CONFIDENTIAL

ICSID Case No. ARB/19/1

Administered by the

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

LEGACY VULCAN, LLC

Claimant

v.

UNITED MEXICAN STATES

Respondent

CLAIMANT'S ANCILLARY CLAIM REPLY

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1. Claimant Legacy Vulcan, LLC ("Legacy Vulcan") submits this Reply on Ancillary Claim in response to Mexico's Counter-Memorial on Ancillary Claim.[1]

I. INTRODUCTION

2. Mexico's Counter-Memorial fails to refute the facts that animate Legacy Vulcan's ancillary claim, its entitlement to relief in light of Mexico's wrongful conduct, and the amount of loss Mexico has caused Legacy Vulcan. The evidence is overwhelming. As the Tribunal was deliberating to issue the Award, Mexico launched an unprecedented campaign of public attacks against Legacy Vulcan and CALICA in an effort to pressure them into dropping this arbitration. Mexico's conduct left Legacy Vulcan with no choice but to seek the assistance of the Tribunal to prevent the aggravation of the dispute. Despite the Tribunal's order, Mexico has continued its anti-CALICA campaign. For close to ten months, Legacy Vulcan's operations in Mexico have been paralyzed, and there is no indication that this situation will change. The Tribunal has the power to right this wrong. It should award Legacy Vulcan the relief it seeks.

3. The record shows that Mexico shut down CALICA's remaining operations based on nothing more than the Mexican President's skewed, predetermined views of those operations, the political dividends accrued from attacking them, and the objective of pressuring Legacy Vulcan into dropping this arbitration and its investment in favor of local tourism interests. This is a textbook example of a State's failure to accord fair and equitable treatment. Legacy Vulcan is therefore entitled to compensation for Mexico's additional NAFTA breach.

4. The televised remarks of President Andrés Manuel López Obrador — which Respondent largely overlooks and tries to rewrite — alone establish the facts underpinning Legacy Vulcan's ancillary claim. The President announced in May 2022 that he had personally ordered the immediate shutdown of CALICA's ongoing extraction in La Rosita. His government swiftly executed that order. The President premised it on purported deception by CALICA, as well as unfounded allegations of illegality and environmental harm he had been spouting for months. None of those allegations were true, nor were they based on any administrative or formal finding that CALICA's operations in La Rosita were unlawful or environmentally harmful — because they were not. As the President publicly acknowledged, CALICA's quarrying of La Rosita had been authorized by prior administrations. Environmental authorities had confirmed CALICA had been doing so properly for nearly 30 years. The President simply decried that this "never should have

[1] Undefined terms herein have the same meaning provided in Claimant's Memorial on Ancillary Claim.

been authorized."[2] What Mexico had long ago evaluated and allowed was suddenly stopped and disallowed, without a proper basis in law or fact.

5. Mexico's President candidly revealed the motivations behind the shutdown he ordered — despite Respondent's efforts to spin his words. As the construction of one of President López Obrador's signature projects, the Mayan Train, started to gain traction, it became the target of criticism by environmental activists and political opponents of the President. He answered this criticism with attacks against CALICA, using Legacy Vulcan and its investments as scapegoats. He claimed that it was the nearby operations of CALICA that destroyed the environment and broke the law, not the Mayan Train's construction. He complained that CALICA's operations were authorized by "neoliberal" officials who hypocritically criticized the Train on environmental grounds. He decreed that CALICA's quarrying would be halted. Legacy Vulcan had to agree to drop this arbitration and transform its investment for tourism — a long-standing goal of local interests — or it would lose its investment.

6. In its Counter-Memorial on Ancillary Claim, Mexico ignores or sidesteps these facts — most notably the President's own words — and instead sketches an alternative reality based mostly on bare allegations lacking evidentiary support. Respondent makes the far-fetched allegation that Legacy Vulcan and CALICA have engaged in a fraud spanning over three decades, purportedly deceiving Mexican authorities by concealing their intent to disregard Mexican environmental laws. This is fiction.

7. In reality, Legacy Vulcan and CALICA have openly operated La Rosita for over three decades under valid government permits and in accordance with environmental laws, under the close scrutiny of Mexico's environmental-enforcement arm, as environmental-law expert [redacted] further confirms. CALICA has gone above and beyond its legal obligations by voluntarily subjecting itself to intrusive environmental audits for well over a decade, as [redacted] also confirms. Relevant authorities were fully aware of CALICA's activities *in La Rosita* for nearly 30 years and signed off on them. This changed in 2022, after President López Obrador started lambasting those activities and decreed they had to be stopped "immediately." Mexico's assertions of environmental destruction are pretextual and unsupported, as confirmed by the independent environmental expert report of Dr. Gino Bianchi

[2] Transcript of President's Morning Press Conference (31 March 2022) (C-0183-SPA.8) (free translation, the original reads: "Tienen estas dos mil 400 hectáreas, las compraron para extraer material, llevar el material a Estados Unidos; eso ya no se puede hacer ahora, no se debió hacer nunca, no se debió autorizar.").

Mosquera. **Part II** sets the factual record straight, rebutting and exposing Mexico's factual misstatements and falsehoods.

8. Mexico seeks to avoid liability for its wrongful conduct by raising an entirely new jurisdictional objection: that, because the wrongful shutdown of CALICA's remaining operations in Mexico occurred after NAFTA was terminated, NAFTA does not apply to that conduct. As **Part III.A** demonstrates, the Tribunal already ruled in Procedural Order No. 7 that Legacy Vulcan's ancillary claim is "within the scope of the consent of the Parties and within the jurisdiction of ICSID." Mexico's objection also is at odds with Annex 14-C of the United States-Mexico-Canada Agreement ("USMCA"), which extends NAFTA Chapter 11 protections for three years after NAFTA's termination for legacy investments such as Legacy Vulcan's. Mexico's belated attempt to escape the Tribunal's jurisdiction under NAFTA Chapter 11 should be rejected.

9. Turning to the merits of Legacy Vulcan's ancillary claim, **Part III.B** further demonstrates that Mexico, by arbitrarily thwarting CALICA's remaining operations on the President's whim, again failed to accord fair and equitable treatment to Legacy Vulcan's investment in violation of NAFTA Article 1105. Mexico also frustrated Legacy Vulcan's and CALICA's legitimate expectations that they would be able to operate and benefit from the Project for as long as economically feasible in accordance with the 1986 Investment Agreement and applicable permits, authorizations, and concessions duly issued under Mexican law. Mexico failed to refute this in its Counter-Memorial on Ancillary Claim, and its newfound reliance on NAFTA Article 1114 does not shield it from liability.

10. **Part IV** sets forth the quantum of damages to which Legacy Vulcan is entitled as a result of Mexico's breaches and rebuts Mexico's argument that Legacy Vulcan has not met its burden of proof on its damages claim. Contrary to Mexico's repeated contentions, NAFTA does not establish a territorial limitation on the applicable standard of compensation, *i.e.*, full reparation. Even if Mexico were correct, Legacy Vulcan has demonstrated that the fair market value of CALICA is the netback value of its reserves, as the vast majority of the value of the CALICA Network derives from the CALICA reserves themselves.

11. Legacy Vulcan has met its burden of proving these losses under NAFTA, which have been calculated by Darrell Chodorow and Fabricio Núñez of The Brattle Group in the amount of [redacted], before adjusting for interest and tax. Brattle's valuation is reasonable and well-supported by documents Legacy Vulcan maintained in the ordinary course of business, as well as by the testimony of Vulcan Materials Company's ("VMC") [redacted]

[redacted]. The alternative valuations put forth by Mexico (between [redacted]) do not pass the straight-face test, as they imply that Legacy Vulcan is better off with Mexico's wrongful measures than without them. Those valuations rely on conceptually unsound and implausible assumptions, and should be rejected.

12. Finally, as explained in **Part V**, Mexico's decision to delay its request for leave to file a counterclaim until its Counter-Memorial on Ancillary Claim is inconsistent with the Tribunal's order and the procedural rules governing this arbitration. It also disregards the careful procedural schedule negotiated by the Parties and adopted by the Tribunal. The Tribunal should deny Mexico's request for these reasons alone. Mexico's request should also be denied because its purported counterclaim falls outside the scope of the Parties' consent to arbitration, does not implicate any cause of action arising under NAFTA, and is not closely related to Legacy Vulcan's ancillary claim. Mexico's belated attempt to bring a counterclaim should be rejected accordingly.

II. STATEMENT OF FACTS

A. KEY FACTS RELATING TO LEGACY VULCAN'S ANCILLARY CLAIM CANNOT REASONABLY BE DISPUTED.

13. Mexico's Counter-Memorial on Ancillary Claim ignores or sidesteps key facts animating Legacy Vulcan's ancillary claim that are effectively conceded or well established by record evidence, including background facts about Legacy Vulcan's investments in the Project:

- CALICA began its investment in the Project as a result of its 1986 agreement with state and federal authorities (the "1986 Investment Agreement"), which envisioned a project for the quarrying and processing of limestone for the export by sea of aggregates to U.S. customers.[3]
- As stated in the 1986 Investment Agreement, the environmental impacts of the Project were evaluated and the Project was authorized from an environmental standpoint by Mexican authorities.[4]
- Mexico's Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*) ("SEMARNAT") and its enforcement arm, the *Procuraduría Federal de Protección al Ambiente* ("PROFEPA") thereafter

[3] *E.g.*, Memorial (Ancillary Claim), ¶ 10; Counter-Memorial (Ancillary Claim), ¶¶ 32-33, 142.

[4] Memorial (Ancillary Claim), ¶ 10; Counter-Memorial (Ancillary Claim), ¶¶ 142, 144-145; *see also, e.g.*, Investment Agreement (6 August 1986) (C-0010-SPA.4, 6, 11, 14, 50) (noting, *inter alia*, that the federal government "conducted the required environmental impact assessments" and that the project was "feasible from an environmental standpoint."); *id.*, Annex 2 (environmental impact statement).

considered and cited the 1986 Investment Agreement as having authorized extraction activities in La Rosita years before the present dispute arose.[5]

- Relying on the 1986 Investment Agreement, CALICA acquired La Rosita and Punta Venado, and excavated and dredged a deep-water port.[6] CALICA also secured a port concession that, as amended, remains in force 35 years later, is due to expire in 2037, and may be further extended for an additional 50-year term.[7]
- Under a customs permit that Mexican customs authorities routinely renewed as a matter of course (roughly every three years before 2022), CALICA has operated a specific purpose marine terminal in Punta Venado allowing Legacy Vulcan's vessels to transport materials directly from its Mexican quarry to the United States without having to clear customs at a different port.[8]
- By 2018, Legacy Vulcan's investment in the Project included two limestone-producing lots (La Rosita and El Corchalito); an additional untapped lot (La Adelita); a state-of-the art stone-crushing plant; extraction and transportation machinery; and the port, terminals, and vessels to ship the processed stone to yards along the U.S. Gulf Coast.[9]
- From the late 1980s through 2017, CALICA's environmental compliance record was not questioned by environmental authorities; to the contrary, PROFEPA inspections found CALICA in compliance with environmental laws and regulations, and PROFEPA awarded CALICA Clean Industry Certificates for the 2003-2018 period based on detailed environmental audits. CALICA's environmental efforts have garnered local and international recognition.[10]

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[5] *See, e.g.*, Corchalito/Adelita Federal Environmental Impact Authorization (30 November 2000) (C-0017-SPA.23) ("[E]l 6 de agosto de 1986 se autorizó, mediante acuerdo firmado por la entonces Secretaría de Desarrollo Urbano y Ecología, la Secretaría de Comunicaciones y Transportes, el Gobierno del Estado de Quintana Roo y la empresa Calizas Industriales del Carmen, S.A. de C.V., la autorización para que dicha empresa lleve a cabo la explotación de los predios 'Punta Inha' y 'La Rosita' sobre y bajo el nivel freático."); PROFEPA Inspection Resolution (10 December 2012) (C-0043-SPA.6-7) ("en fecha seis de agosto de mil novecientos ochenta y seis, se autorizó a la inspeccionada para que llevara a cabo la explotación de los predios 'Punta Inha' y 'La Rosita', sobre y bajo el nivel freático[.]").

[6] *See, e.g.*, Memorial (Ancillary Claim), ¶ 16; Memorial, ¶¶ 29, 62; Punta Venado Title Deed (18 December 1986) (C-0029-SPA.8); La Rosita Title Deed (22 May 1987) (C-0030-SPA.3).

[7] Amendment to the Concession granted by the Federal Government through the SCT to Calica (13 May 2015) (C-0016-SPA.15, 37) (providing a term for the concession through April 2037, which may be renewed for an additional 50-year term). *See also* Mexico Federal Official Gazette, Ports Act, Article 23 (19 July 1993) (C-0047-SPA.40) (providing that port concessions may be granted for a term of up to 50 years and may be renewed for an additional term of 50 years).

[8] *See* Memorial (Ancillary Claim), ¶¶ 18-19, 31; Witness Statement-[redacted]-Claimant's Ancillary Claim Memorial-Third Statement-ENG, ¶ 6; Customs Act Regulations, Article 11 (20 April 2015) (C-0200-SPA.5-6); Letter No. DGJA-2022-0981 from Leonardo Contreras Gómez (Agencia Nacional de Aduanas de México) to CALICA (30 March 2022) (C-0201-SPA.9).

[9] *See, e.g.*, Claimant's Post-Hearing Brief, ¶¶ 7-9; Memorial, ¶¶ 29-50, 53, 106-108.

[10] *See, e.g.*, Memorial (Ancillary Claim), ¶¶ 21-29; PROFEPA Inspection Resolution (10 December 2012) (C-0043-SPA.56-57) (detecting no facts or omissions presumably constituting a violation to environmental regulations); PROFEPA Inspection Resolution (29 March 1993) (C-0281-SPA) (same); *see also, e.g.*, Clean Industry Certificate (27 July 2016) (C-0042-SPA).

14. Key facts relating to Mexico's May 2022 shutdown of La Rosita also cannot reasonably be disputed:

- From January to May 2022, President López Obrador regularly referred to Legacy Vulcan and CALICA in his *Mañanera* press briefings, claiming that CALICA was destroying the environment, using CALICA to deflect from environmental criticism of the Mayan Train project, asserting that CALICA was violating the law and could not continue its extraction activities, criticizing prior "neoliberal" governments for having authorized those activities, and announcing Mexico's "proposal" to convert CALICA's lots into "a tourist area" and for CALICA to "withdraw [its ICSID] claim."[11]
- While Mexico's President made these remarks, Mexico's customs authority first delayed and then granted only an unprecedentedly short two-month renewal of CALICA's customs permit.[12] Mexico's Interior Minister conditioned the permit's full renewal on CALICA's abandonment of further extraction, a condition unrelated to the merits of the customs permit that CALICA rejected in writing on 11 February 2022.[13]
- On 2 May 2022, Mexico's President disclosed in his *Mañanera*: "I have instructed the Secretary [of SEMARNAT] to proceed immediately. [...] We will proceed legally because there is a violation of the laws and it is a tremendous destruction of the environment. Besides, it is audacious to mock the authorities of our country. [...] *Yes, until the extraction is stopped*."[14]
- Hours after the President's announcement in Mexico City, PROFEPA officials executed an inspection at CALICA's lots in Quintana Roo, accompanied by over 30 armed marines, armed vehicles, drones, and naval vessels.[15] Fifteen PROFEPA inspectors roamed through La Rosita over the next four days.[16]

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[11] *See* Memorial (Ancillary Claim), Appendix A (containing relevant excerpts of the President's remarks).

[12] Memorial (Ancillary Claim), ¶¶ 32-33.

[13] Witness Statement-[redacted]-Claimant's Ancillary Claim Memorial-Third Statement-ENG, ¶¶ 15-16; Letter from [redacted] to Ambassador Esteban Moctezuma (11 February 2022) (C-0179-ENG).

[14] *E.g.*, Transcript of President's Morning Press Conference (2 May 2022) (C-0168-SPA.14) (emphasis added) (the original reads: "Entonces, he dado instrucciones a la secretaria [de la SEMARNAT] para proceder de inmediato. [...] Se va a proceder legalmente porque hay violación a las leyes y es una tremenda destrucción del medio ambiente. Además, es un atrevimiento burlarse de las autoridades de nuestro país. [...] *Sí, hasta que se detenga la extracción*."); Andrés Manuel López Obrador, Tren Maya Prioriza Cuidado de Zonas Arqueológicas y del Ambiente, YouTube (uploaded 2 May 2022), https://www.youtube.com/watch?v=VeiERG4QXhI (C-0188-SPA) (video online begins display at 02:00:50).

[15] *See* Memorial (Ancillary Claim), ¶¶ 61-62, Picture 7; Pictures of Mexico's Incursion into CALICA's Facilities (2-5 May 2022) (C-0169-SPA.7-11); Witness Statement-[redacted]-Claimant's Ancillary Claim Memorial-Third Statement-ENG, ¶ 25.

[16] *See* Memorial (Ancillary Claim), ¶¶ 62-63; PROFEPA Inspection Report on Environmental Impact (2-5 May 2022) (C-0171-SPA.9) (closing the report for May 3 stating "siendo las 23 horas con 59 minutos"); PROFEPA Inspection Report on Forestry (2-5 May 2022) (C-0172-SPA.14) (closing the report for May 3 stating "siendo las veintitrés horas con treinta y dos minutos").

- On 5 May 2022, PROFEPA's inspectors shut down La Rosita, alleging that CALICA lacked (i) an environmental impact authorization and (ii) an Authorization for Soil-Use Change in Forested Terrains (*Autorización de Cambio de Uso de Suelo en Terrenos Forestales* or "CUSTF").[17]
- Before this shutdown, PROFEPA had inspected CALICA in 2012 and determined that the company had "prior environmental impact approval" for its activities in La Rosita and found "no facts or omissions presumptively constituting a violation of environmental law."[18]
- On 10 May 2022, Mexico's customs agency invoked PROFEPA's shutdown to suspend CALICA's customs permit, which the government had granted a few weeks before for a term of three years.[19]
- While formally described as a preliminary and "temporary" security measure, PROFEPA's shutdown has remained in place for over nine months and counting,[20] without any movement on the PROFEPA administrative procedure relating to it.

15. Mexico's Counter-Memorial on Ancillary Claim either ignored, conceded, or unsuccessfully tried to downplay or explain away these facts. As discussed further below, Respondent simply failed to refute the facts that support Legacy Vulcan's ancillary claim.

B. MEXICO SHUT DOWN LA ROSITA BASED ON THE PRESIDENT'S POLITICALLY MOTIVATED INSTRUCTIONS.

1. Mexico's Attempt to Downplay President López Obrador's Remarks Regarding Legacy Vulcan and CALICA Fails.

16. Try as it might, Mexico cannot take back what President López Obrador said publicly about Legacy Vulcan and CALICA in the run-up to the shutdown of La Rosita. Legacy Vulcan's Memorial on Ancillary Claim discussed the President's relevant remarks exhaustively, including extensive quotes, an appendix transcribing them, and video exhibits of

[17] PROFEPA Inspection Report on Environmental Impact (2-5 May 2022) (C-0171-SPA.69, 71-72); PROFEPA Inspection Report on Forestry (2-5 May 2022) (C-0172-SPA.61-62). *See also* Counter-Memorial (Ancillary Claim), ¶ 4 (conceding that the shutdown was grounded on the supposed lack of an environmental impact authorization and a CUSTF); Third Witness Statement of Margarita Balcázar ¶ 19 (RW-0012) (same); Witness Statement of Patricio Vilchis, ¶ 27 (RW-0013) (same).

[18] *See* Memorial (Ancillary Claim), ¶ 25; PROFEPA Inspection Resolution (10 December 2012) (C-0043-SPA, 6-7) (free translation, the original reads: "[E]n fecha seis de agosto de mil novecientos ochenta y seis, se autorizó a la inspeccionada para que llevara a cabo la explotación de 'Punta Inha' [Punta Venado] y 'La Rosita', sobre y debajo el nivel freático, por lo que, se desprende que la empresa [CALICA], sí cuenta con el resolutivo o la autorización previa en materia de impacto ambiental para llevar a cabo las obras o actividades que se realizan en el predio sujeto a inspección[.]"); *id.* at 56-57 (free translation, the original reads: "Del análisis a los hechos y circunstancias en el acta de inspección […] se desprende no haberse detectado hechos u omisiones presuntamente constitutivos de infracción a la normatividad ambiental[.]").

[19] Memorial (Ancillary Claim), ¶ 35; Counter-Memorial (Ancillary Claim), ¶¶ 380-382.

[20] *See* Counter-Memorial (Ancillary Claim), ¶¶ 269, 280.

relevant *Mañaneras*.[21] The President's words are at the core of the evidence supporting Legacy Vulcan's ancillary claim; yet Respondent dedicated less than 10% of the 103-page "facts" section of its Counter-Memorial on Ancillary Claim to addressing them. While Mexico's brief tries to spin the President's remarks, they contradict Mexico's skewed factual narrative and alone show that the shutdown of La Rosita was the result of a raw Presidential order, not the ordinary enforcement of Mexico's environmental laws or the regular administrative process set forth by law.

17. President López Obrador's remarks in his *Mañanera* of 2 May 2022 are illustrative. The President openly acknowledged that he had "*instructed* the Secretary [of SEMARNAT] to *proceed immediately*" with legal action against CALICA "*until the extraction is stopped*" "*because there is a violation of the laws* and *it is a tremendous destruction of the environment*."[22] This public concession followed months of televised attacks against CALICA by the President, who accused CALICA of environmental destruction and illegality, reacted to critics of the Mayan Train project by pointing to CALICA, criticized past "neoliberal" governments for having granted permits for CALICA's activities, and declared that those activities had to be transformed into a tourism project or else.[23]

18. Respondent tries to rewrite what the President said on 2 May 2022, asserting that he did not "predetermine" legal violations and merely informed that the government would proceed legally to check whether CALICA was violating the law or causing environmental harm.[24] But the President declared that "there is a violation of the laws" and a "tremendous destruction of the environment,"[25] not that SEMARNAT would go check whether that was the case. The President had clearly predetermined legal violations and environmental harm by CALICA.

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[21] *E.g.*, Memorial (Ancillary Claim), Part II.B.2, Appendix A. *See also* Reply (Ancillary Claim), Appendix A.

[22] Memorial (Ancillary Claim), ¶ 56 (quoting from Transcript of President's Morning Press Conference (2 May 2022) (C-0168-SPA.14)) (emphasis added) (free translation, the original reads: "he dado instrucciones a la secretaria [de la SEMARNAT] para proceder de inmediato. […] Se va a proceder legalmente porque hay violación a las leyes y es una tremenda destrucción del medio ambiente. Además, es un atrevimiento burlarse de las autoridades de nuestro país. […] Sí, hasta que se detenga la extracción."); Andrés Manuel López Obrador, Tren Maya Prioriza Cuidado de Zonas Arqueológicas y del Ambiente, YouTube (uploaded 2 May 2022), https://www.youtube.com/watch?v=VeiERG4QXhI (C-0188-SPA) (video online begins display at 02:00:50).

[23] Memorial (Ancillary Claim), ¶¶ 36-60 (discussing and quoting these remarks).

[24] Counter-Memorial (Ancillary Claim), ¶¶ 134, 228, 232.

[25] Transcript of President's Morning Press Conference (2 May 2022) (C-0168-SPA.14) (free translation, the original reads: "Se va a proceder legalmente porque hay violación a las leyes y es una tremenda destrucción del medio ambiente."); Andrés Manuel López Obrador, Tren Maya Prioriza Cuidado de Zonas Arqueológicas y del Ambiente, YouTube (uploaded 2 May 2022),

19. Respondent similarly asserts that, in his 2 May 2022 *Mañanera*, President López Obrador did not "expressly order[] the shutdown [*clausura*] and/or suspension of [CALICA's] activities."[26] Yet the President announced that he had instructed SEMARNAT to proceed immediately against CALICA "*until extraction is stopped*."[27] The President was not merely asking that SEMARNAT dispatch inspectors to CALICA for an independent judgment on whether a shutdown measure was appropriate. He expressly ordered Mexico's federal environmental agency to stop CALICA's extraction, as PROFEPA inspectors did soon thereafter.

20. President López Obrador had echoed these statements for months before 2 May 2022, further confirming that he had predetermined that CALICA's quarrying activities would no longer be permitted and had to stop, purportedly because they were illegal and environmentally destructive.[28] The President did this while acknowledging that CALICA's extraction activities *had been authorized* by previous governments, criticizing those governments for having done so, and calling out environmental opponents of the Mayan Train project for not opposing CALICA's alleged environmental "destruction" instead. A few examples:

- On 31 January 2022, the President asserted that, "since [CALICA's] concession was not extended because *they were not complying, well, [they were] violating, destroying the territory*, they went to an international claim [*denuncia*], and they are requesting damages, I don't know, of millions of pesos, in other words, we also have to pay them."[29] He added that "*this cannot be allowed*," in reference to

https://www.youtube.com/watch?v=VeiERG4QXhI (C-0188-SPA) (video online begins display at 02:00:50).

[26] Counter-Memorial (Ancillary Claim), ¶ 232 (free translation, the original reads: "No se puede advertir de manera alguna que, en la conferencia indicada, se haya emitido alguna manifestación en la que expresamente se ordenara la clausura y/o suspensión de las actividades de la Demandante, ni se predeterminaran faltas o incumplimientos. Las opiniones e intercambios se formularon en el contexto del tema que se estaba tratando en el momento y con el propósito de transparentar la situación.").

[27] Transcript of President's Morning Press Conference (2 May 2022) (C-0168-SPA.14) (emphasis added) (free translation, the original reads: "hasta que se detenga la extracción[.]"); Andrés Manuel López Obrador, Tren Maya Prioriza Cuidado de Zonas Arqueológicas y del Ambiente, YouTube (uploaded 2 May 2022), https://www.youtube.com/watch?v=VeiERG4QXhI (C-0188-SPA) (video online begins display at 02:00:50).

[28] *See, e.g.*, Transcript of President's Morning Press Conference (22 April 2022) (C-0186-SPA.9) ("Pon la imagen de Calica, lo que no vieron los ambientalistas [...] porque nosotros tomamos la decisión de detener la destrucción de Calica, que tienen más de dos mil hectáreas y estaban usando [...] como banco de material toda esa área para llevarse la grava a construir caminos en Estados Unidos, una gran destrucción."). *See also* Memorial (Ancillary Claim), Part II.B.2 (discussing and quoting these and further statements).

[29] Transcript of President's Morning Press Conference (31 January 2022) (C-0176-SPA.22) (free translation, the original reads: "Como no se les amplió la concesión porque estaban incumpliendo, bueno, violando, destruyendo el territorio, se fueron a una denuncia internacional, y están pidiendo una indemnización, no sé, de millones de pesos, o sea, que todavía nosotros les tenemos que pagar.") Andrés Manuel López Obrador, Adelanto de Programas para el Bienestar por veda electoral 2022, YouTube (uploaded 31 January 2022), https://www.youtube.com/watch?v=kymtpvyiDEk (C-0244-SPA) (video online begins display at 02:19:50).

CALICA's activities, which he described as "extracting material and taking [it] to the United States by ship."[30]

- In February 2022, the President stated that CALICA was "suing the Government of Mexico, they want I don't know how many millions of dollars, because *they do not respect any law*, any contract;"[31] "we are talking about the *destruction* of 500 hectares;"[32] "of course *there are violations*, since *they are destroying the environment*;"[33] and "*extraction will no longer be permitted, nothing*," while acknowledging that previous administrations "*granted [...] permits [...] before 2000* [...] without even placing a limit" for La Rosita, "the lot they are exploiting."[34]
- In March 2022, the President displayed aerial visuals of CALICA's lots on a large screen, claiming to show how CALICA had left the area "*destroyed*,"[35] and — while

[30] Transcript of President's Morning Press Conference (31 January 2022) (C-0176-SPA.21-22) (emphasis added) (free translation, the original reads: "Pues resulta que le dieron a esa empresa dos concesiones hace tiempo, 20 años, para extraer material y llevarse el material a Estados Unidos por barco. [...] [E]s de las más importantes en Estados Unidos. Pero podrá ser muy importante, pero esto no lo podemos permitir tiene que haber un acuerdo."). Andrés Manuel López Obrador, Adelanto de Programas para el Bienestar por veda electoral 2022, YouTube (uploaded 31 January 2022), https://www.youtube.com/watch?v=kymtpvyiDEk (C-0244-SPA) (video online begins display at 02:19:50).

[31] Transcript of President's Morning Press Conference (1 February 2022) (C-0177-SPA.16) (free translation, the original reads: "[D]emandan al Gobierno de México, quieren no sé cuántos millones de dólares, porque no respetan ninguna ley, ningún contrato."); Andrés Manuel López Obrador, Tendencia a la baja de cuarta ola de COVID-19 en México, YouTube (uploaded 1 February 2022), https://www.youtube.com/watch?v=0LSkZ4e5Iho (C-0245-SPA) (video online begins display at 02:01:40).

[32] Transcript of President's Morning Press Conference (1 February 2022) (C-0177-SPA.17) (free translation, the original reads: "Y yo estoy seguro que los accionistas principales no saben de esta tragedia, estamos hablando de la destrucción de 500 hectáreas."); Andrés Manuel López Obrador, Tendencia a la baja de cuarta ola de COVID-19 en México, YouTube (uploaded 1 February 2022), https://www.youtube.com/watch?v=0LSkZ4e5Iho (C-0245-SPA) (video online begins display at 02:01:40).

[33] Transcript of President's Morning Press Conference (3 February 2022) (C-0178-SPA.22) (free translation, the original reads: "Claro que hay violaciones, pues esos están destruyendo el medio ambiente. [...] [Y]a no se va a permitir nada de extracción, nada."); Andrés Manuel López Obrador, Baja incidencia delictiva en Hidalgo, YouTube (uploaded 3 February 2022), https://www.youtube.com/watch?v=OyjJQJxJtrc (C-0246-SPA) (video online begins display at 02:13:13); *see also* Transcript of President's Morning Press Conference (7 February 2022) (C-0215-SPA.17) (free translation, the original text reads: "[L]a empresa, esta que está demandando, cuando *quienes están violando la ley, destruyendo el territorio son ellos*, la empresa estadounidense que tiene el banco de grava en Playa del Carmen, Quintana Roo.") (emphasis added); Andrés Manuel López Obrador, Llamado al diálogo entre normalistas de Ayotzinapa y autoridades, YouTube (uploaded 7 February 2022), https://www.youtube.com/watch?v=0Bi2EPCTCKU (C-0247-SPA) (video online begins display at 00:49:51).

[34] Transcript of President's Morning Press Conference (3 February 2022) (C-0178-SPA.22) (emphasis added) (free translation, the original reads: "Estos permisos los entregaron, el de ese predio que están explotando, lo entregaron antes del 2000. Y fíjense cómo era antes este asunto, cómo eran las cosas antes, no le pusieron ni siquiera un límite a la concesión, porque en otros casos, bueno, concesionaron el puerto de Veracruz, en el tiempo de Salinas, 100 años, un siglo, pero acá ni siquiera hay fecha. [...] Ah, aquí está, aquí están los tres, esta rosita[.] Ah, bueno, pero ese es el primero, el que les digo que no tiene límite, ese lo entregaron antes del 2000. [...] Entonces ¿cuál es el planteamiento? Que ya no se va a permitir nada de extracción, nada.").

[35] Transcript of President's Morning Press Conference (24 March 2022) (C-0221-SPA.44) (emphasis added) (free translation, the original reads: "Bueno, pero allá mismo estaba esta empresa Calica, es un banco de

acknowledging that CALICA "*was given permits* to extract material, gravel, in ships that took it to the United States"[36] — he nevertheless declared that this activity "*cannot be done now*, it never should have been done, *never should have been authorized*."[37]

- In April 2022, again purporting to show the "*destruction*" resulting from CALICA's extraction activities and questioning environmental critics of his Mayan Train project for ignoring those activities,[38] President López Obrador declared that CALICA "*will no longer be able to take out, to extract material*" and that its lots "*will no longer be a bank of materials*."[39]

21. The notion that PROFEPA officials would defy the President's instruction — announced openly in the 2 May 2022 *Mañanera* after months of anti-CALICA remarks — is farcical.[40] It is also belied by the record. PROFEPA officials did just what the President ordered soon after his 2 May 2022 announcement; they put a stop to CALICA's remaining extraction activities through a formal shutdown of La Rosita.[41] They echoed the President's accusations of environmental harm and illegality allegedly flowing from CALICA's quarrying activities,[42] even though those activities had been assessed and approved by the Mexican government many years before — a fact that President López Obrador openly acknowledged but PROFEPA's inspectors conveniently chose to ignore (as further discussed below).

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material en Playa del Carmen. […] [A]horita van a ver cómo dejaron destruido. Entonces, ¿qué pasó? Miren, estos son predios, todo esto está escarbado, banco de construcción."); Andrés Manuel López Obrador, Acertada decisión asignar aduanas a Secretaría de Marina, YouTube (uploaded 24 March 2022), https://www.youtube.com/watch?v=QjSJy-5lINM (C-0251-SPA) (video online begins display at 01:30:48).

[36] Transcript of President's Morning Press Conference (24 March 2022) (C-0221-SPA.44) (emphasis added) (free translation, the original reads: "Les dieron permiso para extraer material, grava, que en barcos se llevaban a Estados Unidos para hacer caminos, carreteras, en Estados Unidos"); Andrés Manuel López Obrador, Acertada decisión asignar aduanas a Secretaría de Marina, YouTube (uploaded 24 March 2022), https://www.youtube.com/watch?v=QjSJy-5lINM (C-0251-SPA) (video online begins display at 01:30:48).

[37] Transcript of President's Morning Press Conference (31 March 2022) (C-0183-SPA.8) (free translation, the original reads: "Tienen estas dos mil 400 hectáreas, las compraron para extraer material, llevar el material a Estados Unidos; eso ya no se puede hacer ahora, no se debió hacer nunca, no se debió autorizar.").

[38] *E.g.*, Transcript of President's Morning Press Conference (19 April 2022) (C-0184-SPA.7) (emphasis added) (free translation, the original reads: "¿Por qué no pones los videos de la destrucción que no vieron los ambientalistas estos, que está precisamente en el tramo 5?").

[39] Transcript of President's Morning Press Conference (22 April 2022) (C-0186-SPA.9) (emphasis added) (free translation, the original reads: "ya no van a poder sacar, extraer material, o sea, no va a ser banco de material[.]").

[40] *See, e.g.,* Counter-Memorial (Ancillary-Claim), ¶¶ 134, 226.

[41] Memorial (Ancillary Claim), ¶¶ 61-64; PROFEPA Inspection Report on Environmental Impact (2-5 May 2022) (C-0171-SPA.69-72); PROFEPA Inspection Report on Forestry (2-5 May 2022) (C-0172-SPA.61-62).

[42] *See* PROFEPA Inspection Report on Environmental Impact (2-5 May 2022) (C-0171-SPA.68-71) (making broad allegations of environmental impacts to the soil, water, flora and fauna as a result of CALICA's supposedly unauthorized activities); PROFEPA Inspection Report on Forestry (2-5 May 2022) (C-0172-SPA.54-62) (same).

22. In carrying out the President's order, PROFEPA officials displayed the same kind of obedience that SEMARNAT exhibited throughout the President's public attacks against CALICA.[43] SEMARNAT echoed the President's anti-CALICA remarks in post-*Mañanera* press releases in February-March 2022.[44] In early July 2022, SEMARNAT carried out one of the President's threats by purporting to submit a "complaint" against Legacy Vulcan before the U.N. High Commissioner for Human Rights[45] — a "complaint" that was never served on CALICA or Legacy Vulcan.[46] Remarkably, Mexico faults Legacy Vulcan for not discussing the contents of this "complaint,"[47] even though Mexico has never disclosed it (if it even exists).

23. In August 2022, SEMARNAT piled on the President's smear campaign by publishing on its website a report (so-called "*dictamen*") purporting to detail the "findings" of a months-long "investigation" into CALICA's operations and alleging that those operations caused environmental harm to the area, while extolling the President's "leadership" in "guaranteeing the right to a healthy environment."[48] SEMARNAT never notified CALICA about this "investigation" or gave it an opportunity to rebut SEMARNAT's "findings."[49] It is extraordinary for SEMARNAT to target just one company in a public report that, according to that agency, resulted from the

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[43] *See* Memorial (Ancillary Claim), ¶¶ 41, 46, 85-86.

[44] Memorial (Ancillary Claim), ¶¶ 41, 46 (quoting and citing SEMARNAT press releases echoing the President's remarks against CALICA in February and March 2022). *See also, e.g.*, SEMARNAT Press Release, *¿Dónde estaban los pseudoambientalistas cuando hace años empezó la verdadera devastación en el sureste de México?* (25 March 2022) (C-0226-SPA.2-3) ("La explotación de recursos minerales y pétreos se concedió sin consideración de las daños ambientales que ocasiona, [...] como sucedió con la empresa Calica, en Solidaridad[.]"); SEMARNAT Press Release, *Las decisiones ambientales trascienden en el tiempo, caso Calica* (6 February 2022) (C-0214-SPA.2), https://www.gob.mx/semarnat/prensa/las-decisiones-ambientales-trascienden-en-el-tiempo-caso-calica ("A fin de seguir informando a la población sobre las acciones de administraciones previas y su impacto negativo contra el medio ambiente [...], se hacen las siguientes precisiones en torno al caso del proyecto minero de la empresa Calica[.]").

[45] Memorial (Ancillary Claim), ¶ 85; Transcript of President's Morning Press Conference (31 March 2022) (C-0183-SPA.7) (threatening to bring a "complaint" against Vulcan before "international organizations" for its alleged "ecological disaster"); Transcript of President's Morning Press Conference (16 June 2022) (C-0233-SPA.41) ("A lo mejor están pensando ellos que ya va a terminar el gobierno y que van a reiniciar sus labores. Pero vamos a hacer denuncias en la ONU [.]"); María Luisa Albores González, Twitter (4 July 2022) (C-0234-SPA) ("El territorio es de l@s [sic] mexican@s [sic], cuidarlo es nuestra responsabilidad. Venimos a defender la naturaleza y nuestra soberanía.").

[46] Witness Statement-[redacted]-Claimant's Ancillary Claim Memorial-Third Statement-ENG, ¶ 29.

[47] Counter-Memorial (Ancillary Claim), ¶ 137 ("La Demandante omite discutir sobre el contenido ambos [sic] documentos," referring to the "complaint" to the U.N. High Commissioner and SEMARNAT's so-called "*dictamen*" discussed below). Mexico has failed to submit the purported "complaint" in this arbitration, and CALICA has been unable to obtain a copy of it.

[48] Memorial (Ancillary Claim), ¶ 86; SEMARNAT, *Desastre Ambiental Violatorio del Derecho Humano a un Medio Ambiente Sano* (18 August 2022) (C-0235-SPA.3); SEMARNAT, *Impacto ambiental SAC-TUN*, Gobierno de México (18 August 2022) (C-236-SPA).

[49] Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶ 12.

work of 52 officials and hundreds of work days.[50] As discussed below, SEMARNAT's report is so flawed that it does nothing but confirm that Mexico's allegations of environmental harm are pretextual.[51]

24. By all but ignoring what President López Obrador actually said about Legacy Vulcan and CALICA from January to May 2022, Respondent fails to rebut the clearest evidence that Mexico's shutdown of La Rosita was not based on facts or law justifying it, but rather on the President's caprice.

2. Mexico Misrepresents the Facts in an Effort to Justify the President's Attacks Against Legacy Vulcan and CALICA.

25. Mexico complains that Legacy Vulcan took the President's remarks out of context, arguing that they reflected the President's efforts to inform the public about the government's negotiations with Legacy Vulcan and to address environmental concerns of local communities.[52] The record — including the President's own words — amply show otherwise.

26. Regarding the Parties' discussions, as a threshold matter, Respondent has improperly disclosed the content of settlement communications that are privileged and confidential.[53] Legacy Vulcan objects to this unilateral breach of the settlement privilege and reserves all rights. With this in mind, Legacy Vulcan has limited its discussion of the Parties' communications to correcting the record regarding factual issues Mexico has raised in this arbitration and through the President's public remarks.

27. Mexico and its witness — a SEMARNAT official who attended just two meetings out of the many discussions that took place between the Parties in January-May 2022 — misstate

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[50] SEMARNAT, *Desastre Ambiental Violatorio del Derecho Humano a un Medio Ambiente Sano* (18 August 2022) (C-0235-SPA.18); Expert Report-[redacted]-Environmental-Claimant's Ancillary Claim Reply-Fourth Expert Report-SPA, ¶ 121-126 (confirming that the public SEMARNAT report on CALICA is extraordinary).

[51] *See infra* Part II.C.1.c); Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, Part 5 (explaining why SEMARNAT's report is technically and scientifically deficient and unreliable).

[52] Counter-Memorial (Ancillary Claim), ¶¶ 125-140.

[53] *See, e.g.*, *Standard Chartered Bank Ltd. v. Tanzania*, ICSID Case No. ARB/15/41, Procedural Order No. 6b, Decision Relating to the Claimant's Disclosure Obligations, ¶ 32 (15 January 2018) (Boo (P), Unterhalter, Hossain) (CL-0202-ENG) (recognizing a "Without Prejudice" privilege "borne out of the public policy of encouraging disputing parties to engage in good faith settlement to avoid contentious proceedings" and that documents "related to genuine attempts to resolve the matter in difference" "are privileged"); *Standard Chartered Bank Ltd. v. Tanzania*, ICSID Case No. ARB/15/41, Procedural Order No. 2, ¶ 9.2 (11 October 2016) (Boo (P), Unterhalter, Hossain) (CL-0203-ENG) (recognizing that information relating to "communications exchanged between the Parties in furtherance of settlement discussions" may be designated as confidential in this case).

facts about those discussions.[54] Two facts stand out. *First*, [redacted]. [55] President López Obrador publicly acknowledged as much in January 2022: "one of the *proposals we are making*, as they have already dug, the water here is turquoise because of the stone, so, with a little imagination and talent, it could be *used as a tourist area* […]."[56] He later confirmed that this was Mexico's proposal.[57] Despite Respondent's attempt to deny it,[58] the President presented it as a sort of ultimatum — either a tourism project or no project at all:

> In the case of Calica, well we are also seeking an agreement with them, *there are three options*:
>
> [i] a *shutdown*, because they are no longer permitted to extract material, that can no longer be permitted. […]
>
> [ii] The other option […] is seek an agreement so that the impacted area plus another two thousand hectares they have there, can be *converted into a touristic park*. They also have next to the sea the port concession that can be used as a port for cruise-ships. […]
>
> [iii] And the third [option] is that *we buy the land in full*, we conduct a valuation of how much it costs and we have resources to convert this into a natural park.[59]

28. The fact that Mexico was the one who first proposed converting CALICA's lots into a tourism project and that President López Obrador pressured the company to accept this take-

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[54] Witness Statement of Mr. Iván López, ¶ 12 (RW-011) (acknowledging that he attended two meetings); *but see* Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶ 14 (explaining that multiple meetings and discussions took place beyond the two mentioned by Mr. Rico).

[55] Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶ 16; *see also* Witness Statement-[redacted]-Claimant's Ancillary Claim Memorial-Third Statement-ENG, ¶ 21; *but see* Counter-Memorial (Ancillary Claim), ¶¶ 113-116 [redacted].

[56] Transcript of President's Morning Press Conference (31 January 2022) (C-0176-SPA.22) (emphasis added) (free translation, the original reads: "[E]n es[t]a mina, que es una de las propuestas que les estamos haciendo, como ya escarbaron, el agua aquí es turquesa por la piedra, entonces, con un poco de imaginación y de talento se podría utilizar como zona turística, casi albercas naturales, buscando un acuerdo, pero que ya no se siga destruyendo y que retiren su demanda, porque no tiene fundamento legal.").

[57] Transcript of President's Morning Press Conference (31 March 2022) (C-0183-SPA.8) ("*nuestra propuesta es*: A ver, tus dos mil 400 hectáreas *úsalas en un plan turístico*") (emphasis added).

[58] Counter-Memorial (Ancillary Claim), ¶ 118 ("no existió ninguna presión por parte del Presidente para que CALICA cambiará [sic] sus actividades al sector turístico").

[59] Transcript of President's Morning Press Conference (20 April 2022) (C-0185-SPA.9) (emphasis added) (free translation, the original reads: "Y en el caso de Calica, pues también ya estamos buscando un acuerdo con ellos, son tres opciones: La clausura, porque ya no se permite que extraigan material, eso ya no se puede permitir. Que tienen muchas influencias en el Departamento de Estado, porque es una empresa que se llama Vulcan, es de las empresas constructoras más importantes de Estados Unidos, pero yo creo que hasta los mismos accionistas de Vulcan van a entender que esto no es posible, no puede haber un doble discurso

it-or-leave-it proposal is confirmed by Legacy Vulcan's witness, [redacted], who — as [redacted] — was kept fully abreast of the discussions and participated in a number of them.[60] [redacted] confirms, for example, that, on 9 March 2022, Legacy Vulcan [redacted].[62] Even though Legacy Vulcan went out of its way to accommodate Mexico's claimed interests, the discussions ended in light of the sudden shutdown of La Rosita [redacted].[64]

29. Respondent notes that the 1986 Investment Agreement envisioned that CALICA's lots could be used for tourism,[65] but that Agreement made clear that this could happen (if at all) only *after* the Project was over — not before, as President López Obrador demanded.[66] Respondent's extensive reliance on national and state development plans[67] is similarly unavailing. While those plans discussed tourism as an area of focus for Quintana Roo and Mexico's southeast,

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de decir que nos preocupa el cambio climático y que estemos haciendo esta destrucción. Entonces, si se van a tribunales, porque además hay denuncias, pues vamos a tribunales y vamos a hacer la denuncia formal en organismos internacionales. A ver qué van a hacer los de la ONU, a ver qué va a hacer Greenpeace, que nos ayuden en esto. Esa es una opción. La otra opción, que es importante para ellos y para todos, es buscar un acuerdo para que esa área impactada, más otras dos mil hectáreas que tienen ahí, se puedan convertir en un parque turístico. Tienen también pegado al mar la concesión de un puerto que puede ser utilizado como puerto de cruceros. Estamos hablando de una de las zonas más bellas del mundo en cuanto a playas, es el Caribe. Eso es lo segundo. Y lo tercero es que les compramos el terreno completo, hacemos un avalúo de cuánto cuesta y tenemos recursos para convertir esto en un parque natural."); Andrés Manuel López Obrador, *Seguridad y bienestar, fundamentales para instaurar la paz*, YouTube (uploaded 20 April 2022), https://www.youtube.com/watch?v=RoONYTUVQ-I (C-0257-SPA) (video online begins display at 01:18:55).

[60] Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶¶ 14, 16-17, 22.

[61] Sac-Tun, *Turismo Sustentable del Siglo 21 en la Joya del Mar Caribe* (IRL-004).

[62] Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶ 18.

[63] *Id.*, ¶¶ 20-22.

[64] *Id.*, ¶ 22.

[65] Counter-Memorial (Ancillary Claim), ¶¶ 70, 461.

[66] Investment Agreement (6 August 1986) (C-0010-SPA.241) ("Las lagunas que serán formadas por las excavaciones [...] podrán en un futuro ser desarrolladas para usos recreativos, turísticos, y científicos <u>una vez que las operaciones del proyecto terminen</u>.") (emphasis added); *id.* at 12 ("[El Proyecto] contiene un estudio para el aprovechamiento del área excavada al término de la vida útil del banco de material pétreo, con la posibilidad de utilizarlo como lago propicio para un desarrollo inmobiliario turístico."). *See also* Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶ 16.

[67] Counter-Memorial (Ancillary Claim), ¶¶ 82-101.

they *also* called for development of other sectors, promotion of foreign investment, and diversification of the economy, including into the export sector to which CALICA contributed.[68] As was acknowledged in the 1986 Investment Agreement, the Project "fits within the guidelines [] of the National Program of Industrial and Trade Promotion, with respect to the creation of new jobs, generation of hard currency, and optimal use of natural resources [...]."[69] In any event, the development plans Mexico touts do not justify discriminating against a long-established export-focused foreign investment such as Legacy Vulcan's to favor competing (and local) economic interests.[70]

30. The second fact Mexico misrepresents in connection with Legacy Vulcan's discussions with the government relates to [redacted] Mexico repeats the President's assertion in the 2 May 2022 *Mañanera* that Legacy Vulcan purportedly deceived him by continuing extraction activities in La Rosita despite having agreed to discontinue them.[71] This is false, [redacted].[72]

31. As [redacted] confirms and Mexico has failed to disprove, Mexico's Minister of the Interior conditioned the renewal of CALICA's delayed customs permit in early 2022 on CALICA's agreement to discontinue further quarrying in La Rosita, but CALICA refused.[73] Instead, in a good-faith gesture and with full reservation of rights, CALICA voluntarily agreed to

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[68] *See* Memorial, ¶ 21; Mexico Federal Official Gazette, 1983-1988 National Development Plan, (31 May 1983) (C-0024-SPA.54, 99, 101); 1999-2005 Quintana Roo State Development Plan (1999) (R-0153-ESP.8, 23); 2005-2011 Quintana Roo State Development Plan (2005) (R-0154-ESP.33) Quintana Roo Development Agreement (22 August 1999) (R-0147-ESP.12).

[69] Investment Agreement (6 August 1986) (C-0010-SPA.50) (free translation, the original reads: "El proyecto se inserta en los lineamientos -- [sic] del Programa Nacional de Fomento Industrial y Comercio Exterior, en cuanto a la creación de nuevos empleos, generación de divisas y a la utilización óptima de los recursos nacionales además de favorecer a una región cuyo desarrollo actual sólo esta [sic] representado por actividades primarias.").

[70] *See* Memorial (Ancillary Claim), ¶¶ 37-39, 45, 100.

[71] Counter-Memorial (Ancillary Claim), ¶¶ 133-134; Transcript of President's Morning Press Conference (2 May 2022) (C-0168-SPA.14) ("Acabo de estar el fin de semana [en Calica]. Y me habían engañado en que ya no estaban extrayendo material [.]"); Andrés Manuel López Obrador, *Tren Maya Prioriza Cuidado de Zonas Arqueológicas y del Ambiente*, YouTube (uploaded 2 May 2022), https://www.youtube.com/watch?v=VeiERG4QXhI (C-0188-SPA) (video online begins display at 02:00:50).

[72] Letter from [redacted] to Ambassador Esteban Moctezuma (11 February 2022) (C-0179-ENG); Witness Statement-[redacted]-Claimant's Ancillary Claim Memorial-Third Statement-ENG, ¶ 16; Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶ 21.

[73] Witness Statement-[redacted]-Claimant's Ancillary Claim Memorial-Third Statement-ENG, ¶¶ 15-16.

suspend quarrying for only one month (from 11 February to 13 March 2022).[74] That voluntary commitment was still in place when Legacy Vulcan's representatives met President López Obrador on 9 March 2022.[75] As the discussions dragged on without an agreement, CALICA resumed its normal quarrying operations in April 2022, and Legacy Vulcan informed Mexico of this fact.[76] CALICA even gave a tour of its ongoing operations in La Rosita to a high-ranking Mexican official that month as part of the Parties' discussions, as it had nothing to hide.[77] In a letter to President López Obrador dated 3 May 2022 (the day after he announced his instruction to halt CALICA's extraction), Legacy Vulcan explained that there was no deception.[78] PROFEPA formally shut down La Rosita two days later.

32. Mexico's effort to spin the President's anti-CALICA remarks as a legitimate response to the environmental concerns of local communities[79] also fails. In support of this spin, Respondent cites to sources referring to a class action ("*acción colectiva*") brought by Quetzal Tzab on behalf of a putative class of residents who do not even live in the vicinity of CALICA.[80] As Respondent acknowledges, that action was filed on 25 October 2022,[81] over *five months after* Mexico shut down La Rosita in accordance with the President's instruction. Mr. Tzab, the plaintiff in the class action, conceded that the class action was based on SEMARNAT's anti-CALICA report ("*dictamen*") published on SEMARNAT's website in

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[74] Letter from [redacted] to Ambassador Esteban Moctezuma (11 February 2022) (C-0179-ENG) [redacted] Witness Statement-[redacted]-Claimant's Ancillary Claim Memorial-Third Statement-ENG, ¶ 16.

[75] *See* Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶ 18.

[76] *Id.*, ¶¶ 19-21; Witness Statement-[redacted]-Claimant's Ancillary Claim Memorial-Third Statement-ENG, ¶ 16.

[77] Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶¶ 19-20.

[78] Letter of [redacted] to President Andrés Manuel López Obrador (3 May 2022) (C-0282-ENG).

[79] Counter-Memorial (Ancillary Claim), ¶¶ 129, 135-138.

[80] *See* Counter-Memorial (Ancillary Claim), ¶ 129, bullet 2, n.93 (citing R-0162-SPA); *id.*, ¶¶ 139-140; Class Action Complaint (Quetzal Tzab Gonzalez & Others) Against CALICA (25 October 2022) (C-0283-SPA).

[81] Counter-Memorial (Ancillary Claim), ¶ 139.

August 2022.[82] SEMARNAT boasted in a press release and in a tweet that this was the case.[83] Mr. Tzab is a former official in the mayoral administration of Laura Beristain, a political ally of President López Obrador and long-time opponent of CALICA's operations, as this Tribunal learned in the previous phase of this proceeding.[84] The Mexican government is behind their efforts. In short, the supposed "concerns of local communities" Respondent touts resulted from the President's and his government's anti-CALICA attacks, not the other way around.

33. The President's public anti-CALICA attacks have continued, in blatant disregard of this Tribunal's Procedural Order No. 7. [85] On 5 December 2022, for instance, President López Obrador displayed an aerial video of CALICA's lots and attacked CALICA once again:

> This is Calica [...]. This is the destruction of Playa del Carmen, it is a U.S. company that has all of this, but this part is a bank of material. Then, through here, through this port, they took out material. The environmentalists did not see this, look what they were doing. [...] The Mayan Train goes through here, they did not see this, not this. But, well, look at this, and we already have

[82] *See* Class Action Complaint (Quetzal Tzab Gonzalez & Others) Against CALICA (25 October 2022) (C-0283-SPA.17) ("Para acreditar la procedencia de la medida que se solicita se anexa a la presente una impresión del documento denominado: 'Dictamen [de SEMARNAT] [...] *mediante la que recientemente nos enteramos* de que la empresa ha incumplido [...] las condicionantes ambientales a las que estaba obligada.") (emphasis assed). *See also* Aristegui Noticias, *Presentan acción colectiva ante ONU contra mina de Calica* (2 December 2022) https://aristeguinoticias.com/0212/aristegui-en-vivo/entrevistas-completas/presentan-accion-colectiva-ante-onu-contra-mina-de-calica-video/ (C-0284-SPA) (interview of the named plaintiff explaining that SEMARNAT sent teams to present their findings to the plaintiffs (video at 6:20)).

[83] SEMARNAT, *Sirve estudio técnico elaborado por Semarnat para demanda de acción colectiva de comunidades* (25 October 2022) (C-0285-SPA); María Luisa Albores González, Twitter (25 October 2022) (C-0286-SPA.2) (boasting that SEMARNAT's "technical study" ("*estudio técnico*") served as the basis of the collective action against CALICA and congratulating the plaintiffs for "defending their territory!" ("*¡Enhorabuena por defender su territorio!*")).

[84] *See* Quadratin Quintana Roo, *Laura Beristaín crea la Unidad de Asuntos Indígenas* (24 October 2020) (C-0287-SPA.2) (identifying activist Quetzal Tzab as the head of Solidaridad's Indigenous Affairs Department during Beristain's administration); Tr. (English), Day 2, 315:4-317:20 ([redacted] on redirect referring to the "Beristain clan").

[85] Procedural Order No. 7, ¶ 160(a) (recommending "as provisional measures pursuant to Article 47 of the ICSID Convention, Rule 39 of the ICSID Arbitration Rules, and NAFTA Article 1134 that Mexico take no action that might further aggravate or extend the dispute between the Parties, including further public attacks that exacerbate the dispute between the Parties, unduly pressure CALICA or Legacy Vulcan, or render the resolution of the dispute potentially more difficult"); *see* Memorial (Ancillary Claim), ¶¶ 87-88.

> complained against them at the UN, material for the highways of the United States.[86]

Picture 1 – Screenshot of 5 December 2022 *Mañanera*

34. President López Obrador publicly attacked CALICA again earlier this month, on 1 February 2023. In yet another effort to deflect environmental criticism, the President stated:

> Or what they did in the peninsula with this U.S. company, Calica, which, in Playa del Carmen, one of the most beautiful zones of the Caribbean, opened a bank of material to take gravel, sand, to the United States, to use that gravel in the construction of roads, of highways in the United States, destroy paradise. Greenpeace nor any environmental organization protested.[87]

35. Rather than deescalate and foster an environment in which the Parties could continue to seek a mutually-beneficial agreement, Mexico has doubled down on its anti-CALICA

[86] Transcript of President's Morning Press Conference (5 December 2022) (C-0288-SPA.36) (free translation, the original reads: "Esto es Calica. [...] Esta es la destrucción de Playa del Carmen, es una empresa estadounidense que tiene todo esto, pero esta parte es un banco de material. Entonces, por aquí, por este puerto, sacaban el material. Esto no lo vieron los ambientalistas, miren lo que estaban haciendo. [...] Aquí viene el Tren Maya, esto es lo que ellos vieron, esto no. Pero, bueno, miren esto, y ya los tenemos denunciados en la ONU, material para las carreteras de Estados Unidos."); #ConferenciaPresidente desde Campeche, YouTube (uploaded 5 December 2022), https://www.youtube.com/watch?v=wFr-gS8ySzg&ab_channel=GobiernodeMéxico (C-0289-SPA) (video online begins display at 3:09:27).

[87] Transcript of President's Morning Press Conference (1 February 2023) (C-0290-SPA.11) (free translation, the original reads: "O lo que hicieron en la península con esta empresa estado estadounidense, Calica, que, en Playa del Carmen, una de las zonas más bellas del Caribe, abrieron bancos de material para llevar grava, arena, a Estados Unidos, para usar esa grava en la construcción de caminos, de carreteras en Estados Unidos, destruir el paraíso. Nunca Greenpeace ni ninguna organización ambientalista protestó."); #ConferenciaPresidente | Miércoles 1° de febrero de 2023, YouTube (uploaded 1 February 2023), https://www.youtube.com/watch?v=eAyMTN8FQt8&ab_channel=GobiernodeMéxico (C-0291-SPA) (video online begins display at 1:10:04).

campaign since the May 2022 shutdown of La Rosita, rendering such a resolution much more difficult.[88] Respondent emphasizes that the President's *Mañaneras* are an exercise in transparency and that this arbitration cannot be used to limit that exercise,[89] but they precisely make transparent what Mexico did here in connection with the shutdown of La Rosita. And what it did has consequences under NAFTA, as further discussed in Part III.B below.

C. MEXICO'S ALLEGATIONS OF ENVIRONMENTAL VIOLATIONS ARE BASELESS AND PRETEXTUAL.

36. In May 2022, PROFEPA carried out two parallel inspections of La Rosita in an effort to provide the President's instruction with a veneer of legality.[90] These inspections culminated in the shutdown that the President had ordered.[91] PROFEPA's claimed reasons for this shutdown are baseless and contradict years of prior government conduct. Mexico's Counter-Memorial on Ancillary Claim tries to rewrite history by replacing the grounds PROFEPA actually used to shut down La Rosita with new ones. Both old and new, considered in turn below, are equally unfounded, further demonstrating the pretextual nature of PROFEPA's exercise.

1. PROFEPA's Justifications for Closing La Rosita Are Baseless.

37. PROFEPA purported to base its May 2022 shutdown of La Rosita on two grounds: CALICA's alleged failure to secure an environmental impact authorization and a CUSTF.[92] Neither of these grounds withstands scrutiny. CALICA *did* have an environmental impact authorization and *did not need* a CUSTF.[93] Mexican environmental authorities shared this view

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[88] *See* Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶¶ 20-22.

[89] Counter-Memorial (Ancillary Claim), ¶ 121 ("las manifestaciones públicas señaladas son un ejercicio de transparencia llevado a cabo por el Presidente para informar a la ciudadanía sobre diversos temas. La Demandada es enfática en que el arbitraje de inversión no puede servir como medio para limitar la libertad de discurso de jefes de Estado[.]") (citation omitted).

[90] Memorial (Ancillary Claim), ¶¶ 61-64.

[91] PROFEPA Inspection Report on Environmental Impact (2-5 May 2022) (C-0171-SPA.71-72); PROFEPA Inspection Report on Forestry (2-5 May 2022) (C-0172-SPA.62).

[92] PROFEPA Inspection Report on Environmental Impact (2-5 May 2022) (C-0171-SPA.71-72) ("[C]on la finalidad de prevenir cualquier daño que pudiera seguirse ocasionando con las obras y actividades inspeccionadas las cuales no cuentan con autorización en materia de impacto ambiental [...] los inspectores determinamos imponer como medida de seguridad la CLAUSURA TEMPORAL TOTAL de las obras y actividades de aprovechamiento extractivo [...] que lleva a cabo la empresa [...] sin contar con autorización [...] en materia de impacto ambiental [...]."); PROFEPA Inspection Report on Forestry (2-5 May 2022) (C-0172-SPA.62) ("con la finalidad de prevenir cualquier daño que pudiere seguirse ocasionando con las obras y actividades inspeccionadas las cuales no cuentan con la autorización [CUSTF] emitida por la [SEMARNAT] [...] los inspectores actuantes determinamos imponer como medida de seguridad la CLAUSURA TEMPORAL TOTAL de las instalaciones [...].").

[93] *See, e.g.*, Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Report-SPA, ¶¶ 45-65, 111-131.

for decades and only changed their position after President López Obrador's directive to put an end to CALICA's operations immediately.

a) CALICA Is in Compliance With Its Environmental Impact Obligations.

38. CALICA's operations in La Rosita were authorized long ago from an environmental impact standpoint through the 1986 Investment Agreement.[94] At that time, CALICA undertook an environmental impact statement, describing the Project in detail and its expected environmental impacts.[95] The General Law on Ecological Equilibrium and Environmental Protection (*Ley General de Equilibrio Ecológico y la Protección al Ambiente* or "LGEEPA") setting forth detailed environmental impact obligations had not even been enacted at the time,[96] yet CALICA undertook to assess and minimize the impacts of its proposed Project based on Legacy Vulcan's U.S. experience and standards.[97] In fact, CALICA's environmental impact statement at the beginning of the Project was one of the first (if not the first) such statements in the State of Quintana Roo.[98]

39. Relevant Mexican authorities, including at the federal and state levels, evaluated the environmental impacts of the Project at the time and expressly authorized the Project from an environmental perspective. Based on that evaluation, SEMARNAT's predecessor SEDUE concluded in 1986 that the Project was environmentally feasible.

> The SEDUE, based on the final results of its evaluation of the Project's Environmental Impact Statement, with the support of the National Institute of Ecology, A.C. and the Center of Advanced Investigations and Studies [of the National Polytechnic Institute of Mexico], Mérida Unit, considers the carrying out of the Project

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[94] Investment Agreement (6 August 1986) (C-0010-SPA.6, 14). *See also* Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Report-SPA, ¶¶ 8-15.

[95] Investment Agreement (6 August 1986) (C-0010-SPA.37-401). *See also* Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Expert Report-SPA, ¶ 7 ("La MIA de 1986 contiene un estudio detallado —en casi 400 páginas— de los potenciales impactos que pudiere causar la actividad descrita de CALICA sobre el medio ambiente. A modo ilustrativo, entre muchos otros elementos, la MIA de 1986 incluye un estudio de vibraciones producidas por las explosiones previstas, y un programa de medidas de mitigación, un análisis climatológico, etc.").

[96] *See* PROFEPA Inspection Resolution (10 December 2012) (C-0043-SPA.6) (stating that, in 1986 "aun no existía la obligación de contar con autorización en materia de impacto ambiental, en términos de la [LGEEPA], ordenamiento de fecha posterior a la autorización[.]").

[97] *See* Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶¶ 3-4.

[98] *Id.* ¶ 4.

> proposed by [CALICA] *feasible from an environmental standpoint*.[99]

40. Mexico concedes that this statement in the 1986 Investment Agreement means that the Project "could be undertaken" ["*se puede realizar*"] from an environmental perspective. [100] Mexico's experts similarly concede that the "SEDUE treated the 1986 [Investment] Agreement as an environmental impact authorization."[101]

41. The fact that Mexico provided an environmental impact authorization for the Project with respect to La Rosita through the 1986 Investment Agreement had been recognized by Mexico for decades before the May 2022 shutdown. In 2000, for example, when it granted CALICA the Corchalito/Adelita Federal Environmental Authorization, SEMARNAT expressly recognized that:

> [O]n August 6, 1986, by means of an agreement signed by what was then the Ministry of Urban Development and Ecology [SEDUE], the Ministry of Communications and Transportation, the Government of the State of Quintana Roo and the company [CALICA], an *authorization was granted* for this company *to exploit* the properties 'Punta Inha' [Punta Venado] and '*La Rosita*' *above and below the water table*.[102]

42. PROFEPA itself further confirmed the fact that CALICA was authorized to quarry La Rosita after a 2012 inspection of CALICA that Mexico tries to downplay to no avail.[103] This inspection was expressly aimed at verifying "physically and through documents that [CALICA] [...] complied with its obligations regarding environmental impact, with regard to their

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[99] Investment Agreement (6 August 1986) (C-0010-SPA.6, 14) (emphasis added) (free translation, the original reads: "La SEDUE con base en los resultados finales de su evaluación realizada a la Manifestación de Impacto Ambiental del Proyecto, con el apoyo del Instituto de Ecología, A.C. y el Centro de Investigaciones y Estudios Avanzados del [Instituto Politécnico Nacional de México], Unidad Mérida, considera factible desde el punto de vista ambiental, la realización del Proyecto propuesto por [CALICA][.]").

[100] Counter-Memorial (Ancillary Claim), ¶ 145.

[101] Third SOLCARGO Expert Report, ¶ 98 (RE-008) (free translation, the original reads: "[L]a SEDUE le dio el carácter de autorización de impacto ambiental al Acuerdo de 1986"). *See also* Counter-Memorial (Ancillary Claim), ¶¶ 144-145 ("[E]l Acuerdo de 1986 versa sobre tres elementos del proyecto" incluyendo "la factibilidad ambiental del proyecto, labor a cargo de la SEDUE (hoy SEMARNAT) a través del análisis de la Manifestación Preliminar de Impacto Ambiental [.] Los firmantes del Acuerdo consideraron que las operaciones de la empresa eran 'factible[s] desde el punto de vista ambiental.'").

[102] Corchalito/Adelita Federal Environmental Impact Authorization (30 November 2000) (C-0017-SPA.3, 23) (emphasis added) (free translation, the original reads: "Considerando: Que el 6 de agosto de 1986 se autorizó, mediante acuerdo firmado por la entonces [SEDUE], la [SCT], el Gobierno del Estado de Quintana Roo y la empresa [CALICA], la autorización para que dicha empresa lleve a cabo la explotación de los predios 'Punta Inha' [Punta Venado] y 'La Rosita' sobre y bajo el nivel freático.").

[103] *See* Counter-Memorial (Ancillary Claim), ¶ 309.

authorizations, permits or licenses granted by [SEMARNAT]; *and if they have an environmental impact authorization in effect*." [104] PROFEPA found that the 1986 Investment Agreement constituted the relevant environmental impact authorization for La Rosita:

> [I]t is clear that the company [CALICA], does have the prior resolution or authorization in matters of environmental impact to carry out the works or activities that are being performed on the property subject to inspection[.][105]

43. PROFEPA therefore concluded in 2012 that "*there are no irregularities for which [CALICA] should be charged […] for noncompliance with its environmental impact obligations*."[106]

44. Mexico dismisses PROFEPA's 2012 inspection by arguing that it did not relate to La Rosita or evaluate the 1986 Investment Agreement,[107] but the text of PROFEPA's resolution following that inspection belies this argument. PROFEPA made clear that its 2012 inspection covered CALICA's operations in general, including La Rosita.[108] The resolution confirms that PROFEPA inspectors visited La Rosita, El Corchalito and La Adelita, observed quarrying activities in the first two, and concluded that these activities require an environmental impact

[104] PROFEPA Inspection Resolution (10 December 2012) (C-0043-SPA.2) (emphasis added) (free translation, the original reads: "con el objeto de verificar física y documentalmente que él o las responsables de la empresa citada [CALICA] […] hayan dado cumplimiento con sus obligaciones ambientales en materia de impacto ambiental, en lo referente a sus autorizaciones, permisos o licencias, otorgadas por la [SEMARNAT]; y si cuenta con autorización en materia de impacto ambiental vigente.").

[105] *Id*. at 6-7 (free translation, the original reads: "[S]e tiene que […] en fecha seis de agosto de mil novecientos ochenta y seis, se autorizó a la inspeccionada para que llevara a cabo la explotación de los predios 'Punta Inha' y 'La Rosita', sobre y bajo el nivel freático, por lo que, se desprende que *la empresa [CALICA], sí cuenta con el resolutivo o la autorización previa en materia de impacto ambiental* para llevar a cabo las obras o actividades que se realizan en el predio sujeto a inspección, de conformidad con […] [la LGEEPA] y […] [el] Reglamento de la [LGEEPA] en Materia de Evaluación del Impacto Ambiental.") (emphasis added).

[106] *Id*. at 56-57 (emphasis added) (free translation, the original reads: "se desprende que […] no existen irregularidades por las cuales se proceda a emplazar a procedimiento y en su caso, sancionar al establecimiento denominado [CALICA], por incumplimiento a sus obligaciones ambientales en materia de impacto ambiental.").

[107] Counter-Memorial (Ancillary Claim), ¶ 309; Third SOLCARGO Expert Report, ¶ 122 (RE-008); Third Witness Statement of Margarita Balcázar, ¶¶ 33-34 (RW-0012).

[108] PROFEPA Inspection Resolution (10 December 2012) (C-0043-SPA.2) ("[M]ediante orden de inspección número PFPA/3.2/2C.27.5/058-2012-01-QROO, de fecha cinco de noviembre de dos mil doce, esta Dirección General de Inspección de Fuentes de Contaminación ordenó practicar visita de inspección al establecimiento denominado CALIZAS INDUSTRIALES DEL CARMEN, S.A. DE C.V[.]").

authorization.[109] PROFEPA then assessed whether CALICA's activities in La Rosita were authorized, evaluating the 1986 Investment Agreement in particular:

> [R]egarding the La Rosita property, it is clear that [...] this property only has an authorization dated August 6, 1986, to carry out the extraction [...] but not a federal one on environmental impact[.] [D]espite this [...] it is evident that this property effectively has authorization to exploit the "Punta Inha" and "La Rosita" properties above and below the water table, since at the date of its authorization, there was not yet an obligation to have an environmental impact authorization, in terms of the [LGEEPA], a law dated after the authorization that governs the La Rosita property, dated August 6, 1986. [...]
>
> Thus [...] on August 6, 1986, the inspected company was authorized to carry out the exploitation of the properties "Punta Inha" and "La Rosita", above and below the water table, therefore, it is clear that *the company [CALICA], does have the prior resolution or authorization in matters of environmental impact* to carry out the works or activities that are being performed on the property subject to inspection, in accordance with [...] the [LGEEPA] and [...] the Regulation of the [LGEEPA] on Environmental Impact Assessment.[110]

45. Based in part on this analysis, PROFEPA found no violations by CALICA of its environmental obligations.[111] Mexico and its environmental law experts effectively ignore this

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[109] *Id.* at 4 ("[S]e realizó un recorrido por el predio de las instalaciones de la citada empresa, donde se observó que desarrollan obras y actividades de explotación, extracción, aprovechamiento, molienda, selección, almacenamiento y comercialización de piedra caliza, en una superficie que *incluye a los predios denominados La Rosita* con 931.13 hectáreas y El Corchalito con 369.30 hectáreas; mientras que en el predio denominado La Adelita con una superficie de 882.13 hectáreas, aun no se empiezan las actividades [.] Por lo antes mencionado, dichas obras y actividades requieren autorización en materia de impacto ambiental.") (internal emphasis omitted and emphasis added).

[110] *Id.* at 6-7 (emphasis added) (free translation, the original reads: "[P]or lo que hace al predio de La Rosita, se desprende que [...] el predio referido sólo cuenta con autorización de fecha seis de agosto de mil novecientos ochenta y seis, para realizar la explotación [...] mas no así en materia federal respecto del impacto ambiental [.] [N]o obstante [...] se colige que el predio mencionado, efectivamente cuenta con autorización para realizar la explotación de los predios 'Punta Inha' y 'La Rosita' sobre y bajo el nivel freático, pues a la fecha de su autorización, aun no existía la obligación de contar con autorización en materia de impacto ambiental, en términos de la Ley General del Equilibrio Ecológico y la Protección al Ambiente, ordenamiento de fecha posterior a la autorización que ampara el predio La Rosita, de fecha seis de agosto de mil novecientos ochenta y seis. [...] [S]e tiene que [...] en fecha seis de agosto de mil novecientos ochenta y seis, se autorizó a la inspeccionada para que llevara a cabo la explotación de los predios 'Punta Inha' y 'La Rosita', sobre y bajo el nivel freático, por lo que, se desprende que *la empresa [CALICA], sí cuenta con el resolutivo o la autorización previa en materia de impacto ambiental* para llevar a cabo las obras o actividades que se realizan en el predio sujeto a inspección, de conformidad con [...] [la LGEEPA] y [...] [el] Reglamento de la [LGEEPA] en Materia de Evaluación del Impacto Ambiental.") (emphasis added).

[111] *Id.* at 56-57 ("[S]e desprende que [...] no existen irregularidades por las cuales se proceda a emplazar a procedimiento y en su caso, sancionar al establecimiento denominado [CALICA], por incumplimiento a sus obligaciones ambientales en materia de impacto ambiental.").

evidence. The fact that PROFEPA did not expressly address each and every provision of the 1986 Investment Agreement is immaterial; it clearly found that instrument to constitute a sufficient environmental authorization for CALICA's activities in La Rosita and found no environmental violations.[112]

46. Yet, a decade later, in May 2022, PROFEPA asserted that "the inspected works and activities [at La Rosita] lack an environmental impact authorization,"[113] even though CALICA had again presented the 1986 Investment Agreement as the environmental authorization for its activities there; a document PROFEPA ignored altogether.[114] The reason for Mexico's flip-flop on this issue is clear and simple: PROFEPA was executing the President's instruction to "immediately stop" CALICA's extraction, and denying the existence of an environmental-impact authorization served that purpose.

47. The 2012 PROFEPA inspection was not the only one to encompass activities in La Rosita, even though Mexico falsely claims that "La Rosita has never before been inspected to verify CALICA's compliance" with relevant laws.[115] For instance, in 1993, after CALICA had spent several years quarrying La Rosita, PROFEPA conducted an inspection of that lot "in order to verify and confirm [CALICA's] compliance with the provisions contained in the [LGEEPA], the technical ecological standards and other applicable legal provisions for the granting of permits, authorizations and concessions."[116] PROFEPA inspectors observed and reported on CALICA's production process, and went on to describe that CALICA "presented its 1986 Environmental Impact Statement, as well as the technical recommendations and mitigation measures for the [...]

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[112] *Id.* at 7 ("[CALICA], sí cuenta con el resolutivo o la autorización previa en materia de impacto ambiental[.]"), 56-57 ("[N]o existen irregularidades por las cuales se proceda a emplazar a procedimiento[.]").

[113] PROFEPA Inspection Order and Report on Environmental Impact (29 April 2022) (C-0171-SPA.71) (free translation, the original reads: "las obras y actividades inspeccionadas las cuales no cuentan con autorización en materia de impacto ambiental.").

[114] *Id.* at 16 (refusing to examine the 1986 Investment Agreement at the time). *See also* Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Expert Report-SPA, ¶¶ 92-99 (further explaining that it was improper for PROFEPA to ignore the 1986 Investment Agreement before imposing the shutdown).

[115] Counter-Memorial (Ancillary Claim), ¶ 220 (free translation, the original reads: "[E]l predio La Rosita nunca había sido inspeccionado para verificar el cumplimiento de CALICA en materia de impacto ambiental respecto de la extracción de piedra caliza y en materia forestal con relación a la remoción de vegetación[.]").

[116] PROFEPA Inspection Report (17 March 1993) (C-0280-SPA.3-4, 11-12) (free translation, the original reads: "[E]s con el fin de verificar y comprobar el cumplimiento de las disposiciones contenidas en la Ley General del Equilibrio Ecológico y la Protección al Ambiente, de las normas técnicas ecológicas y demás disposiciones jurídicas aplicables, al otorgamiento de permisos, autorizaciones y concesiones[.]"). To facilitate the legibility of this handwritten inspection report, a transcribed version has been provided and appended to the exhibit after the original document. Pincites are included to the original and transcribed text.

extraction process, [...] [which] were verified during the visit, *observing that they were being complied with*."[117] In the ensuing resolution for its 1993 inspection, PROFEPA concluded that, "in light of the foregoing and having analyzed the legal documentation and the company's physical extraction, we [PROFEPA] conclude on a preliminary basis that *[CALICA] is extracting in accordance with applicable laws*."[118]

48. Thus, before 2022, PROFEPA at least twice assessed CALICA's quarrying activities in La Rosita to determine whether they were duly authorized or violated environmental laws. PROFEPA at least twice formally determined that CALICA was duly authorized to quarry La Rosita and was not in violation of environmental laws. PROFEPA did not alter this conclusion for years thereafter, until it was dispatched to execute the President's discretionary instruction in May 2022.

49. If all of this were not enough, the 2016 environmental audit of CALICA further confirms the validity of the 1986 Investment Agreement as an environmental impact authorization. In the section of the diagnostic report evaluating the need for an environmental impact authorization, the independent, PROFEPA-certified auditors who conducted the 2016 audit explained that CALICA's extractive activities at La Rosita would normally require such an authorization. Their report went on to say, however, "that the company started operations in 1987, before the [...] LGEEPA[] entered into force; [and that] [...] it complied with the environmental requirements that were applicable when it started its activities."[119] This assessment echoed the one PROFEPA itself made after its 2012 inspection of CALICA. Based in part on this assessment of the auditors, in 2016 PROFEPA granted CALICA a Clean Industry Certificate for the sixth time in over a decade.[120]

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[117] *Id.* at 6, 14 (emphasis added) (free translation, the original reads: "la empresa presenta Manifestación de Impacto Ambiental de 1986 así como recomendaciones técnicas y medidas de mitigación principalmente para el proceso constructivo de la [dársena] y para el proceso de explotación, [estas últimas fueron verificadas durante la visita observándose que se le da cumplimiento].") (insertions in original text).

[118] PROFEPA Inspection Resolution (29 March 1993) (C-0281-SPA.2) (emphasis added) (free translation, the original reads: "En atención a lo expuesto y del análisis de la documentación legal y aprovechamiento físico de la empresa, manifestamos de manera preliminar que [CALICA] realiza el aprovechamiento conforme a las normas aplicables.").

[119] Environmental Audit Report (March 2016) (C-0208-SPA.21) (free translation, the original reads: "[L]as actividades de extracción de mineral pétreo (roca caliza) que realiza CALICA, requieren de procedimiento de evaluación de la manifestación de impacto ambiental. No obstante, se debe considerar que la empresa inició operaciones en 1987, antes de que entrara en vigor la [...] LGEEPA[]; [y que] [...] cumplió con los requerimientos en materia ambiental que le eran aplicables cuando comenzó sus actividades[.]"). *See also* Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Report-SPA, ¶¶ 57-63.

[120] Clean Industry Certificate (27 July 2016) (C-0042-SPA).

50. Mexico tries to downplay the import of PROFEPA's multiple grants of Clean Industry Certificates to CALICA, arguing that those certificates and PROFEPA's environmental audit program did not verify CALICA's compliance with the terms and conditions of the 1986 Investment Agreement.[121] This argument misses the mark. La Rosita was not shut down for *breaching the terms* of the 1986 Investment Agreement; it was shut down for purportedly *not having an environmental impact authorization at all*.[122] This purported rationale for shutting down La Rosita flies in the face of the very text of the 1986 Investment Agreement as well as decades of government representations and conduct, including PROFEPA's grant of multiple Clean Industry Certificates, indicating that, in light of that Agreement, CALICA *was in compliance with its environmental-impact obligations*.[123]

51. Respondent's dismissal of those industry certificates and its environmental audit program is undermined by PROFEPA's own handbook, which explains that environmental audits "verify that the Company complies with Federal and Local Environmental Laws, Federal and Local Environmental Regulations, Mexican Official Standards (NOMs) issued by SEMARNAT and the requirements of each municipality."[124] The evidence also shows the rigorous nature of the program, which PROFEPA monitored closely.[125] For instance, when CALICA submitted its first audit report in 2002, PROFEPA identified 29 environmental issues that CALICA had to address to obtain its certificate.[126] CALICA and PROFEPA entered into a *Convenio de Concertación*, an

[121] *See, e.g.*, Counter-Memorial (Ancillary Claim), ¶ 315 ("La auditoría ambiental no tiene como finalidad la verificación sobre el cumplimiento de los términos y condicionantes[.]"); *id.*, ¶ 316 ("La obtención de una certificación de Industria Limpia no contempla la comprobación física de que la empresa esté en cumplimiento de los parámetros y volúmenes de extracción autorizados[.]"); *id.*, ¶ 317 ("[E]n los seis procedimientos de autoevaluación se incurre en la misma omisión: [...] no se revisa ninguna condicionante del Acuerdo de 1986[.]"); *id.*, ¶ 318 ("[N]o se hace referencia al cumplimiento de términos y obligaciones contendidos en el Acuerdo[.]").

[122] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Report-SPA, ¶ 44 ("PROFEPA clausuró las actividades extractivas en La Rosita alegando la (supuesta) inexistencia de una autorización en materia de impacto ambiental para ese predio[.]"); PROFEPA Inspection Order and Report on Environmental Impact (29 April 2022) (C-0171-SPA.71-72).

[123] *See* Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Report-SPA, ¶¶ 45-65 (noting multiple instances of government representations and conduct).

[124] National Environmental Audit Program Explanatory Circular (C-0209-SPA.6) (free translation, the original text reads: "En la Auditoría Ambiental se verifica que la Empresa cumpla con las Leyes Ambientales Federales y Locales, los Reglamentos Ambientales Federales y Locales, las Normas Oficiales Mexicanas ordenadas por Materia (NOMs) dictadas por la SEMARNAT y los requerimientos que cada municipio aplique.").

[125] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 29-31, 34-41.

[126] Coordination Agreement Regarding Actions Resulting from Audit (13 November 2002) (C-0292-SPA). *See also* Action Plan Compliance Report (4 April 2003) (C-0293-SPA.9-18).

agreement specifying a six-month action plan for CALICA to address those issues.[127] CALICA thereafter complied with that plan and PROFEPA confirmed that this was the case by reviewing additional documentary evidence submitted by CALICA and even carrying out site visits.[128] Weeks later, PROFEPA awarded CALICA its first clean industry certificate.[129]

52. The law regulating these audits confirms that, "through the [Clean Industry] Certificate, PROFEPA […] acknowledges that at the time of issuance, the Company operates *in full compliance with environmental regulations*[.]"[130] By granting six Clean Industry Certificates to CALICA covering the 2003-2018 period, Mexico (through PROFEPA) confirmed that CALICA was in full compliance with its environmental obligations at the time, including having a valid environmental-impact authorization for activities in La Rosita.

53. For all of these reasons, the record establishes that PROFEPA's shutdown of La Rosita based on the alleged lack of an environmental impact authorization was pretextual and baseless — contradicted by decades of conduct by PROFEPA and SEMARNAT. PROFEPA was simply trying to give a semblance of legality to its execution of the President's raw instruction to halt CALICA's remaining operations.

b) CALICA Has Not Violated Forestry Laws.

54. The shutdown imposed as a result of PROFEPA's parallel forestry inspection was similarly pretextual. As part of that inspection, PROFEPA professed to conclude that CALICA lacked a CUSTF in violation of the company's legal obligations and that this supposed violation posed such a serious "risk of environmental damage" that it required the immediate shutdown of operations at La Rosita.[131] This is untrue. CALICA has openly and validly cleared vegetation to

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[127] Coordination Agreement Regarding Actions Resulting from Audit (13 November 2002) (C-0292-SPA.6); Action Plan Compliance Report (4 April 2003) (C-0293-SPA.2, 18).

[128] PROFEPA Certification of Compliance with Action Plan (19 May 2003) (C-0294-SPA.2) ("[C]omo resultado del análisis de la documentación […] así como al resultado de las visitas efectuadas a sus instalaciones por personal de esta Dependencia [de PROFEPA] a efecto de dar seguimiento a la ejecución de las obras reportadas, se ha podido constatar la realización de las actividades convenidas.").

[129] Clean Industry Certificate (23 June 2003) (C-0037-SPA).

[130] LGEEPA Regulation on Environmental Audits, Article 23 (29 April 2010) (C-0210-SPA.10) (emphasis added) (free translation, the original reads: "A través del Certificado, la Procuraduría o, en su caso, la Agencia, según corresponda, reconocen que al momento de su otorgamiento, la Empresa opera en pleno cumplimiento de la regulación ambiental y que su Desempeño Ambiental es conforme con los Términos de Referencia.").

[131] PROFEPA Inspection Order and Report on Forestry (29 April 2022) (C-0172-SPA.61-62) ("[L]a [PROFEPA] tiene la obligación de cuidar que las obras y actividades realizadas no sigan generando un riesgo de daño a los recursos naturales[.] […] Es así, que con la finalidad de prevenir cualquier daño que pudiera seguirse ocasionando […] y considerando el riesgo de daño a los recursos naturales […] determinamos imponer como medida de seguridad la CLAUSURA[.]").

quarry La Rosita without a CUSTF for over 30 years, and PROFEPA determined that CALICA did not violate the law for doing so — that is, before the President capriciously ordered the shutdown of CALICA.

55. The Tribunal is well aware that a CUSTF is a permit to remove vegetation from a "forested terrain."[132] As the name of that permit suggests (*cambio de uso de suelo en terrenos forestales*), it covers the change of land use from forestry to non-forestry.[133] Mexico argues that a CUSTF is necessary to remove vegetation for "any land where there is forested vegetation" ("*cualquier terreno en el que exista vegetación forestal*").[134] This assertion assumes that any terrain with forestry-type vegetation is necessarily a "forested terrain" for purposes of the CUSTF. But, as [redacted] has explained and confirms in his latest report, Mexican law mandates that, when considering whether a property is a forested terrain for purposes of the CUSTF, authorities are bound by the environmental management program governing that property's land use.[135] When a property's land use is incompatible with forestry, that property cannot be said to produce forestry goods or services and therefore does not constitute a "forested terrain."[136]

56. Every land-use regulation applicable to La Rosita since 1987 has classified that lot for mining and industrial use and specified *forestry as an incompatible use*.[137] Illustrating this fact, in 2001, the land use for La Rosita and Punta Venado was specifically described as

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[132] *See, e.g.*, Tr. (Spanish), Day 3, 677:5-13 ([redacted] presentation) [English, 588:17-589:4]; Claimant's Post-Hearing Brief, ¶ 53; *id.*, Appendix A, Question 6, pp. 10-11.

[133] Expert Report-[redacted]-Environmental Law-Claimant's Memorial-SPA, ¶¶ 106-107; Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Report-SPA, ¶¶ 100-106; Tr. (Spanish), Day 3, 677:5-678:3, 681:13-22, 705:12-19 ([redacted] presentation and responding to questions from the Tribunal) [English, 588:17-589:16, 592:14-20, 611:3-20].

[134] Counter-Memorial (Ancillary Claim), ¶ 258.

[135] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Expert Report-SPA, ¶¶ 42-48; Expert Report-[redacted]-Environmental-Claimant's Ancillary Claim Memorial-Third Report-SPA, ¶ 115; Expert Report-[redacted]-Environmental Law-Claimant's Memorial-SPA, ¶ 107.

[136] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Expert Report-SPA, ¶¶ 42-48; Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Report-SPA, ¶ 121.

[137] From 1987 to 1994, the land use for La Rosita was governed by a license granted by the State of Quintana Roo based on the 1986 Investment Agreement, authorizing extraction of materials. From then on, La Rosita has been governed by successive regional and local land management programs. *See* Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Report-SPA, ¶ 116-121.

"CALICA Mining."[138] CALICA has therefore never needed a CUSTF to clear vegetation in La Rosita.[139]

Table 1 – Land Use Applicable to La Rosita[140]

Year	Regulatory Instrument	UGA	Land Use
1987	Industrial Use License	N/A	Exclusively for the exploitation of stone and its industrial transformation through crushing process[141]
1994	Coordination Agreement for Ecological Management of the Cancun-Tulum Corridor region	T-25	"Use: Suitable for Industrial Activities"[142] It is neither a "conservation area" nor a "protection area."
2001	Cancun-Tulum Corridor POET	19	Predominant Use: Mining[143] Incompatible Use: Forestry, Flora, and Fauna (among others)
2008	Local Ecological Management Program for the Municipality of Cozumel	A13	Predominant Uses: Mining, Port, and Industrial[144] Incompatible Use: Forestry, Flora, and Fauna

57. Mexico's Counter-Memorial on Ancillary Claim posits, however, that a CUSTF was necessary for La Rosita from day one and that CALICA has deliberately refused to comply with this requirement for over three decades.[145] Faced with the undisputed fact that, before May 2022, no authority had ever so much as hinted that this permit was required for La Rosita, Mexico complains that PROFEPA lacks the resources to monitor every environmental project and that it was unaware of CALICA's activities in La Rosita.[146] Yet the record shows that PROFEPA inspected

[138] POET (16 November 2001) (C-0078-SPA.39).

[139] *See, e.g.*, Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Report-SPA, ¶¶ 115-122 (explaining that La Rosita never required a CUSTF to remove vegetation); Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶¶ 9-10; Tr. (English), Day 2, 303:12-15 [redacted] cross-examination: "we carried out activities in [...] La Rosita for many years, 2000 onwards, without anyone requesting us for [a CUSTF].").

[140] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Report-SPA, ¶ 120.

[141] Industrial Land-Use License (17 March 1987) (MMB-0059).

[142] 1994 Cancun-Tulum Coordinating Agreement (26 October 1994) (MMB-0004.13).

[143] POET (16 November 2001) (C-0078-SPA.39).

[144] Cozumel POEL (21 October 2008) (MMB-0060.112).

[145] Counter-Memorial (Ancillary Claim), ¶ 165 ("En materia forestal, al no obtener la autorización que estaba establecida desde la Ley Forestal de 1986 y su reglamento de 1988, entonces cada árbol derribado desde el comienzo de sus operaciones demuestra su comportamiento ilegal y su mala fe."); *id.*, ¶¶ 59-61, 182 (accusing Claimant of deliberately breaching its supposed obligation to obtain a CUSTF).

[146] *See id.*, ¶¶ 215-216, 220.

La Rosita as early as 1993, was well aware of those activities for decades, and, despite this knowledge, confirmed that CALICA complied with applicable laws.

58. While PROFEPA may be unable to monitor "every" project, CALICA is not a small, new, or secretive operation that could have plausibly fallen through the cracks.[147] It is the largest non-tourism employer in Quintana Roo, has maintained a professional relationship with PROFEPA for decades, and has a quarry spanning hundreds of hectares.[148] As [redacted], explains, "CALICA was a company whose activity was widely known by federal, state and municipal environmental authorities."[149] Even President López Obrador has publicly expressed frustration that environmental groups have never complained about CALICA's large operations while complaining about the purportedly smaller footprint of the Mayan Train.[150]

59. In fact, as discussed above, Mexico's environmental authorities have inspected and received information about CALICA multiple times over the decades, including with respect to La Rosita.[151] As far back as 1993, when CALICA had already cleared vegetation to quarry La Rosita, PROFEPA inspected that lot to check compliance with "applicable legal provisions for the granting of permits, authorizations and concessions,"[152] and concluded that "*[CALICA] is*

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[147] *Id*., ¶ 215 ("[R]esulta fácticamente imposible para la PROFEPA [...] verificar [...] el cumplimiento de todos los operadores obligados en materia ambiental."); *id*., ¶ 220 (stating that PROFEPA "no puede[] [...] verifica[r] el cumplimiento de todos los obligados").

[148] *See* Memorial, ¶ 6; Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶¶ 7-11; La Rosita Title Deed (22 May 1987) (C-0030-SPA.4); El Corchalito Title Deed (28 August 1996) (C-0034-SPA.5).

[149] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Expert Report-SPA, ¶ 53.

[150] *See, e.g*., Transcript of President's Morning Press Conference (21 June 2022) (C-0231-SPA.75) ("Resulta que los ambientalistas que no quieren el Tren Maya en esa zona no vieron lo de la destrucción de Vulcan, de la empresa estadounidense, que ya estamos terminando de hacer todo el estudio para mostrarles la destrucción tremenda que causaron[.]"); Andrés Manuel López Obrador, *Conferencia de prensa matutina, desde Palacio Nacional*, YouTube (uploaded 21 June 2022), https://www.youtube.com/watch?v=SCDD0Oc5PAQ (C-0263-SPA) (video online begins display at 02:30:43); Transcript of President's Morning Press Conference (4 April 2022) (C-0228-SPA.26-27) ("¿Saben cuántas hectáreas tienen? Dos mil 400 hectáreas. [...] Miren aquí está la diferencia. Y nosotros estamos replantando 200 mil hectáreas y este camino, esta brecha para el tren son 100 hectáreas. La doble moral, el doble discurso.").

[151] Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶¶ 4-5, 9-11. *See also, e.g*., PROFEPA Inspection Report (17 March 1993) (C-0280-SPA) (environmental inspection); PROFEPA Inspection Resolution (10 December 2012) (C-0043-SPA) (environmental impact inspection); PROFEPA Inspection Resolution (23 September 1996) (C-0295-SPA); Second Technical Report (18 July 1988) (C-0296-SPA).

[152] PROFEPA Inspection Report (17 March 1993) (C-0280-SPA.3-4, 11-12) (free translation, the original reads: "[E]s con el fin de verificar y comprobar el cumplimiento de las disposiciones contenidas en la Ley General del Equilibrio Ecológico y la Protección al Ambiente, de las normas técnicas ecológicas y demás disposiciones jurídicas aplicables, al otorgamiento de permisos, autorizaciones y concesiones[.]").

extracting in accordance with applicable laws."[153] Had a CUSTF been required for La Rosita, it is inconceivable that PROFEPA would have reached this conclusion, particularly since — as Respondent asserts — Mexican forestry laws required that permit, where applicable, at that time.[154]

60. Further confirming that neither PROFEPA nor SEMARNAT believed that a CUSTF was required for La Rosita until that view became inconvenient for Mexico in this arbitration, none of CALICA's federal environmental authorizations specify that a CUSTF was required even though they envisioned the removal of vegetation for quarrying.[155] This is in stark contrast with the environmental impact authorizations SEMARNAT has issued in other cases, where the agency expressly notes that the granting of that authorization "does not exempt the applicant from applying and obtaining a" CUSTF.[156]

61. Mexico's allegation that a CUSTF was required for La Rosita is also contradicted by its own depiction of PROFEPA's duties. Mexico's Counter-Memorial on Ancillary Claim stresses that PROFEPA is obligated to investigate any "indicia of possible noncompliance with environmental regulations."[157] As the following examples show, Mexican environmental authorities had full knowledge that CALICA was clearing vegetation in La Rosita for decades and never objected.

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[153] PROFEPA Inspection Resolution (29 March 1993) (C-0281-SPA.2) (emphasis added) (free translation, the original reads: "En atención a lo expuesto y del análisis de la documentación legal y aprovechamiento físico de la empresa, manifestamos de manera preliminar que [CALICA] realiza el aprovechamiento conforme a las normas aplicables.").

[154] Counter-Memorial (Ancillary Claim), ¶¶ 167, 261.

[155] Investment Agreement (6 August 1986) (C-0010-SPA.20) ("El proceso se inicia con el desmonte de la franja de terreno que se va a excavar[.]"); *id*. at 403 ("El desmonte previsto para la preparación del sitio deberá ser en forma parcelaria[.]"); Corchalito/Adelita Federal Environmental Impact Authorization (30 November 2000) (C-0017-SPA.32) ("Para realizar el aprovechamiento del banco, se trabajaran las areas desmontadas[.]"); *id*. at 33 ("Las actividades que se llevaran a cabo para la operación del proyecto son las siguientes: [...] a) desmonte y limpieza del terreno[] b) [d]espalme[.]"); *id*. at 38-40 (further mentioning "*desmonte*" activities).

[156] *See, e.g.,* Environmental Impact Authorization for the Mayan Train Project (1 December 2020) (C-0297-SPA.553) ("[L]a presente resolución no exime al promovente de tramitar y obtener la autorización correspondiente para el cambio de uso del suelo en terrenos forestales en una superficie de 800.95 ha, ante la Dirección General de Gestión Forestal y de Suelos de esta Subsecretaría adscrita a la SEMARNAT.") (internal emphasis omitted).

[157] Counter-Memorial (Ancillary Claim), ¶ 209 (free translation, the original reads: "PROFEPA se encuentra obligada a actuar en el ámbito de sus atribuciones y no existe disposición legal alguna para que deje de ejercer su actividad de inspección, menos aun cuando existen indicios de alguna posible violación a las disposiciones ambientales.") (citations omitted).

- In describing the Project, the 1986 Investment Agreement states that CALICA will clear vegetation ("*desmonte*"), an obvious prerequisite to quarrying.[158]
- In 1987, the State of Quintana Roo hired an independent environmental institution to supervise CALICA's compliance with certain obligations of the 1986 Investment Agreement. [159] This institution (which later became an instrumentality of the federal government) visited CALICA regularly and sent the authorities — including SEDUE — reports specifying exactly how much vegetation CALICA had cleared and how it was disposing of the cleared remains (with photographic references).[160] These reports make no mention of a CUSTF being necessary.
- As part of the 1993 PROFEPA inspection described above, the inspectors reported that "the extraction process begins with the *clearing of the land*, which is carried out in a controlled manner, that is, as the extraction process progresses, *the plot is cleared*, keeping a distance between the vegetation and the bank of stone material[.]"[161] PROFEPA went on to conclude that CALICA complied with all applicable obligations and made no mention of the CUSTF.[162]
- In 1999, CALICA requested that the federal authorization to quarry below the water table be extended to La Adelita and El Corchalito.[163] To do so, it submitted a new environmental impact statement that identified vegetation-removal ("*desmonte*") activities at La Rosita — even including a picture of these activities (*see* below). [164] SEMARNAT thereafter granted the environmental impact authorization CALICA requested, explicitly mentioning the 1986 Investment Agreement.[165]

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[158] Investment Agreement (6 August 1986) (C-0010-SPA.20) ("El proceso se inicia con el desmonte de la franja de terreno que se va a excavar[.]"); *id*. at 403 ("El desmonte previsto para la preparación del sitio deberá ser en forma parcelaria[.]").

[159] Agreement between CALICA, the Instituto de Ecología and the Quintana Roo Government (19 March 1987) (C-0298-SPA.4) ("[El Instituto Nacional de Ecología] fue designad[o] por el Gobierno de Quintana Roo con el objeto de realizar labores de instrucción y seguimiento, inspección y vigilancia del cumplimiento del [Acuerdo de 1986][.]").

[160] *See, e.g.*, Second Technical Report (18 July 1988) (C-0296-SPA.4, 7, 11); *id*. at 2 (sending a copy of the report to SEDUE); Third Technical Report (18 April 1989) (C-0299-SPA.5-7).

[161] PROFEPA Inspection Report (17 March 1993) (C-0280-SPA.5, 13) (free translation, the original reads: "En esta área [La Rosita] se observó que el proceso de extracción inicia desde el desmonte que se realiza de manera controlada, es decir conforme se avanza en la extracción se desmonta la parcela guardando una distancia entre la vegetación y el banco de material pétreo[.]").

[162] PROFEPA Inspection Resolution (29 March 1993) (C-0281-SPA.2) ("En atención a lo expuesto y del análisis de la documentación legal y aprovechamiento físico de la empresa, manifestamos de manera preliminar que[CALICA] realiza el aprovechamiento conforme a las normas aplicables.").

[163] CALICA's Environmental Impact Statement, Chapter II (23 October 2000) (C-0077-SPA.41)("[C]on fecha 21 de octubre de 1999, [CALICA] solicitó a la Dirección General de Ordenamiento Ecológico e Impacto Ambiental del Instituto Nacional de Ecología, hacer extensiva la autorización otorgada por la entonces SEDUE para el aprovechamiento de agregados pétreos, puesto que esa entidad autorizó en 1986 el aprovechamiento en los predios 'Punta Inha' y 'La Rosita' y posteriormente, la empresa adquirió los predios 'La Adelita' y 'El Corchalito'.").

[164] *Id*. at 240.

[165] Corchalito/Adelita Federal Environmental Impact Authorization (30 November 2000) (C-0017-SPA.3, 23) (free translation, the original reads: "Considerando: Que el 6 de agosto de 1986 se autorizó mediante acuerdo firmado por la entonces [SEDUE], la [SCT], el Gobierno del Estado de Quintana Roo y la empresa

Picture 2 – CALICA's Further Disclosure to SEMARNAT in 2000 of Vegetation Removal in La Rosita[166]

Foto 4- Desmonte de vegetación en el predio "La Rosita".

- During the 2021 Hearing in this Arbitration, [redacted] testified that CALICA had never had a CUSTF for La Rosita, despite clearing that lot of vegetation, and that no authority had ever complained.[167] The head of PROFEPA and other Mexican environmental officials attended the Hearing that day; yet PROFEPA did nothing until after President López Obrador instructed SEMARNAT to halt CALICA's extraction in La Rosita.[168]

62. CALICA has been open about the fact that it has had to clear vegetation to quarry La Rosita since the late 1980s. Mexico's environmental authorities have had full knowledge of this fact and have confirmed that CALICA was complying with applicable laws. Mexico never claimed that a CUSTF was required for La Rosita until PROFEPA's inspectors were dispatched to execute the President's instruction to halt CALICA's quarrying. These facts confirm that, as [redacted] has testified, no CUSTF was ever applicable to La Rosita. The shutdown of La Rosita for failure to obtain that permit was baseless and pretextual.

[CALICA], la autorización para que dicha empresa lleve a cabo la explotación de los predios 'Punta Inha' [Punta Venado] y 'La Rosita' sobre y bajo el nivel freático.").

[166] CALICA's Environmental Impact Statement, Chapter II (23 October 2000) (C-0077-SPA.240).

[167] Tr. (English), Day 2, 303:4-7 [redacted] cross-examination: "We carried out quarrying operations in La Rosita and El Corchalito without this requirement for decades in the full knowledge of both SEMARNAT and PROFEPA without any objection having ever been raised.").

[168] *See* Tr. (English), Day 2, 271 (listing Ms. Blanca Alicia Mendoza Vera, head of PROFEPA, and other officials from this agency and SEMARNAT among the attendees to the Hearing).

c) PROFEPA's Allegations of Environmental Harm Are Unfounded.

63. Respondent's Counter-Memorial tries to justify the shutdown of La Rosita as due to alleged environmental harm purportedly caused by CALICA's operations there. As it did in the previous stage of this arbitration, Respondent claims that CALICA *per se* caused environmental harm under Mexican law by breaching the 1986 Investment Agreement, to the extent that agreement constituted an environmental impact authorization (a fact Respondent remarkably refuses to concede).[169] Respondent also relies on alleged environmental harm identified in PROFEPA's May 2022 inspection reports and SEMARNAT's anti-CALICA report (so-called "*dictamen*") of August 2022.[170] Mexico's claim of *per se* environmental harm and allegations of specific harms are baseless and pretextual.

64. As explained in Part II.C.2 below, CALICA did not breach the 1986 Investment Agreement, but even if it did, that would not *ipso facto* constitute environmental harm under Mexican law. As Legacy Vulcan established at the Hearing and in its post-hearing briefs,[171] Mexico's Federal Law on Environmental Liability (*Ley Federal de Responsabilidad Ambiental*) defines environmental damage as "the <u>*adverse and measurable*</u> loss, change, deterioration, diminution, impairment, or modification of habitats, ecosystems, natural elements and resources, of their chemical, physical or biological conditions, of the interaction relationships among them, as well as of the environmental services they provide."[172] That law carves out from this definition activities carried out in accordance with an environmental impact authorization but makes this carve-out inapplicable when that authorization is breached.[173] In other words,

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[169] Counter-Memorial (Ancillary Claim), ¶¶ 251, 270-276; Third SOLCARGO Expert Report, ¶ 106 (RE-008).

[170] Counter-Memorial (Ancillary Claim), ¶¶ 250-253, 522; SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA) (hereinafter "SEMARNAT, *Dictamen de Impactos Ambientales*").

[171] Claimant's Post-Hearing Brief, ¶¶ 135-136; Claimant's Post Hearing Reply, ¶¶ 64-65; Tr. (Spanish), Day 3, 691:8-695:1 [redacted] cross-examination) [English, 600:5-603:14].

[172] Federal Law on Environmental Liability, Article 2.III (7 June 2013) (R-0080-SPA.3) (emphasis added) (free translation, the original reads: "Daño al ambiente: Pérdida, cambio, deterioro, menoscabo, afectación o modificación adversos y mensurables de los hábitat, de los ecosistemas, de los elementos y recursos naturales, de sus condiciones químicas, físicas o biológicas, de las relaciones de interacción que se dan entre éstos, así como de los servicios ambientales que proporcionan. Para esta definición se estará a lo dispuesto por el artículo 6o de esta Ley[.]").

[173] *Id.*, Article 6. *See also* Claimant's Post-Hearing Brief, ¶ 136; Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 100-106.

authorized activities cannot constitute environmental damage while unauthorized activities may so constitute *if* they result in "the adverse and measurable" impacts listed in the law.[174]

65. Respondent's contention that unauthorized activities cause *per se* environmental damage regardless of whether their environmental impacts are "adverse and measurable"[175] is untenable. Not posting a sign required under an environmental authorization, for example, would not constitute environmental damage or justify the shutdown of a project.[176] Yet that would be the result under Respondent's tortured interpretation of the environmental-liability law.

66. The fact is that CALICA's activities in La Rosita did not constitute environmental damage under that law's carve-out because they were authorized,[177] but — even if they failed to comply fully with that authorization — Mexico has failed to demonstrate through technical or scientific evidence that those activities have resulted in a "measurable and adverse" impact to the environment. As is detailed in the report of Dr. Gino Bianchi Mosquera, an independent environmental expert with over 30 years of experience directing and participating in environmental projects around the world, including Mexico, the allegations of environmental harm in PROFEPA's May 2022 inspection reports and in SEMARNAT's August 2022 "*dictamen*" are bogus.[178] Some examples:

- SEMARNAT's report drew conclusions about the soil quality of CALICA's lots without running a single sample from those lots. Instead, it relied only on four soil samples from a surrounding area as far as 2 km away from CALICA (*see* orange squares in Picture 3 below), to evaluate an area the size of 2,450 soccer fields. This was 25 times fewer samples than would have been required by Mexican testing standards.[179]

[174] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Report-SPA, ¶¶ 91-92.

[175] Counter-Memorial (Ancillary Claim), ¶¶ 251, 270-275.

[176] Tr. (Spanish), Day 3, 694:10-695:1 ([redacted] cross-examination) [English, 603:3-14].

[177] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, Part IV.A.

[178] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, Parts 2, 5.8 (Dr. Bianchi's conclusions).

[179] *Id.*, ¶¶ 42-45.

Picture 3 – Soil Samples Taken by SEMARNAT for Its August 2022 Report[180]

- SEMARNAT's report indicates — based on that inadequate sampling— that CALICA's soil was "contaminated," but none of the metals sampled by SEMARNAT reach even 10% of the concentrations that could be considered to constitute contamination under applicable Mexican standards.[181]
- SEMARNAT also took water samples only from outside CALICA (as far as 4 km away), but failed to consider water samples taken by an independent laboratory that CALICA had been providing to environmental authorities for over 20 years. These samples consistently show no water contamination within CALICA's properties.[182]
- To measure CALICA's water quality, SEMARNAT used an entirely subjective factor — distorting a well-known formula — and even altered the academically-accepted definitions of what constitutes high or low quality water. It did so in such a way as to skew the result in favor of SEMARNAT's preferred conclusion: that CALICA's activities adversely affected water quality. [183]
- The SEMARNAT report asserts that CALICA's extraction has affected the way water flows underground in the area, but SEMARNAT modeled the hydrogeology so poorly that they artificially created differences in water elevation of up to 15 meters, the height of a three-story building.[184]
- The SEMARNAT report "inferred" that CALICA's extraction negatively affected biodiversity in the area, but Dr. Bianchi demonstrates through photographic

[180] *Id.*, Illustration 5.1 (digitally enhancing an image from the SEMARNAT Dictamen).

[181] SEMARNAT, *Dictamen de Impactos Ambientales* (C-0237-SPA.81). *But see* Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, Part 5.1.1.

[182] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG., ¶¶ 72-77.

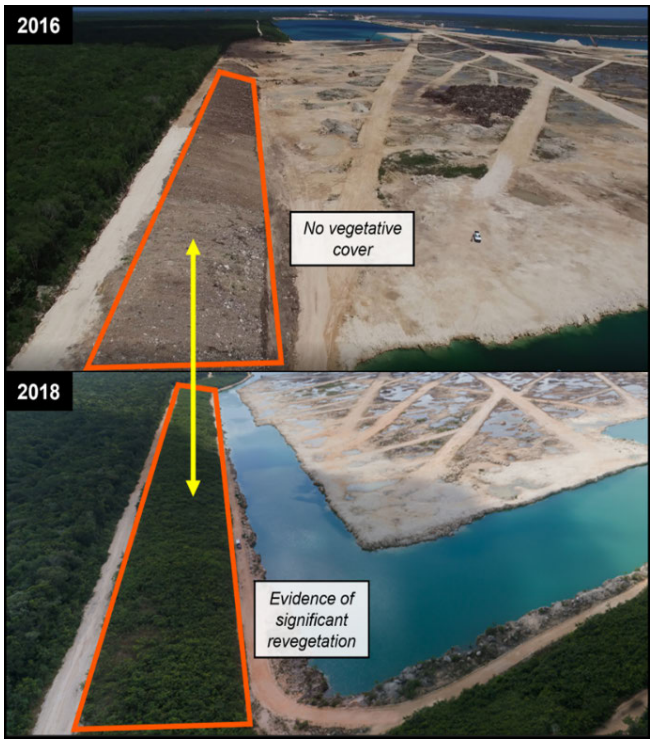
[183] *Id.*, Part 5.2.2.

[184] *Id.*, Part 5.3.1, Illustration 5.15.

evidence — rather than inferences — the presence of myriad mammals, birds, and reptiles in CALICA's lots.[185]

- Contrary to SEMARNAT's allegations that regrowing vegetation in CALICA's lots was "impossible" or would take hundreds of years, CALICA has implemented a successful reforestation program that restores vegetation in just a few years and far exceeds the usual regulatory standards (*see* Picture 4 below).[186]

Picture 4 – Example of Reforested Areas in CALICA's Lots[187]



- PROFEPA's May 2022 inspection reports similarly "contained various generalized allegations of adverse environmental impacts but did not include technically or scientifically sound evidence to validate those allegations."[188]
- PROFEPA's inspectors made overbroad and unsubstantiated statements such as asserting that a small oil stain "risked altering the physical, chemical and

[185] SEMARNAT, *Dictamen de Impactos Ambientales* (C-0237-SPA.97) ("[D]ebido a que el fragmento de vegetación presente en este predio se encuentra aislado e inmerso en la zona de extracción de roca, *se infiere* que actualmente presenta una baja diversidad de especies de fauna.") (emphasis added). *But see* Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶¶ 149-155.

[186] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, Part 5.6; Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶ 6 (discussing this re-vegetation program).

[187] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, Illustration 5.27.

[188] *Id.*, ¶ 176.

> microbiological properties [of the soil] because hydrocarbons are not biodegradable," but hydrocarbons *are* biodegradable.[189]

67. Based on the glaring methodological and technical deficiencies undergirding SEMARNAT's and PROFEPA's allegations of adverse environmental impacts caused by CALICA, Dr. Bianchi concluded that:

> CALICA's operations have not caused the alleged adverse environmental impacts described in the [SEMARNAT] Dictamen . [...] The Dictamen does not present any technically or scientifically sound evidence that establishes a cause-and-effect relationship between CALICA's operations and the alleged adverse environmental impacts. [...]
>
> [T]he [PROFEPA environmental inspection reports] do not provide the necessary scientific or technical evidence to support their allegations of broad adverse environmental impacts[.][190]

68. At their core, Respondent's allegations of environmental harm by CALICA's quarrying in La Rosita presuppose — as President López Obrador did — that any extraction there (with its concomitant removal of surface vegetation and limestone) is environmentally destructive and harmful — even if it was previously authorized. This is not so, as demonstrated by Mexico's approval long ago of precisely that activity in La Rosita after evaluating its environmental impacts and by the independent assessment of a third-party environmental expert.[191] Respondent's allegations of environmental harm are baseless and no more than an *ex-post* attempt to provide cover for the shutdown the President had ordered on a whim three months earlier.[192]

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[189] PROFEPA Inspection Order and Report on Environmental Impact (29 April 2022) (C-0171-SPA.71) (free translation, the original reads: "[S]e detectó en el patio de maniobra el derrame de hidrocarburo sobre suelo natural en una superficie aproximada de un metro cuadrado, lo que ocasionó un riesgo de daño al suelo, lo que trae consigo la alteración de las propiedades físicas, químicas y microbiológicas de éste, ya que los hidrocarburos no son degradables biológicamente[.]"). *But see* Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶¶ 192-193.

[190] *Id.*, ¶¶ 166, 196.

[191] *See, e.g.*, Investment Agreement (6 August 1986) (C-0010-SPA.6, 14) ("La SEDUE con base en los resultados finales de su evaluación realizada a la Manifestación de Impacto Ambiental del Proyecto, con el apoyo del Instituto de Ecología, A.C. y el Centro de Investigaciones y Estudios Avanzados del [Instituto Politécnico Nacional de México], Unidad Mérida, considera factible desde el punto de vista ambiental, la realización del Proyecto propuesto por [CALICA][.]"); The Calica Quarry and Harbor Project: White Paper (28 November 1988) (C-0300-SPA.17) (contemporaneous retelling of how ICA undertook "comprehensive environmental studies [...] of oceanography, harbor planning, geology, climatology, and characterizations of sea water. The studies were submitted to [SEDUE]. SEDUE then commissioned two evaluations by consulting agencies[.] The two studies commissioned by SEDUE supported the environmental integrity of the project.").

[192] Respondent goes so far as to invite the Tribunal to CALICA's sites to see for itself the supposed environmental harm CALICA has caused. Counter-Memorial (Ancillary Claim), ¶ 203. While this is an unnecessary distraction that will further delay the issuance of the Award, Legacy Vulcan has no objection

2. Mexico's Newly Conjured "Violations" of the 1986 Investment Agreement Are Equally Baseless.

69. Unable to justify its wrongful conduct, Mexico relies on a red herring. It tries to supply a new rationale for the shutdown that PROFEPA never asserted when it carried out the President's instruction in May 2022: that CALICA allegedly failed to abide by the terms of the 1986 Investment Agreement.[193] Mexico's newfound argument is remarkable in that Mexico and CALICA have been performing the 1986 Investment Agreement for over 36 years, yet Mexico has never asserted a breach of that agreement until the filing of its Counter-Memorial. Mexico has been on notice of CALICA's purported breaches for years — if not decades — yet Mexico has never sought any of the remedies provided in the agreement to address those alleged deficiencies.[194] Mexico's own conduct reveals that this new allegation is false.

70. No breach of the 1986 Investment Agreement animated the shutdown, as PROFEPA's May 2022 inspection reports make clear and Respondent's own witnesses confirm.[195] PROFEPA's inspectors refused to analyze the 1986 Investment Agreement, let alone CALICA's compliance with its terms, when they imposed the shutdown that the President

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to such a visit if the Tribunal considers it necessary, since such a visit would not show the environmental harm Respondent alleges; just the opposite.

[193] Counter-Memorial (Ancillary Claim), ¶ 231 (arguing that the shutdown was based on "los incumplimientos de CALICA, que se hacen manifiestos a lo largo del presente documento y arbitraje"); *id*. at Part II.F (alleging CALICA breached the 1986 Investment Agreement).

[194] *See* Investment Agreement (6 August 1986) (C-0010-SPA.7, 16) ("[Cláusula] [d]écima segunda[:] El incumplimiento de cualquiera de las obligaciones que la Empresa contrae en este Acuerdo, así como de las que a su cargo deriven de los documentos anexos al mismo, dará lugar a la rescisión del Acuerdo. Las faltas y omisiones de la Empresa serán sancionadas por las autoridades competentes, con arreglo a las disposiciones legales aplicables.").

[195] PROFEPA Inspection Order and Report on Environmental Impact (29 April 2022) (C-0171-SPA.71-72) ("[C]on la finalidad de prevenir cualquier daño que pudiera seguirse ocasionando con las obras y actividades inspeccionadas las cuales no cuentan con autorización en materia de impacto ambiental […] los inspectores actuantes determinamos imponer como medida de seguridad la CLAUSURA TEMPORAL TOTAL de las obras y actividades de aprovechamiento extractivo […] que lleva a cabo la empresa […] sin contar con autorización […] en materia de Impacto Ambiental[.]"); PROFEPA Inspection Order and Report on Forestry (29 April 2022) (C-0172-SPA.62) ("[C]on la finalidad de prevenir cualquier daño que pudiere seguirse ocasionando con las obras y actividades inspeccionadas las cuales no cuentan con autorización [CUSTF] […] determinamos imponer como medida de seguridad la CLAUSURA TEMPORAL TOTAL de las instalaciones[.]"); Third Witness Statement of Margarita Balcázar, ¶ 19 (RW-0012) ("Derivado de los hallazgos detectados, *ante la falta de una autorización de Impacto Ambiental* y el riesgo de daño a los recursos naturales […] los inspectores actuantes determinaron imponer […] la clausura[.]") (emphasis added); Witness Statement of Patricio Vilchis, ¶ 27 (RW-0013) ("Con la finalidad de prevenir cualquier daño que pudiera seguirse ocasionando con las obras y actividades inspeccionadas las cuales *no contaban ni cuentan con autorización* [*CUSTF*] […], *los inspectores actuantes determinaron* […] *imponer como medida de seguridad la clausura* temporal total de las instalaciones donde se estaba realizando el cambio de uso de suelo en terrenos forestales.") (emphasis added).

had ordered.[196] Mexico cannot now rely on purported violations of the Agreement that PROFEPA's inspectors never relied upon — or even suggested — when imposing the shutdown of La Rosita in May 2022.[197]

71. The purported violations of the 1986 Investment Agreement that Mexico belatedly brings up in its Counter-Memorial do not exist in any event.

72. *Bimonthly Reports*. Mexico contends, for example, that CALICA breached Clause Three of the 1986 Investment Agreement,[198] which required CALICA to "inform SEDUE, SCT and the State Government the schedule according to which the different Project works w[ould] be carried out, and to report on their progress every two months or as requested."[199] This is false.[200] CALICA did submit the reports required by the 1986 Investment Agreement, examples of which are enclosed as exhibits here.[201]

73. These reports constituted bimonthly status updates of CALICA's construction and dredging works during construction of Project infrastructure.[202] When CALICA completed this construction in September 1991, it submitted the last bimonthly report of these works, notifying Mexico of the "conclusion of the works for the Project [...] in accordance with clause three of the [1986 Investment Agreement]."[203] SEMARNAT's predecessor (SEDUE) took note of this fact and praised CALICA's "spirit of cooperation, its observance of environmental regulations and its

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[196] *See* Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Report-SPA, ¶¶ 67-79; Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 3-13.

[197] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 10-12.

[198] Counter-Memorial (Ancillary Claim), ¶ 187; Third SOLCARGO Expert Report, ¶¶ 19-20, 87-89 (RE-008).

[199] Investment Agreement (6 August 1986) (C-0010-SPA.6, 14) (free translation, the original reads: "La EMPRESA hará del conocimiento de SEDUE, SCT y del GOBIERNO DEL ESTADO el calendario conforme al cual se realizarán los distintos trabajos que comprende el Proyecto, y se obliga a informarles bimestralmente, o cuando así se le requiera, sobre el avance de los mismos.").

[200] *E.g.*, Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 61-62.

[201] Bimonthly Report (18 January 1990) (C-0301-SPA); Bimonthly Report (8 February 1990) (C-0302-SPA); Bimonthly Report (6 May 1991) (C-0303-SPA); Bimonthly Report (10 July 1991) (C-0304-SPA).

[202] *See, e.g.*, Bimonthly Report (18 January 1990) (C-0301-SPA.3-5) (entitled "Reporte Bimestral del Avance de Obra" and describing the status of the dredging, ship loader, temporary crushing plant, conveyor belt, etc. during November and December 1989).

[203] *See* Letter from SEDUE to CALICA (1 October 1991) (C-0305-SPA) (free translation, the original reads: "me refiero a su atento comunicado [...] de fecha 9 de septiembre de 1991, informando la conclusión de la obra del Proyecto 'CALICA' [...] en apego a la cláusula tercera del acuerdo celebrado entre la Empresa y esta Secretaría[.]").

concern for maintaining ecological balance."[204] Respondent's cavalier assertion that CALICA breached its reporting obligations is false and illustrates that Mexico's allegations are not credible.

74. *Permits*. Respondent also generally alleges that CALICA failed to obtain the permits and authorizations necessary to carry out activities in La Rosita, as required by the 1986 Investment Agreement,[205] but identifies no specific example other than the CUSTF, which was unnecessary (as discussed above).[206] CALICA *did* obtain the permits and authorizations necessary to quarry La Rosita in accordance with the 1986 Investment Agreement.[207]

75. *Purported Term Limit*. Respondent also claims that CALICA breached the term indicated in the 1986 Investment Agreement,[208] but this claim is contradicted by the text of that Agreement as construed by the President himself and PROFEPA. Contrary to Mexico's claim, that Agreement contains no specific term or timeframe for extraction activities in La Rosita. Instead, it provides that "the time of extraction is subject to market conditions and economic feasibility."[209] President López Obrador acknowledged in one of his *Mañaneras* that the permit granted by a prior administration for La Rosita "did not even set a limit to the concession, [...] *there is not even a date*."[210] In his *Mañanera* on 4 May 2022, the President displayed an anti-CALICA video emphasizing this point:

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[204] *Id.* (free translation, the original reads: "No dudando de su espíritu de cooperación, observancia de las normas en la materia y su preocupación por mantener el equilibrio ecológico, aprovecho la ocasión para reiterarle la seguridad de mi distinguida consideración.").

[205] Investment Agreement (6 August 1986) (C-0010-SPA.7, 16) ("[Cláusula] Décima Primera: La empresa se obliga, antes de iniciar el proyecto, a obtener con apego a las disposiciones legales aplicables, la expedición de los permisos, licencias y autorizaciones que fueren necesarias para la ejecución del referido Proyecto.").

[206] Counter-Memorial (Ancillary Claim), ¶¶ 156-157, 182-184; Third SOLCARGO Report, ¶ 93 (RE-008); *but see supra* Part II.C.1.b.

[207] *See* Environmental Audit Report (March 2016) (C-0208-SPA.21) ("la empresa cumplió con los requerimientos en materia ambiental que le eran aplicables cuando comenzó sus actividades[.]"). *See also, e.g.*, Industrial Land-Use License (17 March 1987) ([redacted]-0059) (mentioning the 1986 Investment Agreement); Concession granted by the Executive Branch through the SCT to CALICA (21 April 1987) (C-0012-SPA.5, 16) (same); SEDUE Authorization to Affect ZOFEMAT (2 October 1987) (C-0306-SPA.4) (same); Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 79-81; Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶ 8.

[208] Counter-Memorial (Ancillary Claim), ¶¶ 176-178, 194-195.

[209] Investment Agreement (6 August 1986) (C-0010-SPA.4, 11) (free translation, the original text reads: "El tiempo de explotación estará sujeto a las condiciones de mercado y a la factibilidad económica.").

[210] Transcript of President's Morning Press Conference (3 February 2022) (C-0178-SPA.22) (emphasis added) (free translation, the original text reads: "Y fíjense cómo era antes este asunto, cómo eran las cosas antes, no le pusieron ni siquiera un límite a la concesión, [...] ni siquiera hay fecha."); Andrés Manuel López Obrador, Baja incidencia delictiva en Hidalgo, YouTube (uploaded 3 February 2022), https://www.youtube.com/watch?v=OyjJQJxJtrc (C-0246-SPA) (video online begins display at 02:13:13). While the President indicated that CALICA had a "concession" in connection with its quarry, under Mexican

> In 1986, the federal and Quintana Roo governments granted CALICA the first authorization for the extraction of limestone rock below the water table in La Rosita, a 1,200 hectare property. *This authorization did not specify* either *the duration* or the volume of exploitation of the project, it was *like a blank check to extract limestone and take a piece of our country*.[211]

76. SEMARNAT echoed this in a press release two days later, acknowledging that the 1986 "authorization for the exploitation of limestone under the water table in La Rosita" did not establish a "term of duration […]."[212] Respondent's argument that CALICA breached a purported term limit for extraction at La Rosita cannot be squared with these statements.

77. While the 1986 Investment Agreement provides that its duration would depend on "the times set out in the permits, licenses, authorizations and concessions" for the Project,[213] Mexico has failed to show that CALICA has exceeded any timeframe set forth in any of those instruments.[214] To the contrary, the record shows that no such timeframe has been exceeded. CALICA's port concession, for instance, is not set to expire until 2037 — 50 years after Mexico approved the Project in 1986 — and may be extended until 2087.[215]

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law, quarrying activities are not subject to concessions because the materials within a private property belong to the owner of that property, as Legacy Vulcan has established in this arbitration. *See, e.g.*, Expert Report-[redacted]-Environmental Law-Claimant's Memorial-SPA, ¶ 20.

[211] Transcript of President's Morning Press Conference (4 May 2022) (C-0187-SPA.7) (emphasis added) (free translation, the original reads: "En 1986 instancias del gobierno federal y de Quintana Roo otorgaron a Calica la primera autorización para la extracción de roca caliza por debajo del manto freático en La Rosita, un predio de mil 200 hectáreas. Esta autorización no especificaba ni la vigencia ni el volumen de explotación del proyecto, fue como un cheque en blanco para extraer piedra caliza y llevarse un pedazo de nuestro país[.]"); Andrés Manuel López Obrador, Presentación del Paquete Contra la Inflación y la Carestía, YouTube (uploaded 4 May 2022), https://www.youtube.com/watch?v=CSxFRoOKPfs (C-0260-SPA) (video online begins display at 01:05:51).

[212] SEMARNAT Press Release (6 May 2022) (C-0174-SPA.3) (free translation, the original reads: "En 1986, la Secretaría de Comunicaciones y Transportes, la [SEDUE] y el Gobierno de Quintana Roo otorgaron a Calica la primera autorización para la explotación de roca caliza por debajo del manto freático en La Rosita, *sin determinar un plazo de vigencia, ni volumen de explotación específico*.") (emphasis added).

[213] Investment Agreement (6 August 1986) (C-0010-SPA.8, 16) (free translation, the original reads: "La duración de este acuerdo dependerá de los plazos y tiempos establecidos en los permisos, licencias, autorizaciones y concesiones a que se refiere la cláusula Décima Primera."); *see id.* at 7, 16 (referring generally to "permisos, licencias y autorizaciones que fueren necesarias para la ejecución del referido Proyecto" Within Clause Eleven).

[214] *See* Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 66-67.

[215] Amendment to the Concession granted by the Federal Government through the SCT to Calica (13 May 2015) (C-0016-SPA.15, 37) (providing a term for the concession through April 2037, which may be renewed for an additional 50-year term). *See also* Mexico Federal Official Gazette, Ports Act, Article 23 (19 July 1993) (C-0047-SPA.40) (providing that port concessions may be granted for a term of up to 50 years and may be renewed for an additional term of 50 years).

78. Lacking a sound basis from the text of the 1986 Investment Agreement to restrict the Project's duration with respect to La Rosita, Mexico points to language in the environmental impact statement attached as Annex 2 to that Agreement to argue that CALICA's extraction in La Rosita had a 25-year limit.[216] Mexico is wrong again. One section of that statement merely estimated that La Rosita had 220 million tons of extractible limestone, "sufficient for 25 years of continuous extraction."[217] It did not say that extraction would cease in 25 years once commenced. In fact, another section of the environmental impact statement estimated that limestone reserves in La Rosita would be "sufficient for 40 years of continuous extraction."[218] In short, the environmental impact statement attached to the 1986 Investment Agreement nowhere imposed a deadline for CALICA's quarrying activities or overrode that Agreement's text subjecting "the time of exploitation" to "market conditions and economic feasibility."[219]

79. As [redacted] explains, the absence of a specific term in the 1986 Investment Agreement, including Annex 2, is in stark contrast with other — even contemporaneous — permits and authorizations, which refer to a specific number of years of duration ("*vigencia*").[220] When Mexican authorities wanted to limit an authorization, they did so clearly. In this case, SEDUE evaluated the data in the environmental impact statement and authorized the Project with a non-specific duration, as President López Obrador and SEMARNAT acknowledged before Mexico made up this argument in its counter-memorial.

80. PROFEPA's 2012 inspection of CALICA further contradicts Respondent's newly-minted argument. As explained above, during this inspection, PROFEPA reviewed the 1986 Investment Agreement and concluded that CALICA was in compliance with its environmental impact obligations.[221] Mexico tries to wave away this evidence by counting the

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[216] Counter-Memorial (Ancillary Claim), ¶¶ 43, 75, 175-178.

[217] Investment Agreement (6 August 1986) (C-0010-SPA.49) (free translation, the original reads: "Como resultado de las diferentes investigaciones geológicas que se han llevado a cabo en el sitio se ha determinado el volumen aprovechable del banco, el cual *se* estima en 220 millones de toneladas, suficiente para una explotación continua de 25 años.").

[218] *Id*. at 57 (free translation, the original reads: "Como resultado de las diferentes investigaciones geológicas que se han llevado a cabo en el sitio [...] se ha determinado el volumen aprovechable del banco, el cual *se* estima en 220 millones de toneladas, suficiente para una explotación continua de 40 años.").

[219] *Id*. at 4, 11 (free translation, the original text reads: "El tiempo de explotación estará sujeto a las condiciones de mercado y a la factibilidad económica."); Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 63-72.

[220] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 64-67.

[221] *See supra* Part II.C.1.a); PROFEPA Inspection Resolution (10 December 2012) (C-0043-SPA.6-7, 56-57). *See also* Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third

25 years from 1989, when CALICA purportedly began extraction activities.[222] This interpretation finds no support in the text of the 2012 inspection. While PROFEPA — in connection with its 2012 inspection — expressly noted that the environmental impact authorization for El Corchalito and La Adelita had a 20-year term, they included no reference to a time limit for La Rosita.[223]

81. The 2016 environmental audit — which took place more than 25 years after CALICA began quarrying La Rosita — further confirms that quarrying there was not time limited to 25 years. The report of the independent, PROFEPA-certified auditors makes no mention of a time limit for those activities under the 1986 Investment Agreement, let alone finds that the term of these activities had expired.[224] While Respondent dismisses these environmental audits,[225] PROFEPA has acknowledged that they "verify that the Company complies with Federal and Local Environmental Laws, Federal and Local Environmental Regulations, Mexican Official Standards (NOMs) issued by SEMARNAT and the requirements of each municipality."[226] PROFEPA itself reviews the auditors' reports before issuing a Clean Industry Certificate.[227] And PROFEPA issued one for CALICA for the 2016-2018 period, while the company was quarrying La Rosita.[228]

82. *Purported Volume Limit*. Mexico's allegation that CALICA breached the 1986 Investment Agreement by impermissibly exceeding volume limits is similarly unavailing. As Mexico conceded in one of the President's *Mañaneras* and again in a SEMARNAT press release, the 1986 Investment Agreement "*did not specify* either the duration or *the volume* of exploitation

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Report-SPA, ¶¶ 51-56; Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 20-23.

[222] Counter-Memorial (Ancillary Claim), ¶ 178. *But see* Witness Statement-[redacted]-Claimant's Memorial-ENG, ¶ 16 (stating that CALICA commenced clearing activities in Punta Venado and La Rosita in 1987).

[223] PROFEPA Inspection Resolution (10 December 2012) (C-0043-SPA.5-6) (noting that the Federal Environmental Impact Authorization for El Corchalito and La Adelita has a "vigencia de 20 años", but making no similar assertion with regards to the 1986 Investment Agreement).

[224] Environmental Audit Report (March 2016) (C-0208-SPA.10, 20, 154, 266) (referencing the 1986 Investment Agreement without any mention of an expiration).

[225] Counter-Memorial (Ancillary Claim), ¶¶ 313-323; Witness Statement of Mr. Castañeda, ¶¶ 11-24 (RW-0014).

[226] National Environmental Audit Program Explanatory Circular (C-0209-SPA.6) (free translation, the original text reads: "En la Auditoría Ambiental se verifica que la Empresa cumpla con las Leyes Ambientales Federales y Locales, los Reglamentos Ambientales Federales y Locales, las Normas Oficiales Mexicanas ordenadas por Materia (NOMs) dictadas por la SEMARNAT y los requerimientos que cada municipio aplique.").

[227] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Report-SPA, ¶¶ 21-24; Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 34-38.

[228] Clean Industry Certificate (27 July 2016) (C-0042-SPA).

of the project," or a "*specific quarrying volume*."[229] Legacy Vulcan shares this reading of the Agreement. CALICA did not breach the 1986 Investment Agreement by exceeding volume limits in La Rosita.

83. *Purported Depth Limit*. Mexico's additional assertion that CALICA breached the 1986 Investment Agreement by quarrying [redacted] below the water table similarly disregards the text of the Agreement and record facts. The Agreement provides that CALICA would extract "at an *approximate* depth of [redacted] below the water table[.]"[230] In accordance with this provision, the environmental impact statement for La Rosita notes as follows: "The [underwater] perforation will be carried out from the water table level *up to a depth of* [redacted] *depending on the quality of the rock existing at the site* and which shall be extracted."[231] These ranges reflect the porous nature of the karstic rock in CALICA's lots, as independent environmental experts have explained in this arbitration.[232] The bathymetric study Respondent cites confirms that depths of [redacted] are the result of areas that contain natural underwater voids,[233] not from extracting at a deliberate disregard of approximate depth limits. That study found that the average depth of extraction was between [redacted], for example.[234]

84. *Post-Extraction Restoration Plan*. Lastly, Mexico errs in alleging that CALICA breached Clause Nine of the 1986 Investment Agreement by not submitting a restoration plan on

[229] Transcript of President's Morning Press Conference (4 May 2022) (C-0187-SPA.7) (emphasis added) (free translation, the original reads: "En 1986 instancias del gobierno federal y de Quintana Roo otorgaron a Calica la primera autorización para la extracción de roca caliza por debajo del manto freático en La Rosita, un predio de mil 200 hectáreas. Esta autorización no especificaba ni la vigencia ni el volumen de explotación del proyecto, fue como un cheque en blanco para extraer piedra caliza y llevarse un pedazo de nuestro país[.]"); SEMARNAT Press Release (6 May 2022) (C-0174-SPA.3) (free translation, the original reads: "En 1986, la Secretaría de Comunicaciones y Transportes, la [SEDUE] y el Gobierno de Quintana Roo otorgaron a Calica la primera autorización para la explotación de roca caliza por debajo del manto freático en La Rosita, *sin determinar un plazo de vigencia, ni volumen de explotación específico*.") (emphasis added).

[230] Investment Agreement (6 August 1986) (C-0010-SPA.5, 13) (emphasis added) (free translation, the original reads: "se profundizará la excavación para la extracción del material pétreo aproximadamente 12 metros abajo del nivel freático[.]").

[231] *Id*. at 21 (free translation, the original reads: "La perforación se realiza del nivel de agua freática hasta una profundidad de 16 a 18 m dependiendo de la calidad de roca existente en el sitio y que será extraída.").

[232] Expert Report-[redacted]-Environmental Sustainability-Claimant's Reply-SPA, ¶¶ 25-34, 93.

[233] Bathymetric study of the extraction area of CALICA in Quintana Roo, Mexico (February 2018) (C-0126-SPA.15-16).

[234] *Id*. at 2.

how the Project infrastructure may be used post-extraction.[235] Even Mexico's counter-memorial acknowledges that this plan could be submitted at any point, including once the Project reached or was closer to reaching its natural end.[236] Perhaps for this simple reason Mexico's environmental law experts failed to endorse this baseless allegation.[237]

85. In sum, Mexico's red-herring argument should be rejected. Respondent has failed to establish that CALICA breached the 1986 Investment Agreement; alleged breaches that, in any event, did not form the basis for Mexico's shutdown of La Rosita in May 2022. Mexico's newly-found argument represents a *post-hoc* rationale concocted for this arbitration. Mexico's transparent attempt at shifting the spotlight away from its wrongful conduct fails and should be taken into account by the Tribunal when awarding costs.[238]

3. Mexico's Shutdown Has Left CALICA Legally Defenseless.

86. In addition to shutting down La Rosita on pretextual grounds, Mexico has created a situation that effectively leaves the shutdown in place indefinitely, depriving CALICA of effective administrative and judicial recourse to reverse it.

87. Mexican authorities deprived CALICA of an effective opportunity to be heard from the outset. President López Obrador announced his order on live television, a fact already recognized by a Mexican judge to constitute a breach of due process.[239] Even if the President's

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[235] Counter-Memorial (Ancillary Claim), ¶¶ 196-198; Investment Agreement (6 August 1986) (C-0010-SPA.7, 15) ("[Cláusula] Novena: La empresa, con base en lo establecido en la cláusula anterior, deberá presentar a consideración de las partes que intervienen en este Acuerdo, el proyecto integral de restauración y aprovechamiento de la infraestructura creada durante el desarrollo del Proyecto que es motivo de este mismo Acuerdo.").

[236] Counter-Memorial (Ancillary Claim), ¶ 197 ("Conforme a la cláusula octava [del Acuerdo de 1986], dicho proyecto tenía que: […] (3) ser presentado al término de la vida útil del proyecto o durante cualquier etapa de éste.").

[237] *See* Third SOLCARGO Report, §IV.B (RE-008) (asserting that CALICA breached several provisions of the 1986 Investment Agreement but failing to mention Clause Nine).

[238] *See Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, ¶¶ 1062-1074 (22 August 2017) (Derains (P), Grigera Naón, Edward) (CL-0225-ENG) (considering Pakistan's conduct during the arbitration, including the raising of frivolous defenses, in assigning costs). *See also* ICSID Arbitration Rule 52(1) (2022) ("In allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including: […] (b) the conduct of the parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner and complied with these Rules and the orders and decisions of the Tribunal.").

[239] Judgment of Cancún District Court in Amparo 431/2022 (6 December 2022) (C-0307-SPA.34) ("al haberse emitido de manera verbal por el Presidente […], en la conferencia de dos de mayo de dos mil veintidós, la manifestación de que dio instrucciones a la Secretaría para proceder legalmente […] para que no continúe con la operación del proyecto […], es evidente que ésta quedó irreparablemente consumada al momento de ser emitida, de ahí que no es materialmente posible restituir a la parte quejosa en el goce del derecho humano violado, porque la violación se produjo y surtió sus efectos al momento de exteriorizar la

instruction constituted a public report ("*denuncia*"), as Respondent claims[240] (it did not), CALICA should have been given 15 days to respond in accordance with Mexican law but was not given this opportunity.[241] La Rosita was shut down immediately after the President's 2 May 2022 announcement.

88. During PROFEPA's May 2022 inspections and within the timeframe permitted thereafter, CALICA made every effort to evidence its compliance with applicable environmental obligations by, among other things, presenting the 1986 Investment Agreement (as it had done in the past).[242] PROFEPA refused even to consider the Agreement before imposing the shutdown and has since failed — over 9 months later — to issue an *Acuerdo de Emplazamiento* or other formal follow up to the inspections, leaving proceedings adrift.[243]

89. Normally, if PROFEPA inspectors detect irregularities during an inspection, they note those irregularities in an inspection report, which is shortly thereafter followed by a formal charging document, the *Acuerdo de Emplazamiento*.[244] This *Acuerdo* is supposed to detail the specific presumed violations identified and is followed by an administrative proceeding that allows the inspected party to challenge or address those presumed violations.[245] That proceeding is finally resolved through a formal resolution.[246] This is the process that played out with respect to the 2018 shutdown of El Corchalito, though with the multiple flaws Legacy Vulcan established in the previous stage of this arbitration.[247]

90. PROFEPA's over-nine-month delay in even issuing an *Acuerdo de Emplazamiento* with respect to La Rosita is particularly unjustified given that, as PROFEPA's inspectors indicated,

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autoridad responsable que se procedería legalmente en contra de la moral quejosa, sin tener motivación o sustento legal alguno para dicho proceder[.]").

[240] Counter-Memorial (Ancillary Claim), ¶¶ 134, 224-228.

[241] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Expert Report-SPA, ¶¶ 86-91.

[242] PROFEPA Inspection Report on Environmental Impact (2-5 May 2022) (C-0171-SPA.13-16, 77) (presenting PROFEPA with documentation, which the inspectors say they will only analyze after the visit); *but see* Memorial (Ancillary Claim), ¶¶ 68-71 (describing how CALICA similarly presented the 1986 Investment Agreement to PROFEPA inspectors in 2012, who examined it and considered it a valid environmental impact authorization).

[243] PROFEPA Inspection Report on Environmental Impact (2-5 May 2022) (C-0171-SPA.16); Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Expert Report-SPA, ¶¶ 107-118.

[244] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶ 109.

[245] *Id.*

[246] *Id.*

[247] Expert Report-[redacted]-Environmental Law-Claimant's Memorial-First Report-SPA, § VII.B.

the shutdown is partly based on the supposed inexistence of an environmental impact authorization for La Rosita, a document (*i.e.*, the 1986 Investment Agreement) that PROFEPA had assessed many years ago and has had in its possession for many months, if not decades.[248] SOLCARGO and Mexico's witness Margarita Balcázar, a PROFEPA official, conveniently ignore these facts.

91. Until PROFEPA has issued its final, formal decision within the administrative proceeding launched against CALICA, CALICA cannot pursue judicial relief through a *juicio de nulidad* (or appeal the decision in that case through a *recurso de revisión*). [249] Preliminary *amparo* actions are almost always ineffective to challenge preliminary security measures such as the shutdown formally imposed on La Rosita in pending administrative proceedings, as demonstrated by CALICA's ineffective *amparos* in relation to La Rosita's shutdown.[250]

92. What is more, SEMARNAT's August 2022 report ("*dictamen*") on CALICA illustrates Mexico's failure to provide CALICA with an effective opportunity to be heard on Mexico's accusations against it. SEMARNAT carried out the "investigation" of CALICA that led to its report, published the report online, and sent it to prospective plaintiffs — all outside the confines of an administrative process.[251] By doing so, SEMARNAT avoided the limitations administrative law imposes on the State to protect persons from abuse, such as the right to be heard.[252]

93. In sum, by leaving its administrative proceeding against CALICA in limbo, PROFEPA has effectively deprived CALICA from administrative and judicial recourse to reverse the shutdown and has transformed what is formally a preliminary measure into a permanent one.

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[248] PROFEPA Inspection Report on Environmental Impact (2-5 May 2022) (C-0171-SPA.16, 77).

[249] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Expert Report-SPA, ¶¶ 111-112.

[250] *Id.* ¶¶ 114-115. In extraordinary cases, *amparos* may be granted in pending administrative proceedings. CALICA filed several *amparos* following the President's shutdown order and the shutdown itself. None of these have been successful in dislodging the shutdown.

[251] *Id.* ¶¶ 119-126; *see supra* Part II.C.1.c.

[252] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Expert Report-SPA, ¶¶ 123-126.

D. MEXICO UNJUSTIFIABLY DELAYED RENEWAL OF CALICA'S CUSTOMS PERMIT AND LATER SUSPENDED IT INDEFINITELY.

94. As Legacy Vulcan explained in its memorial, CALICA has exported aggregates directly from Punta Venado to the United States for decades without having to clear customs at another location because it routinely received a customs permit to do so.[253] This suddenly changed in January 2022, when Mexico failed to renew the permit for over a month, thus preventing CALICA from exporting aggregates produced in La Rosita during that time.[254]

95. Respondent asserts that its customs authority merely asked CALICA to comply with the formal requirements for renewal and that the customs permit was renewed when those requirements were met,[255] but this assertion ignores record evidence. As [redacted] has testified, Mexico's customs authority had previously renewed CALICA's permit as a matter of course for three-year periods; it suddenly refused to do so in early 2022 based on a naval certification that the Navy had not issued to CALICA despite multiple, timely requests; and it rejected reasonable alternative arrangements CALICA proposed to be able to export materials while renewal of the customs permit remained pending.[256]

96. All of this happened while President López Obrador started attacking CALICA in his *Mañaneras*. On 3 February 2022, the President said the quiet part out loud by linking the grant of the expired permit to concessions by Legacy Vulcan to Mexico's demands:

> "they have to remove the lawsuits and, if not, well we will defend ourselves legally, as we are doing, and we are going to act [*proceder*] because they lack authorization, they have expired permits and also do not have authorization to take out material, the federal government has to authorize, in this case, the exportation."[257]

Mexico applied even more pressure on CALICA regarding the customs permit — without which aggregates produced from the Project languished in Mexico while U.S. customers awaited

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[253] *See supra* ¶ 13; Memorial (Ancillary Claim), Part II.A.3.

[254] Memorial (Ancillary Claim), ¶¶ 31-32; Witness Statement-[redacted]-Claimant's Ancillary Claim Memorial-Third Statement-ENG, ¶¶ 12-13.

[255] Counter-Memorial (Ancillary Claim), ¶ 378.

[256] Witness Statement-[redacted]-Claimant's Ancillary Claim Memorial-Third Statement-ENG, ¶¶ 11-12.

[257] Transcript of President's Morning Press Conference (3 February 2022) (C-0178-SPA.23) (free translation, the original reads: "Y, desde luego, que quiten las demandas y, si no, pues vamos a defendernos legalmente, como se está haciendo, y se va a proceder porque no tienen autorización, tienen vencidos permisos y no tienen tampoco autorización para sacar material, el gobierno federal tiene que autorizar la, en este caso, exportación."); Andrés Manuel López Obrador, Baja incidencia delictiva en Hidalgo, YouTube (uploaded 3 February 2022), https://www.youtube.com/watch?v=OyjJQJxJtrc (C-0246-SPA) (video online begins display at 02:13:13).

delivery — by expressly conditioning the permit's renewal on CALICA's agreement to stop extraction activities altogether.[258] Mexico submitted no evidence rebutting any of these facts in its counter-memorial,[259] missing the suitable procedural opportunity to do so.

97. While the customs permit was eventually renewed, Mexico quickly took it back. On 10 May 2022, just days after Mexico shut down La Rosita in accordance with the President's instruction, Mexico suspended the customs permit and opened a proceeding to revoke it because PROFEPA's "findings" constituted "acts contrary to laws […] [and] to the general interest."[260] While Respondent claims that this suspension resulted from CALICA's non-compliance with customs laws,[261] it flowed only from the alleged violations PROFEPA identified to shut down La Rosita; namely, the alleged violations of environmental laws.[262]

98. Mexico alleges that this suspension is merely "under review" and that CALICA has "legal recourses available" to appeal any eventual decision,[263] but this ignores the practical reality of the situation. Mexico's customs authority is not competent to review the substance of the PROFEPA findings that underpin the suspension.[264] The customs authority has suspended and is on course to revoke CALICA's customs permit based on alleged violations of environmental laws that CALICA cannot properly dispute in the revocation proceeding and has effectively been precluded from disputing within PROFEPA's administrative proceeding, as discussed above. Mexico is again tying CALICA in bureaucratic knots to get its way, as it did with El Corchalito.[265]

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[258] Witness Statement-[redacted]-Claimant's Ancillary Claim Memorial-Third Statement-ENG, ¶¶ 15-16.

[259] *See, e.g.*, Counter-Memorial (Ancillary Claim), ¶ 379 (asserting that it was false that the government conditioned renewal of the customs permit beyond the technical and legal requirements for its renewal but failing to cite or supply any evidence refuting Claimant's proof to the contrary).

[260] Agencia Nacional de Aduanas de México, Oficio DGJA.2022.1658 (10 May 2022) (C-0194-SPA.15) (free translation, the original reads: "cuando esta autoridad tenga conocimiento que, en el ejercicio de la autorización, se cometan actos contrarios a las leyes en perjuicio de terceros, del interés general o del Fisco Federal, procede al inicio de procedimiento de cancelación de la autorización, en comento.").

[261] Counter-Memorial (Ancillary Claim), ¶ 382.

[262] Agencia Nacional de Aduanas de México, Oficio DGJA.2022.1658 (10 May 2022) (C-0194-SPA.15) ("al existir evidencia que la explotación o extracción de esa mercancía autorizada para su exportación se realizó en contravención a las disposiciones ambientales […] procede al inicio de procedimiento de cancelación de la autorización[.]").

[263] Counter-Memorial (Ancillary Claim), ¶¶ 382-383.

[264] Customs Internal Regulation, Arts. 3, 25 (21 December 2021) (C-0308-SPA.3-4, 25-30) (listing the functions of the *Agencia General de Aduanas*, and the *Dirección General Jurídica de Aduanas* but not including any environmental-monitoring powers).

[265] *See, e.g.*, Memorial ¶¶ 157-159; Reply ¶¶ 99-105; Claimant's Post-Hearing Brief ¶¶ 129-134.

99. Further illustrating that the suspension of the customs permit is part of Mexico's execution of the President's order to effectively bring the Project to an end, after PROFEPA wrongfully shut down El Corchalito in 2018 alleging bogus environmental violations, Mexico's customs authority *renewed* the customs permit and did not try to revoke it based on those purported violations.[266] Mexico's past conduct again refutes the notion that it was dispassionately enforcing its laws in the ordinary course when it thwarted what remained of CALICA's quarrying and export operations.

E. MEXICO'S SWEEPING ALLEGATION OF BAD FAITH AND DECEPTION IS BASELESS.

100. Respondent makes the outlandish allegation that Legacy Vulcan and CALICA have engaged in a decades-long, bad-faith effort to deceive Mexican authorities and to ignore Mexican laws.[267] Respondent largely makes this sweeping allegation in its counter-memorial without any factual support whatsoever.[268] The scant evidentiary support Respondent cites for this claim does not support it, and the record amply refutes it.

101. Respondent's allegation of fraud and bad faith is inflammatory and serious; precisely for this reason, allegations of fraud and bad faith require particularized and well-supported facts to back them up.[269] Mexico's allegations come nowhere close to meeting this standard. They are largely made without citation to any proof and ignoring record evidence to the contrary.

102. The record flatly contradicts Mexico's far-fetched portrayal of Legacy Vulcan and CALICA as environmental offenders bent on deceiving the government about their conduct of the Project. Those companies' ultimate parent, VMC, is the largest producer of aggregates in the United States, and responsible environmental practices are a central part of VMC's mission.[270]

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[266] Letter No. 800.02.03.00.00.18-610 from Luis Antonio Pampillón González (Administración General de Aduanas) to CALICA (19 December 2018) (C-0206-SPA).

[267] *See, e.g.*, Counter-Memorial (Ancillary Claim), ¶ 171 (alleging that CALICA obtained permits and authorizations not to comply with Mexican law, but rather as a means of "confusing" Mexican authorities).

[268] *Id.* ¶¶ 328-377 (containing similar unsupported allegations of deception and bad faith).

[269] *Chevron Corporation (USA.) and Texaco Petroleum Corporation (USA.) v. Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Interim Award, ¶ 143 (1 December 2008) (Böckstiegel (P), van den Berg, Brower) (CL-0204-ENG) (suggesting that there is a high burden of proof when a respondent seeks to argue that a holder of a right cannot raise and enforce the resulting claim based on bad faith).

[270] Vulcan Materials Company - Mission and Values, (last visited 6 February 2023), https://www.vulcanmaterials.com/about-vulcan/mission-and-values (C-0309-ENG) (confirming that the company's mission includes being a "responsible steward[] with respect to the safety and environmental impact of our operations and products," and the company has committed "to minimiz[ing] any adverse impacts our activities have on the environments in which we operate.").

CALICA shares this mission and has long acted accordingly.[271] As [redacted] explains, "CALICA has always set itself to the highest standards of legal and environmental compliance — standards that permeate the culture within VMC."[272]

103. It is undisputed that CALICA has spearheaded multiple sustainability initiatives throughout the years.[273] It has gone above and beyond the environmental requirements imposed by Mexican law by, for example, voluntarily subjecting itself to extensive and intrusive environmental audits by PROFEPA-certified auditors.[274] It pursued an environmental impact statement for La Rosita and Punta Venado even before the LGEEPA came into force.[275] It has, for decades, maintained a staff dedicated specifically to environmental and sustainability issues, and related environmental programs, at a cost of millions of dollars per year.[276] These investments have, for example, nurtured a tree nursery to repopulate cleared vegetation in both CALICA's quarried lots and land outside CALICA's properties that have exceeded the usual reforestation metrics by over 500% and earned the company local and international recognition.[277] These facts amply contradict Respondent's unsubstantiated depiction of Legacy Vulcan and CALICA as scheming environmental fraudsters.

104. Ignoring these facts, Mexico argues that certain disclosures by VMC were at odds with what Legacy Vulcan and CALICA represented to Mexican authorities and allegedly reveal a hidden intent to disregard Mexican obligations.[278] Respondent misapprehends those disclosures, which do nothing of the sort. VMC's financial filings are in line with SEC regulations governing the disclosure of quarrying companies.

105. Mexico's claim that, in 2001, VMC disclosed to U.S. shareholders an otherwise secret intent to quarry CALICA's lots for 98 years is a gross mischaracterization.[279] That disclosure properly identified the "estimated years of life of aggregates reserves" at various

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[271] Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶¶ 3-4.

[272] *Id.* ¶ 3.

[273] *See, e.g.*, Memorial (Ancillary Claim), ¶¶ 26-28.

[274] Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶ 5.

[275] *Id.* ¶ 4; PROFEPA Inspection Resolution (10 December 2012) (C-0043-SPA.6).

[276] Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶¶ 6-7.

[277] SAC-TUN, *2020 Sustainability Report* (2021) (C-0211-ENG.19, 22); Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶¶ 157-158.

[278] Counter-Memorial (Ancillary Claim), ¶¶ 31-58.

[279] *Id.*, ¶¶ 37-39 (citing Vulcan Materials Company, Form 10-K for the 2001 Fiscal Year (27 March 2002) (C-0046-ENG.14)).

locations "based on the average rate of production [...] for the most recent three-year period."[280] As [redacted], explains, this disclosure reflected VMC's assessment that, at that rate of production, it would have taken approximately 98 years to quarry CALICA's limestone reserves — not that the company intended or was authorized to quarry all of those years.[281] This is a standard disclosure based on how long it would take to mine a property to completion,[282] wholly separate from what VMC subsidiaries have to do to secure and comply with relevant local requirements.

106. Mexico is also wrong to assert that VMC misrepresented to its investors that it had the required environmental authorizations to quarry 665.2 million tons of reserves in Mexico.[283] Mexico again mischaracterizes this disclosure and ignores relevant context. Under applicable SEC rules, "reserves" was defined as "a mineral deposit which could be economically and legally extracted or produced at the time of the reserve determination."[284] Consistent with this definition and industry practice,[285] VMC reported its reserves beyond permit or lease terms; *i.e.*, assuming the economic and legal viability of extraction at the time of reporting would continue into the future.[286] As [redacted] explains, lease and permit renewals are the norm in the industry, and it would be deceptive <u>*not*</u> to report reserves beyond permit periods.[287] This approach is fully consistent with SEC rules on the issue.[288]

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[280] Vulcan Materials Company, Form 10-K for the 2001 Fiscal Year (27 March 2002) (C-0046-ENG.7).

[281] Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-First Statement-ENG, ¶ 26.

[282] *See, e.g.*, Martin Marietta Materials, Inc., Form 10-K for the 2021 Fiscal Year, (22 February 2022) ([redacted]-0008.6) ("Management believes its aggregates reserves are sufficient to permit production at present operational levels for the foreseeable future. The Company does not anticipate any significant difficulty in obtaining reserves used for production. The Company's aggregates reserves average approximately 78 years, based on current production levels.").

[283] Counter-Memorial (Ancillary Claim), ¶¶ 51-53 (citing Vulcan Materials Company, Form 10-K, 2009, p. 18 (R-0140-ENG)).

[284] Securities and Exchange Commission, Industry Guides, Guide 7: Description of Property by Issuers Engaged or to be Engaged in Significant Mining Operations (C-0310-ENG.2).

[285] *See, e.g.*, CRH 2021 Annual Report and Form 20F, (2021)(FGL-0009-ENG.237) (noting that the CRH Group reports reserves despite that "[t]here can be no assurance that the required licenses and permits will be forthcoming at the appropriate juncture or that relevant operating entities will continue to satisfy the many terms and conditions under which such licenses and permits are granted.").

[286] Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-First Statement-ENG, ¶¶ 28-29.

[287] *Id.*

[288] *See Adoption of Integrated Disclosure System*, 47 FR 11380(16 March 1982) (C-0311-ENG.18) (permitting, pursuant to Instruction 5 to Item 102, the disclosure of estimated "proved or probable" extractive reserves other than oil and gas); *see also* 17 CFR § 229.1302(e)(3)(i) (C-0312-ENG.10) ("The term *mineral reserves* does not necessarily require that extraction facilities are in place or operational, that the company has obtained all necessary permits or that the company has entered into sales contracts for the sale of mined products. It does require, however, that the qualified person has, after reasonable investigation, not identified any obstacles to obtaining permits and entering into the necessary sales

107. Respondent also tries to support its sweeping allegations of bad faith with supposed contradictions by CALICA[289] that do not exist. These alleged contradictions are laid out in a section of the counter-memorial (Part II.K) that is confusing and difficult to understand, but — from what can be discerned — Respondent's allegations do not withstand scrutiny. To the extent Respondent alleges that CALICA contradicts itself by accepting that the CUSTF applied to La Adelita but not to La Rosita, for example,[290] that allegation ignores key differences between those lots. Specifically, the land use for most of La Adelita was changed in 2009 through Solidaridad's *Programa de Ordenamiento Ecológico Local* ("POEL") to make quarrying incompatible (also removing "forestry" from incompatible uses) and, even though the POEL provided that it did not apply retroactively, SEMARNAT represented thereafter that a CUSTF would be needed for La Adelita.[291] None of this ever happened with respect to La Rosita, whose land use designation has remained apt for quarrying activities and incompatible for forestry for decades.[292]

108. Respondent is similarly wrong to suggest that CALICA somehow contradicted itself by claiming here that, after the 2018 shutdown of El Corchalito, it quarried only La Rosita while relying on the Corchalito/Adelita Federal Environmental Authorization when it sought a preliminary injunction on 2 May 2022 in response to the President's announced order.[293] As Legacy Vulcan has explained, surprised by that announcement and the government's show of force later that day, CALICA's counsel rushed to court to seek preliminary relief, submitting — as required by *amparo* procedures — proof of CALICA's rights through a certified copy of its 2000 federal environmental authorization (counsel did not readily have a certified copy of the 1986 Investment Agreement at that time).[294] The 2000 authorization should have been sufficient because it expressly recognizes CALICA's rights under the 1986 Investment Agreement, not just CALICA's rights with respect to El Corchalito and La Adelita.[295] CALICA in no way misrepresented facts to Mexican courts.

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contracts, and reasonably believes that the chances of obtaining such approvals and contracts in a timely manner are highly likely.").

[289] Counter-Memorial (Ancillary Claim), ¶¶ 324-377.

[290] *Id.*, ¶¶ 368-373.

[291] *See, e.g.*, Memorial, ¶¶ 79-85; Claimant's Post-Hearing Brief, ¶¶ 57-63.

[292] *See supra* Part II.C.1.b).

[293] Counter-Memorial (Ancillary Claim), ¶¶ 330-334.

[294] Claimant's Reply to Respondent's Response to Its Request for Provisional Measures and For Leave to Submit an Ancillary Claim, ¶ 14, n.27.

[295] *Id.*, ¶ 14.

109. These and other allegations of bad faith and deception in Mexico's counter-memorial betray a desperate effort by Respondent to change the subject and mask the misconduct sustaining Legacy Vulcan's ancillary claim. Those allegations are unsupported, contradicted by the record, and should be rejected accordingly. As further explained below, the facts established in this ancillary-claim proceeding demonstrate Mexico's liability under NAFTA.

III. LEGAL BASIS FOR CLAIMS

110. Mexico's untimely jurisdictional and admissibility objections have no merit. As explained below in Part III.A, the Tribunal has already admitted Legacy Vulcan's ancillary claim into this proceeding and determined that it has jurisdiction to resolve it. Moreover, Mexico's new argument that NAFTA did not apply to its conduct in 2022 violates the plain text of Annex 14-C of the USMCA, which extended the substantive obligations of NAFTA Chapter 11 for legacy investments until 1 July 2023.

111. As to Mexico's response on the merits, Legacy Vulcan showed in its Memorial on Ancillary Claim that Mexico breached the fair and equitable treatment standard under NAFTA Article 1105 by arbitrarily thwarting what remained of the Project on the President's whim and contrary to Mexico's assurances going back many decades.[296] Mexico has failed to refute this. There can be no reasonable question about the applicable standard under NAFTA Article 1105, and the record amply shows that Mexico has breached it (Part III.B). Mexico's newly-found argument that NAFTA Article 1114 somehow shields it from its breaches fails (Part III.C).

A. AS THE TRIBUNAL HAS ALREADY DETERMINED, CLAIMANT'S ANCILLARY CLAIM IS ADMISSIBLE AND THE TRIBUNAL HAS JURISDICTION TO RESOLVE IT.

112. In Procedural Order No. 7 ("PO No. 7"), the Tribunal concluded that Legacy Vulcan's ancillary claim was admissible and that it also fell "within the scope of the consent of the Parties and within the jurisdiction of ICSID."[297] Despite this clear ruling, Mexico again challenges the admissibility of and jurisdiction over Legacy Vulcan's ancillary claim, relying on two new arguments.[298] Mexico first argues that Legacy Vulcan's ancillary claim falls outside the scope of NAFTA because the events to which it relates occurred in 2022, and NAFTA was superseded by the USMCA on 1 July 2020.[299] Mexico also reiterates its baseless and unsupported

[296] Memorial (Ancillary Claim), Part III.B.

[297] Procedural Order No. 7, ¶¶ 150, 154.

[298] *See* Counter-Memorial (Ancillary Claim), ¶¶ 394-395.

[299] *See id.*, ¶¶ 407-414.

allegations that Legacy Vulcan violated Mexico's environmental laws and should therefore be prohibited from pursuing its ancillary claim under the "unclean hands" doctrine.[300]

113. Mexico's new jurisdictional and admissibility arguments fail. *First*, consistent with principles of treaty interpretation set forth under the Vienna Convention on the Law of Treaties ("VCLT"), it is clear that Mexico consented to arbitrate Legacy Vulcan's ancillary claim under NAFTA Chapter 11. *Second*, not only does Mexico misapply the "unclean hands" doctrine, its allegations that Legacy Vulcan and CALICA intentionally disregarded Mexican environmental laws for decades are false. Mexico's attempt to prevent the Tribunal from considering the full extent of its wrongful conduct under NAFTA should be rejected.

1. NAFTA Chapter 11 Applies to Legacy Vulcan's Ancillary Claim.

114. Mexico raises for the first time in its Counter-Memorial on Ancillary Claim an entirely new jurisdictional objection by arguing that the Tribunal lacks jurisdiction over Legacy Vulcan's ancillary claim because Mexico's shutdown of CALICA's remaining operations occurred in May 2022, after NAFTA was superseded by the USMCA.[301] Mexico is wrong. Annex 14-C of the USMCA makes clear that NAFTA Chapter 11 protections remain in force for three years (*i.e.*, until June 30, 2023) for legacy investments, such as Legacy Vulcan's Project in Mexico. Mexico's wrongful conduct falls squarely within that timeframe. A good faith reading of the text of USMCA Annex 14-C, carried out in a manner consistent with principles of treaty interpretation set forth in the VCLT, confirms this conclusion.

a) The Plain Meaning of USMCA Annex 14-C Confirms That Legacy Vulcan's Ancillary Claim Falls Within the Scope of NAFTA Chapter 11.

115. Under 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."[302] As the NAFTA tribunal in *Mondev International Ltd. v. United States* explained, "there is no principle either of extensive or restrictive interpretation of jurisdictional

[300] *See id.*, ¶¶ 394-406.

[301] *See id.*, ¶¶ 407-414. Mexico specifically cites Article 1 of the Protocol Replacing the North American Free Trade Agreement within the USMCA, *see id.*, ¶ 408, n.335, which provides as follows: "Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, *without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA*." Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States and Canada (30 November 2018), Art. 1 (C-0313-ENG) (hereinafter "USMCA Protocol") (emphasis added).

[302] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 332, 23 May 1969, Art. 31(1) (CL-0141-ENG).

provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties."[303] A good faith reading of Annex 14-C of the USMCA in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose confirms that Mexico has consented to arbitrate Legacy Vulcan's ancillary claim under NAFTA Chapter 11.

116. Legacy Vulcan does not dispute that the USMCA entered into force on 1 July 2020, superseding NAFTA.[304] However, pursuant to the Protocol replacing NAFTA with the USMCA ("USMCA Protocol"), this succession of treaties was "without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA."[305] Annex 14-C, paragraph 1, of the USMCA contains several references to NAFTA, and provides in relevant part:

> 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. [FN20] [FN21]
>
> [FN20] 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.
>
> [FN21] 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

[303] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 43 (11 October 2002) (CL-0011-ENG).

[304] *See* USMCA Protocol (C-0313-ENG).

[305] *Id.*, Art. 1.

> Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

117. As this text shows, the Parties to the USMCA specifically consented to arbitration of NAFTA claims "with respect to a legacy investment." This consent "shall expire three years *after* the termination of NAFTA 1994,"[306] and a "legacy investment" is "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement."[307]

118. A good faith reading of Annex 14-C of USMCA Chapter 14 confirms that Mexico "consent[ed], 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 […] Section A of Chapter 11 (Investment) of NAFTA 1994" for three years after NAFTA was superseded by the USMCA.[308] As commentators have explained, this means that "[i]nvestors […] *may still use* NAFTA Chapter 11 for these legacy investments so long as they commence an arbitration proceeding against a host state within three years of NAFTA's termination."[309] In other words, Annex 14-C functions as a three-year sunset period for legacy investments — there is no indication that legacy investors would be limited only to claims that were in existence or that could have been brought while NAFTA was in force, as Mexico argues.[310]

119. Legacy Vulcan's investments in Mexico are a "legacy investment" under USMCA Annex 14-C. It is undisputed that Legacy Vulcan has invested in the Project in Mexico for decades, before and after 1994,[311] and its investments existed as of 1 July 2020, when the USMCA entered into force.

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[306] USMCA, Annex 14-C, ¶ 3 (C-0314-ENG) (emphasis added).

[307] *Id.*, ¶ 6(a).

[308] *Id.*, ¶¶ 1-3 (emphasis added).

[309] Daniel García-Barragán, Alexandra-Mitretodis, & Andrew Tuck, *The New NAFTA: Scaled-Back Arbitration in the USMCA,* 36 J. of Int'l Arb. 6, p. 743 (2019) (CL-0205-ENG) (emphasis added).

[310] In this regard, there is nothing exceptional about extending the obligations of a treaty for a period of time after the treaty terminates. As the commentary to the VCLT explains, "when a treaty is about to terminate or a party proposes to withdraw, the parties may consult together and agree upon conditions to regulate the termination of withdrawal. Clearly, any such conditions provided for in the treaty or agreed upon by the parties must prevail[.]" ILC 1966 Draft Articles on the Law of Treaties (C-0315-ENG.81).

[311] *See, e.g.*, Memorial, ¶ 17, n.2. *See also* Copy of Certification of Formation of Legacy Vulcan, LLC (3 June 2015) (C-0001-ENG); Vulcan Materials Company, Form 10-K for the 2019 fiscal year, p. 3 (26 February 2020) (C-0023-ENG). At the time Legacy Vulcan started investing in Mexico, the company was called Vulcan Materials Company and was organized under the laws of New Jersey, United States. In 2007, as part of a merger, Vulcan Materials Company was renamed Legacy Vulcan Corp. and became a subsidiary of a newly formed parent company named Vulcan Materials Company that was organized under the laws of

120. Legacy Vulcan's claims against Mexico concern the wrongful treatment of Legacy Vulcan's Mexican investments through a series of measures, including the aggravating shutdown of La Rosita and Punta Venado in May 2022. Legacy Vulcan sought leave to add its ancillary claim to this proceeding that same month, *i.e.*, during the three-year period that the Parties consented to the submission of a claim alleging the breach of an obligation under NAFTA Chapter 11 for a legacy investment. Accordingly, Legacy Vulcan's ancillary claim alleging that Respondent breached NAFTA Chapter 11 in 2022 with respect to its legacy investment in Mexico is proper under Annex 14-C of the USMCA.

121. Despite the USMCA Parties' clear consent to protect legacy investments under NAFTA until July 1, 2023, Mexico argues that Annex 14-C does not extend the substantive protections of Chapter 11 until that date.[312] According to Mexico, this means that it was no longer possible for Mexico to violate NAFTA Chapter 11 after June 30, 2020.[313] This argument is at odds with the plain text of Annex 14-C.

122. As described above, paragraph 1 of USMCA Annex 14-C establishes the Parties' consent "to the submission of a claim [...] alleging ***breach of an obligation*** under [...] Section A of Chapter 11 (Investment) of NAFTA."[314] Paragraph 3 further provides that this consent "shall expire three years after the termination of NAFTA 1994."[315] Mexico suggests in passing that this period is consistent with the three-year statute of limitations for investors to bring a claim under NAFTA,[316] but it ignores that, under NAFTA Articles 1116(2) and 1117(2), an investor may not assert a claim more than three years after it had ***both*** knowledge of the alleged breach and knowledge that it had incurred loss or damages.[317] USMCA Annex 14-C refers only to "the breach

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New Jersey, United States. In 2015, Legacy Vulcan Corp. was merged into Legacy Vulcan, a limited liability company. *See* Memorial, ¶ 17, n.2 (citing sources).

[312] *See* Counter-Memorial (Ancillary Claim), ¶ 409.

[313] *See id.*, ¶ 408. Respondent's purported counter-claim contradicts this position. Respondent claims that environmental obligations may be inferred for foreign investors from NAFTA Article 1114, and that Legacy Vulcan purportedly violated these obligations with respect to quarrying in La Rosita after 2020. *See id.*, ¶¶ 512, 514. As explained above in Part II.C, Respondent's allegations of environmental violations are false, but — in presenting this argument — Respondent inadvertently concedes that NAFTA continues to regulate the Parties' conduct with respect to Legacy Vulcan's investment in Mexico. Respondent cannot have it both ways.

[314] USMCA, Annex 14-C, ¶ 1 (C-0314-ENG) (emphasis added).

[315] *Id.*, ¶ 3 (C-0314-ENG).

[316] *See* Counter-Memorial (Ancillary Claim), ¶ 409.

[317] NAFTA Art. 1116(2) (C-0009-ENG) ("An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage"); NAFTA Art. 1117(2) (C-0009-ENG) ("An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than

of an obligation" under Section A of Chapter 11 and says nothing about the investor's knowledge of the loss or damage as a result of that breach. Mexico's suggestion that the three-year sunset period aligns with the statute of limitations in NAFTA is unsupported and ignores that ***both*** knowledge of the breach as well as knowledge of the resulting damages must occur before the limitations period begins.

123. Mexico's interpretation would also lend no *effet utile* to other provisions of Annex 14-C.[318] For instance, footnote 21 to paragraph 1 of Annex 14-C provides that "Mexico and the United States do not consent under paragraph 1 [to submission of claims under NAFTA] with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E."[319] Critically, however, an investor is only eligible to submit a claim under USMCA Annex 14-E ("Mexico-United States Investment Disputes Related to Covered Government Contracts") for acts that occurred ***after*** the entry into force of the USMCA (*i.e.*, after the termination of NAFTA).[320] If paragraph 1 of Annex 14-C only granted legacy investors the right to submit a claim for acts that occurred ***before*** the termination of NAFTA (as Mexico claims), there would be no reason to exclude eligible Annex 14-E claimants from paragraph 1, since a claim under USMCA Annex 14-E could only be filed for an act that occurred ***after*** the termination of NAFTA.

124. Mexico's interpretation of USMCA Annex 14-C would make footnote 20 to paragraph 1 of that Annex similarly redundant. This footnote provides that, in respect of claims regarding legacy investments, "[f]or 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

three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.").

[318] It is a fundamental principle of treaty interpretation that provisions should not be interpreted in such a way as to render them meaningless. *See* ILC 1966 Draft Articles on the Law of Treaties, p. 219 (C-0315-ENG.35) ("When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.").

[319] USMCA, Annex 14-C, ¶ 1, n.21 (C-0314-ENG).

[320] *See* USMCA, Article 14.2, ¶ 3 (C-0316-ENG) ("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.") (emphasis added).

apply with respect to such a claim."[321] If paragraph 1 of Annex 14-C only granted legacy investors the right to submit a claim alleging a breach of the substantive obligations of NAFTA Chapter 11 (Section A) (but did not extend those obligations into the three year sunset period), it would be superfluous to clarify that the substantive obligations of NAFTA Chapter 11 (Section A) apply to such a claim.

125. Mexico's interpretation of USMCA Annex 14-C ignores not only the text of Annex 14-C but also the language of the USMCA Protocol. That Protocol explicitly recognizes that certain provisions of NAFTA continue to apply after the USMCA took effect: "[u]pon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, *without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA*."[322] Accordingly, when a provision in the USMCA refers to certain provisions of NAFTA (*e.g.*, "*Chapter 11 (Section A) (Investment)*"), those NAFTA provisions remain in effect with respect to legacy investments *after* the implementation of the USMCA.

b) Mexico's Position Contravenes the Object and Purpose of NAFTA and the USMCA.

126. In addition to being at odds with a good faith reading of the USMCA in accordance with the ordinary meaning of its terms, Mexico's interpretation of USMCA Annex 14-C is also at odds with the object and purpose of both NAFTA and the USMCA.[323] Under NAFTA, the Parties "resolved to: […] ENSURE a *predictable* commercial framework for business planning and investment."[324] The Parties to the USMCA similarly "resolv[ed] to: […] ESTABLISH a clear, transparent, and *predictable* legal and commercial framework for business planning, that supports further expansion of trade and investment."[325] The Parties to the USMCA also "recognize[d] the importance of a smooth transition from NAFTA 1994 to [the USMCA]."[326]

127. If Mexico's position were accepted, the decades-long protections afforded legacy investors like Legacy Vulcan under NAFTA Chapter 11 abruptly expired on 1 July 2020, without the opportunity for those investors to reconsider or reconfigure their investments in light of the

[321] USMCA, Annex 14-C, ¶ 1, n.20 (C-0314-ENG) (emphasis added).

[322] USMCA Protocol, ¶ 1 (C-0313-ENG) (emphasis added).

[323] Vienna Convention on the Law of Treaties, Art. 31(1)-(2) (CL-0141-ENG) ("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.").

[324] NAFTA, Preamble (C-017-ENG).

[325] USMCA, Preamble (C-018-ENG).

[326] USMCA, Art. 34.1(1) (C-019-ENG).

new legal framework under the USMCA. In the case of legacy investments in Canada, which is not a party to the investment-protection provisions of USMCA Chapter 14 (although Canada did consent to the submission of legacy investment claims pursuant to Annex 14-C), Mexico's position would have the effect of abruptly terminating ***all*** protections under NAFTA and the USMCA for legacy NAFTA investors in Canada on 30 June 2020. This Tribunal should not accept an interpretation that would lead to such an extraordinary result, effectively depriving legacy investors of the predictable and smooth transition to the USMCA that the NAFTA and USMCA Parties intended.[327]

c) Public Statements Made by the USMCA Parties and Other Trade Agreements Confirm that Mexico Is Wrong.

128. Statements made by all three Parties after the USMCA was finalized confirm their intent to extend the substantive protections of NAFTA Chapter 11 into the sunset period set forth in USMCA Annex 14-C.

129. In a 2018 press briefing after announcing that a deal had been reached to replace NAFTA, a "senior [U.S.] administration official" stated that "*[t]he investment protections* in Chapter 11 are going to continue to be available."[328] After the United States implemented the USMCA, the U.S. Congressional Research Service issued a report noting that, "[f]or certain claims brought by investors against a NAFTA Party involving investments established or acquired while NAFTA was in force and that still exist when the USMCA enters into force, Article 14-C.1 permits the relevant NAFTA provisions *to apply* for three years after NAFTA is terminated."[329]

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[327] *See* Frédéric G. Sourgens, *Chapter 15: Living on a Prayer: Termination of Intra-EU BITs and the Law of Treaties*, *in* THE VIENNA CONVENTION ON THE LAW OF TREATIES IN INVESTOR-STATE DISPUTES: HISTORY, EVOLUTION, 325 (E. Shirlow, K. Gore, eds. 2022) (CL-0206-ENG) ("[T]he sunset clauses themselves implicate the very heart of the treaty regime in which they were included. Investment treaties seek to provide reasonably stable investment conditions. These conditions must allow the investor to form certain baseline understandings about what recourse the investor may have and what types of protections the investor can expect. These rights and expectations are always subject to reasonable change. But they cannot be taken away abruptly or arbitrarily thus leaving the investor stranded."); *see also Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 14 (25 September 1983) (Goldman (P), Foighel, Rubin) (CL-0207-ENG) ("[A]ny convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the *consequences* of their commitments the parties may be considered as having reasonably and legitimately envisaged." (emphasis added)).

[328] Inside Trade, *Quoted: Senior Administration Officials on the USMCA* (1 October 2018) (C-0320-ENG.4) (emphasis added), available at https://insidetrade.com/trade/quoted-senior-administration-officials-usmca.

[329] Congressional Research Service, *USMCA: Implementation and Considerations for Congress* (30 January 2022) (C-0321-ENG.4) (emphasis added).

130. In its Statement on Implementation of the USMCA, the Government of Canada explained that "Paragraph 1 [of Annex 14-C] allows the submission of a new claim by an investor in accordance with Section B of Chapter 11 of NAFTA, with respect to legacy investments […] *for an alleged breach of an obligation under Section A of Chapter 11*[.]"[330]

131. The Government of Mexico itself provided the following explanation of Annex 14-C: "[i]n the case of claims that *may arise* between the investors from Canada and the United States with the respective governments, the dispute settlement mechanism under NAFTA will continue to be applied provisionally."[331] Mexico tellingly did not refer to claims that had arisen by the time NAFTA terminated but to claims that "may arise" during the provisional period.

132. Moreover, if the USMCA Parties had intended to preclude claims with respect to measures taken during the three-year sunset period, they would have stated so, as they have in other trade agreements:

- In a side letter in connection with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"), Mexico and Australia terminated their bilateral investment treaty ("BIT"), but agreed that this BIT would "continue to apply for a period of three years from the date of termination to any investment […] which was made before the entry into force of the [CPTPP] for both Australia and the United Mexican States *with respect to any act or fact that took place or any situation that existed before the date of termination*. A claim under Article 13 (Arbitration: Scope and Standing and Time Periods) of the [BIT] may only be made within three years from the date of termination and *only with respect to any act or fact that took place or any situation that existed before the date of termination*."[332]
- Article 9.38(2) of the Canada-Panama Free Trade Agreement states that "[n]otwithstanding [the suspension of the Canada-Panama BIT], the [Canada-Panama BIT] remains operative for a period of 15 years after the entry into force of this Agreement for the purpose of *any breach of the obligations of the [Canada-Panama BIT] that occurred before the entry into force of this Agreement*. During this period the right of an investor of a Party to submit a claim

[330] Government of Canada, *Canada-United States-Mexico Agreement – Canadian Statement on Implementation* (03 September 2020) (C-0322-ENG.128) (emphasis added), available at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/implementation-mise_en_oeuvre.aspx?lang=eng#61.

[331] Government of Mexico, Secretary of the Economy, *Reporte T-MEC: Capítulo de Inversión del T-MEC [USMCA Report: USMCA Investment Chapter]* (9 September 2019) (C-0323-SPA.3) (emphasis added) (free translation, the original reads: "En el caso de las reclamaciones que pudieran surgir entre los inversionistas de Canadá y de los Estados Unidos con los respectivos Gobiernos, se continuará aplicando provisionalmente el mecanismo de solución de controversias bajo el TLCAN.").

[332] *See* Side Letter between Australia and Mexico Regarding Termination of Promotion and Reciprocal Protection of Investments (8 March 2018) (C-0324-ENG.2) (emphasis added).

to arbitration concerning such a breach shall be governed by the relevant provisions of the [Canada-Panama BIT]."[333]

- Article 30.8(2) of the Comprehensive Economic and Trade Agreement ("CETA") between Canada and the European Union states that "a claim may be submitted under an agreement listed in Annex 30-A [BITs that will be suspended when CETA enters into force] in accordance with the rules and procedures established in the agreement if: (a) *the treatment that is object of the claim was accorded when the agreement was not suspended or terminated*; and (b) no more than three years have elapsed since the date of suspension."[334]

133. The USMCA Parties knew how to limit legacy investment claims to measures that occurred before the USMCA superseded NAFTA, but they failed to do so. Their public statements after the USMCA was finalized confirm that, as the text shows, such a limitation was not their intent. Mexico fails to offer a single public statement or any other source suggesting otherwise.

d) The Tribunal Has Already Determined that NAFTA Applies to Mexico's Conduct At Issue Here.

134. Finally, it has already been established that NAFTA applies to the Parties' dispute regarding Mexico's treatment of Legacy Vulcan's Project in Mexico, and that treatment includes the shutdown of La Rosita and Punta Venado.[335] The subject matter of the Parties' dispute is Mexico's interference with Legacy Vulcan's Project to quarry limestone and produce high-quality aggregates for export to the United States, of which La Rosita and Punta Venado are core components.[336] The facts that form the basis of Legacy Vulcan's ancillary claim — namely, Mexico's shutdown of La Rosita and Punta Venado — are part of the series of acts at issue in that dispute that failed to accord fair and equitable treatment to Legacy Vulcan's investment in violation of NAFTA.

135. As the Tribunal recognized in PO No. 7, "the allegedly unlawful shutdown of CALICA's operations at El Corchalito, based on the findings of an inspection by PROFEPA" was

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[333] *See* Free Trade Agreement Between Canada and the Republic of Panama, signed 14 May 2010, entered into force 1 April 2013, Art. 9.38(2) (C-0325-ENG) (emphasis added).

[334] *See* Comprehensive Economic and Trade Agreement between Canada and the European Union, signed 30 October 2016, provisionally entered into force 30 October 2016, Art. 30.8(2) (C-0326-ENG) (emphasis added).

[335] *See, e.g.*, Procedural Order No. 1 (establishing pursuant to NAFTA, *inter alia*, the rules and procedure that govern this arbitration).

[336] La Rosita and Punta Venado were the two lots initially contemplated for development in the 1986 Investment Agreement. *See* Investment Agreement, pp. 2-3 (6 August 1986) (C-0010-SPA). As the Tribunal concluded in PO No. 7, "it is clear that the La Rosita lot forms part of the same quarrying operation and therefore the same subject matter [of the original claims]" such that it is "not feasible to separate the subject matter of the ancillary claim about La Rosita from the dispute already before the Tribunal in relation to Punta Venado, La Adelita and El Corchalito." Procedural Order No. 7, ¶ 137.

within the subject-matter of Legacy Vulcan's original claim and, "[n]otably, the subject-matter of the ancillary claim is the alleged wrongful shutdown of Claimant's operations in La Rosita following an inspection by PROFEPA."[337] Thus, the subject-matter of Legacy Vulcan's claim against Mexico arose before the USMCA superseded NAFTA in 2020, and that subject-matter cannot now be artificially split for jurisdictional purposes.

136. Mexico's new jurisdictional objection also ignores that in PO No. 7 — issued in July 2022 (*i.e.*, two years *after* the USMCA superseded NAFTA) — the Tribunal already determined that it had the power to order provisional measures pursuant to NAFTA Article 1134.[338] In relying on *NAFTA Article 1134* to recommend that Mexico "take no action that might further aggravate or extend the dispute between the Parties [...]," the Tribunal necessarily applied the provisions of NAFTA Chapter 11 to Mexico and its conduct in 2022.[339] This is consistent with Annex 14-C of the USMCA, which extends the Parties' consent to be bound by NAFTA Chapter 11 until 1 July 2023 for legacy investments.

137. In sum, USMCA Annex 14-C plainly enshrines the State Parties' consent to extend the substantive protections of NAFTA Chapter 11 until 1 July 2023 for legacy investments such as Legacy Vulcan's. Consistent with this sunset provision, the Tribunal has already determined that NAFTA Chapter 11 continues to apply in this proceeding with respect to Mexico's conduct toward Legacy Vulcan and its investments in Mexico.[340] Mexico's belated and artificial attempt to exclude the application of NAFTA Chapter 11 to its latest wrongful conduct relating to Legacy Vulcan's investments fails.

2. Mexico's "Unclean Hands" Argument Does Not Render Legacy Vulcan's Claim Inadmissible.

138. Mexico also claims that the "unclean hands" doctrine precludes admission of Legacy Vulcan's ancillary claim.[341] As shown in Part II.C.1.c above, Mexico is wrong on the facts.

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[337] Procedural Order No. 7, ¶ 135; *see generally Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, ICJ Judgment (21 April 2022), ¶¶ 45-47 (CL-0208-ENG) (holding that it is proper to examine "incidents alleged to have occurred *after* the lapse of the jurisdictional title" so long as those incidents "arose directly out of the question which is the subject-matter of the Application," "are connected to the alleged incidents that have already been found to fall within the Court's jurisdiction," and "consideration of those alleged incidents does not transform the nature of the dispute between the Parties in the present case" (emphasis added)).

[338] Procedural Order No. 7, ¶ 98.

[339] *Id.*, ¶ 160(a).

[340] *See id.*, ¶ 98.

[341] *See* Counter-Memorial (Ancillary Claim), ¶¶ 394-399.

Mexico is also wrong on the law by misapplying the "unclean hands" doctrine. For these reasons, the Tribunal should reject Mexico's untimely objection.

139. Mexico's own cited authorities prove that the "unclean hands" doctrine is inapplicable here. In *Khan Resources v. Mongolia*, for instance, the tribunal explained that the doctrine provides that "the protections of an investment treaty [...] cannot be extended to an investment ***made*** illegally."[342] Respondent has not alleged — much less proven — that Legacy Vulcan ***made*** its Mexican investment illegally. At most, Mexico alleges that Legacy Vulcan's quarrying operations at La Rosita violated applicable environmental laws.[343] This allegation is false, but even if it were true, it would not establish that Legacy Vulcan ***obtained*** or ***made*** its investment illegally such that it should be denied NAFTA protection.[344] For similar reasons, Mexico's reliance on *Rusoro Mining* is misplaced because the tribunal in that case indicated that the "unclean hands" doctrine precludes investments ***obtained*** or ***made*** illegally from enjoying the protection of an investment treaty.[345]

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[342] *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia and Monatom Co, Ltd*, PCA Case No. 2011-09, Decision on Jurisdiction, ¶ 382 (25 July 2012) (Williams (P), Fortier, Hanotiau) (RL-0145) (hereinafter "*Khan Resources v. Mongolia* (Jurisdiction)") (emphasis added) (cited by Respondent, *see* Ancillary Claim Counter-Memorial, ¶ 396). As the tribunal explained, "[t]his is logical. An investor who has *obtained* its investment in the host state only by acting in bad faith or in violation of the laws of the host state, has brought him or herself within the scope of application of the [Treaty] only as a result of his wrongful acts." *Id.*, ¶ 383; *see also Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 101 (15 April 2009) (Stern (P), Bucher, Fernández-Armesto) (CL-0209-ENG) (hereinafter "*Phoenix v. Czech Republic* (Award)") ("If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system.").

[343] *See, e.g.*, Counter-Memorial (Ancillary Claim), ¶ 398.

[344] *Khan Resources v. Mongolia* (Jurisdiction), ¶ 384 (RL-0145) ("[T]here is no compelling reason to altogether deny the right to invoke the [Treaty] to any investor who has breached the law of the host state in the course of its investment [...] It would undermine the purpose and object of the Treaty to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits."); *see also Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, ¶ 345 (16 August 2007) (Fortier (P), Cremades, Reisman) (CL-0210-ENG) ("[A]llegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction.").

[345] *See Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, ¶ 492, n.406 (22 August 2016) (Fernández-Armesto (P), Orrego Vicuña, Simma) (RL-0003) (citing *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, ¶ 132 (18 November 2014) (Fernández-Armesto (P), Alvarez, Vinuesa) (CL-0211-SPA) ("[N]o se puede entender en ningún caso que un Estado está ofreciendo el beneficio de la protección mediante arbitraje de inversión cuando el inversor, para alcanzar esa protección, ha incurrido en una actuación gravemente antijurídica."); *Phoenix v. Czech Republic* (Award), ¶ 101 (CL-0209-ENG) ("States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments *made* in violation of their laws." (emphasis added)); *Saur International S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, ¶ 308 (6 June 2012) (Fernández-Armesto (P),

140. Mexico's argument that *Al-Warraq v. Indonesia* applies "mutatis mutandis" is similarly wrong.[346] In *Al-Warraq*, the tribunal was guided by Article 9 of the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference (the "OIC Agreement"), which prohibited investors from "taking any actions that would disrupt the public interest" or "trying to achieve gains through unlawful means."[347] The tribunal found that an investor's fraudulent conduct was a violation of this "explicit provision," which "[un]like most BITs," "binds an investor to observe certain norms of conduct."[348] Mexico fails to draw any connection between Article 9 of the OIC Agreement and the provisions of NAFTA that would make *Al-Warraq* relevant to this case — because there is none.[349]

141. For all these reasons, Mexico's "unclean hands" argument should be rejected.

B. MEXICO HAS NOT REFUTED THAT IT FAILED TO ACCORD FAIR AND EQUITABLE TREATMENT TO LEGACY VULCAN'S INVESTMENTS IN MEXICO UNDER NAFTA ARTICLE 1105.

142. Mexico does not dispute that the minimum standard of treatment under NAFTA Article 1105 is infringed if the conduct is "arbitrary, grossly unfair, unjust or idiosyncratic" or "involves a lack of due process [...] [including] a complete lack of transparency and candour in an administrative process."[350] To the contrary, Mexico has endorsed this standard as set out in *Waste Management v. Mexico* and other NAFTA arbitral decisions.[351]

Hanotiau, Tomuschat) (CL-0212-SPA) ("[L]a finalidad del sistema de arbitraje de inversión radica en proteger únicamente inversiones legales y *bona fide* [...] no se puede entender en ningún caso que un Estado esté ofreciendo el beneficio de la protección mediante arbitraje de inversión, cuando el inversor, para alcanzar esa protección, haya incurrido en una actuación antijurídica.")).

346 Counter-Memorial (Ancillary Claim), ¶ 395.

347 *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Award, ¶¶ 631-648 (15 December 2014) (Cremades (P), Hwang, Nariman) (CL-0127-ENG).

348 *Id.*, ¶ 631.

349 The jurisdictional award in *Khan Resources v. Mongolia* is also fatal to Respondent's objection. In that case, the tribunal explicitly rejected Respondent's contention that "an investor who has violated the laws of the host state is not entitled to the substantive protections of the [Treaty] regardless of whether such violations 'occurred before or after the initial investment was made.'" *Khan Resources v. Mongolia* (Jurisdiction), ¶¶ 380-381 (RL-0145). Observing that "[i]t would undermine the purpose and object of the Treaty to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits," the tribunal rejected the respondent's jurisdictional objection. *Id.*, ¶ 384. The Tribunal should do the same here.

350 Counter-Memorial (Ancillary Claim), ¶ 416.

351 Counter-Memorial, ¶ 299 ("En conclusión, el estándar mínimo del derecho internacional consuetudinario prohíbe una acción que sea 'arbitraria, notoriamente injusta, antijurídica o idiosincrática, y discriminatoria si la demandante es objeto de prejuicios raciales o regionales o si involucra ausencia de debido proceso que lleva a un resultado que ofende la discrecionalidad judicial.'") (citing *Waste*

143. As explained further below, Mexico has failed to refute that its actions against Legacy Vulcan and CALICA in 2022 violated this minimum standard of treatment under NAFTA Article 1105, because that conduct (1) was arbitrary; (2) was not in good faith; (3) disregarded due process; and (4) frustrated Legacy Vulcan's and CALICA's legitimate expectations.

1. Mexico's Conduct Was Arbitrary.

144. The Parties agree that NAFTA Article 1105 protects investors against arbitrary State conduct.[352] Conduct is arbitrary when it is not based on the facts or the law but rather on domestic politics and discretion.[353] As Professor Schreuer has explained, conduct is arbitrary when it cannot be "justified in terms of rational reasons that are related to the facts," such as "where a public interest is put forward as a pretext to take measures that are designed to harm the investor."[354] Arbitrariness is also present if the conduct is not a "reasonable and proportionate

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Management v. United Mexican States (II), ICSID Case No. ARB(AF)/00/3, Award, ¶¶ 98-99 (30 April 2004) (Crawford (P), Civiletti, Magallón Gómez) (CL-0007-ENG) (hereinafter "*Waste Management v. Mexico* (Award)")); Rejoinder, ¶ 321 (asserting the same); Tr. (Spanish), Day 1, 275:7-17 (Respondent's Opening Statement, reciting the *Waste Management* standard: "el Tribunal está limitado a decidir si ha habido una violación del estándar mínimo de trato conforme al derecho internacional consuetudinario, es decir, si hubo una conducta que haya sido arbitraria, notoriamente injusta, antijurídica o idiosincrática y discriminatoria, si la demandante es objeto de [prejuicios] raciales o regionales, o si involucra una ausencia de debido proceso que lleva a un resultado que ofende la discrecionalidad judicial.") [English, 228:9-18]; Respondent's Opening Presentation, Slide 64. Several other NAFTA tribunals have similarly endorsed the standard articulated in *Waste Management*. *See Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, ¶¶ 152(2), 171 (22 May 2012) (van Houtte (P), Sands, Janow) (CL-0008-ENG); *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 442 (17 March 2015) (Simma (P), McRae, Schwartz) (CL-0009-ENG) (hereinafter, "*Bilcon v. Canada* (Award)"); *Mesa Power Group, LLC. v. Government of Canada*, PCA Case No. 2012-17, Award, ¶ 501 (26 March 2016) (Kaufmann-Kohler (P), Brower, Landau) (CL-0015-ENG); *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, ¶ 559 (8 June 2009) (Young (P), Caron, Hubbard) (CL-0016-ENG) (hereinafter, "*Glamis v. United States* (Award)"); *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, ¶ 283 (18 September 2009) (Pryles (P), Caron, McRae) (CL-0017-ENG) (hereinafter, "*Cargill v. Mexico* (Award)"); *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, ¶¶ 199, 208-210 (31 March 2010) (Orrego Vicuña (P), Dam, Rowley) (CL-0005-ENG) (hereinafter, "*Merrill & Ring v. Canada* (Award)"); *GAMI Investments, Inc. v. Government of the United Mexican States*, UNCITRAL, Final Award, ¶¶ 95 et seq. (15 November 2004) (Paulsson (P), Reisman, Muró) (CL-0012-ENG).

[352] Memorial, ¶ 188; Reply, ¶ 127; Memorial (Ancillary Claim), ¶ 92; Counter-Memorial, ¶¶ 297-299; Rejoinder, ¶ 321; Counter-Memorial (Ancillary Claim), ¶ 421.

[353] Rudolph Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12(1) Santa Clara J. Int'l L. 7, p. 31 (2014) (CL-0050-ENG) ("[F]air and equitable treatment will stand in the way of conduct of the host state that is driven by domestic politics instead of arising out of considerations related to the investment. Governmental action will also be suspect in case it is not based on a proper review of facts relevant to a decision."). *See also Ronald Lauder v. Czech Republic*, UNCITRAL, Award, ¶ 221 (3 September 2001) (Briner (P), Klein, Cutler) (CL-0044-ENG); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, ¶ 184 (27 August 2008) (Salans (P), van den Berg, Veeder) (CL-0045-ENG); *Valores Mundiales, S.L. y Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, ¶ 619 (25 July 2017) (Zuleta (P), Grigera-Naón, Derains) (CL-0023-SPA).

[354] Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, in THE FUTURE OF INVESTMENT ARBITRATION, p. 188 (R. Alford, C. Rogers, eds. 2009) (CL-0051-ENG) (hereinafter, "Schreuer, *Arbitrary or Discriminatory Measures*"). In particular, administrative conduct is arbitrary when it

reaction to objectively verifiable circumstances."[355] Thus, a State acts arbitrarily, in breach of NAFTA Article 1105, when it cancels an investor's operating license for political reasons disconnected from legitimate policy objectives (*Abengoa v. Mexico*).[356] A State similarly acts arbitrarily when it interferes with an investment for political gain (*Azurix v. Argentina*).[357] Other tribunals have also considered conduct to be arbitrary when, for example, it is politically motivated for nationalistic reasons,[358] or is contrary to due process[359] or the rule of law.[360]

145. The facts here easily satisfy the arbitrariness standard, and — as explained in Part II above — Mexico has failed to refute those facts. Mexico's interference with Legacy Vulcan's quarrying and export investments was arbitrary and, thus, a violation of NAFTA Article 1105, as established by the following facts, among others:

- Mexico targeted CALICA starting in January 2022 — through numerous Presidential attacks, veiled threats, the delay of CALICA's customs permit, etc. — to score political points by deflecting environmental criticism of the Mayan Train project and condemning political opponents who had granted environmental authorizations to CALICA.[361]

"unreasonably departs from the principles of justice recognized by the principal legal systems of the world." *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, n.57 (11 October 2002) (CL-0011-ENG) (hereinafter "*Mondev v. United States* (Award)") (citing Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, Article 8 (b), reprinted in L.B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AJIL 515, 551 (1961)).

[355] Schreuer, *Arbitrary or Discriminatory Measures*, p. 188 (CL-0051-ENG).

[356] *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, ¶¶ 644-652 (Mourre (P), Siqueiros, Fernández-Armesto) (CL-0047-SPA) (hereinafter "*Abengoa v. Mexico* (Award)").

[357] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 144 (14 July 2006) (Rigo Sureda (P), Lalonde, Martins) (CL-0028-ENG).

[358] *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, ¶ 233 (19 August 2005) (Yves Fortier (P), Schwebel, Rajski) (CL-0046-ENG) ("The Tribunal has found that [Poland], by the conduct of organs of the State, acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character.").

[359] *Waste Management v. Mexico* (Award), ¶ 98 (CL-0007-ENG); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, ¶ 187 (6 November 2008) (Kaufmann-Kohler (P), Mayer, Stern) (CL-0140-ENG) ("It is also common ground that the fair and equitable treatment may be violated when procedural propriety and due process are denied.").

[360] *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, ¶¶ 453-454 (1 June 2009) (Williams (P), Pryles, Orrego Vicuña) (CL-0048-ENG); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, ¶ 491 (10 March 2015) (Fernández-Armesto, Orrego Vicuña, Mourre) (CL-0049-ENG).

[361] *See supra* Parts II.B, II.C.

- The President found it politically advantageous to label Legacy Vulcan — which he portrayed as a U.S. company taking a piece of Mexico to build roads abroad — as a law-breaking destroyer of the environment to defend the Mayan Train.[362]
- Mexico shut down La Rosita in May 2022 at the direction of President López Obrador, without providing CALICA an effective opportunity to defend itself against this unchecked exercise of raw presidential power.[363]
- The President's instruction was not based on a lawfully-determined finding of environmental harm or illegality, but rather on the President's false claim that CALICA "had deceived" him by continuing to quarry as it had been doing for decades.[364]
- Further ignoring the facts and the law relating to CALICA's operations in La Rosita, the President ordered the shutdown even while acknowledging that CALICA had received environmental authorizations to quarry that lot from previous "neoliberal" administrations.[365]
- Despite this acknowledgment, PROFEPA executed the President's order and shut down La Rosita by claiming that CALICA lacked environmental permits and authorizations to operate there. In doing so, PROFEPA inspectors ignored the 1986 Investment Agreement, which PROFEPA had previously found to constitute a valid environmental authorization.[366]
- Illustrating the pretextual nature of its purported justification for the shutdown, PROFEPA's actions contradicted decades of statements and conduct by PROFEPA and SEMARNAT confirming that CALICA was authorized to quarry La Rosita and that CALICA's operations complied with Mexican law.[367]
- In an effort to give cover to the President's arbitrary order, as well as his predetermined allegations of environmental harm, three months after the shutdown SEMARNAT published a so-called "*dictamen*" singling out CALICA and alleging environmental harm from its operations.[368] SEMARNAT did this without even notifying CALICA about it, let alone giving the company an opportunity to rebut the allegations in the "*dictamen*" before its publication.[369] Those allegations

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[362] *See, e.g.*, Transcript of President's Morning Press Conference (5 December 2022) (C-0288-SPA.37) ("Esto es Calica. […] Esta es la destrucción de Playa del Carmen, es una empresa estadounidense que tiene todo esto, pero esta parte es un banco de material. […] Esto no lo vieron los ambientalistas, miren lo que estaban haciendo. […] Aquí viene el Tren Maya, esto es lo que ellos vieron, esto no.").

[363] *See supra* Parts II.B, II.C.3.

[364] *See supra* Part II.B.2.

[365] *See, e.g.*, Transcript of President's Morning Press Conference (2 May 2022) (C-0168-SPA.14) ("Calica, […] que está extrayendo grava para las carreteras de Estados Unidos y recibió permisos de los gobiernos neoliberales, y los ambientalistas nunca jamás dijeron nada, y es una destrucción al territorio sin precedente y lo siguen haciendo. […] Entonces, he dado instrucciones a la secretaria [de la SEMARNAT] para proceder de inmediato. […] Sí, hasta que se detenga la extracción.").

[366] PROFEPA Inspection Report on Environmental Impact (2-5 May 2022) (C-0171-SPA.16) (PROFEPA inspectors refusing to review the 1986 Investment Agreement handed to them during the visit).

[367] *See* Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Report-SPA, ¶¶ 45-65, 111-131.

[368] SEMARNAT, Dictamen de Impactos Ambientales (18 August 2022) (C-0237-SPA).

[369] Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶ 12.

lack a sound technical and scientific basis, and are based on skewed and flawed methods that seemed designed to reach the desired anti-CALICA conclusions espoused by President López Obrador.[370]

- Mexico then fed the bogus results of SEMARNAT's "*dictamen*" to political allies to promote a class-action lawsuit against CALICA and later cite that lawsuit to justify President López Obrador's anti-CALICA remarks and shutdown order from months earlier.[371]
- Mexico pressured Legacy Vulcan to drop this arbitration and to accept a premature conversion of its Mexican investment into a tourism project that would benefit the President's preferred industry and one of his close associates (a tourism entrepreneur). He presented this in take-it-or-leave-it terms.[372]

146. To distract from these facts, Mexico claims that the relevant standard of review under NAFTA and customary international law does not allow tribunals to act as appellate bodies or to second-guess government decision-making.[373] Mexico strikes a strawman. Legacy Vulcan is not asking the Tribunal to act as a Mexican or appellate court. Legacy Vulcan is simply asking the Tribunal to find that Mexico's shutdown of La Rosita and related suspension of CALICA's customs permit breached NAFTA Article 1105 in light of the facts and circumstances surrounding

[370] *See supra* Part II.C.1.c); Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, Part 5.

[371] *See* Aristegui Noticias, *Presentan acción colectiva ante ONU contra mina de Calica* (2 December 2022) (C-0284-SPA) (interview of the named plaintiff explaining that SEMARNAT sent teams to present their findings to the plaintiffs (video begins display at 6:20)), https://aristeguinoticias.com/0212/aristegui-en-vivo/entrevistas-completas/presentan-accion-colectiva-ante-onu-contra-mina-de-calica-video/; SEMARNAT, *Sirve estudio técnico elaborado por Semarnat para demanda de acción colectiva de comunidades* (25 October 2022) (C-0285-SPA); María Luisa Albores González, Twitter (25 October 2022) (C-0286-SPA.2) (boasting that SEMARNAT's "technical study" ("*estudio técnico*") served as the basis of the collective action against CALICA and congratulating the plaintiffs for "defending their territory!" ("*¡Enhorabuena por defender su territorio!*")); Counter-Memorial (Ancillary Claim), ¶¶ 139-140 (citing "*denuncia colectiva*" to defend the Mexico's actions without disclosing Mexico's involvement in it).

[372] *See supra* Part II.B. *See also* Memorial (Ancillary Claim), ¶ 45 (discussing evidence — which Respondent failed to rebut in its Counter-Memorial — that Daniel Chávez, one of the President's closest advisors on the Mayan Train project, owns tourism interests that could stand to benefit from CALICA's demise); Mauricio Flores, *Las complicaciones de un tren imposible*, El Intependiente (15 February 2023) (C-0327-SPA) (reporting a plan for a hotel or amusement park near CALICA's port led by President López Obrador's advisor Daniel Chávez is facing complications).

[373] Counter Memorial (Ancillary Claim), ¶¶ 452-456.

those measures.[374] This is well within the Tribunal's purview.[375] Mexico's suggestion that government decisions are entitled to unlimited deference and cannot be questioned in this arbitration is simply wrong.[376]

147. Mexico tries to recast its actions as a legitimate exercise of its regulatory powers, relying on the decision in *Glamis Gold v. United States* to support its argument that this exercise should not be questioned here.[377] Mexico is again wrong. In *Glamis Gold*, for instance, the tribunal explained that the conduct of a government agency violates NAFTA if the agency's review and conclusions are arbitrary or lack due process.[378] The tribunal concluded that this had not happened under the specific facts of that case because respondent's quick and effective remediation of the relevant procedurally-deficient measure was sufficient to cure its administrative proceeding of any defects.[379] Unlike the respondent in *Glamis Gold*, Mexico has presented no evidence showing that it took any action to correct the evident shortcomings surrounding PROFEPA's shutdown of La Rosita, including, among others, PROFEPA's disregard of CALICA's evidence and failure to prosecute the administrative proceeding.

148. Mexico's insistence that President López Obrador's anti-CALICA remarks were a mere "exercise of governmental transparency and accountability" to "address[] a real and legitimate environmental concern"[380] is misplaced. As explained in Part II.B above, Mexico's spin of those remarks flies in the face of what the President actually said; his words — along with the

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[374] Memorial (Ancillary Claim), ¶¶ III.B.2.a; *see also Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) (Grigera Naón (P), Fernández-Rosas, Bernal Verea) (CL-0052-ENG) (hereinafter "*Tecmed v. Mexico* (Award)") (holding Mexico in breach of the fair and equitable treatment standard when it refused to renew an investor's permit and caused the closure of the investor's facility for political reasons, without regard to whether the facility was being properly operated); *Abengoa v. Mexico* (Award), (CL-0047-SPA) (holding Mexico violated the fair and equitable treatment standard when it closed the investor's facility for political reasons rather than legitimate environmental and public health considerations).

[375] *See, e.g.*, Procedural Order No. 7, ¶ 145 (rejecting Mexico's argument that "[e]ste Tribunal no puede funcionar como una instancia de revisión en contra de todos y cada uno de los actos de autoridad relacionados con la Demandante").

[376] *See Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2)), Award, ¶ 584 (4 April 2016) (Levy (P), Gotanda, de Chazournes) (hereinafter, "*Crystallex v. Venezuela* (Award)") (CL-0089-ENG) ("[D]eference to the primary decision-makers cannot be unlimited, as otherwise a host state would be entirely shielded from state responsibility."); *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award, ¶ 562 (27 March 2020) (Affaki (P), Born, Lowe) (CL-0114-ENG) (quoting the tribunal in *Crystallex*).

[377] *See* Counter-Memorial (Ancillary Claim), ¶¶ 452-458.

[378] *Glamis v. United States* (Award), ¶ 779 (CL-0016-ENG).

[379] *Id.*, ¶ 771.

[380] Counter-Memorial (Ancillary Claim), ¶ 458 (free translation).

broader context and timing of Mexico's measures — establish the political and improper motivations behind Mexico's actions.

149. The President's order to "immediately" halt further extraction activities at CALICA was not justified in terms of rational reasons arising from the facts or the law, nor was it "an exercise of governmental transparency and accountability."[381] Instead, the President's order stemmed from political motivations; he used unsupported, predetermined allegations of legal violations and environmental harm, fabricated from the podium of his press conferences, with the clear intention of deflecting environmental criticism of the Mayan Train and pressuring Legacy Vulcan to drop this arbitration.[382] PROFEPA executed the President's order to shut down La Rosita after he made and reiterated these unsupported, false accusations.[383] And those false accusations — dressed up in scientific garb by SEMARNAT in the anti-CALICA "*dictamen*" it published in August 2022 — were the basis of the "class action" Mexico cites in support of its assertion that the environmental concerns of local communities drove the President's remarks; an assertion debunked above.[384] Mexico's anti-CALICA allegations led to the purported "community concerns," not the opposite.

150. Mexico's claim that its measures against Legacy Vulcan and CALICA were not intended to favor the tourism industry[385] is also belied by the record. Mexico all but ignores the President's remarks tying CALICA to his preference for the tourism industry and pressuring for CALICA to stop the Project to transform it into a tourism development "because they are in the middle of [that] tourist zone."[386] Instead, Mexico insists that CALICA [redacted]

[381] *Id.*, ¶¶ 123, 458 (free translation); *see* Transcript of President's Morning Press Conference (2 May 2022) (C-0168-SPA.14) ("he dado instrucciones a la secretaria [de la SEMARNAT] para proceder de inmediato").

[382] Transcript of President's Morning Press Conference (31 January 2022) (C-0176-SPA.21-22) (stating that CALICA is: "destruyendo el territorio [...] para [...] llevarse el material a Estados Unidos por barco."); Andrés Manuel López Obrador, Adelanto de Programas para el Bienestar por veda electoral 2022, YouTube (uploaded 31 January 2022), https://www.youtube.com/watch?v=kymtpvyiDEk (C-0244-SPA) (video online begins display at 02:19:50); Transcript of President's Morning Press Conference (3 February 2022) (C-0178-SPA.22) ("Claro que hay violaciones, pues esos están destruyendo el medio ambiente. [...] [Y]a no se va a permitir nada de extracción, nada."); Andrés Manuel López Obrador, Baja incidencia delictiva en Hidalgo, YouTube (uploaded 3 February 2022), https://www.youtube.com/watch?v=OyjJQJxJtrc (C-0246-SPA) (video online begins display at 02:13:13); Transcript of President's Morning Press Conference (31 January 2022) (C-0176-SPA.22) ("que ya no se siga destruyendo y que retiren su demanda, porque no tiene fundamento legal.").

[383] *See* Part II.A above. As explained in Part II.B.1 above, SEMARNAT echoed the President's anti-CALICA remarks in press releases, before the U.N. Human Rights Commission, and in a bogus report (*dictamen*) purporting to detail CALICA's environmental harms. *See* Part II.B.1 above.

[384] *See supra* Part II.B.1; *but see* Counter-Memorial (Ancillary Claim), ¶ 458.

[385] Counter-Memorial (Ancillary Claim), ¶¶ 460-461.

[386] Transcript of President's Morning Press Conference (31 January 2022) (C-0176-SPA.22) (free translation, the original reads: "En Tulum por eso también se va a proteger, porque es del medio

[redacted],[387] but this is false, as explained in Part II.B.2 above.[388] President López Obrador himself publicly acknowledged that this transformation was "one of the proposals *we [Mexico] are making*." [389] He also confirmed that this was a take-it-or-leave it proposal, pressuring Legacy Vulcan to accept it and drop the arbitration, or face the end of its Project.[390]

151. The shutdown of La Rosita was the result of a capricious and politically-convenient decision by Mexico's President to use CALICA as a ploy for the defense of a signature project of his administration, as well as the desire to pressure Legacy Vulcan into accepting Mexico's terms to bring this arbitration to an end. If that is not arbitrary, what is?

2. Mexico Failed to Act in Good Faith.

152. Mexico claims that good faith is not an autonomous obligation under the minimum standard of treatment because the "commitment to fair and equitable treatment is an expression of the principle of good faith" and that "various elements of [that] treatment [...] are

ambiente, pero además es la actividad económica principal el turismo, ya hablamos de cuánto ha dado el turismo de esta región, que hay que cuidar esta actividad y el medio ambiente."). *See also* Transcript of President's Morning Press Conference (1 February 2022) (C-0177-SPA.16-17) (free translation, the original reads: "Lo mismo en el caso del muelle, tenemos que llegar a un acuerdo y ya se está viendo. [...] [S]i se observa, toda esta zona es la zona turística de las más importantes del mundo, Playa del Carmen."); Transcript of President's Morning Press Conference (10 February 2022) (C-0216-SPA.30-31) (emphasis added) (free translation, the original reads: "Dijimos: Sí, pero ya no van a extraer más, ya no pueden ser bancos de material, no se pueden utilizar como bancos de material esos pre[d]ios, porque están en plena zona turística, a un kilómetro de las playas del Caribe, del mar turquesa.").

[387] Counter-Memorial (Ancillary Claim), ¶ 460.

[388] *See supra* Part II.B.2.

[389] Transcript of President's Morning Press Conference (31 January 2022) (C-0176-SPA.22) (emphasis added) (free translation, the original text reads: "[E]n es[t]a mina, que es una de las propuestas que les estamos haciendo, como ya escarbaron, el agua aquí es turquesa por la piedra, entonces, con un poco de imaginación y de talento se podría utilizar como zona turística, casi albercas naturales, buscando un acuerdo, pero que ya no se siga destruyendo y que retiren su demanda, porque no tiene fundamento legal.").

[390] Transcript of President's Morning Press Conference (20 April 2022) (C-0185-SPA.9) (emphasis added) (free translation, the original reads: "Y en el caso de Calica, pues también ya estamos buscando un acuerdo con ellos, son tres opciones: La clausura, porque ya no se permite que extraigan material, eso ya no se puede permitir. [...] Esa es una opción. La otra opción, que es importante para ellos y para todos, es buscar un acuerdo para que esa área impactada, más otras dos mil hectáreas que tienen ahí, se puedan convertir en un parque turístico. Tienen también pegado al mar la concesión de un puerto que puede ser utilizado como puerto de cruceros. Estamos hablando de una de las zonas más bellas del mundo en cuanto a playas, es el Caribe. Eso es lo segundo. Y lo tercero es que les compramos el terreno completo, hacemos un avalúo de cuánto cuesta y tenemos recursos para convertir esto en un parque natural."); Andrés Manuel López Obrador, *Seguridad y bienestar, fundamentales para instaurar la paz*, YouTube (uploaded 20 April 2022), https://www.youtube.com/watch?v=RoONYTUVQ-I (C-0257-SPA) (video online begins display at 01:18:55).

manifestations of the more general principle of good faith."[391] This argument presents a distinction without a difference and is wrong.

153. NAFTA tribunals have recognized that a "*basic obligation of the State* under [NAFTA] Article 1105(1) is to act in good faith and form[.]"[392] To comply with this basic obligation, the host State must "not manifestly violate the requirements of consistency, even-handedness and non-discrimination."[393] Mexico has previously acknowledged that NAFTA's "fair and equitable treatment standard requires the Respondent [host State] to act in good faith[.]"[394]

154. Mexico does not dispute that good faith implies that a host State must refrain from using "legal instruments for purposes other than those for which they were created."[395]

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[391] Counter-Memorial (Ancillary Claim), ¶¶ 427-428 (citing Andrew Newcombe & Lluís Paradell, Law and Practice of Investment Treaties. Standards of Treatment (Kluwer 2009), p. 277 (RL-0156)). Claimant notes that Exhibit RL-0156 is incomplete and does not contain the references Respondent cites.

[392] *Waste Management v. Mexico* (Award), ¶ 138 (CL-0007-ENG) ("A basic obligation of the State under Article 1105(1) is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means.")(emphasis added); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, ¶ 134 (13 November 2000) (Hunter (P), Chiasson, Schwartz) (CL-0059-ENG) (hereinafter, "*S.D. Myers v. Canada* (Partial Award)") ("Article 1105 imports into the NAFTA the international law requirements of due process, economic rights, obligations of good faith and natural justice."); *Merrill & Ring v. Canada* (Award), ¶ 187 (CL-0005-ENG) ("Good faith and the prohibition of arbitrariness are no doubt an expression of such general principles and no tribunal today could be asked to ignore these basic obligations of international law.") (citations omitted). *See also Nuclear Test Case (Australia v. France),* Judgment, 1974 I.C.J. Rep., ¶ 46 (June 27) (CL-0213-ENG) (explaining that one of the basic principles governing the creation and performance of legal obligations, including the very rule of *pacta sunt servanda* in the law of treaties, is the principle of good faith.).

[393] *Saluka Investments B.V. v. Czech Republic*, Partial Award, ¶ 307 (17 March 2006) (Watts (P), Yves Fortier, Behrens) (CL-0027-ENG) ("A foreign investor [...] may in any case properly expect that the [host State] implements its policies *bona fide* by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination.").

[394] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Mexico's Counter-Memorial, ¶ 841 (22 May 1998) (CL-0042-ENG) (in which Mexico's acknowledges that "[t]he fair and equitable treatment standard requires the Respondent to act in good faith"). As Legacy Vulcan has explained, while bad-faith State action against an investor is a violation of the fair and equitable treatment standard, a showing of bad faith is not required to establish a violation of that standard. Memorial (Ancillary Claim), ¶ 103 (citing RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, 157 (Oxford University Press, 2012) (CL-0109-ENG-Am)); *Mondev v. United States* (Award), ¶ 116 (CL-0011-ENG) (finding that "a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.")).

[395] Counter-Memorial (Ancillary Claim), Part III.C. *See also Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Award, ¶ 300 (12 November 2010) (Williams (P), Álvarez, Schreuer) (CL-0056-ENG) ("Bad faith action by the host state includes the use of legal instruments for purposes other than those for which they were created. It also includes a conspiracy by state organs to inflict damage upon or to defeat the investment, the termination of the investment for reasons other than the one put forth by the government, and expulsion of an investment based on local favouritism.") (hereinafter, "*Frontier v. Czech Republic* (Award)") (quotations omitted); *Abengoa v. Mexico* (Award), ¶ 643 (CL-0047-SPA) ("También es contrario al nivel mínimo de trato el hecho por el Estado de utilizar los poderes que le otorga la ley para propósitos ajenos a los fines de la misma"); *Tecmed v. Mexico* (Award), ¶¶ 153-154 (CL-0052-ENG)

Mexico does not event try to address any of the four decisions — *Abengoa v. Mexico*, *Bayindir v. Pakistan*, *Frontier Petroleum v. Czech Republic*, and *Gold Reserve v. Venezuela* — that have confirmed this proposition.[396]

155. As Legacy Vulcan has explained, in *Abengoa v. Mexico*, the tribunal found that Mexico had failed to act in good faith when it shut down an investor's facility for political reasons rather than legitimate environmental and public-health concerns.[397] In that case, Mexico "disseminated, without having any evidence [...] the idea that [the investor's] operation would generate severe consequences for the population," even though the plant had all the necessary authorizations.[398] Mexico did something similar here: its President started accusing CALICA publicly of environmental destruction and illegality without any evidence to substantiate those claims. He then ordered an immediate halt to CALICA's operations as a politically expedient means of countering criticism of the Mayan Train, despite acknowledging that CALICA's operations had been duly authorized and despite PROFEPA having reached no formal administrative finding of environmental harm or illegality regarding operations in La Rosita. Like in *Abengoa*, Mexico failed to act in good faith here.

156. Tribunals have similarly held that a host State breaches its obligations to act in good faith when the reasons given to justify the relevant measure do not correspond to the government's actual motivation or go beyond those officially stated.[399] That is exactly what happened here. Mexico shut down La Rosita for reasons other than those formally expressed by the government entities that executed that act. Mexico highlights the formal reasons contained in PROFEPA's inspection reports (which served as the basis for the suspension of the customs permit), though it ignores the real reasons President López Obrador openly revealed in his *Mañaneras*. He claimed in his *Mañanera* on 2 May 2022 — and confirmed later[400] — that his

("The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments.").

396 Counter-Memorial (Ancillary Claim), Part. III.C.

397 Memorial (Ancillary Claim), ¶ 104 (citing *Abengoa v. Mexico* (Award), ¶¶ 644-652 (CL-0047-SPA)).

398 *Id.*

399 *See Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, ¶ 572 (22 September 2014) (Bernardini (P), Dupuy, Williams) (CL-0086-ENG) (hereinafter "*Gold Reserve v. Venezuela* (Award)"); *Frontier v. Czech Republic* (Award), ¶ 300 (CL-0056-ENG); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan I*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶¶ 237-250 (14 November 2005) (CL-0201-ENG) (Kaufmann-Kohler (P), Berman, Böckstiegel).

400 *See, e.g.*, Transcript of President's Morning Press Conference (25 May 2022) (C-0196-SPA.15) ("Ellos incumplieron con un acuerdo, habíamos quedado de que se detenían los trabajos de excavación [...] me informaron que habían reiniciado el trabajo o no habían dejado de trabajar [...] [E]l planteamiento es: no

government shut down CALICA based on a perceived and fictional deception by the company.[401] He had previously decreed without any valid basis that those operations destroyed the environment and violated unspecified laws to deflect environmental criticism of the Mayan Train project.[402] The predetermined allegations of environmental damage and illegality that the President lodged against Legacy Vulcan and CALICA for months also were intended to pressure Legacy Vulcan to abandon this arbitration and to turn the Project into a tourist development.[403] These facts fall squarely within the type of State conduct that is considered not to be in good faith.

157. Mexico's attempt to dismiss the President's announcement of 2 May 2022 and the PROFEPA inspections launched that very day as a mere "temporal coincidence" is disingenuous.[404] Mexico points out that PROFEPA's inspection orders preceded the President's announcement of his instruction to halt CALICA's extraction on 2 May 2022,[405] but — as Legacy Vulcan has explained[406] — in making this announcement, President López Obrador acknowledged that his instruction followed a fly-over of CALICA's operations on 29 April 2022 — the date of PROFEPA's inspection orders.[407] In any event, Mexico elsewhere concedes in its

queremos que se siga destruyendo el medio ambiente, no queremos que se siga utilizando toda esa área, que son como tres mil hectáreas, como banco de material y que se lleven ese banco de material para construir carreteras en Estados Unidos.").

[401] Transcript of President's Morning Press Conference (2 May 2022) (C-0168-SPA.14) ("Acabo de estar el fin de semana. *Y me habían engañado* en que ya no estaban extrayendo material, y pasaba yo por ahí, sobrevolaba, siempre, como tres veces, y, en efecto, estaba todo parado, las grúas paradas, todo parado; pero ahora pasé, quizá no sabían o fue porque pasamos el viernes y sobrevolé y me di cuenta de que están trabajando con todo, extrayendo material y cómo están cargando un barco. Entonces, he dado instrucciones a la secretaria [de la SEMARNAT] para proceder de inmediato. [...] Se va a proceder legalmente porque hay violación a las leyes y es una tremenda destrucción del medio ambiente. Además, es un atrevimiento burlarse de las autoridades de nuestro país. [...] Sí, *hasta que se detenga la extracción*.") (emphasis added); Andrés Manuel López Obrador, *Tren Maya Prioriza Cuidado de Zonas Arqueológicas y del Ambiente*, YouTube (uploaded 2 May 2022), https://www.youtube.com/watch?v=VeiERG4QXhI (C-0188-SPA) (video online begins display at 02:00:50).

[402] *See supra* Part II.B.1.

[403] *Id.*

[404] Counter-Memorial (Ancillary Claim), ¶¶ 464-465.

[405] *Id.*

[406] Claimant's Reply to Respondent's Response to Its Request for Provisional Measures & for Leave to Submit an Ancillary Claim, ¶ 10 (2 June 2022).

[407] Transcript of President's Morning Press Conference, p. 14 (pdf) (2 May 2022) (C-0168-SPA) ("[...] ahora pasé, quizá no sabían o fue *porque pasamos el viernes* [29 April 2022] *y sobrevolé y me di cuenta de que están trabajando con todo*, extrayendo material y cómo están cargando un barco. *Entonces, he dado instrucciones a la secretaria para proceder de inmediato*." (emphasis added)); Andrés Manuel López Obrador, Tren Maya Prioriza Cuidado de Zonas Arqueológicas y del Ambiente, YOUTUBE (uploaded 2 May 2022), https://www.youtube.com/watch?v=VeiERG4QXhI (C-0188-SPA) (video online begins display at 2:00:50).

Counter-Memorial on Ancillary Claim that PROFEPA's inspections were carried out "*as a result of* that instruction" ("*[d]erivado de esta instrucción*").[408]

158. Mexico's argument that its good-faith actions are evidenced by its willingness to negotiate in parallel with this arbitration [409] ignores that Mexico improperly pressured Legacy Vulcan into accepting its take-it-or-leave-it proposal. President López Obrador launched a months-long smear campaign against Legacy Vulcan and CALICA, and used the presidential bully pulpit to pressure Legacy Vulcan into dropping this arbitration and abandoning the Project.[410] Mexico's government improperly delayed the renewal of CALICA's customs permits and impeded exports for weeks while the President launched his campaign of attacks, before suspending the permit indefinitely.[411] Mexico even tried to link the issuance of the customs permit to CALICA's commitment not to extract any more limestone in La Rosita.[412] The President then openly admitted that Legacy Vulcan had three options, none of which entailed continuing its Project: either transform its investment into a tourism venture or face a shutdown by, or a forced sale to, the government.[413] The President ordered the shutdown soon thereafter. This is a far cry from negotiating a potential settlement in good faith.

159. In sum, the record makes clear that the reasons officially stated by Mexico to shut down Legacy Vulcan's remaining operations in La Rosita and to indefinitely suspend CALICA's customs permit — that is, PROFEPA's purported "findings" of environmental violations — were predetermined and pretextual, and did not correspond to the real reasons behind those actions. Mexico has therefore failed to comply with its basic obligation to act in good faith, in breach of NAFTA Article 1105.

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[408] Counter-Memorial (Ancillary Claim), ¶ 228 (emphasis added).

[409] *Id.*, ¶ 467.

[410] *See, e.g.*, Transcript of President's Morning Press Conference (20 April 2022) (C-0185-SPA.9) ("Y en el caso de Calica, pues también ya estamos buscando un acuerdo con ellos, son tres opciones: La clausura, [...] porque ya no se permite que extraigan material, eso ya no se puede permitir. [...] Entonces, si se van a tribunales, porque además hay denuncias, pues vamos a tribunales y vamos a hacer la denuncia formal en organismos internacionales. A ver qué van a hacer los de la ONU, a ver qué va a hacer Greenpeace, que nos ayuden en esto. [...] La otra opción [...] es buscar un acuerdo para que esa área impactada, más otras dos mil hectáreas que tienen ahí, se puedan convertir en un parque turístico. [...] Y lo tercero es que les compramos el terreno completo, hacemos un avalúo de cuánto cuesta y tenemos recursos para convertir esto en un parque natural."). *See also supra* Part II.B.2.

[411] *See supra* Part II.D.

[412] *Id.*; Witness Statement-[redacted]-Claimant's Ancillary Claim Memorial-Third Statement-ENG, ¶¶ 15-16.

[413] *See supra* Part II.B.2.

3. Mexico Violated Legacy Vulcan's and CALICA's Due Process Rights.

160. Mexico has also violated Legacy Vulcan's and CALICA's basic due process rights. It is undisputed that a core element of due process is the right to be heard, including the right to have government bodies consider evidence presented when making decisions relating to measures affecting an investment.[414] Legacy Vulcan and CALICA were denied that right by the President's sudden order to "immediately" halt CALICA's operations, an order that did not arise from any formal administrative proceeding that CALICA could effectively challenge, and which was swiftly implemented by Mexico's instrumentalities. Indeed, a Mexican court — while denying an *amparo* action by CALICA because the President's verbal order had been consummated — recognized that the President had violated CALICA's due process because his order "lacked motivation or any legal support to proceed" against CALICA.[415]

161. Contrary to Mexico's bare assertion that "PROFEPA assessed the evidence presented by CALICA" during the May 2022 inspections,[416] the record establishes that PROFEPA refused to do so. During the May 2022 inspections, CALICA presented to PROFEPA the 1986 Investment Agreement, including the environmental impact statement and the mitigation plan attached as Annexes 2 and 4 to the 1986 Investment Agreement, respectively, as well as the 2000 Corchalito/Adelita Federal Environmental Authorization.[417] Those documents show "that CALICA established its activities in a valid manner from the point of view of environmental law."[418] Unlike previous inspections, in which PROFEPA reviewed the same documents and

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[414] *See Glencore International A.G. & C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, ¶ 1318 (27 August 2019) (Fernández-Armesto (P), Garibaldi, Thomas) (CL-0057-ENG) (hereinafter, "*Glencore v. Colombia* (Award)") ("[t]he rule of law requires that in [...] administrative proceedings [...] due process be respected: the [...] administrative authority, must give each party a fair opportunity to present its case and to marshal appropriate evidence, and then must assess the submissions and the evidence in a reasoned, even-handed, and unbiased decision.") (citation omitted). *See also Tecmed v. Mexico* (Award), ¶ 162 (CL-0052-ENG) (finding that Mexico violated the fair and equitable treatment standard when it, *inter alia*, "prevented [the local company] from being able to express its position as to [certain] issue[s] and to agree with [the relevant Mexican agency] about measures required to cure the defaults").

[415] Judgment of Cancun District Court in Amparo 431/2022 (6 December 2022) (C-0307-SPA.34) (free translation, the original reads: "la violación se produjo y surtió sus efectos al momento de exteriorizar la autoridad responsable que se procedería legalmente en contra de la moral quejosa, sin tener motivación o sustento legal alguno para dicho proceder"); *see supra* Part II.C.3.

[416] Counter-Memorial (Ancillary Claim), ¶ 470.

[417] *See* Memorial (Ancillary Claim), ¶ 115; PROFEPA Inspection Report on Environmental Impact (2-5 May 2022) (C-0171-SPA.13-16, 77); PROFEPA Inspection Report on Forestry (2-5 May 2022) (C-0172-SPA.19-22).

[418] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Expert Report, ¶ 4; *see also id.*, ¶¶ 69-79; Memorial (Ancillary Claim), ¶¶ 115-119.

concluded that CALICA's activities in La Rosita were properly authorized,[419] PROFEPA improperly refused to assess that documentation during the May 2022 inspections before imposing the shutdown.[420] That shutdown was based in part on CALICA's purported failure to possess the very environmental impact authorization for its activities in La Rosita that the documentation CALICA provided demonstrated. PROFEPA's refusal to consider this evidence has continued to this day, almost ten months after the May 2022 shutdown.

162. Furthermore, while PROFEPA purported to shut down La Rosita on a "temporary" basis, it has yet to prosecute the administrative proceeding, leaving CALICA defenseless against what has effectively been a long-term shutdown of its operations.[421] As [redacted] explains, if PROFEPA detects irregularities during a visit, inspectors typically note them in the relevant inspection report, which is shortly thereafter followed by a charging document: the *Acuerdo de Emplazamiento*.[422] That instrument allows the inspected party to challenge any alleged irregularities, which are finally resolved through an administrative resolution.[423] Because none of those procedural steps have occurred almost ten months after the shutdown, the shutdown of CALICA's remaining operations is effectively made indefinite. In this way, PROFEPA's actions with respect to La Rosita have mirrored the approach PROFEPA took with the administrative proceeding regarding its "temporary" closure of El Corchalito.

163. Mexico's argument that CALICA can seek relief from PROFEPA's actions in domestic courts ignores the reality of the situation Mexico has created. As [redacted] explains, until PROFEPA issues its final, formal decision within the administrative proceeding against CALICA, the company cannot pursue judicial relief through a *juicio de nulidad* (or appeal the decision in that case).[424] By keeping the administrative proceeding on hold, PROFEPA has effectively deprived CALICA of the opportunity to seek domestic judicial review of PROFEPA's actions.[425] *Amparo* actions are not adequate substitutes for the judicial recourse that may be

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[419] *See* Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Expert Report, ¶ 98 (comparing the 2017 inspection of El Corchalito, the 2012 inspection of all lots, and the 2022 inspection of La Rosita).

[420] *See, e.g.*, PROFEPA Inspection Report on Environmental Impact (2-5 May 2022) (C-0171-SPA.16) ("*una vez concluida la visita [de inspección]* se proceda al análisis de los documentos.") (emphasis added).

[421] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Expert Report, ¶¶ 107-112.

[422] *Id.*, ¶ 109.

[423] *Id.*

[424] *Id.* ¶ 111-118.

[425] *Id.*, ¶¶ 112-113.

pursued after the conclusion of an administrative proceeding because *amparos* are almost always ineffective to challenge temporary security measures — such as a shutdown — in pending administrative environmental proceedings.[426]

164. Mexico's conduct in this case therefore constitutes a denial of due process. As the tribunal in *Glencore* explained, due process requires that host States "give each party a fair opportunity to present its case and to marshal appropriate evidence," as well as "assess the submissions and the evidence in a reasoned, even-handed, and unbiased decision." [427] PROFEPA failed to do that in rushing to execute the President's instruction to stop CALICA's remaining extraction activities. Mexico thus deprived CALICA and Legacy Vulcan of due process in imposing and maintaining the shutdown of La Rosita.

165. Mexico also violated Legacy Vulcan's and CALICA's due process rights when it unjustifiably suspended CALICA's customs permit based on PROFEPA's shutdown. It is no defense to argue — as Mexico does — that "[Legacy Vulcan's and CALICA's] right to present [their] arguments and evidence before the customs authority and the federal judiciary has been respected"[428] because they have had recourse to Mexico's National Customs Agency ("ANAM") and Mexican courts to challenge the suspension of CALICA's customs permit. [429] As commentators have explained, however, the fact that a host State makes courts available for challenging conduct constituting due process violations under domestic law does not shield that State from treaty claims under NAFTA arising from the same conduct.[430]

166. Under Mexican law, ANAM may not suspend the type of customs permit CALICA holds for reasons beyond those concerning customs, and any decision adopted by ANAM must be based on well-established findings of wrongful conduct.[431] That is not what happened here.

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[426] *Id.*, ¶¶ 114-117. While *amparos* may be granted in pending administrative proceedings in extraordinary cases, CALICA has filed several *amparos* following the President's order as well as the shutdown, but none of these have been successful.

[427] *Glencore v. Colombia* (Award), ¶ 1318 (CL-0057-ENG).

[428] Counter-Memorial (Ancillary Claim), ¶ 477.

[429] *Id.*, ¶¶ 476-477.

[430] CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, ¶ 7.104 (Oxford, 2007) (CL-0003-ENG) ("[T]he investor may pursue a claim for breach of the treaty standards that is based directly upon allegations of administrative misconduct, irrespective of whether he has sought redress before the local courts."). As Legacy Vulcan has explained at length, NAFTA contains no requirement to exhaust domestic remedies as a prerequisite to advancing a claim for denial of due process; it contains an obligation for Mexico to accord investments fair and equitable treatment. *See, e.g.*, Claimant's Post Hearing Brief, ¶¶ 25-26.

[431] *See* Mexican Customs Law, Art. 1 (C-0278-SPA) (establishing the competences of ANAM); Constitution of Mexico, Art. 16 (C-0328-SPA).

As Mexico concedes, ANAM based its decision to suspend CALICA's customs permit on the purportedly preliminary "findings" of the PROFEPA inspections.[432] ANAM could not have validly justified its decision to suspend CALICA's customs permit on PROFEPA's formal, final findings — because there are none. Mexico's previous conduct also contradicts its defense: ANAM granted CALICA's customs permit in April 2022 — just weeks before suspending it[433] — being well aware that President López Obrador had publicly accused CALICA of "environmental destruction" and PROFEPA was asserting similar allegations of environmental harm in the El Corchalito proceeding. It is evident that Mexico's conduct constitutes yet another violation of NAFTA Article 1105.

4. Mexico Frustrated Legacy Vulcan's and CALICA's Legitimate Expectations.

167. In response to Legacy Vulcan's showing that Mexico's conduct frustrated Legacy Vulcan's and CALICA's legitimate expectations with respect to La Rosita, Mexico first contends that the minimum standard of treatment does not contain an autonomous obligation to "safeguard" the expectations of an investor or its investment.[434] According to Mexico, an investor's legitimate expectations may, at best, be considered as one of many factors in assessing the alleged violation of NAFTA Article 1105.[435] Mexico's position is at odds with what multiple NAFTA tribunals have held on this issue, and with the jurisprudence upon which Mexico itself relies.

168. NAFTA tribunals have consistently recognized that host State conduct that frustrates an investor's legitimate expectations may alone violate NAFTA Article 1105. As the tribunal in *Thunderbird v. Mexico* observed, the minimum standard of treatment "within the context of the NAFTA framework" is breached "where a Contracting Party's conduct creates

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[432] Counter-Memorial (Ancillary Claim), ¶ 476. *See also* Agencia Nacional de Aduanas de México, Oficio DGJA.2022.1658 (10 May 2022) (C-0194-SPA.18) (referencing PROFEPA's findings as the basis for the suspension: "[D]e una revisión a la Orden de Inspección No. PFPA/4.1/2C.27.5/024/2022 de fecha 29 de abril de 2022 y el Acta de Inspección No. PFPA/4.1/C.27.5/024/2022 levantada en fecha 05 de mayo de 2022, esta Autoridad Administrativa observa que hay eminente riesgo de daño a los recursos naturales del Estado Mexicano, lo que puede ocasionar a la alteración de los elementos que integran el medio ambiente de la región, y que pueden traer como consecuencia daño irreparables, sistema ecológico en donde se encuentran inmersas las obras y actividades que se desarrollan el predio denominado 'La Rosita', así como su zona de influencia […] En razón de lo expuesto y ante las medidas de seguridad consistente en la clausura de las obras y actividades relacionadas a la explotación de las mercancías en cita, y ante un eminente riesgo de daño a los recursos naturales generados por dichas actividades, se actualiza la hipótesis de cancelación establecida en el Resolutivo Decimo, Numeral 8 de la autorización[.]").

[433] Witness Statement-[redacted]-Claimant's Ancillary Claim Memorial-Third Statement-ENG, ¶ 18.

[434] Counter-Memorial (Ancillary Claim), ¶ 429.

[435] *Id.*

reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages."[436] This holding is consistent with the principle, upheld by other tribunals, that the obligation to protect an investor's legitimate and reasonable expectations is "the basic touchstone of [the] fair and equitable treatment" standard.[437] Indeed, Mexico itself has recognized that NAFTA protects an investor's "reasonable or legitimate expectations [...] that arise through targeted representations or assurances made explicitly or implicitly by a state party."[438]

169. Nevertheless, Mexico posits that, even if legitimate expectations could serve as a predicate for a claim under NAFTA Article 1105, NAFTA tribunals have significantly narrowed the scope of the legitimate expectations standard.[439] It claims that, in *Glamis Gold v. United States*, for instance, the tribunal held that, to give rise to a claim for breach of an investor's legitimate expectations, representations must be "definite, unambiguous and repeated such that they create a quasi-contractual relationship."[440] Mexico misconstrues that decision. The *Glamis Gold* tribunal did not hold that "definite, unambiguous and repeated" assurances were required,[441] but rather that a violation of NAFTA Article 1105 requires "at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the

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[436] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, ¶ 147 (26 January 2006) (van den Berg (P), Wälde, Ariosa) (CL-0004-ENG) (hereinafter, "*Thunderbird v. Mexico* (Award)").

[437] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, ¶ 348 (31 October 2011) (Caflisch (P), Stern, Avila) (CL-0153-ENG) ("[t]here is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the Parties[.]"). *See also Gavrilovic v. The Republic of Croatia*, ICSID Case No. ARB/12/39, Award, ¶¶ 954-955 (26 July 2018) (Pryles (P), Alexandrov, Thomas) (CL-0154-ENG) (confirming the quoted passage from *El Paso* and explaining that "[a]ccordingly, it can be said that the breach of a legitimate and reasonable expectation may give rise to a violation of the FET standard, taking into account the scope of the undertaking of FET in the applicable treaty.").

[438] Counter-Memorial, ¶ 306; *see also* Mexico's Counter Memorial in *Odyssey Marine Exploration, Inc. v. United Mexican States,* ICSID Case No. UNCT/20/1, ¶ 568 (23 February 2021) (Serrano (P), Alexandrov, Sands) (CL-0155-ENG) (citing *Thunderbird v. Mexico* (Award), ¶ 147 (CL-0004-ENG)). Mexico has also accepted the articulation of legitimate expectations set forth by the tribunal in *Bilcon v. Canada*, which found that repeated assurances made by government officials directly to the claimant created legitimate expectations in the investor regarding the viability of a quarry investment in Nova Scotia. Rejoinder, ¶ 326 (citing *Bilcon v. Canada* (Award), ¶ 589 (CL-0009-ENG)).

[439] Counter-Memorial (Ancillary Claim), ¶¶ 430-431.

[440] *Id.* ¶ 430 (citing *Glamis Gold v. United States* (Award), ¶ 802 (CL-0016-ENG)).

[441] The tribunal simply stated in *dicta* that "[t]he asserted assurances made to Claimant are not equivalent to the assurances in *Metalclad*, which were found to be 'definitive, unambiguous and repeated' and thus were sufficient to create the threshold State obligation." *Id.*, ¶ 802 (citations omitted).

investment."[442] In any case, Legacy Vulcan easily meets the *Glamis Gold* standard here, where there is much more than "a quasi-contractual relationship." Mexico has expressly represented to Legacy Vulcan and CALICA in a written agreement that CALICA would be able to quarry La Rosita and export aggregates to the United States for as long as it was economically feasible. Mexico confirmed numerous times through certificates and inspection reports that CALICA's operations in La Rosita complied with applicable environmental laws.[443]

170. Mexico's assertion that an investor's legitimate expectations cannot arise from a host State's existing law is irrelevant.[444] Legacy Vulcan does not claim that its expectation to quarry La Rosita and export aggregates to the United States was based merely on Mexican law; rather, this expectation was based on Mexico's decades-long written representations and conduct, starting with the 1986 Investment Agreement.[445]

171. Mexico is also wrong in claiming that the objective reasonableness of an investor's legitimate expectations presupposes a proper risk assessment.[446] An independent risk assessment is not a precondition for the development of legitimate expectations, particularly where the host State has made repeated specific assurances regarding the viability of the investment.[447] In any event, Mexico's argument is irrelevant because it ignores that, in cases where tribunals have inquired into an investor's diligence, the investor had not relied on specific assurances from the host state regarding the viability of its investment, unlike the case here.[448]

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[442] *Id.* ¶ 766. *See also id.* ¶¶ 576, 767, 799, 812-813.

[443] *See supra* Part II.C.1, 2.

[444] Counter-Memorial (Ancillary Claim), ¶ 438.

[445] *Id.*, ¶¶ 128-136.

[446] Counter-Memorial (Ancillary Claim), ¶¶ 434-438.

[447] *See* Reply, ¶ 138 (citing *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, ¶ 331 (31 July 2019) (Donoghue (P), Sacerdoti, Williams) (CL-0111-ENG) ("The Tribunal considers that a formal due diligence process is not a precondition to a successful claim of legitimate expectations."); *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶ 396 (19 February 2019) (Lowe (P), Spigelman, Tomuschat) (CL-0112-ENG) (hereinafter, "*Cube Infrastructure v. Spain* (Award)") ("[T]he right to rely upon the representations made in this case do not depend on there being evidence of any particular form or scale of legal due diligence by external advisors.")).

[448] Counter-Claim (Ancillary Claim), ¶¶ 434-438. *See, e.g.*, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, ¶ 141 (12 January 2011) (Nariman (P), Crook, Anaya) (CL-0018-ENG) (holding that laws of general application do not give rise to legitimate expectations and highlighting the lack of any specific commitments or representations made by respondent); *Glamis v. United States* (Award), ¶ 622 (CL-0016-ENG) (finding that no breach of legitimate expectations as the host State had not made any specific assurances); *Thunderbird v. Mexico* (Award), ¶¶ 148-164 (concluding that an opinion from the government did not generate legitimate expectations because the claimant misrepresented the nature of its investment and knew that its business was illegal under Mexican law).

172. Mexico cites *Methanex v. United States* to argue that, because quarrying is a highly regulated industry, the issuance of regulatory approvals to CALICA was not certain.[449] Mexico's argument ignores the fact that, as tribunals have consistently found, a host State may frustrate an investors' legitimate expectations regarding investments in highly regulated sectors.[450] Mexico's argument and its reliance on *Methanex* is in any case inapposite because CALICA has received all the required environmental permits and authorizations, and it has been operating under the close scrutiny and acquiescence of Mexican authorities for decades.

173. Mexico breached NAFTA Article 1105 by frustrating Legacy Vulcan's legitimate expectations with respect to its investment as it relates to La Rosita and Punta Venado. For almost four decades, Mexico's instrumentalities gave assurances and confirmed that CALICA would be able to quarry La Rosita, as summarized below.

- On 6 August 1986, Mexico entered into the 1986 Investment Agreement whereby it specifically acknowledged CALICA's right to quarry La Rosita for as long as economically feasible and authorized CALICA to quarry that lot from an environmental standpoint.[451] As explained in Part II.C.2 above, that Agreement was not time-limited in the way Mexico asserts in its counter-memorial and in fact permitted CALICA's ongoing operations when Mexico suddenly shut them down in May 2022. Even President López Obrador openly recognized that Mexico had

[449] Counter-Memorial (Ancillary Claim), ¶ 438 (citing *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, Part IV, ¶ 9 (3 August 2005) (Veeder (P), Rowley, Reisman) (RL-020)).

[450] *See CEF Energia BV v. Italian Republic*, SCC Case No. 2015/158, Award, ¶244 (16 January 2019) (Reichert (P), Sachs, Sacerdoti) (CL-0113-ENG) (finding that changes enacted by the government in the renewable energy sector frustrated the claimant's legitimate expectations"); *Cube Infrastructure v. Spain* (Award), ¶¶ 299, 442 (CL-0112-ENG) (finding that, despite a judgment by the Supreme Court of Spain affirming the government's "broad authorisations" in "a highly regulated area such as the electricity sector," certain regulatory reforms in that sector frustrated the claimant's legitimate expectations); *see also ADC Affiliate Limited & ADMC Management Limited v. Republic of Hungar*y, ICSID Case No. ARB/03/16, Award, ¶ 424 (2 October 2006) (Kaplan (P), Brower, van den Berg) (CL-0081-ENG) (hereinafter "*ADC v. Hungary* (Award)") ("The related point made by the Respondent that by investing in a host State, the investor assumes the '*risk*' associated with the State's regulatory regime is equally unacceptable to the Tribunal.") (emphasis in the original).

[451] Investment Agreement (6 August 1986) (C-0010-SPA.4, 11) ("El lugar en donde se desarrollará el proyecto [...] se localiza en una zona litoral que comprende ecosistemas que pudieran ser afectados. Por tal motivo, la SEDUE realizó los estudios de impacto ambiental requeridos"); *id*. at 6, 14 ("La SEDUE con base en los resultados finales de su evaluación realizada a la Manifestación de Impacto Ambiental del Proyecto, con el apoyo del Instituto de Ecología, A.C. y el Centro de Investigaciones y Estudios Avanzados del [Instituto Politécnico Nacional de México], Unidad Mérida, considera factible desde el punto de vista ambiental, la realización del Proyecto propuesto por [CALICA][.]"); *id*. at 7, 16 ("SEDUE, SCT y el GOBIERNO DEL ESTADO se comprometen, en la esfera de sus respectivas competencias, a coordinar sus funciones y a dar las facilidades para la obtención de los permisos requeridos para la realización del Proyecto [de CALICA]."); *id*. at 4, 11 ("El tiempo de explotación estará sujeto a las condiciones de mercado y a la factibilidad económica.").

"granted [...] permits [...] before 2000 [...] *without even placing a limit*" with respect to La Rosita, "the lot they are exploiting."[452]

- In July 1987, Mexico's then-President, Miguel de la Madrid, personally endorsed the Project, as Legacy Vulcan and its Mexican partner in the Project committed to invest [redacted] to develop it.[453]
- Starting in March 1987, consistent with Mexico's commitment in the 1986 Investment Agreement to "provide the accommodations [*facilidades*] to obtain the permits required to carry out the Project," Mexican instrumentalities issued permits, authorizations, and other instruments confirming that CALICA could quarry and operate in La Rosita.[454]
- In April 1987, on the basis of the 1986 Investment Agreement, Mexico issued the CALICA Port Concession authorizing CALICA to build and use a port terminal to load aggregates for export.[455] With that concession in hand — and relying on the 1986 Investment Agreement — CALICA acquired La Rosita and Punta Venado.[456] CALICA's Port Concession is valid through 2037 and may be extended further, another indication of Mexico's recognition that CALICA would be exporting aggregates from La Rosita for as long as economically feasible.[457]
- Throughout the years, PROFEPA inspected CALICA, including La Rosita, and assessed multiple environmental audits from CALICA, finding that CALICA was in

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[452] Transcript of President's Morning Press Conference (3 February 2022) (C-0178-SPA.22) (emphasis added) (free translation, the original text reads: "Estos permisos los entregaron, el de ese predio que están explotando, lo entregaron antes del 2000. Y fíjense cómo era antes este asunto, cómo eran las cosas antes, no le pusieron ni siquiera un límite a la concesión, porque en otros casos, bueno, concesionaron el puerto de Veracruz, en el tiempo de Salinas, 100 años, un siglo, pero acá ni siquiera hay fecha. [...] Ah, aquí está, aquí están los tres, esta rosita [...] Ah, bueno, pero ese es el primero, el que les digo que no tiene límite, ese lo entregaron antes del 2000. [...] Entonces ¿cuál es el planteamiento? Que ya no se va a permitir nada de extracción, nada.").

[453] Agreement entered into between Grupo ICA and Vulcan Materials Company, witnessed by Miguel de la Madrid Hurtado, President of the United Mexican States (6 July 1987) (C-0011-SPA.4, 8-9); *see also* Memorial, ¶ 28.

[454] *See*, *e.g.*, Industrial Land-Use License (17 March 1987) ([redacted]-0059); Corchalito/Adelita Federal Environmental Authorization (30 November 2000) (C-0017-SPA.23) (authorizing, *inter alia*, the operation of the processing plant in La Rosita). Throughout the years, Mexico's instrumentalities have also issued numerous zoning instruments confirming that CALICA could quarry La Rosita from a land use perspective. *See* 1994 Cancun-Tulum Coordination Agreement (26 October 1994) ([redacted]-0004.13) (classifying La Rosita as T-25); 2001 Cancun-Tulum POET (16 November 2001) (C-0078-SPA.39); Cozumel POEL (21 October 2008) ([redacted]-0060.112). *See also* Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Memorial-Third Report-SPA, ¶¶ 115-122.

[455] Concession granted by the Executive Branch through the SCT to CALICA (21 April 1987) (C-0012-SPA.5, 16).

[456] Punta Venado Title Deed (18 December 1986) (C-0029-SPA); La Rosita Title Deed (22 May 1987) (C-0030-SPA).

[457] Amendment to the Concession granted by the Federal Government through the SCT to CALICA (13 August 1993) (C-0013-SPA); Amendment to the Concession granted by the Federal Government through the SCT to CALICA (7 June 1994) (C-0014-SPA); Amendment to the Concession granted by the Federal Government through the SCT to CALICA (C-0015-SPA); Amendment to the Concession granted by the Federal Government through the SCT to CALICA (13 May 2015) (C-0016-SPA). *See also* Mexico Federal Official Gazette, Ports Act, Article 23 (19 July 1993) (C-0047-SPA.40) (providing that port concessions may be renewed for an additional term of 50 years).

compliance with its environmental obligations.[458] For instance, in an inspection conducted in 1993, PROFEPA concluded that, "having analyzed the legal documentation and the company's physical extraction, we [PROFEPA] conclude on a preliminary basis that *[CALICA] is extracting in accordance with applicable laws*."[459]

- CALICA participated on a voluntary basis in Mexico's National Environmental Audit Program from 2002-2016, which earned CALICA six Clean Industry Certificates from PROFEPA for the 2003-2018 period.[460] PROFEPA issues these certificates based on environmental audits carried out by independent, PROFEPA-certified auditors, who "verify that the Company complies with Federal and Local Environmental Laws, Federal and Local Environmental Regulations, Mexican Official Standards (NOMs) issued by SEMARNAT and the requirements of each municipality."[461] PROFEPA monitors this program closely.[462]
- Before CALICA was awarded its first Clean Industry Certificate, PROFEPA required it to enter into a *Convenio de Concertación*, whereby CALICA agreed to improve certain environmental indicators under the close review of both PROFEPA and its certified auditors.[463] After a careful "analysis of the documentation provided" and "visits to [CALICA's] site," PROFEPA confirmed CALICA's compliance and awarded CALICA its first Clean Industry Certificate.[464]

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[458] *See* Memorial (Ancillary Claim), ¶¶ 21-25; PROFEPA Inspection Resolution (10 December 2012) (C-0043-SPA.56-57) (detecting no facts or omissions presumably constituting a violation to environmental regulations); PROFEPA Inspection Resolution (29 March 1993) (C-0281-SPA.2) ("En atención a lo expuesto y del análisis de la documentación legal y aprovechamiento físico de la empresa, manifestamos de manera preliminar que [CALICA] realiza el aprovechamiento conforme a las normas aplicables.").

[459] PROFEPA Inspection Resolution (29 March 1993) (C-0281-SPA.2) (emphasis added) (free translation, the original reads: "En atención a lo expuesto y del análisis de la documentación legal y aprovechamiento físico de la empresa, manifestamos de manera preliminar que [CALICA] realiza el aprovechamiento conforme a las normas aplicables.").

[460] Clean Industry Certificate (23 June 2003) (C-0037-SPA); Clean Industry Certificate (16 December 2005) (C-0038-SPA); Clean Industry Certificate (31 July 2008) (C-0039-SPA); Clean Industry Certificate (28 February 2012) (C-0040-SPA); Clean Industry Certificate (2 June 2014) (C-0041-SPA); Clean Industry Certificate (27 July 2016) (C-0042-SPA).

[461] National Environmental Audit Program Explanatory Circular (C-0209-SPA.6) (free translation, the original reads: "En la Auditoría Ambiental se verifica que la Empresa cumpla con las Leyes Ambientales Federales y Locales, los Reglamentos Ambientales Federales y Locales, las Normas Oficiales Mexicanas ordenadas por Materia (NOMs) dictadas por la SEMARNAT y los requerimientos que cada municipio aplique."). *See also* Counter-Memorial (Ancillary Claim), ¶ 317 (stating that the audits were "realizadas por personal externo y validado por la PROFEPA"); Third SOLCARGO Expert Report, ¶ 7 (RE-008) (referring to "auditores autorizados por PROFEPA").

[462] *See* Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Expert Report-SPA, ¶¶ 34-38.

[463] Coordination Agreement Regarding Actions Resulting from Audit (13 November 2002) (C-0292-SPA.5-6). None of the 29 improvement points concerned CALICA's environmental impact authorization or the alleged requirement to obtain a CUSTF. *See id.* at 9-19.

[464] PROFEPA Certification of Compliance with the Action Plan (19 May 2003) (C-0294-SPA.2) (free translation, the original reads: "como resultado del análisis de la documentación contenida en los informes [...] así como la resultado de las visitas efectuadas a sus instalaciones por personal de esta Dependencia [de PROFEPA] [...], se ha podido constatar la realización de las actividades convenidas."); Clean Industry Certificate (23 June 2003) (C-0037-SPA). By law, each of these Certificates "acknowledges that at the time of issuance, the Company operates *in full compliance with environmental regulations*[.]" LGEEPA Regulation on Environmental Audits, Article 23 (29 April 2010) (C-0210-SPA.10)

The latest of these audits, for the 2016-2018 period, again found CALICA to be in full compliance with its environmental obligations through an audit process that included a review of the 1986 Investment Agreement.[465]

- For decades, CALICA openly cleared vegetation and conducted quarrying activities in La Rosita without a CUSTF. Mexico knew this, including through the 1993 PROFEPA inspection, but never indicated that this authorization was required for operations in La Rosita.[466] Instead, Mexico validated CALICA's compliance with applicable laws with respect to CALICA's operations in La Rosita. Further, in this proceeding, after having heard that CALICA operated La Rosita without a CUSTF, Mexico represented that CALICA's ability to quarry La Rosita remained untouched and that Legacy Vulcan had accordingly been "able to continue operating its business project[.]"[467]

174. None of these facts can be seriously disputed. These explicit and implicit assurances by Mexico, including its affirmative conduct over the course of decades, created reasonable and justifiable expectations that CALICA would be able to quarry La Rosita for export, as originally envisioned in the 1986 Investment Agreement.[468] Contrary to Mexico's assertion that Legacy Vulcan's expectations arose from "general statements,"[469] Mexico's assurances and representations (i) came in the form of agreements, permits, authorizations, concessions, and inspection and audit reports entered into or issued by Mexico's instrumentalities at the federal, state, and municipal levels; (ii) were addressed specifically to Legacy Vulcan and/or CALICA; and (iii) specifically concerned the Project, including La Rosita in particular.

(free translation, the original reads: "A través del Certificado, la Procuraduría [...] reconocen que al momento de su otorgamiento, la Empresa opera en pleno cumplimiento de la regulación ambiental y que su Desempeño Ambiental es conforme con los Términos de Referencia.").

[465] Environmental Audit Report (March 2016) (C-0208-SPA.21) ("las actividades de extracción de mineral pétreo (roca caliza) que realiza CALICA requieren de procedimiento de evaluación de la manifestación de impacto ambiental [...] la empresa cumplió con los requerimientos en materia ambiental que le eran aplicables cuando comenzó sus actividades"); *id*. at 10, 20, 142-143, 154, 266. *See also* Memorial (Ancillary Claim), ¶ 24.

[466] Tr. (English), Day 2, 303:4-7 ([redacted] cross-examination: "We carried out quarrying operations in La Rosita and El Corchalito without this requirement for decades in the full knowledge of both SEMARNAT and PROFEPA without any objection having ever been raised."); PROFEPA Inspection Report (17 March 1993) (C-0280-SPA5, 13) (visiting La Rosita and describing the "desmonte" activities being carried out). *See also* Second Amendment to the Corchalito/Adelita State Environmental Authorization (19 May 2011) (C-0075-SPA.28-30) (Whereas [*Considerando*] 14 states that inspection visits were carried out at La Rosita and maps out the areas where extraction — and thus, vegetation removal — was taking place, without referencing any missing authorizations) (*see* pp. 8-10 for clearer legibility).

[467] Tr. (Spanish), Day 1, 252:20-253:8 (Respondent's Opening Statement) ("[N]unca se clausuraron [...] otros aspectos del proyecto. Por ejemplo, el procesamiento que hacen en el predio La Rosita. De este modo la demandante pudo seguir operando su proyecto de negocio[.]") [English 209:17-210:1].

[468] *See, e.g.*, Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Fourth Statement-ENG, ¶ 10 (explaining that Legacy Vulcan and CALICA "continued [with] operations [in La Rosita] on the informed understanding that they were lawful and that their environmental impacts were properly assessed and authorized long ago").

[469] Counter-Memorial (Ancillary Claim), ¶ 442.

175. Relying on Mexico's representations and assurances, Legacy Vulcan invested millions of dollars to, *inter alia*, dredge a harbor, build and maintain the Port Terminal, acquire and develop La Rosita, including its Processing Plant and supplemental plant, and purchase heavy equipment to quarry La Rosita and vessels to export its aggregates to the United States.[470] As the tribunals in *Bilcon* and *Thunderbird* explained, these kinds of "specific encouragements [are] critical for [an] [i]nvestors' decision to continue with the project[,]"[471] "such that a failure by the NAFTA Party to honour [the] expectations [arising from those encouragements] could cause the investor (or investment) to suffer damages."[472] That is exactly what happened here: by shutting down CALICA's remaining quarrying operations and foreclosing Legacy Vulcan's ability to export aggregates, Mexico frustrated Legacy Vulcan's and CALICA's legitimate expectations and caused Legacy Vulcan to suffer damages (as explained below).

176. Unable to seriously dispute that its representations and assurances were targeted and specific to Legacy Vulcan and its investments, Mexico finally contends that Legacy Vulcan's expectations were neither "reasonable" nor "justifiable."[473] In support, Mexico argues that Legacy Vulcan misunderstands its permits and authorizations — pointing to irrelevant cross-references to the 1986 Investment Agreement — and that PROFEPA-endorsed audits and compliance certificates did not focus on that agreement.[474] Leaving aside that Mexico's view of the facts is incorrect (the PROFEPA-endorsed audits and compliance certificates ***did*** assess the 1986 Investment Agreement, for example[475]), the fact remains that, for decades, Mexico acted in accordance with the assurances and representations relating to La Rosita discussed above. This pattern of conduct suddenly changed in 2022, when President López Obrador decided to pressure Legacy Vulcan to drop this arbitration and use CALICA as a scapegoat to deflect public criticism of the Mayan Train. Mexico had been scrutinizing CALICA's quarrying operations since 1986, and since then confirmed time and again what PROFEPA refused to accept when it shut

[470] *See* Memorial (Ancillary Claim), ¶¶ 128-130.

[471] *Bilcon v. Canada* (Award), ¶ 470; *see also id.* ¶¶ 468-471, 588-589 (CL-0009-ENG).

[472] *Thunderbird v. Mexico* (Award) ¶ 147 (CL-0004-ENG).

[473] Counter-Memorial (Ancillary Claim), ¶¶ 439-449, 481-490.

[474] *Id.*

[475] Environmental Audit Report (March 2016) (C-0208-SPA.21) ("las actividades de extracción de mineral pétreo (roca caliza) que realiza CALICA requieren de procedimiento de evaluación de la manifestación de impacto ambiental [...] la empresa cumplió con los requerimientos en materia ambiental que le eran aplicables cuando comenzó sus actividades"); *id.* at 10, 20, 142-143, 154, 266 (including further references).

down La Rosita: CALICA did have an environmental impact authorization — the 1986 Investment Agreement — and did not need a CUSTF.[476]

177. For these reasons and those stated in Claimant's Memorial on Ancillary Claim, Legacy Vulcan has amply demonstrated that Mexico frustrated Legacy Vulcan's and CALICA's legitimate expectations, in breach of NAFTA Article 1105.

C. MEXICO'S ENVIRONMENTAL REGULATORY POWERS DO NOT IMMUNIZE IT FROM VIOLATIONS OF NAFTA ARTICLE 1105.

178. In yet another abrupt about-face, Mexico now claims that its conduct is justified under NAFTA Article 1114.[477] That Article provides that "[n]othing in" NAFTA Chapter 11 "shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."[478] According to Mexico, its latest measures against CALICA are not arbitrary because they arose from a legitimate objective: the protection of the environment.[479] This is wrong on the facts and the law.

179. As a threshold matter, Mexico expressly rejected relying on NAFTA Article 1114 as part of its defense in this case, and its recent argument to the contrary is yet another flip-flop that helps unmask the pretextual nature of Mexico's purported environmental concerns with the Project. At the July 2021 hearing, President van den Berg specifically asked Mexico to confirm that "[t]here is no reliance whatsoever [by Mexico] […] in this case on that provision."[480]

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[476] *See supra* Part II.C.1.

[477] Counter-Memorial (Ancillary Claim), Part III.C.1.

[478] NAFTA, Art. 1114 (C-0009-ENG).

[479] Counter-Memorial (Ancillary Claim), Part III.C.1.

[480] Tr. (English), Day 1, 239:12-241:4 (President van den Berg: "[…] there is one further aspect, Ms. Rayo or Mr. Pérez Gárate. You are undoubtedly familiar with the NAFTA Chapter Eleven. There is a provision in Article 1114 about environmental matters. There is no reliance whatsoever insofar as I can see it in this case on that provision[.]" // Mr. Pérez Gárate: "We did not refer to this provision. We are very aware of this provision, and, in particular, so that there is no flexibility around the environmental regulations just to attract investment. *It is not part of our defense. We didn't think it was necessary to use it as part of our defense*, but, clearly, it is a very relevant provision for Chapter 11, and it is something, a discussion, that continues to be reflected in the Agreement that we have with the U.S. and Canada." // President van den Berg: "We thank you. It was simply the Tribunal wasn't sure that […] we have seen the provision, that you have also seen the provision, and that thereafter we mentioned the provision and the whole world says hey, why haven't you seen that provision. Okay. We can now simply note we all have seen the provision, but there is no reliance on the provision. Can we leave it at that?" // Mr. Pérez Gárate: "Yes, Mr. President" // President van den Berg: "Mr. López Forastier? You also agree, Mr. López Forastier." // Mr. López Forastier: "That is my understanding, Mr. President. That issue has not been raised by Respondent." // President van den Berg: "Duly noted.").

Mexico's response was clear:

> "MR. PÉREZ GÁRATE: "We did not refer to this provision. We are very aware of this provision [...] *It is not part of our defense. We didn't think it was necessary to use it as part of our defense*[.]"[481]

There is no principled reason for Mexico to change its position now.

180. As explained in Part II above and in Legacy Vulcan's Memorial on Ancillary Claim, President López Obrador's own public statements show that Mexico's shutdown of La Rosita were taken not "to address a serious environmental concern," as Mexico claims,[482] but to deflect domestic environmental criticism of the President's Mayan Train project, to attack political opponents and previous "neoliberal" governments, and to pressure Legacy Vulcan into dropping this arbitration and transforming the Project into a tourist site.[483]

181. Mexico is also wrong in suggesting that NAFTA Article 1114 immunizes it from responsibility for breaching other NAFTA provisions. That Article requires Mexico to adopt environmental measures *consistent with Article 1105*, by making clear that nothing in NAFTA Chapter 11 should be construed as preventing a Party from "adopting, maintaining or enforcing any measure *otherwise consistent with this Chapter*" (*i.e.*, NAFTA Chapter 11).[484] Mexico's shutdown of CALICA's remaining quarrying and export operations were not consistent with NAFTA Chapter 11, even if one were to accept the fiction that the sudden closure was imposed to ensure that Legacy Vulcan's investment was undertaken in a manner sensitive to legitimate environmental concerns. As has been shown above, that was not really why Mexico imposed the shutdown here, however.

182. Mexico's right to exercise its regulatory powers is constrained by the terms of the treaty to which it agreed. Thus, while as a basic principle, sovereign States have the right and power to regulate their domestic economic and legal affairs, the exercise of that right and power "is not unlimited and must have its boundaries [...]. [T]he rule of law, which includes treaty obligations, provides such boundaries."[485] States are bound to exercise their regulatory powers in

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[481] *Id*. at 240:2-6.

[482] Counter-Memorial (Ancillary Claim), ¶ 421.

[483] *See supra* Part II.B; Memorial (Ancillary Claim), Part II.B.

[484] NAFTA, Art. 1114 (C-0009-ENG) (emphasis added).

[485] *ADC v. Hungary* (Award), ¶ 423 (CL-0081-ENG).

accordance with international law,[486] and a host State cannot resort to its regulatory powers as a pretext for evading its international obligations,[487] as Mexico tries to do here.

183. Tribunals have confirmed that environmental protection does not give *carte blanche* to host States to exercise their regulatory powers in a manner inconsistent with their treaty obligations.[488] In *Bilcon v. Canada*, for example, a NAFTA tribunal explained that "the mere fact that environmental regulation is involved does not make investor protection inapplicable."[489] Indeed, "[w]ere such an approach to be adopted — and [NAFTA] State Parties could have chosen to do so — there would be a very major gap in the scope of the protection given to investors."[490]

184. Mexico cites *S.D. Myers v. Canada* to argue that host States have wide leeway to act for the protection of the environment.[491] Yet the NAFTA tribunal in that case held that the host State had in fact breached NAFTA because, like here, "there was no legitimate environmental reasons" for introducing the relevant measure.[492] For those reasons, as explained by the tribunal in *TECO v. Guatemala*, "the deference to the State's regulatory powers cannot amount to

[486] *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progrès S.A.S. v. Republic of Poland* (PCA), Award, ¶ 569 (14 February 2012) (Park (P), Hanotiau, Lalonde) (CL-0214-ENG) ("a host state's regulatory and/or administrative actions must be taken (i) in good faith, (ii) for a public purpose, (iii) in a way proportional to that purpose, and (iv) in a non-discriminatory manner.").

[487] J.R. Marlles, *Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law* (2006-2007), p. 310 (CL-0215-ENG.37).

[488] *See, e.g.*, *Crystallex v. Venezuela* (Award), ¶¶ 583-584 (CL-0089-ENG) ("[…] deference to the primary decision-makers cannot be unlimited, as otherwise a host state would be entirely shielded from state responsibility and the standards of protection contained in BITs would be rendered nugatory."); *Marion & Reinhard Unglaube v. The Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, ¶ 247 (16 May 2012) (Kessler (P), Berman, Cremades) (CL-0216-ENG) ("[…] deference, however, is not without limits. Even if […] measures are taken for an important public purpose, governments are required to use due diligence in the protection of foreigners and will not be excused from liability if their action has been arbitrary or discriminatory") (internal footnote omitted); *Gold Reserve v. Venezuela* (Award), ¶ 595 (CL-0086-ENG) ("[A] State has a responsibility to preserve the environment and protect local populations living in the area where mining activities are conducted. However, this responsibility does not exempt a State from complying with its commitments to international investors by searching ways and means to satisfy in a balanced way both conditions."); *ADC v. Hungary* (Award), ¶ 423 (CL-0081-ENG) (noting that when a State entered into a bilateral investment treaty, "it becomes bound by it and the investment protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate[.]").

[489] *Bilcon v. Canada* (Award), ¶ 597 (CL-0009-ENG).

[490] *Id.*

[491] Counter-Memorial (Ancillary Claim), ¶ 421.

[492] *S.D. Myers v. Canada* (Partial Award), ¶¶ 194-195 (CL-0059-ENG).

condoning behaviors that are manifestly arbitrary, idiosyncratic, or that show a complete lack of candor in the conduction of the regulatory process."[493]

185. Finally, Mexico cannot credibly contend that its arbitrary and targeted shutdown of Legacy Vulcan's investment constituted a reasonable exercise of regulatory power.[494] As explained in Part II above and in Legacy Vulcan's Memorial on Ancillary Claim, President López Obrador's own public statements show that Mexico's shutdown of La Rosita was taken not "to address a serious environmental concern," as Mexico now claims,[495] but to deflect domestic environmental criticism of the President's Mayan Train project, to attack political opponents and previous "neoliberal" governments, and to pressure Legacy Vulcan into dropping this arbitration and transforming the Project into an ecotourism venture.[496] The President's bare, predetermined assertions of environmental harm by CALICA were also belied by Mexico's previous assessment and approval of CALICA's activities from an environmental standpoint — which the President himself acknowledged — as well as Mexico's decades-long determination that CALICA's quarrying of La Rosita complied with applicable environmental laws.[497]

186. For these reasons, Mexico's newfound reliance on NAFTA Article 1114 fails.

IV. COMPENSATION

A. LEGACY VULCAN IS ENTITLED TO FULL REPARATION UNDER NAFTA AND CUSTOMARY INTERNATIONAL LAW.

187. Mexico repeats its argument that the CALICA Network is a transnational business, not a protected enterprise under Article 1117 of NAFTA or a protected investor under Article 1116.[498] On this basis, Mexico claims that Legacy Vulcan has not met its burden of proving

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[493] *Teco v. Guatemala*, ICSID Case No. ARB/10/23, Award, ¶ 492 (Mourre (P), Park, von Wobeser) (CL-0058-ENG) (interpreting CAFTA-DR Article 10.11 ('Investment and Environment'), a provision identical to NAFTA Article 1114, stating that "[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.") In that case, the tribunal explained that "although the role of an international tribunal is not to second guess or to review decisions that have been made genuinely and in good faith by a sovereign in the normal exercise of its powers, it is up to an international arbitral tribunal to sanction decisions that amount to an abuse of power, are arbitrary, or are taken in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters." *Id.* ¶ 493.

[494] Counter-Memorial (Ancillary Claim), ¶ 421.

[495] *Id.*

[496] *See supra* Part II; Memorial (Ancillary Claim), Part II.B.

[497] *See supra* Part II.C.1; Memorial (Ancillary Claim), Part II.B.

[498] Counter-Memorial (Ancillary Claim), Part V.B-C.

the foreseeability and reasonable certainty of its damages claim.[499] For the reasons explained below, Mexico is wrong.

188. *First*, NAFTA requires full reparation for *all losses* suffered by Legacy Vulcan as a result of Mexico's violations of Article 1105 and does not establish a territorial limitation on this standard of compensation. *Second*, even if Mexico's argument had any merit, Legacy Vulcan's valuation correctly applies Mexico's artificial limitation because the vast majority of fair market value of the CALICA Network accrues to the CALICA reserves themselves, as reflected in the netback value of those reserves. *Third*, Legacy Vulcan has met its burden of proving these losses under NAFTA. The losses incurred were a foreseeable consequence of Mexico's violations because CALICA's value has always derived principally from its ability to supply its aggregates to the U.S. Gulf Coast market. In addition, Legacy Vulcan has proven these damages with reasonable certainty: the valuation is supported by robust expert analysis that relies not just on witness testimony, but also is corroborated by substantial data from documents maintained in the normal course of business.

1. NAFTA Does Not Establish a Territorial Limitation on the Scope of Recoverable Damages.

189. As Mexico has argued before, its central argument regarding ancillary-claim damages is that Legacy Vulcan is seeking damages for a transnational business that is not protected under NAFTA.[500] Mexico argues that Legacy Vulcan has failed to specify whether it is claiming damages on behalf of CALICA or on its own behalf as an investor, and that, regardless, neither NAFTA Article 1116 nor Article 1117 allow it to claim damages for the CALICA Network.[501]

190. As Legacy Vulcan has previously explained, this argument rests on the false legal premise that NAFTA imposes a territorial limitation on the scope of recoverable damages caused by treaty violations.[502] Mexico is incorrectly conflating the jurisdictional standards of the treaty with the standard for recoverable damages. Under NAFTA Articles 1116 and 1117, Legacy Vulcan's

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[499] *Id.*, Part V.D.

[500] Counter-Memorial (Ancillary Claim), ¶ 534 ("[S]e busca atribuir a CALICA el 100% del valor de un negocio trasnacional que llevan a cabo al menos 3 empresas constituidas en 3 jurisdicciones distintas. […] Importantemente, este negocio transnacional no constituye una inversión protegida y, por lo tanto, no se puede reclamar como un daño la reducción de su valor justo de mercado en una reclamación bajo el TLCAN."); *id.*, ¶ 558 ("[L]a Demandante está reclamando como propios, los daños causados a tres empresas constituidas en tres jurisdicciones distintas, sin molestarse en explicar y demostrar cómo es que los daños a esas entidades y activos habrían fluido a Legacy Vulcan LLP.").

[501] Counter-Memorial (Ancillary Claim), § V.C.

[502] *See* Reply, ¶¶ 204-212.

claim for damages corresponding to the diminution in value of the CALICA Network reflects the magnitude of loss suffered by Legacy Vulcan as an investor and by CALICA as an enterprise that Legacy Vulcan wholly owns and controls.[503]

191. Under NAFTA Article 1116, an investor may bring a claim where there has been a NAFTA breach and "the investor has incurred loss or damage by reason of, or arising out of, that breach."[504] Under Article 1117, an investor may bring a claim on behalf of an enterprise that it controls directly or indirectly where there has been a breach of NAFTA and "the enterprise has incurred loss or damage by reason of, or arising out of, that breach."[505] To succeed on its claims, Legacy Vulcan must show (i) that Mexico breached an obligation under Section A of NAFTA Chapter 11; (ii) that Legacy Vulcan or its enterprise CALICA has "incurred loss or damage"; and (iii) that this loss or damage was "by reason of, or arising out of" by Mexico's breach.[506]

192. Legacy Vulcan has established each of these elements. The claimant is Legacy Vulcan, and its claims are submitted under Article 1116 on its own behalf as an investor and under Article 1117 on behalf of its wholly-owned, indirectly-controlled enterprise, CALICA.[507] In either case, as discussed further below in Part V.B.2, the losses sustained must account for the diminution of the fair market value of the CALICA Network because the CALICA Network is how CALICA realizes its value as a source of aggregates, and the fair market value of the CALICA Network assets downstream of CALICA is heavily dependent on access to CALICA's reserves.[508]

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[503] As Legacy Vulcan has previously described, the distinction between claiming under NAFTA Articles 1116 or 1117 has no implication for the substance of the claims or the measure of damages. Legacy Vulcan is the sole (indirect) owner of CALICA and is entitled to file a claim for its own losses, including losses incurred by CALICA, all of which flow through to Legacy Vulcan. *See* Claimant's Reply ¶ 214 (citing *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Jurisdiction, ¶ 35 (22 November 2002) (Keith (P), Yves Fortier, Cass) (CL-0134-ENG) ("[T]he distinction between claiming under article 1116 or article 1117, in the context of this dispute at least, is an almost entirely formal one, without any significant implication for the substance of the claims or the rights of the parties. UPS is the sole owner of UPS Canada. As such, it is entitled to file a claim for its losses, including losses incurred by UPS Canada.")). Further, as explained below, Brattle's valuation of the harm to Legacy Vulcan is <u>*less*</u> than the harm to CALICA since Brattle takes account of Legacy Vulcan's capacity for mitigation. *Infra* ¶¶ 200-201.

[504] NAFTA, Article 1116.

[505] NAFTA, Article 1117.

[506] NAFTA, Article 1116(1); NAFTA, Article 1117(1).

[507] *See* Memorial, ¶ 20; Reply, ¶ 121.

[508] *See* Expert Report-Darrell Chodorow and Fabricio Núñez-Claimant's Ancillary Claim Reply-Fourth Report-ENG ("Fourth Brattle Report"), §§ II.A, III.B.

193. Mexico's assertions that the "CALICA Network" does not qualify as an "enterprise of another Party" under Article 1117 or as an "investor" under Article 1116 are irrelevant and misplaced.[509] There is no dispute that Legacy Vulcan is an investor under Article 1116 and that CALICA is its wholly-owned enterprise under Article 1117. The damages associated with losing access to CALICA reserves are slightly less for Legacy Vulcan as an investor than for CALICA as an "enterprise of another Party" because Legacy Vulcan can mitigate a portion of its loss by selling from inland U.S. quarries that do not rely on the CALICA Network.[510] Mexico accuses Legacy Vulcan of failing to provide evidence of its damages as an ***investor***,[511] but this is a farce: there is no dispute that CALICA is 100% owned by Legacy Vulcan, and all damage suffered by the enterprise flows to its sole owner.[512]

194. Mexico focuses on the U.S. Yards and Vulica components of the CALICA Network to try to obfuscate its misplaced jurisdictional objections to Claimant's damages claim.[513] But, as Claimant has previously explained, this attempt to restrict damages to omit consideration of any transactions or entities outside Mexico is an artificial territorial limitation that is unsupported by the text of NAFTA and other decisions that considered this issue.[514] Nor does Mexico cite any relevant case law in support of its artificial limitation. To the contrary, NAFTA case law establishes that losses sustained outside the host state ***are*** compensable. The test is whether the losses claimed reflect "when, as a proximate cause of a Chapter 11 breach, there is interference with the investment and the financial benefit to the investor is diminished."[515]

195. Put otherwise, there is no requirement that the investor's losses be incurred within the host state.[516] In fact, consistent with the NAFTA goal of increasing cross-border investments among the NAFTA Parties, NAFTA investments often involve integrated enterprises whose

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[509] *See* Counter-Memorial (Ancillary Claim), ¶¶ 546, 548.

[510] *See* Fourth Brattle Report, § III.D.

[511] Counter-Memorial (Ancillary Claim), ¶ 556.

[512] *Supra* n.503. Legacy Vulcan also is the sole indirect owner of Vulica and the leases to the U.S. Yards. *See* Organizational Chart of Legacy Vulcan, LLC (as of 2015) (submitted to the Tribunal on 28 July 2021) (C-0329-ENG).

[513] *See* Counter-Memorial (Ancillary Claim), ¶ 558.

[514] Reply, ¶¶ 206-210.

[515] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award (Damages), ¶ 121 (21 October 2002) (Hunter (P), Chiasson, Schwartz) (CL-0132-ENG) (hereinafter "*S.D. Myers v. Canada* (Damages)").

[516] *Id.*, ¶ 118 (CL-0132-ENG) ("There is no provision that requires that all of the investor's losses must be sustained within the host state in order to be recoverable. The test is that the loss to the (foreign) investor must be suffered as a result of the interference with its investment in the host state.").

business model relies on a cross-border supply chain.[517] In such cases, losses sustained by the investor are not restricted to losses incurred within the host country — rather, the compensable losses are the "*overall damage* to the economic success of the investor," "by reason of or arising out of" the host country's breaches.[518] This interpretation is consistent with the plain text of NAFTA Articles 1116 and 1117, which unambiguously entitle the investor or enterprise to recover "incurred loss or damage by reason of, or arising out of, that breach" — not incurred loss or damage by reason of, or arising out of, that breach *in the host State*, as Mexico would like NAFTA to read.

196. Mexico's attempt to limit Legacy Vulcan's damages claim to only losses incurred within Mexico thus fails. NAFTA contains no such territorial restriction on the scope of recoverable losses. Under NAFTA, Legacy Vulcan is entitled to recover any and all losses (the "overall damage" to its economic success) proximately caused ("by reason or arising out of") by Mexico's breaches.

2. Full Reparation Requires Compensation for the Diminution of the Fair Market Value of Legacy Vulcan or the Netback Value of CALICA's Reserves.

197. Legacy Vulcan is entitled to compensation for the overall damage it has sustained as a proximate cause of Mexico's breaches. That damage is best measured by the diminution in fair market value ("FMV") of Legacy Vulcan resulting from the reduction of the FMV of CALICA.[519] As Mr. Chodorow and Mr. Núñez (hereinafter "Brattle") explain, the diminution in Legacy Vulcan's FMV is slightly less than the netback value of the CALICA reserves.[520]

198. Contrary to Mexico's assertions, it is false that CALICA's business "begins and ends" in Mexico and that any value generated outside of Mexico does not correspond to value attributable to CALICA.[521] Rather, as Brattle describes, the value of CALICA derives from its

[517] *Id.*, ¶¶ 109-122 (CL-0132-ENG) (noting that "[t]he purpose of virtually any investment in a host state is to produce revenues for the investor in its own state" and awarding damages for losses incurred by the U.S. investor in the United States as a proximate cause of Canada's measures against its Canadian enterprise); *Cargill v. Mexico* (Award), ¶¶ 523, 525-526 (CL-0017-ENG) (noting that "the inability of the parent to export product to its investment is just the other side of the coin of the inability of the investment [...] to operate as it was intended to import [product] into Mexico" and awarding damages for the investment's lost sales to the Mexican market and the U.S. parent company's lost sales to its Mexican investment).

[518] *S.D. Myers v. Canada* (Damages), ¶ 117 (CL-0132-ENG) ("Where there is a breach of Chapter 11, and interference with the economic activity of an investment, the *overall damage to the economic success of the investor* arising from the measure adopted by the host state must be examined.") (emphasis added).

[519] Memorial (Ancillary Claim), ¶¶ 141-145.

[520] Fourth Brattle Report, § III.D.

[521] *See* Counter-Memorial (Ancillary Claim), ¶¶ 532, 534.

ability to reach high-price markets in the U.S. Gulf Coast with very low transportation costs, and the value of the CALICA Network is largely contingent on access to CALICA reserves.[522] Natural resource reserves are valued based on their netback value because that reflects the price at which the reserves can be sold into the market, subtracting the costs of production, transportation, and marketing that product to customers.[523] The downstream elements of the CALICA Network (*i.e.*, Vulica for transportation and the U.S. yards for distribution) are cost elements in an integrated business operation designed to extract and export CALICA aggregates to the U.S. Gulf Coast.[524] Without CALICA, Vulica and the U.S. Yards have limited value.[525]

199. Mexico's attempt to isolate the value of "CALICA Mexico" on the premise that CALICA's business is and always has been the domestic sale of aggregates is unsupported, superficial, and disingenuous.[526] As the record amply shows and Legacy Vulcan's witnesses have explained, the CALICA Network was developed from inception as a vertically integrated export-driven business, a reality that continues to be reflected to this day in the way that the Network is operated and managed.[527] There is ample evidence in the record demonstrating Mexico's awareness of this fact dating back to the 1986 Investment Agreement — indeed, Mexico's President Miguel De la Madrid Hurtado attended the ceremony in July 1987 at which VMC and Grupo ICA announced "the formation of a joint venture *to supply construction aggregates to the U.S. Gulf Coast*."[528] Even Mexico's current President agrees that Legacy Vulcan's investment in Mexico is an export-driven venture.[529]

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[522] Fourth Brattle Report, § III.B.

[523] *Id.*, § III.C.

[524] *See* Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Third Statement-ENG, ¶ 4; *see also* Witness Statement-[redacted]-Claimant's Reply-ENG, ¶¶ 8-14.

[525] *See* Fourth Brattle Report, ¶ 38.

[526] *See* Counter-Memorial (Ancillary Claim), ¶¶ 532, 539.

[527] *See* Witness Statement-[redacted]- Claimant's Ancillary Claim Reply-Third Statement-ENG, ¶¶ 4-9; Witness Statement-[redacted]-Claimant's Reply-ENG, ¶¶ 8-14.

[528] Vulcan Materials Co., Press Release (15 July 1987) (C-0330-ENG) (describing the establishment of "a large quarrying operation in the Yucatan Peninsula of Mexico to produce the construction aggregates, a shipping operation to transport the construction aggregates to the U.S. and a U.S. sales organization to sell the construction aggregates in the Gulf Coast markets"). President De la Madrid Hurtado also served as a "witness of honor" to the Investment Agreement. *See* Agreement entered into between Grupo ICA and Vulcan Materials Company, witnessed by Miguel de la Madrid Hurtado, President of the United Mexican States, pp. 2-3 (6 July 1987) (C-0011-SPA).

[529] Transcript of President's Morning Press Conference (31 January 2022) (C-0176-SPA.21-22) ("Pues resulta que le dieron a esa empresa dos concesiones hace tiempo, 20 años, para extraer material y llevarse el material a Estados Unidos por barco."); Transcript of President's Morning Press Conference (31 March 2022) (C-0183-SPA.8) ("Tienen estas dos mil 400 hectáreas, las compraron para extraer material, llevar el material a Estados Unidos[.]"); Transcript of President's Morning Press Conference

200. Accordingly, the FMV of Legacy Vulcan reflects the netback value of CALICA's reserves for their highest and best use — in this case, export to the U.S. Gulf Coast.[530] This is the value that CALICA's reserves can create for Legacy Vulcan or another hypothetical buyer.[531] While Mexico argues that Brattle's valuation approach reflects the "strategic value" of CALICA to Legacy Vulcan,[532] that is not correct: FMV requires consideration of both a hypothetical buyer and a hypothetical seller. A willing seller would not sell CALICA for less than the full value that it would forego by selling the company, and a willing buyer would value CALICA based on the ability to deploy similar shipping and distribution assets and expertise to sell CALICA aggregates into the U.S. Gulf Coast markets to capture the highest value use of the CALICA reserves.[533] Further, as Brattle explains, in practice a willing buyer would most likely value CALICA even ***higher*** since Brattle's valuation accounts for Legacy Vulcan's ability to mitigate a portion of lost CALICA cash flows (which a hypothetical buyer will not do).[534]

201. It also is not correct to state that Legacy Vulcan's claim includes claims for the FMV of Vulica and the U.S. Yards.[535] It does not. Brattle's analysis ***deducts*** from the FMV of the CALICA Network the FMV of Vulica and the U.S. Yards following the shutdown of La Rosita.[536] That is, the value that Vulica and the U.S. Yards have outside the CALICA Network is subtracted in order to arrive at the FMV that CALICA contributes to the CALICA Network.[537] In addition, because Brattle seeks to assess the loss in value to Legacy Vulcan specifically, their analysis accounts for Legacy Vulcan's ability to mitigate a portion of lost profits of CALICA sales outside of any of the CALICA Network assets.[538]

202. Similarly, Mexico's focus on the transfer prices at which CALICA sells its aggregates to VMC is misplaced.[539] The value of CALICA's reserves is not captured by the transfer price at which CALICA sells them to VMC. That transfer price is a price derived from a

(24 March 2022) (C-0221-SPA.44) ("Les dieron permiso para extraer material, grava, que en barcos se llevaban a Estados Unidos para hacer caminos, carreteras, en Estados Unidos").

[530] *See* Fourth Brattle Report, § III.C; *id.*, ¶ 37.

[531] *See id.*, ¶¶ 40-43.

[532] *See* Counter-Memorial (Ancillary Claim), ¶ 537.

[533] *See* Fourth Brattle Report, § III.C.

[534] *See id.*, ¶ 42; *see also id.*, § III.D.

[535] *See* Counter-Memorial (Ancillary Claim), ¶ 535.

[536] *See* Fourth Brattle Report, ¶¶ 48-51.

[537] *See id.*

[538] *See* Fourth Brattle Report, ¶¶ 52-53.

[539] *See* Counter-Memorial (Ancillary Claim), ¶ 533.

backward-looking assessment that seeks to compensate VMC for its risks, costs, and investment that were necessary to find and develop CALICA as well as the broader CALICA Network.[540] This is irrelevant to assessing the FMV of CALICA on the Valuation Date. The FMV is a forward-looking analysis that reflects the fact that CALICA is an established quarry that produces aggregates with properties that customers in Gulf Coast markets know and desire, allowing the quarry's owner to realize the highest value of the CALICA reserves.[541]

3. Mexico's Argument that Legacy Vulcan Contributed to Its Own Injury Cannot Be Taken Seriously.

203. Mexico also claims that Legacy Vulcan is responsible for its losses. This contributory fault argument fails on many levels.[542] *First*, it is based on the false premise that CALICA was somehow negligent by failing to obtain an environmental impact authorization for La Rosita.[543] As explained in Part II.C above and in Legacy Vulcan's Memorial on Ancillary Claim, CALICA operated La Rosita for over 30 years in full compliance with Mexican environmental law and under the oversight of Mexican authorities, who repeatedly represented to CALICA that it had the required environmental authorizations to operate La Rosita and that it was in compliance with Mexican environmental laws.[544]

204. *Second*, the relevant facts in *Copper Mesa v. Ecuador*, the single case Respondent relies on, stand in stark contrast with the facts here.[545] In *Copper Mesa*, the tribunal found that the claimant's injury was caused, in part, by claimant's own acts where claimant had "recruited and us[ed] armed men, fir[ed] guns and spray[ed] mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands."[546] Respondent fails to draw any connection between claimant's conduct in *Copper Mesa* and Legacy Vulcan's or CALICA's conduct here.[547]

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[540] *See* Fourth Brattle Report, § VI.A.2.

[541] *See id.*, ¶ 233. Mexico's reference to Article 179 of the Income Tax Law, which according to Mexico requires CALICA to use market pricing when determining its taxable income, is beside the point. *See* Counter-Memorial (Ancillary Claim), ¶ 533. There is no allegation or basis for an allegation that CALICA has evaded income taxes in Mexico or that CALICA is prohibited from using internal transfer prices.

[542] *See* Counter-Memorial (Ancillary Claim), ¶¶ 400-406.

[543] *See* Counter-Memorial (Ancillary Claim), ¶ 403.

[544] *See supra* Part II.C; Memorial (Ancillary Claim), ¶¶ 20-25, 131.

[545] *See* Counter-Memorial (Ancillary Claim), ¶¶ 401-402 (citing *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award (15 March 2016) (Veeder (P), Cremades, Simma) (RL-0146-ENG) (hereinafter "*Copper Mesa v. Ecuador* (Award)")).

[546] *Copper Mesa v. Ecuador* (Award), ¶ 6.99 (RL-0146-ENG).

[547] *See* Counter-Memorial (Ancillary Claim), ¶¶ 402-403.

205. *Third*, Mexico pulls its damages estimation out of thin air. It fails to explain how it calculated and concluded that Legacy Vulcan purportedly contributed "at least 50%" to its own injury by quarrying La Rosita for 30 years in full compliance with Mexican environmental law and the approval of Mexican authorities. Mexico also contradicts itself. If Legacy Vulcan operated without the required authorization — as Mexico cavalierly claims — why should Mexico be responsible for the remaining 50%?

206. Respondent's contributory fault defense makes no sense and should be dismissed.

4. Legacy Vulcan Has Met Its Burden to Establish the Damages It Is Entitled to in Relation to Its Ancillary Claim.

207. The Parties agree that NAFTA establishes a standard of full reparation for all losses suffered as a result of Mexico's breaches.[548] Mexico argues that Legacy Vulcan misapplies the full-reparation standard by claiming damages connected to Vulica and the U.S. Yards, which, according to Mexico, were not a foreseeable or proximate cause of Mexico's breaches and by failing to prove its damages with reasonable certainty.[549]

208. Legacy Vulcan does not dispute that the full-reparation standard incorporates principles of causation and reasonable certainty. Legacy Vulcan has met its burden of proving each one of those principles for two principal reasons.

209. *First*, Mexico is incorrectly trying to superimpose its artificial territorial restriction onto the causation standard. To establish causation, Legacy Vulcan has to prove that its losses would not have occurred but-for Mexico's breaches[550] and that its losses were proximately caused by Mexico's breaches.[551] Legacy Vulcan has established both here. There is no basis for

[548] *See* Memorial (Ancillary Claim), ¶¶ 139-140; Counter-Memorial (Ancillary Claim), ¶ 561.

[549] *See* Counter-Memorial (Ancillary Claim), ¶¶ 561-583.

[550] *See Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-4, Award on Damages, ¶ 114 (10 January 2019) (Simma (P), McRae, Schwartz) (CL-0172-ENG) ("[T]he test is whether the Tribunal is 'able to conclude from the case as a whole and with a sufficient degree of certainty' that the damage or losses of the Investors 'would in fact have been averted if the Respondent had acted in compliance with its legal obligations' under NAFTA.").

[551] *See, e.g., S.D. Myers v. Canada* (Damages), ¶ 122 (CL-0132-ENG) ("[C]ompensation should be awarded for the overall economic losses sustained by [the investor] that are a proximate cause of [the host state's] measure, not only those that appear on the balance sheet of its investment."); *id.*, ¶ 140 ("Other ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the *proximate* cause of the harm.").

Mexico's artificial causation requirement as one demanding Legacy Vulcan to show that its claimed damages were foreseeable based on territorial considerations.[552]

210. As described above, Brattle's valuation deducts from the FMV of the CALICA Network the FMV of Vulica and the U.S. Yards based on their value outside of the Network. It is therefore not accurate to suggest that Legacy Vulcan is claiming losses for those businesses and that those losses were not proximately caused by Mexico's breaches of NAFTA.[553] In addition, the FMV of CALICA itself reflects the foreseeable nature of the losses because CALICA was established and operated from the start as an export-driven, vertically integrated business.[554] In other words, the losses to CALICA valued by Brattle are foreseeable because they reflect the losses caused in a real-world scenario where CALICA is no longer able to sell its aggregates for a profit in the United States, consistent with its highest and best use.

211. Further, as discussed above, there is no territorial limitation on the scope of recoverable damages under NAFTA. The fact that the diminution in Legacy Vulcan's FMV as a result of Mexico's breaches involves some losses associated with economic transactions that take place outside of Mexico (*i.e.*, transportation and resale) does not have any bearing on the foreseeability of the losses under NAFTA.[555] Since Mexico partook in the 1986 Investment Agreement, Mexico has been well aware for decades that its measures directed at CALICA would have direct and immediate consequences well beyond Mexico. Mexico cannot credibly claim that those losses were not foreseeable.

212. *Second*, and as discussed further in Part V.B, Legacy Vulcan has met its burden of proving its losses with reasonable certainty. It is well-established that damages need not be determined with absolute certainty and "the fact that damages cannot be fixed with certainty is

[552] *See* Counter-Memorial (Ancillary Claim), ¶ 569 (arguing that damages were not foreseeable and thus not proximately caused by Mexico's breaches because they are connected to shipping and distribution elements of the business that take place outside of Mexico).

[553] *See id.*, ¶¶ 544-548; 567-569.

[554] *Supra* ¶ 199.

[555] *See supra* Part IV.A.1.

no reason not to award damages when a loss has been incurred."[556] "In such cases, approximations are inevitable; the settling of damages is not an exact science."[557]

213. Mexico also claims that Legacy Vulcan's damages are speculative because Brattle's analysis relies on assumptions and testimony that lack documentary support, or relies on documentary support where the source of the data is not apparent on the face of the document.[558] But these criticisms fail. Brattle relies primarily on documents maintained by Legacy Vulcan in the normal course of business, which are presumptively reliable[559] and which provide valuable information that cannot always be captured in financial statements or public disclosures.[560] This is particularly the case for a venture that has more than 30 years of highly profitable operations.

214. The supporting documents that Mexico identifies as not verifiable are in fact documents maintained in the normal course of business that demonstrate the integrated business operation of the CALICA Network.[561] For example, [redacted] are all documents regularly maintained in the course of business that reinforce the accuracy of Brattle's netback valuation to capture CALICA's FMV.[562] These and many other documents on which Brattle relies[563] are the same documents that VMC used (and uses) to evaluate the performance of the CALICA Network in the normal course of business.

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[556] *Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶ 8.3.16 (20 August 2007) (Rowley (P), Bernal Verea, Kaufmann-Kohler) (CL-0087-ENG) (hereinafter, "*Vivendi v. Argentina* (Award)") (citations omitted); *see also Gold Reserve v. Venezuela* (Award), ¶¶ 685-686 (CL-0086-ENG); *Crystallex v. Bolivia* (Award), ¶¶ 865-876 (CL-0089-ENG); *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, ¶¶ 824-825 (22 November 2018) (Jaramillo (P), Vicuña, Guglielmino) (CL-0135-ENG).

[557] *Vivendi v. Argentina* (Award), ¶ 8.3.16.

[558] *See* Counter-Memorial (Ancillary Claim), ¶ 572.

[559] In arbitration, business records and documents prepared in the ordinary course of business are admissible evidence and Mexico has presented no reasoned basis to challenge the authenticity of Legacy Vulcan's documents. *See Uiterwyk Corporation v. The Government of the Islamic Republic of Iran*, IUSCT Case No. 381, Partial Award, ¶ 142 (6 July 1988) (Böckstiegel (P), Holtzmann, Mostafavi) (CL-0217-ENG) (because a "document was prepared in the ordinary course of business and, as such, carries weight[,] [t]he Tribunal has no reason to question [its] authenticity"); *Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran*, IUSCT Case Nos. 128 and 129, Award, ¶ 91 (7 July 1987) (Mangard (P), Brower, Ansari Moin) (CL-0218-ENG) ("[W]e agree that SISA's documents, apparently prepared in the ordinary course of business, adequately substantiate the existence of the goods[.]").

[560] *See* Fourth Brattle Report, IV.B.1.

[561] *See id.*

[562] *See id.*, ¶ 84; *id.*, Appendix B.

[563] *See id.*, ¶ 84; *id.*, Appendix B.

215. In addition, as described in detail in Brattle's Reply, the data in these documents is sourced from VMC's internal electronic databases, including the sources of financial reporting used to prepare audited financial statements and the sources of sales and budget data used to make critical business decisions year to year.[564] In the limited instances where relevant inputs were not available in the normal course of business, Brattle stated so and estimated those inputs (or used Legacy Vulcan's estimates) under reasonable assumptions and based on data or documents maintained in the normal course of business.[565]

216. Nor is it accurate to state that Brattle failed to validate its inputs and relied blindly on Legacy Vulcan's representations.[566] To the contrary, as Brattle describes in detail, its key inputs are corroborated by witness testimony and verified by data and documents maintained by Legacy Vulcan in the regular course of business.[567] On the issue of mitigation, [redacted] testimony is corroborated by CALICA Network documents maintained in the regular course of business ([redacted]).[568] Related factors like the premium quality of CALICA aggregates and the production and logistical advantages of the CALICA Network are also corroborated by testimony from multiple witnesses and normal-course-of-business documents.[569] Similarly, the uneconomic nature of trying to serve CALICA customers from [redacted] also can be verified by [redacted] testimony as well as normal-course-of-business documents.[570] As [redacted] describes and analysis prepared by VMC before this arbitration corroborates, it is in most cases cost-prohibitive to try to meet U.S. Gulf Coast demand otherwise served by CALICA from [redacted].[571]

217. Mexico's attempts to undermine the reasonable certainty of Legacy Vulcan's damages do not withstand scrutiny. Legacy Vulcan's damages analysis relies on well-supported information and reasonable assumptions where necessary, corroborated by witness testimony

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[564] Fourth Brattle Report, ¶¶ 86-95; *see also* Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Third Statement-ENG, ¶ 10.

[565] Fourth Brattle Report, § IV.B.2.

[566] Counter-Memorial (Ancillary Claim), ¶ 576.

[567] Fourth Brattle Report, § IV.B.3.

[568] *See id.*, ¶ 86.

[569] *See id.*; Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Third Statement-ENG, ¶¶ 26-30. In addition, contrary to Mexico's argument, the relevant sales prices in the underlying documents are freight-adjusted. *See* Fourth Brattle Report, ¶ 86.

[570] *See* Fourth Brattle Report, ¶ 86; Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Third Statement-ENG, ¶¶ 26-30.

[571] Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Third Statement-ENG, ¶¶ 13, 26-30.

and ordinary-course-of-business documents that reflect the real-world operation of the CALICA Network.

B. BRATTLE'S DCF ANALYSIS PROVIDES THE BEST ESTIMATE OF LEGACY VULCAN'S DAMAGES.

218. Mexico's criticism of Brattle's valuation is that it values damages to the CALICA Network (and not "CALICA Mexico") and that it relies on unverified information provided by Legacy Vulcan.[572] As explained above, these criticisms fail. Further, as described in detail below, Brattle's DCF analysis provides a reasonable and well-supported estimate of the overall damage to Legacy Vulcan as a result of Mexico's breaches, while Hart and Vélez's alternative valuations make implausible assumptions and significantly understate damages. Before interest and an adjustment to avoid double-taxation, Brattle has reasonably and conservatively estimated the loss to Legacy Vulcan's FMV in connection with the ancillary claim as equal to [redacted].

[redacted]

1. The Brattle DCF Analysis Is Reasonable and Well-Supported.

a) CALICA Was and Expected to Remain Highly Profitable.

219. Contrary to Mexico's assertions, CALICA was not experiencing a profound decline in profitability.[573] It is accurate that quarrying costs increased since 2014, but this was due to Mexico's other breaches or the temporary effects of COVID-19 that were reversing by the

[572] *See* Counter-Memorial (Ancillary Claim), ¶ 604.

[573] *See* Counter-Memorial (Ancillary Claim), ¶¶ 589-594; *see* Fourth Brattle Report, §§ II.B, IV.A.

Valuation Date.[574] Specifically, Legacy Vulcan incurred investment costs to increase below-water quarrying and capacity as a result of other NAFTA breaches covered in the first phase of this proceeding, and to increase reliability and operational capacity in anticipation of beginning quarrying La Adelita, which Mexico prevented.[575] The significant decline in CALICA's profitability that Hart and Vélez purport to identify thus is not an accurate characterization because, as Brattle explains, the negative cash flows to which Hart and Vélez's point are driven by these additional one-time investments as well as by performance that was affected by the pandemic.[576] As Brattle explains, the profitability of the overall CALICA Network has remained high despite the depressing effects of the pandemic and the need to shift to below-water quarrying resulting from Mexico's other wrongful measures.[577]

220. The pandemic led to (i) a disproportionately large drop in demand in the U.S. Gulf Coast markets served by CALICA; (ii) operation shutdowns and other disruptions that affected overall production and required purchase of replacement aggregates from third parties; (iii) higher production costs associated with lower production levels; and (iv) other related factors, such as the inability to raise prices in a low-demand environment.[578] The purported "steep decline" in CALICA's financial performance that Hart and Vélez emphasize is attributable largely to these factors, as further demonstrated by the CALICA Network's highly stable profitability in the three years before the pandemic.[579] The depressive factors associated with the pandemic were reversing by the Valuation Date, which is reflected in Brattle's reasonable expectation of higher profitability relative to 2020 and 2021 — a conclusion that is also corroborated by Legacy Vulcan's ordinary-course budgeted EBITDA (prepared before the La Rosita shutdown).[580] Figure 1 below shows, based on Legacy Vulcan's normal-course-of-business records, that EBITDA for the CALICA Network was expected to reach pre-COVID levels in 2022.

[574] *See* Fourth Brattle Report, § IV.A.
[575] *See id.*, § IV.A.3.b.
[576] *See id.*, § IV.A.3.
[577] *See id.*, § IV.A.3.c.
[578] *See id.*, § IV.A.1.
[579] *See id.*, § IV.A.3.
[580] *See id.*, § IV.A.2; *id.*, ¶ 71.

221. Finally, Hart and Vélez's profitability analysis is inherently misleading because it focuses only on "CALICA Mexico" — ignoring the value that CALICA creates for the CALICA Network, which, as Brattle has explained, must be equal to the fair market value of the CALICA reserves.[581] Looking to the netback value, *i.e.*, the netback profit margin per ton for the Network, CALICA's profit margins are higher than for VMC's aggregates segment as a whole, and remained high even in the midst of the pandemic — despite Hart and Vélez's claims that CALICA had become "non-economic" and was "nearing the end of or in fact past its economic viability."[582] This metric can be appreciated in Figure 2 below.

[581] *See* Brattle Reply, §§ II.A, III.B-C.

[582] *See id.*, ¶ 81; Third Hart/Vélez Report, ¶¶ 22.i, 38.

[redacted]

b) Brattle's Mitigation Analysis Is Reliable.

222. Mexico supposes — without evidence — that, without CALICA, Legacy Vulcan could simply replace all lost CALICA volumes and profits with sales of aggregates from other quarries.[583] Hart and Vélez purport to identify a series of defects in Brattle's analysis of the limited mitigation options available.[584] However, as Brattle explains in detail, their mitigation analysis is based on reliable inputs, consistent with analysis prepared by VMC in the ordinary course of business, and informed by Legacy Vulcan's real-world experience of trying to mitigate the lost profits from the inability to quarry La Rosita.[585]

[583] *See* Counter-Memorial (Ancillary Claim), ¶¶ 605, 616.

[584] *See* Third Hart/Vélez Report, ¶ 24. As discussed below, Mexico has failed to meet its burden of proving the factual basis of its premise that Legacy Vulcan could have replaced 100% of CALICA's production. *Infra* n.628.

[585] *See* Fourth Brattle Report, § IV.C; *see also id.*, § IV.B.3.

223. Brattle's assumptions about replaceable volumes and margins from other offshore quarries, [redacted], are reasonable. [redacted].[588] Further, Mexico's statements that Vulcan can simply pass through these higher costs onto customers are baseless, incorrect, and defies the most basic principles of economics.[589] VMC has to price its products at the rate that the market will bear in order to be a competitive supplier; it cannot simply pass on higher production or transportation costs by selling the aggregates at a higher price.[590]

224. Mexico accuses Brattle of relying solely on witness testimony to support this mitigation analysis,[591] but that also is incorrect. Brattle's assumptions and the related witness testimony are corroborated by analysis and documents prepared in the normal course of business by VMC, including well before Mexico's shutdown of operations, or based on data collected in the normal course of business.[592] It is Mexico which, by contrast, makes unsupported statements and assumptions — for example, that Legacy Vulcan could purportedly mitigate lost sales through a Bahamas quarry or its U.S.-based quarries.[593] As evidenced by ordinary-course-of-business documents and confirmed by testimony from [redacted], neither are viable options to replace CALICA sales and margins. [redacted]

[586] *See* Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Third Statement-ENG, ¶ 14; *see also* Fourth Brattle Report, IV.C.1.

[587] *See* Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Third Statement-ENG, ¶¶ 14, 19-21; *see also* Fourth Brattle Report, IV.C.1.

[588] *See* Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Third Statement-ENG, ¶¶ 22-24; *see also* Fourth Brattle Report, IV.C.1.

[589] *See* Counter-Memorial (Ancillary Claim), ¶ 616.

[590] *See* Fourth Brattle Report, ¶ 97; Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Third Statement-ENG, ¶ 25.

[591] *See* Counter-Memorial (Ancillary Claim), ¶¶ 604, 609.

[592] *See* Fourth Brattle Report§ IV.B.

[593] *See* Counter-Memorial (Ancillary Claim), ¶¶ 610, 612.

[redacted]

225. Finally, Hart and Vélez's focus on the reported increase in VMC's Gulf Coast revenues between Q1 2021 and Q3 2022[596] is misplaced and says nothing about the ability to replace lost sales from CALICA — which represent a fraction of VMC's entire Gulf Coast market, and whose customers cannot be profitably served by aggregates from these other quarries.[597] In fact, as Brattle discusses, [redacted]

c) Brattle's Conclusions Are Consistent With VMC's Financial Disclosures.

226. Mexico's allegations regarding inconsistencies or incongruities between Brattle's analysis and VMC's financial disclosures are all meritless, for at least five reasons.[599]

227. *First*, VMC's 2022 10-Q disclosure anticipating a lower 2022 EBITDA (Earnings before interest, taxes, depreciation, and amortization) of approximately US$ 80-100 million due to the La Rosita shutdown does not undermine Brattle's damages estimate of [redacted].[600] In fact, it confirms Brattle's calculations. As Brattle explains, their analysis was independent and did not rely on VMC's disclosure, but is consistent with it.[601] Brattle's damages estimate also is consistent with VMC's budgeted EBITDA before the shutdown of La Rosita as well as CALICA's actual historical EBITDA.[602] There is no discrepancy between the US$ 80-100 million figure and Brattle's total damages estimate, since Brattle assesses damages for the ***permanent*** shutdown of La Rosita whereas the EBITDA impact disclosure concerned only the impact on earnings for what

[594] *See* Fourth Brattle Report, § IV.C.2; Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Third Statement-ENG , ¶ 15.

[595] *See* Fourth Brattle Report, § IV.C.3.

[596] *See* Counter-Memorial (Ancillary Claim), ¶ 613.

[597] *See* Fourth Brattle Report, § IV.D.5.

[598] *See id.*; *id.*, § IV.C.4.

[599] *See* Counter-Memorial (Ancillary Claim), ¶¶ 618-625.

[600] *See id.*, ¶¶ 619-620.

[601] *See* Fourth Brattle Report, ¶ 159.

[602] *See id.*, ¶¶ 160-161.

remained of 2022 (*i.e.*, May to December 2022).[603] [redacted]

228. *Second*, [redacted]

229. *Third*, the net operating loss disclosure in Q3 2022 does not support Hart and Vélez's misstatements regarding CALICA's alleged lack of profitability due to below-water quarrying costs.[606] Rather, as Brattle explains, the loss arose only in Q3 of 2022, which was the first full quarter after the shutdown of La Rosita had taken effect.[607] Before the shutdown, even with the added costs of below-water quarrying at La Rosita, CALICA aggregates were continuing to generate healthy profit margins.[608]

230. *Fourth*, as explained above, VMC's reported increase in Gulf Coast sales for Q3 2022 has no bearing on the volume and significance of the lost CALICA sales.[609] [redacted]

[603] *See* Fourth Brattle Report, ¶ 162.

[604] *See* Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-ENG, ¶ 22.

[605] *See id.*, ¶ 27; *see also* Fourth Brattle Report, § IV.D.3.

[606] *See* Counter-Memorial (Ancillary Claim), ¶ 622.

[607] *See* Fourth Brattle Report, § IV.D.4.

[608] *See* Fourth Brattle Report, § IV.A.3.c. Nor is there any incongruity, as Hart and Vélez insist, between Brattle's damages analysis and VMC's 2021 annual report disclosure that "no individual mining property is individually material to our business." *See* Counter-Memorial (Ancillary Claim), ¶ 615. [redacted] *See* Witness Statement-[redacted]- Claimant's Ancillary Claim Reply-ENG, ¶ 32. [redacted] *Id.*, ¶ 33.

[609] *Supra* ¶ 225; *see also* Fourth Brattle Report, §§ IV.D.5, IV.C.4.

[610] *See* Fourth Brattle Report § IV.C.4; Witness Statement-[redacted]-Claimant's Reply-ENG, ¶ 12.

[redacted]

231. *Fifth*, Brattle's analysis of expected lost sales remains consistent with its analysis in the prior phase of the arbitration. [redacted] The higher potential mitigation at this stage arises because of new considerations that did not exist at the time of Mexico's prior breaches. [redacted] Thus, there is no inconsistency, and Brattle has in fact relied upon the best contemporaneous information available to estimate potential mitigation at the time of its prior reports and its current reports.[616]

2. Full Reparation Requires Reversing the Double-Taxation of the Income of the U.S. Yards.

232. As discussed above, there is no basis to exclude from Legacy Vulcan's compensation lost value solely on the basis that it is attributable to transactions or entities outside of Mexico.[617] Full reparation requires that Legacy Vulcan be compensated for the overall economic damage it has suffered as a result of Mexico's breaches, including an adjustment for double-taxation on the U.S. Yards' income.

233. Hart and Vélez's speculative assertions that an award might not be subject to taxes in the United States, or that such taxes could be offset by a foreign tax credit, are baseless and unsupported.[618] Nor is Legacy Vulcan required to present expert testimony to prove this loss with reasonable certainty.[619] As [redacted] explained, Legacy Vulcan's income flows up to its parent

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[611] *See* Fourth Brattle Report, § IV.C.4.

[612] *See id.*, § IV.C.3.

[613] *See* Witness Statement-[redacted]-Claimant's Ancillary Claim Memorial-Second Statement-ENG, ¶¶ 14-15; Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Third Statement-ENG ¶ 14.

[614] *See* Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Third Statement-ENG ¶ 14.

[615] *See* Witness Statement-[redacted]-Claimant's Ancillary Claim Memorial-Second Statement-ENG, ¶ 18; *see also* Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-Third Statement-ENG, ¶ 22.

[616] *See* Fourth Brattle Report, § IV.C.

[617] *See supra* Part IV.A.1.

[618] *See* Counter-Memorial (Ancillary Claim), ¶ 628.

[619] *See id.*, ¶ 629.

company (VMC) and would be taxed at the U.S. corporate tax rate of 25.6%.[620] In that scenario, as Brattle explains, there is no uncertainty.[621] The U.S. Yards income from CALICA's aggregates (which Brattle has already tax-affected in its damages estimate) will be taxed twice. The full-reparation standard requires reversing this double-taxation.[622]

3. Mexico's Valuation Is Implausible and Grossly Understates Damages.

234. The valuations put forward by Hart and Vélez in Mexico's Counter-Memorial are not serious. Under Mexico's principal theory, Legacy Vulcan would be entitled to the lost value only of "CALICA Mexico," which is either [redacted], or, without accounting for dividend taxes, [redacted]. [623] In other words, Mexico remarkably claims that Legacy Vulcan may be better off as a result of Mexico's wrongful conduct.

235. Even on Mexico's alternative theory (where Legacy Vulcan is entitled to damages based on the full lost value of the CALICA Network), the purported lost value is a mere [redacted].[624] For context, this is the same business that VMC expected would generate [redacted] in 2022 alone, and the same business for which VMC disclosed to shareholders a loss of US$ 80-100 million in expected EBITDA for *just* May-December 2022 as a result of Mexico's shutdown of CALICA's remaining operations.[625]

236. The implausibility of these valuations is apparent on their face, but it is further demonstrated by the fundamental conceptual errors and other flaws, identified by Brattle in its fourth report, that are discussed below.

a) Hart and Vélez's CALICA Network DCF Model Is Conceptually Unsound.

237. The gateway problem with Hart and Vélez's CALICA Network DCF model is that it is engineered to ignore any consideration of the profitability of the CALICA Network. As Brattle explains, this model is indifferent to changes in critical inputs relating to the production and sale of CALICA aggregates (*e.g.*, production and sales volumes, prices, shipping and yard costs,

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[620] *See* Witness Statement-[redacted]-Claimant's Reply-Second Statement-ENG, ¶ 27.

[621] *See* Fourth Brattle Report, § IV.E.

[622] *See id.*

[623] *See* Counter-Memorial (Ancillary Claim), ¶¶ 598-599.

[624] *See id.*, ¶ 603.

[625] *See supra* ¶¶ 220 (Figure 1), 227.

CAPEX, depreciation, and taxes).[626] Hart and Vélez's model effectively assigns zero value to the CALICA reserves *regardless* of how much value they could have generated for Legacy Vulcan, because the model assumes that Legacy Vulcan could replace all lost CALICA Network profits with sales of other aggregates *at equivalent profit margins*.[627] While the burden is on *Mexico* to prove that Legacy Vulcan has failed to mitigate its claimed damages,[628] Hart and Vélez provide zero evidence and analysis to support their 100% mitigation assumption.[629] As discussed in Part V.B.1.b above, Legacy Vulcan's documented *in*ability to replace the lost value of CALICA is in fact a key driver of damages.

238. Rather than build a valuation analysis around the factors that are critical to CALICA's value as a business, Hart and Vélez's CALICA Network model is driven by only five factors: working capital, land sale proceeds, continuing costs (post-shutdown), severance costs, and decommissioning costs.[630] That is, the model assumes CALICA had no value as a business going forward and the only damages to Legacy Vulcan arise from differences in assets and liabilities post-shutdown in the but-for and actual worlds.[631] This is a transparent and foundational distortion aimed at absolving Mexico of liability for its wrongful conduct.

239. As Brattle explains, Hart and Vélez's CALICA Network DCF model is so conceptually flawed that its outputs do not logically square with undisputed and well-documented facts about the value of CALICA and the CALICA Network to Legacy Vulcan.[632] For example, Hart and Vélez's model implies a full-year EBITDA in the But-For Scenario that is *substantially* lower than CALICA's historical EBITDA, even as compared to inferior performance years during the COVID-19 pandemic.[633] In fact, Hart and Vélez's model assumes that the CALICA Network would generate [redacted] assuming full-year operations in 2022 without the

[626] *See* Fourth Brattle Report, § V.A.

[627] *See id.*

[628] *See Cairn v. India*, PCA Case No. 2016-07, Final Award, ¶ 1887 (21 December 2020) (Lévy (P), Alexandrov, Thomas) (CL-0219-ENG) ("[W]hile the Claimants bear the burden of proving their loss, it is for the Respondent to prove the assertions or defences that it pleads, such as its mitigation defence. To discharge that burden, the Respondent must show that the Claimants could reasonably have avoided the loss."); *Middle East Cement v. Egypt*, ICSID Case No. ARB/99/6, Award, ¶ 170 (12 April 2002) (Wallace (P), Bernardini, Böckstiegel) (CL-0220-ENG) ("[T]he Respondent has the burden of proof for the facts establishing such a duty [of mitigation] and the failure of Claimant to carry it out.").

[629] *See* Fourth Brattle Report, ¶¶ 17, 99-100, 186-187.

[630] *See id.*, ¶ 188.

[631] *See id.*, § V.A.

[632] *See* Fourth Brattle Report, § V.

[633] *See id.*, § V.B.

shutdown of La Rosita[634] — an estimate that is [redacted] than the CALICA Network's expected 2022 EBITDA based on its annualized pre-shutdown performance.[635] But the CALICA Network had already earned [redacted] through April 2022 even without the ability to export aggregates to the U.S. Gulf Coast during part of this period due to Mexico's delay in renewing CALICA's customs permit in early 2022, as shown in Figure 3 below.[636]

[redacted]

b) Hart and Vélez's CALICA Network DCF Model Contains Errors and Incorporates Unreasonable Assumptions.

240. Hart and Vélez's model contains a number of more technical errors, including (i) double-counting freight-delivery costs to customer sites; (ii) double-counting overhead costs in the But-For Scenario (while ignoring it in the Actual Scenario); and (iii) double-counting

[634] *See id.*, ¶ 191.

[635] *See id.*, ¶ 191. Hart and Vélez's 2022 EBITDA estimate of [redacted] *total* also cannot be squared with VMC's public disclosure to shareholders estimating an EBITDA impact of US$ 80-100 million for May-December 2022 following the La Rosita shutdown. *See* Fourth Brattle Report, ¶ 192.

[636] *See id.*, ¶ 192.

production costs on inventories.[637] By overstating or ignoring these costs, Hart and Vélez's model understates Legacy Vulcan's actual damages.[638] These errors are the source of much of the above-noted discrepancy between the CALICA Network's historical EBITDA (which was never less than [redacted] even during the depths of the COVID-19 pandemic) and Hart and Vélez's [redacted] estimate.[639]

241. The model also relies on unreasonable assumptions that are driven by Hart and Vélez's inappropriate reliance solely on three-year historical data.[640] As Brattle describes, by mechanically applying this backward-looking approach, Hart and Vélez model inputs into the future (prices, production costs, and CAPEX) that incorrectly assume the future will resemble the relatively immediate past.[641] By ignoring reasonable and well-supported future expectations about higher prices and lower production costs and capital expenditures, Hart and Vélez's model does not produce realistic results.[642] Figure 4 provides an illustrative example of how, by ignoring objectively reasonable forward-looking expectations about price increases, Hart and Vélez's model systematically undervalues the CALICA Network and the CALICA reserves.[643]

[637] *See* Fourth Brattle Report, § V.C.1.

[638] *See id.*

[639] *See id.*

[640] *See* Fourth Brattle Report, § V.C.2.

[641] *See id.*

[642] *See id.* The land valuation estimate that Hart and Vélez offer as an alternative to Brattle's [redacted] valuation also is unreasonable. They state that the "current listing values of the land are [...] between [redacted]," Third Hart/Vélez Report, ¶ 180, but it relies solely on two online *listings* for nearby land that say nothing about the actual value rather than the listed sale price. *See* Fourth Brattle Report, § IV.B.4. Perhaps acknowledging that these listings are not a reliable means to value CALICA, Hart and Vélez ultimately adopt Brattle's [redacted] land valuation assumption in their model.

[643] *See id.*, ¶ 207.

[redacted]

242. Brattle identifies a number of additional problems with Hart and Vélez's inputs. *First*, Hart and Vélez's estimate of Legacy Vulcan's working capital incorrectly includes [redacted].[644] *Second*, the discount rate (8.94%) used is too high [redacted].[645] Nor is it appropriate to apply an excessive country-risk premium based on Mexico's sovereign spread to a private company like CALICA whose production is mainly exported to the United States.[646] *Third*, the WACC Hart and Vélez use is based on a comparison of mining companies from emerging markets, rather than comparable companies that are prominent in the U.S. aggregates market, which are substantially less risky.[647]

[644] *See id.*, § V.C.2.c.
[645] *See id.*, § V.C.3.
[646] *See id.*, ¶ 221.
[647] *See id.*, ¶ 222.

c) Hart and Vélez's DCF Model for "CALICA Mexico" Suffers from Many of the Same Errors as the CALICA Network DCF.

243. Legacy Vulcan has explained that there is no legal basis under NAFTA to exclude from Legacy Vulcan's damages economic harm that occurs outside of Mexico.[648] From an economic perspective, Brattle also explains that Hart and Vélez's purported "CALICA Mexico" valuation does not make sense conceptually and that it is inaccurate to rely on transfer prices to try to segregate the FMV of CALICA Mexico from the CALICA Network.[649] This is so for at least three reasons.

244. *First*, as Brattle explains, calculating damages for CALICA requires assessing the value of CALICA within the CALICA Network, and a lack of audited financial statements for the CALICA Network has no bearing on this analysis.[650] In fact, the ordinary-course-of-business documents on which Brattle relies [redacted] plainly demonstrate that the CALICA Network is treated as a single integrated business unit in which operational decisions are made, and performance is assessed, for the Network as a whole.[651] By ignoring this real-world evidence about how the CALICA Network functions and how the value of CALICA's reserves is realized, Hart and Vélez vastly understate the value of CALICA.[652] Hart and Vélez's approach also ignores that the vast majority of the CALICA Network's value is contingent on access to CALICA's reserves, and that this would be reflected in CALICA's FMV.[653]

245. *Second*, Hart and Vélez's attempt to isolate the value of "CALICA Mexico" is not only flawed conceptually, but cannot be accomplished by relying on the transfer prices at which CALICA sells its aggregates to VMC (as Hart and Vélez do).[654] As Brattle has previously explained, internal transfer prices exist to meet technical tax requirements [redacted].[655] They do not reflect the FMV of

[648] *Supra* § IV.A.1.
[649] *See* Fourth Brattle Report, § VI.A.
[650] *See id.*, § VI.A.1.
[651] *Id.*; *see also id.*, § IV.B.
[652] *See id.*, § IV.A.
[653] *See id.*, § VI.A.1.
[654] *See id.*, § VI.A.2.
[655] *See id.*

CALICA as of the Valuation Date, which relies on forward-looking expectations, not historical investments when uncertainties about the viability and profitability of the business were yet-to-be resolved.[656]

246. Last, the "CALICA Mexico" DCF repeats many of the same errors as Hart and Vélez's CALICA Network DCF.[657] [redacted] All of these errors and unreasonable assumptions feed into Hart and Vélez's wholly implausible valuation of [redacted] Such a valuation cannot be reasonable in view of VMC's disclosure to shareholders in May 2022 that Mexico's actions caused a reduction in expected EBITDA of US$ 80- US$ 100 million for just the remaining eight months of 2022.[659]

247. In sum, Legacy Vulcan is entitled to *full* reparation for the overall economic damage it has suffered as a result of Mexico's breaches. Unlike Hart and Vélez's valuations, which transparently and conspicuously understate damages, Brattle's DCF analysis provides a reasonable and well-supported estimate of the overall damage to Legacy Vulcan: [redacted] before adjusting for interest and taxes.

V. MEXICO'S UNTIMELY REQUEST FOR LEAVE TO FILE A COUNTERCLAIM

248. A section of Mexico's Counter-Memorial on Ancillary Claim purports to seek leave from the Tribunal to submit a counterclaim against Legacy Vulcan arising from alleged environmental damage.[660] Mexico argues that NAFTA and applicable arbitral rules vest the Tribunal with jurisdiction to rule on this counterclaim because: (i) it purportedly falls within the scope of the Parties' consent to arbitrate; (ii) NAFTA Article 1114 purportedly establishes affirmative obligations for investors on which Mexico's counterclaim may be based; and (iii) there is an allegedly close connection between the counterclaim and Legacy Vulcan's claim. Mexico is wrong on all counts. As a threshold matter, Mexico's request for leave to submit a counterclaim is untimely and should be rejected on this basis alone. It should also be rejected because neither NAFTA nor the ICSID Rules of Procedure for Arbitration Proceedings (the "ICSID Arbitration Rules") vest the Tribunal with jurisdiction over Mexico's counterclaim.

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[656] *See* Fourth Brattle Report, ¶ 233.

[657] *See id.*, § VI.B.1.

[658] *See id.*, § VI.B.3.

[659] *See id.*, ¶¶ 158-159, 193.

[660] Counter-Claim (Ancillary Claim), Part IV. Tellingly, Mexico's Request for Relief does not include its purported request for leave to submit a counterclaim. *Id.*, ¶¶ 633-635.

A. MEXICO'S REQUEST FOR LEAVE TO FILE A COUNTERCLAIM IS UNTIMELY AND THUS FAILS ON PROCEDURAL GROUNDS.

249. In Mexico's response to Legacy Vulcan's request for leave to file an ancillary claim, Mexico purported to "reserve its right" to seek leave to file a counterclaim "related to the subject of [Legacy Vulcan's] new claim."[661] Acknowledging Legacy Vulcan's jurisdictional objection to this counterclaim and observing that Mexico "ha[d] not, at [that] stage, submitted a particularised application for leave" to submit a counterclaim, the Tribunal declared in PO No. 7 that it "shall decide upon any application for leave to submit a counterclaim in accordance with the procedural rules, after giving Claimant the opportunity to comment."[662]

250. More than five months passed after the Tribunal issued PO No. 7 without any application from Mexico for leave to file a counterclaim. Instead, Mexico waited until the submission of its Counter-Memorial on 19 December 2022, to "present[ ] its Request to file this Counterclaim,"[663] asserting that it would only articulate its counterclaim in greater detail *after* the Tribunal resolved this request.[664] This request was untimely and made in contravention of applicable procedural rules.

1. Mexico's Request Is Inconsistent With Procedural Rules Governing the Arbitration.

251. ICSID Arbitration Rule 40(2) provides that:

> (2) An incidental or additional claim shall be presented not later than in the reply and a *counter-claim no later than in the countermemorial*, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any

[661] Mexico's Response to the Claimant's Request for Provisional Measures and Leave to File an Ancillary Claim, ¶ 130 ("México desea enfatizar que en caso de que el Tribunal autorice la presentación de la nueva reclamación que la Demandante pretende hacer pasar por subordinada, se reserva el derecho de presentar una solicitud de autorización para presentar una reconvención relacionada con el objeto de la nueva reclamación"). *See also* Dúplica a las Solicitudes de la Demandante de Autorizar un Nueva Reclamación y Otorgar Medidas Provisionales, ¶¶ 94-95 (7 June 2022).

[662] Procedural Order No. 7, ¶159 (11 July 2022).

[663] Counter-Memorial (Ancillary Claim), ¶ 524. *See also id.*, ¶ 494 (in which Mexico "presents its Counterclaim Request").

[664] *See id.*, ¶ 523.

> objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.[665]

252. This rule thus required Mexico to present any "counter-claim no later than in [its] countermemorial."[666] Instead, Mexico's Counter-Memorial on Ancillary Claim contains only a request for leave to file a counterclaim. This is so because Mexico inexplicably let months go by after the Tribunal issued PO No. 7 in July 2022 without seeking leave to file its counterclaim. In doing so, Mexico effectively tries to skirt the deadline by which it was required to file its counterclaim under ICSID Arbitration Rule 40(2), without any justification.

253. Mexico's leave request is also inconsistent with the Tribunal's determination in PO No. 7 that it would "decide upon any application for leave to submit a counterclaim *in accordance with the procedural rules*."[667] Because Mexico's request for leave fails to comply with the deadline set forth in ICSID Arbitration Rule 40(2), it is not in accordance with the procedural rules. It should be denied on this basis alone.

2. Mexico's Request Disregards the Agreed Procedural Calendar and Threatens to Disrupt this Proceeding.

254. Aside from disregarding the procedural rules governing this arbitration, Mexico's request for leave to file a counterclaim also disregards the established procedural calendar and risks upending it to Legacy Vulcan's detriment. On 25 July 2022, the Parties agreed on a procedural calendar for the briefing of Legacy Vulcan's ancillary claim.[668] The Tribunal later endorsed this briefing schedule and other aspects of the procedural calendar relating to the ancillary claim.[669]

255. If granted, Mexico's untimely request for leave to file a counterclaim would upend this procedural calendar. Additional briefing not foreseen in the procedural calendar would be necessary to address Mexico's counterclaim. As the respondent to the counterclaim,

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[665] ICSID Arbitration Rule 40(2) (2006) (emphasis added). While the ICSID Arbitration Rules were amended in 2022, this arbitration is governed by the 2006 edition of those rules, in effect when this proceeding commenced. *See* Procedural Order No. 1, § 1.1 (26 November 2019). References to the ICSID Arbitration Rules in this brief are therefore to the 2006 edition of those rules.

[666] ICSID Arbitration Rules, Rule 40(2).

[667] Procedural Order No. 7 (11 July 2022), ¶ 159 (emphasis added).

[668] *See* Communication from Claimant's Counsel to the ICSID Secretariat (25 July 2022); Communication from Mexico to the ICSID Secretariat (25 July 2022).

[669] *See* Communication from the Tribunal (21 September 2021). The procedural calendar agreed to by the Parties in July 2022 has remained in place with only slight adjustments, including the establishment of a deadline for NAFTA Article 1128 submissions as well as a three-day extension for Mexico's Counter-Memorial and Legacy Vulcan's Reply, as agreed to by the Parties on 14 December 2022. *See* Communication from the Tribunal on Article 1128 Submissions (21 September 2022); Communication from Mexico (14 December 2022).

Legacy Vulcan should be entitled to present at least a counter-memorial to the counterclaim (and potentially a rejoinder if Mexico seeks to submit a reply). Given the already compressed procedural calendar, scheduling such additional briefing would require postponing the July 2023 hearing date and lengthening what was envisioned to be a two-to-three-day hearing. The award in this arbitration — now more than four-years old and counting — would be delayed further.

256. All of these effects on the procedural calendar could have been avoided had Mexico sought leave to submit its counterclaim in a timely manner. Mexico's failure to do so should not disadvantage Legacy Vulcan by causing unnecessary and avoidable procedural delays in this case.

B. THE TRIBUNAL LACKS JURISDICTION OVER MEXICO'S COUNTERCLAIM.

257. Mexico's request to submit a counterclaim should also be denied because the Tribunal lacks jurisdiction over that counterclaim. A tribunal may only exercise jurisdiction over a counterclaim brought under an investment treaty where: (1) the parties have consented to arbitrate the counterclaim under the dispute-resolution provisions of the applicable treaty; (2) the cause of action alleged in the counterclaim arises under the applicable investment treaty; and (3) there is a close connection between the subject matter of the counterclaim and that of the primary claim.[670] Failing to meet any of these elements is fatal to Mexico's untimely bid to file a counterclaim here. It fails to meet all of them. Because Mexico's counterclaim falls outside the scope of the Parties' consent to arbitrate, does not implicate any cause of action arising under NAFTA, and is not closely related to Legacy Vulcan's ancillary claim, the Tribunal does not have jurisdiction over Mexico's counterclaim.

1. Mexico's Counterclaim Does Not Fall Within the Scope of the Parties' Consent.

258. It is axiomatic that consent to arbitrate a dispute is an indispensable condition for the exercise of a tribunal's jurisdiction.[671] This principle is set forth in Article 46 of the

[670] *See Limited Liability Company AMTO v. Ukraine*, SCC, Final Award, ¶ 118 (26 March 2008) (Cremades Sanz-Pastor (P), Söderlund, Runeland) (RL-0166) ("The jurisdiction of an Arbitral Tribunal over a State party counterclaim under an investment treaty depends upon the terms of the dispute resolution provisions of the treaty, the nature of the counterclaim, and the relationship of the counterclaims with the claims in the arbitration."). *See also Saluka Investments B.V. v. Czech Republic*, PCA Case No. 2001-04, Decision on Jurisdiction over the Czech Republic's Counterclaim, ¶ 61 (7 May 2004) (Watts (P), Behrens; Yves Fortier) (RL-0176) (hereinafter "*Saluka v. Czech Republic* (Counterclaim Decision)").

[671] *See Spyridon Roussalis v. Romania,* ICSID Case No. ARB/06/1, Award, ¶ 865 (7 December 2011) (Hanotiau (P), Reisman, Giardina) ("Under the system created by the ICSID Convention, consent by both parties is an indispensable condition for the exercise of the Centre's jurisdiction. The Convention only requires that consent be in writing, leaving the parties otherwise free to choose the manner in which to express their consent.") (CL-0223-ENG).

ICSID Convention, which provides that: "Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute *provided that they are within the scope of the consent of the parties* and are otherwise within the jurisdiction of the Centre."[672] A similar requirement is reflected in ICSID Arbitration Rule 40(1).[673] Thus, absent a consent to arbitrate counterclaims as manifested in a treaty or through a separate agreement between the parties to a dispute, a tribunal would lack jurisdiction to consider a respondent's counterclaims.[674]

259. Accordingly, for the Tribunal to have jurisdiction over Mexico's counterclaim, the counterclaim must fall within the scope of the Parties' arbitration agreement under NAFTA or some other agreement between them. The Parties here have not agreed to arbitrate Mexico's counterclaim. Respondent's contention that the Tribunal nevertheless has jurisdiction over counterclaims generally under NAFTA Article 1137(3) is meritless. That provision states that, "[i]n an arbitration under this Section, a Party shall not assert, as a defense, counterclaim, right of setoff or otherwise, that the disputing investor has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages."[675] Contrary to Mexico's contention, the mere reference to "counterclaim" in this provision does not evidence the Parties' consent to arbitrate Mexico's counterclaim.

260. In considering jurisdiction over counterclaims, numerous tribunals have held that the scope of consent to arbitrate is contained within the arbitration clause of the dispute-resolution provisions of the applicable investment treaty.[676] Even a cursory review of those provisions in NAFTA shows that only investors with covered investments may bring

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[672] ICSID Convention, Art. 46 (emphasis added).

[673] *See* ICSID Arbitration Rule 40(1) ("Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.").

[674] *See Iberdrola Energía, S.A. v. Republic of Guatemala (II),* PCA Case No. 2017-41, Final Award, ¶ 384 (24 August 2020) (Kaufmann-Kohler (P), Thomas, Dupuy) (CL-0197-ENG) (holding that a tribunal will have jurisdiction over a counterclaim submitted by a respondent only where "the disputing parties have given their consent to arbitrate counterclaims and there is a close connection between the claims and the counterclaim consent to arbitration").

[675] NAFTA, Article 1137(3) (C-0009-ENG).

[676] *See, e.g., Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, ¶ 333 (15 April 2016) (Kaufmann-Kohler (P), Dupuy, Grigera Naón) (CL-0224-ENG); *Karkey Karadeniz Elektrik Uretim AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, ¶ 1012 (22 August 2017) (Derains (P), Grigera Naón; Edward) (CL-0225-ENG); *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, ¶ 526 (18 January 2019) (Derains (P), Tawil, Vinuesa) (CL-0226-ENG).

disputes to arbitration under that treaty. NAFTA Article 1122 specifically addresses "Consent to Arbitration." That consent is limited only to "the submission by a *disputing investor of a claim*."[677] Confirming this, NAFTA Articles 1116 and 1117 refer only to claims "*by an investor*" (whether on its own behalf or on behalf of an enterprise) alleging that a NAFTA Party has breached an obligation under specified provisions of Chapter 11. Likewise, NAFTA Articles 1120 (Submission of a Claim to Arbitration) and 1121 (Conditions Precedent to Submission of a Claim to Arbitration) specify that only "a *disputing investor* may submit [a] claim to arbitration."[678]

261. Thus, under NAFTA's arbitration and dispute-settlement provisions, it is clear that consent was granted only to arbitrate investor claims for breach of substantive investor rights under that Treaty, and that there is no consent to arbitrate State counterclaims such as the one Mexico proposes here. This type of provision has been interpreted as not conferring jurisdiction over counterclaims brought by respondent States. For instance, in *Rusoro v. Venezuela*, the tribunal considered a counterclaim submitted by Venezuela asserting that the claimant's operation of a gold mine failed to follow the mining plan, and resulted in damage to Venezuelan resources and increased costs for the State's future operation of the mine.[679] The tribunal held that it lacked jurisdiction over the counterclaim because "the [t]reaty does not afford host States a cause of action against an investor of the other Contracting Party, be it by way of claim or of counter-claim."[680] The applicable treaty in that case (the Canada-Venezuela BIT) had comparable language to NAFTA in that claims could only be submitted by investors.[681]

262. The tribunal in *Karkey Karadeniz Elektrik Uretim AS v. Pakistan* took a similar approach, reasoning that "the text of the BIT is decisive in determining [the tribunal's] jurisdiction over the counterclaims."[682] In that case, the tribunal reviewed the dispute-resolution provisions of the applicable treaty and held that: "References to the 'investor' [...] in the dispute

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[677] NAFTA, Article 1122 (C-0009-ENG) (emphasis added).

[678] NAFTA, Article 1134 (C-0009-ENG) (emphasis added).

[679] *See Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, ¶ 606 (22 August 2016) (Fernández-Armesto (P), Simma, Vicuña) (RL-0003).

[680] *Id.*, ¶ 628.

[681] *See* Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (1 July 1996) (emphasis added) (C-0331-ENG). For instance, Article XII:2 of that treaty provides as follows: "If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by *the investor* to arbitration in accordance with paragraph (4)." Similarly, Article XII:3 provides: "*An investor* may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if [...]." *Id.*

[682] *Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, ¶ 1012 (22 August 2017) (Derains (P), Grigera Naón; Edward) (CL-0225-ENG).

resolution clause of the BIT means that the BIT is intended to enable arbitration only at the initiative of the investor. The BIT imposes no obligation on investors, only on the Contracting State."[683]

263. The text of NAFTA Chapter 11 limits the submission of claims to investors. Since the Parties have not otherwise consented to arbitrate counterclaims, the Tribunal lacks jurisdiction to consider a counterclaim submitted by Mexico.

2. The Nature of the Claim Does Not Implicate Any Investor Obligations Under NAFTA Chapter 11.

264. Even if Mexico were to satisfy the above requirement to establish that the Tribunal has jurisdiction over Mexico's counterclaim (it has not), the Tribunal would still lack jurisdiction over Mexico's purported counterclaim because the nature of its counterclaim does not implicate any investor obligations under NAFTA Chapter 11. Mexico argues that it may be "implied" from the text of NAFTA Article 1114 that investors have an obligation to comply with Mexico's environmental laws and that this can be the basis of a counterclaim.[684] Mexico is wrong for at least two reasons.

265. *First*, as described above in Part III.C, Mexico has expressly disclaimed reliance on Article 1114 in this case. To the extent Mexico's proposed counterclaim is based exclusively on that waived provision, Mexico's request for leave to file such a counterclaim should be rejected on this basis alone.

266. *Second*, nowhere does Article 1114 impose an "obligation" on investors that is susceptible to enforcement via NAFTA arbitration. Article 1114 provides as follows:

> (1) Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
>
> (2) The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an

[683] *Id.*, ¶ 1013.

[684] Counter-Memorial (Ancillary Claim), ¶ 512 ("El Artículo 1114 del TLCAN (Medidas Relativas al Medio Ambiente) regula cuestiones medioambientales de las que se pueden inferir obligaciones para el inversionista respecto a la legislación ambiental del Estado receptor (en este caso, México).").

> investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.[685]

267. Nothing in this text imposes upon Legacy Vulcan or CALICA any obligation or otherwise creates a cause of action for Mexico to enforce such a non-existent obligation via a counterclaim in this proceeding. Article 1114(1) merely clarifies obligations that are imposed on NAFTA Contracting Parties elsewhere under NAFTA Chapter 11, not on investors. Article 1114(2) similarly does not impose any obligations on investors, but rather imposes specific obligations prohibiting NAFTA Contracting Parties from relaxing, waiving, or otherwise derogating from certain measures. Under neither provision is Mexico entitled to pursue its proposed counterclaim here.

268. The arbitral decisions that Mexico cites in this respect do not actually support its position. In *Aven v. Costa Rica*, the tribunal considered whether Article 10.11 of CAFTA-DR — which is similar to NAFTA Article 1114(1)[686] — generated obligations for investors with which they were required to comply.[687] Mexico quotes from the *Aven* award to suggest that the tribunal held that this article did generate treaty obligations for investors,[688] but this is a gross mischaracterization of what the *Aven* tribunal actually held. Mexico's quote corresponds to a hypothetical posed by the tribunal in its consideration of the issue.[689] That tribunal held precisely the opposite of what Mexico suggests: that the provision at issue ***did not*** give rise to any

[685] NAFTA, Article 1114(1) (C-0009-ENG).

[686] Article 10.11 of CAFTA-DR provides that "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."

[687] *See also David R. Aven et al. v. Republic of Costa Rica,* ICSID Case No. UNCT/15/3, Final Award, ¶¶ 734-735 (18 September 2018) (Siqueiros (P), Baker, Nikken) (CL-0222-ENG) (hereinafter "*Aven v. Costa Rica* (Final Award)").

[688] Counter-Memorial (Ancillary Claim), ¶ 513 ("En *Aven*, el tribunal analizó una disposición similar al Artículo 1114(2) [sic] del TLCAN y determinó que 'las "medidas" adoptadas por el Estado receptor para la protección del medioambiente deberían considerarse obligatorias para todos aquellos que se encuentren bajo la jurisdicción del Estado, en particular, los inversionistas extranjeros. Por lo tanto [...] los inversionistas tienen la obligación, no solo en virtud del derecho interno sino también en virtud de[l Tratado].'").

[689] *Aven v. Costa Rica* (Final Award), ¶ 734 (CL-0222) (considering hypothetically what a possible "effect of Article 10.11 ***could be***") (emphasis added).

corresponding obligation for investors that would support the filing of a counterclaim by a respondent under the treaty.[690]

269. Mexico's reliance on *Urbaser v. Argentina* is similarly misplaced. In that case, the tribunal concluded that, even if counterclaims were theoretically possible under an investment treaty, there were no applicable obligations under the relevant treaty which the claimants could have breached. The counterclaim asserted there was dismissed accordingly.[691] The same is true, and the same should be done, here.

270. Mexico also relies on *Burlington v. Ecuador*, but that case is simply inapposite.[692] There, both parties had agreed that the tribunal had jurisdiction over counterclaims, which is simply not the case here. As the tribunal in *Aven v. Costa Rica* recognized, the determination in *Burlington* regarding jurisdiction over counterclaims has no applicability in cases where jurisdiction over such claims is in dispute:

> In *Burlington*, the issue of jurisdiction was not at the [sic] stake, because the Parties reached an agreement where they "expressed their agreement and consent that this arbitration is the 'appropriate forum for the final resolution of the Counterclaims arising out of the investments [...], so as to ensure maximum judicial economy and consistency.'"[693]

271. Unlike the claimant in *Burlington*, Legacy Vulcan did not consent to arbitrate the counterclaim that Mexico is seeking leave to file. Contrary to Mexico's assertion that Legacy Vulcan's Notice of Intent to arbitrate constituted such a consent, it is clear that Legacy Vulcan's consent to arbitrate was submitted "*in accordance with Article 1121" of NAFTA*.[694] As described above, NAFTA Article 1121 contemplates conditions under which "a disputing

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[690] *See id,*, ¶ 743 ("[T]the Tribunal believes that the language of Article 10.9.3.c [relating to performance requirements] and 10.11 seeks to ensure that States retain a significant margin of appreciation in respect of environmental measures in their respective jurisdictions, *but they do not—in and of themselves—impose any affirmative obligation upon investors. Nor do they provide that any violation of state-enacted environmental regulations will amount to a breach of the Treaty which could be the basis of a counterclaim*.") (emphasis added).

[691] *See Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic,* ICSID Case No. ARB/07/26, Award (8 December 2016) (Bucher (P), McLachlan, Martínez-Fraga) (RL-0174).

[692] *See* Counter-Memorial (Ancillary Claim), ¶ 515.

[693] *Aven v. Costa Rica* (Final Award), ¶ 736 (CL-0222-ENG).

[694] Notice of Intent, § 5 (3 September 2018) ("Legacy Vulcan y Calica consienten por la presente en someter a un arbitraje CIADI, *de conformidad con el Artículo 1121 del TLCAN*") (C-0007-SPA) (emphasis added).

investor" may submit a claim, and cannot — as Mexico suggests — be interpreted as a consent by Legacy Vulcan to arbitrate counterclaims brought by Mexico under NAFTA Chapter 11.

272. Mexico's reliance on the *Perenco v. Ecuador* is similarly unavailing.[695] That case involved an investment treaty claim against Ecuador by the other party to the consortium at issue in *Burlington*.[696] The dispute related to an investment stemming from two contracts the consortium executed with Ecuador's national oil company.[697] Ecuador lodged a counterclaim arising from those contracts, not from obligations imposed upon the investor under the BIT.[698] Since the legal relationship giving rise to the counterclaim in *Perenco* was contractual, not treaty-based, that case does not help Mexico.

273. Far from helping Mexico, the cases it cites do the opposite — they confirm Legacy Vulcan's position that NAFTA does not grant the Tribunal jurisdiction over Mexico's proposed counterclaim. Other arbitral decisions further confirm this position. As the tribunal in *Gavazzi v. Romania* explained, for instance: "[I]t is the letter of the BIT, interpreted under international law, that binds the Parties. Where there is no jurisdiction provided by the wording of the BIT in relation to a counterclaim, no jurisdiction can be inferred merely from the 'spirit' of the BIT [...]."[699] The tribunal in *Anglo-American v. Venezuela* similarly held that it lacked jurisdiction over a claim that was "not based on a violation of the Treaty or on a violation of international law, only on Venezuelan law."[700]

274. Thus, contrary to Mexico's assertions, extensive jurisprudence supports the conclusion that there are no obligations that bind investors under NAFTA Chapter 11 that would sustain a counterclaim brought by a NAFTA Contracting Party against an investor. For this additional reason, Mexico's request for leave to file its counterclaim should be denied.

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[695] Counter-Memorial (Ancillary Claim), ¶ 515, n.450 (citing *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Award (27 September 2019) (Tomka (P), Kaplan, Thomas) (CL-0102-ENG) (describing circumstances — which are not applicable here — where "a legal relationship between and investor and a State" may allow for submission of counterclaims by that State)).

[696] *See Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, ¶¶ 4, 6, n.2 (11 Aug 2015) (Tomka (P), Kaplan, Thomas) (CL-0227-ENG).

[697] *Id.*, ¶ 4.

[698] *Id.*, ¶ 36 (noting that the principles upon which Ecuador's counterclaim was based related to "the Consortium's obligations under the Participation Contracts").

[699] *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, ¶ 154 (21 April 2015) (van Houtte (P), Paulsson/Veeder, Rubino-Sammartano) (CL-0228-ENG).

[700] *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, ¶¶ 529-530 (18 January 2019) (Derains (P), Tawil, Vinuesa) (CL-0226-ENG).

3. Mexico's Counterclaim Is Not Closely Related to Legacy Vulcan's Primary Claim.

275. Finally, even if Mexico satisfied both of the above conditions required to establish the Tribunal's jurisdiction to entertain counterclaims submitted by Mexico (it has not), an additional requirement that must be satisfied for a tribunal to entertain a counterclaim is that the "counterclaim must have a close connection with *the primary claim* to which it is a response."[701] Mexico asserts that its counterclaim relates to alleged damage caused by CALICA's operations in "El Corchalito, La Adelita, La Rosita, and Punta Venado."[702] According to Mexico, because Legacy Vulcan's overall investment relates to these four lots, its counterclaim is closely related to Legacy Vulcan's primary claim.[703] Mexico's position is untenable.

276. Contrary to Mexico's argument, the appropriate test is not whether there is a close connection between Mexico's counterclaim and Legacy Vulcan's investment as a whole. The pertinent question is whether Mexico's counterclaim possesses a sufficiently close connection to the "primary claim" currently before this Tribunal.[704] The "primary claim" for purposes of this assessment is Legacy Vulcan's ancillary claim, which relates to Mexico's wrongful shutdown of CALICA's remaining quarrying and export operations in La Rosita and Punta Venado.[705] Mexico's counterclaim, however, is much broader, in that it encompasses purported environmental damage from quarrying in El Corchalito.[706] Mexico's attempt to misrepresent the scope of the "primary claim" to relate more broadly to the entirety of Legacy Vulcan's investment is baseless and must be rejected.

277. Mexico's prior filings illustrate that its current position is untenable. When it originally "reserved its rights" to file a counterclaim, Mexico did so only in respect of "the subject of [Legacy Vulcan's] *new* claim."[707] This Tribunal has explained that, "[as] Respondent has noted,

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[701] *Saluka v. Czech Republic* (Counterclaim Decision), ¶ 61 (RL-0176) (emphasis added).

[702] Counter-Memorial (Ancillary Claim), ¶ 511 (citing Procedural Order No. 7, ¶ 130).

[703] *Id.*, ¶ 511.

[704] *Saluka v. Czech Republic* (Counterclaim Decision), ¶ 61 (RL-0176).

[705] *See* Memorial (Ancillary Claim), ¶ 3.

[706] *See* Counter-Memorial (Ancillary Claim), ¶ 511 ("La reconvención presentada por la Demandada se relaciona precisamente con el daño ambiental generado por el desarrollo y ejecución del proyecto de inversión *en los cuatro lotes identificados por el Tribunal*." (emphasis added)).

[707] Mexico's Response to the Claimant's Request for Provisional Measures and Leave to File an Ancillary Claim, ¶ 130 (26 May 2022) ("México desea enfatizar que en caso de que el Tribunal autorice la presentación de la nueva reclamación que la Demandante pretende hacer pasar por subordinada, se reserva el derecho de presentar una solicitud de autorización para presentar una reconvención relacionada con el objeto de *la nueva reclamación*") (emphasis added). *See also* Dúplica a las Solicitudes de la Demandante de Autorizar un Nueva Reclamación y Otorgar Medidas Provisionales, ¶¶ 94-95 (7 June 2022).

Claimant's prior claims and requests for relief in this proceeding are directed at CALICA's La Adelita and El Corchalito lots, as well as port fees associated with the port at Punta Venado."[708] Mexico missed its opportunity to file a counterclaim relating to those "prior claims" during earlier stages of this arbitration. Mexico's misrepresentation of the scope of the "primary claim" at this stage as extending to the entirety of Legacy Vulcan's investment is an attempt to turn back the clock to belatedly assert a counterclaim in response to claims that have already been fully briefed.

278. Mexico waived its right to bring a counterclaim for environmental damage allegedly arising from CALICA's quarrying in El Corchalito because Mexico failed to assert such a claim by its first Counter-Memorial on 23 November 2020. Tribunals have consistently found that allowing parties to belatedly raise new arguments or claims is inconsistent with fundamental principles of due process and procedural efficiency. In *Bureau Veritas v. Paraguay*, for example, the tribunal held that new arguments raised for the first time in post-hearing briefs were inadmissible, reasoning that "it would not be consistent with principles of due process and procedural economy to introduce new arguments into the preliminary phase when both parties had already agreed to an orderly procedural schedule, and where the parties had had ample opportunities to present their arguments."[709] Similarly, in *Euram v. Slovakia*, the tribunal rejected the respondent's submission of new jurisdictional objections, raised after its statement of defense, noting that, "[i]n deciding whether a plea is 'justifiably late,' the [t]ribunal must [...] have regard to whether there has been undue delay by the [r]espondent once it became aware of the facts and to whether there will be undue prejudice to the [c]laimant if the plea is admitted."[710]

279. Here, Mexico had ample opportunity in the previous phase of this arbitration to submit counterclaims concerning alleged environmental damage arising from El Corchalito.[711] It declined to do so. To allow Mexico to file at this late stage of the arbitration a counterclaim relating to claims that have already been fully briefed by the Parties would be severely prejudicial to Legacy Vulcan.

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[708] Procedural Order No. 7, ¶ 71.

[709] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, ¶ 52 (29 May 2009) (Knieper (P), Sands, Fortier) (CL-0229-ENG).

[710] *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, Second Award on Jurisdiction, ¶ 118 (4 June 2014) (Greenwood (P), Stern, Petsche) (CL-0221-ENG).

[711] Mexico's suggestion that CALICA caused environmental damage in La Adelita is frivolous. As the Tribunal is well aware, CALICA has been unable to even clear vegetation from, let alone quarry, that property as a consequence of Mexico's repudiation of the 2014 Agreements. *See, e.g.*, Memorial, ¶¶ 85-86, 111-131.

* * *

280. Respondent's half-hearted effort to pursue a counterclaim in this arbitration premised on bogus allegations of environmental destruction is yet another attempt at giving effect to President López Obrador's threats and politically-motivated anti-CALICA attacks.[712] This effort should not be countenanced. Mexico's request for leave to file a counterclaim should be rejected because it is contrary to applicable procedure and because the substance of that counterclaim falls outside the Tribunal's jurisdiction.

VI. REQUEST FOR RELIEF

281. For the foregoing reasons, Legacy Vulcan respectfully requests that the Tribunal render an Award in its favor:

a. Upholding Legacy Vulcan's ancillary claim and dismissing Mexico's jurisdictional objection to this claim;

b. Declaring that Mexico has breached NAFTA and applicable principles of international law by failing to accord Legacy Vulcan's investments, including CALICA, fair and equitable treatment in violation of Article 1105;

c. Determining that this breach has caused damages to Legacy Vulcan;

d. Ordering Mexico to pay to Legacy Vulcan compensation, in accordance with NAFTA and customary international law, in an amount sufficient to provide full reparation to Legacy Vulcan for the damages incurred as a result of the wrongful conduct at issue regarding this ancillary claim, including:

i. Compensation for damages arising out of Mexico's wrongful measures in the amount of [redacted];

ii. Compensation of [redacted] to account for the double taxation that would result on a portion of this Award;

iii. Pre-Award compound interest at a rate reflecting the cost of short-term borrowing by the Government of Mexico from the date of the breach to the date of the Award, and post-Award compound interest also reflecting the cost of short-term borrowing by the Government of Mexico from the date of the Award until actual and full payment by Mexico, even if the Award is converted into a judgment of a court of a State party to the ICSID Convention;

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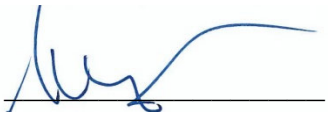
[712] *See* Transcript of President's Morning Press Conference (3 February 2022) (C-0178-SPA.23) ("nosotros no nos quedaríamos nada más con esta denuncia, nosotros vamos, si es necesario, a acudir [...] a otros tribunales internacionales, porque es destrucción de nuestro territorio."); Transcript of President's Morning Press Conference (14 June 2022) (C-0271-SPA.40) ("Están ahora muy molestos porque se clausuró el banco de Calica. Imagínense, se llevaban material para construir carreteras en Estados Unidos, destruyendo, una catástrofe ecológica, y vamos a presentar una denuncia internacional."); Transcript of President's Morning Press Conference (16 June 2022) (C-0233-SPA.41) ("Sí, entonces ahí si ya se tomó la decisión de cancelar por completo la obra. Y así como ellos acudieron a tribunales internacionales, nosotros vamos a acudir a la ONU y a tribunales internacionales."). *See also supra* Part II.C.1.c (showing that Mexico's allegations of environmental harm are contrived, lacking any scientific or technical basis).

e. Ordering Mexico to pay all costs and expenses of this arbitration proceeding (including this ancillary claim), including the fees and expenses of the Tribunal and the cost of legal representation, plus interest thereon;

f. Rejecting Mexico's request for leave to file its counterclaim; and

g. Ordering such other or additional relief as may be appropriate under the applicable law or that may otherwise be just and proper.[713]

Respectfully submitted,



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[713] Legacy Vulcan reserves its right to pursue additional claims that may arise out of further retaliatory measures by Mexico.