup>8</sup> Application, ¶ 6.

<sup>9</sup> Application, ¶¶ 9-10.

<sup>10</sup> Response, ¶ 32; Rejoinder, ¶ 43.

<sup>11</sup> Response, ¶¶ 33-37; Reply, ¶¶ 11-12; Rejoinder, ¶¶ 53-55.

<sup>12</sup> Application, ¶ 10.

El Corchalito and La Adelita, and not La Rosita.<sup>13</sup> Claimant disagrees with Respondent’s interpretation of the scope of this *amparo* proceeding, which in its view covered La Rosita as well.<sup>14</sup>

26. On 3 May 2022, Respondent states that CALICA gave access to PROFEPA’s inspectors, who carried out an inspection visit of 3 days, concluding on 5 May 2022.<sup>15</sup> At the conclusion of the inspection, according to Respondent there were various findings that presupposed environmental non-compliance. PROFEPA imposed a “total temporary closure” on the basis of risk to natural resources.<sup>16</sup> The technical findings by PROFEPA are, by Respondent’s account, a preventive and not definitive measure, and are open in an administrative proceeding in Mexico.<sup>17</sup>
27. On 5 May 2022, a federal district court issued provisional suspension orders pending a decision on the *amparo* 431/2022 referred to in ¶ 25 above.<sup>18</sup> Respondent states that this suspension was only granted in respect of El Corchalito and La Adelita, and not La Rosita.<sup>19</sup> Claimant disagrees.<sup>20</sup>
28. Also on 5 May 2022, Claimant states that PROFEPA ordered the shutdown of CALICA’s quarrying operations, on the basis of (i) an alleged lack of environmental authorization to carry out quarrying and processing activities in La Rosita; (ii) an alleged lack of Authorization for Soil-Use Change in Forested Terrains (*Autorización de Cambio de Uso de Suelo en Terrenos Forestales*, “CUSTF”); and (iii) alleged harm to the environment as a result of CALICA’s activities.<sup>21</sup>
29. Respondent states that Claimant attempted to expand its request in *amparo* 431/2022 to include La Rosita, and on 9 May 2022 the federal judge denied CALICA’s request, citing

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<sup>13</sup> Response, ¶ 52.

<sup>14</sup> Reply, ¶ 14.

<sup>15</sup> Response, ¶ 38.

<sup>16</sup> Application, ¶ 39.

<sup>17</sup> Response, ¶ 40.

<sup>18</sup> Application, ¶ 10.

<sup>19</sup> Response, ¶¶ 52-53.

<sup>20</sup> Reply, ¶ 14.

<sup>21</sup> Application, ¶ 11.



the lack of identity or relation of La Rosita with the El Corchalito and La Adelita lots, and ordered CALICA to commence separate *amparo* proceedings.<sup>22</sup>

30. Additional factual matters will be discussed in the context of the discussion below.

**V. PROVISIONAL MEASURES**

31. In this Section, the Tribunal shall set out the Parties' respective positions in relation to the provisional measures sought by Claimant, before determining whether those measures will be granted.

**A. Claimant's Position**

32. In Claimant's view, the applicable rules set out in ¶¶ 10-13 above give the Tribunal broad discretion whether to grant provisional measures.<sup>23</sup> Claimant disagrees that NAFTA Article 1134 excludes the application of the ICSID Convention and ICSID Rules on this point.<sup>24</sup>
33. According to Claimant, the criteria generally accepted for awarding provisional measures are: (i) the tribunal has *prima facie* jurisdiction to grant the requested measures, (ii) the absence of provisional measures will irreparably impair or harm a claimant's rights, and (iii) the provisional measures are urgently needed to prevent such impairment. Claimant further submits that the measures it requests will not disproportionately prejudice Respondent.<sup>25</sup>
34. According to Claimant, the events mentioned in its Application demonstrate Respondent's decision to aggravate the Parties' dispute. In its view, Respondent's conduct continues to threaten Claimant's rights to procedural due process and non-aggravation of the dispute, requiring the Tribunal's urgent intervention.<sup>26</sup>

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<sup>22</sup> Response ¶ 54.

<sup>23</sup> Application, ¶ 20; Reply, ¶ 46.

<sup>24</sup> Reply, ¶¶ 46-49.

<sup>25</sup> Application ¶ 22.

<sup>26</sup> Application, ¶ 18.

35. *Prima facie jurisdiction.* Claimant submits that the Tribunal has *prima facie* jurisdiction to grant the provisional measures because its request relates to a legal dispute between Respondent and Claimant, and arises directly out of CALICA's investments in Mexico, which are protected under the Treaty. In Claimant's view, the jurisdictional objections raised by Respondent in these proceedings are not relevant to the Application.<sup>27</sup>
36. *Irreparable harm.* Claimant contends that its procedural rights will be irreparably impaired by Respondent's harassment and public attacks against Claimant and CALICA, on the basis that Claimant has the right to proceed through arbitration without having the dispute aggravated, exacerbated or extended by the other party, and without having resolution of the dispute made more difficult.<sup>28</sup>
37. The necessity of the measures is established, in Claimant's view, because: (i) Respondent has ignored an order of its own judiciary that would have provisionally preserved CALICA's ability to continue operating its investment;<sup>29</sup> (ii) Respondent's public disparagement of CALICA's operations as illegal may pave the way for further pressure on CALICA, for example through criminal proceedings against company officials;<sup>30</sup> (iii) Respondent's public attacks during repeated press briefings are severely prejudicial to Claimant and CALICA and risk irreparable injury to their reputation and ability to continue operations in Mexico;<sup>31</sup> and (iv) Respondent's actions threaten Claimant's ability to pursue this arbitration, due to specific public remarks regarding this arbitration which Claimant sees as an effort to strong-arm it into forfeiting its rights and to compel CALICA to transform its operation into a tourism project.<sup>32</sup> In its Reply, Claimant further refers to (v) the threatened revocation of both CALICA's customs permit and port concession.<sup>33</sup>

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<sup>27</sup> Application, ¶ 23.

<sup>28</sup> Application, ¶¶ 24-25. *See also* ¶¶ 26-28.

<sup>29</sup> Application, ¶ 30.

<sup>30</sup> Application, ¶ 30.

<sup>31</sup> Application, ¶¶ 31-32.

<sup>32</sup> Application, ¶ 33; Reply, ¶ 55.

<sup>33</sup> Reply, ¶ 45.

38. *Urgency.* Claimant submits that provisional measures are urgent, in the sense that it will otherwise suffer imminent harm or harm that would arise before the award is rendered.<sup>34</sup> In its view, the ongoing and escalating public remarks by Mexico's President have prompted Mexican agencies to take unjustified actions to shut down CALICA's remaining operations, have severely damaged Claimant's and CALICA's reputation in Mexico, and threaten to render null part of Claimant's relief sought in this arbitration.<sup>35</sup> According to Claimant, the rhythm and speed of the actions taken by Mexico mean that the measures cannot wait until the final Award.<sup>36</sup>
39. *Proportionality.* Claimant contends that the provisional measures requested are proportionate and would not cause any harm to Respondent. In its view, Claimant's right to non-aggravation of the dispute is compelling, while Respondent lacks a compelling reason to continue public attacks against Claimant and CALICA.<sup>37</sup>

### **B. Respondent's Position**

40. Respondent opposes Claimant's request for provisional measures. Respondent asserts that NAFTA Article 1134 has modified the procedural rules contained in Article 47 of the ICSID Convention and ICSID Rule 39, excluding their application by virtue of NAFTA Article 1120(2) (see ¶ 9 above).<sup>38</sup>
41. Respondent emphasises that provisional measures are extraordinary and should not be granted lightly.<sup>39</sup>
42. In light of the statement in NAFTA Article 1134 that "[a] Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred

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<sup>34</sup> Application, ¶ 35.

<sup>35</sup> Application, ¶ 36 ; Reply, ¶ 58.

<sup>36</sup> Application, ¶ 37.

<sup>37</sup> Application, ¶ 39; Reply ¶¶ 61-62.

<sup>38</sup> Response, ¶¶ 140, 141.

<sup>39</sup> Response, ¶ 139.

to in Article 1116 or 1117”, Respondent denies that the Tribunal’s discretion to grant provisional measures is broad.<sup>40</sup>

43. According to Respondent, five standards apply to determine whether a tribunal should recommend provisional measures: (i) *prima facie* jurisdiction of the tribunal; (ii) identify a right susceptible of being affected and demonstrate a *prima facie* claim; and prove that the provisional measures are (iii) necessary; (iv) urgent and (v) proportionate.<sup>41</sup>
44. *Prima facie jurisdiction.* While the Respondent does not dispute the Tribunal’s power to recommend provisional measures in principle, Respondent argues that it is not competent to recommend the measures sought by Claimant, because the facts that Claimant refers to concern a new claim that Claimant attempts to pass off as an ancillary claim but which has no relation to the original claims.<sup>42</sup>
45. *Procedural right affected.* In Respondent’s view, the dispute before the Tribunal is not susceptible of being aggravated because the acts referred to in the Application have no relation with that dispute. According to Respondent, Claimant’s right to the protection of due process is limited to due process in this arbitration.<sup>43</sup>
46. *Urgency.* Respondent contends that provisional measures are only urgent when they cannot await the outcome of the award.<sup>44</sup> Respondent denies that there is necessity or urgency for the provisional measures, *inter alia* on the basis that (i) the shutdown of La Rosita is not irregular but was in accordance with the applicable legal procedure; (ii) the harm alleged by Claimant is speculative in that it refers to non-existent criminal proceedings against company officials; (iii) the premise that Respondent has erected

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<sup>40</sup> Response, ¶ 140.

<sup>41</sup> Response, ¶ 142; Rejoinder, ¶ 96,

<sup>42</sup> Response, ¶ 143.

<sup>43</sup> Response, ¶ 149.

<sup>44</sup> Response, ¶ 156; *citing, inter alia*, **RL-134**, C. Schreuer, *The ICSID Convention*, 2<sup>nd</sup> ed. CUP (2009), pp. 775-776.

operational barriers to Claimant's investment in Mexico is false; (iv) there is no hindrance to relief in this case, which can be resolved by the Tribunal without the measures.<sup>45</sup>

47. *Necessity.* Respondent submits that a measure is necessary when it will protect the affected party from a clear and substantial risk of irreparable harm.<sup>46</sup> According to Respondent, Claimant has not identified with precision its right that is necessary to protect.<sup>47</sup> Citing ICJ jurisprudence which has been relied on by other arbitral tribunals, Respondent further contends that the "irreparable prejudice" to be suffered is a very high legal standard.<sup>48</sup> Respondent submits that Claimant has failed to prove serious risk or irreparable harm, taking into account that (i) due process has already been guaranteed at all times and only the award is outstanding; (ii) due process is also afforded under national law; and (iii) Claimant's rights are fully protected and Respondent has not ignored an order of its own judiciary, contrary to Claimant's assertion.<sup>49</sup>
48. Respondent further questions Claimant's account of the events relevant to the Application, on the basis that (i) PROFEPA acted within the scope of its powers to protect the environment and verify compliance with environmental obligations; and (ii) Claimant fails to mention that the President's declarations in the press conferences are limited to the negotiation process that is carried out in parallel to the arbitration.<sup>50</sup>
49. Respondent further submits that CALICA is guaranteed due process and domestic legal remedies. It will have the opportunity to bring proof to clarify or disprove the findings of the environmental authority in order to reverse its determination and potentially lift the closure, or have it overturned in a national court. In this sense, Respondent argues that CALICA has not exhausted its internal procedures related to the acts and measures taken

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<sup>45</sup> Response, ¶ 160; Rejoinder, ¶ 56. *See also* Rejoinder, ¶ 104.

<sup>46</sup> Response, ¶ 152; *citing, inter alia*, **CL-184**, *Plama Consortium Limited v. Republic of Bulgaria*, Order 6 September 2005, ¶¶ 45-46.

<sup>47</sup> Response, ¶ 152.

<sup>48</sup> Response, ¶ 153; *citing, inter alia*, **CL-177**, *Occidental Petroleum Corporation y Occidental Exploration and Production Company v República del Ecuador*, Decision on provisional measures, 17 August 2007, ¶ 59; **RL-133**, *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, Decision on Claimant's Request for Provisional Measures, 3 March 2010, ¶¶ 38-43, 55-56.

<sup>49</sup> Response, ¶ 154-155; Rejoinder, ¶¶ 6, 36, 101.

<sup>50</sup> Response, ¶ 18; Rejoinder, ¶¶ 6, 32, 35, 48, 57.

in La Rosita, and in fact several proceedings challenging these acts are in progress.<sup>51</sup> Respondent further identifies at least two different appeal proceedings available to be filed by CALICA against the determinations of the environmental authorities.<sup>52</sup> As such, in Respondent's view Claimant's actions in the arbitration procedure are premature.<sup>53</sup>

50. *Proportionality.* Respondent argues that proportionality requires the Tribunal to balance the harm caused or imminent to Claimant and the possible effect that the provisional measure may cause to Respondent.<sup>54</sup> In Respondent's view, the provisional measures would be disproportionate in that (i) the measures refer to facts that are not related to Claimant's original claims; (ii) none of the acts have affected the status quo of the facts originally examined by the Tribunal; (iii) Claimant has been afforded due process in all proceedings; and (iv) there is a risk that the proceedings continue indefinitely, due to parallel Mexican proceedings.<sup>55</sup>

### **C. Tribunal's Analysis**

51. In this Section, the Tribunal will determine whether to grant Claimant's request for provisional measures, taking into account the Parties' positions as summarised above and as set out in their respective submissions. The Tribunal will first consider its power to recommend provisional measures, before turning to the relevant criteria, and finally deciding whether the Tribunal should make the recommendation sought.

#### **(i) *The Tribunal's Power to Recommend Provisional Measures***

52. The Parties agree that the Tribunal has the power to order provisional measures as set out in NAFTA Article 1134 (see ¶ 10 above). The Tribunal is not persuaded by Respondent's argument that NAFTA Article 1134 excludes the application of Article 47 of the ICSID Convention and ICSID Rule 39, which equally govern the Tribunal's power to award such

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<sup>51</sup> Response, ¶¶ 44, 47-50, 54, 57. *See also* ¶ 135.

<sup>52</sup> Response, ¶ 56.

<sup>53</sup> Response, ¶ 72; Rejoinder, ¶ 93.

<sup>54</sup> Response, ¶ 163.

<sup>55</sup> Response, ¶ 166.

measures. In this respect, NAFTA Article 1120(2) provides that “[t]he applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.”

53. The Tribunal finds no inconsistency between NAFTA Article 1134, the ICSID Convention and the ICSID Rules with respect to provisional measures and no aspect of NAFTA Article 1134 that would require or imply the exclusion of those applicable rules. Accordingly, Article 47 of the ICSID Convention and ICSID Rule 39 apply together with any modifications in NAFTA Article 1134.
54. Notably, NAFTA Article 1134 includes a specification that “[a] Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117” (see ¶ 10 above). The Tribunal considers this to circumscribe the Tribunal’s power under Article 47 of the ICSID Convention to “recommend any provisional measures” (see ¶ 12 above).

***(ii) The Criteria for Recommending Provisional Measures***

55. NAFTA Article 1134 provides that provisional measures may be recommended “to preserve the rights of a disputing party, or to ensure that the Tribunal’s jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal’s jurisdiction. . .” It further provides that “[a] Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117” (see ¶ 10 above).
56. Article 47 of the ICSID Convention provides that the Tribunal may recommend provisional measures “to preserve the respective rights of either party”, “if it considers that the circumstances so require” (see ¶ 12 above).
57. ICSID Rule 39 sets out the procedure for consideration of a request for provisional measures, including that such a request “shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures” (see ¶ 13 above).

58. The above provisions reflect the Tribunal's broad discretion in considering a request for provisional measures, as long as such measures do not enjoin the application of a measure alleged to constitute a breach of NAFTA in the proceedings.
59. In terms of the specific criteria to be applied by the Tribunal to determine whether it should exercise such discretion, having examined the relevant rules and the criteria put forward by the Parties, which do not differ greatly (see ¶¶ 32 and 43 above), the Tribunal considers the criteria to include: (i) the *prima facie* jurisdiction of the Tribunal; (ii) a specific right to be preserved; (iii) necessity of the measures to prevent irreparable harm, including the proportionality of the measures; and (iv) urgency.
60. With regard to Respondent's submission that Claimant must also identify a *prima facie* claim with respect to its request for provisional measures,<sup>56</sup> the Tribunal is not persuaded that this criterion is relevant to the present case. In any event, at this late stage of the proceedings the Tribunal considers that Claimant has made out a *prima facie* claim with respect to its requests for relief put forward to date, without prejudging the merits of such requests.
61. In terms of the gravity of a recommendation of provisional measures, Respondent emphasizes that it is an exceptional remedy, not to be lightly granted. The Tribunal concurs with Respondent and with the view expressed by the tribunal in *Plama v. Bulgaria* that provisional measures are an extraordinary measure which should not be recommended lightly.<sup>57</sup>
62. In the Tribunal's view, the gravity of granting a recommendation for provisional measures is built into the criteria set out in ¶ 59 above, in the sense that the requesting party must establish the necessity, urgency and proportionality of the provisional measures. The establishment of these elements ensures that provisional measures are not to be granted

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<sup>56</sup> See Response, ¶ 142.

<sup>57</sup> CL-184, *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order on Provisional Measures, 6 September 2005, ¶ 38.



lightly. Provisional measures are granted where the Tribunal considers necessary, for the important purpose of maintaining the integrity of the arbitration proceedings.

63. The Tribunal shall examine the relevant criteria in order to determine whether to exercise its discretion to recommend the provisional measures sought by Claimant.

***(iii) Whether the Tribunal Should Recommend Provisional Measures***

64. Claimant requests that the Tribunal recommend (see ¶ 16 above):

that Mexico take no action that denies due process to Legacy Vulcan or that might further aggravate or extend the dispute between the Parties, including further public attacks that exacerbate the dispute between the Parties, unduly pressure CALICA or Legacy Vulcan, or render the resolution of the dispute potentially more difficult.

65. The Tribunal will first consider (i) the *prima facie* jurisdiction of the Tribunal, before turning to (ii) whether there is a specific right to be protected; (iii) the necessity of the measures to prevent irreparable harm, including the proportionality of the measures; and (iv) urgency.
66. *Prima facie jurisdiction.* The Tribunal finds that it has *prima facie* jurisdiction for the purposes of considering the request for provisional measures. In this respect, Claimant's request concerns the rights of the disputing Parties to this arbitration. Subject to the Tribunal's considerations below with respect to the specific rights to be preserved, the Tribunal also finds that the requested measures relate to Claimant's investment in Mexico.
67. Respondent objects that the Tribunal is not competent to recommend provisional measures regarding a measure that does not form part of the original claim.<sup>58</sup> The Tribunal considers it more appropriate to discuss this issue at ¶ 95 below. For present purposes, the Tribunal finds that it has *prima facie* jurisdiction to grant the measures which generally relate to the disputing Parties and Claimant's investment.

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<sup>58</sup> Response, ¶ 133. See also Response, ¶ 145; Rejoinder, ¶ 97.

68. *Specific right to be protected.* ICSID Rule 39 provides that a party may request provisional measures for the preservation of its rights, and such a request must “specify the rights to be preserved” (see ¶ 13 above). Likewise, NAFTA Article 1134 (see ¶ 10 above), and Article 47 of the ICSID Convention (see ¶ 12 above) refer to the preservation of the rights of a disputing party.
69. The Tribunal agrees with Respondent that an arbitral tribunal may only grant provisional measures if there are substantive and procedural rights that should be protected and preserved until the tribunal renders its award.<sup>59</sup> As is clear from the above provisions, the right to be protected must relate to the arbitration proceeding. This necessarily entails a connection to the requesting party’s claims and requests for relief in the arbitration.<sup>60</sup>
70. Importantly for present purposes, the requested provisional measures must relate to the existing claims before the Tribunal. While Claimant has made a request to introduce an ancillary claim in this arbitration, that request is being decided by the Tribunal in this Procedural Order No. 7, and no specific requests for relief have yet been made in relation to that claim. For the purposes of examining the specific rights to be protected, the Tribunal therefore takes into account the requests for relief made to date by Claimant in its prior submissions in this arbitration.
71. As Respondent has noted, Claimant’s prior claims and requests for relief in this proceeding are directed at CALICA’s La Adelita and El Corchalito lots, as well as port fees associated with the port at Punta Venado.<sup>61</sup> Claimant makes an alternative request for relief as follows:<sup>62</sup>

Giving Respondent the option to pay less than the full amount ordered above for items (i), (ii), (iv) and (v) if Mexico’s instrumentalities, (x) within three months from the issuance of the Award, were to amend the POEL to expressly allow quarrying operations by CALICA in La Adelita, *and* (y) immediately close all

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<sup>59</sup> See Response, ¶ 150.

<sup>60</sup> See also CL-184, *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order on Provisional Measures, 6 September 2005, ¶ 40.

<sup>61</sup> See Claimant’s Memorial dated 18 May 2020 (“**Memorial**”), ¶ 347; Reply, ¶ 288.

<sup>62</sup> Memorial, ¶ 347(e); Reply, ¶ 288(e).

administrative and judicial proceedings against CALICA arising out of the inspection of El Corchalito, allowing CALICA to resume operations normally with no penalties to CALICA or any of its affiliates or any of their respective employees, agents, advisors or other representatives (collectively, the “Settlement Measures”), in which case Respondent shall pay the damages effectively incurred up to the performance of the Settlement Measures;

72. In its Application, Claimant requests protection of its right to non-aggravation of the dispute, including procedural due process (see ¶ 64 above). Contrary to Respondent’s assertion, the Tribunal considers this request to be readily identifiable from Claimant’s submissions on the Application.<sup>63</sup>
73. The Tribunal concurs with the tribunal in *Churchill Mining v. Indonesia* that the preservation of the *status quo* and non-aggravation of the dispute are self-standing rights vested in any party to ICSID proceedings.<sup>64</sup>
74. Claimant argues that the right to non-aggravation includes the right to due process.<sup>65</sup> The Tribunal agrees, while confirming Respondent’s view that the due process in question is Claimant’s right to due process in this arbitration.<sup>66</sup> As such, a recommendation that would purport to relate to due process to be granted in domestic administrative or legal proceedings, without connection to this arbitration, would be beyond the purview of this Tribunal.
75. In light of the foregoing, the Tribunal will examine whether the provisional measures requested by Claimant are necessary to protect Claimant’s right to non-aggravation of the dispute and procedural due process, specifically with respect to the dispute presently before the Tribunal as reflected in Claimant’s requests for relief to date.

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<sup>63</sup> See Application, ¶ 25; Reply, ¶ 51.

<sup>64</sup> CL-185, *Churchill Mining PLC v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14 on Procedural Measures, ¶ 71 (22 December 2014).

<sup>65</sup> Application, ¶ 27; Reply, ¶ 51.

<sup>66</sup> See Response, ¶ 149.

76. *Necessity, irreparable harm and proportionality.* Claimant's request for provisional measures is founded on multiple alleged circumstances (see ¶ 37 above), including:
- (i) Respondent has ignored an order of its own judiciary that would have provisionally preserved CALICA's ability to continue operating its investment, instead arbitrarily and unjustifiably shutting down CALICA's remaining operations;<sup>67</sup>
  - (ii) Respondent's public disparagement of CALICA's operations as illegal may pave the way for further pressure on CALICA, for example through criminal proceedings against company officials;<sup>68</sup>
  - (iii) The threatened revocation of CALICA's port concession;<sup>69</sup>
  - (iv) The threatened revocation of CALICA's customs permit;<sup>70</sup>
  - (v) Respondent's public attacks during repeated press briefings are severely prejudicial to Claimant and CALICA and risk irreparable injury to their reputation and ability to continue operations in Mexico;<sup>71</sup> and
  - (vi) Respondent's actions threaten Claimant's ability to pursue this arbitration, due to specific public remarks regarding this arbitration which Claimant sees as an effort to strong-arm it into forfeiting its rights and to compel CALICA to transform its operation into a tourism project.<sup>72</sup>
77. Based on the materials presented to the Tribunal for the purpose of deciding on the Application, the Tribunal is not satisfied that the risk of irreparable harm in relation to item (i) in ¶ 76 above has been made out. Specifically, while the Tribunal does not find any misrepresentation by Claimant, there is insufficient evidence that Respondent has ignored a decision of its own judiciary that would have provisionally preserved CALICA's ability

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<sup>67</sup> Application, ¶ 30; Reply, ¶ 45

<sup>68</sup> Application, ¶ 30.

<sup>69</sup> Reply, ¶ 45.

<sup>70</sup> Reply, ¶¶ 45.

<sup>71</sup> Application, ¶¶ 31-32.

<sup>72</sup> Application, ¶ 33; Reply, ¶ 55.

to continue operating its investment. The Tribunal observes that the Parties disagree on the scope of application of the court order in question,<sup>73</sup> and at least one Mexican court has issued an order that would appear to contradict Claimant's argument that the order on which it seeks to rely covered CALICA's La Rosita lot.<sup>74</sup> In addition, Claimant has insufficiently established a connection to its relief requested to date in these proceedings (see ¶ 71 above).

78. With respect to the risk of criminal proceedings in item (ii) of ¶ 76 above, the alleged harm remains speculative at this time, since no such proceedings have been initiated. The same applies to the alleged threatened revocation of CALICA's port concession in item (iii) of ¶ 76.
79. As for the potential revocation of Claimant's customs permit (item (iv) of ¶ 76 above), Respondent confirms that proceedings for the suspension and cancellation of CALICA's export permit are underway.<sup>75</sup> While Claimant's export permit is undoubtedly of relevance to its investment in Mexico, to issue provisional measures with respect to ongoing proceedings before the Mexican authorities would be a very serious matter. The Tribunal declines to do so based on the materials before it and at this stage.
80. In relation to item (v) of ¶ 76 above, Claimant refers to the public remarks made by the President López Obrador, which in its view affect the ability of CALICA and Claimant to resume operations and cause injury to their reputations across Mexico.<sup>76</sup> According to Respondent, a risk to reputation cannot be a basis for provisional measures because it is not a procedural right related to the integrity of the proceedings, nor is it a right in dispute.<sup>77</sup>

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<sup>73</sup> Response, ¶ 134; Reply, ¶¶ 13-14; Rejoinder, ¶ 37.

<sup>74</sup> See **R-131**, *Juzgado Séptimo de Distrito en el Estado de Quintana Roo, Amparo Indirecto 431/2022, Acuerdo*, 9 May 2022, p. 2.

<sup>75</sup> Rejoinder, ¶¶ 60-61.

<sup>76</sup> Reply, ¶ 53.

<sup>77</sup> Rejoinder, ¶ 99. See also Rejoinder, ¶¶ 102, 105.

81. The Mexican President's public remarks are also the basis for item (vi) of ¶ 76 above, which Claimant sees as an effort to strong-arm it into forfeiting its rights and to compel CALICA to transform its operation into a tourism project.
82. The Tribunal agrees that a risk to Claimant's reputation is not, as such, a right to be protected by way of provisional measures, since it is not a right in dispute before the Tribunal. However, public remarks regarding ongoing arbitration proceedings by the disputing parties may impact upon the integrity of the proceedings and have the potential to aggravate the dispute.
83. In this respect, the tribunal in *Biwater Gauff v. Tanzania* noted:<sup>78</sup>
- It is self-evident that the prosecution of a dispute in the media or in other public fora, or the uneven reporting and disclosure of documents or other parts of the record in parallel with a pending arbitration, may aggravate or exacerbate the dispute and may impact upon the integrity of the procedure. This is all the more so in very public cases, such as this one, where issues of wider interest are raised, and where there is already substantial media coverage, some of which already being the subject of complaint by the parties
84. The Tribunal concurs that the parallel prosecution of an ongoing dispute in public fora may exacerbate the dispute before the Tribunal. The Tribunal recognizes the value of public dissemination of information about an ongoing arbitration proceeding under NAFTA, as also recognized in the form of various transparency measures under NAFTA. The importance of public access to information is consistent with the need to ensure the integrity of the arbitral proceedings. At the same time, this Tribunal is mandated to decide upon the Parties' dispute and must ensure the integrity of the arbitral proceedings.
85. The Tribunal expresses its concern that public statements by President López Obrador made specifically in relation to this arbitration are likely to aggravate the Parties' dispute.

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<sup>78</sup> **CL-188**, *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 on Provisional Measures, 29 September 2006, ¶ 136.

In particular, on 31 January 2022 the President remarked in his press briefings (see also ¶ 20 above):<sup>79</sup>

. . . Como no se les amplió la concesión porque estaban incumpliendo, bueno, violando, destruyendo el territorio, se fueron a una denuncia internacional, y están pidiendo una indemnización, no sé, de millones de pesos, o sea, que todavía nosotros les tenemos que pagar.

. . . en esa mina, que es una de las propuestas que les estamos haciendo, como ya escarbaron, el agua aquí es turquesa por la piedra, entonces, con un poco de imaginación y de talento se podría utilizar como zona turística, casi albercas naturales, buscando un acuerdo, pero que ya no se siga destruyendo y que retiren su demanda, porque no tiene fundamento legal.

86. In addition, on 1 February 2022, the President stated:<sup>80</sup>

Lo mismo en el caso del muelle, tenemos que llegar a un acuerdo y ya se está viendo. . . . Pero, además, demandan al Gobierno de México, quieren no sé cuántos millones de dólares, porque no respetan ninguna ley, ningún contrato.

87. It should be noted that the above statements clearly refer to these pending arbitration proceedings, and therefore to Claimant's existing claims before the Tribunal. The Tribunal therefore rejects Respondent's suggestion that these facts are unrelated to the original claims made by Claimant.<sup>81</sup>

88. According to Respondent, the President's declarations take place in the context of a negotiation between the President and high officials of Claimant.<sup>82</sup> Claimant disputes the assertion that the President's statements are limited to informing the public about recent negotiations.<sup>83</sup> The fact of ongoing negotiations between the Parties does not alter the Tribunal's duty to ensure the integrity of the proceedings. Nor does it justify public

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<sup>79</sup> C-176, Transcript of President's Morning Press Conference, 31 January 2022, p. 22.

<sup>80</sup> C-177, Transcript of President's Morning Press Conference, 1 February 2022, p. 16.

<sup>81</sup> Response, ¶¶ 136, 137, 146.

<sup>82</sup> Response, ¶ 65. *See also* Response, ¶ 67

<sup>83</sup> Reply, ¶ 9.

comments such as those set out at ¶¶ 85-86 above in relation to the merits of the dispute currently before this Tribunal.

89. The fact of the late stage of the arbitration proceedings does not, in the Tribunal’s view, render this provisional measure less necessary or lessen the harm suffered to the aggravation of the dispute.<sup>84</sup>
90. Nor is it relevant that the President’s declarations are made at press conferences for public communication purposes and are not an administrative act.<sup>85</sup> To cause irreparable harm, it is not necessary that aggravation of the dispute modifies Claimant’s or CALICA’s legal situation.<sup>86</sup>
91. As part of its analysis on necessity, the Tribunal must also consider the proportionality of the provisional measure, *i.e.*, to balance the respective harms caused to the Parties by granting or refraining from a recommendation.<sup>87</sup> The Tribunal in *Caratube II v. Kazakhstan* found this to require that measures are “appropriate”, including “not to unduly encroach on the State’s sovereignty and activities serving public interests”.<sup>88</sup> Respondent submits that provisional measures granted against a sovereign State put it at a disadvantage to an investor, which should only be done in exceptional circumstances.<sup>89</sup>
92. State sovereignty in respect of activities serving public interests is an important consideration which has been given due weight by the Tribunal. The Tribunal considers that a recommendation made in relation to public comments about the dispute and disputing parties pending before this Tribunal does not unduly encroach on Respondent’s sovereignty or interfere in the exercise of public authority. In particular, the wording of the Tribunal’s

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<sup>84</sup> See Response, ¶ 148.

<sup>85</sup> See Response, ¶¶ 68-69.

<sup>86</sup> See Response, ¶ 70.

<sup>87</sup> See **CL-178**, *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 158.

<sup>88</sup> **RL-125**, *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on Claimant’s Request for Provisional Measures, 4 December 2021, ¶ 121.

<sup>89</sup> Response, ¶ 165.



recommendation is limited to what is necessary to maintain the integrity of these proceedings and not more.

93. The Tribunal therefore considers that public comments made by Mexico's President on Claimant's claims and damages sought in these proceedings jeopardise the integrity of the arbitral process and are tantamount to prosecution of the dispute in the media and other public fora, contrary to the non-aggravation of the dispute. Such harm is irreparable, in the sense that it cannot be compensated by damages. Subject to its considerations on urgency below, the Tribunal therefore finds it necessary to issue a recommendation in relation to this item.
94. Likewise unhelpful to the resolution of this dispute is the resort to armed forces for the purposes of entering CALICA's premises, and other disparaging public comments by the President in press conferences with respect to Claimant and CALICA, which appear to refer to CALICA's operations as a whole, including the La Adelita and El Corchalito lots.<sup>90</sup>
95. In their submissions on the Application, the Parties have addressed at length the actions taken by Mexican authorities in relation to CALICA's lot La Rosita. The factual matters associated with the Application are highly disputed between the Parties, including the legal basis for actions taken by the Mexican authorities with respect to La Rosita.<sup>91</sup> As already noted, the Tribunal's recommendation of provisional measures is based on the requests for relief made to date in this arbitration, which do not include claims with respect to La Rosita. While it cannot be excluded that actions taken with respect to La Rosita would be relevant for the non-aggravation of the dispute, for the purposes of this decision on provisional measures, the Tribunal does not consider it necessary or appropriate to address ongoing administrative and legal proceedings in relation to La Rosita which are the subject of the ancillary claim.<sup>92</sup> Indeed, Claimant has not made any request that the Tribunal issue a recommendation with respect to such proceedings, beyond its general request for due

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<sup>90</sup> See, e.g., C-196, Transcript of President's Morning Press Conference, 25 May 2022, pp. 16, 17; C-168, Transcript of President's Morning Press Conference, 2 May 2022, p. 14.

<sup>91</sup> See, e.g., Response, ¶¶ 20-21, 24-25, 41; Reply, ¶¶ 7, 10-12; Rejoinder, ¶¶ 6, 34, 40-42, 46-52, 6, 40-42.

<sup>92</sup> See, e.g., Response, ¶¶ 22-29, 45; Rejoinder, ¶¶ 42, 44-45, 57, 62-65.

process and non-aggravation. It suffices to note that based on the materials presented and at this time, the Tribunal does not consider that the actions taken by Mexican authorities pursuant to applicable law are an aggravation of the dispute before this Tribunal.

96. *Urgency.* The Tribunal agrees with Respondent that “[t]he condition of urgency is met when the acts susceptible of causing irreparable prejudice can ‘occur at any moment’ before the Court makes a final decision on the case. . . .”<sup>93</sup> On the other hand, the Tribunal does not consider it necessary that a matter concerns a case of imminent execution of persons condemned to death in order to be considered urgent.<sup>94</sup> The type of urgency will depend on the matter under consideration in any particular case.
97. The Tribunal considers its recommendation in ¶ 93 above to be urgent, in the sense that the acts susceptible of causing irreparable prejudice have already occurred and, in the absence of the Tribunal’s recommendation, may continue to occur before the Tribunal’s award in this case. In this respect, the President’s press conferences commenting on CALICA and its operations have continued even while this Application is pending.
98. *Conclusion.* In light of the foregoing, the Tribunal recommends as a provisional measure pursuant to Article 47 of the ICSID Convention, Rule 39 of the ICSID Arbitration Rules and NAFTA Article 1134 that Respondent take no action that might further aggravate or extend the dispute between the Parties, including further public attacks that exacerbate the dispute between the Parties, unduly pressure CALICA or Legacy Vulcan, or render the resolution of the dispute potentially more difficult.
99. The Tribunal has granted Claimant’s request in the terms in which it was sought, save for the exclusion of the words “that denies due process to Claimant”, since the Tribunal has

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<sup>93</sup> Response, ¶ 159; quoting **RL-137**, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Decision(s) of the Court, International Court of Justice, 23 January 2020, ¶¶ 65-66.

<sup>94</sup> See Response, ¶ 158; citing **RL-136**, *LaGrand Case (Germany v. United States of America)*, ICJ, Order, 3 March 1999, ¶ 26.

not found Claimant's due process rights in this arbitration to be specifically implicated by Respondent's conduct.

100. While expressed in general terms, the Tribunal does not consider its recommendation to be overly broad. It has been granted in the light of the specific circumstances mentioned at ¶¶ 93, 94 and 97 above. Moreover, the aggravation of a dispute can take many forms, all of which are to be avoided by the disputing parties.

## VI. ANCILLARY CLAIM

### A. Claimant's Position

101. Claimant argues that its ancillary claim is admissible and timely under ICSID Rule 40(1) (see ¶ 14 above).<sup>95</sup> Claimant denies that ICSID Rule 40(1) is modified by NAFTA.<sup>96</sup>
102. For Claimant, the ancillary claim falls within the scope of the Parties' consent and is within ICSID's jurisdiction. Claimant argues that Respondent's consent in NAFTA Article 1122 and Claimant and CALICA's consent in their Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter 11 serve for this purpose.<sup>97</sup>
103. Claimant further submits that the Tribunal has jurisdiction *ratione materiae*, *ratione personae*, and *ratione voluntatis*, since the dispute is (i) a legal dispute (ii) that arises directly out of Claimant's investment in the Project in Mexico (iii) between Mexico (Contracting State of the ICSID Convention) and Claimant (a national of the United States).<sup>98</sup>
104. For Claimant, the ancillary claim is timely since it arises from new facts which post-date the written and oral phases of this arbitration.<sup>99</sup>

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<sup>95</sup> Application, ¶ 41.

<sup>96</sup> Reply, ¶ 21.

<sup>97</sup> Application, ¶ 45.

<sup>98</sup> Application, ¶ 46.

<sup>99</sup> Application, ¶¶ 48-49; Reply, ¶ 37.

105. Claimant submits that the wrongful shutdown of CALICA's operations at La Rosita arises directly out of the subject-matter of the dispute, being Respondent's interference with Claimant's investments in the Project in violation of NAFTA.<sup>100</sup> In Claimant's view, La Rosita is a core part of the integrated Project at issue in this arbitration, and the ancillary claim would not transform the dispute before the Tribunal into a fundamentally different one.<sup>101</sup>
106. Since it arises directly from the subject-matter of the dispute, Claimant argues that the ancillary claim is not subject to the required cooling-off period and formalities of new claims.<sup>102</sup>
107. Claimant contends that the principles of economy, efficiency and finality support hearing and deciding all aspects of the Parties' dispute in one proceeding.<sup>103</sup> Claimant argues that Respondent would have adequate opportunity to address the ancillary claim and would benefit from the cost and other efficiencies of doing so in one arbitral proceeding by a tribunal that is already well-versed on the Parties' dispute.<sup>104</sup>

### **B. Respondent's Submission**

108. Respondent argues that there is no basis in Chapter 11 of NAFTA to present an ancillary claim based on a measure that did not form part of the original claim. In this regard, Respondent contends that NAFTA Articles 1119 (Notice of Intent to Submit a Claim to Arbitration), 1120 (Submission of a Claim to Arbitration) and 1121 (Conditions Precedent to Submission of a Claim to Arbitration) have modified the ICSID Rules which do provide for such an option. Pursuant to NAFTA Article 1120(2), the arbitral procedural rules only apply to the extent modified by Section B of Chapter 11 of NAFTA.<sup>105</sup>

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<sup>100</sup> Application, ¶ 42.

<sup>101</sup> Application, ¶¶ 43-44.

<sup>102</sup> Reply, ¶ 35.

<sup>103</sup> Application, ¶ 50; *quoting* Schreuer, ICSID Commentary, Art. 46, ¶ 1.

<sup>104</sup> Application, ¶ 50.

<sup>105</sup> Response, ¶¶ 77-78; Rejoinder, ¶ 69.

109. In Respondent’s view, the new claim sought to be put forward by Claimant is not ancillary but is an entirely new claim with no factual or legal relationship with the facts and claims originally presented. In this regard, Respondent submits that Claimant should be required to indicate which of the previously identified measures the ancillary claim is “additional” to and demonstrate a close relationship to it. Respondent further denies that the Tribunal needs knowledge of the ancillary claim to be able to resolve the original dispute between the Parties, which in its view is a requirement of admitting the ancillary claim.<sup>106</sup>
110. In order to prove that a claim is ancillary, Respondent submits that Claimant should be required to prove: (i) that the new claim is effectively subordinate to one of the three originally-formulated claims; (ii) the object or theme of the dispute is the same; (iii) there is a close connection between the principal and accessory claims, such as the Tribunal cannot decide on the first without resolving the second; (iv) the new claim is within the limits of consent of the parties; and (v) the claim has been presented within the required legal period.<sup>107</sup>
111. Respondent argues that to allow Claimant to present an ancillary claim at this stage of the proceedings would be contrary to the finality and predictability of the proceedings.<sup>108</sup>
112. According to Respondent, the principles of economy, efficiency and finality are not decisive to determine whether an ancillary claim should be admitted.<sup>109</sup> The *Itera v. Georgia* tribunal stated, in this regard, that the requirement is that the subject matter is the same, rather than efficiency considerations alone.<sup>110</sup>

### C. Tribunal’s Analysis

113. Claimant requests leave to present an ancillary claim concerning “Mexico’s wrongful shutdown of Legacy Vulcan’s remaining quarrying operations in Mexico under a schedule

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<sup>106</sup> Response, ¶¶ 74, 112; Rejoinder, ¶¶ 4, 8, 66, 74, 77.

<sup>107</sup> Response, ¶ 106; Rejoinder, ¶ 67.

<sup>108</sup> Response, ¶ 103; Rejoinder, ¶ 83.

<sup>109</sup> Response, ¶ 125.

<sup>110</sup> Response, ¶ 126; quoting **RL-116**, *Itera International Energy LLC and Itera Group NV v. Georgia I*, Decision on the Admissibility of Ancillary Claims, 4 December 2009, ¶ 100.

to be discussed with Respondent and the Tribunal.”<sup>111</sup> To decide on this request, the Tribunal will consider below (i) the Tribunal’s power to admit an ancillary claim; (ii) the relevant criteria; (iii) whether the Tribunal should admit the ancillary claim; (iv) procedural implications; and (v) the potential counterclaim.

**(i) *The Tribunal’s Power to Admit an Ancillary Claim***

114. The Tribunal notes that the potential ancillary claim before it is not a modification of Claimant’s original relief sought. The ancillary claim is sought to be made in addition to the original claims, in relation to Claimant’s “remaining quarrying operations in Mexico” (see ¶ 113 above).
115. Respondent argues that the Tribunal is not empowered to admit an ancillary claim to this arbitration, on the basis that NAFTA Articles 1119 (Notice of Intent to Submit a Claim to Arbitration), 1120 (Submission of a Claim to Arbitration) and 1121 (Conditions Precedent to Submission of a Claim to Arbitration) have modified the ICSID Rules which do provide for such an option.<sup>112</sup> According to Respondent, a claim under NAFTA is one subject to certain formalities, including (i) the requirement of at least 90 days of written notice; (ii) the expiry of at least six months from when the acts took place; (iii) the investor’s written consent to submit to arbitration and waiver of any proceedings before national authorities.<sup>113</sup> For Respondent, the ICSID Rules cannot modify the requirements for its consent to arbitrate under NAFTA.<sup>114</sup> Respondent argues that these conditions have not been fulfilled and Mexico has therefore not consented to arbitrate this claim.<sup>115</sup>
116. The Tribunal finds Respondent’s contention that NAFTA has excluded Article 46 of the ICSID Convention and ICSID Rule 40 to be without merit. NAFTA Articles 1119, 1120 and 1121 do not purport to modify the possibility granted under Article 46 of the ICSID Convention to “determine any incidental or additional claims or counterclaims arising

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<sup>111</sup> Application, ¶ 51(ii).

<sup>112</sup> Response, ¶¶ 77-78; Rejoinder, ¶ 69.

<sup>113</sup> Response, ¶ 83.

<sup>114</sup> Rejoinder, ¶ 69.

<sup>115</sup> Response, ¶¶ 114-115; Rejoinder, ¶ 2.

directly out of the subject-matter of the dispute provided that they are within scope of the consent of the parties and are otherwise within the jurisdiction of the Centre”. The Tribunal finds no contradiction between the possibility to admit an additional claim which arises “directly out of the subject-matter of the dispute”, and NAFTA’s procedural requirements to submit the original claim to arbitration. In the absence of an inconsistency, if the NAFTA parties had intended to modify that aspect of the ICSID Rules, they would have done so explicitly.

117. This finding is consistent with that of the prior NAFTA tribunals cited by Claimant,<sup>116</sup> including *Feldman v. Mexico*<sup>117</sup> and *Metalclad v. Mexico* (in the related context of amendments to previously submitted claims and consideration of new facts and events).<sup>118</sup> The Tribunal does not consider the case of *Methanex v. Mexico* or *Merrill & Ring Forestry L.P. v. Government of Canada* to add to this analysis, insofar as they restate (in different contexts and in relation to the specific facts before them) that the requirements of consent must be fulfilled under NAFTA, including formalities under NAFTA Articles 1118-1121.<sup>119</sup>
118. The Tribunal therefore rejects Respondent’s argument that it has not consented to the admission of an ancillary claim in this arbitration. Pursuant to NAFTA Article 1120, Respondent consented to application of the procedural rules under the ICSID Convention, which in this respect have not been modified by any provision in Section B of Chapter 11 of NAFTA.
119. As such, in circumstances where an ancillary claim is admitted pursuant to the applicable criteria (and conditional on such criteria being met), the requirements of written notice of a claim, the expiry of a six-month period and the investor’s consent and waiver are covered by compliance with those requirements in relation to the original claim. The Tribunal

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<sup>116</sup> Reply, ¶¶ 22-23.

<sup>117</sup> **CL-196**, *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶ 54: “the issue of ancillary claims remains untouched by Section B of Chapter Eleven”.

<sup>118</sup> **CL-019**, *Metalclad v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 67.

<sup>119</sup> **RL-120**, *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/01, Decision on a Motion to Add a New Party, 31 January 2008, ¶ 28; **RL-070**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, ¶ 120. See Response, ¶ 1113.

emphasises, in this respect, that any potential ancillary claim must be examined closely to determine whether it meets the specific requirement of arising “directly out of the subject-matter of the dispute”, which is the key basis of admission and for the understanding that NAFTA’s procedural requirements have already been complied with.

**(ii) *The Criteria to Admit an Ancillary Claim***

120. Article 46 of the ICSID Convention and ICSID Rule 40 apply to determine whether an ancillary claim may be admitted (see ¶¶ 11 and 14 above). Article 46 of the ICSID Convention and ICSID Rule 40 refer to “incidental or additional” claims, “arising directly out of the subject-matter of the dispute”. Such additional claims must be within scope of the consent of the Parties and otherwise within the jurisdiction of the Centre.

121. As for the timing of admission of an ancillary claim, ICSID Rule 40 states that such a claim:

shall be presented not later than in the reply. . . unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.

122. Several arbitral tribunals have referred to Note B(a) to ICSID Rule 40 when setting out the relevant test:<sup>120</sup>

The test to satisfy this condition is whether the factual connection between the original and the ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute, the object being to dispose of all the grounds of dispute arising out of the same subject-matter.

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<sup>120</sup> See **CL-010**, *ADF v. United States*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, n. 151; **CL-162**, *CMS v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ¶ 116; **CL-190**, *Mobil v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶ 118. See Application, ¶ 42.



123. According to Claimant, this involves an analysis of whether the facts underlying the party's ancillary claim are sufficiently connected to the investor's claims and the matrix of facts already present in the dispute.<sup>121</sup>
124. Claimant also relies on the commentary of Prof. Schreuer, who states that the idea is "to deal with closely-related claims in one set of proceedings", and that tribunals should avoid "parallel or consecutive proceedings relating to different aspects of the same dispute[, which] are not only costly and inefficient but are also liable to lead to conflicting outcomes."<sup>122</sup>
125. Respondent, on the other hand, relies on the decisions of other arbitral tribunals to submit that Claimant should be required to prove: (i) that the new claim is effectively subordinate to one of the three originally-formulated claims (*Lotus Holding v. Turkmenistan*); (ii) the object or theme of the dispute is the same (*Itera v. Georgia*); (iii) there is a close connection between the principal and accessory claims, such as the Tribunal cannot decide on the first without resolving the second (*ADF Group Inc. v. United States of America*; *Itera v. Georgia*); (iv) the new claim is within the limits of consent of the parties; and (v) the claim has been presented within the required legal period.<sup>123</sup>
126. Based on the text of the applicable rules (see ¶¶ 120 and 121 above), the Tribunal finds that the criteria to admit the ancillary claim are that it (i) arises directly out of the subject-matter of the dispute; (ii) is within scope of the consent of the Parties and otherwise within the jurisdiction of the Centre; and (iii) is timely presented or the Tribunal authorizes its later presentation.
127. The Tribunal considers criteria (i)-(iii) put forward by Respondent in ¶ 125 above to be different expressions of the requirement that an ancillary claim arises directly out of the

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<sup>121</sup> Application, ¶ 42.

<sup>122</sup> Application, ¶ 50; quoting Schreuer, ICSID Commentary, Art. 46, ¶ 1.

<sup>123</sup> Response, ¶ 106; Rejoinder, ¶ 67; citing **RL-119**, *Lotus Holding Anonim Sirketi v. Turkmenistan*, ICSID Case No. ARB/17/30, Award, ¶ 192; **RL-116**, *Itera International Energy LLC and Itera Group NV v. Georgia I*, Decision on the Admissibility of Ancillary Claims, 4 December 2009, ¶ 100; **CL-010**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 144.

subject-matter of the dispute. The Tribunal endorses the (undisputed) requirement that the original and ancillary claim must be closely connected, in the sense that the Tribunal cannot decide on the first without resolving the second.<sup>124</sup> This being a strict requirement, the Tribunal does not consider that the other proposed criteria add to the analysis.

**(iii) *Whether the Tribunal Should Admit Claimant’s Ancillary Claim***

128. The Tribunal shall apply the above criteria to determine whether Claimant’s ancillary claim with respect to its “remaining quarrying operations in Mexico” (see ¶ 113 above) should be admitted.
129. The Tribunal observes that this part of the Order in relation to the admission of Claimant’s ancillary claim is issued by majority of the Tribunal.<sup>125</sup> The majority of the Tribunal has reviewed the draft dissent of Professor Puig, which does not give it reason to change its views, in particular since this Order is issued on the basis of what the Parties have submitted to the Tribunal for the purposes of this Application. References to the Tribunal in this subsection should be understood as references to the majority of the Tribunal.
130. *Arises Directly out of Subject Matter.* The Parties fundamentally disagree on whether the ancillary claim sought to be filed by Claimant arises directly out of the subject matter of the Parties’ dispute. Claimant argues that the “subject matter” of the dispute is “Mexico’s wrongful interference with Legacy Vulcan’s investments in the Project, which encompasses four lots: El Corchalito, La Adelita, La Rosita, and Punta Venado”.<sup>126</sup> Accordingly, in its view an ancillary claim “concerning Mexico’s wrongful shutdown of Legacy Vulcan’s remaining quarrying operations in Mexico” falls within the existing subject matter.
131. Respondent submits, on the other hand, that there is no close connection between the ancillary claim and the original claims.<sup>127</sup> Respondent asserts that the present arbitration

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<sup>124</sup> Request, ¶ 42; Rejoinder, ¶ 110.

<sup>125</sup> See dissenting opinion to Procedural Order No. 7 of Professor Puig.

<sup>126</sup> Reply, ¶ 32.

<sup>127</sup> Response, ¶¶ 86-87; Rejoinder, ¶¶ 27-29.

concerns El Corchalito and La Adelita and the ancillary claim is about La Rosita and is not related to those excavation sites.<sup>128</sup> For Respondent, the “CALICA Network” is a controversial concept invoked by Claimant, which cannot be used to create a non-existent relationship between the original claims and the ancillary claim.<sup>129</sup>

132. As further evidence that the ancillary claim is a separate and new claim, Respondent relies on the fact that (i) the ancillary claim results in a separate loss and would require an independent valuation of damages;<sup>130</sup> and (ii) La Rosita is governed by a separate legal instrument to La Adelita and El Corchalito.<sup>131</sup>
133. The Tribunal finds Respondent’s characterisation of the subject matter of the Parties’ dispute too narrow. In this regard, the subject matter of the dispute is to be distinguished from the original claims made.
134. The Tribunal considers there to be a close connection between the ancillary claim and the existing dispute between the Parties. The existing claims before the Tribunal relate to the quarrying lots of La Adelita and El Corchalito, and to the port at Punta Venado.
135. La Rosita is one of three lots owned by CALICA for quarrying operations, the other two (La Adelita and El Corchalito) being the subject of the original claims. The original claims filed by Claimant include (i) the alleged repudiation of agreements to alter a local environmental regulation (*Programa de Ordenamiento Ecológico Local*) applicable to Adelita, having allegedly prevented CALICA from quarrying that lot;<sup>132</sup> and (ii) the allegedly unlawful shutdown of CALICA’s operations at El Corchalito, based on the findings of an inspection by PROFEPA.<sup>133</sup> Notably, the subject-matter of the ancillary

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<sup>128</sup> Response, ¶ 95. *See also* Rejoinder, ¶ 9, 12-14.

<sup>129</sup> Response, ¶ 95.

<sup>130</sup> Response, ¶¶ 89-90, 92; Rejoinder, ¶¶ 7, 31 73, 74.

<sup>131</sup> Rejoinder, ¶¶ 24-26.

<sup>132</sup> *See* Memorial, ¶ 112.

<sup>133</sup> *See* Memorial, ¶ 159.

claim is the alleged wrongful shutdown of Claimant's operations in La Rosita following an inspection by PROFEPA.<sup>134</sup>

136. The interconnection between La Adelita, El Corchalito and La Rosita as a matter of fact is evident from the record of these proceedings. ¶ 2 of the Request for Arbitration introduced the "Project" as "a major joint-venture project to extract limestone for export to the United States".<sup>135</sup> ¶ 3 of the Request for Arbitration further describes the Project as including "the construction of a deep-sea port to export the production and other substantial infrastructure to conduct quarrying operations in a lot that Claimant acquired for that purpose."<sup>136</sup> The original lot referred to is La Rosita, which contains a limestone quarry and processing plant. The "Project" described by Claimant includes "Claimant's Extraction Plant, Port Terminal and fleet of vessels to export the petrous materials quarried at La Rosita, El Corchalito, and La Adelita."<sup>137</sup>
137. Without prejudging its decision on the scope of Claimant's investment under NAFTA or ascribing any legal significance to Claimant's description of the "Project", it is clear that the La Rosita lot forms part of the same quarrying operation and therefore the same subject matter, with the purpose of quarrying limestone from adjoining sites and exporting materials from Mexico. La Rosita has been frequently referred to throughout this arbitration as a part of CALICA's operations in Mexico. The Tribunal does not consider it feasible to separate the subject matter of the ancillary claim about La Rosita from the dispute already before the Tribunal in relation to Punta Venado, La Adelita and El Corchalito.
138. The Tribunal therefore finds there to be a close connection between the ancillary claim and the original claims. The Tribunal further finds that the connection between the two is so close as to require the adjudication of the ancillary claim in order to achieve the final settlement of the dispute, in order to dispose of all the grounds of dispute arising out of the

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<sup>134</sup> See Application, ¶ 51(ii): "... ancillary claim concerning Mexico's wrongful shutdown of Legacy Vulcan's remaining quarrying operations in Mexico. . ."

<sup>135</sup> Request for Arbitration, ¶ 2.

<sup>136</sup> Request for Arbitration, ¶ 3.

<sup>137</sup> Request for Arbitration, p. 31.

same subject-matter. Indeed, to separate the disputes would, in the Tribunal's view, potentially lead to conflicting decisions on the same subject-matter. In this regard, the ancillary claim refers to actions and assessments made by PROFEPA with respect to La Rosita which are relevant to the arguments made before this Tribunal in relation to La Adelita and El Corchalito.

139. The Tribunal notes, at that this point, that the question whether it will be appropriate to admit such a claim to ongoing arbitration proceedings will very much depend on the circumstances of the case. It is for each tribunal to assess whether that is warranted. In this regard, several previous arbitral tribunals have had to consider whether a claimant may make an ancillary claim on the basis of the same facts that were the basis of the original claims. In the present case, on the other hand, the potential ancillary claim concerns a new alleged measure regarding the same project of quarrying operations that has taken place while this arbitration remains pending. The ancillary claim is based on an alleged further measure with respect to Claimant's quarrying operations, on grounds that are closely connected to the alleged measures with respect to La Adelita and El Corchalito.
140. The Tribunal rejects the assertion that the ancillary claim is "fundamentally different" from the primary dispute.<sup>138</sup> Nor does the ancillary claim concern an "other project" distinct from the one in dispute.<sup>139</sup> The fact that La Rosita is a separate lot, or that it may be subject to different environmental regulations, does not redefine the subject matter of the dispute as set out at ¶ 137 above.
141. In addition, the Tribunal does not consider it an issue that the ancillary or additional claim may require separate valuation.
142. For the same reasons, the Tribunal rejects Respondent's contention that Claimant is estopped from arguing that La Rosita forms part of the original dispute, because it is

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<sup>138</sup> Response, ¶ 109; quoting **RL-119**, *Lotus Holding Anonim Sirketi v. Turkmenistan*, ICSID Case No. ARB/17/30, Award, ¶¶ 192, 193.

<sup>139</sup> See **CL-010**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 143; Response, ¶ 96.

inconsistent with its actions and submissions in these proceedings.<sup>140</sup> The Tribunal finds no inconsistency in the positions taken by Claimant, in particular since the ancillary claim concerns the same project.

143. In reaching this determination, the Tribunal does not consider that Claimant is evading the conditions of consent under NAFTA, or preventing Respondent's authorities from ensuring compliance with the law.<sup>141</sup>
144. The Tribunal observes that its decision to admit the ancillary claim is not based on Claimant's reservation of rights to expand its claim, and does not consider it necessary to further address that point.<sup>142</sup>
145. In terms of Respondent's argument that Claimant's claim is premature,<sup>143</sup> the Tribunal confirms that it does not consider itself to act as an appeal mechanism for ongoing administrative or legal proceedings in Mexico. Subject to compliance with the waiver requirements under NAFTA, the Tribunal does not consider this to be an obstacle to admission of the ancillary claim.
146. While not the prevailing consideration for deciding whether to admit the ancillary claim, the Tribunal also considers that time, cost and procedural efficiency favours the consideration of the ancillary claim together with the original claims. In this regard, it is in the interests of both Parties that a Tribunal is already composed to hear the ancillary claim and is well-versed in the underlying facts of the case. The fact that consideration of the ancillary claim will require additional procedural steps still offers greater efficiency than composition of a new tribunal to hear the dispute, which entails the additional risk of conflicting decisions referred to in ¶ 138 above.
147. In this regard, the Tribunal takes note of Respondent's argument that the ancillary claim would require reopening the proceedings, at a time when they were practically concluded

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<sup>140</sup> Rejoinder, ¶¶ 11, 20-23.

<sup>141</sup> Response, ¶ 88.

<sup>142</sup> Reply, footnote 69; Rejoinder, ¶¶ 78, 87-90.

<sup>143</sup> Rejoinder, ¶ 92.

and the award is awaited.<sup>144</sup> However, this does not outweigh the considerations in ¶ 146 above.

148. *Scope of Consent and Jurisdiction.* Article 46 of the ICSID Convention and ICSID Rule 40 require that an ancillary claim is “within scope of the consent of the parties and . . . otherwise within the jurisdiction of the Centre” (see ¶¶ 11 and 14 above).
149. According to Respondent, it has not consented to arbitrate the ancillary claim regarding La Rosita.<sup>145</sup> The Tribunal has already rejected Respondent’s argument that it has not consented to the admission of an ancillary claim in this arbitration at ¶ 118 above. In addition, in circumstances where an ancillary claim is admitted, as stated at ¶ 119 above, the Tribunal understands that the requirements of written notice of a claim, the expiry of a six-month period and the investor’s consent and waiver fully apply and are covered by compliance with those requirements in relation to the original claim. Any dispute with respect thereto can therefore be considered in conjunction with the original claims. In the Tribunal’s view, to decide otherwise would lead to the absurd result of further delays to the same dispute between the parties, contrary to procedural economy.
150. The Tribunal otherwise considers the ancillary claim to be within the scope of the consent of the Parties and within the jurisdiction of ICSID. In this regard, NAFTA Article 1122(1) provides for Mexico’s consent: “[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in [NAFTA]”. The Tribunal considers the procedures set out in NAFTA to have been complied with as set out in ¶ 149 above.
151. NAFTA Article 1122(2) further states that “[t]he consent given by [Article 1122] paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre). . . .” Claimant provided its consent under this provision by submitting its original Notice of

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<sup>144</sup> Response, ¶ 98.

<sup>145</sup> Rejoinder, ¶ 84.

Intent to Submit a Claim to Arbitration,<sup>146</sup> as reiterated in its instrument of consent and waiver dated 3 December 2018 and the Request for Arbitration.<sup>147</sup>

152. With respect to the jurisdiction of ICSID in Article 25 of the ICSID Convention,<sup>148</sup> the Tribunal considers that the ancillary claim is a legal dispute arising directly out of an investment (*i.e.*, CALICA) between a Contracting State (Mexico) and a national of another Contracting State (Claimant), which the parties to the dispute have consented in writing to submit to the Centre (see ¶¶ 150-151 above).

153. *Timeliness.* In terms of the timeliness of the ancillary claim, while the default is that it must be submitted at the latest at the time of the Reply, ICSID Rule 40 contemplates the potential admission at a later stage subject to the Tribunal's authorization, which request is being considered in this Order. The fact that the ancillary claim was not filed with the Reply therefore does not exclude it from consideration.<sup>149</sup>

154. In all the circumstances, and specifically because the ancillary claim arises from new facts directly related to the subject matter of the original dispute, as well as the considerations mentioned at ¶¶ 137-146 above, the Tribunal authorizes its admission to this arbitration.

**(iv) Procedure**

155. Respondent originally asserted that the fact that ICSID Rule 40(3) only permits Respondent to make observations on the ancillary claim confirms that it is not a basis to admit entirely new claims.<sup>150</sup> A truly ancillary claim, in its view, would be resolved in the same procedure and result as the originally formulated claims.<sup>151</sup>

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<sup>146</sup> C-007, Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter 11, dated 3 September 2018.

<sup>147</sup> C-008, Legacy Vulcan LLC's and Calizas Industriales del Carmen, S.A. de C.V.'s executed instrument of consent and waiver pursuant to NAFTA Article 1121, dated 3 December 2018; Request for Arbitration, ¶¶ 24, 28.

<sup>148</sup> Article 25(1) of the ICSID Convention provides: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

<sup>149</sup> See Response, ¶¶ 101-102; quoting RL-117, *Metalclad v. Mexico*, ¶ 68; Response, ¶ 117.

<sup>150</sup> Response, ¶ 122.

<sup>151</sup> Response, ¶ 123.



156. Claimant denies that its ancillary claim would be decided by the Tribunal based only on its submissions and Respondent's observations to date in respect of the ancillary claim. In Claimant's view, adjudication of this claim will require further written submissions, evidence, witness declarations, expert reports, and possibly a brief hearing.<sup>152</sup>
157. The Tribunal confirms that consideration of the ancillary claim shall be carried out respecting due process for both sides, including at a minimum further written submissions and evidence, and not based on the observations made to date. The Tribunal considers it appropriate to determine this procedure in consultation with the Parties in due course.

*(v) Potential Counterclaim*

158. In the event that the Tribunal admits the ancillary claim, Respondent reserves the right to submit a counterclaim directly related to the dispute, which it argues is within the scope of ICSID Convention Article 46.<sup>153</sup> According to Claimant, the Tribunal would lack jurisdiction over a counterclaim submitted by Respondent under NAFTA Chapter 11.<sup>154</sup>
159. The Tribunal notes that as per its latest request for relief with respect to the Application (see ¶ 18 above), Respondent at this stage only "reserves its right" to introduce a counterclaim and has not, at this stage, submitted a particularised application for leave to do so. The Tribunal is open to considering any such application for leave by Respondent, which Respondent is at liberty to file. The Tribunal shall decide upon any application for leave to submit a counterclaim in accordance with the procedural rules, after giving Claimant the opportunity to comment.

**VII. DECISION**

160. On the basis of the above, the Tribunal hereby decides as follows:
- (a) RECOMMENDS as provisional measures pursuant to Article 47 of the ICSID Convention, Rule 39 of the ICSID Arbitration Rules, and NAFTA Article 1134 that

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<sup>152</sup> Reply, ¶ 41.

<sup>153</sup> Response, ¶¶ 129-130; quoting **RL-121**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, Decision on Jurisdiction and Liability, ¶ 1414; Rejoinder, ¶¶ 94-95.

<sup>154</sup> Reply, ¶¶ 42-44.

Mexico take no action that might further aggravate or extend the dispute between the Parties, including further public attacks that exacerbate the dispute between the Parties, unduly pressure CALICA or Legacy Vulcan, or render the resolution of the dispute potentially more difficult;

- (b) By majority,<sup>155</sup> PERMITS Legacy Vulcan to present an ancillary claim concerning Mexico's wrongful shutdown of Legacy Vulcan's remaining quarrying operations in Mexico under a schedule to be discussed with Respondent and the Tribunal;
- (c) DEFERS any decision on any counterclaim to be presented by Respondent, subject to a reasoned application for leave by Respondent;
- (d) RESERVES the matter of costs related to the Application; and
- (e) REJECTS any remaining requests.

On behalf of the Tribunal,

[Signed]

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Prof. Albert Jan van den Berg  
President of the Tribunal  
Date: 11 July 2022

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<sup>155</sup> See dissenting opinion to Procedural Order No. 7 of Professor Puig.