Odyssey Marine Exploration, Inc v The United Mexican States, ICSID Case No. UNCT/20/1:

Dissenting Opinion of Professor Philippe Sands KC

1. This case concerns an investment in the Gulf of Ulloa, on the west coast of Mexico, an area rich in biodiversity which plays a significant role for many marine organisms. One amongst these is the loggerhead turtle (*caretta caretta*), a highly migratory species that is recognised under international and national laws as internationally endangered.[1] Other significant marine species in the Gulf of Ulloa include gray and blue whales, dolphins, seals, sea lions, and many species of birds which pass through the Gulf at various times of the year. The importance of the region to marine life is recognised by international organisations, including UNESCO, and scientific bodies.[2] A number of areas surrounding the Gulf are designated as protected areas.

2. The Gulf of Ulloa is also important in providing fisheries resources for local communities, in a way that significantly underpins their social and economic wellbeing. Local fishermen and authorities, as well as the Mexican State, have expressed a desire to balance the exploitation of fishing resources with the protection of the marine environment. To that end, they have developed a regulatory regime that is intended to minimise the harm that fisheries (as well as other activities) may have on marine life in the Gulf. This regulatory regime is supported and complemented by the activities of a number of fishing organisations and societies, and academic and learned bodies. The successful operation of this regime, and the protection of the Gulf of Ulloa, has been a significant concern for many years. This reflects a commitment on the part of the Mexican State and the local community to protect the marine environment of the Gulf of Ulloa.

3. This is one part of the background against which Odyssey Marine Exploration, Inc. (U.S.) ("**Odyssey**" or the "**Claimant**"), a company incorporated in the state of Nevada,

[1] Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES'), Appendix I (included under the Cheloniidae genus); Red List of the International Union for the Conservation of Nature (**R-0042**).
[2] **C-0009**, SEMARNAT Denial Decision, 12 October 2018, pp. 73-74; **R-0029,** CONANP Report on World Natural and Mixed Heritage in Mexico 2012-18; **R-0030,** The David and Lucile Packard Foundation Presentation on Marine Priority Regions for Mexico.

United States of America, proceeded to invest in a project that would engage in the mining of phosphates on the seabed of the Gulf of Ulloa. Odyssey is a company with impressive expertise in deep sea exploration and the recovery of artefacts and cargo from wrecked or sunken ships. It appears to be a responsible company, but also one that has no previous experience in seabed (or any other) mining, and no expertise of its own in relation to seabed mining of the kind that it now proposes to engage in.

4. Moreover, the investment and proposed activity of Odyssey in Mexico is premised on the use of a technique of seabed mining for phosphates that appear to be entirely novel and untested anywhere in the world. A number of factors – the absence of experience of the company and its personnel, the novelty of the mining techniques, the significant potential impact on the environment - became apparent on the first day of the hearing in this case: in the course of a cross-examination, Dr Lozano, the Environmental and Project Manager of the Don Diego project, confirmed that he had no experience in Mexico, or in sea-mining, or in applying for environmental permits of this kind.[3]

5. These facts alone, which are not substantively contested, coupled with the ecological characteristics of the Gulf of Ulloa, would give any reasonable public authority pause in proceeding with any decision to authorise the proposed mining activity. If any case called for the diligent application of the obligation to protect the environment, including a precautionary approach (which is binding on and applicable to Mexico under international law and Mexican law), this is it.

6. The project in which Odyssey has invested seeks to mine phosphate from a particular area in the Gulf of Ulloa. It is sometimes referred to as the 'Don Diego deposit'. Odyssey has proposed to make use of a mechanical method to extract phosphate from the seabed: first, a suction tube would carry material from the seabed; second, the phosphate would be separated from the extraneous sediment; and third, the extraneous sediment would be deposited back to the sea floor.[4] Whilst the suction technique proposed for this project appears to have been used in other kinds of projects, this is

[3] Hearing Transcript Day 1, pp. 206-207.
[4] **C-0059**, Boskalis Don Diego Phosphate Mining Proposal.

apparently the first time that these techniques would be used to extract minerals from the seabed.[5]

7. This simple description allows any reasonable person to recognise that the proposed activity, to be carried out over an extended area of 800 square kilometres, is one that is liable to disturb the floor of the ocean on a scale that is both significant and novel. It is notable that Odyssey has at various times sought to avoid characterising its proposed activity as 'mining', preferring to refer to it as 'dredging' (it might just as inaccurately have referred to its activity as 'hoovering' or 'cleaning'). It has adopted this approach to terminology, one assumes, because of the negative connotations often (but not always fairly) associated with mining activities. Yet the reality is that as a matter of international law, the 'Don Diego Project' is a mining project.[6] Indeed, Odyssey itself has described its various witnesses and consultants as experts in 'mining', and has suggested that its investment should be treated as a mining project when it has been advantageous to do so.[7]

8. Given the nature of the project, and the inevitability of certain impacts on the environment of the Gulf of Ulloa, it is perhaps not surprising that the Don Diego Project would cause alarm amongst certain communities, in particular those with interests in fishing and ecology. Odyssey itself has acknowledged the potential for environmental harm, having engaged a number of consultants on environmental matters, and undertaken a number of studies to assess the extent of the potential impacts and harm, as well as the availability of mitigation measures. The Tribunal has been presented with a large body of evidence from both parties as to the significance of the potential environmental harm and the efficacy of mitigation measures. I say more about this material below.

9. The Tribunal also had the opportunity to hear from the Sociedad Cooperativa de Producción Pesquera Puerto Chale S.C.L, a local fishing cooperative, and the Centre for International Environmental Law, a public interest organisation, which sought to

[5] Hearing Transcript Day 7, pp. 1695-1697.
[6] UNCLOS Annex III, Arts 13 and 17; Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (2013) Regulation 1; Hearing Transcript Day 4, pp. 885-889; Hearing Transcript Day 5, pp. 1299-1300; Hearing Transcript Day 7, pp. 1692-1696.
[7] See in particular the Claimant's written submissions on quantum in its Memorial at pp. 151-168, and in its Reply at pp. 137-233.

intervene in the proceedings to address the potential impacts of the mining project on the marine environment of the Gulf of Ulloa. A Majority of the Tribunal considered that neither of these organisations should be authorised to participate. As set out in my dissenting opinion on that decision, which is attached to this, it was surprising and regrettable that the Majority concluded that no useful purpose would be served by allowing either of these two organisations to be authorised to make filings that could assist the Tribunal. The decision suggested to me, at an early stage in the proceedings, that the Tribunal might proceed on the basis that this case had no significant environmental aspect, despite the ample evidence to contrary even at that earlier stage of the proceedings. Regrettably, the approach taken by the Majority on the merits of this case has fully confirmed that initial concern.

10. I return to the environmental impact of the proposed project below. For present purposes, it suffices to say that a cautious approach to this project would be wholly reasonable in light of the context: the novelty and nature of the proposed activity, the inexperience of Odyssey and its own staff, the ecological significance of the location, and the application of the precautionary principle.[8] It is therefore no surprise that the need for caution was explicitly acknowledged by one of the Claimant's key witnesses, Mr Alfonso Flores, in the course of the hearing.[9]

11. On jurisdiction, I agree with the conclusion that the Tribunal can hear the dispute.

12. On the merits, however, I do not share the Majority's conclusion that the Respondent may be said to have acted in a manner that is arbitrary, or that Art 1105 NAFTA has been violated. The Majority's approach to the law and the facts is tainted by numerous deficiencies which undermine the reasoning and the conclusions. Of particular concern is the failure to consider the environmental context of the proposed project, the principal arguments put forward by the Respondent to justify the refusal to authorise the project, and the evidence that is on the record in this case.

13. For reasons of judicial economy, the Majority has decided that it is unnecessary to determine whether the Respondent's conduct amounts to a failure to provide Full

[8] Principle 15 Rio Declaration, Art 194 UNCLOS.
[9] Hearing Transcript Day 7, p. 1698.

Protection and Security (Art 1105 NAFTA) or an indirect expropriation (Art 1110 NAFTA), or whether the Respondent has treated the Claimant less favourably than domestic investors (Art 1102 NAFTA). To be clear, I do not consider it to be even arguable that any of those provisions has been breached, on the basis of the record before the Tribunal. As the majority has not addressed these provisions, I limit my analysis to the allegation of arbitrary conduct and Art 1105 NAFTA.

Art 1105 NAFTA

14. The Majority concludes that the Respondent has treated the Claimant 'arbitrarily' and that such treatment amounts to a breach of the standard outlined in Art 1105 NAFTA.

15. Arbitrariness falls to be interpreted and applied by reference to the relevant provisions of NAFTA, and the relevant or applicable rules of international law. The preamble to NAFTA and its Art 1114 affirm the importance of environmental protection and sustainable development, as recognised by the USA in its Non-Disputing Party Submission in this case.[10] The system of international investment law does not exist in a vacuum, and tribunals assessing the actions of States must remember that States are subject to a large number of other international obligations. Indeed, the Vienna Convention on the Law of Treaties requires the interpretation of NAFTA to take into account 'any relevant rules of international law applicable in the relations between the Parties', a formulation which includes treaty and customary obligations.[11] In the present case, the relevant rules which are applicable include customary obligations on the protection of biodiversity and the marine environment. These obligations can be found in treaties such as the 1992 Convention on Biological Diversity and the United Nations Convention on the Law of the Sea (to which the United States is not a party), and have also been found to exist in customary international law. Those customary obligations include the obligation to protect and preserve the environment, in a manner that is consistent with a precautionary approach.[12] Of particular relevance is Art 208

[10] Submission of the United States of America, paras 21-22.
[11] Article 31(3)(c) of the Vienna Convention on the Law of Treaties.
[12] Principle 15 of the Rio Declaration. Various international courts and tribunals have recognised that the precautionary principle is a rule of customary international law. See in particular: *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber)* ITLOS Case No. 17, Advisory Opinion of 1 February 2011, para 135; *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, ICJ Reports

UNCLOS, which requires States to "prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction", and which reflects a rule of customary law.[13] Hence, when considering whether the Respondent acted in an arbitrary fashion, it is critical to recall that it was obliged to act in accordance with its duty under international law to protect the environment of the Gulf of Ulloa, and the precautionary principle.

16. I agree with the Majority that, in principle, arbitrary conduct may amount to a breach of the international minimum standard referred to in Art 1105. Whether it does so will depend on the facts of the case. As pointed out by Canada in its Non-Disputing Party Submission, Art 1105 does not give tribunals the power to second-guess government policy and decision making. Any assessment under Art 1105 must, therefore, be carried out in light of the "high measure of deference that international law generally extends to the right of domestic authorities to regulate within their own borders".[14] I also agree that the judgment of the ICJ in *ELSI* may be taken as a starting point in defining 'arbitrary' conduct in international law. The judgment of the ICJ is clear in setting a high standard: conduct will only be considered 'arbitrary' when it is "opposed to the rule of law" and when the conduct in question "shocks, or at least surprises, a sense of judicial propriety".[15]

17. This standard may be said to be broad and open to interpretation, but there can be no doubt that the ICJ intended to set a high bar. For its part, the Majority has not fully articulated what it believes to be the various strands of arbitrariness. The Majority has found that the Respondent acted in an arbitrary fashion: in other words, by deciding to reject the MIA authorising the Claimant's project to proceed, it has acted in a way that "shocks" or "surprises" the Majority's sense of judicial propriety. This finding appears to rest on the belief that the Respondent made its decision to reject the MIA for reasons

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1996, p. 226, para 29; *Pulp Mills on the River Uruguay (Argentina v Uruguay),* Provisional Measures, Order of 13 July 2006, ICJ Reports 2006, p. 152; Dissenting Opinion of Judge Ad Hoc Vinuesa; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests *(New Zealand v France) Case,* ICJ Reports 1995, Dissenting Opinion of Judge Sir Geoffrey Palmer, para 91, and Dissenting Opinion of Judge Weeramantry, p. 342.

[13] Article 208 of United Nations Convention on the Law of the Sea.

[14] Non-Disputing Party Submission of Canada, para 18, citing *S.D. Myers, Inc. v Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para 263 (Arbs. J. Martin Hunter, Bryan P. Schwartz, Edward C Chiasson QC) and several other NAFTA cases to the same effect.

[15] *Elettronica Sicula S.p.A. (ELSI)*, Judgment, ICJ Reports 1989, p. 15, para 128.

that were not to do with the environmental reasons stated to be the basis for the decision. In principle, I do not disagree that acting for reasons other than those given may - depending on the evidence that is available, and the particular facts of a given case - amount to arbitrary conduct and a breach of the international minimum standard of treatment.

18. However, I part with the Majority on the application of that standard of law to the facts of the present case. A finding that a State has taken a decision for reasons which differ from those stated is a most serious charge. Essentially, it amounts to finding that a State and its officials have acted dishonestly. In light of this, one would expect the Majority to take a careful thorough approach to the assessment of the evidence, closely analysing witness testimony and documentary evidence (or lack thereof) which purports to support such allegations, and doing so in a balanced manner.

19. In particular, one would expect the Majority to have carefully review the environmental reasons given by the Respondent in the two decisions it took to reject the Claimant's MIA. Of course, it is not for the Tribunal to determine whether such concerns were well-founded, but the rigour and care with which the Respondent has analysed the environmental issues - and the plausibility of its conclusions, having regard to the margin of appreciation which a public authority will have in relation to decisions on such matters - have direct relevance to the credibility and force of a conclusion that a Respondent has actually acted for reasons that are different to those which are stated to be the basis for its decision.

20. Despite this obvious point, the Majority has not seen fit to engage at all with an analysis that is careful and thorough. Instead, it has based its factual conclusions on an approach which may be characterised as speculative, and placed a weight on witness testimony of a quality and credibility that is questionable.

21. The Majority has based its finding on four main factors. I address each in turn. A common thread runs through each of the factors, and that relates to the Majority's engagement with the detailed decisions by the Respondent that reject the MIA: the first decision is 236 pages in length, the second is 516 pages. The reports in respect of both decisions go to significant lengths to analyse the potential environmental impact of

Odyssey's proposed mining project. They undertake a detailed analysis of Odyssey's methodology and its proposed measures to mitigate the environmental effects of its mining activities. They include details about the serious and wide-ranging environmental concerns of reputable independent scientific bodies and organisations, as well as members of the public. As the evidence before the Tribunal made clear, this proposed project elicited a great deal of concern for many legal and natural persons. Yet despite the abundance of material, the Majority has chosen to ignore the evidence as to environmental harm in its entirety.

22. The environmental concerns expressed in the two decisions include the following:
    a. the impact on the habitat of endangered *caretta caretta* turtle;[16]
    b. the abundance of turtles in the project site;[17]
    c. the impact on whales and other large marine mammals;[18]
    d. the impact of mechanical dredging/mining on benthic organisms in the seabed, and the consequential impact on the organisms which feed on those benthic organisms;[19]
    e. the compatibility of the project with the precautionary principle as recognised by both Mexican and international law;[20]
    f. the methodology of the Claimant's environmental surveys, including the time of year at which those surveys were carried out;[21]
    g. the relaxed attitude adopted by the proposed mitigation measures to the loss of turtle life,[22] and
    h. the lack of clear methods or indicators for assessing the ongoing impact of the project.[23]

[16] **C-0008**, SEMARNAT Denial Decision, 7 April 2016, pp. 220-222; **C-0009**, SEMARNAT Denial Decision, 12 October 2018, pp. 464-467.
[17] **C-0008**, SEMARNAT Denial Decision, 7 April 2016, pp. 220-222; **C-0009**, SEMARNAT Denial Decision, 12 October 2018, pp. 469-471.
[18] **C-0009**, SEMARNAT Denial Decision, 12 October 2018, pp. 471-472.
[19] **C-0008**, SEMARNAT Denial Decision, 7 April 2016, p. 222; **C-0009**, SEMARNAT Denial Decision, 12 October 2018, pp. 480-494.
[20] **C-0009**, SEMARNAT Denial Decision, 12 October 2018, pp. 509-511.
[21] **C-0009**, SEMARNAT Denial Decision, 12 October 2018, pp. 469-471.
[22] **C-0009**, SEMARNAT Denial Decision, 12 October 2018, pp. 500, 509-512.
[23] **C-0009**, SEMARNAT Denial Decision, 12 October 2018, p. 501.

23. The concerns expressed during the public consultations related to the project included the following:
    a. the Government of the State of Baja California Sur, which expressed concern as to the manner in which the environmental assessments had been carried out;[24]
    b. the National Commission for the Knowledge and Use of Biodiversity, which expressed concern regarding the negative impacts of mining and the overlap between the project area and various sites important for their biodiversity;[25]
    c. the National Commission for Protected Natural Areas, which expressed various concerns including the potential impact of the project on whales;[26]
    d. the Institute of Sea Sciences and Limnology, which expressed particular concern relating to the release of toxic elements into the water column,[27] and
    e. the Society of Marine Mammalogy, which cited concerns relating to the acoustic impact on whales and potential habitat loss.[28]

24. In respect of individual submissions, the two refusal decisions also record a number of instances where the Respondent requested follow-up information or clarification on matters of detail including methodology. Moreover, even a cursory glance at the two decisions shows that the analysis sections are replete with references to - and backed by - a range of independent and publicly available scientific publications, which address and analyse the environmental significance of the Gulf of Ulloa, and the likely significant adverse effects of the proposed project.

25. Despite these concerns being available in evidence before the Tribunal, the Majority has not referred to, or offered any views on, the substantive reasons put forward by the Respondent in support of its refusal decisions. These reasons are at the very heart of the Respondent's defence to the claim before the arbitral tribunal, and it is troubling and inappropriate that on a matter of evident local, national and international concern, an

[24] **C-0008**, SEMARNAT Denial Decision, 7 April 2016, pp. 162-163; **C-0009**, SEMARNAT Denial Decision, 12 October 2018, pp. 160-161.
[25] **C-0008**, SEMARNAT Denial Decision, 7 April 2016, p. 165; **C-0009**, SEMARNAT Denial Decision, 12 October 2018, p. 163.
[26] **C-0008**, SEMARNAT Denial Decision, 7 April 2016, pp. 165-172; **C-0009**, SEMARNAT Denial Decision, 12 October 2018, pp. 163-170.
[27] **C-0008**, SEMARNAT Denial Decision, 7 April 2016, pp. 175-179; **C-0009**, SEMARNAT Denial Decision, 12 October 2018, pp. 173-177.
[28] **C-0008**, SEMARNAT Denial Decision, 7 April 2016, pp. 184-191; **C-0009**, SEMARNAT Denial Decision, 12 October 2018, pp. 182-189.

international arbitral tribunal should proceed in silence in this way. The Majority has offered no justification, explanation or reasons for its decision not to consider or assess the reasons offered by the Respondent for its decision to reject an MIA on environmental grounds. It is hard to see any reasonable basis for that failure. Having failed to take into account relevant arguments and evidence, the Majority has fallen into fatal error, undermining any possibility that its conclusions might be said to be reasonable or related to the evidence before it.

26. The only acknowledgement in the Award of the environmental issues at the heart of the case are the three extremely short paragraphs considering the submissions from independent scientific bodies, NGOs and government organisations outlined in paragraph 23 above.[29] Unfortunately, the Majority appears to fundamentally misunderstand the proper role of such submissions in an environmental assessment process. The Majority casually dismisses the relevance of these submissions on the basis that they are not referred to in the analysis section of the two decisions,[30] something not contested by the Claimant. This is hardly surprising. As seemingly acknowledged by both the Claimant and the Majority,[31] these submissions were not binding and the Respondent was required to carry out its own independent analysis of the Don Diego Project. Had the Respondent relied on this material in the way envisaged by the Majority, the Respondent would have left itself open to the charge that it had not made the two refusal decisions itself, or that it had been selective in referring to some but not all submissions. The manner in which the Respondent dealt with the third party submissions inscribes itself in a practise that is in no way exceptional. In this way, the Majority's approach appears to reflect a lack of understanding of the environmental assessment process rather than anything more substantive.

27. The real significance of these submissions is not in how they are referred to in the analysis of the MIA, but in the effect they have on the credibility of the argument that the Respondent was not actually acting for the environmental reasons given. In my view, the existence of detailed submissions from a large number of independent and authoritative expert organisations or individuals who have expressed serious concerns

[29] Majority's Award, paras 431-434.
[30] Majority's Award, para 434.
[31] Claimant's Reply, para 69; Majority's Award, para 433.

as to the environmental impacts of the Don Diego Project goes to the credibility of the Respondent's case: these submissions confirm both the reasonableness of the conclusion that the Don Diego Project gave rise to significant environmental concerns, and that the Respondent may be said to have acted on the basis of those concerns. The Majority passes in silence on both aspects.

28. Instead of addressing the environmental reasons invoked by the Respondent, the Majority has largely based its conclusion that the Respondent acted for reasons other than environmental protection by relying on the witness testimony of two individuals, Mr Alfonso Flores and Mr Alberto Villa. Both are former employees of SEMARNAT. I have paid the closest attention to the written statements and oral testimony of Mr Flores and Mr Villa, and regret that I have a number of concerns which lead me to have significant doubts about their credibility.

29. One significant concern is that Mr Flores and Mr Villa received payments from the Claimant for time they devoted to the preparation of their witness statements and time spent attending the hearings. This fact was not initially declared to have been the case: the arrangements were not disclosed by Odyssey or the witnesses at the earliest opportunity, as they might have been, and the details of the arrangements, including the conditions, timing and financial amounts emerged only during the course of the hearing.[32] The subsequent failure of Mr Flores to submit invoices to the Tribunal, despite orders to do so, means that the Tribunal does not have a complete picture as to the financial and other arrangements he entered into in deciding to provide testimony in this case.[33] However, it appears that each witness was paid around USD 200 per hour for their time, in respect of the preparation of their witness statements and oral testimony, amounting to a total of no less than USD 25,000 each.[34] Having regard to the relative brevity of the statements, this is a significant sum, and appears to amount to over half of the annual salaries they received as employees of SEMARNAT.

30. Moreover, in the course of the hearing it emerged that a part of the payment received by Mr Villa appeared to have been for work undertaken prior to the signing of his

[32] Hearing Transcript Day 2, pp. 337-350.
[33] Hearing Transcript Day 7, p. 1647-1649.
[34] Hearing Transcript Day 2, p. 341.

contract with the Claimant. Whilst Mr Villa's first witness statement was signed on 8 May 2020, the Commitment Contract under which he received payment was not signed until 2 November 2020. Mr Villa was subject to the operation of a rule of Mexican law which explicitly prohibited the two individuals from engaging in such activities within a year of their employment at SEMARNAT: see Articles 55 and 56 of the General Law of Administrative Liabilities. Mr Villa denied that he was being remunerated in any way for the time spent preparing his first witness statement.[35] However, given the rate of USD 200 per hour, and the fact that Mr Villa was paid for at least 60 hours of 'hearing preparation',[36] Mr Villa's protestations are not persuasive.

31. The Majority is right to point out that it is not illegal or unusual as such for witnesses in investor-State disputes to be paid for their time. However, that does not mean that a tribunal should disregard the existence of such payments - including the conditions, timing and value - or the candour (or absence of it) of a party in connection with the making of such payments, as it forms a view as to the credibility of one or more witnesses. The arrangements in this case were unusual, and may well have been irregular or even unlawful under Mexican law. The lack of initial transparency meant that the Tribunal was not aware of the arrangements when they first read the witness statements. I believe that the restraint of the Majority on this important issue - given the very great weight it has placed on the evidence of the two witnesses - is of concern. How much weight can reasonably be placed on the testimony of the two most important witnesses, when part way through proceedings it emerges that they have been paid significant amounts by the party that will benefit from their evidence? Not a great deal, in my view, and even less given the absence of other evidence to support the conclusion reached by the Majority. The arrangements entered into with the witnesses, taken together with the other points I address below, give rise to significant doubts as to the credibility of Mr Flores and Mr Villa, and to the weight that should be afforded to their testimony.

32. I have other doubts about the testimony of Mr Flores and Mr Villa. First, despite claiming to have extensive involvement in the relevant decision-making process whilst

[35] Hearing Transcript Day 2, p. 338.
[36] Hearing Transcript Day 2, p. 347.

employees at SEMARNAT, neither was able to point to any contemporaneous documentary evidence, in the form of emails, meeting minutes or reports, to support their assertions or the facts they alleged. This does not in itself mean that the testimony of Mr Flores and Mr Villa should be discounted entirely. However, in light of the two lengthy reports setting out the environmental reasons for the refusal of the MIA, this lack of documentary evidence tendered by the witnesses to establish that the refusal was motivated by other considerations is, to say the least, surprising and disconcerting. The absence of any such evidence significantly limits the weight to be given to the testimony of Mr Flores and Mr Villa.

33. A further doubt arises from the fact that the testimony of each of the two witnesses is not persuasive on its own terms. A great deal is left unaddressed and unexplained by their accounts. They have nothing to say, for example, on consistent, strong and widely articulated opposition to the Don Diego Project on environmental grounds from authoritative and independent scientific institutions, as well as citizens groups and members of the public. The opponents included those most directly affected by the proposed project, such as the local fishing community. Nor do they have anything to say about the expressions of concern that emanated from authorities beyond SEMARNAT, or express views on how SEMARNAT could reasonably be expected to ignore such expressions of concern. The suggestion from another of the Odyssey's witnesses, Mr Gordon, that the environmental concerns raised were 'ideological' rather than scientific, tends to support the conclusion that the proponents of the project and its supporters viewed environmental matters to be a nuisance, and to lack substance.[37] By contrast, the expert reports produced by the Respondent were independent, authoritative and compelling in their conclusions as to the project's risks for marine life in the Gulf of Ulloa, particularly the *caretta caretta* turtles: see Report by Dr. Agnese Mancini, Dr. Alberto Abreu, Dr Bryan Wallace, Dr Allan Zavala, and Msc. Raquel Briseño, Sea Turtle Expert Group on the Conservation of the *Caretta Caretta* Turtle in the Gulf of Ulloa (October 13, 2021, especially at para 127). The evidence before the Tribunal on the risk of environmental harms was compelling, not concocted, and articulated by highly qualified individuals and governmental and non-governmental bodies alike. The evidence further supported the conclusion that Odyssey was a wholly inappropriate

[37] Hearing Transcript Day 1, pp. 193-194.

proponent of a project such as this, characterised as it was by the unfortunate combination of no experience in mining activities and a profound sense of hostility to environmental concerns that might stand in the way of the project.

34. The Tribunal also heard from Mr Pacchiano, the individual who Odyssey alleges was alone responsible for blocking the Don Diego project. I found Mr Pacchiano to be a credible witness, in the sense that his concern was rather obviously motivated by a desire to ensure that the project should only proceed if the legitimate environmental concerns that had been raised were capable of being fully and professionally addressed. The fact that he has a personal commitment to the protection of the environment is not something that should be held against him. To the contrary, as Secretary of SEMARNAT you would expect that individual to proceed in a precautionary manner, and I heard nothing in his testimony - or views that emerged in cross-examination - to indicate that the motivations for his actions were not properly founded on legitimate environmental concerns. Did the conduct of Mr Pacchiano "shock … or at least surprise … a sense of judicial propriety"?[38] It did not shock or surprise my sense of judicial propriety, particularly given the Respondent's obligation to comply with the precautionary principle. I find it difficult to see how, on the basis of the evidence before the Tribunal, a reasonable reader or observer could conclude that Mr Pacchiano's behaviour was shocking or arbitrary. Reasonable people may have different views on the merits of the decision to reject the MIA on environmental grounds, but it cannot by any stretch be considered to be a decision that shocked or was arbitrary. It was, very plainly, based only on concerns about the environmental risks of the project as outlined in the two lengthy decisions denying the MIA, and there was no compelling evidence before the Tribunal pointing to any other basis for the decision. Indeed, despite stating that the decision to deny the MIA was taken due to the personal motives of Mr Pacchiano, neither the Claimant nor the Majority has been able to identify what these supposed motives actually were. Much of what Mr Pacchiano said tended to reinforce my doubts about the testimony of Mr Flores and Mr Villa, and the lack of credibility of the project's proponents.

[38] *Elettronica Sicula S.p.A. (ELSI)*, Judgment, ICJ Reports 1989, p. 15, para 128.

35. Yet the Majority dismisses Mr Pacchiano's testimony in its entirety, by means that are unconvincing. Rather than casting a critical eye over the testimony of Mr Pacchiano, on the one hand, and the testimony of Mr Flores and Mr Villa on the other, the Majority relies on thin reasoning that opted instead for the plausibility of the evidence of the latter individuals. Contrary to the view expressed by the Majority,[39] the fact that Mr Pacchiano attended a number of meetings related to the Don Diego project cannot of itself support Odyssey's case that he was determined to block the project. To the contrary, the nature of the project and the investor would have set alarm bells ringing for any reasonable individual who occupied the position that Mr Pacchiano did. Deep seabed mining is controversial, as it is liable to have long-term consequences which are difficult to predict. The potentially problematic nature of the activity is reflected in current international debates concerning deep sea-bed mining under UNCLOS,[40] and a recent decision taken by the 14th Conference of the Convention on Migratory Species that has pointed to the environmental dangers of deep sea mining, and has urged states to recognise the impact of such mining, act in accordance with the precautionary principle and "not to engage in deep-sea mining" until robust evidence on the potential harm of such mining has been obtained.[41]

36. Equally striking is the Majority's conclusion that the lack of testimony from a number of other individuals who were involved in the decision-making process should be taken as an indication that the Claimant's allegations are true. It is true that these individuals did not appear before the Tribunal "to support Mr. Pacchiano's version that the statements of Messers. Flores and Villa were false",[42] as the Majority asserts. It is

[39] Majority's Award, paras 374-375.
[40] Eg See further International Seabed Authority, 'Draft Regulations on Exploitation of Mineral Resources in the Area: The Facilitator's Fourth Revised Draft Text on Parts IV and VI and Related Annexes' ISBA/28/C/IWG/ENV/CRP.3 (16 October 2023); International Seabed Authority, 'Secretary General Annual Report: Ensuring the Sustainable Management and Stewardship of the Deep Seabed and its Resources for the Benefit of Humankind' (June 2022); International Seabed Authority 'Draft Regulations on the Exploitation of Mineral Resources in the Area' ISBA/25/C/WP.1 (22 March 2019), Part IV.; International Seabed Authority, 'Preliminary Strategy for the Development of Regional Environmental Management Plans for the Area' ISBA/24/C/3 (16 January 2018); International Seabed Authority, 'Towards an ISA Environmental Management Strategy for the Area' ISA Technical Study No. 17.
[41] CMS Resolution 14.6 on Deep-Seabed Mineral Exploitation Activities and Migratory Species, UNEP, paras 2-3, adopted 17 February 2024. The decision is of no legal effect in relation to these proceedings, and does not inform my conclusions, as it post-dates the hearings and the parties have not had a chance to address it, and Mexico and the US are not parties to the Convention. Nevertheless, it confirms the reasonableness of concerns addressed by the experts and other parties who participated in the decision-making process in Mexico. CMS/Resolution 14.6
[42] Majority's Award, para 386.

equally the case, however, that they did not appear in order to support the account given by the Claimant's witnesses. To draw the inferences the Majority has - or indeed in the other direction - from the absence of one or more potential witnesses, and then to give such weight on the basis of absence and inference, is contrary to the basic fact-finding responsibilities of a tribunal charged with assessing evidence and applying law.

37. A second factor relied upon by the Majority is the decision of the TFJA that the first MIA refusal decision was unlawful. It is to the credit of the TFJA – and to Mexico – that the ruling did criticise the first refusal decision: a decision taken was challenged, found to have been adopted unlawfully as a matter of Mexican law, and set aside. The system of Mexican law worked. Yet the Majority completely misinterprets what the TFJA did: it did not criticise the decision to refuse the MIA on the merits of environmental concerns, but rather on the basis of the reasons given and the approach taken. Moreover, it is well-established and even self-evident that a finding of illegality or fault at the domestic level does not mean that a finding of illegality at the international level necessarily follows. As explained by the ICJ in *ELSI*:

> "A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. … Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication."[43]

38. The core of the criticism from the TFJA is that the first refusal decision was insufficiently precise and did not fully explain the basis on which some findings were reached.[44] The TFJA's decision is thorough and clearly reasoned, and it deserves the fullest respect for what it concluded and for what it did not say. The TFJA did not rule that the refusal decision was taken for reasons other than those put forward in the decision. Contrary to the suggestion put forward by the Majority, the TFJA did not find that the refusal decision had "serious flaws from a scientific and environmental

[43] *Elettronica Sicula S.p.A. (ELSI)*, Judgment, ICJ Reports 1989, p. 15, para 124.
[44] **C-0170**, TFJA Ruling, 21 March 2018, pp. 138-170 (English).

perspective",[45] or that the decision was "devoid of scientific bases".[46] Rather, the TFJA explicitly stated that it did not have the expertise to consider the merits of the environmental reasons put forward,[47] and confined its review to the clarity of the analysis and reasoning. In light of this, the TFJA decision provides no support for the Majority's view that the refusal decision was taken for reasons other than the environmental reasons put forward.

39. The Tribunal has been provided with a second refusal decision in which the environmental concerns are addressed in more depth and with additional evidence, precisely to address the concerns raised by the TFJA in its judgment.[48] A challenge to this decision remains pending before the domestic courts, and it would be inappropriate to comment on prospects of this challenge succeeding (moreover, as the Claimant has not addressed the manner in which the TFJA has conducted those proceedings, it is not part of the claim in these proceedings and cannot be addressed by this Tribunal). For present purposes, however, it suffices to note that the second report is even longer and more detailed than the first, and seeks (on its face) to address the concerns raised by the TFJA in its judgment. It also appears to address both the economic and environmental aspects of this project. It is therefore striking that, despite the emphasis placed on the second decision by the Respondent, the Majority has chosen to say nothing about the contents of the second report in considering the merits of the dispute. The Majority has found that a decision is arbitrary without examining the stated reasons for the decision.

40. At the very least, the existence and content of the second report surely had to be assessed to determine the nature of the effort by SEMARNAT to address the concerns raised by the TFJA in its judgment, and to determine whether the report may be characterised as a genuine attempt to repair the failings of the first report? The Majority should have asked itself whether the contents of the second report were such as to oppose the rule of law, or to shock (or at least surprise) a sense of judicial propriety.[49] On its face, it is absurd to conclude, on the basis of the totality of the evidence before

[45] Majority's Award, para 406.
[46] Majority's Award, para 406.
[47] **C-0170**, TFJA Ruling, 21 March 2018, p. 187 (English).
[48] **C-0009**, SEMARNAT Denial Decision, 12 October 2018.
[49] *Elettronica Sicula S.p.A. (ELSI)*, Judgment, ICJ Reports 1989, p. 15, para 128.

the Tribunal, that the decision to reject the MIA, for the reasons set out in the second report, can be described as shocking or to reflect the work of a lawless mind.

41. The Majority relies on a third factor to find a violation of Art 1105, namely the decision taken by SEMARNAT Undersecretary Martha García Rivas on 27 February 2017 to reject ExO's Request for Review. Here, the Majority places considerable emphasis on the refusal to give sufficient (or any) weight to various scientific reports submitted by Odyssey in support of the Request. These include formal defects such as the failure to include the full name of an author of one of the reports and the fact that some of the signatories were foreign.[50] This failure was also criticised by the TFJA.[51]

42. This appears to be a case of overzealousness on the part of SEMARNAT. It was not justifiable, in my view, to refuse to give weight to scientific reports merely on the basis of apparently minor formal defects. That said, it is hard to see how Undersecretary García Rivas' actions could be said to provide substantive support to the conclusion that the decision to deny the Claimant's MIA was taken for reasons other than the environmental reasons put forward by SEMARNAT. The TFJA decision made no findings as to why Undersecretary García Rivas acted as she did, and did not suggest that her actions undermined or cast doubt on the importance given to the environmental reasons in the MIA decision. There is no evidence before the Tribunal to indicate why Undersecretary García Rivas acted as she did, and the Majority has cited none. Instead, the Majority has engaged in an act of speculation, identifying this as an additional factor to support a conclusion that the Respondent rejected the Claimant's MIA for reasons that had nothing to do with environmental protection. In the absence of evidence, it is wrong for an international arbitral tribunal to engage in speculation as to motive, and it is wrong to place weight on the consequences of that speculation. The approach departs from the proper assessment of evidence that is an inherent part of the arbitral function. Speculation is not a basis for assessing the facts. Speculation cannot buttress or make a finding of fact, or be relied upon to reach a legal conclusion. Yet that is precisely what the Majority has done.

[50] Majority's Award, paras 409-423.
[51] **C-0170**, TFJA Ruling, 21 March 2018, pp. 186-188.

43. Finally, in relation to the second SEMARNAT decision, the Majority places much emphasis on a statement allegedly made by SEMARNAT five days after the TFJA ruling, which the Claimant alleges to reflect an intention to do no more than to confirm SEMARNAT's original decision and deny the MIA for a second time, following the decision of the TFJA.[52] The document containing the alleged statement requires careful consideration, as the origins of the statement are a source of significant disagreement between the parties. In this regard, it is striking that the Majority has not been able to point to clear evidence upon which it can reasonably rely to resolve that disagreement, choosing instead to proceed on the basis of its apparent authority and significance.[53] In the absence of clear evidence establishing the origins of the statement, it is difficult to see how it could reasonably be given much, if any, weight.

44. Even assuming, however, that the statement is to be taken at face value, it does not offer any material support to the Majority's conclusion that the Respondent acted for reasons other than the protection of the environment. In seeking evidence of a conspiracy within SEMARNAT against the Claimant, the Majority appears to have discounted a less convoluted explanation for the supposed statement: that SEMARNAT was confident with the environmental and scientific analysis which it had carried out, and intended to express its assessment and conclusions in a manner required by the decision of the TFJA. The Majority does not dispute that a significant scientific and technical analysis had already been carried out at that point in time, or that the Respondent was entitled (and obliged) to act in compliance with a precautionary approach, having regard to the ecological significance of the Gulf of Ulloa. Once again, the Majority has read into a document a motive for its contents that is entirely speculative.

45. The Majority also offers "observations" relating to the Claimant's legitimate expectations.[54] It is not clear as to what bearing (if any) these "observations" have on the Majority's conclusions, as they appear only after it has concluded that a breach of Art 1105 occurred. In any case, this section adds little to the Majority's analysis. No serious effort is made to establish (i) the 'quasi-contractual commitment' necessary for

[52] Majority's Award, paras 424-430; **C-0470**, Informational Note.
[53] Majority's Award, paras 428-430.
[54] Majority's Award, para 443.

any expectation to be relevant to an MST analysis,[55] (ii) evidence of actual reliance on that commitment,[56] or (iii) evidence that any such reliance was reasonable or prudent.[57] Instead, the Majority has resorted to further vague and general assertions, unsupported by any legal authority or factual evidence. Like the remainder of the award, this standard of reasoning falls far below what the Claimant and Respondent are entitled to expect from an international tribunal.

Compensation

46. It follows from my conclusions on the merits that I do not believe the Claimant can be said to be owed any compensation. However, even if the Majority's analysis on the merits may be said to be correct, which in my view it is not, I have serious reservations as to the approach taken on compensation.

47. The concern with the Majority's approach rests on three fundamental principles of international law, which tribunals are required to follow in determining the quantification of compensation following the finding of an internationally wrongful act. *First*, there must be a causal link between the breach identified and the loss claimed. It is not enough to show the existence of a loss following a wrongful act without also establishing that it was caused by the breach actually identified. *Second*, the principles for quantifying compensation will depend on the treaty breach identified. Whilst the standard of 'full compensation' explained in *Chorzow Factory* applies to all internationally wrongful acts, the principles for quantification will differ depending on the particular obligation breached. Inherent in a finding of an unlawful expropriation is that a claimant has lost the full value of its investment and that compensation should therefore be measured according to the fair market value of the expropriated asset ('FMV'). Where a breach of a different obligation is identified, however, the loss suffered may be considerably less than the full value of the investment, meaning that the FMV standard or sunk costs cannot automatically be applied to determine the quantum of compensation. In such cases tribunals must look to evidence beyond the

[55] *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para 290 (Arbs. Michael Pryles, David D. Caron, Donald M. McRae).
[56] Eg *RWE Innogy GMBH and RWE Innogy Aersa S.A.U. v Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019, paras 494-506 (Arbs. Anna Joubin-Bret, Judd L. Kessler, Samuel Wordsworth).
[57] Eg *Invesmart, B.V. v Czech Republic*, UNCITRAL, Award, 26 June 2009, para 250 (Arbs. Michael Pryles, Christopher Thomas, Piero Bernardini).

value of the investment to determine the loss actually suffered. *Third*, claimants bear the burden of establishing the loss and demonstrating the causal link between the breach identified and the loss claimed. In the absence of sufficient evidence or argument from a claimant, tribunals should not enter into their own analysis or speculation. In my view, the Majority has violated all of these cardinal principles.

48. In this case the Majority has found only that there has been a breach of Art 1105 NAFTA, rightly rejecting the claim that there has been an unlawful expropriation. Instead of presenting distinct quantum analyses for each claimed violation of NAFTA, the Claimant has chosen to present a single argument based on the full value of the investment.[58] This method would be logical in the context of a claim for unlawful expropriation, but for the reasons explained above it cannot be applied automatically to other treaty breaches. Simply asserting, as the Claimant does, that each alleged breach independently caused the value of the investment to become zero without any supporting evidence or analysis is manifestly inadequate.[59] In the absence of any argument or evidence from the Claimant as to any loss flowing from the distinct treaty breach identified, the Majority reaches a conclusion that is unreasoned. At its highest, the loss caused to the Claimant, on the Majority's approach, can be no more than that which arises from the cost of having to make a second application for an MIA, or the delay that followed the making of such an application. There is no claim that the Mexican courts have acted wrongfully. As the Claimant has offered no argument or evidence as to the damages that arise in relation to additional costs incurred or delay, the Majority should have concluded that no compensation can be awarded to the Claimant. This is the approach taken by other tribunals, such as the recent award in *Infinito Gold v Costa Rica*.[60]

[58] Claimant's Memorial, para 376.
[59] Claimant's Memorial, para 376.
[60] *Infinito Gold Ltd. v Republic of Costa Rica,* ICSID Case No. ARB/14/5, Award, 3 June 2021 (Arbs. Gabrielle Kaufmann-Kohler, Bernard Hanotiau, Brigitte Stern), paras 584-586. See also *Pawlowski AG and Projekt Sever S.R.O. v Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021 (Arbs. Juan Fernández-Armesto, John Beechey, Vaughan Lowe), paras 728-737; *The AES Corporation and TAU Power B.V. v Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013 (Arbs. Pierre Tercier, Vaughan Lowe, Klaus Sachs), paras 444-478; *The Rompetrol Group N.V. v Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Arbs. Franklin Berman, Donald Francis Donovan, Marc Lalonde), paras 281-288; *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, 24 July 2008 (Arbs. Bernard Hanotiau, Gary Born, Toby Landau), paras 788-806.

49. Yet the Majority has proceeded otherwise, awarding the Claimant compensation measured according to the FMV standard for the loss of the entire investment. This is essentially unreasoned and deeply problematic. There is no evidence whatsoever in this case that any breach of Art 1105 has caused the total loss of the investment, and the Majority has pointed to none. Instead, the Majority has seemingly proceeded on the unstated assumption that *any* breach of an investment treaty leads to an award of compensation based on the FMV standard. This is plainly incorrect. The Majority is also wrong to state that the Respondent agreed that any compensation should be measured according to the FMV standard;[61] a brief glance at the written submissions shows that the Respondent clearly states that it believes the FMV standard applies only following a finding that the Claimant had a right capable of being expropriated and that there had been either (i) an unlawful expropriation, or (ii) measures tantamount to expropriation.[62] The Respondent did not, as the Majority seems to suggest,[63] agree that the FMV standard applies whenever a treaty breach has been identified. To the contrary, the Respondent has explicitly stated that it "rejects the proposed measure of compensation in any other scenario".[64] Given that the Majority has not even attempted to analyse the existence of unlawful expropriation or measures tantamount to an expropriation, it appears that the Majority's quantum analysis is based on a misreading, or misunderstanding, of the record before the Tribunal.

50. Regrettably, this is not the end of the problems with the Majority's compensation analysis. As noted in the earlier section of this dissent, a challenge to the second refusal decision was pending before the Mexican courts when this arbitration was begun. There are a number of possible outcomes to this domestic litigation, and there is no evidence before the Tribunal to allow an assessment as to the likely outcome. As noted, the Claimant has not argued that the Mexican courts have violated any provision of the NAFTA.

51. It may, for example, be the case that the second decision is upheld with the result that the Don Diego Project is not permitted to go ahead. Alternatively, the second decision may be struck down with SEMARNAT being asked to consider the Project once again.

[61] Majority's Award, para 559.
[62] Respondent's Counter-Memorial, para 632; Respondent's Post-Hearing Brief, paras 150-152.
[63] Majority's Award, para 559.
[64] Respondent's Counter-Memorial, para 632.

A determination of whether any particular outcome involves a breach of NAFTA would have to be assessed in light of both the content of the second refusal decision (on which the Majority has not commented) and the content of the TFJA judgment.

52. Despite this, the Majority has concluded that in the absence of the apparent breach of Art 1105 "the MIA would have been granted" and "there is a high probability" that other authorisations and licences would also have been granted.[65] Later, in calculating damages, the Majority goes even further, stating that: "If the MIA had not been wrongly rejected, Claimant would have continued the normal course of the Project, obtained the rest of the permits from the relevant authorities and been in a position to exploit the phosphate deposits comprised in the Don Diego Project."[66] This too is pure speculation, unsupported by evidence. It is a finding that shocks, the wishful thinking of a couple of arbitrators who have substituted their personal views for the evidence. It is an approach that mischaracterises and disrespects the proceedings before the Mexican courts, and undermines the proceedings which are ongoing. Until the decision of the TFJA is known, and even thereafter, the Tribunal cannot predict whether the Claimant's project will ultimately go ahead, or in what form it may go ahead, or the nature or extent of the Claimant's financial loss, if any. In these circumstances, it is evidently premature and wrong for the Majority to award the quantum of damages based on the Claimant's approach and its own speculations. On a proper approach to the Majority's conclusions, the only financial loss which could plausibly be argued with any degree of certitude is the cost incurred in making a second MIA application. That amount has not even been claimed, as the record makes clear. It follows that no compensation should be awarded. If the Majority had engaged with the correct principles and standards applicable to the quantification of compensation it would have so found.

53. Had the Majority properly considered the three cardinal principles on causation, the distinctions between different obligations and the burden of proof, I believe it would have reached the conclusion that, on the basis of the current stage of the proceedings before the Mexican courts and the evidence and argument before this Tribunal, no compensation should be awarded to the Claimant in this case. Instead, it has opted to

[65] Majority's Award, para 576.
[66] Majority's Award, para 600.

award compensation on a basis that is fundamentally flawed, both as a matter of law under the NAFTA, and in terms of legal policy. They have concocted a future that is plucked out of thin air.

Costs

54. The costs statements of both parties merit close scrutiny. The Claimant's costs amount to US$21,265,683.40, a jaw-dropping figure given the relatively discrete and straightforward nature of this case. About one half of this amount appears to have been provided by third-party funders (DrumCliffe LLC and Poplar Falls LLC).[67] For broader context, a recent report has cited the mean cost for claimants in investor-State cases to be US$ 6.4 million, less than one-third of what the Claimant has claimed in costs in this case.[68] The Respondent's costs amount to US$2,590,212.44, about ten per cent of the Claimant's figure if the ICSID costs (US$400,000 paid by each Party) are taken out of the equation. Remarkably, the Claimant spent more on a single quantum expert (Compass Lexecon, paid a staggering US$2,897,657.72). No less remarkably, Compass Lexecon came up with a headline claim for compensation of US$3.1376 billion,[69] about one hundred times more than the amount eventually awarded by the Majority (US$37.1 million).

55. The Claimant's costs are, by any decent standard, unreasonably high. There is ample authority for the proposition that a Tribunal should not make an order for unreasonably high costs.[70] On the basis of my own experience in investor-State arbitration (more than forty cases as counsel, on both sides, and thereafter more than sixty cases as arbitrator) I can see nothing exceptional or complex about this case that could justify such excessive costs. Having regard to the nature and extent of the original claim and the

[67] **C-0190**, pp. 4, 21-24, 56-58.
[68] BIICL-Allen & Overy, '2021 Empirical Study: Costs, Damage and Duration in Investor-State Arbitration' (June 2021), pp. 9-12.
[69] Majority's Award, para 601.
[70] See *Charanne B.V. and Construction Investments S.A.R.L. v Kingdom of Spain*, SCC Case No. V 062/2012, Final Award, 21 January 2016 (Arbitrators Alexis Mourre, Guido Santiago Tawil, Claus Von Wobeser), paras 563-564; *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*, ICSID Case No. ARB/15/29, Award, 22 October 2018 (Arbitrators Ian Binnie, Kanaga Dharmananda, Brigitte Stern), paras 389-401 ("A party is free to spend as much money as it wishes on legal fees and expenses, but it does not follow that all such costs and expenses should be imposed on the opposing (unsuccessful) party"; *Interocean Oil Development Company and Interocean Oil Exploration Company v Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Award, 6 October 2020 (Arbitrators William W. Park, Julian D.M. Kew, Hon. Justice Edward Torgbor), paras 384-387, refusing to order costs that are "unreasonably high" (para 385).

outcome decided by the Majority, and the gap between the two, I agree with the decision of the Majority that each side should bear its own legal costs.

* * *

56. As is clear, however, I am in fundamental disagreement with the approach taken by the Majority to matters of liability and quantum, and with the conclusions. The evidence before this Tribunal cannot bear the finding that the Respondent acted for reasons that were not genuinely motivated by real environmental concerns, or that the actions of the Respondent have caused the loss of the entire investment. Having regard to the evidence, and to the legal principles to be applied, the only aspect of this case which could be said to be "contrary to the rule of law", or which "shocks, or at least surprises, a sense of judicial propriety", is the approach taken to the interpretation and application of the law by the Majority, on both liability and quantum.

57. This is a case in which the legal system of Mexico has worked. A decision was taken by the Mexican authorities, it was challenged before the Mexican courts, which ruled in favour of the Claimant. There has been no denial of justice, and none has been argued. On the basis of the evidence, the process of decision-making in Mexico has been extensive and thorough. The project very obviously raises significant environmental concerns: it proposed a mining technique that is untried and untested, to be utilised by a Claimant that has zero experience in the activity it wished to engage in, in an area that is recognised to be ecologically sensitive. In this context, at a relatively early stage of the decision-making process, the Claimant received a decision that it did not like. It went to the local courts to get justice, and it got justice. It then invoked an international treaty obligation to challenge its earlier treatment. That approach was premature: the violation of Mexican law was corrected, there was no violation of any international legal obligation.

58. By way of conclusion, I cannot refrain from expressing the view that this unprecedented and disturbing Award is novel and groundbreaking in the worst of ways. Beyond the prematurity of the application, the reasonable environmental concerns identified by the Respondent and others, which should have been at the centre of the Majority's reasoning, have been wilfully ignored, along with the high level of regulatory deference

to which the Mexican State is entitled. At a time when local, national and international laws have come together to promote a more careful and considered approach to the protection of the environment, including the marine environment, the Majority has found arbitrariness in the face of reasonable and serious environmental concerns, compelling evidence, and an applicable law which sets a very high bar for such a finding. The Majority has treated the evidence and the law as obstacles to be overcome in the pursuit of a desired outcome, rather than as the path to the correct result. The Majority has made an order on liability and quantum that is unjustified under the law.

59. States and investors alike place their trust in arbitral tribunals to deal with highly sensitive disputes, involving a range of public and commercial interests and perspectives. At a time when states are finally beginning to recognise the challenges and complexities of taking decisions that may have significant impacts on the environment, and as the fragility of our marine environment is increasingly understood, the Majority has driven a coach and horses through Art 1105 and legitimate environmental concerns. This is a deeply regrettable Award. Evidence and law have been ignored, to be replaced by speculation and arbitral activism.

[Signed]

Professor Philippe Sands KC

27 August 2024

Professor Sands appends a dissent as follows:

1. I regret that I do not agree with the Majority's decision to reject the joint Request for Leave to file an *amicus curiae* brief. In applying the criteria in the FTC statement a Tribunal should show an awareness that the NAFTA Parties have recognised that *amicus curiae* submissions have the potential to improve both the quality and the legitimacy of the final award, even if the tribunal ultimately disagrees with the reasoning of those submissions. It is incumbent upon arbitrators to have regard to the need to consider the impact on the legitimacy of the final award in light of both (a) general legitimacy concerns in relation investment treaty arbitration, and (b) specific local community interests that are engaged by a particular case. Regrettably, the Majority's decision indicates no awareness of these considerations, and has in effect overridden the views of the Respondent, which contributed to the drafting of FTC statement.

Significant interest in the arbitration

2. Contrary to the view of the Majority, I believe it is clear that the *Cooperativa* has a significant interest in the outcome of the arbitration. The Majority's conclusion appears to rest exclusively on the basis that the Claimant in these proceedings is seeking compensation and not restitution, implying that only if the Claimant was seeking restitution would the Majority have found that the *Cooperativa* had a significant interest in the arbitration. This is an extraordinarily narrow reading of the 'significant interest' requirement, and the Majority has offered no justification in support. It is now well-recognised that investment treaty arbitration can have a significant impact on domestic regulatory regimes, even where compensation is the only remedy awarded. It is therefore entirely possible that a finding that the Respondent has breached the treaty could lead to regulatory changes which directly affect the interests of the *Cooperativa*, either immediately or in the future. The Majority's decision fails to recognise or take account of the broader impacts of investment treaty arbitration.

3. The position of *CIEL* is more difficult, and I agree with the Majority that it is not enough to demonstrate merely a 'general interest in the proceeding'. Nevertheless, I believe that CIEL has demonstrated a significant interest in the current case. In reaching this conclusion, I have

found the nature of *CIEL*'s work particularly significant. It is not an organisation which has a general interest in the protection of the environment, or a general academic interest in investment treaty arbitration. Rather, *CIEL* has a limited set of clear goals which focus on how the law (particularly international treaty arbitration) affects human rights and the environment. In my view, the present proceedings fall squarely within *CIEL*'s limited focus, and the outcome of these proceedings may impact on *CIEL*'s ability to achieve its aim. To the extent that more information was needed in this respect, the Tribunal could, as I proposed, have requested further information from *CIEL*.[2]

Assistance on a legal or factual issue

4. I believe that both the *Cooperativa* and *CIEL* are able to bring a unique perspective to the specific factual and legal issues in this dispute, and that these perspectives would assist the Tribunal.

5. The utility of the perspective offered by the *Cooperativa* relates to the impact that the Claimant's project may have had on the fishing activity of local people. To suggest, as the Majority appears to, that the impact of the project is irrelevant and that the dispute concerns only the legality of the decision to refuse operating permits is not persuasive. The two issues are intrinsically connected, and a conclusion on the latter cannot be reached without consideration of the former. Whilst the Parties themselves are in a position to explore the impact of the Claimant's project on the interests of local people, the *Cooperativa* is in a unique position to give a first hand account and thus support or challenge the arguments of the parties. This unique perspective would have been extremely valuable, and I consider it to be deeply regrettable that the Majority has decided that it does not wish to hear from a community that is directly affected by the outcome of the proceedings. Such a decision will only serve to undermine perceptions as the legitimacy of these proceedings.

[2] In addressing this issue, it is appropriate to disclose that I was involved in the founding of a predecessor organisation to CIEL, back in 1989. I have had no involvement or role in any aspect of the activity or operation of this incarnation of the organisation, since its founding more than twenty-five years ago.

6. In my view, *CIEL* is able to offer a unique perspective due to its ability to place this dispute in the context of broader debates and developments in international law. The focus of the Parties has naturally been on the legal standards of the treaty and the relevant factual evidence. In my view, these broader debates are highly relevant to the Tribunal's task in this case, given the potential interplay of investment, environmental and human rights issues in this case. Given its expertise, I believe that *CIEL* is well-placed to offer additional insights that could assist the Tribunal, and that its contribution would have enriched the material available to the Tribunal, beyond the pleadings of the Parties. At a time when challenges to the environment are recognised as affecting a range of stakeholders, I consider it regrettable that the Majority does not think it appropriate to allow those who have demonstrated that they may be affected by the outcome a chance to participate in the proceeding, by means of a limited *amicus* submission. A quarter of a century ago, the International Court of Justice recognised that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn", and there was now a general obligation to protect the environment which was "part of the corpus of international law relating to the environment".[3] An *amicus* filing offers an important means of giving effect to that obligation, whilst also recognising the rights and interests of affected persons.

Impact on the Parties

7. To have allowed the *Cooperativa* and *CIEL* to submit *amicus* briefs would not have unduly burdened the parties, unfairly prejudiced either party or disrupted the arbitral proceedings. Both sides are represented by experienced counsel, and are perfectly capable of responding to *amicus* briefs. That one or both of the *amici* may have offered a view which is contrary to the interests of either party is not in itself a sufficient reason to exclude the *amici* from proceedings. Indeed, parties should welcome the opportunity for more rigorous and detailed argument, as Respondent has done. Finally, any concern about the burden on the parties or disruption to the

[3] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996,* p. 226, at 241 (para. 29).

proceedings could be easily managed by imposing strict limits and requirements on the *amicus* briefs.

Professor Philippe Sands QC

16 December 2021