



**BEFORE THE HONORABLE ARBITRATION TRIBUNAL ESTABLISHED
UNDER CHAPTER XI OF THE NORTH AMERICAN TRADE AGREEMENT (NAFTA)
AND THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE
UNITED MEXICAN STATES AND CANADA (USMCA)**

**SILVER BULL RESOURCES, INC.
(CLAIMANT)**

V.

**UNITED MEXICAN STATES,
(RESPONDENT)
(ICSID Case No. ARB/23/24)**

REJOINDER

BY THE UNITED MEXICAN STATES:

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ASSISTED BY:

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August 30, 2025

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GLOSSARY

Abbreviation	Full name
2000 Contract	Agreement for the transfer of rights between Metalín and Mineros Norteños signed on August 30, 2000.
Option Agreement	Agreement signed on June 1, 2018 between the Claimant and South32.
Concession Agreements	Refers jointly to the 1997 Contract and the 2000 Contract.
AIA	Environmental Impact Authorization.
AMLO	Andrés Manuel López Obrador.
Amparo 4/2016	Indirect amparo proceeding 4/2016 filed by Metalín on April 6, 2016, before the First Unitary Court of Chihuahua.
Amparo 750/2019	Direct amparo proceeding 750/2019 filed by Mineros Norteños before the Third Collegiate Court of Chihuahua.
Appeal 7/2015	Appeal filed by Metalín on May 11, 2015, before the Second Unitary Court of Chihuahua.
Appeal 12/2017	Appeal filed by Mineros Norteños before the Second Unitary Court of Chihuahua.
Articles of the ILC	Article of the International Law Commission on the International Responsibility of States.
Notice of Force Majeure	Communication sent by SVB to South32 on October 11, 2019.
BBVA	BBVA Mexico, S.A., Multiple Banking Institution, Financial Group.
Chapter XI	Chapter XI of NAFTA.
ICSID	International Centre for Settlement of Investment Disputes.
CJF	Federal Judiciary Council.
CNPP	National Code of Criminal Procedures.
Valdez Concessions	La Perla, La India, and La India Dos.
CONAGUA	National Water Commission.
1997 Contract	“Exploration contract and unilateral promise of sale” signed by Star Morning and Mineros Norteños on August 30, 1997.

Contract with the Valdez family	Promissory agreement for the transfer of rights signed by Minera between the Valdez family and Metalín and the Valdez family on April 21, 2010.
Option Agreement	Agreement signed on June 1, 2018, between the Claimant and South32.
CPEUM	Political Constitution of the United Mexican States.
CVDT	Vienna Convention on the Law of Treaties.
Respondent, Mexico or Mexican State	United Mexican States.
Claimant, Silver Bull or SVB	Silver Bull Resources Inc.
DOF	Official Gazette of the Federation.
United States	United States of America.
Termination Date	Date of termination of NAFTA, which is July 1, 2020.
Assessment Date	August 31, 2021.
Ha	Hectares.
Metalín facilities	Offices, machinery, and movable property related to its operations in Sierra Mojada.
Eighth District Judge of Coahuila	Eighth District Judge in the State of Coahuila.
First Civil Judge of Morelos	First Civil Judge of the Judicial District of Morelos.
First Civil Judge of Torreón	First Judge of First Instance in Civil Matters of the Judicial District of Torreón, Coahuila.
Second Civil Judge of Torreón	Second Judge of First Instance in Civil Matters of the Judicial District of Torreón, Coahuila
Commercial Lawsuit 2/2015	Commercial lawsuit filed by Mineros Norteños against Metalín in May 2014.
Mining Law	Mining Law regulating Article 27 of the CPEUM, published on June 26, 1992, in the Official Gazette of the Federation.
LGEEPA	General Law on Ecological Balance and Environmental Protection.
LGDFS	General Law on Sustainable Forest Development.
LGPGIR	General Law on Waste Prevention and Comprehensive Management.

LOFGC	Organic Law of the Attorney General's Office of the State of Coahuila de Zaragoza.
The Valdez family	Jaime Valdez Farías, María Asunción Pérez, and Antonio Valdez Pérez.
Lots	Land included in the Unificación Mineros Norteños and Vulcano concessions.
Metalline	Metalline Mining Company.
EIS	Environmental impact statement.
Minera Metalín, Metalín, or the subsidiary	Minera Metalín, S.A. de C.V.
Mineros Norteños or MN	Sociedad Cooperativa de Explotación Minera “Mineros Norteños”, S.C.L.
MSA	Refers to the <i>Master Settlement Agreement</i> , an agreement between tobacco producers and a group of state attorneys general.
MXN	Refers to Mexican pesos.
NMT or MST	Minimum Standard of Treatment in accordance with customary international law.
Interpretative Note of the CLC	2001 Interpretative Note of the NAFTA Free Trade Commission Interpretative Note of the FTAA.
NSR	Net smelter return royalty.
Objection of Lack of Jurisdiction	Argument presented by Metalín in case 2/2015 to challenge the jurisdiction of the First Civil Judge of Morelos.
Objection of Term or Condition	Argument presented by Metalín in case 2/2015 to maintain that Mineros Norteños lacked standing.
Statute of limitations objection	Argument presented by Metalín in case 2/2015 stating that Mineros Norteños' action had been filed outside the legal time limit.
Statute of Limitations	Maximum period of three years established in NAFTA for submitting a claim to arbitration.
PJF	Federal Judiciary.
First Unitary Court	First Unitary Court of Chihuahua.
Sierra Mojada Project	Sierra Mojada Project through which the Claimant sought to explore and exploit 20 mining concessions that it claims to own.

PSP	Full Protection and Security.
United Kingdom	United Kingdom of Great Britain and Northern Ireland.
RPM	Public Mining Registry.
RPP	Public Property Registry.
SCJN	Supreme Court of Justice of the Nation.
SdA	Request for Arbitration.
Section A	Section A of Chapter XI of NAFTA.
Section B	Section B of Chapter XI of NAFTA.
Second Unitary Court	Second Unitary Court of Chihuahua.
SEMARNAT	Ministry of the Environment and Natural Resources.
South32	South32 International Investment Holdings Pty Ltd.
Star Morning	Minera Star Morning, S.A. de C.V.
Third Collegiate Court of Chihuahua	Third Collegiate Court for Civil and Labor Matters of Chihuahua
TJE	Fair and Equitable Treatment.
NAFTA	North American Free Trade Agreement.
T-MEC	Agreement between the United Mexican States, the United States of America, and Canada.
Superior Court of Justice of Coahuila	Superior Court of Justice of the Judicial Branch of the State of Coahuila.
US	US dollars.
VJM	Fair market value.

I. INTRODUCTION

1. The following image shows the “blockade” claimed by the Claimant, without the need for the qualifiers it has expressed throughout the arbitration against Mineros Norteños, the Mexican authorities, and the 2019 Demonstration:



Image 1. Photograph taken on August 11, 2025, of the Mineros Norteños Demonstration outside the Minera Metalín facilities

2. The following image shows members of Mineros Norteños who held the Demonstration at the Minera Metalín facilities on September 8, 2019, without the need for the qualifiers that it has expressed throughout the arbitration against Mineros Norteños.



Images 2 and 3. Photographs from September 8, 2019, produced by the Claimant.

3. These images speak for themselves. With them in mind, it should be remembered that this arbitration is related to a mining project that the Claimant values at US\$315.3 million, and that the Claimant abandoned due to the adversities it faced as a result of contractual disputes arising from actions taken by the Claimant itself.¹ If the Claimant had acted reasonably to address these adversities, its mining activities would surely have continued. Therefore, the Respondent is not liable for the situation created by the Claimant. Any damage suffered by the Claimant was caused by the Claimant itself and is not subject to any compensation.

4. The Claimant claims the following in the Reply:

Mexico blames the entire investor-state dispute framework for the genesis of this dispute. Like other States that now so often seek to tap into the backlash against investment treaty arbitration, Mexico contends that SVB's claims "cast[] doubt on the proper functioning of the investor-State dispute settlement system by pitting the interest of the system . . . against the general interest of the community in which an investment is established." Again, such a complaint about "the system" may be relevant in other disputes, but not this one. As Dr. Weiler sets out in historical detail in his monograph, the duty of States to protect the investments of foreigners from the acts of third parties dates to Venetian merchant society and is not some modern abomination of the treaties that Mexico continues to ratify freely. For Mexico to invoke some investor-treaty parade of horrors to avoid liability for its own fundamental refusal to uphold law and order is just another Hail Mary.²

5. These types of arguments not only lack merit, but demonstrate a desperate attempt to increase an incorrect appearance about the Sierra Mojada community, Mineros Norteños, and the Mexican authorities.

6. The Respondent respectfully requests that the Tribunal review these arguments with caution, remembering that, throughout this arbitration, Silver Bull has made allegations against members of the Tribunal; has sought to characterize this case as "politically motivated" against foreign investment in the mining sector, and has attempted to argue a conspiracy theory involving Mineros Norteños and Deputy Borrego. All of this is meaningless, and at least five aspects should be considered preliminarily:

7. *First*, the Claimant obtained from Mineros Norteños the assignment of rights over mining concessions in 1997 and 2000, which are the subject of discussion in this arbitration. Even 22 years

¹ Counter-Memorial, ¶ 560.

² Reply, ¶ 4, point 16.

after this occurred, a period in which several members of the cooperative grew old and even died, the mining concessions did not evolve into an exploitation project, and an unreasonable delay occurred, giving rise to the Manifestation of which the Claimant is making claims in this arbitration.³

8. *Second*, the Claimant unreasonably refused to pay Mineros Norteños a reasonable amount as compensation to resolve the delay in bringing the project to the exploitation phase. In 2014, 14 years after the transfer of rights agreed in 2000, Mineros Norteños requested an advance payment of US\$1 million in royalties. The Claimant rejected this proposal.⁴ Six years later, Mineros Norteños requested an agreement involving an advance payment of US\$2 million in royalties and a payment of US\$50,000 for representation expenses.⁵

9. *Third*, the contractual dispute between the Claimant and the Valdez family resulted in the seizure of the 18 concessions, which in turn resulted in Silver Bull losing control of its investments.⁶

10. *Fourth*, the Mexican courts consistently ruled that the Claimant did have a contractual obligation to develop the Sierra Mojada Project within four years, a factual aspect that is essential for the Tribunal to take into consideration.

11. *Finally*, as a result of the commercial difficulties faced by the Claimant, on August 31, 2022, the Option Agreement between South32 and Silver Bull was finished.⁷

³ Counter-Memorial, ¶ 3.

⁴ Counter-Memorial, ¶ 566.

⁵ Counter-Memorial, ¶¶ 397, 566. After the Counter-Memorial was filed, it became clear that the payment of US\$50,000 was not related to the payment to “each member of Mineros Norteños who had worked on the Sierra Mojada project in the past but were no longer able to work” but rather to representation expenses. See email sent on June 15, 2017, by Mr. Juan Manuel López Ramírez to Tim Barry forwarding the proposal from Mineros Norteños, **C-0206**.

⁶ Counter-Memorial, ¶¶ 34, 225-271, 553-560.

⁷ Counter-Memorial, ¶ 258.

12. The Claimant has only itself to blame for the poor business decisions it made. It is widely known that international investment agreements are not insurance policies against poor business decisions.⁸ For this simple reason, the Claimant's case should be dismissed by the Tribunal.

13. It is clear that the Claimant was not diligent. The documentary evidence, the witness statements provided by the Respondent (made by Messrs. Lorenzo Fraire, Elías Portillo, and Antonio Valdez), and the legal reports by Messrs. Carlos del Razo (on regulatory matters) and Rodolfo Islas (on criminal matters) demonstrate Silver Bull's negligence.

14. In the Reply, the Claimant states that “SVB has brought in the major international backing necessary to turn Sierra Mojada into Mexico's next great silver story.”⁹ The facts and evidence show the opposite. A diligent investor would have conducted at least a social impact study to define the impacts that its project activities would have on the community and its inhabitants. A diligent investor would have tried to mitigate a social conflict and not prolong it for more than 20 years. A diligent investor would have informed the competent authorities of the problem it was facing. A diligent investor would have exercised its rights before the competent authorities. As will be described in this Rejoinder, none of this was done by Silver Bull.

15. The Claimant alleges that the Sierra Mojada Project was close to reaching the exploitation phase, although there is no evidence to support this claim. Among several aspects to consider, the absence of a Pre-Feasibility Study is necessary evidence that the Project was far from reaching exploitation.

16. For the benefit of the Tribunal, the Respondent lists and clarifies the relevant aspects surrounding its jurisdictional objections in Section III of this Rejoinder. However, by way of introduction, a summary of the Respondent's main jurisdictional objections is presented below:

A. The Respondent's jurisdictional objections

17. It is now clear that each of the claims presented by the Claimant falls outside the jurisdiction *ratione temporis* and *ratione voluntatis* of the Tribunal.

⁸ CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Award on Jurisdiction, ¶ 29. **RL-0182**.

⁹ Reply, ¶ 4, p. 5.

18. In its Reply, the Claimant argues that the alleged violations of Articles 1105 and 1110 of NAFTA are “continuing” in nature and have persisted from September 2019 “to the present day.”¹⁰ Similarly, the Claimant does not identify any date for the alleged violations of Articles 1102 and 1103, but rather argues that Mexico has repeatedly or continuously “granted more favorable treatment” to other investors, both “before” and “after” the “termination of NAFTA.”¹¹

19. For each of these claims, the Claimant alleges that it suffered exactly the same loss or damage on August 31, 2022, and argues that the termination of the Option Agreement in August 2022 resulted in the total loss of the value of the project, as well as the value of the amounts invested by SVB to acquire and develop the project.¹² According to the Claimant, from that moment on, the Project ceased to be viable.¹³

20. This has confirmed two fundamental errors in the Claimant's reasoning.

21. *First*, the Claimant is mistaken in considering that a continuing *situation* that transcends the termination of NAFTA can give rise to a continuing *breach* of a NAFTA Chapter 11 obligation. This is not the case. Pursuant to Article 70 of the VCLT, the substantive protection obligations contained in Section A of Chapter 11 of NAFTA ceased to be binding on the Parties when they were terminated, superseded, and replaced by those in Chapter 14 of the USMCA.

22. *Second*, the loss or damage allegedly caused by the termination of the Option Agreement occurred more than two years after Articles 1102, 1103, 1105, and 1110 of NAFTA ceased to be binding on Mexico. As confirmed by Article 13 of the ICS Articles, there can be no breach where there is no binding obligation in force *ratione temporis*. Therefore, it cannot be asserted that the loss or damage allegedly suffered by the claimant in August 2022 is due to a breach of NAFTA.

23. Consequently, each of the Claimant's claims falls outside the Tribunal's jurisdiction *ratione temporae*.

24. For the Claimant, the solution to this dilemma is to argue that the investment protections provided for in NAFTA continued to apply to existing investments until June 30, 2023, in

¹⁰ Reply, ¶¶ 402, 409-410, 440, 443, 462.

¹¹ Reply, ¶ 593.

¹² Memorial, ¶ 3.28; Reply, ¶¶ 7, 281, 624.

¹³ Reply, ¶ 426.

accordance with Annex 14-C of the USMCA.¹⁴ However, once again, the Claimant is mistaken. Annex 14-C simply extended, for a period of three years, the Parties' *consent* to continue using the ISDS mechanism set out in Section B of Chapter 11 of NAFTA to arbitrate “existing investment” claims and “pending claims” for breaches prior to the termination of NAFTA. Annex 14-C did not function as a “survivor clause” or otherwise extend the binding force of the obligations in Section A to acts or events that took place after NAFTA was terminated, superseded, and replaced by the USMCA.

25. The correct interpretation of Annex 14-C is confirmed by the consensus in the subsequent practice of the three USMCA Parties in at least ten different arbitrations.

26. Therefore, the Claimant's claims also fall outside the Tribunal's *ratione voluntatis* jurisdiction.

27. The Respondent will also address its separate objection that the Claimant's claims under Article 1105 are time-barred by the application of NAFTA's three-year statute of limitations and are therefore outside the Tribunal's jurisdiction *ratione temporis*. The Claimant's email correspondence demonstrates that the termination of the Option Agreement was planned, anticipated, and even *proposed to South32 by the Claimant* in September 2019.¹⁵ This indicates that the Claimant knew, or should have known, of the alleged loss or damage well before August 2022.

28. Finally, the Respondent contends that the Option Agreement does not meet the definition of “investment” under NAFTA or the ICSID Convention and, furthermore, that the Valdez attachments prevent the Claimant from having full ownership or control of the investment. Consequently, the claims fall outside the Tribunal's jurisdiction *ratione materiae*.

29. In this Rejoinder, the Respondent will also explain that the Claimant's Legal Arguments are meaningless and without merit. Below is an executive summary of the points that will be addressed in each section:

¹⁴ Reply, ¶ 402, 443, 445, 592.

¹⁵ Email from Tim Barry to Mirek Wozga of South 32 regarding the Manifestation (update and breakdown of expenses), September 19, 2019. **R-0081**.

B. Discrimination (Articles 1102 and 1103 of NAFTA)

30. The Claimant makes two separate claims for discrimination: one under Article 1102 and another under Article 1103 of NAFTA. However, it does not develop a separate analysis for each provision, nor does it succeed in proving a violation of either of them. Despite this lack of clarity, Mexico understands that the comparators proposed by the Claimant are Mineros Norteños, in its claim under Article 1102, and a series of foreign companies and mining projects in Mexico, in its claim under Article 1103.

31. The Respondent reiterates that the analysis of TN and MFN under Articles 1102 and 1103 must focus on whether an investor or investment was treated less favorably under similar circumstances of treatment, not whether the investments are comparable in the abstract. However, the Claimant insists on minimizing the fact that “similar circumstances” apply to the treatment accorded and not to the characteristics of the investment, proposing an analysis that lacks rigor. In addition, SVB seeks to relieve itself of its burden of demonstrating the relevance of the criteria it chooses to analyze the circumstances of treatment, which ultimately boil down to sharing the same economic sector.

32. With respect to the claim under Article 1102, the Claimant: (i) has not identified the alleged treatment granted; (ii) has not proven the similar circumstances of treatment between Mineros Norteños and SVB; and (iii) cannot demonstrate the alleged less favorable treatment among the comparators. In fact, the Claimant's argument would require the Mexican State to ignore its internal regulatory framework, the rights of third parties, and the legitimate limits on the exercise of economic freedoms, which completely exceeds the purpose and scope of the Treaty.

33. With respect to its claim under Article 1103, the Claimant: (i) alleges that the Mexican State acted to lift blockades on other mining projects, while allowing the blockade on Sierra Mojada to remain in place. However, (ii) it failed to establish the relevance of the proposed similar circumstances of treatment and ignored those raised by the Respondent, and (iii) it cannot establish that less favorable treatment was accorded. In particular, Mexico has already demonstrated that the projects compared are at different stages, the blockades are of a different nature, and were resolved through negotiations.

34. The Respondent reiterates that the burden of proof in claims of discriminatory treatment under Articles 1102 and 1103 of NAFTA rests entirely with the Claimant and is not shifted to the

State at any stage with respect to the elements of the applicable standard. Since no violation of Articles 1102 and 1103 has been proven, Mexico is not obligated to justify any difference in treatment as if it were discriminatory. But even if it were assumed that there was a difference in treatment, it would be based on legitimate public policy reasons, such as the protection of the social right to demonstrate.

C. Minimum Standard of Treatment (Article 1105)

35. SVB alleges that Mexico violated the minimum standard of treatment established in Article 1105 of NAFTA by failing to provide PSP and TJE to its investments. However, none of its allegations alter the legal framework clearly established by Mexico or meet the requirements of international jurisprudence to prove a violation of that provision.

36. The Claimant bases its claim on three main facts: (i) that Mexico did not take reasonable measures to restore SVB's access to the Project site or sanction those responsible for the Second Blockade; (ii) that it did not act with the same diligence with which it allegedly responded in other mining projects; and (iii) that Deputy Borrego incited, encouraged, and supported the blockade for his own political and personal benefit. As will be demonstrated, none of these elements constitutes, under international law, a measure attributable to the State that reaches the threshold required to constitute a violation of Article 1105.

37. Mexico insists that the NMT obligation must be understood as an absolute minimum, with a high evidentiary threshold. NAFTA itself and arbitral practice make it clear that the TJE is not a generic clause that covers any questionable act, and its interpretation must respect the sovereign power of States to regulate. In this context, the State does not incur international responsibility under this standard for failing to act in accordance with an investor's personal expectations and preferences, or for refraining from forcibly intervening in peaceful demonstrations, especially when the existence of violence or criminal conduct has not been proven.

38. On the one hand, the Claimant misrepresents the scope of the FPS obligation. Although it refuses to accept it, its claim assumes that it is an obligation of results or strict liability. However, it has been proven that FPS must be evaluated through the prism of due diligence and reasonableness. In this context, Mexico has demonstrated that it acted reasonably by deploying a police presence, opening institutional channels for dialogue and investigation, and evaluating the facts in accordance with its regulatory framework.

39. The fact that the State's response did not produce the result desired by Silver Bull (the lifting of the blockade through the use of public force) does not imply an internationally wrongful omission. Furthermore, the Claimant's Reply conveniently ignores several key legal and factual issues raised by Mexico in its Reply, such as Silver Bull's role in restricting the actions of the authorities and various questionable actions by its executives, as well as Mexico's obligations under domestic and international human rights law.

40. Furthermore, the Claimant has failed to refute that TJE's obligation under Article 1105 is understood as an absolute minimum, that the threshold for proving its breach is high, and that it does not include ancillary duties such as non-discrimination or legitimate expectations, except in relation to manifestly arbitrary state conduct. Under this legal framework, the Claimant does not even attempt to demonstrate that Mexico's actions violate these standards, and focuses instead on responding to the Respondent's criticisms. However, it has been proven that Mexico acted within the bounds of reasonableness, without exceeding the limits established by domestic law or its international obligations.

D. Expropriation (Article 1110)

41. Regarding the claim of expropriation, the Respondent reiterates its position that the alleged inaction of the Mexican authorities does not constitute expropriation.

42. The Claimant has not demonstrated that its investment lost all its value as a result of the alleged inaction of the Mexican authorities. It merely alleges, without evidence, that no reasonable investor would invest in the Project given the alleged blockade by Mineros and Norteños. The Respondent considers that a claim of this nature cannot rest solely on the testimony of the CEO of the company filing the claim.

43. The Claimant attributes the failure of the Project to the departure of South32 in August 2022, but has not demonstrated that South32 decided to withdraw because of the alleged passivity of the Mexican authorities in response to the Mineros Norteños demonstration. Again, this crucial fact for establishing causality rests solely on the testimony of Mr. Barry, CEO of Silver Bull. The Respondent has suggested that South32's departure may have had other causes, such as the seizure of the Metalín concessions as a result of the litigation between that company and the Valdez family. Without those concessions, the Project would not have been able to continue regardless of what happened with South32 or the Northern Miners' Demonstration.

44. Nor is it the case that the loss of financing for a Project constitutes expropriation. As both parties acknowledge, indirect expropriation is assessed on the basis of the effects of the measure, which must be comparable to direct expropriation in order to prove the existence of indirect expropriation. The fact that Silver Bull considers that it cannot continue without the financial backing of South32 does not prove that the Project has lost all its value. As will be explained below, if the Project had a value as high as that assigned to it by BRG (the Claimant's damage expert), it is entirely possible that an investor would be willing to acquire the Project and reach an agreement with Mineros Norteños. This is because the compensation demanded by Mineros Norteños represents only a small fraction of the value that the Claimant attributes to the investment. It is also possible (and probable) that the Project was not nearly as valuable as BRG claims, in which case there would be no basis for asserting that the Project lost all of its value. It is also strange that Silver Bull was not willing to reach an amicable settlement with Mineros Norteños and pay advance royalties, but was willing to allocate resources to initiate this arbitration against the Mexican State through the sponsorship of a third-party funder.¹⁶

45. However, if it is determined that the Respondent expropriated the Claimant's investment, Mexico requests that the Tribunal order the Claimant to transfer, free of any encumbrance, all of Metalín and Contractors' assets to the Respondent to avoid double recovery. The above- includes, without limitation: mining concession titles, exploration data and results as of the Valuation Date, real estate, and equipment.

E. Damages

46. The Respondent's position on damages can be summarized in the following points:

- The Claimant has not resolved the issues of specification in its claim for damages. In particular, it has still not specified which claims it is bringing on its own behalf and which on behalf of Metalín. As indicated at the time, this is relevant because the Treaty requires that an award relating to a claim brought under Article 1117 be paid to the company. Furthermore, the company has not submitted a calculation of damages related to a violation of Articles 1102, 1103, and 1105 that do not have expropriatory effects.

¹⁶ Litigation Funding Agreement. C-0137, p. 65.

- The standard of full reparation does not require damages to be determined based on the fair market value (FMV) of the investment. For the Respondent, the standard of full reparation is satisfied by eliminating the consequences of the violation and, importantly, restoring the situation that would in all probability have been faced had the violation not occurred.
- The Claimant has not established causation for the damages it claims. In particular, it has not demonstrated that South32 withdrew from the Project because of the Mexican authorities' failure to take reasonable action in response to the Mineros Norteños demonstration. It is entirely possible that it did so because of the seizure of the Metalín mining concessions as a result of the outcome of the litigation with Mr. Valdez.
- The Claimant contributed to the damage it incurred. It did so by failing to comply with the contractual obligation it acquired in 2000 when it acquired the Mineros Norteños lots in exchange for an initial payment and royalties on mineral sales that would begin to be paid no later than 2001. It also failed to fulfill its obligation to mitigate the damage, as it made no attempt to sell the Project to a third party despite the high value it attributes to it. Its position on the loss of value of the Project presupposes that the conflict with Mineros Norteños is irresolvable or economically unviable, which is false.
- The Claimant has not demonstrated its damages with reasonable certainty. The valuation it presents—i.e., US\$315 million according to the second BRG report—is highly speculative and significantly overestimates the alleged value of the Project on the Valuation Date, especially considering that the Claimant spent more than 20 years exploring the site without even reaching the pre-feasibility stage.
- The Respondent's damage expert (Dr. Tiago Duarte-Silva of CRA) considers that the best approximation of the value of the Claimant's investment is obtained from the capitalization value of SVB immediately prior to the Mineros Norteños Demonstration, updated to the Valuation Date. This value amounts to approximately US\$19.2 million, which contrasts sharply with the US\$315 million that BRG attributes to the Project.
- Pre- and post-award interest should be calculated based on the Mexican government's cost of funding. Any rate above that cost would compensate the Claimant for a risk it never

incurred. Furthermore, there is no basis for declaring the award tax-free, as the compensation is not calculated on the basis of after-tax cash flow.

II. FACTS

A. There is no relationship between the termination of the Option Agreement and the alleged inaction of the Mexican authorities.

47. On August 31, 2022, Silver Bull and South32 mutually agreed to terminate the Option Agreement. Clause 2.1 of the Termination Agreement sets forth the terms on which such termination was agreed by the parties:

The Parties agree that upon the fulfillment of the conditions precedent in clause 3 of this Agreement and subject to the Continuing Obligations in clause 5 of this Agreement, that the Option Agreement will be terminated by mutual agreement and that the Parties will be released from their obligations under the Option Agreement.¹⁷

48. The Claimant alleges that “there was a clear and direct link between Mexico's acts and omissions with respect to the continuing blockade and South 32's decision to exit the Project.”¹⁸ However, such a causal link has not been demonstrated in the facts.

49. The Claimant ignores that, at the date of termination of the Option Agreement, there were several factors that created uncertainty regarding the Sierra Mojada project. After more than twenty years of exploration, the company had still not managed to delineate a commercially viable mineral deposit, nor was there any certainty regarding the Claimant's property rights over the Sierra Mojada Project, in light of the results of the Valdez Trial (see Section F *below*).

1. The evidence presented by the Claimant is insufficient

50. The Claimant argues that its communications with South32 confirm that the termination of the Option Agreement “was prompted by the Mexican authorities' failure to put an end to the Blockade.”¹⁹ However, none of the communications submitted by the Claimant demonstrate this fact. None of them mention South32's concerns regarding the alleged lack of action by the Mexican authorities, nor do they refer to the 2019 Manifestation as a relevant factor in the termination of the Option Agreement.

¹⁷ Termination Agreement, Clause 2.1. **C-0048.**

¹⁸ Reply, ¶ 292.

¹⁹ Reply, ¶¶ 297-298.

51. The following conclusions can be drawn from the communications submitted by the Claimant:

52. *First*, the Claimant argues that the communications exchanged during the force majeure period (October 2019-August 2022) confirm that the 2019 Demonstration was “South32’s main concern.”²⁰ However, the Claimant was unable to produce a single document confirming this alleged concern and its relevance to the termination of the Option Agreement.

53. During the document production phase, the Respondent requested all communications and reports prepared by the Claimant in relation to the force majeure situation, in accordance with the monthly reporting obligation contained in Clause 8.3 (1)(c) of the Option Agreement.

The Party that is prevented from carrying out its obligations under this Agreement as a result of a Force Majeure must: [...] (c) inform each other Party in writing every thirty (30) days (or any other period agreed in writing by the Parties) after the date of notification of the Force Majeure pursuant to section 8.2 of the ongoing effect of, and the steps taken to remove the effects of, the Force Majeure.²¹

54. The Claimant did not produce any documents and did not provide a reasonable explanation to justify the lack of documents informing South32 about what it itself describes as the “main concern” that led that company to terminate the Option Agreement.

55. The Respondent also requested the production of all communications and documents exchanged with South32 discussing the reasons behind the termination of the Option Agreement. The Claimant merely reproduced the communications referred to in its Memorial and Reply, which, as explained *below*, do not discuss this specific issue. The Claimant also failed to offer a reasonable explanation for the non-existence of the requested communications. It is implausible that there are no communications or reports discussing the reasons behind the decision that, according to the Claimant, reduced the value of its investment to zero. In any case, none of the communications in the file demonstrate a “clear and direct” relationship between the 2019

²⁰ Reply, ¶ 297.

²¹ The Respondent specifically refers to the Claimant’s Request for Production 4. *See* Option Agreement. Clause 8.3 (1)(c). **C-0031**. (“The Party that is prevented from carrying out its obligations under this Agreement as a result of a Force Majeure must: [...] (c) inform each other Party in writing every thirty (30) days (or any other period agreed in writing by the Parties) after the date of notification of the Force Majeure pursuant to section 8.2 of the ongoing effect of, and the steps taken to remove the effects of, the Force Majeure.”)

Demonstration or the alleged inaction of the authorities and the termination of the Option Agreement.

56. *Second*, the Mineros Norteños Demonstration began on September 8, 2019. Just 11 days later, on September 19, 2019, Tim Barry sent a message to Mirek Wozga of South32 informing him of the situation. This is the first communication between Silver Bull and South32 regarding the 2019 Demonstration. In this email, Tim Barry summarizes the results of the Option Agreement as follows:

I am also looking at the results of the drilling and although we have had some success I am asking if there is a S32 size target to be had here (as I am sure you are). Target wise we have hit all of our main targets with moderate results (see map below). As a result, one scenario for us to consider is to finish up the JV and split the remaining expenditure.²² [emphasis added]

57. This email indicates that the termination of the Option Agreement with South32 may well have been the result of a lack of satisfactory results. Otherwise, there would be no explanation for Mr. Barry's suggestion to terminate the partnership and split the costs.²³ Mr. Mirek Wozga of South32 expressed no interest in terminating the Agreement at that time. They were willing to “see how the situation progresses.”²⁴

58. Two days after suggesting the termination of the Option Agreement to South32, Mr. Tim Barry sent a communication to his lawyer, Mr. Jorge Sánchez, suggesting as part of the narrative to be presented to the Mexican authorities, to highlight that “one of the world's largest mining companies has a joint venture on the project and is very seriously considering leaving the project.”²⁵ However, South32 had not made any suggestion of termination at this point. The termination was a suggestion by Mr. Tim Barry, and it is clear that he wanted to use South32 and its potential exit to pressure the authorities to lift the Demonstration using public force. A few days

²² Email from Tim Barry to Mirek Wozga of South 32 regarding the Demonstration (update and breakdown of expenses), September 19, 2019. **R-0081**.

²³ By 2019, Silver Bull had already sent samples to the laboratory and only the samples were pending. Everything indicates that there were samples to confirm viability despite the blockade. See, Email from Tim Barry to Mirek Wozga of South32, September 27, 2019. **R-0082**.

²⁴ Email from Tim Barry to Mirek Wozga of South 32 regarding the Manifestation (update and breakdown of expenses), September 19, 2019. **R-0081**.

²⁵ Email from Tim Barry to Jorge Sánchez regarding the 2019 Demonstration, September 17, 2019. **C-0241**.

later, on October 11, 2019, Mr. Tim Barry notified South32 of the force majeure status to support this narrative.

59. The reality is that South32 had entered into the Option Agreement with full knowledge of the risks of the dispute between the Claimant and Mineros Norteños and recognized that such dispute could have a “material effect on the economic feasibility of potential future development of the Property.”²⁶

60. *Third*, despite the force majeure notification submitted in October 2019, communications between South32 and the Claimant from September 2019 to July 2021 show that Mr. Tim Barry merely informed Messrs. Mirek and Andrew of South32 about the status of Commercial Lawsuit 2/2015.²⁷ These communications show that:

- Until March 2021, Silver Bull was not interested in mediating the conflict with Mineros Norteños and the Sierra Mojada community. The Claimant indicated that it was awaiting the ruling that would definitively resolve Commercial Lawsuit 2/2015 in order to “prepare a strategy aimed at dealing with MN in a formal and definitive manner.”²⁸
- On March 11, 2021, the Claimant obtained the ruling in Amparo 375/2020, which confirmed the statute of limitations on Mineros Norteños' rights to claim payment of royalties. The Claimant had the mistaken belief that a favorable ruling in the commercial lawsuit would be sufficient to eliminate the conflict it had with the community over the non-payment of royalties.²⁹
- In April 2021, Mr. Tim Barry contacted South32 to inform it of the ruling in Amparo 374/2020 and confirm that the strategy for resolving the conflict with the community and Mineros Norteños would be to file civil claims and criminal complaints against the leading

²⁶ Option Agreement, Section 2.2 (7) - Royalties, p. 203. **C-0031**.

²⁷ Email from Tim Barry to Mirek Wozga of South 32, March 18, 2021. **C-0265**. Email from Tim Barry to Mirek Wozga of South 32, March 31, 2021. **C-0266**.

²⁸ Email from Tim Barry to Mirek Wozga of South 32, March 31, 2021. **C-0266**.

²⁹ See email sent by Mr. Tim Barry on March 31, 2021. **C-0266**.

members of Mineros Norteños.³⁰ Once again, the Claimant was not reporting on specific mechanisms to address the conflict generated by the company's non-compliance.

- In June 2021, Mr. Barry informed South32 that they had hired a lawyer specializing in agrarian law and had met with Mineros Norteños. In that communication, Mr. Barry acknowledged that the use of public force against Mineros Norteños “*may carry a social problem in the region*” and that his lawyer recommended that they “*analyze the possibility of making a minimal economic proposal to* .”³¹ Mr. Mirek, from South32, approved the dialogue with Mineros Norteños.
- In July 2021, despite acknowledging the social issues present in the Sierra Mojada community, Mr. Barry informed South32 that he would proceed with criminal charges against members of Mineros Norteños as a strategy to gain negotiating leverage.³² Up to this point, Mr. Tim Barry had not considered the possibility of engaging in good faith dialogue with the community and Mineros Norteños to address their concerns and reach an agreement that would allow the demonstration to be lifted.

61. *Fourth*, despite having received various proposals from Mineros Norteños between 2016 and 2022, there is no record of Silver Bull reporting them to South32. The communications show that the Claimant waited until October 2021 to inform South32 that it would meet with Mineros Norteños because they had expressed an interest in negotiating, and that it would hire a third party to handle the discussions with Mineros Norteños.³³

62. A month later, in December 2021, Silver Bull informed South32 that it intended to purchase Mineros Norteños' royalties, but Mineros Norteños “replied to our offer with a counter of 50% of their royalty upfront and 50% in 4 months.”³⁴ This is the only proposal from Mineros Norteños that was communicated to South32. At that time, the picture was much broader:

³⁰ See, Email from Tim Barry to Mirek Wozga of South 32, April 30, 2021. **C-0269**. Email from Tim Barry to Mirek Wozga of South 32, July 21, 2021. **C-0275**.

³¹ Email from Tim Barry to Mirek Wozga of South 32, June 27, 2021. **C-0272**. Email from Tim Barry to Mirek Wozga of South 32, June 27, 2021. **C-0273**.

³² Email from Tim Barry to Mirek Wozga of South 32, July 21, 2021. **C-0275**.

³³ Email from Tim Barry to Mirek Wozga of South 32, October 15, 2021. **C-0294**.

³⁴ Email from Tim Barry to Mirek Wozga of South 32, December 11, 2021. **C-0304**.

- Mineros Norteños had submitted more than eight formal proposals to Minera Metalín.³⁵ The Claimant had ignored all of these proposals and had systematically refused to meet personally with community members.
- \$With the support of the Municipality of Sierra Mojada, the Claimant had met on at least two occasions with Mineros Norteños to offer a payment of US\$200,000 in cash and the possibility of granting them shares in Minera Metalín in exchange for lifting the Demonstration.³⁶ As Mr. Elías Portillo explains in his testimony, Mineros Norteños rejected the Claimat offer because “[they] feared that if they accepted the cash payment without a formal written agreement, the company would consider the debt settled” and “the offer of shares did not meet their needs because the community did not trust that the company's shares had any real value.”³⁷
- Mineros Norteños had clearly stated that they sought “a written agreement formalized before official authorities” in order to disperse the Demonstration.³⁸ The Claimant had refused a written agreement, which prevented negotiations from moving forward and increased mistrust in the community.

63. The communications submitted by the Claimant only show that Mr. Tim Barry sent brief and incomplete reports on the situation in Sierra Mojada in October and December 2021.³⁹ None of these reports outlined a plan of action to resolve the conflict with the community in the long term. There is no record of South32 responding to these reports.

64. *Fifth*, the communications between the Claimant and South32 related to the termination of the Option Agreement do not refer to the Northern Miners' Demonstration.⁴⁰ The evidence presented by the Claimant only shows that the parties negotiated the terms of South32's exit starting in July 2022. There is not a single statement by South32 or its representatives that supports,

³⁵ Table of proposals submitted by Mineros Norteños and Minera Metalín 2016–2022. **R-0083**.

³⁶ Witness statement by Mr. Elías Portillo, ¶¶ 28-36.

³⁷ Witness Statement of Mr. Elías Portillo, ¶¶ 29 and 35.

³⁸ Witness Statement of Mr. Elías Portillo, ¶ 31. *See also*, Second Witness Statement of Mr. Lorenzo Fraire, ¶ 62

³⁹ See C-0294, C-0304, and C-0318.

⁴⁰ See C-0318, C-0321, C-0322, and C-0126.

much less confirms, that the termination was a consequence of the Demonstration or the Mexican government's failure to act. The Claimant acknowledges that the Termination Agreement does not mention the reasons behind the termination, so it does not help to clarify this point either.⁴¹

65. South32 was aware of the risks associated with the conflict with Mineros Norteños from the moment it signed the Option Agreement, including the possibility that royalty payments would make the project economically unviable.⁴² Despite this, South32 decided to remain in the project. When South32 finally decided to withdraw, it was faced with a project with “modest” results despite a very long period of exploration, unfavorable laboratory test results, and active litigation, such as Metalín's dispute with the Valdez family, which created great uncertainty about the future of the Sierra Mojada Project.

66. Communications with South32 also demonstrate that the Claimant falsely attributes the failure of the Project to South32's departure. If the Claimant's premise were true, it would be incomprehensible that Mr. Barry would have proposed terminating the Agreement a few days after the start of the 2019 Demonstration. The Claimant also decided to use South32's potential departure as a bargaining chip in its discussions with the Mexican authorities. The Claimant had the mistaken view that the Amparo 375/2020 ruling would be sufficient to compel the Mexican authorities to order the use of public force to disperse the peaceful demonstration by Mineros Norteños, and therefore decided to ignore Mineros Norteños' concerns and abandon the project while awaiting the ruling. The Claimant recognized that this strategy was causing social conflict in the community of Sierra Mojada and yet decided to pursue it nonetheless.

2. By 2019, the Claimant had not demonstrated that the Project was economically viable.

67. There is evidence that Silver Bull had not been very successful in exploring the concessions, and there is no evidence that South32's contributions under the Option Agreement have changed this situation.

- In its 2001 SEC Form 10-K, Metalline Mining states that “the Company has been in the exploration stage since November 8, 1993, and has no revenues from operations. The Company is primarily engaged in the acquisition and exploration of mineral properties.

⁴¹ Reply, ¶ 295.

⁴² Option Agreement, Section 2.2 (7) - Royalties, p. 203. C-0031.

Should the Company locate a commercial minable reserve, the Company would expect to actively prepare the site for extraction.”⁴³ In its 2022 Form 10-K—i.e., 21 years later—the company maintains that statement.⁴⁴

- In 2010, Silver Bull issued a press release confirming that the Sierra Mojada project was not economically viable. Silver Bull made these statements in 2010, long before they had problems with Mineros Norteños:

The non-sulfide zinc deposit lies at an average depth of 150-200 meters below the surface. The initial evaluation of the deposit by Metalline indicated the deposit needed to be mined from underground to avoid a high stripping ratio. ... An underground mining operation of this magnitude would generate insufficient revenue at foreseeable zinc prices to pay back in a reasonable period of time the substantial (+\$500 million) capital requirement ...

As part of the open pit alternative analysis in 2008, it was discovered that a silver-bearing zone lay above the non-sulfide zinc zone and unless it could be properly quantified and evaluated it would have to be treated as “waste” in any future economic evaluations of the non-sulfide zinc zone. A successful drilling and evaluation campaign focused on this silver zone could significantly improve the economics of mining and processing the non-sulfide zinc zone, ... but because of the economic collapse in 2008, zinc prices dropping to \$0.57/lb., and the resulting drop in Metalline's share price, Metalline was unable to devote any significant capital to this effort until market conditions improved.⁴⁵ [emphasis added]

- Twelve years later, the situation did not seem to be improving. The 2022 SEC Form 10-K states that: “No commercially mineable ore body has been delineated on the Sierra Mojada Project, nor have the Company's properties been shown to contain proven or probable mineral reserves,” and “[we] cannot guarantee that any mineral deposits identified on the Sierra Mojada Project will qualify as an ore body that can be legally and economically exploited.”⁴⁶

⁴³ Metalline Mining Company 2001 SEC Form 10-K, **C-0074**, p. 29.

⁴⁴ Silver Bull SEC 10-K 2022, **R-0084**.

⁴⁵ Silver Bull press release, November 19, 2010. **R-0085**.

⁴⁶ Silver Bull SEC 10-K 2022, p. 14. **R-0084**. *See also*, Silver Bull SEC 10-K 2021, **R-0086**; Silver Bull SEC 10-K 2020, **R-0087**; Silver Bull SEC 10-K 2019, **R-0088**; Silver Bull SEC 10-K 2018, **R-0089**; Silver Bull SEC 10-K 2017, **R-0090**; Silver Bull SEC 10-K 2016, **R-0091**; Silver Bull SEC 10-K 2015, **R-0092**; Silver Bull SEC 10-K 2014, **R-0093**; Silver Bull SEC 10-Q, Apr 2022, **R-0094**; Silver Bull SEC 10-Q, Jan 2022, **R-0095**; Silver Bull SEC 10-Q, Jul 2021, **R-0096**; Silver Bull SEC 10-Q, Apr 2021, **R-0097**; Silver Bull SEC 10-Q Jan 2021, **R-0098**; Silver Bull SEC 10-Q Jul 2020, **R-0099**; Silver Bull SEC 10-Q Apr 2020, **R-0100**; Silver Bull SEC 10-Q Jan 2020, **R-0101**; Silver Bull SEC 10-Q Jul 2019, **R-0102**;

- The Respondent amended complaint of October 9, 2019, in Investigation File 902/2019 confirmed: “by Silver Bull press release dated July 19, 2019, the latest drill assays were published disclosing very disappointing results. The fact is that despite considerable exploration efforts over the past 20 years, a feasible ore body capable of being put into commercial production remains to be discovered on the Project.”⁴⁷

68. Further evidence that the Sierra Mojada Project was not worth much is the opinion of other potential investors. In 2021, Mr. Barry asked the owner and director of a successful royalty company how much he would pay for the royalty that had been offered to Mineros Norteños. Mr. Barry reported the response he received as follows: “Basing it on the fact it is a production royalty capped at US\$6.875 million on a low-grade silver deposit with difficult metallurgy still at the exploration stage of development, he wouldn't pay more than US\$500,000 for the royalty. Even then he felt he would be overpaying.”⁴⁸

3. In any case, early termination is a common outcome in option agreements in the mining sector.

69. Early termination and non-exercise of a purchase option are common in the mining sector. Prior to the termination of the South32 Agreement, Silver Bull already had experience with this type of termination:

- In October 1999, Minera Metalín signed a Joint Venture Letter Agreement with Minera North S. de R.L. de C.V., a subsidiary of the Australian mining company North Limited. Less than a year later, in August 2000, this agreement was terminated.⁴⁹
- In November 2001, Metalline Mining and Minera Metalín signed an Option Agreement with Minas Peñoles S.A. de C.V. and Compañía Minera la Parrena to allow Peñoles to acquire a stake in the Sierra Mojada project through exploration and a feasibility study

Silver Bull SEC 10-Q Apr 2019, **R-0103**; Silver Bull SEC 10-Q Jan 2019, **R-0104**; Silver Bull SEC 10-Q Jul 2018, **R-0105**; Silver Bull SEC 10-Q Apr 2018, **R-0106**; Silver Bull SEC 10-Q Mar 2018, **R-0107**.

⁴⁷ Investigation File 902/2019, p. 76. **C-0498**.

⁴⁸ Email from Tim Barry to Federico Velásquez, November 23, 2021. **C-0301**. The same was reported to Mineros Norteños. See Letter from Silver Bull to Mineros Norteños, May 11, 2022 (20220511 - Letter from SVB to Mineros Norteños _FINAL). **R-0089**.

⁴⁹ Metalline Mining Company 2001 SEC Form 10-K, **C-0074**, p. 7.

during an acquisition period of no more than five years. In 2003, Peñoles terminated the Option Agreement.⁵⁰ Information from the General Directorate of Mines indicates that the Option Agreement was only in effect from 2002 to 2003.⁵¹

70. If there had been viable mining opportunities in the Sierra Mojada area, it is reasonable to assume that a “large mining company” such as Peñoles, with experience in projects in the Sierra Mojada area, would not have terminated the agreement.

71. South32 also had experience with similar terminations. A clear example is the cancellation of the agreement with Freegold Ventures in August 2022 in relation to the Shorty Creek project in Alaska. In 2019, South32 committed to injecting USD \$10 million into the exploration of the project, with the option to obtain a 70% interest in it. As with the Option Agreement with Silver Bull, South32 decided to terminate this agreement by invoking termination clauses without having to justify a specific cause.⁵²

4. The Option Agreement did not guarantee the Project in Sierra Mojada would go into production

72. There was no guarantee that South32 would have exercised its option in the absence of the alleged breach. The Claimant seeks to equate the Option Agreement with a *Joint Venture Agreement* between Silver Bull and South32 for the exploitation of the Sierra Mojada Project. The Option Agreement did not guarantee any type of partnership between the two companies, much less the commencement of production at the mine.

73. The central feature of option agreements is that they do not imply an obligation to acquire property nor do they generate legitimate expectations of consolidation of a property right, unless the option is exercised and the agreed conditions are met. At any time, the option holder may decide to exercise its purchase option if the project to be developed or the property to be acquired is viable, or not to exercise it and withdraw from the business. South32 had the right, but not the obligation, to acquire 70% of the shares of Metalín y Contratistas under the Option Agreement.

⁵⁰ Silver Bull press release dated November 19, 2010. **R-0085**.

⁵¹ General Directorate of Mines, Card: Fortuna, April 8, 2025, **C-0340**; General Directorate of Mines, Card: Unificación Mineros Nortes, April 8, 2025, **C-0342**.

⁵² Freegold Announces the withdrawal of South32 from the Shorty Creek Option Agreement, August 11, 2022. **R-0107**.

74. The effects of the option agreement should not be confused with those of other contracts, such as a promissory contract, which effectively creates an obligation for both parties to enter into a subsequent contract. The option does not create or ensure an obligation on the part of the parties to enter into a subsequent contract or to continue with the business.

75. In this case, the Option Agreement between South32 and the Claimant granted South32 “an option to subscribe for, be issued and become the holder of 70% of all the issued and outstanding shares of the Company and 70% of all the issued and outstanding shares of Contratistas.”⁵³ As a condition for maintaining the “option” right for up to four years, South32 was required to make annual payments to Silver Bull. These payments did not create any kind of interest or definitive right for South32 over the shares of Minera Metalín or Contractors and should not be understood as partial payments to obtain such ownership or interest.

76. The funds granted by South32 were intended for specific operations related to the exploration of the Project.⁵⁴ However, the Option Agreement did not guarantee that this stage would be completed, nor did it guarantee financing by South32 for the mine to enter into production. The Shareholders Agreement templates that would be signed if South32 decided to exercise the option confirm this.⁵⁵ The purpose of these Agreements was “the management and operation of the Company and, if warranted, further exploration, development, and exploitation of the Property by and through the Company.”⁵⁶

77. Simply put, the Option Agreement with South32 did not ensure that Silver Bull would be ready to complete the exploration phase for the Sierra Mojada Project, much less begin the production phase.

⁵³ Option Agreement, p.5. **C-0031.**

⁵⁴ See Option Agreement, p. 15. **C-0031.** The Option Agreement covered only "work done, or performed on or in respect of the Property to explore for Minerals prospecting, analyzing, property maintenance, sampling, assaying, preparation of reports, estimates and studies studies), surveying, rehabilitation, reclamation and environmental protection, and any management and administration necessary to conduct the foregoing work or activities."

⁵⁵ The model shareholder agreements were included as Annexes 3 and 7 to the Option Agreement and defined the terms and conditions that would govern South32's participation in the Sierra Mojada Project, specifically the conditions for the transfer of 70% of the shares of Minera Metalín and Contratistas to South32. These agreements never materialized.

⁵⁶ Option Agreement, pp. 82 and 154. **C-0031.**

B. The Claimant has not refuted that it agreed to pay royalties to Mineros Norteños

78. The Claimant alleges in its Reply that Mexico misrepresents Mineros Norteños' rights under the 1997 Contract and the 2000 Contract. It asserts that Minera Metalín's only obligation was to use its best efforts to bring the Sierra Mojada Project into production and that it was implausible that the mine would be brought into production within four years.⁵⁷

79. In an unfortunate attempt to distance itself from its responsibility in the conflict with Mineros Norteños, the Claimant alleges that the Respondent “attempts to condone the unlawful behavior of Mineros Norteños by contending that the Claimant's Mexican subsidiary, Minera Metalín, had breached contractual obligations owed to Mineros Norteños.”⁵⁸ It also points out that, in doing so, “Mexico shamefully mischaracterizes the rulings of its own courts, which found repeatedly that Mineros Norteños's claims were inadmissible.”⁵⁹ Finally, it takes the position that Minera Metalín fulfilled its contractual obligations under the 1997 Contract and the 2000 Contract.

80. The Claimant's arguments are erroneous, demonstrate a profound ignorance of Mexican law, and are contrary to the judgments issued in Commercial Case 2/2015 and the amparo proceedings and challenges related to those judicial proceedings.

81. The reality is that the Mexican courts that heard the case between Mineros Norteños and Minera Metalín consistently held that Metalín had a contractual obligation to develop the mine within four years.⁶⁰

82. Similarly, it has been demonstrated that the Mexican courts did interpret the 1997 Contract and the 2000 Contract and concluded that Minera Metalín had an obligation to begin mining operations on the mining lots and start paying royalties to MN no later than four years after the signing of the 1997 Contract. For this simple reason, it cannot validly argue that it fulfilled its contractual obligations.

⁵⁷ Reply, ¶¶ 42-43, 48.

⁵⁸ Reply, ¶ 4.

⁵⁹ Reply, ¶ 4.

⁶⁰ Counter-Memorial, Section II.F.2.

1. The 1997 Contract and the 2000 Contract must be interpreted together

83. Whether the 1997 and 2000 contracts can be interpreted individually or must be interpreted together is a matter of Mexican law that has already been resolved by the Mexican courts. In fact, the courts that heard Commercial Case 2/2015 and the amparo proceedings and challenges related to that proceeding repeatedly concluded that the 1997 Contract and the 2000 Contract should be interpreted together. In the judgment of Commercial Case 2/2015—which resolved Mineros Norteños' claims against Minera Metalín—the Eighth District Judge stated:

It is relevant to analyze jointly the exploration contract and unilateral promise of sale, executed on August 30, 1997, and the mining assignment contract, executed on August 30, 2000, as it is from there that the true intention of the contracting parties can be determined.⁶¹

84. This was not the only Mexican court to reach this conclusion:

- In ruling on the Objection to Term or Condition, the Eighth District Judge stated that the 1997 Contract and the 2000 Contract should be read together to understand the intention of the parties.⁶²
- In resolving Appeal 7/2015 filed by Minera Metalín against the Eighth District Judge's ruling on the Objection to Term or Condition, the Second Unitary Court determined that “since both contracts form the basis of the Claimant action regarding the payment of royalties [...] the terms of those contracts on that issue are subject to interpretation, since they must be considered in a related manner, not in isolation, in order to unravel the will of the parties [...]”.⁶³ The Second Unitary Court even

⁶¹ Judgment in Commercial Case 2/2015, ¶ 22. **R-0027**.

⁶² Ruling on the Incident of Failure to Comply with a Term or Condition, pp. 12-13. **R-0023** (In this context, if in clause seven, entitled "royalties," of the contract containing the transfer of ownership of the mining concession rights of August 30, 2000, the Sociedad Cooperativa de Explotación Minera "Mineros Norteños" S.C.K. [purchaser], it can be seen that when it undertook to pay royalties and the discovery bonus, it did so by referring to clause five of the exploration contract signed on August 30, 1997, then it is necessary to refer to the content of that clause to ascertain the intention of the parties in relation to the payment of royalties and bonuses.) [Emphasis added]

⁶³ Appeal on Appeal 7/2015, p. 19. **R-0024**.

concluded that the interpretation of the 1997 Contract and the 2000 Contract did not cause any harm to Minera Metalín.⁶⁴

- Although the ruling in Amparo 4/2016 was overturned on purely procedural grounds,⁶⁵ the First Unitary Court had also concluded that the 1997 Contract and the 2000 Contract should be read together.⁶⁶
- In the Second Appeal Ruling 12/2017, the Second Unitary Court confirmed that the 1997 Contract and the 2000 Contract should be interpreted in relation to each other “since the mere fact that one of the contracts on which the action is based refers to a clause in a previous contract obliges the judge to take it into account and establish what the contracting parties intended to agree.”⁶⁷

85. It is clear that the Mexican courts established that both agreements should be interpreted jointly.

2. The Mexican courts confirmed that Minera Metalín was obliged to commence mining operations no later than 2001.

86. The Claimant misinterprets the decisions of the domestic courts and states that “the royalty obligation was subject to a suspensive condition, namely, the occurrence of production” and that “Mexican courts did not assess Minero’s Norteños claims for royalties on the merits, nor did they assess whether Minera Metalín even had a legal obligation.”⁶⁸ As noted in the previous section, this is a matter of Mexican law on which Mexican courts have already ruled and, therefore, must be treated as facts by this Tribunal. International tribunals do not act as appellate bodies with respect to domestic court decisions.

⁶⁴ Award on Appeal 7/2015, p. 20. **R-0024.**

⁶⁵ Counter-Memorial, ¶¶ 125-127.

⁶⁶ Amparo proceedings 4/2016, p. 27. **R-0025.** (“The truth is that, as [the Second Unitary Court] correctly determined, said contract [...] should be analyzed in conjunction with the [contract] of August 1997; by virtue of the fact that the content of the contract in question (August 30, 2000), specifically in its seventh clause, refers to the fifth clause of the different contract of August 30, 1997, clauses that refer to the payment of royalties [...]).

⁶⁷ Second Award on Appeal 12/2017, p. 64. **C-0417.**

⁶⁸ Reply, ¶¶ 48, 53.

87. As a starting point, the Respondent notes that the Claimant repeatedly states that “not a single court held that royalties were owed” and that “nor did they assess whether Minera Metalín even had a legal obligation under the 1997 or 2000 Contract to pay royalties.”⁶⁹ The Claimant uses this artifice to try to convince the Tribunal that the Mexican courts ruled in its favor on the merits and that the payment of royalties would begin when it started mining the mine. This is incorrect.

88. As explained in the Counter-Memorial, the Mexican courts have consistently held that Minera Metalín had an obligation to commence mining operations within four years of the signing of the 1997 Contract. The Claimant now argues that this determination was made “for the sole purpose of assessing Minera Metalín’s statute of limitations defense.”⁷⁰ The Mexican courts explained that there was a legally binding obligation on Minera Metalín to pay royalties since 1997.

89. While it is true that the Mexican courts’ interpretation was made to resolve the “objection of compliance with a term or condition” (i.e., whether a deadline had been set for commencing mining operations), the statute of limitations objection, and the various related challenges, this fact does not alter the conclusion that the obligation existed. In fact, it would have been impossible for the Mexican courts to determine that Mineros’ claim was time-barred without first establishing the existence of the obligation and the date from which the obligation was enforceable against the company. The Claimant does not explain why the interpretation of the Mexican courts should be ignored because it was used to resolve the objections raised by Minera Metalín.

90. The Claimant denies that it had an obligation to pay royalties in this arbitration. Minera Metalín also did not deny such an obligation in Commercial Lawsuite 2/2015 or in the related amparo trials and appeals.

91. Finally, the Respondent is concerned about the various inaccuracies and incorrect statements regarding Commercial Lawsuite 2/2015 and the related amparo trials and appeals. Commercial Lawsuit 2/2015 and the related amparo lawsuits and challenges have already been explained in detail in the Counter-Memorial. However, the Respondent will identify and clarify the inaccuracies in the Reply for the benefit of the Tribunal.

⁶⁹ Reply, ¶¶ 49 and 53.

⁷⁰ Reply, ¶ 53.

a. Incident of failure to comply with a deadline or condition

92. The Claimant alleges that in the “Incident of failure to comply with a deadline or condition,” the Eighth District Judge “did not validate Mineros Norteños' theory of breach” and only rejected Metalín's objections “(i) that the claim was time-barred, and (ii) that the royalty clause was subject to a suspensive condition and therefore unenforceable.”⁷¹

93. It also accuses the Respondent of failing to point out that the ruling on the objection for failure to comply with a deadline or condition was “later corrected by the appellate court and ultimately reversed by the Eighth District Judge on October 4, 2017.”⁷²

94. The Claimant also alleges that there is no evidence in the record that the Eighth District Judge determined that Minera Metalín and Mineros Norteños had agreed to a four-year deadline to commence exploration and production work in the 1997 Contract.⁷³ This is false.

95. All of these assertions are incorrect.

96. The Eighth District Judge specifically concluded that the contract established a four-year period to commence exploration and production work:

“Therefore, it is undeniable that, contrary to what Minera Metalín Sociedad Anónima de Capital Variable maintains, a period was agreed upon with Sociedad Cooperativa de Exploración Minera “Mineros Norteños S.C.L.” for the commencement of exploitation and production work on the mining lots, namely, no later than four years [...], and after that [production], it would make royalty payments [...]”⁷⁴ [Emphasis added]

97. The purpose of the incident of failure to comply with the term or condition was to resolve Metalín's objection that no fixed deadline had been set for the start of mining operations.⁷⁵ This incident had nothing to do with the statute of limitations objection, as the Claimant incorrectly states.

98. Furthermore, the Respondent did not at any time fail to point out that the ruling on the incident of failure to comply with a deadline or condition was the subject of an appeal, Appeal

⁷¹ Reply, ¶ 53.

⁷² Reply, ¶ 53.

⁷³ Counter-Memorial, ¶ 115. Ruling on the incident of failure to comply with the deadline or condition, p. 15. **R-0023.**

⁷⁴ Ruling on the Incident of Failure to Comply with a Term or Condition, p. 15. **R-0023.**

⁷⁵ Ruling on the Incident of Failure to Comply with a Term or Condition, p. 7. **R-0023.**

7/2015. The Respondent invites the Court to consult Section II.F.2.a. of the Counter-Memorial, where it explains that Metalín filed Appeal 7/2015 before the Second Unitary Court, which confirmed Metalín's obligation to begin mining operations within four years and to begin paying royalties to Mineros Norteños.

99. Finally, the Claimant states that the ruling on the incident of failure to comply with the deadline or condition was “reversed by the Eighth District Judge on October 4, 2017.” This is not only incorrect, but legally absurd.

100. The Respondent explained that the Incident of failure to comply with the deadline or condition dismissed Metalín's objection arguing that no deadline had been set for commencing exploitation work. On the other hand, Commercial Court Ruling 2/2015 resolved the entire claim filed by Mineros Norteños and indicated that the statute of limitations operated in favor of Metalín, which is a completely different matter.

101. The Claimant does not explain how Commercial Court Ruling 2/2015 reversed the ruling on the motion for failure to comply with a deadline or condition—or, as the case may be, Appeal Ruling 7/2015—if these are different issues. By making these kinds of arguments, the Claimant simply confuses two different issues: the existence of a deadline for fulfilling an obligation and the statute of limitations on a claim.

b. Appeal 7/2015

102. In resolving Appeal 7/2015, the Second Unitary Court concluded that, in accordance with the 1997 Contract and the 2000 Contract, Metalín was obliged to commence production within a specified period, namely four years:

[I]n the second paragraph of clause five of the 1997 contract, it was stated that the explorer undertook to make its best efforts to bring the lots into production no later than four years after the conclusion of the “present” contract. It is also true that it was stated that the above was in the event that it had purchased the rights to the lots, that is, it is clear that its obligation to bring the mining lots into production was only valid if it purchased the rights, so it must be understood that this commitment arose from that moment on and, therefore, the time limit.⁷⁶ Emphasis added

Hence, without making an express ruling on the statute of limitations for the action [...], this court determines that the obligation to exploit and/or put into production the

⁷⁶ Appeal ruling 7/2015, p. 26. **R-0024.**

Vulcano and Unificación Mineros Norteños mining lots, in order to pay royalties, was agreed to be fulfilled within a specified period.⁷⁷ Emphasis added

103. The Claimant incorrectly states that “the Second Unitary Court explicitly recognized that Minera Metalín had made its royalty obligation subject to certain milestones—i.e., production and sale of minerals—and analyzed these milestones under the legal framework applicable to suspensive conditions.”⁷⁸ It even warns that the Second Unitary Court reached a “flawed conclusion” in determining that “Minera Metalín had not proven the existence of a suspensive condition.”⁷⁹ In fact, both statements are contradictory: it is not possible to argue that the same court determined that an obligation is conditional and later that it had not been proven that said obligation was subject to conditions.

104. The above is nothing more than the result of a misreading of Appeal Judgment 7/2015. At no time did the Second Unitary Court recognize that Minera Metalín had made its obligation to pay royalties subject to certain “milestones.” On the contrary, what the Second Unitary Court stated was:

Therefore, this court considers that in this particular case, as the respondent and therefore the debtor, who asserts the exception of failure to comply with the term or condition to which the action is subject, since it made the enforceability of the obligation to pay royalties () dependent on the fulfillment of the condition that the mineral deposit had been prepared and developed, the mineral product had been extracted and separated, and smelting settlements had been obtained or the product had been sold, then the burden of proof lies with it.⁸⁰

However, this ruling considers that the incidental claimant [Minera Metalín] [...] failed to prove that the obligation is subject to condition [...].⁸¹

[Emphasis added]

105. As can be seen, the Second Unitary Court concluded that it was Minera Metalín that had the burden of proving that the obligation to pay royalties depended on the fulfillment of certain conditions because it was Minera Metalín that presented that argument. The Court concluded that Metalín did not meet the burden of proof, that is, it failed to prove that the payment of royalties was subject to the fulfillment of certain conditions. In its account of the facts, the Claimant is

⁷⁷ Appeal Award 7/2015, p. 27. **R-0024.**

⁷⁸ Reply, ¶ 58.

⁷⁹ Reply, ¶¶ 58-59.

⁸⁰ Appeal Judgment 7/2015, p. 33. **R-0024.**

⁸¹ Appeal Judgment 7/2015, p. 33. **R-0024.**

improperly attributing to a Mexican court its own theory of the facts, which it failed to prove in the litigation.

c. Amparo 4/2016

106. The First Unitary Court also included express recognition of Metalín's obligation to begin exploration work within a period of four years:

[T]he truth is that when analyzing the content of said contract in conjunction with the August 1997 contract, it is clear that there is a specific deadline for this; since the four-year term agreed upon in clause five of the August 1997 contract constitutes the period that the parties wished to establish for the commencement of exploitation work on the mining concessions.⁸² [Emphasis added]

d. The Judgment of Commercial Case 2/2015

107. The Claimant alleges that Mexico did not identify any evidence to support the conclusion that Minera Metalín had an enforceable obligation to pay royalties to Mineros Norteños.⁸³ It also asserts that the Judge “never proceeded to assess the content of the obligations under the 1997 and 2000 Contracts.”⁸⁴ Both statements are incorrect.

108. The Eighth District Judge concluded that Mineros Norteños' action was time-barred and, therefore, its claims could not proceed.⁸⁵ To reach this conclusion, the Judge analyzed the content of the 1997 Contract and the 2000 Contract and determined: (i) that Metalín did have an obligation to begin exploitation of the mining lots within four years; and (ii) that this obligation was enforceable as of August 30, 2001.

109. In analyzing whether Metalín had an obligation to begin exploitation of the mining lots within four years, the Eighth District Judge determined:

I interpret that the parties agreed that in the event that the exploration company purchased the rights of the cooperative society, it undertook to put the mining lots into production no later than four years after the conclusion of the aforementioned contract.⁸⁶

⁸² Award on Amparo Appeal 4/2016, p. 29. **R-0025**.

⁸³ Reply, ¶ 64.

⁸⁴ Reply, ¶ 67.

⁸⁵ Counter-Memorial, Section F.2.d.

⁸⁶ Judgment in Commercial Trial 2/2015, p. 12, ¶ 30. **R-0027**.

110. After determining that Metalín had the obligation to begin exploitation work within four years, the Eighth District Judge proceeded to analyze the date on which that period began. To do so, he again interpreted the content of the 1997 Contract and the 2000 Contract and stated:

Thus, having analyzed the above, I consider that if the contract for the transfer of mining concession rights did not establish the period from which mining operations had to begin and, consequently, the payment of royalties, it was precisely because the exploration contract and unilateral promise of sale had already stated that if the “exploration” company purchased the rights from the cooperative, it undertook to put the mining lots into production no later than four years after the first contract was signed.

Therefore, the obligation to begin mining operations was effective as of August 30, 2001.⁸⁷

111. The Court can confirm that, contrary to the Claimant's claim, the Eighth District Judge did interpret the 1997 Contract and the 2000 Contract. Although the judge ruled in favor of Metalín, concluding that MN's claim was time-barred, he also determined that Metalín had the obligation to begin mining in 2001 and to start paying royalties to Mineros Norteños.

e. Appeal 12/2017 and Amparo 750/2019

112. In its Counter-Memorial, the Claimant explained that Mineros Norteños filed Award 12/2017 against the Judgment in Commercial Case 2/2015, whose central claim was the date from which the statute of limitations for the action brought against Metalín should be counted, and, therefore, the date of the statute of limitations for the claim.⁸⁸

113. On July 31, 2019, the Second Unitary Court issued its ruling on Appeal 12/2017 and ruled against Mineros Norteños for failing to explain why the interpretation of the Eighth District Judge in Commercial Court Award 2/2015 was incorrect.⁸⁹

114. Mineros Norteños filed Amparo 750/2019 against Appeal Ruling 12/2017, arguing that it had indeed offered reasons to challenge the decision of the Eighth District Judge. On January 24, 2020, the Third Collegiate Court issued the ruling on Amparo 750/2019 and ruled in favor of Mineros Norteños, ordering the Second Unitary Court to issue a new ruling on Appeal 12/2017.⁹⁰

⁸⁷ Judgment of Commercial Trial 2/2015, p. 14, ¶¶ 36-37. **R-0027.**

⁸⁸ Counter-Memorial, ¶¶ 135-140.

⁸⁹ Counter-Memorial, ¶¶ 139-140. *See also* Appeal Award 12/2017, p. 36. **R-0029.**

⁹⁰ Counter-Memorial, ¶¶ 141-142.

115. Thus, the Second Unitary Court issued the Second Ruling on Appeal 12/2017 on March 10, 2020. It is precisely this ruling on which the Claimant makes various incorrect allegations.

116. The Claimant alleges that the Second Judgment of Appeal 12/2017 did not analyze the content of Metalín's obligations on the merits and that it was a procedural decision that reaffirmed that Mineros Norteños' claim was time-barred.⁹¹ To this end, it transcribes an excerpt that it confuses with a determination by the Second Unitary Court in the Second Appeal Judgment 12/2017. This excerpt states that:

Nothing would be decided regarding the start and end dates of the period that the respondent had to comply with the obligation in question, as this was an issue that would be debated in the proceedings and resolved in a final judgment, while the statute of limitations exception is peremptory in nature.⁹²

Therefore, it can be concluded that even though the appealed decision was upheld, this unitary court only confirmed its meaning . . . and omitted to examine the exception of failure to comply with the time limit to which the action is subject, as it is linked to the statute of limitations.⁹³

117. The Court may confirm that, once again, the Claimant misinterprets the judgments issued by the Mexican judiciary. In fact, the excerpt used by the Claimant is a summary made by the Second Unitary Court of part of the Appeal Ruling 7/2015 issued on March 7, 2016. This is because one of Mineros Norteños' arguments was precisely related to Appeal Award 7/2015.⁹⁴

118. The Claimants misinterpretation is evident when analyzing what was said a few paragraphs earlier, where the Second Unitary Court clarifies that it refers to Appeal Ruling 7/2015:

[T]hat ruling was replaced by the one issued by this unitary court on March 7, 2016, when deciding civil case 7/2015, which was the result of the appeal filed against it by the respondent; and although the first instance ruling was upheld on appeal, this was based on arguments other than those put forward by the lower court when ruling on the inadmissibility of the exception of failure to comply with the time limit or condition to which the action is subject, not in relation to the statute of limitations.⁹⁵ Emphasis added

119. The above is also confirmed in the two paragraphs preceding the one cited by the Claimant, which state “[b]ecause on that occasion, as can be inferred from the appeal ruling in question [...]

⁹¹ Reply, ¶ 75

⁹² Second Appeal Award 12/2017, p. 36. **C-0417.**

⁹³ Second Appeal Award 12/2017, pp. 36-37. **C-0417.**

⁹⁴ Second Appeal Award 12/2017, pp. 30-32. **C-0417.**

⁹⁵ Second Appeal Award 12/2017, pp. 35-36. **C-0417.**

since this was the subject of the [...] exception [...] of limitation raised by the respondent, which had to be decided when the final judgment was handed down [...]” and “[i]n effect, the issues raised by the appellant were analyzed and [...] it was considered that it was not necessary to modify the incidental decision appealed [...]”.⁹⁶ These statements unequivocally demonstrate that the Second Unitary Court was describing the decision in Appeal Award 7/2015.

120. Furthermore, the paragraph that the Claimant incorrectly cites and interprets begins by stating that “at no time was a ruling made on the statute of limitations” since this had been requested by Metalín.⁹⁷ The Court notes that this sentence is written in the past tense, confirming that it is not an analysis or conclusion of the Second Unitary Court.

121. The Court can also corroborate that the Second Unitary Court summarized part of the Appeal Judgment 7/2015, as it expressly stated:

This court considers that it must analyze this topic of the judge's ruling, of course, without making a pronouncement on the statute of limitations, because that issue will be debated in the proceedings and resolved in a final judgment.⁹⁸

122. As if that were not enough, the interpretation that the Claimant seeks to give makes no sense, since the Mexican courts had already ruled on the statute of limitations objection raised by Metalín when the Second Appeal Judgment 12/2017 was issued. So much so that the Eighth District Judge determined in the Judgment of Commercial Trial 2/2015 that the statute of limitations was applicable in favor of Metalín.

123. Contrary to the Claimant’s allegations, in the Second Appeal Ruling 12/2017, the Second Unitary Court upheld the Ruling in Commercial Case 2/2015 and determined that Metalín was obligated to begin mining operations on August 30, 2001:

Thus, it is concluded that Minera Metalín, Sociedad Anónima de Capital Variable, did indeed commit to putting the mining lots into operation within a period of four years [...] ⁹⁹ Emphasis added

⁹⁶ Second Appeal Award 12/2017, p. 36. **C-0417.**

⁹⁷ Second Appeal Award 12/2017, p. 36. **C-0417.**

⁹⁸ Appeal Award 7/2015, p. 25. **R-0024.**

⁹⁹ Second Appeal Award 12/2017, p. 65. **C-0417.**

[The] respondent [Metalín] was obligated to carry out the activity of putting the mining lots into production, starting from the signing of the contract on August 30, 1997, and the four-year period expired on August 30, 2001 [...].¹⁰⁰ [Emphasis added]

124. Finally, the Claimant seeks to argue that the determination of August 30, 2001, as the date from which Metalín was to commence mining operations was nothing more than a “legal assumption” used to determine the statute of limitations on Mineros Norteños' claims.¹⁰¹ This is not only incorrect but illogical. The statute of limitations cannot be determined for an obligation that does not exist.

125. Mexican courts have explained that the statute of limitations is “the means of acquiring property or freeing oneself from obligations, through the passage of a certain period of time and under the conditions established by law.”¹⁰² Specifically, they have pointed out that negative prescription—such as that which operated in favor of Metalín—is “the way to be released from an obligation by the passage of a certain period of time from when it could be enforced, so that the right to demand its fulfillment is extinguished [...]”.¹⁰³ Therefore, the first step in concluding that prescription has operated is to determine the existence of an obligation.

126. In any case, Metalín acknowledged that it had an obligation to begin exploitation work on August 30, 2001, and to start paying royalties. This is evident because in Commercial Trial 2/2015, it argued:

Therefore, with regard to the statute of limitations exception, the respondent [Metalín] maintains that it has operated in consideration of the fact that the exploration contract and unilateral promise of sale, entered into on August 30, 1997, in its fifth clause, a royalty payment was agreed upon corresponding to 2% of the net amount of the smelter settlements or first-hand purchase and sale invoices to be paid for the sale of minerals and metals obtained from the lots called “Unificación Mineros Norteños” and “Vulcano,” until the amount of \$10,475,000 had been covered.oo U.S. dollars (ten million four hundred seventy-five thousand dollars of the United States of America).¹⁰⁴
Emphasis added

¹⁰⁰ Second Appeal Award 12/2017, p. 67. **C-0417**.

¹⁰¹ Reply, ¶ 76.

¹⁰² Thesis: I.3o.C.290 C (10a.), T.C.C., Judicial Weekly of the Federation and its Gazette, Tenth period, December 2017, Volume IV, Digital Reg. 2015893. **R-0108**.

¹⁰³ Thesis: I.11o.C.47 C (10a.), T.C.C., Judicial Weekly of the Federation and its Gazette, Tenth Era, March 2014, Digital Reg. 2006064. **R-0028**.

¹⁰⁴ Judgment of Commercial Trial 2/2015, p. 7, ¶ 15. **R-0027**.

This amount was to begin to be paid no later than four years after the conclusion of the aforementioned contract, that is, as of August 30, 2001.¹⁰⁵ Emphasis added

Therefore, it considers that the ten-year period for the statute of limitations to apply to the aforementioned breach of contract began on that date.¹⁰⁶

127. The Claimant cannot now argue that the determination of August 30, 2001, as the date for Metalín to begin exploitation of the mining lots was a mere “legal assumption” for the purpose of the statute of limitations.

f. Amparo 375/2020

128. The last of the proceedings that the Claimant misinterprets is Amparo 375/2020. The Respondent explained in its Counter-Memorial that Mineros Norteños filed Amparo 375/2020 against the Second Judgment of Appeal 12/2017.¹⁰⁷

129. The Claimant appears to suggest that the Mexican courts determined that Metalín's obligation to pay royalties was conditional upon commencing exploitation, without the commencement of exploitation being subject to a specific time limit.¹⁰⁸ On this point, it is clear that the Mexican courts interpreted the 1997 Contract and the 2000 Contract on multiple occasions and consistently determined that there was a deadline for Metalín to commence mining operations, i.e., four years from the date of execution of the 1997 Contract.

130. The Claimant argues that the Third Collegiate Court confirmed two points: (i) that the obligation to exploit the mines was conditional upon Metalín acquiring the mining lots; and (ii) that the clause establishing the four-year deadline for bringing the mines into production could not be interpreted in isolation, but rather in the “full context of the Agreement.”¹⁰⁹

131. With respect to the first point, the question of whether the exploitation of the mines was conditional upon the acquisition of the mining lots is not in dispute. It is clear that the condition existed and was fulfilled with the 2000 Contract. It appears that the Claimant is attempting to divert the Tribunal's attention with issues that are not relevant.

¹⁰⁵ Commercial Trial Award 2/2015, p. 7, ¶ 16. **R-0027.**

¹⁰⁶ Commercial Trial Award 2/2015, pp. 7-8, ¶ 17. **R-0027.**

¹⁰⁷ Counter-Memorial, ¶¶ 144-145.

¹⁰⁸ Reply, ¶¶ 79-82.

¹⁰⁹ Reply, ¶ 79.

132. As for the second point, the Respondent has already demonstrated that the Mexican courts determined that the 2000 Contract and the 1997 Contract should be interpreted together. There is no doubt about that.

133. However, while the Claimant acknowledges that both contracts should be interpreted together, it attempts to give a different interpretation from that given by the national courts with respect to the four-year period that Metalín had to begin exploration work.

134. The Claimant cites a portion of the Amparo 375/2020 ruling and asserts that it was a determination of the Third Collegiate Court. This is incorrect. The excerpt cited by the Claimant () is a summary made by the Third Collegiate Court of the arguments of Mineros Norteños, as clearly indicated in the paragraph preceding the one cited by the Claimant, which begins with the phrase: “[t]his is because in the lawsuit filed by the claimant cooperative [...], it was indicated [...]”.¹¹⁰

135. Subsequently, the Third Collegiate Court summarized Mineros Norteños' position regarding the date from which the four years for Metalín to begin mining operations should be counted. Mineros Norteños argued that:

[T]hat period could not begin as literally stated in the first part of the second paragraph of that clause, because it contained an obligation to purchase and because it was impossible to comply with it as long as the obligated party did not acquire the rights to the Vulcano and Unificación Mineros Norteños mining properties, given that the contract of August 30, 1997, was a contract in which the cooperative undertook to sell and only granted Minera Metalín, Sociedad Anónima de Capital Variable, the power to carry out exploratory work for a period of three years, in addition to which it was repeatedly stated that the obligation on the part of the explorer to put the lots into production would arise only if the aforementioned mining rights were purchased.¹¹¹

136. The Third Collegiate Court confirmed that this was a summary of Mineros Norteños' arguments in Amparo 375/2020, stating that “in accordance with the above, the applicant for the amparo [Mineros Norteños] pointed out that a complex sentence could have two or more statements that formed a semantic unit.”¹¹² There is no doubt that the Claimant is once again mistaken in its interpretation of the rulings issued by the Mexican courts.

¹¹⁰ Direct amparo ruling 375/2020, p. 80. **C-0040**.

¹¹¹ Direct Amparo ruling 375/2020, p. 81. **C-0040**.

¹¹² Direct Amparo ruling 375/2020, pp. 82-83. **C-0040**.

137. Second, the Respondent alleges that the Third Collegiate Court “expressly recognized that royalty payments would be triggered only if production occurred, reaffirming their conditional nature.”¹¹³ To support its claim, the Claimant again cites an excerpt from the Amparo 375/2020 ruling.

138. What the Claimant omits is that the excerpt on which it relies is only the beginning of the Third Collegiate Court's analysis, which deals with the content of the first paragraph of clause five of the 1997 Contract.

139. The Third Collegiate Court also analyzed the second paragraph of clause five of the 1997 Contract and concluded that the obligation to begin exploitation work was not indefinite, but had to begin no later than four years after the signing of said contract:

Then, as the judge accurately established in the contested ruling, it follows from the analysis of that clause that the parties did not want to leave the company's obligation to start paying royalties to the cooperative indefinite, as it was established that no later than four years after the signing of that contract (August 30, 1997), the explorer undertook to put the lots into production, provided that it had exercised its right of purchase, which was necessary in order for it to begin paying royalties, because, as was seen, these would be paid at a rate of 2% of the net amount of the smelting settlements or first-hand purchase and sale invoices paid to the exploration company for the sale of the minerals and metals obtained from the lots.¹¹⁴ Emphasis added

140. Contrary to the Respondent's assertion, the Third Collegiate Court did confirm that Metalín had the obligation to commence mining operations no later than four years after the signing of the 1997 Contract:

Therefore, the judge's decision to declare the claim unfounded is considered correct, because the respondent had the obligation to put the mining lots into production as of the signing of the contract on August 30, 1997, and therefore said term effectively ended on August 30, 2001.¹¹⁵ Emphasis added

141. It is concerning that the Claimant selectively and decontextualized quotes certain paragraphs from the Mexican courts' rulings and systematically makes serious errors of interpretation such as those described in the preceding paragraphs.

¹¹³ Reply, ¶ 81.

¹¹⁴ Direct Amparo ruling 375/2020, pp. 95-96. **C-0040.**

¹¹⁵ Direct amparo ruling 375/2020, pp. 97-98. **C-0040.**

142. As the Tribunal will note, it is a fact that various courts and tribunals at all levels of the Mexican justice system confirmed that Metalín had an obligation to begin mining operations on August 30, 2001, and thereby begin paying royalties to Mineros Norteños.

3. The statute of limitations decreed by the national courts did not extinguish Minera Metalín's obligation to pay Mineros Norteños.

143. As previously noted and in the Memorandum of Reply, negative prescription is a procedural matter that releases a party to an agreement from fulfilling an obligation due to the passage of time.¹¹⁶ Mexican courts have stated that the effect of the statute of limitations is that “the right to demand compliance is extinguished.”¹¹⁷ Similarly, they have stated that the statute of limitations “does not in itself eliminate the right to payment or compliance with the obligation, but rather extinguishes the creditor's right to take action in court and demand compliance by the debtor.”¹¹⁸ The Claimant does not dispute this situation.

144. The Respondent has demonstrated that, although it was determined that Mineros Norteños' action was time-barred, the Mexican judicial system confirmed that Metalín did have an obligation to begin mining operations as of August 30, 2001. The exploitation of the mines would in turn allow for the payment of the agreed royalties.

145. Accordingly, even though Mineros Norteños can no longer demand compliance with the 1997 Contract and the 2000 Contract, Metalín's obligation to commence work—and pay royalties to Mineros Norteños—continues to exist. It is Metalín that has been in breach of the contracts since August 2001, that is, for 24 years.

¹¹⁶ Reply, ¶ 132.

¹¹⁷ Thesis: I.11o.C.47 C (10a.), T.C.C., Judicial Weekly of the Federation and its Gazette, Tenth Era, March 2014, Digital Reg. 2006064. **R-0028**.

¹¹⁸ Thesis: I.11o.C.47 C (10a.), T.C.C., Judicial Weekly of the Federation and its Gazette, Tenth Era, March 2014, Digital Reg. 2006064. **R-0028**.

C. The Claimant generated a social conflict with the community of Sierra Mojada

146. In its Reply, the Claimant argues that “blockaders were not representative of the broader community but rather members of a private local mining cooperative.”¹¹⁹ Three issues must be clarified.

147. *First*, Sierra Mojada is a town located within the municipality of the same name in the state of Coahuila. The total population of this town is 462 inhabitants, according to data from the National Institute of Statistics and Geography.¹²⁰ This town has been the most affected by the Claimant's lack of concrete progress on its project, as well as by the contractual problems it has with Mineros Norteños.

148. The Claimant is unaware that the Mineros Norteños Cooperative has a strong relationship with the community because it represents a majority of the families that make up the municipality. The Municipal President of Sierra Mojada, Mr. Elías Portillo, clearly explains this relationship:

The Mineros Norteños cooperative is made up of a considerable number of families from Sierra Mojada, which is why the conflict between the company and Mineros Norteños has significantly affected the community. This also explains why their demonstration against the company has always had the support of the Sierra Mojada community.¹²¹

149. The link between the community of Sierra Mojada and Mineros Norteños is also demonstrated by actions, such as the support they received from the community in relation to the demonstration. As Mr. Fraire explains in his second statement:

So many years have passed since the agreement was signed that more than 70 members have died. But their families are still waiting for Minera Metalín to fulfill its promise. That is why the community supports us. They know that what we are asking for is not only for those of us who are still alive, but also for the families of those who are no longer with us.¹²²

150. *Second*, the contractual relationship between Mineros Norteños and the Claimant affected the economy of the entire community of Sierra Mojada. This contractual relationship raised expectations in the community, which had waited more than 20 years to obtain a source of income

¹¹⁹ Reply, ¶ 4.

¹²⁰ Population of Sierra Mojada, 2020 Census, INEGI. **R-0109**.

¹²¹ Witness Statement by Mr. Elías Portillo, ¶ 12.

¹²² Second Witness Statement of Mr. Lorenzo Fraire, ¶ 13.

and employment as a result of the mining project. The project never started, and few members of the community were employed.¹²³

151. The Claimant attempts to reinforce its assertion that Silver Bull benefited the local community economically by presenting a table with alleged employee information from 1998 to 2019.¹²⁴ Notwithstanding the fact that this information is not based on official data that would allow its veracity to be verified, the table shows that from 2013 to 2015 no one was hired, and from 2016 to 2019 only 11 people were hired, of whom only 8 were from the local community.

152. Mr. Lorenzo Fraire explains that the Claimant maintained a hiring scheme that required the signing of monthly contracts and avoided providing social security benefits.

Several of us members of Mineros Norteños had worked with Metalín long before. I myself worked for them for approximately three years. At that time, we signed contracts every month, but the company kept the contracts. Although we worked for them, they never gave us social security or benefits. Most of us received our payments in yellow envelopes with cash, without insurance or benefits.¹²⁵

153. Instead of demonstrating the economic benefits that Silver Bull provided to the community, the documents provided by the Claimant show the small number of people the company employed. It is clear that the entire community of Sierra Mojada had incentives to protest against the company and ensure payment to Mineros Norteños, as this would have represented a huge economic benefit for the entire community.

154. When the Claimant stated that there was no obligation to pay Mineros Norteños, they deprived the entire community of the income derived from this payment. This generated mistrust in the community, who recognized that the rights to the mining concessions had been ceded with the expectation of obtaining greater profits than the Cooperative would have obtained through artisanal exploitation of the properties.

155. The community of Sierra Mojada had lost confidence in the Claimant and perceived that its intention had been to obtain the concessions and then sell them to a third party that would not recognize the payment commitment to Mineros Norteños or to the community, which would leave

¹²³ Witness Statement of Mr. Elías Portillo, ¶ 8.

¹²⁴ Information from Minera Metalín employees. **C-0415**.

¹²⁵ Second Witness Statement by Mr. Lorenzo Fraire, ¶ 6.

them without the royalties they had been promised.¹²⁶ Mr. Elías Portillo explains that the Claimant's lack of commitment and clarity caused unrest in the community of Sierra Mojada, which supported the Demonstration in 2016 and 2019:

This situation not only affected the members of the Cooperative, but also generated an atmosphere of growing mistrust and discontent in the community of Sierra Mojada, which had expected the mining project to bring collective benefits, employment opportunities, and economic development. The company's failure to comply with the commitments made to Mineros Norteños was interpreted by the population as a breach of trust towards the community, which deepened social unrest and led to tensions that intensified over the years.

Failure to take concrete action to bring the project into production and resolve the conflict with Mineros Norteños resulted in a deterioration of the company's relationship with the Sierra Mojada community. The community perceived that Minera Metalin's interest was not to launch a project in Sierra Mojada and that it was only seeking to sell the project to another company without fulfilling its commitments to Mineros Norteños and the community.¹²⁷

156. Although the Claimant now seeks to separate the Cooperative from the community of Sierra Mojada, the reality is that the Claimant's representatives recognized that the conflict with Mineros Norteños involved the entire community of Sierra Mojada, which “may carry a social problem in the region.”¹²⁸ The lack of diligence in its relationship with the community ultimately led to the social conflict that the Claimant itself had anticipated.

157. *Third*, the Claimant seeks to discredit Mineros Norteños' relationship with the community on the grounds that “any surplus that a cooperative generates from its transactions does not go to the community but to members of the cooperative.”¹²⁹ This not only ignores the relationship between the cooperative and the community discussed *above*, but also the social nature of cooperative societies.

158. A cooperative society is a form of social organization characterized by being composed of working-class individuals who contribute their personal labor to the society with the aim of achieving social and economic improvement.¹³⁰ Through the cooperative, workers, laborers, or farmers join together in a single enterprise dedicated to providing services or manufacturing one

¹²⁶ El Financiero, Miners allege \$6 million fraud by Metalín, January 29, 2015. **R-0110**.

¹²⁷ Witness Statement of Mr. Elías Portillo, ¶ 10-11.

¹²⁸ Email from Mr. Tim Barry to South32, June 27, 2021. **C-0272**.

¹²⁹ Reply, ¶ 34.

¹³⁰ PRODECON, Cooperativism in Mexico, October 2022. **R-0111**.

or more products, combining their efforts to become the driving force behind their economic development. In this sense, members do not contribute economic capital to the society. Instead, they contribute their personal, physical, or intellectual labor.

159. In Mexico, cooperative societies are regulated by the General Law on Cooperative Societies, which separates and distinguishes them from traditional commercial companies. Article 2 of this Law recognizes that the purpose of this type of society is to satisfy individual and collective needs.

Article 2.- A cooperative society is a form of social organization made up of individuals based on common interests and the principles of solidarity, self-help, and mutual aid, with the purpose of satisfying individual and collective needs through economic activities involving the production, distribution, and consumption of goods and services.¹³¹

160. In this case, the members of the Mineros Norteños Cooperative joined together in a partnership with the aim of contributing their personal labor to the development of a mining project for the benefit of the community to which they belong. It is simply incorrect for the Claimant to equate them with a traditional commercial enterprise engaged in the development of mining projects simply because they decided to form a legal entity.

1. The development of the Claimant's project depended on the continued approval of the Sierra Mojada Community.

161. Mr. Del Razo explains in his Second Report:

One of the major limitations to the development of projects related to the use of natural resources is what are known as social conflicts, consisting of public confrontation between actors seeking to influence the organization of social life. In this sense, social conflicts can arise from opposition to natural resource exploitation projects and their lack of acceptance, for whatever reason, by the affected communities.

In line with the above, the role of SLOs, understood as the social and ongoing approval of stakeholders in natural resource exploitation projects, is highlighted; that is, it refers to **the approval, in the terms referred to, of the communities involved in projects that exploit the natural resources located in their territories.**

162. The Claimant seeks to minimize its responsibility in the conflict with the community by classifying it as extortion by Mineros Norteños. However, the evidence shows that Mineros Norteños was only demanding payment of the compensation that had been promised as part of the payment for the sale of its concessions to Metalín in 2000.

¹³¹ General Law on Cooperative Societies, Article 2. **R-0112.**

163. In 2016, after more than 15 years, the community and Mineros Norteños had still not received the promised profits from the transfer of their concessions. The evidence shows that the 2016 Demonstration sought to have the Claimant clarify to the community when it would fulfill its obligations and provide clarity on the status of the project. The 2016 Demonstration was lifted because the Claimant committed to finding a solution and negotiating with Mineros Norteños. This never happened.

164. In 2019, after three years (2016-2019) of waiting, Mineros Norteños resumed their demonstration. The Claimant continued with its evasive strategy. The Claimant was aware of the community's concerns, including the lack of confidence in the company's permanence and the possibility that the project would be sold to a third party without recognizing the economic commitment to Mineros Norteños. There is no evidence that the Claimant has addressed these community concerns.

165. In fact, on October 9, 2019, Mr. Fabián Landeros, Comptroller of Minera Metalín, filed a written extension of the complaint within Investigation File 902/2019. His brief contained an information sheet acknowledging that, although the Project depended on the acceptance of the local community and the issue with Mineros Norteños had affected the community's sense of camaraderie toward the Project, they had decided to wait until Mineros Norteños lost the Commercial Lawsuit to try to regain the community's acceptance.

During the 9 years that current management has conducted exploration activities on the Project, we have enjoyed very good community relations. The only friction point is around the MN lawsuit, which has been instigated by an outside Mexican lawyer giving MN and the wider community bad legal advice.

We have worked very hard to develop a spirit of partnership with the Project in the local community. The search for an ore body capable of becoming a mine is truly a joint effort requiring all involved to contribute something.

Unfortunately, for reasons of its own, MN decided years ago to take an adversarial approach through the courts.

When they lose the final court decision, we hope to again try to instill a sense of partnership in the community, without which we fear a mine will never be developed on the Project.¹³²

166. Although the Claimant seeks to minimize the importance of its lack of diligence in its relationship with the community, the reality is that it generated a social conflict that made it

¹³² Investigation File 902/2019, pp. 76-77. **C-0498.**

impossible for the Claimant to obtain a “social license” that would allow it to continue its activities in Sierra Mojada. Mr. Del Razo confirms that social conflicts can be a relevant factor in the loss of the Social License on a project:

The existence of instruments and obligations that consider social conflicts, and with them the granting of SLOs, in the development of mining projects is an indicator of the recognition of the importance of the acceptance of projects by the communities involved, even conditioning, in a normative manner (without prejudice to the fact that, as mentioned, they are a de facto condition) the maintenance of concessions.¹³³

167. What is concerning is that there is no evidence that Silver Bull has even analyzed the possible impacts of the Project on the community of Sierra Mojada.

2. The Claimants were not very diligent in their relationship with the Sierra Mojada community.

168. In the Reply, the Claimant states that “SVB has brought in the major international backing necessary to turn Sierra Mojada into Mexico's next great silver story.”¹³⁴ The facts and evidence show the opposite. They also show that Silver Bull was not diligent with the community of Sierra Mojada, leading to the conclusion that the Claimant's assertions are unsubstantiated. Four factual aspects are relevant.

169. *First*, it is concerning that the Claimant has not submitted any documents in the arbitration demonstrating that Minera Metalín or Silver Bull conducted any type of social impact analysis at the start of the Sierra Mojada Project or at the time Silver Bull acquired Minera Metalín in 2010 to obtain the so-called “social license.”¹³⁵ During the document production phase, the Respondent requested documents “discussing, analyzing, or commenting on any analysis, valuation, report, or due diligence relating to the Sierra Mojada Project, including, but not limited to, the viability of the Project, contractual obligations, and any social impact of the Project, prior to the merger of Metalline, Metalline Mining Delaware,” but the Claimant produced absolutely nothing.¹³⁶

170. As Mr. Del Razo explains, various conflicts may arise against projects related to the exploitation of natural resources and the lack of acceptance by the communities surrounding

¹³³ Second Report of Mr. Carlos del Razo, ¶ 114.

¹³⁴ Reply, ¶ 4, point 5.

¹³⁵ Second Report of Mr. Carlos del Razo, ¶ 109.

¹³⁶ Procedural Order No. 3, Annex B, p. 73.

them.¹³⁷ The members of Mineros Norteños are part of a vulnerable group given the situation and economic adversities they face. In the words of Mr. Carlos del Razo:

Although the ML expressly establishes the obligation to carry out prior consultation processes in indigenous or Afro-Mexican territories, the underlying principles (such as meaningful participation, identification of social impacts, and community trust building) are equally applicable and recommended in non-indigenous contexts, as in the case at hand.¹³⁸

171. Based on the Claimant's statements, it would have been reasonable for Silver Bull to conduct an impartial and independent analysis of the impact of its exploratory activities—and the possible sale of the Project once exploitation became viable—on the community of Sierra Mojada, in accordance with international industry best practices.¹³⁹

172. Similarly, Silver Bull would have been expected to engage the community and provide comprehensive information to the inhabitants of Sierra Mojada, giving them the opportunity to express their opinions and propose ideas.¹⁴⁰ The Complainant notes that “Mr. Barry regularly provided updates to Mineros Norteños through presentations, typically twice a year.”¹⁴¹ This statement and the documents provided are concerning. The fact that the company in charge of the project that would be the “next great silver story” for Mexico limited itself to giving two annual talks to the community of Sierra Mojada, in a foreign language and using a couple of presentation slides with technical information¹⁴², cannot in any way be considered an exercise in community participation and information, but rather a negligent practice full of opacity.

173. Silver Bull's lack of information raised various concerns for Mineros Norteños about the possibility of Minera Metalín being declared insolvent; uncertainty about the duration of the exploration phase; the Option Agreement entered into with South32 and the possible sale of the Project, among other issues.¹⁴³ All of this could have been prevented or mitigated with a social

¹³⁷ Second Report of Mr. Carlos del Razo, ¶ 116.

¹³⁸ Second Report of Mr. Carlos del Razo, ¶ 109.

¹³⁹ Second Report of Mr. Carlos del Razo, ¶ 118-121.

¹⁴⁰ Second Report of Mr. Carlos del Razo, ¶ 115.

¹⁴¹ Reply, ¶ 91.

¹⁴² See Silver Bull Presentation to Mineros Norteños, June 2023, **C-0177**.

¹⁴³ Second Witness Statement of Mr. Lorenzo Fraire, ¶ 5.

impact analysis (technical, professional, and impartial) based on industry best practices to preserve the trust of the Sierra Mojada community.

174. *Second*, the evidence presented in the arbitration demonstrates tactics employed by Silver Bull executives that generated further misinformation and discord among the members of Mineros Norteños.

175. It is questionable that Silver Bull executives—specifically Mr. Tim Barry and Mr. Juan Manuel López—considered making monthly payments to certain members of Mineros Norteños “in return for dropping all legal proceedings and agreeing to support the company in all possible ways—starting with the surface rights.”¹⁴⁴ The fact that such monthly payments were around MXN\$500 (approximately US\$25) only reinforces the vulnerability of the Sierra Mojada community and the economic hardships they face. The evidence also shows that, rather than being a formal employer in the Sierra Mojada community, Silver Bull, through Minera Metalín, informally and temporarily hired Sierra Mojada residents and members of Mineros Norteños to dissuade them from pursuing the demands that the Cooperative had been making of Minera Metalín for years and to dissuade them from exercising their rights to demonstrate.¹⁴⁵

176. Equally questionable is Silver Bull's leaking of information to the local press in an attempt to change public perception of the Sierra Mojada Project and pressure Mineros Norteños members to negotiate on the terms that Silver Bull sought to impose.¹⁴⁶

177. The role of Mr. Juan Manuel López in relation to the Sierra Mojada Project is also questionable. On the one hand, Mr. López claims to be the Country Manager of the Sierra Mojada Project.¹⁴⁷ On the other hand, there is recurring evidence that he attempted to undermine the support that Mineros Norteños was receiving (either through the payment of money or temporary

¹⁴⁴ Emails between Tim Barry and Juan Manuel López dated May 20 and 21, 2016, **C-0200**.

¹⁴⁵ Second Witness Statement of Mr. Lorenzo Fraire, ¶ 5. Witness Statement of Mr. Elías Portillo, ¶ 8.

¹⁴⁶ Email sent on November 11, 2019, by Mr. Barry, **C-248**. Email sent on November 9, 2019, by Mr. Barry, **R-0113**.

¹⁴⁷ Witness Statement of Mr. Juan Manuel López, ¶ 1.3.

and informal jobs) and spread information among the inhabitants of Sierra Mojada on the instructions of Mr. Barry.¹⁴⁸

178. It is difficult to understand how the Country Manager of a project that would be “Mexico's next great silver story” would employ such tactics in the community where he apparently lives. Even more difficult to understand is Mr. Juan Manuel López's questionable practice of recording conversations with individuals from Sierra Mojada without their consent and while consuming alcoholic beverages at the beer establishment he owns, with the aim of obtaining some kind of evidence to be used in this arbitration.¹⁴⁹ This tactic renders the recordings made by the Claimant and obtained by Mr. Juan Manuel López inadmissible.

179. *Third*, the change in attitude of Silver Bull and its representatives towards Sierra Mojada and Mineros Norteños is questionable. Initially, the Project did indeed represent a potential source of employment that would improve the community's situation. Mr. Lorenzo Fraire explains that “over time, that changed. They began to view us negatively, with a certain contempt. They no longer treated us equally, and on several occasions they called us 'dissatisfied miners'. It got to the point where they didn't even want to receive us anymore. We felt that they saw us as a nuisance, when in reality we were their business partners and the ones who had worked the mines all our lives.”¹⁵⁰ The dialogue between Silver Bull and Minera Metalín with Mineros Norteños became fractured, which was exacerbated by the treatment received by the cooperative members from Minera Metalín representatives.

180. Any company with the technical and financial capacity and experience that sought to launch the next “great silver story in Mexico” would have done things completely differently from Silver Bull, and at the very least, would not have employed the tactics described *above*, which only demonstrate a clear lack of understanding of the social impact of the project on the inhabitants of Sierra Mojada.

¹⁴⁸ Email dated May 15, 2020, sent by Mr. Tim Barry (Hi JM ... If it is very small then we can leverage this by striking a deal and an end to this blockade with the others. They can then deal with the small group of rebels internally. ... Please pass this message into the community and MN - they are playing with fire by shutting down the project), C-0255.

¹⁴⁹ Second Witness Statement of Mr. Lorenzo Fraire, ¶¶ 41-48.

¹⁵⁰ Second Witness Statement of Mr. Lorenzo Fraire, ¶ 4.

3. Negotiations between Mineros Norteños and Minera Metalín

181. In an attempt to convince the Tribunal of its alleged willingness to resolve the dispute with Mineros Norteños, the Claimant devotes approximately seven pages of its Reply to trying to convince the Tribunal that it was willing to negotiate in order to shift the responsibility for any failure to Mineros Norteños. The reality is very different.

182. The Claimant describes Mineros Norteños' proposals as attempts at extortion and irrational. However, the mediator it hired recommended that the company enter into a financial agreement with Mineros Norteños to resolve the dispute.

183. It even uses the argument of an alleged kidnapping of Metalín workers again. The Respondent is emphatic that such allegations cannot be made lightly; it has been proven that the 2019 demonstration was peaceful and that the Metalín workers remained at the site of their own free will.¹⁵¹

184. The evidence shows that, instead of trying to resolve the conflict with Mineros Norteños, the Claimant employed delaying tactics. It systematically refused to meet personally with Mineros Norteños and sent unreasonable proposals. On the contrary, it was Mineros Norteños who made most of the proposals, which clearly shows that the intention to resolve any dispute did not come from the Claimant.

185. The root of the conflict was the precarious situation of the members of Mineros Norteños and the fact that SVB's offers did not really address the community's concerns about the possible sale of the project. Most of SVB's offers were based on increasing the amount of royalties—which were years overdue and depended on work that Metalín had not even begun despite being obligated to do so—or company shares, which generated mistrust and did not offer an immediate solution to the population's needs.

186. Silver Bull had many opportunities over the years to negotiate with Mineros Norteños and resolve the situation. Even in 2015, shortly after Mineros Norteños filed its lawsuit against Metalín, Mr. López Ramírez knew that the claims were going to be a significant problem for the company. In an email sent to Mr. Tim Barry, Mr. López Ramírez states that:

¹⁵¹ See Section E *below*.

During the Governor's last visit to town, Mineros Norteños spoke to him about the lawsuit, and for this reason, the person we contacted advised us to write a letter to the Governor explaining our arguments on this case. We need to express in this letter the legal status of the project (lawsuits), the importance of the project for the county of Sierra Mojada, and any information that may be important or useful.¹⁵²

187. Subsequently, the 2016 Demonstration was called off by Mineros Norteños because Mr. López Ramírez reported that Tim Barry would come to negotiate. Mr. López Ramírez provided a letter from Mr. Tim Barry in which he presented an “offer to attend this meeting and try to negotiate an agreement.”¹⁵³ The meeting took place almost a month later, on March 8, 2016. However, despite Silver Bull's offer to attend the meeting, Mr. Tim Barry stated that “[Mineros Norteños] had requested the meeting, so we were coming to hear what they had to say; we would not be coming to the meeting offering proposals as they requested.”¹⁵⁴

188. In a clear demonstration of their commitment to resolving the situation, on the same day as the meeting with Mr. Tim Barry, the members of Mineros Norteños agreed in less than half an hour on an offer to present to Metalín.¹⁵⁵ The following day (March 9, 2016), Mineros Norteños confirmed their proposal in writing.¹⁵⁶ This offer was presented to the Silver Bull Board on March 16, 2016. In contrast, it took the company another 24 days (until April 9, 2016) to respond to Mineros Norteños.¹⁵⁷ On April 9, 2016, Metalín rejected Silver Bull's proposal and presented a counterproposal to increase royalties to US\$8 million.¹⁵⁸

189. Mr. Lorenzo Fraire explains the response they received from Metalín and points out that the counterproposal did not guarantee Metalín's compliance with its obligations:

A month later, Metalín rejected our proposal, telling us that they were confident they would win the lawsuit we had filed against them. They did make us a counterproposal, but they did not want to pay us anything and only wanted to increase the amount of royalties. But that, again, would have left us in uncertainty because we would again have to wait and see when Metalín would start mining.¹⁵⁹

¹⁵² Emails between Juan Manuel López Ramírez and Tim Barry, January 20, 2015, **C-0359**.

¹⁵³ Letter from Tim Barry to Mineros Norteños, February 4, 2016, p. 2. **JMLR-011**.

¹⁵⁴ First Witness Statement of Mr. López Ramírez, ¶ 7.5.

¹⁵⁵ First Witness Statement of Mr. López Ramírez, ¶ 7.14.

¹⁵⁶ Exchange of proposals between Mineros Norteños and Metalín in 2016, p. 6. **C-0198**.

¹⁵⁷ Exchange of proposals between Mineros Norteños and Metalín in 2016, p. 6. **C-0198**.

¹⁵⁸ Exchange of proposals between Mineros Norteños and Metalín in 2016, p. 4. **C-0198**.

¹⁵⁹ Second Witness Statement of Mr. Lorenzo Fraire, ¶ 57.

190. Mr. López Ramírez stated that “[b]etween March 2016 and September 2019, I participated in at least five more meetings like this with Mineros Norteños where we discussed a possible settlement.”¹⁶⁰

191. The evidence shows that between March 2016 and September 2019, there were no other meetings like that. What did happen during that period were the following approaches by Mineros Norteños, demonstrating their intention to resolve the conflict and to be paid a portion of the amount owed, which Metalín has failed to pay for years:

- On May 30, 2017, members of Mineros Norteños approached Mr. Juan Manuel López Ramírez in search of an agreement with Metalín. They asked if Metalín was willing to accept offers it had made in the past, showed interest in working, and expressed their urgency to reach an agreement.¹⁶¹ Metalín did not respond.
- On June 8, 2017, Mineros Norteños submitted a proposal requesting a payment of US\$2 million upon sale of the project and US\$30,000 for attorneys' fees, including a payment of US\$8 million in three installments instead of royalties. This proposal reiterated their interest in working, in this case on land outside the Project.¹⁶² Metalín did not respond.
- On June 15, 2017, Mineros Norteños submitted a new proposal. This time, they calculated 13% interest due for Metalín's years of non-compliance with the amount owed, to be covered within two years. This proposal included an amount for legal fees and preference in hiring personnel.¹⁶³ Once again, Metalín did not respond.
- On September 24, 2018, more than a year later, Mineros Norteños presented a new proposal. They requested US\$1.5 million for the sale or partnership of the project, US\$8 million in annual payments. This proposal included a request that any contract or agreement be made before a notary public.¹⁶⁴ Metalín did not respond.

¹⁶⁰ First Witness Statement by Mr. López Ramírez, ¶ 7.17.

¹⁶¹ Email from Mr. Juan Manuel López Ramírez to Mr. Tim Barry, May 30, 2016. **C-0360**.

¹⁶² Proposal from Mineros Norteños dated June 8, 2017. **C-0204**.

¹⁶³ Proposal from Mineros Norteños dated June 15, 2017. **C-0205**.

¹⁶⁴ Proposal by Mineros Norteños dated June 15, 2017. **C-0210**.

- On March 12, 2019, members of Mineros Norteños again approached Mr. Juan Manuel López Ramírez and requested to speak with Mr. Tim Barry. They again expressed their intention to reach an agreement to resolve their dispute and indicated that they would send a proposal.¹⁶⁵ As a result of this approach, on March 15, they sent Metalín a proposal requesting US\$1 million, a specific amount for attorneys' fees, annual payments until the debt was paid in full, and that any agreement be made before a notary public. Mineros Norteños offered to withdraw from legal proceedings.¹⁶⁶ Minera Metalín still did not respond.

192. As can be seen, Mineros Norteños was the party seeking to engage with Metalín in order to resolve the dispute. In contrast, Mr. Juan Manuel López Ramírez merely received Metalín's proposals, questioned them, and forwarded them to his superiors. Metalín did not respond to any of Mineros Norteños' proposals.¹⁶⁷

193. Mr. Lorenzo Fraire confirms that it was Mineros Norteños who made the proposals to Metalín seeking to resolve the dispute:

Between that time and 2019, before the 2019 demonstration began, we made several proposals to Metalín. The truth is that we were desperate and wanted to resolve the problem we had. I repeat, at that date, 19 years had passed since the 2000 Contract was signed, 19 years without seeing a single peso and without Metalín starting to exploit the mines. We are not businesspeople, far from it, but we do not believe it is normal for a business to wait 19 years and not generate a single peso.¹⁶⁸

194. A few months before the 2019 demonstration, Mineros Norteños attempted to enter into negotiations with the company again. Mr. Juan Manuel López Ramírez described the situation to Mr. Tim Barry as follows:

They said that they want to have an agreement to finish the lawsuit, they said that they know that we will start working soon and we have “money” and they want to see if the

¹⁶⁵ Email from Mr. Juan Manuel López Ramírez to Mr. Tim Barry, March 12, 2019. **C-0211**.

¹⁶⁶ Proposal from Mineros Norteños dated March 15, 2019. **C-0213**.

¹⁶⁷ Email from Mr. Juan Manuel López Ramírez to Mr. Tim Barry, May 30, 2016. **C-0360**. Email from Mr. Juan Manuel López Ramírez to Mr. Tim Barry, June 9, 2017. **C-0203**. Email from Mr. Juan Manuel López Ramírez to Mr. Tim Barry, June 15, 2017. **C-0206**. Email from Mr. Juan Manuel López Ramírez to Mr. Tim Barry, September 24, 2018. **C-0209**. Email from Mr. Juan Manuel López Ramírez to Mr. Tim Barry, March 16, 2019. **C-0212**.

¹⁶⁸ Second Witness Statement of Mr. Lorenzo Fraire, ¶ 58.

company can give them something. I tried to explain to them that this money is only for the drill program and in no way can it be diverted to other expenses...

They said that they will send us a proposal to settle the lawsuit. Obviously, I told them that we can hear them out. It's the same story as in the past. They will come with unreasonable proposals. I think the best option is to say that you are not available right now, but when you come back, you can hear their proposals.

They never threatened to block us again, like in the last drilling program. I will try to hire key people from MN to try to stop ideas of 'blocking'.¹⁶⁹

195. These proposals, which the Claimant describes as unreasonable, represented a small portion of the royalties that Metalín owed Mineros Norteños after more than 18 years of non-compliance. Instead of negotiating in good faith with Mineros Norteños, the company's strategy was to “[say] that [they] are not available right now” and wait for the authorities to resolve the problem. Clearly, this did not work.

196. The Claimant noted that after the 2019 Demonstration, “[d]espite the blockaders’ intransigence, the Claimant persisted in its efforts to negotiate a good-faith resolution to the Continuing Blockade.”¹⁷⁰ However, the Claimant’s definition of “good-faith resolution” appears to be one that did not require them to spend large sums of money or suffer inconvenience.

197. On October 4, 2019, less than a month after starting the 2019 Demonstration and tired of not getting answers from Metalín and Silver Bull, Mineros Norteños sent a letter requesting that Metalín's board of directors present a short-term proposal for the payment of the amounts owed.¹⁷¹ Instead of presenting a proposal, Metalín set conditions for Mineros Norteños.

198. On November 20, 2019, Mineros Norteños requested a meeting with Mr. Tim Barry in order to “find a solution to the outstanding debts arising from the purchase and sale of the mine agreed upon with you.”¹⁷² Mineros Norteños also stated that its objective was for each of the parties to reach a conciliatory agreement.¹⁷³ Mr. Tim Barry and Metalín again did not respond.

¹⁶⁹ Email from Mr. Juan Manuel López Ramírez to Mr. Tim Barry, March 12, 2019, **C-0211**.

¹⁷⁰ Reply, ¶ 276.

¹⁷¹ Communication from Mineros Norteños dated October 4, 2019. **C-0244**.

¹⁷² Email from Mr. Juan Manuel López Ramírez to Mr. Tim Barry, November 20, 2019, p. 2. **C-0250**.

¹⁷³ Email from Mr. Juan Manuel López Ramírez to Mr. Tim Barry, November 20, 2019, p. 2. **C-0250**.

199. After almost a year, the members of Mineros Norteños were tired of the 2019 Demonstration and were willing to end it in exchange for a reasonable agreement. On August 11, 2020, they proposed the following:

Mineros Norteños and its board of directors, chaired by Timoty Barry, make a new proposal to Minera Metalín.

They make the following proposal:

1. As a first point, Mineros Norteños proposes the following to Minera Metalín: an advance payment of \$2 million on the debt.

2. Second, it requests 50,000 dilates as payment for the lawyers.

[...]

4. Fourth, Mineros Norteños commits to assisting in the exploration or in the “Sierra Mojada” project.¹⁷⁴

200. Mr. Lorenzo Fraire points out that Mineros Norteños was willing to resolve the dispute with Metalín and even asked them to let them work to move forward with the project:

We sought out Mr. Juan Manuel López Ramírez in person in 2020 and made another proposal to Metalín. We asked them to pay us. We wanted to resolve the situation so badly that we asked them to let us work with them.¹⁷⁵

201. This means that, in 2020, the company could have ended the entire dispute for just US\$2.05 million. This is a very reasonable offer that would have spared the company further problems, especially considering that by this point Metalín had been in breach of its obligations for 19 years and had not paid royalties to Mineros Norteños. In August 2020, South32 was still participating in the Project with no threat of abandoning it and, according to the Claimant, there had been no damage to its investment.

202. This is one of the ways in which the Claimant contributed to its loss, as it had a reasonable opportunity to resolve the issue in 2020 but failed to do so. There appears to be no evidence that Silver Bull considered this offer. It is possible that the company completely ignored this offer and hoped that the problem would resolve itself, as people were desperate.

203. After 2021, the following proposals were made:

¹⁷⁴ Proposal from Mineros Norteños dated August 11, 2020. **C-0119**.

¹⁷⁵ Second Witness Statement of Mr. Lorenzo Fraire, ¶ 59.

- On November 27, 2021, Metalín proposed giving Mineros Norteños US\$1.5 million in Silver Bull shares to be delivered over four years.¹⁷⁶
- On November 30, 2021, Mineros Norteños reported that it had put Metalín's proposal to a vote and unanimously agreed not to accept it. Mineros Norteños reported that it was not interested in any type of shares in the company and requested payment of the debt, 50% as an advance payment and 50% in four months.¹⁷⁷ It is not unreasonable that Mineros Norteños did not wish to extend their relationship with a company that had not paid them for 20 years and was also demanding that they wait another four years for some kind of financial solution.
- On March 5, 2022, they proposed payment of US\$3 million in shares and US\$6.875 million in royalties.¹⁷⁸ Clearly, Metalín did not take into consideration that Mineros Norteños had told them they were not interested in company shares.
- On May 3, 2022, Mineros Norteños were willing to reduce the amount owed as long as they were paid something. Mineros Norteños asked for US\$4 million for a royalty that was agreed at US\$6.875 million. This reduction of almost US\$3 million shows that Mineros Norteños were desperate. Mr. Juan Manuel López Ramírez acknowledges this situation.¹⁷⁹
- On May 17, 2022, Mineros Norteños informed Silver Bull that they wanted to be paid the amount owed to them since they were elderly and could not wait another 20 years. However, they were open to receiving a proposal.¹⁸⁰
- On June 20, 2022, Mineros Norteños sent a new communication to Silver Bull, stating that it was without prejudice to the letter of May 17, 2022. In this communication, they asked how much Silver Bull would be willing to pay if they sold 30% of the royalties.¹⁸¹ Once again, this proposal shows desperation to resolve any issues and obtain income to live on.

¹⁷⁶ Second Witness Statement of Mr. Juan Manuel López Ramírez, ¶ 119. Emails between Messrs. Darren Klinck, Juan Manuel López Rodríguez, Tim Barry, and Federico Velasquez, p. 1. **C-0301.**

¹⁷⁷ Counterproposal from Mineros Norteños dated November 30, 2021. **C-0302.**

¹⁷⁸ Second Witness Statement of Mr. Juan Manuel López Ramírez, ¶ 125.

¹⁷⁹ Second Witness Statement of Mr. Juan Manuel López Ramírez, ¶ 126.

¹⁸⁰ Letter from Mineros Norteños to Silver Bull dated May 17, 2022. **C-0317.**

¹⁸¹ Letter from Mineros Norteños to Silver Bull dated June 20, 2022. **C-0320.**

Silver Bull's only response—more than a month later—was that they were analyzing the proposal.¹⁸²

204. In addition, at least four meetings were held in which Mineros Norteños tried to find a solution. In 2021, two meetings were held in the city of Torreón. Subsequently, there was a meeting in Mexico City in 2022. The last meeting was held in La Esmeralda, in the municipality of Sierra Mojada, in 2023.¹⁸³ After this, Metalín informed Mineros Norteños that they had initiated arbitration and were no longer willing to negotiate.¹⁸⁴

205. Mr. Lorenzo Fraire points out that it was Mineros Norteños who sought to negotiate and, in contrast, the proposals made by Metalín were not serious or realistic:

We were the ones who always sought out Metalín to try to find a solution, but they stopped responding to us for a long time. From the beginning, we asked that any agreement we reached be signed before a notary. We wanted any agreement to be in writing. But they never wanted that. Metalín didn't want anything in writing; they always wanted it to be a verbal agreement.

All their proposals were conditional on them selling the project. We saw that Metalín's intention was never to exploit it themselves, but to sell it and disappear. That's why they were never going to pay us. What if they sold it and then left? Where would we find them?¹⁸⁵

206. The evidence shows that the Claimant never really intended to negotiate with Mineros Norteños and that it intended to use other tactics: *i.e.*, letting time pass:

Hi Tim, honestly I don't think they will accept. Months ago they were thinking of more than 20 million because lawyers told them they were winning the case. Last week, when the leader called, he started saying that they only want the “debt” (6.8 million) to leave the camp. Now these people are like children who want a toy in a store (crying, screaming).

We can try, but as Rodrigo said, maybe it will be useful to wait for the final resolution from the judge.¹⁸⁶ Emphasis added

¹⁸² Letter from Silver Bull to Mineros Norteños dated June 26, 2022. **C-0323**.

¹⁸³ Second Witness Statement of Mr. Lorenzo Fraire, ¶ 60. Witness Statement of Mr. Elías Portillo, ¶ 42.

¹⁸⁴ Second Witness Statement of Mr. Lorenzo Fraire, ¶ 62.

¹⁸⁵ Second Witness Statement of Mr. Lorenzo Fraire, ¶¶ 62-63.

¹⁸⁶ Silver Bull emails dated April 27, 2020. **R-0114**.

207. The Tribunal will be able to verify from the evidence presented in this arbitration that Mineros Norteños was always seeking to resolve the dispute with Minera Metalín, to such an extent that on one occasion they proposed to forgive them almost US\$3 million.

208. On the contrary, the Claimant always maintained its erroneous position of not recognizing the debt it owed to Mineros Norteños and presented solutions that were unfeasible considering the circumstances.¹⁸⁷ The reason Mineros Norteños was not interested in obtaining shares in the company or increasing the amount of royalties was because it lost confidence in Silver Bull after more than 20 years of non-compliance with its obligations.

4. Deputy Francisco Javier Borrego Adame did not incite or encourage the 2019 Demonstration.

209. In its Reply, the Claimant alleges the following:

Mexico also chooses to ignore one of the most troubling aspects of this case, namely, that its own Federal Deputy, Francisco Javier Borrego Adame, incited, encouraged, and supported the Continuing Blockade. As evidence obtained by SVB shows, Deputy Borrego was intimately involved with orchestrating the Continuing Blockade and, predictably, he did so for two reasons: to advance the anti-foreign mining agenda which his and AMLO's MORENA party advocated, and seemingly to line his own pockets. Mexico's response to these serious allegations is a single bald denial in its Counter-Memorial. It has neither presented Deputy Borrego as a witness nor produced -4- a single document from his office, despite being ordered by the Tribunal to do so. In a sense, this silence is Mexico's answer to the central question asked above.¹⁸⁸

210. The Claimant's assertions are erroneous, as there is no evidence or elements to support the alleged "anti-mining and anti-foreign investment agenda" and that this has affected the Sierra Mojada Project. In fact, the Claimant has not presented any evidence confirming that the Mexican authorities were opposed to the development of its Project. As Mr. Elías Portillo explains, the Mexican authorities' interest has always been to maintain the Claimant's investment in order to reactivate mining activity in the Municipality of Sierra Mojada:

¹⁸⁷ Communication from Silver Bull dated September 16, 2022. **C-0327**. ("Mineros Norteños must recognize the difference between a 'Debt' and a 'Royalty'; we cannot continue to have meetings and continue to discuss this at the negotiating table.") Emails from Mr. Tim Barry dated April 17, 2020. **R-0115**. ("This is NOT a debt. They have not lent us money, and we have not agreed to pay them the amount by a certain date. We have agreed to pay them the money when we have a mine in production." and "If they want more of this we are wasting our time.... and there is no value in talking with them").

¹⁸⁸ Reply, ¶ 4, point 7.

The municipality's interest has always been to provide all the support necessary to reach an agreement that would allow mining activity in the municipality to resume and eliminate the social conflict that has been generated by the disagreement between the community and Minera Metalin, as well as to guarantee and monitor that the demonstration remained peaceful.¹⁸⁹

211. The Claimant has also failed to present evidence suggesting that Deputy Borrego orchestrated or had any involvement in the 2019 Demonstration. The truth is that the Claimant has created a theory of political manipulation as a legal strategy to advance its claim in this arbitration. However, the evidence presented by the Claimant itself in Investigation File 902/2016 confirms that the Claimant's position, until prior to this arbitration, was that Mineros Norteños had initiated its claims against Minera Metalin “for reasons of its own” and that the Demonstration had been “instigated by an outside Mexican lawyer giving MN and the wider community bad legal advice.”

During the nine years that current management has conducted exploration activities on the Project, we have enjoyed very good community relations. The only point of friction is around the MN lawsuit, which has been instigated by an outside Mexican lawyer giving MN and the wider community bad legal advice.

Unfortunately, for reasons of its own, MN decided years ago to take an adversarial approach through the courts.¹⁹⁰ [Emphasis added]

212. The email sent by Mr. Juan Manuel López to Tim Barry on June 19, 2020 confirms that Deputy Borrego only went to the Mineros Norteños camp to provide them with food and clarified that “legally there's nothing to do.”¹⁹¹ On June 29, 2020, Mr. Juan Manuel confirmed that during this meeting “the lawyer and Borrego said at this moment it is better to stop the blocking.”¹⁹²

213. Deputy Borrego was elected by District 2 of the State of Coahuila, which includes the Municipality of Sierra Mojada and 11 other municipalities in the State of Coahuila. His first term as a federal deputy began in 2018 and ended in 2021, while his second term as a deputy began in 2021 and will end in 2024. Deputy Borrego was reelected for a third term that will end in 2027. A review of his career shows that his work as a representative has focused on legislation related to the transportation sector, as this was the sector in which he worked in the private sector since

¹⁸⁹ Witness Statement of Mr. Elías Portillo, ¶ 21.

¹⁹⁰ Investigation File 902/2019, pp. 76-77. **C-00498.**

¹⁹¹ Email dated June 19, 2020. **C-0115.**

¹⁹² Email dated June 29, 2020. **C-0145.**

1970.¹⁹³ There is no agreement or official position on the part of Deputy Borrego in relation to the 2019 Demonstration.

214. The photos presented by the Claimant as evidence of Deputy Borrego's alleged relationship with the 2019 Demonstration are taken out of context. Mr. Lorenzo Fraire, whom the Claimant identifies as the main point of contact with the Representative, testifies that Deputy Borrego never influenced the decisions of Mineros Norteños and that they only asked him to support them with supplies and money so that the members of Mineros Norteños could go to the competent authorities to present their case.¹⁹⁴

The lawyers in Mexico told me that Silver Bull claims that Deputy Borrego interfered with our legal strategy. That is not true. As I pointed out before, Deputy Borrego only listened to us and supported us so that we could present our problem and find a solution. Mineros Norteños' legal strategy was always independent and based solely on the cooperative's agreements.¹⁹⁵ [Emphasis added]

215. Mr. Lorenzo Fraire also clarified that Mineros Norteños has no contact with Deputy Borrego and that he has only attended, as a citizen, an event organized in 2024 related to that year's elections.¹⁹⁶ The photographs do not show any relationship between the 2019 Mineros Norteños demonstration and Deputy Borrego.

216. It is common practice for Mexican deputies to provide food and in-kind support to the communities they represent in order to meet the specific needs of their population. This practice should not be confused with political support for the benefit of a specific movement. Some examples of this practice are as follows:

- Congressman Ricardo Gallardo Cardona, who during the health contingency joined forces with the City Council of Soledad de Graciano Sánchez and the Municipal DIF to deliver more than 40,000 food parcels to vulnerable people—senior citizens, single mothers, and

¹⁹³ Legislative Information System, Deputy Francisco Javier Borrego Adame. **R-0116.**

¹⁹⁴ Second Witness Statement of Mr. Fraire, ¶¶ 38-39.

¹⁹⁵ Second Witness Statement of Mr. Fraire, ¶ 39.

¹⁹⁶ Second Witness Statement of Mr. Fraire, ¶ 40.

people with disabilities—bringing them support to their homes as a personal act in the face of a collective crisis.¹⁹⁷

- In Veracruz, the Deputy of Misantla allocated his salary to the purchase of food parcels for those most in need as a gesture of solidarity.¹⁹⁸
- In Tamaulipas, Representative Víctor Manuel García Fuentes delivered basic food basket items to residents of Valle Real.¹⁹⁹

217. Deputy Borrego continues this practice frequently and provides social support such as food baskets, toys, and mattresses to other communities in Coahuila. His support for Mineros Norteños is not an isolated case.

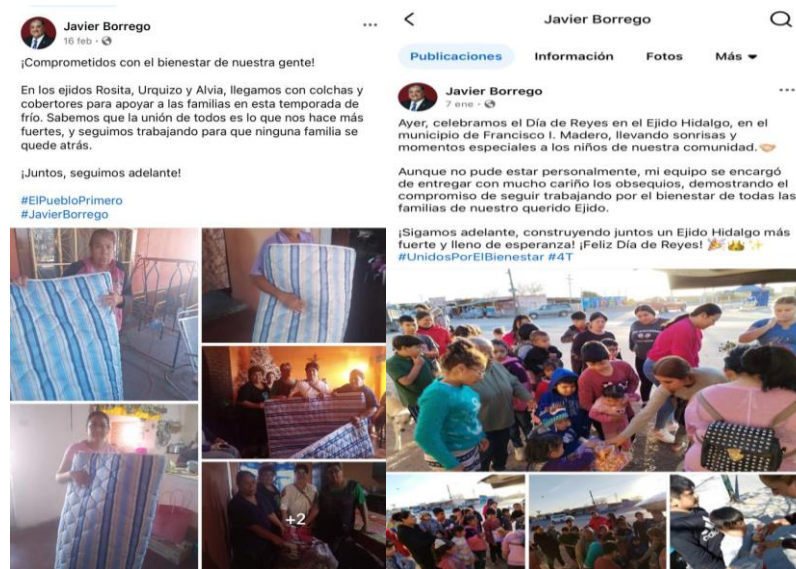


Image 4: Photographs obtained from Mr. Borrego's Facebook profile. **R-0120.**

218. The Claimant seeks to take the social efforts of a congressman for his constituents out of context and fails to point out that the Congressman does not have the power to influence or

¹⁹⁷ Soledad cerca de ti, “Mayor of Soledad, Municipal DIF, and Federal Deputy Ricardo Gallardo Cardona join forces to help vulnerable sectors during the health crisis,” April 27, 2020. **R-0117.**

¹⁹⁸ Perfil Veracruz magazine, “Deputy from Misantla allocates his salary to buy food supplies to support those most in need,” April 5, 2020. **R-0118.**

¹⁹⁹ El Mercurio, “Deputy Víctor García delivers food aid to families in Matamoros, February 2025.” **R-0119.**

manipulate other agencies. The fact that Deputy Borrego provided social assistance to a vulnerable group does not imply that he was involved in organizing the 2019 Demonstration.

219. To support its position, the Claimant presents recordings of conversations between Mr. Juan Manuel López and members of Mineros Norteños in which reference is made to Mr. Borrego's alleged participation in the 2019 Demonstration. As described *above*, the validity of these recordings is questionable.

220. The recordings were made in Juan Manuel López's family bar. It is unclear whether the members of Mineros Norteños knew they were being recorded and that their responses would be used in this legal proceeding. Furthermore, these recordings were obtained in January 2025, long after the start of the 2019 blockade. Therefore, the recordings simply cannot be taken seriously because they were obtained without the consent of the parties, are h t after the events, were obtained specifically for use in this arbitration, and the statements were made under the influence of alcohol.²⁰⁰

221. Mr. Lorenzo Fraire has clarified that Deputy Borrego at no time incited the demonstration and that the conversations recorded by Mr. Juan Manuel López discuss local rumors that cannot be confirmed.²⁰¹

Most of the things that have been said are rumors that circulated in the town, which is common in the community. While some people said one thing, others said another. We shared these comments with Juan Manuel with the understanding that they were only local rumors. This also happens with the recordings of the conversations that Mr. Juan Manuel López Ramírez had with the other two members of Mineros Norteños.²⁰²

222. Despite having obtained the recordings during the course of these proceedings, the Claimant has not presented the individuals who appear in the recordings as witnesses. These conversations were fabricated by the Claimant to establish a biased narrative in favor of its position in this arbitration.

²⁰⁰ Second Witness Statement of Mr. Fraire, ¶ 48. (“It is important to mention that Mr. Juan Manuel López Ramírez and his family own a bar. In the recordings of Mr. Juan Manuel López Ramírez with the other two members of Mineros Norteños, you can clearly hear that he is giving them beer and they are drinking it. I don't find it strange that people who are drinking alcohol say things that are nonsensical or untrue.”)

²⁰¹ Second Witness Statement of Mr. Fraire, ¶ 42.

²⁰² Second Witness Statement of Mr. Fraire, ¶ 47.

D. The Mexican authorities acted reasonably in response to a social demonstration in 2019

223. The Claimant characterizes the 2019 Demonstration as a “hostile takeover” of its facilities. However, the evidence in Investigation File 906/2015 and the Claimant's internal emails contradict its position, at least on the following points:

- Mineros Norteños was accompanied by members of the community during the 2019 demonstration;
- There were no acts of violence, intimidation, or presence of weapons during the 2019 Demonstration;
- The local police monitored the 2019 Demonstration and were present to ensure that it was a peaceful exercise of the right to free demonstration;
- No one was held against their will. The workers who remained on the premises did so of their own free will.
- The contingent that accompanied Mineros Norteños in the demonstration included children, women, seniors, and people with disabilities;
- There was legitimate concern on the part of Mineros Norteños and the Sierra Mojada community regarding the failure to make the agreed payment to Mineros Norteños and the possibility that the Claimant would sell the project without fulfilling its commitments to the community;
- The Claimant did not make use of the legal means available. The only legal means used was the intention to file criminal complaints against Mineros Norteños as a means of intimidation. The criminal complaint for alleged dispossession and deprivation of liberty was filed on September 12, 2019, and was not concluded due to a lack of procedural momentum on the part of the Claimant.



Image 5: Photograph of the 2019 demonstration showing that members of the community attended, including women and children. **R-0121.**

224. The Complainant has failed to refute any of these elements.

1. The Mexican authorities acted in accordance with the rules applicable to the use of public force in peaceful demonstrations

225. The use of public force is a regulated and sensitive issue in any country in the world. Mexico is no exception. Its legal system and legislation regulate the use of public force to preserve the human rights of its citizens, such as the right to freedom of demonstration.²⁰³

226. In Mexico, the National Law on the Use of Force²⁰⁴ regulates the exercise of public force and establishes the practices and principles that police officers and prosecutors must apply to determine whether it is appropriate to use public force to prevent abuses of authority.²⁰⁵

227. Specifically, in order for the authorities to use public force in a specific situation, six guiding principles must be met: (i) absolute necessity, (ii) legality, (iii) prevention, (iv) accountability, (v) rationality, and (vi) timeliness.²⁰⁶ This means that public force can only be used as a last resort, in the face of a real and present threat.²⁰⁷

²⁰³ Report of Mr. Islas, ¶ 37.

²⁰⁴ Counter-Memorial, ¶¶ 195-196.

²⁰⁵ Report of Mr. Islas, ¶ 30-33.

²⁰⁶ National Law on the Use of Force, Article 4. **R-0032.**

²⁰⁷ National Law on the Use of Force, Article 4. **R-0032.**

228. Additionally, various international standards, such as the United Nations Basic Principles on the Use of Force, establish that the use of force is always exceptional and only appropriate when all means of dialogue and mediation have been exhausted.²⁰⁸ As discussed in Section C *above*, these means were not exhausted in this case.

229. The 2019 demonstration was carried out in exercise of the right to peaceful protest, recognized by Articles 6 and 9 of the Mexican Constitution,²⁰⁹ Article 21 of the International Covenant on Civil and Political Rights²¹⁰ and the American Convention on Human Rights,²¹¹ which prevent States from acting with violence or using public force against demonstrations solely because of discomfort or pressure from individual interests.

230. In the face of a peaceful demonstration, the authorities' obligation is not to disperse it, but to protect the right to freedom of expression, adopt accompanying measures, maintain non-intimidating surveillance, and facilitate channels of communication, but without coercing those involved. Only in the event of a real, current, and serious threat to the life or integrity of individuals can the gradual and strictly supervised use of force be considered.²¹² This framework seeks to ensure that the State acts responsibly, prioritizing social peace, without criminalizing the demonstration or acting as a force of repression in the face of legitimate expressions of discontent.²¹³

231. Mr. Islas explains that the events surrounding the 2019 demonstration confirm that the use of public force was not justified.

The photographs provided by the Claimant show that children, women, elderly people, and people with disabilities, i.e., vulnerable groups, were present at the blockade. The

²⁰⁸ United Nations, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. **R-0122.**

²⁰⁹ CPEUM, Articles 6 and 9. **R-0125.**

²¹⁰ International Covenant on Civil and Political Rights. **R-0126.**

²¹¹ American Convention on Human Rights (Pact of San José). **R-0127.**

²¹² Report of Mr. Islas, ¶¶ 236-241.

²¹³ Mexican Constitution, Article 21. **R-0125.** Thesis P. LIII/2010, Public Safety. The Reasonableness of the Use of Force by Police Forces Requires Verification of Its Legality. **R-0128.** This legal precedent establishes that the use of public force requires the existence of clear regulatory guidelines—constitutional, legal, regulatory, or procedural—that define when and how it can be used, especially in the case of lethal force. Such use is only appropriate if it is carried out by a legally authorized authority and pursues a lawful and constitutionally valid purpose, taking into account the circumstances of the case.

Claimant provided evidence showing that the use of public force could not be resorted to because it was a peaceful demonstration..²¹⁴

232. In accordance with the principles governing the use of public force, Mexican authorities responded to the 2019 Demonstration and sought to promote dialogue between the demonstrators and the company.

2. The 2016 Demonstration cannot be compared to the 2019 Demonstration

233. The Claimant argues that Mexico acted in 2016 and chose not to do so in 2019.²¹⁵ The Claimant has not explained what specific actions the Mexican authorities took in the 2016 Demonstration that were not taken in 2019.

234. The evidence confirms that in both cases, Mexican authorities were present to ensure the physical integrity of the individuals involved and to monitor that no acts of violence occurred. The only difference was the Claimant's response to the concerns of Mineros Norteños and the community. In 2016, Mineros Norteños withdrew of its own accord in anticipation of a personal meeting with Mr. Barry and the possibility of reaching a solution to its claims. In 2019, the Claimant refused to engage in dialogue with Mineros Norteños.

235. The fact that Mineros Norteños' reaction was different in 2019 is not a consequence of the actions of the Mexican authorities, but rather of the Claimant's own negligence. The evidence clearly shows that, unlike in 2016, during 2019 Mr. Tim Barry systematically refused to meet with Mineros Norteños to address their concerns.²¹⁶

236. The evidence shows that the Mexican authorities contacted by the Claimant took the following actions in response to the 2019 Demonstration:

- On September 5, 2019, Mr. Juan Manuel informed the Public Prosecutor's Office of Laguna de Rey, Municipality of Ocampo, that the Demonstration would take place. The Public Prosecutor's Office informed Mr. Juan Manuel of the legal means

²¹⁴ Report of Mr. Islas, ¶ 68.

²¹⁵ Reply ¶¶ 2 and 5.

²¹⁶ Email from Mr. Juan Manuel to Mr. Barry, March 12 and 16, 2019. **C-0212**. ("I told them that you do not have a date to come back" [...] "I told them that I have had no communication with you for a week and I do not know when you will come.")

available and mentioned that police officers would be sent to monitor the situation.²¹⁷ At that time, the Public Prosecutor's Office provided him with the contact information for the state police so that could communicate with them in the event that they showed up at their facilities.²¹⁸

- On September 6, 2019, the Public Prosecutor's Office went to the town of Esmeralda to talk with members of Mineros Norteños prior to the 2019 Demonstration to inform them about the possible commission of crimes.²¹⁹
- On the day of the 2019 Demonstration, at least two local police units were present to respond to the Claimant's request for support. The state police commander explained to Mr. Juan Manuel that it would not be possible to use public force and remained at the scene to verify that there were no acts of violence.²²⁰ The Claimant's account of events confirms that on this day they maintained telephone contact with the Coordinator of Public Prosecutors.
- On September 10, 2019, Delegado Rubén Benjamín reiterated to Mr. Juan Manuel that it was necessary for him to file a complaint so that the prosecuting authority could intervene, and they agreed on an appointment to interview him on September 11 at 3:00 p.m.²²¹
- On September 12, 2019, Mr. Juan Manuel again requested police support to verify the departure of the personnel who were at the mine facilities. The commander of

²¹⁷ Investigation File 902/2019, Witness Statement by Mr. Juan Manuel, p. 31. **C-0498**. Email from Juan Manuel to R. Hernández describing the events that occurred in 2019, September 12, 2019. **R-0129**.

²¹⁸ Emails between Juan Manuel López, Tim Barry, and Brian Edgar, September 2019. **C-0219**.

²¹⁹ Investigation File 902/2019, Witness Statement by Mr. Juan Manuel, p.31. **C-0498**. Emails from September 6 and 7, 2019, from Juan Manuel to Tim Barry. **C-0220**. (“I had a meeting with the State Police, they will be alert tomorrow in the town” [...] “I had a call with the local prosecutor, he had a talk with the main member of MN yesterday and he told this: [...] He informed the police.”)

²²⁰ Investigation File 902/2019, Witness Statement by Mr. Juan Manuel, p.32. **C-0498**. Email from Juan Manuel to R. Hernández with a description of the events that occurred in 2019, September 12, 2019. **R-0129**.

²²¹ Email from Juan Manuel to R. Hernández describing the events that occurred in 2019. **R-0129**. *See also* email from Juan Manuel to Tim Barry dated September 10, 2019. **C-0220**. (“He can come only if we sue them and then they can come to do the investigation and then come and so everything needed to push them out.”)

Fuerza Coahuila went to the facilities and confirmed that no one was being held inside the facilities.²²²

- On September 13, 2019, Mr. Tim Barry reported that charges had been filed against Mineros Norteños with the Public Prosecutor's Office in San Pedro, Coahuila, and that this would allow the prosecutor's office to return to the site. The email from that day confirms that the Claimant only informed the Canadian and US embassies about the 2019 Demonstration, as well as a Senator from the State of Coahuila about the situation.²²³ This email also confirms that the local police went to the site to ensure that the drillers who were in the camp could leave the camp without any problems.
- On September 19, 2019, the public prosecutor's office visited the mine facilities to investigate the reported events. On that day, witnesses who were present were interviewed and general information about the alleged perpetrators was collected. In its Approved Police Report, the Public Prosecutor's Office stated that there were no “flagrant” or “urgent” acts and that there were no signs of physical force being used.²²⁴
- During the period 2021-2023, Mr. Elias' statement confirms that local authorities offered support and facilities to the Claimant to engage in talks with Mineros Norteños that would lead to the resolution of the conflict. During this time, at least four negotiation tables were held, with the Municipality of Sierra Mojada covering the travel and per diem expenses of the members of Mineros Norteños.²²⁵
- ²²⁶SEGOB contacted Mineros Norteños and Minera Metalín with the aim of following up on the 2019 Demonstration. The Claimant rejected SEGOB's intervention.

²²² Investigation File 902/2019, Witness Statement by Mr. Juan Manuel, p. 32. **C-0498.**

²²³ Email from Juan Manuel to R. Hernández describing the events that took place in 2019, September 12, 2019. **R-0129.**

²²⁴ Investigation File 902/2019, p. 25. **C-0498.**

²²⁵ Witness Statement by Mr. Elias Portillo, ¶ 26. Verification of meeting expenses for March 2022. **R-0124.**

²²⁶ Counter-Memorial, ¶ 200.

237. The evidence shows that the actions of the Mexican authorities were appropriate, proportionate, and consistent with the events that occurred, as confirmed by the Respondent's criminal law expert.²²⁷

238. The Claimant filed a complaint in 2019 with the Attorney General's Office of the state of Coahuila for alleged acts committed during the 2019 Demonstration.²²⁸ However, as explained in Section E *below*, the criminal investigation itself was limited by the lack of follow-up by the complainant, who did not provide the additional evidence requested by the prosecutor's office, nor did it pursue proceedings for its resolution. This fact demonstrates that, although the Coahuila Prosecutor's Office opened the corresponding investigation file, the lack of procedural momentum on the part of the company hindered its progress; an omission solely attributable to the Claimant.

239. Another avenue available to the Claimant was civil action, within which it could have brought actions for recovery of property and precautionary measures. The Civil Code of Coahuila and its Civil Procedure Code provide for actions to recover possession of real property and precautionary measures to secure the condition of movable and immovable property, which may be ordered even before a final judgment is rendered.²²⁹ The Claimant could have brought an action for recovery of property,²³⁰ requesting the immediate return of the occupied premises and the securing of movable property to prevent any damage to its condition. These means of defense, which are dealt with by the competent civil courts, are commonly used in property and commercial disputes. There is no evidence in the file that the company has brought such actions.

240. According to Article 353 of the Civil Procedure Code of Coahuila,²³¹ procedural measures must be requested within an ongoing judicial proceeding, or beforehand as a precautionary measure. Had it deemed it necessary, the Claimant could have filed a well-founded and reasoned request with the competent judicial authority, providing *prima facie* evidence (known as “prima facie evidence”) and offering the corresponding guarantee.²³² These measures could have included, among others, police custody of facilities, restraining orders, or securing access, always executed

²²⁷ Report of Mr. Islas, ¶¶ 251-254.

²²⁸ Reply ¶ 215-217.

²²⁹ Civil Procedure Code for the State of Coahuila de Zaragoza, Article 44. **R-0049.**

²³⁰ Civil Code for the State of Coahuila de Zaragoza, Articles 1793 to 1800. **R-0131.**

²³¹ Civil Procedure Code for the State of Coahuila de Zaragoza, Article 353. **R-0049**

²³² Civil Procedure Code for the State of Coahuila de Zaragoza, Articles 354 to 358. **R-0049.**

by the competent authority and with respect for the human rights of the demonstrators. The fact that the Complainant did not resort to such mechanisms shows that it was not interested in exhausting the legal remedies provided for in state law for the preventive protection of its rights. It also implies that any harm it may allege cannot be attributed to the inaction of the authorities, but rather to its own failure to take timely action.

241. The Complainant also had the possibility of filing an indirect amparo lawsuit against the actions or omissions of the state authorities of Coahuila.²³³ This procedure is regulated in the Constitution and in the Amparo Law, and constitutes a mechanism for claiming human rights violations that undermine legal certainty due to acts or omissions by authorities. There is no evidence that Minera Metalín requested the competent authorities to lift the 2019 Manifestation, or that Minera Metalín filed an amparo lawsuit in response to any omission by those authorities.

242. As noted in the following section, the Complainant also had the opportunity to file an amparo lawsuit during the criminal investigation and even after it was temporarily shelved due to a lack of momentum on the part of Minera Metalín.

²³³ Under the Mexican legal system, the amparo proceeding is a constitutional control mechanism that can be initiated by any person (natural or legal), referred to as the "complainant," against acts of authority that, in their opinion, violate the human and fundamental rights established in the Mexican Constitution or the human rights established in international treaties to which Mexico is a party.

There are two types of amparo proceedings: direct amparo (against final judgments) and indirect amparo (against acts of authority other than final judgments). District Courts and Collegiate Courts of Appeal hear indirect amparo proceedings, while Collegiate Circuit Courts resolve direct amparo proceedings. Both types of amparo proceedings allow final judgments to be challenged through an appeal for review, which in turn is decided by the Collegiate Circuit Courts.

In an amparo proceeding, the District Judge may grant a suspension of the contested act, similar to an injunction in countries with common law legal systems. There are two types of suspensions: provisional and final. Provisional suspension is granted or denied at the time the amparo petition is admitted; the standard for granting it is less rigorous, and its effects generally last until a decision is made on the granting of final suspension. Final suspension

is granted or denied in a subsequent proceeding, called an incidental hearing, in which all parties to the amparo proceeding participate. The standard for granting it is more rigorous than that applicable to the provisional suspension, and its effects last until a final judgment is issued in the amparo proceeding

3. The examples of problems at other mines are not comparable to the social demonstration in Sierra Mojada

243. The Claimant has provided news articles about other blockades that Mexico allegedly broke up to argue that “Mexico can and has used appropriate force and other measures to end similar mining blockades in Mexico, but has failed to take *any* reasonable action (let alone forceful action) in this case.”²³⁴ The conditions under which these blockades were dispersed cannot be compared to the 2019 Demonstration.

244. Most of the examples are blockades that were resolved by an agreement reached between the mining company itself and the local community (*e.g.*, Los Mineros in Guerrero, Peñasquito in Zacatecas, Los Filos in Guerrero, and San Rafael in Sinaloa). Specifically, Mexico Business News reports on the blockades in San Rafael and Los Filos (C-0123, C-0122) indicate that Mexican authorities helped monitor the situation, but ultimately the blockades were lifted because the company reached an agreement with the blockaders.

245. In this case, the evidence shows that the state police supervised the 2019 Demonstration and responded to all of the Claimant's calls, but the Claimant decided not to address the concerns of Mineros Norteños and the Sierra Mojada community. The Claimant ignored Mineros Norteños' proposals for negotiation until 2021, when it obtained the ruling in Amparo 375/2020. Once the ruling was obtained, the Claimant's strategy was to criminalize the members of Mineros Norteños.

246. The rest of the examples presented by the Claimant show that the Mexican authorities used public force because there were elements of violence or court orders that justified police intervention. An example of this is the news reports about the blockades in La Herradura.²³⁵

E. Investigation File 902/2019 does not confirm the Petitioner's position

247. The Complainant argues that Investigation File 902/2019 confirms its position regarding the 2019 Demonstration and the Complainant's alleged failure to prosecute the alleged crimes committed by Mineros Norteños against the Complainant. The following sections provide some clarification in this regard.

²³⁴ Reply, ¶ 4, point 4.

²³⁵ Zacatecas government promises protection to Canadian miner that suspended operations after organized crime robberies. **C-0136**. *See also*, Reply, ¶¶ 480-481.

1. The Public Prosecutor's Office temporarily closed the investigation due to lack of evidence

248. The Complainant alleges that the judicial authorities abandoned the Investigation File without any justification. This position completely ignores the scope of the order temporarily shelving the investigation file and its justification.

249. In the course of the investigation, the Public Prosecutor's Office carried out various procedures, including the incorporation of witness statements, certified police reports, expert reports on criminalistics, topography, and appraisal, as well as the analysis of photographs presented by the Claimant.²³⁶

250. On September 24, 2024, the Public Prosecutor's Office evaluated all the evidence presented and determined that it was appropriate to order the temporary closure of the investigation file because, up to that point, it had not been proven that the acts had been committed through intimidation, physical violence, or deception, nor had the manner of participation of the probable perpetrators identified by the Claimant been proven. This justification is clearly outlined in the temporary closure order:

Proceedings in which, to date, it has not been proven that the acts were committed through intimidation, physical violence, deception, stealth, or by taking advantage of a lack of surveillance, nor has the involvement of the probable perpetrators identified to date been proven, exhausting all possible lines of investigation to continue with the investigation file and conclude it through any means authorized by law.²³⁷

251. As Mr. Islas explains, this justification was sufficient to close the investigation because the essential elements to prove the crimes reported were not present in the evidence gathered, including in the statements of the Claimant's own witnesses:

257. First, with regard to the crime of dispossession, the criminal offense requires the concurrence of material acts of disturbance or dispossession of real property, carried out through violence, threats, clandestinity, or other illegitimate means, accompanied by *animus spoliandi*. [...]

132. Contrary to the above, and as can be seen in file 902/2019, the photographs provided by the alleged victim, as well as the interviews with their witnesses, show that there are a number of people OUTSIDE the property demonstrating peacefully. [...]

²³⁶ Investigation file 902/2019, pp. 396-397. **C-0498.**

²³⁷ Investigation file 902/2019, Temporary Archive, p.397. **C-0498.**

202. Consequently, it is not possible to request the use of public force, nor to move forward with the prosecution or determination of the investigation file in terms other than those decided in September 2024. The records reviewed for this ruling also show that there is insufficient evidence to rebut the presumption of innocence of the accused, much less to justify an arrest warrant. In view of the above, scenarios are developed in which law enforcement is used or not used.²³⁸

252. Article 254 of the CNPP allows the Public Prosecutor's Office to provisionally close an investigation when the data or evidence is insufficient to clarify the facts or there is no evidence to help advance the criminal investigation.

The Public Prosecutor's Office may temporarily shelve investigations in their initial stages where there is insufficient evidence, data, or elements to establish lines of inquiry that would allow proceedings to be carried out to clarify the facts that gave rise to the investigation. The case will remain shelved until data is obtained that allows it to be continued in order to bring criminal proceedings.

253. The Supreme Court of Mexico has explained that this does not amount to an acquittal (*i.e.*, temporarily acquitting the respondent in a criminal case because the evidence provided by the prosecution during the trial is insufficient to prove his guilt), because the power to temporarily close the investigation file can only be exercised prior to the start of criminal proceedings and when there is no background information, sufficient data, or evidence from which lines of investigation can be established to carry out proceedings aimed at clarifying the facts that gave rise to the investigation.²³⁹

254. It is important to note that closing the investigation does not mean that the authority has “ultimately closed the criminal case.”²⁴⁰ The investigation may be reopened if new evidence or lines of inquiry emerge that make it feasible to reopen the case, provided that the statute of limitations has not expired. The agreement to close the case states that the statute of limitations for criminal proceedings expires on September 22, 2029,²⁴¹ as indicated below:

Third. - The statute of limitations for criminal proceedings in this investigation file will be September 22, 2029, based on the provisions of Articles 174, 175, 176, 177, and 178 of the State Criminal Code in force.²⁴²

²³⁸ Expert Report by Mr. Islas, ¶¶ 257,132,202.

²³⁹ Thesis: 1a./J. 102/2024 (11a.). Subjects: Criminal, Constitutional. Type: Case law. Digital record: 2028862. Publication: Judicial Weekly of the Federation, Period: Eleventh. **R-0132**.

²⁴⁰ Reply, ¶ 261.

²⁴¹ Investigation File 902/2019, Temporary Archive, pp. 398, 404. **C-0498**.

²⁴² Investigation File 902/2019, Temporary Archive, p. 404. **C-0498**.

255. The Coahuila Prosecutor's Office notified Daniela Ramírez Villegas, who, like Juan Manuel López Ramírez, is an authorized representative of Minera Metalín, of the temporary closure agreement, as evidenced by messages dated September 24, 2024, in which she stated that she was aware of the decision.²⁴³

2. The Investigation File supports the Respondent's position in relation to the 2019 Statement

256. The Claimant takes the contents of the investigation file out of context to support its position on an alleged “failure to take action” by the Mexican authorities.²⁴⁴ However, the evidence in the investigation confirms that the Claimant's allegations regarding the 2019 Demonstration are excessive. Below are some clarifications in this regard:

257. *First*, the Claimant's statement of facts and the statements presented by Minera Metalín's witnesses confirm that the Demonstration remained outside the Claimant's premises at all times and was composed mainly of elderly people, women, and minors. There is no indication that there was any act of violence or intimidation on the part of Mineros Norteños.

258. On September 13, 2019, Mr. Landeros stated the following:

On September 8, 2019, at approximately 1:00 p.m., in the vicinity of my client's facilities, approximately 120 people, including adult men and women as well as minors, began to arrive and gather, eventually remaining at the entrance and around the aforementioned facilities.²⁴⁵

259. On September 19, agents from the Public Prosecutor's Office visited the Project to prepare an official police report on the events that had been reported. As part of their activities, they interviewed Mr. Juan Manuel López, who confirmed that “there were about 120 people, including elderly people, women, and children [...] and they gathered outside the camp.”²⁴⁶

260. Mr. Islas confirms that the presence of children, women, and elderly people prevented the authorities who responded to the 2019 demonstration from using public force to disperse them.²⁴⁷

²⁴³ Investigation File 902/2019, Temporary Archive, pp. 2 and 405. **C-0498.**

²⁴⁴ Reply, ¶ 227.

²⁴⁵ Investigation File 902/2019, Complaints of Facts, p. 1. **C-0498.**

²⁴⁶ Investigation File 902/2019, Reports of Facts, p. 32. **C-0498.**

²⁴⁷ Report of Mr. Islas, ¶ 68.

261. *Second*, the statements of Mr. Juan Manuel López confirm that the state police and public security forces responded promptly to Mr. Juan Manuel's requests for support and were present during the 2019 demonstration. The security forces informed the Claimant of the legal means at their disposal:

So the next day, I appeared before the public prosecutor, Mr. Elias Garcia, in the town of Laguna del Resy, municipality of Ocampo, whom I informed of what was going to happen and asked for his support in making him aware of the crime that could be committed. He simply told me that if it happened, I should come forward to file a complaint and told me that personnel would go to talk to the leaders of Norteños anyway, and indeed they did so, speaking with one of the leaders named Lorenzo Frayre Hernandez [...]

On Sunday, September 8, 2019, normal work was carried out [...] in the office at approximately 1:20 p.m., I was notified by radio that trucks were heading towards the mine, and I asked people to close the camp. Accompanied by Oscar Ariel Olague, we left the office but remained inside the camp, and Oscar began to take photographs and videos. At that moment, we realized that there were already two units there, one from public security and the other from the Coahuila police force. At that moment, an officer approached me and said he wanted they wanted to talk to me. Oscar and I left the camp and went to the intersection where the police units and the people from Mineros Norteños were.

262. *Third*, the statement submitted by Mr. Oscar Ariel Olague Corral, an employee of Minera Metalín, confirmed that no one remained at the site against their will. Mr. Corral states that he went to the project site one day after the 2019 Demonstration to pick up the people who had remained at the facility in accordance with the instructions of Mr. Juan Manuel López.

On Monday, September 9, Mr. Juan Manuel called me and asked me to do him a favor by taking the geologists out through an emergency door on the west side. So, at 11:00 p.m. that day, I went up to the mine on the east side and took them out of the camp.²⁴⁸

263. Mr. Juan Manuel himself confirmed that, at the time of the 2019 Demonstration, there were about 15 people at the facility and he ordered only eight people to leave through an alternate door. The rest of the workers remained in the camp of their own free will or on the instructions of Mr. Juan Manuel López.

264. Mr. Juan Manuel López's statement confirms that Mr. Melnyk remained on the premises until September 9, 2025, because he was waiting for Mr. Oscar Ariel to pick him up and take him to the city of Torreón.

²⁴⁸ Investigation File 902/2019, Allegations of Facts, p. 27. C-0498.

Remaining inside the camp were workers named Jose Velzaquez Balnco, Matt Melnick, Baltazar Ruven, Oscar Natividad Tabanico, Baltazar Gatelum, Victor Chavarría Chairez, and Carlos Daniel Luna Cisneros, as well as eight people who were in the logging or core area and others in the drilling area. I asked these eight people to leave through an alternate exit. [...] and it was approximately 4:00 p.m. when Jose Velazquez called me and said that he needed to leave the camp, as did Matt Melick, so I told Oscar Ariel to go to the Peñoles mine and take the geologists out through an alternate exit [...] and at approximately 11:00 p.m. on Monday, September 9, 2019, Oscar Ariel took them out through the alternate exit we had agreed upon and immediately transported them to the city of Torreón, Coahuila.

265. The rest of the personnel remained at the facility of their own free will. It was not until September 12, 2019, that Mr. Juan Manuel decided to contact the police commander to inform him that the personnel were seeking to leave through the main entrance of the camp. The police commander went to the site and confirmed that three people had already left the camp and that only Mr. Carlos Daniel Luna had remained to keep him informed of the situation.²⁴⁹

266. Mr. Carlos Daniel Luna's statement confirms that it was Mr. Juan Manuel who ordered him "to close the doors because people were heading there."²⁵⁰

267. The exchange of communications between Mr. Tim Barry and Mr. Juan Manuel López in the days following the 2019 Demonstration confirms that there was never a kidnapping and that the accusation was made in an attempt to put pressure on Mineros Norteños. On September 11, 2019, Tim Barry suggested to Mr. Juan Manuel López that charges be brought against Mineros Norteños for kidnapping because such accusations are highly sensitive in Mexico:

As you know, Mexico is highly sensitive to hostage and kidnapping situations, and it would reflect very badly on MN if they had taken people hostage. Our staff cannot freely leave the project and do not have access to food, water, and medicine.²⁵¹

268. On September 12, Mr. Juan Manuel López Ramírez responded that the workers remained on the premises of their own free will and that there was no risk situation. At that time, Mr. Juan Manuel López characterized the kidnapping allegations as a lie and explained that he ordered the workers to leave through the site's emergency exit.

In my opinion:

²⁴⁹ Investigation File 902/2019, Allegations of Facts, p. 33. **C-0498**.

²⁵⁰ Investigation File 902/2019, Reports of Facts, p. 40. **C-0498**.

²⁵¹ Emails between Mr. Juan Manuel López and Mr. Tim Barry ("Re: Hostage Situation"), September 2019. **R-0133**.

There is no danger right now for the people who are in the camp (driller, water truck driver, resident geologist, and guard), because they want to be there themselves, we have food and all services. No one is under medical prescription.

Regarding Matt's comment, I decided to send them (Matt and Jose) out the back door, assuming that if he tried to leave through the main door, the MN people could stop them for too long and cause him to miss his flight.

It is a delicate situation for me and my family because we live in town. If I talk to the police about the hostages, the police will tell them that I said that. All the police, or most of them, have family with MN.

I agree that this situation is taking too long and everyone is desperate, but I cannot lie about this (hostages). Please understand my situation.²⁵² [Emphasis added]

269. The statements described and Mr. Barry's communications with South32 and its lawyers regarding his intention to use criminal complaints as “negotiating leverage” in his relationship with Mineros Norteños (discussed in sections A and C *above*) confirm that the Claimant's strategy was never to properly follow legal proceedings to address the issues caused by the 2019 Demonstration or to properly exhaust criminal proceedings. Instead, the Claimant planned to misuse the Mexican legal system and its institutions as a method of intimidation against the demonstrators who were on its premises.

270. *Fourth*, the evidence shows that the Complainant abandoned the investigation. On December 18, 2024, the Public Prosecutor's Office informed the delegate of the Attorney General's Office of the state of Coahuila that the investigation file remained on file because no response had been obtained from the Complainant that would allow additional information to be gathered on the facts reported.

In relation to investigation file number 0902/SP/UISO/2019, initiated as a result of the complaint filed by Mr. FABIAN LANDEROS ARENAS IN HIS CAPACITY AS LEGAL REPRESENTATIVE OF THE PERSON NAMED “MINERA METALÍN, S.A. de C.V., against SOCIEDAD COOPERATIVA DE EXPLOTACIÓN MINERA MINEROS NORTEÑOS S.C.L, for the crime of DEPRIVATION OF LIBERTY, I would like to inform you that the investigation file is currently on temporary file, as the victim was required, by agreement dated June 26, 2023, to provide suitable information for the location of the personnel who were working at the Metalim[sic] company at the time the events occurred. This was done in order to be able to interview witnesses who could provide information to clarify the facts. However, no response was received from the victim, her legal representative, or legal advisor, and therefore the agreement to

²⁵² Emails between Mr. Juan Manuel López and Mr. Tim Barry (“Re: Hostage Situation”), September 2019. **R-0133**.

temporarily archive the case was issued, since there are currently no grounds for terminating the criminal proceedings.²⁵³

271. Mr. Islas explains that “as no evidence was added for five years, it was temporarily closed in September 2024” and that this closure, even after being notified, was not challenged “either due to lack of interest or lack of evidence.”²⁵⁴

272. Thus, far from supporting the Claimant's position, the investigation file confirms that (i) the Coahuila police actively responded to all of the Claimant's requests for support; (ii) the 2019 Demonstration was peaceful and comprised vulnerable groups, which precluded the use of public force; (iii) no person was detained against their will, and (iv) the Claimant used the investigation file as a means of intimidation against the members of Mineros Norteños and never intended to exhaust the legal remedies available to address the situation in Sierra Mojada.

3. The Complainant did not exercise the legal remedies available against the closure of the investigation

273. As already noted, the temporary closure of the investigation file does not in any way imply that criminal proceedings have been terminated. On the contrary, the agreement expressly recognizes that the closure does not interrupt or suspend the statute of limitations or the right to file a complaint,²⁵⁵ and therefore the State's punitive claim remains in force until such criminal proceedings expire. Consequently, the temporary closure of the case simply releases the Public Prosecutor's Office from its duty to investigate while it does not have evidence, lines of investigation, or elements that justify further proceedings.

274. The Claimant may file legal remedies such as a request for proceedings or an appeal to a higher authority to reactivate the investigation.²⁵⁶ However, to date, there is no record that Silver Bull has exercised any of these mechanisms to request the continuation of criminal proceedings.²⁵⁷

²⁵³ State Attorney General's Office, Laguna II Region, Official Letter 515/2024 from the Public Prosecutor of the Mass Case Processing Unit, Mesa II, San Pedro, Coahuila, December 18, 2014. **R-0041**.

²⁵⁴ Report of Mr. Islas, ¶¶ 196- 197.

²⁵⁵ Investigation File 902/2019, p. 404. **C-0498**.

²⁵⁶ Report of Mr. Islas, ¶¶ 278-279

²⁵⁷ Investigation File 902/2019, p. 404. **C-0498**.

275. Mr. Islas explains that the Claimant had the possibility of challenging the temporary closure agreement within 10 days of its notification in accordance with Article 258 of the CNPP, but decided not to do so.²⁵⁸

276. Mr. Tim Barry's communications show that they had hired a local lawyer to follow up on Investigation File 902/2019. The reports that were sent to Mr. Tim Barry show the lack of diligence with which the Investigation File was handled. In July 2021, Mr. Barry's lawyer reported that the investigation file would be presented to a judge in the following days for the determination of criminal charges.²⁵⁹ There is no record in the Investigation File that this was reported by the Public Prosecutor's Office on those dates. Nor is there any evidence that the Claimant filed any legal appeal when this did not happen.

4. The Claimant's request for adverse inferences is untenable.

277. The Claimant alleges that the Respondent improperly withheld the Investigation File during the document production phase and failed to comply with the Court's orders.²⁶⁰ This assertion ignores the fact that the Respondent explained in a timely manner that its legal representatives are prohibited from accessing criminal files by express provision of Mexican law.

278. Article 218 of the CNPP establishes the principle of “secrecy,” “confidentiality,” or “reserve” in criminal matters. In accordance with the principle of criminal reserve, only the victim, the accused, their attorneys, and the public prosecutor may have access to the files or records of an investigation file.

The investigation records, as well as all documents, regardless of their content or nature, objects, voice and image recordings, or related items, are strictly confidential, and therefore only the parties may have access to them, with the limitations established in this Code and other applicable provisions.

The victim or injured party and their legal advisor may have access to the investigation records at any time.

The accused and their defense counsel may have access to them when they are detained, summoned to appear as the accused, or subject to an act of harassment and an interview is sought. From that moment on, the records may no longer be kept confidential for the accused or their defense counsel in order not to affect their right to defense. For the

²⁵⁸ Report of Mr. Islas, ¶ 197.

²⁵⁹ Email between Mr. Tim Barry and Mr. Rodrigo Hernández, July 21, 2021. C-0149.

²⁶⁰ Reply, ¶¶ 220-227.

purposes of this paragraph, an act of harassment shall be understood as that provided for in Article 266 of this Code.

In no case may the confidentiality of the records be invoked to the detriment of the respondent and his or her defense counsel once the order to proceed to trial has been issued, except as provided for in this Code or in special laws.

For the purposes of access to public government information, the Public Prosecutor's Office shall only provide a public version of the decisions not to prosecute, to temporarily close the case, or to apply a criterion of opportunity, provided that a period equal to the statute of limitations for the crimes in question has elapsed, in accordance with the provisions of the corresponding Federal or state Criminal Code, which may not be less than three years or more than twelve years from the date on which said decision became final.²⁶¹ [Emphasis added]

279. In other words, unlike the Claimant and its legal representatives, the Investigation File cannot be consulted directly by the Respondent's legal representatives.

280. The Claimant argues that the Respondent's legal representatives had access to the Investigation File because they requested information about it from the Prosecutor's Office in May 2023 (C-0423). However, on December 18, 2024, the Public Prosecutor's Office in charge of the Investigation File limited itself to providing a general update on the status of the investigation without providing unlimited access to the file (R-0041).

281. Despite the above, and in an effort of good faith, the Respondent submitted the privilege and confidentiality registry with the support of the Coahuila State Prosecutor's Office, in accordance with what was ordered by the Court during the production of documents.²⁶² In preparing the privilege registry, the Prosecutor's Office reiterated that access to the Investigation File was restricted.

282. Therefore, the Respondent maintains that the allegations of bad faith presented by the Claimant in relation to the production of the Investigation File are absurd. The Claimant requested a document that was clearly in its possession, custody, and control as part of its legal strategy to obtain adverse inferences about facts that it has been unable to prove. The request to produce the Investigation File was in itself inappropriate and excessively burdensome in light of the impossibility of the Respondent's legal representatives, which is contrary to the IBA Rules applicable to the analysis of document production.

²⁶¹ National Code of Criminal Procedures, Article 218. **R-0134.**

²⁶² Reply, ¶ 22.

F. The Claimant ignores the negative effect of the Valdez trial on the development and ownership of their Investment

283. In its Reply, the Claimant asserts that:

...Mexico next conjures up the theory that the “real cause” of the loss of the Claimant’s investment was a lawsuit, the Valdez litigation. But that case raises more questions about Mexican regional judicial practice than it does provide answers to the Tribunal regarding the issue of causation. As developed below, the case was **shockingly** resurrected years after its dismissal by an appellate court and is now pursued by a married couple who have been deceased for years – their son continuing the litigation without having bothered to demonstrate that he is authorized to do so. The Valdez family is in the process obtaining some non-final attachments over the Claimant’s concessions that had already been lost as a consequence of Mexico’s breaches of the NAFTA.

In any event, Mexico’s reliance on the Valdez litigation is an “Ave Maria” as indicated by its document requests, where it sought documents that would have shown that the Claimant’s option agreement partner, South32, actually terminated that agreement because of the impact of the Valdez litigation. But the disclosure process has shown only that South32 terminated the Option Agreement because Mexico had failed to lift the Continuing Blockade. In fact, there is no evidence that South32 had any concern over the Valdez litigation. This reveals the Valdez theory for what it is – a transparent attempt to distract from the only issue that matters in this case, Mexico’s inaction in relation to the Continuing Blockade.

284. The characterization of the Valdez trial in this arbitration as a “Hail Mary” is incorrect. *First*, it was the Claimant itself that introduced the Valdez case in its SdA,²⁶³ and then strategically decided to withdraw it. Consequently, Mexico is fully within its rights to raise reasonable doubts about an issue that the Claimant itself brought to the table in the first place.

285. *Second*, it is serious that the Claimant refers to the actions of the Mexican judicial authorities as “highly questionable and irregular,” “a strange turn of events,” “spurious,” “absurd,” “false,” “raising serious concerns,” or “suspicious,” to mention a few of its expressions.²⁶⁴ Such language is inappropriate in international proceedings, as it concerns the actions of the judiciary of a sovereign state. Furthermore, the Claimant has not made any claim in this arbitration against the Mexican judicial authorities, so its accusations are unfounded.

²⁶³ RfA, Section 3(F).

²⁶⁴ See, Reply, Section 2.11.

286. *Third*, the Claimant's attempt to minimize the relevance of the Valdez trial overlooks the fact that Metalín itself relied on Mexican court decisions when it suited it.²⁶⁵ In fact, it used those decisions as a basis for refusing to comply with its contractual obligations to Mineros Norteños.

1. The validity and regularity of the Valdez trial

287. The Respondent showed in its Counter-Memorial that the Valdez family case is another example of how Metalín operated in Sierra Mojada.²⁶⁶ In the Valdez case, Minera Metalín occupied the concessions covered by the contract without paying the agreed amount. The 2010 promise of assignment contract provided for staggered payments and a final payment, as well as the obligation to give 30 days' notice if the concessions were not acquired. Metalín paid for only three years, stopped paying in 2013, and never covered the final amount, continuing to use the lots without rights.²⁶⁷

288. The reality is that the Mexican courts confirmed that Metalín failed to fulfill its commitments to the Valdez family. The Respondent has not filed any claims based on the actions of the Mexican courts and, despite the unfortunate characterizations used in the Reply, the Tribunal

²⁶⁵ See, Reply, ¶ 47 (“...that narrative is incorrect both factually and legally and is not supported by the content of the judgments themselves. More importantly, it ignores the most salient and indisputable fact in this case: that the Mexican courts repeatedly dismissed Mineros Norteños’ claim for premature payment of royalties.”) *See also*, Reply, ¶ 50 (Mexico asserts that “it is well established that international tribunals cannot act as appellate bodies with respect to decisions issued by competent local authorities.” SVB fully agrees. This Tribunal is not being asked to review or overturn any decision of the Mexican courts.”) [Emphasis added]

²⁶⁶ Arising from the lawsuit brought by this family against Metalín, the Valdez family described their relationship with the company in the following terms: (“After suffering painful illnesses resulting from the refusal and social irresponsibility of the company MINERA METALIN SA DE CV, which to this day HAS REFUSED TO FACE UP TO ITS OBLIGATIONS ARISING FROM THE SIGNING OF THE CONTRACTS.”) They also pointed out that: (“As is already known, the plaintiffs in the lawsuit have stated that they suffered from various illnesses as a result of the refusal of the company METALIN SA DE CV to meet its commitments to the plaintiffs in the lawsuit, and that the rapacious attitude and lack of values of said company is also evident, since in its response to the main claim, it DENIES HAVING ANY INTEREST IN ACQUIRING THE MINES, but through illegal acts and convenient notifications that have since been declared null and void, AS RECORDED IN THE COURT RECORDS, IT HAS TRIED BY ALL MEANS TO TAKE OVER THE CONCESSIONS THAT ARE THE SUBJECT OF THE PRESENT LAWSUIT.”) Brief dated September 26, 2019, pp. 647 and 651. **R-0135.**

²⁶⁷ Counter-Memorial, Section L.1.

must consider these actions as facts. These facts, coupled with the subsequent seizure, demonstrate that the Claimant lost control of the investment it is claiming in this arbitration.²⁶⁸

289. The Respondent notes that the Claimant questions Mr. Antonio Valdez's standing to act in the lawsuit. In fact, the competent judge expressly recognized Mr. Antonio Valdez's authority to continue representing his deceased parents in the lawsuit against Minera Metalín, based on the civil procedural law of the State of Coahuila. In fact, this argument was raised by Minera Metalín during the proceedings and received a clear judicial response in which the following was resolved:

...[I]t is unnecessary for the heirs or executor of the estate of JAIME VALDES FARIAS AND MARIA ASUNCION PEREZ ALONSO DE VALDES to appear in the proceedings in order for the respondent to comply with its obligations, since said parties are represented by their attorney, Mr. ANTONIO VALDEZ PEREZ, and in accordance with the provisions of Article 3062 of the Civil Code for the State of Coahuila, when the mandate ends due to the death of the principal, the agent must continue to perform the power of attorney while the heirs provide for the business themselves, provided that failure to continue performing the duties could result in harm.²⁶⁹

290. Mexican law allows a person who has power of attorney over another person's property to continue to do so even if the owner dies, until the heirs take over. This includes everything necessary to protect the property and avoid harm, including ongoing lawsuits. In this regard, the Claimant's objections regarding the lack of standing to sue are unfounded because they ignore both local law and the decisions of Mexican courts on this issue. The Respondent reiterates that the Tribunal must consider all the actions of the Mexican courts to be correct.²⁷⁰

291. The Valdez trial was conducted in accordance with the procedural law of the State of Coahuila.²⁷¹ It is not a disputed fact in this arbitration that, following non-contentious proceedings initiated in 2015 and in view of Minera Metalín's refusal to cover the payments due, in 2016 the Valdez family brought a civil lawsuit against it. The trial judge initially dismissed the claims, but the Valdez family filed an appeal, which was heard and decided by the Regional Chamber of the Superior Court of Justice of Coahuila in 2020.

²⁶⁸ Order for the Award of Real Estate, December 5, 2023. pp. 2-4. **R-0136**.

²⁶⁹ Order of February 15, 2022, Case 103/2016, pp. 1271-1273. **R-0137**. Power of attorney. **R-0138**.

²⁷⁰ Witness Statement of Mr. Valdez, ¶¶ 18-19.

²⁷¹ Counter-Memorial, Section L.1(a) and L.2.

292. The Claimant points to the existence of an allegedly absurd authorization to “appeal the March 2017 ruling.”²⁷² This argument was also raised and resolved in the lawsuit brought by the Valdez family,²⁷³ and now the Claimant seeks to bring it to arbitration, even though no measure attributable to the Mexican State's administration of justice is at issue here.

293. The Claimant acknowledges the final judgment of March 2017, but omits that there were subsequent incidents that were processed and resolved in accordance with the law in 2019. It also omits that the contested nullity was due to the fact that the notification of the judgment in Civil Case 103/2016 was deficient.

294. ²⁷⁴ d no knowledge of the judgment in Civil Case 103/2016 until April 5, 2019, and they filed a motion to nullify the proceedings based on local legislation and precedents of the SCJN. Metalín was heard and defeated in that proceeding. Consequently, on June 17, 2019, the court upheld the motion, annulled the notification of the judgment in Civil Case 103/2016 in 2017, and ordered a new personal notification to be made at the correct address, which allowed Mr. Antonio Valdez to file Appeal 87/2020 against the judgment in Civil Case 103/2016 and subsequently conclude the case with the Judgment of Appeal 87/2020 on October 1, 2020.²⁷⁵

295. The Regional Chamber of the Superior Court of Coahuila overturned the initial ruling and concluded that Minera Metalín had breached its contractual obligations by failing to validly notify the termination of the contract and continuing to occupy the concessions without making the corresponding payments. It should be noted that the court considered Minera Metalín's arguments regarding having given notice in accordance with the contract; however, the company continued to occupy the lots covered by the contract, which constituted a material breach of its obligations to the Valdez family.

296. Consequently, the court ordered Minera Metalín to pay US \$5.9 million, which led to the seizure of part of the property linked to the Silver Bull project, due to Minera Metalín's unwillingness to pay, both before and after the ruling. This outcome demonstrates both the

²⁷² Reply, ¶ 321.

²⁷³ Brief of May 29, 2019. **R-0139**.

²⁷⁴ Brief dated April 8, 2019. **R-0140**.

²⁷⁵ Appeal Judgment 87/2020, pp. 51-53. **C-0029**.

existence of the breach and the habitual conduct of Silver Bull, as well as the regularity and firmness of the judicial proceedings followed by the courts of Coahuila.²⁷⁶

297. Contrary to what the Claimant²⁷⁷ claims in Appeal Ruling 87/2020, the court based its decision on the continuity of possession, and not on alleged exploitation. This conclusion was supported by Metalín's own admission in a 2013 notarized statement, in which it acknowledged that it “remains in possession of the mines covered by the contract” with the Valdez family, even after its alleged termination.²⁷⁸

2. The effect of the seizure

298. The Claimant argues that, under Mexican law, the seizure is merely a precautionary measure that does not deprive Minera Metalín of ownership or control of its concessions. However, this assertion ignores the factual consequences of a seizure. The seizure is not a mere formal incident.

299. The Claimant reduces the concept of ownership to formal title to the concessions, when in fact it consists of three essential attributes: (i) use, (ii) enjoyment, and (iii) disposal.²⁷⁹ Even if Minera Metalín continues to appear as the registered owner of the concessions, the truth is that, as a result of Appeal Judgment 87/2020 in the Valdez trial, it cannot implement the Project, enjoy its economic fruits, and much less freely dispose of them due to the judicial prohibition on the sale of assets and the priority of the credit in favor of the Valdez family.²⁸⁰

300. The Claimant's position in its Reply does not contradict the Respondent's position.²⁸¹ The Supreme Court of Mexico has been clear on this point: the seizure does not transfer formal ownership (), but it does deprive the owner of the essential attributes of ownership, namely use, enjoyment, and disposal, leaving a title empty of real content.²⁸²

²⁷⁶ Witness Statement of Mr. Valdez, ¶¶ 23-24.

²⁷⁷ Reply, ¶ 321.

²⁷⁸ Appeal Judgment 87/2020, p. 17. **C-0029**.

²⁷⁹ Federal Civil Code, Article 830. **R-0141**.

²⁸⁰ Counter-Memorial, ¶ 244

²⁸¹ Reply, ¶ 334.

²⁸² Direct Appeal in review 2705/2015 decided by the First Chamber of the Supreme Court of Justice of the Nation, ¶ 59. **C-0474**.

301. The enforcement of Appeal Judgment 87/2020 was carried out in accordance with Mexican law. It is important to bear in mind what happened from the time Metalín attempted to designate the “Dormidos” concession as attachable property (insufficient to cover the debt) until the formal registration of the attachments on 18 concessions in August 2024.²⁸³

302. On July 7, 2022, “that is, approximately one month before South32 notified SVB of its intention to withdraw from the Project,”²⁸⁴ bank accounts and facilities in Sierra Mojada had already been seized. Subsequently, the June 2023 extension extended the attachments to virtually all relevant concessions. Therefore, although the Claimant asserts that it “remained the owner,” as of July 2022, it had lost actual and effective control of the investment.²⁸⁵

303. The seizures were not a minor procedural formality, but rather the direct consequence of Metalín's breach and a reflection of questionable practices that the company had already exhibited in the past, as in the case of Mineros Norteños. Far from being a protected investment, the Sierra Mojada Project was already legally compromised and economically unviable before the critical date of arbitration (i.e., June 28, 2023).

3. On the manner of Minera Metalín's operation in Sierra Mojada

304. Minera Metalín had lost effective control of its investment before August 31, 2022, the termination date of the Option Agreement with South32.

305. The judicial seizure was a direct consequence of a final judgment in favor of the Valdez family, which Metalín never complied with. This pattern of non-compliance is not new.²⁸⁶ It also failed to comply with Mineros Norteños, arguing that the claim faced by Metalín was time-barred, even though the Mexican courts had determined that Metalín was obliged to commence work four years after the 1997 contract and to pay royalties. Similarly, in the case of the Valdez family, Metalín ignored a final judgment against it.

306. Another constant pattern of Metalín has been the delay of trials. It is not unreasonable to assume that the intention behind the “negotiations” between Metalín and the Valdez family was

²⁸³ Counter-Memorial, ¶¶ 246-247 and 253-255.

²⁸⁴ Counter-Memorial, ¶ 249.

²⁸⁵ Counter-Memorial, ¶ 349.

²⁸⁶ Witness Statement of Mr. Valdez, ¶¶ 6 and 32-33.

more to gain time than to resolve the conflict on its merits.²⁸⁷ With the Valdez family, it repeated the strategy: despite a final judgment, it prolonged the litigation through appeals, motions, and counterclaims, which was even noted by the court itself when it pointed out the use of frivolous appeals.²⁸⁸ This conduct was also evidenced by the message dated July 18, 2022, from Mr. Tim Barry to Mr. Antonio Valdez,²⁸⁹ which reveals Metalín’s questionable behavior and their repeated non-compliance.

307. The cancellation of the BBVA bank account following the seizure order reinforces the argument that Metalín lacked the assets available to meet its obligations, whether due to fraudulent management or financial mismanagement.²⁹⁰ It is concerning that the Claimant lightly states that “Mexico’s assertion that Minera Metalín attempted to hide assets is false”, based solely on an October 2022 email sent by Minera Metalín’s Mexican lawyer to Silver Bull’s CFO, stating that the account that had been seized had been inactive since 2021 and was closed by the bank in 2022.

308. The record shows otherwise. On July 7, 2022, the seizure was admitted; on July 12, 2022, an official letter was sent to the banking institution, on July 14, Metalín filed a brief, and finally, on August 30, 2022, the bank notified that it was impossible to comply with the seizure because the account had been canceled on July 15 of that year.

309. The Claimant’s explanation is simply not credible. It is unacceptable that a diligent CFO was unaware of the status of the accounts of a project that the company itself describes as strategic.²⁹¹ Mr. Richards’ witness statement shows that the financial management of the Project was delegated to the representative in Mexico, evidencing a lack of interest and corporate control. The Claimant’s explanation is simply not credible.

310. In this context, the termination of the Option Agreement and South32’s departure did not result from the 2019 Demonstration or any government action, but rather from the loss of control over the Project’s concessions and assets caused by the Claimant’s own breaches of contract and the enforcement of a court judgment.

²⁸⁷ Witness Statement of Mr. Valdez, ¶¶ 35, 37, 40, 43, and 45.

²⁸⁸ Witness Statement of Mr. Valdez, ¶¶ 28-30.

²⁸⁹ Message from Tim Barry to Antonio Valdez dated July 18, 2022. **R-0048**.

²⁹⁰ Counter-Memorial, ¶ 250.

²⁹¹ Memorial, ¶ 2.51.

311. The reasonable doubt between the termination of the Option Agreement and the seizures resulting from the Valdez lawsuit shows that the conflict with Mineros Norteños was an independent social issue. In its Reply, the Claimant implicitly acknowledges that the 2019 Demonstration and the Valdez Lawsuit have separate effects. Additionally, it acknowledges that, even if the 2019 Demonstration had not occurred, as a result of the ruling in favor of the Valdez family and the resulting debt, it may have had to dispose of the Sierra Mojada Project to pay the debt, because the reality is that there is no factual evidence of the viability of the Project that Silver Bull called “Mexico’s next big silver story”.²⁹²

312. It is logical that knowledge of the judgment against Metalín and the subsequent seizures of the Sierra Mojada Project would lead to South 32’s exit, since Metalín would lose control of the Project.

313. In its Reply, the Claimant reinforces the argument that Silver Bull had poor management. No mining company with a true vision of success, faced with serious financial difficulties, would have decided to retain three concessions whose usefulness was marginal, simply because, in the words of Tim Barry, they were “nice to have”.²⁹³ Their retention reveals poor management in light of the inefficient use of the company’s limited financial resources.

4. Status of the enforcement proceedings

314. The Claimant devotes several paragraphs of its Reply to pointing out that, even if the Valdez family were to execute the seized assets, the DGM would have to “revoke the concession and authorize the transfer of rights to a third party”.²⁹⁴

315. To this end, the Claimant cites the Mining Law, which establishes in Article 23 that the Ministry of Economy, through the DGM, may authorize the transfer of ownership of mining concessions.

316. However, the Claimant fails to point out two important issues: i) the Mining Law refers to this power of the DGM in a discretionary manner by using the word “may”; and ii) the DGM’s analysis will be limited to verifying that the beneficiary “pays the corresponding fees and complies

²⁹² Reply, ¶ 342. *See also*, Memorial, ¶ 2.31.

²⁹³ Reply, ¶ 316.

²⁹⁴ Reply, ¶ 341.

with the requirements set forth in the original concession”. Article 23 of the Mining Law itself states:

Article 23.- The Ministry may authorize the transfer of ownership of mining concessions. To this end, the Regulations must specify the procedure to be followed jointly by the owner and the new beneficiary.

The Ministry may authorize the transfer of ownership of the mining concession once the beneficiary of the transfer pays the corresponding fees and complies with the requirements requested for the original concession. Such transfer shall be registered in the Public Mining Registry. In the event of non-compliance with obligations prior to the transfer of ownership, the person transferring and the beneficiary of the transfer shall be jointly and severally liable.²⁹⁵ Emphasis added.

317. It is clear that, contrary to what the Claimant seems to suggest, the DGM’s analysis is limited to compliance with matters of form, not substance.

318. In any case, it is important to note that the analysis of the transfer of ownership of mining concessions mentioned above, as drafted in Article 23 of the Mining Law, is oriented toward transfers agreed upon by private parties, for example, in contracts for the assignment of rights.

319. The Respondent does not suggest that the DGM should or should not carry out such an analysis; in any case, that would have to be determined by that authority in the exercise of its discretionary power provided for by law. However, in the case of the Valdez trial, it is important to note that any change of ownership would be the result of a court order, which must be complied with by any administrative authority.

320. Likewise, the Claimant cites section V of Article 42 of the Mining Law for the alleged cancellation of the concessions as part of the change of ownership. Cancellation is clearly not applicable in this case. Once again, the Valdez case led to the enforcement proceedings of the judgment issued in their favor. This implies that the concession titles should change ownership in order to comply with the judgment against Metalín. The cancellation of the concessions would result in the concessions ceasing to exist, which is clearly not the purpose of an enforcement proceeding.

321. In any case, according to the procedure described by the Claimant, on August 21, 2024, the seizure of the concessions was registered with the Public Mining Registry.

²⁹⁵ Mining Law, Article 23. **R-0012**.

322. Even considering the need for authorization from the DGM, the enforcement proceedings are already at an advanced stage. This is confirmed by the adjudication of the properties indicated in paragraph 248 of the Counter-Memorial, which constitute Metalín's offices. Likewise, the enforcement proceedings for the concessions that make up the Sierra Mojada Project are at an advanced stage and can no longer be amended by Minera Metalín. This is confirmed by Mr. Antonio Valdez:

Metalín can no longer cover the debt because it did not voluntarily comply with the judgment within the time limit granted to it.²⁹⁶

323. The Claimant also suggests that even if the DGM changed the ownership of the concessions, Silver Bull would still have the amparo proceeding as a last resort to fight it.²⁹⁷

324. The Respondent views this assertion by the Claimant with concern, as it would seem to suggest that the amparo proceeding could be used to challenge any decision by the First Civil Judge of Torreón regarding the procedure for the enforcement of Appeal Judgment 87/2020. This would be incorrect and questionable.

325. The Respondent does not question or comment on the right of any person who considers themselves aggrieved to file an amparo lawsuit. However, it considers that, in any case, the only thing that could be analyzed in a possible amparo—in the terms proposed by the Claimant—would be precisely the actions of the DGM, which, once again, would be acting in compliance with a court order of execution. It would appear that the Claimant in this arbitration, like Metalín with Mineros Norteños and the Valdez family, is only seeking to delay the fulfillment of its obligations.

G. Claimant's Request for Adverse Inferences Is Unfounded

326. Claimant requests that adverse inferences be drawn regarding the following points:²⁹⁸

- Documents prepared by the Municipal Trustee, the Public Prosecutor's Office, and the police officers do not support Mexico's assertion that the first blockade was peaceful or that Mineros Norteños ended it voluntarily.

²⁹⁶ Witness Statement of Mr. Valdez, ¶ 24.

²⁹⁷ Reply, ¶¶ 341-342.

²⁹⁸ Reply, ¶¶ 12-24.

- Documents from Deputy Borrego would allegedly show that he actively coordinated and supported the second blockade, in collusion with Mineros Norteños.
- Documents from various state authorities would allegedly show that Mexico was sufficiently warned in advance about the second blockade and decided not to intervene, despite having the means to do so.
- Documents on other mining blockades would allegedly show that Mexico has intervened and imposed criminal sanctions in similar cases, allowing the conclusion that SVB was treated less favorably.
- Documents from prosecutors' offices, police forces, and state agencies would allegedly show that the lack of action in relation to the second blockade resulted from political orders, particularly from Deputy Borrego, suggesting undue political interference in judicial or public security decisions.

327. No adverse inferences should be drawn against Respondent for the following reasons: (i) Claimant's request for adverse inferences seeks to remedy its own burden of proof and evidentiary standard; (ii) Mexico has produced all documentation available; and (iii) Mexico is legally precluded from producing "pending" criminal files, which have always been available to Claimant, as discussed *above*.²⁹⁹

328. First, Claimant has brought claims that depend on a high evidentiary threshold;³⁰⁰ however, unable to meet its burden of proof, Claimant has filed a request for adverse inferences to compensate for its own shortcomings.

329. This is not the first time that a Claimant has sought to rely on adverse inferences to support its claims; however, international tribunals have recognized that "the graver the charge, the more confidence there must be in the evidence relied on."³⁰¹ In other words, in the absence of

²⁹⁹ See Section E *above*.

³⁰⁰ Reply ¶ 15-16. For example, demonstrating the Mexican state's collusion with acts that they claim are unlawful, as well as the alleged action of those authorities in response to the alleged unlawful acts.

³⁰¹ The Case Concerning Oil Platforms (Iran v. U.S.), Separate Opinion of Judge Higgins, 2003, ¶ 33. **RL-0051.**

evidence to support Claimant's serious allegations, it seeks to obtain adverse inferences international tribunals have recognized that "burden of proof" and "evidentiary threshold."

330. The first of these standards, the burden of proof, is based on the principle of *onus probando incumbit actori*, which requires a party making an allegation to prove it.³⁰² The evidentiary standard, in turn, refers to the degree of "proof" required to establish a fact or allegation, that is, the amount of evidence necessary to prove a disputed matter.³⁰³ For example, in the case of bad faith, it has been recognized that the evidentiary threshold is particularly high,³⁰⁴ which would be difficult to satisfy by Claimant's mere assertions.

331. However, the Claimant's claims are futile since this strategy has already been rejected by other investment tribunals, which have indicated that allegations of "incomplete evidence" are insufficient to shift Claimant's burden of proof.³⁰⁵

332. Therefore, Mexico requests that the Claimant's request for adverse inferences be dismissed, especially considering the nature of the Claimant's requests and the role that inferences would play in the current case, which demonstrates the proper justification for Respondent's document production. In this regard, and for the convenience of the Tribunal, the most important elements of this stage are summarized in the following sections:

1. The Respondent produced all of the requested documentation

333. In the context of the production of documents ordered by the Tribunal in Procedural Order No. 3 (PO3), the Claimant has made serious allegations about Mexico's alleged failure to comply with its document production obligations, in contravention of both PO3 and the IBA Rules on the

³⁰² This has been recognized in the *Avena* case. See, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, ¶ 55. **RL-0048**. ("[b]oth Parties recognize the well-settled principle in international law that a litigant seeking to establish the existence of a fact bears the burden of proving it").

³⁰³ The Tribunal in *Rompetrol v. Romania* stated it as follows: "[T]he burden of proof defines which party has to prove what in order for its case to prevail; the standard of proof defines how much evidence is needed to establish either an individual issue or the party's case as a whole." *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013, ¶ 178. **RL-0050**.

³⁰⁴ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Award, August 27, 2009, ¶ 143. **RL-0111**. ("The Tribunal further considers that, as argued by the Respondent, the standard for proving bad faith is a demanding one, in particular if bad faith is to be established on the basis of circumstantial evidence.")

³⁰⁵ *Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, May 29, 2021, ¶ 728. **RL-0112**.

Taking of Evidence. According to the Claimant, Mexico's production has been “fundamentally deficient”, has obstructed its ability to prepare its Reply, and reflects a pattern of bad faith conduct in previous arbitrations. Among the main issues raised, the Claimant argues that:

- Mexico has produced only four documents relevant to the disputed facts, two of which were already part of the file.
- No searches were allegedly conducted in the correct agencies, with the relevant custodians, or in the relevant repositories.
- Mexico allegedly failed to explain why documents that, in the Tribunal's opinion, were “probably in existence” were not located.
- The use of privilege and confidentiality to withhold Investigation File 902/2019 would be inadmissible and contrary to the Tribunal's previous ruling.
- In this case, Mexico would be repeating a “modus operandi” of evading document production already observed in other ICSID cases.

334. Clearly, this is not the case, and to explain why, Mexico, through its communication of April 14, as well as in its previous communications, developed the following points.

a. Good faith compliance with PO3 and the IBA Rules

335. The Respondent conducted exhaustive and reasonable searches of physical, digital, institutional, and key officials’ archives, within the domestic legal framework and in accordance with the IBA Rules. These documentary searches were carried out between January 23 and February 20, 2025, in multiple federal, state, and municipal agencies, including: The General Directorate of Mines (Ministry of Economy); the Attorney General's Office of the state of Coahuila (in the Monclova and San Pedro offices); the Secretariat of Public Security of the State of Coahuila; the Directorate of Internal Affairs; and the Government of the State of Coahuila (Correspondence and Archives Unit).³⁰⁶

³⁰⁶ As the Respondent has pointed out, and as the Tribunal will note, the requests were addressed to those agencies that, in accordance with their legal powers, were competent to have the required documentation, if it existed. This was done in accordance with the principle of legality, according to which authorities may only exercise the powers expressly conferred upon them by law. *See Pawlowski AG and Project Sever s.r.o. v. Czech Republic, ICSID Case No. ARB/17/11*, November 1, 2021, ¶ 363. **RL-0113.**

336. It should be noted that the volume of documents found is not evidence of bad faith or negligence on the part of the respondent, but rather the result of the material non-existence of the documents that the Claimant expects to exist. To claim otherwise would subject the Respondent to a *probatio diabolica*, that is, to compel it to prove an indefinite non-existence.

b. Unfounded criticism regarding the location of documents

337. The Respondent has already timely addressed the criticisms raised by the Claimant:

- Request No. 1 – Documents prepared by the Municipal Trustee and public officials on September 4, 2016: The Claimant requested documents related to the discussions or responses recommended by the Ministry of Economy (Economy) or its General Directorate of Mines (DGM) regarding the Second Blockade, including those related to a meeting on December 13, 2019, between Minera Metalín and the Undersecretary of Mining, Mr. Quiroga. The Tribunal ordered the production of documents in the possession, custody, or control of Economy or the DGM. However, the Claimant argued that only a search was conducted at the DGM and that there is no evidence that Economy conducted an independent search, which, in its view, constitutes a failure to comply with the order. In response, the Respondent explained that, in accordance with the legal powers established in the Organic Law of the Federal Public Administration and the Internal Regulations of the Ministry of Economy, it concentrated its search efforts on the DGM, as it is the competent unit on mining matters. The search was formally conducted between January 23 and February 5, 2025, and as a result, Official Letter No. SE/610/1963/2021 was located and produced.
- Request No. 5 – Documents from Deputy Borrego relating to the second blockade. In Request No. 5, the Claimant requested the production of documents prepared by or on behalf of four specific state entities: the Coahuila State Citizen Service, the Public Prosecutor's Office in Química del Rey, and the Coahuila Force, in relation to the requests for intervention made by Minera Metalín on September 3, 2019, to prevent a second illegal blockade. The Tribunal granted this request for the period between September 3 and December 31, 2019. However, the Claimant alleged that

Mexico limited itself to searching the physical and digital archives of the Coahuila State Government and the General Directorate of Internal Affairs in Saltillo, without explaining why those repositories would cover all the requested documents, even though the aforementioned entities are located in different locations.

- For its part, Mexico explained that the vagueness and imprecision of the Claimant's request prevented it from clearly identifying the relevant custodians or repositories. Nevertheless, in an effort of good faith, on January 23, 2025, a formal request was made to the Government of the State of Coahuila to conduct a search of the physical and digital archives of its Correspondence and Archives Unit, which was carried out between January 23 and 31, 2025, without positive results. Similarly, on the same day, a request was sent to the Secretariat of Public Security of the State of Coahuila, and between January 23 and February 20, 2025, the corresponding search was carried out in the archives of the General Directorate of Internal Affairs in Saltillo, without any relevant documents being located.
- Request No. 6 – The Claimant specifically requested all documents that had been prepared or compiled by the Química del Rey Public Prosecutor's Office that recorded the September 5, 2019, meeting with Minera Metalín, and requested that those documents cover the period from September 5 to December 31, 2019. The Tribunal approved that request for that period. However, Mexico searched for those documents only in the archives of the Attorney General's Office for the central region of Coahuila, in Monclova, without clarifying why it did not also search other locations such as the Saltillo Delegation, which apparently also keeps documents from the Public Prosecutor's Office in Coahuila, raising doubts as to whether that search was complete or adequate.
- Given the ambiguity, the Respondent requested that the Attorney General's Office of the State of Coahuila—which is the superior authority of the Química del Rey Attorney General's Office—conduct an official search of the archives of the Monclova Regional Delegation. This search was conducted between January 23 and February 11, 2025, and after reviewing those files, no documents were found that

matched those requested by the Claimant, i.e., no records or minutes of that meeting or related documents were found for that period.

- Request No. 7 – The Claimant requested documents that had been prepared or received by or on behalf of Mr. Irágu, coordinator of all Public Prosecutors in the state of Coahuila, or by the offices of the Public Prosecutor in Química del Rey, Torreón, and San Pedro de las Colonias, in response to requests for assistance made by Minera Metalín on September 8 and 9, 2019, to lift a continuous blockade. The Tribunal approved this request for the period from September 8 to December 31, 2019. Mexico claimed to have searched for these documents in the archives of the Regional Delegations of the Attorney General's Office located in Monclova (central region) and San Pedro (Laguna II region), but did not explain why the search was not conducted in the central archive in Saltillo or why it was not specifically searched for in the personal files of Mr. Irágu, identified as the main custodian of the information.
- In response, the Respondent explained that, given the lack of precision in the request, it decided to act in good faith by formally requesting the Coahuila State Attorney General's Office to conduct an official search between January 23 and February 18, 2025, in the archives of the Regional Delegations of Monclova and San Pedro. After thoroughly reviewing those files, no documents were found that matched those requested by the Claimant related to requests for assistance in lifting the blockade during the indicated period. This would be consistent with the Claimant's attitude of not resorting to the criminal authorities, due to what can only be described as widespread disdain for them.

338. The foregoing can be summarized as follows: by making vague requests or failing to clearly identify custodians or competent agencies, the Claimant imposed disproportionate burdens on the Respondent, hindering the targeted search it sought. However, the Respondent, with the resources available and to the best of its ability, attempted to obtain the information requested,

thus obtaining results that, while “disappointing” for the Claimant, are extraordinary given the burden placed on the Respondent.³⁰⁷ This exercise is far from what could be classified as bad faith.

339. In conclusion, as in cases such as *B-Mex v. Mexico*, in the absence of grounds for adverse inferences, this Tribunal must dismiss the claimant's claims,³⁰⁸ simply because the evidence does not exist and, therefore, is not and has not been in the possession, control, or custody of the Respondent.

c. References to previous cases are irrelevant

340. The Respondent rejected the comparisons made by the Claimant with other arbitration cases (Coeur Mining, B-Mex, Finley). This is because each case has different circumstances, and it is unprecedented to extrapolate behaviors or generalize conduct without even having access to the files and without contextual analysis, and could have unprecedented consequences in investment arbitration. It is necessary to remember that the principles of procedural law require evaluating the conduct of the parties within the current case, not based on isolated precedents.

d. Deficiencies in the Claimant's own production

341. Following the Claimant's own reasoning regarding the production of documents, the Respondent notes that Silver Bull did not submit documents that, in principle, it should have under its control—such as contracts, plans, and other documents issued in accordance with the law—until after it had submitted its Reply, that is, after realizing the absurdity of its claims in light of its own production of documents. Thus failing to comply with its own legal obligations.³⁰⁹

342. However, even considering the third production of documents, the arguments invoked by the Claimant to oppose the production of documents by Mexico are applicable to its own conduct. Under that logic, it could be accepted that the parties to an investment arbitration promise to

³⁰⁷ Despite these shortcomings, Mexico demonstrated that it made additional and reasonable efforts to respond as fully as possible, including requests to municipalities, Attorney General's Office, and state agencies.

³⁰⁸ *B-Mex, LLC et al. v. the United Mexican States*, ICSID Case No. ARB(AF)/16/3, Award, June 21, 2024, ¶ 150. **RL-0114**.

³⁰⁹ See, for example, request 1, related to communications concerning the Silver Bull and South32 litigation, the absence of which indicates a breach of Silver Bull's obligations under the Agreement between the two parties. See Option Agreement, Clause 6.9. **C-0031**.

produce documents and then fail to deliver anything, or deliver any type of information to simulate compliance with that procedural stage, as the Claimant does.³¹⁰

343. The Claimant's conduct reveals a contradiction: it questions practices in which it itself engages. However, if, despite this, it insists on its claims, one can only conclude that it acted in bad faith or that it considers that the rules it invokes do not apply to it. Below are a couple of deficiencies in the Claimant's production of documents.

- Request No. 1 – This request refers to communications between the Claimant or any related company and South32 in relation to the litigation with the Valdez family. Despite committing to produce the documentation, having a disclosure obligation to South32,³¹¹ , and having a court order,³¹² , regarding the production of information, Silver Bull did not produce any documentation. This contradicts the Claimant's own evidence, which on several occasions treated the Valdez trial as a matter relevant to Silver Bull's development.³¹³
- Request No. 4 – Request 4 refers to those communications, or reports, prepared by Silver Bull regarding the force majeure clause in its Agreement with South32. Silver Bull stated that it had used this clause to suspend its obligations, therefore, it is illogical that the exercise of the clause did not involve an exchange of documents

³¹⁰ See, for example, Respondent's requests 1, 9, 16, 17, 19, and 20.

³¹¹ See Option Agreement, Clause 6.9. **C-0031**. (“Obligations to Inform. During the term of this Agreement, each Silver Bull Party must, and must cause its Affiliates to: (1) promptly deliver to South32 any notice, demand, or other material communication relating to any of the material Assets of the Company (including the Property) or Contractors that it or any of its Affiliates receive; and (2) obtain the prior written consent of South32 to the sending by it or its Affiliates of any notice, demand, or other material communication relating to the Property, the Existing Agreements, or any of the other significant Assets of the Company or Contractors to any third party, including any adjacent property owner or any Governmental Authority, where such notice, demand, or other material communication is likely to have a material adverse effect on the Property, the Company, Contractors, or the Option, or South32's rights and interests (direct or indirect) under this Agreement.

³¹² Procedural Order No. 3, Annex B, p. 7.

³¹³ See Minutes of a Meeting of the Board of Directors of Silver Bull Resources Inc., September 12, 2022, p. 2. **R-0142**. Minutes of a Meeting of the Board of Directors of Silver Bull Resources Inc., January 2019, p. 3. **R-0143**. Minutes of a Meeting of the Board of Directors of Silver Bull Resources Inc., March 2019, p.3. **R-0144**.

between the Parties.³¹⁴ Once again, the Claimant offered to provide documents to avoid a court order, but did not deliver any.

- Request No. 5 – Request 5(d) referred to the actions taken to validate the insurance for theft or damage to the properties located in Sierra Mojada. Once again, despite an express order from the Court, the Respondent did not provide any information, as it never enforced said insurance policies. This demonstrates Silver Bull's general disregard for the Mexican system, which is why it also failed to follow due criminal process.
- Request No. 8 – This request refers to the delivery of internal or external communications regarding attempts to sell the Project to third parties to recover part of the alleged damages, including feasibility discussions, offers, and responses, between September 8, 2019, and the present. The Court ordered the production of the written offers as they could be useful for the purposes of the quantum in the dispute. The Claimant did not produce a single document.
- From the Silver Bull board of directors meeting on December 7, 2021—a date within the search period—it appears that “[...] there is another group that is interested in purchasing the Project.”³¹⁵ Unless that group disappeared after that date, or the information related to that offer is contrary to Silver Bull's interests in this Court, there is no reasonable explanation for the failure to produce those documents.
- Request No. 9 – This request was made for documentation proving how the Claimant obtained, under what conditions and with what encumbrances (or without them) the mining concessions and rights related to its project. In this regard, Silver Bull undertook to produce documents on the ownership of Veta Rica and La Inglesa, and the Tribunal ordered any purchase agreement or other document relating to the rights it claims to have over the 20 mining concessions, as well as any document proving the existence of encumbrances on them.

³¹⁴ Complaint, ¶¶ 2.203-2.205; Reply, ¶ 289.

³¹⁵ Minutes of a Meeting of the Board of Directors of Silver Bull Resources Inc., December 7, 2021, p.3. **R-0145.**

- Request No. 16 – The request refers to, and is ordered with respect to, those documents that prove the nationality of investors Víctor García Jiménez and Víctor Manuel García Palacios; documents that would prove, or fail to prove, Silver Bull's ownership of the investment that is the subject of the dispute. Despite the relevance of these documents,³¹⁶ Silver Bull does not appear to have them, or pretends not to have them because the [Mexican] nationality of both investors would be to its detriment.
- Request No. 17 – Request 17 refers to those documents and communications from the Claimant or its affiliates regarding analyses, valuations, or due diligence related to the Sierra Mojada Project between 2009 and April 2010, prior to the merger with Metalline. As has been pointed out by various courts, “prudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal,”³¹⁷ this obligation implies, at a minimum, having the documents on the valuations and possible results of a merger.
- Request No. 19 – Request 19 is related to communications and documents from the Claimant or its affiliates regarding litigation related to the 20 concessions of the Sierra Mojada Project, including the file of civil trial 966/2014 against Metalín. Notably, it is Ordinary Civil Trial No. 966/2014 that Silver Bull uses to argue that it does not owe royalties, which is why it is surprising that, despite this being the basis of its claims, it does not have a single document to share, despite the Court's decision requesting the documents in that ordinary trial.
- Request No. 20 – The court orders the Claimant to disclose to the Respondent the compensation rates agreed upon with the witnesses appointed for their testimony and preparation, as well as any expenses covered beyond what is reasonable. The court's

³¹⁶ Among other things, this documentation serves to: i) Verify compliance with legal requirements, especially regarding foreign investment; ii) Clarify whether there were any changes or transfers of shares that could affect the ownership of the rights claimed; iii) Determine the traceability of share control, which is essential for assessing the legitimacy of the claim.

³¹⁷ *Alasdair Ross Anderson et al. v. Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, May 19, 2010, ¶ 58. **RL-0115**. *SunReserve Luxco Holdings SRL v. Italy*, SCC Case No. 132/2016, Final Award, March 25, 2020, ¶ 714. **RL-0116**. *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, November 1, 2021, ¶ 293. **RL-0113**.

order is twofold: i) with respect to the compensation rates agreed upon with the witnesses, and; ii) with respect to expenses beyond what is reasonable. The Claimant did not produce any documents.

344. In light of the foregoing, and given that the Claimant abused the exercise of good faith involved in the document production stage by agreeing to produce information only to mislead the Tribunal, the Respondent requests that the Tribunal make the following adverse inferences.

- Pursuant to Request No. 1, and since the Claimant did not produce the communications between it or its related companies and South32 regarding the litigation with the Valdez family, the Tribunal is requested to infer that such communications existed and would have shown that South32's departure was largely due to SVB losing its “investment” in the Valdez trial.
- Pursuant to Motion No. 4, and considering that the Claimant did not produce any documents or reports on the application of the force majeure clause in its Agreement with South32, it is requested that the Tribunal infer that relevant communications did exist, which would have shown that the exercise of the clause does not justify the suspension of its obligations or its version of events.
- Pursuant to Request No. 5 (d), and given that the Claimant did not submit information on the activation of insurance for theft or damage to property in Sierra Mojada, it is requested that the Tribunal infer that it did not enforce such insurance or exhaust the available legal remedies, which evidences a lack of diligence and diminishes the credibility of its allegations regarding the damages claimable in the dispute.
- Pursuant to Request No. 8, and since no documentation was produced on attempts to sell the Project to third parties between September 8, 2019, and the present date, despite the fact that the board of directors reported interest from third parties, it is requested that the Tribunal infer that there were indeed relevant offers and communications, which could demonstrate the viability of the project and contradict the Claimant's narrative of damages.
- Pursuant to Motion No. 9, and considering that the Claimant did not produce contracts, documents, or evidence regarding the ownership and encumbrances of the

20 mining concessions, it is requested that the Court infer that the Claimant does not have full ownership of the concessions or that there were encumbrances, weakening its claim regarding the investment.

- Pursuant to Request No. 16, and since the Claimant did not produce documentation about the nationality of investors Víctor García Jiménez and Víctor Manuel García Palacios, it is requested that the Tribunal infer that control of the company was limited.
- Pursuant to Request No. 17, and given that the Claimant did not produce documents of analysis, valuations, or due diligence prior to the merger with Metalline, it is requested that the Tribunal infer that it did not perform an adequate due diligence before committing funds, which shows, among other things, that its valuation was not performed properly.
- Pursuant to Request No. 19, and considering that the Claimant did not produce documents on the litigation related to the concessions (including ordinary lawsuit 966/2014), it is requested that the Tribunal infer that the documents would have shown inconsistencies in its arguments, among other things demonstrating its own fault in the resolution of the conflict with MN.
- Pursuant to Request No. 20, and given that the Claimant did not produce documentation on fees and expenses paid to witnesses, it is requested that the Tribunal infer that there are unjustified payments or expenses, affecting the transparency, good faith, and credibility of the testimonies.

2. The Respondent is not hiding information related to the 2016 and 2019 Manifestations

345. In its Reply, the Claimant states that “[r]ather than explain why it took no action, Mexico’s defense is therefore to conceal the contemporaneous record and shift the blame onto the Claimant.”³¹⁸ This is not the case. On the contrary, and as the Respondent has pointed out, the Mexican authorities have acted within the scope of their powers.

³¹⁸ Reply, ¶¶ 4, points 4 and 19.

346. As can be seen from Mr. Islas' expert report, there was no crime to prosecute and, consequently, it was not legally possible to use public force, much less in the terms requested by the Claimant. Additionally, Mr. Islas' analysis shows that the Claimant's inactivity "restricted the authority's actions and limited the analysis of the legitimate use of force and the investigation."³¹⁹

347. Once again, and as the criminal expert points out, the use of public force is subject to the principles of legality, necessity, suitability, and proportionality, and is subject to reasonable application in accordance with the situation,³²⁰ therefore, the State's actions could not be violent, but rather had to be subject to criminal proceedings, which the Claimant decided to abandon and was reluctant to pursue from the beginning.³²¹

3. The Tribunal should not give weight to evidence obtained illegally or without consent

348. In discussing about the evidence presented by the Claimant, the Respondent is forced to oppose to the presentation of evidence that, by its nature, cannot be admitted or considered by this Tribunal.

349. Specifically, the Claimant submitted Exhibits C-0333-SPA to C-0338-SPA, which consist of recordings and their respective transcripts of "private" conversations between Juan Manuel López Ramírez and several members of the Mineros Norteños cooperative. All of the evidence presented by the Claimant, which was obtained while this arbitration was already underway, stands out for its biased character³²² and its irregular acquisition due, among other things, to the use of alcoholic beverages to obtain information³²³ and the lack of consent on the part of the persons

³¹⁹ Report of Mr. Islas, ¶ 196.

³²⁰ Counter-Memorial, ¶¶ 195-224.

³²¹ Email from Mr. Brian Edgar to Juan Manuel, Jorge Sánchez, and Tim Barry (Re_MN), September 6, 2019. **R-0146**. ("Suing in Mexico is pointless")

³²² See, for example, Transcript of conversation between Juan Manuel and José Ángel Sifuentes, January 5, 2025, p. 3. **C-0334**. Transcript of conversation between Juan Manuel and Lorenzo Fraire, pp. 11-24. **C-0336**. Transcript of conversation between Juan Manuel and Alfredo Rosales, January 6, 2025, p. 5. **C-0338**.

³²³ See, for example, Transcript of the conversation between Juan Manuel and José Ángel Sifuentes, January 5, 2025, January 5, 2025, pp. 3, 5-6. **C-0334**. They refer to the beer brands "Corona" and "Tecate." Transcript of conversation between Juan Manuel and Alfredo Rosales, January 6, 2025, p. 1. **C-0338**. They refer to a similar transaction and the presence of alcoholic beverages.

who were recorded, who were deceived by an SVB employee who used his job “position” to generate a false empathy with the Mineros Norteños.³²⁴

350. In the Mexican framework, evidence obtained irregularly,³²⁵ obtained directly or indirectly in violation of fundamental rights,³²⁶ or contrary to morality and the law³²⁷ is inadmissible and has no effect. Such is the case with the evidence that was obtained, in a biased manner without consent, in the presence of psychoactive substances such as alcohol.

351. This is reinforced by the Expert Report presented by Mr. Islas, who points out that, due to the violation of fundamental rights, such as the protection of personal data, privacy, private life, or honor, the Claimants's conduct is contrary to law.³²⁸ This is because, among other reasons, information obtained through deception is contrary to the Mexican Constitution and the Federal Law on Protection of Personal Data Held by Private Parties.³²⁹ Additionally, he points out that:

the disclosure and use of the information collected by Silver Bull violates not only the principles of personal data protection, but also fundamental rights recognized in the Constitution and in international instruments such as the International Covenant on Civil and Political Rights (art. 17) and the American Convention on Human Rights (art. 11). The Claimants' actions, in attributing illegal acts without the backing of a competent authority, constitute an unlawful infringement of the privacy, honor, and reputation of the individuals involved.³³⁰

³²⁴ Transcript of the conversation between Juan Manuel and Lorenzo Fraire, pp. 1-2, 18-19. **C-0336**. Juan Manuel points out that “[...] the contact would be with me” to refer to Silver Bull. It is also suggested that a possible financial solution was discussed; *see also* Transcript of the conversation between Juan Manuel and José Ángel Sifuentes, January 5, 2025, p. 1. **C-0334**. Transcript of the conversation between Juan Manuel and Alfredo Rosales, January 6, 2025, p. 6. **C-0338**. He reaffirms his position as an employee of Silver Bull.

³²⁵ Jurisprudence 1a./J. 139/2011 (9th Period), Digital Registry 160509, Judicial Weekly of the Federation, Book III, December 2011, Volume 3, page 2057. **R-0147**.

³²⁶ Isolated thesis 1a. CLXII/2011, Ninth Epoch, Digital Registry 161221, Judicial Weekly of the Federation, Volume XXXIV, August 2011, page 226. **R-0148**. Thesis 1a. CLXVII/2013 (10th Period), Digital Record 2003564, Judicial Weekly of the Federation, Book XX, May 2013, Volume 1, page 537. **R-0149**.

³²⁷ Jurisprudence VII.2o.T. J/1 L (11th), Digital Record 2023915, Judicial Weekly of the Federation, Book 8, December 2021, Volume III, page 2193. **R-0150**. Documentary evidence obtained by electronic means in labor proceeding. As it does not have full probative value, evidence obtained from registration control systems requires further refinement in order to prove the facts it contains.

³²⁸ Report of Mr. Islas, ¶ 164.

³²⁹ Report of Mr. Islas, ¶ 165.

³³⁰ Report of Mr. Islas, ¶ 177.

352. This type of evidence is inadmissible and has been classified as such in cases such as *Methanex v. the United States of America*, in which, in view of the unlawful obtaining of evidence and in accordance with the principles of good faith, the Tribunal determined: *i*) to shift the burden of proof regarding the admissibility of the evidence after it was demonstrated that the evidence presented by the Claimant had been obtained unlawfully³³¹ (as in the case of evidence obtained through deceit or intoxicating liquor), and; *ii*) To reject the admissibility of evidence that has been obtained unlawfully or through improper conduct.³³²

353. It is therefore concluded that documents presented as evidence, which were obtained unlawfully through improper conduct and were maliciously prepared by the Claimant, cannot be admitted as evidence in this arbitration. Admitting this evidence would set a perverse precedent that would encourage conduct such as getting people drunk in order to record them without their consent in order to obtain testimony that is beneficial to one party.

354. Therefore, the Respondent requests that this evidence not be admitted, thereby preserving, among other things, the principles of good faith in investment arbitrations, as well as the fundamental rights of the individuals who were recorded contrary to law.

H. Permits, authorizations, and licenses required for the exploration and exploitation phases

355. The Claimant argues that it complied with obtaining all permits, licenses, and authorizations for the exploration phase and that, where applicable, it would have obtained all necessary permits and licenses for the exploitation phase.³³³ The Respondent agrees that there are regulatory differences for the exploration and exploitation phases, but that does not imply that the Claimant fully complied with the regulations in the exploration phase, much less that the necessary permits and licenses for the exploitation phase would be obtained in the normal course of its project.³³⁴

³³¹ *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, August 3, 2005, ¶ 55. **CL-0169**.

³³² *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, August 3, 2005, ¶¶ 58-59. **CL-0169**.

³³³ Reply, Section 2.12.

³³⁴ Second Report of Mr. Carlos del Razo, ¶¶ 51-52.

356. Regardless of the 18 concessions that the Claimant argues it holds, the viability of the project in the technical or regulatory phase was not assured for the exploitation phase, as there are unaccredited regulatory milestones for both phases. As in the case of *Mineros Norteños*, the Claimant fails to recognize the complex regulatory, social, and corporate framework involved in mining extraction projects.³³⁵

357. As part of the regulatory framework applicable to mining projects, Mr. Del Razo specified that the Mining Law is applicable to the Project, regardless of whether the mining concessions were obtained prior to its enactment.³³⁶ This is based on its nature and constitutional origin, which states that regardless of the granting of the concession, mining legislation is applicable to concessions that existed prior to it,³³⁷ and these do not grant real rights over the concessioned assets.

358. Concessions originate in administrative and constitutional law, which is related to the principle of progressivity of administrative acts and the regulation of concessioned public services.³³⁸

359. Although the Claimant argues that it has fulfilled its obligations during the exploration phase, the reality is that there is no evidence that all of the following have been accredited, such as:³³⁹

- The mine restoration, closure, and post-closure program, which was to be updated within 365 days after the Mining Law came into force in 2023;
- Payments of fees, contributions, royalties, and other considerations;
- Report on the execution and verification of works and tasks carried out; and
- Reports on authorizations, applicable certifications, and legal acts entered into with private parties for the operation of the concession.

³³⁵ Second Expert Report of Mr. Carlos del Razo, ¶ 52.

³³⁶ Second Expert Report of Mr. Carlos del Razo, Section V.

³³⁷ Second Expert Report of Mr. Carlos del Razo, ¶¶ 81-85.

³³⁸ Second Expert Report of Mr. Carlos del Razo, ¶¶ 42-41.

³³⁹ Second Expert Report of Mr. Carlos del Razo, ¶ 43.

360. In addition to the mining requirements, there are other permits and authorizations in other areas that the Claimant also failed to provide evidence of and merely stated that they were not applicable, including: (i) the Environmental Impact Authorization (AIA), and (ii) the Concession Title for the exploitation, use, and utilization of national waters, under Industrial Use in Mining activities.

361. These requirements are essential for the exploitation stage, but their obtaining is not secured in the normal course of the Project. The AIA is obtained through a rigorous procedure in which the environmental impacts are weighed and actions for their remediation are included, this procedure is known as the Environmental Impact Assessment Procedure, which requires the preparation of an Environmental Impact Statement, involving several years of negotiations with the Ministry of Environment and Natural Resources. In most cases, it is not obtained on the first application and requires many adjustments to comply with legislation and be environmentally fit.³⁴⁰

362. For its part, the national water concession is essential for any mining concession, given the characteristic and necessity of having a legal and technically validated source for obtaining water for a mining project. Failure to obtain this permit may result in the cancellation of the mining concession.³⁴¹

363. Other relevant permits include the hazardous waste management permit, which is necessarily linked to mining projects in the exploitation phase and must be reported, as well as the explosives handling permit, which the Claimant argues was not necessary given the exploration mechanism,³⁴² but this is inconsistent with the permits that the Claimant reported to Mineros Norteños that it had to obtain, including the explosives handling permit.³⁴³

364. The fact that these formalities have not been accredited does not prevent the competent authority from reviewing compliance, nor does the fact that there are no penalties imply that the Mexican authority validates compliance and, where appropriate, confirms any non-compliance, with the possibility of imposing penalties or even proceeding with the cancellation of

³⁴⁰ Second Expert Report of Mr. Carlos del Razo, ¶¶ 59-63.

³⁴¹ Second Expert Report of Mr. Carlos del Razo, ¶¶ 64-71.

³⁴² Reply, ¶ 397.

³⁴³ Silver Bull Presentation to Mineros Norteños, October 2015, p. 13. **C-0187**.

concessions.³⁴⁴ However, compliance with these formalities is not proof of a viable project in itself and would only be a step toward generating reasonable expectations for the exploitation period.

III. THE TRIBUNAL HAS NO JURISDICTION OVER THE CLAIMS

A. The Tribunal does not have jurisdiction over claims alleging non-compliance with Article 1105.

365. In its Reply, the Claimant continues to allege that “ Mexico’s breaches of NAFTA Article 1105 span from the imposition of the Continuing Blockade in September 2019 until the present, and arise out of Mexico’s continued failure to take any reasonable action in its power to end it”³⁴⁵ The Claimant argues that: (i) “ as here, the State’s breach is continuing in nature, the limitation period does not start to run until the relevant unlawful activity ceases”;³⁴⁶ and (ii) “ the State is considered to repeat the relevant act or omission day after day, and thus the claimant becomes aware of the breach day after day, thereby renewing the limitation period until the relevant act or omission stops.”³⁴⁷ On this basis, the Claimant argues that Mexico’s alleged “breaches of NAFTA Article 1105 are continuing in nature, have not ceased, and therefore operate to renew the limitation period.”³⁴⁸ However, the only loss or damage allegedly suffered by the Claimant occurred more than two years after the termination of NAFTA.³⁴⁹

366. As the Respondent explains below, the Claimant's arguments are based on the erroneous assumption that a continuing *act* that transcends the termination of NAFTA can give rise to a continuing *breach* of a NAFTA Chapter 11 obligation beyond the termination of NAFTA. This is

³⁴⁴ Mining Law, Articles 54 and 55. **R-0012**. Second Report by Carlos del Razo, ¶ 149.

³⁴⁵ Reply, ¶ 410.

³⁴⁶ Reply, ¶ 411.

³⁴⁷ Reply, ¶¶ 411, 413.

³⁴⁸ Reply, ¶¶ 402, 422, 455 (“Those continuing unlawful acts and omissions began on September 8, 2019, and continue to this day”).

³⁴⁹ Reply, ¶¶ 438 (“the Claimant’s claims under NAFTA Article 1105 arise out of Mexico’s continued and repeated refusal to take reasonable action in its power to protect the Claimant’s investment and to lift the Continuing Blockade, as it did in 2016.1125 This continued and repeated refusal to act is what led directly to the Claimant’s loss of its Project in its entirety, which loss crystallized on 31 August 2022 with the termination of the Option Agreement”), 426 (“Specifically, SVB acquired knowledge of the loss and damage incurred as a result of Mexico’s continuing breaches on 31 August 2022, when South32 terminated the Option Agreement due to Mexico’s refusal to take any action to end the Continuing Blockade for nearly three years.”).

not the case. The substantive treaty protection obligations in NAFTA ceased to be binding on the Parties when they were terminated, superseded, and replaced by those in the USMCA.

367. The Respondent categorically denies that there has been any breach of any NAFTA obligation in this case. However, for purposes of argument, the Respondent notes that the continuing breach of a Treaty obligation can only continue as long as the obligation remains in force and is binding on the Parties to the Treaty.³⁵⁰ With the termination of NAFTA on July 1, 2020, the Parties were released from their substantive obligations under Section A of Chapter 11 of NAFTA with respect to acts and events occurring on or after that date.³⁵¹

368. Therefore, even in cases where a continuing act allegedly caused a continuing breach of Article 1105 of NAFTA, it could not be asserted that such breach *continued* after the termination of NAFTA on July 1, 2020. In the absence of a binding obligation, there can be no breach.³⁵² Consequently, when a Treaty obligation ends by agreement of the Parties, the breach of that obligation cannot *continue*, as the Parties are no longer bound by it.³⁵³ In the future, the continuation of the act alone cannot render the terminated obligation still in force and binding in relation to acts or events occurring after the date of termination. In turn, losses or damages *occurring* after the date of termination, at a time when the obligation is no longer binding, cannot be attributed to or derived from a breach of the obligation.

369. To the extent that a continuing act allegedly violated NAFTA obligations *prior to the entry into force of the USMCA*, Annex 14-C allowed claims for such violations to be submitted to arbitration under the NAFTA dispute settlement mechanism for a period of three years. However, as the Respondent explains below, Annex 14-C did not function as a “survivor clause” or otherwise extend the binding force of the substantive treaty protection obligations contained in Section A of Chapter 11 of NAFTA. Any situation that continues to exist after the entry into force of the

³⁵⁰ Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, Article 13. **RL-0017.**

³⁵¹ Vienna Convention on the Law of Treaties, Article 70, **RL-0018.**

³⁵² Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, Article 13. **RL-0017.**

³⁵³ Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, Articles 13, 14(2) and 14(3). **RL-0017.**

USMCA can only give rise to an alleged breach of the substantive treaty protection obligations under Chapter 14 of the USMCA, to the extent applicable.

370. This is relevant because the Claimant also argues that “the limitation period begins to run only when the investor, or its enterprise, has acquired both knowledge of the alleged breach and knowledge that it has suffered loss or damage as a result of it,” and “when knowledge of these two facts is not simultaneous, the limitation period begins to run from the latter of these facts.”³⁵⁴ In this regard, the Claimant explicitly argues that: “Specifically, SVB became aware of the losses and damages suffered as a result of Mexico’s continuing breaches on August 31, 2022, when South32 terminated the Option Agreement due to Mexico’s refusal to take any action to end the Continuing Blockade for almost three years”; and “as Mr. Barry explains, from that point on, the Project was unviable.”³⁵⁵ The Claimant argues that “a claim will only be time-barred under NAFTA if the investor is aware of both events (i.e., the breach and the loss or damage suffered) before the cut-off date,”³⁵⁶ and “when, as in this case, the investor became aware of the second fact [i.e., the damage or loss incurred] after the deadline [i.e., June 28, 2020], its claim will not be time-barred.”³⁵⁷

371. The Respondent notes that on September 19, 2019, approximately 11 days after the start of the 2019 Demonstration, the Claimant presented South32 with the option to terminate their relationship. In an email addressed to Messrs. Mirek Wozga, Darryl Steane, and Mike Roberts, with a copy to Mr. Sean Fallis, Mr. Tim Barry stated the following:

Following our conversation, I asked Sean to provide an update on expenditure. The breakdown is as follows

1 – \$3.4 million funded to date (out of \$6 million)

2 – Approx \$750K remaining in outstanding bills and costs if we chose to shut down the program (most of this is for drilling completed during August)

3 – \$1.85M in unspent commitment.

4 – We should have a better understanding of MN’s plans post the State Prosecutors visit and **whether or not this will turn into a long siege by Minera Norten**. With this in mind, I am also looking at the results of the drilling, and although we have had some

³⁵⁴ Reply, ¶ 404.

³⁵⁵ Reply, ¶ 426.

³⁵⁶ Reply, ¶ 429.

³⁵⁷ Reply, ¶ 429.

success, I am asking if there is an S32-sized target to be had here (as I am sure you are). Target-wise, we have hit all of our main targets with moderate results (see map below). As a result, **one scenario for us to consider is to finish up the JV and split the remaining expenditures.**³⁵⁸

372. This communication demonstrates that, as early as September 2019, the Claimant was designing on its own and offering South32 the same result³⁵⁹ that it now characterizes as “the Claimant's loss of its Project in its entirety, a loss that crystallized on August 31, 2022, with the termination of the Option Agreement.”³⁶⁰ This communication also calls into question the extent to which the mutual decision to terminate the option agreement was actually attributable to the so-called “continuing blockage” or to the alleged NAFTA violations, which will be addressed in the analyses of the merits and damages below.

373. The fact that the Claimant invited South32 to “consider” this “scenario” in September 2019 suggests that it acquired, or should have acquired, knowledge of the alleged loss or damage well before it occurred in August 2022. When the Tribunal considers that knowledge of the alleged breaches and knowledge of the alleged loss or damage were first acquired before June 28, 2020, the claims under Article 1105 will be time-barred by application of the three-year limitation period. Consequently, these claims would fall outside the Tribunal's jurisdiction *ratione temporis*.

374. On the other hand, the Claimant's position that it “first acquired” knowledge of the alleged loss or damage “on August 31, 2022, upon termination of the Option Agreement”³⁶¹ and its mistaken belief that the breach of Article 1105 continues “to the present”³⁶² have serious implications for the Tribunal's jurisdiction *ratione voluntatis*. This is because the loss or damage

³⁵⁸ Email correspondence dated September 19, 2019, between Mr. Tim Barry and Messrs. Mirek Wozga, Darryl Steane, and Mike Roberts, regarding: “Update and breakdown of expenses,” **R-0081**.

Mr. Mirek, from South32, replied as follows: “Thanks for the update and for providing an overview of the expenses. Let's see how the situation evolves after the State Attorney's visit.”

³⁵⁹ Complaint, ¶¶ 2.208-2.210 (“On August 31, 2022, the parties entered into a mutual termination of the Option Agreement (“Termination Agreement”). ... As reflected in the Termination Agreement, South32 agreed to pay SVB a sum of US\$518,000. This amount represented US\$175,000 for the rehabilitation of the project site and the preparation of environmental reports, and US\$343,000 for the reimbursement of direct expenses related to the project. ... As Messrs. Barry and Edgar point out, the Termination Agreement marked the end of the Sierra Mojada project, which culminated in SVB losing its entire investment in the project”).

³⁶⁰ Reply, ¶ 438.

³⁶¹ Reply, ¶ 426.

³⁶² Reply, ¶¶ 410, 422.

that allegedly occurred when the Option Agreement was terminated, or that arose after the termination of the Option Agreement, took place more than two years after Article 1105 ceased to be binding on Mexico. No breach of Article 1105 could occur in relation to acts or events that took place after July 1, 2020. As of that date, the substantive obligations of Chapter 11 of NAFTA were terminated, superseded, and replaced by those of Chapter 14 of the USMCA, which became binding on the Parties. In this regard, the obligations of Article 1105 of NAFTA were replaced by those of Article 14.6 of the USMCA. There was no “continuing violation” of Article 1105 that would lead to the termination of the Option Agreement on August 31, 2022.

375. The loss or damage must be “suffered [...] as a consequence of, or arising from” the breach of a binding obligation, and not simply from the underlying factual situation. In 2022, it cannot be asserted that the loss or damage allegedly suffered when the Option Agreement was terminated, or that occurred after the termination of the Option Agreement, was suffered as a result of, or arose from, a breach of Article 1105 of NAFTA. As discussed below, Annex 14-C did not extend the binding force of the substantive protection obligations of the Agreement contained in Section A of Chapter 11 of NAFTA, and does not allow the Claimant to submit such a claim to arbitration. Therefore, the claims would fall outside the Tribunal's *ratione voluntatis* jurisdiction.

1. The Tribunal does not have jurisdiction *ratione temporis* over claims alleging non-compliance with Article 1105.

376. There is no dispute between the parties that June 28, 2020, is the *date dies a quo* or deadline for the claim, three years before the Claimant filed its request for arbitration.³⁶³

377. In its Counter-Memorial, the Respondent explained that the Claimant had or should have had actual or constructive knowledge of the alleged breaches and the alleged loss or damage prior to June 28, 2020. The Respondent explained that the *force majeure* notice that the Claimant sent to South32 on October 11, 2019, demonstrates that the Claimant was aware at that time of the economic consequences of the alleged breaches of Article 1105,³⁶⁴ , even though the scope or quantification was not yet clear.³⁶⁵

³⁶³ Reply ¶ 407.

³⁶⁴ Counter-Memorial, ¶¶ 288-289, 311-322.

³⁶⁵ Counter-Memorial, ¶ 315.

378. ³⁶⁶The Claimant, in its Reply, argues that “when, as in this case, knowledge of the breach and the damage are not simultaneous, the limitation period begins to run only after knowledge of the loss is acquired” and argues that such knowledge was acquired on August 31, 2022, with the termination of the Option Agreement.³⁶⁷ On this basis, it argues that, “[i]rrespective of when SVB first acquired knowledge of Mexico's continuing breaches, the date of its knowledge of the loss and damage incurred falls well within the limitation period.”³⁶⁸

379. The Claimant characterizes as “erroneous” the Respondent’s position that the Claimant should have had knowledge of the alleged loss or damage prior to June 28, 2020. ³⁶⁹ However, as noted above, in the email correspondence sent to South32 on September 19, 2019, just 11 days after the start of the second demonstration, Mr. Barry contemplated “Whether or not this will turn into a long siege by Minera Nortenos,” mentioned the possible option of “shutting down the program,” and proposed, in light of the “moderate results” of “the drilling,” that “one scenario for us to consider is to finish up the JV and split the remaining expenditure.”³⁷⁰ This evidence confirms that, as early as September 2019, the Claimant was not only aware of the alleged loss or damage related to the termination of the Option Agreement, but was actively planning it and proposing it to South32. In light of this evidence, the Claimant cannot suggest that it first became aware of these damages or losses in August 2022. The Respondent contends that, based on the facts on record and the Claimant's extensive experience in the industry and region, it is not credible that the Claimant remained unaware of the alleged loss or damage until August 2022.

380. The Claimant remains evasive as to the date on which it first became aware of the alleged “continuing violations” of Article 1105.³⁷¹ However, in the case of a continuing violation, “the breach nonetheless occurs when the State act is first perfected and can be definitively characterized

³⁶⁶ Reply, ¶ 431.

³⁶⁷ Reply, ¶ 426.

³⁶⁸ Reply, ¶ 437

³⁶⁹ Counter-Memorial, ¶¶ 407, 433-434.

³⁷⁰ Email correspondence dated September 19, 2019, between Mr. Tim Barry and Messrs. Mirek Wozga, Darryl Steane, and Mike Roberts, regarding: “Update and Breakdown of Expenses,” **R-0081**.

³⁷¹ Reply, ¶ 427.

as a breach of the relevant obligation.”³⁷² This is consistent with Article 14(3) of the ICJ Articles on State Responsibility, which provides that “the breach of an international obligation requiring a State to prevent a particular event occurs when the event occurs and continues throughout the period during which the event continues and remains contrary to that obligation.”³⁷³

381. The Claimant itself alleges that the State’s actions have constituted violations of Article 1105 since September 2019. As noted above, it contends that: “Mexico’s breaches of NAFTA Article 1105 span from the imposition of the Continuing Blockade in September 2019 until the present”;³⁷⁴ and “include Mexico’s refusal to exercise the State’s police power at Sierra Mojada to restore SVB to its investment and to end the Continuing Blockade at any point from September 8, 2019, until the present.”³⁷⁵ Mexico contends that it is simply not credible that the Claimant had no actual or constructive knowledge of the alleged violations said to result from the Mexican State’s alleged omissions during the 9 months and 20 days that elapsed between the date the “Second Blockade” began and the *dies a quo* (June 28, 2020). At a minimum, a reasonable third-party investor, subject to Chapter 11 of NAFTA, acting with due diligence (including consultations with legal counsel), would have been aware of this.

382. Furthermore, the Claimant erroneously argues that “Mexico’s breaches of NAFTA Article 1105 in this case are continuing and persist” and that “those continuing breaches thus renew the limitation period.”³⁷⁶ The Claimant’s position is based on a misinterpretation of the interaction between Article 14 of the ILC, Articles 1116 and 1117 of NAFTA, and general principles of treaty interpretation. The NAFTA limitation period begins to run “on the date upon which the claimant first acquired knowledge of the alleged breach and damage, regardless of whether the measure complained of is continuing or complete.”³⁷⁷

³⁷² *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018, ¶158. **RL-0027**

³⁷³ Reply ¶¶ 294-295, citing International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), Chapter IV.E.1, November 2001, Article 14(3), **RL-0017**.

³⁷⁴ Reply, ¶ 410 [emphasis added].

³⁷⁵ Reply, ¶ 422 [emphasis added].

³⁷⁶ Reply, ¶ 432.

³⁷⁷ *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Respondent’s Response to Pleadings 1128, March 3, 2014, ¶ 4. **RL-0117**. *Resolute Forest Products Inc. v.*

a. The Claimant knew or should have known of the loss suffered by the alleged breaches of Article 1105 before the *dies a quo*, June 28, 2020.

383. Regardless of the Claimants' argument that the alleged loss or damage materialized on August 31, 2022, the Claimant had or should have had actual or constructive knowledge of the breach and the respective damages before June 28, 2020. It is unreasonable to assume that the Claimant could have considered that the omission it attributes to the Respondent did not result in a loss until August 2022.

384. While the Claimant dismissed Mexico's argument that it probably had actual knowledge of the damage at the time it sent the *force majeure* notice as erroneous,³⁷⁸ the Claimant also acknowledged that “when it sent the *force majeure* notice – SVB had no basis yet to conclude that Mexico would refuse to take reasonable actions within its power to end the Continuing Blockade or that the damage caused to its investment by that refusal would be irreversible.”³⁷⁹ The Claimant does not explain how an alleged delay or interruption of its operations, including one significant enough to justify *invoking force majeure*, does not cause any loss or raise concerns that such loss is imminent. Furthermore, the Claimant does not explain how it was unaware of such loss or damage during more than nine months of “continuous” delay or interruption.

385. The Claimant cannot credibly argue that there was an impediment to fulfilling its obligations and commitments to South32 for an extended period of more than nine months that did not entail associated losses, or that such repercussions were unknown and could not reasonably have been known during that period.³⁸⁰

386. In fact, although the Claimant alleges that, in October 2019, it “hoped and expected that the situation would be resolved and that Mexico would take reasonable action to lift the Blockade,”³⁸¹ the email message of September 19, 2019 reveals that the Claimant was

Government of Canada, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018, ¶ 158. RL-0027.

³⁷⁸ Counter-Memorial, ¶ 288; Reply, ¶ 433.

³⁷⁹ Reply, ¶434.

³⁸⁰ Reply, ¶434.

³⁸¹ Email correspondence dated September 19, 2019, between Mr. Tim Barry and Messrs. Mirek Wozga, Darryl Steane, and Mike Roberts, re: “Update and Breakdown of Expenses.” **R-0081.**

contemplating “**whether or not this will turn into a long siege by Minera Nortenos,**”³⁸² and had proposed the termination of the Option Agreement for South32 “to consider.”

387. Having contemplated South32's exit from the Option Agreement in September 2019 before having any idea of the duration of the demonstration or the State's response to the demonstrators, the Claimant cannot now argue that it had no knowledge of the alleged loss or damage prior to June 28, 2020. The termination of the Option Agreement on August 31, 2022, was planned, anticipated, and proposed in September 2019.

**b. The characterization of a breach as a continuing breach
does not suspend or extend the statute of limitations**

388. There is no dispute between the Parties that the statute of limitations imposed by NAFTA is clear and unambiguous, and that such period begins to run when the investor, or its enterprise, becomes aware of both the alleged breach and that it has suffered loss or damage as a result thereof.³⁸³

389. However, the Claimant argues that there is a type of violation that is not subject to the three-year statute of limitations set forth in Articles 1116 and 1117 of NAFTA. The Claimant argues that, in the case of violations of a “continuing” nature, the statute of limitations does not begin to run when “the investor first acquired, or should have first acquired,” knowledge of the violation and the alleged loss or damage. Rather, according to the Claimant, “the statute of limitations does not begin to run until the relevant unlawful activity ceases.”³⁸⁴

390. The Respondent does not support the characterization of Mexico's alleged infringements as “continuing” infringements. However, as set forth below, this characterization is irrelevant to determining when the statute of limitations begins to run.

391. The Claimant's interpretation of the limitation period set forth in Articles 1116 and 1117 suffers from three significant flaws. (1) The Claimant relies excessively on international human rights cases to support its position. These cases are neither analogous nor applicable to the present

³⁸² Email correspondence dated September 19, 2019, between Mr. Tim Barry and Messrs. Mirek Wozga, Darryl Steane, and Mike Roberts, regarding: “Update and Breakdown of Expenses.” **R-0081**.

³⁸³ Reply ¶¶ 403-404. Counter-Memorial ¶¶ 284-285.

³⁸⁴ Reply ¶ 411.

arbitration. The ICJ has recognized the right of investment s as a *lex specialis* system within general international law.³⁸⁵ (2) The Claimant disregards the text of NAFTA, including the ordinary meaning of the following terms in Articles 1116 and 1117: “the date on which it first became aware or should have become aware.” (3) The Claimant ignores the subsequent practice of the NAFTA Contracting Parties. Therefore, the Respondent reiterates that the statute of limitations begins to run from the date on which the Claimant first became aware, or should have become aware, of the alleged violation and the loss or damage, regardless of whether the contested action or omission is continuous or complete.³⁸⁶

392. Most of the examples cited by the Claimant to support the proposition that continuing violations renew the limitation period refer to situations in which a State is accused of breaching its international human rights obligations.³⁸⁷ The remedies available in these situations go beyond compensation and can make the difference between a death sentence and life imprisonment.³⁸⁸ In the context of violations of freedom of expression,³⁸⁹ the right to life,³⁹⁰ restrictions on the death

³⁸⁵ *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Dissenting Opinion of Prof. Raúl Emilio Vinuesa, March 31, 2025 [Spanish], ¶83 **RL-0118**. Citing Crawford, James, *The International Law Commission’s Articles on State Responsibility*, Cambridge University Press, 2002, at 307, ¶ 4.

³⁸⁶ *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Respondent’s Reply to Allegations 1128, March 3, 2014, ¶ 4. **RL-0117**.

³⁸⁷ Reply ¶¶ 411-417. *Neville Lewis v. Jamaica*, Inter-American Commission on Human Rights, Case 11.825, Report No. 97/98, December 17, 1998, ¶24 **CL-0195**. *R. De Becker v. Belgium*, Application No. 214/56, Decision of June 9, 1958, Annual Report of the European Convention on Human Rights, 2 (1958-59), p. 222, **CL-0194**. *Peter Blaine v. Jamaica*, Inter-American Commission on Human Rights, Case 11.827, Report No. 96/98, December 17, 1998, **CL-0196**. *Zorica Jovanović v. Serbia*, Case No. 21794/08, Judgment of March 26, 2013, European Court of Human Rights, **CL-0197**.

³⁸⁸ *Neville Lewis v. Jamaica*, Inter-American Commission on Human Rights, Case 11.825, Report No. 97/98, December 17, 1998, ¶ 24 **CL-0195**

³⁸⁹ *M.R. De Becker v. Belgium*, Application No. 214/56, Decision of June 9, 1958, Yearbook of the European Convention on Human Rights, 2 (1958-59), p. 222, **CL-0194**.

³⁹⁰ *Peter Blaine v. Jamaica*, Inter-American Commission on Human Rights, Case 11.827, Report No. 96/98, December 17, 1998, **CL-0196**.

penalty,³⁹¹ and the right to privacy,³⁹² , legal analysis regarding limitation periods has leaned toward the protection of human rights and fundamental freedoms.³⁹³

393. Even in these cases, the context and circumstances surrounding the violation remain relevant in determining whether the applicant has been untimely. For example, in the case of *Zorica Jovanović v. Serbia*, the alleged violation occurred in the context of a disappearance.³⁹⁴ This characterization of a continuing violation, even in the context of human rights violations, does not extend the limitation period indefinitely. The European Court of Human Rights (ECHR) considered that there had to be a point at which the State's inaction with regard to the situation ceased to prolong the limitation period.

However, not all ongoing situations are the same. With regard to disappearances, applicants cannot wait indefinitely before lodging their application with the Court. Where there is a state of ignorance and uncertainty and, by definition, a failure to account for what has happened, if not an appearance of deliberate concealment and obstruction on the part of some authorities, it is more difficult for the relatives of the missing to assess what is happening, or what can be expected to happen. Allowances must be made for the uncertainty and confusion which frequently mark the aftermath of a disappearance. Still, applications can be rejected as out of time where there has been excessive or unexplained delay on the part of applicants once they have, or should have, become aware that no investigation has been instigated or that the investigation has lapsed into inaction or become ineffective and, in any of those eventualities, there is no immediate, realistic prospect of an effective investigation being provided in the future. Where initiatives are being pursued with regard to a disappearance situation, applicants may reasonably await developments that could resolve crucial factual or legal issues. Indeed, as long as there is some meaningful contact between families and authorities concerning complaints and requests for information, or some indication or realistic possibility of progress in investigative measures, considerations of undue delay will not generally arise. However, where there has been a considerable lapse of time, and there have been significant delays and lulls in investigative activity, there will come a moment when the relatives must realize that no effective investigation has been, or will be provided.

³⁹¹ *Neville Lewis v. Jamaica*, Inter-American Commission on Human Rights, Case 11.825, Report No. 97/98, December 17, 1998, **CL-0195**.

³⁹² *Zorica Jovanović v. Serbia*, Case No. 21794/08, Judgment of March 26, 2013, European Court of Human Rights, **CL-0197**.

³⁹³ *M.R. De Becker v. Belgium*, Application No. 214/56, Decision of June 9, 1958, Yearbook of the European Convention on Human Rights, 2 (1958-59), p. 51, **CL-0194**.

³⁹⁴ *Zorica Jovanović v. Serbia*, Case No. 21794/08, Judgment of March 26, 2013, European Court of Human Rights, ¶55. **CL-0197**.

394. The alleged prolonged inaction or alleged ineffectiveness of States in the face of a peaceful demonstration can be compared to their inaction and ineffectiveness in the face of a disappearance. In this context, the question that arises is when the Claimant should have realized “that there is no immediate, realistic prospect of an effective [reasonable state action] being provided in the future.”³⁹⁵ The Respondent reiterates its argument that a prudent investor who was previously aware of the State’s swift and effective conduct during a blockade³⁹⁶ would have developed such awareness with respect to the State’s alleged ineffectiveness or inaction in the nine months and twenty days between the second blockade and the *dies a quo*.³⁹⁷

395. Human rights conventions cannot be considered analogous to investment treaties. The purpose of the relevant treaty and the concerns of the contracting parties are relevant considerations for its interpretation. In the case of *De Becker v. Belgium*, the ECHR held that the legitimate concerns of the contracting parties to ensure protection, order, stability, and peace by avoiding constant litigation over past events were not an obstacle to examining ongoing violations of fundamental rights and freedoms.³⁹⁸ However, the NAFTA parties have categorically denied that ongoing acts extend the statute of limitations.

396. In the *Detroit International Bridge Company v. Government of Canada* case, the latter responded to the allegations brought by the United States and Mexico under Article 1128 on the non-litigating party (NLP), stating that the three NAFTA Parties agreed as follows:

L Continuing acts or a continuing course of conduct does not extend the strict three-year time limitations period in Article 1116(2) and 1117(2) for filing a NAFTA claim. A claim must be filed within three years from the date upon which the claimant first acquired knowledge of the alleged breach and damage regardless of whether the measure complained of is continuing or complete.

The agreement of the NAFTA Parties on how these provisions are to be interpreted should be considered decisive and given considerable weight by the Tribunal.³⁹⁹

³⁹⁵ *Zorica Jovanović v. Serbia*, Case No. 21794/08, Judgment of March 26, 2013, European Court of Human Rights, ¶ 55. **CL-0197**.

³⁹⁶ Memorial, ¶ 2.86. Witness Statement by Mr. López Ramírez, ¶ 8.33.

³⁹⁷ See Counter-Memorial, ¶¶ 291-310.

³⁹⁸ *M.R. De Becker v. Belgium*, Application No. 214/56, Decision of June 9, 1958, Annual Report of the European Court of Human Rights, 2 (1958-59), pp. 50-51, **CL-0194**.

³⁹⁹ *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Respondent’s reply to the allegations under Article 1128, March 3, 2014, ¶¶ 4-5. **RL-0117**. The Tribunal found that it did not have jurisdiction on the basis of an objection raised under Article 1121 concerning

397. In the Respondent’s view, the positions publicly stated by the United States and Mexico in the *Detroit International Bridge Company v. Canada* case, together with the position stated by Canada, establish a consistent and discernible pattern that constitutes a “subsequent practice” within the meaning of Article 31(3)(b) of the VCLT. While the decision in *UPS v. Canada* contradicts this interpretation, it was issued years before the consensus of the NAFTA Parties demonstrated in *Detroit International Bridge Company*. Since 2014, following this consensus, no NAFTA tribunal has determined that continuing acts extend the limitation periods.

398. The Claimant relies on Article 14 of the ILC Articles to support its interpretation.⁴⁰⁰ To the extent that the Claimant has demonstrated that other tribunals have relied on these principles to conclude that, when “the State’s breach is continuing in nature, the limitation period does not start to run until the relevant unlawful activity ceases”⁴⁰¹, it has only done so in the context of violations of human rights and fundamental freedoms under treaties other than NAFTA.

399. In other ICSID decisions and awards, there is only sporadic support for the Claimant’s proposal. On this point, some tribunals have determined that a continuing infringement extends jurisdiction,⁴⁰² while others have determined that the words “first acquired, or should have first acquired” must have *useful effect*.⁴⁰³

waiver and therefore determined there was no need to address the “remaining issues raised by Canada in this jurisdictional and/or admissibility stage.” *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction, April 2, 2015, ¶ 338. **RL-0119**.

⁴⁰⁰ Reply, ¶¶ 411-414. Articles of the International Law Commission on the International Responsibility of States, Article 14(2) and (3), **CL-0081**.

⁴⁰¹ Reply, ¶ 411.

⁴⁰² Reply ¶¶ 418-419, citing *United Parcel Service of America v. Government of Canada*, Award on the Merits, May 24, 2007, paras. 22-24, **CL-0198**, and *Energía y Renovación Holding S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, March 31, 2025, ¶ 246, **CL-0176**.

⁴⁰³ *Carlos Ríos and Francisco Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, January 11, 2021, ¶¶201-203. **RL-0120**; *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018 ¶158. **RL-0027**. (“Articles 1116(2) and 1117(2) of NAFTA refer to the time when the breach ‘first’ occurred. According to the ordinary meaning of the terms used and the object and purpose of the provision (under Article 31 of the Vienna Convention on the Law of Treaties), whether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant. In terms of Article 14(2) of the Articles on State Responsibility, ‘[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.’ But the breach nonetheless occurs when the State act is first perfected and can be definitively characterized as a breach of the relevant obligation. Here the reopening of the Port

400. The ICSID and NAFTA cases cited by the Claimant in support of its argument suffer from critical flaws that detract from their usefulness as interpretive aids in determining when the limitation period begins to run for the purposes of this arbitration.

401. Although the limitation period relevant to the case of *Energía y Renovación Holding, S.A. v. the Republic of Guatemala*⁴⁰⁴ is described in a manner similar to that established in Articles 1116 and 1117 of NAFTA, the facts of the present arbitration are substantially different. As discussed below, the manner in which the respondent State assumed its own responsibility beyond the treaty by signing an agreement with the investor significantly influenced the tribunal's interpretation and approach to the dispute.

402. However, the dissenting opinion in *Energía y Renovación Holding S.A. v. Republic of Guatemala* criticized the majority's interpretation of the date on which the limitation period begins to run, precisely the point on which the Claimant relies.⁴⁰⁵ The majority in the *Energía v. Guatemala* case, like the Claimant in the present arbitration, relied on Article 14 of the ILC Articles, excluding the text of the treaty itself and the broader framework of the ILC Articles.⁴⁰⁶ Professor Raúl Emilio Vinuesa considered that “there is no legal or factual justification for interpreting that the Treaty, implicitly or by omission, grants, for the purposes of defining the conditions and effects of prescription, that differential treatment should be given to alleged continuing violations as opposed to instantaneous violations.”⁴⁰⁷

The present articles shall not apply in the case and to the extent that the conditions of the existence of an internationally wrongful act, the content of the international responsibility of a State or the manner of its implementation are governed by special rules of international law.”

Hawkesbury mill on favorable terms—alleged by the Claimant to constitute a breach of Articles 1102(3) and/or 1105(1)—first occurred no later than September 2012.”) [emphasis added].

⁴⁰⁴ Central America-Panama Free Trade Agreement (2002) Article 10.17. **R-0151**. “Free Trade Agreement between Central America and Panama (2002) “An investor may not file a claim if more than three (3) years have elapsed since the date on which it first became aware or should have become aware of the alleged violation, as well as knowledge that it suffered losses or damages.”

⁴⁰⁵ *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Dissenting Opinion of Prof. Raúl Emilio Vinuesa, March 31, 2025 ¶¶ 81-83. **RL-0118**.

⁴⁰⁶ *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Dissenting Opinion of Prof. Raúl Emilio Vinuesa, March 31, 2025 ¶¶ 65-96. **RL-0118**.

⁴⁰⁷ *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Dissenting Opinion of Prof. Raúl Emilio Vinuesa, March 31, 2025 ¶ 83. **RL-0118**.

The ICJ Report explains that “For the *lex specialis* principle to apply, it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to seclude the other.” (Emphasis added).

The content and scope of the principle of *lex specialis* derogating from *lex generalis* was extensively developed by the ILC in its 2006 report on the Fragmentation of International Law. The report expressly recognizes investment law as a *lex specialis* system within general international law. Nowhere in this Report is the possibility of derogating from a rule of general customary international law through an express rule of a treaty in force between States ignored. Furthermore, the fact that the text of Articles 10.17.2 and 10.18.2 does not distinguish between alleged continuing or instantaneous violations does not authorize the rewriting of the Treaty on the basis of an interpretation contrary to applicable law.⁴⁰⁸

403. Like the Claimant in the *Energia v. Guatemala* case, the Claimant in this arbitration ignores that Article 55 of the ILC Articles provides that “these articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law”.⁴⁰⁹

404. Furthermore, NAFTA entered into force years before the ICJ Articles were published, while the Free Trade Agreement between Central America and Panama (2002) entered into force one year later. Therefore, NAFTA’s silence on the concept of continuing breach cannot be understood as a tacit agreement to treat breaches that can be characterized as “continuing” differently for the purposes of determining the applicable limitation period. More importantly, the NAFTA contracting parties have adopted a position on this point that has the effect of rejecting the application of the majority interpretation in *Energy and Renewal v. Guatemala* on limitation periods for continuing breaches.

405. The arguments presented under Article 1128 in the *Detroit International Bridge Company v. Government of Canada* case⁴¹⁰ detract from the relevance of the tribunals analysis in the *UPS v. Canada* case. With regard to the proposition that “continuing courses of conduct constitute

⁴⁰⁸ *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Dissenting Opinion of Prof. Raúl Emilio Vinuesa, March 31, 2025 ¶¶ 81-83. **RL-0118**.

⁴⁰⁹ Articles of the International Law Commission on the International Responsibility of States, Article 55, **RL-0017**.

⁴¹⁰ *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Respondent’s Reply to Allegations 1128, March 3, 2014, ¶¶ 4-5. **RL-0117**.

continuing breaches of legal obligations and renew the limitation period accordingly”, the tribunal in *UPS v. Canada* determined that the Respondent “provided no special reason to adopt a different rule”.⁴¹¹

406. Unlike in *UPS v. Canada* and *Energia v. Guatemala*, the tribunals in *Ríos v. Chile* and *Resolute Forest Products Inc. v. Government of Canada* recognize Article 14 of the ILC and determine that its applicability in investor-state disputes is subject to *lex specialis* or the text of the treaty, which cannot be ignored. In *Ríos v. Chile*, for example,

The Tribunal notes that, as *lex specialis*, the Treaty does not condition the statute of limitations for claims on the continued existence or duration of the wrongful act. Rather, according to Article 9.18.1 of the FTA, the statute of limitations begins to run from the moment a claimant becomes aware of the alleged violation and of the losses. Thus, the criterion of the Treaty is the claimant’s knowledge of the existence of the wrongful act, regardless of its duration.

407. In the *Resolute Forest Products Inc. v. Government of Canada* case, the NAFTA tribunal determined that, “[a]ccording to the ordinary meaning of the terms used and the object and purpose of the provision (under Article 31 of the Vienna Convention on the Law of Treaties), whether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant.”⁴¹² Furthermore, it stated that “the breach nonetheless occurs when the State act is first perfected and can be definitively characterized as a breach of the relevant obligation under the relevant.”⁴¹³ The Claimant has not alleged that the breach was first perfected after the *dies a quo*. Instead, the Claimant maintains that knowledge of the damage resulting from the breach did not materialize until August 31, 2022.⁴¹⁴ As already stated, this proposition cannot be accepted.⁴¹⁵

408. The limitation period begins to run from “the date upon which the claimant first acquired knowledge of the alleged breach and damage regardless of whether the measure complained of is

⁴¹¹ *United Parcel Service of America v. Government of Canada*, Award on the Merits, May 24, 2007, ¶ 28, **RL-0095**.

⁴¹² *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018, ¶ 158. **RL-0027**

⁴¹³ *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018, ¶ 158. **RL-0027**

⁴¹⁴ Reply, ¶ 426.

⁴¹⁵ See Section III.B.a. *supra*.

continuing or complete.”⁴¹⁶ This follows not only from the ordinary meaning of the terms of the provision in their context, as required by the general rules of interpretation codified in Articles 31 to 33 of the VCLT, but also from “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”⁴¹⁷

409. The Claimant seeks to render ineffective the words “first acquired knowledge” in Articles 1116(2) and 1117(2) of NAFTA, in contravention of the general rule of interpretation of the VCLT. However, the Claimant’s argument would require the Tribunal to ignore “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.⁴¹⁸ Therefore, the three-year limitation period began when the Claimant first acquired, or should have first acquired knowledge of the alleged breaches and the alleged loss or damage.

410. The Claimant has confirmed that its claims under Article 1105 arise solely from the alleged loss of its Project when the Option Agreement was terminated.⁴¹⁹ Given this characterization of its loss, the Claimant cannot assert, in light of its proposal to South32 in September 2019 to consider terminating the Option Agreement,⁴²⁰ that it first acquired knowledge of this damage or loss in August 2022.

411. For the reasons stated above, the Claimant’s claims for breach of Article 1105 are time-barred because the three-year period established in the text of NAFTA has elapsed and, therefore, fall outside the Tribunal’s jurisdiction *ratione temporis*.

⁴¹⁶ *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Respondent’s Reply to Allegations 1128, March 3, 2014, ¶ 4. **RL-0117**.

⁴¹⁷ Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

⁴¹⁸ *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Respondent’s Reply to Allegations 1128, March 3, 2014, ¶¶ 4-5. **RL-0117**. (“Continuing acts or a continuing course of conduct does not extend the strict three-year time limitations period in Article 1116(2) and 1117(2) for filing a NAFTA claim. A claim must be filed within three years from the date upon which the claimant first acquired knowledge of the alleged breach and damage regardless of whether the measure complained of is continuing or complete. The agreement of the NAFTA Parties on how these provisions are to be interpreted should be considered decisive and given considerable weight by the Tribunal”).

⁴¹⁹ Reply, ¶ 438.

⁴²⁰ Email correspondence dated September 19, 2019, between Mr. Tim Barry and Messrs. Mirek Wozga, Darryl Steane, and Mike Roberts, regarding: “Update and Breakdown of Expenses,” **R-0081**.

2. Alternatively, the Tribunal does not have jurisdiction *ratione voluntatis* and *ratione temporis* over the claims for breach of Article 1105.

412. The Claimant argues, in the alternative, that the Respondent's claims for breach of Article 1105 fall outside the Tribunal's jurisdiction *ratione voluntatis*, which implies an element of *ratione temporis*.⁴²¹ This is because the loss or damage that allegedly occurred when the Option Agreement was terminated in August 2022, or that arose after the termination of the Option Agreement, took place more than two years after Article 1105 ceased to be binding on Mexico. Therefore, any loss or damage that occurred after August 2022 cannot have been caused by or resulted from a breach of Article 1105 of NAFTA.

413. As discussed below in relation to the interpretation of Annex 14-C, the subsequent practice of the NAFTA/USMCA Parties has overwhelmingly confirmed that they did not agree to the "survival" of the substantive obligations of the treaty in Section A of Chapter 11 of NAFTA or to continue to be bound by those obligations in relation to acts or events that occurred after the termination of NAFTA.⁴²² Furthermore, the Parties did not consent to or agree to arbitration of claims alleging such breaches. Rather, in Annex 14-C, they agreed and consented to arbitration of claims for "legacy investments" alleging breach of NAFTA obligations, which could necessarily only have occurred while those obligations were in force and binding, *i.e.*, in relation to acts and events that took place prior to the termination of NAFTA.

414. As the United States explained in its recent submission under Article 1128 in *Cyrus Capital*: "Annex 14-C necessarily permits only claims for breaches of NAFTA that are alleged to have occurred while NAFTA was in force. The USMCA Parties did *not* consent in Annex 14-C to the submission of claims based on conduct that occurred *after* NAFTA terminated".⁴²³ In the same

⁴²¹ The Respondent raises this objection in response to the Claimant's position that it "first acquired" knowledge of the alleged loss or damage "on August 31, 2022, when South32 terminated the option agreement" (Reply, ¶ 426), and its mistaken belief that the breach of Section 1105 has somehow continued "from September 2019 to the present" (Reply, ¶¶ 410, 422).

⁴²² On these points, Respondent refers to and relies on the detailed arguments and evidence it presents below regarding the proper interpretation of Exhibit 14-C.

⁴²³ *Cyrus Capital Partners, L.P. and Contrarian Capital Management, LLC v. United Mexican States*, ICSID Case No. ARB/23/33, Article 1128 Submission of the United States of America, July 15, 2025, ¶ 4 **RL-0121**.

case, Canada also agreed in its submission under Article 1128 that “CUSMA Annex 14-C does not provide the Parties’ consent to arbitrate an alleged breach of the NAFTA’s substantive investment provisions that occurred after the NAFTA was terminated”.⁴²⁴

415. The Claimant’s claims are based on the allegations that: (i) “the breaches at issue in this case under NAFTA Article 1105 are continuing in nature” and cover “from the imposition of the Continuing Blockade in September 2019 until the present”;⁴²⁵ and (ii) the loss or damage occurred when “[t]he termination of the Option Agreement in August 2022 resulted in the complete loss of the Project’s value, as well as the value of the amounts SVB invested to acquire and develop the Project”.⁴²⁶ First, the Claimant is mistaken in considering that a continuing act that transcends the termination of NAFTA can give rise to a continuing *breach* of a NAFTA Chapter 11 obligation beyond the termination of NAFTA, much less indefinitely (*i.e.*, “to the present”). Second, as noted above, there is no consent under Annex 14-C to arbitrate claims alleging breaches of obligations under Section A of Chapter 11 of NAFTA that occurred after the termination of NAFTA.

416. With respect to the first point, any breach of Article 1105—including a “continuing breach”—could not continue beyond the termination of NAFTA on July 1, 2020, as the Parties were released from their substantive obligations under Section A of Chapter 11 of NAFTA in relation to acts and facts occurring from that date. Article 70(1)(a) of the VCLT confirms that: “Unless the treaty otherwise provides or the parties otherwise agree, *the termination of a treaty [...] releases the parties from any obligation further to perform the treaty.*”⁴²⁷ Since neither the USMCA nor NAFTA “provides otherwise,” and the USMCA Parties did not “agree otherwise,” a breach of an obligation under Section A of Chapter 11 of NAFTA could only occur while NAFTA was in force and binding on the Parties. Therefore, Article 1105 simply does not apply in relation to acts and events occurring after July 1, 2020.

417. This is fully consistent with Article 13 of the ILC Articles on State Responsibility, which codifies the application of the general principle of intertemporal law in the field of State

⁴²⁴ *Cyrus Capital Partners, L.P. and Contrarian Capital Management, LLC v. United Mexican States*, ICSID Case No. ARB/23/33, Article 1128 Submission of Canada, July 15, 2025, ¶ 13, **RL-0122**.

⁴²⁵ Reply, ¶ 410.

⁴²⁶ Memorial, ¶ 3.28; Reply, ¶¶ 7, 281, 624

⁴²⁷ Vienna Convention on the Law of Treaties, Article 70. **RL-0018**.

responsibility.⁴²⁸ Article 13 provides that: “ An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”⁴²⁹ When there is no binding obligation in force, there can be no breach.

418. This principle also applies to the concept of “continuing violation” provided for in Article 14(2) of the ILC Articles on State Responsibility, which states that “[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation”. When there is no longer a binding obligation requiring the State’s compliance, there can be no breach of the obligation *at that point*. Consequently, the continued breach of an international obligation cannot extend beyond the moment when the obligation ceases to be binding on the State, even if the situation that caused the breach continues beyond that moment. To consider otherwise would be to nullify the sovereign authority of the State to agree when to be bound and when not to be bound by an international obligation.

419. The Respondent was subject to the investment protection obligations of NAFTA in relation to acts and events that took place before the termination of NAFTA. Once the USMCA entered into force, the Respondent became subject, *from that moment on*, to the investment protection obligations of the USMCA set forth in the new investor-State regime of Chapter 14. Consequently, an alleged violation of Article 1105 could only occur in relation to acts or events that took place (or situations that ceased to exist) *before* the time NAFTA was terminated.⁴³⁰ To the extent that those acts, events, or situations continued beyond that time, they could only violate the relevant obligations of the USMCA (*i.e.*, Article 14.6) under the new investor-State regime.

420. Therefore, it cannot be said that the losses or damages that allegedly occurred when the Option Agreement was terminated on August 31, 2022, or that arose after the termination of the Option Agreement, were caused by or resulted from a breach of Article 1105 of NAFTA.

⁴²⁸ ILC Articles, vol. II, part 2 (2001), UN Doc. A/CN.4/SER.A/2001/Add.1 (part 2), p. 57. **RL-0123.**

⁴²⁹ ILC Articles, vol. II, part 2 (2001), UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), p. 57. **RL-0123.**

⁴³⁰ See, for example, USMCA, Article 14.2(3) (“For greater certainty, this Chapter, except as provided for in Annex 14-C (Legacy Investment Claims and Pending Claims) does not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement”).

421. For the reasons stated above, the Claimant’s claims under Article 1105 of NAFTA fall outside the Tribunal’s jurisdiction *ratione voluntatis* and *ratione temporis*.

B. The Tribunal does not have jurisdiction *ratione temporis* or *ratione voluntatis* over claims alleging a breach with Article 1110

422. In its Counter-Memorial, the Respondent explained why the Claimant’s claim for breach of Article 1110(1) of NAFTA falls outside the Tribunal’s jurisdiction *ratione temporis* and *ratione voluntatis*.⁴³¹ In its Reply, the Claimant presents two arguments in response. First, despite the clear, comprehensive, and applicable decision of the majority of the tribunal in *TC Energy*,⁴³² the Claimant alleges that “Annex 14-C of the USMCA extends the application of the substantive investment protections contained in Section A of NAFTA Chapter 11 beyond June 30, 2020, until the end of the transition period on June 30, 2023.”⁴³³ The Claimant’s position is legally untenable and clearly incorrect.

423. As explained in detail below, the correct interpretation of Annex 14-C is established through a rigorous analysis in accordance with the customary rules of treaty interpretation codified in the *Vienna Convention on the Law of Treaties* (VCLT). This interpretation is confirmed by the common positions consistently adopted by each of the USMCA Parties in their public statements regarding Annex 14-C, including at least ten different arbitrations. Taken together, these submissions establish a discernible pattern of “subsequent practice” within the meaning of Article 31(3)(b) of the VCLT. This subsequent practice includes, *among other things*, cases in which USMCA Parties made submissions under Article 1128 in relation to Annex 14-C that were contrary to the interests of their own investor claimants.

424. The evidence and legal authorities overwhelmingly confirm that Annex 14-C simply extended, for a period of three years, the *consent* of the Parties to continue using the ICSID mechanism established in Section B of Chapter 11 of NAFTA to arbitrate “legacy investments” claims and “pending claims” alleging breaches of certain NAFTA obligations that had occurred prior to the termination of NAFTA. Annex 14-C did not function as a “survivorship clause” or

⁴³¹ Counter-Memorial, ¶¶ 323-344.

⁴³² Reply, ¶ 410, 422.

⁴³³ Reply, ¶ 443.

otherwise extend the binding force of the obligations in Section A to acts or events occurring after NAFTA was terminated, superseded, and replaced by the USMCA.

425. Second, the Claimant insists that “even if Annex 14-C of the USMCA did not extend the substantive investment protections contained in Section A of NAFTA Chapter 11, ... Mexico's misconduct constitutes a continuing breach that commenced before the termination of NAFTA on June 30, 2023.”⁴³⁴ The Claimant’s reasoning on this point not only suffers from the same misunderstanding that affects its allegations of “continuing” breaches of Article 1105 “to the present”, but also misinterprets the nature of an indirect expropriation that breaches Article 1110(1).⁴³⁵

426. In this regard, the Claimant appears to suggest that the indirect expropriation it alleges in its claim was of a “continuing” character, which somehow allowed the alleged *breach* of Article 1110(1) to exist on August 31, 2022, more than two years after this provision ceased to be binding on Mexico. As the Respondent explained in its Counter-Memorial, an indirect expropriation is an event that can only occur once and cannot be ongoing in nature.⁴³⁶ In any event, even if an ongoing violation of Article 1110(1) were legally and factually possible, it could not continue beyond the termination of NAFTA on July 1, 2020.

427. Each of these issues is addressed below.

1. The correct interpretation of Annex 14-C of the USMCA in accordance with the VCLT

428. As explained by the Respondent in its Counter-Memorial, Annex 14-C of the USMCA extended the Parties’ consent to arbitration of claims using the ICSID mechanism set forth in Section B of Chapter 11 of NAFTA, alleging breach of the obligations set forth, *inter alia*, in Section A of Chapter 11 of NAFTA that, for any reason, could not be submitted to arbitration before the termination of NAFTA. Thus, Annex 14-C was intended to resolve procedural issues arising from the transition between NAFTA and the USMCA, ensuring the ability to arbitrate claims pending under NAFTA, as well as claims alleging breaches of NAFTA in relation to acts or events that took place in the months or weeks prior to the termination of NAFTA.

⁴³⁴ Reply, ¶ 443.

⁴³⁵ Reply, ¶ 410, 422.

⁴³⁶ Counter-Memorial, ¶¶ 325-328.

429. Without Annex 14-C, investors would not have been able to submit such claims to arbitration. They would not have been able to file their claims under Annex 14-D of the USMCA because the alleged violations had occurred before the USMCA entered into force. Similarly, they would not have been able to file their claims under NAFTA, as it would have been impossible for them to comply with the 90-day notification requirement under Article 1119 or the six-month time limit under Article 1120(1), unless the ICSID mechanism provided for in Section B of Chapter 11 of NAFTA remained in force and was applicable to the arbitration of their claims. This is precisely the solution offered by Annex 14-C.

430. Therefore, the obvious *effet utile* of Annex 14-C does not require that the obligations in Section A continue to be binding in relation to acts and events that occur *after* NAFTA has been terminated and replaced by the USMCA.

431. Furthermore, there is nothing to imply that Annex 14-C goes beyond what is stated in the text. The text provides that each Party “consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under”, *among other things*, “Section A of Chapter 11 (Investment) of the NAFTA 1994”. This does not imply that the alleged “breach of an obligation” could occur at a date after the termination of NAFTA, when the obligations under Section A are no longer in force or binding on the Parties.

432. It is well established that a breach of an obligation does not occur unless the State is bound by the obligation in question at the relevant time.⁴³⁷ It is also well established that, unless a treaty provides otherwise or the Parties agree otherwise, the termination of a treaty releases the parties from any obligation to continue to comply with the Treaty.⁴³⁸ There is nothing in Annex 14-C, the USMCA, or NAFTA that requires or permits the substantive protection obligations of the Treaty set forth in Section A of Chapter 11 of NAFTA to remain in effect or continue to be binding in relation to acts or events occurring after the termination of NAFTA and the entry into force of the USMCA. In this regard, Article 14.2(3) confirms that the exceptional function of Annex 14-C is

⁴³⁷ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), Chapter IV.E.1, November 2001, Article 13. **RL-0017**.

⁴³⁸ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, Article 70. **RL-0018**.

to bind the Parties “in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this [USMCA]”.

433. In its Reply, the Claimant argues that Annex 14-C does not contain any “temporal limitation” on when breaches of Section A obligations that can be asserted in claims brought to arbitration occurred.⁴³⁹ It erroneously argues that “Mexico’s position requires the Tribunal to import a temporal limitation into USMCA Annex 14-C that is not in its text.”⁴⁴⁰ These arguments are completely without merit and omit essential considerations of fact and law.

434. Contrary to the Claimant’s assertions, the Respondent’s interpretation does not “import” a non-textual “time limitation” into Annex 14-C. Rather, the time requirement is already established in the ordinary meaning of the terms of Annex 14-C, the termination of NAFTA, and the rules of international law. As noted above, Article 70 of the VCLT confirms that: “Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention [...] releases the parties from any obligation further to perform the treaty”.⁴⁴¹ Since neither the USMCA nor NAFTA “provides otherwise”, and the USMCA Parties did not “agree otherwise”, a “breach of an obligation under [...] Section A of Chapter 11 [of NAFTA]”, as mentioned in Annex 14-C, could only occur while NAFTA was in force.

435. The Claimant also suggests that its position is based on “a good faith interpretation of the ordinary meaning” of the provisions of Annex 14-C “in light of their object and purpose, in accordance with Article 31 of the Vienna Convention on the Law of Treaties”.⁴⁴² For the reasons summarized below, the Respondent disagrees. A rigorous analysis, in accordance with the customary rules and principles of treaty interpretation codified in Article 31 of the VCLT, demonstrates the opposite: that Annex 14-C does not extend the binding force of the substantive obligations of Section A of Chapter 11 of NAFTA in relation to acts and events occurring after the termination of NAFTA.

⁴³⁹ Reply, ¶¶ 446, 450.

⁴⁴⁰ Reply, ¶ 451.

⁴⁴¹ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, Article 70. **RL-0018.**

⁴⁴² Reply, ¶ 448.

a. Principles of interpretation

436. Article 31(1) of the VCLT requires that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Article 31(2) clarifies the scope of “context” for the purposes of treaty interpretation. It is important to note that Article 31(3) requires that the analysis take into account, *among other things*, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” and “any relevant rules of international law applicable in the relations between the parties”. Finally, Article 31(4) provides that a term shall be given a “special meaning” if it is established that the Parties so intended.

437. In the context of World Trade Organization (WTO) dispute settlement, panels that have applied Article 31 have considered that the “three elements referred to in Article 31—text, context, and object and purpose—are to be viewed as one integrated rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order”.⁴⁴³ Given that “as the words of the treaty form the foundation for the interpretive process”, “interpretation must be based above all on the text of the treaty”.⁴⁴⁴ However, “even though the text of a term is the starting point for any interpretation, the meaning of a term cannot be found exclusively in that text”.⁴⁴⁵ In this regard, the “ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose”.⁴⁴⁶ Although the “context and object and purpose may simply confirm the textual meaning of a term”, in “many cases, ... it is impossible to give meaning, even ‘ordinary meaning’, without also looking at the context and/or object and

⁴⁴³ Panel Report, *United States – Sections 301 of the Trade Act of 1974*, WT/DS152/R, adopted on January 27, 2000, DSR 2000:II, 815, ¶ 7.22, **RL-0124**; Panel Report, *Canada – Automobiles*, WT/DS139/R, WT/DS142/R, adopted on June 19, 2000, modified by the Appellate Body report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043, ¶ 10.12. **RL-0125**.

⁴⁴⁴ Appellate Body Report, *Japan – Alcoholic Beverages Tax*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on November 1, 1996, DSR 1996:I, 97, ¶ 24. **RL-0126**.

⁴⁴⁵ Panel Report, *Canada – Automobiles*, WT/DS139/R, WT/DS142/R, adopted on June 19, 2000, modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043, ¶ 10.12. **RL-0125**.

⁴⁴⁶ Panel Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/R, adopted on November 5, 2001, as modified by the Appellate Body report WT/DS192/AB/R, DSR 2001:XII, 6067, ¶ 7.46, citing Article 27(1) of the Final Draft Articles of the International Law Commission. **RL-0127**.

purpose”.⁴⁴⁷ According to the Appellate Body, “this is ultimately a holistic exercise that should not be mechanically subdivided into rigid components”.⁴⁴⁸

438. Similarly, international tribunals that have had the task of interpreting and applying Article 31(1) of the VCLT have emphasized that the three components of this provision—the text, the context, and the object and purpose—should not be considered in isolation, but rather as a coherent framework for the interpretation of treaties.⁴⁴⁹ Interpretation must faithfully adhere to the ordinary meaning of the terms of the treaty, be considered within its context, and be consistent with its objectives.⁴⁵⁰ The term “ordinary meaning” transcends mere textual analysis and requires a broader exploration that includes the textual environment and the overall objectives of the treaty.⁴⁵¹

439. One of the elements of the general rule of interpretation in Article 31(1) of the VCLT is that the treaty must be interpreted in “good faith”. The element of “good faith” is based on the principle of *pacta sunt servanda* and requires that any interpretation reflect the genuine terms that were agreed upon without expanding or reducing their scope through speculative reading.⁴⁵² Similarly, good faith requires that treaties be interpreted with regard to the consequences and results that the parties could reasonably and legitimately have foreseen at the time of signing.⁴⁵³ Interpreting Annex 14-C to include, merely by *implication*, the survival and binding application

⁴⁴⁷ Panel Report, *Canada — Automobiles*, WT/DS139/R, WT/DS142/R, adopted on June 19, 2000, modified by the Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043, ¶ 10.12, **RL-0125**. Panel Report, *United States — Sections 301 to 310 of the Trade Act of 1974*, WT/DS152/R, adopted on January 27, 2000, DSR 2000:II, 815, ¶ 7.22 **RL-0124**.

⁴⁴⁸ Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted on January 19, 2010, DSR 2010:I, 3, ¶ 348. **RL-0128**.

⁴⁴⁹ *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, April 9, 2015, ¶ 282. **RL-0129**.

⁴⁵⁰ *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, ¶ 70. **RL-0105**.

⁴⁵¹ *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, August 7, 2002, ¶ 99. **RL-0130**.

⁴⁵² *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, August 7, 2002, ¶ 98, **RL-0130**. *Daimler Financial Services AG v. Argentine Republic*, CCIAN Case No. ARB/05/1, Award, August 22, 2012, ¶ 173. **RL-0131**.

⁴⁵³ *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, October 22, 2012, ¶ 166. **RL-0132**.

of NAFTA obligations to acts and events occurring after the termination of NAFTA would conflict with this principle.

440. The ordinary meaning of the terms in the first paragraph of Annex 14-C, interpreted in their context (including footnotes 20 and 21, Article 14.2(3), and the *Protocol replacing NAFTA with the USMCA*) and in light of the object and purpose of the USMCA, together with the subsequent practice of the three USMCA Parties and the absence of “subsequent agreements” or rules of international law indicating otherwise, supports the following interpretation: (a) Annex 14-C extends the Parties’ consent to arbitrate disputes regarding “legacy investments” under the investor-state dispute settlement mechanism set forth in Section B of Chapter 11 of NAFTA, for claims alleging a breach of an obligation under Section A (*among other things*), which must necessarily relate to events or acts that occurred while that obligation was in force; (b) and Annex 14-C does not imply the survival of the substantive obligations set out in Section A or their binding application in relation to acts or events occurring after the termination of NAFTA.

b. The ordinary meaning of the terms of Annex 14-C

441. Annex 14-C consists of six paragraphs and two footnotes (footnotes 20 and 21, both related to the first paragraph). The first paragraph is the key provision, establishing the *consent* of the States Parties to arbitrate claims for “legacy investments” and “pending claims” alleging breaches of certain NAFTA obligations using the investor-state dispute settlement mechanism set out in Section B. The text of paragraph 1 and footnotes 20 and 21 state the following:

Annex 14-C

LEGACY INVESTMENT CLAIMS AND PENDING CLAIMS 1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:

- (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
- (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
- (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party’s obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.^{20, 21}

²⁰ For greater certainty, the relevant provisions in Chapter 2 (General Definitions), Chapter 11 (Section A) (Investment), Chapter 14 (Financial Services), Chapter 15 (Competition Policy, Monopolies and State Enterprises), Chapter 17 (Intellectual Property), Chapter 21 (Exceptions), and Annexes I-VII (Reservations and Exceptions

to Investment, Cross-Border Trade in Services and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim.

²¹ Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

442. Paragraph 1 establishes the “consent” of the States Parties to arbitration of certain claims “in accordance with Section B of Chapter 11 (Investment) of the NAFTA 1994”. In NAFTA, Section B “establishes a mechanism for the settlement of investment disputes”⁴⁵⁴ in relation to claims brought by investors alleging that a State Party has breached its obligations under Section A, or Article 1503(2), or Article 1502(3)(a).⁴⁵⁵ The consent set forth in paragraph 1 of Annex 14-C covers claims alleging breach of exactly the same NAFTA obligations. Since only the obligations under Section A are relevant in the circumstances of the current dispute, the obligations under Articles 1503(2) and 1502(3)(a) will not be considered in this analysis.

443. Paragraph 1 sets out two limitations on the consent it offers: i) it is limited to a claim “relating to a legacy investment”, and ii) the claim must allege a breach of an obligation under, *among other things*, Section A of Chapter 11 of NAFTA. The phrase “alleging breach of an obligation under: [...] Section A of Chapter 11” is central to the interpretation of Annex 14-C. The ordinary meaning of this phrase establishes the temporal and substantive limitations of the consent provided for in Annex 14-C.

444. The common definition of the term “breach” implies “an act of breaking or failing to observe a law, agreement, or code of conduct”.⁴⁵⁶ Similarly, Black’s Law Dictionary states that “breach” means “a violation or infraction of a law, obligation, or agreement, esp. of an official duty or a legal obligation”.⁴⁵⁷ In the context of Annex 14-C, the usual meaning of “breach” is, therefore an act that violates an *obligation* (i.e., under Section A).

445. In turn, the term “obligation” refers to “[a]n act or course of action to which a person is morally or *legally bound*; what someone is *bound* to do; a duty, commitment.”⁴⁵⁸ A key element

⁴⁵⁴ NAFTA, Article 1115.

⁴⁵⁵ NAFTA, Articles 1116(1) and 1117(1).

⁴⁵⁶ Oxford English Dictionary, “Breach.” **R-0152**.

⁴⁵⁷ Black's Law Dictionary, “breach.” **R-0153**.

⁴⁵⁸ Oxford English Dictionary, “Obligation.” **R-0154**.

of the ordinary meaning of the expression “breach of an obligation” is that the obligation must be “legally binding” at the time of the alleged breach. Therefore, the *ordinary meaning* of the expression “breach of an obligation” in paragraph 1 of Annex 14-C is simply the “violation” of a treaty “obligation” *that was “legally binding” on the Parties on the date of the alleged breach*. It is therefore clear that, without further ado, the literal text of Annex 14-C contemplates claims arising from measures that took place while NAFTA was still in force. The text contains nothing that modifies the ordinary time frame in which an alleged “breach” could occur.

446. This interpretation is consistent with the principles of customary international law codified in Articles 12 and 13 of the ILC Articles,⁴⁵⁹ which apply to this dispute pursuant to Article 31(3)(c) of the VCLT and Article 1131(1) (Governing Law) of Chapter 11 of NAFTA. Article 12 provides that: “There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character”. Article 13 further provides that: “An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs”. The ILC commentary explains that this reflects “the general principle of intertemporal law”.⁴⁶⁰

447. The Claimant’s position that “Annex 14-C extends the application of the substantive investment protections contained in Section A of NAFTA Chapter 11 beyond June 30, 2020” is inconsistent with (i) the ordinary meaning of the terms of Annex 14-C, and (ii) the temporal limitations of the Respondent’s obligations under NAFTA. For all practical purposes, the Claimant’s approach seeks to have the same effect as a survival clause, by keeping the obligations of Section A in force for three more years. This position has no basis in the text of Annex 14-C.

448. In addition to its incompatibility with the ordinary meaning of the terms of Annex 14-C, the Claimant’s position overlooks the established practice of the USMCA Parties in the texts of NAFTA, the USMCA, and other regional trade agreements. Where there is agreement on the survival and continued effect of certain obligations beyond the termination of a treaty, the USMCA Parties have explicitly set forth their agreement using clear and unambiguous language. In fact,

⁴⁵⁹ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), Chapter IV.E.1, November 2001, Articles 12 and 13, **RL-0017**.

⁴⁶⁰ Articles of the ILC, vol. II, part 2 (2001), Doc. A/CN.4/SER.A/2001/Add.1 (part 2), pp. 54-59. **RL-0123**.

the texts of their trade agreements demonstrate that each of the USMCA Parties is familiar with survival clauses, sunset clauses, and other similar transitional clauses that serve to extend binding obligations beyond the termination date of a treaty.

449. For example, Article 30 of Mexico’s model BIT provides as follows:

Article 30: Entry into Force, Duration, and Termination

[...]

4. **This Agreement shall continue to be effective** for a period of ten years from the date of termination only with respect to investments made prior to such date.⁴⁶¹

[Emphasis added].

450. The U.S. model BIT contains a similar clause in Article 22:

Article 22: Entry into Force, Duration, and Termination

[...]

3. **For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination,** except insofar as those Articles extend to the establishment or acquisition of covered investments.⁴⁶²

[Emphasis added]

451. The same is true of Canada’s BIT model. Article 57(4) provides as follows:

This Agreement shall remain in force unless a Party delivers to the other Party a written notice of its intention to terminate the Agreement. The termination of this Agreement will be effective one year after the written notice of termination has been received by the other Party. **In respect of investments or commitments to invest made prior to the date of termination of this Agreement, Articles 1 through 56, as well as paragraphs 1 and 2 of this Article, shall remain in force for 15 years.**⁴⁶³

⁴⁶¹ Model BIT of Mexico. **R-0155.** Another example is Article XXIII of the Mexico-Spain APPRI (“This Agreement shall remain in force for 10 years. Thereafter, it shall remain in force until the expiration of 12 months from the date on which either Contracting Party has notified the other in writing of its intention to terminate it. The provisions of this Agreement shall remain in force with respect to investments made during its term for a period of 10 years from the date of termination, without prejudice to the subsequent application of the general rules of international law”). **R-0156.**

⁴⁶² United States Model BIT. **R-0157.** Another example is Article 22(3) of the BIT between the United States and Rwanda (“3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.”). **RL-0158.**

⁴⁶³ Canada Model BIT. **R-0159.** Another example is Article 41(4) of the Canada-Moldova BIT (“4. This Agreement shall remain in force unless a Party notifies the other Party in writing of its intention to terminate it. The termination of this Agreement will be effective one year after notice of termination has been received by the other Party. In respect of investments or commitments to invest made prior to the date

[Emphasis added]

452. These clauses incorporate precise, deliberate, and explicit language to extend the obligations established in the treaty beyond its termination. Language of this type was also included in paragraph 4 of Article 34.1 of the USMCA (the “Transitional Provision from NAFTA 1994”), which states that “Chapter Nineteen of the NAFTA 1994 shall continue to apply to binational panel reviews related to final determinations published by a Party before the entry into force of this Agreement”. The phrase “shall continue to apply” is not used in relation to Section A of Chapter 11 of NAFTA in Article 34.1, Annex 14-C, or anywhere else in the USMCA.

453. Therefore, if the Parties had intended for the obligations in Section A to survive the termination of NAFTA, continuing in force to bind the Parties in relation to acts or events occurring after the date of termination (and despite the entry into force of the USMCA), they would have followed standard practice, as indicated in the examples described above. This would have required the addition of language that explicitly, clearly, and unambiguously stated that the obligations themselves would “remain binding,” “remain in effect,” or “continue to apply” beyond the termination of NAFTA. No such language appears in Annex 14-C, USMCA, or NAFTA.

454. In fact, if the USMCA Parties had intended to extend the temporal scope of the obligations in Section A of Chapter 11 of NAFTA, the terms of Annex 14-C could have simply provided that, with respect to a legacy investment, Chapter 11 of NAFTA 1994 “shall continue to apply” or “shall remain in effect” for a period of three years from the date of termination. It would not have been necessary to extend the “consent” of “each Party” or to refer to the dispute settlement mechanism in Section B separately from claims for breach of the substantive obligations in Section A. Alternatively, the USMCA parties could have avoided Annex 14-C altogether by including a transitional provision similar to Article 34.1.4 of the USMCA, explicitly stating that Chapter 11 of NAFTA “shall continue to apply to legacy investments for three years from the date of termination of NAFTA”.

when the termination of this Agreement becomes effective, Articles 1 to 40 inclusive, as well as paragraphs 1, 2 and 3 of this Article, shall remain in force for a period of 15 years.”). **R-0160.**

c. The context of Annex 14-C supports the conclusion that it applies only to measures taken while NAFTA was in force

(1) Footnote 20 of paragraph 1 of Annex 14-C

455. Based on testimony presented in the *TC Energy* arbitration by Professor Christoph Schreuer, who is not testifying in this arbitration, the Claimant argues that footnote 20 confirms its position.⁴⁶⁴ Its argument appears to be based on the phrase “For greater certainty, the relevant provisions in [...] Chapter 11(Section A) (Investment) of the NAFTA 1994 apply with respect to such a claim”. However, this simply confirms the usual principle of intertemporal law. This principle dictates that disputes must be assessed on the basis of the legal framework in force at the time the relevant events or acts occurred, and not on the basis of the legislation in force at the time the dispute arises.

456. For the reasons set out below, the ordinary meaning of footnote 20 is entirely consistent with the interpretation of Annex 14-C presented by the Respondent. Furthermore, nothing in footnote 20 suggests the existence of an agreement between the Parties that the obligations in Section A remain binding in relation to acts and events occurring after the termination of NAFTA.

457. Footnote 20 begins with the phrase “for greater certainty”, indicating that it provides clarification rather than introducing a new right, obligation, or procedural requirement. The inclusion of this phrase is standard practice in treaty drafting to clarify existing obligations, not to introduce new ones.⁴⁶⁵ The phrase “with respect to such a claim” at the end of the footnote refers to the “claim” described in paragraph 1. Footnote 20 therefore clarifies, *among other things*, that “the relevant provisions of [...] Chapter 11 (Section A)” “apply with respect to such a claim” “alleging a breach of an obligation under [...] Section A of Chapter 11”. It is absolutely necessary that “the relevant provisions” of Section A “apply” for the purposes of arbitrating a claim alleging a breach of an obligation under Section A. This does not change the time period in which the alleged breach may occur, which remains the time period in which the obligation is in force and binding.

⁴⁶⁴ Reply, ¶¶ 452-453.

⁴⁶⁵ *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America (II)*, ICSID Case No. ARB/21/63, Award, July 12, 2024, ¶ 159. **RL-0042**

458. Claims under paragraph 1 are necessarily subject to arbitration after the termination of NAFTA and the entry into force of the USMCA. Therefore, such claims relate to provisions of NAFTA that are no longer in force at the time they are submitted to arbitration and are assessed by arbitral tribunals. Footnote 20 merely confirms, “for greater certainty”, that the “relevant provisions” of NAFTA “apply with respect to such claim”. This reflects the principle of customary international law codified in Article 70.1(b) of the VCLT, according to which “the termination of a treaty [...] does not affect any right, obligation or legal situation of the parties, created through the execution of the treaty prior to its termination” (unless the treaty provides otherwise or the parties agree otherwise).

459. Furthermore, as the majority of the tribunal considered in the *TC Energy* case,

From a more general perspective, it is in the Arbitral Tribunal’s view extremely unlikely that an agreement to extend for three years not only Section A of Chapter 11 but also article 1503(2), Chapter 14 (referred to in article 1503(2)) and Chapter 17 (referred to in article 1110-7), would have been done by implication in obscure terms and not explicitly in Annex 14-C or in the final provisions of USMCA. ...

The unlikelihood of such an implied extension of NAFTA’s substantive provisions is even more evident in light of the overlap that would exist between these extended NAFTA provisions (as invocable in the context of a claim under Paragraph 1) and the corresponding provisions of USMCA (Chapters 17 (financial services), 20 (intellectual property) and 21 (competition)), and the likely differences between the extended NAFTA provisions and USMCA. It is noteworthy that article 1110-7 of NAFTA refers generally to Chapter 17 on intellectual property (insofar as the issuance of compulsory licenses granted in relation to intellectual property rights or the revocation, limitation or creation of intellectual property rights is concerned), and that — under the Claimant’s interpretation — one would have to conclude that Chapter 17 would be extended in its entirety for its relevant provisions to apply to a claim referring to such matters under 1110-7. The same observation applies, as the behavior of state enterprises exercising regulatory, administrative or governmental authority is concerned, to Chapter 14 on financial services, which is referred to in a generic way in article 1503(2).

460. For the reasons set out above, footnote 20 does not support the Claimant’s position. On the contrary, its *effet utile*, including the clarification it provides, is entirely consistent with the Respondent’s interpretation and the rules of international law.

(2) Footnote 21 to paragraph 1 of Annex 14-C

461. The Claimant considers that “in footnote 21 to USMCA Annex 14-C, the USMCA Parties addressed the issue of a continuing breach”.⁴⁶⁶ Citing an explanation provided by the United States

⁴⁶⁶ Reply, ¶¶ 459-460.

in the *TC Energy* arbitration, the Claimant argues that “in a case of continuing breach, an investor could be eligible to submit a claim under USMCA Annex 14-C and USMCA Annex 14-E”. On this basis, the Claimant erroneously reasons that, since “SVB is not eligible to submit claims under USMCA Annex 14-E”, it “remains eligible to submit claims to arbitration under Annex 14-C arising out of Mexico's continuing breaches that commenced before the NAFTA termination date”.⁴⁶⁷ However, the example cited by the Claimant actually serves to refute its own reasoning.

462. In the example, the United States describes how, in the absence of footnote 21, a continuing situation could give rise to competing claims alleging breaches of (i) NAFTA obligations *prior to NAFTA's termination*, and (ii) USMCA obligations *after USMCA's entry into force*. In this regard, the United States described a “*claim under Annex 14-C, relying on the substantive obligations of NAFTA because portions of the continuing breach predated its termination*”; and an “*Annex 14-E claim, relying on the USMCA with respect to portions of the continuing breach that postdate its entry into force*”.⁴⁶⁸ This example did not contemplate that a claim under Annex 14-C could be based on NAFTA obligations with respect to “parts of the continuing breach” that “postdate” the termination of NAFTA. On the contrary, it contemplated that such parts would be subject to a claim under Annex 14-E for breach of USMCA obligations.

463. Footnote 21 establishes a specific exception to the consent granted by Mexico and the United States in paragraph 1 of Annex 14-C. It excludes from the scope of their consent “an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E”. The ordinary meaning of the text of footnote 21 is that an investor who is “eligible to submit claims to arbitration under paragraph 2 of Annex 14-E” cannot submit a claim to an arbitral tribunal under paragraph 1 of Annex 14-C (*i.e.*, with respect to an existing investment). The terms of footnote 21 do not preclude the possibility that such an investor may have: (i) an investment that meets the conditions of a “legacy investment” under paragraph 6 of Annex 14-C, and (ii) a claim alleging a breach of a Section A obligation within the meaning of paragraph 1. However, the terms of footnote 21 make it clear that an investor in this situation cannot submit its claim to arbitration under Annex 14-C against Mexico or the United States.

⁴⁶⁷ Reply, ¶¶ 460-462.

⁴⁶⁸ Reply, ¶ 460, citing *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America (II)*, ICSID Case No. ARB/21/63, Respondent's Reply to Claimants' Observations on Respondent's Request for Bifurcation, 2 March 2023, ¶ 31, **CL-0214**.

464. This exclusion is consistent with customary international law codified in Article 70.1(b) of the VCLT, which provides that “[u]nless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty [...] does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination”. Annex 14-C provides a means to facilitate and control this principle of customary international law. Footnote 21 is an example of the States Parties “agreeing otherwise” as to the extent to which their obligations under NAFTA bind them in relation to acts or events occurring prior to the termination of the agreement.

465. The Respondent does not propose to speculate on all the factual circumstances that could give rise to the activation of footnote 21. The Parties’ consent to paragraph 1 of Annex 14-C was established only for a limited time, and footnote 21 applied exclusively within that period. This period began on July 1, 2020, with the termination of NAFTA and the entry into force of USMCA, and ended on July 1, 2023, in accordance with paragraph 3 of Annex 14-C. These details provide important context for the analysis of the circumstances under which footnote 21 would be triggered.

466. The Respondent agrees that a scenario in which footnote 21 could have been triggered is an act, omission, event, or continuing situation spanning from the termination of NAFTA to the entry into force of the USMCA. On July 1, 2020, the substantive investment protection obligations of Section A of Chapter 11 of NAFTA were terminated, with the result that the Parties were released from them as of that date, in accordance with the default rules of the VCLT. At the same time, they were replaced by the substantive investment protection obligations of Chapter 14 of the USMCA, which became binding on the Parties in relation to future acts and events (as well as situations that had not ceased to exist prior to the date of entry into force of the USMCA).⁴⁶⁹ Given that this transition occurred in a single day, it is reasonable to expect that there may be ongoing measures that cross that one-day threshold.

467. It is possible that such measures may give rise to: (i) legacy investment claims under Annex 14-C alleging breach of Section A obligations *prior to the termination of NAFTA*; and (ii) claims under the USMCA alleging non-compliance with Chapter 14 obligations *after the USMCA entered into force*.

⁴⁶⁹ See USMCA, Article 12.2(3).

468. Customary international law, codified in Article 14.2 of the ILC Articles on State Responsibility, recognizes that a State act of a continuing nature may give rise to a continuing breach of an international obligation. In this regard, Article 14.2 provides that: “The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation” [*emphasis added*]. In the scenario described above, in which a continuous act or fact transcends the termination of NAFTA and the entry into force of the USMCA, the result would not be a single continuous breach of a single obligation, but rather separate breaches of (i) the relevant obligation under Section A *prior to the termination of NAFTA*, and (ii) the relevant obligation under Chapter 14 *after the entry into force of the USMCA*. The sequence of these separate breaches, which would result from the termination of NAFTA and its replacement by the USMCA, is analogous to the continuing breach that would occur in the context of an uninterrupted obligation.

469. Provided that an investor’s investment met the criteria to be considered a “legacy investment” under paragraph 6 of Annex 14-C, it would provisionally be eligible to submit its claim to arbitration under Annex 14-C alleging breach of the obligations in Section A. However, if the investor also met the criteria set out in paragraph 2 of Annex 14-E, such that it was also “eligible” to submit its claim to arbitration under Annex 14-E with respect to the breach of the obligations of Chapter 14, it would be disqualified from submitting its claim under Annex 14-C.

470. The scenario described above is neither theoretically abstract nor remote. The transition from the obligations of Chapter 11 of NAFTA to those of Chapter 14 of the USMCA occurred in a single day, July 1, 2020. In very practical terms, a continuing situation could have violated the obligations of Section A until June 30, 2020, and subsequently those of Chapter 14 as of July 1, 2020. Footnote 21 would channel a specific category of investors—those eligible to file claims for USMCA violations under Annex 14-E—exclusively to that dispute resolution mechanism.

471. For the reasons stated above, the Respondent’s interpretation of Annex 14-C is entirely consistent with footnote 21. To the extent that this footnote provides relevant context for the interpretation of Annex 14-C, there is nothing to support the Claimant’s position that Annex 14-C extends the binding force of NAFTA obligations to acts and events occurring beyond the termination of NAFTA.

**d. The object and purpose of the USMCA support the
Respondent's interpretation of Annex 14-C**

472. The conclusions drawn in the preceding sections are further reinforced when analyzed from the perspective of the object and purpose of the USMCA. Broadly speaking, the object and purpose of the USMCA was to supersede and replace NAFTA with a “new high-standard agreement”. The preamble explicitly states the intention to “REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement”.⁴⁷⁰ In line with this fundamental objective, Chapter 14 of the USMCA introduces an investor-state dispute settlement regime that is significantly more restrictive than the NAFTA dispute settlement regime and is based on updated rules.

473. While NAFTA offered a broader range of protections to investors and their investments, the new USMCA regime is more limited, both substantively and procedurally. The USMCA Parties clearly decided to move away from the broader NAFTA regime to a more limited regime. In these circumstances, the new legal framework is not compatible with the intended coexistence of the NAFTA regime. Nor can it be said that this was the intention of the Parties.

474. Under NAFTA, investors could file claims for breaches that occurred while the Agreement was in force, subject to the substantive and procedural requirements set forth in that Agreement. Similarly, the USMCA establishes a different framework designed to provide clarity and certainty for future investments. By allowing only existing investment claims arising from breaches that occurred while NAFTA was in force, the USMCA ensures that appropriate transitional protections are applied without blurring the clear distinction between the obligations and protections that came into force with the USMCA and those under NAFTA that ceased to apply upon its termination.

475. Annex 14-C ensured that consent to arbitrate pending claims under NAFTA, as well as claims for NAFTA breaches that could not be submitted to arbitration prior to NAFTA's termination (including claims related to acts or events that occurred shortly before NAFTA's termination), would be maintained on a transitional basis. This served the purpose of protecting NAFTA investors without hindering the termination of NAFTA and the entry into force of the USMCA, allowing for a fair and orderly transition. In contrast, the claimant's interpretation would

⁴⁷⁰ USMCA, Preamble, ¶ 3.

result in an overlap of legal regimes that would undermine the greater certainty and stability that the USMCA sought to establish.

e. The “subsequent practice” of the USMCA Parties in relation to the interpretation of Annex 14-C

476. As noted above, Article 31(3)(b) of the VCLT provides that, for purposes of interpreting treaties, “There shall be taken into account, together with the context: [...] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.

477. The WTO Appellate Body has held that, “in order for ‘practice’ within the meaning of Article 31(3)(b) to be established: (i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or pronouncements must imply agreement on the interpretation of the relevant provision”.⁴⁷¹ The Appellate Body has also explained that such “agreement may be deduced from the affirmative reaction of a treaty party” and that “in specific situations, the ‘lack of reaction’ or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties”.⁴⁷²

478. In fact, Canada, Mexico, and the United States have consistently defended the same position in recent cases brought under Annex 14-C: for example, *TC Energy*,⁴⁷³ *Coeur Mining, Inc. v. United Mexican States*, ICSID Case No. UNCT/22/1 (*Coeur Mining*); *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1 (*Legacy Vulcan*);⁴⁷⁴ *Ruby River Capital LLC*

⁴⁷¹ Appellate Body Report, *United States – Measures Affecting the Cross-Border Provision of Gambling and Gaming Services*, WT/DS285/AB/R, April 7, 2005 (approved April 20, 2005), DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475), ¶ 192 (emphasis added). **RL-0133.**

⁴⁷² Appellate Body Report, *European Communities – Tariff Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, September 12, 2005 (approved September 27, 2005), and Corr.1, DSR 2005:XIX, 9157, ¶ 272. **RL-0134.**

⁴⁷³ *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America (II)*, ICSID Case No. ARB/21/63, Mexico’s 1128 Submission, September 11, 2023, **RL-0040**; *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America (II)*, ICSID Case No. ARB/21/63, Claimant’s Counter-Memorial on Preliminary Objections, June 12, 2023, **RL-0135**; *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America (II)*, ICSID Case No. ARB/21/63, Respondent’s Reply on its Preliminary Objection, December 27, 2023. **RL-0136.**

⁴⁷⁴ *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Second Submission by the United States Pursuant to Article 1128, July 21, 2023, **RL-0137**; *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Reply to the Respondent’s Counter-Memorial, April 21, 2023, **RL-0039.**

v. Canada, ICSID Case No. ARB/23/5 (*Ruby River*);⁴⁷⁵ *Alberta Petroleum Marketing Commission v. United States of America*, ICSID Case No. UNCT/23/4;⁴⁷⁶ *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15 (*Access*);⁴⁷⁷ *Cyrus Capital Partners, L.P. and Contrarian Capital Management, LLC v. United Mexican States*, ICSID Case No. ARB/23/33 (*Cyrus Capital*).⁴⁷⁸ The common positions publicly expressed by each of the Parties in these disputes establish their shared understanding that only claims arising from acts, events, or measures taken while NAFTA was in force may be submitted to arbitration under Annex 14-C.

479. For example, in its recent submission under Article 1128 (NDP) in *Cyrus Capital*, the United States accepted that: “Annex 14-C necessarily permits only claims for breaches of NAFTA that are alleged to have occurred while NAFTA was in force. The USMCA Parties did *not* consent in Annex 14-C to the submission of claims based on conduct that occurred *after* the NAFTA terminated.”⁴⁷⁹ It is important to note that he summarized the common and consistent consensus on this issue among the USMCA Parties as follows:

⁴⁷⁵ *Ruby River Capital LLC v. Canada*, ICSID Case No. ARB/23/5, Respondent's Counter-Memorial on the Merits, July 15, 2024. **RL-0138**.

⁴⁷⁶ *Alberta Petroleum Marketing Commission (APMC) v. United States of America*, ICISID Case No. UNCT/23/4, Mexico's Submission Pursuant to NAFTA Article 1128, January 15, 2025, **RL-0139**; *Alberta Petroleum Marketing Commission (APMC) v. United States of America*, ICSID Case No. UNCT/23/4, Canada's Submission Pursuant to NAFTA Article 1128, January 15, 2025, **RL-0140**; *Alberta Petroleum Marketing Commission (APMC) v. United States of America*, ICISID Case No. UNCT/23/4, Memorial on Jurisdiction, October 15, 2024, **RL-0141**; *Alberta Petroleum Marketing Commission (APMC) v. United States of America*, ICISID Case No. UNCT/23/4, Reply on Jurisdiction, May 22, 2025. **RL-0142**.

⁴⁷⁷ *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Article 1128, Submission by the United States of America, March 28, 2025. **RL-0143**; *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Article 1128, Submission by Canada, March 28, 2025, **RL-0144**; *Access Business Group LLC v. United Mexican States*, ICSID Case No. ARB/23/15, Respondent's Memorial on Jurisdiction, September 29, 2024 [Spanish] **RL-0145**.

⁴⁷⁸ *Cyrus Capital Partners, L.P. and Contrarian Capital Management, LLC v. United Mexican States*, ICSID Case No. ARB/23/33, Article 1128 Submission of the United States of America, July 15, 2025. **RL-0121**. *Cyrus Capital Partners, L.P. and Contrarian Capital Management, LLC v. United Mexican States*, ICSID Case No. ARB/23/33, Article 1128 Submission of Canada, July 15, 2025. **RL-0122** *Cyrus Capital Partners, L.P. and Contrarian Capital Management, LLC v. United Mexican States*, ICSID Case No. ARB/23/33, Reply on Jurisdiction, April 16, 2025. **RL-0146**; *Cyrus Capital Partners, L.P. and Contrarian Capital Management, LLC v. United Mexican States*, ICSID Case No. ARB/23/33, Memorial on Jurisdiction, June 4, 2024. **RL-0147**.

⁴⁷⁹ *Cyrus Capital Partners, L.P. and Contrarian Capital Management, LLC v. United Mexican States*, ICSID Case No. ARB/23/33, Article 1128 Submission of the United States of America, July 15, 2025. **RL-0121**.

The three USMCA Parties all agree that Annex 14-C permits only claims based on conduct occurring while the NAFTA was in force. In addition to its submissions in the *TC Energy* case, the United States has also taken this position in the *Alberta Petroleum Marketing Commission v. United States* (“APMC”), *Legacy Vulcan v. United Mexican States* (“Legacy Vulcan”), *Amerra Capital Management and others v. United Mexican States*, *Coeur Mining, Inc. v. United Mexican States*, *Access Business Group LLC v. United Mexican States* (“Access Business”), and *Goldgroup Resources, Inc. v. United Mexican States* arbitrations. Mexico has expressed its agreement with the U.S. position in the *Legacy Vulcan*, *TC Energy*, *APMC*, and *Access Business* arbitrations. Canada likewise confirmed its agreement with this interpretation of Annex 14-C in *APMC*, *Access Business*, and *Ruby River v. Canada*, where it observed that there is “consensus among the USMCA Parties” on this issue.⁴⁸⁰

480. Similarly, in its submission of Article 1128 (NDP) in *Cyrus Capital*, Canada agreed that: “the ordinary meaning of the terms [of Annex 14-C], in their context and in light of the treaty’s object and purpose, confirms that CUSMA Annex 14-C does not provide the Parties’ consent to arbitrate an alleged breach of the NAFTA’s substantive investment provisions that occurred after the NAFTA was terminated”.⁴⁸¹ Like the United States, it summarized the consistent and discernible pattern of “subsequent practice” as follows:

Each of the CUSMA Parties has publicly stated that it did not consent in Annex 14-C to the submission of claims for alleged breaches of NAFTA obligations that occurred after NAFTA terminated. See e.g., *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America* (ICSID Case No. ARB/21/63), Mexico’s Submission Pursuant to Article 1128 of NAFTA, September 11, 2023, ¶ 5; *Legacy Vulcan, LLC v. United Mexican States* (ICSID Case No. ARB/19/1), Second Submission of the United States of America, July 21, 2023, ¶¶ 8-12; *Legacy Vulcan, LLC v. United Mexican States* (ICSID Case No. ARB/19/1), Mexico’s Counter-Memorial on the Ancillary Claim, December 19, 2022, ¶¶ 407-14; *Legacy Vulcan, LLC v. United Mexican States* (ICSID Case No. ARB/19/1), Mexico’s Rejoinder on the Ancillary Claim, 21 April 2023, ¶¶ 258-87; *Ruby River Capital LLC v. Canada* (ICSID Case No. ARB/23/5), Contre-Mémoire Sur Le Fond et Mémoire Sur La Compétence Du Canada, July 15, 2024, ¶ 262; *Alberta Petroleum Marketing Commission v. United States of America* (ICSID Case No. UNCT/23/4), Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 15 January 2025, ¶ 9; *Alberta Petroleum Marketing Commission v. United States of America* (ICSID Case No. UNCT/23/4), United States of America’s Memorial on its Preliminary Objections, 15 October 2024, ¶ 66, fns. 86-87; *Access Business Group LLC v. United Mexican States* (ICSID Case No. ARB/23/15), Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 28 March 2025, ¶ 9; *Goldgroup Resources Inc. v. Mexico*

⁴⁸⁰ *Cyrus Capital Partners, L.P. and Contrarian Capital Management, LLC v. United Mexican States*, ICSID Case No. ARB/23/33, Article 1128 Submission of the United States of America, July 15, 2025, ¶ 12. **RL-0121.**

⁴⁸¹ *Cyrus Capital Partners, L.P. and Contrarian Capital Management, LLC v. United Mexican States*, ICSID Case No. ARB/23/33, Article 1128 Submission of Canada, July 15, 2025, ¶ 13. **RL-0122.**

481. As can be seen from the above, public statements on the correct interpretation of Annex 14-C have been made by the USMCA Parties not only as litigating parties defending their positions as respondents in arbitration proceedings under Annex 14-C, but also as non-disputing parties (NDPs). The purpose of non-litigant submissions under Article 1128 is to allow non-litigants to “make submissions to a Tribunal on a question of interpretation of this Agreement”. Tribunals often give these submissions considerable weight, not only because they provide insight into the collective interpretation of the treaty by the parties, but also because they are made by parties who have no interest in the dispute other than the correct interpretation of the treaty. For example, in *Methanex v. United States*, the tribunal considered submissions by non-litigating parties as evidence of the parties’ intent and as interpretive guidance, which can be critical in resolving ambiguities in the treaty text.⁴⁸²

482. In this context, Mexico, the United States, and Canada have established their consensus on the interpretation of the scope of Annex 14-C in their respective written submissions in the above-mentioned arbitrations. However, some claimants have sought to downplay the importance of these submissions, likely because they present a unified and restrictive interpretation that contradicts the reading that claimants prefer to give to the USMCA. The consistent jurisdictional objections raised by the USMCA Parties in these cases, and the equally consistent submissions by the non-litigating Parties, establish not only a common formal legal position but, more importantly, demonstrate a shared and common interpretation of Annex 14-C.

483. The ILC position on subsequent practice under Article 31 of the VCLT provides a fundamental framework for assessing how consistent actions, including official statements, by the parties to an international agreement can establish a common understanding of the provisions of the treaty. The ILC has clarified that statements by parties to a treaty, even when made in the context of legal disputes, are valid as “subsequent practice” within the meaning of Article 31,

⁴⁸² *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, August 3, 2005. **RL-099.**

paragraph 3(b), of the VCLT, contributing to a consistent interpretation of the treaty. According to the ILC:

Subsequent practice under article 31, paragraph 3 (b), must be conduct “in the application of the treaty.” This includes not only official acts at the international or at the internal level that serve to apply the treaty, including to respect or to ensure the fulfillment of treaty obligations, but also, *inter alia*, official statements regarding its interpretation, such as statements at a diplomatic conference, **statements in the course of a legal dispute**, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the domestic or international level.⁴⁸³

[Emphasis added]

484. Furthermore, in *The Canadian Cattlemen for Fair Trade v. United States of America* case, the tribunal considered that the Parties’ positions on a question of interpretation of NAFTA—as reflected in the arguments presented by the United States in that arbitration and elsewhere, in Mexico’s submission under Article 1128, and in a Counter-Memorials submitted by Canada in another arbitration — constituted a “subsequent agreement” within the meaning of Article 31(3)(b) of the VCLT. The tribunal reasoned and concluded as follows:

The Respondent maintains that there is such a “subsequent agreement,” and points to its own statements on the issue, before this Tribunal and elsewhere; to Mexico’s Article 1128 submission in this arbitration; and to Canada’s statements on the issue, first in implementing NAFTA, and, later, in its counter-memorial in the *Myers* case.

All of this is certainly suggestive of something approaching an agreement, but, to the Tribunal, all of this does not rise to the level of a “subsequent agreement” by the NAFTA Parties. ...

The question remains: is there “**subsequent practice**” that establishes the agreement of the NAFTA Parties on this issue within the meaning of Article 31(3)(b)? The Tribunal concludes that there is. Although there is, to the Tribunal, insufficient evidence on the record to demonstrate a “*subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*,” the available evidence cited by the Respondent demonstrates to us that there is nevertheless a “*subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications....*”

On the record before this Tribunal, as cited by the Respondent above, there is evidence of a sequence of facts and acts that amounts to a practice that is concordant, common, and consistent. The Tribunal is of the view that this is “subsequent practice” within the meaning of Article 31(3)(b). And this “subsequent practice” confirms the Tribunal’s

⁴⁸³ Report of the International Law Commission, 70th Session, UN Doc. A/73/10, Chapter VI, ¶ 18. **RL-0148.**

interpretation of the ordinary meaning of Article 1101(1)(a) of NAFTA, as set out above.⁴⁸⁴

485. In this case, the criteria of “concordant, common, and consistent” practice are crucial, as they indicate that the actions of the treaty parties must reflect a consistent and shared understanding that is regularly maintained in practice. With respect to Annex 14-C, public statements by the three USMCA Parties in a series of investor-state disputes have consistently confirmed a common and concordant interpretation of Annex 14-C. These statements and written submissions establish a pattern that should guide the Tribunal’s assessment of this interpretive question.

**f. Conclusion on the correct interpretation of Annex 14-C
of the USMCA in accordance with the VCLT**

486. Ultimately, a sound interpretive analysis in accordance with the rules set forth in Article 31 of the VCLT leads to the conclusion that Annex 14-C does not constitute an agreement to extend the binding force of the substantive investment protection obligations of Section A of Chapter 11 of NAFTA in relation to acts or events occurring after the termination of NAFTA. Rather, Annex 14-C constitutes exactly what its terms state: consent to extend access to NAFTA arbitration procedures for “legacy investment claims” alleging breach of NAFTA obligations and which, without further ado, could only arise in relation to acts or events that took place before the USMCA superseded and replaced NAFTA on July 1, 2020.

**2. The alleged indirect expropriation took place more than two
years after Article 1110(1) ceased to be binding on Mexico.**

487. The Claimant maintains that the “taking of the Project in breach of NAFTA Article 1110(1)” took place “on August 31, 2022”. Therefore, according to the Claimant, the alleged “expropriation” and “breach” took place more than two years after Article 1110(1) ceased to be binding on Mexico. As the Respondent has previously argued, there can be no breach of the substantive treaty protection obligations under Section A of Chapter 11 of NAFTA in relation to acts or events that took place after the termination of NAFTA.

⁴⁸⁴ *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, January 28, 2008, ¶ 189. **RL-0149**.

488. The Claimant disagrees that an “expropriation” can be “continuous” in nature, as the Respondent alleges. By definition, this cannot be the case.⁴⁸⁵ However, even a continuous situation that gave rise to a continuous breach of a NAFTA obligation could only be continuous until NAFTA was terminated and replaced by the USMCA on July 1, 2020. The continuing situation may have given rise to a continuing breach of a USMCA obligation from that date (*e.g.*, Article 14.8(1)), but it could no longer breach an obligation under a treaty from which the Parties had been exempted and to which they were no longer bound.

489. The Claimant presents the confusing argument that “Mexico unlawfully expropriated SVB’s protected investments in the Sierra Mojada Project through a series of continuing acts and omissions”.⁴⁸⁶ The use of the expression “series of acts and omissions” implies an alleged “breach consisting of a composite act” within the meaning of Article 15 of the ILC Articles on State Responsibility, which provides as follows: “The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act”.⁴⁸⁷ However, the use of the term “continuous” suggests an alleged “breach of an international obligation by an act of a State having a continuing character” within the meaning of Article 14(2) of the ILC Articles on State Responsibility, which “extends over the entire period during which the act continues and remains not in conformity with the international obligation”.⁴⁸⁸

490. The Claimant argues that “the conduct that forms the basis of SVB’s indirect expropriation claim here is continuing in nature and commenced *before* the NAFTA termination date”.⁴⁸⁹ In this regard, it argues that “its claims in this case – including its indirect expropriation claim under

⁴⁸⁵ See, for example, *Reza Said Malek v. Government of the Republic of Iran*, IUSCT Case 193. Final Award, August 11, 1992, ¶114, **RL-0036**, cited in: Ripinsky, Sergey, Williams, Kevin, *Damages in International Investment Law*, OUP (2008), pp. 246-247. **RL-0037** (“Where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of the property, the breach forming the cause of action is deemed to take place on the day when the interference has ripened into a more or less irreversible deprivation of the property rather than on the beginning date of the events”).

⁴⁸⁶ Reply ¶ 440.

⁴⁸⁷ Articles of the International Law Commission on the international responsibility of States, Article 15. **RL-0017**.

⁴⁸⁸ Articles of the International Law Commission on the international responsibility of States, Article 14(2). **RL-0017**.

⁴⁸⁹ Reply ¶ 457.

Article 1110(1) of NAFTA – arise out of Mexico’s continuing unlawful acts and omissions,” which “commenced on September 8, 2019, and continue to this day”.⁴⁹⁰ To the extent that the Claimant suggests that the alleged *breach* of Article 1110(1) began in September 2019 and continued to exist as of August 31, 2022, it is confusing the continuing (or composite) acts or omissions it alleges with the act of expropriation (*i.e.*, the “appropriation” of its investment by the State) it alleges. Even if a continuing breach of Article 1110(1) were legally and factually possible, it could not continue beyond the termination of NAFTA on July 1, 2020.

491. The Claimant's arguments are based on a misinterpretation of the “internationally accepted scope of the term expropriation”.⁴⁹¹

492. In its Counter-Memorial, the Respondent explained that, even in cases where the loss of value occurs over a period of time, indirect expropriation is a discrete event that occurs when “the economic value of the investment has been ‘neutralized or destroyed’.”⁴⁹² NAFTA tribunals have consistently held that indirect expropriation has effects equivalent to those of direct expropriation.⁴⁹³ This implies that, for indirect expropriation to occur, “the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision has been neutralized or destroyed”.⁴⁹⁴ It follows logically that a breach equivalent to expropriation cannot occur before this threshold is reached. Therefore, the Respondent argues that

⁴⁹⁰ Reply ¶ 455.

⁴⁹¹ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, ¶ 286. **RL-0067**. (“The Tribunal agrees with the conclusion in the Interim Award of the *Pope & Talbot Arbitral Tribunal* that something that is ‘equivalent’ to something else cannot logically encompass more. In common with the *Pope & Talbot* Tribunal, this Tribunal considers that the drafters of the NAFTA intended the word “tantamount” to embrace the concept of so-called “creeping expropriation”, rather than to expand the internationally accepted scope of the term expropriation”).

⁴⁹² Counter-Memorial, ¶326.

⁴⁹³ Counter-Memorial, ¶ 325. *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶¶ 116-117. **CL-0055**. See also, *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. **ARB(AF)/02/1**, Award, July 17, 2006, ¶ 176. **RL-0033**; *Lone Pine Resources Inc. v. the Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, November 21, 2022, ¶ 497, **RL-0032** and *Glamis Gold, Ltd. V. United States of America*, Final Award, June 8, 2009, ¶ 357. **RL-0034**.

⁴⁹⁴ *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/02/02, Award, May 29, 2003, ¶¶ 116-117, cited in *Lone Pine(AF)/00/2*, Award, May 29, 2003, ¶¶ 116-117, cited in *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, November 21, 2022, ¶ 497. **RL-0154**.

“[w]here the alleged expropriation is carried out by way of a series of interferences in the enjoyment of the property, the breach forming the cause of action is deemed to take place on the day when the interference has ripened into a more or less irreversible deprivation of the property rather than on the beginning date of the events”.⁴⁹⁵

493. In its Reply, the Claimant continues to erroneously rely on a characterization of the Respondent’s conduct as “continuous” to create a new type of expropriation that requires an analysis inconsistent with accepted approaches and definitions of expropriation.⁴⁹⁶ The Claimant argues that “the State’s wrongful conduct are continuing acts and omissions that result in an indirect expropriation due to their ‘significant and lasting negative effect’”.⁴⁹⁷ In the context of “creeping expropriation,” a series of unlawful acts and omissions may give rise to indirect expropriation, but the Claimant appears to reject the characterization of “creeping expropriation” in this case.⁴⁹⁸

494. Under the general framework for creeping expropriation, the acts that result in expropriation may occur over a period of time. However, “the date of the expropriation is the date on which the incriminated actions first lead to a deprivation of the investor’s property that crossed the threshold and became tantamount to an expropriation”.⁴⁹⁹ The framework the Claimant puts forward turns this concept on its head. The Claimant appears to suggest that a breach of expropriatory character was occurring while the NAFTA was in force. However, during this time, the investment retained its value. The Option Agreement remained in place, pursuant to which funding was provided to the Claimant. Moreover, the investment retained its value for more than

⁴⁹⁵ *Reza Said Malek v. Government of the Republic of Iran*, ICSID Case No. 193. Final Award, August 11, 2025, 1992, ¶ 114, **RL-0036**, cited in: Ripinsky, Sergey, Williams, Kevin, *Damages in International Investment Law*, OUP (2008), pp. 246-247. **RL-0037**.

⁴⁹⁶ Reply ¶ 325. *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶¶ 116-117, cited in *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, November 21, 2022, ¶ 497. **RL-0032**. See also: *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, July 17, 2006, ¶ 176, **RL-0033**. *Lone Pine Resources Inc. v. the Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, November 21, 2022, ¶ 497, **RL-0032** and *Glamis Gold, Ltd. v. United States of America*, Final Award, June 8, 2009, ¶ 357, **RL-0034**.

⁴⁹⁷ Reply ¶ 458.

⁴⁹⁸ Reply ¶ 458.

⁴⁹⁹ *Veteran Petroleum Limited (Cyprus) v. Russia*, PCA Case No. 2005-05/AA228, Final Award, July 18, 2014 ¶ 1761. **RL-0150**.

two years after NAFTA's expiry, i.e., until the alleged "taking" and indirect expropriation on 31 August 2022.⁵⁰⁰

495. The Respondent rejects the proposition that the Claimant's investment has ever been expropriated. However, for the sake of its jurisdictional objections, the Respondent reiterates that, with the termination of the NAFTA on 1 July 2020, the Parties were released from their substantive obligations under Section A of NAFTA Chapter 11 in relation to acts and facts taking place from that date forward.⁵⁰¹ When the Claimant and South32 mutually ended the option agreement, the situation pertaining to the Claimant's investments could not be characterized as a breach of Article 1110 of NAFTA because that provision no longer bound Mexico. In the absence of a binding obligation, there can be no breach.⁵⁰² In this regard, the obligations in NAFTA Article 1110(1) were superseded and replaced by the obligations in USMCA 14.8(1) as of 1 July 2020. The latter has since bound the Parties in relation to all acts and facts taking place after the date of entry into force of the USMCA or situations that did not cease to exist before that date.⁵⁰³

496. The Claimant argues that the decision of the International Court of Justice ("ICJ") in *Nicaragua v. Colombia* supports its position. It contends that "Nicaragua brought claims under Article XI of the Pact of Bogota arising out of certain 'incidents' that had occurred both before and after the date on which the Pact of Bogota ceased to be in force for Colombia", and that the "ICJ found that it had jurisdiction over Nicaragua's claims relating to incidents that had occurred after the date of termination"⁵⁰⁴ The Claimant argues that a "similar conclusion is warranted here" because, "[a]s in *Nicaragua v. Colombia*, Mexico's measures in this case that occurred after the NAFTA termination date are simply a continuation of the same measures that existed before the NAFTA termination date".⁵⁰⁵

⁵⁰⁰ Reply ¶ 443.

⁵⁰¹ Vienna Convention on the Law of Treaties, Article 70. **RL-0018.**

⁵⁰² International Law Commission, Articles on the International Responsibility of States, Article 13, **RL-0017.**

⁵⁰³ NAFTA, Article 14.2(3).

⁵⁰⁴ Reply, ¶¶ 463-465.

⁵⁰⁵ Reply, ¶ 465.

497. However, there is no basis for the Claimant to rely on the ICJ’s findings in *Nicaragua v. Colombia* or to present the situation in that case as remotely instructive. First, this was not an investor-state dispute, and there was no claim of expropriation involved.

498. Second, the ICJ was considering its jurisdiction in circumstances where the treaty was terminated while the proceedings were well underway, after the ICJ had assumed jurisdiction over the dispute in relation to acts, facts, and alleged breaches that had taken place before the termination of the treaty. Thus, the ICJ was not considering its jurisdiction in the context of a new claim submitted to arbitration that, from the beginning, relied on acts and facts taking place both before and after the termination of a treaty. Instead, the ICJ was tasked with determining whether the introduction of new acts and facts into the existing dispute, over which the ICJ had already concluded it had jurisdiction, could transform the nature of the dispute to the point that its jurisdiction was impaired by the new acts and facts that had occurred after the termination of a treaty.⁵⁰⁶

499. For the foregoing reasons, the ICJ’s decision in *Nicaragua v. Colombia* has no application to the current question, which is whether an alleged indirect expropriation can breach NAFTA Article 1110 more than two years after that provision has ceased to bind the Parties (having been terminated and replaced by USMCA Article 14.8 and the new investor-state regime).

a. The word “tantamount” in Article 1110 must be given effect. Expropriation cannot be temporary, recurrent or continuous whether direct or indirect.

500. The Claimant creates an artificial distinction between “a situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property”,⁵⁰⁷ and a situation where the indirect expropriation results from the “significant and lasting negative effects” of the State’s “continuing acts and omissions”.⁵⁰⁸ The Respondent contends that, for the purposes of this analysis, it is unnecessary to parse the distinctions between a “series of acts” and “continuing acts and omissions” and assess their implications because there

⁵⁰⁶ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, International Court of Justice, Summary 2022/3, April 21, 2022, Section II, **CL-0205**.

⁵⁰⁷ Reply ¶ 458. *Citing Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003, ¶ 20.22, **CL-0203**.

⁵⁰⁸ Reply ¶ 458.

is no reason to depart from the generally accepted analyses of expropriation — including with respect to “creeping expropriation”. Under the NAFTA, a breach that is tantamount to expropriation (direct, indirect, or creeping) occurs when a substantial or complete deprivation of the attributes of the property in an investment occurs, not beforehand, and not when it is likely to occur.⁵⁰⁹

501. Further, NAFTA ISDS decisions and awards do not support an expansion of the scope of expropriation, conceptually or legally. The word “tantamount” in Article 1110 must be given effect. As the Respondent explained in the Counter-Memorial, expropriation cannot be temporary, recurrent, or continuous, whether direct or indirect.⁵¹⁰ The tribunal in *S.D Myers* affirmed this point:

The Tribunal agrees with the conclusion in the Interim Award of the *Pope & Talbot* Arbitral Tribunal that something that is “equivalent” to something else cannot logically encompass more. In common with the *Pope & Talbot* Tribunal, this Tribunal considers that the drafters of NAFTA intended the word “tantamount” to embrace the concept of so-called “creeping expropriation”, rather than to expand the internationally accepted scope of the term expropriation.⁵¹¹

502. The Claimant attempts to broaden the scope of the term “expropriation” based on *the cases of Wena Hotels Ltd. v. Arab Republic of Egypt, Olin Holdings Ltd v. Libya, and G. Mohamed Abdel Raouf Bahgat v. Egypt (I)*. These cases arise in the context of BITs that are relevant to the present

⁵⁰⁹ *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018 ¶ 154. **RL-0083**. (“Breaches of Articles 1102(3) and 1105(1) occur when the governmental conduct complained of occurs. By contrast a breach of Article 1110(1) occurs when the expropriation (as there defined) occurs and not before. The gist of an expropriation is the loss of the property in question, as a result of a governmental taking (direct or indirect). Only when the investor is substantially or completely deprived of the attributes of property in an investment can there be an expropriation under Article 1110(1).”) [emphasis added]; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, ¶ 328. **RL-0032** (“Claims only arise under NAFTA Article 1110 when actual confiscation follows, and thus mere threats of expropriation or nationalization are not sufficient to make such a claim ripe; for an Article 1110 claim to be ripe, the governmental act must have directly or indirectly taken a property interest resulting in actual present harm to an investor”).

⁵¹⁰ Counter-Memorial ¶ 325. *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, *Laudo*, 29 de mayo de 2003, ¶¶ 116-117, cited in *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, November 21, 2022, ¶ 497. **RL-0032**. See also: *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, July 17 2006, ¶ 176. **RL-0033** and *Glamis Gold Ltd. v. United States of America*, Final Award, June 8, 2009, ¶ 357. **RL-0034**.

⁵¹¹ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Parical Award, November 13, 2000, ¶¶ 283-286. **RL-0067**.

NAFTA arbitration. The language of the relevant provisions and circumstances that were found to be expropriatory are easily distinguished.

503. More importantly, the tribunals in these cases found that expropriation took place on the date when the State's alleged misconduct was or became expropriatory in nature. In each case, the State's conduct in-and-of-itself was arguably tantamount to expropriation from the first act or omission that impacted the investment, regardless of the duration and long-term effects of such conduct. None of these cases adopt or support the adoption of a distinct type of indirect expropriation that merits a novel approach to the factual and legal analyses.

- i) In *Wena Hotels Ltd. v. Arab Republic of Egypt*, the tribunal determined that the expropriation took place on the date that the State-controlled entity forcibly and violently seized the hotels. The tribunal found that this had the effect of transferring the hotels to the State-controlled entity.⁵¹² The tribunal's analysis focused heavily on the fact that the entity that seized the hotels was State-controlled. This situation, which continued for a year, was deemed indirect expropriation, not because of the long-lasting effects, but because of the immediate gravity of the conduct attributable to the State.⁵¹³
- ii) In the case of *Olin Holdings Ltd v. Libya*, the State expropriated a plot of land on which the investor's factory was located. An order for eviction was sent to the investor (the "Expropriation Order"). This was followed by the demolition of buildings around the factory, which impacted critical infrastructure (sewage, electricity).⁵¹⁴ While the State's conduct met the definition of a direct expropriation, it was characterized as indirect expropriation because the expropriated land on which the investment operated was not owned by the investor.⁵¹⁵ After the Expropriation Order and eviction notice, legal proceedings and regulatory processes related to the legality of the Expropriation Order placed the investment under significant uncertainty.⁵¹⁶ The tribunal was meticulous in considering the entirety of the circumstances that spanned the five years of uncertainty regarding the expropriation. Although the finality of the expropriation

⁵¹² *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, ¶¶ 124, 125, 131. **CL-0049.**

⁵¹³ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, ¶¶ 79-128. **CL-0049.**

⁵¹⁴ *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Final Award, May 25, 2018, ¶ 189, 229, 314. **CL-0173.**

⁵¹⁵ *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Final Award, May 25, 2018, ¶ 166. **CL-0173.**

⁵¹⁶ *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Final Award, May 25, 2018, ¶¶ 165-166. **CL-0173.**

remained in question for many years, the expropriation was deemed to occur on the date when the Expropriation Order was originally issued in 2006.⁵¹⁷

- iii) In *G. Mohamed Abdel Raouf Bahgat v. Egypt (I)*, the State took a series of actions that were cumulatively deemed expropriatory in nature on the date when the freezing order, the last of the measures, was implemented.⁵¹⁸ The Tribunal found that, within the span of one month, the “Respondent not only arrested Claimant but also took control over the Project site, froze the assets of the Companies, and prohibited the employees from returning to their offices”.⁵¹⁹ Notably, the State’s multi-pronged interference with the investment also created years of uncertainty, but it was the cumulation of State conduct which led the tribunal to conclude that an indirect expropriation had occurred.

504. The three cases show that, where there is the potential that the impugned conduct may be reversed, tribunals have considered whether this potential or actual reversal precludes a finding of expropriation.⁵²⁰ The cases also show that, while this context is relevant to the overall analysis, the potential for reversibility does not preclude a finding that a State’s conduct constitutes an expropriation. Ultimately, these cases do not support the Claimant’s proposition that a state’s conduct can be deemed expropriatory prior to the date of the “taking” because of the eventual damage such conduct allegedly causes to an investment.

505. Further, the examples cited by the Claimant show that acts and omissions that are expropriatory in nature are not continuous. Rather, they occur at a distinct point in time, and they are primarily characterized as expropriatory by virtue of their direct and definitive impact — i.e., substantially or completely depriving the investor of the investment— not because of their “significant and lasting negative effect” on the investment.⁵²¹ The accepted approach to determine when an indirect expropriation occurred requires determining when the impugned actions first led

⁵¹⁷ *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Final Award, May 25, 2018, ¶¶ 165-167. **CL-0173**.

⁵¹⁸ *Mohamed Abdel Raouf Bahgat v. Egypt (I)*, PCA Case No. 2012-07, Final Award, December 23, 2019, ¶¶ 203,482, 479, **CL-0172**.

⁵¹⁹ *Mohamed Abdel Raouf Bahgat v. Egypt (I)*, PCA Case No. 2012-07, Final Award, December 23, 2019, ¶ 482, **CL-0172**.

⁵²⁰ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, ¶ 99. **CL-0049**. *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Final Award, May 25, 2018, ¶¶ 165-167. **CL-0173** *Mohamed Abdel Raouf Bahgat v. Egypt (I)*, PCA Case No. 2012-07, Final Award, December 23, 2019, ¶ 227, **CL-0172**.

⁵²¹ Reply ¶ 458. *Mohamed Abdel Raouf Bahgat v. Egypt (I)*, PCA Case No. 2012-07, Final Award, December 23, 2019, ¶ 232, **CL-0172**.

“to a deprivation of the investor's property that crossed the threshold and became tantamount to an expropriation.”⁵²²

b. The facts alleged to constitute a breach of Article 1110 had not occurred before the Parties were released from their substantive obligations under Section A of Chapter 11 of NAFTA.

506. The Claimant appears to be attempting to extend backward in time the alleged expropriation so that it falls within the scope of NAFTA, prior to July 1, 2020, at a time when the Parties were bound by Article 1110. However, the Claimant has clearly argued that the “taking” of its investment took place on 31 August 2022,⁵²³ and that “[t]he termination of the Option Agreement in August 2022 resulted in the complete loss of the Project's value, as well as the value of the amounts SVB invested to acquire and develop the Project”.⁵²⁴ According to the Claimant, “from that moment forward, the Project was unviable.”⁵²⁵ The Respondent maintains that this alleged expropriation took place long after Article 1110 ceased to be binding and, therefore, any expropriation that allegedly occurred in August 2022 was not—and could not be—a violation of NAFTA.

507. Acts and facts taking place more than two years earlier, before July 1, 2020, cannot properly be characterized as expropriation. As the tribunal ruled in *Glamis Gold, Ltd. v. United States*, “[c]laims only arise under NAFTA Article 1110 when actual confiscation follows, and thus mere threats of expropriation or nationalization are not sufficient to make such a claim ripe.”⁵²⁶ Moreover, as the tribunal in *Resolute Forest Products Inc. v. Government of Canada*: “one cannot know of a breach until the facts alleged to constitute the breach have actually occurred. It is not

⁵²² *Veteran Petroleum Limited (Cyprus) v. Russia*, PCA Case No. 2005-05/AA228, Final Award, July 18, 2014 ¶ 1761. **RL-0150.**

⁵²³ Reply, ¶ 440.

⁵²⁴ Memorial, ¶ 3.28; Reply, ¶¶ 7, 281, 624.

⁵²⁵ Reply, ¶ 426.

⁵²⁶ *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, award, June 8, 2009, ¶ 328. **RL-0034.** See also *Eli Lilly v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, March 16, 2017, ¶163. **RL-0024**; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, ¶ 103. **RL-0105.**

enough that a breach is likely to occur.... [A] breach of Article 1110(1) occurs when the expropriation (as there defined) occurs and not before.”⁵²⁷

508. For the foregoing reasons, the Claimant's claim under NAFTA Article 1110 falls outside the Tribunal's jurisdiction *ratione temporis* and *ratione voluntatis*.

C. The Tribunal does not have jurisdiction *ratione temporis* or *ratione voluntatis* over the claims alleging non-compliance with Articles 1102 and 1103.

509. The Claimant, in its Memorial, presented claims alleging breaches of NAFTA Articles 1102 (national treatment) and 1103 (most-favored-nation treatment) together under a single heading.⁵²⁸ The Claimant broadly, that: “Mexico’s inaction in relation to the Continuing Blockade constitutes ‘treatment’ for purposes of NAFTA Articles 1102 and 1103”.⁵²⁹ On this basis, it alleged that Mexican authorities had accorded more favorable treatment to: (i) Mexico's “own investors”, “by permitting Mineros Norteños to blockade, occupy, possess, and exploit the Sierra Mojada Project site unlawfully”; and (ii) a group of “foreign mining companies”, “by ending the blockades imposed on their mining operations, while permitting the Continuing Blockade at Sierra Mojada to continue unabated and without sanction”.⁵³⁰

510. The Claimant did not identify when the alleged breaches had taken place. However, it repeated its allegation that “Mexico's acts and omissions lead to the total destruction of the value of the Project, as well as the value of the amounts SVB invested to acquire and develop the Project, in breach of Mexico's obligations under NAFTA”.⁵³¹ This suggested that the alleged loss or damage was the same as that alleged in relation to the Claimant's other claims under NAFTA Articles 1105 and 1110. The Claimant alleges that it incurred this loss or damage on August 31, 2022, arguing that: “[t]he termination of the Option Agreement in August 2022 resulted in the complete loss of the Project’s value, as well as the value of the amounts SVB invested to acquire

⁵²⁷ *Resolute Forest Products Inc. v. Government of Canada*, ICC Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018 ¶ 154. **RL-0083**.

⁵²⁸ Memorial, ¶¶ 4.55-4.70.

⁵²⁹ Memorial, ¶ 4.60.

⁵³⁰ Memorial, ¶ 4.65.

⁵³¹ Memorial, ¶ 4.70.

and develop the Project.”⁵³² According to the Claimant, “from that moment forward, the Project was unviable”.⁵³³

511. In its Counter-Memorial, the Respondent noted that “the Claimant has omitted basic facts of its claim, such as the date of the alleged breach of Article 1102”, preventing the analysis of “issues such as, for example: (i) whether the claim was filed within the 3-year period under Articles 1116(2) and 1117(2) or (ii) whether the obligation existed at the time of the alleged breach (*i.e.*, whether the Tribunal has jurisdiction *ratione temporis* and *ratione voluntatis* over the claim)”.⁵³⁴ The Claimant’s claim under Article 1103 also suffered from the same deficiencies.

512. In addition, the Respondent noted that none of the examples that the Claimant offered as evidence of an Article 1103 breach had taken place while the NAFTA was in force. The Respondent explained that all of these alleged comparators “occurred between 2021 and 2023”, even though the “NAFTA was replaced by the USMCA as of July 1, 2020, and its obligations ceased to apply between the Parties”.⁵³⁵ The Respondent explained that the “Claimant cannot use the treatment accorded to a third country investor at a date after the termination of NAFTA to demonstrate a breach of NAFTA” and, therefore, “none of the examples offered by the Claimant constitute evidence of a breach of Article 1103”.⁵³⁶

513. In its Reply, the Claimant clarified that the “relevant treatment” it alleges to be “less favourable treatment” under Articles 1102 and 1103 “began in September 2019 and continues to this day”.⁵³⁷ Although the Claimant does not refer to the alleged breaches as “continuing breaches”, it relies on the same incorrect interpretation of USMCA Annex 14-C that it offered in relation to its indirect expropriation claim under Article 1110: *i.e.*, “the investment protections under the NAFTA continued to apply to legacy investments until 30 June 2023 pursuant to Article 14-C of the USMCA”.⁵³⁸ On this basis, the Claimant argues that , since “[a]ll of the relevant

⁵³² Memorial, ¶ 3.28; Reply, ¶¶ 7, 281, 624.

⁵³³ Reply, ¶ 426. [Emphasis added]

⁵³⁴ Counter-Memorial, ¶ 493.

⁵³⁵ Counter-Memorial, ¶ 500.

⁵³⁶ Counter-Memorial, ¶ 500.

⁵³⁷ Reply, ¶ 591.

⁵³⁸ Reply, ¶ 592.

treatment regarding the Claimant, its investments, and the relevant comparators occurred before that date”, “they can plainly form the basis of a breach of NAFTA Articles 1102 and 1103”.⁵³⁹ The Claimant is incorrect.

514. For the same reasons as those explained in the Respondent’s jurisdictional objections concerning the Claimant’s claims under Articles 1105 and 1110, the Claimant’s claims under Articles 1102 and 1103 also fall outside the Tribunal’s jurisdiction *ratione temporis* and *ratione voluntatis*.

515. First, as the Respondent has explained above, the Claimant errs in its interpretation of the scope of Annex 14-C. Annex 14-C simply extended, for a 3-year period, the *consent* of the Parties to continue using the ISDS mechanism set out in Section B of NAFTA Chapter 11 to arbitrate “legacy investment” claims and “pending claims” alleging breaches of certain NAFTA obligations that had necessarily occurred prior to the NAFTA’s termination. Annex 14-C did not operate as a “survival clause” or otherwise extend the binding force of the Section A obligations in relation to acts or facts taking place after the NAFTA was terminated, superseded, and replaced by the USMCA. In this regard, the Respondent refers to and relies upon the arguments and evidence that it has presented above concerning the correct interpretation of Annex 14-C. The Respondent’s position is confirmed by the overwhelming consensus in the subsequent practice of the three USMCA Parties, which has established a clear, consistent, and concordant interpretation of Annex 14-C.

516. Second, as explained above, any breach of Articles 1102 or 1103 could not continue beyond the termination of the NAFTA on 1 July 2020 because the Parties were released from their substantive obligations under Section A of NAFTA Chapter 11 in relation to acts and facts taking place from that date forward. Article 70(1)(a) of the VCLT confirms that: “Unless the treaty otherwise provides or the parties otherwise agree, *the termination of a treaty under its provisions or in accordance with the present Convention ... releases the parties from any obligation further to perform the treaty*”.⁵⁴⁰ Since neither the USMCA nor the NAFTA “otherwise provides”, and the USMCA Parties did not “otherwise agree”, a breach of an obligation under Section A of NAFTA Chapter 11 could only occur while the NAFTA was in force and bound the Parties. As

⁵³⁹ Reply, ¶ 592.

⁵⁴⁰ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, Article 70. **RL-0018**.

noted above, the consensus of the USMCA Parties, as established in their subsequent practice, is that they “do not permit claims based on an alleged NAFTA breach that occurred after the NAFTA was terminated”.⁵⁴¹ Thus, Articles 1102 and 1103 simply do not apply in relation to acts and facts taking place after 1 July 2020.

517. This is entirely in keeping with Article 13 of the ILC Articles on State Responsibility, which codifies the application of the general principle of intertemporal law in the field of State responsibility.⁵⁴² Article 13 provides that: “An act of the State does not constitute a breach of an international obligation unless the State is bound by that obligation at the time the act occurs”.⁵⁴³ When there is no binding obligation in force, there can be no breach.

518. The Claimant continues to be evasive about identifying the date(s) of the alleged breaches. In its Reply submission, it merely alleges that: “Mexico not only afforded more favorable treatment *after* the NAFTA terminated, it also afforded more favorable treatment *before* the NAFTA terminated”⁵⁴⁴ The Complainant is mistaken that a breach of Articles 1102 or 1103 could arise under *both* scenarios, on either side of the NAFTA’s termination date.

519. Mexico was bound by the NAFTA treaty protection obligations *before* the NAFTA was terminated. *After* the USMCA entered into force, Mexico was bound by the USMCA treaty protection obligations under the new investor-State regime established in Chapter 14. Thus, to the extent that Mexican authorities allegedly accorded treatment to the Claimant that was less favourable than the treatment they accorded to other investors *before* the termination of the NAFTA, such treatment may have breached NAFTA Articles 1102 and/or 1103 *at that time*. However, to the extent that Mexican authorities allegedly accorded such treatment to the Claimant *after* the termination of the NAFTA, it could no longer be said to constitute a breach of Articles 1102 or 1103. At best, such treatment may have constituted a breach of Articles 14.4 and/or 14.5 of USMCA Chapter 14, which were the binding obligations in force *at that time*.

⁵⁴¹ *Cyrus Capital Partners, L.P. and Contrarian Capital Management, LLC v. United Mexican States*, ICSID Case No. ARB/23/33, Article 1128 Submission of Canada, July 15, 2025, ¶ 9 **RL-0122**.

⁵⁴² ICD Articles, vol. II, part 2 (2001), UN Doc. A/CN.4/SER.A/2001/Add.1 (part 2), p. 57. **RL-0123**.

⁵⁴³ ICD Articles, vol. II, part 2 (2001), UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), p. 57. **RL-0123**.

⁵⁴⁴ Reply, ¶ 593.

520. Moreover, the “total destruction of the value of the Project” that the Claimant allegedly incurred when the Option Agreement was terminated in August 2022 cannot be attributed to a breach of Articles 1102 or 1103. This is because the loss or damage that was allegedly incurred when the Option Agreement was terminated, or that arose following the termination of the Option Agreement, took place more than two years after Articles 1102 and 1103 had ceased to be binding on Mexico. Therefore, any loss or damage that was incurred as of August 2022 could not be incurred by reason of, or arising out of, a breach of Articles 1102 or 1103.

521. To the extent that a breach of Articles 1102 or 1103 may have occurred *before* the termination of the NAFTA, while the NAFTA was in force, it is notable that the Claimant’s investment retained its value during this time. The Option Agreement remained in place, pursuant to which South32 continued to provide funding to the Claimant.

522. For the foregoing reasons, the Claimant’s claims under NAFTA Articles 1102 and 1103 fall outside the Tribunal’s jurisdiction *ratione temporis* and *ratione voluntatis*.

D. The Tribunal does not have jurisdiction *ratione materiae* over certain assets that the Claimant considers investments

523. In its Counter-Memorial, the Respondent alerted the Tribunal to a seizure on 19 concessions related to the Sierra Mojada Project. The Respondent noted that the seizure, which was implemented before the Claimant’s RfA was submitted, meant that the Claimant did not have full control or ownership of these assets.⁵⁴⁵ Given the legal status of these concessions, the Claimant retains something less than full ownership and control. Under the circumstances, these assets cannot be characterized as an “investment of an investor of a Party” pursuant to NAFTA Article 1139.⁵⁴⁶ It is the status of the concessions at the time when the RfA was lodged that is relevant for assessing issues of jurisdiction.⁵⁴⁷

⁵⁴⁵ Counter-Memorial ¶¶ 348-350.

⁵⁴⁶ Counter-Memorial ¶¶ 345, 350.

⁵⁴⁷ Counter-Memorial ¶ 349 *Carlos Sastre et al. v. the United Mexican States*, ICSID Case No. UNCT/20/2, Award, November 21, 2022, ¶¶ 157. **RL-0043**.

524. The Claimant attempts to characterize the claims of Mr. Valdez and his parents as “spurious” and “unfounded,” and the seizure as a “provisional remedy” or a “precautionary measure”.⁵⁴⁸ These characterizations are inaccurate and misleading. The facts are that:

- Mr. Valdez was successful in his lawsuit against Minera Metalín, obtaining a judgment of US\$ 5.9 million in October 2020 that covered the unpaid debt and rent that Minera Metalín owed to his elderly parents.⁵⁴⁹
- When Minera Metalín failed to pay the judgment, Mr. Valdez proceeded to request the seizure of Metalín’s bank accounts and real estate. As these proved insufficient, proceedings ensued leading to the attachment and seizure of the mining concessions comprising the Sierra Mojada Project.⁵⁵⁰ In this regard, the Claimant confirms that “the Valdezes moved to extend the seizure to encompass the concessions”.⁵⁵¹

525. The Claimant seeks to emphasize that enforcement proceedings involving the forced sale and transfer of mining concessions are a lengthy and highly regulated process under Mexican law,⁵⁵² but Mr. Valdez believes that the Claimant has engaged in tactics to unduly delay this process for as long as possible .⁵⁵³ The Respondent submits that, for the purposes of submitting NAFTA claims against Mexico, the Claimant should not be considered to have full ownership or control of the concessions. Although it is true that a seizure does not necessarily guarantee that a formal transfer of title will ultimately take place, legal title is only the starting point for determining ownership and control.⁵⁵⁴ Whatever ownership or control remains with the Claimant is not sufficient in this case for the investment to meet the de definition of “investment of an investor of a Party”.

⁵⁴⁸ Reply, ¶¶ 470, 472-473.

⁵⁴⁹ Witness Statement of Mr. Valdez, ¶¶ 16-17.

⁵⁵⁰ Witness Statement of Mr. Valdez, ¶ 26.

⁵⁵¹ Reply, ¶ 302.

⁵⁵² Reply, ¶¶ 335-353.

⁵⁵³ Witness Statement of Mr. Valdez, ¶ 28.

⁵⁵⁴ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015 ¶104. **RL-0151**. (“There is a general presumption that a majority shareholder also controls the company, a presumption which can only be rebutted if there are special elements which create doubts about the owner’s control”). Here while legal title may create a general presumption the existence of the seizure rebuts this presumption.

526. The Respondent also maintains that the Option Agreement does not meet the definition of “investment” under either NAFTA or the ICSID Convention. First, the agreement does not fit the specific definition of “investment” under NAFTA Article 1139, and it fails to satisfy the elements of the *Salini test*. Consequently, it does not meet the standard for what constitutes an investment under the ICSID Convention.

527. The Claimant’s contention that it meets the definition of investment under the NAFTA arises from a misapplication of the requirements set out by the tribunal in *Lone Pine Resources v. Canada*. The Claimant’s interests in the Option Agreement do not arise from a commitment of capital, but rather a *potential* commitment to sell shares that never actually materialized — i.e., an “option” that was never exercised.

528. The Claimant also contends that the Option Agreement should be considered a covered investment because it was “inextricably linked” and “part and parcel” with the larger investment in the Sierra Mojada Project. The claimant in this regard has failed to show how the mere possibility of selling 70% of the Shares of the investment, in the event that South32 decided to exercise its option to purchase them, was an inextricable part of an investment that had existed for over 25 years without such an option agreement, without delineating any economically mineable ore body, and without earning any revenue at all. Simply put, the way the Claimant had been funding its exploration activities for a few years cannot, by virtue of being the sole means of financing during that time, make it inextricable from the investment itself.

529. The Claimant also failed to meet the burden of proving that the Tribunal has jurisdiction under Article 25 of the ICSID Convention. The Claimant only proved that, through the Option Agreement, South32 had contributed to the economic development of the host State. The Claimant’s own contributions have not been demonstrated. Similarly, the circular logic it employed to demonstrate that the investment involved risk for purposes of the *Salini test* only serve to illustrate the lack of any real risk undertaken by the Claimant with respect to the Option Agreement.

1. The Claimant does not have control over certain assets that it identifies as an investment

530. The impact of a seizure of pertinent assets on the jurisdiction of an investor-state tribunal has not been widely analyzed. The reason in most cases may be that the seizure-like measure that

allegedly deprived the investor of ownership and control is also the basis for the investor-state claim.⁵⁵⁵ Jurisdictional challenges based on the same grounds as the investor’s claim could have resulted in a circular dilemma contrary to the object and purpose of investment treaties. The factual circumstances in the current case do not create such a conundrum for the Tribunal. Here, the Claimant has lost significant property interests in certain key assets of its investment due to a dispute with a third person (Mr. Valdez) that is entirely unrelated to its NAFTA claims, or to Mineros Norteños, or to the Mexican authorities. Rather, the Valdez enforcement proceedings and seizures are solely the result of the Claimant’s disregard for its legitimate contractual obligations and dilatory tactics.⁵⁵⁶

531. Two key clarifications must be made regarding (1) the legal character of the seizure, and (2) the legal and factual effects of the seizure. Ultimately the seizure is not as insignificant to the Claimant’s ownership and control as it contends.

532. First, the Claimant incorrectly describes the Valdez seizure as a “precautionary measure”, citing an unrelated *amparo* proceeding challenging the constitutionality of the reform regarding “seizures”.⁵⁵⁷ There are two types of seizure under Mexican law: “precautionary” and “executionary”.⁵⁵⁸ The seizure to which the Claimant’s concessions are subject is the result of the forceful execution of a binding judgement on the Claimant. Once the Claimant was warned about the seizure, but nevertheless failed to pay the amount owed to the Valdez family, the assets were identified, and the seizure was constituted.⁵⁵⁹ Under this type of seizure, the Claimant’s continued failure to pay the judgment will eventually crystallize in the loss of the property.⁵⁶⁰

533. The Claimant’s characterization of the “seizure” as a merely a judicial attachment is misleading. *First*, a prudent investor would surely know that the “seizure” under Mexican law is more than a judicial attachment. The seizure dispossesses the investor of its property rights to use

⁵⁵⁵ See, e.g., *Mohamed Abdel Raouf Bahgat v. Egypt (I)*, PCA Case No. 2012-07 (“*Bahgat v. Egypt I*”), Final Award, December 23, 2019, **CL-0172**.

⁵⁵⁶ Witness Statement of Mr. Valdez, ¶¶ 6 and 17. Reply, ¶¶ 225-255.

⁵⁵⁷ Reply ¶ 334.

⁵⁵⁸ See Civil Procedure Code for the State of Coahuila, Article 938. **R-0049**.

⁵⁵⁹ Witness Statement of Mr. Valdez, ¶¶ 23-26. Reply ¶ 244.

⁵⁶⁰ Counter-Memorial ¶ 244.

the property, enjoy its economic benefits, or dispose of it freely.⁵⁶¹ In effect, although the Claimant retains formal ownership of the concessions, it has been deprived of the essential attributes of ownership and control over them. This situation has existed since June 2, 2023, and persists to this day.⁵⁶² The seizure has the effect of confiscating the Claimant's assets, and the Claimant has not demonstrated that it retains full ownership or control.

534. *Second*, the situation becomes even more serious when considering that, since December 5, 2023, the Claimant's operating properties—including workshops, offices, and main access points—were awarded to the Valdez family.⁵⁶³

2. The Option Agreement with South32 does not constitute an investment.

a. The Claimant failed to demonstrate that Minera Metalín's interest in the Option Agreement is covered by NAFTA Article 1139(h)

535. The Claimant alleges that the Option Agreement meets the definition of investment set out in NAFTA article 1139(h) because it meets the requirements identified by the tribunal in *Lone Pine Resources v Canada*.⁵⁶⁴ In that case, the tribunal found that an investment under NAFTA Article 1139(h) contains four requirements: “the alleged investment must be (i) an interest; (ii) arising out of the commitment of capital or other resources in the territory of a NAFTA party; (iii) which capital, must have been committed towards economic activity in the territory of a NAFTA party; and (iv) must be pursuant to a contractual arrangement”.⁵⁶⁵

536. The Claimant's misapplication of these criteria leads it to conclude that “SVB has an interest (i.e., its rights under the Option Agreement) arising from its commitment of capital and resources

⁵⁶¹ Counter-Memorial ¶ 244.

⁵⁶² Witness Statement of Mr. Valdez, ¶ 26.

⁵⁶³ Order awarding the properties, December 5, 2023. **R-0136**.

⁵⁶⁴ Reply, ¶ 480. *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, November 21, 2022, ¶ 347. **RL-0032**.

⁵⁶⁵ Reply, ¶ 480. *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, November 21, 2022, ¶ 347. **RL-0032**.

toward economic activity in Mexico (i.e., its investments in the Sierra Mojada Project), which is pursuant to a contractual arrangement (i.e., the Option Agreement with South32)”.⁵⁶⁶

537. In the Counter-Memorial, the Respondent also explained that South32’s payments, and the potential future purchase of the Project, do not depend on the production, revenues, or profits of the Sierra Mojada Project.⁵⁶⁷ In its Reply, the Claimant argues that “South32’s future returns on its investment in the Project if it decided to exercise its option were undoubtedly dependent on the future ‘production, revenues or profits’ of SVB. Thus, the Option Agreement with South32 falls squarely within the scope of NAFTA Article 1139(h)”⁵⁶⁸ This proposition equates an option agreement with a purchase agreement. The key distinction is that the potential future profits do not depend on production, they depend on a decision to exercise the option. The Claimant cannot speculatively assume that the Option Agreement will be exercised for purposes of this analysis. This cannot be treated as a foregone conclusion. More importantly, that determination would only be relevant if South32’s investment were the basis of this dispute.

538. The Option Agreement involves financing the further exploration of the Project. The interests that the Claimant describes are receipt of \ funds for the purpose of exploring the *potential* of its investment. As the “operator” in the Option Agreement, the Claimants commitments are not of capital or resources.⁵⁶⁹ In the Claimant’s own words, “South32’s acquisition of a 70% interest and corresponding funding would have, in turn, permitted SVB, as operator, to develop and implement a mine plan and proceed to the feasibility stage”.⁵⁷⁰

539. From before the start of the contractual agreement with South32 until the termination of the Option Agreement, the Claimant did not provide capital or resources pursuant to a contractual agreement. The Claimant’s interests arose solely from the promise to sell its shares if South32 wished to exercise the option of purchasing them. The option was never exercised.

⁵⁶⁶ Reply, ¶ 481.

⁵⁶⁷ Counter-Memorial, ¶¶ 354-358.

⁵⁶⁸ Reply, ¶ 485.

⁵⁶⁹ Option Agreement, Clause (6.6). **C-0031**.

⁵⁷⁰ Reply, ¶ 92.

540. Notably, the case the Claimant cites to support a broader interpretation of NAFTA Article 1139(h) explicitly excludes “potential interests” from covered investments.⁵⁷¹ In *Merrill & Ring Forestry v. Canada*, the tribunal found that:

While there can be no doubt that property such as the lands, logs or timber which are affected to the requisite degree by government measures will be protected under Article 1139(h)...The right concerned would have to be an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument. This reasoning underlies the Feldman tribunal’s conclusion that an investor cannot recover damages for the expropriation of a right it never had. Expropriation cannot affect potential interests.⁵⁷²

541. Under the standards proposed by the Claimant, its interests in the Option Agreement do not constitute investments, as they are only “potential interests” (which did not arise from a commitment of the Claimant’s resources).

542. The Claimant further contends that the Option Agreement is inextricable from the investment. The Claimant supports its position by citing *Finley Resources Inc v United Mexican States*. The tribunal in the *Finley* arbitration determined that it had jurisdiction over a guarantee/contingent liability that could not be considered an investment outside of a very specific context.⁵⁷³ The Claimant is effectively arguing that because of the alleged importance of the Option Agreement, it should be considered an investment even if it does not meet the definition of an investment. The Respondent rejects the characterization of the Option Agreement as “part and parcel” or “inextricably linked” to the Claimant’s investment. The Option Agreement was only in force for a fraction of the investment’s existence, and the Claimant has failed to establish that the the Project was without value in the absence of the Option Agreement.⁵⁷⁴

543. For the foregoing reasons, the Tribunal lacks jurisdiction *ratione materiae* to hear the issues surroundind to the Option Agreement.

⁵⁷¹ Reply, ¶ 482. *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, ICSID Administered, Award, demarche 31, 2010, ¶142, CL-0029.

⁵⁷² Reply, ¶ 482. *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, ICSID Administered, Award, demarche 31, 2010, ¶¶ 141-142, CL-0029.

⁵⁷³ Reply, ¶ 483.

⁵⁷⁴ Reply, ¶ 646.

IV. CLAIMANT HAS FAILED TO ESTABLISH ANY BREACH OF NAFTA

544. As established in the previous section, this Tribunal does not have jurisdiction to examine the Claimant's claims under NAFTA Articles 1102, 1103, 1105, and 1110. However, should the Tribunal disagree and find that it has jurisdiction to examine one or more of those claims, the Claimant has failed demonstrated that any of those Articles have been violated.

A. Relevant context for the Tribunal to assess whether the invoked NAFTA obligations have been breached

1. Claimant's actions

545. In addressing its claims under the above-mentioned NAFTA provisions, the Claimant's Reply completely ignores the context of the demonstrators' actions. That context is the foundation for such actions, explains why they occurred, and demonstrates why they do not constitute international wrongs or breaches of NAFTA obligations.

546. That context makes it clear that the Claimant's actions are the *sole direct cause* of the demonstrations and their duration. Without the Claimant's actions, the demonstrations would never have taken place. Once they occurred, it was entirely up to the Claimant to resolve them reasonably so that its exploration activities could continue. The Claimant's unwillingness to reasonably resolve its dispute with Mineros Norteños is the sole reason for the duration of the demonstrations. The financial cost of resolving the dispute with Mineros Norteños was insignificant compared to the value Claimant attributes to its investment and cannot be used to justify the Claimant's alleged inaction. There is no doubt that the Claimant's decision not to resolve the matter with Mineros Norteños was a poor business decision and that the Claimant is "the author of its own misfortune."

547. By initiating this arbitration, the Claimant seeks compensation from the Respondent for its own misconduct and business decisions, for the consequences arising from the risks it created with such conduct and decisions, and for its unacceptable treatment of Mineros Norteños' members. This includes seeking compensation for its failed attempt to use its biased interpretation of the facts in this arbitration to compel the Respondent to take action against an unsophisticated and disadvantaged group for demonstrations that were justifiable and reasonable when considered in their proper context. No breaches of NAFTA Chapter XI occurred, and the Claimant's case is based on a misapplication of the fundamental principles of international law incorporated therein.

548. The following facts, ignored by the Claimant in its Reply, provide important context for the Tribunal's assessment of the demonstrators' action, Respondent's response to them, and the Claimant's characterization of both:

- The members of Mineros Norteños are a modest and economically disadvantaged group. This contrasts sharply with the Claimant, which is an exploration company run by a more sophisticated and well-paid management. From the outset, there was an economic imbalance in favor of the Claimant.
- The matter in question arises from a commercial dispute that has been ongoing for more than a decade between the Claimant and Mineros Norteños in relation to a 25-year-old commercial agreement (the “2000 Contract,” which incorporated provisions from a previous 1997 Contract) under which the group transferred its mining rights to the Claimant in exchange for royalty payments in order to develop two mines that “traditionally were the only source[s] of employment in the region.”⁵⁷⁵ The dispute went through several stages, resulting in the following judgments (an incidental judgment with three subsequent challenges, the original 2017 judgment with three confirming challenges, and an appellate judgment updated following an amparo proceeding), all of which confirmed Mineros Norteños' interpretation of the 2000 Contract. Although the statute of limitations barred Mineros Norteños from enforcing the 2000 Contract through a commercial lawsuit, Claimant's obligation to pay royalties to Mineros Norteños was confirmed, which remains in effect to date:
 - a. **Judgement on the incident of failure to comply with a term or condition:** in May 2014, Mineros Norteños filed a lawsuit against Metalín alleging breach of the 2000 Contract for failing to pay any royalties to Mineros Norteños.⁵⁷⁶ On August 21, 2014, Metalín responded to the lawsuit and argued, among other issues, that no deadline had been set for the start of mining operations and, therefore, the necessary condition for the payment of royalties had not been met. On April 24, 2015, the Eighth District Judge issued a judgement on the incident of failure to comply with the deadline or condition in which, contrary to Metalín's arguments, he confirmed that under the 1997 Contract the parties had agreed to a four-year period from the acquisition of the mining concessions rights to commence exploration and

⁵⁷⁵ Counter-Memorial, ¶¶ 95-96-110, citing judgment Amparo 375/2020, pp. 12-13. **C-0040.**

⁵⁷⁶ Counter-Memorial, ¶ 107.

production, and confirmed the obligation to pay royalties to Mineros Norteños upon expiration of that period.⁵⁷⁷

- b. **Appeal Judgement 7/2015:** Minera Metalín filed an appeal and, on March 7, 2016, the Second Unitary Court of Mexico issued an appeal judgement confirming the judgement of the Eighth District Judge and determining that: (i) the Eighth District Judge had properly interpreted the Concession Agreements; (ii) Metalín was indeed obligated to put the mining lots into production no later than within four years and (iii) Metalín had not demonstrated that the payment of royalties to Mineros Norteños was subject to having “prepared and developed the mineral deposit, detached and extracted the mineral product and that smelter settlements had been obtained or such product had been sold”.⁵⁷⁸ It also noted that there was no evidence that Metalín had taken steps to begin exploitation of the mining lots.⁵⁷⁹
- c. **Amparo Judgement 4/2016:** Minera Metalín filed an amparo lawsuit to challenge Appeal Judgement 7/2015, and on August 23, 2016, the First Unitary Court issued an amparo judgement upholding the decision of the Second Unitary Court and concluding that, contrary to Minera Metalín's allegations, Appeal Judgement 7/2015 had correctly determined that there was an obligation to bring the concessions into production within four years and that Metalín had made no effort to achieve this.⁵⁸⁰
- d. **Amparo Judgement in Review 145/2016** - Minera Metalín filed a third challenge through an appeal for review of the amparo, which was dismissed on the grounds that Appeal Judgement 7/2015 did not constitute an irreparable act, thereby implicitly upholding the decisions of the lower courts.⁵⁸¹
- e. **Commercial Trial Judgment 2/2015** - Once all appeals had been exhausted, the Eighth District Judge issued Commercial Trial Judgment 2/2015, confirming that Minera Metalín was obliged to commence work on the mining lots within a period of four years, which expired on August 30, 2001.⁵⁸² He noted that, although the 2000 Contract did not specify the deadline by which mining operations (and, therefore, payments to Mineros Norteños) were to begin, this was because the 1997 Contract had already established this requirement.⁵⁸³ However, due to the expiration of the 10-year statute of limitations for filing a claim on August 31, 2011, Mineros Norteños' action was time-barred.⁵⁸⁴ This did not extinguish Mineros Norteños' right to payment or to the fulfillment of the Claimant's obligation under

⁵⁷⁷ Counter-Memorial, ¶ 115.

⁵⁷⁸ Counter-Memorial, ¶¶ 118, citing Appeal Judgment 7/2015.

⁵⁷⁹ Counter-Memorial, ¶¶ 119.

⁵⁸⁰ Counter-Memorial, ¶¶ 123-124.

⁵⁸¹ Counter-Memorial, ¶¶ 126-127.

⁵⁸² Counter-Memorial, ¶¶ 128.

⁵⁸³ Counter-Memorial, ¶ 130.

⁵⁸⁴ Counter-Memorial, ¶¶ 131.

the 2000 Contract, but it did preclude the creditor's right to bring an action before the courts and demand performance by the debtor.⁵⁸⁵

- f. **Appeal Judgment 12/2017** - Mineros Norteños appealed the Commercial Trial Judgment 2/2015. The central issue was the determination of the date from which the statute of limitations should be counted.⁵⁸⁶ On July 31, 2019, the Second Unitary Court of the Federal District issued Appeal Ruling 12/2017, upholding the Commercial Court Ruling.⁵⁸⁷
- g. **Amparo Judgment 750/2019** – Dissatisfied with the outcome, Mineros Norteños filed amparo proceedings 750/2019. On January 24, 2020, the Third Collegiate Court issued Amparo Judgement 750/2019 and ordered a new judgment on Appeal 12/2017.⁵⁸⁸
- h. **Second Appeal Judgment 12/2017** – In response to the Amparo Judgement 750/2019, on March 10, 2020, the Second Unitary Tribunal issued a new Appeal Judgement 12/2017.⁵⁸⁹ In this judgement, it was determined that although the action was time-barred, Metalín had the obligation to commence mining operations within four years, that is, by August 30, 2001.⁵⁹⁰
- i. **Amparo Judgment 375/2020** – Mineros Norteños filed Amparo 375/2020 against the Second Appeal Judgement. On March 11, 2021, the Third Collegiate Court issued Ruling 375/2020 and concluded that the Second Unitary Court had not violated any constitutional rights of Mineros Norteños.⁵⁹¹ However, the Third Collegiate Court also analyzed the 1997 Contract and the 2000 Contract and determined that Metalín had the obligation to begin mining operations within four years.⁵⁹²
- Claimant's exploration activities under that agreement have continued for 25 years with no indication that the mine will go into production. This occurred 21 years after, according to the judgement of the Mexican courts, the Claimant's obligations under the 2000 Contract to commence production should have been fulfilled.

⁵⁸⁵ Counter-Memorial, ¶¶ 132.

⁵⁸⁶ Counter-Memorial, ¶ 135.

⁵⁸⁷ Counter-Memorial, ¶ 139.

⁵⁸⁸ Counter-Memorial, ¶ 142.

⁵⁸⁹ Counter-Memorial, ¶ 143.

⁵⁹⁰ See *supra*, ¶ 74.

⁵⁹¹ Counter-Memorial, ¶ 145.

⁵⁹² See *supra*, ¶ 94.

- The sole purpose of the 2016 and 2019 demonstrations was to seek an amicable solution to a commercial dispute arising from Metalín's repeated breach of contract.⁵⁹³
- The Claimant refused to engage in genuine negotiations with Mineros Norteños to resolve the dispute.

549. In view of this context, the core of the Claimant's case is: (i) the claims before Mexican courts were time-barred and irrelevant to whether NAFTA had been breached or to support the Claimant's argument that there was no obligation to commence production; (ii) Mineros Norteños had no legitimate basis for their demonstrations; and (iii) under international law, the Respondent was obligated to take action against the Mineros Norteños demonstrators. The Tribunal must reject these three arguments.

550. Although the claim became time-barred, it was Claimant's actions that caused the statute of limitations to expire. The Claimant's executives had the balance of power in the commercial relationship and had strong economic incentive to perpetuate their personal remuneration and, to that end, they put their own interests first and took advantage of a simple and economically disadvantaged group that had placed its trust in the Claimant. Through these actions, the Claimant deliberately created a situation that threatened the economic existence of the Mineros Norteños. At the same time, the Claimant took steps that led in the expiration of the statute of limitations and prevented Mineros Norteños from enforcing their contractual rights in Mexican courts.

551. There was clearly a legitimate basis for Mineros Norteños to protest. As determined by the Mexican courts, the Claimant delayed the development of the mine for 21 years after the production start date required by the contract, thereby breaching the terms of the 2000 Contract and, insofar as incorporated, the terms of the 1997 Contract. The Claimant was solely responsible for the prescription of the claim and, in doing so, severely harmed Mineros Norteños' members by depriving them of legal recourse to enforce their agreements. They suffered severe economic hardship and could no longer enforce their rights under the agreements in Mexican courts. The Claimant was unwilling to reasonably resolve its dispute with Mineros Norteños, despite having benefited from 21 years of exploration that were not contemplated in the 2000 and 1997 Contracts.

⁵⁹³ Counter-Memorial, ¶149.

The Claimant created a situation in which the protests were the only option left to Mineros Norteños. It cannot now complain about those demonstrations.

552. International law cannot be invoked to argue that Respondent was required to take measures against Mineros Norteños in these circumstances, solely to perpetuate the Claimant's principals' unjust enrichment. The Respondent's alleged inaction in the face of the demonstrators was legitimate for reasons including: (i) Mineros Norteños were exercising a constitutionally protected right to demonstrate; (ii) despite the Claimant's arguments to the contrary, the demonstrations were peaceful (the Claimant bases its case on evidence of minor incidents and that were fully understandable in the circumstances);⁵⁹⁴ (iii) it was a contractual dispute between the Claimant and the Mineros Norteños, a socially and economically disadvantaged group, provoked by the Claimant's own breach of the terms of its agreements with the Mineros Norteños; and (iv) the resolution of the dispute was at all times in Claimant's hands, which could have resolved it in a reasonable manner.

553. In this context, contrary to what the Claimant suggests in its Reply, the Respondent's actions did not amount to an indirect expropriation under NAFTA Article 1110, did not breach the national treatment obligations of Article 1102, did not breach the most-favored-nation obligations of Article 1103, and did not breach the minimum standard of treatment obligations of Article 1105.

2. The treatment of protesters in investor-state case law

554. The Respondent categorically rejects the Claimant's argument that it did not "take any reasonable action within its power to protect the Project site."⁵⁹⁵ The Claimant fails to address what constitutes reasonable action in the facts of this dispute in light of investor-State dispute settlement case law on protests. The few cases cited by the Claimant in relation to protests differ from the Claimant's circumstances both in terms of the nature and scale of the protests and the scale of the measures taken by the State.⁵⁹⁶

⁵⁹⁴ See Counter-Memorial, ¶¶ 149-191.

⁵⁹⁵ Reply, ¶264.

⁵⁹⁶ *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, November 7, 2018, ¶¶ 181-201, **RL-0106**. *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, March 31, 2025 ¶¶ 241-246. **CL-0176**.

555. The Claimant's argument that the Claimant did not take “any reasonable action” in response to the demonstration⁵⁹⁷ is based on two incorrect assumptions: (1) that a reasonable action is equivalent to forcibly evicting the Mineros Norteños camp located outside the Metalin facilities and ensuring that Mineros Norteños did not interfere with the continuation of the mine exploration; and (2) that the standard of due diligence and reasonableness is determined without taking into account national and international contextual factors.

556. As the Claimant rightly points out, the duty of States to protect foreign investments has deep historical roots.⁵⁹⁸ For example, *the case of ELSI v. Italy* was heard by the ICJ in 1996 and predates the growth of the investor-state dispute settlement system. However, *the ELSI v. Italy case* has been followed by NAFTA and other investor-state dispute settlement tribunals.⁵⁹⁹

557. This case set an important precedent for assessing a State's response to protests.⁶⁰⁰ *ELSI* established that the “provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.”⁶⁰¹ This is indicative of a deferential approach adopted to assess the State's response to protests, whether legal or not, and the standard of due diligence. The ICJ's conclusions on a State's response to protests have been repeated in subsequent investor-State arbitrations.⁶⁰²

⁵⁹⁷ Reply, ¶264.

⁵⁹⁸ Reply, ¶ 4 (point 16).

⁵⁹⁹ Counter-Memorial, ¶ 376. See, e.g., *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, May 2, 2007, ¶¶ 328-329; **RL-0074**. *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, Jan. 9, 2003, ¶ 121 (describing Canada's approval of the standard). **RL-0075**; *Joshua Dean Nelson v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, June 5, 2020, ¶ 324. **RL-0072**. *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, September 20, 2021, ¶ 279. **RL-0076**. *Crompton (Chemtura) Corp. v. Government of Canada*, CPA Case No. 2008- 01, Counter-Memorial (Public Version), October 20, 2008 [Part B], ¶ 47. **RL-0077**.

⁶⁰⁰ *Elettronica Sicula S.p.A (ELSI) (United States v. Italy)*, 1989 ICJ Reports 15 (July 20, 1989), ¶ 108 **RL-0073**.

⁶⁰¹ *Elettronica Sicula S.p.A (ELSI) (United States v. Italy)*, 1989 ICJ Reports 15 (July 20, 1989), ¶ 66 **RL-0073**.

⁶⁰² *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, ¶ 49. **RL-0103**. and *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, October 12, 2005, ¶¶ 164-165. **CL-0177**.

558. In *ELSI v. Italy*, the claimant alleged that the respondent “breached its legal obligations” by (1) unlawfully seizing ELSI’s plant; (2) **allowing ELSI’s workers to occupy the plant**; (3) unjustifiably delaying the resolution of the legality of the seizure; and (4) interfering in ELSI’s bankruptcy proceedings.⁶⁰³ The seizure of the plant was the most significant violation alleged, while the occupation of the plant following the seizure was ancillary.⁶⁰⁴

559. While *the ELSI case* differs from the current arbitration due to the significantly lesser relevance of the protest to the overall claim, as well as the scale and magnitude of the protests, the ICJ made three observations on protests that are useful for framing the current arbitration:

560. *First*, the ICJ emphasized that the employees acted in response to the company’s measures and that the company expected, or should have expected, that protests following the dismissal of 800 employees would cause some disruption to its operations.⁶⁰⁵ The fact that the company knew its actions would trigger some reaction by the affected employees was a relevant factor in the ICJ’s analysis. Similarly, the fact that the protest was a direct consequence of the actions, legitimate or not, taken by the company against the protesters cannot be underestimated. In this regard, the circumstances of the 2016 and 2019 demonstrations and Silver Bull’s continued lack of good faith in its negotiations with Mineros Norteños are relevant in assessing the alleged violations arising from the State’s response to the protests.

561. *Secondly*, there must be a degree of causation between the protesters’ challenged actions and the damage or deterioration of the investment for a State’s response to a protest to be considered less than “the full protection and security required by international law.”⁶⁰⁶ The ICJ determined that the Claimant had not demonstrated that the deterioration of the plant and

⁶⁰³ *Elettronica Sicula S.p.A (ELSI)* (United States v. Italy), 1989 ICJ Reports 15 (July 20, 1989), ¶ 108 **RL-0073**.

⁶⁰⁴ *Elettronica Sicula S.p.A (ELSI)* (United States v. Italy), 1989 ICJ Reports 15 (July 20, 1989), ¶ 48 **RL-0073**.

⁶⁰⁵ *Elettronica Sicula S.p.A (ELSI)* (United States v. Italy), 1989 ICJ Reports 15 (July 20, 1989), ¶ 108 **RL-0073**.

⁶⁰⁶ *Elettronica Sicula S.p.A (ELSI)* (United States v. Italy), 1989 ICJ Reports 15 (July 20, 1989), ¶ 108 **RL-0073**.

machinery was due to the presence of the workers.⁶⁰⁷ The alleged damage caused to the camp by the protest was insignificant, especially in the context of the amount of damages claimed.

562. *Third*, the classification of a protest as illegal is only one factor in the analysis and not a determining factor in concluding that a violation has occurred. The ICJ considered that “[t]he mere fact that the occupation was referred to by the Court of Appeal of Palermo as unlawful does not, in the Chamber’s view, necessarily mean that the protection afforded fell short of the national standard to which the FCN Treaty refers.”⁶⁰⁸ The analysis must evaluate both the protest and the State’s response in the context of the relevant treaty. As discussed above, the contextual background in which the protests arose is relevant to this assessment.

563. The assessment of a violation in the context of protests is a determination that depends largely on the facts. A thorough review of cases involving protests in investor-state dispute arbitration has not revealed any situation analogous to the present arbitration, a conclusion supported by the absence of such a decision or award in the Claimant’s own submissions. The cases identified in the Claimant’s submissions in which the alleged violation occurred in the context of protests are examined below.⁶⁰⁹ However, it remains very clear that the protests in *the cases of Cengiz v. Libya and Energía y Renovación Holding, S.A. v. the Republic of Guatemala* were large-scale, regional, and involved significant elements of violence and lawlessness.⁶¹⁰

564. Nevertheless, existing cases reveal trends that support and clarify the tribunals’ approach to this complex issue. A protest is a catalyst for a breach claim under investment treaties to the extent that the State’s actions in relation to that protest are considered to breach a treaty. However, the observed trend shows that the threshold for determining breach arising from a protest is very high. When determining the applicable threshold, it is useful to distinguish between the treatment

⁶⁰⁷ *Elettronica Sicula S.p.A (ELSI)* (United States v. Italy), 1989 ICJ Reports 15 (July 20, 1989), ¶ 108 **RL-0073**.

⁶⁰⁸ *Elettronica Sicula S.p.A (ELSI)* (United States v. Italy), 1989 ICJ Reports 15 (July 20, 1989), ¶ 108 **RL-0073**.

⁶⁰⁹ In addition, the Tribunal must take into account that the Claimant has not demonstrated a breach of Article 1105 of NAFTA. *See* Section IV.B *below*.

⁶¹⁰ *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, November 7, 2018, ¶¶ 181-201, **RL-0106**. *Energía y Renovación Holding, S.A. v. the Republic of Guatemala*, ICC Case No. ARB/21/56, Award, March 31, 2025 ¶¶ 241-246. **CL-0176**

of protest cases in the context of expropriation and those in the context of full protection and security.

a. The expropriation context

565. According to existing investor-State case law, a State's conduct only reaches the level of expropriation when combined with government action that directly impedes operations, such as a change in law, the revocation of a permit, or contractual disputes. To the extent that a tribunal has determined that full protection and security standards were breached, this issue will be addressed below. However, there is not a single example in which the alleged ineffectiveness of a State's protection against protesters has in itself constituted indirect expropriation. This illustrates the high standard required to establish indirect expropriation and the Claimant's misinterpretation of what conduct elevates the level of a breach under customary international law.

566. The only NAFTA arbitration identified in relation to protests that had any bearing on the finding of non-compliance by the Government is *the case of Metalclad v. Mexico*. The tribunal's analysis focused on the respondent State's failure to “ensure a transparent and predictable framework for Metalclad’s business planning and investment.”⁶¹¹ While the blockade was part of the factual background, it did not figure in the tribunal's reasoning as a basis for the finding of non-compliance. It should be noted that the tribunal did not rule on the claimant's allegations that “the demonstration was organized at least in part by the Mexican state and local governments, and that state troopers assisted in blocking traffic into and out of the site.”⁶¹² In short, the protest itself was incidental to other challenged conduct.

567. In *South American Silver v. Bolivia*, local communities protested against the company's mining project. The tribunal considered the context of these protests, which led to a government decree nationalizing the project and revoking the company's rights. The tribunal found that Bolivia did not pay adequate compensation for the expropriation, but did not find it to be unlawful.

⁶¹¹ *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, ¶ 99. **RL-0105**. This decision was partially overturned by the British Columbia Supreme Court because the court interpreted that the minimum treatment obligation included the obligation of transparency in case 1105. *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Reasons for the judgment of the Honorable Mr. Justice Tysoe, May 2, 2001, ¶¶ 70-76. **RL-0152**.

⁶¹² *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, ¶ 99. **RL-0105**

Interestingly, the tribunal found that the claimant had contributed to the escalation of the social conflict.⁶¹³ Furthermore, mindful of the cultural and historical context of the region, the tribunal took note of the mediation efforts proposed by the State and declined to speculate on the viability or feasibility of more forceful interventions.⁶¹⁴

568. In both the *Abengoa v. Mexico* and *Tecmed v. Mexico* cases, protests surrounding the construction of a landfill project formed the factual backdrop to the tribunal's analysis of expropriation; however, it was the non-renewal or cancellation of the permit authorizing the investor to operate the landfill that constituted the expropriation, not the Government's alleged failure to protect the investment from protesters.⁶¹⁵

569. The Claimant asserts that, unlike the claimant's subsidiary in *Copper Mesa*, it did not employ “organised armed men in uniform using tear gas canisters and firing weapons at local villagers and officials” to deal with the protesters,⁶¹⁶ and should therefore be commended for its

⁶¹³ *South American Silver Limited v. Plurinational State of Bolivia*, CPA Case No. 2013-15, Award, November 22, 2018 ¶ 491. **RL-0153**. (“That said, the Parties do not dispute the existence of a social conflict, and that marches, demonstrations, and violent acts, including physical violence and deaths, emerged. Evidence on the existence of the social conflict is abundant in the record. The substantive difference between the Parties is that each of them holds the other one responsible for causing the conflict. In the view of the Tribunal, it is clear, as mentioned in the paragraphs above, that the conflict with the indigenous communities had its genesis in the Project. It is possible that poverty in the area and even a history of actions or omissions by the government of Bolivia towards the communities had contributed to the conflict, but even if it were assumed that the Claimant was not involved in instigating the conflict, the actions it took upon seeing the first seeds of the conflict contributed to the divisiveness and more profound clashes among the Indigenous Communities”.

⁶¹⁴ *South American Silver Limited v. the Plurinational State of Bolivia*, CPA Case No. 2013-15, Award, November 22, 2018 ¶ 575. (“For one thing, it is clear that the Respondent, in particular through Governor Gonzalez, supported the meetings and attempts to mediate, which culminated, inter alia, in the Agreement with the Office of the Governor.⁹³⁷ Bolivia offered a suspension of the activities to placate the conflict, which CMMK rejected, and Bolivia’s officials met on several occasions with the community members and with CMMK to seek solutions to the conflict. It is not the task of the Tribunal to speculate ex post facto and with a retroactive bias whether other measures could have been implemented or whether the military intervention requested by the Claimant would have been effective.”)

⁶¹⁵ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶¶ 108, 151. **RL-0154**. *Abengoa, S.A. and COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, April 18, 2013 [Testado] ¶¶ 578-610. **RL-0155**.

⁶¹⁶ *Copper Mesa Mining Corporation v. Republic of Ecuador*, CPA Case No. 2012-2, Award, March 15, 2016, ¶ 4.265. **RL-0057**.

treatment of Mineros Norteños.⁶¹⁷ The Claimant's conduct is far from commendable. While in *Copper Mesa* the existing situation of social unrest was exacerbated by the deployment of armed personnel, the claimant's negligent and deliberate actions directly created the situation that gave rise to its injury.⁶¹⁸ In *Copper Mesa*, the tribunal found that the claimant's negligence was sufficient to establish contributory negligence.⁶¹⁹ As set out in this submission, a similar conclusion should be adopted in this arbitration.⁶²⁰

b. The full protection and security context

570. This issue is more complex in the context of full protection and security, as the protests addressed in existing jurisprudence had varying importance in tribunals' final conclusions. In some cases, the protests at issue were related to the alleged final breach, but did not constitute a significant part of the tribunals' analysis.⁶²¹ In other cases, discussed below, the protests were relevant to the tribunal's assessment of the breach.

⁶¹⁷ Reply, ¶ 4 (point 13).

⁶¹⁸ In the present case, the Claimant actively and negligently contributed to its loss, and the failure of the Project is attributable to three issues: (i) breach of contract with Mineros Norteños; (ii) lack of resources; and (iii) seizure of the concessions due to the litigation against the Valdez family. See Section V.C. 2 and 3 below.

⁶¹⁹ *Copper Mesa Mining Corporation v. Republic of Ecuador*, CPA Case No. 2012-2, Award, March 15, 2016, ¶ 6.100. **RL-0057**. (“That is not to say that the Claimant’s senior management in Canada was fully privy to the planning and execution of these acts. On the evidence, the Tribunal prefers to base its decision on the Claimant’s negligence, rather than the wilful conduct of its Canadian senior management. If it were based on the latter’s own wilful conduct as the Claimant’s alter ego, the result, as regards Article 39, would be much graver for the Claimant’s case. in fact like in *Copper Mesa*”). On November 13, 2008, almost a year after these critical events, the Claimant’s situation had not improved in the Junín area. In fact, the Claimant had by then acquired pariah status in the local community and in Quito, which undoubtedly motivated its change of corporate name in July 2008, to no avail.

⁶²⁰ The Tribunal may confirm that the Claimant actively and negligently contributed to her loss. See Section V.C. 2 and 3 below.

⁶²¹ *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, September 16, 2015. **RL-0156**. (breach of FET unrelated to protests), *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003. **RL-0154**. (breach of FET unrelated to protests), *Abengoa, S.A. and COFIDES, S.A. v. the United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, April 18, 2013. **RL-0155**. (breach of FET not attributed to the treatment of protesters, but to the cancellation of the permit), *Metalclad Corporation v. the United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000. **RL-0105** (breach of FET unrelated to protests). *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania I.*, ICSID Case No. ARB/15/31, Award, March 8, 2024. **RL-0157**. (public resistance led to the closure of the project; breach of FET unrelated to protests), *Tekfen-TML Joint Venture and others v. Libya*,

571. The cases identified below demonstrate that the context in which the protests arose, their magnitude, the level of damage, and the State's conduct are all relevant elements in this analysis. Ultimately, tribunals have followed the considerations set forth in *ELSI* discussed above.⁶²² (1) The issue of causation between the company's actions and the protest is highly relevant; (2) any deterioration of the investment as a result of the protest must be identified and attributable to the protest; and (3) the analysis must assess both the protest and the State's response in the context of the relevant treaty and the totality of the factual circumstances.

572. The tribunal in *South American Silver v. Bolivia* determined that the State did not breach the full protection and security standard by failing to act more forcefully to resolve the protests.⁶²³ In reaching this conclusion, the tribunal took into account the social context of the region, the claimant's conduct, and the applicable standard under the treaty.⁶²⁴ The tribunal considered that the claimant had undertaken good faith efforts that met the standard of due diligence to help resolve the matter by assisting in negotiations and seeking alternatives to conflict.⁶²⁵ It is important to note that the tribunal referred to the State's experience in resolving social conflicts within its borders. The tribunal considered that the respondent's judgment on the appropriateness of more forceful measures prevailed over the claimant's request for militarization.⁶²⁶ Protests arise from a complex matrix of facts and circumstances that are specific to a State and, often, to a particular region within that State. The standard of due diligence requires taking this context into account, especially when

ICC Arbitration No. 21371/MCP/DDA, Final award, February 11, 2020. **RL-0158.** (he analysis of FPS is unrelated to the state's treatment of protesters).

⁶²² *Elettronica Sicula S.p.A (ELSI)* (United States v. Italy), 1989 ICJ Reports 15 (July 20, 1989), ¶ 108 **RL-0073.**

⁶²³ *South American Silver Limited v. the Plurinational State of Bolivia*, CPA Case No. 2013-15, Award, November 22, 2018 ¶ 88-91. **RL-0159.**

⁶²⁴ *South American Silver Limited v. the Plurinational State of Bolivia*, CPA Case No. 2013-15, Award, November 22, 2018 ¶ 687. **RL-0159.** ("The Tribunal agrees that the full protection and security standard under the Treaty imposes on Bolivia the duty to act with due diligence, i.e. to adopt measures that are reasonable to protect the investment, taking account of the circumstances of the case.")

⁶²⁵ *South American Silver Limited v. the Plurinational State of Bolivia*, CPA Case No. 2013-15, Award, November 22, 2018 ¶ 91. **RL-0159.**

⁶²⁶ *South American Silver Limited v. the Plurinational State of Bolivia*, CPA Case No. 2013-15, Award, November 22, 2018, ¶ 90. **RL-0159.**

weighing the State's obligations to its citizens, the international community, and the investor.⁶²⁷ The Claimant's insistence on the use of police force in this arbitration proceeding ignores this reality. Similarly, its allegations that the State failed to take reasonable measures ignore the support provided to facilitate negotiations.

573. In *Louis Dreyfus Armateurs v. India*, a project to modernize the Haldia port complex faced protests from workers and unions, fueled by fears of job losses. The protests included actions such as blocking trucks and preventing access by officials and workers.⁶²⁸ There was conflicting evidence about the level of violence in the protests.⁶²⁹ In its assessment of whether the respondent had breached the full protection and security standard, the tribunal did not examine the effectiveness of the police response. Instead it:

consider[ed] such questions about the proper deployment of law enforcement resources to be generally judgment calls, to be made by a State acting in good faith to protect individuals and local businesses from intimidation and violence, and exercising the degree of due diligence required by international law, based on the foreseeability of unrest in a particular area, the extent of available resources, and competing demands for allocation of those resources among other areas potentially also in need of law enforcement protection.⁶³⁰

⁶²⁷ Additionally, in Mexico, the use of public force is a regulated and sensitive issue. Its legal system and legislation govern the use of public force with a view to safeguarding the human rights of its citizens, including the right to freedom of demonstration. In any case, the Claimant could have requested the adoption of alternative measures with full respect for the human rights of the demonstrators. See Section II.D. 1 and 3.

⁶²⁸ *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Award, September 11, 2018 ¶ 219. **RL-0160**. (“labor protests against the Consent Order began almost immediately, initially outside the dock area and targeting KoPT and HDC officers themselves. On 18 September 2012, KoPT notified the police that a group of 200-250 workers, mostly from Ripley and another operator (A.M. Enterprise), had gathered to protest outside of the main HDC offices; according to the INTTUC labor leader, “[t]hey were protesting against KoPT’s decision to take vessels at Berth No. 2 & 8 on priority over other berths” under the Consent Order, which would lead to retrenchment of workers employed on other berths. KoPT reported that the crowd was blocking the main gate of its offices and “not allowing any Port Officials or vehicles to pass through.” The police were requested to take action “so that the blockade at the gate is lifted forthwith.” By KoPT’s account, the police thereafter intervened and the workers “lifted the blockade of the office”; police records suggest that no active intervention was needed, as the officer who visited the site of the demonstration (at least upon his arrival) reported the site to be “peaceful,” with no obstruction of the gates.”)

⁶²⁹ *Ibid.*

⁶³⁰ *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Award, September 11, 2018, ¶ 382. **RL-0160**.

574. The arbitral tribunal further stated that “[i]n general, tribunals should be wary of second-guessing these judgment calls, except where the evidence suggests bad faith, improper intent, or a serious lack of due diligence in response to a reasonably foreseeable and otherwise manageable threat.”⁶³¹ While the tribunal recognized that assessing the issue of due diligence may be appropriate in some cases, it considered that the circumstances of the case placed the claim outside its jurisdiction.⁶³² Despite lacking jurisdiction, the tribunal emphasized that, when assessing the State actions, a certain degree of deference should be shown to the State’s judgments and exercise of due diligence. The Respondent addresses the due diligence argument below.⁶³³

575. In *De Sutter v. Madagascar II*, a bankrupt textile company laid off most of its staff, leading to protests and social tensions that escalated and resulted in the factory being attacked, looted, and set on fire.⁶³⁴ The claimants argued that the security forces (gendarmierie) could have protected the factory but arrived late and withdrew, while the respondent, Madagascar, contended that the gendarmierie’s actions were justified due to its limited resources and the need to preserve human life.⁶³⁵ The tribunal found that, despite the period of unrest in the region, the gendarmes could have arrived earlier and prevented the looting and destruction of the factory and that, by failing to do so, they had breached the full protection and security standard.⁶³⁶

⁶³¹ *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Award, September 11, 2018, ¶ 382. **RL-0160**.

⁶³² *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Award, September 11, 2018, ¶ 382. *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Award, September 11, 2018.

⁶³³ See Section V.B. below.

⁶³⁴ (DS)2, S.A., *Peter de Sutter and Kristof De Sutter v. Republic of Madagascar*, ICSID Case No. ARB/17/18, Award, April 17, 2020 ¶¶ 78-83. **RL-0161**.

⁶³⁵ (DS)2, S.A., *Peter de Sutter and Kristof De Sutter v. Republic of Madagascar*, ICSID Case No. ARB/17/18, Award, April 17, 2020 ¶ 296. **RL-0161**.

⁶³⁶ (DS)2, S.A., *Peter de Sutter and Kristof De Sutter v. Republic of Madagascar*, ICSID Case No. ARB/17/18, Award, April 17, 2020, ¶ 341. **RL-0161**. [Translated by the Respondent] (“The Tribunal considers that the available personnel could have taken several simple measures to protect the site and that they should have done so. They could have blocked the two access points to the site, fired repeated warning shots, maintained a visible presence giving the impression that they were defending the site, and secured the entrance to the factory. This would very likely have prevented the damage that occurred. Since the obligation to protect and ensure safety is an obligation of means and not of results, it is not necessary to establish that these measures would have prevented all damage. It is sufficient to note that the law enforcement officers did not make the efforts required of them by their duty to protect”).

576. In identifying the potential measures that the respondent State could have taken to avoid breaching the FPS standard, the tribunal in *De Sutter v. Madagascar II* appeared to depart from the deferential practice described above. However, its decision was based on a factual context easily distinguishable from the present arbitration:

- The tribunal was persuaded by the claimant's expert's assertion that the respondent readily available, simple, and non-coercive measures with high deterrent potential.⁶³⁷ One such measure was for the gendarmes to arrive at the scene earlier and use their vehicles to block the entrances.⁶³⁸ In the present arbitration, the Claimants did not identify any measures that had a high-deterrent, easily implementable measures. The Respondent maintains that it acted diligently, based on the peaceful nature and context of the demonstration.
- The tribunal found it very “striking” that “an unknown number of police officers left around 7:30 p.m. to go to dinner, and that the remaining officers left shortly after midnight, around 12:30 a.m., while the PGM factory was being looted and the store was on fire.”⁶³⁹ The physical destruction of property is not a significant part of the present arbitration, and the parties disagree on whether such damage can be attributed to the Respondent.⁶⁴⁰ More importantly, the tribunal in *De Sutter v. Madagascar II* considered that the continued police presence could have had a mitigating effect on the destruction. In the present arbitration, police presence was not necessary to maintain a peaceful manifestation, as evidenced by the continued absence of violence.⁶⁴¹

⁶³⁷ (DS)2, S.A., *Peter de Sutter and Kristof De Sutter v. the Republic of Madagascar II*, ICSID Case No. ARB/17/18, Award, April 17, 2020, ¶¶ 288 and 341. **RL-0161**.

⁶³⁸ (DS)2, S.A., *Peter de Sutter and Kristof De Sutter v. Republic of Madagascar II*, ICSID Case No. ARB/17/18, Award, April 17, 2020, ¶ 341. **RL-0161**.

⁶³⁹ (DS)2, S.A., *Peter de Sutter and Kristof De Sutter v. Republic of Madagascar II*, ICSID Case No. ARB/17/18, Award, April 17, 2020, ¶ 340. **RL-0161**.

⁶⁴⁰ In the present case, the failure of the Project is attributable to: (i) breach of contract with Mineros Norteños; (ii) lack of resources; and (iii) seizure of the concessions due to the enforcement of the litigation against the Valdez family. See Section V.C. 2 *below*.

⁶⁴¹ See Section II.D. *supra*.

577. The tribunal's findings in *De Sutter v. Madagascar II* were based on factual circumstances distinguishable from those in the present arbitration. However, the legal principles followed remain relevant: “the obligation to protect and ensure safety is an obligation of means and not of results.”⁶⁴² This issue is addressed below.⁶⁴³ However, it is clear that what is reasonable depends on the nature of the protest and the possibility of implementing response measures.

578. In *Energía y Renovación v. Guatemala*, the claimant alleged that Guatemala had violated the Free Trade Agreement by failing to protect its investment from social unrest and violence in the San Mateo Ixtatán region.⁶⁴⁴ The claimant's case was based on a series of attacks and threats by armed groups that destroyed property and caused injuries to personnel, resulting in project delays and cost increases.⁶⁴⁵ The tribunal departed significantly from the practice of deference to state sovereignty and ultimately concluded that Guatemala's efforts to protect the investment were insufficient.⁶⁴⁶ The tribunal also departed from the “means, not ends” approach previously followed.⁶⁴⁷

579. The reason for this marked departure was a Peace Agreement signed by the investor and the State in relation to the lack of security in the San Mateo Ixtatán region. This document served as an interpretive tool and as a clear indication of the State's intentions and commitments in relation to the standard of full protection and security. The tribunal emphasized the relevance of this legal document:

Nunca se insistirá lo suficiente en que las medidas establecidas en el Acuerdo para la Paz fueron negociadas y aceptadas por Guatemala, y que el gobierno guatemalteco estuvo ampliamente representado en su proceso de elaboración. Así, miembros de numerosos organismos y ministerios participaron de la elaboración del Acuerdo para la

⁶⁴² (DS)2, S.A., *Peter de Sutter, and Kristof De Sutter v. Republic of Madagascar II*, ICSID Case No. ARB/17/18, Award, April 17, 2020, 341. **RL-0161**. [Translated by the Respondent]

⁶⁴³ See Section IV.B. *below*.

⁶⁴⁴ *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, March 31, 2025, ¶¶ 78, 270-273. **CL-0176**.

⁶⁴⁵ *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, March 31, 2025, ¶¶ 82-85. **CL-0176**

⁶⁴⁶ *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, March 31, 2025 ¶ 331. **CL-0176**.

⁶⁴⁷ *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, March 31, 2025, ¶¶ 289 and 331. **CL-0176**.

Paz, entre ellos el Ministerio de la Defensa Nacional, el Ministerio de Gobernación y la Policía Nacional Civil

Debe subrayarse que este Tribunal no está evaluando la violación del Acuerdo como si fuera una violación contractual capaz de dar lugar a una violación del Tratado. La lógica del análisis es diferente. Este Tribunal entiende que el Acuerdo para la Paz estableció medidas objetivas que sirven de criterio para valorar si el Estado guatemalteco actuó o no con la debida diligencia bajo los términos del Artículo 10.06 del Tratado. De hecho, es la propia Guatemala, como parte del Acuerdo, la que reconoce que estas acciones deben ser implementadas para garantizar la seguridad y gobernabilidad de la región. Asimismo, al subscribir estas obligaciones, el Estado guatemalteco asume implícitamente que cuenta o contará con los medios para implementar dichas acciones.⁶⁴⁸ [Emphasis added]

There is no analogous agreement in the present arbitration and, therefore, there are no valid reasons to depart from the practice of deference to the State and the “means and not ends” standard identified above. Despite the Claimant's efforts to present the case of *Energia y Renovacion v. Guatemala* as analogous to the present arbitration,⁶⁴⁹ the record of the present arbitration does not provide a legal or factual basis that [justifies] such an analysis.

580. The claims in *Discovery Global v. Slovak Republic* arose from the government's response to protests by local activists who blocked the wells and from the government's order to conduct a full environmental assessment.⁶⁵⁰ The tribunal categorically dismissed all claims.⁶⁵¹ The tribunal conducted its analysis of the state's response to the protesters through the lens of legitimate expectations.⁶⁵² The tribunal determined that “the police appear to have been acting well within their right not to intervene in a private dispute between two co-owners over which it had no jurisdiction absent any indication of criminal conduct”.⁶⁵³ Therefore, the tribunal acted with deference to the State’s criminal property laws in its conclusions.

⁶⁴⁸ *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, March 31, 2025 ¶¶ 348, 350. **CL-0176**

⁶⁴⁹ Reply, ¶¶ 526-527.

⁶⁵⁰ *Discovery Global LLC v. Slovak Republic*, ICSID Case No. ARB/21/51, Award, January 17, 2025, ¶¶ 142 and 150. **RL-0162**.

⁶⁵¹ *Discovery Global LLC v. Slovak Republic*, ICSID Case No. ARB/21/51, Award, January 17, 2025, ¶ 713. **RL-0162**.

⁶⁵² *Discovery Global LLC v. Slovak Republic*, ICSID Case No. ARB/21/51, Award, January 17, 2025, ¶¶ 497-499. **RL-0162**.

⁶⁵³ *Discovery Global LLC v. Slovak Republic*, ICSID Case No. ARB/21/51, Award, January 17, 2025, paras. 530-532. **RL-0162**.

581. In *MNSS v. Montenegro*, the Claimant argued that “the Respondent subjected their investments to discriminatory, unreasonable, unlawful, and irregular acts and omissions that directly or cumulatively had the effect of unlawfully expropriating them and violating other standards of protection to which they consider themselves entitled.”⁶⁵⁴ The tribunal found that the lack of police intervention in response to employees’ occupation of the investment amounted to a violation of the treaty’s requirement of “constant protection and security”.⁶⁵⁵ The tribunal found that only two police officers were present during the occupation and failed to act, but refrained from commenting on what measures it would have considered sufficiently proactive. The respondent’s conduct in *MNSS v. Montenegro* was inferior to that of the Respondent in the present arbitration, which could be considered proactive.⁶⁵⁶

582. The tribunal went on to conclude that “the Claimants have failed to show that they suffered damage as a result of the Respondent’s actions. As a consequence, while the standard in Article 3(1) of the BIT was breached, there is no basis for an award of damages in relation to the behavior of the police during the two strikes at the end of the year 2010.”⁶⁵⁷ While the threshold for breach varies depending on the relevant BIT, the findings on the causation required between the alleged breach and the damage suffered remain generally pertinent and will be addressed below.⁶⁵⁸

583. In the *Toto Costruzioni v. Lebanon* case, the only part of the claim that referred to the protesters and an alleged violation of the full protection and security standard concerned obstruction of the investor's activity by disgruntled individuals whose land had been expropriated to allow the investment to proceed.⁶⁵⁹ The tribunal found that “the temporary obstructions of some expropriated owners did not amount to an impairment which affected the physical integrity of the

⁶⁵⁴ MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, May 4, 2016, ¶5. **CL-0076**.

⁶⁵⁵ MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, May 4, 2016, ¶ 356. **CL-0076**.

⁶⁵⁶ In this case, the local police monitored the 2019 Demonstration and were present to ensure that it was a peaceful exercise of the right to freedom of demonstration. See Sections II.D and IV.B.3.

⁶⁵⁷ MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, May 4, 2016, ¶ 356. **CL-0076**.

⁶⁵⁸ See Section V.C. *below*.

⁶⁵⁹ *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID CASE No. ARB/07/12, Award, June 7, 2012, ¶ 226,227. **RL-0164**.

investment. Moreover, it did not demonstrate that Lebanon could have taken preventive or remedial action that it failed to take, and that it acted negligently in relation to the owners' obstructions".⁶⁶⁰ The tribunal based its conclusions on the proposition that "the obligation to grant full security does not address all kinds of impairment, but only those which affect the physical integrity of the investment against the use of force."⁶⁶¹ The tribunal in *Toto Costruzioni v. Lebanon* thus created an exception for peaceful demonstrations, even if they interfere with the claimant's operations, as is the case in this arbitration.

584. *The case Copper Mesa Mining v. Ecuador* has already been discussed for its analysis of concurrent negligence in the context of protests.⁶⁶² The tribunal also found that the Respondent had breached the FET and FPS standards by legally prohibiting the claimant (under threat of criminal sanctions) from operating in the Junín area in response to anti-mining protests.⁶⁶³ Any analysis of whether the breach would have occurred without the additional legal prohibition imposed by the respondent is pure speculation. However, the tribunal stated that, while "the Respondent should have attempted something to assist the Claimant in completing its consultations and other requirements for the EIS. It is of course difficult to say now what it should have done to resolve all the Claimant's difficulties and, still more so, whether what anything it could have done would have changed the Claimant's position for the better." [emphasis added].⁶⁶⁴ In theory, assistance in completing the consultations could have been sufficient protection against a finding of non-compliance by the respondent, even if the consultations were ultimately unsuccessful.

585. Furthermore, the tribunal recognized that "the Government in Quito could hardly have declared war on its own people. Yet, in the tribunal's view, it could not do nothing."⁶⁶⁵ Inaction in

⁶⁶⁰ *Toto Costruzioni Generali S.p.A. Republic of Lebanon*, ICSID CASE No. ARB/07/12, Award, June 7, 2012, ¶ 229. **RL-0164.**

⁶⁶¹ *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID CASE No. ARB/07/12, Award, June 7, 2012, ¶ 228. **RL-0164.**

⁶⁶² *Copper Mesa Mining Corporation v. Republic of Ecuador*, CPA Case No. 2012-2, Award, March 15, 2016, ¶ 6.100. **RL-0057.**

⁶⁶³ *Copper Mesa Mining Corporation v. Republic of Ecuador*, CPA Case No. 2012-2, Award, March 15, 2016, ¶ 6.83. **RL-0057.**

⁶⁶⁴ *Copper Mesa Mining Corporation v. Republic of Ecuador*, CPA Case No. 2012-2, Award, March 15, 2016, ¶ 6.83. **RL-0057.** [emphasis added].

⁶⁶⁵ *Copper Mesa Mining Corporation v. Republic of Ecuador*, CPA Case No. 2012-2, Award, March 15, 2016, ¶ 6.83. **RL-0057.**

these situations is reprehensible, as is any action that could be interpreted as an aggressive use of force. Respondents in situations of social unrest have been forced to walk a fine line in order to continue complying with the rules of FET and FPS and with international human rights laws. In *Copper Mesa*, what ultimately cemented the violation was the added legal impediment to operations in contravention of the FET standard. In the present arbitration, no such factual situation exists. Consistent with the cases examined, State responses to protests do not readily constitute a violation of the FPS without violence or demonstrable harm to the physical integrity of the investment caused by the protesters.

586. In *Plama v. Bulgaria*, the claimant accused the respondent of failing to protect the refinery from illegal riots. Such failure “allegedly paralyzed the production of the Refinery and blocked all movements of products in and out of the Refinery for two and a half months.”⁶⁶⁶ The tribunal found that the evidence was contradictory in virtually every respect.⁶⁶⁷ Therefore, the tribunal was “unable to form any firm view as to what really transpired. The burden of proof being on Claimant, the tribunal cannot, therefore, rule in its favor concerning these allegations, including with respect to its claim under Article 12 of the ECT.”⁶⁶⁸ Despite the lack of analysis on the merits, the tribunal in *Plama v. Bulgaria* reiterated that the burden of proof rests with the Claimant, illustrating how the finding of a violation of the FPS rule is highly contextual and therefore inseparable from the findings of fact.

587. In the *Noble Ventures v. Romania* case, the claimant alleged that:

Romania failed to provide full protection and security to Noble Ventures during a period of extreme labor unrest in the spring and summer of 2001. [that] local police refused to

⁶⁶⁶ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, ¶ 236. **CL-0026**.

⁶⁶⁷ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, ¶ 248. **CL-0026** (“Eyewitnesses to the same events gave conflicting testimony as to what they saw. Thus witnesses presented by Claimant testified that the workers at the Refinery rioted, used violence to evict the Refinery’s director, Mr. Beauduin, from his office, were encouraged and even led in their actions by Syndic Todorova and that the police did nothing to intervene and afford protection to the premises and its management. Respondent’s witnesses testified that the workers gathered to demand payment of their overdue wages, that their demonstration was peaceful, that Syndic Todorova was not seen encouraging or leading the demonstration, that there was no violence and that Mr. Beauduin left his office of his own volition, safely escorted by the police.”)

⁶⁶⁸ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, ¶ 249. **CL-0026**

exercise adequate measures to protect Noble Ventures and CSR in Resita from unlawful activity on its premises. [and that] Romania did not provide reasonable nor adequate protection and security for Noble Ventures in Resita. As a result of unlawful strikes and occupations, Noble Ventures' premises were repeatedly occupied, its files and cash accounts were pilfered, facilities and equipment were sabotaged and members of its management were confined and, in some cases, beaten.⁶⁶⁹

588. Although Silver Bull alleges a disruption of its operations, it cannot claim that the conduct of the Mineros Norteños exceeded that allegedly suffered by Noble Ventures investors.⁶⁷⁰ The tribunal considered in that arbitration the facts of the *ELSI v. Italy* case and the conclusion that Italy's conduct was not contrary to international standards, concluding that it was not easy to demonstrate that standards of protection had been violated.⁶⁷¹ By stating that it is not easy to prove that protection standards have been violated, the tribunal's analysis of the *Noble Ventures* case confirmed the deference first observed in the *ELSI v. Italy* case.

With regard to the Claimant's argument that the Respondent breached Art. II (2)(a) of the BIT, which stipulates that the "Investment shall ... enjoy full protection and security," the Tribunal notes: that it seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in customary international law of aliens. The latter is not a strict standard, but one requiring due diligence to be exercised by the State. Questions concerning the content of the standards of protection have already been discussed to some extent by inter alia ICSID Tribunals in *Asian Agricultural Products Limited v. Republic of Sri Lanka* (Case No. ARB/87/3, Award of June 27, 1990, ICSID Reports IV, p. 250 and at pp. 278 et seq.) and in *American Manufacturing & Trading, Inc. v. Republic of Zaire* (Case No. ARB/93/1, Award of February 21, 1997, ICSID Reports V, p. 14, at p. 30), although the facts in those cases were quite different from those in the present case.

However, in its *ELSI* judgment (ICJ Reports 1989, p. 15 et seq.), the ICJ had to deal with a situation not so different from that in the present case. In *ELSI*, the Court was concerned with the occupation of a plant by its employees and with an alleged breach of a protection standard provided for in a Treaty of Friendship, Commerce, and Navigation concluded between the United States and Italy in 1948. The Court found that the protection provided by Italy could not be regarded as falling below the full protection and security required by international law, which, considering the facts of that case, indicates that violations of protection standards are not easily to be established. Comparing the facts of the *ELSI* case with the situation in the present case, it is difficult to see in what respect the conduct of the Respondent in the present case was more harmful than that of Italy in the *ELSI* case, so as to justify a different result.

⁶⁶⁹ *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, October 12, 2005, ¶¶ 15-17. **CL-0177**.

⁶⁷⁰ Memorial, ¶¶ 42-70.

⁶⁷¹ *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, October 12, 2005, ¶ 165. **CL-0177**

However, it does not seem to be necessary to enter into a detailed examination with regard to the claimed violation of Art. II (2)(a) of the BIT. Even assuming the correctness of the Claimant's factual allegations, it is difficult to identify any specific failure by the Respondent to exercise due diligence in protecting the Claimant. And even if one concluded that there was a certain failure on the side of the Respondent sufficiently grave to regard it as a violation, it has not been established that non-compliance with the obligation prejudiced the Claimant, to a material degree. The Claimant has failed to prove that its alleged injuries and losses could have been prevented had the Respondent exercised due diligence in this regard, nor has it established any specific value of the losses.⁶⁷² [emphasis added]

589. The Respondent has not proven that Mineros Norteños' actions were on par with those of other protesters and have not met the high standard for protest actions to constitute a violation of international obligations. Therefore, the Claimant's claims must be dismissed.

B. The Claimant has not demonstrated a breach of Article 1105 of NAFTA

590. If this Tribunal finds that it has jurisdiction to hear the Claimant's claims under Article 1105 of NAFTA, the Claimant has not demonstrated that Article 1105 has been violated as a result of the protests and actions of the Respondent. In its Reply, the Claimant alleges that the Respondent violated the minimum standard of treatment established in Article 1105 of NAFTA by failing to provide full protection and security (FPS) and fair and equitable treatment (FET) to its protected investments.⁶⁷³

591. This section addresses the FET and FPS obligations, specifying the applicable standard and its proper application to the facts on the record. Mexico (i) reaffirms the arguments set forth in its Counter-Memorial, which SVB did not contest or respond to, and (ii) refutes, one by one, the arguments that the Claimant made directly or indirectly in its Reply. As will be demonstrated, none of the Claimant's arguments alter the legal framework or meet the threshold necessary to establish a violation of Article 1105 of NAFTA.

592. In this section, Mexico summarizes the Claimant's allegations regarding the FET and the FPS (**Section 1**). It then outlines the general contours of MST under customary international law, clarifying the burden of proof on the Claimant, the high threshold required to establish a violation, and the deference accorded to the State's regulatory conduct (**Section 2**). Mexico then addresses

⁶⁷² *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, October 12, 2005, ¶¶ 164-168. **CL-0177**.

⁶⁷³ Reply, ¶ 514.

the FPS standard, explaining its scope, demonstrating that Mexico complied with its obligations, and showing that the authorities invoked by the Claimant are inappropriate or have been misrepresented (**Section 3**). Finally, Mexico moves on to the FET standard, establishing that its conduct was reasonable and remained within the limits of its sovereign prerogatives (**Section 4**).

1. Arguments in the Claimant's Reply

593. In its Reply, the Claimant alleges that the Respondent breached the MST established in Article 1105 of NAFTA by failing to provide FPS and FET to its protected investments.⁶⁷⁴ Furthermore, it elaborates on these allegations as follows:

- The Mexican authorities failed to take reasonable measures within their power to protect SVB's investments from the 2019 Demonstration, despite its multiple requests for assistance; to restore SVB's and Minera Metalín's access to the project site; or to sanction Mineros Norteños and its members for their continued illegal conduct. As a result of Mexico's inaction, SVB has been denied access to its project for years, during which time Mineros Norteños has taken over the mine and profited from the sale of waste at the site.⁶⁷⁵
- Mexico's own Federal Deputy, Mr. Borrego, incited, encouraged, and supported the 2019 Demonstration for his own political and personal gain. And while Mexico acted quickly to resolve similar protests at other mining projects in Mexico, it unjustifiably refused to take such action in relation to the Sierra Mojada project.⁶⁷⁶
- Mexico's arguments misrepresent the relevant legal standards and then distort or ignore the evidence of its misconduct. Mexico's continued failure to exercise any care, let alone reasonable care, to protect SVB's investments from the 2019 Demonstration has breached Mexico's obligation to provide FPS and FET.⁶⁷⁷

594. These arguments form the core of the Claimant's position under Article 1105 and are reiterated throughout its Reply. The Respondent will address each of these allegations in the following sections.

⁶⁷⁴ Reply, ¶ 514.

⁶⁷⁵ Reply, ¶ 515.

⁶⁷⁶ Reply, ¶ 516.

⁶⁷⁷ Reply, ¶ 518.

2. General aspects of MST

595. Before turning to FPS and FET, Mexico describes several general aspects of minimum standard of treatment under customary international law under Article 1105 of NAFTA. These points identify areas of convergence and controversy arising from the parties' allegations and establish the applicable threshold for determining whether a violation of the minimum standard of treatment has occurred. They also help clarify the burden of proof on the Claimant (**section a**), the high standard required to determine the existence of a violation (**section b**), and the relevance of regulatory deference, especially in light of a State's constitutional and legal obligations (**section c**).

a. The burden of proving that the FET standard has evolved beyond *Neer* rests with the Claimant

596. As Mexico has demonstrated, to the extent that the Claimant contends that the MST standard under customary international law has evolved beyond *Neer*, the burden of proving such evolution falls on the Claimant.⁶⁷⁸ In its Reply, the Claimant merely asserts that both parties agree with the formulation of the standard by the tribunal in *Waste Management II*.⁶⁷⁹ While Mexico does not challenge that formulation, this does not relieve the Claimant of the burden of demonstrating, with legal rigor, how and to what extent the MST has evolved, or how that evolution applies to the facts of the present case.

597. The Claimant fails to meet this burden. Mexico provided sufficient case law and arguments to support its position that the standard articulated in *Neer* is the applicable threshold.⁶⁸⁰ On the contrary, the Claimant merely asserts that the MST “is not limited to outrageous conduct”⁶⁸¹ and relies solely on four arbitral awards⁶⁸², even though arbitral awards are not a source of customary international law *or opinio juris* and none of them establish precise conduct or clarify the specific content of the alleged evolution of the standard.

⁶⁷⁸ Counter-Memorial, ¶¶ 409, 423.

⁶⁷⁹ Reply, ¶ 546.

⁶⁸⁰ Counter-Memorial, ¶ 408.

⁶⁸¹ Reply, ¶ 544.

⁶⁸² Reply, footnote 1353.

598. Once again, Mexico does not deny that the MST may have evolved over time. However, the legally relevant question is not whether the standard has evolved in the abstract, but whether the Claimant has demonstrated that the treatment at issue in this case falls short of the evolved MST, if it exists. Article 1105 is not an empty vessel into which the Claimant can pour any complaint it wishes to make under NAFTA. Furthermore, the existence and content of any customary rule must be demonstrated by the practice of States and *opinio juris*; and awards alone do not constitute custom.⁶⁸³

599. Furthermore, the Claimant's argument is based on several interpretive deficiencies. Pursuant to Article 31 of the VCLT, a treaty must be interpreted in good faith, in accordance with the ordinary meaning of its terms, in their context and in the light of its object and purpose.⁶⁸⁴ It would contravene this interpretative rule to treat a clause explicitly linked to MST under customary international law—as is the case with Article 1105—as if it were an autonomous rule. Doing so would render the MST qualifier meaningless and rewrite the balance achieved by the NAFTA Parties in their negotiated text.

600. Similarly, the principle of effectiveness (*effet utile*) requires that the terms of the treaty be interpreted in a manner that gives full effect to the intentions of the Parties.⁶⁸⁵ The Claimant's

⁶⁸³ *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, November 21, 2022, ¶ 595 (“Respondent, thus, rightly posits that the content of custom is best evidenced by proof of consistent and widespread State practice that is adopted out of a sense of legal obligation”). **RL-0032.** See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, ¶ 90 (“The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.”). **RL-0081.** *Glamis Gold v. United States of America*, UNCITRAL, Final Award, June 8, 2009, ¶ 602. **RL-0054.** *Merrill and Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, ¶ 193. **RL-0074.** *Resolute Forest Inc. v. Government of Canada*, PCA Case No. 2016-13, Final Award, July 25, 2022, ¶ 668. **RL-0055.**

⁶⁸⁴ Vienna Convention on the Law of Treaties, Article 31, **RL-0018.**

⁶⁸⁵ *Eureko B.V. v. Republic of Poland*, UNCITRAL Case, Partial Award, August 19, 2005, ¶ 248 (“It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective”). **RL-0165.**

interpretation of Article 1105, separated from the MST anchor, would deprive the provision of its operational meaning and nullify the Parties' express decision to base the obligation on customary international law. The Tribunal must avoid an interpretation that would strip the reference to the MST of any practical consequence.⁶⁸⁶

601. Consistent NAFTA jurisprudence confirms that Article 1105 does not reflect the autonomous FET or FPS clauses found in other investment treaties. NAFTA tribunals have repeatedly emphasized that the standard in Article 1105 must be interpreted in accordance with customary international law, and not imported from other treaties.⁶⁸⁷ The non-NAFTA awards cited by the Claimant, rendered under substantially different treaty texts, cannot override or supersede the interpretive consensus developed under NAFTA. Those authorities are legally and contextually irrelevant.

602. Mexico respectfully submits that the Claimant has not demonstrated that the treatment complained of constitutes a violation of the MST under customary international law, much less a violation supported by evidence of state practice and *opinio juris*. It is now too late to remedy that omission.

⁶⁸⁶ *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, July 1, 2004, ¶ 68 (“The Tribunal agrees with both parties in that the proper interpretation of Article X must not result in rendering it meaningless. This is the conclusion that arises evidently from the Vienna Convention on the Law of Treaties in respect of interpretation”). **RL-0166**. See also World Trade Organization, Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, May 20, 1996, p. 27 (“One of the corollaries of the “general rule of interpretation” in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.” **RL-0167**. [Emphasis in original].

⁶⁸⁷ *Waste Management, Inc. v. United Mexican States II*, ICSID Case (Complementary Mechanism) No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 91 (“[C]larifies that Article 1105 refers to a standard existing under customary law, not standards under other treaties of the NAFTA Parties or other provisions within NAFTA”). **RL-0061**. Citing *Mondev International Ltd. v. United States of America*, ICSID Case (Supplementary Mechanism) No. ARB(AF)/99/2, Award, October 11, 2002, ¶ 121 (“Article 1105(1) refers to a standard existing under customary international law, and not to standards established by other treaties of the three NAFTA Parties. There is no difficulty in accepting this as an interpretation of the phrase “in accordance with international law.” Other treaties potentially concerned have their own systems of implementation. [...]. If there had been an intention to incorporate by reference extraneous treaty standards in Article 1105 and to make Chapter 11 arbitration applicable to them, some clear indication of this would have been expected. Moreover, the phrase “minimum standard of treatment” has historically been understood as a reference to a minimum standard under customary international law, whatever controversies there may have been over the content of that standard.

b. The threshold for proving non-compliance with Article 1105 remains high

603. The Claimant agrees with Mexico that Article 1105 does not require States to grant treatment additional or superior to the “customary international law minimum standard of treatment of aliens” or MST.⁶⁸⁸ However, it contends that Mexico misinterprets the content and scope of this standard, leading it to erroneously conclude that Mexico has not violated its obligations to grant FET and FPS under NAFTA.⁶⁸⁹

604. The evidence presented by both parties demonstrates the contrary. A common thread in the eight decisions referred to in the Respondent’s Counter-Memorial is that the obligation under Article 1105 must be understood as an absolute minimum, “a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner.”⁶⁹⁰ Given this *minimal* nature, international tribunals have consistently held that the threshold for determining a violation is high, even if the standard has evolved since the *Neer* decision.⁶⁹¹

605. This is confirmed by the authorities invoked by the Claimant itself. For example, the *Thunderbird* tribunal, cited by the Claimant, explicitly reaffirmed that the threshold for determining a violation of the MST remains high. It held that the acts must constitute a “flagrant

⁶⁸⁸ Reply, ¶ 517. *See also* Counter-Memorial, ¶¶ 405-406; FTC Interpretative Note, section B, ¶¶ 1-3. **RL-0058.**

⁶⁸⁹ Reply, ¶ 517.

⁶⁹⁰ Counter-Memorial, ¶ 410. *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Award, November 15, 2004, ¶¶ 95-97. **RL-0062.** *Mobil Investments Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, July 13, 2018, ¶ 141. **RL-0029.** *Merrill and Ring Forestry L.P. v. Government of Canada*, ICSID Case UNCT/07/1, Award, March 31, 2010, ¶¶ 199, 208. **RL-0060.** *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 283. **RL-0063.** *Glamis Gold v. United States of America*, UNCITRAL, Final Award, June 8, 2009, ¶ 559. **RL-0034.** *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006, ¶ 43. **RL-0064.** *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, December 19, 2013, ¶¶ 454-455. **RL-0065.** *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 219. **RL-0066.**

⁶⁹¹ Counter-Memorial, ¶ 411.

denial of justice” or “manifest arbitrariness falling below acceptable international standards.”⁶⁹² The Claimant omits any reference to this conclusion.⁶⁹³

606. In other words, the Claimant also bears the burden of proving that Mexico’s conduct was *manifestly* arbitrary—a demanding standard that cannot be met simply by pointing to ordinary administrative or regulatory decisions. However, the Claimant’s Reply does not address this threshold in any meaningful way. While it mentions this standard in summarizing Mexico’s arguments, it notably avoids refuting or addressing it substantively. The only relevant mention appears in connection with the *Mesa Power* case, in which the Claimant does not discuss the applicable threshold, but simply asserts that the reference is inappropriate because this case “does not concern Mexico’s “mistakes” in the exercise of its administrative functions, but rather an outright refusal to exercise those functions.”⁶⁹⁴ This evasive response is revealing. Instead of demonstrating how the actions of the Mexican authorities in this case constitute manifest arbitrariness, the Claimant attempts to completely sidestep the legal criterion.

607. With respect to the FET obligation, the Claimant merely asserts that “bad faith is not a necessary element.”⁶⁹⁵ Mexico does not dispute that proof of bad faith is not required to establish a breach of the MST. However, this does not lower the applicable threshold or contradict Mexico’s position. As numerous tribunals have confirmed, a balanced interpretation of the standard is essential—one that does not require malice or intent, but also does not reduce the MST to a catch-all clause covering any potentially questionable act.

608. In conclusion, Mexico respectfully maintains that the Claimant has not refuted Mexico’s position on the high threshold for a violation of Article 1105, nor has it established what the applicable standard would be. The Claimant has not addressed this demanding standard and, ironically, has relied on awards that confirm the rigor of the threshold.

⁶⁹² Counter-Memorial, ¶ 433. *See also International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006, ¶ 194. **RL-0064.**

⁶⁹³ Reply, footnote 1370.

⁶⁹⁴ Reply, ¶ 548.

⁶⁹⁵ Reply, ¶ 550.

c. The Claimant recognizes the State's regulatory authority, which includes its legal and constitutional obligations.

609. Mexico has also demonstrated that the assessment of a violation of Article 1105 must take into account all relevant facts and circumstances, and not isolated incidents or specific circumstances in a vacuum.⁶⁹⁶ A key factor to consider is the regulatory authority of the host State, including its legal rights and obligations.⁶⁹⁷ In its Reply, the Claimant noted that several NAFTA tribunals have recognized that “international law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs.”⁶⁹⁸ However, in its Reply, the Claimant alleges that Mexico exaggerates the level of deference that should be accorded to a State for its regulatory decisions.⁶⁹⁹

610. However, the Claimant's own arguments reinforce Mexico's position rather than refute it. The Claimant acknowledges that “ States retain discretion in regulating their affairs, when they conclude investment treaties, such as the NAFTA, States agree to exercise its regulatory powers in accordance with the standards set forth in those treaties.”⁷⁰⁰ Given that the MST standard, as established, covers measures that are “arbitrary or manifestly unreasonable,” the Claimant's formulation effectively accepts that public measures taken in accordance with national law, including constitutional obligations, do not reach that threshold. This is also expressly confirmed by the tribunals in *Parkerings*, on which the Claimant relies:

⁶⁹⁶ Counter-Memorial, ¶ 413.

⁶⁹⁷ *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, November 15, 2004, ¶ 97. **RL-0062**. *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL Case, Partial Award, November 13, 2000, ¶ 263. **CL-0085**. (“It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited, however, is for a State to act unfairly, unreasonably, or inequitably in the exercise of its legislative power.”)

⁶⁹⁸ Counter-Memorial, ¶ 413. *See also Mesa Power Group LLC v. Government of Canada*, CPA Case No. 2012-17, Award, March 24, 2016, ¶ 505. **RL-0071**. *See also Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, November 21, 2022, ¶ 623. **RL-0032**.

⁶⁹⁹ Reply, ¶ 548.

⁷⁰⁰ Reply, ¶ 549.

It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify, or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited, however, is for a State to act unfairly, unreasonably, or inequitably in the exercise of its legislative power.⁷⁰¹

611. In fact, investment tribunals refer to the State's experience in resolving social conflicts within its borders, which is the situation in this arbitration. Tribunals must be cautious in questioning State decisions, except where evidence suggests bad faith, improper intent, or a serious lack of due diligence in response to a reasonably foreseeable and otherwise manageable threat, which is not the case in this arbitration.

612. Protests arise from a complex matrix of facts and circumstances that are specific to a State and, often, to a particular region within that State. The due diligence standard requires that this context—including the social context in which the investor protests arose, their magnitude, the level of harm, and the associated State conduct—be taken into account when weighing the State's obligations to its citizens, the international community, and investors. When a respondent State has made good faith efforts that meet the standard of due diligence, such as helping to resolve the matter by assisting in negotiations and seeking alternatives to conflict, the standard is met. The context of this arbitration establishes that the Respondent has clearly met the standard of due diligence.

613. Furthermore, the Claimant does not challenge Mexico's argument that public authorities are not subject to a standard of perfection under international law.⁷⁰² As the tribunal noted in *Cargill v. Mexico*, a finding of arbitrariness cannot be based solely on the idea that a national authority may have erred in its decision-making:

an actionable finding of arbitrariness must not be based simply on a tribunal's determination that a domestic agency or legislature incorrectly weighed the various

⁷⁰¹ Reply, ¶ 549. *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, ¶ 332, **CL-0062**.

⁷⁰² See Section IV.B.3(2)(a).

factors, made legitimate compromises between disputing constituencies, or applied social or economic reasoning in a manner that the tribunal criticizes.⁷⁰³

614. Finally, the authorities cited by the Claimant in an attempt to minimize Mexico's deference are inapplicable. With the exception of *Thunderbird v. Mexico*, all of the cases cited by the Claimant—*ADC v. Hungary*⁷⁰⁴, *Parkerings v. Lithuania*⁷⁰⁵, *CME v. Czech Republic*⁷⁰⁶, and *Tecmed v. Mexico*⁷⁰⁷—refer to treaties that do not link the FET standard to customary international law. These tribunals applied autonomous standards, not the framework of NAFTA Article 1105. Therefore, they are not relevant to this dispute, as they applied a different standard.

615. In summary, the arguments and authorities cited by the Claimant do not support its position and, in some cases, directly reaffirm the regulatory deferral incorporated into the NAFTA framework. Consequently, the Tribunal must uphold the principle that international investment law does not elevate private interests above the sovereign right—and duty—of a State to manage the complex social realities within its territory.⁷⁰⁸

⁷⁰³ *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 292. **RL-0063.**

⁷⁰⁴ Agreement between the Government of the Republic of Cyprus and the Government of the People's Republic of Hungary on the Reciprocal Promotion and Protection of Investments, May 24, 1989, Art. 3(1) (“Each Contracting Party shall ensure fair and equitable treatment to the investments investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance use, enjoyment or disposal thereof by those investors.”). **R-0162.**

⁷⁰⁵ Agreement between the Kingdom of Norway and the Republic of Lithuania on the Reciprocal Protection and Promotion of Investments, June 16, 1992, Art. 3 (“Each Contracting Party shall promote and encourage in its Territory investments of Investors of the other Contracting Party and accept such investments in accordance with its laws and regulations and accord them equitable and reasonable treatment and protection. Such investments shall be subject to the laws and regulations of the Contracting Party in the Territory of which the investments are made”). **R-0163.**

⁷⁰⁶ Agreement between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic on the Reciprocal Promotion and Protection of Investments, April 29, 1991, Art. 3(1) (“Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.”). **R-0164.**

⁷⁰⁷ Acuerdo para la Promoción y Protección Recíproca de Inversiones entre los Estados Unidos Mexicanos y el Reino de España, 23 de junio de 1995, Art. 4(1) (“Cada Parte Contratante garantizará en su territorio un tratamiento justo y equitativo, conforme al Derecho Internacional, a las inversiones realizadas por inversores de la otra Parte Contratante”). **R-0156.**

⁷⁰⁸ *Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. Eastern Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A., and Abal Hermanos S.A. v. Republic of Uruguay), Award, July 8, 2016, ¶ 424 (“Except where specific

3. Mexico did not breach its FPS obligation

a. The scope of the FPS obligation contained in Article 1105

(1) Claimant's Interpretation of the FPS

616. This section summarizes SVB's main legal arguments regarding the scope of the FPS obligation. *First*, the Claimant asserts that:

SVB's position is not that the FPS standard imposes an obligation of strict liability on the host State; rather, SVB's position is that the FPS standard imposes an obligation of due diligence or vigilance.¹³⁰⁰ That standard requires, in turn, that the host State exercise "reasonable care" in the circumstances or take "reasonable actions" within its own power to prevent harm or injury to the investment.⁷⁰⁹

617. *Second*, the Claimant argues that the FPS standard has a "dual" structure, imposing both a positive obligation to prevent harm and a negative obligation not to cause harm.⁷¹⁰ It alleges that Mexico has failed to take into account this "dual" nature of FPS.⁷¹¹

618. *Third*, the Claimant relies on a series of arbitral awards—*Cengiz, Parkerings, AAPL, AMT, Energia y Renovación*, and *MNSS*—to argue that a breach of the FPS may occur when a State (i) fails to prevent the damage, (ii) fails to restore the status quo, (iii) fails to act, (iv) fails to sanction the offender, (v) adopts ineffective measures, or (vi) fails to respond "proactively" to known threats.⁷¹²

promises or representation are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable"). **CL-0038**, citing *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶ 372. **CL-0032**. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, December 8, 2016, ¶ 622 ("investor's interests are not to be identified as separate and distinct from the legal framework into which they have been placed upon entering into the investment. This includes, firstly, the respect for the rights and powers exercised by the competent authorities as provided for under the Concession Contract and the Regulatory Framework"). **RL-0170**.

⁷⁰⁹ Reply, ¶ 522.

⁷¹⁰ Reply, ¶ 519.

⁷¹¹ Reply, ¶ 519.

⁷¹² Reply, ¶¶ 522-534.

619. *Finally*, the Claimant seeks to refute Mexico's argument that cases such as *Wena* and *Suez* are inapplicable. In particular, it argues that there is no substantive difference between an autonomous FPS standard and FPS under the MST.⁷¹³

(2) Respondent's Interpretation of FPS

(a) Response to SVB's Proposed Standard

620. The Claimant argues that Mexico violated the FPS standard under Article 1105 of NAFTA, primarily by failing to prevent or respond effectively to the 2019 Demonstration. However, as Mexico will demonstrate in this section, the FPS obligation under Article 1105 is not a guarantee of indefinite protection, nor does it impose strict liability for all damages suffered by investors. It is an obligation based on customary international law MST, which requires States to act with due diligence and in a reasonable manner, taking into account their capabilities and the specific circumstances of the case. While SVB attempts to reframe this obligation as a requirement for proactive or even results-based conduct, the applicable standard remains that of reasonableness, not perfection. Mexico's actions must be evaluated in this context.

621. *First*, both parties agree that FPS under Article 1105 is not autonomous but rather part of the MST, as clarified by the NAFTA FTC Interpretative Note.⁷¹⁴ Therefore, the Tribunal's analysis must be limited to the MST and not to an expanded or independent standard.

622. *Second*, Mexico does not dispute that the FPS obligation may comprise both positive and negative components. However, the Claimant appears to argue that Mexico had an affirmative obligation to *prevent* the 2019 Demonstration and *avoid* all losses to SVB, a position that, in practice, requires a result rather than diligence.⁷¹⁵ While SVB denies advocating strict liability, its argument is based on the premise that the mere occurrence of harm is sufficient to trigger State responsibility⁷¹⁶, which contradicts the well-established principle that this is “an obligation of means and not of results.”⁷¹⁷ The appropriate question is whether Mexico took reasonable

⁷¹³ Reply, ¶ 530.

⁷¹⁴ Counter-Memorial, ¶ 417. *See also* Reply, ¶ 517.

⁷¹⁵ Counter-Memorial, ¶ 418.

⁷¹⁶ Counter-Memorial, ¶ 418. *See also* Reply, ¶ 520.

⁷¹⁷ *See* ¶ 536 *supra*, citing *De Sutter v. Madagascar II*.

measures given its actual capabilities and the surrounding context, not whether it prevented all harm.

623. Similarly, “deploying” efforts in response to civil unrest does not equate to forcibly dismantling peaceful protests. However, the Claimant’s argument confuses the two concepts. It cites the *Cengiz* case, in which the tribunal noted that the host State did not “deploy security forces... during a period of significant instability.”⁷¹⁸ But in this case, the Claimant alleges that “Mexico failed to deploy its police and prosecutorial authorities to prevent, disperse, or remove the Continuing Blockade – which continues with impunity even today - causing the total destruction of SVB’s protected investments in the Project.”⁷¹⁹ They are not equivalent. The obligation to exercise police powers with due diligence does not translate into a duty to suppress protests by force, especially when there is no evidence of violence.

624. Even if the Tribunal finds a positive dimension to the FPS obligation, the standard remains that of due diligence and reasonableness, as SVB itself acknowledges.⁷²⁰ The relevant question is not whether Mexico effectively eliminated all risk to the investor, but whether it acted unreasonably given the circumstances.⁷²¹ Therefore, that analysis requires a context-sensitive assessment: it must weigh the nature and magnitude of the protests, the possible consequences of intervention, Mexico’s institutional capacities, and the need to avoid disproportionate escalation,⁷²² rather than a results-based metric.

625. *Third*, all of the categories identified by the Claimant—failure to prevent harm, restore the *status quo*, act, punish violators, or adopt effective measures—are not independent obligations. Mexico acknowledges that the above formulations are different expressions of the same underlying

⁷¹⁸ Reply, ¶523.

⁷¹⁹ Reply, ¶523.

⁷²⁰ Reply, ¶ 519. *See also* Memorial, ¶ 4.30.

⁷²¹ Memorial, ¶ 4.30. Counter-Memorial, ¶ 418.

⁷²² Elettronica Sicula S.p.A (ELSI) (United States v. Italy), 1989 ICJ Reports 15 (July 20, 1989), ¶ 108 **RL-0073**. *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, November 22, 2018 ¶ 87. **RL-0073** (“The Tribunal agrees that the full protection and security standard under the Treaty imposes on Bolivia the duty to act with due diligence, i.e. to adopt measures that are reasonable to protect the investment, taking account of the circumstances of the case.”) *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Award, September 11, 2018 ¶ 219 **RL-0160**. *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, March 15, 2016 ¶ 6.83. **RL-0057**. (DS)2, S.A., *Peter de Sutter and Kristof De Sutter v. Republic of Madagascar II*, ICSID Case No. ARB/17/18, Award, April 17, 2020 ¶ 341. **RL-0161** [Translated by the Respondent]

obligation to act with due diligence. However, separating them obscures the key point: in each case, the State's obligation is to act reasonably, not to act perfectly.

626. Mexico also emphasizes that the obligation to act must actually exist in the applicable legal framework. A State cannot be blamed for failing to act in favor of an investor if it was legally or constitutionally obligated to consider competing public interests. The balance between public and private interests is inherent in any legal system; the existence of such tension does not in itself constitute a breach of FPS under an investment treaty.

627. *Fourth*, there is a substantial difference between an autonomous FPS rule and one linked to the MST. This distinction is crucial. A stand-alone FPS clause can be interpreted as requiring the State to act in all cases to protect the investor's interests. Conversely, when FPS is part of the MST, not all deficiencies or failures constitute a violation. The applicable threshold, as Mexico has demonstrated, is whether the State's conduct was manifestly arbitrary, grossly negligent, or lacking in good faith.⁷²³

628. In conclusion, the Claimant misrepresents both the scope and threshold of the FPS obligation under Article 1105. While Mexico does not dispute that FPS includes both positive and negative dimensions, its content must be assessed through the lens of customary international law (as set out in the Treaty) and the standard of due diligence. Furthermore, the Tribunal must consider Mexico's response to the 2019 Demonstration in its full social, legal, and institutional context, and not through retrospective or results-based metrics.

(b) Arguments by the Respondent that the Claimant did not address

629. The Claimant's Reply fails to address several key legal and factual issues raised by Mexico in its Counter-Memorial. In particular, the Claimant: (i) ignores its own role and omissions in the events surrounding the 2019 Demonstration; (ii) continues to misrepresent the scope and purpose of the FPS standard; and (iii) sidesteps Mexico's legal framework and obligations under domestic and international human rights law.

630. *First*, the Claimant fails to address its own conduct. Nowhere in the section of the Reply devoted to FPS does it acknowledge its own failure to conduct a criminal investigation or to seek

⁷²³ See Section IV.A.2.a

the support of the relevant authorities. Investment arbitration jurisprudence has consistently recognized the relevance of investor conduct in FPS analysis. Tribunals applying NAFTA Article 1105 have followed the approach established in *ELSI*, which highlights three important aspects: (i) the question of causation between the company's actions and the protest is highly relevant; (ii) any deterioration of the investment as a result of the protest must be identified and attributed to the protest; and (iii) the analysis must evaluate both the protest and the State's response in the context of the relevant treaty and the totality of the factual circumstances.⁷²⁴ The Claimant ignores all of these considerations.

631. *Second*, the Claimant again mischaracterizes the object of protection under the FPS standard. Although it formally invokes the obligation to provide FPS—which is clearly limited to the physical protection of the investment, something that was not challenged by SVB⁷²⁵—it relies on arguments unrelated to physical security, such as the alleged conduct of national courts and prosecutors.⁷²⁶ This appears to be a confusion between FPS and other obligations such as FET, which renders the Claimant's argument untenable. Mexico reiterates that if FPS under Article 1105 refers only to the physical protection of the investment, it cannot be extended to other forms of harm, such as economic losses, damage to reputation, or procedural irregularities in domestic proceedings.

632. *Third*, the Claimant does not refute Mexico's position that the right to protest is protected constitutionally and internationally. In its Counter-Memorial, Mexico explained that peaceful protests are protected by its Constitution and the human rights treaties to which it is a party.⁷²⁷ For example, this is reflected in Article 6 of the Constitution and in multiple decisions of national courts.⁷²⁸ Similarly, the protection of the right to protest is part of Mexico's international human

⁷²⁴ See Section IV.A.2.b.

⁷²⁵ See Section IV.B.3.a.(2)(a)

⁷²⁶ Reply, ¶ 536.

⁷²⁷ Counter-Memorial, ¶¶ 31, 199, 449.

⁷²⁸ Political Constitution of the United Mexican States, Article 6. “La manifestación de las ideas no será objeto de ninguna inquisición judicial o administrativa, sino en el caso de que ataque a la moral, la vida privada o los derechos de terceros, provoque algún delito, o perturbe el orden público; el derecho de réplica será ejercido en los términos dispuestos por la ley.” **R-0010** [Emphasis added]

rights commitments.⁷²⁹ This is further supported by the expert evidence submitted by Mexico in support of this claim, including a report by an expert in Mexican criminal law.⁷³⁰ The Claimant's only response is that Mexico cannot rely on its own legislation to justify its refusal to act in the face of illegal conduct.

Mexico cannot rely on its own law to justify its refusal to act in the face of the patently illegal conduct of Mineros Norteños. As set forth above, and as confirmed by the criminal file, the Mexican authorities had direct confirmation of the fact that Mineros Norteños was unlawfully blockading and occupying Minera Metalín's land, and had taken its employees hostage; it also had confirmed the identity of the perpetrators. As noted, in such circumstances, the Mexican Constitution and the CNPP imposed mandatory requirements on the authorities to act diligently, promptly, and transparently – particularly where victims' rights are at stake – but they inexplicably failed to do so here.⁷³¹

633. In essence, the Claimant insists that the Respondent should have acted more forcefully to resolve the protest. However, it does not dispute that the Mexican Constitution protects peaceful protests and assemblies, nor does it provide a compelling legal framework under which those protections should have been overridden. Instead, it takes for granted that its own interests should prevail over those of others, including the affected community. That assumption not only lacks legal basis, but is contrary to the exercise of weighing required by the due diligence standard, especially when the State must balance competing rights and obligations.

634. In conclusion, the Claimant has failed to meaningfully address several central aspects of Mexico's defense. It ignores the relevant conduct of the investor, continues to misrepresent the scope of the FPS standard, and acknowledges Mexico's constitutional and international obligations regarding peaceful protests. These omissions undermine the credibility of its FPS claim and confirm that it faces a high threshold for establishing a violation of Article 1105.

⁷²⁹ See, for example, Article 19 of the International Covenant on Civil and Political Rights RL-0092; Articles IV and XXI of the American Declaration of the Rights and Duties of Man RL-0093 and/or; Article 13 of the American Convention on Human Rights **R-0033**.

⁷³⁰ See Section IV.E. See Expert Report of Mr. Islas.

⁷³¹ Reply, ¶ 531.

b. The Respondent's actions comply with the FPS obligation

635. With respect to FPS, the Claimant merely recycles the same factual allegations on which it relies for its other claims,⁷³² without making any real effort to tailor its argument to the obligation at issue. Specifically, it refers to: (i) Mexico's alleged inaction in response to the protest⁷³³; (ii) the alleged involvement of Deputy Borrego⁷³⁴; and (iii) alleged discriminatory treatment in the manner in which other protests were resolved.⁷³⁵ While not all of these issues are relevant to the FPS, Mexico will address them briefly given the Claimant's reliance on these arguments. However, the only conduct that could plausibly be related to the FPS is the alleged inaction of the Mexican authorities to protect the physical integrity of the investment.

636. The Claimant also asserts that “despite the clear evidence of Mexico’s breach of its FPS obligation, Mexico offers no response to the Claimant’s arguments applying the FPS standard to the facts.”⁷³⁶ This is a misrepresentation of the record. Contrary to the Claimant’s assertion, Mexico devoted an entire section of its Counter-Memorial to applying the FPS standard to the relevant facts.⁷³⁷ By ignoring that discussion, the Claimant effectively acknowledges its substance. It is disingenuous to claim that Mexico “offers no response” simply because the Claimant is unable to refute the response that has already been given.

637. For the avoidance of doubt, Mexico devotes this entire section to applying the legal standard of FPS to the facts of the present case. First, it demonstrates that no duty to act arose in the context of a peaceful protest (**Section 1**). It then shows that the Mexican authorities acted reasonably and with due diligence in deploying police and investigative units (**Section 2**). The section further highlights how the Claimant’s own omissions prevented the State from responding effectively (**Section 3**). Even assuming that there were some deficiencies in the State’s conduct, Mexico establishes that such conduct did not reach the level of manifest arbitrariness (**Section 4**). Finally, Mexico explains why the Claimant's allegations regarding Deputy Borrego (**Section 5**)

⁷³² Reply, ¶¶ 515–516.

⁷³³ Reply, ¶ 532.

⁷³⁴ Reply, ¶ 535.

⁷³⁵ Reply, ¶ 533.

⁷³⁶ Reply, ¶ 537.

⁷³⁷ Counter-Memorial, ¶¶ 448-459.

and comparisons with other mining projects (**Section 6**) are erroneous, as they lack both factual basis and legal relevance.

(1) Mexico did not fail to act because it had an obligation not to do so

638. The Claimant summarizes its case regarding the failure to act as follows:

In sum, Mexico took no steps to enforce the law, to bring an end to Mineros Norteños's unlawful conduct, or to restore the Project site to the rightful control of SVB and Mineros Metalín. Rather, after years of delay and inactivity – despite the ongoing nature of the Continuing Blockade – Mexico has permanently shelved its criminal investigation on the purported basis that Minera Metalín failed to respond to an alleged request in June 2023, even though the actual resolution archiving the investigation refers to no such request. And as set forth above, Minera Metalín never received that belated request, nor is there any proof of delivery. The net result of Mexico's complete failure to act is that the Claimant has lost the entirety of its protected investments in the Project, while Mineros Norteños continues to control and to use the Project as its own, by, among other things, mining the waste dumps and seeking to sell the Project to interested buyers.⁷³⁸

639. The Claimant's case revolves around the alleged affirmative component of the FPS standard, namely the State's duty to actively intervene to prevent or put an end to the harm. In simple terms, the Claimant argues that Mexico should have put an end to the 2019 Demonstration by forcibly dispersing the demonstrators.⁷³⁹ However, it is indisputable that, under both domestic and international law, Mexico has a duty to protect its citizens' right to peaceful protest.⁷⁴⁰ Furthermore, international law establishes that, for an omission to constitute a breach of the duty to provide physical protection and security, there must be a prior legal duty to act.⁷⁴¹

640. Mexico has consistently demonstrated that it had no legal obligation to forcibly disperse the protest in question. Mexican authorities who visited the site documented the situation and concluded that the protest remained peaceful and non-violent.⁷⁴² Furthermore, the evidence presented by the Claimant, which purports to demonstrate violent conduct, has been

⁷³⁸ Reply, ¶ 536.

⁷³⁹ Reply, ¶ 533.

⁷⁴⁰ See Section II.D.1.

⁷⁴¹ See Section IV.B.3.b.(1)

⁷⁴² Counter-Memorial ¶¶ 194-196, 223. See also Witness Statement of Mr. Portillo, ¶ 14 (“The municipal authorities have not received any reports or complaints from the community regarding acts of violence or illegal acts by the individuals who maintain shifts at the camp”).

misrepresented and does not demonstrate any act of aggression.⁷⁴³ Even SVB's senior executives acknowledged that the Mineros Norteños demonstrations were peaceful and that all company personnel were safe.⁷⁴⁴ SVB is essentially accusing Mexico of failing to fulfill an obligation that, according to the Claimant's own characterization of the protest, does not exist. Finally, an expert report submitted with this Rejoinder confirms that intervening in the context of a peaceful protest would have violated Mexico's constitutional and international obligations.⁷⁴⁵

641. In conclusion, the protest in question was peaceful and, as such, did not give rise to an obligation on the part of the State to act. When there is no obligation to act, there can be no breach of an obligation to act. The Claimant's theory presupposes the existence of an obligation that does not arise from the law. Consequently, its allegations of breach of the FPS standard on this basis must be dismissed.

(2) Mexico deployed its police and investigative forces with a reasonable degree

642. The Claimant's central argument is as follows:

Instead of promptly investigating and prosecuting such unlawful conduct as it was legally required to do, Mexico avoided taking meaningful action, even when Mineros Norteños obstructed its investigation by refusing to allow the authorities to access the site. As explained in Section 2.11 above, the criminal file reveals a consistent pattern – the authorities would visit the mine site, document illegal activity and admissions of wrongdoing by Mineros Norteños, but then fail to take any further action. As a result, Mexico effectively acquiesced in Mineros Norteños's continued and unabated criminal activity. Such inaction falls plainly short of the requirement to exercise due diligence and take reasonable actions within the State's power to prevent harm to the Claimant's investment – here, the authorities had the power and a clear basis to take action, but they simply refused to do so.⁷⁴⁶

643. This description is inaccurate and misleading. Mexico did deploy police and investigative forces⁷⁴⁷, which determined that the protest remained peaceful and did not justify coercive

⁷⁴³ See Sections D and II.E.1 *supra*.

⁷⁴⁴ Email from Tim Barry to Major Drilling, September 10, 2019, 29_RE Sierra Mojada Drill Program. **R-0165**. See also email from Juan Manuel to Tim Barry, September 11, 2019, Re_Hostage situation, p. 1. **R-00166**.

⁷⁴⁵ See Section II.D.1.

⁷⁴⁶ Reply, ¶ 532.

⁷⁴⁷ See Section II.D.1. and Section II.E.

intervention.⁷⁴⁸ The Claimant itself acknowledges that “the authorities would visit the mine site, document illegal activity”⁷⁴⁹, but fails to acknowledge that these visits also involved direct contact with both the company and members of the community.⁷⁵⁰ The authorities issued warnings to the demonstrators⁷⁵¹ and documented the situation⁷⁵², but concluded that the circumstances did not justify forcible removal.⁷⁵³

644. The protests were not illegal, nor was it necessary to disperse them by force. It should be noted that the Claimant does not cite any evidence to support its rather tenuous claim that there was “criminal activity” on the part of *Mineros Nortesños*.⁷⁵⁴ Therefore, breaking up the protest would have meant nullifying a community’s fundamental right to express its discontent.⁷⁵⁵ Therefore, the Claimant cannot credibly claim that Mexico did not deploy law enforcement or prosecuting authorities, since both were in fact involved. What the Claimant really objects to is that, in its subjective opinion, these measures were not sufficiently “significant.”

645. As previously established, FPS is an obligation of means, not of results, a point that both parties claim to accept.⁷⁵⁶ The Claimant contradicts itself by acknowledging the deployment of police and investigators while simultaneously criticizing the fact that these measures did not result in the immediate dismantling of the protest. Although claims not to advocate a strict interpretation of the FPS obligation⁷⁵⁷, SVB’s argument confirms that its complaint does not concern the State’s failure to act, but rather the outcome of that action, which was inadequate according to the standard of due diligence.

646. In any case, the record shows that Mexico went beyond mere observation of the facts, effectively complying with a standard of reasonableness and due diligence, as required by the FPS

⁷⁴⁸ See Section II.D. and Section II.E.

⁷⁴⁹ Reply, ¶¶ 173, 532.

⁷⁵⁰ See Section II.D. and Section II.E.

⁷⁵¹ See Section II.D. and Section II.E.

⁷⁵² See Section II.D. and Section II.E.

⁷⁵³ See Section II.D. and Section II.E.

⁷⁵⁴ Reply, ¶¶ 525, 532.

⁷⁵⁵ See Section II.D. and Section II.E.

⁷⁵⁶ See Section II.D. and Section II.E.

⁷⁵⁷ Reply, ¶ 522.

obligation.⁷⁵⁸ The authorities initiated criminal investigations, prepared incident reports, and followed procedures consistent with national and international standards of due process.⁷⁵⁹ As in any system of rule of law, the initiation of an investigation does not imply guilt, and prosecution requires sufficient legal evidence, not mere allegations.

647. The Claimant's repeated insinuation that Mexico “refused” to act reflects a fundamental misunderstanding of how due process and prosecutorial discretion work. The mere fact that charges were ultimately not filed does not reflect inaction or acquiescence, but rather an evidence-based assessment by the competent authorities.

648. As if the documented history of tensions and abuses by the company toward the local community were not enough⁷⁶⁰, the Claimant now demands that Mexico have prosecuted and convicted members of that community based solely on its own version of events, which includes such serious allegations as death threats⁷⁶¹ and kidnapping.⁷⁶² However, such punitive action cannot legally be carried out without clear and convincing evidence. Fortunately, the Mexican legal system is not governed by private complaints or assumptions, but by established evidentiary thresholds and procedural guarantees.

649. The state is not an enforcer of private investor interests, and the FPS standard—agreed upon by both parties to ensure the physical protection of investments⁷⁶³—cannot be used as a weapon to persecute vulnerable communities. As confirmed by documentary evidence, the demonstrators remained outside the company's premises at all times and did not engage in violent acts.⁷⁶⁴ It is therefore deeply troubling that the Claimant is attempting to misrepresent the FPS

⁷⁵⁸ See Section II.E.

⁷⁵⁹ See Section II.E.

⁷⁶⁰ See Section II.C. Counter-Memorial, ¶¶ 39-48, 77-94.

⁷⁶¹ Reply, ¶ 118. López Ramírez WS2, paragraphs 6.21, 22. Audio recording of Mr. Lorenzo Fraire's threat during the 2016 Protest, February 4, 2016, **C-0193**; Transcript of the audio recording of Mr. Lorenzo Fraire's threat during the 2016 Protest, February 4, 2016 (original in Spanish: «*Si hay una tragedia, tú vas a ser el responsable... si nos toca morir aquí, nos vamos a morir aquí*»), **C-0194**.

⁷⁶² Reply, ¶¶ 4, 35, 217, 265-266, 538, 559.

⁷⁶³ See Section IV.B.3.a.

⁷⁶⁴ See Section II.E.2.

obligation, not to ensure its safety or seek redress for actual damages, but to demonize and punish a community that dared to protest against the investor's abuses.

650. Furthermore, in criminal matters, and particularly in cases involving socially sensitive protests, it is essential to respect the independence of the prosecution and the autonomy of law enforcement authorities. The Claimant's attempts to access confidential investigation files⁷⁶⁵ or to compel the State to violate its own procedural guarantees⁷⁶⁶ are inconsistent with this principle and demonstrate its disregard for the applicable legal framework. In addition, the Claimant had access to these files at all times as a party to the proceedings.

651. The Claimant has not demonstrated that Mexico failed to fulfill its obligation to provide FPS under Article 1105. The record shows that Mexico took reasonable and diligent measures to address the situation, including deploying police forces, collaborating with the community and the company, and conducting criminal investigations in accordance with its legal system. The Claimant's disagreement with the outcome of these actions does not render Mexico's conduct a breach of the Treaty. The FPS standard requires reasonableness, not perfection; due diligence, not immediate success as defined by the investor itself.

(3) The Mexican authorities were unable to investigate due to the Claimant's negligence

652. As explained above, one of the Claimant's central arguments is that the Mexican authorities did not initiate criminal proceedings against the members of Mineros Norteños.⁷⁶⁷ However, under Mexican law, the filing of a criminal complaint must be accompanied by sufficient information to enable an investigation.⁷⁶⁸ Similarly, under investment law, the investor's conduct is recognized as a relevant factor in assessing the reasonableness of the State's conduct in resolving a dispute.⁷⁶⁹ In

⁷⁶⁵ See Section II.E.4.

⁷⁶⁶ See Section II.E.4.

⁷⁶⁷ Reply, ¶ 532.

⁷⁶⁸ See Section II.E.

⁷⁶⁹ *Elettronica Sicula S.p.A (ELSI) (United States v. Italy)*, 1989 ICJ Reports 15 (July 20, 1989), ¶ 108 **RL-0073**. *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, March 15, 2016 ¶ 6.100 [referenced by the Claimant, but not included as documentary evidence].

the face of inappropriate conduct by the Claimant, the State's ability to respond effectively may be significantly impaired.

653. Mexico has presented compelling evidence demonstrating that, although the Claimant initiated the complaint process, it failed to provide the evidence and support necessary for the Office of the Prosecutor to advance the investigation.⁷⁷⁰ This lack of diligence directly undermined the ability of Mexican authorities to proceed.

654. Furthermore, the assessment of obligations under the MST must take into account all relevant circumstances, including the capacities and limitations of the receiving State.⁷⁷¹ Given that the protest was peaceful and that the individuals involved were members of the local community who did not engage in violent acts⁷⁷², it would have been unreasonable for the Mexican authorities to apply criminal sanctions without a well-founded basis or evidence to the contrary. International law does not require States to act on mere assumptions of wrongdoing, especially when the facts on the ground suggest otherwise.

(4) Even if Mexico did not act, its omissions did not constitute manifest arbitrariness

655. Even assuming, *for the sake of argument*, that Mexico failed to act, the Tribunal must assess whether such failure meets the high threshold of “manifest arbitrariness” set forth in Article 1105. As Mexico has demonstrated—and as the Claimant does not dispute—the MST requires conduct that is judicially improper,⁷⁷³ or that is in some way arbitrary, grossly unfair, egregious, or scandalous.⁷⁷⁴ This implies both a significant degree of *materiality* and a lack of *rational* justification.

⁷⁷⁰ See Section II.E. Status Criminal Case 0902/SP/UIISO/2019. **R-0041**; Witness Statement of Mr. Portillo, ¶ 14.

⁷⁷¹ See Section IV.B.2.

⁷⁷² See Section II.D. and Section II.E.

⁷⁷³ *Waste Management, Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 98. **RL-0061**.

⁷⁷⁴ *Glamis Gold, Ltd. v. United States of America*, UNCITRAL Case, Award, June 8, 2009, ¶ 616. **RL-0034**.

656. *First*, it is well established that not every adverse impact on an investment gives rise to international responsibility.⁷⁷⁵ That is precisely why domestic legal systems exist: to provide avenues of redress, including administrative, civil, criminal, and constitutional remedies. Only conduct that exceeds a high threshold—often involving a grave wrong or a denial of justice—can give rise to a claim under the MST.⁷⁷⁶

657. In this case, SVB did not attempt to pursue such domestic remedies. It took no steps to have the demonstration lifted through judicial proceedings or to seek an internal resolution on the legality of the protest.⁷⁷⁷ Had it done so, it could have obtained a binding resolution under Mexican law. Furthermore, the actual impact of the State’s alleged inaction, if any, was limited. It is by no means proven that South32’s withdrawal—on which the Claimant bases most of its alleged losses—was caused by the protests, let alone by the response of the Mexican authorities. On the contrary, there is credible evidence pointing to other causes, such as the financial difficulties of the project⁷⁷⁸ and the encumbrance of the concessions due to the Valdez trial.⁷⁷⁹ It should be noted that even the Claimant’s own staff internally described the impact of the protests as minimal.⁷⁸⁰

658. *Second*, even if Mexico’s actions or omissions were in some way deficient, they were not capricious or devoid of context. As this Tribunal must do, the situation must be assessed in light of all relevant circumstances.⁷⁸¹ This was not a case of violent crime, armed conflict, or looting,

⁷⁷⁵ *Elettronica Sicula S.p.A (ELSI)* (United States v. Italy), 1989 ICJ Reports 15 (July 20, 1989), ¶ 108 **RL-0073**. *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, November 22, 2018 ¶ 491. **RL-0153**. *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, October 12, 2005 ¶¶ 164 -168. **CL-0177**.

⁷⁷⁶ See Section IV.B.2.b.

⁷⁷⁷ See Section II.D.3.

⁷⁷⁸ See Section II.F.3.

⁷⁷⁹ See Section II.F.

⁷⁸⁰ Email from Juan Manuel to Tim Barry, October 23, 2021, Re_Meeting with Mineros Norteños, p. 1. **R-0167**.

⁷⁸¹ See Section IV.A.2.b.

as cited by the Claimant.⁷⁸² Rather, it was a peaceful protest by a local community asserting social grievances.⁷⁸³

659. In this context, the Mexican authorities faced a legitimate dilemma: on the one hand, to intervene forcefully to defend the private interests of the company and potentially infringe on the community's constitutional rights to protest and risk exacerbating the conflict; and, on the other hand, to respect those rights and accept a certain degree of private economic impact. Neither option is inherently arbitrary or unreasonable. States often have to weigh complex and conflicting considerations. Once again, a finding of arbitrariness cannot be based solely on an investor's disagreement with the way in which the national authorities assessed the competing interests, reached political compromises, or applied socioeconomic considerations.⁷⁸⁴ In other words, what matters is that Mexico made good faith efforts, deployed officials to monitor the situation, and made a decision based on a rational assessment of the facts and the legal framework.

660. In light of the foregoing, Mexico respectfully submits that any alleged omission falls far short of the high threshold required to violate the MST. The record shows that the Mexican authorities made reasonable decisions within the bounds of their legal and constitutional obligations, and that no conduct—assuming it could be characterized as inaction—was manifestly arbitrary or irrational. Consequently, the Claimant's claim under Article 1105 must be dismissed.

(5) The conduct of Deputy Borrego is irrelevant for purposes of the FPS

661. Although most of the Claimant's argument regarding FPS is based on the affirmative dimension of the obligation—that is, Mexico's alleged failure to forcibly dismantle the 2019 Demonstration⁷⁸⁵—the Claimant also invokes the negative dimension of FPS, namely the State's alleged obligation to “refrain from causing harm.” This is articulated through the alleged conduct

⁷⁸² *Cengiz İnşaat Sanayi ve Ticaret A.Ş. v. Libya (ICC Case No. 21537/ZF/AYZ)*, Award, November 7, 2018, ¶ 437, **RL-0106**. *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8 (“*Parkerings v. Lithuania*”), Award, September 11, 2007, ¶ 332, 355, **CL-0062**. *Energía y Renovación Holding, S.A. v. the Republic of Guatemala*, ICSID Case No. ARB/21/56 (“*Energía y Renovación v. Guatemala*”), Award, March 31, 2025, ¶ 78, **CL-0176**. *Wena Hotels v. Egypt*, Award, December 8, 2000, ¶¶ 84-95, **CL-0049**. *MNSS v. Montenegro*, Award, May 4, 2016, ¶¶ 352-353, **CL-0076**

⁷⁸³ See Section II.C.

⁷⁸⁴ See Section IV.B.2.c. *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 292. **RL-0069**.

⁷⁸⁵ Reply, ¶ 515.

of Deputy Borrego, whom the Claimant accuses of instigating and supporting the protests. The Claimant presents the following narrative:

Moreover, as SVB has shown, not only were the Mexican authorities fully aware of the Continuing Blockade, but Mexico's own Federal Deputy incited and encouraged it.¹³²⁸ Although Mexico has failed to produce any documents in response to SVB's requests regarding Deputy Borrego and his role in inciting, encouraging, and supporting the Continuing Blockade, the contemporaneous record affirms that role. As Mr. Fraire's own audio statements make plain, Deputy Borrego's motives for inciting the Blockade are clear: to gain political capital for the MORENA Party and for his re-election campaign by supporting a local mining cooperative in its dispute with a foreign investor, while at the same time lining his pockets with a percentage of any proceeds obtained by Mineros Norteños from its extortionate actions. These facts speak for themselves – Mexico, through Deputy Borrego's unlawful actions, has plainly breached its obligation to refrain from doing harm to SVB's protected investments.⁷⁸⁶

662. The Claimant reiterates this theory and even goes so far as to demand that Mexico present testimonial or documentary evidence from Deputy Borrego. It then asks the Tribunal to draw an adverse inference given Mexico's alleged failure to present evidence:

Nor does Mexico provide any rebuttal testimony or evidence from Deputy Borrego. SVB's arguments regarding Mexico's breach of its FPS obligation therefore stand un rebutted and are reinforced by the further evidence that has come to light since SVB filed its Memorial. Moreover, as demonstrated above, the Claimant is entitled to an adverse inference that documents from Deputy Borrego and his office would demonstrate that he encouraged, supported, and coordinated the Continuing Blockade with Mineros Norteños.⁷⁸⁷

663. *First*, there is no legal or factual link between Deputy Borrego's alleged conduct and FPS's failure to fulfill its obligation. The Claimant's argument is based on several erroneous premises: (i) that Deputy Borrego had a legal obligation to refrain from the alleged conduct; (ii) that he acted on behalf of the Mexican State; and (iii) that his actions are attributable to Mexico under applicable legal standards. None of these elements is substantiated.

- According to the Claimant's own version of events, Deputy Borrego was “inciting, encouraging, and supporting the ongoing blockade” for electoral reasons. The only evidence alleged is an illegal audio recording made by SVB of Mr. Fraire, a member of the community, who speculates that the Deputy was seeking reelection. In any democratic system, it is customary for elected officials to seek the support of their constituents. There

⁷⁸⁶ Reply, ¶ 535.

⁷⁸⁷ Reply, ¶ 537.

is no legal obligation, either in Mexican or international law, that prohibits a legislator from expressing his political opinions or supporting the concerns of the community. Therefore, even if taken literally, there is no legal duty that could breach the FPS's obligation.

- Furthermore, Deputy Borrego is not an agent of the Mexican executive branch, nor does he hold any position of authority within the police or administrative agencies. As a federal legislator, his political statements or activities do not compromise Mexico's international responsibility, unless they can be attributed to the State.⁷⁸⁸
- Even assuming, *for the sake of argument*, that Deputy Borrego supported the demonstration, such statements would have no bearing on the question of whether the Mexican State failed to fulfill its FPS obligation. The relevant question is whether the authorities responsible for maintaining public order acted with due diligence. There is no reason to suggest that the police or investigative agencies were influenced, instructed, or restricted by Deputy Borrego's alleged conduct.

664. *Second*, Mexico is not obligated to present evidence to refute unfounded or speculative accusations. The burden of proof lies with the Claimant, who must substantiate its allegations with convincing evidence. To date, the Claimant has provided nothing more than photographs of a campaign event⁷⁸⁹—a common occurrence in Mexican political life—and an unsubstantiated and illegally recorded audio clip⁷⁹⁰, neither of which demonstrates that Deputy Borrego's actions violated the FPS standard established in the treaty, which consists of applying due diligence and making reasonable efforts to protect the physical safety of the investor. On the contrary, the evidence presented by the Respondent demonstrates that there is no longer any connection between Deputy Borrego and Mineros Nortesños or the protests.⁷⁹¹ Similarly, the evidence demonstrates that

⁷⁸⁸ See Section II.C.4.

⁷⁸⁹ Facebook post by Deputy Borrego, May 18, 2024 (available at: <https://www.facebook.com/share/p/JN9v1HoMc26H9UTB/?mibextid=oFDknk>), **C-0332**.

⁷⁹⁰ See Section II.C.4. Audio recording of the conversation between Juan Manuel López Ramírez and Lorenzo Fraire (Mineros Nortesños) about Deputy Borrego's involvement and the monetary demands, January 5, 2024, **C-0335**; Transcript of the audio recording of the conversation between Juan Manuel López Ramírez and Lorenzo Fraire (Mineros Nortesños) about the involvement of Deputy Borrego and the monetary demands, January 5, 2024, **C-0336**.

⁷⁹¹ Second Witness Statement of Mr. Fraire, ¶ 45.

the protests arose from longstanding contractual disputes and tensions with the community, rather than political orchestration.⁷⁹²

665. Furthermore, as demonstrated elsewhere in this submission, no adverse inference is warranted, and Mexico fully complied with the Tribunal's procedural orders.⁷⁹³ Under the IBA Rules, an adverse inference can only be drawn when a party fails to produce documents *ordered by the Tribunal*.⁷⁹⁴ The only production order issued against Mexico in relation to documents concerning Deputy Borrego was “Minutes of, or other Document recording, any meeting held on or about 3 September 2019 between Deputy Borrego and Mineros Norteños”.⁷⁹⁵ Therefore, accepting the Claimant's request for adverse inferences would imply an inference that such meetings took place and that Deputy Borrego promoted the demonstration at the Project at that meeting. Making these two inferences would make sense of the Tribunal's decision and undermine the procedural guarantees established by the IBA Rules.

666. In conclusion, the Claimant's arguments regarding Deputy Borrego lack both legal and factual merit. His alleged conduct is irrelevant to the analysis of FPS under Article 1105, as it is not attributable to Mexico nor is it related to the actions of the authorities responsible for public security. Furthermore, Mexico has no legal obligation to present evidence in its defense, and there is no basis for drawing adverse inferences.

(6) The reference to other companies is irrelevant for the purposes of the FPS

⁷⁹² Second Witness Statement of Mr. Fraire, ¶ 42 (“At no time did he ask us for money or incite us to hold the demonstration.”) *See also* Witness Statement of Mr. Portillo, ¶ 9 (“I am aware of the conflict between Minera Metalin and the Sociedad Cooperativa de Exploración Minera “Mineros Norteños”, S.C.L. (Mineros Norteños) since 2006, when the community began to feel dissatisfied with the lack of progress on the Sierra Mojada Project, as well as the non-payment of royalties...”)

⁷⁹³ See Section II.C.4.

⁷⁹⁴ 2020 IBA Rules on the Taking of Evidence in International Arbitration, Article 9.6. (“If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.”) [Emphasis added]

⁷⁹⁵ Procedural Order No. 3, Annex A, p. 33.

667. The Claimant's argument remains fundamentally the same: that Mexico was allegedly obliged to use force to end the peaceful protests. However, on this occasion, it bases its claim on the assertion that Mexico has historically intervened in other blockades.

Nor do Mexico's domestic laws on the use of force justify its inaction in this case.¹³²³ As a threshold matter, Mexico did not need to use force to resolve the Continuing Blockade, as demonstrated by the Initial Blockade. In any event, Mexico had ample justification to use reasonable force in this case, given Mineros Nortesños's flagrant criminal activity. As set forth above, Mexico has a history of intervening, in some cases through the use of force, to resolve blockades against other mining projects. There is no explanation for its refusal to take any action – through force or other means – to intervene in the Continuing Blockade and restore the Claimant's access to its Project.⁷⁹⁶

668. This comparison is legally erroneous and objectively misleading.

669. *First*, as Mexico has already explained, there is no connection between the Claimant's allegations of differential treatment and the MST standard in general.⁷⁹⁷ Simply put, alleging disparate treatment is different from alleging a lack of physical protection. The Claimant has not demonstrated—and cannot demonstrate—how its security was affected by the treatment afforded to other companies. This is because differential treatment is governed by Articles 1102 and 1103, not by the FPS clause in Article 1105. The two obligations are legally and analytically independent.

670. *Second*, the Claimant's reference to the use of force is vague and unsubstantiated. It alleges that Mexico should have used force to disperse the protests and that the State has historically intervened in similar protests “through the use of force.”⁷⁹⁸ Although SVB does not identify any specific comparators or explain how they are relevant to the FPS obligation, Mexico assumes in good faith that the Claimant may be referring to the 2016 Mineros Nortesños Protest or other mining projects mentioned in its claim under Articles 1102 and 1103.⁷⁹⁹ Regardless of the comparator, the conclusion is the same.

671. If the Claimant is referring to the 2016 Demonstration, Mexico has already clarified that this protest did not end due to State intervention, but rather as a result of further promises made by

⁷⁹⁶ Reply, ¶ 533.

⁷⁹⁷ Counter-Memorial, ¶¶ 407, 437-442.

⁷⁹⁸ Reply, ¶ 533.

⁷⁹⁹ See Section IV.B.

the investor to the community, which were subsequently not fulfilled.⁸⁰⁰ There was no use of force by the State; only false guarantees made by the company were relied upon. If, on the other hand, the Claimant is referring to other blockades related to different projects, Mexico has explained that those situations involved labor disputes that were normally resolved through direct negotiations between the companies and the communities.⁸⁰¹ There is no indication that State force was used, nor that the underlying circumstances were similar. Therefore, none of these examples constitutes a valid basis for comparison.

672. In summary, the Claimant's reference to other mining projects as comparators is legally erroneous and factually unsupported. FPS's obligation under Article 1105 does not require uniform treatment in different contexts, nor does it require the use of force in response to peaceful demonstrations. The examples cited are factually inappropriate or inaccurate, and none of them establish that Mexico acted unreasonably, arbitrarily, or in breach of its duty of due diligence. The Claimant's argument, based on vague analogies and speculative inferences, does not demonstrate any violation of the FPS standard.

c. The authorities cited in the Claimant's Reply do not support its case

673. As is customary in this arbitration, the Claimant refers to multiple investor-state arbitration decisions in an attempt to support its FPS allegations, weaving excerpts into its arguments without providing sufficient context or legal analysis. Mexico, on the other hand, will address each authority separately, providing the Tribunal with an adequate understanding of the facts and reasoning of those cases. Examination of these circumstances in light of the facts of this arbitration establishes that Article 1105 has *not* been violated.

(1) Cengiz v. Libya

674. The Claimant cites the case of *Cengiz v. Libya* to argue that a State must exercise reasonable care to protect an investor's investment, taking into account the State's means and resources and the general policy and security situation in the State, and that it is prohibited for a

⁸⁰⁰ See Section II.D.2. Counter-Memorial, ¶¶ 154-156. Letter from Tim Barry to Juan Manuel López dated February 4, 2016. **JMLR-011**. Counter-Memorial, ¶ 2.79. Witness Statement of Mr. López Ramírez, ¶ 6.15. Witness Statement of Mr. Fraire, ¶ 17.

⁸⁰¹ See Section II.D.4 Counter-Memorial, ¶¶ 474-488.

State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.⁸⁰² The tribunal found that Libya had breached the FPS standard by failing to deploy security forces to protect the Claimant's assets during a period of great instability, allowing private groups to repeatedly raid the investor's project, loot its equipment, and destroy its facilities.⁸⁰³

(2) Parkerings v. Lithuania

675. The Claimant cites the case of *Parkerings v. Lithuania* to argue that: (i) a State may breach the FPS standard when it fails to prevent a third party from causing damage to an investor's investment, fails to restore *the situation* to its pre-damage state, and fails to punish the perpetrator; and (ii) it is an undeniable right and privilege of every State to exercise its sovereign legislative power, but that it is prohibited for a State “to act unfairly, unreasonably or inequitably in the exercise of its legislative power.”⁸⁰⁴

(3) AAPL v. Sri Lanka

676. The Claimant cites the case of *AAPL v. Sri Lanka* to defend the proposition that a State must demonstrate that it has taken all precautionary measures to protect investments in its territory.⁸⁰⁵ The tribunal determined that the Respondent, by failing to protect the investor's shrimp farm from a military counterinsurgency operation, “violated its due diligence obligation which requires undertaking all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destructions.”⁸⁰⁶

(4) AMT v. Zaire

⁸⁰² Reply, ¶ 522, citing *Cengiz İnşaat Sanayi ve Ticaret A.S. v. Libya* (ICC Case No. 21537/ZF/AYZ), Award, November 7, 2018, ¶ 437, **RL-0106**.

⁸⁰³ Reply, ¶ 523.

⁸⁰⁴ Reply, ¶ 524, 549, citing *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, ¶¶ 332, 355, **CL-0062**

⁸⁰⁵ Reply, ¶ 524, citing *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, **CL-0094**

⁸⁰⁶ Reply, ¶ 524, citing *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, **CL- 0094**

677. The Claimant cites the case of *AMT v. Zaire* to argue that a State “must show that it has taken *all measures of precaution* to protect the investments of AMT on its territory.”⁸⁰⁷ In that case, during periods of political instability and civil unrest, Zairean military forces looted and destroyed the investor's property.⁸⁰⁸ The tribunal noted that Zaire had failed to meet the FPS standard “*by not taking any measures* to ensure the protection and security of the investment in question.”⁸⁰⁹

(5) **Energía y Renovación v. Guatemala**

678. The Claimant cites the case of *Energía y Renovación v. Guatemala* to argue that when the measures taken by a State are inadequate and have no practical effect, they do not meet the FPS standard.⁸¹⁰ In that case, the tribunal found that Guatemala had failed to protect the Claimant's investments in hydroelectric power plants from protests and violence by local opponents and had therefore breached the FPS standard.⁸¹¹

679. The claimant's case was based on a series of attacks and threats by armed groups that destroyed property and caused injuries to personnel, resulting in project delays and cost increases.⁸¹² In addition, there was a peace agreement signed by the State and the investor regarding the lack of security in the region, which was a clear indication of the State's intentions and commitments regarding the standard of full protection and security.⁸¹³

(6) **Wena Hotels v. Egypt**

⁸⁰⁷ Reply, ¶ 525, citing *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, February 21, 1997, ¶ 6.05, **CL-0005**

⁸⁰⁸ Reply, ¶ 525, citing *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, February 21, 1997, ¶ 6.05, **CL-0005**

⁸⁰⁹ Reply, ¶ 525, citing *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, February 21, 1997, ¶ 6.05, **CL-0005**

⁸¹⁰ Reply, ¶ 527.

⁸¹¹ Reply, ¶ 526, citing *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56 (“*Energía y Renovación v. Guatemala*”), Award, March 31, 2025, ¶ 78, **CL-0176**

⁸¹² See Section IV.A.2. *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, March 31, 2025, ¶¶ 82-85. **CL-0176**

⁸¹³ See Section IV.A.2. *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, March 31, 2025, ¶¶ 348, 350. **CL-0176**

680. The Claimant cites the case of *Wena Hotels v. Egypt* for the following facts related to the breach of the FPS standard found by the tribunal: (i) Egypt was aware of the Egyptian Hotel Company's intention to confiscate the Claimant's hotels and took no action to prevent such confiscation; (ii) once the seizures took place, neither the police nor the Ministry of Tourism took immediate steps to quickly return the hotels to Wena's control; and (iii) neither the Egyptian Hotel Company nor its senior officials were seriously punished for their actions in forcibly evicting Wena and illegally possessing the hotels for approximately one year.⁸¹⁴

(7) MNSS v. Montenegro

681. The Claimant cites *the case of MNSS v. Montenegro* to argue that the FPS standard “requires the Government to have a more proactive attitude to ensure the protection of persons , and property in the circumstances of [the investor in that case], particularly when it had been forewarned.”⁸¹⁵ In that case, workers invaded and occupied the Claimant's steel mill on two occasions, but on both occasions Montenegro took no action to remove the protesters, despite having been warned of the second occupation.⁸¹⁶

682. Based on the above and other relevant decisions concerning social protests and the FPS standard, the Respondent identifies two general patterns that emerge from the case law: (i) cases in which *violent* protests *and* State inaction have given rise to a violation of the FPS standard, and (ii) cases—completely omitted by the Claimant—in which *peaceful* protests *and* State action aimed at safeguarding the right to protest have not given rise to a violation.

683. *First*, the cases cited by the Claimant that did give rise to violations of the FPS standard are substantially different from the circumstances of the present arbitration. Those cases involved the State's complete failure to fulfill its obligation to “deploy security forces,” occurred during “periods of significant” “political instability and civil unrest,” and included egregious conduct such as “raiding investor property, repeatedly looting its equipment, and destroying its facilities,”

⁸¹⁴ Reply, ¶ 528 citing *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, ¶¶ 84-95, **CL-0049**

⁸¹⁵ Reply, ¶ 534, citing *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, May 4 2016, ¶¶ 352-353, **CL-0076**

⁸¹⁶ Reply, ¶ 534, citing *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, May 4, 2016, ¶¶ 352-353, **CL-0076**

as well as “killings,” “attacks and threats,” “injured personnel,” and “property seizures.” The perpetrators were often “military forces” or “armed groups,” and the damages reached a level that would shock any sense of judicial propriety. Some cases even involved the direct responsibility of the State or State organs. None of these conditions are present in the present case.

684. In the present case, there is no evidence of criminal activity⁸¹⁷, nor any indication that Mineros Norteños has at any time crossed the physical perimeter of the Project.⁸¹⁸ The protest remained outside the gates at all times, and there was no physical damage to property, let alone to SVB personnel.⁸¹⁹ The authorities arrived at the scene and documented the situation, noting that the protest was peaceful.⁸²⁰ In fact, a criminal investigation was opened following the Claimant's complaint, but the Claimant did not provide sufficient evidence for the investigation to proceed.⁸²¹ It should be noted that the protest was carried out by members of a vulnerable community that had been mistreated for years by the company, and not by armed or criminal groups, much less by State agents.⁸²² Therefore, both the nature of the alleged harm and the reasonableness of the State's response are substantially different from those in the cases cited by the Claimant.

685. *Second*, other cases omitted by the Claimant found no breach of the FPS standard, even when protests occurred, because the tribunals recognized the State's duty to balance investor protection with social rights. These cases include:

- The State's response to protests by local activists who blocked the wells and its order to conduct a full environmental assessment. The tribunal found that “the police appear to have been acting well within their right not to intervene in a private dispute between two co-owners over which it had no jurisdiction absent any indication of criminal conduct.”⁸²³

⁸¹⁷ See Section II.D and Section II.E. Counter-Memorial, ¶¶ 149-167, 174-191.

⁸¹⁸ See Section II.D. Counter-Memorial, ¶¶ 193. In fact, the Claimant's own officials, who are witnesses in this arbitration, reported at the time that “I finished the visit in my view **the damages are minimum**. I will report with photos to explain everything, but you can be quiet.” See Email from Juan Manuel to Tim Barry, October 23, 2021, Re: Meeting with Mineros Norteños. **R-0167**.

⁸¹⁹ See Section II.D. Counter-Memorial, ¶¶ 193.

⁸²⁰ Counter-Memorial, ¶¶ 194, 199.

⁸²¹ Counter-Memorial, ¶¶ 193, 213-224.

⁸²² Counter-Memorial, ¶¶ 39-48, 77-94.

⁸²³ See Section IV.A.2. ¶ 539, citing *Discovery Global v. Slovak Republic*.

- The obstruction of the investor by disgruntled individuals whose land had been expropriated to allow for the investment's operations were temporary obstructions by some expropriated landowners that did not constitute an impairment affecting the physical integrity of the investment. This ruling created an exclusion for peaceful demonstrations, even if they interfere with the Claimant's operations, as is the case in this arbitration.⁸²⁴

686. The findings in *Discovery Global v. Slovak Republic* and *Toto Costruzioni v. Lebanon* reinforce Mexico's position. As in those cases, the demonstration at issue here was peaceful, and the authorities acted within their discretion and legal obligations by avoiding the use of force and engaging with the community through established channels.⁸²⁵

687. In conclusion, the case law confirms that none of the cases relied upon by the Claimant supports the conclusion that the FPS standard has been breached in the facts of this dispute. If anything, they underscore how different this case is from the factual circumstances of those decisions. On the contrary, other cases presented by the Respondent that share a factual matrix similar to that of this case confirm that peaceful protests are legitimate under investment law and, therefore, a State's reasoned decision not to end them by force cannot constitute a breach of the PPS principle obligation.

4. Mexico did not breach the FET obligation

a. Scope of the FET obligation contained in Article 1105

688. Mexico's key legal argument regarding FET is that the Claimant's attempt to extend the MST beyond its established limits should be rejected. To that end, in the following sections, Mexico will further clarify the proper scope of FET by demonstrating that: the FET obligation under Article 1105 is understood as an absolute minimum (**section 1**); the threshold required for a breach of fair and equitable treatment under Article 1105 of NAFTA remains high (**section 2**). FET is limited to the treatment of investments (**section 3**). Article 1105 does not include a non-discrimination obligation (**section 4**). Article 1105 does not cover legitimate expectations (**section 5**).

⁸²⁴ See Section IV.A.2, ¶ 542, citing *Toto Costruzioni v. Lebanon*.

⁸²⁵ See Section II.D. Counter-Memorial, ¶¶ 192-201.

(1) The FET obligation under Article 1105 is understood as an absolute minimum

689. The Claimant continues its failed attempt to deny the clear distinction between the usual MST under customary international law and an autonomous FET obligation. Its reasoning, as summarized in the Reply, constructs an artificial line of argument based on four arbitral decisions to conclude, erroneously, that it is essentially irrelevant whether States agree to an autonomous FET clause or one linked to customary international law's customary MST:

In addition, there is a growing recognition among investment treaty tribunals – particularly in the post-*Waste Management II* era – that the FET standard under customary international law is not materially different from an “autonomous” FET standard found in many BITs. For instance, the tribunal in *Deutsche Bank v. Sri Lanka* concluded that the content of the autonomous FET obligation in the Germany-Sri Lanka BIT was “not materially different from” the minimum standard of treatment under customary international law. Similarly, in *Rusoro Mining v. Venezuela*, the tribunal found no meaningful difference between the protections offered under the two standards. The tribunal in *Rumeli v. Kazakhstan* came to the same conclusion. The Rumeli tribunal further observed that both standards share a set of core principles, including: (i) a requirement for the State to maintain transparency in its actions; (ii) an obligation to act in good faith; (iii) a prohibition on conduct that is arbitrary, grossly unfair, unjust, erratic, discriminatory, or procedurally deficient; and (iv) a duty to uphold due process and procedural fairness.⁸²⁶

690. The Claimant confuses the Respondent's position—namely, that the Claimant failed to demonstrate any evolution of the MST under customary international law—with a rejection of NAFTA jurisprudence that has examined such evolution.⁸²⁷ After presenting this erroneous equivalence, the Claimant attempts to demonstrate an evolution of the MST standard based on certain arbitral awards.⁸²⁸ However, what emerges from this exercise and the cases cited is that the MST standard under Article 1105 does not require States to grant treatment that exceeds the minimum under customary international law.⁸²⁹

⁸²⁶ Reply, ¶ 547.

⁸²⁷ Reply, ¶¶ 544–545.

⁸²⁸ Counter-Memorial, ¶ 434. Reply, ¶ 547.

⁸²⁹ *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006, ¶ 194. **RL-0064**. *IC Power Ltd and Kenon Holdings Ltd v. Republic of Peru*, ICSID Case No. ARB/19/19, Award, October 3, 2023, ¶ 290, **CL-0179**. (“According to the Tribunal, the rationale of provisions of this type is to prevent an overbroad interpretation of the MST/FET, setting a higher threshold for a finding of breach than under an autonomous FET clause not tethered to customary international law.”) *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, March

691. In its Reply, the Claimant agrees with the Respondent that *Waste Management II* offers the interpretation most widely accepted by NAFTA tribunals of the content of the FET standard in Article 1105.⁸³⁰ The other cases cited in support of the Claimant's position are based on the *Waste Management* standard⁸³¹ or, upon closer examination, support the Respondent's interpretation.

692. For example, in analyzing the substantive obligations of the FET standard, the tribunal in *Rusoro v. Venezuela* assessed the threshold for breach by referring to “violations of certain thresholds of propriety, or contravene basic requirements of rule of law.”⁸³² The tribunal relied on *Glamis Gold*, which stated:

The fundamentals of the Neer standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1)...The standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under Neer.⁸³³

693. The very cases on which the Claimant relies ultimately support the findings in *Glamis Gold*, confirming that the MST standard is “linked” to customary international law⁸³⁴ and does not go beyond it.⁸³⁵ In essence, these cases support Mexico’s interpretation that the obligation under Article 1105 should be understood as an absolute minimum, “a floor below which treatment of

31, 2010, ¶ 193. **RL-0060**. (“The protection does not go beyond that required by customary law, as the FTC has emphasized. Nor, however, should protected treatment fall short of the customary law standard.”).

⁸³⁰ Counter-Memorial, ¶ 409. Reply, ¶¶ 545-546.

⁸³¹ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, October 31, 2012, ¶ 420, **CL-0069**. *IC Power Ltd and Kenon Holdings Ltd v. Republic of Peru*, ICSID Case No. ARB/19/19, Award, October 3, 2023, ¶ 290, **CL-0179**. *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, ¶¶ 583-587. **CL-0025**.

⁸³² *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016, Award, August 22, 2016, ¶ 523, footnote 421, **CL-0039**.

⁸³³ *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Final Award, June 8, 2009, ¶ 616. **RL-0034**.

⁸³⁴ *IC Power Ltd and Kenon Holdings Ltd v. Republic of Peru*, ICSID Case No. ARB/19/19, Award, October 3, 2023, ¶ 289. **CL-0179**.

⁸³⁵ *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, ¶ 193. **RL-0060**

foreign investors must not fall, even if a government were not acting in a discriminatory manner.”

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694. However, after acknowledging that both parties consider *Waste Management II* to be relevant and informative in the analysis of the TJE, the Claimant attempts to surreptitiously broaden the framework by misrepresenting a conclusion of *the Rumeli* tribunal. The Claimant asserts that the *Rumeli* tribunal further observed that “both standards” share a number of basic principles, including the prohibition of arbitrary, manifestly unfair, unjust, capricious, discriminatory, or procedurally deficient conduct, and the duty to respect due process and procedural fairness.⁸³⁷

695. Based on this, a reader could reasonably conclude that “both standards” refer to the NMT standard and an autonomous FET obligation. But this is incorrect. The *Rumeli* arbitration concerned MFN and NT provisions, not an MST clause; the FET standard was incorporated by virtue of the MFN clause, with the consent of the parties.⁸³⁸ Therefore, the *Rumeli* tribunals analysis of the FET standard is wholly inapplicable to the present arbitration, as the clauses under review are not analogous to Article 1105. The Claimant’s attempt to dilute the standard is therefore without merit.

696. Even setting this aside, the Claimant’s argument in paragraph 547 of its Reply remains logically and legally flawed. SVB erroneously argues that the common elements of NMT and FET—such as the obligation to avoid manifest arbitrariness or denial of justice—make the two standards identical. This is simply untrue. For example, the fact that both standards prohibit

⁸³⁶ Reply, ¶ 410. *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Final Award, June 8, 2009, ¶ 619. **RL-0034**.

⁸³⁷ Reply, paragraph 547.

⁸³⁸ Reply, paragraph 547. *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, paragraphs 583 and 591. **CL-0025**. (“(1) Each Party shall permit in its territory investments, and activities associated therewith, on a basis no less favorable than that accorded in similar situations to investments of investors of any third country, within the framework of its laws and regulations. (2) Each Party shall accord to these investments, once established, treatment no less favorable than that accorded in similar situations to investments of its investors (‘National Treatment clause’) or to investments of investors of any third country, whichever is the most favorable (‘MFN clause’)”)

manifestly unfair treatment does not mean that NMT includes broader notions such as legitimate expectations. It only means, as Mexico argues, that those common elements are the bare minimum.

697. On the contrary, Mexico has already demonstrated that there is a clear distinction between the FA standard and the FET and PSP obligations. When a claimant alleges that FA has evolved to incorporate additional elements, it must demonstrate such evolution through evidence of consistent and widespread state practice accompanied by *opinio juris*, in accordance with the rules for establishing customary international law.⁸³⁹ SVB has not even attempted to meet this burden. Furthermore, adopting the Claimant's approach would contradict the rules of treaty interpretation set forth in Article 31 of the VCLT and would unjustifiably override the express intent of the NAFTA Parties by interpreting Article 1105 with elements they never intended to include.⁸⁴⁰ Finally, Mexico has demonstrated that prevailing NAFTA jurisprudence supports its interpretation of Article 1105 as limited to the NMT.⁸⁴¹

(2) The threshold required for a violation of the JTE under Article 1105 of NAFTA remains high

698. Mexico recalls that the FET, as part of the MFN under customary international law, only prohibits serious or manifestly arbitrary conduct.⁸⁴² Therefore, the threshold for establishing a violation remains high. As in the context of the PSP, it is not sufficient for the Claimant to simply allege that the State took an erroneous measure or that the investor disagrees with a measure.⁸⁴³ The applicable standard is reasonableness, not perfection.⁸⁴⁴ Furthermore, when evaluating regulatory conduct, tribunals must show due deference to the State's legitimate prerogatives and its margin of appreciation in balancing competing public policy objectives.⁸⁴⁵

699. For its part, the Claimant alleges that Mexico exaggerates the threshold required to determine a violation of FET under NAFTA.⁸⁴⁶ However, the very cases it invokes support

⁸³⁹ See Section IV.B.

⁸⁴⁰ See Section IV.B.

⁸⁴¹ See Section IV.B.

⁸⁴² See Section IV.B.

⁸⁴³ See Section IV.B.

⁸⁴⁴ See Section IV.A.

⁸⁴⁵ See Section IV.B.

⁸⁴⁶ Reply, ¶ 548.

Mexico’s position. For example, although the tribunal in *López-Goyne v. Nicaragua* accepted that it is not necessary to determine bad faith to establish a violation of FET, it repeatedly stated that the threshold remains high.⁸⁴⁷ The tribunal further considered that “while malicious intent, wilful negligence, or bad faith are not elements required by the MFN clause, under customary international law, there must be some aggravating factor such that the acts of the State in question consist of more than a minor deviation from what is considered acceptable at the international level.”⁸⁴⁸

700. Mexico does not argue that it is necessary to prove bad faith in order to establish a breach of the obligation of fair and equitable treatment. However, it does argue that the threshold remains considerably high, as consistently confirmed by the case law presented in its submissions, which the Claimant continues to ignore. For example, the Claimant does not dispute the *Mesa Power tribunal’s* conclusion that “imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard,” which is an informative articulation of the standard.⁸⁴⁹ This articulation of the threshold is consistent with longstanding NAFTA authority and underscores that a finding of EIT breach requires more than an error in judgment or an exercise of discretion that the investor simply disapproves of. The Claimant’s submissions do not demonstrate otherwise.

(3) The EIT is limited to the treatment of investments.

701. As Mexico clarified in its Counter-Memorial, the obligation under Article 1105 is imposed on investors’ investments, not on the investors themselves.⁸⁵⁰ Therefore, the Claimant can only bring a claim under that provision on behalf of Metalin, pursuant to Article 1117, and, pursuant to Article 1135(2) and 1135(2)(b), any damages related to a claim brought under Article 1117 would

⁸⁴⁷ *The López-Goyne Family Trust et al. v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, March 1, 2023, ¶¶ 410-416. (cited by the Claimant, but not included as documentary evidence) **RL-0168**.

⁸⁴⁸ *The López-Goyne Family Trust et al. v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, March 1, 2023, ¶ 416. (cited by Claimant, but not included as documentary evidence – **RL-0168**).

⁸⁴⁹ Reply, ¶ 548.

⁸⁵⁰ Reply, ¶ 419. *Joshua Dean Nelson v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, June 5, 2020, ¶ 312. **RL-0072**.

have to be paid to the company.⁸⁵¹ This was not challenged by the Claimant in its Reply. Therefore, the Tribunal must take this distinction into account when assessing the claim for remedy, breach of obligation, and any applicable damages.

(4) Article 1105 does not include a non-discrimination obligation

702. Extending the scope of Article 1105 to include discriminatory treatment contemplated in Articles 1102 and 1103 would be redundant and contrary to the text of the treaty.⁸⁵² The Claimant has brought claims for discrimination under Articles 1102 and 1103, and has done so on the basis of the same facts and the same evidence. Therefore, if this Tribunal were to find that discrimination against the Claimant did in fact occur (which the Respondent strongly denies), that violation would be covered by the claims brought under Articles 1102 and 1103.⁸⁵³

703. In its Reply, SVB argues that Mexico's position is "without merit" because it is "undisputed" that the TJE obligation includes non-discrimination⁸⁵⁴ and "SVB has not sought to establish a violation of Article 1105(1) of NAFTA solely by reference to alleged violations of other provisions," but has demonstrated how the facts of this case "give rise to separate violations of Articles 1102, 1103, and 1105 of NAFTA."⁸⁵⁵ These arguments are erroneous and fail to address Mexico's fundamental points.

704. *First*, the reference to discrimination in the EFTA's analysis of certain tribunals does not support the conclusion that a claim of discrimination is sufficient to establish a breach of the EFTA. In particular, the tribunal's articulation of the FET standard in *Waste Management v. Mexico II* is inappropriate, as no claims under Articles 1102 or 1103 were raised in that case. Therefore, the conclusion that "the minimum standard of fair and equitable treatment is breached by conduct attributable to the State and is prejudicial to the claimant if such conduct is [...] discriminatory"⁸⁵⁶

⁸⁵¹ Counter-Memorial, ¶¶ 419-420.

⁸⁵² Counter-Memorial, ¶ 440.

⁸⁵³ Counter-Memorial, ¶ 442.

⁸⁵⁴ Reply, ¶ 551.

⁸⁵⁵ Reply, ¶ 552.

⁸⁵⁶ *Waste Management, Inc. v. United States II*, ICSID Case No. ARB(AF)/00/3), Award, April 30, 2003, ¶ 98, **CL-0056**

cannot be taken as a general rule or as support for the duplicate submission of claims in this arbitration.

705. *Second*, regardless of how some tribunals have interpreted the scope of the obligation as covering or not covering discriminatory treatment, what the Respondent is asking the Tribunal is to read the text of NAFTA and interpret it in accordance with its context, its object and purpose, in accordance with Article 31 of the Vienna Convention on the Law of Treaties, including, of course, reasonable consideration of its entire structure. Similarly, the approach proposed by the Claimant conflicts with the attribution of effective meaning to each provision.

706. *Third*, it is procedurally inconsistent and legally erroneous to invoke exactly the same conduct and legal reasoning as a breach of both the non-discrimination obligations (Articles 1102 and 1103) and the NMT under Article 1105. This duplicative allegation undermines procedural economy and disregards the specific structure of NAFTA, which assigns different legal standards to different types of conduct. For example, the requirements of Article 1105 are not the same as those of Articles 1102 and 1103 (e.g., the latter require identifying less favorable treatment granted in similar circumstances, while Article 1105 does not even mention discrimination). The Claimant offers no convincing reason to justify this overlap, and the Tribunal should not read into Article 1105 what the Parties deliberately formulated in separate provisions.

707. In any event, should the Tribunal decide that Article 1105 covers discriminatory conduct, Mexico refers, for reasons of procedural economy, to the arguments it has already raised in relation to Articles 1102 and 1103.⁸⁵⁷ With one key distinction: unlike those articles, Article 1105 is expressly linked to the MFN under customary international law. This must have interpretative consequences. In other words, to establish that the allegedly discriminatory treatment—if proven—violates Article 1105, the Claimant must first demonstrate that non-discrimination is part of the NMT.⁸⁵⁸ This cannot be done simply by citing isolated awards⁸⁵⁹, as if investment arbitration operated under a system of precedent.⁸⁶⁰ The Claimant must demonstrate, using the methodology

⁸⁵⁷ See Section IV.D.

⁸⁵⁸ Section IV.B.4.

⁸⁵⁹ Section IV.B.2.

⁸⁶⁰ *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Award, February 28, 2024, ¶ 293. **RL-0082**. (“For the avoidance of doubt, the Tribunal clarifies that arbitral awards

for proving custom, that non-discrimination is a practice generally and systematically followed and accepted as law.⁸⁶¹ Second, it must demonstrate that the alleged discrimination reaches the level of flagrant or manifest arbitrariness, the threshold applicable to violations of the NMT.⁸⁶²

708. The Claimant's own authorities confirm this interpretation. It cites the case of *Glamis Gold v. United States* to argue that Article 1105 protects investors from "evident discrimination,"⁸⁶³ but again ignores that no claims were made under Articles 1102 or 1103 in that case. The Claimant also ignores the tribunal's careful analysis, which leads it to conclude, "that, as part of the duty prescribed by Article 1105 to not act arbitrarily, there is a duty to not unfairly target a particular investor, whether based upon nationality or some other characteristic."⁸⁶⁴ In fact, at no point does the tribunal separate the concept of discrimination from that of arbitrariness. Rather, it states:

The protection afforded by Article 1105 must be distinguished from that provided for in Article 1102 on National Treatment. Article 1102(1) states: "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors..." The treatment of investors under Article 1102 is compared to the treatment the State's own investors receive and thus can vary greatly depending on each State and its practices. The fair and equitable treatment promised by Article 1105 is not dynamic; it cannot vary between nations as thus the protection afforded would have no minimum.⁸⁶⁵

709. Similarly, in *TECO v. Guatemala*, the tribunal referred to "discriminatory treatment" as one of several attributes that, if present, could give rise to a violation of FET. But, as in *Glamis Gold* and *Waste Management II*, the tribunal was not tasked with adjudicating claims under provisions that expressly addressed discrimination. In its final reasoning, the tribunal determined that a violation of the TJE had occurred based on arbitrary conduct, not discrimination.⁸⁶⁶ This

rendered by international arbitral tribunals do not constitute state practice or *opinio juris* and, as such, do not create customary international law.")

⁸⁶¹ Section IV.B.2.

⁸⁶² Section IV.B.4.

⁸⁶³ *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Final Award, June 8, 2009, footnote 1087. **CL-0088.**

⁸⁶⁴ *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Final Award, June 8, 2009, ¶ 627, **CL-0088.**

⁸⁶⁵ *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Final Award, June 8, 2009, ¶ 615. **CL-0088.**

⁸⁶⁶ *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Final Award, June 8, 2009, ¶ 627, **CL-0088.**

supports the conclusion that evidence of discrimination alone is insufficient to establish a violation of Article 1105. Something more is required, such as arbitrariness.

710. In summary, SVB has not demonstrated that non-discrimination forms part of the NMT under customary international law, nor has it demonstrated that the alleged conduct was so serious as to infringe the high threshold required by Article 1105.

(5) Article 1105 does not cover legitimate expectations.

711. In its Reply, Mexico demonstrated that the Claimant had not shown that, based on the consistent practice of *the* State and *opinio juris*, the doctrine of “legitimate expectations” formed part of the NMT standard established in Article 1105.⁸⁶⁷ The Claimant is silent on this issue in its Reply, offers no significant refutation to the legal authorities cited by Mexico, and therefore continues to fail to meet its burden.⁸⁶⁸ This silence is significant, given that the NAFTA Parties agreed to base Article 1105 on customary international law. Nevertheless, the Claimant merely reiterates its position without addressing Mexico’s arguments:

Mexico’s assertion that the minimum standard of treatment under customary international law does not encompass legitimate expectations is incorrect and contradicted by several NAFTA tribunals... Mexico itself expressly admits that several international tribunals... have interpreted the minimum standard of treatment in Article 1105 to include such protection.⁸⁶⁹

712. Unlike the Claimant, Mexico has recognized in good faith the divergence of opinions among investment tribunals. The Claimant, on the other hand, takes an absolute and misleading position, treating the inclusion of legitimate expectations in the MFN as a matter settled “without question,” which is clearly not the case. The very decisions cited by Mexico in its Reply, and which the Claimant has not addressed, are proof of this division. Mexico recalls, in particular, the reasoning of the *Red Eagle* tribunal. That tribunal concluded unequivocally that the investor “has not provided the Tribunal with any evidence of state practice or *opinio iuris* supporting [the

⁸⁶⁷ Memorial in Reply, ¶¶ 425, 443.

⁸⁶⁸ Memorial in Reply, ¶¶ 423, 426-427. *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, January 9, 2003, ¶¶ 183, 185. **RL-0075**. *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, November 21, 2022, ¶¶ 595, 600, **RL-0032**. *Ahmadou Sadio Diallo (The Republic of Guinea v. The Democratic Republic of the Congo)*, Preliminary Objections, (2007) ICJ Rep. 582, ¶ 90. **RL-0081**.

⁸⁶⁹ Reply, ¶ 553.

proposition that the doctrine of legitimate expectations forms part of customary NMT], and the Tribunal is not aware of any.”⁸⁷⁰

713. This conclusion is consistent with other decisions and authorities, including higher courts in international law, such as the ICJ.⁸⁷¹ As the annulment committee explained again in *MTD v. Chile*, obligations must derive from the treaty itself, and not from an indeterminate and subjective set of investor expectations:

In principle, the host State’s obligations towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations that investors may have or claim. A tribunal that seeks to infer from such expectations a set of rights distinct from those contained in, or enforceable under, the BIT may well be exceeding its powers and, if the difference is substantial, may be manifestly exceeding them.⁸⁷²

714. The Claimant also fails to address Mexico’s criticism of its reliance on *Tecmed*, a decision widely questioned by other tribunals and commentators for its expansive interpretation of Article 1105.⁸⁷³ These omissions are revealing. Furthermore, the *Red Eagle* tribunal is another example of a highly critical view of the decision in *Tecmed*. The Claimant cites *Tecmed* to propose that, in light of the principle of good faith, the EIT under customary international law protects the basic expectations of investors⁸⁷⁴, but the *Red Eagle* tribunal noted:

In its submissions, the Claimant has relied heavily on the award of the tribunal in *Tecmed v. Mexico*. In that case, the tribunal suggested that the investors have a wide range of legitimate expectations relating to the stability and consistency of a host State’s regulatory framework, without the need to show the existence of a representation, the existence of a reasonable expectation or reliance on that representation. The *Tecmed*

⁸⁷⁰ Memorial in Reply, ¶ 427. *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Award, February 28, 2024, ¶ 293. **RL-0082**.

⁸⁷¹ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, October 1, 2015, ICJ Reports 2015, ¶ 162 (“The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation.” **RL-0169**).

⁸⁷² *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Annulment, March 21, 2007, ¶ 67. **RL-0090**. See also *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Award, November 12, 2008, ¶ 151. **RL-0080**. *Antonio del Valle Ruiz et al. v. Kingdom of Spain*, CPA Case No. 201917 Final Award, March 13, 2023, ¶ 519. **RL-0049**.

⁸⁷³ Reply, ¶ 446.

⁸⁷⁴ Reply, ¶ 553, 2 point. Citing *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 154, **CL-0055**

tribunal also stated that a State's failure to fulfil such expectations would amount to a breach of the customary MST. It is not a surprise that the award in *Tecmed* is often cited by claimants in investor-state disputes, in seeking to claim the broadest possible protection under the relevant investment treaty. With respect to the tribunal that sat in *Tecmed*, however, the majority of this Tribunal is very far from being persuaded that this view of the MST is correct or even plausible. As explained above, that award relied on no evidence of state practice or *opinio juris* to support its conclusion as to the existence of such a customary rule, and it appears there is none. It is striking that the *Tecmed* standard is now rarely (if ever) tribunals and has been strongly criticized in explicit terms by the annulment committee in *MTD v. Chile*. The *Tecmed* award is not one on which reliance may be placed.⁸⁷⁵

715. In any event, the Tribunal reserves the discretionary power to determine whether the concept of “legitimate expectations” falls within the scope of application established by the NMT. The real question is not whether some tribunals have referred to this concept, but whether its inclusion is compatible with the text of NAFTA and customary international law, as required by Article 1105. Mexico maintains that it is not. The standard set forth in Article 1105 is that of flagrant or manifestly arbitrary conduct, not that of disappointment or unfulfilled expectations.⁸⁷⁶

716. The only authority cited by Mexico that the Claimant attempted to address is precisely *Red Eagle*, but even in that case, SVB fails to overcome the Tribunal's fundamental conclusion. The Claimant points out that the tribunal accepted that the NMT could be violated when “at least a quasi-contractual relationship” is established between the State and the investor.⁸⁷⁷ But this is a different issue that does not contradict Mexico's position. SVB is still required to demonstrate that, under international custom, legitimate expectations are included in the NMT. If a tribunal considers expectations to be relevant, those expectations must derive from concrete and specific commitments, not from general policy objectives or aspirational statements.

717. Without prejudice to its main position that legitimate expectations are not part of the NMT under customary international law, Mexico notes that the tribunals cited by the Claimant have only recognized expectations as part of the NMT in exceptional cases, and always in relation to specific and unequivocal statements made to induce investment. This was the case in *Mobil and Grand*

⁸⁷⁵ *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Award, February 28, 2024, ¶ 295, **RL-0082**

⁸⁷⁶ Section IV.B.

⁸⁷⁷ Reply, ¶ 556. *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Award, February 28, 2024, ¶ 293, **RL-0082**.

River, the only two NAFTA decisions (apart from *Tecmed*) cited by the Claimant in support of its proposal.⁸⁷⁸ Similarly, multiple tribunals that have ruled under other treaties have agreed that, in order to be included in the MFN standard and/or constitute a breach of the FET obligation, expectations must be clear, specific, and directed at the investor, and not based on general regulatory frameworks or investment attraction strategies.⁸⁷⁹

718. Furthermore, even in those cases, tribunals have consistently held that the frustration of legitimate expectations is not, in itself, sufficient to establish a breach. Rather, they significantly limit the scope of what can be considered a legitimate expectation, even when expectations are taken into account in the broader analysis of FET.⁸⁸⁰

719. The Claimant cites the *IC Power case* to demonstrate that legitimate expectations have been considered part of customary international law. However, the Claimant omits to include the tribunal's conclusion that:

However, given that the threshold established by the NMT/JTE is higher than that of an autonomous JTE clause, the requirements for determining the existence of a breach of legitimate expectations under the NMT/JTE must be rigorous. In particular, according to case law, such a determination is subject to an objective analysis of the overall context, without prejudice to the subjective views of the investor and taking into account the specific facts of the case, in order to establish whether (i) the State made specific promises or representations to the investor, (ii) on which the investor reasonably relied in making the investment, and (iii) which the State subsequently repudiated.⁸⁸¹

720. Similarly, the tribunal's decision in the *Odyssey* case, on which the Claimant relies, confirms that "legitimate expectations are not an independent element within the FET standard under Article 1105(1) of NAFTA. Rather, such expectations are an factor that may be considered

⁸⁷⁸ Reply, ¶ 553. Counter-Memorial, ¶ 444. *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/, Decision on Liability and on Principles of Quantum (redacted), May 22, 2012, ¶ 170. **RL-0089**. *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (redacted version), January 12, 2011, ¶ 141. **RL-0028**.

⁸⁷⁹ Reply, ¶ 444. *UAB E energija (Lithuania) v. Republic of Latvia* (ICSID Case No. ARB/12/33), Award, December 22, 2017, ¶ 835. **RL-0086**. *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, ¶ 340. **RL-0087**. *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, December 27, 2010, ¶ 120. **RL-0088**.

⁸⁸⁰ Reply, ¶ 444.

⁸⁸¹ *IC Power Ltd and Kenon Holdings Ltd v. the Republic of Peru*, ICSID Case No. ARB/19/19, Award, October 3, 2023, ¶311, **CL-0179**.

in determining whether conduct violates the FET standard.”⁸⁸² It should be noted that the tribunal considered that “the Claimant’s legitimate expectations do not play a central role in the majority’s analysis, as Mexico’s arbitrary and idiosyncratic conduct constitutes a violation of the FET standard regardless of the claimant’s expectations.”⁸⁸³

721. Ultimately, SVB has failed to demonstrate that the concept of legitimate expectations forms part of customary international law, as required by the Treaty, and fails to reconcile the high threshold required for a violation of Article 1105 with its broad and vague interpretation of the doctrine of legitimate expectations. For these reasons, the Claimant’s legal theory is flawed and incomplete, and cannot serve as the basis for a violation of FET under NAFTA.

b. The Respondent’s actions meet the applicable TJE standard.

722. Instead of continuing to argue in favor of a breach of the FET, as is its burden of proof, the Claimant’s reply consists of going on the defensive and responding to six factual arguments raised by Mexico to demonstrate that this did not occur.⁸⁸⁴ As part of this exercise, SVB makes several errors and omissions critical to its factual case, such as failing to mention conduct attributable to the Mexican State and failing to make any connection to the applicable legal standard. Although the Respondent considers these arguments to be irrelevant, Mexico’s defense in this section will focus on addressing these responses.

(1) The relevant acts identified by the Claimant are neither proven nor attributable to Mexico

723. The Claimant’s first line of argument is that the demonstration was not peaceful. To support this assertion, it lists seven actions that allegedly prove the contrary, which can be reduced to kidnappings and threats against employees, blocking access to the site, damage to private property, extortionate demands, and obstruction of investigations by the authorities.⁸⁸⁵ The fact that the

⁸⁸² *Odyssey Marine Exploration, Inc. and Exploraciones Oceánicas S. de R.L. de C.V. (ExO) v. the United Mexican States*, ICSID Case No. UNCT/20/1, Award, September 17, 2024, ¶ 317, **CL-0183**.

⁸⁸³ *Odyssey Marine Exploration, Inc. and Exploraciones Oceánicas S. de R.L. de C.V. (ExO) v. the United Mexican States*, ICSID Case No. UNCT/20/1, Award, September 17, 2024, ¶ 441, **CL-0183**.

⁸⁸⁴ Reply, § 4.2.2.2.

⁸⁸⁵ Reply, ¶ 559.

Claimant's entire factual case on TJE is based on these exaggerated and unfounded accusations speaks for itself.

724. As for the alleged actions taken against company personnel, Mexico has already demonstrated that the Claimant has failed to provide any credible or convincing evidence. The allegations concerning threats and serious crimes, such as kidnapping, are based on illegally obtained and misrepresented evidence and border on questionable procedural tactics.⁸⁸⁶ The same applies to the alleged property damage, which has not been supported by contemporary documentation, technical reports, or inventory records.

725. In fact, the criminal law expert hired by Mexico to address these serious but unsubstantiated allegations reviewed the available evidence and concluded that none of the alleged conduct meets the high evidentiary threshold required by Mexican criminal law, as would be expected in any democratic legal system.⁸⁸⁷ Simply put, the self-serving account of one party claiming to have suffered damages does not constitute proof of a criminal act. Quite the contrary: these bold allegations could themselves constitute criminal conduct, such as defamation and illegal recording.⁸⁸⁸

726. As for the alleged extortion demands by members of Mineros Nortesños, Mexico has submitted with this reply a complete record of the offers exchanged between the parties as part of what was clearly a negotiation.⁸⁸⁹ Upon review, the Tribunal will be able to conclude for itself that these exchanges bear no relation to extortion. In any case, this demonstrates the ease with which the Claimant resorts to dramatic labels for normal situations. Similarly, with regard to the alleged obstruction of access to the site, both for the authorities and for employees, Mexico has demonstrated that these events took place in the context of a legitimate social protest⁸⁹⁰, which was recognized as peaceful by the authorities themselves.⁸⁹¹

⁸⁸⁶ Section IV.B.3.

⁸⁸⁷ Expert report of Mr. Islas, ¶ 159.

⁸⁸⁸ Expert Report of Mr. Islas, ¶¶ 68, 160-163.

⁸⁸⁹ Section II.C.3

⁸⁹⁰ Section II.D.

⁸⁹¹ Section II.D.

727. All of the above demonstrates that none of the conduct alleged by the Claimant constitutes a violation of Article 1105. From a legal standpoint, it is also revealing that each and every one of the acts referred to by the Claimant relate to the conduct of private individuals, and not of the State. Therefore, it is unclear what “measure” of the State the Claimant is challenging for the purposes of the TJE, let alone how such a measure would meet the high threshold required for a breach of this obligation under Article 1105. It appears that the Claimant has misinterpreted the concept of “measure” in public international law and mistakenly believes that it must demonstrate that Mineros Norteños—and not Mexico—breached the obligation.

(2) The Respondent acted reasonably and within the scope of its powers and authority.

728. The Claimant’s second response to Mexico’s arguments is that the authorities did not act in accordance with their domestic and international obligations.⁸⁹² Immediately after this statement, the Claimant acknowledges that the Mexican authorities took several measures, including conducting inspections and requesting information about the demonstrations.⁸⁹³ It then reveals its true complaint: in the Claimant’s view, these measures were “formalistic and did nothing to put an end to the criminal activity of Mineros Norteños.”⁸⁹⁴ This confirms that, as with the PSP obligation, the Complainant’s underlying complaint is that the authorities’ measures did not produce the desired result, as if Article 1105 imposed a standard of strict liability. The Claimant itself acknowledged that this is not a correct interpretation of the standard⁸⁹⁵, and has not provided any convincing justification for departing from the applicable threshold of manifest arbitrariness or egregious conduct, which is not a requirement of perfection, and certainly not “perfection” as unilaterally defined by the investor.

729. This claim also ignores a basic premise of international IMT: it must be interpreted in light of the sovereign right of States to regulate, a point recognized by both parties. The Mexican authorities did nothing more than respond to a peaceful demonstration in an appropriate and proportionate manner, i.e., without resorting to the use of force, because they simply did not have

⁸⁹² Reply, ¶ 561.

⁸⁹³ Reply, ¶ 561.

⁸⁹⁴ Reply, ¶ 561.

⁸⁹⁵ Reply, ¶ 522.

the legitimacy to do so and there was no need to do so.⁸⁹⁶⁸⁹⁷ The rational policy decision not to initiate criminal proceedings or impose sanctions is the exclusive competence of the State and cannot be challenged by an investment tribunal. For this reason, the Tribunal must approach the Claimant's arguments with caution and deference to the policy decisions of sovereign authorities.

730. The Claimant also alleges that other mining projects received different treatment, but Mexico has already demonstrated that this comparison is entirely unfounded.⁸⁹⁸ In short, the factual circumstances of the conflicts in Sierra Mojada and other projects are not even remotely analogous to support an allegation of discriminatory or arbitrary treatment.

731. The Claimant then returns (once again) to the alleged actions of Deputy Borrego, claiming that he instigated and supported the protest for personal or political reasons. Mexico has already addressed this argument in detail in other sections of this submission⁸⁹⁹, including in the context of the PSP obligation⁹⁰⁰, and it is not necessary to repeat those points here. Suffice it to say that nowhere in the record is there any alleged "evidence" that, according to the Complainant, demonstrates a link between Deputy Borrego and the actions of Mineros Norteños, as described by the Complainant. Furthermore, the Complainant still fails to explain why the actions of Deputy Borrego, even if true, can be attributed to the Mexican State when the Complainant itself presents them as actions motivated by "personal" reasons.

732. The Claimant also puts forward a generalized theory about an alleged "national agenda against mining."⁹⁰¹ This argument assumes, without any basis, that all branches of the Mexican government conspired to undermine its investment: from members of the legislative branch, such as Deputy Borrego, to administrative authorities, such as the Municipal Police, and even investigative authorities, such as the Prosecutor's Office. However, to support this theory, the Claimant relies on an inappropriate comparison with the *Odyssey* case, which concerned the

⁸⁹⁶ Reply, ¶ 458.

⁸⁹⁷ *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, November 22, 2018, ¶¶ 90-91. **RI-0159**. *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Award, September 11, 2018, ¶ 382 **RI-0160**.

⁸⁹⁸ See Section II.D.4.

⁸⁹⁹ See Section II.C.4

⁹⁰⁰ See Section II.C.4

⁹⁰¹ Reply, ¶ 565.

actions of a single government entity with centralized authority for decision-making on the approval of environmental permits.⁹⁰² That case bears no relation to the present dispute, in which the Claimant has failed to demonstrate that there was a coordinated campaign, much less that it reached the level of a treaty violation under the NMT. A few photographs of elected officials speaking at campaign events are far from demonstrating the existence of a systematic state-sponsored campaign against a specific investor.

733. In conclusion, the Claimant's argument is so poorly substantiated that it does not meaningfully address Mexico's fundamental defenses, including the right to protest and the limits on the use of force under Mexican law. Instead, the Claimant offers a political narrative devoid of context and evidentiary support, constructed around isolated fragments of evidence. This approach reveals the fundamental weakness of the Claimant's claim based on fair and equitable treatment. There is no manifest arbitrariness, no denial of justice, no abuse of power, only disagreement with the fact that the results of legitimate regulatory action did not favor the investor.

(3) The Claimant did not take the necessary legal steps to request the intervention of the Public Prosecutor's Office ().

734. As the Respondent has already explained in the section on the duty to report, the Complainant did not follow the appropriate legal channels under Mexican law to initiate a more thorough investigation into Mineros Norteños' conduct.⁹⁰³ In particular, the Complainant did not file criminal complaints with the competent authorities, nor did it provide evidence or take the necessary procedural steps to advance the proceedings.⁹⁰⁴ In its response, the Claimant merely states that it “promptly reported” the allegedly unlawful conduct to certain authorities.⁹⁰⁵ This statement is irrelevant. The fact that the Claimant reported it promptly is a different matter. In fact, the authorities responded quickly and visited the site almost immediately, demonstrating their willingness to act.⁹⁰⁶

⁹⁰² Reply, ¶ 565. *Odyssey v. Mexico*, Final Award, September 17, 2024, ¶¶ 441-442. **CL-0183**.

⁹⁰³ See Section II.D.3.

⁹⁰⁴ Memorial in Reply, ¶¶ 452-453.

⁹⁰⁵ Reply, ¶ 566.

⁹⁰⁶ First Witness Statement of Mr. López Ramírez, ¶¶ 8.13-8.14.

735. The key issue is whether the Claimant fulfilled its procedural obligations to enable the authorities to act. This includes filing formal criminal complaints, providing evidence, and responding to investigators' requests. Mexico established in its Counter-Memorial that the Claimant did not take these basic steps.⁹⁰⁷ Instead of proving otherwise, in its Reply, SVB merely alleges that it did not receive some communications from the authorities, that there is no proof of delivery, and that there is no evidence that this was the reason why the criminal investigation was closed.⁹⁰⁸ However, these assertions are flatly contradicted by the Claimant's own evidence. In fact, the record shows that official notifications were sent and received by the Claimant's registered legal representatives, including one of its witnesses in this arbitration.⁹⁰⁹

736. The Claimant also refers to a letter submitted by Mexico in its Counter-Memorial in which SVB explicitly requested that certain authorities not become involved in the matter.⁹¹⁰ The Claimant now attempts to downplay this, arguing that the letter was issued four years prior to the 2019 Manifestation and after the arbitration had commenced.⁹¹¹ Furthermore, it asserts that the letter was not a formal proposal, but merely an offer to facilitate dialogue.⁹¹² None of this changes the fact that it was the Claimant itself that expressed its desire to exclude government intervention. Moreover, this confirms once again that what the Claimant wanted was for the authorities to act in accordance with SVB's preferences. In short, if the demonstration was not forcibly dispersed, the intervention of the Mexican authorities was of no use to the Claimant.

737. Most importantly, the Claimant does not explain how any of these facts, even if accepted as true, constitute a breach of the obligation of fair and equitable treatment (FET) under Article 1105. No serious effort has been made to demonstrate that these actions constitute manifest arbitrariness or egregious conduct. The record shows that a criminal investigation was initiated, procedural steps were taken, and investigations were conducted, including witness interviews, police reports, and expert analyses⁹¹³ The competent authorities ultimately concluded that no

⁹⁰⁷ Reply, ¶¶ 452-453.

⁹⁰⁸ Reply, ¶ 568.

⁹⁰⁹ See Section II.E.¶ 218 See Investigation File 902/2019. **C-0498-SPA**, pp. 2 and 405.

⁹¹⁰ Reply, ¶ 567. Email exchange between Juan Manuel López and SEGOB, **R-0036**.

⁹¹¹ Reply, ¶ 567.

⁹¹² Reply, ¶ 567.

⁹¹³ See Section II.E ¶ 212. See Investigation File 902/2019. **C-0498-SPA**, ¶¶. 396-397.

criminal conduct could be identified⁹¹⁴ The Complainant, as a party to those proceedings, had full access to the case file and the opportunity to pursue the process. She chose not to do so. The rational decision by prosecutors not to file charges, based on a lack of evidence, does not constitute a violation of international law. This Tribunal is not a Mexican criminal court and should not be used as a forum to re-litigate or overturn the legitimate discretion of the prosecution.

738. In conclusion, the Claimant's failure to take the basic legal steps necessary to support its own case fatally undermines its claim. It did not file the required complaints, did not respond to the authorities, and even asked some of them to refrain from intervening. Now, it seeks to shift the blame for the foreseeable consequences of its own inaction to the Mexican State. This is not a valid claim under Article 1105 of NAFTA.

(4) The Claimant abandoned its project

739. The Respondent demonstrated in its Counter-Memorial that, based on the available evidence, it was reasonable to conclude that SVB abandoned its project.⁹¹⁵ The Claimant's response in the Reply is based on the following premises:

- SVB and its employees were unable to access the site due to the protest, which in turn led to South32's withdrawal from the project.⁹¹⁶
- It made good-faith efforts to reach an agreement with the community, but could not accept what it describes as extortionate demands.⁹¹⁷
- SVB did not breach any commitment to Mineros Nortesños, and the litigation with the Valdez family is irrelevant.⁹¹⁸

740. The Claimant does not explain why this is relevant to the analysis of the TJE obligation. In particular, all of these issues relate to the conduct of the investor, not the State. However, the

⁹¹⁴ See Section II.E ¶ 213. Investigation File 902/2019, Temporary Archive, p. 397. **C-0498.**

⁹¹⁵ Counter-Memorial, ¶ 454.

⁹¹⁶ Reply, ¶ 569.

⁹¹⁷ Reply, ¶ 570.

⁹¹⁸ Reply, ¶ 571.

Respondent will address each of these points in order to provide the Tribunal with a complete picture of the factual analysis.

741. *First*, the Claimant has not presented convincing or conclusive evidence demonstrating that the protests or actions of the Mexican authorities were the reason South32 withdrew from the project.⁹¹⁹ There is no reference to such causality in any of the communications between South32 and SVB, nor in the public statements or documents submitted by the company.⁹²⁰ On the contrary, there are numerous plausible alternative explanations, including the financial difficulties of the Project, which are well documented.⁹²¹ The Claimant’s narrative is an *a posteriori* rationalization that lacks factual basis.

742. *Second*, the Claimant’s assertion that it “sought in good faith” to reach an agreement with the community is not credible when compared to the documentary record. The evidence shows that SVB behaved abusively toward the community for several years, behavior that continues in the present proceedings, in which it continues to label them as criminals.⁹²² Upon examination of the terms and structure of the offers exchanged, there is nothing to support the claim that the community’s demands were “extortionate.”⁹²³ On the contrary, in light of SVB’s contractual obligations⁹²⁴, the community’s requests appear to be within the bounds of what a reasonable negotiating partner could demand.

743. For the same reasons, it is clear that SVB systematically failed to fulfill its commitments to the community. The Claimant has been unable to refute the existence of these commitments, even though it won the local litigation based solely on the statute of limitations defense.⁹²⁵ In fact, as this Tribunal will note, the litigation with the Valdez family is not incidental, but fundamental to understanding the investor’s abusive conduct. That litigation led to SVB’s loss of control of all

⁹¹⁹ See Section II.A.

⁹²⁰ See Section II.A.

⁹²¹ See Section II.F.

⁹²² See Section II.C.

⁹²³ See Section II.C.

⁹²⁴ See Section II.B.

⁹²⁵ See Section II.B.

its concessions⁹²⁶ and triggered a formal ethical complaint against the company filed with South32 by Mr. Valdez.⁹²⁷

744. All of the above reaffirms Mexico's position that the real cause of the Project's demise lies in the Claimant's own conduct, and not in any act or omission of the Mexican State. There is no legal or factual basis for shifting liability to Mexico under international law. SVB failed to fulfill its obligations, alienated its stakeholders, and ultimately abandoned the Project. In short, an investor genuinely committed to the development of a project would not have resisted resolving a community dispute that involved such a marginal cost compared to the total value of the Project.⁹²⁸ Therefore, the only accurate way to describe SVB's actions is abandonment.

(5) The Claimant's arguments of discrimination remain insufficient to demonstrate a violation of TJE

745. As noted throughout this submission, the Claimant repeatedly insists that it was discriminated against in comparison to other investors and investments. For its TJE argument, it alleges that the Respondent "has not even attempted to refute the merits of the Claimant's arguments regarding Mexico's discrimination."⁹²⁹ This assertion is clearly incorrect. Mexico has presented extensive legal and factual arguments refuting the Claimant's allegations.⁹³⁰ For reasons of procedural efficiency, Mexico will not repeat those arguments in detail here.

746. From a legal standpoint, Mexico has already established that discriminatory treatment alone does not constitute a breach of the FET obligation.⁹³¹ As for the facts, Mexico has demonstrated that the projects to which the Claimant seeks to compare its own situation are not analogous. The Claimant ignores key contextual differences, including the fact that those other projects were affected by labor disputes that were ultimately resolved through amicable

⁹²⁶ See Section II.F.

⁹²⁷ See Section II.F.

⁹²⁸ See ¶505 *supra*.

⁹²⁹ Reply, ¶ 571.

⁹³⁰ See Section IV.B.4.

⁹³¹ See Section IV.B.4.

negotiations with local communities, circumstances that are entirely absent in the Claimant's case.⁹³²

747. Even if a claim for discrimination could be brought under Article 1105—despite the Claimant already invoking Articles 1102 and 1103—Mexico has demonstrated, in accordance with established jurisprudence, that only manifestly arbitrary or grossly discriminatory conduct can constitute a breach of the NMT. However, the Claimant has not demonstrated that the alleged conduct meets this high threshold. Instead, it repeats the same arguments made in its claims under Articles 1102 and 1103, without adapting its analysis to the different standard set forth in Article 1105.⁹³³ This superficial and duplicative approach fails to meet the requirements and is bound to fail.

(6) No legitimate expectations have been identified as required by investment law.

748. Since its Memorial in Response, Mexico has consistently pointed out that the claimant has not based its claim of legitimate expectations on any specific commitment made by the State.⁹³⁴ Instead of remedying this deficiency, the claimant now asserts in its Reply that “it is not necessary to identify a specific commitment in order to establish a claim of legitimate expectations.”⁹³⁵ This admission is fatal to the Claimant’s argument. As Mexico has demonstrated, supported by consistent and systematic jurisprudence, legitimate expectations must derive from clear and specific commitments by the State.⁹³⁶ By choosing not to base its claim on this basis, the Claimant, which bears the burden of proof, effectively confirms that its claim is unfounded.

749. The Claimant’s only attempt to fill this evidentiary gap is to argue that legitimate expectations can be derived from the host State’s legislation.⁹³⁷ On this basis, it alleges that Mexico frustrated SVB’s legitimate expectations that “Mexico would respect and enforce its own legislation and take measures to enforce it in the event that the Claimant’s investment was affected

⁹³² See Section II.D.4.

⁹³³ Reply, ¶ 572.

⁹³⁴ Counter-Memorial, ¶ 445.

⁹³⁵ Reply, ¶ 573.

⁹³⁶ See Section IV.B.4.

⁹³⁷ Reply, ¶ 573.

by flagrant criminal conduct.”⁹³⁸ It also maintains that part of these expectations included the ability to conduct mining activities “without interference from third parties.”⁹³⁹ According to this theory, Mexico’s alleged failure to end the 2019 Demonstration constitutes a breach of its expectations.⁹⁴⁰

750. In *the argument*, even if no specific commitments are required, Mexico acted entirely in accordance with what a reasonable investor should have expected. By refraining from forcibly dispersing a peaceful protest, Mexico complied with its domestic legal obligations and international human rights standards.⁹⁴¹ Furthermore, the competent authorities found no “flagrant criminal conduct” and therefore made the legal decision not to proceed with further investigations or coercive measures.⁹⁴² There is no evidence of arbitrary, egregious, or manifestly improper conduct. The mere fact that the outcome was not what the Complainant desired, *i.e.*, the forcible dispersal of the demonstration, does not mean that there were legitimate expectations, much less that they were breached. Consequently, the Complainant’s argument regarding legitimate expectations must be dismissed.

751. It is now clear that the Complainant has failed to demonstrate a breach of NAFTA Article 1105. The general elements of the NMT, as explained by Mexico, remain unchallenged. Breach must meet a high threshold and take into account the regulatory powers of the State. If a claimant alleges that the content of the NMT has evolved over time, it must not only demonstrate that such evolution has taken place, but also explain how it occurred, which the Claimant has failed to do. On the contrary, the record shows unequivocally that the Mexican authorities intervened in the demonstrations and, after a reasoned decision-making process, concluded that no acts of violence or criminal conduct were taking place. In the absence of such evidence, neither the authorities nor the Mexican State had any obligation to intervene by force. The Claimant’s entire case under Article 1105 is based on the fact that it did not get its way. Such disappointment cannot serve as a

⁹³⁸ Reply, ¶ 573.

⁹³⁹ Reply, ¶ 573.

⁹⁴⁰ Reply, ¶ 573.

⁹⁴¹ See Section II.D.

⁹⁴² See Section II.D and Section II.E.

credible basis for determining a breach of an international investment agreement. It is not the role of the Tribunal to question decisions made lawfully by state authorities acting within the bounds of reasonableness and discretion. Accordingly, Mexico respectfully requests that the Tribunal dismiss the Claimant's claim under Article 1105 in its entirety.

C. The Claimant has not demonstrated that Article 1110 of NAFTA has been violated.

752. This section demonstrates that the Claimant has failed to prove a breach of Article 1110 of NAFTA. First, Mexico addresses the specific actions and omissions that the Claimant attributes to the Mexican authorities and characterizes as expropriation (**section 1**). Mexico then demonstrates that the Claimant has failed to show that indirect expropriation under international law has occurred, particularly in light of the high threshold required by NAFTA and existing ISDS jurisprudence (**section 2**). Finally, it demonstrates that none of the precedents relied upon by the Claimant support its case in the context of the present dispute (**section 3**).

1. Mexico's alleged actions and omissions

753. The Claimant contends that the conduct of the Mexican authorities allowed Mineros Norteños to block, occupy, possess, and exploit the Project with impunity.⁹⁴³ Its theory of expropriation is based on two forms of State conduct: (i) the alleged direct instigation by Deputy Borrego and (ii) the alleged unjustified inaction of the Mexican authorities.

754. *First*, the Claimant has failed to establish any link between the conduct of Deputy Borrego and the alleged expropriation. As demonstrated in this Rejoinder, there is no evidence of this alleged instigation and, even if there were, Deputy Borrego's actions cannot be attributed to the Mexican State under international law.

755. Mexico has emphasized that there is no official statement, position, or expression by Deputy Borrego against foreign mining or in favor of the alleged acts of expropriation.⁹⁴⁴ The only evidence on which the Claimant relies is an isolated expression of political support, in a personal capacity, to certain constituents in his electoral district.⁹⁴⁵ Furthermore, as confirmed by Mr.

⁹⁴³ Reply, ¶ 505.

⁹⁴⁴ See Section C.4 *above*.

⁹⁴⁵ See Section C.4 *supra*.

Lorenzo Fraire in his second witness statement, neither he nor other members of the community have any contact with Deputy Borrego.⁹⁴⁶ Therefore, there is no evidence of coordination or influence.

756. *Second*, with regard to the alleged inaction of the Mexican authorities, Mexico has already explained that it acted in accordance with applicable protocols for addressing peaceful demonstrations and social conflicts, both during the events of 2016 and 2019.⁹⁴⁷ To be clear, there is no evidence of ongoing illegal activities by Mineros Norteños that would require State intervention. The Claimant believes that any attempt to resume operations at the site will be violently rejected by Mineros Norteños, but this is merely conjecture; it has made no effort to resume activities. In 2019, the Claimant’s own representative, Mr. Tim Barry, expressly stated that “[t]he protest is non-violent and all contractors and staff are safe.”⁹⁴⁸ The assertion that the protest constituted criminal or violent conduct is not supported by the evidence and is contradicted by the Claimant’s own contemporary statements.

757. In light of the foregoing, the Claimant’s assertion that “Mexico has neutralized the benefit of SVB’s investments in the Sierra Mojada Project by not allowing SVB and Minera Metalín to regain access to the Project site and preventing SVB from bringing the Project into production with its partner South32”⁹⁴⁹ is nothing more than a misrepresentation of the Mexican State and its conduct. As this Rejoinder has demonstrated, the Claimant’s narrative is factually inaccurate, legally untenable, and, even at first glance, fails to meet the strict requirements necessary to establish expropriation.⁹⁵⁰

2. The Claimant has not demonstrated that an indirect expropriation has occurred

758. As noted in the Reply, the parties to this dispute agree that indirect expropriation is defined as the total or near-total deprivation of the value of the investment without a formal transfer of

⁹⁴⁶ Second Witness Statement of Mr. Fraire, ¶ 40 (“I confirm that we, the members of Mineros Norteños, have no contact with Deputy Borrego”).

⁹⁴⁷ See Section II.D *above*.

⁹⁴⁸ Email from Tim Barry to Major Drilling, September 10, 2019, 29_RE Sierra Mojada Drill Program, p. 2. **R-0165**.

⁹⁴⁹ Reply, ¶ 506.

⁹⁵⁰ See §II.B.1 *supra*.

title.⁹⁵¹ The Claimant has also clarified in its Reply that the investment behind its expropriation claim is Minera Metalín and all of its assets (the Project). Therefore, for the expropriation claim to succeed, the Claimant must demonstrate that the Project lost all of its value (the fact of expropriation) and that such loss was a consequence of the alleged violations of the Treaty attributed to Mexico (causation).

759. From an evidentiary perspective, it is the Claimant who bears the burden of proving that it has suffered this total or near-total deprivation. However, as demonstrated in the Counter-Memorial, the Claimant has not met this burden.⁹⁵² Its allegations are based on Mr. Barry's unsubstantiated assertion that "no reasonable investor would have invested in the Project,"⁹⁵³ rather than on actual evidence of dispossession or loss of economic value. Therefore, the Claimant's assertion that its investment lost its value is not supported by the facts. The Claimant retained legal title to the investment and continued to have the right and, in fact, the obligation to sell it to mitigate its damages.

760. The Claimant's burden of proof in relation to its expropriation claim is not satisfied by alleging (or even proving) that SVB could not have continued with the Project without South32's financial backing. The Claimant must prove that the Project lost its value to each and every potential investor. In other words, it must demonstrate, and not simply assert, that "no reasonable investor would have invested in the Project."⁹⁵⁴

761. It is important to note that SVB's inability to continue with the Project on its own does not constitute expropriation and, even if it did, it would not be attributable to the actions or omissions of the Respondent. There is ample evidence of SVB's precarious financial situation even before the problems with Mineros Norteños began, and despite South32's financial backing. For example, SVB's 2019 10-K report filed with the SEC states the following:

As of October 31, 2019, we had cash and cash equivalents of \$1,432,000. Even with the South32 funds, the continued exploration and possible development of the Sierra Mojada Project will require significant amounts of additional capital. If we are unable to fund future operations by way of financings, including public or private offerings of

⁹⁵¹ Reply, ¶ 498.

⁹⁵² Counter-Memorial, ¶ 389.

⁹⁵³ Reply, ¶ 507.

⁹⁵⁴ Reply, ¶ 507.

equity or debt securities, we will need to significantly reduce operations, which will result in an adverse impact on our business, financial condition, and exploration activities. We do not have a credit, off-take or other commercial financing arrangement in place that would finance continued evaluation or development of the Sierra Mojada Project, and we believe that securing credit for these projects may be difficult. Moreover, equity financing may not be available on attractive terms and, if available, will likely result in significant dilution to existing stockholders.⁹⁵⁵ [Emphasis added]

762. Later in the same 10-K report, it explains that SVB was at risk of dilution if South32 decided to exercise the option, as it did not have the financial resources to fund its share of the project in that scenario:

If South32 were to exercise its option to purchase 70% of the equity of Minera Metalín and Contratistas, we will be required to contribute 30% of subsequent funding toward development of the Sierra Mojada Project, and we do not currently have sufficient funds to do so. If South32 exercises its option to purchase 70% of the equity of Minera Metalín and Contratistas, under the terms of the Option Agreement, we will retain a 30% ownership in Minera Metalín and Contratistas, and be obligated to contribute 30% of subsequent funding toward the development of the Sierra Mojada Project. If we fail to satisfy our funding commitment, our interest in Minera Metalín and Contratistas will be diluted. We do not currently have sufficient funds with which to satisfy this future funding commitment, and there is no certainty that we will be able to obtain sufficient future funds on acceptable terms or at all. [Emphasis added]

763. The Claimant has also failed to demonstrate that South32's departure was caused by the alleged NAFTA violations. Although the Claimant contends that South32 abandoned the Project due to "continuing unlawful blockage," South32 itself never made any public statement to that effect. Although internal correspondence shows that South32 was aware of the situation, its references to the blockade were isolated (only once) and limited to occasional requests for updated information. Therefore, the Claimant is attributing to South32 a motive that the company itself never expressed. The Respondent will elaborate on the issue of causation in the damages section of this submission.

764. In the absence of probative evidence, the Claimant resorts to vague and unsubstantiated statements drawn from the testimony of Mr. Timothy Barry.⁹⁵⁶ In response to the observation by Mexico in the Counter-Memorial that Mr. Barry's statement was merely a subjective assessment that cannot prove actual deprivation, the Claimant now asserts that his opinion was based on

⁹⁵⁵ Silver Bull SEC 10-K 2019, p. 15. **R-0088**.

⁹⁵⁶ Reply, ¶ 507. Second Witness Statement of Mr. Barry, ¶ 66.

conversations with anonymous shareholders and investors.⁹⁵⁷ According to the Claimant, “[a]fter South32’s withdrawal, Sierra Mojada had effectively become unfinanceable, even if the blockade were resolved.”⁹⁵⁸

765. Regardless of the fact that “unfinancable” is not equivalent to “worthless” (which is what the Claimant must prove) Mr. Barry's second testimony remains speculative and unsubstantiated. Mr. Barry’s assertions about the perception of unidentified market players are of no probative value. Mr. Barry does not specify how many people he spoke to, who they were, whether they were qualified to assess the Project’s marketability, or whether they were actually capable of making the investment.⁹⁵⁹ The only person named is Rick Rule,⁹⁶⁰ whose opinion, even if accurately quoted, does not reflect the views of the investment community. An anecdotal comment from a single investor cannot serve as proof of the Project's alleged lack of value.

766. In his second witness statement, Mr. Barry further attempts to substantiate his position by referring to online comments, including a post allegedly published on a website for “investors,” later identified as Silicon Investor.⁹⁶¹ However, as the Tribunal itself can verify, this platform is not subject to any editorial oversight or verification mechanism.⁹⁶² Apart from the home page, which appears to display recent information on stock prices, mainly for technology stocks, the rest of the content appears to be generated in forums where any member can contribute to the discussion without the need to check the data or verify its authenticity. It even has a tab for discussing “hobbies”:

⁹⁵⁷ Reply, ¶ 307.

⁹⁵⁸ Reply, ¶ 307.

⁹⁵⁹ Second Witness Statement of Mr. Barry, ¶ 66.

⁹⁶⁰ Reply, ¶ 307.

⁹⁶¹ Second Witness Statement of Mr. Barry, ¶ 67.

⁹⁶² Silicon Investor, About Silicon Investor. **R-0168**.

Subject Title	create new subject	Ticker	Price	Chg %	Moderated By	Total Replies	Most Recent Message	Replies in 7 days	Submits in 30 days
Qualcomm Moderated Thread - please read rules before posting		QCOM	160.75	+0.6%	Silicon Observer	195452	27 minutes ago	133	2
AMD, ARMH, INTC, NVDA		AMD	168.57	+0.9%	neolib	69792	16 minutes ago	205	3
Tesla EVs - TSLA		TSLA	345.90	-1.0%	Savant	26298	30 minutes ago	34	2
Semi Equipment Analysis		SOXX	252.55	+0.5%	Return to Sender	94974	7 AM	34	
OLED Universal Display Corp		OLED	141.06	0.0%	slacker711	29598	3 hours ago	9	
SpaceX					Eric	3071	yesterday	15	2
Research Frontiers (REFR)		REFR	1.430	+1.2%	wallstreetbull	49448	an hour ago	13	2
Media Industries: Newspapers, TV, Radio, Movies, Online		NFLX	1,232	+0.7%	Ron	8128	5 hours ago	30	
Ouster (OUST)		OUST	30.83	+1.8%	The Ox	182	an hour ago	18	2

767. Mr. Barry offers no explanation as to why this source should carry any weight in assessing the value of the Project. Relying on anonymous and unverified Internet publications is no substitute for credible economic or financial evidence in international arbitration. Once again, Mr. Barry could have presented actual evidence of his attempts to seek other sources of financing or to sell the Project to a third party. It is telling that he has not provided any such evidence.

768. It should also be noted in this context that Mexico attempted to take advantage of evidence of the Claimant’s attempts to sell the Project during the document submission round. In particular, it requested “communications sent or received by the Claimant or its affiliates, or internal communications related to any attempt to sell the Project to a third party to recover at least part of the alleged damages. This request includes internal discussions on the feasibility of selling the Project, offers sent to potential buyers, and their respective responses.” The Tribunal granted this request, but only with respect to “any written offers to acquire the Project.”⁹⁶³ The Claimant did not submit any documents, which is also very revealing.

769. The Claimant also does not refute Mexico’s reference to relevant case law, such as *Corn Products v. United Mexican States* and *Glamis Gold Ltd v. United States of America*, in which claims for indirect expropriation were rejected due to the absence of significant deprivation.⁹⁶⁴ The Claimant also fails to rebut Mexico’s argument that the Project is likely to retain its value because the conflict with Mineros Norteños is not irresolvable and the Project has the same amount of

⁹⁶³ Procedural Order No. 3, Exhibit B, p. 35.

⁹⁶⁴ Counter-Memorial, ¶ 391.

mineral resources today as it did when the protest began. The Tribunal will recall that the Claimant alleges that a mining property derives its value from the resources found therein.⁹⁶⁵

770. In fact, while the Claimant continues to argue that no reasonable investor would invest in the Project, the Claimant's damages expert (BRG) attempts to maximize the damages claim by arguing that the Project was worth US\$315 million immediately prior to South32's exit.⁹⁶⁶ These two positions are in conflict with each other. The Claimant's argument is, in essence, that no reasonably informed buyer would be willing to settle with Mineros Norteños for US\$7 million, even though the Project was allegedly worth 45 times that amount. This makes no sense from an economic point of view. If SVB had offered adequate terms to compensate a new buyer for the payment necessary to resolve the dispute with Mineros Norteños, it would likely have found one. This point was raised in the Counter-Memorial. The Claimant did not address this argument in its Reply.

771. The Claimant will likely argue at the hearing that this is mere speculation on the part of the Respondent. However, if it takes that position, it should explain on what basis it speculates that "no reasonable investor would have invested." Once again, Mr. Barry's testimony is not sufficient, even if the tribunal were inclined to consider the second-hand evidence that Mr. Barry included only in his second witness statement.

772. Of course, it is also possible that the Project was never worth USD \$315 million and that no reasonable investor would have been willing to pay that amount because the actual value of the Project was closer to what the new buyer would have had to pay Mineros Norteños to continue with the Project. However, if that were the case, damages would be limited to the USD \$7 million (or any other amount) that Mineros Norteños was willing to accept to lift the alleged second blockade. The Respondent has no doubt that the Claimant and its third-party financier would consider that amount disappointing, which explains the Claimant's double standard of saying that the Project was very valuable and yet no reasonable investor would be willing to reach an agreement with Mineros Norteños for a small fraction of the alleged value of the project.

⁹⁶⁵ Memorial, ¶ 5.11. Counter-Memorial, ¶ 28, 400.

⁹⁶⁶ Second BRG Report, ¶ 207, Figure 8. Defendant notes that the original amount claimed was \$362.7 million.

773. SVB ignores credible evidence indicating that Mineros Norteños had shown a willingness to engage in dialogue and seek a negotiated solution to the second protest.⁹⁶⁷ Instead of considering this possibility, the Claimant dismisses Mineros Norteños’ efforts outright, labeling them “extortionate demands.”⁹⁶⁸ Such rhetorical devices cannot substitute for a reasoned rebuttal and further weaken the plausibility of the Claimant’s position, especially since they contradict or distort the facts. For example, the fact that SVB’s own mediator advised the company to reach a financial agreement with Mineros Norteños to resolve the dispute.⁹⁶⁹

774. The letter sent by Mineros Norteños to Silver Bull on December 18, 2021 explicitly illustrates the socioeconomic vulnerability of the community, the vital importance of the compensation owed, and the reasonableness of the proposal:

We want to make it very clear that just as you, as capitalists, are concerned with reaching a good negotiation, we, as cooperative members, most of whom are elderly, urgently need to receive what we are entitled to, but not crumbs. Consider that we are 143 members and that those \$100,000 distributed are not even enough to purchase a basic basket of goods for a fortnight.⁹⁷⁰

775. It is clear that these statements do not constitute extortion; they are a call for justice and the survival of a community in economic distress. Instead of presenting a coherent legal theory, the Claimant chooses to denigrate a community it has exploited for years, while attempting to portray itself as the victim. It misrepresents Mexico’s defense as an attempt to “blame the victim,” when in fact the record shows that Mineros Norteños is a marginalized community whose contractual rights were ignored by the Claimant for more than two decades,⁹⁷¹ affecting the sole source of livelihood for hundreds of families.⁹⁷²

776. The Claimant acknowledges that it rejected these alleged “extortionate demands” because it feared that the community might protest again in the future. But this assertion is contradicted by the letter from Mineros Norteños itself, which included a clear promise:

⁹⁶⁷ Counter-Memorial, ¶ 397.

⁹⁶⁸ Reply, ¶ 269.

⁹⁶⁹ See Section II.C *above*.

⁹⁷⁰ Letter from Minera Norteños to Silver Bull, December 18, 2021, **C-0306**.

⁹⁷¹ See Sections B and C *above*.

⁹⁷² See Section II.E.1 *supra*.

We will reach an agreement and hand over the facilities as long as we receive a fair amount in line with the maximum royalty limit⁹⁷³

777. Therefore, SVB made an informed decision not to engage with a vulnerable community and instead resorted to this arbitration as a means of obtaining significant compensation from the State for an investment that had not even reached the pre-feasibility stage after more than 20 years of exploration.

778. In summary, the Claimant retains legal ownership, has not lost control of the investment, has made no effort to monetize it, and has not demonstrated any total or near-total loss of the investment. The measures taken by the Mexican State, like the Mineros Norteños Manifestation, did not deprive the Claimant of its investment. In any event, as explained in the section on the Valdez trial, it was that proceeding that affected its property rights. Therefore, it cannot meet the high threshold required to establish an expropriation of its investment under international law.

3. The authorities cited by the Claimant do not support its case.

779. The Claimant cites a number of investment arbitration cases and assumes that, in doing so, the legal and factual circumstances of those cases are identical to its own and that, consequently, the same reasoning applies to the present dispute. However, the mere fact that a party cites a large number of cases does not exempt it from the obligation to explain how those cases relate to its own situation and why they are applicable. As will be demonstrated in this section, far from supporting the Claimant's position, the authorities cited reinforce the Respondent's arguments and confirm that the requirements for determining the existence of indirect expropriation are not met in this case.

780. Mexico has conducted a detailed and specific analysis of the cases on which the Claimant relies to support its claim of indirect expropriation. This analysis yields two main conclusions.

781. *First*, the circumstances of the cases cited by the Claimant are clearly distinguishable from the facts of the present arbitration for two main reasons: (i) the alleged interference with investments in those cases was carried out directly by State organs or officials in the exercise of their governmental functions, unlike the present case, which concerns acts of private individuals over whom the State exercised no control; and (ii) the cases cited largely concerned direct

⁹⁷³ Letter from Minera Norteños to Silver Bull, December 18, 2021, **C-0306**.

expropriations or State measures of comparable gravity, the expropriation was recognized by both parties to the dispute, and occurred in post-conflict situations and criminal investigations.

782. *Second*, several of the authorities cited by the Claimant in fact confirm the legal approach proposed by Mexico. For example, the report of the United Nations Secretary-General clearly demonstrates that investment has a social dimension that must be taken into account when analyzing the concept of the rule of law, and this includes the presence of vulnerable communities such as Mineros Nortesños. Rather than contradicting Mexico’s position, this report reinforces the argument that States may take measures to protect social stability and the rights of third parties, without this necessarily implying State liability.

783. Furthermore, these cases confirm that the finding of expropriation requires a high threshold: there must be a substantial, permanent, and irreversible deprivation of the value of the investment and, in some cases, a corresponding benefit to the State or another entity. The decision in *S.D. Myers*, for example, emphasized that the existence of a benefit to the host State may be a relevant factor in assessing whether an expropriation has occurred. In this case, there is no evidence that the Mexican State or any public entity has obtained such a benefit.

784. In its response, the Claimant relies on the following authorities: (i) *Wena Hotels v. Egypt*;⁹⁷⁴ (ii) *Amco Asia Corporation v. Indonesia*;⁹⁷⁵ (iii) *Tethyan Copper Company v. Pakistan*;⁹⁷⁶ (iv) Report of the Secretary-General of the United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, August 23, 2004;⁹⁷⁷ (v) *Compañía del Desarrollo de Santa Elena v. Costa Rica*;⁹⁷⁸ (vi) *Tecmed v. Mexico*;⁹⁷⁹ (vii) *S.D. Myers v. Canada*;⁹⁸⁰ (viii) *Bahgat v. Egypt I*;⁹⁸¹ and (ix) *Olin Holdings v. Libya*.⁹⁸²

⁹⁷⁴ Reply, footnote 1254, **CL-0049**.

⁹⁷⁵ **CL-0047**.

⁹⁷⁶ Reply, footnote 1255, **CL-0170**.

⁹⁷⁷ Reply, footnote 1265, **CL-0171**.

⁹⁷⁸ Reply, footnote 1266, **CL-0007**.

⁹⁷⁹ **CL-0055**.

⁹⁸⁰ Reply, footnote 1267, **CL-0085**.

⁹⁸¹ Reply, ¶ 511, **CL-0172**.

⁹⁸² Reply ¶ 512, **CL-0173**.

a. Wena Hotels

785. The Claimant cites *Wena Hotels v. Egypt* to argue that expropriation occurs when “the State withdraws the protection of its courts from the expropriated owner and tacitly allows the *de facto* possessor to continue in possession of the seized property”⁹⁸³ and that “allowing an entity (over which Egypt could exercise effective control) to illegally seize and possess the hotels for nearly a year is more than a fleeting interference with the use of that property or the enjoyment of its benefits.”⁹⁸⁴ The *Wena* arbitration concerned an investor (Wena) that had two lease agreements for the operation and management of hotels with the Egyptian Hotels Company (EHC), an Egyptian public sector company affiliated with the General Authority for Public Sector Tourism.⁹⁸⁵ Serious disagreements arose between Wena and EHC regarding the performance of the lease agreements.⁹⁸⁶ As a result, EHC violently seized the two hotels and the lease agreements were terminated.⁹⁸⁷ The seizures were carried out by a large number of individuals associated with EHC who were armed with, among other things, sticks, rods, clubs, and “licensed” weapons.⁹⁸⁸ Several of these individuals were subsequently convicted of criminal offenses for their actions.⁹⁸⁹ Therefore, there is clear evidence of physical violence by the protesters.

786. The *Wena* case differs from the facts of this arbitration because it concerned direct expropriations in the form of direct seizures (not indirect expropriation as alleged in this arbitration), which were carried out by a public sector company that was described by the tribunal as “an entity over which Egypt could exert effective control” (which is not the case in this

⁹⁸³ Reply, ¶ 506.

⁹⁸⁴ Reply, ¶ 510.

⁹⁸⁵ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, ¶ 17. CL-0049.

⁹⁸⁶ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, ¶ 19. CL-0049.

⁹⁸⁷ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, ¶¶ 28-30. CL-0049.

⁹⁸⁸ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, ¶¶ 33-50. CL-0049.

⁹⁸⁹ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, ¶ 59. CL-0049.

arbitration) and involved aggressive and criminal actions by that government entity (which is also not the case in this arbitration).⁹⁹⁰

787. In that case, according to one of the testimonies, approximately 150 people gathered in front of the Nile Hotel, some of whom were carrying sticks and clubs after the Ramadan breakfast.⁹⁹¹ Not only that, but according to one of the testimonies in that case, there were also episodes of physical violence.⁹⁹²

788. The facts of the *Wena* case differ substantially from the circumstances that characterized the Mineros Norteños protest. In particular, as Mexico has already explained in this Rejoinder, Mineros Norteños did not carry firearms or knives.⁹⁹³ Similarly, as has already been demonstrated, there was no violence or use of force by Mineros Norteños that caused injury or threatened the lives of Metalín personnel.⁹⁹⁴ There is also another distinctive factor, namely that, as mentioned above, in this case the Claimant itself acknowledged the situation.

789. For these reasons, *Wena Hotels* does not support the Claimant's argument. Rather, the absence of these indications in this arbitration supports the Respondent's defense that no expropriation has occurred.

b. Amco Asia Corporation

790. *Amco Asia Corporation v. Indonesia* is cited for the statement that “the state withdraws the protection of its courts from the expropriated owner and tacitly allows a *de facto* possessor to remain in possession of the seized property.”⁹⁹⁵ This citation is incomplete because it omits the last part of the sentence, “as did the Roman praetor in allowing *longi temporis praescripto*.”⁹⁹⁶

⁹⁹⁰ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, ¶¶ 99-101. **CL-0049**.

⁹⁹¹ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, ¶ 34. **CL-0049**.

⁹⁹² *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, ¶ 35. **CL-0049** (“I was surprised by violent knocking on the door and its breaking, shouting in the hall of the hotel, and I saw three persons bursting into my office. They attacked me, slapping my face and breaking my eyeglasses. They took possession of my office by force and everything inside it.”).

⁹⁹³ See Section II.E.1 *above*.

⁹⁹⁴ See Section II.E.1 *supra*.

⁹⁹⁵ Reply, ¶ 506.

⁹⁹⁶ *Amco Asia Corporation v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, November 20, 1984, ¶ 158. **CL-0047**.

This is a legal term from Roman law that refers to the period of time after which a person who possesses property can claim ownership. This is generally known as “rights of occupation” or, in Anglo-Saxon legal terminology, “adverse possession,” and may allow someone to obtain ownership of land that they have occupied without permission for a certain period of time. This has no bearing on the facts of this arbitration. For these reasons, *Amco Asia Corporation* does not support the Claimant’s argument regarding acquisitive prescription. Furthermore, in this arbitration, the Respondent has not withdrawn the protection of the courts from the Claimant and has not tacitly allowed the members of *Mineros Norteños* to “remain in possession of the seized property,” because they have not seized anything. The absence of these indications supports the Respondent’s defense that no expropriation has occurred.

c. Tethyan Copper Company

791. The case of *Tethyan Copper Company v. Pakistan* concerned an exploration agreement in the form of a joint venture between the investor and the Government of Baluchistan (GOB), a province of Pakistan.⁹⁹⁷ The tribunal had to determine whether there had been an indirect expropriation in the sense that the Claimant’s investment had been substantially deprived of its value and/or rendered useless by the Respondent’s conduct, in particular by the decision of the Department of Mines and Mining Development of the Granting Authority (Balochistan) to deny the mining concession application of Tethyan Copper Company Pty Limited (TCCP).⁹⁹⁸ The Claimant cites it as follows:

[b]y denying [the] Mining Lease Application... the Licensing Authority rendered it impossible for Claimant to make use of the information and data it had collected and thereby also rendered Claimant’s interest in both [companies] useless” and that, “[w]ithout a mining lease, neither of them could any longer fulfill their exclusive purpose, after the exploration had been completed; thus, following the denial of Application, the value of [the investment] was effectively neutralized.”⁹⁹⁹

⁹⁹⁷ *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, November 10, 2017, ¶ 217. **CL-0170**.

⁹⁹⁸ *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, November 10, 2017, ¶ 1327. **CL-0170**.

⁹⁹⁹ Reply, footnote 1255, citing *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, November 10, 2017, ¶ 1328.

792. The complete passages from the quoted paragraph and the following paragraph read as follows (key text underlined):¹⁰⁰⁰

In this regard, the Tribunal notes that the sole purpose of the Joint Venture under the CHEJVA and, likewise, of TCCP was to carry out the exploration and eventual mining operations at Reko Diq. After Claimant had spent more than US\$ 240 million on its exploration work and had completed its Feasibility Study on the Initial Mine Development of the area, TCCP filed an application for a mining lease, which would have allowed Claimant to amortize the expenditures it had incurred during the exploration period. By denying TCCP's Mining Lease Application, however, the Licensing Authority made it impossible for Claimant to make use of the information and data it had collected and thereby also rendered Claimant's interest in both the CHEJVA and in TCCP useless. Without a mining lease, neither of them could any longer fulfill their exclusive purpose, after the exploration had been completed; thus, following the denial of TCCP's Application, the value of both the CHEJVA and TCCP was effectively neutralized.

Consequently, the Tribunal finds that the denial of TCCP's Mining Lease Application was a measure having an effect equivalent to expropriation. While the Tribunal is aware of, and agrees with, the Respondent's argument that a *bona fide* regulatory measure of the State cannot amount to an expropriation, the Tribunal recalls its finding above that the decision of the Licensing Authority was not justified by any of the grounds invoked in the Notice of Intent to Reject and/or in this arbitration. Rather, it was motivated by the GOB's decision to implement its own project, instead of continuing its collaboration with Claimant, and therefore amounted to a violation of Respondent's FET obligation. At the same time, the Tribunal considers that such a motivation excludes the classification of the denial as a *bona fide* regulatory measure; despite its "disguise" as an exercise of regulatory power under rule 48(3) of the 2002 BM Rules, the denial amounts to abuse of sovereign power that can also constitute a measure with expropriatory effect. [emphasis added]

793. Thus, *the Tethyan case* concerned a joint venture agreement between an investor and the government to develop a mine, which was frustrated by the government's refusal to grant an exploitation concession, even though, *among other things*, the investor had completed a feasibility study related to the mining concession, which then enabled the government to promote its own project. None of these facts are applicable in this arbitration because in this arbitration: (i) there was no joint venture agreement between the investor and the Government of Mexico; (ii) no feasibility or pre-feasibility studies of the mine were conducted;¹⁰⁰¹ (iii) no application, license, or other authorization was denied; and (iv) there was no substitute project supported by the government to benefit from the expropriation of an investment. Therefore, the *Tethyan* case does

¹⁰⁰⁰ *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, November 10, 2017, ¶¶ 1328-1329. **CL-0170**.

¹⁰⁰¹ Reply, ¶ 539.

not support the Claimant’s argument. The absence of these indications in this arbitration supports the Respondent’s defense that no expropriation has occurred.

d. Report of the Secretary-General of the United Nations on the rule of law and transitional justice

794. The report of the Secretary-General of the United Nations on the rule of law and transitional justice is cited to support the claim that “Mexico had an obligation to defend and enforce the rule of law in Sierra Mojada” and to assert that:

The rule of law... refers to a principle of governance under which all persons, institutions, and entities, public and private, including the State itself, are subject to publicly promulgated laws that are equally enforced and applied independently, and are consistent with international human rights norms and principles. It also requires measures to be taken to ensure respect for the principles of the rule of law, equality before the law, accountability before the law, fairness in the application of the law, separation of powers, participation in decision-making, legality, non-arbitrariness, and procedural and legal transparency.¹⁰⁰²

795. The purpose of the report is “to highlight the most important issues and conclusions drawn from the Organization’s experience in promoting justice and the rule of law in societies experiencing or emerging from conflict” in situations where, *among other things*, governance and judicial processes have deteriorated.¹⁰⁰³ It is clearly directed at factual situations that are not relevant to this arbitration. Furthermore, even in the context of the report’s subject matter, it is recognized that “the definitions and interpretations of these concepts vary widely,” referring, *among other things*, to the concepts of the rule of law.¹⁰⁰⁴ The passage quoted by the Claimant in footnote 1265 of the Reply reflects the mission of the United Nations, providing only one of the many definitions and interpretations of the concepts.

796. Furthermore, in examining the United Nations definition, the report refers, *among other things*, to “the greater vulnerability of minorities, women [and] children...”; “the unequal distribution of wealth and social services”; “upholding human rights, protecting against fear and

¹⁰⁰² Reply, ¶ 508 and footnote 1265, citing the Report of the Secretary-General of the United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, August 23, 2004, ¶ 6. **CL-0171.**

¹⁰⁰³ Report of the Secretary-General of the United Nations, *The Rule of Law and Transitional Justice in Societies Affected by Conflict*, August 23, 2004, ¶¶ 2, 21-22. **CL-0171.**

¹⁰⁰⁴ Report of the Secretary-General of the United Nations, *The Rule of Law and Transitional Justice in Societies Experiencing or Emerging from Conflict*, August 23, 2004, ¶ 5. **CL-0171.**

need”; “international human rights standards and principles”; and “the interests of victims and the well-being of society as a whole.”¹⁰⁰⁵ Therefore, even if the UN definition is applied, it does not give priority to the interests of the Claimant over the interests of the members of Mineros Norteños, all of whom are economically disadvantaged. It is clear that the Respondent must take their interests into account when addressing issues that affect them, as it did in this case. For these reasons, the *UN Secretary-General's report* does not support the Claimant’s argument (). It also confirms the legitimacy of the Respondent’s actions and therefore supports its defense that no expropriation has taken place.

e. Compañía del Desarrollo de Santa Elena

797. The case of *Compañía del Desarrollo de Santa Elena v. Costa Rica* concerned the direct expropriation of the investor’s property by Costa Rica through an expropriation decree (the existence of an expropriation was acknowledged by the parties), in which “the fundamental issue before the Tribunal is the amount of compensation to be paid by Respondent.”¹⁰⁰⁶ It is cited for the following statement:

There can be no dispute that Mexico has permanently deprived SVB of its investments in the Sierra Mojada Project and prevented it from “exploiting the economic potential of the property.”¹⁰⁰⁷

798. This authority is irrelevant because it referred to a direct expropriation that was conceded by the parties, in which the only issue was compensation for damages. In contrast, this arbitration concerns an alleged *indirect* expropriation that is in dispute. The focus is not solely on damages. For these reasons, *Compañía del Desarrollo de Santa Elena* does not support the Claimant's argument. It is irrelevant to the Respondent’s defense.

¹⁰⁰⁵ Report of the Secretary-General of the United Nations, *The Rule of Law and Transitional Justice in Societies Affected by Conflict*, August 23, 2004, ¶¶ 2, 4-6, 7. **CL-0171**.

¹⁰⁰⁶ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, February 17, 2000, ¶¶ 15-21, 54. **CL-0007**.

¹⁰⁰⁷ Reply, ¶508.

f. Tecmed v. Mexico

799. The *Tecmed v. Mexico* case concerned the non-renewal of a permit to operate a landfill, which was considered an indirect expropriation.¹⁰⁰⁸ The Claimant cites paragraph 115 of the award without including the following passage at the end of that paragraph:

In determining whether an expropriation constitutes an “indirect expropriation,” it is particularly important to examine the effect that such a measure may have had on the investor's rights. Where the effect is similar to that which would have resulted from a direct expropriation, it is highly likely that the investor will be protected by most of the provisions of the BITs.¹⁰⁰⁹ [Emphasis added]

800. Nor does it cite the following points from *Tecmed* regarding indirect expropriation:

Generally, it is understood that the term “...equivalent to expropriation...” or “tantamount to expropriation” included in the Agreement and in other international treaties related to the protection of foreign investors refers to the so-called “indirect expropriation” or “creeping expropriation”, as well as to the above-mentioned *de facto* expropriation. Although these forms of expropriation do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect.¹⁰¹⁰

Therefore, it is understood that the measures adopted by a State, whether regulatory or not, are an indirect *de facto* expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that “...any form of exploitation thereof...” has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed.¹⁰¹¹

The Resolution meets the characteristics mentioned above: undoubtedly it has provided for the non-renewal of the Permit and the closing of the Landfill permanently and irrevocably, not only due to the imperative, affirmative and irrevocable terms under which the INE's decision included in the Resolution is formulated, which constitutes an action — and not a mere omission— attributable to the Respondent, with negative effects on the Claimant's investment and its rights to obtain the benefits arising therefrom, but also because after the non-renewal of the Permit, the Mexican regulations issued by INE become fully applicable. Such regulations prevent the use of the site

¹⁰⁰⁸ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, ¶ 117. CL-0055.

¹⁰⁰⁹ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, ¶ 115. CL-0055.

¹⁰¹⁰ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, ¶ 114. CL-0055.

¹⁰¹¹ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, ¶ 116. CL-0055.

where the Landfill is located to confine hazardous waste due to the proximity to the urban center of Hermosillo.¹⁰¹²

[T]here is no doubt that in the future the Landfill may not be used for the activity for which it has been used in the past ... Moreover, the Landfill could not be used for a different purpose since hazardous waste has accumulated and been confined there for ten years. Undoubtedly, this reason would rule out any possible sale of the premises in the real estate market.¹⁰¹³ [Emphasis added]

801. These points are easily distinguished from the situation in this arbitration. The effect of the Respondent's alleged inaction in this arbitration is not irreversible or permanent, but depends on the private actions of the Claimant, specifically on its reasonable resolution of a dispute with the members of Mineros Norteños, who have legitimate concerns about the Claimant's actions. It is important to note that the Respondent's alleged inaction does not preclude the possibility of selling the mine to another buyer, which—if the value claimed by the Claimant were well-founded—would attract considerable interest from potential buyers. For these reasons, *the Tecmed v. Mexico case* does not support the Claimant's argument. The absence of such indications in this arbitration supports the Respondent's defense that no expropriation has occurred.

g. S.D. Myers v. Canada

802. The *S.D. Myers v. Canada* case concerned an alleged indirect expropriation.¹⁰¹⁴ The tribunal found that closing the border for 18 months did *not* constitute indirect expropriation.¹⁰¹⁵ It concluded that:

The Interim Order and the Final Order were designed to, and did, curb SDMI's initiative, but only for a time. CANADA realized no benefit from the measure. The evidence does not support a transfer of property or benefit directly to others. An opportunity was delayed.¹⁰¹⁶

¹⁰¹² *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, ¶ 117. **CL-0055.**

¹⁰¹³ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, ¶ 117 **CL-0055.**

¹⁰¹⁴ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, ¶ 287. **CL-0085.**

¹⁰¹⁵ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, ¶ 284. **CL-0085.**

¹⁰¹⁶ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, ¶ 287. **CL-0085.**

803. The Claimant cites this to argue that in some contexts and circumstances, it would be appropriate to consider that a deprivation is equivalent to an expropriation, even if it is partial or temporary”.¹⁰¹⁷ However, the alleged inaction of the Respondent does not amount to an expropriation for the reasons already explained in relation to *Tecmed*, and because the Respondent neither benefited from the alleged inaction nor transferred the mining rights to third parties. For these reasons, *S.D. Myers* does not support the Claimant's argument. The absence of these indications in this arbitration supports the Respondent's defense that no expropriation has occurred.

h. Bahgat v. Egypt (I)

804. *Bahgat v. Egypt (I)* concerned an “indirect expropriation that took place with the arrest of the Claimant and the Freezing Order of his, his families' and the Companies' bank Accounts.”¹⁰¹⁸ The tribunal determined that:

the arrest of Claimant on February 5, 2000 deprived ADEMCO and AISCO of their chief executive officer. The removal of Claimant's and the Companies' documents from the offices in February 2000 deprived the Companies of their ability to manage their business. The Freezing Order and its confirmation resulted in the discontinuation of the paying of salaries to the employees. On the same days followed the closure of the offices of ADEMCO and AISCO and the removal of the officers from the Project site. All these measures de facto brought an end to all commercial activities of ADEMCO and AISCO.
¹⁰¹⁹

805. The Claimant cites this award for its conclusions that “no possibility exists to undo the adverse impact that the lost 6 years had on Claimant’s investment” and that it was “unlikely that in the remaining period [of the concession] the mining project could achieve economic viability with an adequate return on investment.”¹⁰²⁰

806. By way of example, in this case, the Tribunal considered that the Claimant's detention prevented him from exercising his function as Managing Director of ADEMCO and AISCO, that the Claimant's and the companies' documents were seized from the offices in February 2000, which deprived the companies of the ability to manage their businesses, and that it was impossible to pay

¹⁰¹⁷ Reply, ¶ 509.

¹⁰¹⁸ *Mohamed Abdel Raouf Bahgat v. Egypt (I)*, PCA Case No. 2012-07, Final Award, December 23, 2019, ¶ 272. **CL-0172**.

¹⁰¹⁹ *Mohamed Abdel Raouf Bahgat v. Egypt (I)*, PCA Case No. 2012-07, Final Award, December 23, 2019, ¶ 227. **CL-0172**.

¹⁰²⁰ Reply, ¶ 511.

the employees.¹⁰²¹ These effects are not comparable to those of the Sierra Mojada Project, whose real value, as explained above, was very low at all times, with no commercially exploitable mineral deposits that would generate income from their extraction.

807. Apart from the fact that this Authority issued detention orders and a freezing order—facts that clearly distinguish it from this arbitration—even if the Tribunal disagrees with the Respondent's allegations and considers that the alleged inaction had a negative effect on the Claimant's investment, such effect would be reversible. Notwithstanding the effects that the Valdez Trial has had on the Claimant's interest in the Sierra Mojada Project, the Project remains the same, the Claimant could still reasonably resolve its dispute with the members of Mineros Norteños and resume exploration or, failing that, sell the mine to a third party which, if the alleged value were well-founded, would generate considerable interest in the market. For these reasons, *Bahgat v. Egypt (I)* does not support the Claimant's argument, but rather supports the Respondent's defense that no expropriation has occurred.

i. Olin Holdings v. Libya

808. The case of *Olin Holdings v. Libya* concerned the alleged illegal and discriminatory expropriation, both legal and economic, of the investor's investment between November 2006 and June 2011, without due process of law and without prompt, adequate, and effective compensation.¹⁰²² The Claimant cites this award for the following statements:

[T]he tribunal found that the dispossession of the investor's factory, which in turn forced the investor to vacate the premises and left the investor unable to realize the benefits of its investment for over four years constituted an indirect expropriation.¹⁰²³

[T]he tribunal similarly affirmed that "State measures, even if temporary, can have an effect equivalent to expropriation if their length and impact on the investment are sufficiently important."¹⁰²⁴

Even though the expropriation was "temporary," the tribunal concluded that "the four and a half years of uncertainty" and the economic damage suffered by the claimant were

¹⁰²¹ *Mohamed Abdel Raouf Bahgat v. Egypt (I)*, PCA Case No. 2012-07, Final Award, December 23, 2019, ¶ 227. **CL-0172**.

¹⁰²² *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Final Award, May 25, 2018, ¶¶ 92-93 and 129. **CL-0173**.

¹⁰²³ Reply, ¶ 457.

¹⁰²⁴ Reply, ¶ 512.

sufficient to find that Libya's measures amounted to an expropriation of the claimant's investment.¹⁰²⁵

809. The Claimant omits the following passages from the award:

During the period which followed the issuance of the 2006 Expropriation Order, and the successive eviction notices sent to Olin as outlined above, Olin was effectively deprived of the guarantee of an unfettered ownership of its investment. Olin further substantially lost control of its ability to properly conduct and plan its business.¹⁰²⁶

In the present case, the foregoing Libyan measures considerably impaired Olin's investment between November 2006 and June 2011, which is a significant period of time for a business that had just started its operations. These measures coincided with Olin accumulating a negative cash flow of LYD 18.8 million during the period between 2006 and 2010.¹⁰²⁷

[O]wing to the delays in the launch of Olin's products and its inability to realize the benefits of its investment during the four and a half years of uncertainty that followed the application of the 2006 Expropriation Order, Olin was overtaken by its competitors on the Libyan market and had lost the advantage of being one of the first entrants as a local private producer. Therefore, Olin bore the economic consequences of Libya's expropriation measures beyond 2011.¹⁰²⁸

Based on the foregoing, the Tribunal concludes that the issuance of the 2006 Expropriation Order combined with Libya's measures that followed had an effect equivalent to an expropriation of Olin's foreign investment.¹⁰²⁹

810. *Olin Holdings* relied on facts that are not raised in this arbitration. In this arbitration, the Claimant's ownership of the rights to the mine was not affected by the protests (although the Claimant did suffer encumbrances on its properties and concessions due to the Valdez lawsuit), it did not lose control of its ability to conduct and plan its business due to the Respondent's alleged inaction, (it was an exploration company that, by definition, has negative cash flows, it was not overtaken by its competitors in the mining exploration sector, and it could still reasonably resolve its dispute with the members of Mineros Norteños and resume exploration or sell the mine to another buyer who, if the Claimant's alleged value has any basis, would generate considerable

¹⁰²⁵ Reply, ¶ 512.

¹⁰²⁶ *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Final Award, May 25, 2018, ¶ 158. CL-0173.

¹⁰²⁷ *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Final Award, May 25, 2018, ¶ 165. CL-0173.

¹⁰²⁸ *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Final Award, May 25, 2018, ¶ 166. CL-0173.

¹⁰²⁹ *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Final Award, May 25, 2018, ¶ 167. CL-0173.

interest from potential buyers. For these reasons, *Olin Holdings* does not support the Claimant's argument, but rather endorses the Respondent's defense that no expropriation has occurred.

811. In summary, none of the authorities cited by the Claimant supports its assertion that an expropriation has occurred in this arbitration. Each of the cases invoked involved factual circumstances and legal conclusions materially different from those at issue in the present case, such as direct government seizures, withdrawal of judicial protection, or irreversible loss of economic viability due to affirmative measures by the State. In contrast, the present case concerns alleged omissions by the Respondent in the context of a localized dispute between the Claimant and a group of private individuals, without any government seizure, project of substitution, denial of regulatory approvals, or transfer of value. The Respondent has not withdrawn judicial protection, nor has it prevented the Claimant from resolving the dispute, selling the mine, or seeking other solutions. Therefore, the Claimant's invocation of these precedents is erroneous, and their inapplicability only reinforces the Respondent's position that no expropriation has occurred.

4. The legality of the measures is irrelevant for the purposes of Article 1110, as there has been no expropriation.

812. The Claimant alleges that Mexico has not addressed the legality of the expropriation and therefore concludes that this element has been admitted. This statement is inaccurate and misrepresents Mexico's position. Mexico categorically rejects the idea that expropriatory conduct has occurred in this case. As explained above, the Claimant has failed to establish the minimum requirement for indirect expropriation, namely the total or near-total deprivation of its investment. In the absence of expropriation, there is no basis for examining the legality or illegality of the alleged expropriation.

D. The Claimant has not demonstrated a violation of Articles 1102 and 1103 of NAFTA

813. Although the Claimant makes two separate claims, one under Article 1102 and the other under Article 1103 of NAFTA, it presents both arguments as if they constituted a single claim, without developing a separate analysis for each provision. This approach is legally incorrect. Although both Articles share the general objective of prohibiting discrimination, they refer to different standards: Article 1102 prohibits less favorable treatment of the investor or its investment compared to the treatment granted to nationals of the host State, while Article 1103 prohibits less

favorable treatment of the investor or its investment in front of the treatment grantedg to investors from third States.

814. Mexico will address each of these provisions separately, recognizing their distinct nature. To this end, this section is structured as follows: *first*, some common elements applicable to non-discrimination standards will be discussed (**Section 1**). *Then*, it will be demonstrated that the Claimant has not proven a violation of Article 1102 (**Section 2**) or Article 1103 (**Section 3**). *Next*, the Respondent will demonstrate that, even if the Tribunal were to conclude that there was a difference in treatment under the terms of the Treaty, it would be justified by the circumstances (**Section 4**). *Finally*, the Respondent will explain that, in any event, the termination of NAFTA prevent consideration of claims under Articles 1102 and 1103 (**Section 5**).

1. General aspects applicable to non-discrimination standards

815. To prove a violation of a non-discrimination obligation—whether National Treatment (NT) under Article 1102 or Most-Favored Nation (MFN) under Article 1103—the Claimant must demonstrate that (i) treatment has been granted to the investor or investment; (ii) this treatment was given in similar circumstances, and (iii) it was less favorable than that given to another investor or investment.¹⁰³⁰

816. Likewise, the Respondent emphasizes that the fundamental difference between the two Articles lies in the identity of the comparator: in the case of Article 1102, it is necessary to establish that the foreign investor received treatment less favorable than that accorded to a national investor in similar circumstances; in the case of Article 1103, the analysis must be carried out with respect to an investor from a third State.

a. The notion of “treatment”

817. The Claimant maintains that it has received “less favorable treatment,” but at no point does it define what is meant by “treatment,” even though this word is central to both Article 1102 and Article 1103, especially in the expression: “Each Party shall accord to investors of another Party treatment no less favorable.” Although it is not incumbent upon the Respondent to establish the

¹⁰³⁰ Memorial, ¶ 461.

meaning of the term, the Claimant's conceptual omission hinders legal analysis and requires clarification in order to ensure the accuracy and thoroughness of the debate.

818. In accordance with the customary rules of interpretation established in the Vienna Convention on the Law of Treaties (VCLT), and in line with its ordinary meaning, the word “treat” in Spanish refers to “the action and effect of treating,” which implies “manejar algo, gestionarlo o disponerlo.”¹⁰³¹ Applied to the context of NAFTA, this suggests that “treatment” encompasses conduct attributable to the host State that affects the initiation, development, management, and termination of an investor's business activity.¹⁰³² In this regard, the Claimant only states that it covers “all conceivable measures”.¹⁰³³

819. The extent of this concept, however, does not exempt the Claimant from clearly identifying which specific measures constitute the alleged less favorable treatment, nor from establishing their impact in comparison with the treatment accorded to a domestic investor or an investor from a third State in similar circumstances.

b. The existence of “similar circumstances”

820. The focus of the analysis under Articles 1102 and 1103 of NAFTA, in this case, falls on the second part of the standard: the existence of similar circumstances. This does not imply, however, that Mexico recognizes the existence of “treatment,” much less that such treatment was less favorable than that received by domestic investors or their investments or investors from a third country or their investments. The attention devoted to this component of the obligation is solely due to the large number of mistakes and inaccuracies in the Claimant's allegations on this particular point. Mexico will now address the conceptual component of these deficiencies.

(1) Similarity qualifies the circumstances of the “treatment” granted, not the investment/investor

821. The Claimant stated in its Memorial that the second element of the analysis is to identify investments or investors that have received differential treatment in similar or comparable

¹⁰³¹ Dictionary of the Royal Spanish Academy, *Trato*. **R-0169**. Dictionary of the Royal Spanish Academy, *Tratar*. **R-0170**.

¹⁰³² *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, ¶ 79. **CL-0029**.

¹⁰³³ Memorial, ¶ 4.59.

circumstances.¹⁰³⁴ In its Counter-Memorial, Mexico explained that the NT and MFN analysis should focus on comparing similar circumstances with respect to the treatment conferred, rather than on an abstract comparison between the investments or investors themselves.¹⁰³⁵ The Claimant appears to accept this point by stating that the Tribunal must assess “whether Mexico treated the Claimant or its investments less favorably than the relevant comparator(s), viz, the local or foreign investors or investments.”¹⁰³⁶ However, it then attempts to minimize the relevance of distinguishing between the treatment granted and the characteristics of the subjects, saying that it is “a distinction without a difference.”¹⁰³⁷

822. By qualifying this distinction as irrelevant, the Claimant ignores the arguments and case law presented by Mexico in its Counter-Memorial,¹⁰³⁸ which reinforces its importance. It is clear that two investments may be in similar circumstances in certain respects, but be in different circumstances with regard to the treatment received. For example, two mining projects may be regulated under the same legal framework, but one may have failed to comply with environmental or social requirements, in which case differential treatment is not contrary to the Treaty standard. By completely omitting this analysis, the arguments and authorities invoked by Mexico remain uncontroverted.

823. Among the cases cited by Mexico, *Resolute Forest v. Canada* stands out, in which this distinction is expressly recognized.¹⁰³⁹ Even in *Bilcon v. Canada*, a case invoked by the Claimant itself, it is noted that “Article 1102 refers to the way in which either the investor or investment is treated, rather than confining concerns over discrimination to comparisons between similar articles

¹⁰³⁴ Memorial, ¶ 4.61.

¹⁰³⁵ Counter-Memorial, ¶¶ 461-466.

¹⁰³⁶ Reply, ¶ 587.

¹⁰³⁷ Reply, ¶ 583 (“In its Counter-Memorial, Mexico does not dispute that the relevant legal standard requires ‘like circumstances.’ However, it argues that the phrase ‘similar circumstances’ applies to the ‘treatment accorded to the investor/investment ‘with respect to the establishment, acquisition, expansion, management, conduct, operation, sale, or other disposition of investments,’ and not to the investor/investment per se.’ This is a distinction without a difference.”).

¹⁰³⁸ Counter-Memorial, ¶ 461-466. *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, December 10, 2018, ¶¶ 7.18. **RL-0085**. Non-Disputing Party Submission of Mexico in *Mercer International Inc. v. Government of Canada*. **RL-0094**. *Resolute Forest Inc. v. Government of Canada*, CPA Case No. 2016-13, Final Award, July 25, 2022, ¶ 575. **RL-0083**.

¹⁰³⁹ *Resolute Forest Inc. v. Government of Canada*, CPA Case No. 2016-13, Final Award, July 25, 2022, ¶ 575. **RL-0083**.

of trade.”¹⁰⁴⁰ In conclusion, what must be analyzed is whether an investor or investment was subject to different treatment under similar circumstances, not whether the investments are comparable in the abstract.¹⁰⁴¹

(2) The fact that the circumstances do not have to be identical does not imply that any common circumstance is sufficient.

824. Since its Memorial, Claimant argues that, since the standard does not require absolute identity between the circumstances, but only similarity, this part of the analysis is inherently flexible.¹⁰⁴² Mexico agrees that an exact match is not required,¹⁰⁴³ but emphasizes that the analysis must be conducted on a case-by-case basis, which requires identifying and justifying the factors relevant to comparing the treatment accorded. Consequently, it is not enough to point out any element of similarity: it is necessary to demonstrate that this element is relevant to assessing whether there was discriminatory treatment with respect to the treatment received. Otherwise, the analysis would lose rigor and it would suffice for a party to choose arbitrary criteria to support its claim.

825. Instead of carrying out this specific analysis, the Claimant resorts to three factors that, in its opinion, have been considered relevant in other cases: belonging to the same economic sector, being subject to the same legal regime, and producing competing goods.¹⁰⁴⁴ However, in addition to the fact that the argument completely ignores the fact that “similar circumstances” apply to treatment and not to investment, Mexico has explained that there is no universal set of factors applicable to all cases; there is no “*one size fits all*.” The Claimant’s burden is to demonstrate why these criteria are relevant in the particular context of the alleged treatment. Indeed, even within the same sector or regulatory regime, there may be substantial differences that justify different treatment without constituting discrimination.

¹⁰⁴⁰ *Bilcon v. Canada*, Award on Jurisdiction and Liability, March 17, 2015, ¶ 692, **CL–0072**. [Emphasis added]

¹⁰⁴¹ Counter-Memorial, ¶ 466.

¹⁰⁴² Memorial, ¶ 4.61.

¹⁰⁴³ Counter-Memorial, ¶ 467.

¹⁰⁴⁴ Reply, ¶ 582.

826. The Claimant incurs in a logical fallacy: assuming that any similarity is sufficient simply because absolute identity is not required. That conclusion unjustifiably reduces the complexity of the analysis and ignores that the true standard requires demonstrating the relevance of the circumstances invoked. This fallacy allows the Claimant to avoid the burden of justifying why its own criteria should prevail over those raised by Mexico. As illustrated by the anecdote attributed to Diogenes, defining a human being as a “featherless biped” may be technically correct, but without relevant criteria, the definition loses its analytical value.

827. Ironically, in attempting to refute the differences pointed out by Mexico, the Claimant itself confirms that not every difference is relevant, which, by analogy, implies that not every similarity is relevant. It cites, for example, the case of *Cargill v. Mexico*, in which it was held that “the fact that a difference in circumstances exist in the abstract is not enough; the difference has to be relevant in the context of the particular being imposed.”¹⁰⁴⁵ Applying that same reasoning, the fact that two investments share certain characteristics is not enough: the similarity must be relevant for the purposes of the challenged treatment. If the contrary were accepted, it would allow the parties to arbitrarily select the criteria that most favor them.

828. In theory, according to the principle of *actori incumbit probatio*, it is the Claimant’s burden to prove the violation of the Treaty. It is the Claimant who must demonstrate that the alleged similarities are relevant in the specific context of the allegedly discriminatory treatment it received. This means that, even if the State decided not to contest the criteria for comparison, the Tribunal would not be obliged to accept them if it considers that they are not appropriate for the specific case. In the absence of such a demonstration by the Claimant, there can be no violation of Articles 1102 or 1103 of NAFTA.

c. “Less favorable treatment”

829. The Claimant argues that the third element requires demonstrating that it received a less favorable treatment than that granted to comparable investors or investments.¹⁰⁴⁶ This means that the treatment must have been equivalent to the best treatment granted to the comparator, neither

¹⁰⁴⁵ Reply, ¶ 602.

¹⁰⁴⁶ Memorial, ¶ 4.64.

better nor worse.¹⁰⁴⁷ Furthermore, it recognizes that such treatment must have had an adverse practical effect on the claimant, even if it is not disproportionate.¹⁰⁴⁸ In its Reply, it maintains this definition and adds that, in reviewing this component of the standard, “[t]ribunals have assessed the adverse effects of the measures imposed on foreign investors or investments and their comparators.”¹⁰⁴⁹ Mexico agrees with these definitions.

d. Burden of proof in a non-discrimination claim

830. In the context of the burden of proof, the Claimant accepts that it has the burden to demonstrate *prima facie* a violation of Articles 1102 and 1103 of NAFTA.¹⁰⁵⁰ However, it maintains that, once that *prima facie* case has been established, “the burden then shifts to the respondent to demonstrate that the differential treatment was objectively justified.”¹⁰⁵¹ Mexico’s position is different: the burden of proof remains with the Claimant at all times, including the burden of proving each element of the non-discrimination standard.¹⁰⁵²

831. In support of its position, the Claimant cites the *Apotex* case, which distinguishes between the “legal burden of proof,” which corresponds to the party that must prove the essential elements of its claim, and the “burden of production” of relevant facts in support of its case or defense, which, it asserts, rests with the State.¹⁰⁵³ However, this distinction does not modify the general rule that the Claimant must fully substantiate each of the elements required by Articles 1102 and 1103, as well as present evidence to support them.

¹⁰⁴⁷ Memorial, ¶ 4.64 citing *Pope & Talbot v. Government of Canada*, Phase 2 Award on the Merits, April 10, 2001, ¶ 118, **CL-0050** ¶ 42; *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, November 21, 2007, **CL-0086**, ¶ 205.

¹⁰⁴⁸ Memorial, ¶ 4.64 citing *S.D. Myers, Inc. v. Government of Canada*, Partial Award (Merits), November 13, 2000, **CL-0085**, ¶¶ 252-254.

¹⁰⁴⁹ Reply, ¶ 587 citing *S.D. Myers v. Canada*, Partial Award, November 30, 2000, ¶ 254, **CL –0085**; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/5 (“*Archer Daniels v. Mexico*”), Award, November 21, 2007, ¶209, **CL –0086**.

¹⁰⁵⁰ Memorial, ¶ 576.

¹⁰⁵¹ Memorial, ¶ 576.

¹⁰⁵² Counter-Memorial, ¶ 468.

¹⁰⁵³ Reply, ¶ 611.

832. In order to establish a *prima facie* case, it is essential that the Claimant provide sufficient and relevant evidence to support its allegation. In the case of *Feldman v. the United Mexican States*, cited by the Claimant itself, the tribunal, retaking criteria from the Appellate Body of the World Trade Organization, emphasized that, for a change in the burden of proof to occur, it is necessary that the body of evidence initially presented by the party making the allegation must be sufficiently robust and credible.¹⁰⁵⁴ The standard is not satisfied by mere conjecture or general allegations, but by concrete evidence that allows reasonably assume the existence of a discriminatory treatment.

833. Far from supporting SVB's argument, the *Feldman* precedent confirms that the burden of proof is not automatically or lightly reversed. Such investment, if it occurs, is only appropriate when the evidence of discrimination is "clear, manifest, or obvious," a threshold that the tribunal itself recognized as mandatory. As demonstrated in the following sections, in this case, the Claimant has failed to establish a difference in treatment that is so evident as to justify a transfer of the *onus probandi*. Consequently, the high standard necessary to alter the ordinary rules of burden of proof distribution has not been met.

834. The Claimant also invokes the award in *Bilcon v. Canada*, arguing that the transfer of the burden to Mexico is not unreasonable.¹⁰⁵⁵ However, it fails to cite the entire passage. For the Tribunal's clarity, Mexico reproduces the relevant excerpt below:

The approach taken in *Pope & Talbot* would seem to provide legally appropriate latitude for host states, even in the absence of an equivalent of Article XX of the GATT, to pursue reasonable and non-discriminatory domestic policy objectives through appropriate measures even when there is an incidental and reasonably unavoidable burden on foreign enterprises. Consistently with the approach taken in the *Feldman* case, however, the present Tribunal is also of the view that once a *prima facie* case is made out under the three-part UPS test, the onus is on the host state to show that a measure is still sustainable within the terms of Article 1102. It is the host state that is in a position to identify and substantiate the case, in terms of its own laws, policies, and

¹⁰⁵⁴ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Arbitral Award, December 16, 2002, ¶ 77. **RL-0019**

¹⁰⁵⁵ Reply, ¶ 612 ("Contrary to Mexico's contention, shifting the burden of proof to the respondent would not constitute an 'unreasonable burden. As the Bilcon tribunal observed, "[i]t is the host State that is in a position to identify and substantiate the case, in terms of its own laws, policies, and circumstances, that an apparently discriminatory measure in fact compliant with the 'national treatment' norm set out in Article 1102."").

circumstances, that an apparently discriminatory measure is in fact compliant with the “national treatment” norm set out in Article 1102.¹⁰⁵⁶

835. Read in context, the above passage is fully consistent with Mexico's position. This is not a reversal of the burden of proof, but rather a logical procedural rule: once the investor proves the three elements of the standard, the State can justify the measure based on its own policies or regulatory objectives. This does not mean that the investor is exempt from proving any of the essential elements of Articles 1102 and 1103. As the *Bilcon* tribunal itself points out, the analysis is based on a three-part standard, the burden of which rests entirely on the claimant. The same is held by the tribunal in *UPS*, cited by both parties.¹⁰⁵⁷

836. What falls within the State's sphere of proof is the objective justification of a measure which, having been proven to be differentiated, is not discriminatory. This type of justification may include, for example, measures aimed at legitimate regulatory purposes. Hence the reference to Article XX of the GATT as an analogy: these are exceptions invoked by the State, so the burden of proof lies with the party alleging them.

837. Consequently, the Claimant's interpretation of an alleged “transfer of burden” is unfounded. This is not a distinction between legal burden and burden of proof, nor is it a reversal of the principle of *actori incumbit probatio*. It is simply a recognition that each party must prove the facts on which it bases its own allegations. The Claimant must prove the existence of the violation and its various elements, and the Respondent must prove the applicable exceptions. In the following, Mexico will demonstrate that the Claimant has not met its burden of proving the cumulative elements required by Articles 1102 and 1103.

¹⁰⁵⁶ *William Clayton v. Canada*, CPA Case No. 2009-4, Jurisdiction and Liability Award, March 17, 2015, ¶723 **RL-0030**.

¹⁰⁵⁷ *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, ¶ 84. **RL-0095** (“Failure by the investor to establish one of those three elements will be fatal to its case. This is a legal burden that rests squarely with the Claimant. That burden never shifts to the Party, here Canada. For example, it is not for Canada to prove an absence of like circumstances between UPS Canada and Canada Post regarding article 1102”).

2. The Claimant has not established a case of discrimination under Article 1102

838. Before addressing the merits of each of the claims, and considering that the Claimant has treated its arguments under Articles 1102 and 1103 as if they were a single claim, it is useful to briefly summarize how it has formulated its case, in order to facilitate the Tribunal's work.

839. Mexico understands that the comparators selected by the Claimant are: (i) Mineros Norteños, in its claim for alleged violation of the NT (Article 1102), and (ii) a series of foreign companies and mining projects in Mexico that, it affirms, also faced social protests, for the purposes of its claim under MFN treatment (Article 1103).¹⁰⁵⁸

840. In its Counter-Memorial, Mexico explained that these comparators were not appropriate and exposed several substantive differences in relation to the investment and investor involved in the present arbitration, especially with respect to the relevant circumstances of treatment, which is what the standard requires.¹⁰⁵⁹ The Claimant did not substantially address or refute these arguments in its Reply, limiting itself to reiterating the original formulation regarding the selected comparators.¹⁰⁶⁰

a. The Claimant has not identified the treatment granted; it is inappropriate or has not been demonstrated

841. The Claimant has not identified the “treatment” granted under the terms of Article 1102 of NAFTA. But, even if the Tribunal considers that it has, the treatment that, to the best of Mexico's knowledge and belief, the Claimant has proposed is legally erroneous and unsupported by evidence.

842. *First*, the Claimant has not clearly identified the alleged less favorable treatment granted. In its Memorial, it merely stated that the measures included in Section 2 (factual background) affected its ability to access the project site, and that for this reason alone it constituted “treatment” within the meaning of Article 1102.¹⁰⁶¹ However, it did not explain exactly what those measures

¹⁰⁵⁸ Reply, ¶ 577(a) and (b).

¹⁰⁵⁹ Counter-Memorial, ¶¶ 29-30, 474-494. *See also*, Section II.D.3 *supra*.

¹⁰⁶⁰ Reply, ¶ 577(a) and (b).

¹⁰⁶¹ Memorial, ¶ 4.60.

were, nor how they constituted treatment under the Treaty. It simply assumed that the existence of the treatment was self-evident. Mexico noted this omission and pointed out that it had not been demonstrated what treatment would have been accorded to other investors in allegedly similar circumstances.¹⁰⁶²

843. In its Reply, the Claimant insists on its original position. It points out that the treatment conferred by Mexico on Mineros Norteños would have materialized in “allowing Mineros Norteños to illegally block, occupy, possess, and exploit the Sierra Mojada Project site.”¹⁰⁶³ The problem is that this does not identify what treatment—or its absence—the investment would have received. Consequently, the Claimant still fails to demonstrate what the alleged treatment is.

844. *Second*, the treatment alleged by the Claimant, if it had identified it (*quod non*), would lack logical or legal sense. Based on its argument, the treatment that Mexico should have granted to its investment—in order to comply with the standard of Article 1102—would be also allow it to illegally block, occupy, possess, and exploit private property. As the Respondent has already explained, this argument would only make sense if SVB or Metalín had attempted to take actions such as those allegedly taken by Mineros Norteños and the Mexican authorities had prevented or quickly resolved them, unlike what happened with the community.¹⁰⁶⁴ This is not what the Claimant alleges, nor could it do so because there is no “treatment” in such circumstances.

845. Furthermore, the State is not obligated, and in fact is prohibited, from facilitating actions that contravene legality and public order. Requiring Mexico to adopt an equivalent standard with respect to the Claimant would imply forcing it to violate its own laws. This argument is not only legally untenable, but also demonstrates the lack of substance of NT's claim. If the Claimant wishes to complain about this type of conduct, there are other standards in the Treaty that are appropriate for challenging it, such as Full Protection and Security (FPS) in Article 1105, which is already addressed in another section of this submission¹⁰⁶⁵ This is not the case with Article 1102.

¹⁰⁶² Counter-Memorial, ¶ 490.

¹⁰⁶³ Reply, ¶ 577. *See also* ¶ 593 (“[B]y allowing them to block the Project, hold the Claimant’s personnel hostage, steal and damage the Claimant’s property, and ultimately take de facto possession of the Project”).

¹⁰⁶⁴ Counter-Memorial, ¶ 492.

¹⁰⁶⁵ Section IV.B.3 *supra*.

846. *Third*, even if one were to assume that the alleged treatment has some logical basis, the Claimant has not demonstrated that such treatment existed. As has been shown, Mexico did not encourage or support the social protests of *Mineros Nortesños*.¹⁰⁶⁶ It simply complied with its legal mandate not to interfere in peaceful social demonstrations, such as those that occurred in this case.¹⁰⁶⁷ Without evidence of acts on its part that reflect acquiescence, support, or attribution to the Mexican State, the behavior of non-State third parties cannot be imputed to it. The Claimant has not offered convincing evidence to the contrary.

847. In conclusion, the Claimant has not precisely identified how the State treated its investment less favorably than it treated *Mineros Nortesños*. The Claimant has presented an unacceptable definition since the legal point of view and has not demonstrated, through reliable evidence, that it or its investment received treatment less favorable, in similar circumstances, than the treatment accorded to *Mineros Nortesños*. Consequently, its argument under Article 1102 fails since the first element of the standard.

b. The Claimant has not demonstrated the importance of its criteria or the irrelevance of those of the Respondent.

848. This argument is made for the more thoroughness of the defense and without prejudice to the fact that Mexico has already demonstrated that it is incorrect to compare investors or their investments in the abstract, since what must be compared is whether there are similar circumstances with respect to the “treatment” received in one case or the other.¹⁰⁶⁸ That said, the Claimant's argument is based on the premise that the only relevant criterion for establishing “similar circumstances” is belonging to the same economic sector. This position, however, completely ignores the differences raised by Mexico in its Counter-Memorial and avoids justifying why its own criteria should prevail. In this section, Mexico will demonstrate that the differences identified are relevant and sufficient to invalidate the second element of the analysis under Article 1102, confirming that the comparators selected by the Claimant are inadequate.

(1) Sharing an economic sector is not a sufficient criterion for analyzing similar circumstances

¹⁰⁶⁶ See Sections II.C.4, II.D.1 and 2, and II.E.2 *supra*.

¹⁰⁶⁷ See Section II.D *supra*.

¹⁰⁶⁸ Counter-Memorial, ¶ 491.

849. As indicated above, in response to the differences pointed out by Mexico between the Claimant's investment and that of its comparators, the Claimant maintains that the standard of “similar circumstances” does not require “identity”¹⁰⁶⁹ and, on that basis, seeks to relieve itself of its burden of proving the relevance of the criteria selected. In particular, it cites the award in *Corn Products v. Mexico* and asserts that, in that case, the tribunal concluded that investors belonging to the same sector met this requirement.¹⁰⁷⁰ According to the Claimant, “[t]he same analysis applies here: while there are differences between SVB, its Project, and the comparators, they were all in the same business sector – namely, the Mexican mining sector.”¹⁰⁷¹

850. This interpretation is incorrect. Although the tribunal in *Corn Products* considered the economic sector as a starting point,¹⁰⁷² did not hold that this criterion was decisive or sufficient on its own. The way in which the Claimant presents this reference distorts the tribunal's reasoning and mistakenly suggests that, simply because they are in the same sector, all differences are irrelevant. In reality, the tribunal in *Corn Products* conducted a much broader contextual analysis, also examining whether the products marketed by the foreign investor (HFCS) competed with domestic products (cane sugar), the fact that Mexican law considered cane sugar and HFCS to be substitute products, and the purpose of the measure analyzed in the specific case (a tax on soft drinks sweetened with HFCS that did not apply to soft drinks sweetened with cane sugar).¹⁰⁷³

851. The measure evaluated by the tribunal in *Corn Products* substantially impacted its legal analysis, as the tribunal found that there was strong evidence of a violation of Article 1102 if it could be proven that said measure was directly related to the products and discriminated in favor of one or the other.¹⁰⁷⁴ However, in the present case, a similar analysis cannot be carried out because Mexico's conduct in this case is not related to the products produced by the Claimant and/or Mineros Norteños, but rather to the government's alleged inaction in the face of a peaceful demonstration. Unlike the *Corn Products* case, in the present arbitration there is no evidence that the measure sought to favor domestic producers over foreign ones; rather, Mexico's action was

¹⁰⁶⁹ Reply, ¶ 600.

¹⁰⁷⁰ Reply, ¶ 586.

¹⁰⁷¹ Reply, ¶ 586.

¹⁰⁷² *Corn Products v. Mexico*, Decision on Liability, January 15, 2008, ¶ 120, CL –0063.

¹⁰⁷³ *Corn Products v. Mexico*, Decision on Liability, January 15, 2008, ¶ 120, CL –0063.

¹⁰⁷⁴ *Corn Products v. Mexico*, Decision on Liability, January 15, 2008, ¶ 122, CL –0063.

limited to mediating a conflict between private parties without discriminating on the basis of SBV's products or activities, which was reluctant to take positive action to resolve it.

852. The Claimant consistently argues that there are similar circumstances under Articles 1102 and 1103, since all comparable projects are in the same economic sector, subject to the same legal and regulatory regime, and engaged in comparable products.¹⁰⁷⁵ In particular, both in the case of *Mineros Norteños* and the foreign investors cited, these are mining companies. However, these three factors are redundant and constitute an artificial division of “different” criteria that actually point *in the same direction*. It is highly likely that two or more buyers operating in the same economic sector are subject to the same legal and regulatory regime. As Mexico demonstrated, the burden on a claimant is not merely to identify these similarities, but to demonstrate that they are relevant to the analysis of the treatment granted.¹⁰⁷⁶

853. Thus, the Claimant's essential argument is that comparability is satisfied by the mere fact of being in the same commercial sector. Mexico acknowledges that this may be a relevant consideration, depending on the circumstances of the case, but reiterates that it is not determinative and does not replace the comprehensive analysis required to demonstrate a violation of Article 1102 or 1103.¹⁰⁷⁷ Indeed, arbitral practice under other treaties has confirmed that “similar circumstances” do not always exist even when companies share the same industry and are subject to the same regulatory framework. Such was the conclusion of the tribunal in *Champion Trading Co. v. Egypt*, where the claim of comparability between companies in the cotton sector was rejected on the grounds that they operated through different commercialization mechanisms. The tribunal stated:

Although both kinds of companies operate in the same industry and are subject to same kind of rules, there is a significant difference between a company which opts to buy cotton from the Collection Centres at fixed prices and a company which opts to trade on the free market, whether or not the company is privately-owned or State-owned or whether the company is national or foreign.¹⁰⁷⁸

¹⁰⁷⁵ Reply, ¶ 600.

¹⁰⁷⁶ See Section II. D.1 *supra*.

¹⁰⁷⁷ Counter-Memorial, ¶ 471.

¹⁰⁷⁸ *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, Award, October 27, 2006, ¶ 154. **RL-0171**.

854. On the other hand, with regard to the differential criteria raised by Mexico, the Claimant does not dispute that there are differences between its company, its project, and the comparators it has chosen.¹⁰⁷⁹ It simply argues that these differences do not matter because they are all actors in the mining sector.¹⁰⁸⁰ This makes it clear that the debate does not revolve around the existence of differences, but rather their *legal relevance*. With this in mind, Mexico will now demonstrate that the differences between Mineros Norteños and the investment that is the subject of this arbitration, which have been proven and have not been refuted by the Claimant, are relevant and sufficient to undermine the existence of “similar circumstances” under Article 1102.

(2) It is clearly illogical to compare a local community with a mining company

855. Even if were accepted *in arguendo* that is valid to compare investors and investments in the abstract—which Mexico denies—it is profoundly misguided to equate a local mining cooperative with a mining company solely because both operate in the same economic sector. The differences between the two are obvious: size, structure, technical capabilities, financial strength, access to legal representation, economic incentives, and vulnerability to the State. Sharing the same sector is not enough to be comparable; to claim otherwise is as lax as arguing that a neighborhood store and a supermarket chain are comparable simply because they both sell food.

856. However, the Claimant insists on making this comparison by stating that Mineros Norteños is a local mining cooperative that operates in the same sector, is subject to the same legal and regulatory regime, and markets the same products—valuable minerals—as SVB.¹⁰⁸¹ First of all, it should be noted that neither SVB nor Metalín marketed any products, but in any case, the alleged similarities detected are superficial and formal. On the contrary, the substantial differences are numerous and legally relevant.

857. As Mexico has explained in this Rejoinder, Mineros Norteños is a community organization of a social nature, which means that it is a form of collective organization made up of members of a local community who carry out economic activities not primarily for profit, but as a means of

¹⁰⁷⁹ Reply, ¶¶ 597, 599.

¹⁰⁸⁰ Reply, ¶¶ 597, 600.

¹⁰⁸¹ Reply, ¶ 598.

subsistence, mutual support, and community development.¹⁰⁸² In contrast, the Claimant is a for-profit legal entity incorporated abroad with profit motive, a formal legal structure, defined corporate governance, access to international financial markets, and a strategic commercial interest in expanding its mining operations globally.

858. SVB has expressly stated that it was created “for the purpose of acquiring and developing mineral properties”¹⁰⁸³, while its local subsidiary Metalín has acquired “multiple mining concessions from various mineral exploration companies and local mining cooperatives”¹⁰⁸⁴, and both companies have carried out legally complex operations such as mergers and reorganizations with other companies.¹⁰⁸⁵ This operational structure reflects a level of legal and financial sophistication and complexity that is not remotely comparable to Mineros Norteños.

859. Furthermore, the witnesses presented by the Claimant and the executives of SVB have extensive experience in the mining industry, having worked in other mining exploration companies operating in various countries, held management positions in these companies, and carried out activities such as establishing subsidiaries, implementing procedures for compliance with local regulations, and negotiating agreements with some of the largest mining companies in the world.¹⁰⁸⁶ This level of specialization, professionalism, and access to qualified human capital is in no way comparable to that of the members of Mineros Norteños, who—as Mexico explained in its Counter-Memorial—have limited educational levels, depend mainly on manual labor for their livelihood¹⁰⁸⁷, and whose tools the Claimant itself has described as “relatively crude technology.”¹⁰⁸⁸

860. More importantly, the aforementioned differences are relevant in the context of the allegedly discriminatory treatment. It is essential to remember that a local community has legitimate means of social protest and collective expression that are different from those of a

¹⁰⁸² See Section II.C *supra*. PRODECON, Cooperativism in Mexico, October 2022. **R-0111**.

¹⁰⁸³ Memorial, ¶ 2.1.

¹⁰⁸⁴ Memorial, ¶ 2.2.

¹⁰⁸⁵ Memorial, ¶¶ 2.5-2.6.

¹⁰⁸⁶ Memorial, ¶ 2.3. Witness Statement of Mr. Tim Barry, ¶. 2.7.

¹⁰⁸⁷ Counter-Memorial, ¶ 42.

¹⁰⁸⁸ Memorial, ¶ 2.16.

private company. Communities can resort to mechanisms such as demonstrations, symbolic blockades, or assemblies, as forms of social pressure traditionally recognized and protected by the Mexican legal system.¹⁰⁸⁹ In contrast, a company such as SVB cannot pretend to use those same mechanisms, nor can it allege discrimination for not having received equivalent treatment. There is no symmetry in their capacities for mobilization, nor in their purposes, nor in the way their conduct is evaluated socially and legally.

861. In short, the Claimant has not fulfilled its burden of demonstrating why the differences pointed out by Mexico are irrelevant in light of the specific measures alleged to be discriminatory. Its strategy consists of reiterating the existence of certain formal similarities, without seriously addressing or proving the irrelevance of the factors that undermine comparability. In the absence of a solid analysis, the Tribunal does not have the elements to privilege the Claimant's interpretation over the approach offered by Mexico, which does consider the material differences between the supposed comparators.

c. In the circumstances of this arbitration, it is not possible that there was less favorable treatment.

862. This third component of the analysis under Article 1102 of NAFTA requires to demonstrating that the investor was treated “less favorably” in comparison with another investor in similar circumstances. However, in the conditions of this arbitration, that analysis is impossible, given that, as Mexico has demonstrated, the Claimant has not proven either (i) that it received less favorable treatment¹⁰⁹⁰, nor (ii) the existence of similar circumstances with respect to the identified comparators.¹⁰⁹¹ In the absence of these two elements, there is no possible point of comparison, and therefore it cannot be asserted that there was less favorable treatment.¹⁰⁹² This is a structural defect in the Claimant's argument that prevents it to satisfy the standard required by Article 1102.

¹⁰⁸⁹ See ¶ Section D *supra* (“The 2019 Demonstration was carried out in the exercise of the right to peaceful demonstration, recognized by Articles 6 and 9 of the Mexican Constitution, Article 21 of the International Covenant on Civil and Political Rights, and the American Convention on Human Rights, which prevent States from acting with violence or using public force against demonstrations solely because of discomfort or pressure from individual interests.”)

¹⁰⁹⁰ See Section IV.D.2.a. *supra*.

¹⁰⁹¹ See Section IV.D.2.b. *supra*.

¹⁰⁹² Counter-Memorial, ¶ 501.

863. On the other hand, SVB acknowledges that the applicable standard requires demonstrating a “practical adverse effect on the claimant” as a result of the alleged discriminatory treatment.¹⁰⁹³ However, at no time the Claimant has specifically and conclusively identified such effect. It is not enough to assert that certain actions or omissions by the State constitute treatment and that this treatment is different from that granted to other investors; it is essential to establish that this different treatment has produced a specific negative consequence attributable to the difference in treatment. Even if it were argued that there is an adverse effect, this would not result from the alleged discriminatory treatment, but from the State's own acts or omissions (*i.e.*, not forcibly breaking up the demonstration or instigating it), which would exist even in the absence of any differential treatment. Such effects, if any, must be analyzed under other standards of the Treaty, such as Article 1105 or Article 1110. The Claimant's strategy is to subsume all state actions under multiple NAFTA provisions without adequately differentiating their requirements and scope of application, however, this only demonstrates a poor understanding of how each standard works and a litigation approach that rather than clarify the aspects of its claim, seeks to confuse.

864. Finally, even if the foregoing were ignored, accepting the Claimant's argument would lead to a untenable conclusion from a legal point of view: that the alleged less favorable treatment consisted of not allowing a private investor to bring actions against the private property of third parties or not recognizing rights that only a local community can exercise. This would require the State to ignore its domestic regulatory framework, the rights of third parties, and the legitimate limits on the exercise of economic freedoms, which completely exceeds the purpose and scope of the NT standard provided for in the Treaty. Therefore, the Claimant's claim must be dismissed.

3. The Claimant has not established a case of discrimination under Article 1103

865. For the purposes of its claim under Article 1103 of NAFTA, the Claimant identifies the following comparators:¹⁰⁹⁴

Foreign mining companies – namely, Fresnillo (United Kingdom), Americas Gold and Silver Corporation (United States), Equinox Gold (Canada), Pan American Silver (Canada), Torex Gold Resources (Canada), Newmont Goldcorp (United States), and Gan-Bo (China)

¹⁰⁹³ Memorial, ¶ 4.64.

¹⁰⁹⁴ Reply, ¶ 577(b).

866. As with respect to Article 1102, Mexico will demonstrate that the Claimant has not satisfied all three elements of the applicable standard under Article 1103, in particular (ii) similar circumstances and (iii) less favorable treatment.

a. Unlike Article 1102, the Claimant did identify relevant treatment under Article 1103.

867. Unlike the claim under Article 1102, in the case of Article 1103, the Claimant has identified, at least in general terms, the allegedly more favorable treatment conferred on the foreign investors with whom it seeks to compare itself. In its Memorial, the Claimant not only identified the measures allegedly taken by the State with respect to the comparators, but also contrasted them with those adopted (or omitted) with respect to its investment.¹⁰⁹⁵ In its Reply, it reiterates this point and clarifies that the relevant treatment by the Mexican State consists in “taking action to end blockades imposed on their mining operations, while permitting the Continuing Blockade at Sierra Mojada to continue unabated and without sanction.”¹⁰⁹⁶

868. Although the Claimant does not expressly state so, it is understood that its argument is based on the premise that the Mexican State acted to lift blockades on other mining projects, while allowing the blockade in Sierra Mojada to continue without intervention. In this regard, Mexico accepts that this allegation could satisfy the first element of the standard (treatment granted). This point clearly distinguishes the argument under Article 1103 from that under Article 1102, where the Claimant did not identify the relevant treatment for comparison purposes.

b. The Claimant still fails to justify the similarities it alleges nor refute the differences raised by Mexico.

869. As it does not distinguish between its claims under Articles 1102 and 1103, the Claimant's argumentative strategy is identical in both cases. It merely maintains that the relevant circumstances need not be identical, but only similar, and asserts that its argument of similar circumstances is based on three criteria used by previous tribunals (*i.e.*, same economic sector, legal regime, and products).¹⁰⁹⁷

¹⁰⁹⁵ Memorial, ¶ 4.65.

¹⁰⁹⁶ Reply, ¶ 577(b).

¹⁰⁹⁷ Reply, ¶ 600.

870. However, Mexico has already demonstrated that: (i) it is inappropriate to compare investments or investors in the abstract; (ii) not every similarity is legally relevant; (iii) the criteria invoked by the Claimant are reduced to a single and superficial point of coincidence: the economic sector; and (iv) the Claimant has not established its legal relevance.¹⁰⁹⁸ For reasons of procedural economy, Mexico will not repeat all these arguments here, but will retake the differences set out in its Counter-Memorial, which remain substantially unrebutted.

871. In particular, the Claimant has not addressed legally relevant issues raised by Mexico, such as the causes of the demonstrations or blockades, their legality, the nature of the relationships between the companies and the demonstrators, and, especially, the manner in which the conflicts were resolved in each case.¹⁰⁹⁹

(1) Stage of the mining project and applicable regulatory framework

872. Mexico demonstrated that the Sierra Mojada Project was in the exploration stage, while several of the comparators were already in the exploitation stage.¹¹⁰⁰ The Claimant, without further analysis, dismisses the relevance of this fact,¹¹⁰¹ despite the fact that it was precisely the perpetual exploratory stage of the Project that generated community discontent and the non-payment of debts owed to them.¹¹⁰²

873. Furthermore, for these same reasons, the alleged identity of the regulatory regime applicable to the Claimant and the comparators is incorrect. As demonstrated by Mexico's regulatory expert, exploration and exploitation activities are subject to different legal requirements. The Claimant had not processed the minimum requirements necessary to be able to exploit its Project.¹¹⁰³ For example, Mexico has provided evidence that some of the protests against the

¹⁰⁹⁸ See Sections IV.D.1. and IV.D.2.b. *supra*

¹⁰⁹⁹ Counter-Memorial, ¶ 497.

¹¹⁰⁰ Counter-Memorial, ¶ 476.

¹¹⁰¹ Counter-Memorial, ¶ 600.

¹¹⁰² As Mr. Lorenzo Fraire acknowledges in his Second Witness Statement (“I repeat that at that time, 19 years had passed since the 2000 Contract was signed, 19 years without seeing a single peso and without Metalín beginning to exploit the mines. We are not businesspeople, far from it, but we do not believe it is normal for a business to wait 19 years and not generate a single peso.”) Second Witness Statement of Mr. Lorenzo Fraire, ¶ 58.

¹¹⁰³ Second Report of Mr. Carlos del Razo, ¶¶ 149-151.

companies it considers comparable were of a labor nature. The Claimant did not provide any legal analysis refuting this point or addressing this technical evidence.¹¹⁰⁴

874. This criterion is legally relevant because the different stages of the project involve different regulatory obligations, degrees of development, economic expectations, and community relations.¹¹⁰⁵ The level of social, environmental, and economic impact of a mine in the exploitation stage is different from that of a mine in the exploratory stage, which also determines the expected response of the State to blockades or other situations. For example, in Mexico, exploitation requires a formal concession, complete environmental permits (such as the AIA), management plans, and agreements with communities.¹¹⁰⁶ In this sense, the comparison made by the Claimant is erroneous from a regulatory and factual point of view.

(2) Labor relations and level of community involvement

875. Mexico established that there are notable differences in labor relations between companies and protesters in the projects used as comparators, with respect to Sierra Mojada.¹¹⁰⁷ While the companies invoked by the Claimant as comparators maintained structured labor relations with their communities, the Claimant lacked a meaningful labor relationship with Mineros Norteños.¹¹⁰⁸

876. In its Reply, the Claimant responds that many workers on the Project belonged to Mineros Norteños¹¹⁰⁹ and presents an Excel spreadsheet with information on its employees from 1998 to 2019.¹¹¹⁰ This is irrelevant because the conflict between Mineros Norteños and Metalín was not of a labor nature (as it was in some of the other cases that the Claimant uses as comparables). However, its own evidence shows that between 2013 and 2015 it had no employees, and between 2016 and 2019 it hired only 11 people, of whom only 8 were from the community.¹¹¹¹ Furthermore, as Lorenzo Fraire stated, “[a]lthough we worked for them, they never gave us social security or

¹¹⁰⁴ Counter-Memorial, ¶ 476.

¹¹⁰⁵ Second Report of Mr. Carlos del Razo, ¶¶ 44-47, 149-151, 55-75.

¹¹⁰⁶ Second Report of Mr. Carlos del Razo, ¶¶ 55-75, 10-110.

¹¹⁰⁷ Counter-Memorial, ¶¶ 476, 479-480, 486.

¹¹⁰⁸ Counter-Memorial, ¶¶ 84, 476. Statement by Mr. Lorenzo Fraire, ¶ 43.

¹¹⁰⁹ Reply, ¶ 601.

¹¹¹⁰ Reply, ¶ 601.

¹¹¹¹ Excel Table of Employee Information, 1998–2019, C–0415.

benefits. Most of us received our payments in yellow envelopes, without insurance or benefits.”¹¹¹² This confirms what Mexico has already pointed out: SVB did not have an employment relationship with the members of Mineros Norteños that was protected by the Federal Labor Law.¹¹¹³

877. This criterion is legally relevant for analyzing similarities in the treatment granted because the type of employment relationship directly affects the company's social and labor obligations, as well as its responsibility in the event of labor or social conflicts. Comparing SVB with companies that had structured and legally protected employment relationships completely distorts the analysis of discriminatory treatment.

(3) Willingness to negotiate and corporate response to blockades

878. The Claimant attempts to minimize the importance of corporate involvement in the negotiation process.¹¹¹⁴ However, as has been proven, SVB did not participate in a serious or sustained manner in negotiations with Mineros Norteños, nor did it show any willingness to attend their claims.¹¹¹⁵

879. This criterion is legally relevant because, under the standard of Article 1103, if a company makes no effort to negotiate and resolve a conflict—as the comparators did—it cannot then claim that the State treated it less favorably in similar circumstances.

880. Far from analyzing the causes of the blockade or its lack of involvement, the Claimant prefers to focus exclusively on the results. On the one hand, it alleges that, like SVB, other companies “were also adversely affected by blockades or other unlawful activities that disrupted their mining operations.”¹¹¹⁶ However, it completely ignores the fact that these blockades were not resolved by state action, but by private negotiation mechanisms. Nor has it demonstrated that the “other activities” to which it refers were “unlawful” or that the Mineros Norteños demonstration fits that description.

¹¹¹² Statement by Mr. Lorenzo Fraire, ¶ 6.

¹¹¹³ Counter-Memorial, ¶ 476.

¹¹¹⁴ Reply, ¶ 601.

¹¹¹⁵ Counter-Memorial, ¶¶ 475-488.

¹¹¹⁶ Reply, ¶ 594.

881. For example, Tim Barry acknowledged in an email that he was “speaking with some colleagues who have had similar blockade issues at Los Filos and Penasquito and the way these blockades ultimately got resolved were targeted civil lawsuits against the key perpetrators of the blockade.”¹¹¹⁷ Thus, he acknowledges that, in those cases, the companies acted diligently and did not resort to the monopoly of public force, but rather to the available and relevant legal channels. In contrast, SVB did not file valid lawsuits, did not remedy the procedural defects in its submissions¹¹¹⁸, and did not exhaust other available criminal, civil, administrative, and constitutional remedies.¹¹¹⁹ The detrimental effects of this business decision cannot be attributed on Mexico.

882. Additionally, the Claimant itself has issued press releases about other blockades that confirm that these were resolved through negotiations and social agreements with the community, while SVB, on the other hand, refused to make serious offers to Mineros Norteños. In August 2021, Mexico Business News announced that:

Equinox Gold has announced that the illegal blockade at its Los Filos mine in Guerrero has been lifted and the mine has resumed operations... The community blocked the mine in 4Q20 arguing that the company did not comply with the community social collaboration agreement signed in 2019... In April, the company announced it had signed an updated social collaboration agreement with the Carrizalillo community, which was similar to the one signed in 2019 and will be valid until April 2025.¹¹²⁰

883. Another Mexico Business News article from September 2021 states that:

Mexico's National Union of Mining, Metallurgical, Steel and Allied Workers has announced that the access points... are no longer blocked... Based on the agreement signed on July 6... the accesses to the San Rafael mine were finally unblocked... The resolution comes after several efforts made by the company and the federal government, whose members have sought to address the conflict with key decision makers.¹¹²¹

884. Of the seven comparators identified by the Claimant in relation to Article 1103, in its Reply only makes specific reference to company Pan American Silver, the operator of the La Colorada mine. In this regard, it argues that the distinction made by Mexico —namely, that there was no

¹¹¹⁷ Email Correspondence Between Tim Barry and Rodrigo Hernández, April 15, 2021, **C-0268**.

¹¹¹⁸ See Sections II.F. 1 and 3 *supra*.

¹¹¹⁹ See Section D.2 *supra*.

¹¹²⁰ Mexico Business News, Blockade Lifted at Equinox Gold’s Los Filos Mine, August 2, 2021. **C-0122**.

¹¹²¹ Mexico Business News, San Rafael Mine is No Longer Blocked, September 15, 2021. **C-0123**.

blockade— would be irrelevant, since both SVB and Pan American would have been adversely affected by an adverse situation.¹¹²² However, this statement completely misrepresents Mexico's argument and highlights the fragility of the proposed comparison.

885. In the case of La Colorada, there was no blockade, but rather a suspension of activities that the company itself decided upon after a criminal act occurred within its facilities, and operations were resumed by order of the company.¹¹²³ There is no factual or legal relationship between that situation and a peaceful demonstration organized by a local community, as occurred in the case of Sierra Mojada. To claim that both circumstances are comparable is completely illogical and unfounded, and it is up to the Claimant to explain why it considers this analogy relevant.

886. In short, by arguing that the treatment given by the Mexican State occurred in similar circumstances with respect to other foreign investments, the Claimant compares itself to companies that had genuine labor relations, resolved their conflicts through dialogue, and adopted active strategies to protect their projects. As should already be evident to the Tribunal, SVB's situation with Mineros Norteños is not comparable. To claim otherwise not only distorts the standard of Article 1103, but also implies a reading that is completely detached from reality.

c. Nor is it possible that there is less favorable treatment in the case of Article 1103.

887. As with the claim under Article 1102, under the conditions of this arbitration, it is legally untenable to assert that the Claimant has received “less favorable treatment” within the meaning of Article 1103 of NAFTA. As Mexico has explained, although relevant treatment has been identified in this case, the Claimant has not demonstrated that there are “similar circumstances” with respect to the treatment accorded to its investment and the treatment accorded to the alleged foreign comparators. Without this basis for comparison, any analysis of the existence of less favorable treatment is unsupported. Furthermore, the Claimant has also failed to prove in this case what adverse effects it has suffered, and especially that these are a consequence of the alleged differential treatment.

¹¹²² Reply, ¶ 604.

¹¹²³ Counter-Memorial, ¶ 488; Aristegi news “Temporary closure of La Colorada mine in Zacatecas announced.” **R-0079**.

888. As demonstrated, the burden of proof in claims of discriminatory treatment under Articles 1102 and 1103 of NAFTA rests entirely with the Claimant and is not shifted to the State at any stage with respect to the elements of the applicable standard. Mexico has also explained that these three elements are cumulative and must be proven in their entirety. The Claimant has not met this burden. It has not adequately identified the treatment its investment would have received, has based its comparability analysis on superficial and legally irrelevant criteria, and has not demonstrated the existence of less favorable treatment or its alleged adverse effects. Since a violation of Articles 1102 and 1103 has not been proven, Mexico is not obligated to justify any difference in treatment as if it were discriminatory. There is no reversal of the burden of proof, nor is there a need to demonstrate that there was an objective justification: simply, the standard required for this type of claim to proceed has not been met.

4. It is irrelevant to review the legality of the expropriation and, in any case, the Claimant has not proven any illegality.

889. According to the Claimant, Mexico has not argued that the discrimination was justified and therefore concedes this part of the standard.¹¹²⁴ This assertion is completely unsupported. The burden of proof with respect to all elements of the standard rests with the Claimant¹¹²⁵ and, in this case, SVB has not demonstrated any of the three cumulative elements required by Articles 1102 and 1103 of NAFTA. In fact, its probatory situation is so precarious that, in the case of Article 1102, it has not even identified the treatment granted.¹¹²⁶ To the extent that none of these elements has been proved, it is not incumbent upon the Respondent to justify discrimination that does not even exist.

890. In any case, in the unlikely event that the Tribunal were to find that discriminatory treatment existed, it would not be necessary to look far to identify a legitimate justification. Two legal rules are relevant to this analysis:

- In *Feldman v. United Mexican States*, the tribunal, citing *Pope & Talbot v. Canada*, noted that differences in treatment between domestic and foreign investors presumably

¹¹²⁴ Reply, ¶ 578.

¹¹²⁵ See Section IV.D.2.d. *supra*.

¹¹²⁶ See Section IV. D.2.a. *supra*.

violate Article 1102(2) “unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.”¹¹²⁷

- In *Parkerings v. Lithuania*, the tribunal concluded that, even though the claimant and another foreign company operated in similar economic sectors, a municipality had legitimate reasons to distinguish between the two projects, in particular, social rights and interests such as historical and archaeological preservation and environmental protection.¹¹²⁸

891. Both rules are directly applicable to the present case, in which the alleged differences in treatment respond to relevant public purposes and not to a discriminatory intent.

892. *First*, with regard to the comparison with Mineros Norteños, the only thing the Claimant could argue is that it was not allowed to protest (as previously noted, it cannot claim authorization for acts that, in its own account, it describes as illegal). With this clarity, the legitimate reason for this differential treatment would be very simple: SVB has not been the victim of systematic mistreatment and contractual breaches in conditions of vulnerability¹¹²⁹ and, unlike the members of the cooperative, SVB does not have the social right to protest.¹¹³⁰

893. *Second*, with regard to the comparison with other mining companies and projects, the Claimant argues that its blockade was not lifted through the use of force, unlike in other cases. First of all, this is false: in none of the situations cited was force used to disperse protests.¹¹³¹ But even if this were the case, the alleged omission by the State would be justified by a legitimate public policy objective: the protection of the social right to protest. This right is consecrated both

¹¹²⁷ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Arbitral Award, December 16, 2002, ¶ 184. **RL-0019**.

¹¹²⁸ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Arbitral Award, September 11, 2007, ¶ 396. **CL-0062**.

¹¹²⁹ Section II. C. *supra*. Counter-Memorial, ¶¶ 39-48, 77-94.

¹¹³⁰ Section II.D.1. *supra*.

¹¹³¹ Section II. D.3. *supra*.

in the Mexican Constitution and in the State's international commitments.¹¹³² It would be difficult to find a clearer and more solid justification for differential treatment.

894. In conclusion, even if it were assume —*arguendo*— that there was a difference in treatment, it would be based on legitimate reasons linked to fundamental rights and public policy objectives. The differentiation under both relevant provisions would have been adopted to protect social rights covered by national and investment law, and there is no indication that they were adopted to discriminate against investment based on its nationality. Therefore, the alleged violation of Articles 1102 and 1103 remains inadmissible even in the Claimant's best case scenario.

V. DAMAGES

895. Nothing in this section shall be interpreted as an admission of the Respondent's international responsibility or as a waiver of the legal defenses set forth in the section on the merits of the claim in this submission.

A. The Claimant has not resolved the problems of specification in its claim for damages

896. In its Counter-Memorial, the Respondent explained that the Claimant's claim for damages was not properly specified.¹¹³³ The Claimant has not remedied at least two of the problems identified: (i) it has only quantified the damages associated with an expropriation, even though it claims four separate violations of NAFTA; and (ii) it did not specify which claims it is filing on its own behalf and which on behalf of Minera Metalín. As explained at the time, this has important implications for the analysis of damages, which can be summarized as follows:¹¹³⁴

- If this Tribunal concludes that the Respondent violated any provision of NAFTA, but that violation did not constitute indirect expropriation, the Tribunal would lack an assessment that could serve as the basis for an award of damages.¹¹³⁵
- NAFTA provides in Article 1135(2)(a) that when a claim is brought on behalf of an enterprise under Article 1117, any award of damages and interest shall be paid to the

¹¹³² Section II.D.1. *supra*.

¹¹³³ Counter-Memorial, ¶¶ 514-521.

¹¹³⁴ Counter-Memorial, ¶¶ 515-519.

¹¹³⁵ Counter-Memorial, ¶ 515.

enterprise.¹¹³⁶ However, by failing to specify which claims it is filing on its own behalf and which on behalf of the company, the Claimant prevents this Tribunal from determine who should receive compensation in the case that it finds that Mexico violated the treaty.

897. Regarding the first point, the Claimant argues in its Reply: “The Respondent's breaches, individually or cumulatively, caused the loss of the Claimant's investment because Mexico failed to protect SVB and Minera Metalín from the Continuing Blockade, causing the loss of SVB's entire investment.”¹¹³⁷ Thus, according to the Claimant's position, “whether the Tribunal finds that the Respondent unlawfully expropriated the Claimant's investment [...] or finds that it failed, for instance, to accord FPS, the practical result is the same: the Claimant lost its investment because of the Respondent's breach.”¹¹³⁸

898. Far from resolving the problem, this brings it to the surface. What would happen if this Tribunal determined, for example, that Mexico violated Article 1105 (MST), but failed to demonstrate that the violation had expropriatory effects?¹¹³⁹ The question is relevant because Mexico has taken the position that the Claimant has not demonstrated that its investment (whatever that may be) lost all its value with the departure of South32 (see section IV. C. *above*).

899. In simple terms, Claimant has not quantified the damages allegedly suffered from a violation of Articles 1105, 1102, and/or 1103 *that does not have expropriatory effects*.¹¹⁴⁰ The cases cited by the Claimant —e.g., *Gemplus v. Mexico*, *CMS v. Argentina*— are not useful because, in *Gemplus*, the tribunal determined that an expropriation had occurred, and the factual and legal context of *CMS* differs substantially from that in this case.

900. The Claimant clarified in the Reply that the expropriated investment is Metalín and its assets, but did not specify which claims it is presenting on behalf of Metalín and which on its own behalf. The Respondent therefore takes the position that the claim for violation of Article 1105

¹¹³⁶ Counter-Memorial ¶¶ 518-519.

¹¹³⁷ Reply, ¶ 619.

¹¹³⁸ Reply, ¶ 619.

¹¹³⁹ By "expropriatory effects," the Respondent means the total or near-total loss of the value of the investment. In other words, that the alleged violation had effects equivalent to direct expropriation.

¹¹⁴⁰ Counter-Memorial, ¶ 515.

was filed on behalf of Metalín because MST's obligation was assumed in front of the investment and not in front of the investor.¹¹⁴¹

B. The standard of compensation

901. In its Counter-Memorial, the Respondent stated that it agreed with the Claimant that the standard of compensation applicable in this case was that of full reparation. However, it disputed that this standard required determining the amount of compensation based on the fair market value (FMV) of the investment or that it specified any particular methodology or particular approach for quantifying it.¹¹⁴²

902. The Claimant does not dispute this in its Reply. Relying on the *Crystallex* award, it asserts that full reparation “*can only be attained by applying FMV, as this measure 'ensures that the consequences of the breach are wiped out and that the situation which would, in all probability, have existed if the wrongful acts had not been committed is re-established.*”¹¹⁴³ The Claimant does not explain why full reparation can only be achieved by paying compensation equivalent to the FMV of the investment in this case. It appears to want to extract a general rule from a particular case, which is completely inappropriate.

903. To be clear, the fact that the tribunal in *Crystallex* determined that compensation based on the FMV of the investment satisfied the standard of full reparation in that case does not mean that this is true in all cases. Not only are there numerous precedents where the tribunal used a measure of compensation other than FMV in cases related to a pre-operational mining project, but the evidence indicates that the sunk cost method (which does not determine FMV) is the most commonly used by international tribunals in such cases.¹¹⁴⁴ This was the approach adopted in the cases of *Bahgat v. Egypt*, *Copper Mesa v. Ecuador*, *South American Silver v. Bolivia*, *Stans Energy v. Kyrgyzstan*, *Bear Creek Mining v. Peru*, and *Odyssey v. Mexico*.

¹¹⁴¹ Article 1105 states: "Each Party shall accord to the investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment, and full protection and security."

¹¹⁴² Reply, ¶¶ 507, 525-526.

¹¹⁴³ Reply, ¶ 617. Emphasis added by Respondent.

¹¹⁴⁴ In *Odyssey*, a case relied upon by the Claimant, the tribunal concluded that “[...] the most used method by tribunals [in investor-State cases involving pre-production mining projects] is the sunk cost approach (five out of 11 cases) [...]”. *Odyssey v. Mexico*, ICSID Case No. UNCT/20/1, “Award,” September 17, 2024, ¶ 634: CL-0183. See also Counter-Memorial, ¶ 524.

904. To be clear, the Respondent does not dispute that FMV *may* be the appropriate measure of compensation in cases where the full reparation standard applies. However, contrary to what the Claimant seems to suggest, there is no precedent indicating that it is mandatory to use FMV or suggesting that it is inappropriate to use a different measure of compensation, such as sunk costs.

905. To determine compensation in accordance with the standard of full reparation, it is necessary to eliminate the consequences of the wrongful act and, importantly, to restore the situation that would in all probability have existed but for the alleged violations, as determined by the *Chórzow Factory* tribunal.¹¹⁴⁵ This part of the analysis is not addressed in either the Memorial or the Reply, and cannot be obviated simply by referring to the decisions of other tribunals that applied the same compensation standard in a different factual context.¹¹⁴⁶

906. The relevant question in this case is what situation SVB and its subsidiary Metalín would have faced if the Mexican authorities had intervened to disperse a peaceful protest using public force. The Claimant appears to suggest that, in that hypothetical scenario, the Sierra Mojada Project would have had a value of US\$315 million, which it could have realized by selling it to a third party on the Valuation Date. This amount represents the FMV that BRG attributes to the Project immediately prior to South32's exit.¹¹⁴⁷ However, this scenario would certainly not have been the most likely scenario in the absence of the breach by omission alleged against the Respondent.

907. First, the Respondent disputes that the Project had such a high value immediately prior to South32's exit. After all, SVB is a company that has never developed or operated a mine and has never generated revenue. This is not an assumption on the part of the Respondent. In its 2022

¹¹⁴⁵ Paraphrasing the decision in *The Factory at Chorzów (Claim for Indemnity) (The Merits)*, PCIJ, Ser. A., No. 17, 1928, Judgment, September 13, 1928, p. 40. **RL-0098**. (“reparation must, as far as possible wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”)

¹¹⁴⁶ For example, in *Crystallex*, the claimant had completed the exploration phase, had feasibility studies approved by the Venezuelan authorities, and had declared mineral reserves. See *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, “Award,” April 4, 2016, ¶¶ 878 and 884. **CL-0075**.

¹¹⁴⁷ The definition of FMV is based on a sale and purchase transaction of the investment between a hypothetical seller and buyer who are fully informed of the relevant facts and acting freely.

annual report, SVB stated: “Since its inception in November 1993, the Company has not generated revenue and has incurred an accumulated deficit of \$137,104,079.”¹¹⁴⁸

908. In its 2019 annual report, prepared with information as of October 31 of that year —i.e., a month and a half after the Second Blockade— SVB stated: “No commercially mineable ore body has been delineated on our Sierra Mojada Project, nor have our properties shown to contain proven or probable mineral reserves.”¹¹⁴⁹ The idea that it would have been possible to achieve, in the two and a half years between the start of the Second Blockade and the Valuation Date, what the company was unable to achieve in the 20 years prior to the Second Blockade is questionable, to say the least.

909. The Claimant even communicated to the investing public that it had doubts about its ability to maintain sufficient cash to achieve its business objectives, and that there was no guarantee that it would be able to obtain it on terms it considered reasonable, even though, by then, it had the support of South32:

Due to our history of operating losses, we are uncertain that we will be able to maintain sufficient cash to accomplish our business objectives.

During the fiscal years ended October 31, 2019, and October 31, 2018, we suffered net losses of \$3,939,000 and \$3,520,000, respectively. At October 31, 2019, we had stockholders' equity of \$8,565,000 and cash and cash equivalents of \$1,432,000... We are not engaged in any revenue-producing activities, and we do not expect to be in the near future. Currently, our potential sources of funding consist of the sale of additional equity securities, entering into joint venture agreements, or selling a portion of our interest in our assets. There is no assurance that any additional capital that we will require will be obtainable on terms acceptable to us, if at all. Failure to obtain such additional financing could result in delays or indefinite postponement of further exploration of our projects. Additional financing, if available, will likely result in substantial dilution to existing shareholders.¹¹⁵⁰ [Underlining by the Respondent, bold and italics in the original]

910. The available evidence also suggests that SVB would have faced severe financial problems in the absence of the alleged violations if South32 had exercised its purchase option. The same 2019 annual report states: “[i]f South32 were to exercise its option to purchase 70% of the equity of Minera Metalín and Contratistas, we will be required to contribute 30% of subsequent funding

¹¹⁴⁸ Silver Bull SEC 10-K 2022, p. 26. **R-0084.**

¹¹⁴⁹ Silver Bull Resources, INC, Form 10-K for the Fiscal Year Ended October 31, 2019, p. 22. **R-0088.**

¹¹⁵⁰ Silver Bull Resources, INC, Form 10-K for the Fiscal Year Ended October 31, 2019, p. 24. **R-0088.**

toward development of the Sierra Mojada Project, and we do not currently have sufficient funds to do so.”¹¹⁵¹ A little further on, it explains that if South32 were to exercise the option and SVB did not have the necessary funds to cover the 30% of the capital that would correspond to it, “*our interest in Minera Metalín and Contratistas will be diluted.*”¹¹⁵²

911. To all this, we must add the seizure of all the Project's concessions as a consequence of the litigation between Metalín and the Valdez family. The Claimant suggests that the Mexican courts acted in a questionable manner in that case, but has not filed a claim related to the litigation with the Valdez family and does not deny that Metalín's concessions have been seized.

912. The Respondent maintains that a company with SVB's track record that lacks the capital necessary to continue exploration and “achieve its business objectives” cannot seriously claim that the most likely scenario, in the absence of the alleged violations, would be one in which it would own an asset valued at US\$315 million that it could freely sell to a third party on the Valuation Date.¹¹⁵³

913. The most likely scenario in the absence of the Repondent's alleged omission is one in which all of Metalín's concessions and offices would have been seized as a result of the litigation with the Valdez family, South32 would have withdrawn anyway due to the impossibility of continuing to explore the seized concessions, and SVB would not have had the capital to continue with the Project on its own. In that scenario, the investment would have had marginal value.

C. Delimitation of legally relevant damage

914. As explained in the Counter-Memorial, the legally relevant damage is defined by the principles of reasonable certainty, causation, and contributory fault.

915. The first (reasonable certainty) relates to the standard of proof in the context of damages and requires that the existence of the damage and its amount be proven with a reasonable degree

¹¹⁵¹ Silver Bull Resources, INC, Form 10-K for the Fiscal Year Ended October 31, 2019, p. 44. **R-0088.**

¹¹⁵² Silver Bull Resources, INC, Form 10-K for the Fiscal Year Ended October 31, 2019, p. 44. **R-0088.**

¹¹⁵³ The FMV is defined as “the highest price, expressed in terms of money or money's worth, obtainable in an open and unrestricted market between knowledgeable, informed and prudent parties, acting at arm's length, neither party being under any compulsion to transact (Income Tax Act (Canada)) as at a given point in time. Reference to a Market Value must be stated to be as at the applicable Valuation Date.”) *The CIMVAL Code for the Valuation of Mineral Properties*, November 29, 2019, p. 36. **R-0080.**

of certainty.¹¹⁵⁴ In the context of this case, this would involve demonstrating that the Sierra Mojada Project had a certain value prior to the alleged violation and lost it *entirely* as a result of the measures complained of. It also involves rejecting excessive speculation in the estimation of damages, if any.

916. The second principle (causation) requires proof of a sufficient, proximate, foreseeable, or direct causal link between the alleged violation and the damage.¹¹⁵⁵ In this case, the relevant question is whether the losses that the Claimant alleges to have incurred were caused by the alleged inaction of the Mexican government in response to the alleged blockade by Mineros Norteños and not by other factors, such as the Claimant's breach of contract with Mineros Norteños, the seizure of the Claimant's concessions as a result of the litigation with the Valdez family, or the Claimant's inability to finance its own exploration without the assistance of third parties.

917. Under the third principle (contributory fault), it is necessary to reduce the amount of compensation to take into account any contribution to the damage by the Claimant's negligent or malicious conduct.¹¹⁵⁶ In this case, the question to consider would be whether the Claimant or Metalín materially contributed to the loss they allege to have suffered by breaching their contractual obligations to Mineros Norteños, by refusing to engage in dialogue with them to try to reach an agreement.

1. Reasonable certainty

918. The damages in this case are based on the alleged total loss of the value of the Claimant's investment.¹¹⁵⁷ According to its damage expert (BRG), this investment would have had a FMV of \$315.3 million had it not been for the alleged violations.¹¹⁵⁸ The Respondent stated in its Reply

¹¹⁵⁴ Counter-Memorial ¶¶ 561-562.

¹¹⁵⁵ Counter-Memorial ¶ 530.

¹¹⁵⁶ Counter-Memorial ¶ 568.

¹¹⁵⁷ It is reiterated that although the Claimant alleges violations of NMT, TN, and MFN obligations, it has not quantified damages other than those resulting from indirect expropriation. It is also reiterated that if this tribunal determines that indirect expropriation did not occur, it would lack a valuation on which to base its determination of damages.

¹¹⁵⁸ Reply, ¶ 714.

that the Claimant had not demonstrated that the Project had such a high value on the Valuation Date, much less that it had lost that value.¹¹⁵⁹

919. As explained at the time, many mining projects do not reach the production phase and are abandoned with substantial losses for investors.¹¹⁶⁰ In its 2019 annual report, SVB acknowledged that it was an exploration-stage company and, as such, “*we may never enter the development and production stages.*” It also acknowledged that a “*commercially mineable ore body*” had not been delineated and cautioned the investing public “*not [to] assume that the projects contained in the Report on our Sierra Mojada Project will ever be realized.*”¹¹⁶¹ The Respondent respectfully submits that the Tribunal would be well advised to follow this same recommendation in analyzing the claim for damages.

920. In the Reply, the Claimant argues: “*contrary to the Respondent's assertions, the Project was not only viable but was ideally positioned for economic success.*”¹¹⁶² It then lists a series of factors that, in its view, demonstrate the above. The problem for the Claimant is that its burden is not to demonstrate that the Project was “ideally positioned for economic success,” but rather that it was economically viable and therefore had positive value (and lost it).

921. To establish the technical and economic viability of a mining project, the statements of Mr. Barry and Mr. Edgar or a *Preliminary Economic Assessment* (PEA) are not sufficient. A pre-feasibility study (PFS) or feasibility study (FS) is required, which the company had not even begun. CIMVAL defines a feasibility study as:

[A] comprehensive technical and economic study of the selected development option for a mineral project that includes appropriately detailed assessments of applicable Modifying Factors together with any other relevant operational factors and detailed financial analysis that are necessary to demonstrate, at the time of reporting, that extraction is reasonably justified (economically mineable).¹¹⁶³

¹¹⁵⁹ Reply ¶¶ 578–605.

¹¹⁶⁰ Reply, ¶¶ 536–537.

¹¹⁶¹ Silver Bull Resources, INC, Form 10-K for the Fiscal Year Ended October 31, 2019, p. 22. **R-0088.**

¹¹⁶² Reply, ¶ 648, *et seq.*

¹¹⁶³ *The CIMVAL Code for the Valuation of Mineral Properties*, November 29, 2019, p. 33. **R-0080.**

922. A feasibility study is also necessary to declare “mineral reserves,” which are nothing more than “*the economically mineable part of a Measured and/or Indicated Mineral Resource [...]*.”¹¹⁶⁴ That same definition states: “*The public disclosure of a Mineral Reserve must be demonstrated by a Pre-Feasibility Study or Feasibility Study.*” In other words, a mineral resource declaration and/or a PEA are not sufficient to demonstrate that it is economically viable to extract the declared mineral resources.

923. It should also be recalled that by 2019, the Sierra Mojada Project had “mineral resources” (something the Respondent has never denied) but not “reserves,” precisely because it had not yet demonstrated that it was economically viable to exploit those resources. As noted in its 2019 annual report, SVB still considered itself to be in the exploration phase even though, by that time, it had spent 22 years exploring the Sierra Mojada concessions without having moved on to the pre-feasibility phase.

924. In the absence of such a study, it would be highly speculative to value the company based on its future returns—i.e., a DCF. This is why CIMVAL guidelines do not recommend the income approach for valuing mineral properties in the exploration stage. As can be seen from the CIMVAL table ¹¹⁶⁵ reproduced below, such properties are valued using a market or cost approach:

TABLE 1. Valuation Approaches for Different Types of Mineral Properties

Valuation Approach	Exploration Properties	Mineral Resource Properties	Development Properties	Production Properties
Income	No	In some cases	Yes	Yes
Market	Yes	Yes	Yes	Yes
Cost	Yes	In some cases	No	No

925. It is in this context that the statement that “[t]he Claimant compiled robust studies to derisk the Project and progress it towards the pre-feasibility stage, which it would have reached had it

¹¹⁶⁴ Mineral resources are classified from lowest to highest degree of geological certainty as: inferred, indicated, and measured. See *The CIMVAL Code for the Valuation of Mineral Properties* (2019), pp. 35-37. **R-0080.**

¹¹⁶⁵ The CIMVAL Code for the Valuation of Mineral Properties, November 29, 2019, p. 19. **R-0080.**

not been for the Continuous Blockade” should be evaluated.¹¹⁶⁶ These “robust studies” are different versions of a preliminary economic assessment or PEA, defined as: “a study, other than a Pre-Feasibility or Feasibility Study, that includes an economic analysis of the potential viability of Mineral Resources.”¹¹⁶⁷

926. The Claimant asserts that JDS Mining & Energy “*estimated the total resources of 328,401 silver equivalent ounces and estimated the value of the Project between US\$250.7 million and US\$677.1 million in its base case scenario under the discounted cash flow (“DCF”) approach.*”¹¹⁶⁸ However, as can be seen from the CIMVAL table, the DCF method, which belongs to the income approach, is not recommended for valuing a project in the exploration stage, such as Sierra Mojada. In fact, this is why BRG did not present a valuation using that approach.¹¹⁶⁹

927. The Claimant also relies on South32's participation in the Project to refute the argument that the Project's viability had not been demonstrated on the Valuation Date. The Claimant even describes the Respondent's argument as “lazy sophistry.”¹¹⁷⁰ But once again, the economic viability of an economic project is not demonstrated by the participation of a partner, regardless of whether it is the “*eighth largest mining company in the world*” or the largest of all. The Claimant speaks as if it were impossible for large mining companies to participate in projects that later fail. South32 clearly believed that the Project had a chance of success, but its participation did not guarantee it. Its commitment to the Project was limited: it would invest up to US\$10 million over four years, and only then decide whether to acquire 70% of the shares of Metalín y Contratistas.¹¹⁷¹ In fact, the Claimant posits that if the Project had been worth between US\$250 and US\$677 million, as stated by JDS Mining & Energy stated in its preliminary economic assessment¹¹⁷²

¹¹⁶⁶ Reply, ¶ 648, 5th bullet point.

¹¹⁶⁷ *The CIMVAL Code for the Valuation of Mineral Properties*, November 29, 2019, p. 39. **R-0080.**

¹¹⁶⁸ Reply, ¶ 648, 5th bullet point

¹¹⁶⁹ BRG First Report, ¶¶ 52-53.

¹¹⁷⁰ Reply, ¶ 649.

¹¹⁷¹ Memorial ¶ 2.93

¹¹⁷² Reply, ¶ 468. BRG Initial Report ¶32(f).

, or the US\$315.3 million that BRG now assigns to it¹¹⁷³, Mr. Barry would never have proposed to South32 in 2019 to end the partnership and split the costs as an alternative:

Following our conversation, I asked Sean to give an update on expenditure. The breakdown is as follows:

[...]

4 – We should have a better understanding of MN's plans post the State Prosecutors visit and whether or not this will turn into a long siege by Minera Nortenos. With this in mind, I am also looking at the results of the drilling, and although we have had some success, I am asking if there is an S32-sized target to be had here (as I am sure you are). Target-wise, we have hit all of our main targets with moderate results (see map below). As a result, one scenario for us to consider is to finish up the JV and split the remaining expenditure.¹¹⁷⁴

928. To suggest that the Project was viable simply because it had mineral resources, a PFS, or a particular partner is a mistake. It was entirely possible that a subsequent feasibility study would conclude that it was not economically viable to extract these resources, in which case the property would have had little or no residual value. Similarly, it was possible that the feasibility study would significantly reduce the volume of economically extractable mineral resources in consideration of factors such as the cost of extracting the mineral, market conditions, or any other factor from the long list of factors considered in a feasibility study.

929. The Claimant cannot reasonably ignore this possibility, especially considering the warnings it included in its 10-K reports, such as: “*there is significant uncertainty in any mineralized material estimate, and actual deposits encountered and economic viability of a deposit may differ materially from our estimates.*”¹¹⁷⁵

930. If SVB had other operating mines in the region or had developed mines in other countries, the uncertainty associated with the Project might be less, but SVB's track record is not solid either. The Respondent finds it frankly extraordinary that a company (i) that has never generated revenue since its incorporation 32 years ago; (ii) that has incurred substantial losses throughout its history (approximately US\$137 million); (iii) has spent more than 20 years exploring the Sierra Mojada concessions without advancing to the pre-feasibility stage; (iv) does not have its own resources to

¹¹⁷³ Reply, ¶ 676.

¹¹⁷⁴ Email correspondence dated September 19, 2019, between Mr. Tim Barry and Messrs. Mirek Wozga, Darryl Steane, and Mike Roberts, regarding: "Update and Breakdown of Expenses," **R-0081**.

¹¹⁷⁵ Silver Bull Resources, INC, Form 10-K for the Fiscal Year Ended October 31, 2019, p. 24. **R-0088**.

explore its properties; and (v) whose market capitalization immediately prior to the Second Blockade barely reached US\$ 17 million (without long-term debt), dares to assert before an international tribunal such as this one that its investment was worth US\$315 million on the valuation date and that it lost it entirely due to the alleged inaction of the Claimant in the face of a conflict that it itself provoked. This is clearly unreasonable and illogical.

931. Given the inconsistency of its claim, the Claimant has had no choice but to take the Respondent's arguments out of context and misrepresent them. For example, it states in the Reply that Mexico “*baldly asserts that 'the Project would have marginal value if any,' mainly because it had not progressed to pre-feasibility or feasibility studies*” and, after referring to South32's involvement and the studies it had conducted prior to the alleged violation, concludes that: “*the Respondent simply fails to proffer a single technical argument or rebuttal evidence to support its proposition that the Project lacked technical viability.*”¹¹⁷⁶

932. The Claimant misrepresents Mexico's position. The Respondent did not argue that the Project was unviable and had no value whatsoever; it argued that the Claimant had not demonstrated that the project was viable and, therefore, that it had the value now assigned to it:

536. With respect to the first point, it is reiterated first that the Claimant has not demonstrated that the Project was economically viable or, in other words, that but for the alleged violation it would have generated future returns for its owners and, therefore, that it had the value that it claims to have lost as a result of the Respondent's actions. It should be remembered that many mining projects do not reach the production stage and have to be abandoned at a loss. There is nothing in the record to suggest that the Project was or would have become economically viable and, therefore, that it would probably have moved into the production stage but for the alleged violations.¹¹⁷⁷ [Emphasis added by the Respondent]

933. Immediately after the quoted passage, the Respondent referred to the CIMVAL guidelines and the feasibility studies necessary to demonstrate viability and declare mineral reserves. It noted that the Claimant had not carried out these studies, which is an undisputed fact. It also stated that “a real possibility was that the resources found within the Project concessions (or part of them) would have a reduced value given the extraction costs or that they would not be economically exploitable.” It was in this context that it concluded: “In that case, the Project would have marginal

¹¹⁷⁶ Reply, ¶¶ 649-650.

¹¹⁷⁷ Reply, ¶ 536.

value, if any.”¹¹⁷⁸ The Claimant omitted the context in which the statement was made and the initial part of the sentence in order to construct this “straw man” argument, which it then attacks with determination.

934. Such tactics are inappropriate in investment arbitration. In any case, it is not up to the Respondent to refute something that the Claimant has not proven. The technical and economic viability of a mining project is demonstrated by pre-feasibility and feasibility studies, not by optimism, goodwill, and studies that do not even adhere to internationally recognized valuation guidelines and are contrary to the warnings that the company itself has published in its reports to the SEC.

935. As will be seen below, BRG's valuation of the project is highly speculative because it is based on the volume of mineral resources discovered in the Sierra Mojada concessions and rules of thumb for converting them into reserves. In effect, BRG assumes that 90% of measured resources, 50% of indicated resources, and 20% of inferred resources would be exploitable,¹¹⁷⁹ despite the fact that the company had not yet commissioned a feasibility or pre-feasibility study. Once again, the warnings in SVB's SEC filings are illustrative:

Mineral resource estimates may not be reliable.

There are numerous uncertainties inherent in estimating quantities of mineralized material such as silver, zinc, lead, and copper, including many factors beyond our control, and no assurance can be given that the recovery of mineralized material will be realized. In general, estimates of mineralized material are based upon a number of factors and assumptions made as of the date on which the estimates were determined, including:

[...]

All estimates are, to some degree, uncertain. For these reasons, estimates of the recoverable mineral resources prepared by different engineers or by the same engineers at different times may vary substantially. As such, there is significant uncertainty in any mineralized material estimate, and actual deposits encountered and economic viability of a deposit may differ materially from our estimates.¹¹⁸⁰

[Underlining by the Respondent, bold and italics in the original]

936. In the Claimant's own words, the basis for BRG's valuation—i.e., the volume of mineral resources—is unreliable, as “the deposits encountered and the economic viability of a deposit may

¹¹⁷⁸ Reply, ¶ 539.

¹¹⁷⁹ First BRG Report, ¶ 65.

¹¹⁸⁰ Silver Bull Resources, INC, Form 10-K for the Fiscal Year Ended October 31, 2019, p. 24. **R-0088**.

differ materially from our estimates.” The presence of “*significant uncertainty*” surrounding the variable that governs BRG’s valuations using the market approach—i.e., the volume of mineral resources—is contrary to the principle of reasonable certainty.

937. But even assuming, *for the sake of argument*, that SVB’s estimates were reliable and that the viability of extracting the resources has been demonstrated (*quod non*), one might wonder what the current value of the Project would be. This is relevant because the damages are given by the difference between the value of the investment in the counterfactual scenario and the current scenario. In this case, the problem is not only the absence of reasonable certainty about the value of the investment in the counterfactual scenario, but also the absence of reasonable certainty about its current value.

938. The Claimant assumes that the value of the investment in the current scenario is zero, because: “*no reasonable investor would be interested in a mining project illegally blockaded for nearly three years with no hope of any Government intervention.*”¹¹⁸¹ However, this logic not only (wrongly) assumes that the Respondent was responsible for the failure to resolve the conflict with Mineros Norteños, but also that the only way to resolve it was through the use of force by the State, which the State has refused to use against a peaceful protest. Clearly, there is a possibility of reaching an agreement with Mineros Norteños by compensating them for the royalties that Metalín agreed to pay them since 2000 (approximately US\$7 million). The numerous offers made by Mineros Norteños show that they are open to resolving the dispute for a *de minimis* amount compared to the value that BRG attributes to the Project.¹¹⁸² As noted at the time, Mineros Norteños would derive no benefit from the failure of the Project.

939. In short, the lack of a reasonable response to these arguments demonstrates that there is no reasonable certainty of damages equivalent to indirect expropriation or of their *quantum*. On the

¹¹⁸¹ Memorial. ¶ 2.209.

¹¹⁸² Mineros Norteños Meeting notes, March 8, 2016, **C-0196**. Email from Juan Manuel López Ramírez to Tim Barry et al. Relaying Informal Proposal from Mineros Norteños to Minera Metalín, May 30, 2017, **C-0360**. Proposal from Mineros Norteños to Minera Metalín, June 8, 2017, **C-0204**. Proposal from Minera Norteños to Minera Metalín, June 15, 2017, **C-0207**. Proposal from Minera Norteños to Minera Metalín, June 15, 2017, **C-0207**. Proposal from Mineros Norteños to Minera Metalín, March 15, 2019, **C-0213**. Mineros Norteños Board of Directors Proposal to Minera Metalín, August 11, 2020, **C-0119**. Letter from Silver Bull’s President Darren Klinck to Mineros Norteños, December 29, 2021, **C-0307**. Proposal from Mineros Norteños to Minera Metalín, May 17, 2022, **C-0317**. Proposal from Mineros Norteños to Minera Metalín, June 20, 2022, **C-0320**.

one hand, BRG's valuation has no basis in reality; it is nothing more than a fantasy of the Claimant and the company financing this claim, which naturally wishes to maximize the return on its investment. On the other hand, the Claimant has not demonstrated that the investment has lost all its value, whatever that value may have been in reality.

2. Causation

940. In its Reply, the Claimant insists that the Respondent is solely responsible for the failure of the Project. In its words, “[i]f Mexico had instead enforced law and order and restored the Project to the Claimant, the loss of the Claimant’s investment would not have occurred, demonstrating that Mexico’s breaches are the proximate cause of the harm.”¹¹⁸³ With the same superficiality and levity, one could argue that if the Claimant had fulfilled its commitment to bring a mine in Sierra Mojada into operation within four years (or ten, fifteen, or twenty), we would not be in the situation we find ourselves in now.

941. The Respondent's failure to act in response to the Second Blockade was not the proximate cause of the Project's failure. The Project failed largely due to Metalín's breach of contract (an established fact); its unwillingness to acknowledge its debt and reach a reasonable agreement with them; the lack of its own resources to achieve this agreement and continue exploration of the properties; and the conflict with the Valdez family that led to the seizure of its concessions. These arguments will be developed below.

a. The failure of the Project is attributable to the Claimant's breach of contract with Mineros Norteños

942. The Respondent will not dwell on this point, which has been discussed *ad nauseam* in the Counter-Memorial and in this submission.

943. The Mexican courts have determined on several occasions that Metalín had committed to start up a mine within four years of its acquisition. In fact, this was one of the elements on which the Mexican courts relied to determine that the statute of limitations had expired for claiming Metalín's breach. This period expired in 2001.¹¹⁸⁴ Metalín did not fulfill this commitment, the

¹¹⁸³ Reply, ¶ 641.

¹¹⁸⁴ Counter-Memorial, ¶ 131.

existence of which the Claimant disputes, but which has been upheld in multiple decisions issued in that case. Subsequently, in 2014, Mineros Norteños sued Metalín in a commercial lawsuit that was ultimately decided in Metalín's favor due to the expiration of the statute of limitations for filing the claim.¹¹⁸⁵

944. The fact is that Mineros Norteños was promised a royalty as part of the compensation agreed upon for the concessions that the Claimant intended to exploit in four years, but two decades later, they were still in the exploration phase with no certainty that they would ever be put into operation. As noted in the Reply, the royalty agreed upon for the concessions represented approximately 75% of the total amount that Metalín agreed to pay.¹¹⁸⁶

b. The failure of the Project is attributable to SVB's lack of resources

945. The Claimant repeatedly asserts that it was South32's withdrawal that “crystallized” the damage to its investment.¹¹⁸⁷ However, it has not sought to demonstrate the existence of a causal link between the Mexican government's alleged passivity in the face of the Second Blockade and South32's withdrawal.

946. In fact, beyond Mr. Barry's testimony, the Claimant has not provided any contemporary evidence that South32 withdrew from the project due to the failure to resolve the conflict with Mineros Norteños. There is no document in the record to indicate this, and the Claimant has not offered the testimony of any representative of South32 to confirm this, which, to date, is only a hypothesis based exclusively on Mr. Barry's statement.

947. As explained in the Counter-Memorial, there are other reasons why South32 may have decided to withdraw. One example is the embargo on concessions, which will be discussed in the following section.¹¹⁸⁸ However, this is a matter of burden of proof and, in this context, it was incumbent upon the Claimant to prove that South32 withdrew as a result of the Respondent's alleged omission in relation to the Second Blockade. It failed to do so.

¹¹⁸⁵ Counter-Memorial, ¶ 131.

¹¹⁸⁶ Counter-Memorial, ¶ 80.

¹¹⁸⁷ Reply, ¶¶ 306-311.

¹¹⁸⁸ Counter-Memorial, ¶¶ 256-271.

948. The Claimant also failed to demonstrate that the Project had become “unviable” with the departure of South32. As noted above, the viability of the Project had not been demonstrated on the Valuation Date, but regardless of this, the inability to fund the Project with its own resources or to get a third party to do so is not attributable to the Respondent. As noted in the Counter-Memorial: “the Claimant's argument seems to boil down to this: since SVB did not have the necessary resources to continue the exploration on its own and pay the amount owed to Mineros Norteños, it must be concluded that the Project has lost all its value.”¹¹⁸⁹ The Claimant has not responded to this argument, nor has it demonstrated that anyone is willing to invest in the Project. To fill this gap, the Claimant relies on its expert:

647. BRG confirms that following South32’s exit from the Project, a “rational investor” faced with this fact would not have committed any funding, effectively confirming the Claimant’s loss. According to BRG, from an economic perspective “South32’s withdrawal from the Project on August 31, 2022 is indicative and representative of the view of a rational investor: that they cannot commit capital to a Project that is inaccessible and with property rights that are not expected to be enforced.

949. However, BRG cannot testify as to what a “rational investor” would do in the circumstances. Although it assigns a value of US\$315 million to the Project, the expert seems to suggest that no one would have been willing to invest a modest amount to resolve the problem with Mineros Norteños and continue with the exploration to realize the value attributed to the Project. This is nonsense and only demonstrates that the Project has never had that value.

950. Ultimately, the Claimant's problem is that it has no way of proving the basis of its claim: that South32 withdrew as a result of the violation it accuses the Respondent of and that, as a result, the Project lost all its value. In any case, the inaccessibility of the Project referred to by BRG (see previous quote) is not only the result of the protest by Mineros Norteños but also of the seizure of the properties.

c. The failure of the Project is attributable to the seizure of the concessions that followed the ruling in the litigation with the Valdez family.

951. In the Counter-Memorial, the Respondent explained that it was not entirely clear that South32 had withdrawn because of the Second Blockade. This is relevant because the Claimant alleges that it was “the illegal act of Mexico's failure to take any reasonable measures to end the

¹¹⁸⁹ Counter-Memorial, ¶ 401.

continued blockade [that] caused South32 to terminate the Option Agreement, *marking the end of the Project and the loss of the entire investment.*”¹¹⁹⁰

952. The Respondent referred in this context to the litigation between Minera Metalín and the Valdez family, which was resolved in favor of the Valdez family and resulted in the eventual seizure of Minera Metalín's concessions to guarantee payment of the debt the company owed to that family. The Respondent also noted that the Claimant, despite referring to the resolution of this dispute in its SdA as “*yet another example of the Mexican authorities' failure to accord SVB's investment with the protections under NAFTA,*” did not file a claim based on that measure.¹¹⁹¹

953. As recalled, Metalín prevailed in the first instance in the dispute brought by Mr. Valdez; however, Mr. Valdez succeeded in overturning the judgment through an appeal process that was resolved on October 1, 2020. Metalín challenged this ruling through an amparo proceeding, but the appeal was unsuccessful and was dismissed on June 10, 2021.¹¹⁹² Subsequently, on March 3, 2022, Mr. Valdez requested the First Civil Court of Coahuila to enforce the judgment, and on March 15, 2022, due to Metalín's failure to pay, its right to voluntarily pay the debt of more than US\$5 million to the Valdez family was declared precluded. Thus, on June 24, 2022, just two months after South32 withdrew from the Project, the Valdez family requested authorization to seize 14 of Metalín's concessions.¹¹⁹³

954. It was clear to the Respondent that the seizure of Metalín's concessions, which began before South32's departure, represented an insurmountable obstacle to the continuity of the Project and called into question the purchase option agreement that South32 had with SVB. To follow up on this hypothesis, the Respondent requested the production of all communications between the Claimant or any related company and South32 in connection with the litigation with the Valdez family between October 1, 2020, and September 30, 2022.¹¹⁹⁴ The Claimant did not object to the

¹¹⁹⁰ Memorial, title of section "(H)" beginning at ¶ 2.202.

¹¹⁹¹ Counter-Memorial, ¶ 556.

¹¹⁹² Reply, ¶323.

¹¹⁹³ See Counter-Memorial, ¶¶ 554-559.

¹¹⁹⁴ Respondent's Motion No. 1. See Annex B to Procedural Order No. 3 (i.e., the Respondent's Redfern with the Tribunal's decision), pp. 7-12.

request, but did not produce a single communication related to lithium with the Valdez family or to the seizure of the concessions requested by the Valdez family to enforce the judgment.

955. As explained in the Respondent's request for documents, Clause 5.2 of the Option Agreement with South32 stated that neither SVB nor Metalín could establish or allow liens on Metalín's properties or assets without South32's authorization.¹¹⁹⁵ Likewise, as noted in the Counter-Memorial, the Valdezes contacted South32 directly to alert it to the outcome of the litigation.¹¹⁹⁶ Given the above, the Respondent considers it frankly implausible that there was no communication between Metalín and South32 regarding the litigation with the Valdezes and/or the seizure of Metalín's concessions that the Valdezes requested in June 2022 to guarantee the amount that Metalín owed them as a result of the litigation (US\$5.9 million). It would be equally implausible that South32 had become aware of the outcome of the litigation and the seizures of the concessions and decided to ignore these facts when it decided to withdraw from the Project.

956. It should be noted in this regard that the Claimant has not presented any contemporary evidence of the reasons why South32 decided to withdraw from the Project. The few communications that the Claimant has placed on the record account for the decision, but not the reasons behind it. This is important because the Claimant attributes South32's withdrawal and the failure of the Project to the Respondent's alleged inaction in response to the Second Blockade, but there is no contemporary evidence that the Mexican government's alleged inaction caused South32's withdrawal (and the failure of the Project).

957. Finally, in accordance with the standard of full reparation, the Respondent would be obliged to eliminate the consequences of the wrongful act and restore the situation that would in all probability have existed if the wrongful act had never been committed. This "situation that would in all probability have existed" had it not been for the government's alleged inaction in response to the Second Blockade would have been the loss of the concessions due to the aforementioned embargo and the failure of the Project even if South32 had decided to remain a partner of Metalín.

¹¹⁹⁵ Option Agreement, p. 46. **C-0031**.

¹¹⁹⁶ Counter-Memorial, ¶¶ 256-257. *See also*, Mr. Antonio Valdez's report to South32, **R-0062**. Letter of intent from SVB to the Valdez family, **R-0045**.

958. In short, the Claimant has not demonstrated the existence of a sufficient causal link between South32's departure (which allegedly eliminated the value of the Project) and the Mexican government's alleged failure to use force to prevent the Mineros Norteños from continuing their protest against Metalín.

3. Contributory negligence and mitigation of damages

959. The Claimant accuses the Respondent of confusing the concepts of contributory negligence and mitigation. It alleges that Mexico argues that the Claimant did not mitigate its damages by not paying royalties to Mineros Norteños and, at the same time, that this was the reason why it incurred the damage.¹¹⁹⁷ Based on the foregoing, the Respondent concludes that the same factual basis cannot simultaneously be the cause of the loss and the demonstration that the Claimant did not mitigate the damage:

660. Here, however, the Respondent confuses the application of these two separate theories by using the same factual basis for both defenses. For instance, it claims that the Claimant did not mitigate its damages by failing to pay Mineros Norteños royalties and, at the same time, it claims that this was the reason the Claimant suffered its injury. This is logically incoherent – even if the factual basis of the Respondent's argument were accepted, the same actions cannot be both the prior cause of a loss and a failure to reduce that same loss after it has occurred.

960. The confusion seems to be the result of a somewhat unfortunate wording in the Counter-Memorial:

571. The Respondent contends that SVB actively and negligently contributed to its loss, not only through its failure to comply with the obligation to commence operations within a period of four years and its intransigence in response to Mineros Norteños' proposals. It also did so by failing to attempt to mitigate its losses through the sale of the investment to a third party. Therefore, the Respondent respectfully contends that SVB should bear a very significant portion of the damages, in the unlikely event that the Tribunal finds the Respondent liable for a violation of NAFTA.¹¹⁹⁸

961. The second sentence of the quoted passage referred to the fact that the amount claimed would have been lower if SVB had attempted to mitigate its losses. It is in this sense that it was asserted that the Claimant actively and negligently contributed to its loss. To be clear, the Respondent's position is that the Claimant contributed to the damage by breaching its contractual obligations and by its intransigence during the negotiations with Mineros Norteños. On the other

¹¹⁹⁷ Reply, ¶¶ 659-660.

¹¹⁹⁸ Counter-Memorial, ¶ 571.

hand, the Claimant breached its obligation to mitigate damages by attempting to sell the Project to a third party when it was unable to continue with its own resources.

962. With regard to the argument of contributory negligence, the Claimant points out that this “is yet another manifestation of the Respondent's flawed argument that the Claimant should have simply acceded to Mineros Norteños's extortionate demands.” In its view, “there is simply no basis for argue that the Claimant should have agreed to unwarranted demands that contradicted the agreements between the parties, had already been rejected by Mexico's own courts, and were made under duress due to the unlawful Continuing Blockade that Mexico had failed to remove, prosecute, or sanction.”¹¹⁹⁹

963. The Respondent finds it surprising that the Claimant relies on court rulings that dismissed Mineros Norteños' claim on the grounds of the statute of limitations and, at the same time, ignores (or pretends to ignore) that those same rulings indicate that Metalín had committed to starting operations and paying royalties to Mineros Norteños within approximately four years. The Respondent does not even deny the commitment, but merely alleges that it was not enforceable because Metalín had not yet commenced commercial operations. Mineros Norteños' demand that Metalín fulfill this commitment is what the Claimant characterizes as “extortionate demands.”

964. The Claimant also asserts that, in essence, “Mexico's argument condones Mineros Norteños's illegal conduct, by contending that no matter what Mineros Norteños's demands were, what threats Mineros Norteños made, or what Mexico's own courts had decided, the Claimant should have met those demands come what may.” This is false. Mexico has never condoned illegal conduct in this case. The investigations that were conducted at the time did not reveal any illegal conduct on the part of Mineros Norteños, and that was the reason why no action was taken against their protest. As already stated, Mineros Norteños have a constitutional right to demonstrate freely, and the authorities cannot simply suppress that right because SVB finds it inconvenient.

965. Unfortunately, the saga with Mineros Norteños is not the only conflict between Metalín and the locals. Mr. Valdez's testimony, presented in this document, shows that this is more of a pattern of behavior. A *modus operandi* whereby Metalín acquired certain mining concessions that

¹¹⁹⁹ Reply, ¶ 661.

were in the hands of local groups for a modest initial payment and promises of future payments that would never materialize.

966. Mr. Valdez testifies that between 2010 and 2011, there were at least four groups of people with signed purchase agreements that were subsequently repudiated by Metalín.¹²⁰⁰ Some of these groups decided not to file lawsuits against the company and settled for the return of their land. However, the Valdez family and the Mineros Norteños did not accept the settlements offered by the company after it breached its contracts, which led to legal proceedings and protests, such as the one that brings us here today. The Claimant simply wants the Respondent to forcibly resolve the conflicts it created with its indefensible conduct.

967. Ironically, the Claimant also states in its 2019 10-K report: “*Our success depends on developing and maintaining relationships with local communities and other stakeholders.*”¹²⁰¹ The Mineros Norteños and the Valdez family would surely question Metalín's commitment to what its parent company described as an essential element of the Project's success. The Respondent reiterates that taking advantage of a group of people with limited resources and sophistication is not the way to guarantee the future of a mining project.¹²⁰²

968. Turning to the issue of damage mitigation, the Claimant accuses the Respondent of attempting to shift its *burden of proof* onto the Claimant by arguing that there is no evidence that SVB made any effort to mitigate its damages.¹²⁰³ The Respondent did not attempt to shift the burden of proof to the Claimant. It simply noted that SVB had not referred to any efforts to mitigate the damage in its submission and had not provided any evidence in that regard. The Claimant cannot seriously punish the Respondent for not providing evidence of non-mitigation, knowing that Mexico had not yet had the opportunity to request documents. It will be recalled that in these proceedings, it was determined that there would be a round of document production after the Counter-Memorial.

¹²⁰⁰ Witness Statement of Mr. Antonio Valdez, ¶¶ 30-33.

¹²⁰¹ Silver Bull Resources, INC, Form 10-K for the Fiscal Year Ended October 31, 2019, p. 16. **R-0088.**

¹²⁰² Counter-Memorial, ¶ 551.

¹²⁰³ Reply, ¶ 667.

969. During the document production stage, the Respondent requested: “*Communications sent or received by the Claimant or its subsidiaries, or internal Communications relating to any attempt to sell the Project to a third party to recover at least part of the alleged damages. This request includes internal discussions regarding the feasibility of selling the Project, offers sent to potential buyers and their respective responses.*”¹²⁰⁴ The Tribunal granted the request but limited it to written offers to acquire the Project, noting that “[a]ny such offers might well be relevant and material to mitigation.”¹²⁰⁵

970. The Claimant did not produce a single offer, which may be due to: (i) it made no effort to find a buyer, or (ii) it could not do so because it knew about the liens on the concessions and that no rational investor would invest in a mining project without certainty about the ownership of the concessions. Either of these options would be highly detrimental to the Claimants' claim. The first case would imply their liability for failing to fulfill their obligation to mitigate damages. The second would imply that the causal link between the violation and the damage does not exist.

971. In any event, the Respondent is confident that if the Claimant had had in its files communications with third parties demonstrating that it attempted to sell the Project after South32's departure, the Claimant would have presented them to this Tribunal to support its argument that no rational investor would have invested in the Project after South32's departure. Instead, it relies on the mere statements of Mr. Barry and BRG.

D. Valuation

972. The Claimant's expert (BRG) attributes a value of US\$315.3 million to the Sierra Mojada Project as of August 31, 2022.¹²⁰⁶ This value is obtained by applying the comparable transactions methodology, which corresponds to the market approach. In addition, BRG uses three other alternative methodologies to reaffirm its value conclusion: (i) “Public guideline companies,” which also belongs to the market approach (US\$426.8 million); (ii) “Multiple of Exploration Expenditure” (MEE), which is a cost approach methodology (US\$485.9 million); and (iii) sunk costs.¹²⁰⁷

¹²⁰⁴ See Annex B to Procedural Order No. 3, p. 35 (request 8).

¹²⁰⁵ Annex B, Procedural Order No. 3 on Production of Documents, p. 35.

¹²⁰⁶ Second BGR Report, ¶¶ 17, 204.

¹²⁰⁷ Second BGR Report, ¶¶ 16-17.

973. As will be seen below, BRG's damage estimate and its alternatives are grossly exaggerated and contain inherently speculative elements that make them in ly inapplicable in the context of international arbitration. The Respondent has requested its damage expert, Dr. Tiago Duarte-Silva of Charles River Associates (CRA), to respond to the second report of the Claimant's damage expert (BRG). The main conclusions are summarized below. For a more detailed explanation of each of these points, the Respondent refers the reader to Dr. Duarte-Silva's second report (CRA Report 2).

1. Comparable Transactions

974. The primary method used by BRG to value the Project is that of comparable transactions. As its name suggests, the method consists of deriving the value of the investment from a set of transactions involving similar properties.

975. Defining this set of “comparable” transactions is the first step in this methodology. Once the set of comparables has been identified, the implicit value multiple in each of the selected transactions is calculated (in this case, “Enterprise Value / Weighted Mineral Resources”). Subsequently, the average value of the multiples obtained in the previous step (the median in this case) is calculated, and the result is multiplied by the weighted volume of mineral resources of the Project to determine its “*enterprise value*.”

976. Dr. Duarte-Silva's criticism focuses on the questionable comparability of these transactions. BRG uses a set of nine “comparable” transactions. In his first report (CRA Report 1), Dr. Duarte-Silva explained that it was necessary to exclude certain transactions involving properties: (i) with mineral reserves declared at the date of the transaction; (ii) whose mineralization was less than 50% silver or zinc; and (iii) with unquantified resources at the date of the transaction. The reasons behind these exclusions were explained in detail in CRA Report 2.¹²⁰⁸ In summary:

- the first category of transactions had to be excluded because the Sierra Mojada Project had not declared reserves as of the valuation date, as it was still in the exploration phase and had not conducted a feasibility study.

¹²⁰⁸ CRA Report 2, ¶ 5.

- The second category of transactions had to be excluded because the Sierra Mojada Project was primarily a gold and silver mining project and was therefore subject to the conditions of those markets.
- The third category had to be excluded because the presence of unquantified resources skewed the multiple of the sample of comparables upward because their value was reflected in the numerator, but the volume of unquantified resources was not included in the denominator.

977. These three filters reduced the sample of comparables to two transactions: Levon and Tinka.¹²⁰⁹

978. In its second report, BRG criticizes this conclusion, arguing that Levon should not be part of the sample because when the sample consists of only two transactions, the average or median of the sample cannot be used. This, of course, is counterintuitive and inappropriate, as explained in Section III.A.3 of CRA Report 2.¹²¹⁰

979. BRG has corrected its sample of comparables to address some of Dr. Duarte-Silva's criticisms, but objects to the exclusion of five transactions with unquantified mineral resources (Murchinson, Pine Point, Altamin, Constantine, and Arizona). Dr. Duarte-Silva disagrees, but acknowledges that there could be reasons why an investor might consider two of these five transactions (Murchinson and Pine Point). For this reason, Dr. Duarte-Silva includes these two transactions in an alternative set of comparable transactions.¹²¹¹

980. Another controversial point is the use of an index to update the multiple for each of the comparable transactions to the valuation date set in this arbitration. BRG objects to this adjustment, asserting, without basis, that such an adjustment is unusual and inappropriate. Dr. Duarte-Silva maintains that the adjustment is common and necessary to ensure that the multiples obtained from comparable transactions reflect the evolution of market conditions as of the valuation date. Failure to make this adjustment would lead to multiples that do not reflect the passage of time and

¹²⁰⁹ CRA Report 2, ¶ 5.

¹²¹⁰ CRA Report 2, ¶ 6

¹²¹¹ CRA Report 2, ¶ 8

significant movements in the sector that would impact the fair market value of the Sierra Mojada Project.¹²¹²

981. Another controversial point in the context of comparable transaction valuation is the application of a control premium. BRG increases the value of comparable transactions involving less than a 50% stake by 32.9%, arguing that this is standard practice. It is not, as explained in CRA Report 1.¹²¹³

982. A control premium is only appropriate when the potential buyer believes that there are ways to increase the value of the investment through better management of the company or synergies.¹²¹⁴ It is obvious that if the company is well managed and there are no synergies to be exploited, taking “control” of the company would not increase its value and, therefore, no control premium would be justified. The following example, taken from one of the leading texts on valuation, illustrates this point:

For instance, if the value of a private firm run by an incumbent management is \$100 million and the value of the firm run optimally is \$150 million, the difference between 51 percent and 49 percent shares can be computed as follows:

Value of controlling interest = 51% of optimal value = $0.51 \times 150 = \$76.5$ million

Value of non-controlling interest = 49% of status quo value = $0.49 \times 100 = \$49$ million

The additional 2 percent interest (from 49 to 51 percent) has a disproportionate effect on value because of control. This value of control will be greatest for private firms that are poorly run and will be close to zero for well-run firms.¹²¹⁵ [Emphasis added by Respondent]

983. If BRG believes that a potential buyer would have paid an additional premium for control in any of the transactions included in its set of comparable transactions, it should have justified this on a case-by-case basis. It did not do so and cannot simply disregard this analysis by assuming that an investor will always be willing to pay a third more for a stake that gives it control of any company.

¹²¹² CRA Report 2, ¶ 9

¹²¹³ CRA Report 1, ¶ 109.

¹²¹⁴ CRA Report 2, ¶ 10.

¹²¹⁵ Damodaran, Aswath; *Investment Valuation*, Wiley Finance, Second Edition (2002), p. 685. **R-0171.**

984. Dr. Duarte-Silva also notes that BRG does not distinguish between the percentage of the stake acquired and the degree of control. Instead, it assumes a general premium for all transactions involving a stake of less than 50%. However, it is possible that a transaction of less than 50% could give the buyer control of the company, in which case any control premium would have been included in the price paid, even though the transaction involved less than 50% of the share capital.¹²¹⁶ Increasing that price by almost 33% would inevitably lead to an overestimation of the value of the transaction.

985. The third, and perhaps the biggest point of disagreement among experts, is the unjustified use of weightings to obtain the average volume of resources used in the denominator of the selected multiple, which serves as the basis for the project valuation. Specifically, BRG applies a weighting of 90% for “measured” resources, 50% for “indicated” resources, and 10% for “inferred” resources.¹²¹⁷

986. BRG claims that these weightings are “*uniform and derived from widely accepted guidelines*.” However, in another opinion offered in another arbitration (*EcoOro v. Colombia*), BRG used different weightings, which it described at the time as “*used practically uniformly in the mining industry*.”¹²¹⁸ Dr. Duarte-Silva observes that if BRG had used these weights, which it described as universally used in the mining industry, in another case, the result would have been significantly lower.¹²¹⁹ This inconsistency demonstrates the impact of the arbitrary use of weightings and the speculation inherent in BRG's valuation.

987. As explained at the time, the proportion of mineral resources that can be economically extracted (i.e., mineral reserves) is determined through a complex and exhaustive feasibility study. The result depends on a multitude of factors (“modifying factors”) ranging from the estimated quality of the ore to the type of mine to be developed, which obviously depends on the specific characteristics of the project.¹²²⁰ There are no generally applicable rules for estimating the volume

¹²¹⁶ CRA Report 1, ¶¶ 107-111. CRA Report 2, ¶¶ 139-140.

¹²¹⁷ First BRG Report, ¶ 65.

¹²¹⁸ CRA Report 2, ¶ 12.

¹²¹⁹ CRA Report 2, ¶ 12.

¹²²⁰ According to the definition in the CIMVAL guidelines: “Modifying Factors means considerations used to convert Mineral Resources to Mineral Reserves. These include, but are not restricted to, mining, processing, metallurgical, infrastructure, economic, marketing, legal, environmental, social, and

of mineral reserves (). If there were, and if they were reliable, companies would not invest substantial resources in developing technical and economic feasibility and pre-feasibility studies.

988. Dr. Duarte-Silva also considers that BRG misrepresents the source from which it derives these weights, in addition to not citing any empirical analysis or other evidence to support them.¹²²¹

989. To illustrate the impact of the assumptions used by BRG, Dr. Duarte-Silva points out that if the comparables he considers appropriate (i.e., Tinka and Levon) were used, the weights that BRG used in *EcoOro* were used, the generalized application of the control premium were eliminated, and the multiples of comparable transactions were updated to the valuation date using an industry index, the Project would have a value of just \$30 million, a figure that would be reduced to \$19 million if the base were expanded to include the Murchinson and Pine Point transactions, which, according to BRG, should be included.¹²²²

2. Comparable companies (Public Guideline Companies)

990. This method is analogous to that of comparable transactions, but instead of calculating a multiple based on the value paid in a transaction, it is calculated based on the capitalization value of public companies that are considered comparable. As in the case of comparable transaction valuation, the differences between the experts focus on the sample of comparable companies, the widespread (and unjustified) use of a control premium, and the use of arbitrary weights to obtain the weighted volume of mineral resources.

991. With regard to the sample of comparable companies, the main difference between the experts is a series of filters proposed by Dr. Duarte-Silva to ensure the comparability of the companies in the sample. Dr. Duarte-Silva proposed three additional filters to those applied by BRG:

- Exclude companies with properties with unquantified resources, as the value of such properties is reflected in the capitalization value of the company (the numerator of

governmental factors (CIM Definition Standards).” *The CIMVAL Code for the Valuation of Mineral Properties*, November 29, 2019, p. 39. **R-0080.**

¹²²¹ CRA Report 2, ¶¶ 11-12.

¹²²² CRA Report 2, ¶ 13.

the multiple) but the volume of such resources is not yet reflected in the denominator. This skews the multiples of these companies and the median of the sample upward.

- Exclude companies that declared companies or started production in the three years prior to the Valuation Date. This filter was added to ensure an adequate level of comparability in terms of the development phase.
- Exclude companies whose size differs materially from the Sierra Mojada Project. This filter is intended to ensure comparability in terms of project scale.

992. In his first report, Dr. Duarte-Silva demonstrated, through the application of these filters, that only four of the original sample of 41 companies proposed by BRG are sufficiently comparable to value the Sierra Mojada Project (Fireweed, Renegade, Silver Storm, and ZincX). In its second report, BRG acknowledges that three of its original 41 companies should have been excluded for the reasons given by Dr. Duarte-Silva, but it kept the rest of the companies in the sample.¹²²³ For BRG, the filters for size and unquantified resources are not applicable.

993. Section III.B.1.b of Dr. Duarte-Silva's second report justifies the use of the filters he proposes. The Respondent considers it impractical to reproduce all these reasons here and therefore requests that they be considered reproduced herein and urges the Tribunal to review that section of the CRA report for a complete explanation of these valuation parameters.

994. The second point of difference between the experts is BRG's generalized application of a control premium. Unlike the comparable transactions valuation, where BRG applied the premium only to those transactions representing a minority interest (less than 50% of the shares), BRG applies the 32.9% control premium to all comparable companies under this method. The reasons for rejecting this generalized use of the control premium are fundamentally the same as those explained in the previous section on the comparable transactions method.

995. As explained at the time, such premiums are only justified when there are reasons to believe that the company in question is poorly managed and could generate greater profits for its shareholders by changing management. The control premium would be justified in such cases

¹²²³ CRA Report 2, ¶¶ 14-15. As indicated above, including companies with properties with unquantified resources skews the result, since the presumed value of these resources is recognized in the numerator of the multiple without the volume of these resources being recognized in the denominator.

because it would allow the new majority shareholder to make that change in management and increase the value of the company. However, it is not reasonable to assume that all publicly traded companies are poorly managed, as BRG implicitly assumes. The analysis must be done on a case-by-case basis, and it was up to BRG to carry it out, since it is BRG that proposes the application of the premium. However, the Claimant's damage expert did not do so. Instead, he implicitly asks this Tribunal to assume that all publicly traded shares do so at a discount of 32.9%.

996. To illustrate the pernicious effect of applying a generalized control premium, Dr. Duarte-Silva removed it from the BRG model, keeping the rest of the variables unchanged. With that single change, the sample multiple is reduced from \$0.95 to \$0.71 and the resulting value for the Sierra Mojada Project from US\$427 to US\$321 (almost one hundred million dollars).¹²²⁴

997. The third point of disagreement among the experts is the weights that BRG uses to calculate the volume of resources that make up the denominator of the multiple (EV/Weighted Resources). As explained in the previous section, these weights lack support, and BRG itself has proposed different weights in another case using essentially the same justification—i.e., that they are in almost uniform use in the industry.

998. Dr. Duarte-Silva performed a sensitivity analysis replacing BRG's weightings (90%, 50%, and 10%) with the weightings that BRG used in another case, arguing that they were universally applicable (50%, 50%, and 25%). This change would reduce the value of Sierra Mojada from US\$48 million to US\$19 million if the sample of four comparables proposed by Dr. Duarte-Silva is used, and from US\$132 million to US\$38 million if a sample of ten comparables is used (i.e., the size filter is not applied).¹²²⁵

999. Dr. Duarte-Silva also comments on the inconsistency of BRG's position regarding the use of market capitalization value. As noted in his second report, BRG dismisses SVB's market capitalization as a means of valuing the Sierra Mojada Project, falsely arguing that SVB's shares are not “efficiently” traded or marketed (in the economic sense). However, it seems to forget its concern in its approach to comparable companies. In fact, BRG never bothered to demonstrate that

¹²²⁴ CRA Report 2, ¶ 140.

¹²²⁵ CRA Report 2, ¶ 141, subparagraphs a and b.

the shares of the companies it includes in its sample of comparables are traded efficiently.¹²²⁶ Dr. Duarte even points out that several of these companies would fail the test that BRG used to reject the market capitalization methodology for valuing damages in this case.¹²²⁷

1000. Section III.B.1 of the CRA Report 2 justifies the use of the proposed filters and explains why the resource volume database used by BRG is unreliable and why a generalized control premium cannot be applied. Respondent considers it impractical to reproduce all of these reasons here and therefore urges the Tribunal to review that section of the CRA report for a full explanation of these valuation parameters.

1001. If (i) the filters proposed by Dr. Duarte-Silva, (ii) the weights that BRG described as universally used in the mining industry at *EcoOro*, and (iii) the generalized control premium were eliminated, the final result would be a valuation of US\$19 million.¹²²⁸ This is far from the US\$315.3 million proposed by BRG, but “mysteriously” close to SVB's capitalization value before the Second Lockdown (US\$17 million).¹²²⁹

3. Multiple of Exploration Expenditure (MEE)

1002. The Claimant's expert offers a third valuation using the “Multiple of Exploration Expenditure” method. BRG applies this method by adding up all the expenses incurred in the exploration of the Sierra Mojada properties and then multiplying it by a factor called the “Prospectivity Enhancement Multiplier” (PEM) of 3x.

1003. In CRA Report 1, Dr. Duarte explained his objections to this method. In his opinion, BRG artificially inflated the expense base and did not adequately justify the use of a PEM of 3x.¹²³⁰ He also noted that the literature cited by BRG in support of this method (Lawrence and Dewar, 1999) rejects the application of the MEE in the manner applied by BRG, observing: “*It is quite erroneous to see [the MEE method] as a simple formula where one identifies all past exploration expenditure and then factors it up by a multiple.*”¹²³¹

¹²²⁶ CRA Report 2, ¶¶ 174-178.

¹²²⁷ CRA Report 2, ¶ 176.

¹²²⁸ CRA Report 2, ¶¶ 15-16.

¹²²⁹ CRA Report 2, ¶ 17.

¹²³⁰ CRA Report 1, ¶¶ 134-139.

¹²³¹ CRA Report 2, ¶ 205, *See also* SD-042, p. 18.

1004. With regard to the cost base, Dr. Duarte-Silva explained in his first report that it was based on unaudited and unverifiable accounting records, as they were not supported by invoices and other documents that would have allowed for verification. Needless to say, no hypothetical buyer would have been willing to purchase the properties at a price obtained using a method whose inputs cannot be verified. That is why some of the FMV definitions refer to a well-informed buyer and seller or an equivalent formulation.¹²³²

1005. The inability to verify the expense base on which this method is based is not a theoretical concern. In his first report, Dr. Duarte Silva mentioned that the base used by BRG included an additional US\$25 million to the exploration expenses reported in SVB's annual reports to the SEC (i.e., the "10-k reports").¹²³³ In its second report, BRG states that the exploration expenses reported in the 10-k reports do not capture the so-called "overhead costs" because they are included in the total expenses item.

1006. However, this explanation is unsatisfactory, primarily because there is no way to determine whether these costs are associated with the Sierra Mojada Project or with SVB's projects in Gabon or Kazakhstan ().¹²³⁴ It should also be noted that normally not all overhead costs are included in the expense base in an MEE approach, but only those related to exploration (hence its name), and the component of overhead costs that could reasonably be attributed to the exploration of the Sierra Mojada properties should already be included in the figures reported in the 10-K reports as "Exploration and Property Holding Costs."

1007. According to the literature cited by BRG in its report, only "*reasonable administrative overheads*" should be included in the base. A SAMREC guide on the application of the cost

¹²³² For example, the *Merriam-Webster Dictionary* defines FMV as: "a price at which buyers and sellers with a reasonable knowledge of pertinent facts and not acting under any compulsion are willing to do business." Available at: <https://www.merriam-webster.com/dictionary/fair%20market%20value> *Odyssey v. Mexico*, ICSID Case No. UNCT/20/1, "Award," September 17, 2024, ¶ 560: **CL-0183** citing *Starrett Housing v. Iran Final Award*, ¶ 277. ("In this respect, seeking to give precise content to the FMV concept, the Majority adheres to the formulation made by the *Starrett Housing v. Iran* tribunal, which defined FMV as '*the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat.*'") Emphasis added.

¹²³³ CRA Report 1, ¶ 122 and Figure 4.

¹²³⁴ CRA Report 2, ¶ 211.

approach to the valuation of mining assets at the exploration stage confirms this understanding by stating: “for expenditure to be relevant, it must be directly applicable and specific to the mineral asset as well as the commodity. Instances of non-relevance include: (...) Head office (or other) expenses which are not directly related to the exploration efforts and results. Reasonable administrative costs directly applicable to the asset may be included.”¹²³⁵ BRG did not carry out this analysis despite the fact that it is the Claimant who has the burden of proving its damages based on the principle of reasonable certainty.

1008. Dr. Duarte-Silva also pointed out in his first report that only those exploration expenses that were effective and contributed to increasing the value of the property could be included in the base. In its second report, BRG states that all exploration costs and expenses should be included, regardless of whether they were wasted or not, because they all provided additional information about the Project. However, as Dr. Duarte Silva points out in his second report, this position contradicts the literature that BRG itself cites in its report:

the method derives the required value from only the relevant and effective exploration expenditure (...). The Expenditure Base comprises past expenditure (including reasonable administrative overheads, but not expenditure which has been deemed ineffective and written off for tax purposes.¹²³⁶

1009. But again, BRG did not carry out this analysis. Nowhere are the expenses that make up the base analyzed to verify that they were reasonable and effective. BRG simply assumes that all exploration expenses are relevant and should be part of the base. This is clearly unreasonable and implies an unacceptable deviation from the principle of reasonable certainty.

1010. Moving on to the topic of PEM, Dr. Duarte-Silva believes that the 3x PEM used by BRG is subjective and not properly supported.¹²³⁷ Not only that, but it contradicts the sources that BRG itself cites. For example, BRG relies on an article by P.G. Onley which, according to the expert, states that the PEM typically falls within a range of 0.5x to 3x and the latter applies to “*ore-grade intersections or exposures indicative of economic resource.*” According to Dr. Duarte-Silva, the article not only fails to point this out, but also states, “*The author is only aware of one example*

¹²³⁵ CRA Report 2, ¶ 214,

¹²³⁶ CRA Report 2, ¶ 220 citing SD-0142, p. 18.

¹²³⁷ CRA Report 2, ¶ 217.

where the parameters have been explicitly defined.”¹²³⁸ The same article emphasizes that the greatest limitation of cost-based valuation methods (such as MEE) “*is probably the subjectivity involved in applying the [PEM],*”¹²³⁹ since the PEM “*is far too subjective and practitioners should be rigorous in their definition of the PEM factor used.*”¹²⁴⁰

1011. The Claimant’s damage expert does not have the credentials to determine the PEM factor to be used in a valuation using the MEE method. As can be seen, this factor depends on a subjective assessment of the expected return on the expenses incurred, which will necessarily depend on the specific characteristics of a project. A PEM cannot be applied in a general manner without an analysis to justify it, yet that is exactly what BRG does. The Claimants could have hired an independent expert (i.e., a geologist) to determine the appropriate multiple for the Sierra Mojada Project and what expenses should be included in the base, but they did not do so. BRG’s speculations are not a substitute for that analysis.

1012. It should also be noted that BRG adjusts the cost base for inflation before applying the PEM, but none of the sources it cites to support the 3x PEM it uses refer to this adjustment, which may result in double counting of the damage. In other words, BRG does not explain or justify that a 3x PEM is applicable to inflation-adjusted expenses. To illustrate this point, Dr. Duarte offers the following example:

Suppose a property’s value when transacted is \$30 and its past costs were \$10. The resulting multiple is 3.0x (i.e., $\$30/\$10=3.0$). But those costs adjusted for inflation are \$25. Now the multiple is 1.2x (i.e., $\$30/\$25=1.2$). So, that multiple of 3.0x was largely due to inflation.¹²⁴¹

1013. BRG responds that some authors claim that costs should be adjusted for inflation; however, none of the authors it cites to support the use of a PEM of 3x mention inflation adjustments to the cost base. Therefore, the possibility of double counting damages remains.

1014. To verify whether it is reasonable to use a PEM of 3x to value properties such as Sierra Mojada, Dr. Duarte-Silva calculated the PEM implicit in the transactions that BRG uses as comparables in its main valuation. The method used by the expert is explained in detail in Section

¹²³⁸ CRA Report 2, ¶ 219.

¹²³⁹ SD-040, p. 196.

¹²⁴⁰ CRA Report 2, ¶ 223.

¹²⁴¹ CRA Report 2, ¶ 225.

IV.C of his second report. The results are summarized in the last column of Table 5 of his second report, which is reproduced below for the reader's convenience:

Table 5: Transaction Cost Multiples (\$ millions except for ratios)³²²

Target [a]	Implied Enterprise Value at 100% [b]	Adjusted EV [c]	Adjusted MPI [d]	Adjusted Implied EV/ Adjusted MPI [e]
[1] Altamin Limited (ASX:AZI)	\$22.56	\$19.36	\$41.37	\$0.47
[2] Constantine Metal Resources Ltd.	\$11.31	\$6.66	NA	NA
[3] Tinka Resources Limited (TSXV:TK)	\$62.83	\$34.05	NA	NA
[4] Murchison Minerals Ltd. (TSXV:MUR)	\$2.00	\$1.83	\$16.01	\$0.11
[5] Levon Resources Ltd.	\$10.15	\$9.61	\$52.90	\$0.18
[6] Arizona Mining Inc.	\$1,550.30	\$1,551.51	NA	NA
[7] Pine Point Mining Limited	\$23.19	\$21.79	NA	NA
[8]			Median	\$0.18

1015. As can be seen, the median cost multiple is only 0.18, which is significantly lower than 3. If this average value were applied to SVB's exploration costs in Sierra Mojada, updated in the same way that the costs of the companies behind these comparable transactions were updated, the valuation of Sierra Mojada would be \$27 million.¹²⁴²

1016. In summary, BRG's valuation using the MEE method cannot be accepted because: (i) the cost base to which the multiplier is applied was unduly expanded, and (ii) there is no support for the use of a PEM multiplier of 3x.

4. Sunk costs

1017. As an alternative to determining the FMV of the investment, BRG proposes using the sunk cost methodology to calculate damages under the full repair standard. Dr. Duarte-Silva criticized this valuation in his first report for two reasons: (i) BRG exaggerates the amount of these costs, and (ii) BRG updates the costs using a market index or the industry cost of capital, which, according to Dr. Duarte-Silva, would result in overcompensation for the Claimant.

1018. A first observation is that the cost base used by BRG includes costs incurred by other companies that contributed capital to explore the properties. In Dr. Duarte-Silva's opinion, only the costs incurred by the Claimant could be considered based on the full repair standard, since compensating the Claimant for an expense that it did not finance would put it in a much more

¹²⁴² CRA Report 2, ¶ 239.

advantageous position than it would have enjoyed had the alleged violation not occurred. Based on this criterion, Dr. Duarte-Silva excludes the US\$4.6 million contributed by South32 between 2018 and 2021 from the US\$56.9 million in exploration costs reported in SVB's SEC filings.¹²⁴³

1019. Regarding the updating of these costs to the Valuation Date, Dr. Duarte-Silva objects to using the index proposed by BRG or the industry cost of capital. As explained in Dr. Duarte-Silva's second report, the assumption behind this update is that the company could have invested these funds in other projects and obtained a return equivalent to that of the mining industry, if the cost of capital is used, or to that of silver mining, if the index is used. In both cases, in Dr. Durate-Silva's opinion, the Claimant would be compensated for a risk it never took.¹²⁴⁴

1020. In its second report, BRG argues that it is appropriate to update sunk costs because such an update represents the opportunity cost of the funds invested and reflects the fact that the Claimant would not have made these investments if it had known that its investment would be expropriated.¹²⁴⁵ However, this argument does not address the main criticism, which is that updating the costs using the index or cost of capital would compensate the Claimant for a risk it did not incur.¹²⁴⁶

1021. Certainly, SVB could have invested the funds in another project, but there was no guarantee of a positive return, let alone a return equivalent to the cost of capital in the mining industry or the return obtained by the silver mining industry in general. As Dr. Duarte-Silva points out in his second report, BRG overlooks the fact that, just as there are businesses that generate returns in excess of the cost of capital, there are also investments that fail and generate returns below that cost, and the same can be said of the return reflected in the index. Importantly, there is no way of knowing what the outcome of an alternative investment to Sierra Mojada would have been.¹²⁴⁷ The reality is that mining is a risky industry and, as SVB itself points out in its reports to the SEC, “[m]ost exploration projects do not result in the discovery of commercially mineable ore deposits.

¹²⁴³ CRA Report 2, ¶ 245.

¹²⁴⁴ CRA Report 2, ¶ 246.

¹²⁴⁵ BRG Second Report, ¶ 177.

¹²⁴⁶ CRA Report 2, ¶ 250.

¹²⁴⁷ CRA Report 2, ¶ 252.

Even if the presence of reserves is established at a project, the legal and economic viability of the project may not justify exploitation.”¹²⁴⁸

5. CRA assessment

1022. For Dr. Duarte-Silva, the best approximation of the FMV of the Sierra Mojada Project is obtained from the market capitalization of SVB immediately prior to the Second Lock-up, updated to the Valuation Date. To do this, Dr. Duarte-Silva takes the average market capitalization value of SVB in the 30 days prior to the Second Freeze (US\$20.8 million) and then updates it using an industry index to express that value as of the Valuation Date. The resulting value is US\$19.2 million.¹²⁴⁹

1023. BRG's main criticism of this valuation method is that, in its view, SVB's stock is not traded efficiently and, therefore, the stock price could deviate from its intrinsic value. To this end, it relies on an article by Bhole *et al.* published in *the University of Illinois Law Review Online*, which seeks to determine whether the market is efficient for legal purposes using eight indicators: *stock turnover*; analyst coverage; bid-ask spread; institutional ownership; market capitalization; short interest; presence of market makers; and cause-and-effect relationship.¹²⁵⁰

1024. In his second report, Dr. Duarte-Silva explains that the article on which BRG relies: (i) has no economic basis; (ii) with the exception of the cause-and-effect test, the indicators mentioned in the article only offer indirect evidence of efficiency and have been shown to be insufficient to establish it; (iii) the cause-and-effect test is the only scientifically valid test to demonstrate market efficiency (or inefficiency); and (iv) the cause-and-effect test demonstrates that SVB's stock was trading efficiently.¹²⁵¹ The Respondent refers the reader to Section III.B.2.c of the second CRA report for a detailed explanation of all these points, which can be summarized as follows:

- The article by Bhole *et al.* does not provide empirical evidence that would allow anyone to claim that a stock is not trading efficiently because it falls below a certain percentile of *the benchmark*. In fact, the authors point out that the fact that some of

¹²⁴⁸ Silver Bull Resources, INC, Form 10-K for the Fiscal Year Ended October 31, 2019, p. 15. **R-0088.**

¹²⁴⁹ CRA Report 2, ¶¶ 196-199.

¹²⁵⁰ CRA Report 2, ¶ 156, referring to BRG First Report, ¶ 118.

¹²⁵¹ CRA Report 2, ¶ 157.

the selected indicators fall below that level “*does not weigh in favor of market efficiency*,” which is not the same as saying that the stock is not trading efficiently. As Dr. Duarte-Silva states, the efficiency of a stock is not determined by comparing it to other stocks.¹²⁵²

- Other authors have shown that the indicators used in the article by Bhole *et al.* are not reliable for determining efficiency. For example, an article by Erenburg *et al.* concludes:

We find that reliance by the courts on certain indicators of market efficiency is inherently flawed. The general problem is failure to recognize that the empirical values of the indicators are endogenously determined. For example, while trading presumably makes prices more efficient, inefficient prices also motivate trading. Thus, it cannot be presumed in cross-sectional comparisons that higher share turnover or large numbers of analysts covering the stock [two indicators used in Bhole *et al.*] means that the shares are more efficiently priced. Similar endogeneity concerns arise with regard to the other factors commonly relied on by the courts. We find no useful relation between the factors we examine and the actual weak-form efficiency of the market.¹²⁵³ [Emphasis added by the Respondent]

- The cause-and-effect test is a statistical test used to determine whether the price of a given stock consistently responds to unexpected announcements that impact the value of the company. This is the only scientifically valid test of efficiency. The first BRG report even demonstrates that SVB's stock was efficiently priced based on this cause-and-effect test.¹²⁵⁴
- Dr. Duarte-Silva conducted his own cause-and-effect efficiency test and concluded: “*There is a statistically significant relationship between the press release variable and SVB's total returns. In plain terms, SVB's stock price reacts immediately to press releases. So, SVB's stock trades efficiently.*”¹²⁵⁵

¹²⁵² CRA Report 2, ¶¶ 160-162.

¹²⁵³ CRA Report 2, ¶ 163, citing G. Erenburg, J. K. Smith, and R. L. Smith, “*The Paradox of ‘Fraud-on-the-Market Theory: Who Relies on the Efficiency of Market Prices?’*” *Journal of Empirical Legal Studies*, Vol. 8, No. 2, 2011, 260–303, p. 300. **CRA-148.**

¹²⁵⁴ CRA Report 2, ¶¶ 165-168.

¹²⁵⁵ CRA Report 2, ¶ 171.

1025. BRG also objects to the use of SVB's market capitalization value because it argues that, by measuring it in the 30 days prior to the Second Block, CRA does not capture the positive impact of the final decision in the litigation with Mineros Norteños that was issued in 2021. On this point, Dr. Duarte-Silva explains in his second report that the impact of that decision was marginal. Dr. Duarte-Silva examined SVB's share price before and after the announcement of the legal victory on March 31, 2021, and concluded that the announcement increased SVB's share price by only 4%, or US\$1 million in terms of SVB's market capitalization.¹²⁵⁶ Incidentally, it should be noted that the fact that SVB's share price reacted to the announcement is further evidence that the stock is trading efficiently.

1026. Finally, BRG objects to the use of SVB's market capitalization to approximate the value of the Sierra Mojada Project, arguing that it does not take into account the fact that the self-described “massive sulfide mineralization” that Metalín detected in 2017 would surely have been quantified by the Valuation Date, and the company would have declared additional mineral resources. Dr. Duarte-Silva refutes this argument by pointing out the obvious: assuming the declaration of additional mineral resources is mere speculation with no basis other than the testimony of Mr. Barry, who is clearly not an independent expert.¹²⁵⁷

1027. To bolster its weak argument, BRG cites a private investment fund specializing in mining that points out that, once mineralization is detected, the resource definition phase would take between 1 and 3 years. According to BRG, this shows that SVB could have declared additional resources from the aforementioned deposit at some point between the start of the Second Lockdown and the Valuation Date. In this context, it is worth recalling what SVB reported in 2010 about the “non-sulfide zinc deposit”:

The non-sulfide zinc deposit lies at an average depth of 150-200 meters below the surface. The initial evaluation of the deposit by Metalline indicated that the deposit needed to be mined from underground to avoid a high stripping ratio. [...] An underground mining operation of this magnitude would generate insufficient revenue at foreseeable zinc prices to pay back the substantial (+\$500 million) capital requirement within a reasonable period of time [...]¹²⁵⁸

¹²⁵⁶ CRA Report 2, ¶ 146.

¹²⁵⁷ CRA Report 2, ¶ 153.

¹²⁵⁸ Silver Bull press release, November 19, 2010. **R-0085**.

1028. This example is provided only to illustrate the impact of BRG's speculation. It cannot be assumed that the “massive sulfide mineralization” would have increased the value of the Project.

1029. BRG also fails to mention that the discovery of this deposit was made in August 2017, and more than two years had passed between the discovery and the start of the Second Blockade without any declaration of additional resources. It also fails to mention that at least part of the positive impact of this discovery would already be incorporated into SVB's 2019 market capitalization, precisely because the announcement was made in 2017 and the stock is efficiently priced.¹²⁵⁹

E. Interest and taxes

1030. In the first round of submissions, the Claimant argued that SVB was entitled to receive no less than the interest rate that Mexico pays to its dollar creditors (i.e., the Mexican government's dollar funding rate) on the grounds that granting a lower rate would incentivize the Respondent to “refinance” its tax obligations by withholding payment of awards.¹²⁶⁰ The Respondent agreed with this position.

1031. In the Reply, the Claimant appears to change its position and now proposes three different rates: the Respondent's dollar funding rate (i.e., the rate originally proposed); the Claimant's cost of capital; and the U.S. *Prime Rate* plus a 2% premium.

Table 8: Pre-award interest sensitivity analysis

Figures in USD million	Respondent's CoD	Claimant's CoE	US Prime +2%
FMV of the Sierra Mojada Project as of 31 August 2022	315.3	315.3	315.3
Pre-award interest	59.6	77.1	90.7
Damages to Claimant as of 25 April 2025	374.8	392.4	406.0

1032. The Respondent argues that applying any of the alternative rates proposed by BRG would compensate the Claimant for a risk it never assumed, and reiterates that the only risk to which the Claimant would be exposed in the event of a favorable award would be the risk of non-payment by the Claimant, which is duly reflected in Mexico's dollar funding cost.

¹²⁵⁹ CRA Report 2, ¶ 155.

¹²⁶⁰ Memorial, ¶ 5.20.

1033. The Respondent also notes that, despite proposing these two alternative rates, the Claimant continues to request that the Tribunal “*ORDER Mexico to pay pre-award and post-award interest on a compound basis at a rate calculated by reference to Mexico's borrowing cost.*” Therefore, Mexico maintains its position that any interest that this Tribunal may determine should be calculated based on that rate with annual compounding.

1034. On the issue of taxes on the award, the Claimant notes that Mexico has not objected to the request that the award issued by the Tribunal be net of taxes. The Respondent considers that the Claimant has not proven its damages, but, in any event, the Claimant does not use a methodology based on after-tax income and, therefore, there is no reason to assume that there is a potential problem of double taxation. Therefore, there is no reason to determine that the award, if any, should be net of taxes.

VI. REQUEST FOR COSTS

1035. Pursuant to Section 9.1 of Procedural Order No. 1 and Rule 52(1) of the ICSID Arbitration Rules, the United Mexican States requests the Tribunal to order the Claimant to pay in full the costs and expenses incurred by Mexico as a result of this arbitration, including:

- the Tribunal's fees and expenses;
- the administrative expenses of ICSID;
- the fees and expenses of the attorneys representing Mexico;
- the fees and expenses of the experts engaged by Mexico; and
- any additional expenses related to these proceedings that Mexico reasonably incurs until the issuance of the Award.

1036. This arbitration has been the result of a misinterpretation of the investor-state dispute settlement system under NAFTA. The Respondent has been forced to respond to this arbitration, which was initiated and has been pursued by the Claimant itself, in relation to the investor's breach of a private contract with a community made up mainly of vulnerable elderly people. Furthermore, this is a project whose technical and financial viability was never proven. Investor-state arbitration was not designed to settle private disputes or to obtain undue benefits from contractual situations between private parties.

1037. The inadmissibility of the claim is confirmed by multiple factors:

- The Tribunal lacks jurisdiction *ratione temporis*, *ratione voluntatis*, and *ratione materiae*;
- Mexico did not breach any of its obligations under NAFTA;
- The Claimant has filed unfounded claims for the sole purpose of obtaining an undue benefit and exchanging, through arbitration, potential profits from a project with proven financial difficulties; and
- Alternatively, even if the Tribunal were to find that it has jurisdiction and that the Respondent is internationally liable, the Claimant's claim for damages is without merit.

1038. The Respondent recalls that ICSID tribunals have adopted a multi-factor approach to costs, considering:

... whether a party has prevailed in its claims, and if it has prevailed only in part, whether the rejected claims were reasonable or frivolous. It should also take into account the procedural conduct of the parties, and in particular whether such conduct unnecessarily delayed the proceedings or increased their costs. [Emphasis added]¹²⁶¹

1039. The Claimant's procedural conduct has unjustifiably increased the duration and cost of these proceedings. By way of illustration:

- Early in the proceedings, the Claimant filed an unfounded request to challenge an arbitrator, which suspended the arbitration for approximately two months and required additional time and costs from both the Respondent and the arbitrators. This request was rejected;
- The Claimant made a late, partial, and strategic production of documents that were always in its possession, including investigation file 0902/SP/UISO/2019, even going so far as to request adverse inferences against Mexico for the alleged absence of such documents. The Claimant's inefficient conduct in this matter included successive submissions requesting these documents from Mexico at a late stage of the

¹²⁶¹ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, February 7, 2017, ¶ 620. **RL-0170**.

proceedings, when the production of documents had already been completed, despite the fact that the Tribunal had rejected its requests and Mexico had stated that it did not have access to these files because they were part of a criminal case file subject to confidentiality. Furthermore, knowing that the Respondent's representatives were legally prevented from accessing the complete file, the Claimant, who finally acknowledged having access to the files, presented only strategically selected excerpts, which compromised the principles of equality of arms and due process. Finally, the complete file was produced late, only on July 2, 2025.

- The introduction of approximately 500 new pieces of documentary evidence in its Reply, including several manifestly inadmissible files, such as audio and video recordings obtained under irregular conditions, without the consent of those involved, which forced the State to devote considerable resources to reviewing and refuting them in their entirety, as well as to hire experts to refute the Claimant's slight and repeated accusations regarding Mexican criminal law;
- On July 18, 2025, the Claimant submitted a third documentary production, consisting mainly of internal emails from its own company corresponding to the period 2014-2022, which were always in its possession. These documents were delivered fragmented, cut up, and duplicated, which made their review unproductive and even unclear. This production included the untimely submission of nearly a hundred annexes just a few weeks before the presentation of the rejoinder, which placed an unnecessary procedural burden on Mexico.

1040. These examples demonstrate a dilatory and bad-faith procedural strategy designed to increase costs and put pressure on the State. Such conduct constitutes sufficient grounds for the claimant to be ordered to pay the costs in full.

1041. The situation is aggravated by the existence of a third-party funding agreement that enabled the Claimant to initiate and sustain this arbitration. It is not appropriate for the State to bear the costs of defending itself against an unfounded claim, especially when its financing is predominantly speculative in nature. In fact, to date, Mexico is uncertain whether, if its requests are granted and the claims fail, the Claimant will be in a financial position to pay the costs of these proceedings. No guarantee has been offered in this regard.

1042. Consequently, Mexico respectfully requests the Tribunal to:

- Order the Claimant to pay all costs and expenses of this arbitration;
- To include in that order any additional expenses related to these proceedings that Mexico reasonably incurs until the issuance of the Award; and
- Order that such sums bear compound interest from the date of the Award until full payment, at a reasonable commercial rate to be determined by the Tribunal.

1043. Only a full award of costs will reflect the reality of these proceedings: the Claimant has exploited investment arbitration for improper purposes, abused procedural rules, and forced the State to expend disproportionate human and financial resources.

VII. CONCLUSION

1044. In light of the foregoing, the Respondent requests that the Tribunal determine:

- That it lacks jurisdiction *ratione temporis*, *ratione voluntatis*, and *ratione materiae*;
- If the Tribunal assumes jurisdiction, it should reject the claims on their merits, because the alleged loss of investment is attributable to the Claimant;
- That no breach of the provisions of NAFTA has been demonstrated;
- Alternatively, if the Tribunal concludes that it has jurisdiction and that the Respondent has incurred international liability, the Respondent requests that its position on the quantum of damages be taken into consideration.
- If the Tribunal determines that the Respondent expropriated the Claimant's investment, Mexico requests that the Tribunal order the Claimant to transfer all of Metalin and Contractors' assets to the Respondent to avoid double recovery. This includes, without limitation: mining concession titles, exploration data and results as of the Valuation Date, real estate, and equipment. It also requests that payment of the award be conditional upon the delivery of these assets free of any encumbrances.

Respectfully submitted,

[Signed]

Alan Bonfiglio Ríos

General Director of Legal Consultancy for Internacional Trade.