IN THE MATTER OF
AN ARBITRATION UNDER THE RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Alicia Grace; Ampex Retirement Master Trust; Apple Oaks Partners, LLC; Brentwood Associates Private Equity Profit Sharing Plan; Cambria Ventures, LLC; Carlos Williamson-Nasi; Carolyn Grace Baring; Diana Grace Beard; Floradale Partners, LLC; Frederick Grace; Frederick J. Warren; Frederick J. Warren IRA; Gary Olson; Genevieve T. Irwin; Genevieve T. Irwin 2002 Trust; Gerald L. Parsky; Gerald L. Parsky IRA; John N. Irwin III; José Antonio Cañedo-White; Nicholas Grace; Oliver Grace III; ON5 Investments, LLC; Rainbow Fund, L.P.; Robert M. Witt; Robert M. Witt IRA; Vista Pros, LLC; Virginia Grace

Claimants

v.

United Mexican States

Respondent

STATEMENT OF CLAIM

October 7, 2019

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I. INTRODUCTION

1. This is a paradigmatic case of unfair and discriminatory treatment, expropriation and government retaliation, leading to the total destruction of Claimants' investment. México destroyed Integradora de Servicios Petroleros Oro Negro, S.A.P.I. de C.V. ("Integradora, and together with its subsidiaries, "Oro Negro") and drove it out of business because, among other reasons, Oro Negro refused to participate in bribery of Mexican officials. México also implemented its wrongful measures by colluding with Oro Negro's creditors and allowing them to take over Oro Negro's only assets, five state-of-the-art jack-up rigs used for offshore drilling (the "Rigs"), and Oro Negro's contracts with Petróleos Mexicanos ("Pemex"), México's oil company and monopoly, through which Oro Negro leased the Rigs.

2. After Pemex purported to unilaterally cancel Oro Negro's contracts, the U.S. shareholders of Oro Negro initiated this arbitration against México, claiming damages for México's breaches of the North American Free Trade Agreement ("NAFTA"). Claimants are the U.S. individuals or entities who own 43% of Integradora.

3. Oro Negro's business was to own and lease Rigs to Pemex. Integradora is the ultimate parent company of Oro Negro. Oro Negro's five Rigs are among the best jack-up rigs in México, including because they extract oil in deeper water and are of superior quality to most of the rigs provided by its competitors. Few other Mexican oil companies own comparable rigs. Oro Negro leased the Rigs to Pemex under five contracts (the "Oro Negro Contracts"). Oro Negro had the best performance, including safety record, of any company in the industry.

4. Pemex is a highly corrupt and, not coincidentally, tremendously inefficient company. It is owned and controlled by the Mexican government; indeed, it is part of the government and by far México's largest source of revenue. Pemex has been at the center of numerous high-profile corruption cases. As one of many examples, Pemex's Chief Executive Officer ("CEO") from 2012

to 2016, Emilio Lozoya ("Mr. Lozoya"), is currently the target of one of México's largest corruption scandals ever: México is investigating him for taking millions in bribes from Pemex contractors. Indeed, one of Pemex's largest former contractors, Odebrecht, S.A. ("Odebrecht"), a large Brazilian construction company, admitted to paying Mr. Lozoya and other Pemex officials over USD 10 million in exchange for contracts.

5. Since initiating this arbitration, the Mexican government has made every effort to fiercely retaliate against certain of the Claimants and Oro Negro, including by initiating close to eight criminal investigations against Oro Negro, its employees and lawyers, and recently issuing arrest warrants and requesting Interpol Red Notices against two of the Claimants and three individuals who are key witnesses in this NAFTA proceeding. These criminal investigations are based on fabricated evidence and replete with red flags of corruption, suggesting that Mexican prosecutors and judges may have taken bribes from Oro Negro's creditors or their agents in pursuit of México's criminal charges against Oro Negro.

6. Oro Negro was founded in 2012 by well-known entrepreneurs; it was, at the time, the only Mexican oil services company to raise equity capital from large international investors, including prominent U.S. investors. In 2014, it raised USD 900 million in debt from international investors (collectively, the "Bondholders") by issuing bonds (the "Bonds"). The group that today controls the majority of the Bonds is known as the "Ad-Hoc Group." The Ad-Hoc Group is comprised of several international vulture funds whose business is to invest at high discounts in debt or equity of distressed companies or governments, and then reap a profit by driving them to bankruptcy and collecting the spare parts. These types of vulture funds have been responsible for the collapse of numerous companies and governments worldwide and for worsening the economic crises of several countries—most notably, of Argentina.

7. The core of this case involves the ultimately successful efforts by México and its co-conspirators to drive Oro Negro out of business and retaliate against Oro Negro for its refusal to partake in México's pay-to-play bribery system and for other arbitrary and discriminatory reasons. With the aid of an international investigation agency, Claimants have obtained recordings (the "Recordings") of Pemex officials where they confirm that México retaliated against Oro Negro because, in part, of its refusal to pay bribes, which led to highly detrimental amendments in 2015 and 2016 and ultimately the cancellation of the Oro Negro Contracts in 2017. The Recordings indicate that Oro Negro's competitor Seamex Limited ("Seamex") paid bribes to Pemex to secure its highly favorable contracts.

8. An additional reason for México to destroy Oro Negro was its desire to give Oro Negro's Contracts to the Ad-Hoc Group and their affiliated entities. México did this by colluding with the Ad-Hoc Group. Stated simply, in addition to canceling Oro Negro's Contracts to retaliate against it for failing to pay bribes, México, through Pemex, purported to terminate the Oro Negro Contracts so that the Ad-Hoc Group could take over the Rigs and enter into new contracts with Pemex. These efforts began by Pemex unilaterally and dramatically amending the Oro Negro Contracts, including by reducing its payments to Oro Negro and refusing to pay Oro Negro over USD 100 million in past due invoices. The efforts by México and the Ad-Hoc Group culminated in Pemex purporting to cancel the Oro Negro Contracts, which forced Oro Negro to file for reorganization in bankruptcy court in México and led to the Ad-Hoc Group successfully taking over the Rigs. Additionally, as a direct result of Oro Negro's bankruptcy, it was unable to complete payment and take delivery on three new rigs it had built and which Pemex falsely represented it would hire (but never did). Therefore, Oro Negro lost its USD 125 million down payment for the three new rigs.

9. Because Pemex would continue leasing the Rigs from the Ad-Hoc Group and its affiliated entities after the purported termination of the Oro Negro Contracts, this arrangement benefited Pemex and México, while allowing México to retaliate against Oro Negro and those connected to it. Collusion with the Ad-Hoc Group was a win-win for México and its pervasive pay-to-play system.

10. To force Oro Negro to capitulate, the Mexican government and Ad-Hoc Group initiated multiple criminal cases seeking to freeze Oro Negro's cash and imprison Oro Negro's management, forcing Oro Negro's key executives into exile in the United States. They did so, it appears, through improper conduct with Mexican prosecutors and judges who issued the arrest warrants and gave the green light for the Ad-Hoc Group to seize the Rigs based on illegitimate and flimsy evidence. And the Ad-Hoc Group resorted to movie-like sensational efforts to seize the Rigs, including by illegally hiring a squadron of helicopters, with the active assistance of the Mexican government, to forcibly board and seize the Rigs. The Mexican government offered protection and otherwise supported the efforts of the Ad-Hoc Group, which flagrantly violated numerous orders of the Mexican bankruptcy court prohibiting the cancellation of the Oro Negro Contracts and any efforts by the Ad-Hoc Group to seize the Rigs.

11. Two of the largest members of the Ad-Hoc Group are controlled by John Fredriksen ("Mr. Fredriksen"), a Norwegian shipping billionaire. Mr. Fredriksen owns and/or controls half of Seamex, the largest competitor of Oro Negro, which also owns five rigs and leased them to Pemex. The other owner of Seamex is Fintech Advisory, Inc. ("Fintech"), the investment firm of David Martínez ("Mr. Martínez"), a Mexican billionaire who, like Mr. Fredriksen, also competed directly against Claimants and Oro Negro in leasing offshore rigs to Pemex. Seamex, very likely for illegitimate reasons, has the industry's best contracts with Pemex in that they have superior prices,

longer duration and cannot be unilaterally terminated by Pemex, in contrast to the contracts of all of Seamex's competitors.

12. México's various actions breached NAFTA Articles 1105 and 1110. Specifically, México violated its obligation to provide Claimants with fair and equitable treatment; to provide full protection and security; and to not expropriate Claimants' investment except under certain conditions not met here.

13. Claimants have brought this NAFTA claim as the only avenue available to seek redress for México's actions leading to the destruction of their investment in Oro Negro. In accordance with well-settled principles of international law, Claimants seek full reparation for the losses resulting from México's violations of the NAFTA and international law, in the form of monetary compensation sufficient to wipe out the consequences of México's wrongful acts. As of October 1, 2019, Claimants claim at least USD 270 million as damages for losses suffered due to México's breaches of the NAFTA plus interest and fees and costs associated with this proceeding.

14. This Statement of Claim proceeds as follows: Part II: is the factual background of the case, describing the Oro Negro investment and the relevant actions of the Mexican government. Part III is the legal argument, in which Claimants demonstrate the Tribunal's jurisdiction over this dispute and describe how México's and Pemex's actions in Part II constitute violations of NAFTA Articles 1105 and 1110. Part IV is an explanation of the damages owed to Claimants as a result of México's actions, and Part V is the request for relief.

II. FACTS

A. Parties

1. Claimants[1]

15. Claimants, directly or indirectly (*i.e.*, through companies, trusts or special purpose vehicles), own approximately 43.2 percent of the shares of Integradora. Claimants, directly or indirectly, provided equity contributions to Integradora from 2012 to 2016 to become its shareholders. Information regarding the Claimants' investment in Integradora is summarized below:[2]

(a) Alicia Grace ("Ms. A. Grace"),[3] a U.S. citizen, brings this claim on her own behalf under NAFTA Article 1116;[4]

(b) Ampex Retirement Master Trust ("Ampex Trust"),[5] a trust organized under the laws of the state of Massachusetts, brings this claim on its own behalf under NAFTA Article 1116;[6]

(c) Apple Oaks Partners, LLC ("Apple Oaks"),[7] a limited liability company constituted under the laws of the state of California, brings this claim on its own behalf under NAFTA Article 1116;[8]

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[1] Exhibits **C-A.1** to **A.31** are powers of attorney of each Claimant to Quinn Emanuel.

[2] Exhibit **C-84** is a copy of the historic log of shareholders of Integradora, reflecting its shareholders and the amount of shares held by each shareholder since Integradora's establishment to date.

[3] Exhibit **C-B.1** is a copy of Ms. A. Grace's U.S. passport.

[4] Ms. A. Grace is a beneficiary of Field Nominee Trust ("Field Trust"), a Bermuda trust that is a direct shareholder of 434,676 shares of Integradora (1.38%). Fields Trust purchased its shares in Integradora from Axis Oil Field Services, S. de R.L. de C.V. ("Axis Services"), a Mexican entity further described below.

[5] Exhibit **C-B.2** is a redacted copy of Ampex Trust's trust agreement, reflecting the name of the trust, the governing law of the trust and the name of the trustee. The trustee's address is publicly available at http://www.statestreet.com/home.html.

[6] Ampex Trust owns 297,701 shares in Integradora (0.95%), which it purchased from Integradora and from Axis Services.

(d) Brentwood Associates Private Equity Profit Sharing Plan ("Brentwood"),[9] an investment vehicle organized under the laws of the United States, brings this claim on its own behalf under NAFTA Article 1116. Brentwood's sole beneficial owner is Frederick J. Warren (described *infra* at Paragraph 18(k));[10]

(e) Cambria Ventures, LLC ("Cambria"),[11] a limited liability company constituted under the laws of the state of Delaware, brings this claim on its own behalf under NAFTA Article 1116;[12]

(f) Carlos Williamson-Nasi ("Mr. Williamson"), a U.S. citizen, brings this claim on his own behalf under NAFTA Article 1116, and also on behalf of the following enterprises under NAFTA Article 1117:[13]

i. Axis Oil Field Services, S. de R.L. de C.V. ("Axis Services"),[14] a limited liability company constituted under the laws of México that is majority

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[7] Exhibit **C-B.3** is a copy of a certificate issued by the state of California reflecting Apple Oaks's name, address and place of constitution or organization.

[8] Apple Oaks owns 314,780 shares in Integradora (1%), which it purchased from Integradora and from Axis Services.

[9] Exhibit **C-B.4** is a copy of a statement reflecting Brentwood's existence and Frederick J. Warren's beneficial ownership of Brentwood.

[10] Brentwood owns 70,637 shares in Integradora (0.22%), which is purchased from Integradora.

[11] Exhibit **C-B.5** is a copy of a certificate issued by the state of Delaware reflecting Cambria's name, address and place of constitution or organization.

[12] Cambria owns 27,091 shares in Integradora (0.09%), which it purchased from Integradora and from Axis Services.

[13] Exhibit **C-B.6** is a copy of Mr. Williamson's U.S. passport.

[14] Exhibit **C-B.7** is a copy of a certificate issued by the Mexican government reflecting Axis Services's name and place of constitution or organization. Mr. Williamson and José Antonio Cañedo-White own and control Axis Services by, *inter alia*, owning 66.6% of its shares. Mr. Williamson owns 99.999% of Clue. Exhibit **C-85** is a certificate from the Attorney in Fact of Clue certifying that Mr. Williamson has been the 99.999% owner of Clue since August 15, 2002 to date. Clue owns 33.3% of Axis Services. Exhibit **C-86** is a certificate from Attorney in Fact of Axis Services certifying that Clue has been the 33.3% owner of Axis Services since November 14, 2011 to date.

owned and controlled by Mr. Williamson and José Antonio Cañedo-White ("Mr. Cañedo") (described *infra* at Paragraph 18(t)(1);[15]

ii. Axis Oil Field Holding, S. de R.L. de C.V. ("Axis Holding"),[16] a limited liability company constituted under the laws of México that is majority owned and controlled by Mr. Williamson and Mr. Cañedo;[17]

iii. Clue, S.A. de C.V. ("Clue"),[18] a corporation constituted under the laws of México that is wholly owned and controlled by Mr. Williamson;[19] and

iv Fideicomiso 305952 ("F. 305952"), a Mexican special purpose vehicle organized under the laws of México.[20] F. 305952 is majority owned and controlled by Mr. Williamson and Mr. Cañedo;[21]

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[15] Axis Services owns 1,565,462 shares of Integradora (4.98%), which it purchased from Sommerville Investments B.V. ("Sommerville"), a prior shareholder.

Additionally, Axis Services is an indirect shareholder of Integradora by owning 99% of Oro Negro Cooperatief U.A. ("ONC"), a Dutch company that directly owns shares in Integradora. Exhibit **C-87** is a copy of the Register of Members of ONC, reflecting Axis Services as 99% shareholder of ONC since May 2, 2016 to date. ONC owns 7,092,883 shares of Integradora (22.54%), which it purchased from Integradora.

[16] Exhibit **C-B.8** is a copy of a certificate issued by the Mexican government reflecting Axis Holding's name and place of constitution or organization. Mr. Williamson and José Antonio Cañedo-White own and control Axis Holding by, *inter alia*, owning 66.6% of its shares. Mr. Williamson owns Clue, which in turn owns 33.3% of Axis Holding. Exhibit **C-86** is a certificate from the Attorney in Fact of Axis Holding certifying that Clue has been the 33.3% owner of Axis Holding since November 14, 2011 to date.

[17] Axis Holding is an indirect shareholder of Integradora by owning 0.1% of ONC.

[18] Exhibit **C-B.9** is a copy of a certificate issued by the Mexican government reflecting Clue's name and place of constitution or organization. Exhibit **C-85** is a certificate from the Attorney in Fact of Clue certifying that Mr. Williamson has been the 99.9999% owner of Clue from August 15, 2002 to date.

[19] Clue is an indirect shareholder of Integradora by owning 33.3% of Axis Services, Axis Holding and F. 305952, respectively. Axis Services and Axis Holding are described above.

Exhibit **C-B.10** is a redacted copy of the F. 305952 Trust Agreement certifying that Clue has been the 33.3% beneficial owner of F. 305952 since December 14, 2011 to date. F. 305952 indirectly owns shares in Integradora by holding the beneficial interest of 3.2618% of Fideicomiso 169852 ("F. 169852"), a Mexican special purpose vehicle organized under the laws of México that directly owns shares of Integradora. Exhibit **C-88** is a redacted copy of the F. 169852 Trust Agreement certifying that F. 305952 has been the beneficial owner of 3.2618% of F. 169852 since December 14, 2011 to date.

F. 169852 owns 15,533,514 shares of Integradora (49.37%), which it purchased from Integradora.

(g) Carolyn Grace Baring ("Ms. C. Grace"),[22] a U.S. citizen, brings this claim on her own behalf under NAFTA Article 1116;[23]

(h) Diana Grace Beard ("Ms. D. Grace"),[24] a U.S. citizen, brings this claim on her own behalf under NAFTA Article 1116;[25]

(i) Floradale Partners, LLC ("Floradale"),[26]a limited liability company constituted under the laws of the state of Delaware, brings this claim on its own behalf under NAFTA Article 1116;[27]

(j) Frederick Grace ("Mr. F. Grace"),[28] a U.S. citizen, brings this claim on his own behalf under NAFTA Article 1116;[29]

(k) Frederick J. Warren ("Mr. Warren"),[30] a U.S. citizen, brings this claim on his own behalf under NAFTA Article 1116 as holder and sole beneficiary of his individual retirement account ("IRA"), which is discussed below;

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[20] Exhibit **C-B.10** is a redacted copy of F. 305952's Trust Agreement, reflecting the name of the vehicle, the governing law of the vehicle, the name and address of the vehicle's manager, and the vehicle's owners.

[21] As discussed above, F. 305952 indirectly owns shares in Integradora by holding the beneficial interest of 3.2618% of F. 169852.

[22] Exhibit **C-B.11** is a copy of Ms. C. Grace's U.S. passport.

[23] Ms. C. Grace is a beneficiary of Field Trust, which is described above.

[24] Exhibit **C-B.12** is a copy of Ms. D. Grace's U.S. passport.

[25] Ms. D. Grace is a beneficiary of Field Trust, which is described above.

[26] Exhibit **C-B.13** is a copy of a certificate issued by the state of California reflecting Floradale's name, address and place of constitution or organization.

[27] Floradale owns 72,119 shares in Integradora (0.23%), which it purchased from Integradora and from Axis Services.

[28] Exhibit **C-B.14** is a copy of Mr. F. Grace's U.S. passport.

[29] Mr. F. Grace is a beneficiary of Field Trust, which is described above.

[30] Exhibit **C-B.15** is a copy of Mr. Warren's U.S. passport.

(l) Frederick J. Warren IRA (the "Warren IRA"),[31] an investment vehicle organized under the laws of the United States, brings this claim on its own behalf under NAFTA Article 1116. The Warren IRA's sole beneficial owner is Mr. Warren;[32]

(m) Gary Olson ("Mr. Olson"),[33] a U.S. citizen, brings this claim on his own behalf under NAFTA Article 1116;[34]

(n) Genevieve T. Irwin ("Ms. Irwin"),[35] a U.S. citizen, brings this claim on her own behalf under NAFTA Article 1116 as sole beneficiary of the Genevieve T. Irwin 2002 Trust, which is discussed below;[36]

(o) Genevieve T. Irwin 2002 Trust (the "Irwin Trust"),[37] a trust organized under the laws of the state of Connecticut, brings this claim on its own behalf under NAFTA Article 1116;[38]

(p) Gerald L. Parsky ("Mr. Parsky"),[39] a U.S. citizen, brings this claim on his own behalf under NAFTA Article 1116 as holder and sole beneficiary of his IRA, which is described below;

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[31] Exhibit **C-B.16** is a copy of a statement reflecting the Warren IRA's existence and Mr. Warren's beneficial ownership of the Warren IRA.

[32] The Warren IRA owns 36,486 shares of Integradora (0.12%), which it purchased from Integradora.

Mr. Warren and the Warren IRA are bringing claims in respect of the same 0.12% equity interest in Integradora. For the avoidance of doubt, they do not seek double recovery.

[33] Exhibit **C-B.17** is a copy of Mr. Olson's U.S. passport.

[34] Mr. Olson owns 17,983 shares in Integradora (0.06%), which he purchased from Integradora and from Axis Services.

[35] Exhibit **C-B.18** is a copy of Ms. Irwin's U.S. passport.

[36] Ms. Irwin is the sole beneficiary of the Genevieve T. Irwin 2002 Trust, a Connecticut trust that is a direct shareholder of Integradora.

[37] Exhibit **C-B.19** is a copy of the Irwin Trust's trust agreement and some of its amendments, reflecting the name of the trust, the governing law of the trust and the name of the trustee. The trustee's address is publicly available at https://www.pbwt.com/michael-s-arlein/.

[38] The Irwin Trust owns 106,550 shares of Integradora (0.34%), which it purchased from Integradora. Ms. Irwin and the Irwin Trust are bringing claims in respect of the same 0.34% equity interest in Integradora. For the avoidance of doubt, they do not seek double recovery.

(r) Gerald L. Parsky IRA (the "Parsky IRA"),[40] an investment vehicle organized under the laws of the United States, brings this claim on its own behalf under NAFTA Article 1116;[41]

(s) John N. Irwin III ("Mr. Irwin"),[42] a U.S. citizen, brings this claim on his own behalf under NAFTA Article 1116;[43]

(t) Mr. Cañedo, a U.S. permanent resident, brings this claim on his own behalf under NAFTA Article 1116, and also on behalf of the following enterprises under NAFTA Article 1117:[44]

i. Axis Services,[45] a limited liability company constituted under the laws of México that is majority owned and controlled by Mr. Williamson (described *supra* at Paragraph 18(f)) and Mr. Cañedo;[46]

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[39] Exhibit **C-B.20** is a copy of Mr. Parsky's U.S. passport.

[40] Exhibit **C-B.21** is a copy of a statement reflecting the Parsky IRA's existence and Mr. Parsky's beneficial ownership of the Parsky IRA.

[41] The Parsky IRA owns 90,150 shares in Integradora (0.29%), which he purchased from Integradora and from Axis Services. Mr. Parsky and the Parsky IRA are bringing claims in respect of the same 0.29% equity interest in Integradora. For the avoidance of doubt, they do not seek double recovery.

[42] Exhibit **C-B.22** is a copy of Mr. Irwin's U.S. passport.

[43] Mr. Irwin owns 202,888 shares in Integradora (0.64%), which he purchased from Integradora and from Axis Services.

[44] Exhibit **C-B.23** is a copy of Mr. Cañedo's U.S. permanent resident permit.

[45] Exhibit **C-B.7** is a copy of a certificate issued by the Mexican government reflecting Axis Services's name and place of constitution or organization.

[46] Mr. Cañedo owns 33.3% of Axis Services. Exhibit **C-86** is a certificate from the Attorney in Fact of Axis Services certifying that Mr. Cañedo has been the 33.3% owner of Axis Services since November 14, 2011 to date. Axis Services owns 1,565,462 shares of Integradora (4.98%), which it purchased from Sommerville, a prior shareholder.

Additionally, Axis Services is an indirect shareholder of Integradora by owning 99% of ONC, a Dutch company that directly owns shares in Integradora. Exhibit **C-87** is a copy of the Register of Members of ONC, reflecting Axis Services as 99% shareholder of ONC since May 2, 2016 to date. ONC owns 7,092,883 shares of Integradora (22.54%), which it purchased from Integradora.

ii. Axis Holding,[47] a limited liability company constituted under the laws of México that is majority owned and controlled by Axis Holding is majority owned and controlled by Messrs. Williamson and Cañedo;[48] and

iii. F. 305952, a Mexican special purpose vehicle organized under the laws of México.[49] F. 305952 is majority owned and controlled by Messrs. Williamson and Cañedo;[50]

(u) Nicholas Grace ("Mr. N. Grace"),[51] a U.S. citizen, with his address at 241 Bradley Place, Palm Beach, Florida 33480, USA. Mr. N. Grace brings this claim on his own behalf under NAFTA Article 1116;[52]

(v) Oliver R. Grace III ("Mr. O. Grace"),[53] a U.S. citizen, with his address at 241 Bradley Place, Palm Beach, Florida 33480, USA. Mr. O. Grace brings this claim on his own behalf under NAFTA Article 1116;[54]

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[47] Exhibit **C-B.8** is a copy of a certificate issued by the Mexican government reflecting Axis Holding's name and place of constitution or organization.

[48] Messrs. Williamson and Cañedo own and control Axis Holding by, *inter alia*, owning 66.6% of its shares. Exhibit **C-86** is a certificate from the Attorney in Fact of Axis Holding certifying that Mr. Cañedo has been the 33.3% owner of Axis Holding since November 14, 2011 to date. Axis Holding is an indirect shareholder of Integradora by owning 0.1% of ONC. Exhibit **C-87** is a copy of the Register of Members of ONC, reflecting Axis Holding as 0.1% shareholder of ONC since May 2, 2016 to date.

[49] Exhibit **C-B.10** is a redacted copy of F. 305952's Trust Agreement, reflecting the name of the vehicle, the governing law of the vehicle, the name and address of the vehicle's manager, and the vehicle's owners.

[50] Exhibit **C-B.10** is a redacted copy of the F. 305952 Trust Agreement certifying that Mr. Cañedo has been the 33.3% beneficial owner of F. 305952 since December 14, 2011 to date. F. 305952 indirectly owns shares in Integradora by holding the beneficial interest of 3.2618% of F. 169852, a Mexican special purpose vehicle organized under the laws of México that directly owns shares of Integradora. Exhibit **C-88** is a redacted copy of the F. 169852 Trust Agreement certifying that F. 305952 has been the beneficial owner of 3.2618% of F. 169852 since December 14, 2011 to date. As described above, F. 169852 owns 15,533,514 shares of Integradora (49.37%), which it purchased from Integradora.

[51] Exhibit **C-B.24** is a copy of Mr. N. Grace's U.S. passport.

[52] Mr. N. Grace is a beneficiary of Field Trust, which is described above.

[53] Exhibit **C-B.25** is a copy of Mr. O. Grace's U.S. passport.

[54] Mr. O. Grace is a beneficiary of Field Trust, which is described above.

(w) ON5 Investments, LLC ("ON5"),[55] a limited liability company constituted under the laws of the state of Florida, brings this claim on its own behalf under NAFTA Article 1116;[56]

(x) Rainbow Fund, L.P. ("Rainbow"),[57] a limited partnership constituted under the laws of the state of California, brings this claim on its own behalf under NAFTA Article 1116;[58]

(y) Robert M. Witt ("Mr. Witt"),[59] a U.S. citizen, brings this claim on his own behalf under NAFTA Article 1116 as holder and sole beneficiary of his IRA, which is discussed below;

(z) Robert M. Witt IRA (the "Witt IRA"),[60] an investment vehicle organized under the laws of the United States, brings this claim on its own behalf under NAFTA Article 1116. The Witt IRA's sole beneficial owner is Mr. Witt;[61]

(aa) Vista Pros, LLC ("Vista Pros"),[62] a limited liability company constituted under the laws of the state of Florida, brings this claim on its own behalf under NAFTA Article 1116; and

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[55] Exhibit **C-B.26** is a copy of a certificate issued by the state of Florida reflecting ON5's name, address and place of constitution or organization.

[56] ON5 owns 1,459,183 shares in Integradora (4.64%), which it purchased from Axis Services and from Progeny Plus ("Progeny"), LLC, a prior shareholder.

[57] Exhibit **C-B.27** is a copy of a certificate issued by the state of California reflecting Rainbow's name, address and place of constitution or organization.

[58] Rainbow owns 430,879 shares in Integradora (1.37%), which it purchased from Integradora and from Axis Services.

[59] Exhibit **C-B.28** is a copy of Mr. Witt's U.S. passport.

[60] Exhibit **C-B.29** is a copy of a statement reflecting the Witt IRA's existence and Mr. Witt's beneficial ownership of the Witt IRA.

[61] The Witt IRA owns 359,837 shares of Integradora (1.14%), which it purchased from Integradora and from Axis. Mr. Witt and the Witt IRA are bringing claims in respect of the same 1.14% equity interest in Integradora. For the avoidance of doubt, they do not seek double recovery.

(bb) Virginia Grace ("Ms. V. Grace"),[63] a U.S. citizen, Ms. V. Grace brings this claim on her own behalf under NAFTA Article 1116.[64]

2. Respondent

i. Overview

16. The Respondent is México. Claimants' claims arise principally out of the conduct of two State organs: the Ministry of Energy (*Secretaría de Energía*), the Mexican government body responsible for regulating the energy sector in México; and Petróleos Mexicanos ("Pemex"), México's state-owned oil and gas company and an organ of México with delegated governmental authority. As elaborated in Section III.B., under both the NAFTA[65] and general principles of international law,[66] the actions of Pemex are attributable to México.

17. Pemex is México's State organ responsible for exploring for and producing oil and gas.[67] Under Mexican law, Pemex is the "exclusive property of the federal Government"[68] and

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[62] Exhibit **C-B.30** is a copy of a certificate issued by the state of Florida reflecting Vista Pros's name, address and place of constitution or organization.

[63] Exhibit **C-B.31** is a copy of Ms. V. Grace's U.S. passport.

[64] Ms. V. Grace is a beneficiary of Field Trust, which is described above.

[65] *See* NAFTA, Art. 1503(2) ("Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges."), **CL-82**.

[66] *See* ILC Articles, Art. 4, Yearbook of the Int'l L. Comm., 2001, Vol. II (Part Two) (Dec. 12, 2001), http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf, **CL-81**.

[67] *See, e.g.*, Ley de Petróleos Méxicanos [LPM] [Mexican Petroleum Law], Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 11-08-2014, Art. 2. ("*Petróleos Mexicanos es una empresa productiva del Estado, de propiedad exclusiva del Gobierno Federal, con personalidad jurídica y patrimonio propios y gozará de autonomía técnica, operativa y de gestión, conforme a lo dispuesto en la presente Ley*. *Petróleos Mexicanos tendrá su domicilio en el Distrito Federal, sin perjuicio de que para el desarrollo de sus actividades pueda establecer domicilios convencionales, tanto en territorio nacional como en el extranjero*.") ["Petróleos Mexicanos is a productive state enterprise, belonging exclusively to the Federal Government, with a legal personality and its own estate, and is endowed with technical, operational, and managerial autonomy, in accordance with what is set forth in this Law. Petróleos Mexicanos will have its domicile in the Federal District [México City], without prejudice to its ability to establish other domiciles, in México or abroad, in order to carry out its activities."], **CL-83**.

México exerts absolute control over Pemex and all of its actions.[69] Pemex's highest management body, its Board of Directors, is comprised of ten members—all appointed by México.[70] The Chairman of the Board of Directors is México's Energy Minister (*Secretario de Energía*), the head of México's Ministry of Energy. The remaining directors include: México's Treasury Secretary (*Secretarío de Hacienda y Crédito Público*); three Mexican government officials appointed by the President of México; and five directors nominated by the President of México and approved by the Mexican Federal Senate.[71]

ii. Pemex Has Repeatedly Admitted Under Oath in U.S. Courts that It Is Part of and Is Controlled by México

18. Pemex is often sued in U.S. courts. Without exception, Pemex has repeatedly argued that it is immune to the jurisdiction of U.S. courts under the Foreign Sovereign Immunities Act (the "FSIA"), a statute that creates immunity from U.S. jurisdiction for entities that are part of a foreign government when the case relates to government functions.[72]

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[68] *See id.*

[69] Pemex itself represents to its creditors (primarily, bondholders) that it is "controlled by the Mexican Government." *See, e.g.*, Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2017), at p. 14, http://www.pemex.com/ri/reguladores/ReportesAnuales_SEC/20F%202017.pdf ("Pemex 2017 Annual Report"), Exhibit **C-89-G**.

[70] *See* LPM, Art. 13. ("*El Consejo de Administración, órgano supremo de administración de Petróleos Mexicanos, será responsable de definir las políticas, lineamientos y visión estratégica de Petróleos Mexicanos, sus empresas productivas subsidiarias y sus empresas filiales.*") ["The Board of Directors, the supreme administrative body of Petróleos Mexicanos, shall be responsible for defining the policies, guidelines and strategic vision of Petróleos Mexicanos, its productive subsidiary companies and its affiliated companies."], **CL-83**.

[71] *See, e.g.*, LPM, Art. 15 ("*El Consejo de Administración estará integrado por diez consejeros, conforme a lo siguiente: I. El titular de la Secretaría de Energía, quien lo presidirá y tendrá voto de calidad y el titular de la Secretaría de Hacienda y Crédito Público; II. Tres consejeros del Gobierno Federal designados por el Ejecutivo Federal, y III. Cinco consejeros independientes, designados por el Ejecutivo Federal y ratificados por el Senado de la República, quienes ejercerán sus funciones de tiempo parcial y no tendrán el carácter de servidores públicos.*") ["The Board of Directors will be comprised of ten directors, in accordance with the following: I. The head of the Ministry of Energy, who will preside over the Board and have the casting vote, and the head of the Ministry of the Treasury; II. Three directors from the Federal Government appointed by the Federal Executive; and III. Five independent directors appointed by the Federal Executive and ratified by the Senate of the Republic, who will perform their functions on a part-time basis and will not have the character of public servants."].

[72] *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, **CL-83**.

19. To claim immunity under the FSIA in prior cases, Pemex has represented under oath to U.S. courts that it is in effect the Mexican State and thus cannot be sued in U.S. courts:

(a) Pemex's function, through *Pemex Exploración y Producción*, ("PEP") is to "explore and develop México's hydrocarbons for the benefit of its people in conformity with Article 27 of the Mexican Constitution, which states that all hydrocarbons in México are owned by the Mexican People . . . ."[73]

(b) Pemex "was created as a separate legal entity in 1938 by Special Decree of the Mexican Congress in accordance with Article 27 of the Mexican Constitution, which vested all ownership of hydrocarbons in the Mexican People and limited their development to the Mexican federal government. The latter provision was amended in 2014 to allow development by private firms with the consent of the Mexican federal government. All initial ownership of hydrocarbons, however, remains with the Mexican People as represented by the federal government . . . As of September 17, 2014, the date this lawsuit was filed, the federal government of México controlled Petróleos Mexicanos through Petróleos Mexicanos' Board of Directors. According to the Mexican Constitution and federal Hydrocarbons Law, exploration and extraction of the nation's hydrocarbon resources remain strategic activities of national importance to the Mexican government."[74]

(c) "Pursuant to Article 25 of the Constitution of the United Mexican States and the Petróleos Mexicanos Act, Petróleos Mexicanos (a government-owned productive

[73] *See* Declaration of Juan Carlos Gonzales Magallanes, *Castillo, et al.* v. *P.M.I. Holdings, N.S., Inc., et al.*, No. 4:14-cv-03435, ECF 160-2, at ¶ 4 (S.D. Tex. Feb. 16, 2016), Exhibit **C-90**.

[74] *See* Declaration of Miguel Angel Ortiz Gómez, *Castillo, et al.* v. *P.M.I. Holdings, N.S., Inc., et al.*, No. 4:14-cv-03435, ECF 160-1, at ¶ 3 (S.D. Tex. Feb. 16, 2016), Exhibit **C-91**.

company) and its Government-Owned Subsidiary Productive Companies (among them Pemex Exploración y Producción and Pemex Transformación Industrial), are under the total control and exclusive ownership of the Mexican government. []The chairman of the Board of Directors of Petróleos Mexicanos is the Secretary of Energy of the Mexican government. [] The budget of Petróleos Mexicanos and of its Government-Owned Subsidiary Productive Companies is drafted by the Federal Executive Branch and authorized by the Congress of the Unión. []The employees of government-owned productive companies are public servants subject to the regime of responsibilities set by the Mexican Congress." (emphasis in the original) (internal numbering removed).[75]

20. Consistent with its prior sworn statements to U.S. courts in the Oro Negro matter, Pemex also attempted to escape, and prevailed in escaping the jurisdiction of U.S. courts by arguing that it is controlled by the Mexican government and that the Oro Negro matter related to Pemex's sovereign functions. Specifically, as further described below, in 2018 and 2019, Oro Negro sought assistance from a U.S. Bankruptcy Court to obtain discovery (documents and testimony) for investigating claims against the Ad-Hoc Group arising from their collusion with Pemex to terminate the Oro Negro Contracts. Oro Negro requested discovery from Pemex and Pemex successfully opposed Oro Negro's request by arguing that it was shielded from providing U.S. discovery under the FSIA because it is part of the Mexican government and its actions regarding Oro Negro were official government actions.[76]

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[75] *See* Declaration of Julio Mora Salas, *Castillo, et al.* v. *P.M.I. Holdings, N.S., Inc., et al.*, No. 4:14-cv-03435, ECF 174-1, at ¶¶ 2-5 (S.D. Tex. Apr. 25, 2016), Exhibit **C-92**.

[76] Attached as Exhibit **C-4** is Pemex's discovery opposition.

21. Pemex has thus conceded in connection with the Oro Negro matter that it is an organ of the Mexican State and that its conduct regarding Oro Negro is a governmental function and is estopped from arguing otherwise in this proceeding.

iii. México Controlled and Directed Pemex's Actions Against Oro Negro

22. Furthermore, México controlled and directed Pemex's actions against Oro Negro. As discussed in more detail in Section III.B, all of Pemex's actions, including its commercial activities, such as the leasing of equipment, are under the control, at the direction and for the benefit of México. As mentioned above, Pemex's Board of Directors is its highest management body and, as such, exercises ultimate decision-making authority in Pemex, including in connection with the leasing of equipment such as Jack-Up Rigs.

23. Indeed, Pemex entered into the Oro Negro Contracts, amended them and purported to terminate them, pursuant to express orders from Pemex's Board of Directors, which, as mentioned, are high-ranking Mexican government officials that are appointed and controlled by México's President. Each of those orders is documented in *acuerdos* (written resolutions by Pemex's Board of Directors), which are themselves cited in the Oro Negro Contracts, their amendments, and termination letters, as their basis. The Secretary of Energy of México, who presides over Pemex's Board of Directors, participated in all the Board meetings and signed all the *acuerdos*, resulting in the Oro Negro Contracts, their amendments and terminations.[77]

[77] Attached as Exhibit **C-93** is the March 1, 2017 authorization of Pemex's Board of Directors that resulted in the termination of the Oro Negro Contracts. Each of Pemex's letters terminating the Oro Negro Contracts (Exhibits **C-M.1**–**C-M.5**) cite to that authorization.

B. Oro Negro's Background And Business

1. History and Establishment

i. Overview of Oro Negro

24. Integradora is a Mexican holding company established in 2012 that is owned by a combination of two Mexican pension funds and European, Mexican and U.S. individual and institutional investors. Claimants directly or indirectly (*i.e.*, through companies, trusts or special purpose vehicles) own 43.2% of Integradora.

25. Each of the Claimants invested in México and made qualifying investments under Chapter 11 of NAFTA, by acquiring equity in Oro Negro between 2012 and 2016. Claimants were shareholders when México adopted the measures that violated Chapter 11 of NAFTA and still hold the same shares today.

26. The business of Integradora and its subsidiaries is to own and lease five offshore drilling platforms, commonly known as "jack-up rigs." Specifically, through five Singaporean special purpose vehicles (the "Singapore Rig Owners"), Integradora owns five state-of-the-art jack-up rigs (the "Rigs")[78] named *Primus*, *Laurus*, *Fortius*, *Decus* and *Impetus*. Integradora also owns 100% of Perforadora Oro Negro, S. de R.L. de C.V. ("Perforadora"), a Mexican oil services company.[79] The Singapore Rig Owners lease the Rigs to Perforadora, which, in turn, leases them to Pemex under five separate contracts (the "Oro Negro Contracts").

[78] Exhibit **C-D** is a chart depicting the ownership structure of Integradora, Perforadora and the Jack-Up Rigs.

[79] Specifically, Integradora owns 99.99% of Perforadora directly and 0.01% through Operadora Oro Negro, S. de R.L. de C.V. ("Operadora"), a wholly owned direct Mexican subsidiary of Integradora.

2. Claimants Invested in Oro Negro Relying on México's Promises of Transparency and Fairness to Foreign Investors

27. Oro Negro was established against the backdrop of a large-scale reform of México's oil and gas industry and México's promises of transparency and fairness to foreign investors as part of its effort to attract foreign investment to the Mexican oil and gas industry.[80]

28. In addition, since 2011, Pemex has claimed in its annual reports to investors and regulators that it maintains strict policies and controls to prevent and combat corruption.[81] And, as discussed in more detail in Section III.D., México is also a party to numerous international agreements in which it represents that it has and will continue to implement effective anti-bribery policies and controls.[82]

29. Accordingly, based on representations México made at the time of their investment, investors could reasonably believe that México would respect the rule of law, treat foreign investors fairly and would not use its sovereign power to extract bribes. For Oro Negro, this meant that

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[80] *See, generally, Reforma Energética – Resumen Ejecutivo* [Energy Reform – Executive Summary], Gobierno de la República [Government of the Republic], https://www.gob.mx/cms/uploads/attachment/file/164370/Resumen_de_la_explicacion_de_la_Reforma_Energetica11_1_.pdf, Exhibit **C-94**; *Palabras del Presidente Enrique Peña Nieto, Durante la Ceremonia Conmemorativa al 76º Aniversario de la Expropiación Petrolera* [Address of President Enrique Peña Nieto During the Commemorative Ceremony for the 76th Anniversary of the Mexican Oil Expropriation], Presidencia de la República [Presidency of the Republic] (Mar. 24, 2014), https://www.gob.mx/presidencia/prensa/palabras-del-presidente-enrique-pena-nieto-durante-la-ceremonia-conmemorativa-al-76-aniversario-de-la-expropiacion-petrolera, Exhibit **C-95**; *La Ley de la Inversión Extranjera en México Promueve Facilidades y Garantías que Ofrece Nuestro País a los Inversionistas* [The Mexican Foreign Investment Act Promotes Convenience and Guarantees that Our Country Offers to Investors], Secretaría de Economía [Ministry of Economy] (Nov. 11, 2011), http://www.siam.economia.gob.mx/work/models/siam/posicionamiento/articulos_posicionamiento/La%20Ley%20de%20inversi%C3%B3n%20extranjera%20en%20M%C3%A9xico%20promueve%20facilidades%20y%20garant%C3%ADas%20que%20ofrece%20nuestro%20pa%C3%ADs%20a%20los%20inversionistas.pdf, Exhibit **C-96**.

[81] *See, e.g.*, Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2011), at 169, Exhibit **C-89A**; Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2012), at 162, Exhibit **C-89B**; Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2013), at 186, Exhibit **C-89C**; Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2014), at 19, 90, Exhibit **C-89D**; Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2015), at 20, 100, Exhibit **C-89E**; Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2016), at 101, Exhibit **C-89F**; Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2017), at 103, Exhibit **C-89G**.

[82] *See, e.g.*, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, **CL-192**, Dec. 17, 1997, S. Treaty Doc. No. 105-43, **CL-193**; Inter-American Convention Against Corruption, Organization of American States (Mar. 29, 1996), **CL-222**.

México would not impose commercially unreasonable terms on Oro Negro for refusing to pay bribes, and would not discriminate against Claimants' investments in Oro Negro. Claimants, in reality, were entitled to have these very expectations even if México had not made these promises, but the promises made by México aided Claimants in their comfort to embark on their substantial investments in the country.

30. Further, México, through Pemex, also made specific representations to Claimants regarding how it would supposedly value them and treat them fairly. A leading member of Claimants is Mr. Warren. Mr. Warren became aware of the Oro Negro investment opportunity through Gonzalo Gil-White ("Mr. Gil"), the CEO of Integradora since its establishment.[83] Mr. Warren then introduced the Oro Negro opportunity to several of his close friends and relatives, many of whom decided to invest.[84]

31. Critical to Mr. Warren's decision to invest in Oro Negro and to invite his friends and relatives to invest, were representations made to him by Pemex's former CEO prior to the investment.[85]

32. Specifically, at a dinner in late 2011, Mr. Warren met Juan José Suárez-Coppel ("Mr. Suárez"), who was the CEO of Pemex at that time.[86] The dinner was organized by Oro Negro for its potential investors to meet Pemex's CEO and other leaders of the Mexican oil industry.[87] At the time, the potential investors included Ares Management, L.P., one of the largest asset

[83] Witness Statement of Frederick J. Warren ("Warren Statement"), **CWS-3**, ¶ 6.

[84] Warren Statement, **CWS-3**, ¶ 6.

[85] Warren Statement, **CWS-3**, ¶ 7.

[86] Warren Statement, **CWS-3**, ¶ 7-8.

[87] Warren Statement, **CWS-3**, ¶ 8.

management firms in the world, and Temasek Holdings Private Limited, the Singaporean sovereign wealth fund.[88]

33. During the dinner, Mr. Suárez represented to Mr. Warren that Pemex was committed to being a productive and efficient entity and that suppliers such as Oro Negro would be key for Pemex's success.[89] Mr. Suárez stated that Pemex viewed Oro Negro as an example that other Pemex suppliers should follow: a company with advanced technical expertise, prepared to acquire premium assets, subject to high corporate governance standards, and with international capital from reputable investors.[90] Without this type of supplier, Pemex would be unable to be a productive and efficient entity.[91] Importantly, Mr. Suárez stated that international investors such as Mr. Warren should feel confident about investing in companies doing business in México with Pemex and that the transactions with suppliers would be professional and lawful at all times.[92]

34. Mr. Suárez, México and Mr. Warren understood that the point of the meeting was for the foreign investors to have access to the top management of Pemex so that the investors could hear from them directly and receive assurances that they supported the investments that the investors would be making and that México would treat foreign investors fairly and commit to backing their investments.[93] Mr. Suárez explained to Mr. Warren how Oro Negro would fit into Pemex's plans, in order to incentivize and convince Mr. Warren to invest in Oro Negro.[94]

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88 Warren Statement, **CWS-3**, ¶ 9.

89 Warren Statement, **CWS-3**, ¶ 10.

90 Warren Statement, **CWS-3**, ¶ 11.

91 Warren Statement, **CWS-3**, ¶ 12.

92 Warren Statement, **CWS-3**, ¶ 12.

93 Warren Statement, **CWS-3**, ¶ 14.

94 Warren Statement, **CWS-3**, ¶ 14.

35. Mr. Warren and Mr. Suárez also discussed the possibility of Pemex converting into a public company, which would require Pemex to implement and adhere to anticorruption compliance laws, such as the Foreign Corrupt Practices Act ("FCPA").[95] Mr. Suárez told Mr. Warren that this was definitely a possibility in the future, and that México had passed laws to encourage the flow of capital into its energy sector, predominantly from the U.S.[96] Mr. Suárez's statements, and his highly sophisticated financial training and his previous experience as the former CFO of Pemex, suggested that México was committed to complying with U.S. laws for foreign investors, including U.S. anticorruption laws, because he would have known that compliance with anticorruption policies would be an essential requirement of such investments.[97]

36. Mr. Warren would not have invested in Oro Negro, and would not have invited his friends and relatives, some of the other Claimants in this case, to invest but for Mr. Suárez's representations, which were instrumental in his decision to invest and to invite others to invest.[98]

C. Oro Negro's Ownership and Operations

1. Overview

37. As mentioned above, Oro Negro's business was to own and lease five Rigs to Pemex. As described in further detail below, Oro Negro's ownership and operations, distilled to their core, involve the following entities and activities:

(a) Integradora, the ultimate parent company;

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95 Warren Statement, **CWS-3**, ¶ 13.

96 Warren Statement, **CWS-3**, ¶ 13.

97 Warren Statement, **CWS-3**, ¶ 13.

98 Warren Statement, **CWS-3**, ¶ 15.

(b) Oro Negro Drilling Limited ("Oro Negro Drilling"), the Singaporean subsidiary of Integradora that issued the Bonds, and is the parent of the Singapore Rig Owners that own the Rigs;

(c) Perforadora, the Mexican subsidiary of Integradora responsible for operating the Rigs;

(d) the Bareboat Charters between the Singapore Rig Owners and Perforadora, the subsidiary of Integradora that operated the Rigs;

(e) the Oro Negro Contracts between Pemex and Perforadora, pursuant to which Perforadora operated the Rigs for Pemex's benefit; and

(f) a Mexican trust (in Spanish, *fideicomiso*) into which Pemex paid the revenue under the Oro Negro Contracts.

2. Integradora

38. The ultimate parent company of Oro Negro is Integradora, the Mexican holding company that owns Oro Negro Drilling, the Singapore Rig Owners and Perforadora, as well as several other subsidiaries.

39. Integradora is owned by a combination of two Mexican pension funds (known in México as *afores*) and investors based in the United States, México and Europe. Currently, two Mexican pension funds own approximately 47% of Integradora; Claimants, a group of U.S.-based individual and institutional investors, own approximately 43%; and a group of Mexican individuals and European individual and institutional investors own approximately 10%.[99]

[99] Exhibit **C-84** is the complete shareholders log (*libro de registro de acciones*) for Integradora.

40. Between 2012 and 2016, Integradora's shareholders collectively made approximately USD 590 million in equity investments.[100]

3. Oro Negro Drilling, the Singapore Rig Owners and the Five Contracted Rigs

41. Integradora acquired the five Rigs between 2012 and 2015.[101] The Rigs are identified by the names *Primus*, *Laurus*, *Decus*, *Fortius* and *Impetus*. The Rigs, which drill for oil and gas in shallow offshore waters, are superior to rigs of Oro Negro's competitors in México, because, among other reasons, they are more stable, can house larger crews, have larger and more efficient drills and have longer legs (thus permitting them to drill in deeper water).[102]

42. Integradora owns the aforementioned five Rigs through the Singapore Rig Owners, five Singaporean special purpose corporate entities.[103] Specifically, Integradora owns 100% of the equity of Oro Negro Drilling, a Singaporean entity which in turn owns 100% of the equity in each Singapore Rig Owner. Each Singapore Rig Owner owns one Rig.[104]

43. Even though each Singapore Rig Owner owns a Rig, none of the Singapore Rig Owners operates or has the capacity to operate a Rig.[105] Perforadora is the Oro Negro entity responsible for operating each Rig and with the capacity to do it.[106]

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[100] *See* Complete shareholders log (*libro de registro de acciones*) for Integradora, **C-84**; Witness Statement of Gonzalo Gil-White ("Gil Statement"), **CWS-1**, ¶ 10.

[101] Gil Statement, **CWS-1**, ¶ 15.

[102] Gil Statement, **CWS-1**, ¶ 15.

[103] The Singapore Rig Owners are each named for the corresponding Rig: Oro Negro Primus, Pte. Ltd.; Oro Negro Laurus, Pte. Ltd.; Oro Negro Fortius, Pte. Ltd.; Oro Negro Decus, Pte. Ltd.; and Oro Negro Impetus, Pte. Ltd.

[104] Gil Statement, **CWS-1**, ¶ 16.

[105] Gil Statement, **CWS-1**, ¶ 17.

[106] Gil Statement, **CWS-1**, ¶ 17.

4. Perforadora

44. Perforadora is the Mexican subsidiary of Integradora responsible for operating the Rigs. Perforadora leases the Rigs from the Singapore Rig Owners through contracts known as bareboat charter contracts (the "Bareboat Charters"). Perforadora, in turn, leases the Rigs to Pemex.

5. Employees

45. In September 2017, when Perforadora filed for bankruptcy protection in México, Integradora and its subsidiaries employed approximately 400 employees, including approximately 40 U.S. nationals.[107] Between March 2018 and June 2019, as a result of the facts described in this Statement of Claim, which resulted in the demise of Oro Negro's business and loss of possession of the Rigs, Integradora and its subsidiaries were forced to terminate approximately 390 employees, almost their entire workforce.[108] Since Integradora and Perforadora were declared in liquidation proceedings, Integradora and its subsidiaries have further reduced their workforce and now employ only about ten people.[109]

D. Oro Negro's Bonds

1. Overview

46. In 2014, to finance the acquisition of the Rigs, Integradora raised capital from its shareholders and issued bonds through its subsidiaries.[110]

47. Specifically, two Integradora subsidiaries, Oro Negro Drilling and Oro Negro Impetus issued two series of bonds with an aggregate face value of USD 900 million.[111] All bonds were later consolidated into a single bond debt issued by Oro Negro Drilling (the "Bonds").[112]

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[107] Gil Statement, **CWS-1**, ¶ 19.

[108] Gil Statement, **CWS-1**, ¶ 20.

[109] Gil Statement, **CWS-1**, ¶ 21.

[110] Gil Statement, **CWS-1**, ¶ 22.

48. The Bonds have a 7.5% annual interest rate and matured in January 2019.[113] The Bonds were not repaid in January 2019 due to the unlawful conduct of México and the Ad-Hoc Group, which this Statement of Claim describes in detail.[114]

49. The Bonds are governed by a bond agreement between Oro Negro Drilling and Nordic Trustee AS ("Nordic Trustee"), a Norwegian financial services firm (as amended and restated, the "Bond Agreement").[115] Nordic Trustee is the trustee under the Bond Agreement and is responsible for acting on behalf of the Bondholders to collect on the Bonds. The Bond Agreement is governed by Norwegian law.[116]

2. Security Rights

50. The Bonds are primarily secured by:

(a) a share charge (equivalent to a pledge of stock) granted by Integradora to Nordic Trustee over Integradora's shares in Oro Negro Drilling, which includes Integradora's authorization to Nordic Trustee to replace, if certain conditions are met, Oro Negro Drilling's directors (the "Oro Negro Drilling Share Charge")[117];

(b) share charges granted by Oro Negro Drilling to Nordic Trustee over Oro Negro Drilling's shares in the Singapore Rig Owners, which include Oro Negro Drilling's

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111 Gil Statement, **CWS-1**, ¶ 23.

112 Gil Statement, **CWS-1**, ¶ 23.

113 Exhibit **C-97** is the Bond Agreement. *See* Bond Agreement, **C-97** at 13, 33.

114 *See infra* Sections II.H-M.

115 *See* Bond Agreement, **C-97** at 1.

116 *See* Bond Agreement, **C-97** at 83.

117 Bond Agreement, **C-97** at 7, 13.

authorization to Nordic Trustee to replace, if certain conditions are met, each of the Singapore Rig Owners' directors (the "Singapore Rig Owner Share Charges"); and[118]

(c) mortgages on the Rigs.[119]

51. The Oro Negro Drilling Share Charge and the Singapore Rig Owner Share Charges are governed by Singaporean law.[120] The mortgages are governed by Panamanian law.[121]

3. The Bond Agreement's Events of Default

52. Under the Bond Agreement, events of default include, *inter alia*, (a) Oro Negro Drilling's failure to pay interest or the principal upon the Bonds' maturity; and (b) Integradora or any of its subsidiaries, including Perforadora, initiating restructuring, insolvency or bankruptcy proceedings. In such circumstances, Nordic Trustee may declare an event of default, exercise the Bondholders' security rights and demand immediate payment of the entire principal and accrued interest.

53. Mexican law provides that terminating a contract or taking any actions to worsen a debtor's condition, such as declaring an event of default due to the commencement of insolvency proceedings, is unenforceable as a violation of Mexican public policy because it impairs the debtor's ability to successfully reorganize.[122]

4. The Ad-Hoc Group's Control of Nordic Trustee and the Bondholders

54. Nordic Trustee is subject to the Bondholders' control and direction, *i.e.*, it does not act independently. Rather, it acts solely at the direction of and pursuant to instructions by the

[118] Bond Agreement, **C-97** at 22.

[119] Bond Agreement, **C-97** at 14, 23.

[120] Exhibits **C-98 – C-103** are the Oro Negro Drilling Share Charge and Singapore Rig Owner Share Charges.

[121] Exhibits **C-104 – C-108** are the Mortgages (as amended, where applicable).

[122] Expert Report of Alfonso Lopez Melih ("Lopez Expert Report"), **CER-1**, ¶¶ 22-23, 33. Even though the Bond Agreement states that it is governed by Norwegian law, Nordic Trustee's right to declare an event of default under the Bond Agreement is subject to Mexican law. Lopez Expert Report, **CER-1**, ¶ 32.

Bondholders. The Bondholders make decisions by voting in meetings or issuing written resolutions. In either case, decisions are binding on all Bondholders upon the approval of 50% or more of the Bondholders.[123] As such, the Ad-Hoc Group, which purports to own over 50% of the Bonds, has controlled every single action and decision of the Bondholders since at least May 2017.

5. Bond Amendments

55. In 2015 and 2016, as a result of amendments Pemex induced Oro Negro to accept (described *infra* ¶¶ 82-88), Oro Negro Drilling and Nordic Trustee amended the Bond Agreement twice (the "Bond Agreement Amendments").[124]

56. In connection with the Bond Agreement Amendments, the Bondholders conducted detailed and lengthy audits of Integradora and its subsidiaries' finances and operations.[125] The Bondholders were completely satisfied with Integradora and its subsidiaries' finances and operations and made only minor recommendations, which Integradora and its subsidiaries accepted and implemented.[126]

E. The Bareboat Charters

1. Overview

57. Each Singapore Rig Owner entered into a bareboat charter with Perforadora (together, as defined above, the "Bareboat Charters").[127] A bareboat charter is an instrument commonly used in the maritime industry to lease a vessel without a crew or equipment.[128]

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[123] The Bondholders need approval of 66.6% of the Bondholders only when they have to decide on amendments of the Bond Agreement or waivers of any rights under the Bond Agreement. Exhibit **C-97** at 73 (Bond Agreement).

[124] Gil Statement, **CWS-1**, ¶ 24.

[125] Gil Statement, **CWS-1**, ¶ 25.

[126] Gil Statement, **CWS-1**, ¶ 25.

[127] Exhibits **C-109 – C-113** are the Bareboat Charter Agreements. The Bareboat Charter Agreements contain identical terms. Thus, foregoing citations to Sections of the Bareboat Charters will be the same across all five.

[128] Gil Statement, **CWS-1**, ¶ 28.

58. The five Bareboat Charters are governed by U.S. maritime law and are subject to the jurisdiction of New York courts.[129]

2. Charter Period

59. A key aspect of the Bareboat Charters is the "Charter Period," which is defined to be from "the commencement of the [Pemex Contract]" to the "date of termination or expiry of [the Pemex Contract]."[130] Because, as further described below (*infra* ¶¶ 119-120, 131-132), Pemex never validly terminated any of the Oro Negro Contracts and wrongfully refused to allow Perforadora to perform, all the Bareboat Charters remained in effect for their full term.[131] In addition, since Perforadora filed for bankruptcy protection in México in September 2017, the judge overseeing the bankruptcy has enjoined the termination of the Bareboat Charters during the pendency of the bankruptcy proceedings.[132]

60. During the Charter Period, pursuant to the terms of the Bareboat Charters, Perforadora has sole and exclusive possession of the Rigs.[133]

3. Charter Hire

61. Perforadora is obligated to pay the Singapore Rig Owners "Charter Hire," which is defined in the Bareboat Charters as the net funds Pemex pays to Perforadora under the Oro Negro Contracts, after paying for Perforadora's operational and administrative expenses.[134] The Bareboat Charters expressly provide that Charter Hire is not due unless and until Pemex pays Perforadora

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[129] *See* Bareboat Charters, p. 12, Exhibits **C-109 – C-113**.

[130] *See* Bareboat Charters, p. 2, Exhibits **C-109 – C-113**.

[131] Lopez Expert Report, **CER-1,** ¶¶ 48-55, 57, 60, 62-63.

[132] Lopez Expert Report, **CER-1**, ¶¶ 34-38.

[133] *See* Bareboat Charters, p. 4, Exhibits **C-109 – C-113**.

[134] *See* Bareboat Charters, p. 5–6, Exhibits **C-109 – C-113**.

while the Rigs are in service.[135] If the Rigs are not in service, or Pemex fails to pay, Perforadora does not owe any Charter Hire.[136] Thus, the only way that the Singapore Rig Owners receive funds from Oro Negro is via payments from Pemex.

62. Pursuant to the Bond Agreement, Charter Hire is paid through the Mexican Trust (*see infra* ¶¶ 63-64).[137]

4. The Mexican Trust

63. The Bond Agreement provided for the establishment of a Mexican trust (in Spanish, *fideicomiso*) that receives the payments by Pemex to Perforadora for leasing the Rigs (the "Mexican Trust").[138] Pursuant to its "waterfall" structure, the Mexican Trust had to first distribute to Perforadora the funds it needed to pay ordinary business expenses, including operating the Rigs, taxes and salaries.[139] As such, Perforadora's economic survival depended on payments from the Mexican Trust. To block payments from the Mexican Trust to Perforadora is tantamount to depriving Perforadora of cash, ensuring its demise.

64. The Mexican Trust's administrator (*i.e.*, the entity responsible for managing the trust funds, including paying the beneficiaries) is Deutsche Bank México, Institución de Banca Multiple, S.A. ("Deutsche México"), the Mexican subsidiary of Deutsche Bank, AG, a large German bank ("Deutsche Bank").[140]

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135 *See* Bareboat Charters, p. 6-7, Exhibits **C-109 – C-113**.

136 *See* Bareboat Charters, p. 6-7, Exhibits **C-109 – C-113**.

137 *See* Bond Agreement, pp. 49-51, Exhibit **C-97**.

138 *See* Bond Agreement, pp. 49-50, Exhibit **C-97**; Exhibit **C-3**, p. 1.

139 *See* Exhibit **C-3** (Mexican Trust), p. 40-41.

140 S*ee* Exhibit **C-3** (Mexican Trust), p. 33.

F. The Oro Negro Contracts

1. Overview

65. From April 2013 to January 2014, Perforadora entered into contracts with Pemex Exploración y Producción ("PEP"), a subsidiary of Pemex, to lease to PEP the *Primus*, *Laurus*, *Fortius* and *Decus*. After a Pemex restructuring in mid-2015, PEP assigned these contracts to Pemex Perforación y Servicios ("PPS"), another subsidiary of Pemex. In December 2015, Perforadora entered into a fifth contract with PPS to lease the *Impetus*.[141]

66. Pemex is effectively the only client for high-cost oil and gas services such as offshore drilling because it is the largest State-owned company in México and, until around 2015, had a complete monopoly over all oil and gas exploration and production in México, including in Mexican waters in the Gulf of México.[142]

2. Original Terms

67. The original terms of the Oro Negro Contracts were as follows:[143]

(a) *Primus*: On April 23, 2013, PEP and Perforadora entered into lease no. 421003823 pursuant to which PEP would lease *Primus* for 1,030 days (approximately two years and nine months) at a daily rate of approximately USD 160,000 (the "Primus Contract");

(b) *Laurus*: On April 23, 2013, PEP and Perforadora entered into lease no. 421003824 pursuant to which PEP would lease *Laurus* for 1,233 days (approximately three years and four months) at a daily rate of approximately USD 160,000 (the "Laurus Contract");

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[141] Exhibits **C-E.1-C-E.5** are the Oro Negro Contracts.

[142] Gil Statement, **CWS-1**, ¶ 34.

[143] *See* Exhibits **C-E.1-E.5**.

(c) *Fortius*: On January 13, 2014, PEP and Perforadora entered into lease no. 421004800 pursuant to which PEP would lease *Fortius* for 1,442 days (approximately four years) at a daily rate of approximately USD 160,000 (the "Fortius Contract");

(d) *Decus*: On January 27, 2014, PEP and Perforadora entered into lease no. 421004806 pursuant to which PEP would lease *Decus* for 1,342 days (approximately three years and seven months) at a daily rate of approximately USD 160,000 (the "Decus Contract"); and

(e) *Impetus*: On December 18, 2015, PPS and Perforadora entered into lease no. 641005817 pursuant to which PPS would lease *Impetus* for 1,819 days (approximately five years) at a daily rate of approximately USD 130,000 (the "Impetus Contract").

68. Under the original terms of the Oro Negro Contracts, Perforadora's annual revenues from leasing the Rigs were approximately USD 280 million. Under their original terms, Pemex would have paid Perforadora approximately USD 1.05 billion during the life of the Oro Negro Contracts.

3. Termination Provisions

69. The Oro Negro Contracts may terminate early only if Pemex validly terminates them, or Perforadora and Pemex jointly agree to terminate them. Pemex may validly terminate the Oro Negro Contracts only if Perforadora breaches them, for *force majeure*, or for "duly justified reasons"

(in Spanish, "*razones debidamente justificadas*").[144] "Duly justified reasons" means for non-arbitrary, non-discriminatory grounds.[145]

4. The Three New Rigs

70. In March 2013, Oro Negro contracted the construction and purchase of four additional state-of-the-art Rigs from PPL Shipyard, Pte Ltd ("PPL"), a Singaporean shipyard—the *Impetus* (which, as described above, Pemex ultimately contracted), *Supremus*, *Animus*, and *Vastus* (the *Supremus, Animus and Vastus*, together, the "New Rigs"). *Impetus* and the three New Rigs would have expanded Oro Negro's Rig fleet to eight, allowing it to take advantage of significant economies of scale while responding to and supporting Pemex's need for more drilling.[146]

71. In connection with this acquisition, Oro Negro made a down payment for each of the three New Rigs. In total, Oro Negro paid USD 125 million for the construction of the New Rigs.[147]

72. Oro Negro ordered the construction of the New Rigs to lease them to Pemex, along with the other five Rigs in its fleet.[148] Pemex represented to Oro Negro that it would contract the New Rigs.[149] Pemex's representation was consistent with its stated goal of increasing oil output (*supra* ¶¶ 33), which required more drilling onshore and offshore.[150]

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144 *See* Exhibits **C-E.1-E.5**, at Cl. 18.

145 Lopez Expert Report, **CER-1**, ¶¶ 49-50; *See* Código Civil Federal [CCF] [Federal Civil Code], Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 03-06-2019, Art. 1797.

146 Gil Statement, **CWS-1**, ¶ 38; Exhibit **C-114 - C-122** are the three construction contracts and their amendments.

147 Gil Statement, **CWS-1**, ¶ 39.

148 Gil Statement, **CWS-1**, ¶ 40.

149 Gil Statement, **CWS-1**, ¶ 40.

150 Gil Statement, **CWS-1**, ¶ 41.

73. Confirming this understanding, on October 13, 2013 and on January 27, 2014, Oro Negro submitted letters to Pemex formally offering the New Rigs and the *Impetus* to Pemex.[151] The New Rigs and the *Impetus* would have been available to begin servicing Pemex between November 2014 and November 2015.[152] Oro Negro understood from Pemex's representations that Pemex intended to contract the New Rigs and *Impetus* in 2014 and 2015.[153]

74. However, without warning and as described in more detail below (*infra* ¶ 158), Pemex contracted five rigs from Seamex, Oro Negro's primary competitor, in 2014 and 2015—*i.e.*, virtually the same time frame that the New Rigs were going to be available.[154] The rigs that Pemex contracted from Seamex were of inferior quality to those that Oro Negro had agreed to lease to Pemex and the lease rates that Pemex agreed to pay Seamex were *higher* than the rates for which Oro Negro expected to receive from Pemex for the New Rigs.[155] Oro Negro and its shareholders complained to Pemex about Pemex's discriminatory treatment against Oro Negro and favorable treatment of other vendors such as Seamex, but to no avail.[156]

75. Pemex ultimately did not contract any of the New Rigs, accepting only the *Impetus* in late 2015. Pemex did not provide Oro Negro with any explanation for why it declined to contract the New Rigs and instead contracted, on terms less favorable to Pemex, five rigs from Seamex.[157]

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[151] Exhibit **C-123** is the October 3, 2013 Letter formally offering *Supremus and Vastus* and Exhibit **C-124** is the January 24, 2014 Letter formally offering the *Impetus* and *Vastus*.

[152] Gil Statement, **CWS-1**, ¶ 42: *see also* Exhibit **C-125**. Exhibit **C-125** is a letter dated October 30, 2014 from Oro Negro to Pemex providing the delivery dates for the New Rigs and providing specifications regarding *Impetus*.

[153] Gil Statement, **CWS-1**, ¶ 43; *see also* Exhibit **C-126**. Exhibit **C-126** is a November 28, 2014 email from G. Gil to G. Hernandez providing Pemex with updated delivery dates for the *Impetus, Vastus, Supremus* and *Animus*. Exhibit **C-127** is a November 19, 2014 email from Manuel Olea to Chavelas Omar responding to Pemex's request for updated anticipated delivery dates.

[154] Gil Statement, **CWS-1**, ¶ 44.

[155] Gil Statement, **CWS-1**, ¶ 45.

[156] Gil Statement, **CWS-1**, ¶ 45.

[157] Gil Statement, **CWS-1**, ¶ 46.

76. Despite Pemex's new contracts with Seamex, during 2015 and 2016, Pemex continued leading Oro Negro to believe and representing to Oro Negro that it was interested in leasing the New Rigs.[158] For example, in 2015, during the discussions regarding the first amendments that Pemex imposed on the Oro Negro Contracts, Pemex at all times represented that the amendments were temporary and that the Contracts would revert to their original terms in 2016.[159] Pemex at no time stated that it would not contract the New Rigs.[160] In 2016, during the discussions regarding the second amendments that Pemex imposed on the Oro Negro Contracts, Pemex again at all times represented that the amendments were temporary and never stated that it was no longer interested in leasing the New Rigs.[161] Had Pemex at any time informed Oro Negro that it would not hire the New Rigs, Oro Negro would have sought to sell its purchase option of the New Rigs to a third party or would have attempted to find work for the New Rigs outside of México.[162] Indeed, due to Pemex's repeated representations to Oro Negro regarding the New Rigs, Oro Negro amended on six occasions the construction contracts of the New Rigs to extend the deadline for Oro Negro to complete payment and take delivery.[163] The last amendment gave Oro Negro a deadline of November 30, 2017.[164]

77. Additionally, during 2016, Pemex's CEO repeatedly and publicly represented to the market that Pemex would not reduce its drilling capacity and merely needed to re-adjust its finances due to a temporary cash shortage. At no time did Pemex state that it would cease hiring rigs, or halt

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158 Gil Statement, **CWS-1**, ¶ 47.

159 Gil Statement, **CWS-1**, ¶ 52.

160 Gil Statement, **CWS-1**, ¶ 47.

161 Gil Statement, **CWS-1**, ¶ 53.

162 Gil Statement, **CWS-1**, ¶ 47.

163 Gil Statement, **CWS-1**, ¶ 47.

164 Gil Statement, **CWS-1**, ¶ 47.

or reduce offshore drilling activities,[165] which gave Oro Negro further reassurance that Pemex would still lease the New Rigs as discussed.

78. On October 3, 2017, after Integradora filed for bankruptcy protection (in Spanish, *concurso mercantil*), the shipyard sent a letter terminating the contracts, and informing Oro Negro that it would appropriate the USD 125 million down-payment and sell the New Rigs to a third party, without any compensation to Oro Negro.[166] It later became public that Borr, one of Oro Negro's Bondholders, purchased the New Rigs.[167]

79. Pemex's refusal to contract the New Rigs and its retaliatory actions (in addition to collusion with the Bondholders), drove Oro Negro into bankruptcy, and as a result, Oro Negro was unable to pay for the New Rigs and take delivery.[168]

80. The loss of the New Rigs due to Pemex's arbitrary actions cost Oro Negro not only the USD 125 million down payment, but also the economic benefits of having three additional rigs under contract with Pemex.[169] The loss of the USD 125 million down payment also depleted Oro Negro of funds that it otherwise could have used to finance its operations, including paying down its debts to the Bondholders who helped finance the purchase of the Rigs.

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[165] *See Pemex Tiene Problemas de Liquidez: Gonzalez Anaya*, MVS NOTICIAS (Mar. 8 2016, 11:27 AM), https://mvsnoticias.com/noticias/economia/pemex-tiene-problemas-de-liquidez-gonzalez-anaya-166/, Exhibit **C-128**; *Entrevista con Gonzalez Anaya: Pemex es Solvente, Le Falta Liquidez*, EXCELSIOR (Jan. 3, 2016, 6:31 AM) https://www.excelsior.com.mx/nacional/2016/03/01/1078124, Exhibit **C-129**.

[166] Gil Statement, **CWS-1**, ¶ 49; *See also* Exhibit **C-130**. Exhibit **C-130** is the October 3, 2017 termination letter by the shipyard.

[167] *See* OFFSHORE RIG TRANSACTION DATABASE, BASSOE ANALYTICS, https://www.bassoe.no/rigsales/, **C-131**, at p.6.

[168] Gil Statement, **CWS-1**, ¶ 50.

[169] Gil Statement, **CWS-1**, ¶ 51.

G. Performance and Amendments (2013-2017)

1. Amendments

i. 2015 and 2016 Contract Amendments

81. In 2015 and 2016, Pemex took arbitrary and unjustified actions against Oro Negro that ultimately led to Oro Negro's demise in 2017.

ii. The 2015 Amendments

82. On June 26, 2015, citing supposedly necessary budget reductions due to the global decline in the price of oil, Pemex imposed destructive amendments to the Oro Negro Contracts, in what would become the first step in its financial strangulation of Oro Negro.[170]

83. Specifically, Pemex reduced the daily rates under the *Primus*,[171] *Laurus*,[172] *Fortius*[173] and *Decus*[174] Contracts from approximately USD 160,000 to approximately USD 130,000. Pemex also falsely promised Oro Negro that the rate reductions would apply only for a temporary period, from June 2015 to May 2016, at which time the daily rates would return to USD 160,000, the originally agreed-upon amount (the "2015 Amendments").[175]

iii. The 2016 Amendments

84. Just as the rate reductions in the 2015 Amendments were set to expire, Pemex reneged on its promise that those Amendments would be temporary and imposed further modifications of the Oro Negro Contracts, which further negatively impacted Oro Negro's financial condition, including its ability to repay its bond debt. Pemex unilaterally imposed these terms, again

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170 Gil Statement, **CWS-1**, ¶ 52.

171 Exhibit **C-H.1** is a copy of the June 26, 2015 *Primus* Contract amendment.

172 Exhibit **C-H.2** is a copy of the June 26, 2015 *Laurus* Contract amendment.

173 Exhibit **C-H.3** is a copy of the June 26, 2015 *Fortius* Contract amendment.

174 Exhibit **C-H.4** is a copy of the June 26, 2015 *Decus* Contract amendment.

175 *See, e.g.*, Exhibits **C-H.1 – C.H.4**, pp. 4-5.

promising that they would be temporary and that the Oro Negro Contracts would soon return to their original terms.

85. Specifically, on November 14, 2016, Pemex again reduced the daily rates under the *Fortius*[176] and *Decus*[177] Contracts—this time from approximately USD 160,000 to approximately USD 116,300—and the daily rate under the *Impetus* Contract[178] from approximately USD 130,000 to approximately USD 116,300. Additionally, Pemex unilaterally suspended the *Laurus* Contract[179] and the *Primus* Contract.[180] The rate reductions and suspensions, collectively, are referred to here as the "2016 Amendments." Pemex represented at the time to Oro Negro that the 2016 Amendments were temporary and would expire in around mid-2017.[181] This promise again turned out to be false.

86. The 2015 and 2016 Amendments did not result in Oro Negro's immediate demise because, as set forth above (*supra* ¶¶ 55-56), the Bonds were also amended in 2015 and 2016. Indeed, the 2015 and 2016 Amendments to the Bond Agreement were negotiated in conjunction with Pemex's 2015 and 2016 Amendments to provide temporary debt relief for Oro Negro to survive the daily rate reductions and suspensions until all contracts returned to their original terms in 2017, as Pemex promised they would.

87. However, the 2015 and 2016 Amendments reduced Perforadora's revenue by more than 50%, significantly impairing Claimants' investment in Oro Negro.[182] This drastic reduction in revenue would ultimately doom Oro Negro (and Claimants' investments therein) if they remained

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176 Exhibit **C-I.1** is a copy of the November 14, 2016 *Fortius* Contract amendment.

177 Exhibit **C-I.2** is a copy of the November 14, 2016 *Decus* Contract amendment.

178 Exhibit **C-I.3** is a copy of the November 14, 2016 *Impetus* Contract amendment.

179 Exhibit **C-I.4** is a copy of the November 14, 2016 *Laurus* Contract amendment.

180 Exhibit **C-I.5** is a copy of the November 14, 2016 *Primus* Contract amendment.

181 *See* Exhibits **C-I.1 – C-I.5**, pp. 3, 5; *see* Gil Statement, **CWS-1**, ¶ 53.

182 *See* Gil Statement, **CWS-1**, at ¶ 56.

permanent, but Pemex promised that the reductions would be temporary, prompting Oro Negro to accept them.

88. To pressure Oro Negro into accepting the 2015 and 2016 Amendments, Pemex significantly delayed payment to Oro Negro, causing Oro Negro severe financial strain.[183] For example, the average number of days for Pemex to pay Oro Negro its daily rates doubled from approximately 100 days in 2013 and 2014 to 200 days in 2015 and 2016.[184]

2. 2017 Proposed Amendments

89. In March 2017, Pemex again broke its promise, indicating to Perforadora that the Oro Negro Contracts would not revert to their original terms, and demanding that (a) the two contracts for the *Primus* and *Laurus* remain suspended; and (b) Perforadora accept permanent daily rate reductions of approximately 27% on the other three contracts (the "2017 Proposed Pemex Amendments").[185]

90. The 2017 Proposed Pemex Amendments risked Oro Negro's solvency, including its ability to repay its bond debt.[186]

91. To force Perforadora to accept the 2017 Proposed Pemex Amendments, from April to September 2017, Pemex repeatedly threatened to terminate all of the Oro Negro Contracts.[187] In addition, Pemex refused to approve and pay Perforadora's outstanding invoices even though the Rigs remained in operation and Pemex continued to pump oil using the Rigs.[188] During 2017, while

[183] Gil Statement, **CWS-1**, ¶ 57.

[184] Gil Statement, **CWS-1**, ¶ 57.

[185] Gil Statement, **CWS-1**, ¶ 59; *See* Exhibit **C-132** (Pemex 2017 Amendment Proposal).

[186] Gil Statement, **CWS-1**, ¶ 60.

[187] Gil Statement, **CWS-1**, ¶ 60.

[188] Gil Statement, **CWS-1**, ¶ 61; Exhibits **C-133-C-136** are the return certificates Pemex issued to Oro Negro, which reflect that Pemex continued to use the Rigs through October and November 2017.

Pemex pressured Perforadora to accept the 2017 Proposed Pemex Amendments, Pemex incurred close to USD 90 million in unpaid daily rates owed to Perforadora.[189] Pemex used this tactic repeatedly to coerce Oro Negro. Tellingly, at the inception of the Oro Negro Contracts, Pemex paid for some services in as quickly as 20 days—by the time Oro Negro filed for *concurso*, Pemex had delayed payment of some services for over 900 days.[190]

92. As explained more fully below (*infra* ¶ 100-112), Oro Negro later learned that Pemex was, at the same time it was imposing these crippling rate reductions on Oro Negro, coordinating its efforts with the Ad-Hoc Group and affiliated entities to cause the termination of the Oro Negro Contracts, drive Oro Negro out of business, and take over the Rigs.

93. In August 2017, as a result of Pemex's (a) refusal to pay past due daily rates owed to Perforadora (by September 2017, Pemex owed Perforadora approximately USD 113 million in past due daily rates, including for services provided over ***900 days ago***); and (b) relentless insistence that, if Perforadora did not accept the 2017 Proposed Amendments, Pemex would cancel the Oro Negro Contracts, Perforadora accepted the 2017 Proposed Amendments.[191] However, Pemex failed to execute the required documents and continued to withhold critical past due amounts.[192] Under tremendous uncertainty and financial distress as a result of Pemex's arbitrary, inappropriate and illegal actions, Perforadora filed for bankruptcy protection in México, as described below (*infra* ¶ 113).[193]

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[189] Gil Statement, **CWS-1**, ¶ 62; See Exhibit **C-137** (Unpaid Invoices); See Exhibit **C-138** (2018.06.18 Order to Pemex to Pay Prior Invoices).

[190] Gil Statement, **CWS-1**, ¶ 57.

[191] Exhibit **C-139** is the Letter Perforadora sent to Pemex accepting the proposed terms. Gil Statement, **CWS-1**, ¶ 63.

[192] Gil Statement, **CWS-1**, ¶ 63.

[193] Gil Statement, **CWS-1**, ¶ 64; *See* Exhibit **C-K** (Perforadora's Concurso Petition).

3. Performance Under the Oro Negro Contracts

94. Under the Oro Negro Contracts, Pemex pays Perforadora the daily rate depending on the amount of time the Rig is available and ready for Pemex to use (*i.e.*, not in disrepair or malfunctioning), regardless of whether Pemex actually uses it. This means that if the Rig is available and ready for use for 24 hours, Pemex pays 100% of the daily rate; if the Rig is available and ready for use for only 12 hours, Pemex pays 50% of the daily rate. This is standard practice in the industry.

95. From the inception of the Oro Negro Contracts until Pemex purported to terminate the Oro Negro Contracts in October 2017 (described *infra* ¶ 124), Pemex paid (or authorized payment but had not yet paid), on average, 99.5% of the daily rate under each Pemex Contract, meaning that the Rigs were available and ready for use, on average, 99.5% of the time. Therefore, Perforadora's performance of the Oro Negro Contracts was near perfect.[194]

96. Notwithstanding Oro Negro's impeccable record, Oro Negro constantly experienced significant delays in obtaining payment from Pemex.[195] These delays worsened over the life of the relationship with Pemex, culminating in Pemex's unjustifiably withholding of all amounts due to Oro Negro while pressuring Perforadora to accept the 2017 Proposed Amendments.[196] Pemex never offered any legal or economic justification for Pemex's delay.[197]

[194] Gil Statement, **CWS-1**, ¶ 66.

[195] Gil Statement, **CWS-1**, ¶ 67.

[196] Gil Statement, **CWS-1**, ¶ 67.

[197] Gil Statement, **CWS-1**, ¶ 67.

H. Events from March 2017 to September 11, 2017

1. The Ad-Hoc Group

97. In or around May 2017, the Ad-Hoc Group, a group owning approximately 60% of the Bonds, was formed. As of May 2017, the members of the Ad-Hoc Group were (a) Alterna Capital Partners ("Alterna"); (b) Asia Research and Capital Management ("ARCM"); (c) CQS (UK), LLP ("CQS"); (d) GHL, Ltd. ("GHL"); (e) Maritime Finance Company ("MFC");[198] and (f) Ship Finance International Limited (" SFIL").[199]

98. On information and belief, none of the members of the Ad-Hoc Group purchased the majority of their Bonds at face value, but instead purchased them at a substantial discount.[200]

99. GHL and SFIL are both owned or controlled by Mr. Fredriksen.[201] Notably, Mr. Fredriksen owns or controls Seadrill, which owns 50% of Seamex, Oro Negro's main competitor for Pemex's business.[202] The Ad-Hoc Group, motivated by the interests of Oro Negro's primary competitor, worked with Pemex to cause the ultimate demise of Oro Negro.

2. Pemex Orchestrated Oro Negro's Demise with the Ad-Hoc Group

100. As further described below, Pemex was motivated to retaliate against Oro Negro because Oro Negro had refused to participate in bribery of Mexican and Pemex officials.

101. The Ad-Hoc Group, in turn, supported and encouraged Pemex in forcing Perforadora to accept the 2017 Proposed Pemex Amendments because this would ensure that Oro Negro Drilling would default on the Bonds upon their maturity, allowing the Bondholders to foreclose on, and take

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198 MFC purportedly left the Ad-Hoc Group in December 2018.

199 *See Gil-White v. Ercil*, et al., at p. 1, No. 19-01294 (Adv. Proc.) (Bankr. SDNY) (Jul 10, 2019) (the "Adversary Complaint"), ECF No. 9, Exhibit **C-140**.

200 Gil Statement, **CWS-1**, ¶ 69.

201 *See* Adversary Complaint, ¶¶ 46-47, 58, 65, **C-140**.

202 Adversary Complaint, ¶ 65, **C-140**.

possession of, the Rigs. The Bondholders would operate and profit from the Rigs through Mr. Fredriksen (the controlling party of the largest amount of Bonds) and his web of offshore services companies, including Seamex (the 50/50 joint venture with Mr. Martinez), Oro Negro's largest competitor.

102. As set forth above (*supra* ¶¶ 89-91), in order to compel Perforadora to accept the 2017 Proposed Pemex Amendments, starting in March 2017, Pemex threatened to cancel the Oro Negro Contracts and stopped paying what it owed to Perforadora, even though Pemex continued to use the Rigs.

103. Starting in or around April 2017, members of the Ad-Hoc Group, including principals of MFC and ARCM met with Pemex to discuss and plan for Oro Negro's eventual demise.[203] ARCM, MFC and their principals met with Pemex's most senior executives including:

(a) José Antonio González-Anaya ("González"), Pemex's CEO from February 2016 to November 2017 (when he became the Minister of Finance of México);

(b) Juan Pablo Newman-Aguilar ("Newman"), Pemex's Corporate Director of Finances (equivalent to a CFO) from November 2015 to January 2018;

(c) Miguel Ángel Servín-Diago ("Servín"), Pemex's Procurement Director from April 2016 to date; and

(d) Carlos Alberto Treviño-Medina ("Treviño"), Pemex's Corporate Director of Management and Services (equivalent to a COO) from February 2016 to November 2017, when he replaced González as CEO, until December 2018.[204]

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[203] Gil Statement, **CWS-1**, ¶ 70.

[204] Gil Statement, **CWS-1**, ¶ 70; *See* Exhibit **C-141** *Mexico Appoints Carlos Trevino Medina as Pemex CEO*, HART ENERGY (Nov. 28, 2017, 10:04 AM), https://www.hartenergy.com/news/mexico-appoints-carlos-trevino-medina-pemex-ceo-115431; *see* Exhibit **C-142** Amy Stillman, *Octavio Romero Oropeza Is Named Chief Executive Officer of Pemex*,

104. In those meetings, Pemex, ARMC and MFC agreed that Pemex would force Perforadora to accept the 2017 Proposed Pemex Amendments and that, if Perforadora refused to accept them, Pemex would cancel the Oro Negro Contracts so that the Bondholders could then take over the Rigs and lease them to Pemex.[205] The Ad-Hoc Group and Pemex knew Oro Negro could not accept the 2017 Proposed Pemex Amendments without effectively placing itself in permanent and irreversible financial distress.[206]

105. Further, at the Ad-Hoc Group's request, González promised that Pemex would assign the Oro Negro Contracts to the Ad-Hoc Group or companies controlled by it upon the Ad-Hoc Group taking over the Rigs. The Oro Negro Contracts, however, as both Pemex and the Ad-Hoc Group know, do not give Pemex an assignment right.[207]

106. When Pemex proposed the 2017 Proposed Pemex Amendments and then began to pressure Perforadora to accept them, Oro Negro, which was unaware of the secret dealings between members of the Ad-Hoc Group and Pemex, reached out to the Ad-Hoc Group to discuss amending the Bond Agreement, but the Bondholders refused to negotiate.[208]

107. The Ad-Hoc Group instead insisted that Perforadora accept the 2017 Proposed Pemex Amendments.[209] In August and September 2017, the Ad-Hoc Group sent three letters to Oro Negro demanding that Perforadora yield to Pemex and accept the 2017 Proposed Pemex Amendments.[210]

BLOOMBERG NEWS (Jul. 27, 2018), https://www.bnnbloomberg.ca/octavio-romero-oropeza-is-named-chief-executive-officer-of-pemex-1.1115473.

[205] Gil Statement, **CWS-1**, ¶ 71.

[206] Gil Statement, **CWS-1**, ¶ 71.

[207] *See generally,* Exhibits **C - E.1 –C - E.5.**

[208] Gil Statement, **CWS-1**, ¶ 72; *See* Exhibit **C-143** (2017.08.28 Oro Negro Letter offering to negotiate with Bondholders).

[209] Gil Statement, **CWS-1**, ¶ 73; *See* Exhibit **C-144** (2017.08.23 Letter from Bondholders).

[210] *See* Exhibit **C-145** (2017.08.28 Letter from Bondholders); *See* Exhibit **C-146** (2017.08.11 Letter from Bondholders); *See* Exhibit **C-147** (2017.09.26 Letter from Bondholders).

108. Oro Negro recently learned more about the relationship between Pemex and the Ad-Hoc Group and the negotiations they had regarding Oro Negro, including to give the Oro Negro Contracts to Oro Negro's competitors and an affiliate of the Ad-Hoc Group. Much of this discovery material is subject to a protective order and cannot be disclosed without court approval. Claimants are still in the process of obtaining permission to use that evidence in this proceeding, but have not received it yet. Claimants reserve their right to submit the evidence with its Reply.

109. Pemex found a perfect partner in the Ad-Hoc Group in its desire to destroy Oro Negro.

110. On August 11, 2017, facing a severe liquidity crisis caused by Pemex's refusal to pay its past due daily rates and fearing that Pemex would unlawfully purport to cancel the Oro Negro Contracts, Perforadora informed Pemex that it would accept the 2017 Proposed Pemex Amendments.[211]

111. Despite Perforadora's acceptance, Pemex failed to execute the 2017 Proposed Pemex Amendments.[212] As a result, by early September 2017, Perforadora feared that Pemex was preparing to illegally terminate the Oro Negro Contracts.[213]

112. As a consequence of Pemex failing to execute the 2017 Proposed Pemex Amendments, which would have made the 2015 and 2016 Amendments permanent, the temporary terms of the 2015 and 2016 Amendments expired in late 2017 and the Oro Negro Contracts returned to their original terms (*i.e.*, to their original daily rates and duration).[214]

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211 Exhibit **C-139** (2017.08.11 Acceptance).

212 Gil Statement, **CWS-1**, ¶ 75.

213 Gil Statement, **CWS-1**, ¶ 75

214 Lopez Expert Report, **CER-1**, ¶¶ 62-63.

I. Events After September 11, 2017

1. México's and the Ad-Hoc Groups Efforts to Destroy Oro Negro

i. *Concurso* Request

113. To protect Oro Negro's shareholders, creditors and employees, on September 11, 2017, Perforadora filed for restructuring in México, known as a *concurso mercantil*.[215] Perforadora's *concurso mercantil* proceeding was assigned to the Second District Court for Civil Matters of México City (*Juzgado Segundo de Distrito en Materia Civil en la Ciudad de México*) (the "Concurso Court").[216]

114. Perforadora immediately sought injunctive relief to prevent Pemex from terminating and ceasing to pay under the Oro Negro Contracts.[217] At the time that Perforadora filed its *concurso* petition, Pemex owed it approximately USD 113 million in past due daily rates, including for daily rates accrued in February 2016 (over ***900 days*** due).[218]

115. Perforadora requested that the Concurso Court issue injunctions to maintain its status quo, including expressly prohibiting (a) Pemex from terminating the Oro Negro Contracts or ceasing to pay Perforadora the daily rates under the Oro Negro Contracts; (b) the Bondholders from foreclosing on the Rigs; and (c) Deutsche México from disbursing any trust funds other than to Perforadora to operate its business.[219]

116. On September 29, 2017, Integradora commenced its *concurso mercantil* proceeding before the Concurso Court.[220] Upon commencing its *concurso mercantil* proceeding, Integradora

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[215] Gil Statement, **CWS-1**, ¶ 76; *see* Exhibit **C-K** at 2 (Perforadora Concurso Petition).

[216] Lopez Expert Report, **CER-1**, ¶ 28.

[217] Gil Statement, **CWS-1**, ¶ 77; *See* Exhibit **C-K** at 63 (Perforadora Concurso Petition).

[218] Gil Statement, **CWS-1**, ¶ 57. *See* Exhibit **C-137** (Unpaid Invoices)

[219] Gil Statement, **CWS-1**, ¶ 78; *See* Exhibit **C-K** at 63-83(Perforadora Concurso Petition).

[220] Gil Statement, **CWS-1**, ¶ 79; Lopez Expert Report, **CER-1**, ¶ 29; *See* Exhibit **C-L** (Integradora Concurso Petition).

requested that the Concurso Court consolidate the Integradora proceeding with the pending Perforadora proceeding and thus, that the Concurso Court decide them simultaneously.[221] The Concurso Court granted this request on October 31, 2017.[222]

ii. Injunctions Protecting Oro Negro

117. On October 5, 2017, the *Concurso* Court issued an order granting Perforadora's request to initiate a *concurso* proceeding (the "October 5 Order").[223] In the October 5 Order, the *Concurso* Court issued numerous injunctions, including enjoining Pemex from terminating the Oro Negro Contracts and from ceasing to pay Perforadora under the Oro Negro Contracts.[224] The October 5 Order also enjoined termination of the Bareboat Charters, ensuring that Perforadora could maintain possession of the Rigs during the *concurso*.[225]

118. On October 8, 2017, Perforadora informed the *Concurso* Court that Pemex had attempted to terminate the Oro Negro Contracts and that the Singapore Rig Owners had attempted to terminate the Bareboat Charters (*see infra* ¶¶ 124, 138).[226]

119. As a result, on October 11, 2017, the *Concurso* Court issued an order confirming that Pemex was enjoined from terminating the Oro Negro Contracts, including taking any steps to further its purported terminations (*e.g.*, ceasing to pay Perforadora) and that termination of the Bareboat Charters was prohibited (the "October 11 Order").[227]

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[221] *See* Exhibit **C-L** at 4-5 (Integradora Concurso Petition); *See also* Lopez Expert Report, **CER-1**, ¶ 30.

[222] *See* Exhibit **C-148** (October 31 Order), at 23; Lopez Expert Report, **CER-1**, ¶ 30.

[223] *See* Exhibit **C-N** (October 5 Order) at 24-26; Gil Statement, **CWS-1**, ¶ 81; Lopez Expert Report, **CER-1**, ¶ 34.

[224] *See* Exhibit **C-N** (October 5 Order) at 27-44; Gil Statement, **CWS-1**, ¶ 81; Lopez Expert Report, **CER-1**, ¶ 34.

[225] *See* Exhibit **C-N** (October 5 Order) at 30-32; Gil Statement, **CWS-1**, ¶ 81; Lopez Expert Report, **CER-1**, ¶ 34.

[226] Lopez Expert Report, **CER-1**, ¶¶ 35-36.

[227] *See* Exhibit **C-O** (October 11 Order), pp. 1-2. Lopez Expert Report, **CER-1**, ¶¶ 36-37.

120. Pemex moved to reconsider the scope of the October 5 and October 11 Orders.[228] On December 29, 2017, the *Concurso* Court issued an order resolving the motion (the "December 29 Order").[229] In the December 29 Order, the *Concurso* Court expressly stated that the October 5 and 11 Orders applied retroactively and as such, that Pemex's purported terminations of the Oro Negro Contracts "were not valid" (*i.e.*, that they are null, void and unenforceable) and that the Oro Negro Contracts were valid and enforceable.[230] Pemex is challenging that December 29 Order via an *amparo*, and the *amparo* is pending.[231] The pendency of the *amparo* has allowed Pemex to avoid complying with the December 29 Order since December 2017—this means that Pemex has not paid Oro Negro any day rates since October 3, 2017, when it purported to terminate the Oro Negro Contracts.[232] Pemex's *amparo* is based on the contrived grounds that compliance with its contractual obligations and Mexican insolvency law supposedly threatens Pemex's financial survival.[233]

121. México's court system has delayed without justification deciding this *amparo*, effectively running the clock out on Oro Negro, causing it to run out of cash and lose the Rigs.[234]

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228 Lopez Expert Report, **CER-1**, ¶¶ 38-39.

229 *See* Exhibit **C-P** (December29 Order) at pp. 4-5; *See also* Lopez Expert Report, **CER-1**, ¶ 40.

230 *See* Exhibit **C-P** (December 29 Order) at pp. 4-5; *See also* Lopez Expert Report, **CER-1**, ¶ 37.

231 *See* Exhibit **C-149** (Pemex *amparo*); Lopez Expert Report, **CER-1**, ¶ 41.

232 Gil Statement, **CWS-1**, ¶ 86; *See also* Lopez Expert Report, **CER-1**, ¶ 41.

233 *See* Lopez Expert Report, **CER-1**, ¶ 41.

234 Lopez Expert Report, **CER-1**, ¶ 42; *See* Exhibit **C-149** (pending Pemex *amparo*); *see also* Exhibit **C-150** (May 15 Rig Return Order).

iii. Pemex and the Ad-Hoc Group Drove Oro Negro Out of Business

a. The Bondholders Declared Oro Negro Drilling in Default To Attempt To Foreclose on the Rigs

122. On September 25, 2017, although Perforadora had sought bankruptcy protection and was attempting to reorganize, the Bondholders, via Nordic Trustee, declared Oro Negro Drilling in default.[235] The sole reason for the Bondholders' declaration of default was Perforadora's bankruptcy filing.[236] Upon declaring default, the Bondholders purported to exercise the Oro Negro Drilling and the Singapore Rig Owners Share Charge (described *supra* ¶118), and effectively took over Oro Negro Drilling and the Singapore Rig Owners.[237] Accordingly, since late September 2017, Oro Negro Drilling and the Singapore Rig Owners have been acting under the unlawful control of the Bondholders.[238]

123. The Bondholders took over the Singapore Rig Owners to put themselves in a position to foreclose on the Rigs by demanding that Perforadora turn over the Rigs to them.

b. Pemex Unlawfully Terminated the Oro Negro Contracts on October 3, 2017

124. Even though Perforadora had already sought *concurso* protection, including seeking injunctive relief to prevent the termination of the Oro Negro Contracts, on October 3, 2017, Pemex delivered letters to Perforadora purporting to terminate the Oro Negro Contracts (the "Termination Letters").[239]

125. Oro Negro recently learned more about the relationship between Pemex and the Ad-Hoc Group and the negotiations they had regarding Oro Negro, including regarding the termination

[235] Gil Statement, **CWS-1**, ¶ 84; *See* Exhibit **C-151** (Default Declaration).

[236] *Id.*

[237] Gil Statement, **CWS-1**, ¶ 85. *See* Exhibits **C-98 - C-103** (Share Charges).

[238] Gil Statement, **CWS-1**, ¶ 85.

[239] Exhibits **C-M.1 - C-M.5-T** are the Termination Letters.

of the Oro Negro Contracts. Claimants are still in the process of obtaining permission to use that evidence in this proceeding, but have not received it yet. Claimants plan to submit the evidence with its Reply.

126. By this time, Pemex owed Perforadora approximately USD 113 million for past due services (including dating back as far as February 2016) and, upon the purported termination, immediately became liable for future amounts due under the Oro Negro Contracts.[240] The table below reflects the amounts that Pemex owes Perforadora through the maturity of each Oro Negro Contract:[241]

Oro Negro Contracts	Daily Rates Through End of Contract (USD millions)
Primus Contract	$87
Laurus Contract	$145
Fortius Contract	$193
Decus Contract	$197
Impetus Contract	$219
Total	**$841**

127. As to the Oro Negro Contracts for the *Primus*, *Laurus*, *Fortius* and *Decus*, Pemex asserted in the Termination Letters that it was terminating the contracts because Pemex had entered into lease agreements with other vendors of Rigs for a daily rate of USD 116,300 and Perforadora had purportedly failed to accept leasing the Rigs to Pemex for that rate.[242]

128. These four Oro Negro Contracts do not contain any provision allowing Pemex to unilaterally terminate them on the ground that it obtained better rates from Perforadora's

[240] Gil Statement, **CWS-1**, ¶¶ 57, 87; Lopez Expert Report, **CER-1**, ¶ 62.

[241] Gil Statement, **CWS-1**, ¶ 87; Lopez Expert Report, **CER-1**, ¶ 62.

[242] *See* Exhibits **C-M.1 - C-M.5-T** (Termination Letters); *see also* Lopez Expert Report, **CER-1**, ¶ 51-52.

competitors.[243] Nor was Pemex's asserted ground a "duly justified reason" for termination under Mexican law.[244] Thus, Pemex could not terminate the Oro Negro Contracts for that reason.[245]

129. Moreover, Pemex's assertions were false—Perforadora accepted that rate on August 11, 2017, when it accepted the 2017 Proposed Pemex Amendments (*supra* ¶ 93);[246] it was Pemex that failed to execute.[247]

130. On October 26, 2017, Perforadora sued Pemex in a Mexican federal court, seeking a declaration that Pemex breached the *Decus*, *Fortius*, *Laurus* and *Primus* Contracts by unlawfully terminating them, and demanding specific performance and damages.[248]

131. In February 2019, that Mexican federal court issued a 176-page judgment ruling that Pemex breached the *Decus*, *Fortius*, *Laurus* and *Primus* Contracts by terminating them and, as such, that the terminations of those Oro Negro Contracts were unlawful, invalid and unenforceable.[249] The court held that (a) Pemex did not have the right to unilaterally terminate the Oro Negro Contracts on the ground that other vendors had offered better terms than Perforadora; and (b) in any event, Perforadora had already agreed to modify the Oro Negro Contracts as Pemex had demanded.[250] Pemex, still refusing to adhere not only to its obligations to Oro Negro, but also to Mexican laws and court rulings, has appealed this ruling and the appeal is pending.[251]

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243 Lopez Expert Report, **CER-1**, ¶ 53; *See* Exhibits **C-E.1-E.5**, Cl. 17-18.

244 Lopez Expert Report, **CER-1**, ¶¶ 48-50; *See* Código Civil Federal [CCF] [Fedearl Civil Code], art. 1797, Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 03-06-2019 (Mex.), **CL-195**.

245 Lopez Expert Report, **CER-1**,¶ 53.

246 Exhibit **C-139** (2017.08.11 Letter Accepting the Amendments).

247 Gil Statement, **CWS-1**, ¶ 64.

248 Exhibit **C-152** (October 26, 2017 court filing); Lopez Expert Report, **CER-1**, ¶ 56.

249 Exhibit **C-153** at 172-176 (2019.02.20 Opinion); Lopez Expert Report, **CER-1**,¶ 57.

250 Exhibit **C-153** at 172-176 (2019.02.20 Opinion); Lopez Expert Report, **CER-1**, ¶ 58.

251 Exhibit **C-154** is the Appeal; *See also* Lopez Expert Report, **CER-1**, ¶ 59.

132. As to the Pemex Contract for the *Impetus* Rig, Pemex asserted in the Termination Letter that its reasons for termination were that Perforadora had filed for *concurso*.[252] Terminating a contract in México because a counter-party files for *concurso* is unlawful and unenforceable because it violates a rule in the Mexican Bankruptcy Code expressly prohibiting termination of a contract (or taking any actions to worsen the debtor's condition) based on a *concurso* filing.[253] Importantly, the Recordings obtained by Claimants confirm that Pemex sought to terminate the Oro Negro Contracts, in part, to retaliate against Perforadora for filing for *concurso*.[254] For example, a former Pemex official stated in the Recordings that "the worst is that they [Oro Negro] went and declared bankruptcy, because sometimes that is one of the weapons of the left, but they never thought Pemex was going to react like it did."[255]

133. On November 7, 2017, Perforadora sued Pemex in the *concurso* proceeding (in an ancillary proceeding within the *concurso*) seeking a declaration that Pemex breached the Impetus Contract by unlawfully terminating it, and demanding performance and damages.[256] On December 29, 2017, the *Concurso* Court determined that Pemex had unlawfully terminated the *Impetus* Contract, in violation of the Mexican Bankruptcy Code.[257] As set forth above, Pemex is challenging that December 29 Order via an *amparo* and the *amparo* is pending.[258] México's court system has

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[252] Exhibits **C-M.1 - C-M.5-T** (termination letter); *See also* Lopez Expert Report, **CER-1**, ¶ 54.

[253] Ley de Concursos Mercantiles [LCM], art. 87 (Mex.) ("Se tendrá por no puesta, salvo las excepciones expresamente establecidas en esta Ley, cualquier estipulación contractual que con motivo de la presentación de una solicitud o demanda de concurso mercantil, o de su declaración, establezca modificaciones que agraven para el Comerciante los términos de los contratos."); **CL-261**; Lopez Expert Report, **CER-1**, ¶ 55.

[254] W Avi Yanus ("Black Cube Statement"), **CWS-4**, ¶ 40.

[255] Black Cube Statement, **CWS-4**, ¶ 40; **Appendix H**, statement 22. **Appendix H** is a collection of excerpts from the Black Cube meetings.

[256] Exhibit **C-155** is the ancillary proceeding complaint.

[257] Exhibit **C-P** (2017.12.29 Order). This is the same order which revised the scope of the October 5, Exhibit **C-N** and 11 Orders, **C-O**.

[258] Exhibit **C-149** (*Pemex Amparo*); Lopez Expert Report, **CER-1**, ¶¶ 41-42.

delayed without justification deciding this *amparo*, effectively running the clock out on Oro Negro causing it to run out of cash and lose the Rigs.[259]

134. Even if Pemex had validly terminated the Oro Negro Contracts, each Contract provided that Pemex had to pay Perforadora, as liquidated damages, all the remaining daily rates through the end of the Contracts' terms.[260] Here, as set forth above, the total amount due to Perforadora under the Oro Negro Contracts from the purported October 3, 2017, date of termination through maturity of the Oro Negro Contracts is approximately USD 841 million. Pemex has failed to make this payment to Perforadora.[261]

135. Indeed, Pemex has paid other vendors the day rates due through the end of the contract upon unilateral termination. For example, in late 2018, Pemex reached a deal with Offshore Drilling Holdings ("ODH"), a subsidiary of the Mexican energy conglomerate, Grupo R (another Mexican competitor of Oro Negro), to compensate the company for México's early termination of two semisubmersible rigs.[262] Pemex had informed the company that it would terminate the contracts due to lack of budget and drilling programs.[263] Pemex paid close to USD 230 million to ODH upon unilaterally terminating the contracts.[264]

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[259] Lopez Expert Report, **CER-1**, ¶ 42. *See also* **Appendix B** to the Request for Interim Measures, which lists other pending *amparo* proceedings that remain unresolved.

[260] Exhibits **C-E.1-E.5**; *see also* Lopez Expert Report, **CER-1**, ¶ 62.

[261] Gil Statement, **CWS-1**, ¶ 87.

[262] *Pemex Terminates PDH Bicenenario, Centenario GR Contracts, Agrees to $230M in Fees*, REORG (Jan. 29, 2019 3:58 PM), **C-156**.

[263] *Pemex Terminates PDH Bicenenario, Centenario GR Contracts, Agrees to $230M in Fees*, REORG (Jan. 29, 2019 3:58 PM), **C-156**.

[264] *Pemex Terminates PDH Bicenenario, Centenario GR Contracts, Agrees to $230M in Fees*, REORG (Jan. 29, 2019 3:58 PM), **C-156**.

c. Pemex Refused to Comply with the *Concurso* Court's Orders

136. Despite breaching the Oro Negro Contracts by unlawfully terminating them, in defiance of the *Concurso* Court's October 5 and 11 Orders (which prohibited Pemex from terminating the Oro Negro Contracts or acting in furtherance of any purported terminations), Pemex returned the Rigs to Perforadora and stopped paying the daily rates, including past due daily rates.[265]

137. Further, Perforadora repeatedly sought relief from the *Concurso* Court, which the *Concurso* Court repeatedly granted, and Pemex repeatedly flouted. For example, on June 18, 2018, the *Concurso* Court issued an order instructing Pemex to pay the approximately USD 96 million that it owed for services provided by Perforadora prior to October 3, 2017.[266] Pemex did not pay the USD 96 million and thus, did not comply with the June 18 order.[267] On July 24, August 22, and September 4, 2018, the *Concurso* Court issued additional orders, reiterating Pemex's obligation to pay the USD 96 million and holding Pemex and its CEO in contempt for their failure to comply with the June 18 order.[268] The final order threatened the CEO with arrest if Pemex continued to refuse to comply with the order.[269] Finally, on September 4 and 6, 2018, Pemex paid approximately USD 96 million into the Mexican Trust Account.[270]

d. Pemex and the Ad-Hoc Group Closely Coordinated To Drive Oro Negro Out of Business

138. A mere two days after Perforadora received Pemex's Termination Letters, the Singapore Rig Owners, acting under the unlawful control of the Ad-Hoc Group, purported to

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265 Exhibits **C-133 – C-136** are the Rig Return Certificates; Gil Statement, **CWS-1**, ¶ 140.

266 Exhibit **C-138** is the June 18 Order; *See also* Lopez Expert Report, **CER-1**, ¶ 43.

267 *See* Lopez Expert Report, , **CER-1**, ¶ 43.

268 Exhibits **C-157 – C-159** are the July 24, August 22 and September 4 Orders; Lopez Expert Report, **CER-1**, ¶¶ 43-44.

269 Exhibit **C-159 (**September 4 Order); *See also* Lopez Expert Report, **CER-1**, ¶ 44.

270 Gil Statement, **CWS-1**, ¶ 91.

terminate the Bareboat Charters and demanded that Perforadora return the Rigs on the sole ground that Pemex had validly terminated the Oro Negro Contracts.[271]

139. However, the Singapore Rig Owners were unable to foreclose on the Rigs and force Perforadora to turn them over because of the October 5 and 11 Orders.[272]

e. Pemex and the Ad-Hoc Group Continued Working Together

140. In January 2018, Pemex was set to have negotiations with Perforadora to reactivate the Oro Negro Contracts. To that end, Pemex invited members of Oro Negro's management to attend a meeting at Pemex's headquarters.[273]

141. However, without warning or explanation, shortly before the meeting was set to occur, Pemex cancelled the meeting and never rescheduled it.[274]

142. Oro Negro recently learned more about the relationship between Pemex and the Ad-Hoc Group and the negotiations they had regarding Oro Negro. Claimants are still in the process of obtaining permission to use that evidence in this proceeding, but have not received it yet. Claimants plan to submit the evidence with its Reply.

f. México Cuts Off Oro Negro's Access to Funds

143. After numerous *Concurso* Court orders and facing contempt, in early September 2018, Pemex finally paid into the Mexican Trust approximately USD 96 million that it owed Perforadora for services provided until October 3, 2017.[275] On September 10, 2018, Perforadora instructed Deutsche México to immediately disburse to it approximately USD 27 million of the

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271 Exhibits **C-160 – C-164** (Bareboat Termination Letters).

272 *See* Exhibit **C-N** (October 5 Order); *See* Exhibit **C-O** (October 11 Order).

273 *See* Gil Statement, **CWS-1**, ¶ 93.

274 Gil Statement, **CWS-1**, ¶ 94.

275 Gil Statement, **CWS-1**, ¶ 94.

USD 96 million, which comprised value added tax ("VAT") on Perforadora's invoices to Pemex and expenses that Perforadora incurred in providing the services to Pemex underlying the USD 96 million payment.[276] On September 27, 2018, Deutsche México disbursed approximately USD 13 million to Perforadora, most of which Perforadora had to use to pay VAT.[277]

144. As described below (*infra* ¶¶ 228, 230), in order to block Perforadora from receiving any more of the funds, México and the Ad-Hoc Group improperly commenced a baseless criminal proceeding against Perforadora and in September 2018 obtained an order seizing all of the funds in the Mexican Trust account. As a result, the Mexican Trust is frozen and has not made any payments to Perforadora since September 2018. México, through its courts and again on the basis of baseless criminal allegations recently issued a new seizure order, freezing the funds for an additional 300 days.

g. Current Status of the *Concurso* Proceeding

145. By May 2019, as a result of México's and the Bondholders' coordinated misconduct, Oro Negro finally ran out of cash.[278] Completely illiquid and unable to maintain the Rigs, on May 15, 2019, the *Concurso* Judge ordered Perforadora to turn over the Rigs to the Bondholders.[279]

146. On June 12, 2019, the *Concurso* Judge declared Oro Negro in liquidation.[280] Oro Negro must now wind down all operations, terminate all employees, maintain, maximize and

[276] Gil Statement, **CWS-1**, ¶ 97.

[277] Gil Statement, **CWS-1**, ¶ 97.

[278] Gil Statement, **CWS-1**, ¶ 99.

[279] Exhibit **C-150** is the *Concurso* Judge's order instructing Perforadora to turn over the Rigs to the Bondholders.

[280] Exhibit **C-165** is the *Concurso* Judge's order declaring Integradora and Perforadora in liquidation.

ultimately sell-off all assets.[281] All of this is a direct consequence of México's wrongful measures, which is acting in alignment with the Ad-Hoc Group.

h. The Chapter 15 Proceeding

147. On April 20, 2018, the Foreign Representative of Integradora and Perforadora (*i.e.*, the legal representative of the companies) filed petitions under Chapter 15 of the United States Bankruptcy Code.[282] Chapter 15 allows a foreign debtor involved in an insolvency proceeding abroad to seek certain protection and assistance from U.S. Courts.

148. The purposes of the Chapter 15 Proceeding included obtaining information from several parties regarding their efforts to put Integradora and Perforadora out of business. The Foreign Representative also sought discovery from the Ad-Hoc Group regarding the criminal investigations that they initiated—and that México has carried out—in México against Integradora, Perforadora, their directors and employees.

149. The U.S. Court authorized the Foreign Representative to obtain discovery from the Ad-Hoc Group, AMA and Deutsche México. The U.S. Court subsequently also authorized discovery from Seadrill and Fintech Advisory, the parent entities of Seamex. As noted above, while the Foreign Representative also sought discovery from Pemex, México was able to shield itself from discovery by arguing that Pemex is an organ of the Mexican State that is immune from suit in the U.S.

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[281] *See* Ley de Concursos Mercantiles [LCM] [Commercial Insolvency Law], Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 09-08-2019, **CL-261**.

[282] *See In re Perforadora, et al.*, No. 18-11094 ECF 2-3(Bankr. S.D.N.Y.) (SCC) (Jointly Administered); *In re Integradora, et al.*, No. 18-11095 ECF 2-3 (Bankr. S.D.N.Y.) (SCC), Exhibit **C-166**.

150. From September 2018 to May 2019, Integradora and Perforadora obtained the discovery that the judge ordered. That discovery is the basis of the New York lawsuits, which are described below.

151. As a result of the evidence obtained in the Chapter 15 proceeding, on June 6 and 7, 2019, Integradora and Perforadora filed two lawsuits in New York federal court against the Bondholders and other parties, including Seadrill and Fintech, to hold them accountable for colluding with the Mexican government to drive Integradora and Perforadora out of business and for abusing Mexican criminal proceedings to unlawfully persecute Integradora, Perforadora, their directors and employees and take over the Rigs (the "New York Lawsuits"). The New York Lawsuits allege in detail how the Bondholders and México colluded to destroy Integradora and Perforadora and hence Claimants' qualifying investments.[283]

152. Notably, one of the defendants named in the New York Lawsuits has retaliated fiercely against Claimants and Oro Negro in reaction to the filings. Specifically, on June 26, 2019, Robert Garcia, a partner at the law firm of Garcia Gonzales y Barradas ("GGB"), the Ad-Hoc Group's criminal counsel in México, threatened the court-appointed Liquidator (and now Foreign Representative in the Chapter 15 Proceeding), Fernando Perez Correa, and, via him, the Claimants.[284]

153. Mr. Garcia stated that he would for the next 20 years continue to think of ways to seek revenge on Oro Negro's Shareholders and their counsel Quinn Emanuel.[285] Mr. Garcia went on

[283] Exhibits **C-73** and **C-74** are the New York Lawsuits.

[284] *See In re Perforadora, et al.*, No. 18-11094 (Bankr. S.D.N.Y.) (SCC), ECF No. 233, Exhibit **C-167**.

[285] *See In re Perforadora, et al.*, No. 18-11094 (Bankr. S.D.N.Y.) (SCC), ECF No. 233, Exhibit **C-167**.

to warn the Liquidator to be extremely careful, because he could also be subject to liability for his actions with respect to the New York Lawsuits.[286]

154. As detailed below, Mr. Garcia, with the aid of México through a number of corrupt judges, is making good on his threats through extremely aggressive prosecution of baseless criminal actions against Oro Negro, its executives, and even its counsel. *See infra* ¶¶ 216-316.

J. Seamex

155. While Pemex has treated Oro Negro worse than all other drilling service providers, its preferential treatment of Seamex, Oro Negro's largest competitor, is particularly egregious. As Pemex was retaliating against Oro Negro for Oro Negro's refusal to participate in its pay-to-play system, Pemex was conspicuously treating Seamex much more favorably.

1. Seamex Background

156. From around 2011 to 2015, Pemex entered into numerous rig leases with various companies, including Perforadora.[287] With the notable exception of Seamex's lease agreements, the original terms of all the rig lease agreements were similar even though in practice Pemex treated Oro Negro less favorably than all other providers.[288]

157. Seamex is a company controlled in equal parts by (a) Seadrill Limited ("Seadrill"), a Bermuda-incorporated company owned and/or controlled by Mr. Fredriksen—the same individual who controls SFIL and GHL, Oro Negro's largest Bondholders—and his family; and (b) Fintech Investments, Ltd. ("Fintech"), an international investment fund managed by New York-based

[286] *See In re Perforadora, et al.*, No. 18-11094 (Bankr. S.D.N.Y.), ECF No. 233, (SCC), **C-167**.

[287] **Appendix G** is a comparison of the Seamex and Oro Negro contracts.

[288] *See* **Appendix G**.

Fintech Advisory, Inc., a firm controlled by David Martinez-Guzman ("Mr. Martinez"), a Mexican billionaire.[289]

158. Seamex, which also owns five rigs, is Oro Negro's primary competitor. Seamex's rigs are inferior to Oro Negro's Rigs, including in that they were older and built by lower quality shipyards.[290]

159. Pemex and Seamex entered into rig leases for all five of Seamex's rigs in 2014 (the "Seamex Contracts"). Notably, these leases were entered into around the same time Pemex declined to contract Oro Negro's three New Rigs, despite its representations to Oro Negro that it would.

160. When Seadrill was contemplating entering the Mexican market, it formed a joint venture with Blue Marine, a well-known Mexican shipping and offshore services company.[291] Prior to Pemex awarding them any contracts, Pemex instructed Seadrill to break its joint venture with Blue Marine and partner with Fintech.[292] Therefore, Fintech was specifically appointed by the Mexican government as Seadrill's joint venture partner.[293] This strongly suggests that Fintech has a corrupt relationship with the Mexican government and that Pemex sought to unlawfully favor Seadrill and Fintech by awarding them the Seamex Contracts.[294]

2. The Seamex Contracts

161. The Seamex Contracts contain terms that are strikingly more favorable to Seamex as compared to Pemex's jack-up rig lease agreements with other vendors, including the Oro Negro

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[289] *Fintech in Formation of SeaMex Joint Venture with Seadrill*, CLEARY GOTTLIEB (Feb. 18, 2014), https://www.clearygottlieb.com/news-and-insights/news-listing/fintech-in-formation-of-seamex-joint-venture-with-seadrill47, Exhibit **C-168**; *see also* Exhibits **C-73 and C-74** (the New York Lawsuits).

[290] Gil Statement, **CWS-1**, ¶ 102.

[291] Gil Statement, **CWS-1**, ¶ 103.

[292] Gil Statement, **CWS-1**, ¶ 103.

[293] Gil Statement, **CWS-1**, ¶ 103.

[294] Gil Statement, **CWS-1**, ¶ 103.

Contracts. Appendix G to the Statement of Claim is a summary of the key terms of Pemex's contracts with Oro Negro and Seamex, reflecting Seamex's more favorable terms. Specifically, Seamex's contracts are more favorable because:[295]

(a) Daily rates under the Seamex Contracts are higher than daily rates under all other jack-up rig lease agreements (making the total value of each Seamex Contract tens of millions of dollars higher than the total value of any other vendor's jack-up rig lease agreement);[296]

(b) The Seamex Contracts are generally longer than all other jack-up rig lease agreements;[297]

(c) The Seamex Contracts provide for almost no penalties for deficient maintenance and operation of the jack-up rigs, [298] whereas all other jack-up rig lease agreements contain severe penalties that are easily triggered;[299] and

(d) Finally, unlike all other jack-up rig lease agreements, the Seamex Contracts have a much more favorable termination provision in favor of Seamex; they do not allow Pemex to terminate them except in cases of breach by Seamex or *force majeure*.[300]

3. Pemex Afforded Seamex Preferential Treatment

162. The Seamex Contracts are so noticeably favorable that Seadrill itself has stated to its investors that it is "confident that [the Pemex-Seamex Contracts] are absolutely secure."[301] This

[295] Exhibits **C-F.1 to C-F.5** are the Seamex Contracts.

[296] Exhibits **C-F.1-F.5**, **Annex C**.

[297] Exhibits. **C-F.1-F.5**, **Cl. 3**.

[298] Exhibits. **C-F.1-F.5**, **Cl. 10**.

[299] *See* **Appendix G (Contract Terms)** (reflecting assessment of MR penalties in the final column). *See also, e.g.,* Exhibits C-E.1 – C-E.5 and C-F.1 – C-F.5 at Appx. G (reflecting the difference in MR penalties for Seamex versus Oro Negro).

[300] Exhibits **C-F.1-F.5**, **Cls. 17-18**.

statement demonstrates both Seamex's unique confidence in its contracts and its security in its relationship to Pemex.

163. Even though, as set forth in further detail below, the terms of the Pemex-Seamex Contracts are significantly more expensive for Pemex than the Oro Negro Contracts (because the day rates are higher, had not been drastically reduced and none of the Contracts had been suspended), Pemex nonetheless treated Seamex much more favorably than it did Perforadora and Oro Negro. In fact, the only service provider that Pemex targeted so drastically in 2017 was Perforadora. Pemex targeted Perforadora with the most draconian amendments, indefinitely suspended only Perforadora's rigs, and withheld past-due payments from Perforadora only. Pemex singled out Oro Negro, without economic justification, for negative treatment relative to the rest of Pemex's service providers, and especially as compared to Oro Negro's primary competitor, Seamex.

164. Given the superior quality of Oro Negro's Rigs and Oro Negro's near-perfect performance of the Oro Negro Contracts, there is no valid economic or legal justification for Pemex's persecution of Perforadora and Oro Negro and its preferential treatment of Seamex.

K. Failure To Allow Oro Negro To Continue Servicing Pemex

165. Andrés Manuel López Obrador ("President López Obrador"), the current President of México, took office on December 1, 2018. In 2018, prior to taking office, President López Obrador announced that he would appoint Octavio Romero as Pemex's new CEO ("Mr. Romero").

166. On December 15, 2018, Mr. Romero announced Pemex's plan for the next six years, reflecting a dramatic change of policy *vis-a-vis* the prior government. Specifically, Mr. Romero stated that Pemex would aggressively increase its oil production by approximately 40% (from approximately 1.4 million barrels of oil per day to approximately 2.6 million barrels of oil per

[301] Seadrill Limited, Q4 2014 Earnings Call (Feb. 26, 2015) **C-169**.

day).[302] To that end, Mr. Romero announced that Pemex would invest billions of dollars in increased oil production over the next six years.[303] Further, Mr. Romero indicated that Pemex would begin awarding new drilling and production contracts in January 2019.[304]

167. Shortly thereafter, Pemex announced that it would award the new drilling and productions contracts in bids via private invitations, *i.e.*, that only entities which Pemex directly invited would be able to participate in the new bids.[305]

168. On January 15, 2019, Pemex launched bids for several new contracts, including a bid for leasing 25 offshore drilling platforms.[306] According to the Mexican media, Pemex invited seven Mexican companies to participate in the bid.[307] Pemex did not invite Perforadora.

169. In late January 2019, the Mexican media reported that Opex Perforadora, S.A. de C.V. ("Opex"), a Mexican company (bidding in a joint venture with Borr Drilling Limited ("Borr"), a Norwegian drilling company) won the bid.[308] The media did not indicate how many of the 25

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[302] Iliana Chávez, *Plan Nacional de Exploración y Producción de Pemex 2018-2024*, ENERGÍA HOY (Dec. 15, 2018), http://energiahoy.com/2018/12/15/plan-nacional-de-exploracion-y-produccion-de-pemex-2018-2024/, **C-56**. Édgar Sígler, *AMLO presenta su plan de "rescate" para elevar la producción de Pemex*, EXPANSIÓN (Dec. 15, 2018), https://expansion.mx/empresas/2018/12/15/pemex-promete-produccion-de-hidrocarburos-barriles-sexenio, **C-57**.

[303] *Id*.

[304] *Id*.

[305] José Antonio Belmont, *Pemex modificará esquemas de contratos petroleros*, MILENIO (Oct. 2, 2019, 2:38 PM), https://www.milenio.com/politica/pemex-modificara-esquemas-de-contratos-petroleros, **C-58**. Gabriela Jiménez, *Pemex celebrará 15 contratos por invitación restringida,* EL SOL DE MÉXICO (Dec. 15, 2018), https://www.elsoldemexico.com.mx/finanzas/pemex-celebrara-15-contratos-por-invitacion-restringida-2806920.html, **C-59**.

[306] *Gasta Pemex mil 439 millones de dólares en contratos sin licitación*, AM, https://www.am.com.mx/2019/01/28/mexico/pemex-asigno-contratos-directos-sin-licitacion-por-mil-439-millones-de-dolares-542162, **C-60**. *Pemex opta por adjudicaciones directas*, VANGUARDIA (Jan. 28, 2019), https://www.vanguardiaveracruz.mx/pemex-opta-por-adjudicaciones-directas/, **C-6;**. *Pemex Exploración y Producción asigna primeros contratos para perforación y renta de plataformas*, GLOBAL ENERGY (Jan, 28, 2019), http://globalenergy.mx/noticias/hidrocarburos/pemex-exploracion-y-produccion-asigna-primeros-contratos-para-perforacion-y-renta-de-plataformas/, **C-62**.

[307] Rodrigo Carbajal, *Nuevo Pemex, Mismos Contratistas*, CÓDIGO MAGENTA (Jan. 24, 2019), https://codigomagenta.com.mx/articulo/politica/nuevo-pemex-mismos-contratistas, **C-63**.

[308] *Gasta Pemex mil 439 millones de dólares en contratos sin licitación*, AM https://www.am.com.mx/2019/01/28/mexico/pemex-asigno-contratos-directos-sin-licitacion-por-mil-439-millones-de-

offshore drilling platforms Pemex is seeking to lease from Opex and Borr as a result of this bid. Notably, Mr. Martínez, Seamex's 50% shareholder, appears to be major investor in Borr and Borr's management is comprised of former Seadrill executives.[309]

170. Integradora's and Perforadora's Rigs were uniquely positioned to service Pemex because they were idle in Mexican waters, and ready and able to service Pemex under the Oro Negro Contracts. Despite the availability of Integradora's and Perforadora's Rigs, Pemex refused to allow Perforadora to continue servicing it under the Oro Negro Contracts.

171. Notably, Pemex would not even have needed to conduct a bid to lease Integradora's Rigs because, if Pemex allowed it, they could have continued servicing Pemex under the Oro Negro Contracts. Pemex's failure to reengage with Oro Negro lacks any economic justification, and is but another example of Pemex's arbitrary and/or discriminatory treatment of Claimants' investment in Integradora.

172. This further destroyed Integradora and the value of Claimants' investment because Integradora was unable to reorganize and regain its value by becoming operational again and reestablishing its relationship with Pemex.[310]

L. Corruption in Pemex

1. México's and Pemex's Pattern of Corruption

173. México is often involved in high-profile corruption scandals. For example, Pemex is currently at the center of the Odebrecht bribery case. From 2014 to date, Brazilian law enforcement

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dolares-542162; **C-60**. *Pemex opta por adjudicaciones directas*, VANGUARDIA (Jan. 28, 2019), , https://www.vanguardiaveracruz.mx/pemex-opta-por-adjudicaciones-directas/, **C-61**; *Pemex Exploración y Producción asigna primeros contratos para perforación y renta de plataformas*, GLOBAL ENERGY (Jan, 28, 2019), http://globalenergy.mx/noticias/hidrocarburos/pemex-exploracion-y-produccion-asigna-primeros-contratos-para-perforacion-y-renta-de-plataformas/, **C-62**.

[309] *Id*.

[310] Because Pemex is the largest oil company in the country and virtually the only company that leases rigs to explore and produce oil and gas offshore, the inability to contract with Pemex results in a complete market exclusion.

agencies have uncovered one of the largest corruption schemes in history (known commonly as "*Lava Jato*"). The *Lava Jato* corruption scheme involved payments of hundreds of millions of dollars in bribes by numerous Brazilian and foreign companies to government officials in over a dozen countries, including México, in exchange for valuable contracts.[311] At the heart of *Lava Jato* is Odebrecht, the largest construction company in Brazil.

174. Brazil's evidence against Odebrecht includes that it paid at least USD 10.5 million in bribes to Mr. Lozoya, Pemex's CEO from 2012 to early 2016. In connection with its probe into corruption at Pemex, México is also investigating Mr. Lozoya's executive coordinator, Froylan Gracia Garcia ("Mr. Gracia").[312]

175. Recently, México's comptroller concluded that, during Mr. Lozoya's administration Pemex vastly overpaid for a fertilizer plant.[313] The scandal resulted in the issuance of an arrest warrant for Mr. Lozoya in México, and according to media reports, has sparked a U.S. government investigation of México's former president, President Peña, for taking bribes in connection with the transaction.[314]

176. Notably, Mr. Lozoya was the CEO of Pemex and President Peña was México's president during the time period in which Pemex entered into the Oro Negro Contracts and the Seamex Contracts. Oro Negro did not pay any bribes to Mr. Lozoya, President Peña, or anyone else

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311 *See* Notice of Arbitration at ¶¶ 66-71.

312 *Ex-Pemex Executive under Investigation for Expensive Real Estate*, ANTI-CORRUPTION DIGEST (Feb. 8, 2018), https://anticorruptiondigest.com/2018/02/08/ex-pemex-executive-under-investigation-for-expensive-real-estate/#axzz5wEpkJLXX, Exhibit **C-170**.

313 Amy Guthrie, *Mexico Freezes Oil Exec, Steel Accounts in Corruption Probe*, FOX BUSINESS (May 28, 2019), https://www.foxbusiness.com/markets/mexico-freezes-oil-exec-steel-accounts-in-corruption-probe#, Exhibit **C-171**.

314 Noé Cruz Serrano, *U.S. Authorities are Investigating Former President Pena Nieto for Bribery*, EL UNIVERSAL (Jun. 28, 2019), https://www.eluniversal.com.mx/english/us-authorities-are-investigating-former-president-pena-nieto-bribery, Exhibit **C-172**.

in México.[315] In contrast to Seamex, neither Perforadora nor Oro Negro ever obtained any favorable treatment from Pemex during Mr. Lozoya's tenure as CEO.

2. Oro Negro Was a Victim of México's Pattern of Corruption

177. Pemex's treatment of Oro Negro from 2015 to 2017 was not only legally inappropriate but also made no economic sense, suggesting illegitimate reasons for its actions. For example, Pemex continued to pay other service providers at higher rates, and contracted for more expensive, less favorable contracts in lieu of honoring existing obligations to Oro Negro.

178. Claimants were able to uncover one of the actual motives behind Pemex's puzzling behavior: Oro Negro's refusal to participate in rampant bribery within Pemex.

3. Oro Negro Refused to Pay Bribes

179. México and Pemex expected Oro Negro and its principals to pay bribes. This became clear from conversations between 2012 to 2017 among Oro Negro executives—specifically to Messrs. Cañedo and Gil—and individuals offering to help "operate" (in Spanish, *operar*) to resolve Oro Negro's difficulties with Pemex.[316]

180. The term *operar* is a common reference to bribery, kickback, or influence-peddling within the Mexican government, especially in the context of government contracts.[317]

181. Typically, the way Mexican government officials exact bribes from the business community is by first creating a problem—*e.g.*, by manufacturing a regulatory violation or withholding payments or approvals—especially with regard to existing contracts. Then, an emissary or messenger, usually with a personal or business connection to the affected business persons, approaches those individuals offering to facilitate a resolution, often through in-person meetings

[315] Gil Statement, **CWS-1**, ¶ 101.

[316] Cañedo Statement, **CWS-2**, ¶ 17.

[317] Cañedo Statement, **CWS-2**, ¶ 17.

with officials or their agents (known as *operadores*, or "operators"). The operators then facilitate (*i.e.*, *operar*) the transfer of valuable items between members of the private sector and government officials. Although the particulars of any exchange may vary, this is the typical structure of the process in México.[318]

182. This is precisely what happened to Oro Negro. Beginning in 2014 and 2015, Pemex was consistently late in paying Oro Negro's invoices, despite Oro Negro's impeccable performance and compliance with all of Pemex's requirements. This pattern became more and more severe and pronounced with time, culminating with Pemex's outright refusal to pay past due amounts in the spring and summer of 2017.[319]

4. Discussions with Mr. Cañedo Regarding Bribery

183. Mr. Cañedo began his career working with México's largest development bank. Upon leaving the bank in the late 1990s, he founded an investment firm called Axis. Subsequently, Mr. Cañedo was Chairman of the Board of the holding company of Televisa, México's largest television provider. After Televisa, he founded with his partners a Mexican structured lending investment firm called Navix.[320]

184. As a result of his prominent roles at the national development bank and Televisa, over the course of his career Mr. Cañedo came into frequent contact with other prominent members of the Mexican business community and government officials.[321]

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318 Cañedo Statement, **CWS-2**, ¶ 18.

319 Gil Statement, **CWS-1**, ¶ 57.

320 Cañedo Statement, **CWS-2**, ¶ 15.

321 Cañedo Statement, **CWS-2**, ¶ 16.

185. Unfortunately, Mr. Cañedo's success has also exposed him to México's corruption. Throughout his career, he has observed México's *modus operandi*, as described above (*supra* ¶¶ 180-181).[322]

186. Sadly, his time at Oro Negro proved no exception. Mr. Cañedo, the Non-Executive Chairman of Integradora, was repeatedly approached by individuals offering to facilitate meetings, provide advice or otherwise *operar* to address Oro Negro's problems with Pemex.[323]

187. Specifically, in 2015, Andrés Caire ("Mr. Caire"), a Mexican businessman and acquaintance of Mr. Cañedo, contacted him seeking to meet in person regarding important and urgent matters.[324] Mr. Cañedo did not meet with him in person, but later spoke to Mr. Caire via telephone. In that conversation, Mr. Caire explained in detail Oro Negro's problems (*i.e.*, delayed payments) with Pemex. He also explained that he could set up meetings with people who could help resolve Oro Negro's problems—*i.e.*, that he could "fast-track" payments owed to Oro Negro. He also explained that Mr. Gil lacked experience and did not know how these kinds of issues were resolved. From his conversation with Mr. Caire, it was clear to Mr. Cañedo that the "fast-track" would likely involve bribes. He therefore explained that Integradora's Board of Directors had long vowed to comply with the Foreign Corrupt Practices Act ("FCPA"), the U.S. anticorruption law. In response, Mr. Caire told Mr. Cañedo not to worry about the FCPA. Mr. Gil never stepped down, and Oro Negro never continued the conversation regarding fast-tracking payments with this individual.[325]

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322 Cañedo Statement, **CWS-2**, ¶ 14.

323 Cañedo Statement, **CWS-2**, ¶ 17.

324 Cañedo Statement, **CWS-2**, ¶¶ 19-20.

325 Cañedo Statement, **CWS-2**, ¶ 20.

188. In 2016, a Mexican businessman who looked to negotiate a potential merger between his company and Oro Negro, told Mr. Cañedo that those in Oro Negro did not know how to *operar* with Pemex, and that they failed to understand the culture and way of doing things in Pemex. The businessman explained that in the event of a merger, he should handle all operations without Oro Negro's authorization.[326] Ultimately, Oro Negro did not enter into a merger with this company.[327]

189. In 2015, another Mexican businessman told Mr. Cañedo at a social gathering that Mr. Lozoya was traveling to New York to meet personally with Mr. Martinez, Fintech's owner. This was at the same time that Pemex was trying to negotiate modifications to rig leases.

190. Subsequently, and after Claimants initiated this arbitration, another individual approached Mr. Cañedo. He explained that Oro Negro's Bondholders had sought to have Pemex include a provision in the Oro Negro Contracts allowing Pemex to reassign them.[328] That individual explained that while Mr. Lozoya had declined to add such a provision, his successor, José Antonio Gonzales Anaya, had promised the Bondholders he would transfer to them the Contracts, even though there was no reassignment provision in the contracts.[329]

5. Discussions with Messrs. Cañedo and Gil Regarding Bribery

191. In 2016, Messrs. Cañedo and Gil spoke with Javier Lopez Madrid ("Mr. Lopez Madrid"), a Spanish businessman who is close friends with Mr. Lozoya and Carlos Roa ("Mr. Roa"), a well-connected former Pemex official who worked closely with Mr. Lozoya. Mr. Lopez Madrid mentioned that the best way to have a good relationship with Pemex was through Mr. Gracia (Mr. Lozoya's Executive Coordinator). Media reports indicate that Mr. Gracia has a house in the

[326] Cañedo Statement, **CWS-2**, ¶ 21.

[327] Cañedo Statement, **CWS-2**, ¶ 21.

[328] Cañedo Statement, **CWS-2**, ¶ 23.

[329] Cañedo Statement, **CWS-2**, ¶ 23.

wealthy México City neighborhood of Polanco where businesses meet with him to work out their problems with Pemex—*i.e.*, through which he facilitates bribes. Messrs. Cañedo and Gil never contacted Mr. Gracia.[330]

6. Recorded Statements of Pemex Officials Regarding Corruption

192. The U.S. Shareholders later confirmed that these personal approaches were, in fact, related to Pemex's rampant culture of bribery. Specifically, the U.S. Shareholders hired Black Cube Inc. ("Black Cube"), a London-based intelligence and investigation agency, to investigate México's seemingly inexplicable behavior toward Oro Negro.[331] The Recordings that Black Cube obtained confirmed that México destroyed Oro Negro because of its refusal to pay bribes.

7. Black Cube Overview

193. Black Cube is an elite intelligence-gathering enterprise at the forefront of its field.[332] Founded in 2012 by Avi Yanus, Black Cube is comprised largely of former Israeli military intelligence professionals.[333] Black Cube develops intelligence for use in litigation proceedings around the world. Black Cube's focus is on developing human intelligence, rather than documentary intelligence—*i.e.*, it focuses on gathering information from individuals who may have knowledge of facts pertinent to its investigation.[334]

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330 Cañedo Statement, **CWS-2**, ¶ 22; Gil Statement, **CWS-1**, ¶ 101.

331 Black Cube Statement, **CWS-4**, ¶ 4, 18.

332 Black Cube Statement, **CWS-4**, ¶¶ 4–6.

333 Black Cube Statement, **CWS-4**, ¶¶ 4–6.

334 Black Cube Statement, **CWS-4**, ¶¶ 7–9.

8. Black Cube's Methods

194. Black Cube seeks to meet relevant individuals in person. These meetings are generally organized to take place in a public space.[335] Black Cube typically sends one or more agents to any given meeting.[336]

195. The objective of these in-person meetings is to obtain information relevant to the case through conversation with the individuals.[337]

196. Black Cube records its conversations during these meetings if legally permissible. Consequently, Black Cube makes recordings only in jurisdictions where it is lawful to record a conversation with consent from only one of the parties to the conversation ("one-party consent states").[338] In this matter, Black Cube met with individuals in the United Kingdom, the United States (New York), and México.[339] Each of these jurisdictions is a one-party consent jurisdiction (in the U.S., this varies based on State laws, but Black Cube ensures to only conduct its meetings in States that have one-party consent laws).[340]

197. Black Cube generally records the conversation from start to finish, without breaks, and generally uses multiple recording devices to ensure it captures all the statements during the meeting.[341]

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[335] Black Cube Statement, **CWS-4**, ¶ 9.

[336] Black Cube Statement, **CWS-4**, ¶ 9.

[337] Black Cube Statement, **CWS-4**, ¶ 10.

[338] Black Cube Statement, **CWS-4**, ¶ 11.

[339] Black Cube Statement, **CWS-4**, ¶ 11.

[340] *See* Regulation of Investigatory Powers Act 2000 (U. K.), Exhibit **C-173**; *Tesis de Jurisprudencia* 5/2013 (Supreme Court of México, Mar. 13, 2015). (México), Exhibit **C-174**; N.Y. Penal Law §§ 250.00(1) and 250.05, Exhibit **C-175**; *see also* Expert Report of Jose Luis Izunza Espinosa ("Izunza Expert Report"), **CER-2**, ¶¶ 15-17.

[341] Black Cube Statement, **CWS-4**, ¶ 12. Exhibit 216 contains the Recordings. For purposes of producing copies of the Recordings to the Tribunal, Black Cube used software to distort the voices of the speakers in order to protect their identities and ensure that they are not subject to retaliation. Black Cube made no other alterations to the Recordings. Black Cube preserves the originals of the Recordings without any alterations. **CWS-4 ¶ 13."**

198. Black Cube is careful to avoid eliciting any information from the individuals that may be protected by attorney-client privilege—if the individual seems to be divulging such information, Black Cube agents will attempt to change the conversation to steer away from these revelations. In the instant investigation, the individuals did not share protected or privileged material to Black Cube's knowledge.[342]

199. Black Cube requires strict compliance with the laws of the jurisdictions in which it operates. Black Cube thus seeks legal advice from attorneys in the jurisdictions where it will meet individuals or make recordings to ensure it is compliant with all aspects of local law.[343]

9. The Recordings Confirm México's Bribery and Pay-to-Play-Scheme

200. Black Cube agents approached the individuals in this investigation by representing that they worked for a wealthy Middle Eastern businessman seeking to invest in the Mexican oil industry who was potentially interested in purchasing Oro Negro out of bankruptcy and reestablishing its contracts with Pemex. All of the meetings were conducted in Spanish by the same two Black Cube agents.

201. Black Cube met with five individuals in the fall of 2017—four former Pemex officials and one current Pemex official (at the time, he was a Pemex official but he is no longer with Pemex):[344] (a) Mario Beauregard Alvarez, Pemex's Chief Financial Officer from late 2012 to 2015; (b) Arturo Henriquez Autrey, Pemex's Chief Procurement Officer from 2014 to 2015; (c) Gustavo Escobar Carré, who worked at Pemex from 2013 to 2016 and was Pemex's Chief Procurement Officer from late 2015 to April 2016; (d) Luis Sergio Guaso Montoya, a Pemex employee from 1990

342 Black Cube Statement, **CWS-4**, ¶ 14.

343 Black Cube Statement, **CWS-4**, ¶ 15.

344 **Appendix J** is a table of the date, location and approximate duration of each meeting Black Cube conducted in connection with this investigation.

to 2016 who was the Deputy Director of Strategic Planning for Pemex Exploración y Producción (Pemex's former drilling subsidiary) from 2015 to 2016; and (e) Jose Carlos Pacheco ("Mr. Pacheco"), at the time of the Recordings a current Pemex official who had held a variety of roles since 1993, most recently as the Vice President of Pemex Perforación y Servicios ("PPS," Pemex's current drilling subsidiary).[345]

202. The Pemex officials made statements to Black Cube indicating that (i) there is a pervasive culture of corruption within Pemex, involving numerous high-level Pemex officials who solicit bribes (in cash and other forms) in exchange for favorable treatment by Pemex, and launder those payments (including through offshore companies); (ii) Pemex officials accepted bribes from Seadrill, Fintech and/or Seamex in exchange for the preferential contract terms contained in the Seamex Contracts; and (iii) Pemex officials retaliated against Oro Negro, including by cancelling the Oro Negro Contracts, as a result of Oro Negro's refusal to pay expected bribes.[346] Appendix H is a compilation of key excerpts from the meetings, which are also summarized below.[347]

203. Further, the individuals Black Cube met with identified multiple current and former Pemex officials, many of whom were in Pemex during the period in which Pemex was discriminating and retaliating against Oro Negro, who participate in Pemex's culture of corruption and bribery. Appendices I reflects the position within Pemex of the identified individuals and the alleged acts of corruption associated with each.

204. Mr. Pacheco, a Pemex veteran of nearly three decades, explained Pemex's bribery scheme to the Black Cube agents. He explained that Pemex directors in the past had received up to USD 5 million in connection with a contract, some of which "flow[s] downwards" in "smaller

[345] Black Cube targeted only México in its investigation.

[346] Black Cube Statement, **CWS-4**, ¶¶ 28–44.

[347] **Appendix H** to the Statement of Claim is an identical reproduction of Appendix A to the Black Cube Statement.

amounts" to less senior officials.[348] Pacheco went on to explain in detail, and with examples, how Pemex officials conceal bribe payments. He explained that payments are generally in the form of a simple "success fee," rather than a percentage of the contract, which would be more likely to raise suspicion, and that these fees are collected through "allies," including friends and family members of the Pemex officials.[349]

205. Notably, the identity of these intermediary "allies" is often common knowledge. For example, Pacheco explained that it is common knowledge that no one could get awarded a shallow-waters drilling contract (*i.e.*, the type of contract Oro Negro had) without "speaking" first to the son of Ricardo Villegas, the deputy director of the Shallow Waters Unit within Pemex.[350]

206. Mr. Pacheco underscored that bribery was rampant.[351] In addition to Mr. Villegas, he identified Pedro Joaquin Coldwell, at the time, the Secretary of Energy of México and Chairman of Pemex's Board, Jorge Kim Villatoro ("Mr. Kim"), Pemex's General Counsel from 2016 to 2018, and Miguel Angel Servin ("Mr. Servin"), Pemex's Director of Procurement from 2016 to 2018 and one of the Pemex officials who colluded with the Bondholders to drive Oro Negro out of business, as individuals who would require bribes in order to approve a contract for the potential investor.[352]

207. Mr. Pacheco also stated that Mr. Lozoya usually demanded from USD 50,000 to USD 100,000 simply for taking a meeting.[353] According to Mr. Pacheco, Mr. Lozoya "operated" through Mr. Gracia, Mr. Lozoya's Executive Coordinator, who, as described above, is now also

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348 Black Cube Statement, **CWS-4**, ¶ 32.3.

349 Black Cube Statement, **CWS-4**, ¶ 32–33.

350 Black Cube Statement, **CWS-4**, ¶ 33.2, 34.4.

351 Black Cube Statement, **CWS-4**, ¶ 30.

352 Black Cube Statement, **CWS-4**, ¶ 31.

353 Black Cube Statement, **CWS-4**, ¶ 32.4.

under investigation for corruption.[354] Notably, the information Black Cube obtained confirmed what Oro Negro's executives had been told when they were solicited for bribes: to work with Pemex, they needed to be willing to *operar*, or pay bribes, likely by going through intermediaries including Mr. Gracia.[355]

208. Mr. Pacheco also explained a common mechanism by which these high-level officials conceal the bribe payments they receive in exchange for preferential treatment. Generally, Pemex officials submit false invoices, in the name of third persons, to consulting companies or other service companies.[356] These companies then send the money to offshore companies or accounts the officials control, but that are in the name of third parties.[357]

209. Mr. Pacheco joked that one Pemex official, Javier Hinojosa, has one such company based in Singapore, even though Mr. Hinojosa did not even have a passport.[358] Mr. Pacheco noted how complex the network to accept bribe payments can be, noting that Rafael Garcia Cordova, a former Executive Advisor, had been largely successful in administering Pemex's bribery scheme, setting up more than 20 companies, nominally controlled by his father, to accept and launder bribes.[359]

210. Mr. Pacheco explained that Oro Negro's "main problem" was that it had failed to pay bribes.[360] Mr. Pacheco understood that at least one key decision-maker with regard to the termination, Mr. Servin, pushed for the termination of the Oro Negro Contracts because he is one of

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354 Black Cube Statement, **CWS-4**, ¶ 33.1.

355 Black Cube Statement, **CWS-4**, ¶¶ 32, 33, 39.

356 Black Cube Statement, **CWS-4**, ¶ 34.1.

357 Black Cube Statement, **CWS-4**, ¶ 34.2.

358 Black Cube Statement, **CWS-4**, ¶ 34.3.

359 Black Cube Statement, **CWS-4**, ¶ 33.

360 Black Cube Statement, **CWS-4**, ¶ 39.1.

those normally gets a "cut" or "a benefit" from the contract process, and Oro Negro's refusal to pay bribes meant that Mr. Servin had not gotten the payments he normally expected.[361]

211. Mr. Pacheco was so certain that the Oro Negro Contracts could be reinstated if bribes were paid that he, a then-current Pemex official, even offered to act as an intermediary to facilitate the payment of bribes to the "key stakeholders" in Pemex.[362]

10. The Recordings Indicate that Seamex Bribed Pemex

212. The Recordings indicate that Pemex favored Seamex because Seamex paid bribes, and because Mr. Martinez used his influence to force the contracts through.

213. For example, Mr. Pacheco stated that Mr. Lozoya had approved the highly preferential Seamex Contracts with the support of Mr. Coldwell, the then Energy Secretary, who also receives his "cut" of the bribery and kickback schemes.[363] Mr. Guaso stated that it was "very likely. Yes, yes yes" that Seamex paid bribes to obtain its contacts.[364]

214. Mr. Escobar, in turn, reported that Mr. Martinez was "the only reason Seadrill entered México" and that Mr. Martinez "pushed for this" at a high level in the Pemex administration—so much so that the contracts were essentially already pre-approved by the time they were presented to the Procurement division.[365] Even when presented to lower level officials, Pemex apparently did not go through its normal review process –Mr. Lozoya and Carlos Morales Gil (the former CEO of

[361] Black Cube Statement, **CWS-4**, ¶ 39, 37.2.

[362] Black Cube Statement, **CWS-4**, ¶ 44.

[363] Black Cube Statement, **CWS-4**, ¶ 37.2.

[364] Black Cube Statement, **CWS-4**, ¶ 37.1.

[365] Black Cube Statement, **CWS-4**, ¶ 37.3.

Pemex Exploración and Producción) instructed lower level officials to sign the non-standard Seamex Contracts, and officials in Pemex assumed that Mr. Lozoya received a success fee for doing so.[366]

215. Additionally, Black Cube confirmed that, during the oil downtown, Pemex disproportionately reduced and terminated the contracts of foreign contractors *with the exception of Seamex*, which continued to enjoy preferential treatment under its highly favorable contracts.[367] This is consistent with another of Black Cube's findings that Pemex sought to pressure foeigners to withdraw from México so that Pemex could "protect national service providers."[368]

M. México's Further Retaliatory Actions

216. Unfortunately, since Claimants notified México of their intent to pursue their rights under NAFTA, México has only redoubled its efforts to destroy their investment in Oro Negro and to impair their ability to prosecute their NAFTA claim. From on or around the date when Claimants filed their Notice of Arbitration, which had been preceded by a Notice of Intent, México has initiated eight baseless criminal investigations against Integradora, Perforadora, and their directors, employees and lawyers. These criminal investigations appear to be a direct response to the Notice of Intent and Notice of Arbitration and reflect a carefully orchestrated and methodically executed effort to deter Claimants from pursuing their NAFTA claim. The criminal investigations are in addition to other retaliatory measures such as numerous tax investigations against Oro Negro and their managers, as well as a delay of close to two years to pay Perforadora past due day rates.

366 Black Cube Statement, **CWS-4**, ¶ 37.3.

367 Black Cube Statement, **CWS-4**, ¶ 36–37.

368 Black Cube Statement, **CWS-4**, ¶ 41.

1. Criminal Investigations

217. México launched at least four of the eight criminal investigations described in this Application as a result of criminal complaints filed by the Singapore Rig Owners acting at the behest of the Ad-Hoc Group.

218. México has a duty to investigate objectively and gather all available evidence, including evidence that demonstrates the defendant's innocence, and must terminate any investigation that is meritless.[369] Rather than investigating the facts objectively and terminating investigations premised on false facts and evidence, México colluded with the Ad-Hoc Group and their advisors to launch and aggressively pursue baseless criminal investigations against Integradora, Perforadora, their directors, employees and lawyers in a further campaign to destroy Integradora, Perforadora, and Claimants' investments and ensure the complete destruction of their assets and investments in México.

219. Oro Negro recently learned more about the relationship between Mexican prosecutors and judges and Ad-Hoc Group (through their Mexican attorneys), including information that suggests strong red flags of corruption or other improper forms of influence. Claimants are still in the process of obtaining permission to use that evidence in this proceeding, but have not received it yet. Claimants reserve their right and plan to submit the evidence with its Reply.

2. The PGR Investigation

i. Overview of Investigation

220. On June 18, 2018, the Singapore Rig Owners filed a criminal complaint before the *Procuraduría General de la República* (the "PGR," now known as *Fiscalía General de la República*), México's federal prosecutors' office, against Integradora, Perforadora, Mr. Gil

[369] Código Nacional de Procedimientos Penales, arts. 129 and 131 (2016) (Mex.), **CL-194**; Izunza Expert Report, **CER-2**, ¶ 18.

(Integradora's CEO) and three of their employees accusing them of mismanaging funds in a Mexican trust (*fideicomiso*) that receives Pemex's payments to Perforadora (the "Mexican Trust").[370, 371] The Mexican Trust has to disburse funds to Perforadora for the maintenance and operation of the Rigs and the rest to Singapore Rig Owners.[372]

221. Specifically, the Singapore Rig Owners, acting under the purported control of the Ad-Hoc Group, filed the criminal complaint alleging that Perforadora had obtained from the Mexican Trust more funds than it required to maintain and operate the Rigs.[373]

222. Importantly, Claimants, Integradora and Perforadora learned of this investigation not from the Mexican authorities, but rather because it appeared in the front page of Reforma, the largest newspaper in México, on July 11, 2018.[374] This was about three weeks ***after*** Claimants filed their Notice of Arbitration against México.

223. The Bondholders' accusations are unsubstantiated and false.[375] Perforadora has not obtained from the Mexican Trust more funds than it required to maintain and operate the Rigs.[376]

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[370] The case number of this criminal investigation is FED/SEIDF/UEIDFF-CDMX/0000864/2018.

As described below, we eventually obtained a copy of this complaint. Prior to obtaining a copy, we knew of its content because it was summarized by Ricardo Contreras ("Mr. Contreras"), an associate of the Mexican law firm García González y Barradas, S.C. ("GGB"), which is the law firm that acts as criminal counsel to the Bondholders in México, in an interview that he provided to the local prosecutors' office in México City. Exhibit **C-2** is a transcript of Mr. Contreras' interview (the "Contreras Interview"); Izunza Expert Report, **CER-2**, ¶ 19.

Mr. Contreras provided this interview in the investigation described below as the "Sham Companies Investigation."

[371] The three employees are Mr. Del Val, Integradora's and Perforadora's former Chief Legal Officer, Edgar García, Integradora's and Perforadora's financial comptroller, and Laura Palacios, an employee in Integradora's and Perforadora's financial department.

[372] See Exhibit **C-3**, the Mexican Trust Agreement.

[373] *See* Exhibit **C-14**.

[374] *See id*.

[375] *See* Gil Statement, **CWS-1**, at ¶ 110.

[376] *See* Gil Statement, **CWS-1**, at ¶ 110.

Tellingly, the Bondholders have not made any similar accusations in any other proceedings, including in the Mexican or U.S. restructuring proceedings.[377]

224. Importantly, México, through the PGR, has denied Integradora, Perforadora and their employees (except Mr. Del Val) their right to defend themselves against this criminal complaint. Specifically, Oro Negro and its employees requested that the PGR (a) allow them to provide exculpatory evidence; and (b) give them access to the case file.[378] As criminal law expert, José Luis Izunza Espinosa, explains, the PGR must provide this information to Perforadora because under the Mexican Federal Constitution everyone has the right to defend themselves against criminal investigations and to review the evidence underlying an investigation.[379] The PGR for months failed to even respond to these requests.[380] After many months of litigation to compel the PGR to provide access to the file, in May 2019, the PGR allowed Mr. Del Val's attorneys to access the documents in the file and in August 2019, allowed them to make copies.[381]

225. Importantly, as further discussed below,[382] on September 18, 2018, following a request by the PGR to seize the Mexican Trust and all of the Mexican Trust's and Perforadora's bank accounts, a Mexican federal judge concluded that the allegations of mismanagement of the

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377 *See generally In re Perforadora, et al.*, No. 18-11094 (Bankr. S.D.N.Y.) (SCC) (Jointly Administered).

378 Exhibits **C-5** – **C-8** are Perforadora's and its employees' requests to the PGR; Izunza Expert Report, **CER-2**, ¶ 21.

379 Izunza Expert Report, **CER-2**, ¶¶ 20, 22; Constitución Política de los Estados Unidos Mexicanos [CP] [Mexican Constitution], Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 09-08-2019, Arts. 8, 20, **CL-89**. *See generally* PGR Investigation *Amparos* (Exhibits **C-9** – **C-13**), which describe the constitutional rights that the PGR is violating.

380 Perforadora and its employees are challenging the PGR's failure to respond in Mexican courts via *amparos*. Exhibits **C-9** – **C-13** are these *amparos* (the "PGR Investigation *Amparos*"). The *amparos* are pending. *Amparos* are challenges against government conduct on the ground that the government violated a constitutional right; Izunza Expert Report, **CER-2**, ¶ 22.

381 *See* Gil Statement, **CWS-1**, ¶ 112.

382 *See infra* ¶¶ 49-50.

Mexican Trust were ***completely baseless*** and that the PGR had ***no evidence*** demonstrating that the Mexican Trust was in any way related to any criminal conduct.[383]

226. México and the Bondholders nonetheless used this investigation to unlawfully collect broad ranging tax information regarding Integradora and Perforadora from the *Servicio de Administración Tributaria* (the "SAT"), México's tax agency. Specifically, on June 25, 2018, just one week after the Bondholders filed their complaint, the PGR sent a broad request to the SAT seeking all available tax information regarding Integradora and Perforadora.[384] The SAT responded within a week and provided all the information that the PGR requested.[385] In particular, the SAT sent to the PGR a disc with hundreds of tax filings filed by Integradora and Perforadora and tax filings by third parties reflecting services supposedly provided to them by Integradora and Perforadora (tax filings by an entity reflecting its vendors are known as *Declaraciones Informativas de Operaciones con Terceros*, "DIOT[s]"), as well as charts summarizing these tax filings.[386]

227. The PGR's broad request, and the SAT's response, were a blatant violation of Mexican law and basic human rights.[387] Article 69 of the *Código Fiscal de la Federación*, México's federal tax code, prohibits tax authorities from disclosing tax information to anyone, including other government agencies, absent a court order or in cases of money laundering or tax evasion, absent criminal investigations.[388] The SAT often denies similar requests by the PGR because it considers them a violation of Article 69 and, tellingly, in November 2018, ***denied an identical request*** that the PGR made to gather additional tax information regarding third parties (mainly, competitors of Oro

383 *See* Exhibit **C-176** (September 18 Order); Izunza Expert Report, **CER-2**, ¶ 23.

384 *See* Contreras Interview (Exhibit **C-2**) at p. 2; Izunza Expert Report, **CER-2**, ¶ 24.

385 *See* Contreras Interview (Exhibit **C-2**) at pp. 2–3; Izunza Expert Report, **CER-2**, ¶ 24.

386 *See* Exhibit **C-2** at p. 3 (Contreras Interview).

387 Izunza Expert Report, **CER-2**, ¶ 25.

388 Código Fiscal de la Federación [CFF], art. 69 (2018) (Mex.), **CL-264**.

Negro).[389] Notably, the SAT is part of México's Ministry of Finance. The Minister of Finance when the SAT provided this information to the PGR was José A. González-Anaya ("Mr. González"), the same person who had been the CEO of Pemex when Pemex colluded with the Bondholders in 2017.[390]

228. Embedded in the hundreds of documents provided by the SAT to the PGR, the Bondholders "found" one spreadsheet reflecting that from 2014 to 2017, Perforadora had supposedly issued invoices totaling approximately USD 500,000 to 16 companies that are blacklisted by the Mexican government as companies that facilitate tax evasion.[391] As further described below, the information in that spreadsheet is demonstrably false.[392] Notwithstanding the falsity of that information, México and the Bondholders used that information to initiate another meritless criminal investigation in September 2018, which resulted in the seizure of all of Perforadora's cash and in a court order authorizing the Bondholders to take over the Rigs.[393]

229. The sole purpose of this PGR criminal investigation was to create a vehicle for México to fabricate evidence against Perforadora that it could then use to attack Perforadora in other criminal proceedings.

3. A Mexican Federal Judge Confirmed that this Investigation Is Baseless

230. In early September 2018, based on the allegations of mismanagement of the Mexican Trust (described above) and the SAT's false evidence (further described below), the Singapore Rig

[389] Izunza Expert Report, **CER-2**, ¶ 25; Exhibit **C-177** is the November 2018 denial of information by the SAT.

[390] *See supra* Sections II(H).

[391] *See* Exhibit **C-2** at 3-7 (Contreras Interview).

[392] *See infra* ¶ 243.

[393] *See infra* ¶¶ 247, 253.

Owners requested that the PGR obtain a court order from a Mexican federal judge seizing the Mexican Trust and all of Perforadora's bank accounts.

231. On September 17, 2018, the PGR obliged and requested the seizure order. One day later, a Mexican federal judge denied the seizure as baseless (the "Federal Seizure Denial").[394] The federal judge determined that the Singapore Rig Owners had failed to provide ***any*** evidence that the Mexican Trust or any of the bank accounts of the Mexican Trust or Perforadora were in any way related to, or held proceeds of, any criminal conduct. As such, the federal judge concluded that the allegations of mismanagement of the Mexican Trust were baseless, much less that they justified the seizure of the Mexican Trust or any bank account. Additionally, the federal judge gave no weight whatsoever to the SAT's false evidence.

232. As further described below,[395] the Bondholders then decided to go around the Mexican federal courts and procured the assistance of friendly México City prosecutors and judges, likely motivated to act through corruption.

4. Improper Representation Investigation

233. In around June 2018, the Singapore Rig Owners, acting under the purported ownership and control of the Ad-Hoc Group, filed a criminal complaint[396] before the *Procuraduría General de Justicia de la Ciudad de México* (the "PGJCDMX"), México City's local prosecutors' office, against Mr. Del Val, Integradora's and Perforadora's former Chief Legal Officer, for signing on September 20, 2017, on behalf of Integradora, shareholder resolutions of Oro Negro Drilling and

394 Exhibit **C-76** is the Federal Seizure Denial.

395 *See infra* ¶¶ 216-316.

396 The case number of this criminal investigation is CI-FPC/74/UI-5 S/D/00187/06-2018. Attached as Exhibit **C-15** is the complaint (the "Improper Representation Complaint"); Izunza Expert Report, **CER-2**, ¶ 26.

the Singapore Rig Owners authorizing Jesús Guerra ("Attorney Guerra"), a Mexican attorney, to file for restructuring on their behalf.[397]

234. On September 29, 2017, Attorney Guerra filed for restructuring on behalf of Integradora, and also on behalf of Oro Negro Drilling and the Singapore Rig Owners.[398] After that, Attorney Guerra and other members of his firm have made other filings in the *concurso* proceeding on behalf of Oro Negro Drilling and the Singapore Rig Owners.[399]

235. The Bondholders argue in their complaint that Mr. Del Val misled the *Concurso* Judge by allowing Attorney Guerra to act on behalf of Oro Negro Drilling and the Singapore Rig Owners because, according to the Bondholders, they own and control Oro Negro Drilling and the Singapore Rig Owners, and they did not authorize Attorney Guerra to act on their behalf.[400] The Bondholders allege that this is a crime called procedural fraud (*fraude procesal*), which involves misleading a public official.[401]

236. This investigation is based on allegations so flimsy that they crumble under the slightest scrutiny. First, Integradora's shareholder authorization to Attorney Guerra is dated September 20, 2017; Attorney Guerra filed the petitions nine days later on September 29; 2017, and Nordic Trustee exercised the Oro Negro Drilling Share Charge on October 3. Thus, the authorization was almost two weeks before, and the *concurso* filing was six days before, the date when the Bondholders purportedly became the owners of Oro Negro Drilling. Therefore, there is no way that Mr. Del Val could have signed the shareholder resolutions to mislead Mexican courts.

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397 *See* Improper Representation Complaint (Exhibit **C-15**) at p. 6.

398 *See* Improper Representation Complaint (Exhibit **C-15**) at p. 7.

399 *See* Improper Representation Complaint (Exhibit **C-15**) at pp. 8-10.

400 *See* Improper Representation Complaint (Exhibit **C-15**) at pp. 6-7.

401 *See* Código Penal para el Distrito Federal [CPDF], art. 310, Pub. Gaceta Oficial del Distrito Federal 16-07-2002 (última reforma 16-07-2016) (Mex.); Izunza Expert Report, **CER-2**, ¶¶ 27-28.

237. Second, and in any event, the *Concurso* Judge has not yet decided whether the Bondholders properly exercised their pledge of stock over Oro Negro Drilling and thus, whether they validly own and control Oro Negro Drilling and the Singapore Rig Owners. Given that the *Concurso* Judge has not even decided this issue, the Bondholders have no basis to allege that Mr. Del Val attempted to mislead the *Concurso* Judge.

238. This case remains pending.

5. The Alleged Sham Companies Investigation

i. Overview of the Investigation and the Fabricated Evidence

239. On September 14, 2018, the Singapore Rig Owners, acting under the purported ownership and control of the Ad-Hoc Group, filed a criminal complaint before the PGJCDMX against Perforadora accusing it of issuing invoices totaling approximately USD 500,000 from 2014 to 2017 to 16 companies that supposedly facilitate tax evasion ("sham" or "ghost" companies).[402] The complaint alleges that in supposedly issuing these invoices, Perforadora committed a crime

[402] The case number of this criminal investigation is CI-FDF/T/UI-1 S/D/00787/09-2018. The Bondholders enhanced their complaint (*ampliacion de querella*) on September 19, 2018, on November 30, 2018 and on May 3, 2019. A transcript of the Bondholders' complaint and of the three *ampliaciones* are attached as Exhibits **C-16-C-18** (together, the "Complaints").

Each *ampliacion* adds increasingly absurd allegations, solely intended to harass Claimants. The May 3, 2019 *ampliacion*, for example, makes direct allegations against Mr. Cañedo, the Chairman of the Board of Directors of Integradora and one of the Claimants, Mr. Williamson, a member of the Board of Directors of Integradora and one of the Claimants, and Mr. Gil, Integradora's CEO, Mr. Cañedo's cousin and also a member of the Board of Directors of Integradora. The allegation is based ***solely*** on the fact that they were directors of Integradora (Integradora has ten Board members) and that in 2014 and 2015, Integradora received approximately USD 65 million from Perforadora, its subsidiary, without Perforadora issuing it invoices. In 2014 and 2015, Integradora provided capitalizations for approximately USD 84 million to Perforadora and in 2015, Perforadora returned to Integradora approximately USD 65 million. The *ampliacion* does not explain (nor could it, because it is absurd) why it is a criminal offense that Integradora received the USD 65 million from Perforadora without issuing it any invoices. In any event, because Integradora provided no services to Perforadora, there was no reason why it should have issued any invoices. Exhibit **C-77** is an expert accounting report provided by Perforadora to the PGJCDMX explaining this basic issue. This May 3, 2019 *ampliacion* is the basis for the recent arrest warrants issued against Claimants and their witnesses, which are further described below in this section.

called fraudulent administration (*administración fraudulenta*), which is to knowingly mismanage the finances and assets of a company.[403]

240. On September 21, 2018, Mr. Contreras, an associate at GGB, the Mexican law firm that acts as the Bondholders' criminal counsel, sat for an interview with the PGJCDMX.[404] In the interview, Mr. Contreras stated to the PGJCDMX that in the PGR investigation, the PGR had obtained from the SAT broad tax information regarding Integradora and Perforadora and that the Bondholders had reviewed that information.[405] Specifically, Mr. Contreras stated that the SAT sent the PGR a disc with hundreds of tax filings filed by Integradora and Perforadora and DIOTs (tax filings that companies must file every month reflecting their vendors) by third parties reflecting services supposedly provided to them by Integradora and Perforadora, as well as charts summarizing these tax filings.[406]

241. Embedded in the hundreds of documents provided by the SAT to the PGR, the Bondholders "found" one spreadsheet reflecting that from 2014 to 2017, Perforadora had allegedly issued invoices totaling approximately USD 500,000 to 16 sham companies.[407] Mr. Contreras, however, did not provide in his interview with the PGJCDMX a copy of the supposed spreadsheet, much less of the underlying DIOTs allegedly reflecting the invoices that Perforadora purportedly issued to these sham companies.[408]

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403 *See* Exhibit **C-16** at 11-12 (Sham Companies Complaint); *See* Código Penal para el Distrito Federal [CPDF], art. 234, Pub. Gaceta Oficial del Distrito Federal 16-07-2002 (última reforma 16-07-2016) (Mex.); Izunza Expert Report, **CER-2**, ¶¶ 30-33.

404 *See generally* Exhibit **C-2** (Contreras Interview).

405 *See* Exhibit **C-2** at pp. 2–3 **(**Contreras Interview).

406 *See* Exhibit **C-2** at pp. 2–3 **(**Contreras Interview).

407 *See* Exhibit **C-2** at pp. 4–7 **(**Contreras Interview).

408 *See generally* Exhibit **C-2** (Contreras Interview).

242. These sham companies are notorious bad apples, which explains why México and the Bondholders chose those companies as the supposed "sham" companies. In particular, México and the Bondholders chose those companies because it would (i) add strength to their baseless criminal investigation; and (ii) significantly disparage Integradora and Perforadora and injure their reputation. At the time of Mr. Contreras' interview, two of these 16 companies were on a list that the Mexican government maintains of companies that facilitate tax evasion (known in Spanish as *Empresas que Facturan Operaciones Simuladas*, "EFOS").[409] Since Mr. Contreras' interview, the Mexican government has added the remaining companies to its list of EFOS.[410] Additionally, most of the 16 companies were in a list published in 2017 by a Mexican investigative think tank accusing them of being vehicles for Javier Duarte ("Mr. Duarte"), the governor of the Mexican state of Veracruz from 2010 to 2016, to embezzle public funds.[411] Tellingly, GGB used to be Mr. Duarte's counsel and has been accused by the media of acting as a straw man for Mr. Duarte by holding real estate properties on his behalf.[412]

243. The Bondholders' accusations are demonstrably false.[413] First, Perforadora provides services only to Pemex thus, it makes no sense whatsoever that it would have ever invoiced anyone

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[409] *See* Exhibit **C-2** at p. 1 **(**Contreras Interview); *See* Exhibit **C-16** at pp. 11–12 (Sham Companies Complaint).

[410] The list of EFOS and the dates that these entities were added to the list is publicly available for download from the SAT's official website. *See* Secretaría de Hacienda y Crédito Público, Servicio de Administración Tributaria, *Listado de Contribuyentes (Art. 69-B del Código Fiscal de la Federación)*, http://omawww.sat.gob.mx/cifras_sat/Paginas/datos/vinculo.html?page=ListCompleta69B.html (last accessed Jul. 19, 2019). **Appendix B** to the Application for Interim Measures is a chart showing when each of the purported sham companies was added to the list.

[411] *See* Sham Companies Complaint (Exhibit **C-16**) at 11–12; *See also Descarga de documentos de esta investigación*, MEXICANOS CONTRA LA CORRUPCIÓN Y LA IMPUNIDAD AND ANIMAL POLÍTICO, https://contralacorrupcion.mx/red-karime-duarte/datos.html.

[412] *See Estos son los bienes de Duarte en México y en el extranjero,* EL FINANCIERO (Apr. 15, 2017), https://www.elfinanciero.com.mx/nacional/estos-son-los-bienes-de-duarte-en-mexico-y-en-el-extranjero; **C-78**; , *Catean 5 domicilios de Javier Duarte en la CDMX*, ANIMAL POLÍTICO (Oct. 22, 2016), https://www.animalpolitico.com/2016/10/pgr-catea-domicilios-javier-duarte/, **C-79**.

[413] *See* Gil Statement, **CWS-1**, ¶ 114.

else, much less sham companies.[414] Second, Perforadora conducted a comprehensive internal investigation and determined that these allegations are false.[415] This investigation was straightforward.[416] Under Mexican law, everyone must upload their invoices to an electronic database that the SAT keeps of all invoices.[417] There is no record in the SAT's database of Perforadora ever issuing an invoice to these sham companies or of these companies ever issuing an invoice to Perforadora.[418] Additionally, Perforadora reviewed all its internal accounting records, which are electronically stored in SAP, a standard software that companies use to keep all their business and accounting records, and found no records related to the sham companies.[419] In October 2018, after the Mexican media reported the existence of this criminal investigation, Perforadora provided a report of its findings confirming that these accusations are false to the judge presiding over the *concurso* proceeding (the "*Concurso* Judge") and to the judge presiding over the Chapter 15 proceeding (the "U.S. Judge").[420]

244. Furthermore, given the chronology of events, there are numerous obvious red flags Mexican officials were bribed to (a) convince the SAT to fabricate or deliver to the PGR fabricated evidence; and/or (b) procure the Seizure Order and/or the Rigs Take-Over Order.

245. Counsel for Oro Negro wrote to counsel for the Ad-Hoc Group about these red flags and requested an investigation into whether GGB engaged in corruption in México. To date, over nine months after that letter, there has been no written response.

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414 *See* Gil Statement, **CWS-1**, ¶ 115.

415 *See* Gil Statement, **CWS-1**, ¶ 116.

416 *See* Gil Statement, **CWS-1**, ¶ 117.

417 *See* Gil Statement, **CWS-1**, ¶ 117.

418 *See* Gil Statement, **CWS-1**, ¶ 118.

419 *See* Gil Statement, **CWS-1**, ¶ 119.

420 Attached as Exhibit **C-19** is Perforadora's report. Attached as Exhibits **C-20 – C-22** are the filings of this report with the *Concurso* Judge and the U.S. Judge.

246. The red flags include that:

(a) the SAT delivered false evidence to the PGR;

(b) the SAT sent to the PGR broad tax information regarding Perforadora, a request that the SAT often denies the PGR;

(c) GGB "found" that false evidence, imbedded in the numerous records provided by the SAT to the PGR;

(d) GGB knew or should have known that the information was false because other documents that it reviewed indicated that Perforadora did not have any relationship of any kind with the "sham" companies and GGB made no attempt to verify it;

(e) in only eleven days after launching the investigation in the PGJCDMX, GGB obtained the Seizure Order;

(f) the Seizure Order seized USD 84 million, while the accusation against Perforadora is that it issued invoices for USD 500,000 to 16 companies, an accusation that has nothing to do with and is blatantly disproportionate vis-à-vis the Seizure Order;

(g) Judge Cedillo issued the Seizure Order with no supporting evidence and based solely on Contreras' ex parte and unsupported statements;

(h) the Rigs Take-Over Order authorized the seizure of close to USD 750 million in value, while the accusation against Perforadora has nothing to do with and is blatantly disproportionate vis-à-vis the Rigs Take-over Order; and

(i) GGB obtained the Rigs Take-Over Order based solely on a short, 40-minute summary at a hearing, without providing and without Judge Cedillo requesting any evidence.

6. Unlawful Seizure of Oro Negro's Funds

247. Solely based on Mr. Contreras' interview, despite the patent falsity of the Bondholders' accusations, and that the Federal Seizure Denial had already disregarded the SAT's false evidence, on September 25, 2018, the PGJCDMX and the Bondholders sought and obtained an order from Judge Enrique Cedillo Garcia ("Judge Cedillo"), a local judge in México City, seizing all the bank accounts of the Mexican Trust and of Perforadora.[421]

248. The prosecutor primarily responsible for seeking the unlawful seizure of Oro Negro's funds is Andres Maximino Perez-Hicks ("Prosecutor Perez").[422] As further described below, this is the same prosecutor responsible for aiding the Bondholders in taking over the Rigs and for issuing the arrest warrants against Claimants and their witnesses.

249. There are approximately USD 83 million in the Mexican Trust.[423] This was all the cash that Integradora and Perforadora had left for their survival, including for paying salaries, legal counsel, taxes and maintaining the Rigs.[424]

250. Interestingly, Judge Cedillo issued the Seizure Order a mere three weeks after Pemex paid into the Mexican Trust the daily rates that had been past due for over a year and that the *Concurso* Judge had been repeatedly ordering Pemex to pay.[425] Specifically, Pemex paid approximately USD 96 million into the Mexican Trust on September 4 and 6, 2018.[426] These were accrued daily rates that Pemex owed Perforadora as of October 3, 2017, when it purported to

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421 Attached as Exhibit **C-23** is Judge Cedillo's seizure order (the "Seizure Order").

422 *See* Exhibit **C-23** at p. 1 (Seizure Order)

423 *See* Gil Statement, **CWS-1**, ¶ 121.

424 *See* Gil Statement, **CWS-1**, ¶ 121.

425 *See* Gil Statement, **CWS-1**, ¶ 121.

426 *See* Gil Statement, **CWS-1**, ¶ 91. There were USD 83 million in the Mexican Trust when Judge Cedillo issued the Seizure Order because from September 6 to September 25, 2018, Perforadora drew approximately USD 14 million from the Mexican Trust to pay past due salaries, taxes and expenses to maintain the Rigs.

terminate the Oro Negro Contracts.[427] The *Concurso* Judge issued six orders during 2017 and 2018 compelling Pemex to pay these daily rates, including orders holding Pemex and its former CEO in contempt and threatening to arrest Pemex's former CEO.[428] After all this, Pemex paid—only for México and the Bondholders to seize the money three weeks later.

251. The Bondholders, the PGJCDMX and Judge Cedillo provided no notice whatsoever to Perforadora (or Claimants or any of the companies related to their investments in México) about the criminal investigation, much less the Seizure Order.[429] Instead, Claimants and Perforadora learned of the criminal investigation and the Seizure Order because the Mexican media published articles reporting them on October 1, 2018.[430] In November 2018, Perforadora filed an *amparo* against the Seizure Order on the ground that it violates Perforadora's due process. That *amparo* is pending.[431]

252. Immediately upon learning of the investigation and the Seizure Order, Perforadora requested that the PGJCDMX (a) allow it to provide exculpatory evidence; and (b) give it access to the case file.[432] The PGJCDMX sent to Perforadora a letter on October 18, 2018, informing it that on October 17, 2018, the PGJCDMX had determined that Perforadora should appear for an interview on November 8, 2018, and allowed it to review the case file during and after the interview.[433]

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427 *See* Gil Statement, **CWS-1**, ¶ 88.

428 *See* Gil Statement, **CWS-1**, ¶ 89.

429 *See* Gil Statement, **CWS-1**, ¶ 122.

430 *See* Gil Statement at ¶ 47. Attached as Exhibits **C-71 – C-72** are samples of two media articles.

431 Attached as Exhibit **C-24** is Perforadora's *amparo* against the Seizure Order.

432 *See* Gil Statement, **CWS-1**, ¶ 123.

433 *See* Gil Statement, **CWS-1**, ¶ 13; Attached as Exhibit **C-25** is the October 18, 2018, letter by the PGJCDMX to Perforadora.

7. Unlawful Attempt to Seize Oro Negro's Rigs

253. On Friday October 19, 2018, three weeks before Perforadora would gain access to the case file to review the evidence and mount its defense, the Bondholders sought and obtained a second unlawful order from Judge Cedillo. Judge Cedillo issued this unlawful order solely based on Mr. Contreras' interview; despite that Perforadora had already confirmed to the Bondholders, the *Concurso* Judge and the U.S. Judge that the accusations were false; despite that the PGJCDMX had already sent a letter to Perforadora giving it access to the case file. In this order, Judge Cedillo authorized the Bondholders to take over the Rigs (the "Rigs Take-Over Order").[434] Judge Cedillo in effect authorized the Bondholders to dispossess Integradora all of its assets worth hundreds of millions of dollars.

254. Prosecutor Perez was present at the hearing where the Bondholders sought and obtained the Rigs Take-Over Order and unequivocally and strongly supported their request.[435]

255. Notably, the Bondholders had arranged for Judge Cedillo to issue the Rigs Take-Over Order as early as October 2018. On information and belief, the Bondholders began recruiting the crews that would take control of the Rigs in early October 2018.

256. Shortly after learning of the Rigs Take-Over Order, Integradora and Perforadora demanded that the Bondholders turn over the video recordings of the hearing where the Bondholders sought and obtained the Rigs Take-Over Order. The Bondholders lied and stated that they did not have them. Weeks later, in the course of an *amparo* filed by Perforadora against the Rigs Take-Over

[434] Attached as Exhibits **C-26 – C-27** are discs containing the video recording of the two-day hearing where the Bondholders requested and Judge Cedillo issued the Rigs Take-Over Order (the "Rigs Take-Over Hearing"). The Bondholders did not request this Order in writing and Judge Cedillo did not issue a written Order and thus, the only record of this are the video recordings of the hearing. Courts in México City routinely take video recordings of hearings.; Izunza Expert Report, **CER-2**, ¶ 36.

[435] *See* Exhibits **C-26 – C-27** (Rigs Take-Over Hearing); Exhibit **C-26** is the October 18 Hearing Recording) ; Exhibit **C-27** is the October 19 Hearing Recording.

Order (described below), Integradora and Perforadora obtained the video recordings of the hearing. The video recordings of the hearing reflect attorneys from GGB, the Bondholders' criminal law firm, requesting and obtaining a copy of the video recordings of the hearing.[436] Thus, there is no doubt that the Bondholders had the video recordings of the hearing but lied to Integradora and Perforadora to avoid turning them over.

257. Upon reviewing the hearing recordings, it became obvious why the Bondholders concealed them from Integradora and Perforadora. The video recordings reflect that GGB simply provided an approximately 40-minute summary of the purported facts and then, without asking any questions and without reviewing one single document or one single piece of evidence, Judge Cedillo granted the Rigs Take-Over Order.[437] The result appeared to be predetermined. Further, to ensure that the Bondholders would have all the possible assistance from the Mexican government to enforce the Rigs Take-Over Order, Judge Cedillo also issued orders to the *Agencia de Investigación Criminal* (the "AIC") of the PGR, which is the police force of the PGR, and to the *Fuerzas Armadas*, the Mexican army, to provide all possible assistance to the Bondholders in taking over the Rigs.[438]

258. The events that ensued on the evening of Friday, October 19, 2018, and during the following days defied reality. The Bondholders placed their crews in helicopters and deployed their helicopters on the evening of October 19 to fly over the Rigs.[439] On Saturday, October 20 and Sunday, October 21, the helicopters attempted to land by force on the Rigs.[440] On October 21, one

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436 *See* Exhibits **C-26 – C-27** (Rigs Take-Over Hearing); Exhibit **C-26** at :1:50:10, 1:57:00-1:57:30, 1:57:45-1:58:00 (October 18 Hearing Recording) ; Exhibit **C-27** at 28:50-29:10, 29:30-30:00 (October 19 Hearing Recording) ; *See* Gil Statement, **CWS-1**, ¶ 51.

437 *See generally* Exhibits **C-26 – C-27** (Rigs Take-Over Hearing); Izunza Expert Report, **CER-2**, ¶ 37.

438 Exhibits **C-28** and **C-29** are Judge Cedillo's orders to the AIC and to the *Fuerzas Armadas*, respectively.

439 *See* Gil Statement, **CWS-1**, ¶ 125.

440 *See* Gil Statement, **CWS-1**, ¶ 125.

of the helicopters flew dangerously close in attempting to land by force on the *Decus* and three men jumped onto the *Decus*.[441] In attempting to land by force, the helicopter almost killed one of the *Decus'* crewmembers.[442] Of the three men that forcibly landed on the *Decus*, one was a police officer from the AIC; one purported to be a private security guard hired by the Bondholders; and the other was Mr. Contreras, the GGB associate who provided to the PGJCDMX the interview that served as the sole basis for the Seizure and the Rigs Take-Over Orders.[443] The police officer left the *Decus* on October 21 and Mr. Contreras and his security guard stayed on the *Decus* for almost a week, refusing to leave.[444] While they were on board, the Bondholders falsely claimed to the rest of the world that Perforadora had kidnapped them.[445] In addition, during that week, one of the Bondholders' consultants called crewmembers aboard the Rigs and threatened them with criminal prosecution and loss of their license to work in oil drilling platforms if they did not let the Bondholders take over the Rigs.[446]

259. Revealing of the close coordination between México and the Bondholders and of México's retaliatory intent, on October 23, 2018, in the middle of the Bondholders' attempts to take over the Rigs, one of the largest media conglomerates in México ran a nationwide 10-minute television clip regarding Integradora, Perforadora, Mr. Gil and Mr. Francisco Gil (Mr. Gil's father and the Minister of Finance of México from 2000 to 2006).[447] The clip launches a series of

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441 *See* Gil Statement, **CWS-1**, ¶ 125.

442 *See* Gil Statement, **CWS-1**, ¶ 125.

443 *See* Gil Statement, **CWS-1**, ¶ 125; Exhibit **C-30** consists of several pictures of the men who boarded the *Decus* and reflects that the jacket of one of the men bears the logo of the AIC.

444 *See* Gil Statement, **CWS-1**, ¶ 126.

445 *See* Gil Statement, **CWS-1**, ¶ 126; Exhibit **C-31** is a transcript of an interview by one of the partners at GGB to the media stating that Perforadora was kidnapping the men on the *Decus*.

446 *See* Gil Statement, **CWS-1**, ¶ 126.

447 Attached as Exhibit **C-32** is a disc containing the television clip (the "Television Clip").

outrageous, incendiary and defamatory accusations against Integradora, Perforadora, Mr. Gil and Mr. Francisco Gil including that they are engaged in influence peddling and money laundering and that they have defrauded the Bondholders.[448] Importantly, Mr. Kim himself, the then-General Counsel of Pemex, personally appeared in the clip and falsely stated that Perforadora is corrupt and incompetent and that it had been a deficient services provider to Pemex.[449] Such a statement is not surprising given that Mr. Kim is among those who, according to the individuals interviewed by Black Cube, were taking bribes at Pemex. This television clip was nothing but a crude attempt to defame Integradora, Perforadora, Mr. Gil and his family and turn public opinion against them, increasing the Bondholders' chances to take over the Rigs.

260. The Bondholders' actions were stopped cold by the U.S. Judge. On October 23, 2018, upon a motion by Integradora and Perforadora, the U.S. Judge entered an order prohibiting the Bondholders from continuing to attempt to take over the Rigs or in any way deprive Perforadora of its possession of the Rigs.[450] That order remained in place for months, and the U.S. Judge never revoked it.[451] Following the U.S. Judge's order, the *Concurso* Judge also ordered the Bondholders to cease their unlawful actions and instructed Judge Cedillo to withdraw the Rigs Take-Over Order, which Judge Cedillo unlawfully refused to do.[452] Additionally, Perforadora filed an *amparo* against the Rigs Take-Over Order and obtained a temporary stay of the Order, pending a final resolution of the *amparo*.[453]

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[448] *See* Exhibit **C-32** at 01.49 – 05.54 (Television Clip). The Recordings indicate that Pemex was motivated to cancel the Oro Negro Contracts, in part, because of political ill will against Mr. Francisco Gil. Black Cube Statement, **CWS-4**, ¶ 42.

[449] *See* Exhibit **C-32** at 05.09 – 05.33 (Television Clip).

[450] Attached as Exhibit **C-33** is the order issued by the U.S. Judge.

[451] When Perforadora was forced to surrender the Rigs in May 2019, the order was rendered moot.

[452] Attached as Exhibit **C-34** is the order issued by the *Concurso* Judge.

[453] Attached as Exhibits **C-35** and **C-36** are the *amparo* and the stay issued by the *amparo* judge.

8. México's Refusal to Provide Key Evidence to Oro Negro

261. Starting on November 8, 2018, the PGJCDMX purported to give Perforadora access to the case file.[454] After months of litigation, the PGJCDMX allowed the defendants to make copies of the file[455] but, importantly, still refuses to provide copies to Perforadora of the most important evidence in the file—the disc from the SAT to the PGR that contains tax information, supposedly including a spreadsheet reflecting Perforadora's relationship with the 16 sham companies.[456]

262. To date, México has deprived Perforadora of the piece of evidence that served as the sole basis for the two highly irregular orders of Judge Cedillo, which froze all of Perforadora's money and caused it to lose the Rigs.

9. Red Flags of Corruption

263. In light of these facts, on December 21, 2018, counsel for Integradora and Perforadora sent a letter to counsel for the Bondholders requesting a written confirmation that the Bondholders or their attorneys had not bribed Mexican government officials in connection with the Mexican criminal investigations.[457] More than six months have elapsed since Integradora and Perforadora sent that letter and the Bondholders have not responded.

264. México's and the Bondholders' efforts to prosecute this baseless case continue. On June 11, 2019, the PGJCDMX appointed an expert to issue a report regarding the accusations of Perforadora's relationship with the "sham" companies. On June 17, 2019, just a few days later, the

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[454] *See* Gil Statement, **CWS-1**, ¶ 127.

[455] Perforadora filed two *amparos* against the PGJCDMX's refusal to provide proper access to the file. *See* Gil Statement, **CWS-1**, ¶ 127; Attached as Exhibits **C-37** and **C-38** are the *amparos* by Perforadora.

[456] *See* Gil Statement, **CWS-1**, ¶ 127.

[457] Attached as Exhibit **C-39** is the December 21, 2018 letter. This Exhibit is redacted in compliance with the protective order entered in the Chapter 15 proceeding. Protective orders are standard documents in U.S. litigation that require the parties to maintain confidential the evidence that they exchange during discovery. Because this Exhibit reflects confidential information provided by the Bondholders in discovery, Claimants must redact the portions of the Exhibit that reflect that information.

supposed expert issued his report. The report is a compilation of screenshots of the false Excel spreadsheet listing the invoices supposedly issued by Perforadora to the "sham" companies. It lacks all of the indicia that one would expect to see in a report of a truly independent expert and instead smacks of partiality and contains no real evidence or expert opinions. Based solely on screenshots of the Excel spreadsheet, the purported expert concluded that Perforadora had issued invoices and serviced the 16 "sham" companies.[458] This is nothing more than a shameless effort to continue harassing and retaliating against Claimants and their witnesses.

265. Far worse, it appears that México recently rewarded Judge Cedillo for issuing baseless and suspicious orders by promoting him. In December 2018, just a few months after the Seizure and Rigs Take-Over Orders, the Mexican judiciary promoted him from trial judge to appellate judge. There are no publicly available records justifying the reason for his promotion.[459] This appointment appears to be México's reward to Judge Cedillo for helping to disregard the rule of law, and rule against Claimants' investment vehicles, allowing for the attempted seizure of the Rigs under highly suspicious circumstances.

10. The Contempt Investigation

266. On October 21, 2018, the Singapore Rig Owners, acting under the purported ownership and control of the Bondholders, filed a criminal complaint against Perforadora and its employees before the PGR's office in Ciudad del Carmen, a city in México close to where the Rigs are located.[460]

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[458] Exhibit **C-80** is the report by the supposed "expert."

[459] Exhibit **C-81**, Judge Cedillo's appointment as a federal judge is available here: http://www.poderjudicialcdmx.gob.mx/wp-content/PHPs/boletin/boletin_repositorio/070120191.pdf at p. 7.

[460] The case number of this criminal investigation is FED/CAMP/CAMP/000480/2018. Exhibit **C-40** is the complaint (the "Contempt Complaint").

267. The Bondholders filed this complaint during the week when they were attempting to take over the Rigs.[461] The complaint alleges that Perforadora and its employees are in contempt of the Rigs Take-Over Order because they did not allow the Bondholders to take over the Rigs.[462]

268. In January 2019, the PGR filed charges against three Perforadora employees who were on board the Rigs during the week when the Bondholders attempted to take them over.[463] A federal judge dismissed the charges for lack of jurisdiction on the ground that federal prosecutors and judges do not have jurisdiction over such an investigation.[464]

11. The Duplicative Amparos Investigation

269. On October 18, 2018, the PGR filed a criminal complaint against Mr. Del Val before the PGR arguing that in one of the *amparos* that Mr. Del Val has filed in connection with the Mexican criminal investigations against him, he omitted describing all other *amparos* related to the Mexican criminal investigations.[465] The basis for this complaint is false because Mr. Del Val has described in detail, in each of his *amparos*, each other related or relevant *amparo*.

270. This investigation is pending.

12. The Tax Evasion Investigation

271. On June 17, 2019, the Mexican media reported that the Mexican Ministry of Finances (*Secretaría de Hacienda y Crédito Público*, the "SHCP") had filed a criminal complaint with the PGR against Mr. Cañedo, the Chairman of Integradora and one of the Claimants; Mr. Gil, Integradora's CEO, a director and Mr. Cañedo's cousin; and Gustavo Mondragon, an employee in

461 *See* Exhibit **C-40** at p. 10 (Contempt Complaint).

462 *See* Exhibit **C-40** at pp. 5–6 (Contempt Complaint).

463 *See* Gil Statement, **CWS-1**, ¶ 129.

464 *See* Gil Statement, **CWS-1**, at ¶ 129.

465 The case number of this criminal investigation is FED/JAL/GDL/0005523/2018. Exhibit **C-41** is the complaint.

Integradora's tax department.[466] Perhaps not coincidentally, this was about 10 days after Integradora and Perforadora filed the New York Lawsuits, where they allege and demonstrate acts of collusion, corruption and persecution by México and the Bondholders.[467]

272. The government alleges that in its 2014 tax return, Integradora deducted the inflation value of its investment in its subsidiaries (*i.e.*, deducted the product of the value of the investment times inflation, which is a loss in the value of the investment).[468] The supposedly improperly claimed deduction is approximately USD 500,000.

273. Claimants' knowledge of this criminal complaint is primarily based on the media reports and on a document issued by the *Procuraduría de la Defensa del Contribuyente* ("PRODECON"), a body within the SAT that mediates disputes between the SAT and taxpayers. Specifically, during 2018, as a result of one of the numerous tax audits launched against Integradora (described below), the PRODECON attempted to mediate "…between Integradora and the SAT regarding Integradora's 2014 tax return on three issues at which they were at an impasse. One of those issues was the inflation deduction.[469]

274. The Mexican government's accusation defies common sense and is plainly absurd. First, there is no doubt that Mexican law allows for inflation deduction on *aportaciones para futuros aumentos de capital*.[470] Indeed, the Mexican statute regulating inflation deduction ***expressly and***

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[466] *See Hacienda denuncia a Oro Negro por evasión de más de 10 mdp en 2014,* SDP NOTICIAS (Jun. 17, 2019 1:26 PM), https://www.sdpnoticias.com/economia/2019/06/17/hacienda-denuncia-a-oro-negro-por-evasion-de-mas-de-10-mdp-en-2014, **C-82**.

[467] *See supra* ¶ 18.

[468] The investment is called *aportaciones para futuros aumentos de capital*, which means committing capital in exchange for an option on future stock issuances. *See* Ley del Impuesto sobre la Renta [Income Tax Law], arts. 44-46, Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 30-11-2016 (Mex.).

[469] Exhibit **C-83** is the final PRODECON report, stating that the SAT and Integradora resolved two of the three issues but remained at an impasse regarding the inflation deduction.

[470] *See* Ley del Impuesto sobre la Renta [Income Tax Law], Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 30-11-2016, Arts. 44-46 (Mex.), **CL-263**.

specifically includes *aportaciones para futuros aumentos de capital*.[471] Second, Integradora took this deduction in 2014 and the SAT never even asked any questions, much less objected.[472] Third, even if the deduction was improper, there is no basis whatsoever to convert a tax dispute into a criminal prosecution.[473] Fourth, as a matter of routine, Mexican companies claim inflation deductions on their *aportaciones para futuros aumentos de capital*.

275. Additionally, on August 8, 2019, the SAT issued an order finding that in its 2014 tax return, Integradora improperly deducted the inflation value of its investment in its subsidiaries.[474] Importantly, the August 8 decision concluded that Integradora did ***not owe anything to the SAT*** because even after removing the USD 500,000 deduction, it would have not had to pay any income tax in 2014.[475]

13. First Apparent Investigation Against Quinn Emanuel

276. On July 25 and 26, 2018, El Economista, one of the most prominent newspapers in México, published two articles stating that the Mexican government was considering launching or had already launched an investigation against Quinn Emanuel, Claimants' counsel in this arbitration

[471] The Mexican Tax Code expressly states that companies receiving *aportaciones para futuros aumentos de capital* should treat those investments as loans, which undoubtedly allow for inflation deduction. *See* Ley del Impuesto sobre la Renta [Income Tax Law], Diario Oficial de la Federación [DOF], [Official Journal of the Federation] 30-11-2016, (Mex.), Art. 46 ("Para los efectos del artículo 44 de esta Ley, se considerará deuda, cualquier obligación en numerario pendiente de cumplimiento, entre otras: las derivadas de contratos de arrendamiento financiero, de operaciones financieras derivadas a que se refiere la fracción IX del artículo 20 de la misma, las aportaciones para futuros aumentos de capital y las contribuciones causadas desde el último día del periodo al que correspondan y hasta el día en el que deban pagarse. También son deudas, los pasivos y las reservas del activo, pasivo o capital, que sean o hayan sido deducibles."), **CL-263**.

[472] *See* Gil Statement, **CWS-1**, ¶ 131.

[473] *See* Julio Roberto Sánchez Francisco, *El Principio de Intervención Mínima en El Estado Mexicano*, REVISTA DEL INSTITUTO DE LA JUDICATURA FEDERAL (2007), https://www.ijf.cjf.gob.mx/publicaciones/revista/23/r23_17.pdf, Exhibit **C-178**.

[474] *See* Exhibit **C-179** (ISPON oficio de notificacion de situacion fiscal).

[475] *See* Exhibit **C-179** (ISPON oficio de notificacion de situacion fiscal).

and counsel to Integradora and its subsidiaries.[476] According to the articles, the investigation focuses on whether Quinn Emanuel used information obtained from another Quinn Emanuel client to prepare the Notice of Arbitration.[477] Quinn Emanuel has been unable to confirm whether this investigation exists or is ongoing.

277. Claimants and Quinn Emanuel developed the evidence underlying the Notice of Arbitration in full compliance with all applicable laws and ethical standards. Any insinuation by México to the contrary is baseless and nothing but a shameless effort to retaliate against Claimants through pressuring their counsel.

14. Second Apparent Investigation Against Quinn Emanuel

278. In early July and August 2019, Quinn Emanuel learned that the Bondholders were working with prosecutors in the PGJCDMX to obtain charges and obtain arrest warrants against Quinn Emanuel and its attorneys for *prevaricato*, which under Mexican law makes it a crime to represent conflicting interests in the same litigation. GGB and the PGJCDMX plan to allege that Quinn Emanuel's simultaneous representation of Claimants in this NAFTA claim, and of Integradora and Perforadora in the New York Lawsuits, is a criminal offense. On its face, these criminal accusations are baseless. There is no question that the New York Lawsuits and this arbitral proceeding are not the "same litigation," and this appears to be yet another quiver in México's campaign to attack Claimants and now their counsel.

[476] Attached as Exhibits **C-42** and **C-43** are the media articles.

[477] *See id*.

279. Further, during July 2019, the Mexican media published three articles directly naming specific Quinn Emanuel attorneys and stating that the Mexican government was planning to issue arrest warrants against them in connection with the Oro Negro matter.[478]

280. Quinn Emanuel has been unable to confirm whether this investigation exists or is ongoing. Quinn Emanuel attorneys have restricted to the greatest extent possible travel to México for fear of apprehension, potentially hampering Quinn Emanuel's representation in this proceeding.

15. Arrest Warrants Against Claimants and their Witnesses

281. In addition to the eight investigations described above in this section, on July 16, 2019, México issued arrest warrants against Mr. Cañedo, the Non-Executive Chairman of the Board of Directors of Integradora and one of the Claimants, Mr. Williamson, a non-executive member of the Board of Directors of Integradora and one of the Claimants, Mr. Gil, the CEO of Integradora, a director of Integradora and Mr. Cañedo's cousin, Mr. Del Val, the former Chief Legal Officer of Integradora, and Mr. Villegas, the former CFO of Integradora (together the "Defendants" and the "Arrest Warrants").

282. Claimants and the Defendants learned of the Arrest Warrants through the media. Indeed, every major Mexican media outlet reported on July 17, 2019, about the issuance of the Arrest Warrants.[479] The media, however, did not provide specifics about the Arrest Warrants, much less the underlying grounds, including whether they had been issued in connection with any of the

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[478] *See* Dario Celis, *Bremer irrumpe con la venia de AMLO*, EL FINANCIERO (Sept. 6, 2019), https://www.elfinanciero.com.mx/opinion/dario-celis/bremer-irrumpe-con-la-venia-de-amlo, Exhibit **C-180**; Lourdes Mendoza, *Los secretos de Collado y su Caja*, EL FINANCIERO (Aug. 14, 2019), https://www.elfinanciero.com.mx/opinion/lourdes-mendoza/los-secretos-de-collado-y-su-caja, Exhibit **C-181**; Dario Celia, *¡Sálvese quien pueda!*, El Financiero, (Aug. 20, 2019) https://elfinanciero.com.mx/opinion/dario-celis/salvese-quien-pueda, Exhibit **C-182**.

[479] *See, e.g.*, Abel Barajas, *Ordenan la captura de hijo de Gil Díaz,* REFORMA (Jul. 17, 2019), https://www.reforma.com/aplicacioneslibre/preacceso/articulo/default.aspx?id=1724723&opinion=0&urlredirect=https://www.reforma.com/ordenan-la-captura-de-hijo-de-gil-diaz/ar1724723?v=4&flow_type=paywall, **C-75**.

eight investigations described above.[480] México provided no notice to Claimants, or the other officers of Integradora and Perforadora, of its intention to seek arrest warrants, much less any opportunity to respond to the underlying allegations.

283. The Defendants did not have access to the Arrest Warrants for almost two months, and were not even been provided any copies of the Warrants, making it impossible for them to defend themselves against the allegations. Finally, in late August 2019, the Defendants obtained a copy of the recording of the hearing where the prosecutors sought and the judge issued the Arrest Warrants. This was as a result of an *amparo* that the Defendants filed against the Arrest Warrants, forcing the issuing judge to turn over the recording reflecting the issuance of the Arrest Warrants.[481]

284. As the recording of the hearing reveals, late on July 16, 2019, Prosecutor Perez, the same PGJCDMX prosecutor responsible for the Seizure and Rigs Take-Over Orders, requested and obtained the Arrest Warrants.[482] The issuing judge is Joel de Jesus Garduño Venegas ("Judge Garduño"), a local México City judge.[483] The hearing lasted a little over two hours—tellingly, Judge Garduño did not request, nor did Prosecutor Perez provide, a single piece of evidence in support of the Arrest Warrants.[484] After about 90 minutes of Prosecutor Perez verbally describing the allegations, Judge Garduño simply recited on the record the same allegations and issued the Arrest Warrants.[485] Although at the end of the hearing, Judge Garduño indicated that the Arrest Warrants

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480 Abel Barajas, *Ordenan la captura de hijo de Gil Díaz,* REFORMA (Jul. 17, 2019), https://www.reforma.com/aplicacioneslibre/preacceso/articulo/default.aspx?id=1724723&opinion=0&urlredirect=https://www.reforma.com/ordenan-la-captura-de-hijo-de-gil-diaz/ar1724723?v=4&flow_type=paywall, **C-75**.

481 *See* Exhibit **C-183** (Recording).

482 *See* Exhibit **C-183** (Recording).

483 *See* Exhibit **C-183** (Recording).

484 *See* Exhibit **C-183** (Recording).

485 *See* Exhibit **C-183** (Recording).

should remain strictly confidential, virtually every media outlet in México reported on them in the morning of July 17, 2019, the very next day after then judge had issued the Arrest Warrants.[486]

285. Conspicuously, the Arrest Warrants were issued as part of the same case file (*carpeta de investigacion*) containing the Sham Companies Investigation.[487]

286. The Arrest Warrants are based in large part on allegations in a May 3, 2019, complaint by the Singapore Rig Owners (the "May 3 Complaint"). The allegations in the May 3 Complaint and in the resulting Arrest Warrants ***have absolutely nothing to do with the allegations in the Sham Companies Investigation***. The May 3 Complaint and resulting Arrest Warrants are part of the Sham Companies Investigation because the Singapore Rig Owners filed the May 3 Complaint as an enhancement (*ampliación de querella*) of their original complaint regarding the sham companies. It appears that the Bondholders consolidated all their criminal cases in México City under the Sham Companies Investigation's case file, for which Prosecutor Perez is responsible, so that he could remain in charge of all cases against Oro Negro, its owners and managers.

287. The Arrest Warrants allege that (1) Messrs. Gil and Del Val committed fraudulent administration (*administracion fraudulenta*)[488] because in 2014 and 2015, in violation of the Bareboat Charters, four of the Singapore Rig Owners (all but Oro Negro Impetus) wired a total of USD 50,124,399.32 to Perforadora; and (2) all the Defendants committed abuse of trust (*abuso de confianza*)[489] because in January and September 2015, in violation of the Mexican Trust Agreement,

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[486] *See* Exhibit **C-183** (Recording).

[487] The Arrest Warrants are part of file CI-FDF/T/UI-1 S/D/00787/09-2018, which is the Sham Companies Investigation's file.

[488] Izunza Expert Report, **CER-2**, ¶¶ 29-31.

[489] Izunza Expert Report, **CER-2**, ¶¶ 33-34.

Perforadora made two wire transfers totaling USD 13.5 million to Integradora.[490] These allegations are false, and factually and legally baseless.

288. The basis for these allegations is a July 5, 2019 accounting report provided to Prosecutor Perez by Luis E. Lambarri-Boladeras (the "Lambarri Report"), a local accountant in México City, on behalf of the Singapore Rig Owners.[491]

i. Fraudulent Administration

289. Fraudulent administration is to (1) while managing property that belongs to a third party; (2) with the intent of profiting; (3) engage in any transaction involving that property; and, as a result, (4) cause an injury to the owner of the property.[492] The PGJCDMX's fraudulent administration allegation against Messrs. Gil and Del Val is that Perforadora breached the Bareboat Charters, to the supposed detriment of the Singapore Rig Owners.[493] Specifically, the PGJCDMX alleges that Perforadora breached Section 7.3 of the Bareboat Charters by paying on behalf of the Singapore Rig Owners the Rigs' capital expenditures and then seeking reimbursement of the same from the Singapore Rig Owners.[494] According to the PGJCDMX, the crime is that the Singapore Rig Owners should have directly paid for the Rigs' capital expenditures, rather than reimbursing Perforadora for those expenses.[495]

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[490] The Arrest Warrants were issued as part of the Sham Companies Investigation. As set forth above, the case number of this criminal investigation is CI-FDF/T/UI-1 S/D/00787/09-2018.

[491] Lambarri is a small, undistinguished accountant. He has a small office located in the outskirts of México City: Paseo San Gerardo 106, Residencial la Providencia, 52177 Metepec, Méx., México**.** **(**https://www.google.com/maps/@19.2741102,-99.6070109,3a,49.2y,280.94h,92.56t/data=!3m7!1e1!3m5!1sABN__ZhmBawR2PBLGbgqSw!2e0!6s%2F%2Fgeo1.ggpht.com%2Fcbk%3Fpanoid%3DABN__ZhmBawR2PBLGbgqSw%26output%3Dthumbnail%26cb_client%3Dmaps_sv.tactile.gps%26thumb%3D2%26w%3D203%26h%3D100%26yaw%3D1.7644584%26pitch%3D0%26thumbfov%3D100!7i13312!8i6656) , Exhibit **C-184**.

[492] Izunza Expert Report, **CER-2**, ¶ 31.

[493] *See* Exhibit **C-183** (Recording).

[494] *See* Exhibit **C-183** (Recording).

[495] *See* Exhibit **C-183** (Recording).

290. There are several reasons why the allegation of fraudulent administration against Messrs. Gil or Del Val is patently false and baseless.

291. First, the PGJCDMX does not explain how or why Messrs. Gil or Del Val committed fraudulent administration because the Singapore Rig Owners wired funds to Perforadora in 2014 and 2015. In particular, the PGJCDMX fails to allege that (1) Messrs. Gil or Del Val were managing any property that belonged to a third party (at the time, the Singapore Rig Owners belonged to Integradora); (2) Messrs. Gil or Del Val or anyone else profited from the wires; (3) Messrs. Gil or Del Val engaged in any transactions involving property of a third party (the transactions were between the Singapore Rig Owners and Perforadora, not Messrs. Gil or Del Val); or (4) anyone suffered any injury.[496]

292. Tellingly, the Arrest Warrants do not allege or even mention whether Messrs. Gil or Del Val knew of or were in any way involved in the Singapore Rig Owners' wire transfers to Perforadora.[497]

293. Second, it is false that the Singapore Rig Owners wired USD 50,124,399.32 to Perforadora in 2014 and 2015. They wired approximately USD 44.2 million.[498]

294. Third, Oro Negro publicly disclosed the Singapore Rig Owners' 2014 and 2015 wire transfers to Perforadora. Specifically, Oro Negro Drilling, the Singapore Rig Owners' parent, reported its audited financial statements in Stamdata, the information portal of companies that issue debt in Norway. In September 2016, Oro Negro Drilling posted in Stamdata its 2014 and 2015 audited financial statements. Those financial statements reflect that in 2014 and 2015, the Singapore

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496 *See* Exhibit **C-183** (Recording).

497 *See* Exhibit **C-183** (Recording).

498 *See* **Appendix K**. This is a chart reflecting (1) each wire from the Singapore Rig Owners to Perforadora, including date and amount; (2) Perforadora's corresponding invoice to the Singapore Rig Owners; and (3) Perforadora's SAP ledger reflecting the invoice and payment.

Rig Owners wired approximately USD 44.2 million to Perforadora as reimbursements of capital expenditures for the Rigs that Perforadora had incurred on behalf of the Singapore Rig Owners.[499]

295. Fourth, when Oro Negro and the Bondholders negotiated amendments to the Bond Agreement in 2015 and 2016, Oro Negro extensively discussed with and provided detailed information to the Bondholders and their advisors regarding the Singapore Rig Owners' wire transfers to Perforadora.

296. For example, (1) in August 2015, Oro Negro provided two detailed financial reports to the Bondholders, their financial advisor (Houlihan Lokey) and legal advisor (Paul Weiss), detailing the amount that each Singapore Rig Owner owed Perforadora;[500] and (2) in a call on July 20, 2015, Oro Negro walked the Bondholders, Houlihan Lokey and Paul Weiss, through the inter-company transfers, including the Singapore Rig Owners' transfers to Perforadora for capital expenditure reimbursements.[501]

297. Fifth, as described above, the Bondholders and Oro Negro amended the Bond Agreement in 2016. In that amendment, the Bondholders, including all entities controlled by them, provided a broad release to Oro Negro, its subsidiaries, shareholders, directors, officers, employees and representatives, including expressly for fraud. The release, which is very broad in nature, is contained in the Bond Agreement's clause 15.7 and in separate releases executed by the Bondholders (the "Releases").[502]

298. Sixth, even if the fraudulent administration allegations were true, they amount to no more than a breach of contract claim which cannot constitute a criminal offense and which is outside

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499 *See* Exhibit **C-185 (**https://www.stamdata.com/documents/NO0010700982_IB_20160905.pdf).

500 *See* Exhibits **C-186 - C-187,** Consolidating Balance Sheets and Assorted Diligence Requests, respectively.

501 *See* Exhibit **C-188** (Project Gulf Email).

502 *See* Exhibit **C-97** (Bond Agreement); Exhibit **C-189** is an exemplar of the 2016 Releases.

the jurisdiction of Mexican courts. Specifically, the PGJCDMX alleges that Perforadora breached the Bareboat Charters by paying on behalf of the Singapore Rig Owners the Rigs' capital expenditures and then seeking reimbursement of same from the Singapore Rig Owners. It is a fundamental principal of Mexican criminal law that a mere contractual violation cannot be treated as a criminal offense.[503] Further, the Bareboat Charters are governed by U.S. law and subject to New York courts and, as such, the PGJCDMX and the Bondholders' are circumventing the Bareboat Charters by attempting to criminally enforce them in México City.

299. Seventh, as set forth above, an element of fraudulent administration is injury. Since the Bondholders released Oro Negro and its employees of any claim, damage or liability, the injury element of the crime fails.[504]

300. Eighth, the statute of limitations for fraudulent administration in México is one year from the date when the supposed victim (here, the Singapore Rig Owners) learned of the crime.[505] The Singapore Rig Owners knew of their transfers to Perforadora when they made the transfers in 2014 and 2015. As such, there is no doubt that the statute of limitations expired long ago.

301. As such, there was absolutely no basis for issuing the Arrest Warrants and it appears they were illegally issued at least in part to persecute Claimants and their key witnesses.

ii. Abuse of Trust

302. Abuse of trust is to, (1) while acting as custodian of property that belongs to a third party; (2) transfer the property; and, as a result, (3) cause an injury to the owner of the property.[506] The PGJCDMX's abuse of trust allegation against the Defendants is that Perforadora breached the

[503] Izunza Expert Report, **CER-2**, ¶ 32.

[504] Izunza Expert Report, **CER-2**, ¶ 32.

[505] Izunza Expert Report, **CER-2**, ¶ 31.

[506] Izunza Expert Report, **CER-2**, ¶¶ 33-34.

Mexican Trust Agreement, to the supposed detriment of the Singapore Rig Owners.[507] Specifically, the PGJCDMX alleges that Perforadora breached the Mexican Trust Agreement by transferring funds to Integradora because the Mexican Trust Agreement does not contain any provision allowing Perforadora to wire funds to Integradora.[508] This claim is, in and of itself, baseless because the Arrest Warrants do not rely on any evidence that the funds that Perforadora wired to Integradora in any way originated from the Mexican Trust or came from Pemex's day rate payments into the Mexican Trust.[509]

303. There are several other reasons why the allegation of abuse of trust against the Defendants is patently false and baseless.

304. First, the PGJCDMX does not explain how or why the Defendants committed abuse of trust because Perforadora wired funds to Integradora. In particular, the PGJCDMX fails to allege that that the Defendants (1) were custodians of property of a third party (Integradora has always been the owner of Perforadora and neither of them have ever belonged to the Bondholders); (2) disposed of that property; or (3) injured anyone.[510] Tellingly, the Arrest Warrants do not allege or even mention whether the Defendants knew of or were in any way involved in Perforadora's wire transfers to Integradora.[511]

305. Further, during the relevant time period Integradora had at least eight directors (at times it had more). There is no explanation about why only two of the eight directors (Messrs. Cañedo and Williamson) committed abuse of trust. As noted above, Messrs. Cañedo and

[507] *See* Exhibit **C-183** (Recording).

[508] *See* Exhibit **C-183** (Recording).

[509] *See* Exhibit **C-183** (Recording).

[510] *See* Exhibit **C-183** (Recording).

[511] *See* Exhibit **C-183** (Recording).

Williamson are NAFTA Claimants and, together with Mr. Gil, are the owners of Axis, the original financial sponsor of Oro Negro.[512]

306. Second, as explained below, Perforadora sent to Integradora from 2013 to 2015 a total of USD 84,966,957.08. The Arrest Warrants' allegations focus exclusively on two wires in 2015 totaling USD 13.5 million, almost the exact amount in the Mexican Trust that the *Concurso* Judge determined belong to Perforadora and that Perforadora would have received on July 25, 2019, upon expiration of the Seizure Order.

307. Third, Perforadora's wires to Integradora were due to contributions by Integradora for potential stock issuances, which Perforadora ultimately returned to Integradora.[513] Specifically, from 2012 to 2015, Integradora provided to Perforadora approximately USD 133 million in cash for potential stock issuances.[514] From 2013 to 2015, Perforadora returned approximately USD 85 million to Integradora. These transactions (1) were reported to Oro Negro's auditors and are reflected in Integradora's and Perforadora's audited financial statements;[515] and (2) were reported in Integradora's and Perforadora's tax returns.[516]

308. Fourth, as discussed above, when Oro Negro and the Bondholders negotiated amendments to the Bond Agreement in 2015 and 2016, Oro Negro extensively discussed and provided detailed information to the Bondholders, Houlihan Lokey and Paul Weiss, regarding

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[512] Gil Statement, **CWS-1**, ¶ 3.

[513] It is common for Mexican holding companies to provide contributions to subsidiaries, entitling them to receive future stocks, if the subsidiaries issues more stock (in Spanish, they are called a*portaciones para futuros aumentos de capital*, which literally translates to contributions for future capital increases). An entity that receives such contributions must declare them in its tax returns as debt, lowering the entity's income tax liability. If the entity does not issue stock or issues less than the amount of the contribution, the entity must return the rest of the contribution.

[514] *See* Exhibit **C-190** (BRG Report regarding Integradora's contributions to Perforadora).

[515] *See* Exhibit **C-191** (Integradora 2014-2015 Deconsolidated Audited Financial Statements and Perforadora's 2013-2014 and 2014-2015 Audited Financial Statements.).

[516] *See* Exhibit **C-192** (Integradora's 2012 to 2015 returns and Perforadora's 2012 to 2015 returns).

Integradora's contributions to Perforadora for potential future stock issuances. For example, (1) August 2015, Oro Negro provided two detailed financial reports to the Bondholders, Houlihan Lokey and Paul Weiss, detailing the contributions to Perforadora that Perforadora had not yet returned to Integradora;[517] and (2) in a call on July 20, 2015, Oro Negro and its advisors walked the Bondholders, Houlihan Lokey and Paul Weiss, through the inter-company transfers, including Integradora's contributions to subsidiaries, including Perforadora.

309. Fifth, as set forth above, the Bondholders released Oro Negro in 2016.

310. Sixth, even if the abuse of trust allegations were true, they amount to no more than a breach of contract claim which cannot constitute a criminal offense.[518] Specifically, the PGJCDMX alleges that Perforadora breached the Mexican Trust Agreement because it does not expressly allow for payments from Perforadora to Integradora. It is a fundamental principal of Mexican criminal law that a mere contractual violation cannot be treated as a criminal offense.[519]

311. Seventh, as set forth above, an element of abuse of trust is injury. Since the Bondholders released Oro Negro and its employees of any claim, damage or liability, the injury element of the crime fails.[520]

312. Eighth, the statute of limitations for abuse of trust in México is one year from the date when the supposed victim (here, the Bondholders, which purport to control the Singapore Rig Owners) learned of the crime.[521] The Bondholders learned of Perforadora's transfers to Integradora

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[517] *See* Exhibit **C-186-C-187** (Consolidating Balance Sheets and Assorted Diligence Requests).

[518] Izunza Expert Report, **CER-2**, ¶ 32.

[519] Izunza Expert Report, **CER-2**, ¶ 33.

[520] Izunza Expert Report, **CER-2**, ¶ 35.

[521] Izunza Expert Report, **CER-2**, ¶ 34.

no later than July 2015, as a result of their audit into Oro Negro's finances and operations. As such, there is no doubt that the statute of limitations expired long ago.

313. As such, there was absolutely no basis for issuing the Arrest Warrants and they were illegally issued solely to persecute Claimants and their key witnesses.

iii. New Seizure Order

314. The Seizure Order was supposed to last 300 days—it should have expired on July 25, 2019.[522] Upon expiration of the Seizure Order, the Mexican Trust would have disbursed approximately USD 13.5 million to Perforadora. Indeed, the *Concurso* Court expressly determined on January 31, 2018 that USD 13.5 million currently in the Mexican Trust belong to Perforadora.[523]

315. On July 17, 2019, based on exactly the same allegations to obtain the Arrest Warrants, Prosecutor Perez filed a request with Judge Garduño, the Judge who issued the Arrest Warrants, seeking to freeze the Mexican Trust and Oro Negro's funds for 300 days (the "New Seizure Request").[524] Judge Garduño granted the New Seizure Request.[525]

316. As such, it is evident that the Arrest Warrants were nothing but a pretext of the Mexican government to continue holding on to Oro Negro's cash and block its access to any funds. As a result of the Arrest Warrants, the PGJCDMX was able to obtain a new seizure order for 300 days.

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[522] Exhibit **C-23**.

[523] Exhibit **C-193**, at 10-11 (January 31, 2018 Order).

[524] Exhibit **C-194** is the July 17, 2019 New Seizure Request.

[525] Exhibit **C-195** (Redacted Seizure Extension Order).

16. Other Retaliatory Actions Against Claimants

i. México's Tax Audits[526]

317. Starting in October 2017, after Integradora and Perforadora filed for *concurso* in México, the SAT launched seven baseless tax audits against Integradora and four of its subsidiaries, including Perforadora, all of which are still pending. These tax audits are comprehensive investigations into virtually every aspect of the finances and operations of Integradora and its subsidiaries dating as far back as 2013.

318. Integradora and its subsidiaries have been in business since 2012. However, the SAT started investigating them in 2017 and 2018. Notably, one of these seven tax audits began in April 2018, one month after Claimants delivered to México their Notice of Intent and four of these seven tax audits began in August 2018, two months after Claimants delivered to México their Notice of Arbitration.[527]

319. Integradora and its subsidiaries have been cooperating with the SAT and providing all the information that the SAT has requested.[528] As a result, Integradora and its subsidiaries are spending hundreds of thousands of dollars in these audits and will continue spending hundreds of thousands of dollars more unless this Tribunal intervenes.[529]

320. Additionally, in August 2019, the Mexican government opened a tax audit against Mr. Gil, Integradora's former CEO and a key witness in this NAFTA proceeding. In 2017, Mr. Gil requested and obtained from the SAT permission to cancel his tax identification number and cease

[526] **Appendix C** to the Application for Interim Measures is chart summarizing all the tax audits, including their start date, the target company and scope. Exhibits **C-64 – C-70** are the orders by the SAT opening each of the seven tax audits.

[527] *See* **Appendix C**.

[528] *See* Gil Statement**, CWS-1**, ¶ 67.

[529] *See* Gil Statement**, CWS-1**, ¶ 68.

paying taxes in México due to his relocating to the United States.[530] Prior to allowing Mr. Gil to leave the Mexican tax system, the SAT concluded that he did not owe any taxes and that there were no pending audits against him.[531] It is evidently an act of retaliation that in late August 2019, the SAT informed Mr. Gil that it was conducting an audit against him, despite that two years ago it had no objection to Mr. Gil ceasing to be a Mexican tax payer.[532]

17. México's Refusal To Pay Past Due Daily Rates to Perforadora

321. Pemex owes Perforadora approximately USD 24 million in past due daily rates that accrued from October 3, 2017, the day when Pemex purported to terminate the Oro Negro Contracts, to the days in November and December when Pemex returned the Jack-Up Rigs to Perforadora.[533]

322. To date, although those daily rates are past due over a year, Pemex still refuses to pay them to Perforadora.[534] There is no valid reason for Pemex to continue withholding these funds from Perforadora.[535]

18. México's Efforts to Subvert This NAFTA Proceeding

323. México has attempted twice to subvert the proper course of this NAFTA proceeding. First, on July 23, 2018, Pemex sent a letter to Integradora and Perforadora demanding that they turn over to Pemex the recordings that Claimants described in their Notice of Arbitration.[536] As Pemex knows well, Integradora and Perforadora are not parties to this NAFTA proceeding. Further, as the Notice of Arbitration clearly indicated, the recordings were gathered by and are in possession of

[530] *See* Gil Statement**, CWS-1**, ¶ 139.

[531] *See* Gil Statement**, CWS-1**, ¶ 139.

[532] *See* Gil Statement**, CWS-1**, ¶ 139.

[533] *See* Gil Statement**, CWS-1**, ¶ 70.

[534] *See* Gil Statement**, CWS-1**, ¶ 71.

[535] *See* Gil Statement**, CWS-1**, ¶ 71.

[536] Attached as Exhibit **C-44** is Pemex's letter.

Claimants, not Integradora or Perforadora.[537] As such, Pemex's letter was an attempt to circumvent the proper course of this NAFTA proceeding. Claimants will turn over the recordings described in the Notice of Arbitration to the Tribunal and to México when it is procedurally proper.

324. Second, on October 25, 2018, the *Secretaría de la Función Pública* (the "SFP"), an entity of the Mexican government responsible for investigating public spending, sent a letter to Integradora and Perforadora, similar to Pemex's letter, demanding that they turn over the recordings that Claimants described in their Notice of Arbitration.[538] This was yet a second attempt by México to circumvent the proper course of this NAFTA proceeding.

III. ARGUMENT

A. The Tribunal Has Jurisdiction Over Claimants' Claims

325. All Claimants satisfy the NAFTA's procedural and jurisdictional requirements. To establish the Tribunal's jurisdiction in this case, Claimants must show that:

(a) Claimants are each U.S. investors;

(b) Claimants have made an investment in México; and

(c) Claimants have satisfied the procedural conditions set out in Articles 1118 to 1121.

326. Claimants satisfy each of these elements, and thus, the Tribunal has jurisdiction over the Claimants' claims.

1. Claimants Are U.S. Investors Entitled to Protection Under the NAFTA and Entitled To Bring Claims Under Articles 1116 and 1117

327. As described in Section II.A.1, all of the Claimants are either nationals of the United States for NAFTA purposes or enterprises constituted under the laws of the United States, and have

[537] *See* NOA 2, 18, 40, Section V.

[538] Exhibit **C-45** is the SFP's letter.

made an investment in México and thus are entitled to protection under the NAFTA ("Individual Claimants" or "Enterprise Claimants," respectively).

328. NAFTA Article 1139 defines an "investor of a Party" as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment."[539] NAFTA Article 201 defines a "national" as "a natural person who is a citizen *or* a *permanent resident* of a Party"[540] and an "enterprise" as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association."[541]

329. A qualifying investor in México may make a claim under NAFTA Article 1116(1) on its/his/her own behalf or on behalf of an enterprise under Article 1117(1), concerning breaches of certain obligations under Chapter 11 or 15 of the NAFTA. All Claimants are discussed below.

i. U.S. National Claimants

330. Each of the Individual Claimants are U.S. nationals as defined in the NAFTA, as all of them fall within the definition of "national" as provided in NAFTA Article 201, *i.e.*, "a natural person who is a citizen or permanent resident of a Party,"[542] in this case, the United States. Each of the Individual Claimants are U.S. citizens, or in one case, a U.S. permanent resident. Under Article 1116 of the NAFTA, "[a]n investor of a Party may submit to arbitration under this Section a claim

[539] NAFTA Article 1139, **CL-59**.

[540] NAFTA Article 201, **CL-67**.

[541] NAFTA Article 201, **CL-67**.

[542] NAFTA Article 201, **CL-67**.

that another Party has breached an obligation" under various provisions of the NAFTA.[543] Each Claimant's entitlement to protection under the NAFTA as a U.S. national is described below.

a. U.S. Citizens

331. Alicia Grace, Carolyn Grace Baring, Diana Grace Beard, Frederick Grace, Frederick Warren, Gary Olson, Genevieve Irwin, Gerald Parsky, John Irwin III, Nicholas Grace, Oliver Grace, Robert Witt, and Virginia Grace are all U.S. nationals with U.S. citizenship as evidenced by their U.S. passports.[544] Thus, they are qualified investors under NAFTA Article 1139 and eligible to bring claims on their own behalf under Article 1116.

332. Mr. Williamson is also a U.S. national with U.S. citizenship as evidenced by his U.S. passport.[545] Mr. Williamson obtained his U.S. citizenship by naturalization in 2014. He also holds Colombian citizenship by birth.[546] However, Mr. Williamson's Colombian citizenship is immaterial here, as he holds the nationality of one of the States Party to the NAFTA. The NAFTA contains no provision explicitly or implicitly barring dual citizens of any kind from bringing claims, much less a dual national that holds the nationality of a State unrelated to the dispute.

b. U.S. Permanent Resident

333. Mr. Cañedo is a U.S. permanent resident and Mexican citizen.[547] He began living in the United States in 2012 and obtained his U.S. permanent residence in 2014[548] with the intent to obtain citizenship.[549] Mr. Cañedo has been living in Miami, Florida since 2012 with his U.S.

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543 NAFTA Article 1116, **CL-59**.

544 *See* Claimants' Notice of Intent, Annexes 1, 9, 11, 15, 16, 18, 19, 21, 23, 25, 26, 29, 31.

545 *See* Claimants' Notice of Intent, Annex 8.

546 *See id.*

547 *See* Claimants' Notice of Intent, Annex 24; Cañedo Statement, **CWS-2**, ¶¶ 4, 8.

548 *See id*; Cañedo Statement, **CWS-2**, ¶¶ 5-8.

549 Cañedo Statement, **CWS-2**, ¶¶ 6, 9.

permanent resident wife and two U.S. citizen children ages 7 and 10, who go to school in Miami.[550] He has not held property nor lived in México since 2012.[551] He and his wife own a home in Miami and other properties in the United States.[552] Despite the proximity of México to the U.S., Mr. Cañedo has not been to México frequently since 2012. Mr. Cañedo and his wife are applying for U.S. citizenship in 2020.[553] He has thus been a permanent resident of the U.S. since before the measures complained of in this proceeding, at the time of the filing of this NAFTA case and since then.

334. The NAFTA is unmistakably clear that, for purposes of the treaty, a "U.S. national" includes both U.S. citizens and U.S. permanent residents. Under Article 201, a "national" is "a natural person who is a citizen or a permanent resident of a Party."[554] This provision must be interpreted in accordance with the Vienna Convention on the Law of Treaties ("VCLT"), which states both that "[a] treaty shall be interpreted in good faith according 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"[555] and that "[a] special meaning shall be given to a term if it is established that the parties so intended."[556] Here, the NAFTA Parties clearly intended that either permanent residency or citizenship would be sufficient to bring a person within the scope of the NAFTA as a protected "national."

335. The NAFTA also makes no distinction between citizens and permanent residents of the United States and neither is privileged in the text of the treaty. Because the NAFTA is the *lex*

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[550] Cañedo Statement, **CWS-2**, ¶¶ 10-11.

[551] Cañedo Statement, **CWS-2**, ¶¶ 12-13.

[552] Cañedo Statement, **CWS-2**, ¶ 12.

[553] Cañedo Statement, **CWS-2**, ¶ 9.

[554] NAFTA Article 201 (emphasis added), **CL-67**.

[555] VCLT Art. 31(1), **CL-58**.

[556] VCLT Art. 31(4), **CL-58**.

specialis in this case, the Tribunal must first look at the specific language of the NAFTA when analyzing claims by U.S. permanent residents. General principles of international law apply only in the absence of specific treaty law. In this case, the NAFTA is clear: both U.S. citizens and U.S. permanent residents are U.S. nationals under the treaty. To deny a claim by a U.S. permanent resident would fly in the face of the plain language of the Treaty, and would contradict the intention of the NAFTA Parties to protect the investments of permanent residents. Thus, U.S. permanent residents, such as Mr. Cañedo, have standing to bring a claim under the NAFTA.

336. Mr. Cañedo's Mexican citizenship is further immaterial given that a) the NAFTA explicitly permits disputing investors to submit claims under the UNCITRAL Rules,[557] b) the NAFTA does not prohibit claims by dual nationals in the Treaty, and c) modern arbitral jurisprudence affirms the right of dual nationals to bring cases against the State of one of their nationalities in the UNCITRAL context.

337. The NAFTA provides a deliberate choice to investors in Article 1120 between bringing cases under the ICSID Convention, the ICSID Additional Facility Rules, or under the UNCITRAL Rules.[558] While the ICSID Convention restricts claims by dual nationals bringing a claim against the State of one of their nationalities,[559] the UNCITRAL Rules do not have such a restriction. Here, the U.S. Shareholders made a valid and binding choice to proceed against México under the UNCITRAL Rules. Given the choice provided to investors in Article 1120 of the NAFTA to proceed under the UNCITRAL Rules and the absence of an express prohibition against claims by

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[557] NAFTA Article 1120(1)(c), **CL-59**.

[558] NAFTA Article 1120(1), **CL-59**.

[559] ICSID Convention, Art. 25(2)(a) ("'National of another Contracting State' means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, *but does not include any person who on either date also had the nationality of the Contracting State party to the dispute*." (emphasis added)), **CL-60**.

dual nationals in the UNCITRAL Rules, the logical conclusion is that claims by dual nationals are permitted.

338. Moreover, just as there is no express prohibition against claims by dual nationals in the UNCITRAL Rules, there is also no such express prohibition under the NAFTA. The absence of such a prohibition in the NAFTA stands in contrast to other treaties that México has signed. For example, the México-Australia BIT, México-Uruguay BIT, México-Panama Free Trade Agreement, and Additional Protocol to the Framework Agreement of the Pacific Alliance all contain an express prohibition on claims by dual nationals.[560] If México or the other two NAFTA Parties had intended to restrict claims by dual nationals, they would have included an express prohibition, as they have done in other treaties, or restricted the ability of disputing investors to bring claims only under the ICSID Convention. Given that the NAFTA does not have a textual bar on claims by dual nationals and allows claims under the UNCITRAL Rules, the Tribunal may not read new prohibitions into the UNCITRAL Rules nor into the NAFTA itself.

339. Recent arbitral jurisprudence confirms that dual nationals may bring claims under the UNCITRAL Rules. In *Serafín García Armas v. Venezuela*, the tribunal analyzed the Spain-Venezuela Bilateral Investment Treaty ("BIT"), which, like the NAFTA, does not contain an express restriction against dual nationals bringing claims against one of its own states.[561] The tribunal reasoned that given the absence of any express limitations in the BIT prohibiting dual nationals from

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[560] *See, e.g.*, México-Australia Bilateral Investment Treaty, Article 1(c)(i)(3) ("This Agreement shall not apply to a natural person having nationality or citizenship of both Contracting Parties in accordance with their applicable laws.") (terminated Dec. 30, 2018), **CL-61**; México-Uruguay Bilateral Investment Treaty, Article 1(3)(b) ("*Sin embargo, este Acuerdo no se aplicará a inversiones realizadas por personas físicas que sean nacionales de ambas Partes Contratantes*."), **CL-62**; México-Panama Free Trade Agreement, Chapter 2 ("*[U]na persona física o natural que tiene la nacionalidad de una Parte de conformidad con su legislación aplicable, pero no incluye a los residentes permanentes*."), **CL-63**; and Additional Protocol to the Framework Agreement of the Pacific Alliance (2014), Article 10(1), **CL-203**.

[561] *Serafín García Armas v. República Bolivariana de Venezuela* ("*García*"), PCA Case No. 2013-3, Decision on Jurisdiction (Dec. 14, 2014), ¶¶ 54, 176-181, **CL-64**.

advancing claims against its own states, it was sufficient that the Claimants had Spanish nationality. To hold otherwise, according to the tribunal, would be to revise the text of the BIT by adding a restriction that could have been included (as it was in other BITs) but was not. The tribunal also rejected Venezuela's request to apply the dominant and effective nationality test. Just as the BIT contained no restrictions against claims by dual nationals, it also did not contain any requirement to apply such a test. In holding that it had jurisdiction over the case, the tribunal reinforced that the express language of the treaty controlled in permitting claims by dual nationals.[562] In rejecting a set aside application by Venezuela in the *García* case, the French Court of Cassation affirmed the tribunal's reasoning and the tribunal itself reaffirmed its jurisdictional holding in its recent final judgment in Claimants' favor.[563]

340. Similarly, as in *García*, the dominant and effective nationality test is inapposite when the text of the treaty is clear. Unlike other treaties that both the U.S. and México have signed,[564] the NAFTA does not contain any requirement to apply the "dominant and effective nationality" test. Again, if the NAFTA Parties had wanted tribunals to apply the dominant and effective nationality test to determine the applicable citizenship of the claimants for a NAFTA claim, they would have written such a test into the Treaty as the Parties did in other treaties such as CAFTA-DR. The Parties also could have written an interpretive note through the NAFTA Free Trade Commission ("FTC") advising future tribunals as to their intent on the applicable citizenship of disputing investors as they have done for other substantive questions that have arisen with regard to the NAFTA text. However, the NAFTA Parties have done no such thing.

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[562] *García*, Decision on Jurisdiction, ¶¶ 176-181, **CL-64**.

[563] Judgment of the French Court of Cassation on Venezuela's Set Aside Application (Feb. 13, 2019), https://www.italaw.com/cases/documents/7196, **CL-65**.

[564] *See supra note* ¶ 338.

341. Finally, the objectives of the NAFTA support its text. Article 102 states that "[t]he objectives of this Agreement . . . are to . . . increase substantially investment opportunities in the territories of the Parties."[565] An overly restrictive reading of theTreaty text that leaves certain covered investors and their investments without protection does not "increase substantially investment opportunities."[566]

342. Therefore, all Individual Claimants are U.S. nationals who have validly brought claims under the NAFTA. Accordingly, the Tribunal has jurisdiction *ratione personae* over all named Individual Claimants.

ii. Enterprises Constituted or Organized Under the Laws of the United States

343. As to Ampex Trust, Apple Oaks, Brentwood, Cambria, Floradale, Warren IRA, Irwin Trust, Parsky IRA, ON5, Rainbow, Witt IRA, and Vista Pros, all are enterprises constituted or organized under the laws of one of the states within the United States.[567] As noted above, the term "enterprises" under NAFTA Article 201 explicitly includes corporations, trusts, and partnerships.[568] NAFTA Article 201's only limitation is that the entities must be constituted or organized under the applicable law of a State Party to the dispute. In this case, each Enterprise Claimant is organized under the laws of the United States.

iii. Enterprises Majority Owned and Controlled by Claimants

344. As to Axis Services, Axis Holding, Clue, and F. 305952, all are owned and/or controlled directly or indirectly by the U.S. national Shareholders—the Individual Claimants—

[565] NAFTA Article 102, **CL-66**.

[566] NAFTA Article 102, **CL-66**.

[567] Claimants' Notice of Intent, Annexes 2, 3, 6, 7, 14, 17, 20, 22, 27, 28, 29, 30.

[568] NAFTA Article 201 defines "enterprise" as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any *corporation, trust, partnership*, sole proprietorship, joint venture or other association" (emphasis added), **CL-67**.

above. NAFTA Article 1117 provides that an investor may bring a claim on behalf of a company that the investor "owns or controls *directly or indirectly*." Here, as described in II.A.1, Messrs. Williamson and Cañedo both own and control the named entities.[569] And, as established above, Messrs. Williamson and Cañedo are U.S. Investors under the terms of the NAFTA.[570] Thus, Messrs. Williamson and Cañedo may bring a claim on behalf of Axis Services, Axis Holding, Clue, and F. 305952 under Article 1117.

a. Claimants Own a Majority Shareholding of Each of the Entities

345. Majority ownership is sufficient to establish that an investor owns an enterprise under Article 1117. Here, the Claimants' ownership is more than sufficient because Claimants own 66% of each of the entities. The ordinary usage of "own" in international investment treaty practice supports majority ownership as the relevant benchmark. For example, investment claims at the Iran-United States Claims Tribunal use the benchmark of "fifty per cent or more" ownership to determine corporate nationality.[571] The Canadian Statement on Implementation of the NAFTA further confirms the ordinary understanding of ownership as majority ownership. Specifically, the Canadian Statement observes that "[t]he NAFTA definition of investment includes minority interests, portfolio

[569] Exhibit **C-86** is a certificate from Attorney in Fact of Axis Services certifying that Clue has been the 33.3% owner of Axis Services since November 14, 2011 to date. Exhibit **C-85** is a certificate from the Attorney in Fact of Clue certifying that Mr. Williamson has been the 99.9999% owner of Clue since August 15, 2002 to date. Exhibit **C-87** is a copy of the Register of Members of ONC, reflecting Axis Services as 99% shareholder of ONC since May 2, 2016 to date. Exhibit **C-86** is a certificate from the Attorney in Fact of Axis Holding certifying that Clue has been the 33.3% owner of Axis Holding since November 14, 2011 to date. Exhibit **C-B.10** is a redacted copy of the F. 305952 Trust Agreement certifying that Clue has been the 33.3% beneficial owner of F. 305952 since December 14, 2011 to date. Exhibit **C-88** is a redacted copy of the F. 169852 Trust Agreement certifying that F. 305952 has been the beneficial owner of 3.2618% of F. 169852 since December 14, 2011 to date. Mr. Cañedo owns 33.3% of Axis Services. Exhibit **C-86** is a certificate from the Attorney in Fact of Axis Services certifying that Mr. Cañedo has been the 33.3% owner of Axis Services since November 14, 2011 to date. Exhibit **C-87** is a copy of the Register of Members of ONC, reflecting Axis Holding as 0.1% shareholder of ONC since May 2, 2016 to date.

[570] Claimants' Notice of Intent, Annexes 8, 24.

[571] *See* Iran-United States Claims Tribunal Claims Settlement Declaration, Art. VII(1), **CL-68**.

investment, and real property as well as majority-owned or controlled investments from the NAFTA countries."[572] Each company and their holding by each U.S. national Claimant is listed below.

A) Axis Services

346. Axis Services is owned 33.3% by Mr. Williamson (through his company Clue)[573] and 33.3% by Mr. Cañedo.[574]

B) Axis Holding

347. Axis Holding is owned 33% by Mr. Williamson (through his company Clue)[575] and 33% by Mr. Cañedo.[576]

C) Clue

348. Clue is owned 100% by Mr. Williamson.[577]

D) F. 305952

349. F. 305952 is owned 33.3% by Mr. Williamson and 33.3% by Mr. Cañedo.[578]

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[572] Canadian Statement on Implementation of the NAFTA, Canada Gazette, Part I, Jan. 1, 1994, p. 147, **CL-69**.

[573] Exhibit **C-86** is a certificate from the Attorney in Fact of Axis Services certifying that Clue has been the 33.3% owner of Axis Services since November 14, 2011 to date. Exhibit **C-86** is a certificate from the Attorney in Fact of Clue certifying that Mr. Williamson has been the 99.9999% owner of Clue since August 15, 2002 to date.

[574] Exhibit **C-86** is a certificate from the Attorney in Fact of Axis Services certifying that Mr. Cañedo has been the 33.3% owner of Axis Services since November 14, 2011 to date and certifying that Clue has been the 33.3% owner of Axis Services since November 14, 2011 to date. Exhibit **C-85** is a certificate from the Attorney in Fact of Clue certifying that Mr. Williamson has been the 99.9999% owner of Clue since August 15, 2002 to date.

[575] **C-86** is a certificate from the Attorney in Fact of Axis Holding certifying that Clue has been the 33.3% owner of Axis Holding since November 14, 2011 to date. Exhibit **C-85** is a certificate from the Attorney in Fact of Clue certifying that Mr. Williamson has been the 99.9999% owner of Clue since August 15, 2002 to date.

[576] **C-86** is a certificate from the Attorney in Fact of Axis Holding certifying that Clue has been the 33.3% owner of Axis Holding since November 14, 2011 to date and that José Antonio Cañedo White has been the 33.3% owner of Axis Holding since November 14, 2011 to date. Exhibit **C-85** is a certificate from the Attorney in Fact of Clue certifying that Mr. Williamson has been the 99.9999% owner of Clue since August 15, 2002 to date.

[577] Exhibit **C-85** is a certificate from the Attorney in Fact of Clue certifying that Mr. Williamson has been the 99.9999% owner of Clue since August 15, 2002 to date.

[578] Exhibit **C-B.10** is a redacted copy of the F. 305952 Trust Agreement certifying that Clue has been the 33.3% beneficial owner of F. 305952 since December 14, 2011 to date and certifying that Clue has been the 33.3% beneficial owner of F. 305952 since December 14, 2011 to date. Exhibit **C-85** is a certificate from the Attorney in Fact of Clue certifying that Mr. Williamson has been the 99.9999% owner of Clue since August 15, 2002 to date.

b. Claimants Control the Entities

350. Although Claimants need show only ownership of the entities to establish standing under NAFTA Article 1117 (and have already done so through their majority shareholding), Messrs. Williamson and Cañedo also "control" the enterprises through their ability to direct the companies and make key managerial decisions. NAFTA cases consistently confirm that "control" for purposes of Article 1117 includes de facto forms of control, including, without limitation, managerial control. For example, in *Thunderbird v. México*, the tribunal was confronted with the question of whether a U.S. gaming corporation had standing to assert a claim under Article 1117 on behalf of several Mexican gaming companies. The claimant, Thunderbird, owned the majority of shares of three of the gaming companies, but only had a minority ownership of three other entities. The tribunal found that although Thunderbird did not have majority ownership in the three entities, it still exercised "control" on behalf of the companies sufficient to assert standing under NAFTA Article 1117:

> Despite Thunderbird having less than 50% ownership of the Minority EDM Entities, the Tribunal has found sufficient evidence on the record establishing an unquestionable pattern of de facto control exercised by Thunderbird over the EDM entities. Thunderbird had the ability to exercise a significant influence on the decision-making of EDM and was, through its actions, officers, resources, and expertise, the consistent driving force behind EDM's business endeavour in México.
>
> It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholders meetings. Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation. Ownership and legal control may assure that the owner or legally controlling party has the ultimate right to determine key decisions. However, if in practice a person exercises that position with an expectation to receive an economic return for its efforts and eventually be held responsible for improper decisions, one can conceive the existence of a genuine link yielding the control of the enterprise to that person.[579]

[579] *International Thunderbird Gaming Corporation v. United Mexican States* ("*Thunderbird*"), UNCITRAL, Arbitral Award (Jan. 26, 2006), ¶¶ 107, **CL-70**.

351. Therefore, the Article 1117 claims on behalf of the listed entities are permissible because Claimants can establish not only more majority ownership of the companies, they also can establish both legal and de facto control of the companies.

2. Claimants Made a Protected "Investment" in México Under the NAFTA

352. Each of the Claimants made a protected investment in México under the NAFTA. Article 1139 defines the term "investment" for purposes of the NAFTA in "exceedingly broad terms," covering "almost every type of financial interest . . . ."[580] The term includes, among many other interests:

> (a) an enterprise; (b) an equity security of an enterprise; [. . .] (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution [. . .][581]

353. Claimants own directly or indirectly (through companies, trusts, or special purpose vehicles) 43.2 percent of the shares of Integradora Oro Negro582 and thus are "investors" with a protected "investment." Claimants' direct and indirect shareholdings in Oro Negro fall within the above definition—whether categorized as "equity securit[ies] of an enterprise" or "interest[s] in an enterprise" that entitle the owner to share in the profits of the firm, or another subcategory of protected investment under Article 1139. Claimants therefore hold protected investments under the NAFTA.

354. As shareholders, Claimants are entitled to bring claims under both Article 1116, on their own behalf, and Article 1117, on behalf of the entities that are also shareholders of Integradora Oro Negro, for damages suffered as a result of Respondent's acts. The NAFTA tribunal in *GAMI*

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[580] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), ¶ 96, **CL-109**.

[581] NAFTA Article 1139, **CL-59**.

[582] Complete shareholders log (*libro de registro de acciones*) for Integradora, **C-84**.

Investments Inc. v. United Mexican States stated the rule clearly: "the fact that GAMI is only a minority shareholder does not affect its right to seek the international arbitral remedy."[583] Further, loss in shareholding value is sufficient to give rise to a claim for damages under Article 1116, and specific interference with rights incident to share ownership is not necessary for a shareholder to be able to bring a claim on its own behalf. As the *GAMI* tribunal continued,

> The fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment. . . . Uncertainty in this regard is not an obstacle to jurisdiction.[584]

355. Arbitral tribunals have regularly held that investors are entitled to bring indirect claims based on damage or loss in the value of shareholding interests under both Article 1116 and Article 1117 of the NAFTA. The tribunal in *Pope & Talbot v. Canada* stated that "[i]t could scarcely be clearer that claims may be brought under Article 1116 by an investor who is claiming for loss or damage to its interest in the relevant enterprise."[585]

356. Similarly, the *SD Myers* tribunal held:

> Taking into account the objectives of the NAFTA, and the obligation of the Parties to interpret and apply its provisions in light of those objectives, the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs.[586]

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583 *GAMI Investments Inc. v. United Mexican States* ("*GAMI*"), UNCITRAL, Final Award (Nov. 15, 2004), ¶ 37, **CL-71**.

584 *GAMI*, Final Award, ¶ 33, **CL-71**.

585 *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Respect to Damages (May 31, 2002), ¶ 80, **CL-72**; *See also Mondev International Ltd. v. United States of America* ("*Mondev*"), ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶¶ 82-83, **CL-73**; *United Parcel Service of America Inc. v. Government of Canada* ("*UPS*"), UNCITRAL, Award on the Merits (May 24, 2007), ¶ 35, **CL-74**.

586 *Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (Nov. 13, 2000), ¶ 229, **CL-75**.

357. This comports with the general rule with which tribunals have regularly agreed: that shareholders can bring their own claims for losses incurred to their shareholding, irrespective of the claims for damages that the company itself may also have.[587]

358. Claimants also owned the investment at the time of the measures at issue in this case and owned them at the time the arbitration was filed on June 19, 2018.[588]

3. Claimants Have Satisfied All of the Procedural and Temporal Requirements of the NAFTA

359. Chapter 11 of the NAFTA sets out a number of procedural conditions. Claimants satisfy each of these requirements.

i. Articles 1116, 1117, and 1120

360. All Claimants have satisfied the temporal requirements of making their claims within the time period specified in Articles 1116, 1117, and 1120. Article 1116 states that the "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,"[589] and Article 1117 states that "an investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than 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."[590] Claimants

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[587] *Genin et al. v. Estonia*, ICSID Case No. ARB/99/2, Award (Jun. 25, 2001), ¶¶331–332, **CL-76**; *Champion Trading v. Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction (Oct. 21, 2003); ¶ 3.4.3, **CL-77**; *CMS Gas v. Argentina ("CMS")*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (Jul. 17, 2003), ¶ 80, **CL-78**; *Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentina*, ICSID Case No. ARB/97/3, Award (Nov. 21, 2000), ¶ 55, **CL-106**.

[588] Complete shareholders log (*libro de registro de acciones*) for Integradora, **C-84**.

[589] NAFTA Article 1116, **CL-59**.

[590] NAFTA Article 1117, **CL-59**.

submitted their claim to arbitration by filing a Notice of Arbitration on June 19, 2018.[591] Claimants first became aware of the retaliatory motives for México's behavior in December 2017 when they learned of the contents of the Recordings. In any event, Claimants complain of measures occurring within three years prior to the filing of their Notice of Arbitration—measures which culminated in the cancellation of their leases in 2017 and continued with the Ad Hoc Group's seizure, with the aid of México, of all of the Oro Negro Rigs in 2019. Thus, Claimants' claims are timely.

361. Under Article 1120, investors may only submit their claims to arbitration only after at least six months have elapsed from the time of the events giving rise to the claim. As discussed above, more than six months had elapsed since México implemented the measures about which Claimants are seeking compensation in this proceeding. Therefore, Claimants have complied with this requirement.

ii. Articles 1118 and 1119

362. Under Article 1119, disputing investors must deliver to the proposed Respondent a notice of intention to submit a claim to arbitration at least 90 days before the submission of a claim. Claimants delivered their notice of intent to Respondent on March 14, 2018, and submitted their Notice of Arbitration on June 19, 2018, thus, satisfying this requirement.

363. Further, Article 1118 implores the disputing parties to attempt to settle the claim through consultation or negotiation. Claimants' counsel traveled to México for in-person meetings with México's legal representatives in May 2018 in an attempt to settle the case, but these efforts proved futile. Claimants have also repeatedly indicated to México that they would be willing to try to negotiate a settlement. However, Claimants' efforts have been in vain, as México has ignored Claimants' settlement overtures.

[591] Claimants' Notice of Arbitration (Jun. 19, 2018) ("NOA").

iii. Articles 1121 and 1122: Both Claimants and Respondent Have Consented to Arbitration

364. In order to submit a claim on its own behalf, under NAFTA Article 1121(1), Claimants must (a) consent to arbitration; and (b) waive its rights to initiate or continue any proceeding seeking damages against the Respondent based on the same measures underlying that investor's claim in the arbitration.[592] The Individual Claimants consented to arbitration and waived their rights in accordance with these provisions.[593] The Individual Claimants have also waived the rights of the enterprises they control and on whose behalf they are bringing claims under Article 1117. These enterprises have also submitted their consents to arbitration and waivers under Article 1121(2).[594]

365. Respondent has submitted its consent to arbitration under NAFTA Article 1122(1), whereby México "consents to the submission of a claim to arbitration in accordance with the procedures set out in [the NAFTA]."[595]

366. Accordingly, both Parties have consented to arbitration and the Tribunal has jurisdiction to hear this dispute.

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[592] NAFTA Article 1121, **CL-59**.

[593] Claimants' consents to arbitration and waivers are Exhibits **C-A.1 to A.31**.

[594] The Enterprises' consents to arbitration and waivers are Exhibits **C-A.2**, **C-A.3**, **C-A.4**, **C-A.5**, **C-A.7**, **C-A.8**, **C-A.9**, **C-A10**, **C-A.13**, **C-A.16**, **C-A.19**, **C-A.21**, **C-A.26**, **C-A.27**, **C-A.29**, **C-A.30**.

[595] NAFTA Article 1122(1), **CL-59**.

B. México Is Liable Under the NAFTA for Pemex's Acts and Pemex Acted in a Governmental Capacity in its Conduct Toward Oro Negro

1. Pemex Itself Has Repeatedly Admitted Under Oath in U.S. Courts that It Is Part of and Is Controlled by México and Is Therefore Estopped from Arguing Otherwise in this Case

367. As discussed in Section II.A.2.ii., Pemex consistently and in numerous cases, including in the Oro Negro Matter, has argued that it is immune to the jurisdiction of U.S. courts under the FSIA.[596]

368. To claim immunity under the FSIA in prior cases, Pemex has represented under oath to U.S. courts that, for example, a) Pemex's function is to "explore and develop México's hydrocarbons for the benefit of its people in conformity with Article 27 of the Mexican Constitution, which states that all hydrocarbons in México are owned by the Mexican People . . . ."[597]; and b) "[p]ursuant to Article 25 of the Constitution of the United Mexican States and the Petróleos Mexicanos Act, Petróleos Mexicanos (a government-owned productive company) and its Government-Owned Subsidiary Productive Companies (among them Pemex Exploración y Producción and Pemex Transformación Industrial), are under the total control and exclusive ownership of the Mexican government.[598]

369. Consistent with its prior sworn statements to U.S. courts in other matters, Pemex also attempted to escape, and prevailed in escaping the jurisdiction of U.S. courts in this very matter. In May and June 2018, Pemex, under oath in U.S. District Court, argued that it is controlled by the Mexican government and that the Oro Negro matter related to Pemex's sovereign functions.

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[596] *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, **CL-80**. The FSIA is a statute that creates immunity from U.S. jurisdiction for entities that are part of a foreign government when the case relates to government functions.

[597] *See* Declaration of Juan Carlos Gonzalez Magallanes, *Castillo, et al.* v. *P.M.I. Holdings, N.S., Inc., et al.*, No. *4:14-cv-03435*, ECF 160-2, at ¶ 4 (S.D. Tex. Feb. 16, 2016), **C-90**.

[598] *See* Declaration of Julio Mora Salas, *Castillo, et al.* v. *P.M.I. Holdings, N.S., Inc., et al.*, No. *4:14-cv-03435*, ECF 174-1, at ¶¶ 2-5 (S.D. Tex. Apr. 25, 2016), **C-92**.

Specifically, Oro Negro requested discovery from Pemex in U.S. District Court, and Pemex successfully opposed Oro Negro's request by arguing that it was shielded from providing U.S. discovery under the FSIA because it is part of the Mexican government and its actions regarding Oro Negro were official government actions.[599] Therefore, Pemex conceded in connection with the Oro Negro matter that it is an organ of the Mexican State and that its conduct regarding Oro Negro is a governmental function.

370. Pemex's representations in U.S. courts, including in the Oro Negro matter, are an unequivocal admission that Pemex is an organ of the Mexican State under the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles"). Therefore, under the principle of issue estoppel, Pemex is prevented from making assertions to the contrary in these arbitration proceedings.

2. The Acts of Pemex Are Attributable to México Under Both the NAFTA and International Law

371. The NAFTA imposes obligations on all organs (executive, legislative and judicial) and emanations of the Mexican State, including, without limitation, Pemex and its various subsidiaries. The acts of Pemex, as a state organ exercising governmental authority, are attributable to México under both the NAFTA-specific rules for state responsibility under NAFTA Chapter 15 and the ILC Article**s**.[600] The acts of Pemex and its subsidiaries, as a state enterprise, are equally attributable to México under the provisions of NAFTA Article 1503(2) and under the ILC Articles 4

[599] Objection and Joinder of Petroleos Mexicanos, In re Perforadora, et al., No. 18-11094 (SCC) (Jointly Administered), ECF 36 (Bankr. S.D.N.Y. May 9, 2018), **C-1**.

[600] *See Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part2), http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf, **CL-81**.

(State Organ) Articles 5 (Persons Exercising State Authority), and 7 (Excess of Authority or Contravention of Instructions).[601]

3. The Acts of Pemex Are Attributable to México Under NAFTA Article 1503(2)

372. NAFTA Article 1503(2) states that:

> Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges. (emphasis added).[602]

373. Therefore, a NAFTA Party breaches its obligations under NAFTA Article 1503(2) if the following four elements are satisfied:

A. The state enterprise acts in a manner that is not consistent with the Party's NAFTA obligations;

B. The state enterprise acts under delegated authority;

C. The delegated authority is of a governmental nature; and

D. The NAFTA Party fails to ensure, through regulatory control, administrative supervision or the application of other measures, that the state enterprise acts in a manner consistent with the Party's NAFTA Chapter Eleven obligations.[603]

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[601] *See Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part2), http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf, **CL-81**.

[602] NAFTA Article 1503(2), **CL-82**.

[603] NAFTA Article 1503(2), **CL-82**.

i. Pemex and its Subsidiaries Are State Enterprises that Acted in a Manner Inconsistent with México's NAFTA Obligations

374. Pemex and its subsidiaries are state enterprises under NAFTA Articles 1505 and 201(1) and as discussed in Sections II.C-E., acted in a manner inconsistent with México's NAFTA obligations. NAFTA Article 1505 defines "state enterprise" as "an enterprise owned, or controlled through ownership interests, by a Party." Furthermore, NAFTA Article 201(1), which establishes the definitions of general application for purposes of the NAFTA, defines "state enterprise" as "an enterprise that is owned, or controlled through ownership interests, by a Party." Therefore, Article 1505 and Article 201 govern how a "state enterprise" is defined for purposes of NAFTA Article 1503(2).[604]

375. Mexican law expressly provides that Pemex and its subsidiaries are owned by México. Specifically, the Petróleos Mexicanos Law (Ley de Petróleos Méxicanos, "Pemex Law")[605] and Pemex's Bylaws (Estatuto Orgánico de Petróleos Mexicanos)[606] clearly establish that Pemex and its subsidiaries—specifically, Pemex Exploration and Production (Pemex Exploración y Producción, "PEP") and Pemex Drilling and Services (Pemex Perforación y Servicios, "PPS")—are owned by

[604] While Annex 1505 of the NAFTA provides a country-specific definition of state enterprise specifically for México, the country-specific definition in Annex 1505 has no bearing on the analysis of the definition of "state enterprise" in this case since Annex 1505(b) establishes that, with respect to México, the definition of "state enterprise" "does not include, "the Compañía Nacional de Subsistencias Populares (National Company for Basic Commodities) and its existing affiliates, or any successor enterprise or its affiliates, for purposes of sales of maize, beans and powdered milk"—which is not the state enterprise that is at issue in this case—and, in addition, Annex 1505 explicitly states that the aforementioned country-specific definition is solely for purposes of Article 1503(3), not Article 1503(2).

[605] Ley de Petróleos Méxicanos [Petróleos Mexicanos Law ("Pemex Law")], Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 11-08-2014, Art. 2 ("Petróleos Mexicanos is a productive state enterprise, exclusive property of the Federal Government, with its own legal personality and its own assets, and it is endowed with technical, operational, and managerial autonomy, in accordance with what is set forth in this Law"); Art. 60 ("[t]he subsidiary productive enterprises are productive state enterprises, with their own legal personality and their own assets. They will be organized and will operate in accordance with the provisions of this Law and the provisions that derive from it and will be subject to the management, direction and coordination of Petróleos Mexicanos . . . ."), **CL-83**.

[606] Estatuto Orgánico de Petróleos Mexicanos [Petróleos Mexicanos' Bylaws], Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 05-12-2017, **CL-84**.

México. Therefore, under NAFTA Articles 1505 and 201(1), Pemex and its subsidiaries are state enterprises.

376. As will be explained in further detail in Section III.C.E., Pemex and its subsidiaries acted in a manner inconsistent with México's NAFTA obligations. *See* Section II.Efor a discussion of México's Chapter Eleven breaches.

ii. Pemex and its Subsidiaries Acted Under Delegated Authority

377. Pemex, its subsidiaries, and its agents acted under the delegated authority of the Mexican government. For purposes of NAFTA Article 1503(2), authority can be delegated by an extensive range of government acts. NAFTA Note 45 states that "a 'delegation' includes a legislative grant, and a government order, directive or other act transferring to the monopoly, or authorizing the exercise by the monopoly of, governmental authority." NAFTA Article 1503(2) therefore does not require that governmental authority be delegated in any specific or particular manner, but instead provides for a broad interpretation of the means by which governmental authority may be delegated.[607]

378. Pemex's activities clearly fall within NAFTA Article 1503(2). Pemex acts under a law, here—the Pemex Law—that (i) was decreed by México's Congress of the Union (formally known as the General Congress of the United Mexican States) and (ii) is defined as a "public interest"[608] law. Further, (iii) the law's only purpose is to "regulate the organization, administration, performance, operation, control, evaluation and accountability of the productive state enterprise

[607] While Note 45 refers to NAFTA Article 1502(3) and not to directly to NAFTA Article 1503(2), the definition of "delegation" in NAFTA Note 45 should be understood to also apply to NAFTA Article 1503(2). This is because both NAFTA Article 1502(3) and NAFTA Article 1503(2) refer to delegations of "regulatory, administrative or other governmental authority." Therefore, the definition of the term "delegation" in NAFTA Note 45 should be considered as applicable to both articles.

[608] Pemex Law, p. 1, **CL-83**.

Petróleos Mexicanos […]"[609], and (iv) the law itself establishes that "Petróleos Mexicanos's objective is the development of business, economic, industrial and commercial activities in terms of its purpose, generating economic value and profitability for the Mexican State as its owner . . . and to seek the improvement of productivity so as to maximize the State's oil revenue and contribute, in this way, to the nation's development."[610] Thus, Pemex acts under delegated authority, and the activities described in this Statement falls within NAFTA Article 1503(2).

iii. Pemex and its Subsidiaries Exercised "Regulatory, Administrative or Other Governmental Authority"

a. México Delegates Governmental Authority to Pemex and its Subsidiaries

379. Pemex and its subsidiaries exercised regulatory, administrative or other governmental authority because México delegates such governmental authority to Pemex and its subsidiaries. In order to be attributable to the state under NAFTA Article 1503(2), the enterprise must exercise "regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges." [611] While the NAFTA does not precisely define the scope of this authority, it does provides a number of concrete examples, "such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges."[612]

380. Tribunals, however, have provided extensive guidance on what constitutes "governmental authority" for purposes of NAFTA Article 1503(2). Tribunals have grounded the

609 *Id.*

610 Pemex Law at Article 4, **CL-83**.

611 NAFTA Article 1503(2), **CL-82**.

612 NAFTA Article 1503(2) (emphasis added), **CL-82**.

existence of a state enterprise's governmental authority on a range of different factors, as determination of governmental authority is a fact specific analysis.[613]

381. Some of the key factors tribunals consider when determining if a state enterprise has been delegated governmental authority are: (i) whether a State Ministry or Minister has authority to issue directions to the state enterprise;[614] (ii) whether the state enterprise has authority to enter into contracts;[615] (iii) how the state enterprise was characterized at the time of its creation;[616] and (iv) the role of the state enterprise's board of directors.[617] As described below, Pemex satisfies all of the aforementioned factors.

382. One of the factors considered by tribunals is whether a State Ministry or a State Minister has authority to issue directions to the state enterprise. The *Windstream* tribunal, for example, found that the state enterprise in that case—the Ontario Power Authority ("OPA")—had governmental authority because the Ministry of Energy and Infrastructure, by law, were authorized to issue directions to the OPA.[618]

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[613] As the tribunal in *Windstream Energy v. Canada* noted, "the determination of whether any of the specific acts or omissions" of the state enterprise "at issue in this case are indeed attributable" to the State "requires an assessment of the relevant directions and therefore cannot be made in *abstracto*, but only in *concreto*, in the context of an assessment of the relevant direction", *Windstream Energy LLC v. Government of Canada* ("*Windstream*"), PCA Case No. 2013-22, Award (Sept. 27, 2016), ¶ 234, **CL-85**.

[614] *Windstream,* Award, ¶ 234, **CL-85**; *Mesa Power Group, LLC v. Government of Canada* ("*Mesa Power*"), UNCITRAL, PCA Case No. 2012-17, Award (Mar. 24, 2016), ¶ 441, FN 172, **CL-86**.

[615] *Mesa Power,* Award, ¶¶ 374–375, **CL-86**.

[616] *Adel A Hamadi Al Tamimi v. Sultanate of Oman* ("*Al Tamimi*"), ICSID Case No. ARB/11/33, Award (Nov. 3, 2015), ¶ 344, **CL-87**.

[617] *Al Tamimi,* Award, ¶¶ 327–329 (finding that the OMCO's board of directors had limited authority and that its bylaws did not suggest that OMCO was "intended or empowered to conduct any regulatory, administrative or governmental functions"), **CL-87**.

[618] *Windstream,* Award, ¶ 234, **CL-85**; *see also* Section 25.32 of the Ontario Electricity Act of 1998 states that the Minister may direct the OPA to "undertake any request for proposal, any other form of procurement solicitation or any other initiative or activity that relates to …the procurement of electricity supply or capacity derived from renewable energy sources …", **CL-88**; *see also Mesa Power,* Award, ¶¶ 370-371 (where the Tribunal determined that OPA was acting in the exercise of delegated governmental authority because the Minister of Energy had authority under the Ontario Electricity Act to issue directions to OPA, and OPA was acting under such directions when it developed the feed-in tariff program at issue in the case), **CL-86**.

383. Pemex's Board and the Minister of Energy have authority to, and regularly do, issue directions to Pemex. Specifically, Pemex's Board of Directors (*Consejo de Administración*), Pemex's highest management body and authority,[619] is "responsible for establishing the policies, guidelines and strategic vision of *Petróleos Mexicanos.*"[620] Pemex's ten-member Board of Directors is composed entirely of persons designated by government title or by the President of México. Importantly, the President of Pemex's Board of Directors is México's Minister of Energy. Under Mexican law, the Minister of Energy is appointed by and reports to the President of México.[621] Furthermore, the Pemex Law authorizes the Minister of Energy (through the Board of Directors), among other things,[622] to set Pemex's policies, guidelines, and strategic vision.

384. A second factor considered by tribunals is the state enterprise's authority to enter into contracts. For example, the *Mesa Power* tribunal found that in entering into contracts relating to the procurement of electricity supply and capacity, and given that the Ontario Electricity Act specifically authorized the OPA to enter into such contracts, the OPA was exercising delegated governmental authority.[623]

385. With respect to the second factor, the Pemex Law provides Pemex with extremely broad powers, including the power "to carry out the necessary activities, operations or services for the fulfillment of its object . . . by entering into contracts, agreements, partnerships or associations or any other legal act . . . ."[624] Pemex's powers are ample and far reaching, and in essence, encompass

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619 Pemex Law at Article 13, **CL-83**.

620 *Id.*

621 Constitución Política de los Estados Unidos Mexicanos [Mexican Constitution] Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 06-06-2019, Art. 89, **CL-89**.

622 Pemex Law at Article 13 (II, IV, and V), **CL-83**.

623 *Mesa Power,* Award, ¶¶ 372-375, **CL-86**.

624 Pemex Law at Article 6 (emphasis added), **CL-83**; *see also* Pemex Law at Article 7 ("[i]n order to comply with its purpose, *Petróleos Mexicanos* may enter into, with the Federal Government and with natural or legal persons, all kinds

any acts, performed through almost any means, necessary for the fulfillment of Pemex's purpose, as defined in the Pemex Law.

386. The 1938 Decree that created Pemex[625] (the "Decree") defined Pemex as a "public institution"[626] and as a "public corporation."[627] The Decree also required Presidential approval of Pemex's annual expenditure budget.[628] Furthermore, Pemex itself represents to its creditors that it is "controlled by the Mexican Government."[629] Thus, since its creation, México has characterized Pemex as a juristic person controlled by the state with delegated governmental authority.

387. Tribunals have also considered the role of the state enterprise's board of directors in determining whether a state enterprise has been delegated governmental authority.[630] In Pemex's case, its Board of Directors, which is Pemex's highest management body and is controlled entirely by government appointees, exercises ultimate decision-making authority in Pemex with respect to Pemex's most important affairs. Article 13 of the Pemex Law establishes, in a broad manner that the Board of Directors is "responsible for establishing the policies, guidelines and strategic vision of *Petróleos Mexicanos.*"[631] Among other responsibilities critical to the operation of Pemex, the Board of Directors' duties include (i) establishing the guidelines, priorities and general policies related to,

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of acts, agreements, contracts, underwrite debt securities and provide all kinds of guarantees….") (emphasis added), **CL-83**.

625 Decreto que crea la institución Petróleos Mexicanos [Decree by which the institution Petróleos Mexicanos is created], Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 20-07-1938, **CL-90**.

626 *Id.* at Article 1, **CL-90**.

627 *Id.* at Article 4, **CL-90**.

628 *Id.* at Article 7, **CL-90**.

629 *See, e.g.*, Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2017), at p. 14, http://www.pemex.com/ri/reguladores/ReportesAnuales_SEC/20F%202017.pdf ("Pemex 2017 Annual Report"), **C-89G**.

630 *Al Tamimi*, Award, ¶ 327 (finding that the state enterprise did not have delegated governmental authority because the enterprise's board of directors was "empowered to act only as necessary 'to implement the company goals' with its powers restricted by law and the company's Agreement of Association), **CL-87**.

631 Pemex Law at Article 13, **CL-83**.

among others, production, productivity and budget; (ii) approving the guidelines, priorities and general policies related to the investments of Pemex, its subsidiary production companies and affiliated companies, and the celebration of strategic alliances; (iii) approving the directives, dispositions and general policies for the contracts entered into by Pemex, its subsidiary productive companies and affiliated companies; (iv) fixing and adjusting the prices of the goods and services produced or lent by Pemex and its subsidiary productive companies; (v) approving general policies to cancel debts owed by third parties and in favor of Pemex and its subsidiary productive companies; (vi) establishing the policies and general bases to determine the profitability factor based on which Pemex and its subsidiary productive companies will participate in the tenders for the award of contracts for the exploration and extraction of hydrocarbons; and (vii) approving the projects and decisions the characteristics of which are of strategic importance for the development of the object of the Pemex.[632]

388. Furthermore, Pemex's Board of Directors issues government orders, known as "*acuerdos*," The Board of Directors may issue *acuerdos* with respect to any of the matters that fall within its duties and responsibilities. For example, in 2015-2017, Pemex's Board of Directors, again, all government officials, issued "*acuerdos*," that (a) reduced Pemex's budget; and (b) authorized Pemex to amend its pre-existing contracts with suppliers to meet the reduced budget.[633]

[632] Pemex Law at Article 13 (II,.IV-V, VII, XI, XII-XIII), **CL-83**.

[633] *See* Acuerdo CA-010/2015 (Feb. 13, 2015), **C-217**; Acuerdo CA-013/2016 (Feb. 26, 2016), **C-218**; Acuerdo CA-19/2016 (Mar. 4, 2016), **C-219**; Acuerdo CA-16/2017 (Mar. 1, 2017), **C-93**.

iv. México Failed To Ensure, Through Regulatory Control, Administrative Supervision or the Application of Other Measures, that Pemex and its Subsidiaries Acted In A Manner Consistent with México's NAFTA Chapter Eleven Obligations

389. The obligation under Article 1503(2) to ensure that a state enterprise acts in a manner consistent with Chapter Eleven is an obligation of result, as opposed to an obligation of conduct. The tribunal in *UPS v. Canada* explained:

> The obligations accepted by the Parties are obligations of result and not simply obligations of conduct. They must "ensure" by one measure or another that in the prescribed circumstances the monopoly (private as well as public) or the State enterprise does not act inconsistently with the Parties' *own* obligations under the identified provisions of NAFTA (the whole Agreement under article 1502(3)(a) and chapters 11 and 14 under article 1503(2)).[634]

390. In this case, México failed to ensure, through regulatory control, administrative supervision or the application of other measures, that Pemex and its subsidiaries acted in a manner consistent with México's NAFTA Chapter Eleven obligations. For example, by tolerating and failing to prevent pervasive corruption by Pemex officials, and by initiating retaliatory actions against Claimants after filing their Notice of Intent (described in detail above in Section II.M.), México failed to ensure regulatory control and supervision over Pemex to ensure (i) that its officials did not solicit bribes in connection with public contracting and (ii) that Pemex did not intimidate Claimants, through legal action or otherwise, from proceeding with this NAFTA action. Therefore, pursuant to NAFTA Article 1503(2), the actions of Pemex and its subsidiaries are attributable to México.

4. The Analysis Under NAFTA Article 1503(2) Is Consistent with the Attribution Analysis Under the Articles on State Responsibility

391. As discussed above, NAFTA Article 1503(2)'s framework regarding state-owned enterprises is consistent with the customary international law standard on attribution, the ILC

634 *UPS*, Award on the Merits, ¶ 69, **CL-74**.

Articles. Under customary international law, Pemex's actions are attributable to México under Articles 4, 5, and 7 of the ILC Articles.

i. Pemex Is a State Organ Under ILC Article 4

392. First, Pemex is an organ of the Mexican State under ILC Article 4.[635] The ILC Articles construe the term "state organ" broadly to constitute "all the individual or collective entities which make up the organization of the State and act on its behalf",[636] and extending "to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy . . . ."[637]

393. As described in detail above, Pemex falls squarely within the ILC Articles' definition of state organ. Created as a state-owned monopoly with exclusive rights over the exploration, extraction, refining, and commercialization of oil in México, Pemex has the nearly exclusive right to extract oil and gas in México and relies on contractors to explore for and produce them.[638] While the 2014 energy reforms have ended Pemex's monopoly in the petroleum sector, Pemex has continued to operate as a wholly state-owned enterprise (under the Pemex Law, now termed a "productive State enterprise").[639] Thus, Pemex is the primary, if not the exclusive, client of all oil and gas

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635 ILC Articles, Art. 4, **CL-81**. The ILC Articles are widely considered to represent "a statement of customary international law on the question of attribution for purposes of asserting the responsibility of a S[t]ate towards another State, which is applicable by analogy to the responsibility of States towards private parties." *See Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (Nov. 6, 2008), ¶ 156, **CL-268**. *See* ILC Articles, Art. 4: The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. An organ includes any person or entity which has that status in accordance with the internal law of the State.

636 Commentary on the ILC Articles, Art. 4, § 1, **CL-81**.

637 Commentary on the ILC Articles, Art. 4, § 6, 12, **CL-81**. A state organ covers "any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority."

638 Pemex Form F-4, 2018, *available at* http://www.pemex.com/ri/reguladores/Documents/F-4,%20filed%2020180925.pdf, **C-196**. *See* Declaration of Juan Carlos Gonzalez Magallanes, *Castillo, et al.* v. *P.M.I. Holdings, N.S., Inc., et al.*, No. *4:14-cv-03435*, ECF 160-2, at p. 1 (S.D. Tex. Feb. 16, 2016), **C-90**.

639 Pemex Law at Articles 4, 96, **CL-83**.

contractors, including providers of offshore drilling platforms, in México. Furthermore, as described in Section II.A.2.and below, Pemex has presented and identified itself as a state organ before U.S. courts, even stating that it is "wholly owned by México."[640]

394. Furthermore, a number of U.S. courts have also considered Pemex's status as a state organ in analyzing whether Pemex could benefit from sovereign immunity in U.S. courts. For example, the U.S. Federal courts have described Pemex as:

> an integral part of the United Mexican States[; it] was created by the Mexican Constitution, Federal Organic Law, and Presidential Proclamation; it [wa]s entirely owned by the Mexican Government; [it wa]s controlled entirely by government appointees; [it] employ[ed] only public servants; and [wa]s charged with the exclusive responsibility of refining and distributing Mexican government property.[641]

395. Moreover, Pemex declared before a U.S. District Court in 2016 that, "[a]s of [September 17, 2014], Pemex was, per federal statute, a "productive State enterprise" which remains the "exclusive property of the [Mexican] Federal Government."[642] Pemex continued, noting that the Pemex subsidiaries were also "all organs of the federal government of México."[643]

396. Pemex has also declared before a federal court that "*Petróleos Mexicanos* (a government-owned productive company) and its Government-Owned Subsidiary Productive Companies (among them *Pemex Exploración y Producción* and *Pemex Transformación Industrial*), are under the total control and exclusive ownership of the Mexican government."[644] In that same case, Pemex continued by reciting many of the factors mentioned above in Section II.A.2. regarding

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[640] *Alvarez del Castillo et al v. P.M.I. Comercio Internacional, S.A. de C.V.*, Motion to Dismiss (Feb. 16, 2016), pp. 7–8, fn. 5, **CL-91**.

[641] *Corporacion Mexicana de Servicios Maritimos, S.A. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996), **CL-92**.

[642] *Alvarez del Castillo et al. v. P.M.I. Comercio Internacional, S.A. de C.V.*, Motion to Dismiss (Feb. 16, 2016), pg. 8, **CL-91**.

[643] *Alvarez del Castillo et al. v. P.M.I. Comercio Internacional, S.A. de C.V.*, Motion to Dismiss (Feb. 16, 2016), pg. 9, **CL-91**.

[644] Decl. of Julián Mora Salas at p. 3 OF 26, Alvarez del Castillo v. P.M.I. Comercio Internacional, S.A. de C.V., No. 4:14-cv-03435 (S.D. Tex. April 25, 2016), , ECF No. 174-1, **C-92**.

the composition of its Board, the fact that its budget is controlled by the government, and the fact that its employees are public servants.[645]

ii. Pemex's Conduct Is Attributable to México Under ILC Article 5 Because Pemex Exercised Governmental Authority in its Role vis-à-vis the Investment

397. Even if Pemex had not admitted that it was a state organ—which it did as stated above—Pemex's conduct is still attributable to México under ILC Article 5, because Pemex is empowered by the laws of México to exercise elements of governmental authority as an instrumentality of the state or a parastatal entity.[646] As such, this Tribunal must at least find Pemex's conduct attributable to México, as Pemex is a state instrumentality (also often referred to as a parastatal entity). State instrumentalities are entities, like state enterprises described in more detail above, empowered to exercise the governmental authority of a State.[647]

398. Pemex is a parastatal entity, and as Article 5 of the ILC Articles provides, the conduct of a parastatal entity is attributable to the state if it is empowered by the law of the state to exercise elements of governmental authority.[648] The acts of such an entity are attributable to the state even if the entity operates with independent discretion, and its conduct was not under the control of the state.[649]

399. As described in detail above in Section II.A.2., Pemex is empowered by Mexican law, through the Pemex Law, to "exercise elements of governmental authority" and, in taking those

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[645] Decl. of Julián Mora Salas at p. 3 OF 26, Alvarez del Castillo v. P.M.I. Comercio Internacional, S.A. de C.V., No. 4:14-cv-03435 (S.D. Tex. April 25, 2016), ECF No. 174-1, **C-92**.

[646] Constitución Política de los Estados Unidos Mexicanos [Mexican Constitution] Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 06-06-2019, Art. 25,**CL-89**.

[647] "Chapter 5: The Sources of Attribution in International Investment Law," in Csaba Kovács, Attribution in International Investment Law, 45 Int'l Arb. L. Libr. 185, **CL-93**.

[648] ILC Articles at Art. 5, **CL-81**.

[649] Commentary on the ILC Articles, Art. 5, § 7, **CL-81**; *see also Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Memorial of the Investor (Nov. 20, 2013), ¶ 90, **CL-86**.

actions, was "acting in that capacity in the particular instance."[650] The Mexican legislature delegated specific governmental authority over drilling and extracting oil to Pemex, and thus, Pemex acted under governmental authority.

400. Furthermore, the Pemex Law outlines the delegation of governmental authority to Pemex. The law's stated objective is to generate economic value for México as Pemex's owner in order to maximize the State's oil revenue and contribute to México's development.[651] Therefore, Pemex is a parastatal entity acting on behalf of the state under governmental authority.

401. Even if Pemex's conduct in imposing drastic amendments to the contracts and eventually terminating the business relationship with Claimants could be considered a seemingly commercial act, the context of the relevant conduct leads to the conclusion that this "seemingly commercial act" serves a governmental purpose.[652] Pemex also clearly acted under governmental authority in the performance and termination of the Oro Negro Contracts. The Mexican government, through statutory provisions, delegated to Pemex the task of exploring for and extracting petroleum, in furtherance of the economic advancement of the Mexican state. The Mexican government controls Pemex and its subsidiaries through the composition of the Board, with key governmental figures, including the Secretary of Energy, sitting on the Board. As such, Pemex is a state instrumentality.

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650 ILC Articles at Art. 5, **CL-81**.

651 Pemex Law at Article 4 (emphasis added), **CL-83**.

652 "Chapter 5: The Sources of Attribution in International Investment Law," in Csaba Kovács, Attribution in International Investment Law, 45 Int'l Arb. L. Libr. 164, **CL-93**.

iii. Pemex's and its Agents' Conduct Are Attributable to México Under ILC Article 7 Because Pemex and its Agents Were Acting Within its Capacity even if the Acts Were Ultra Vires

402. Pursuant to Article 7 of the ILC Articles, the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority is attributable to the State under the ILC Articles even if the particular act was *ultra vires*, in excess of authority, or contrary to instructions.[653] Specifically, "under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law."[654]

403. The Mexican government expected bribes from Oro Negro.[655] The evidence shows that high ranking Mexican officials, including a former Minister of Energy, frequently requested bribes and retaliated against those who refused to pay them.[656] Oro Negro never paid those bribes. México then retaliated against Oro Negro not only by imposing the drastic amendments to the Oro Negro Contracts, but ultimately by unlawfully canceling the Oro Negro Contracts.

iv. Conclusion

404. For all of the above reasons, the actions of Pemex complained of in this proceeding are the actions of México under the NAFTA and principles of international law. As such, the Tribunal must view Pemex's actions as tantamount to those of the Mexican State.

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653 ILC Articles at Art. 7; Commentary on the ILC Articles, Art. 7 § 1, 9, **CL-81**.

654 *Velásquez Rodríguez v. Honduras case*, Inter-American Court of Human Rights, Series C, No. 4, ¶ 170 (1988), **CL-94**.

655 Black Cube Statement, **CWS-4**, ¶ 32.2.

656 Black Cube Statement, **CWS-4**, ¶¶ 32, 33, 39.

C. México Expropriated Claimants' Investment in Breach of its Obligations Under Article 1110 of the NAFTA

1. The Expropriation Standard

405. Article 1110 of the NAFTA provides that neither Party shall directly or indirectly expropriate investments of an investor of another Party, except under certain conditions:

(a) for a public purpose;

(b) on a non-discriminatory basis;

(c) in accordance with due process of law and Article 1105(1); and

(d) on payment of compensation in accordance with paragraphs 2 through 6 below.

> 2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.
>
> 3. Compensation shall be paid without delay and be fully realizable.
>
> [. . .]
>
> 6. On payment, compensation shall be freely transferable as provided in Article 1109.

406. As will be explained in further detail below, expropriation can be effected through various State actions.

i. Expropriation May Be Effected Indirectly and Incrementally Leading to a Creeping Expropriation

407. Article 1110 of the NAFTA encompasses both "direct and indirect expropriation"[657] and measures "tantamount to . . . expropriation"[658] (also known as *de facto* expropriation).

408. The foregoing captures the well-established principle that expropriation can either occur directly, through formal acts of outright seizure or transfer of property to the State, or indirectly, when the State's measures relating to the investment of an investor have the same practical effect as a direct expropriation—specifically, the substantial deprivation of the use or economic benefit of property.[659] As the tribunal in *Metalclad v. México* explained:

> [E]xpropriation… includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[660]

409. Expropriation encompasses not only forced transfers of title, but also other types of interference with property. The 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens ("Harvard Draft") provided that "[a] 'taking of property' includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to

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657 NAFTA Article 1110(1), **CL-59**.

658 *Id.*

659 *Metalclad Corporation v United Mexican States* ("*Metalclad*"), ICSID Case No ARB(AF)/97/1, Award (Aug. 30, 2000), ¶ 103, **CL-95**; *see also Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* ("*Middle East Cement Shipping*"), ICSID Case No. ARB/99/6, Award (Apr. 12, 2002), ¶ 107, **CL-96**; *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica* ("*Santa Elena*"), ICSID Case No ARB/96/1, Final Award (Feb. 17, 2000), ¶ 77, **CL-97**.

660 *Metalclad*, Award, ¶ 103, **CL-95**.

use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference."[661]

410. NAFTA tribunals have reached similar conclusions. In *Pope & Talbot* for example, the tribunal established that the test is whether the interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner."[662] Similarly, the *Archer Daniels* tribunal established that an indirect expropriation occurs if the interference is "substantial and deprives the owner of all or most of the benefits of the investment."[663]

411. Significant investment treaty awards outside of the NAFTA context have agreed. In *Middle East Cement*, the tribunal noted that "[w]hen measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as 'creeping' or 'indirect' expropriation."[664] Similarly, the *Tecmed* tribunal observed that indirect expropriation

> is generally understood [to] materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have

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[661] L. Sohn and R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens,* 1961 (55) AM. J. INT'L L. 545, p. 553 ("Harvard Draft"), **CL-98**. *See also* United Nations Conference on Trade and Development ("UNCTAD"), *Taking of Property,* 3-4, 20, UNCTAD/ITE/IIT/15 (2000) ("The taking of property by Governments can result from legislative or administrative acts that transfer title and physical possession. Takings can also result from official acts that effectuate the loss of management, use or control, or a significant depreciation in the value, of assets. Generally speaking, the former can be classified as 'direct takings' and the latter as 'indirect takings.' Direct takings are associated with measures that have given rise to the classical category of takings under international law. They include the outright takings of all foreign property in all economic sectors, takings on an industry-specific basis, or takings that are firm specific […] In contrast, some measures short of physical takings may amount to takings in that they result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor […] Some particular types of such takings have been called 'creeping expropriations', while others may be termed 'regulatory takings'. All such takings may be considered 'indirect takings'[…] It is not the physical invasion of property that characterizes nationalizations or expropriations that has assumed importance, but the erosion of rights associated with ownership by State interferences."), **CL-99**.

[662] *Pope & Talbot, Inc. v. Canada*, UNCITRAL, Interim Award (Jun. 26, 2000), ¶ 102, **CL-72**.

[663] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States* ("*Archer Daniels*"), ICSID Case No. ARB (AF)/04/5, Award (Nov. 21, 2007), ¶ 240, **CL-100**.

[664] *Middle East Cement Shipping,* Award, ¶ 107, **CL-96**.

> that effect. This type of expropriation does not necessarily take place gradually or stealthily— the term "creeping" refers only to a type of indirect expropriation—and may be carried out through a single action, through a series of actions in a short period of time or through simultaneous actions.[665]

412. These tribunals' conclusions are also supported by academic commentators. The Restatement of the Foreign Relations Law of the U.S. describes indirect expropriation, including "creeping" expropriation, as "action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property."[666] Similarly, Professors Michael Reisman and Robert Sloane explain:

> [F]oreign investments may be expropriated 'indirectly through measures tantamount to expropriation or nationalization.' This phrase [. . .] also captures the multiplicity of inappropriate regulatory acts, omissions, and other deleterious conduct that undermines the vital normative framework created and maintained by BITs – and by which governments can, in effect but not name, now be deemed to have expropriated a foreign national's investment. The major innovation of the 'tantamount' clause, found in substance in almost all BITs, therefore consists in extending the concept of indirect expropriation to an egregious failure to create or maintain the normative 'favorable conditions' in the host state.[667]

413. Reisman and Sloane further classify a wide variety of measures might result in an indirect expropriation "[w]ithout concurrently purporting to take title to property" such as "refus[ing] to hold feckless administrators to account for failure to carry out their assigned tasks, taxation, regulation, denial of due process, delay and non-performance, and other forms of

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[665] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States* ("*Tecmed*"), ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), ¶ 114 (stating that although indirect expropriation does "not have a clear or unequivocal definition, it is generally understood that [it] materialize[s] through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect"), **CL-101**. *See Burlington Resources v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (Dec. 14, 2012), ¶ 397 ("When a measure affects the environment or conditions under which the investor carries on its business, what appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment. In this sense, some tribunals have focused on the use and enjoyment of property. The loss of viability does not necessarily imply a loss of management or control."), **CL-42**.

[666] Restatement (Third) of the Foreign Relations Law of the U.S., § 712, comment (g) (Am. Law Inst. 1987), **CL-102**.

[667] M. W. Reisman & R. D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation,* 1002 FACULTY SCHOLARSHIP SERIES 118-119 (2004) ("Reisman & Sloane"), **CL-103**.

governmental malfeasance, misfeasance, and nonfeasance."[668] The key is whether those "measures significantly reduce[d] an investor's property rights or render them practically useless."[669]

ii. Expropriation May Be Effected Incrementally

414. An indirect expropriation that takes place through a series of measures over time, with the aggregate effect of destroying the value of an investment, is referred to as a "creeping" expropriation. As the tribunal in *Fireman's Fund* observed, expropriation can take place over a period of time: "[t]he taking may have the form of a single measure or a series of related or unrelated measures over a period of time (the so-called "creeping" expropriation)."[670]

415. The *Siemens v. Argentina* tribunal also noted that an expropriation can happen over time:

> By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.[671]

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668 *Id*. at 123, **CL-103**.

669 *Id.*, **CL-103**.

670 *Fireman's Fund Insurance Company v. The United Mexican States* ("*Fireman's Fund*"), ICSID Case No. ARB(AF)/02/1, Award (Jul. 17, 2006), ¶ 176(f), **CL-104**.

671 *Siemens A.G. v. Argentine Republic* ("*Siemens*"), ICSID Case No. ARB/02/8, Award (Jan. 17, 2007), ¶ 263, **CL-105**. *See Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3*,* Award (Aug. 20, 2007), ¶ 5.3.16 ("It is well established under international law that even if a single act or omission by a *government* may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached."), **CL-79**; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003), ¶ 20.22 ("Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State *over a period of time* culminate in the expropriatory taking of such property."), **CL-107**.

416. In isolation, the measures might not have an expropriatory effect—however, the cumulative effect of the measures results in expropriation.[672] The tribunal in *Feldman v. México* confirmed that "creeping expropriation" is a form of indirect expropriation.[673] The comments to the 1967 OECD Draft Convention on the Protection of Foreign Property further describe creeping expropriation as the "measures otherwise lawful are applied in such a way as to deprive ultimately the alien of the enjoyment or value of his property, without any specific act being identifiable as outright deprivation."[674]

417. Furthermore, the deprivation from a creeping expropriation may be evident only upon reflection after the fact. As Reisman and Sloane recognize:

> Discrete acts, analyzed in isolation rather than in the context of the overall flow of events, may, whether legal or not in themselves, seem innocuous vis-à-vis a potential expropriation. Some may not be expropriatory in themselves. Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omissions, which in the aggregate expropriated the foreign investor's property rights.[675]

iii. The Relevant Factor for Indirect Expropriation is the Economic Impact on the Investment, Not the State's Intent or Motive

418. The essential factor in determining whether a government measure constitutes an expropriation is the measure's effect on the asset in question, *i.e.* deprivation of its *use, value, or economic benefit for the investor*. Measures that amount to expropriation can also include conduct

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[672] *See* ILC Articles at Art. 15(1) ("The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."), **CL-38**. *See*, *e.g.*, *Crystallex International Corporation v. Bolivarian Republic of Venezuela,* ICSID Case No ARB(AF)/11/2, Award (Apr. 4, 2016), ¶ 669 ("State responsibility for creeping expropriation is reflected in the concept of a composite act, defined in Article 15(1) of the ILC's Articles on State Responsibility."), **CL-108**.

[673] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), ¶¶ 101, 104, 105, 109, **CL-109**.

[674] *OECD Draft Convention on the Protection of Foreign Property*, 7 ILM 117 (1968), p. 11, **CL-110**.

[675] Reisman & Sloane at 123-124, **CL-103**.

which deprives the investor of its ability to manage, use or control the property in a meaningful way.[676] As the tribunal in *Archer Daniels* explained:

> Judicial practice indicates that the severity of the economic impact is the decisive criterion in deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place. An expropriation occurs if the interference is substantial and deprives the investor of all or most of the benefits of the investment.[677]

419. Neither the State's intent, nor its subjective motives, nor the form of the action, constitute relevant criteria for finding whether a measure amounts to expropriation.[678] As explained by the tribunal in *Waste Management II*:

> [T]here is no general requirement of *mens rea* or intent in Section A of Chapter 11. The standards are in principle objective: if an investor suffers loss or damage by reason of conduct which amounts to a breach of Articles 1105 or 1110, it is no defence for the Respondent State to argue that it was not aware of the investor's identity or national character. The only question is whether the various requirements of Chapter 11 in this regard are satisfied.[679]

420. Similarly, the tribunal in *Metalclad* held that it "need not consider the motivation or intent of the adoption"[680] of the government measure. Consistent with prior cases, the *Fireman's Fund* tribunal confirmed that "[t]he effects of the host State's measures are dispositive, not the underlying intent, for determining whether there is expropriation."[681]

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676 UNCTAD, *Expropriation*, 21, UNCTAD/DIAE/IA/2011/7 (2012), **CL-111**.

677 *Archer Daniels,* Award, ¶ 240 (emphasis added), **CL-100**; *see also AES Summit Generation Limited and AES-Tisza Erömü Kft v Republic of Hungary* ("*AES v. Hungary*"), ICSID Case No ARB/07/22, Award (Sept. 23 2010), ¶ 14.3.1 (finding that an expropriation occurs when the investor is "deprived, in whole or significant part, of the property in or effective control of its investment: or for its investment to be deprived, in whole or significant part, of its value"), **CL-112**.

678 *See, e.g.*, *Santa Elena*, Final Award, ¶ 77, **CL-97**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶ 7.5.20, **CL-79**.

679 *Waste Management, Inc. v. United Mexican States* ("*Waste Management*"), ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 79, **CL-113**.

680 *Metalclad*, Award, ¶ 111, **CL-95**.

681 *Fireman's Fund*, Award, ¶ 176(f), **CL-104**.

421. In sum, the question of whether a measure constitutes an expropriation depends upon the ultimate actual effect of the measures on the investor's property. A series of measures that deprive an investor of the use or enjoyment of its investment, including the deprivation of all or a significant part of the economic benefit of its property, amounts to expropriation. If the measures at stake have these effects, there is no need to inquire into the State's motives or intentions, or form of the measures, in order to conclude that an expropriation has occurred.

iv. Expropriation May Affect Rights, Not Only Physical Assets

422. An investment is defined under the NAFTA to include "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory" such as (i) "contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions" and (ii) "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes."[682] It follows that an expropriation of such rights must comply with the NAFTA's provisions on expropriation.

423. Numerous authorities confirm that rights and interests under contracts may be expropriated and that such expropriations occur when a State uses its governmental authority to deprive a foreign investor of the use, enjoyment or value of such rights. As Christie observed in his study of takings of property under international law, "contract and many other so-called intangible rights can, under certain circumstances, be expropriated, even by indirect interference…"[683]

424. In the *Norwegian Ship owners' Claims* case, the Permanent Court of Arbitration held that the detention by the United States of certain ships being built in U.S. shipyards had the effect of

[682] NAFTA Article 1139 (emphasis added), **CL-59**.

[683] George C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 Brit. Y.B. Int'l L. 307, 318-319 (1962), **CL-114**.

taking associated contracts, finding that "whatever the intentions may have been, the United States took, both in fact and in law, the contracts under which the ships in question were being or were to be constructed."[684]

425. The tribunal in *SPP v. Egypt* held that "[t]he Respondent's cancellation of the project had the effect of taking certain important rights and interests of the Claimants… Clearly, those rights and interests were of a contractual rather than *in rem* nature… Moreover, it has long been recognized that contractual rights may be indirectly expropriated. In the judgment of the Permanent Court of International Justice concerning *Certain German Interest in Polish Upper Silesia*, the Court ruled that, by taking possession of a factory, Poland had also 'expropriated the contractual rights' of the operating company."[685] Furthermore, the Iran-United States Claims Tribunal in the *Amoco* case ruled that expropriation "may extend to any right which can be the object of a commercial transaction."[686]

426. The *Vivendi II* tribunal also observed that "it has been clear since at least 1903, in the *Rudolff case*, that the taking away or destruction of rights acquired, transmitted and defined by contract is as much a wrong entitling the sufferer to redress as the taking away or destruction of a tangible property."[687] The tribunal in *CME v Czech Republic* similarly found that the claimant's contract rights had been expropriated indirectly through interference by a regulatory authority, the Media Council:

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[684] *Norwegian Shipowners' Claims* ("*Norway v. United States*"), Award (Oct. 13, 1922), 1 RIAA 307, p. 325, **CL-115**.

[685] *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (May 20, 1992), ¶¶ 164-165, **CL-116**.

[686] *Amoco Int'l Finance Corp. v. Iran*, Iran-US Claims Tribunal, Award (Jul. 14, 1987), 15 Iran-US CTR 189, ¶ 108, **CL-117**.

[687] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007),¶ 7.5.18, **CL-79**.

> The Respondent's view that the Media Council's actions did not deprive the Claimant of its worth, as there has been no physical taking of the property by the State or because the original License… always has been held by the original Licensee and kept untouched, is irrelevant. What was touched and indeed destroyed was the Claimant's and its predecessor's investment as protected by the Treaty. What was destroyed was the commercial value of the investment…[688]

427. The *Pope & Talbot* tribunal regarded an investor's access to the U.S. softwood lumber market as a property right protected by the NAFTA.[689] As noted by Abdala, Spiller and Zuccon, "[i]n economic terms, the seizure of property and the seizure of rights to cash flows have exactly the same consequences."[690]

428. Lastly, as Wälde and Kolo observed, the modern rules regarding investment protection are aimed not only at the protection of tangible property, but also the recognition and protection of the value of property that comes from "the capability of a combination of rights in a commercial and corporate setting and under a regulatory regime to earn a commercial rate of return."[691]

v. Expropriation Can Occur Through Judicial Measures and Seizures

429. It is also well established that expropriation can crystallize through any measure taken by the State or its organs, including its courts. In *Eli Lilly & Co. v. Canada,* the tribunal held that:

> [T]he judiciary is an organ of the State. Judicial acts will therefore in principle be attributable to the State by reference to uncontroversial principles of attribution under the law of State responsibility. As a matter of broad proposition, therefore, it is possible to contemplate circumstances in which a judicial act (or omission) may

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688 *CME Czech Republic BV v Czech Republic* ("*CME*"), UNCITRAL, Partial Award (Sept. 13, 2001), ¶ 591, **CL-118**.

689 *Pope & Talbot, Inc. v. Canada*, UNCITRAL, Interim Award (Jun. 26, 2000), ¶ 96, **CL-72**.

690 S. Ripinsky & K. Williams, *Damages in International Investment Law*, p. 70 (2008), **CL-119**; *see* A. Reinisch, *Expropriation, in The Oxford Handbook of International Investment Law* 410 (P. Muchlinski et. al. eds. 2008), p. 410 ("Whether expropriation, including indirect expropriation, may concern intangible property is, in the first instance, a question of the applicable definition of 'property' or 'investment'. Since most BITs, and the majority of other investment instruments, contain broad definitions of what constitutes an 'investment', anything covered by such definitions will be protected not only against direct but also against indirect expropriation."), **CL-121**.

691 T. Wälde & A. Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 Int'l & Comp. L. Q. 811, 835 (2001), **CL-122**.

> engage questions of expropriation under NAFTA Article 1110, such as, perhaps, in circumstances in which a judicial decision crystallizes a taking alleged to be contrary to NAFTA Article 1110.[692]

430. Tribunals outside the NAFTA context have reached similar conclusions. In *Rumeli v. Kazakhstan*, the tribunal held that "a taking by the judicial arm of the State may also amount to an expropriation."[693] In *Sistem v. Kyrgyzstan* the tribunal also held that the claimant's investment, which consisted in the construction and operation of a hotel, was expropriated by local court decisions, which ultimately had the effect of abolishing the claimant's ownership rights in the hotel.[694] Finally, in *Saipem v. Bangladesh*, in finding that the actions of the Bangladeshi courts amounted to expropriation, the Tribunal held

> In respect of the taking, the actions of the Bangladeshi courts do not constitute an instance of direct expropriation, but rather of "measures having similar effects" within the meaning of Article 5(2) of the BIT. Such actions resulted in substantially depriving Saipem of the benefit of the ICC Award. This is plain in light of the decision of the Bangladeshi Supreme Court that the ICC Award is "a nullity". Such a ruling is tantamount to a taking of the residual contractual rights arising from the investments as crystallised in the ICC Award. As such, it amounts to an expropriation within the meaning of Article 5 of the BIT.[695]

2. México Unlawfully Expropriated Claimants' Investment in Oro Negro

431. Consistent with the provisions of the NAFTA, an "investment is not a single right but is, like property, correctly conceived of as a bundle of rights, some of which are inseparable from others and some of which are comparatively free-standing."[696] As Professor James Crawford

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692 *Eli Lilly & Co. v. Canada,* ICSID Case No. UNCT/14/2, Final Award (Mar. 16, 2017), ¶ 221, **CL-123**.

693 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan,* ICSID Case No. ARB/05/16 ("*Rumeli Telekom*"), Award (Jul. 29, 2008), ¶¶ 702-704, **CL-124**.

694 *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award (Sept. 9, 2009), ¶ 122, **CL-125**.

695 *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award (Jun. 30, 2009), ¶ 129, **CL-127**.

696 *ATA Construction, Industrial and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (May 18, 2010), ¶ 96, **CL-128**.

explained in a statement adopted by the tribunal in *ADC v. Hungary*, "what was expropriated was that bundle of rights and legitimate expectations."[697]

432. Oro Negro had a bundle of rights and legitimate expectations in relation to its investment in the Mexican offshore oil and gas sector. Through a series of measures, acts and omissions, México ultimately deprived Claimants of the value, benefit, use and enjoyment of their rights and investments, as their operations were frustrated and were eventually entirely destroyed.

433. The expropriation of the investment made by Oro Negro in México was creeping and indirect and thus constituted measures having an effect equivalent to expropriation. As mentioned above, whether México intended to expropriate the investment is not determinative, although in this case, the State knowingly and intentionally discriminated against Oro Negro and colluded with the Ad-Hoc Group to terminate the Oro Negro Contracts, in violation of Mexican law and without regard for the rights of international investors.

434. The investment made by Claimants in Oro Negro was based on its ability to contract with Pemex—its only customer and México's largest company. Through various acts and omissions, México deprived Oro Negro of the use, value and benefit of the investment. In summary:

(i) México initiated a politically motivated campaign to destroy Oro Negro as a means to retaliate against Oro Negro for, among other reasons, its refusal to pay bribes.[698] Specifically, on several occasions starting in 2012,[699] agents of the Mexican government discussed the need for Oro Negro to pay bribes.[700]

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[697] *ADC Affiliate Ltd. et. al. v. Hungary* ("*ADC*"), ICSID Case No. ARB/03/16, Award (Oct. 2, 2006), ¶¶ 303-304, **CL-120**. *See Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award (Sept. 13, 2006), ¶ 67 ("The Tribunal considers that […] the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value."), **CL-129**.

[698] *See* RFIM at ¶ 138; *see supra* at ¶¶ 100-112.

[699] Claimants are not considering the bribes solicited by México in 2012 as an independent breach of the BIT. Claimants are providing this information for historical context.

[700] *See* NOA at ¶¶ 7, 8, 39, 40, 74, 76, 78; *see supra* at ¶¶ 177, 202; *see* Gil Statement, **CWS-1**, ¶ 101; Cañedo Statement, **CWS-2**, ¶¶ 19-23.

Oro Negro refused to pay any bribes.[701] One way in which México retaliated against Oro Negro was through the media. México initiated a politically motivated campaign against Oro Negro when one of the largest media conglomerates in México ran a nationwide 10-minute television clip regarding Integradora; Perforadora; Gonzalo Gil-White ("Mr. Gil"), Oro Negro's Chief Executive Officer ("CEO"); and Francisco Gil-Díaz, his father, a former Minister of Finance of México.[702] The clip launched a series of outrageous, incendiary and defamatory accusations against Integradora, Perforadora, and Mr. Gil and his father, including that they are engaged in influence peddling and money laundering and that they have defrauded the Bondholders, all of which are untrue.[703] Importantly, Mr. Kim, the then-General Counsel of Pemex, personally appeared in the clip and falsely stated that Perforadora is corrupt and incompetent and that it had been a deficient services provider to Pemex.[704] All of these allegations are baseless. This television clip was nothing but a crude attempt to defame Integradora, Perforadora, Mr. Gil and his family, and turn public opinion against them.

(ii) Because Oro Negro refused to pay bribes, Pemex also imposed improper and illegal amendments to the Oro Negro Contracts that cut Perforadora's revenues by more than half.[705] Mainly, these amendments—which took place in late 2015 and 2016—entailed a significant reduction in the daily rates of three contracts and the suspension of the other two contracts.[706] Pemex falsely promised Perforadora that these amendments would be temporary and that the Oro Negro Contracts would revert to their original terms during 2017, citing budgetary restrictions and the need to comply with the budgetary constraints imposed on it by the Mexican legislature and executive.[707] However, in around March 2017, Pemex informed Perforadora that it would not comply with its express promise to return the Oro Negro Contracts to their original terms and instead, would make the 2015 and 2016 amendments virtually permanent.[708] As such, these new amendments entailed a permanent injury to the finances of Integradora and Perforadora.[709] To force Perforadora to submit to these new terms, Pemex (a) threatened Perforadora

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[701] *See* NOA at ¶¶ 7, 8, 39, 40, 74, 76, 78; *see supra* at ¶ 178; *see* Gil Statement, **CWS-1**, ¶ 101; Cañedo Statement, **CWS-2**, ¶ 20.

[702] *See* TV Azteca clip entitled "Corrupción y Fraude: La Historia De Oro Negro," **C-32**.

[703] *See id.*

[704] *See id.*

[705] *See* NOA at ¶¶ 4, 10, 39; *see supra* at ¶¶87, 177-178; *see* Gil Statement, **CWS-1**, ¶ 56.

[706] *See* NOA at ¶ 10; *see supra* at ¶¶ 81-88; *see* Gil Statement, **CWS-1**, ¶¶ 52-53, 59.

[707] *See* NOA at ¶¶ 10–15; *see supra* at ¶¶ 81-88; *see* Gil Statement, **CWS-1**, ¶ 52-54.

[708] *See* NOA at ¶¶ 11, 52; *see supra* at ¶ 89; *see* Gil Statement, **CWS-1**, ¶¶ 59-60.

[709] *See* Gil Statement, **CWS-1**, ¶ 60.

with unilateral termination of all of the Oro Negro Contracts; and (b) stopped paying the daily rates to Perforadora under the Oro Negro Contracts, thus financially strangling Integradora and Perforadora.[710]

(iii) México, through Pemex, unlawfully refused to pay past due daily rates, and by September 2017, Pemex owed Perforadora approximately USD 100 million.[711] This financially suffocated Perforadora, which led Perforadora to file for restructuring in México (*concurso mercantil*).[712] On September 11, 2017 and on September 29, 2017, Integradora and six of its subsidiaries also filed for restructuring.[713] Since October 2017, an additional USD 24 million have accrued in past due daily rates, which Pemex refuses to pay.[714]

(iv) Pemex notified Perforadora of the purported termination of the Oro Negro Contracts.[715] Pemex purported to terminate four contracts based on the argument that other companies had agreed to lease similar jack-up rigs at a daily rate which Perforadora had not accepted.[716] Pemex purported to terminate the fifth contract (for the *Impetus* Jack-Up Rig) based on the argument that Perforadora had filed for restructuring.[717] This purported termination destroyed Claimants' investment in its entirety.[718]

(v) Throughout 2017 and 2018, Pemex closely coordinated and colluded with third parties, namely, the Ad-Hoc Group, on how best to cancel the Oro Negro Contracts, what to do with the Contracts after their termination, and what to do with the Rigs. To force Oro Negro to capitulate, in 2018, the Ad-Hoc Group and México initiated criminal cases seeking to seize Oro Negro's cash and the Rigs and to imprison Oro Negro's management based on false and fabricated evidence.[719] And they resorted to movie-like sensational efforts to seize the Rigs including by illegally hiring a squadron of helicopters under the protection of the Mexican government to forcibly board and seize the Rigs.[720] With the assistance of the Mexican government, the

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710 *See* Gil Statement, **CWS-1**, ¶ 61.

711 *See supra at* ¶ 91, 93; *see* Gil Statement, **CWS-1**, ¶¶ 57, 61-62, 87.

712 *See supra at* ¶ 93; *see* Gil Statement, **CWS-1**, ¶ 57.

713 *See* NOA at ¶¶ 13, 56; *see supra* at ¶ 116; *see* Gil Statement, **CWS-1**, ¶¶ 76, 79.

714 *See supra* at ¶ 93; *see* RFIM at ¶ 10, 92; *see* Gil Statement, **CWS-1**, ¶¶ 140-141.

715 *See* NOA at ¶¶ 14, 57; *see supra* at ¶ 321; *see* Gil Statement, **CWS-1**, ¶¶ 82, 89.

716 *See* NOA at ¶ 57; *see supra* at ¶ 128.

717 *See supra* at ¶ 132.

718 *See supra* at ¶ 87; *see* Gil Statement, **CWS-1**, ¶¶ 86-92, 99.

719 *See supra* at ¶ 216-320; *see* Gil Statement, **CWS-1**, ¶ 104-124, 128-131.

720 Exhibit **C-33** consists of several pictures of the men who boarded the *Decus* and reflects that the jacket of one of the men bears the logo of the AIC; *See* Gil Statement, **CWS-1**, ¶¶ 125-126.

Bondholders attempted to take over the rigs, in flagrant violation of numerous orders of the Mexican bankruptcy court and U.S. courts prohibiting the cancellation of the Oro Negro Contracts and any efforts by the Ad-Hoc Group to seize the Rigs.[721] This arrangement benefited Pemex because it could continue leasing the Rigs from the Ad-Hoc Group or its affiliated entities. The Mexican government gladly yielded to the Ad-Hoc Group's influence so that it could retaliate against Oro Negro because Oro Negro persistently refused to pay bribes to Mexican government officials, including Pemex officials.

(vi) México is not allowing Perforadora to continue servicing Pemex, despite Integradora's and Perforadora's Jack-Up Rigs being among the best jack-up rigs in México, available and uniquely positioned to service Pemex because they are idle in Mexican waters, and Oro Negro having the best performance, including safety record, of any company in the industry.[722] From the inception of the Oro Negro Contracts until Pemex purported to terminate the Oro Negro Contracts in October 2017, Pemex paid (or authorized payment but has not yet paid), on average, 99.5% of the daily rate under each Pemex Contract, meaning that the Rigs were available and ready for use, on average, 99.5% of the time.[723]

(vii) Finally, México has impugned Oro Negro's and its principals' reputations such that it has destroyed Oro Negro's brand name and its ability to operate in México.[724]

435. In total, México's acts and omissions, when all taken together, either directly impacted or specifically targeted Oro Negro and deprived Claimants of the value, use, and benefit of their investment.

3. México's Expropriation Was Unlawful

436. México's expropriation of Claimants' investment was unlawful because it (a) lacked compensation, (b) lacked due process and was contrary to Article 1105(1), (c) was discriminatory, and (d) lacked any public purpose.[725] The wording of Article 1110 is clear in that that all conditions

[721] *See supra* at ¶¶ 113-154; *see* Gil Statement, **CWS-1**, ¶¶ 81-83, 124-126.

[722] *See* Gil Statement, **CWS-1**, ¶¶ 29, 65-66, 93-95.

[723] *See* Gil Statement, **CWS-1**, ¶ 66.

[724] *See supra* ¶ 259.

[725] NAFTA Article 1110, **CL-59**.

must be met for a lawful expropriation.[726] Thus, if México fails to satisfy any one of these four conditions, the expropriation is unlawful, and Claimants are owed damages for that unlawful expropriation.

i. The Expropriation Lacked Compensation

437. Article 1110 of NAFTA requires that expropriatory measures be accompanied by a compensation payment. The same provision defines how compensation must be calculated and how it must be paid:

> 2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.
>
> 3. Compensation shall be paid without delay and be fully realizable.
>
> 4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.
>
> 5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.
>
> 6. On payment, compensation shall be freely transferable as provided in Article 1109.

[726] Arbitral tribunals have consistently held that when a treaty cumulatively requires several conditions for a lawful expropriation, failure of any one of those conditions makes the expropriation wrongful. *See*, *e.g.*, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶ 7.5.21 ("If we concluded that the challenged measures are expropriatory, there will be a violation of Article 5(2) of the Treaty [on expropriation], even if the measures might be for a public purpose and non-discriminatory, because no compensation has been paid."), **CL-79**; *Bernardus Henricus Funnekotter & Ors. v. Zimbabwe*, ICSID Case No. ARB/05/6, Award (Apr. 22, 2009), ¶ 98 ("The Tribunal observes that the conditions enumerated in Article 6 are cumulative. In other terms, if any of those conditions is violated, there is a breach of Article 6."), **CL-130**.

438. The *Mondev v. United States* tribunal explained that:

> It is true that the obligation to compensate as a condition for a lawful expropriation (NAFTA Article 1110(1)(d)) does not require that the award of compensation should occur at exactly the same time as the taking. But for a taking to be lawful under Article 1110, at least the obligation to compensate must be recognised by the taking State at the time of the taking, or a procedure must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation.[727]

439. To date, México has not paid any compensation to the Claimants, much less the "fair market value" compensation required by the NAFTA. In addition, México did not recognize its obligation to compensate Claimants at the time of the expropriation, nor did the Claimants have access to a procedure that they could have invoked in order to ensure compensation. México's enduring failure to pay any compensation makes the expropriation unlawful under NAFTA.

ii. The Expropriation Lacked Any Public Interest

440. Under Article 1110 of the NAFTA, the expropriation must be adopted for a public purpose to be lawful. This requires a concrete, genuine interest of the public that is furthered by the expropriation.[728]

441. The tribunal in *ADC v. Hungary* explained that: "[i]f mere reference to 'public interest' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met."[729] In that case, Hungary claimed that the legislation that served as the basis for the taking of the claimants' investment was "important for the harmonization of the Hungarian Government's transport strategy, laws and regulations with the EU law . . . ."[730]

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[727] *Mondev*, Award, ¶ 71 (emphasis added), **CL-73**.

[728] *ADC,* Award,¶ 432, **CL-120**.

[729] *Id.,* **CL-120**.

[730] *Id.* at ¶ 430, **CL-120**.

However, the evidence showed that the Government's real motivation was to take the claimants' concession to operate an airport terminal to pave the way for a more lucrative deal for the State.[731]

442. The *Siag v. Egypt* case demonstrates that a State must be transparent regarding the purpose of the expropriation. In that case the State "failed to satisfy the 'public purpose' limb"[732] of the BIT because while it argued that the expropriated land was later used for a public purpose, the public purpose was not authorized until a number of years after the expropriation took place and the expropriated land went entirely unused for six years. Under those purposes, the expropriation itself was not "for" a public purpose. The tribunal emphasized that the BIT required "that the public purpose [be] the reason the investment was expropriated."[733]

443. Similarly, in *Siemens v. Argentina,* while the tribunal acknowledged that Argentina faced a dire fiscal situation and noted that an expropriation based on a related emergency law that followed could be in the public interest, the tribunal was not persuaded that the actions at issue in fact were taken on that basis. Rather, the evidence showed that Argentina began taking the actions that culminated in the deprivation of the claimant's property in order "to reduce the costs . . . of the Contract" and "as part of a change of policy," and that reference instead to the emergency law "became a convenient device to continue the process started more than a year earlier long before the onset of the fiscal crisis."[734]

444. In this case, there was no legitimate public purpose underlying the expropriation of Claimants' investment. Pemex's desire to retaliate against Oro Negro for its refusal to pay bribes, and because of its desire to favor Seamex or domestic companies, is not a legitimate public purpose.

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731 *Id.* at ¶¶ 304, 433, 476, **CL-120**.

732 *Waguih Elie George Siag and Corinda Vecchi v. Egypt* ("*Siag*"), ICSID Case No ARB/05/15, Award (Jun. 1, 2009), ¶ 433, **CL-132**.

733 *Id.* at ¶ 431, **CL-132**.

734 *Siemens*, Award, ¶ 273, **CL-105**.

In fact, there has not been any "purpose" articulated by México, as it never explained, for example, why, in contravention with the October 5, 2017 Order, it delivered letters to Perforadora purporting to terminate the Oro Negro Contracts and then ceased to pay Perforadora under the Oro Negro Contracts (by October 3, 2017, Pemex owed Perforadora $96 million for past due services). Pemex has also failed to explain why, in defiance of the *Concurso* Court's October 5 and 11, 2017 Orders (which prohibited Pemex from terminating the Oro Negro Contracts or acting in furtherance of any purported terminations), Pemex returned the Rigs to Perforadora and stopped paying the daily rates, including past due daily rates.[735]

445. The State's intention is not determinative of whether there has been an expropriation. The tribunal in *Biloune v. Ghana* observed in finding an expropriation that "one need not plumb the Government's motivations to conclude on this record that the Government's conduct unquestionably caused the irreparable and total loss of Claimants' investments and other factors support the conclusion that this loss was an expropriation.[736] However, where there is political motivation to destroy an investment, this is certainly relevant to the analysis.

446. Here, the facts demonstrate that México unquestionably caused the complete loss of Claimants' investment by terminating the Oro Negro Contracts and then colluding with the Bondholders to ensure that Oro Negro would not be able to survive.[737] The government's intentions in this case included a political intention to bring down Oro Negro for the benefit of third parties. México did this without regard for innocent international investors' protections against expropriation of their investment. The impact of the State's conduct, consistent with its intention, was the

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[735] Exhibits **C-133 – C-136** are the [Certificaciones de Entrega]; Gil Statement, **CWS-1**, ¶¶ 57, 140-141.

[736] *Biloune and Marince Drive Complex Ltd. v. Ghana*, Award on Jurisdiction and Liability (Oct. 27, 1989), ICJ Reports 1993, p. 209, **CL-133**.

[737] *See* Gil Statement, **CWS-1**, ¶ 30-31, 84-98.

complete and total destruction of the company. México's only purpose here was punishing Oro Negro and rewarding preferred players in the market.

447. México's expropriation therefore lacked public interest and was unlawful under the Treaty.

iii. The Expropriation Lacked Due Process of Law and Was Contrary to Article 1105(1)

448. The NAFTA provides that an expropriation lacking due process of law and not in accordance with NAFTA Article 1105(1) is wrongful. The NAFTA does not distinguish between substantive and procedural due process. Accordingly, México was bound to respect both substantive and procedural due process in carrying out the expropriation.[738] Claimant was denied both forms of due process, and its investment was not accorded treatment in accordance with international law, including fair and equitable treatment and full protection and security.

449. Tribunals have confirmed that a lawful exercise of the right to expropriate requires compliance with *substantive* due process. In *Vivendi v. Argentina*, the tribunal recognized that a claimant could be denied substantive due process or "substantive justice" through a "substantively unfair" result.[739] As regards *procedural* due process, the tribunal in *ADC v. Hungary* explained that it:

> [D]emands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights

738 *Siag*, Award,¶ 440, **CL-132**.

739 *Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentina,* ICSID Case No. ARB/97/3, Award (Nov. 21, 2000), ¶ 80, **CL-106**.

> and have its claims heard. If no legal procedure of such nature exists at all, the argument that "the actions are taken under due process of law" rings hollow.[740]

450. To comply with the NAFTA's requirements, an expropriation cannot be motivated by discriminatory intent, must be effected under due process of law and the investment must be treated in accordance with international law, including fair and equitable treatment and full protection and security.

451. In this case, the measures adopted by Pemex in terminating the *Impetus* Contract on the ground that Oro Negro had filed for *concurso mercantil*, as well as Pemex's actions in defiance of the *Concurso* Court's October 5 and 11 Orders,[741] were contrary to Mexican law, violated Claimants' due process rights and resulted in Claimants' investment not being treated in accordance with international law, including fair and equitable treatment and full protection and security. These measures had a direct impact on, or specifically targeted Oro Negro and resulted in the destruction of, the investment.

iv. The Expropriation Was Discriminatory

452. Under Article 1110 of the NAFTA, an expropriation is unlawful if it is discriminatory. Several of México's measures were targeted specifically at Oro Negro. Among other things, the Claimants have recorded statements by current and former senior Pemex officials confirming that Pemex singled out and discriminated against Oro Negro, in part, because it never paid bribes to Pemex.[742] Pemex retaliated against Oro Negro when it refused to pay bribes by imposing crippling reductions to the daily rates under the Oro Negro Contracts, which significantly

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740 *ADC*, Award,¶ 435, **CL-120**. *See Ioannis Kardassopoulous v. Georgia* ("*Ioannis*"), ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (Mar. 3, 2010), ¶¶ 395-396, **CL-134**.

741 Exhibits **C-133 – C-136** are the [Certificaciones de Entrega]; Gil Statement, **CWS-1**, ¶ 82-84, 86, 88-89.

742 Black Cube Statement, **CWS-4**, ¶ 39.

impaired the value of Oro Negro.[743] Moreover, Pemex treated Seamex much more favorably than it did Perforadora and Oro Negro, even though the terms of the Pemex-Seamex Contracts are significantly more expensive for Pemex than the Oro Negro Contracts (because the day rates are higher, had not been drastically reduced and none of the Contracts had been suspended).[744] In fact, the Seamex Contracts are so noticeably favorable that Seadrill itself has stated to its investors that it is "confident that [the Pemex-Seamex Contracts] are absolutely secure."[745] In contrast with Oro Negro, as explained in more detail in Section II.L.10, the Black Cube Recordings indicate that Pemex favored Seamex because Seamex paid bribes. Furthermore, Pemex unlawfully induced Oro Negro to accept the 2015 and 2016 Amendments based on fraudulent representations by Pemex that it would return the Oro Negro Contracts to their original terms.[746] Pemex also destroyed Oro Negro entirely by unilaterally terminating the Oro Negro Contracts in violation of Mexican law and without compensation. Pemex also discriminated against Oro Negro when it violated the *Concurso* Judge's Termination Injunction. Finally, Pemex conspired with the Ad-Hoc Group of Bondholders to destroy Oro Negro and dispossess it of the Jack-Up Rigs. These measures were by definition discriminatory. The discriminatory nature of México's expropriation renders it unlawful under NAFTA.

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743 *See supra at* ¶ 81-93; *see* Gil Statement, **CWS-1**, ¶¶ 52, 53, 56, 59-60.

744 Gil Statement, **CWS-1**, ¶¶ 44-45, 46, 102; *see also* **Appendix G** to the Statement of Claim, which is a summary of the key terms of Pemex's contracts with Oro Negro, Seamex and other lessors, reflecting Seamex's more favorable terms.

745 Seadrill Limited, Q4 2014 Earnings Call (Feb. 26, 2015), **C-169**.

746 *See* Gil Statement, **CWS-1**, ¶¶ 52-53; Exhibit **C-H.1** is a copy of the June 26, 2015 *Primus* Contract amendment; Exhibit **C-H.2** is a copy of the June 26, 2015 *Laurus* Contract amendment; Exhibit **C-H.3** is a copy of the June 26, 2015 *Fortius* Contract amendment; Exhibit **C-H.4** is a copy of the June 26, 2015 *Decus* Contract amendment; Exhibit **C-I.1** is a copy of the November 14, 2016 *Fortius* Contract amendment; Exhibit **C-I.2** is a copy of the November 14, 2016 *Decus* Contract amendment; Exhibit **C-I.3** is a copy of the November 14, 2016 *Impetus* Contract amendment; Exhibit **C-I.4** is a copy of the November 14, 2016 *Laurus* Contract amendment; Exhibit **C-I.5** is a copy of the November 14, 2016 *Primus* Contract amendment.

D. Respondent Breached Its Obligation To Provide Claimants' Investment Fair and Equitable Treatment Under Article 1105 of the NAFTA

1. The Fair and Equitable Treatment Standard

453. Article 1105(1) of the NAFTA states that, "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[747] The fair and equitable treatment (FET) standard in the NAFTA encompasses various duties, including duties to safeguard an investor's legitimate expectations; refrain from unreasonable, arbitrary and discriminatory measures; act transparently with due process, refrain from harassment, coercion, and abusive treatment; and act in good faith.[748] In addition to expropriating Claimants' investment, México also violated the fair and equitable treatment obligation in the NAFTA.

2. The Evolution of FET and the Minimum Standard of Treatment

454. In 2001, the NAFTA Free Trade Commission (FTC) interpreted the concept of fair and equitable treatment as "not requir[ing] treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[749] Since this statement, both NAFTA tribunals and the NAFTA State Parties have agreed that both customary international law and the fair and equitable treatment standard have evolved over time and continue to evolve.[750]

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[747] NAFTA, Article 1105, **CL-59**.

[748] *See, e.g.,* R. Dolzer & C. Schreuer, *Principles of International Investment Law* 145-160 (2d ed. 2012) ("Dolzer & Schreuer"), **CL-135**.

[749] NAFTA FTC Statement 2001, **CL-232**.

[750] *ADF Group Inc. v. United States of America* ("*ADF*"), ICSID Case No. ARB (AF)/00/1, Award (Jan. 9, 2003), ¶ 179 (noting that México, the United States, and Canada have all accepted "that the customary international law referred to in Article 1105(1) is not 'frozen in time' and that the minimum standard of treatment does evolve"), **CL-136**; *Mondev,* Award, ¶ 119, **CL-73**.

455. In the NAFTA case of *Mondev v. United States*, for example, the tribunal observed that each State party to the NAFTA, including México, accepted that the minimum standard of treatment "can evolve" and "has evolved."[751] The tribunal noted the considerable development over time in both substantive and procedural rights under international law, as well as the concordant body of practice reflected in more than 2,000 investment treaties that "almost uniformly provide for fair and equitable treatment of foreign investments."[752] The tribunal in *Mondev* thus concluded that, in modern times, "what is unfair or inequitable need not equate with the outrageous or the egregious," and "a State may treat [a] foreign investment unfairly and inequitably without necessarily acting in bad faith."[753]

456. Noting the evolution of the minimum standard of treatment, many tribunals have observed that the content of the customary minimum standard of treatment is "indistinguishable" or at least "not materially different" from the content of the fair and equitable treatment standard as applied by investment treaty tribunals. For example, the tribunals in *Rusoro Mining v. Venezuela*,[754]

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[751] *Mondev*, Award, ¶¶ 119, 124, **CL-73**.

[752] *Mondev*, Award, ¶¶ 116–117 (further observing that these treaties "will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law"), ¶ 125 (emphasizing that "the investments of investors under NAFTA are entitled, under the customary international law which NAFTA Parties interpret Article 1105(1) to comprehend, to fair and equitable treatment"), **CL-73**.

[753] *Mondev,* Award, ¶ 116 (finding it "unconvincing to confine the meaning of 'fair and equitable treatment' […] of foreign investments to what [that term] – had [it] been current at the time – might have meant in the 1920s when applied to the physical security of an alien"), **CL-73**; *Chemtura Corporation v. Government of Canada* ("*Chemtura*"), NAFTA Chapter Eleven, UNCITRAL, Award (Aug. 2, 2010), ¶ 121 (observing that it could not "overlook the evolution of customary international law, nor the impact of BITs on this evolution"), **CL-137**; *Merrill & Ring Forestry L.P. v. The Government of Canada* ("*Merrill*"), UNCITRAL, Award (Mar. 31, 2010), ¶ 193 (noting "a shared view that customary international law has not been frozen in time and that it continues to evolve in accordance with the realities of the international community"), **CL-138**.

[754] *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* ("*Rusoro Mining*"), ICSID Case No. ARB(AF)/12/5, Award (Aug. 22, 2016) ¶¶ 520–521 (The customary international minimum standard "has developed and today is indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter. The whole discussion of whether […] the BIT incorporates or fails to incorporate the [customary international minimum] Standard when defining FET has become dogmatic: there is no substantive difference in the level of protection afforded by both standards"), **CL-139**.

Rumeli Telecom v. Kazakhstan,[755] *Biwater Gauff v. Tanzania*,[756] *Azurix v. Argentina*,[757] *Duke Energy v Ecuador*,[758] *Saluka v Czech Republic*,[759] and others[760]have found that the minimum standard of treatment under customary international law "has evolved"[761] and that the customary international minimum standard has essentially converged with the fair and equitable treatment standard. The *Rusoro* tribunal observed that the customary international minimum standard is "indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter."[762] The *Rumeli* tribunal noted that the customary international minimum standard is "not materially different" from the FET standard.[763] In *Duke Energy v. Ecuador*,[764] the tribunal held that the standard for fair and equitable treatment under the BIT and the minimum standard of treatment under

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[755] *Rumeli Telekom*, Award, ¶ 611 (The tribunal "shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law"), **CL-124**.

[756] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* ("*Biwater v. Tanzania*"), ICSID Case No. ARB/05/22, Award (Jul. 24, 2008), ¶ 592 ("[T]he Tribunal also accepts, as found by a number of previous arbitral tribunals and commentators, that the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law."), **CL-140**.

[757] *Azurix Corp. v. Argentine Republic* ("*Azurix*"), ICSID Case No. ARB/01/12, Award (Jul. 14, 2006), ¶ 361 ("[T]he minimum requirement to satisfy this standard [fair and equitable treatment] has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law."), **CL-141**.

[758] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* ("*Duke Energy*"), ICSID Case No. ARB/04/19, Award (Aug. 18, 2008), ¶¶ 335-337, **CL-142**.

[759] *Saluka Investments BV (The* Netherlands*) v. Czech Republic* ("*Saluka*"), UNCITRAL, Partial Award (Mar. 17, 2006), ¶ 291 ("[I]t appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied."), **CL-143**.

[760] *See also Siemens,* Award, ¶ 291, **CL-105**; CMS, Award, ¶ 284, **CL-221** ; *Occidental Exploration v. Ecuador* ("*Occidental v. Ecuador*"), LCIA Case No. UN3467, Final Award (Jul. 1. 2004), ¶¶ 188-90, **CL-144**.

[761] *Azurix*, Award, ¶ 345; *Siemens,* Award, ¶¶ 295-297, 299, **CL-141**.

[762] *Rusoro Mining,* Award, ¶ 520, **CL-139**.

[763] *Azurix*, Award, ¶¶ 361, 364 ("The question whether fair and equitable treatment is or is not additional to the minimum treatment requirement under international law is a question about the substantive content of fair and equitable treatment and, whichever side of the argument one takes, the answer to the question may in substance be the same."), **CL-141**.

[764] *Duke Energy,* Award, **CL-142**.

customary international law are "essentially the same."[765] Thus, in evaluating FET claims, awards rendered by both NAFTA and non-NAFTA tribunals are helpful in establishing the bounds of State behavior that violates the fair and equitable standard.

457. Against this backdrop, the tribunal in the seminal NAFTA case on the minimum standard of treatment, *Waste Management v. Mexico II*,[766] found that "despite certain differences of emphasis a general standard for Article 1105 [providing content for the minimum standard of treatment] is emerging."[767] In an oft-cited passage widely regarded as a recitation of the contemporary minimum standard of treatment with respect to foreign investment, the *Waste Management* tribunal stated:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety . . . In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[768]

458. The *Waste Management* tribunal's articulation of the standard has been endorsed by numerous other tribunals, including (i) tribunals, that, like *Waste Management*, were addressing fair and equitable treatment provisions expressly tied to the customary international law minimum

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[765] *Duke Energy,* Award, ¶¶ 333, 335-337, **CL-142**; *see also Saluka,* Partial Award, ¶ 291 (stating that "the difference between the Treaty standard […] and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real"), **CL-143**; *Murphy Exploration and Production Company International v. Republic of Ecuador II*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award (May 6, 2016), ¶¶ 205-206, 208 (noting that the debate between the "autonomous treaty standard" versus the "customary international law" standard is more theoretical than substantial, because "the repeated reference to 'fair and equitable' treatment in investment treaties and arbitral awards shows that the FET standard is now generally accepted as reflecting recognisable components, such as: transparency, consistency, stability, predictability, conduct in good faith and the fulfilment of an investor's legitimate expectations" and concluded that "there is no material difference between the customary international law standard and the FET standard" under the BIT at issue in the case"), **CL-145**.

[766] *Waste Management*, Award, **CL-113**.

[767] *Id.* at ¶¶ 91-98, **CL-113**.

[768] *Id.* at ¶ 98, **CL-113**.

standard of treatment,[769] and (ii) tribunals addressing fair and equitable treatment provisions containing a general reference to international law,[770] and (iii) tribunals addressing fair and equitable treatment provisions without any such express references.[771] This is consistent with the view that the

[769] *E.g.*, *Mobil Investments Canada Inc. and Murphy Oil Corp. v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (May 22, 2012), ¶ 141 ("The [*Waste Management*] tribunal identified the customary international law standard."), **CL-146**; *Merrill,* Award, ¶ 199 ("*Waste Management* also identified unfair and inequitable treatment with conduct that is arbitrary, grossly unfair, unjust or idiosyncratic which, in so far as it also encompasses questions of due process, leads to an outcome which 'offends judicial propriety.'"), **CL-138**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award (Dec. 19, 2013), ¶ 455 ("The Arbitral Tribunal agrees with the many arbitral tribunals [including *Waste Management*] and authorities that have confirmed that such is the content of the minimum standard of treatment in customary international law."), **CL-147**; *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award (Apr. 18, 2013), ¶ 641 ("The Tribunal refers to the Waste Management tribunal's opinion.") (counsel translation); *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (Jun. 29, 2012), ¶ 219 ("The Tribunal finds that *Waste Management II* persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment. The Tribunal accordingly adopts the *Waste Management II* articulation of the minimum standard for purposes of this case."), **CL-148**; *Chemtura,* Award, ¶¶ 122, 215 ("In line with *Mondev*, the Tribunal will take account of the evolution of international customary law in ascertaining the content of the international minimum standard" […] and agreeing with the *Waste Management II*, *Mondev*, and *ADF* tribunals that a violation need not be outrageous to breach Article 1105."), **CL-137**; *Cargill, Inc. v. United Mexican States* (*"Cargill v. Mexico"*), ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 283 ("The central inquiry therefore is: what does customary international law *currently* require in terms of the minimum standard of treatment to be accorded to foreigners? The *Waste Management II* tribunal concluded that a general interpretation was emerging from NAFTA awards."), **CL-113**; *Methanex Corp. v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits (Aug. 3, 2005), Part IV, Chapter C, ¶ 12, Chapter D, ¶ 8 (referring to the fair and equitable treatment standard articulated in *Waste Management v. Mexico* with approval), **CL-151**; *GAMI*, Final Award, ¶ 95 ("The ICSID tribunal in *Waste Management II* made what it called a 'survey' of standards of review applied by international tribunals dealing with complaints under Article 1105. It observed the emergence of a 'general standard for Article 1105.'"), **CL-71**.

[770] *E.g.*, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* ("*Gold Reserve*"), ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014), ¶¶ 568–573 (*noting* that "[i]n *Waste Management v. Mexico* the tribunal summarized its position on the FET standard" and citing this summary with approval), **CL-152**; *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (Sept. 12, 2014), ¶ 558, n. 878 ("[A]s has been found by many other investment treaty tribunals presented with the task of ascertaining the standard's meaning – even where the applicable treaty contains no reference to customary international law – there is much to be said for the general approach stated by the tribunal in *Waste Management*."), **CL-153**; *OKO Pankki Oyj et al v. The Republic of Estonia*, ICSID Case No. ARB/04/6, Award (Nov. 19, 2007), ¶ 239 ("It is therefore helpful to consider what arbitration tribunals have decided in practice, in specific cases, particularly in […] *Waste Management* […."), **CL-154**; *El Paso Energy International Company v Argentine Republic,* ICSID Case No ARB/03/15, Award (Oct. 31.2011), ¶ 348 ("There 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, which derive from the obligation of good faith. This has been aptly stated by the tribunal in *Waste Management*."), **CL-155**; *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), ¶¶ 127-128 ("[T]he fair and equitable treatment analysis involves consideration of the investor's expectations when making its investment in reliance on the protections to be granted by the host State […] this view is reflected in […] *Waste Management*."), **CL-156**; *Azurix,* Award, ¶¶ 368–373 (referring to *Waste Management* in discussing the modern interpretation of the fair and equitable treatment standard), **CL-141**.

[771] *E.g.*, *Biwater v. Tanzania,* Award, ¶¶ 597–600 (citing the NAFTA cases of *Waste Management v. Mexico* and *International Thunderbird Gaming v. Mexico*, and stating that their "description of the general threshold for violations of this standard is appropriate"), **CL-45**; *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-

fair and equitable treatment standard as applied by investment treaty tribunals today reflects the evolution of the customary international law minimum standard of treatment.

3. Traditional Elements of the Fair and Equitable Treatment Standard

459. The FET standard of conduct is broadly designed to "fill gaps which may be left by the more specific standards" of international investment treaties, and the principle of good faith is the "common guiding beacon" orienting the understanding and interpretation of the obligation.[772] Against this back drop of good faith, tribunals have concluded that the ordinary meaning of "fair and

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18/BCB-BZ, Award (Dec. 19, 2014), ¶ 282 (*citing Waste Management v. Mexico* for the proposition that "fair and equitable treatment is frequently noted to include a prohibition on conduct that is 'arbitrary,' 'idiosyncratic,' or 'discriminatory'" and noting that "[t]here is an inherent logic to this association"), **CL-157**; *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction (Dec. 15, 2014), ¶ 337 (*citing Waste Management v. Mexico* for the proposition that "a violation of the obligation to accord fair and equitable treatment involves 'arbitrary […] notoriously unfair behavior […] idiosyncratic' or that 'involves a lack of due process.'") (counsel translation), **CL-158**; *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award (May 21, 2013), ¶ 604 ("The Tribunal is then in agreement with what has been affirmed by other arbitral tribunals [including *Waste Management v. Mexico*] in which the FET serves as the legal basis to protect foreign investors from arbitrary, inconsistent, not transparent and capricious behavior attributable to host States.") (counsel translation), **CL-159**; *Rupert Binder v. Czech Republic*, UNCITRAL, Final Award (Redacted) (Jul. 15, 2011), ¶ 445 (*citing Waste Management v. Mexico* for the assertion that "[t]he state's failure to observe the legitimate expectations of the investor that it has itself induced will amount to a breach of the fair and equitable treatment standard"), **CL-160**; *EDF (Services) Ltd. v. Romania* ("*EDF v. Romania*"), ICSID Case No. ARB/05/13, Award (Oct. 8, 2009), ¶ 216 ("[O]ne of the major components of the FET standard is the parties' legitimate and reasonable expectations with respect to the investment they have made […] It comes into consideration whenever the treatment attributable to the State is in breach of representations made by it which were said to be reasonably relied upon by the Claimant. This concept was stated by the tribunal in *Waste Management*."), **CL-161**; *National Grid P.L.C. v. Argentine Republic* ("*National Grid*"), UNCITRAL, Award (Nov. 3, 2008), ¶ 173 ("*Waste Management* considered it 'relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.'") **CL-162**; *Siemens*, Award, ¶ 299 ("[Under] *Waste Management II*, the current standard includes the frustration of expectations that the investor may have legitimately taken into account when it made the investment."), **CL-105**; *Saluka*, Partial Award, ¶ 302 ("The standard of 'fair and equitable treatment' is therefore closely tied to the notion of legitimate expectations [as] [t]he tribunal in *Waste Management* […] stated."), **CL-143**; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted) (Jun. 26, 2009), ¶ 203 (*noting* approvingly that *Saluka v. Czech Republic* endorsed and commended *Waste Management v. Mexico*'s threshold for infringement of the fair and equitable treatment standard as a useful guide), **CL-230**; *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Final Award (Dec. 11, 2013), ¶ 522 ("There is no dispute that conduct that is substantively improper, whether because it is arbitrary, manifestly unreasonable, discriminatory or in bad faith, will violate the fair and equitable treatment standard […] [a]s stated by the *Waste Management II* tribunal."), **CL-163**.

[772] *See, e.g.*, Dolzer & Schreuer at 132 (The clause is broadly designed "to fill gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties." The principle of good faith is the "common guiding beacon" that will orient the understanding and interpretation of the obligations), **CL-135**; *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), ¶ 297, **CL-164**.

equitable" is generally "just," "even-handed," "unbiased," and "legitimate."[773] As noted above, the *Waste Management* NAFTA tribunal pointed to "arbitrary, grossly unfair, unjust or idiosyncratic, [and/or] discriminatory" measures as being violative of the FET standard.[774] Other NAFTA tribunals have also included the general standard of conduct that is "improper and discreditable."[775]

460. Beyond general descriptions of the types of behavior that are violative of the fair and equitable treatment standard, tribunals and scholars have largely agreed on a few core, often related and overlapping, elements of the fair and equitable treatment obligation under customary international law, including:

(a) Safeguarding investors' legitimate expectations,

(b) Refraining from unreasonable, arbitrary and discriminatory measures,

(c) Providing transparency and due process,

(d) Refraining from harassment, coercion, and abusive treatment,

(e) Acting in good faith.[776]

461. These core elements of the fair and equitable treatment standard are described below in turn.

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[773] *Saluka,* Partial Award, ¶¶ 297–298, **CL-143**. *See MTD Equity Sdn. Bhd. & Anor. v. Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004), ¶ 113, **CL-165**; *Azurix*, Award, ¶ 360, **CL-141**.

[774] *Waste Management,* Award, ¶ 98, **CL-113**.

[775] *Mondev*, Award, ¶ 127, **CL-73**; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* ("*Loewen*"), ICSID Case No. ARB(AF)/98/3, Award (Jun. 26, 2003), ¶ 133 (in reference to *Mondev*), **CL-166**. *See also* UNCTAD, *Fair And Equitable Treatment*, 20-29, II.UNCTAD/DIAE/IA/2011/5 (2012), **CL-167**.

[776] *See, e.g.*, Dolzer & Schreuer at 145-160, **CL-135**; UNCTAD, *Fair And Equitable Treatment*, 20-29, UNCTAD/DIAE/IA/2011/5 (2012), II.UNCTAD/DIAE/IA/2011/5 (United Nations 2012, New York – Geneva) 20–29, **CL-167**; Andrew Newcombe & Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* 279 (2009), **CL-168**; Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP 2008) 157 and 186, **CL-169**. For an overview of the contents of the standard in function of arbitral practice, *see also* Katia Yannaca-Small, *Fair and Equitable Treatment Standard: Recent Developments*, *in Standards of Investment Protection* 111, 118 et seq. (August Reinisch ed., 2008), **CL-170**.

i. Obligation To Safeguard Legitimate Expectations

462. A cornerstone of the fair and equitable treatment standard is the requirement that States safeguard investors' legitimate expectations, thus according investors a stable and predictable investment environment. The NAFTA Preamble itself states that an underlying resolution of the Treaty was to establish "clear . . . rules" and "ensure a predictable commercial framework for business planning and investment."[777] As commentators have observed, "there is in fact no single tribunal on record that has steadfastly refused to find that – at least in principle – [the FET] standard encompasses legitimate expectations."[778] Tribunals have described the obligation as one "to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations."[779] The tribunal in *Waste Management II* noted that in applying the FET standard, "it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[780] The seminal award in *Tecmed v. Mexico*, a case decided under a FET standard "according to international law," offers a clear recitation of the operation of a claimant's legitimate expectations:

> The Arbitral Tribunal considers that this provision of the Agreement [FET], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor *expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor*, so that it may know beforehand any and all rules and regulations that will govern its investments […] The foreign investor also expects the host State *to act consistently, i.e. without arbitrarily revoking any preexisting decisions […] that were relied upon by the investor to assume its commitments as well as to plan and launch*

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777 NAFTA Preamble, **CL-171**.

778 Michele Potesta, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept* 15 (Society of International Economic Law, 3rd Biennial Global Conference, 2013), http://ssrn.com/abstract=2102771, **CL-172**.

779 *Saluka,* Partial Award, ¶ 302, **CL-143**.

780 *Waste Management,* Award, ¶ 98, **CL-13**.

> *its commercial and business activitie*s. 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, and *not to deprive the investor of its investment without the required compensation*.[781]

463. Consistent with this articulation, the NAFTA tribunal in *Thunderbird v. Mexico* observed that:

> the concept of "legitimate expectations" relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.[782]

464. An investor may thus legitimately expect that a State will "conduct itself vis-à-vis his investment in a manner that [is] reasonably justifiable and [does] not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination."[783] At the very least, an investor can have the legitimate expectation that the conduct of the host State will be fair and equitable in the sense that it will not fundamentally contradict basic principles of its own laws and regulations. This includes, as noted by the tribunal in *Alpha v Ukraine*, a legitimate expectation that a State will not act "beyond its authority."[784]

465. The obligation to safeguard legitimate expectations can extend to respecting contractual obligations to which the State has bound itself, particularly when the state entity is acting in a sovereign capacity. Contractual agreements form the core of a stable and predictable legal and business environment, and the disregard and undermining of contracts subverts an investor's legitimate expectations, particularly where the State has made commitments to the investor regarding

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781 *Tecmed,* Award, ¶ 154 (emphasis added), **CL-101**.

782 *Thunderbird*, Arbitral Award, ¶ 147, **CL-70**.

783 *Ioannis,* Award, ¶ 441, **CL-134**.

784 *Alpha Projektholding GmbH v Ukraine* ("*Alpha Projektholding*"), ICSID Case No ARB/07/16, Award (Nov. 8, 2010), ¶ 422, **CL-173**.

the contracts.[785] For example, the tribunal in *Mondev* found that the FET protection under NAFTA Article 1105(1) clearly extended to contract claims, declaring that

> A governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1005 and with contemporary standards of national and international law concerning governmental liability for contractual performance.[786]

466. Similarly, government interference with a contract between an investor and a State entity, as well as the termination of a contract could also amount to a violation of the fair and equitable treatment obligation. In *Rumeli v. Kazakstan*, the tribunal held that the State breached the fair and equitable treatment prong of the applicable treaty through the State organ's decision to terminate Rumeli's contract.[787] In *Alpha v. Ukraine*, the State's interference with a contract leading to its breach was sufficient to implicate the State's international responsibility.[788]

467. In many cases involving contractual breaches, the tribunal required that the State's or State entity's actions be of a governmental or sovereign nature. In *RFCC v. Morocco*, the tribunal noted that while measures taken by Morocco in its sovereign capacity were capable of breaching the FET standard, mere violations of contractual obligations that could have been committed by an ordinary contract partner would not rise to the level of an FET violation.[789] Similarly, in *Impregilo v. Pakistan*, the tribunal found that a misuse of public power in the breach of a contract would

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[785] *See, e.g.*, *Rumeli Telekom*, Award, ¶ 615 (noting that the termination decision was "arbitrary, unfair, unjust, lacked in due process and did not respect the investor's reasonable and legitimate expectations"), **CL-124**; *Alpha Projektholding*, Award, ¶¶ 403, 412, **CL-173**.

[786] *Mondev*, Award, ¶ 134, **CL-73**.

[787] *Rumeli Telekom*, Award, ¶ 615 (noting that the termination decision was "arbitrary, unfair, unjust, lacked in due process and did not respect the investor's reasonable and legitimate expectations"), **CL-124**.

[788] *Alpha Projektholding*, Award, ¶¶ 403, 412, **CL-173**.

[789] *Consortium RFCC v. Royaume du Maroc* ("*RFCC v. Maroc*"), ICSID Case No. ARB/00/6, Award (Dec. 22, 2003), ¶¶ 33–34, **CL-174**.

constitute an FET violation.[790] And in *Duke Energy v. Ecuador*, the tribunal observed that a breach of a contract does not amount to a violation of the FET standard unless the State commits a contractual breach in the exercise of its sovereign power.[791]

468. Nonetheless other tribunals focused on the *effect* of the contractual breach, rendering the evaluation similar to the evaluation of a possible expropriation. In *SGS v. Paraguay*, the tribunal noted that

> a State's non-payment of a contract is . . . capable of giving rise to a breach of fair and equitable treatment requirement, such as, perhaps, where the non-payment amounts to a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of its value.[792]

469. The NAFTA tribunal in *Waste Management v. Mexico* expressed the similar sentiment that:

> even the persistent non-payment of debts by a municipality is not to be equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem.[793]

470. Thus, when the State's action results in a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of value, the State has committed an FET violation.

ii. Obligation To Refrain from Unreasonable, Arbitrary and Discriminatory Measures

471. The obligation to treat investments reasonably, non-arbitrarily and in a non-discriminatory fashion is closely tied to the obligation to safeguard the investor's legitimate expectations. In considering this requirement, the *Saluka* tribunal explained that a foreign investor

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[790] *Impregilo v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (Apr. 22, 2005), ¶¶ 260, 266–270, **CL-175**.

[791] *Duke Energy*, Award, ¶¶ 342–345; *see also AES v. Hungary*, Award, ¶¶ 10.3.12-10.3.13, **CL-142**.

[792] *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (Feb. 10, 2012), ¶ 146, **CL-176**.

[793] *Waste Management v. Mexico II*, ICSID Case No. ARB(AF)/00/3, Final Award (Apr. 30, 2004), ¶ 115, **CL-113**.

"is entitled to expect that the [host State] will not act in a way that is manifestly inconsistent, non-transparent, and unreasonable."[794] The standard of whether State conduct is unreasonable, arbitrary and/or discriminatory is flexible and broad, to be determined in light of all the circumstances of the case. In the words of the tribunal in *CME v. Czech Republic*:

> [t]he determination of reasonableness is in its essence a matter for the arbitrator's judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behavior in light of the goals of the Treaty.[795]

472. Under the NAFTA, the obligation to treat investments in a non-discriminatory manner is all the more important because the Treaty encompasses a non-discrimination clause. As the NAFTA tribunal in *International Thunderbird Gaming* observed:

> Equality between individuals and absence of favouritism – i.e. non-discrimination – plays a role in the assessment of legitimate expectation. That is even more relevant in investment treaties where the prohibition on discrimination in favour of domestic competitors is formally enshrined, as in Art. 1102 of the NAFTA.[796]

473. Most tribunals agree that unreasonable, arbitrary or discriminatory conduct is *per se* a breach of the FET standard.[797] For example, the tribunal in *CMS Gas v. Argentina* noted that "[a]ny measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment."[798] The tribunal's analysis of the government's breach of FET in the *Gold Reserve v. Venezuela* case is also instructive. There, the tribunal found that Venezuela breached the fair and equitable treatment obligation because it made decisions regarding permits and licenses on the basis

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[794] *Saluka,* Partial Award, ¶ 309, **CL-143**.

[795] *CME,* Partial Award, ¶ 158, **CL-118**.

[796] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde (Dec. 1, 2005), ¶ 102, **CL-220**.

[797] *See*, *e.g.*, UNCTAD, *Fair and Equitable Treatment*, 37, UNCTAD/ITE/IIT/11 (Vol. III) (1999), p. 37, **CL-167**.

[798] *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, Award (May 12, 2005), ¶ 290, **CL-221**.

of political preferences and not on applicable legal rules.[799] The tribunal reasoned that this reflected a lack of transparency as to the real reasons behind the decisions and also displayed a lack of good faith.[800]

474. From the arbitral jurisprudence, one can discern three general types of arbitrary measures: those (i) that inflict damage on the investor without serving any apparent legitimate purpose; (ii) that are not based on legal standards but on discretion, prejudice, or personal preference; and (iii) that are taken for reasons that are different from those put forward by the decision maker.[801]

iii. Obligation To Provide Due Process and Transparency

475. Tied to both the obligation to safeguard an investor's legitimate expectations and to refrain from unreasonable, arbitrary and discriminatory measures is the obligation to provide due process and transparency in decision-making. Due process is a fundamental aspect of the rule of law generally, and a key element of fair and equitable treatment.[802] Transparency is an important aspect of due process. Both are important aspects of procedural propriety.[803]

476. The NAFTA refers to due process multiple times. Article 1110 discusses the importance of due process of law as a necessary requirement of a lawful expropriation and refers to Article 1115.[804] Article 1115, in turn, notes the establishment of "a mechanism for the settlement of

[799] *Gold Reserve,* ¶ 564, 580-581, **CL-152**.

[800] *Gold Reserve,* ¶ 591, **CL-152**.

[801] Dolzer & Schreuer at 193, **CL-135**; *see also EDF v. Romania*, Award, ¶ 303, **CL-161**; *Joseph Charles Lemire v. Ukraine* ("*Lemire*"), ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (Jan. 14, 2010), ¶ 262, **CL-177**.

[802] Dolzer & Schreuer at p. 156, **CL-135**.

[803] *Id.* at 154, **CL-135**.

[804] NAFTA Article 1110, **CL-59**.

investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and *due process* before an impartial tribunal."[805]

477. Reflecting upon the importance of due process and judicial propriety in a State's treatment of investors, the tribunal in *Waste Management II v. Mexico* noted, "the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct . . . [*inter alia*] involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."[806] Another NAFTA tribunal, *Loewen v. United States*, observed when evaluating a potential breach of FET that "manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough."[807]

478. Serious departures from due process may result in a violation of the related international law concept of denial of justice. As explained by the tribunal in *Azinian v. Mexico*:

> A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. . . . There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of 'pretence of form' to mask a violation of international law.[808]

479. Denial of justice is usually associated with some failure or shortcoming in the host State's domestic courts, but the procedural guarantees of the FET standard also extend to

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[805] NAFTA Article 1115, **CL-59**.

[806] *Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Final Award (Apr. 30, 2004), ¶ 98, **CL-113**.

[807] *Loewen*, Award, ¶ 132, **CL-166**.

[808] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States,* ICSID Case No. ARB (AF)/97/2, Award (Nov. 1, 1999), ¶¶ 102, 103, **CL-178**. *See generally* Jan Paulsson, *Denial of Justice in International Law* (2005), **CL-179**.

administrative authorities.[809] In *Aven v. Costa Rica*, the tribunal noted that the DR-CAFTA, which has FET language identical to that in the NAFTA, "suggests that fair and equitable treatment has as a fundamental component of denial of justice; 'fair and equitable treatment' includes the obligation not to deny justice in criminal civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world . . . ."[810] Due process includes being able to review evidence submitted against oneself and having the ability to present exculpatory evidence.[811]

iv. Obligation To Refrain from Harassment, Coercion and Abusive Treatment

480. Just as unreasonable, arbitrary and discriminatory conduct is violative of the FET obligation, harassment, coercion and abuse are also serious failures of the State's obligation to provide fair and equitable treatment.[812] As the *Tokios Tokelés v. Ukraine* tribunal held, a State campaign to punish an investor "must surely be the clearest infringement one could find of the provisions and aims of the Treaty."[813] In other words, a State may not use its superior power to harass, coerce, or abuse an investor.

481. For example, in finding a violation of FET, the NAFTA tribunal in *Pope & Talbot v. Canada* found that the relevant government organ had launched an aggressive "verification review"

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[809] Dolzer & Schreuer at 156, **CL-135**.

[810] *David R. Aven and others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award (Sept. 18, 2018), ¶ 356, (analyzing DR-CAFTA), **CL-180**.

[811] *See e.g., Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (Aug. 27, 2019), ¶ 1318, **CL-219**.

[812] Campbell McLaughlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, p. 325, (2017), **CL-181**.

[813] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award (Jul. 26, 2007), ¶ 123, **CL-182**. In another example, *Vivendi v. Argentina II*, the tribunal found that the State, improperly and without justification, had mounted an illegitimate "campaign" against the investment, which constituted a breach of the fair and equitable treatment standard. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶¶ 7.4.19-7.4.41, **CL-79**.

that was "burdensome and confrontational" and replete with "threats and misrepresentation."[814] The tribunal explained that the Canadian regulatory authority

> changed its previous relationship with the Investor and the Investment from one of cooperation … to one of threats and misrepresentation. Figuring in this new attitude were assertions of non-existent policy reasons for forcing them to comply with very burdensome demands for documents, refusals to provide them with promised information, threats of reductions and even termination of the Investment's export quotas, serious misrepresentations of fact in memoranda to the Minister concerning the Investor's and the Investment's actions and even suggestions of criminal investigation of the investment's conduct.[815]

482. In *Tecmed v. Mexico*, México denied a permit's renewal in order to force the investor to relocate to another site, incurring significant costs and risks. Finding that this violated the FET standard in the treaty according to international law, the tribunal noted that

> Under such circumstances, such pressure involves forms of coercion that may be considered inconsistent with the fair and equitable treatment to be given to international investments under Article 4(1) of the Agreement and objectionable from the perspective of international law.[816]

483. Finally, in *Desert Line v. Yemen*, the tribunal found that the State imposed a settlement agreement on the claimant under physical and financial duress.[817] Notably, the tribunal not only found that the State's conduct violated the FET standard, but it also awarded rare moral damages to the claimant.[818] The tribunal noted that the State's conduct "falls well short of minimum standards of international law and cannot be the result of fair and equitable negotiation."[819]

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[814] *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award in Respect of Damages (May 31, 2002), ¶¶ 67–69, **CL-72**.

[815] *Id.* at ¶ 68, **CL-72**.

[816] *Tecmed*, Award, ¶ 163, **CL-101**.

[817] *Desert Line* Projects *LLC v. The Republic of Yemen* ("*Desert Line*"), Award (Feb. 6, 2008), ¶¶ 151–194, **CL-183**.

[818] *Id.*, at, ¶¶ 194, 290, **CL-183**.

[819] *Id.*, at , ¶ 179, **CL-183**.

v. Obligation To Act in Good Faith

484. Good faith is one of the foundations of international law in general and of foreign investment law and the fair and equitable treatment standard in particular.[820] As the NAFTA tribunal in *Thunderbird* observed, the concept of "good faith" is explicitly mentioned in Article 31 of the Vienna Convention.[821] As a "general, if not cardinal principle of customary international law,"[822] good faith is inherent in the concept of FET and minimum standard of treatment.[823] Although tribunals have noted that the FET standard generally "is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not,"[824] tribunals have also confirmed that State conduct carried out with a demonstrable lack of good faith will, of itself, constitute a breach of the obligation to afford FET.[825]

485. For example, in *Tecmed*, México's regulatory body for environmental issues refused to renew the claimant's permit to operate a landfill, because the site had "become a nuisance due to political reasons relating to the community's opposition."[826] The tribunal held that such politically-motivated conduct amounted to a breach of the fair and equitable treatment standard.[827] Similarly, the tribunal in *Azurix* found that Argentina had breached the fair and equitable treatment standard as

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820 *See* Dolzer & Schreuer, *supra* note 209, at 156-58, **CL-135**.

821 Vienna Convention, Art. 31, **CL-58**; see also *Thunderbird*, Arbitral Award, ¶ 91 (referring to Article 31 of the VCLT), **CL-70**.

822 *Siag*, Award, ¶ 450 (describing the principle that States must act in good faith as the "general, if not cardinal principle of customary international law"), **CL-132**.

823 *See Thunderbird*, Arbitral Award, ¶ 138, **CL-70***; Siag*, Award, ¶ 450, **CL-132**.

824 *Occidental v. Ecuador*, Final Award, ¶ 186, **CL-144**. *See also CMS*, Award, ¶ 280, **CL-221**; *Duke Energy*, Award, ¶ 341, **CL-142**; *Azurix*, Award, ¶ 372, **CL-141**; *Siemens*, Award, ¶¶ 299-300, **CL-105**.

825 *See*, *e.g.*, *Rumeli Telekom,* ¶ 609, **CL-124**; *Biwater v. Tanzania,* ¶ 602, **CL-140**.

826 *Tecmed,* Award, ¶¶ 164, 166, **CL-101**.

827 *Id.*, **CL-101**.

a result of the arbitrary actions of provincial authorities who intervened "for political gain" during a tariff dispute with ABA, which provided potable water and sewerage services.[828]

486. Arbitral practice clearly indicates that the FET standard may be violated even if no *mala fide* is involved.[829] As the NAFTA tribunal in *Loewen v. United States* clarified, "[n]either State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice."[830] Similarly, the NAFTA tribunal in *Mondev v. United States* stated, "[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."[831]

487. Nevertheless, while bad faith is certainly not necessary for a violation of FET,[832] actiing in bad faith against the investor would be a paradigmatic violation of the standard.[833] Bad faith can include "using legal instruments for purposes other than those for which they were

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828 *Azurix,* Award, ¶ 144, **CL-141**.

829 *See, e.g.*, *Occidental v. Ecuador*, Final Award, ¶ 186 ("this is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not"), **CL-144**; *CMS*, Award, ¶ 280 ("The Tribunal believes this is an objective requirement unrelated to whether the Respondent has had any deliberate intension or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard."), **CL-221**; *El Paso Energy International Company v. The Argentine Republic,* ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), ¶ 357 ("a violation can be found even if there is a mere objective disregard of the rights enjoyed by the investor under the FET standard, and that such a violation does not requires subjective bad faith on the part of the State."), **CL-155**.

830 *Loewen*, Award, ¶ 132, **CL-166**.

831 *Mondev*, Award, ¶ 116, **CL-73**.

832 Dolzer & Schreuer at 157, **CL-135**; McLaughlan, Shore & Weiniger at 326, **CL-181**.

833 *Cargill v. Mexico*, Award, ¶ 301, **CL-150**.

created"[834] and "a conspiracy by state organs to inflict damages up or to defeat the investment."[835] As the tribunal in *Frontier Petroleum v. Czech Republic* held, the concept of "bad faith":

> [i]ncludes 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 favoritism.[836]

488. In *Bayindir v. Pakistan*, the investor claimed that its expulsion was based on local favoritism and bad faith, because the reasons given by the government did not correspond with its actual motivation.[837] The tribunal found that "unfair motives of expulsion, if proven, are capable of founding a fair and equitable treatment claim under the BIT."[838]

489. Finally, in yet another example, the tribunal in *Waste Management II* observed that

> a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement – would constitute a breach of Article 1105(1). 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."[839]

490. Thus while bad faith is not a necessary condition for an FET violation, it is certainly a sufficient condition. In other words, demonstrated bad faith is significant evidence that a State has committed an FET violation.

vi. Conclusion

491. As this review of recent cases reflects, the minimum standard of treatment under customary international law has evolved and, in the context of foreign investment, has converged in

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[834] *Frontier Petroleum Services Ltd v Czech Republic* ("*Frontier*"), UNCITRAL, Final Award (Nov. 12, 2010), ¶ 300, **CL-184**.

[835] *Id.*, **CL-184**.

[836] *Id.* (footnotes omitted), **CL-184**.

[837] *Bayindir v. Pakistan* ("*Bayindir v. Pakistan*"), ICSID Case No. ARB/03/29, Decision on Jurisdiction (Nov. 14, 2005), ¶¶ 232-243, **CL-185**.

[838] *Bayindir v. Pakistan*, Decision on Jurisdiction, ¶ 250, **CL-185**.

[839] *Waste Management II v. Mexico*, Award, ¶ 138, **CL-113**.

substance with the standard of fair and equitable treatment as interpreted by investment treaty tribunals. Specifically, as demonstrated above, it now is axiomatic that a host State has legal obligations under the minimum standard of treatment—and thus under Article 1105 of the Treaty—to refrain from exercising its powers unreasonably, arbitrarily or in a discriminatory fashion; to provide transparency and due process; to not coerce or harass; to act in good faith and to honor legitimate expectations that arose from conditions that it offered to induce the investor's investment.

4. A Customary International Law Prohibition Against Bribery Has Emerged such that the Expectation of Bribery in and of Itself Is a Violation of the Customary International Minimum Standard Treatment and NAFTA Article 1105

492. In the past few decades, a customary international law prohibition against corruption has emerged, and it is now practically undisputed that corruption and bribery are societal ills and against international public policy.[840]

493. Customary international law "consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way."[841] Generally, the two key elements of customary international law are 1) State practice, or the widespread adoption of a practice by States over time, and 2) *opinio juris*, the sense that States act this way out of a sense of obligation. The lack of objection to the development of a customary international law norm is also helpful in demonstrating its existence. According to the International Law Commission, all of the following may evidence customary international law: treaties, decisions of

[840] For avoidance of confusion, bribery is the "corrupt solicitation, acceptance, or transfer of value in exchange for official action." *Wex Legal Dictionary*, Legal Information Institute, https://www.law.cornell.edu/wex/bribery (last visited Oct. 6, 2019), **CL-186**.

[841] Shabtai Rosenne, Practice and Methods of International Law 55 (1984), **CL-187**.

national courts and international tribunals, national legislation, diplomatic correspondence, opinions of national legal advisors, and the practice of international organizations.[842]

494. In the case of bribery and corruption, State practice is evidenced by the incredible proliferation of treaties, both global and regional, against corruption and bribery, as well as the astonishing number of signatories to various anti-corruption and bribery conventions. For example, the United Nations Convention Against Corruption ("UNCAC"), which was adopted by the U.N. General Assembly on October 31, 2003 and entered into force on December 14, 2005, as of this date has 186 State Parties out of a total of 195 countries in the world.[843] The UNCAC is the only legally-binding universal anti-corruption instrument and is far-reaching in its approach. It covers many different forms of corruption such as bribery, trading in influence, abuse of functions, and various acts of corruption in the private sector.[844]

495. Even earlier than the UNCAC were various regional treaties, including the Inter-American Convention Against Corruption ("Inter-American Convention"), which came into force on March 6, 1997. The Inter-American Convention boasts nearly the entire Americas region as State Parties.[845] The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Anti-Bribery Convention"**)** was signed later that same

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[842] *Report of the International Law Commission to the General Assembly (Part II): Ways and Means of Making the Evidence of Customary International Law More Readily Available*, [1950] 2 Y.B. Int'l L. Comm'n 367, ILC Doc. A/1316, **CL-188**.

[843] *United Nations Convention Against Corruption: Signature and Ratification Status*, United Nations Ofiice on Drugs and Crime, www.unodc.org/unodc/en/corruption/ratification-status.html (last visited Sept. 11, 2019), **CL-189**.

[844] United Nations Convention Against Corruption (2003), **CL-190**.

[845] Inter-American Convention Against Corruption, Organization of American States, Mar. 29, 1996, S. Treaty Doc. No. 105-39, www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_corruption_signatories.asp (last visited Sept. 11, 2019), ("Inter-American Convention"), **CL-191**.

year, on December 17, 1997, and entered into force on February 15, 1999.[846] The OECD Anti-Bribery Convention establishes legally binding standards to criminalize bribery of foreign public officials in international business transactions.[847] All 36 OECD countries, including México, and eight non-OECD countries have adopted the OECD Anti-Bribery Convention.[848]

496. Signatories to these various Conventions have passed complementary legislation in their domestic laws to further criminalize corruption, bribery, and supporting activity, with many of the statutes having extraterritorial reach. The United States started the trend with the enactment of the Foreign Corrupt Practices Act ("FCPA") in 1977. The FCPA covers both U.S. and non-U.S. persons and businesses and can give rise to liability even when the corrupt act takes place outside the United States.[849] The U.S. Shareholders in this NAFTA action are covered by the FCPA and must abide by its provisions or face criminal liability. Scores of countries have followed suit, and at a rapid pace, with their own domestic legislation criminalizing corruption and bribery and strengthening existing related laws.[850] While corruption is still a major problem globally, virtually no country publicly justifies or endorses corruption, as demonstrated by the near-universal accession to treaties like UNCAC and other regional treaties.

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[846] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 2017, S. Treaty Doc. No. 105-43, www.oecd.org/corruption/oecdantibriberyconvention.htm (last visited Sept. 11, 2019), **CL-192**.

[847] *Id.,* **CL-192**.

[848] *Id*., **CL-192**.

[849] Foreign Corrupt Practices Act of 1997, 15 U.S.C. §§ 78dd-1, et seq., **CL-193**.

[850] United Nations Convention Against Corruption (2003), Chapter III, Criminalization and law enforcement, **CL-190**; United Nations Convention Against Corruption: Signature and Ratification Status, *available at* www.unodc.org/unodc/en/corruption/ratification-status.html (last visited Sept. 11, 2019), **CL-189**; Ley Federal Anticorrupción en Contrataciones Públicas [Federal Procurement Anticorruption Law],DOF] [Official Journal of the Federation] 18-07-2016, **CL-258**; Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en materia de combate a la corrupción [Decree by which various provisions of the Constitution of the United Mexican States are reformed, added and repealed, in matters related to combating corruption] Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 27-05-2015, **CL-259**.

497. México is a signatory to all of these relevant major international treaties on anti-corruption. México signed the Inter-American Convention on March 26, 1996 and ratified the treaty on May 27, 1997.[851] It signed the OECD Anti-Bribery Convention on May 27, 1999 and the Convention went into force on July 26, 1999. México passed implementing legislation on May 18, 2000. México actually hosted the opening of the UNCAC for signature in Merida, México, from December 9-11, 2003, and signed it on the first day. México ratified the UNCAC six months later on July 20, 2004.

498. México also criminalizes bribery. Bribery of public officials is prohibited under the Mexican Federal Criminal Code, Article 222, and state level criminal codes contain similar prohibitions.[852] The definition of public official is broad under Mexican law, but includes, among others, elected and appointed government officers and officials of government-owned companies, such as Pemex.[853] The Mexican Criminal Code establishes equivalent penalties for the bribe payer and the public official who accepts a bribe, including jail time, a monetary fine, a lengthy prohibition from exercising public functions and, for public officials, removal from office.[854] The Code also prohibits paying bribes both directly and through intermediaries and punishes both domestic and foreign bribery equally.[855] Finally, México also had a Federal Anti-Corruption Law on Public Procurement, only recently abrogated by the recent enactment of the General Law of Administrative Responsibilities ("GLAR").

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[851] Inter-American Convention Against Corruption, **CL-191**.

[852] *See* Código Penal Federal [CPF] [Federal Penal Code], Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 12-04-2019, Art. 222, **CL-194**; Izunza Expert Report, **CER-2**, ¶ 39.

[853] *See* Constitución Política de los Estados Unidos Mexicanos [CP] [Mexican Constitution], Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 09-08-2019, Arts. 108, 124, 128; **CL-89**; Izunza Expert Report, **CER-2,** ¶ 39.

[854] *See* Código Penal Federal [CPF] [Federal Penal Code], Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 12-04-2019, Art. 222, 222bis, **CL-194**; Izunza Expert Report, **CER-2,** ¶ 39.

[855] *Id.*

499. Since signing the various anti-bribery conventions, México has taken steps to suggest that it may be attempting to crack down on corruption, but the fact remains that corruption remains alive and pervasive within the Mexican government. This case is a prime example.

500. In 2012, México enacted the Federal Procurement Anticorruption Law, criminalizing corruption in public procurement and creating a legal obligation for public officials to report corruption.[856] The law establishes sanctions for both Mexican and non-Mexican persons for corrupt acts relating to public contracts with both the Mexican federal government and foreign governments.[857] The law criminalizes a broad range of corrupt practices, including bribery through a third party and even the mere offering of a bribe, without regard to whether that bribe was actually paid.[858]

501. In 2014, the Attorney General of México created a special prosecutor's office to handle corruption matters.[859] On May 28, 2015, México passed a constitutional amendment creating the National Anti-Corruption System ("NAS"), which coordinates the federal, state, and municipal governments in México to prevent, detect and punish corruption in the public and private sectors.[860] Furthermore, México has signed on to anti-corruption chapters in recent free trade agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, and even the

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856 *See* Ley Federal Anticorrupción en Contrataciones Públicas [Federal Procurement Anticorruption Law],DOF] [Official Journal of the Federation] 18-07-2016, **CL-258**; Izunza Expert Report, **CER-2**, ¶ 40.

857 *Id.* at Arts. 1, 8, 9, **CL-258**; Izunza Expert Report, **CER-2**, ¶ 40.

858 *Id.*

859 Acuerdo A/011/14 por el que se crea la fiscalía especializada en materia de delitos relacionados con hechos de corrupción [Agreement A/011/14 establishing the specialized prosecutor's office for crimes related to corruption], Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 12-03-2014, **CL-267**; Izunza Expert Report, **CER-2**, ¶ 41.

860 Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en materia de combate a la corrupción [Decree by which various provisions of the Constitution of the United Mexican States are reformed, added and repealed, in matters related to combating corruption] Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 27-05-2015, **CL-259**; Izunza Expert Report, **CER-2**, ¶ 41.

revamped draft U.S.-México-Canada Agreement.[861] Anti-corruption has also been a central campaign theme in recent Mexican presidential campaigns.[862] But, unfortunately, what is said publicly and what happens privately behind closed doors are two very different things.

502. This notwithstanding, what emerges is a clear picture that there is an international prohibition on the bribery of government officials, enshrined in both domestic and international law. Thus, it is no surprise that tribunals have uniformly held that requests for a bribe by State actors constitue violations of the FET obligation owed to investors.[863] The tribunal in *EDF* expressed that corruption "is a violation of international public policy"[864] and that "exercising a State's discretion on the basis of corruption is a [. . .] fundamental breach of transparency and legitimate expectations.'"[865] Therefore, the tribunal concluded that "[c]orruption, if found, would constitute a grave violation of the standard of fair and equitable treatment . . . ."[866]

5. Evaluation of a Breach of the Fair and Equitable Treatment Standard Is Highly Fact-Dependent and Involves a Consideration of the Cumulative Effects of the State's Actions

503. As numerous tribunals have confirmed, the evaluation of a potential breach of Article 1105 is highly fact and context-dependent. In *Mondev*, the tribunal observed that "judgment of what

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861 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, **CL-196**; U.S.-México-Canada Agreement, **CL-197**; Izunza Expert Report, **CER-2**, ¶ 41.

862 Mary Beth Sheridan, *Mexico's New Leader is Riding a Wave of Anti-Corruption Furor That's Changing Latin America*, Washington Post, Nov. 29, 2018, https://www.washingtonpost.com/world/the_americas/mexicos-new-leader-is-riding-a-wave-of-anti-corruption-furor-thats-changing-latin-america/2018/11/29/45cab840-edce-11e8-8b47-bd0975fd6199_story.html, **CL-198**, Izunza Expert Report, **CER-2**, ¶ 41.

863 *See e.g.*, *World Duty Free Company Limited v. Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006), ¶¶ 157, 188 (dismissing claimant's claim because it admitted to bribery in the making of the investment), **CL-199**; *EDF v. Romania*, Award, ¶ 221, **CL-161**; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (Dec. 8, 2000), ¶ 111 (noting that if allegations of corruption were proved to be true, they would be grounds to dismiss the claim; and that bribery and corruption are contrary to "international bones mores."), **CL-200**.

864 *EDF v. Romania*, Award, ¶ 221, **CL-161**.

865 *Id.* (quoting Claimants First Post-Hearing Brief, ¶ 167), **CL-161**.

866 *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan,* ICSID Case No. ARB/07/14, Excerpts of the Award (Jun. 22, 2010), ¶ 422, **CL-201**.

is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case."[867] The *Waste Management* tribunal similarly stated that "the standard is to some extent a flexible one which must be adapted to the circumstances of each case."[868]

504. A single act by a State may breach the FET standard, or a breach may become apparent only when considering the cumulative effects of the State's acts.[869] In other words, a State may breach the fair and equitable treatment obligation over time with many small actions that in and of themselves do not each constitute a violation, but taken together, do lead to a breach of the Treaty.[870]

6. México Breached the Fair and Equitable Treatment Standard

505. Section II of this Statement of Claim detailed the various facts that reveal México's numerous breaches of the generally recognized tenets of the FET standard. Specifically, México violated the FET obligation by:

a. Retaliating against Oro Negro for refusing to pay bribes by imposing increasingly onerous contract terms;

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[867] *Mondev*, Award, ¶ 118, **CL-73**.

[868] *Waste Management II*, Award, ¶ 99, **CL-113**; *see also Chemtura*, Award, ¶ 123 ("The Tribunal is of the opinion that the assessment of the facts is an integral part of its review under Article 1105."), **CL-137**; *CMS*, Award, ¶ 277, **CL-221**; *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (Oct. 12, 2005), ¶ 181, **CL-202**.

[869] *El Paso v. Argentina* ("*El Paso*"), ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), ¶ 518 ("The Tribunal considers that, in the same way as one can speak of *creeping expropriation*, there can also be creeping violations of the fair and equitable treatment standard; it is a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result."), **CL-155**; *OAO Tatneft v. Ukraine*, PCA UNCITRAL, Award on the Merits (Jul. 29, 2014), ¶ 413 (considering the aggrete of the events can be considered as amounting to arbitrariness and unreasonableness resulting in a breach of FET), **CL-204**; *Flemingo DutyFree v. Poland*, UNCITRAL, Award (Aug. 12, 2016), ¶ 536 (agreeing with *El Paso* that a succession of acts – whether or not individually significant – can build up to unfair and inequitable treatment until the standard is breached), **CL-205**; *Blusun v. Italy*, ICSID Case No. ARB/14/3, Final Award (Dec. 27, 2016), ¶ 362 (finding that a breach of an obligation to "encourage and create stable, equitable, favourable and transparent conditions for investors' including 'to accord at all times . . . fair and equitable treatment" could be breached by a single transformative act aimed at an investment, or by a program of more minor measures, or by a series of measures taken without plan or coordination but having the prohibited effect), **CL-206**.

[870] *Gold Reserve*, Award, ¶ 566 (agreeing that even if a measure or conduct by the State, taken in isolation, does not rise to the level of a breach of the FET, such a breach may result from a series of circumstances or a combination of measures), **CL-152**; *El Paso*, Award, ¶ 519, **CL-155**.

b. Disregarding its commitments made in relation to the Oro Negro Contracts, such as returning the contracts to the original daily rates upon expiration of the amendments and paying the liquidated damages under the contract when it did terminate;

c. Colluding with the Bondholders to drive Integradora Oro Negro out of business and attempting to award the Oro Negro Contracts to those Bondholders;

d. Discriminating against Integradora Oro Negro in comparison to Seamex, a competitor in like circumstances, with regard to contractual rates and termination provisions, likely in exchange for bribes as well as in comparison to ODH, a competitor in like circumstances, which obtained liquidated damages for the termination of its contract;

e. Further retaliating against Claimants and their counsel for filing this NAFTA claim by pursuing numerous meritless criminal and civil investigations in México and allowing these baseless investigations to continue, causing Claimants to fear for their safety; and

f. Violating Oro Negro's due process rights through irregular judicial proceedings marked by indicia of corruption.

i. México Breached the FET Obligation in NAFTA Article 1105 by Retaliating Against Oro Negro for, Among Other Arbitrary Reasons, its Refusal to Pay Bribes to Pemex and Mexican Officials and Participate in México's Pay-to-Play System

506. México violated the FET obligation by retaliating against Oro Negro because, among other reasons, of its refusal to pay bribes to Pemex and Mexican officials.

507. The retaliation for not paying bribes violated the U.S. Investors' legitimate expectations that government contracting would be conducted properly, on a non-arbitrary and non-discriminatory basis and in good faith in accordance with Pemex's assurances to the U.S. investors, Mexican domestic law, and public statements regarding anti-corruption and good governance.[871] These expectations were reasonable and legitimate, as all investors are entitled to presume that the host State will honor basic principles of natural justice, including not soliciting bribes in order to allow investments to proceed or to proceed on equal, or at least very similar, terms as those that are

[871] *See* Section II.B.2. regarding the Mexican government's statements regarding corruption and bribery and Pemex's assurances to investors, including Oro Negro.

similarly situated to them. Oro Negro was entitled to a basic legitimate expectation that México would "conduct itself vis-à-vis [its] investment in a manner that [is] reasonably justifiable and [does] not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination."[872] As the *Waste Management* tribunal noted, one of the "basic obligation[s] 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."[873]

508. Here, while not necessary to prove an FET violation, México and Pemex made various representations to the oil sector and to Oro Negro and its investors—including U.S. Claimants specifically—[874]that those doing business with Pemex would be treated fairly and transparently, and would not be subject to a pay for play atmosphere.[875]

509. Here, México frustrated Claimants' legitimate expectations by conditioning Oro Negro's very survival on the payment of bribes. As Claimants established in Section II.L.9-10., investigatory evidence reveals that 1) México discriminated against Oro Negro because of its refusal to bribe its government officials, and indicates that 2) other competitors' willingness to bribe Mexican officials resulted in better terms in their Pemex contracts and all around more favorable treatment by Pemex.[876] The Recordings also indicate that Pemex sought to cancel the Contracts for

[872] *Ioannis,* Award, ¶ 441, **CL-134**.

[873] *Waste Management II v. Mexico*, Award, ¶ 138, **CL-113**.

[874] Section II.B.2.; Gil Statement, **CWS-1**, ¶ 14; Warren Statement, **CWS-3**, ¶ 7.

[875] Petróleos Mexicanos, Annual Report (Form 20-F) (Dec. 31, 2017), at pp. 19, 20, 90, 100, 101, 103, 162, 186, **C-89**.

[876] Section II.L.9-10.

other illegitimate reasons, such as favoring domestic providers,[877] ill will against the Gil family, [878] and because Oro Negro filed for bankruptcy.[879]

510. The retaliation against Oro Negro for refusing to bribe and other arbitrary and discriminatory reasons, including through draconian amendments to and especially the termination of its contracts, reflected an unreasonable, arbitrary decision-making process that lacked in transparency and therefore is in and of itself an FET violation. Despite Oro Negro's superior performance and its Jack-Up Rigs' near-perfect availability, Oro Negro was the only service provider that had 40% of its contracts suspended, and also the only provider that had all of its contracts eventually terminated.[880] These facts, by themselves, are already highly suggestive of untoward decision-making, as there is no reasonable, commercial justification for México's discriminatory treatment of Oro Negro. Combining these facts with the investigatory evidence submitted with this Statement of Claim paints an even clearer picture of México's true goal: to financially strangle Oro Negro.

ii. México Breached its FET Obligation by Disregarding its Commitments Made in Relation to the Oro Negro Contracts, such as Returning the Contracts to the Original Daily Rates upon Expiration of the Amendments and Paying the Liquidated Damages Under the Contract when It Did Terminate

511. México also violated the NAFTA's FET obligation toward Claimants by disregarding its contractual commitments to Oro Negro. As discussed in Section II.G.1., México committed to return the Oro Negro Contracts to their original daily rates upon the expiration of the Amendments.

877 Black Cube Statement, **CWS-4**, ¶ 41.

878 Black Cube Statement, **CWS-4**, ¶ 42.

879 Black Cube Statement, **CWS-4**, ¶ 40.

880 Section II.L.2.

Furthermore, upon terminating the contracts, México was under a contractual obligation to pay liquidated damages. México did neither.

512. Particularly when a State acts in a sovereign capacity to breach a contractual commitment with a foreign investor, violations of contractual obligations are capable of breaching the FET standard.[881] Furthermore, multiple tribunals have held that the NAFTA extends to contract claims against a State.[882] For example, in *SGS v. Paraguay*, the tribunal confirmed that a State's non-payment of a contract is capable of giving rise to an FET violation, where the non-payment amounts to a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of its value.

513. Here, México not only repudiated the Oro Negro Contracts and frustrated their economic purpose, but by terminating the Contracts, it deprived Claimants of the entirety of the value of their investment. Moreover, as discussed in Section III.B., México acted in its sovereign capacity in entering into the Contracts, and in particular, in negotiating the amendments and terminating the Contracts. The directive to terminate the Contracts came from Pemex's Board of Directors, which, as established in Sections II.A.2. and III.B.3., is comprised of all government officials, including the Ministers of Energy and Treasury.[883] The termination notices of Oro Negro's Contracts themselves noted that Pemex was terminating the Contracts for "reasons of *public*

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[881] *RFCC v. Morocco*, ¶ 51 (measures taken by Morocco in its sovereign capacity were capable of breaching the FET standard, violation of contractual obligations that could have been committed by an ordinary contract partner would not rise to level of FET violation), **CL-174**; *Impregilo S.p.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/3, Decision on Jurisdiction (Apr. 22, 2005), ¶¶ 260, 266 (simple breach of contract would not amount to FET breach, but misuse of public power would be), **CL-175** ; *Duke Energy*, ¶ 354 (violation of a contract does not amount to violation of FET unless the State commits a violation in the exercise of its sovereign power), **CL-142**.

[882] *Mondev*, Award, ¶ 98, **CL-73**; *Waste Management v. Mexico*, Award, ¶ 163, **CL-113**.

[883] Section III.B.3

interest"[884] and it was relying on its governmental authority bestowed on it through the *Disposiciones Generales de Contratacion para Petróleos Méxicanos y sus Empresas Productivas Subsidiarias* ("DACS")—a statute that applies only to Pemex and that confers upon it special powers. And, by prosecuting retaliatory tax and criminal claims associated with the investors' performance with respect to the Contracts, México is asserting its police power—one of the quintessential exercises of governmental authority—in its harassment of and retaliation against Oro Negro.

iii. México Breached the FET Obligation by Colluding with the Bondholders to Drive Integradora and Perforadora Out of Business and Award its Contracts to Other Parties

514. As described further below, the facts described in Section II.M. establish an independent FET violation for México's conspiracy with Integradora's creditors, the Bondholders, to drive it out of business, destroy its investment and award its contracts to other parties.

515. México deliberately colluded and conspired with Oro Negro's creditors to financially strangle Oro Negro until it had no other choice than to default on its debts, allowing others to make claims on its only assets: the Jack-Up Rigs it once leased to Pemex. México and its creditors were well aware of this outcome; indeed, it was the precise outcome desired and engineered by México in conspiracy with the Ad Hoc Group. México was well aware of Oro Negro's debt position, and knew that its failure to make payments under the contract, draconian amendments, suspension of 40% of the contracts, and eventual termination would undoubtedly destroy the entirety of the value of Claimants' investment and cause Integradora's creditors—the very parties with whom México was colluding—to make claims on the Jack-Up Rigs. This conspiracy and collusion to damage and

[884] Attached as Exhibit **C-93** is the authorization of Pemex's Board of Directors resulting in the termination of the Oro Negro Contracts. Each of Pemex's letters terminating the Oro Negro Contracts (Exhibits **C-M.1 – C-M.5**) cite to that authorization.

ultimately destroy Claimants' investment is inherently bad faith.[885] México cannot justifiably "use[] legal instruments for purposes other than those for which they were created" nor can State organs "conspir[e] . . . to inflict damages up or to defeat the investment"[886] without violating the FET obligation under the NAFTA. Here México did just that in unjustifiably colluding with Oro Negro's creditors to financially strangle Oro Negro and destroy Claimants' investments.

iv. México Discriminated Against Integradora Oro Negro in Comparison to Seamex, a Competitor in like Circumstances, with Regard to Contractual Rates and Termination Provisions, Likely in Exchange for Bribes, as well as in Comparison to ODH, Another Competitor in like Circumstances, Which Obtained Liquidated Damages for the Termination of its Contract

516. México violated Article 1105 when it singled out Oro Negro for discrimination by granting more favorable lease terms and amendments to competitors, suspending payment on 40% of its Contracts, and then unilaterally terminating all of Oro Negro's Contracts. No other competitor had 40% of its Contracts suspended, and then all of its Contracts terminated. Although not every lease will be identical in a given market, the fact that Oro Negro's Jack-Up Rigs were of superior quality compared to those of its competitors and the near-perfect (99.5% availability) performance of the Oro Negro Contracts indicates that México's decisions in its contracting relationship with Oro Negro were not based on commercially reasonable justifications. Instead of making decisions based on commercially reasonable factors such as quality, price, and prior performance, México, through Pemex, treated Oro Negro unfairly, arbitrarily, based on a willingness to bribe and/or a desire to favor local interests, such as Seamex.[887] The Recordings indicate that Pemex was also motivated

[885] *Frontier*, ¶ 300 (bad faith [i]ncludes 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 favoritism."), **CL-184**.

[886] *Id.*, **CL-184**.

[887] Section II.L., Black Cube Statement, **CWS-4**, ¶¶ 35-39.

by a desire to cancel the contracts of "foreign contractors" or pressure them to withdraw from México so that Pemex could "protect national service providers."[888]

517. México has an obligation under the NAFTA to treat investments in a non-discriminatory manner; this reasonably forms part of Claimants' legitimate expectations.[889] Discrimination is also a per se FET violation[890]—as the tribunal in *CMS Gas v. Argentina* held, "[a]ny measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment."[891] Similarly, decision-making based on political preferences, such as retaliation against a family member of an opposition party member, displays a lack of good faith.[892]

518. Here, Pemex relied on "reasons of public interest"[893] and its "regulatory, governmental or administrative authority" when it unilaterally terminated the Oro Negro Contracts in violation of Mexican law and without paying compensation. However, instead of any legitimate public interest, México and Pemex discriminated against Claimants' investment in favor of Seamex, providing Seamex significantly better and more secure contracts from the outset, never terminating its contracts, and even contracting rigs with Seamex that it had represented would go to Oro Negro, causing Oro Negro to lose the down payment on rigs it had commissioned, in reliance on Pemex's commitments. The investigatory evidence that Claimants submit with this memorial indicates that the reason Seamex received this favoritism was bribery. Receiving official action in exchange for something of value is the quintessential definition of bribery, and conditioning official action on bribes is a quintessential violation of the FET obligation. México also discriminated against

888 Black Cube Statement, **CWS-4**, ¶ 41.

889 *International Thunderbird Gaming v. Mexico*, Separate Opinion of Thomas Wälde (Dec. 1, 2005), ¶ 102, **CL-220**.

890 *CMS*, Award, ¶ 290, **CL-221**.

891 *Id.*, **CL-221**.

892 *Gold Reserve,* Award, ¶¶ 581, 591, **CL-152**.

893 Primus Contract Termination Notice, Clause 2.2.1, **C-M.1**.

Claimants and their investment when it colluded with their creditors to put the Claimants out of business and planned to hand over that business to the Ad-Hoc Group or their affiliated entities. Whether this scheme was eventually carried out is beside the point, as the evidence shows that Pemex and Oro Negro's creditors had various discussions in which they planned to drive Oro Negro into bankruptcy, take their rigs and then hand that business over to them.

519. México also violated Article 1105 when it discriminated against Oro Negro in favor of ODH when ODH obtained liquidated damages for the termination of its contract. As described in Section II.L., the Oro Negro Contracts have a liquidated damages provision, just like the ODH Contracts. ODH was one of the few other competitors that had any contract canceled by Pemex. However, unlike its treatment toward Oro Negro, Pemex honored its commitments to make liquidated damages payments under ODH's contract, despite the equivalent terms in the contract. The obvious explanation for Pemex's refusal to pay Oro Negro's liquidated damages provision given the facts in this case is retaliation and personal animosity.

v. México Further Retaliated Against Claimants and Their Counsel for by Pursuing Numerous Criminal and Civil Investigations in México and Causing Claimants To Fear for Their Safety

520. Since the filing of the Notice of Arbitration in June 2018, México has embarked on a relentless campaign to intimidate and harass Oro Negro, its employees, its shareholders, and unbelievably, even its counsel. As detailed in Claimants' Request for Interim Measures and in Section II.M. México has initiated no less than eight investigations, including criminal and tax investigations against Oro Negro. México has issued baseless arrest warrants against two of the Claimants in this case, as well as three key witnesses who are current or former employees of Oro Negro. Not content to effectively bar these five individuals from México (and for some of the five, keep them away from their home), México has also requested Interpol Red Notices against them, preventing them from international travel. Given México's history in this case, if the Claimants or

Oro Negro's witnesses were to stand trial, there is no reason to think that any of these five would be given a fair trial or due process.

521. Although as noted above, bad faith is not required for an FET violation, here México's bad faith is sharply evidenced not only by its collusion with the Oro Negro's creditors but also by its retaliation against Oro Negro following the filing of Claimants' NAFTA claim. The various threatened and confirmed investigations—no less than eight investigations against individual Claimants, employees and board members of Oro Negro, and investigations rumored in the press against Claimants' counsel (both against the firm and against individual attorneys) in this proceeding. Even more, the investigations are being prosecuted by various arms of the Mexican federal government—both Treasury and Justice—reflecting the intensity of the campaign against Oro Negro and México's efforts to pressure Claimants to drop their claims. This retaliation is a brazen violation of the FET obligation.

vi. México Violated Oro Negro's Due Process Rights Through Irregular Judicial Proceedings Marked by Indicia of Corruption

522. The failure to provide due process, in and of itself, is a separate breach of FET. Significant portions of the retaliatory proceedings and other proceedings concerning Oro Negro conspicuously lacked due process. For example, in the 2018 PGR investigation, Perforadora and its employees requested that the PGR (a) allow them to provide exculpatory evidence; and (b) give them access to the case file.[894] Despite a constitutional obligation to provide this information,[895] the

[894] Exhibits **C-5** – **C-8** are Perforadora's and its employees' requests to the PGR; Izunza Expert Report, **CER-2**, ¶ 21.

[895] Izunza Expert Report, **CER-2**, ¶¶ 20, 22; Constitución Política de los Estados Unidos Mexicanos [CP] [Mexican Constitution], Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 09-08-2019, Arts. 8, 20, **CL-89**; *See generally* PGR Investigation *Amparos* (Exhibits **C-9** – **C-13**), which describe the constitutional rights that the PGR is violating.

PGR failed for many months to even acknowledge the requests.[896] Although Perforadora eventually gained access to the case file, PGR has refused to provide any copies of documents in the file to Perforadora.[897] Meanwhile, the PGR's expansive request for private, confidential documents and SAT's furnishing a large number of documents violated Mexican law[898] and the speed with which the response was compiled indicates foul play. Furthermore, in that same proceeding, México and the Bondholders colluded to fabricate nonsensical evidence to try to manufacture a conviction. Suspiciously, the local Mexican judge simply accepted this evidence without explanation.[899]

523. In other examples, such as the criminal complaint lodged by the Singapore Rig Owners, under the purported control of the Ad-Hoc Group, and the sham companies investigations, the investigations remain pending despite extremely flimsy legal cases that do not withstand the slightest scrutiny.

524. Finally, as listed in detail in Section II.M., there are numerous indicia of corruption that suggest that Mexican officials were bribed to (a) convince the SAT to fabricate or deliver to the PGR fabricated evidence; and/or (b) procure the Seizure Order and/or the Rigs Take-Over Order. As discussed above, bribery itself is a violation of FET, and in this case, the FET violations above are compounded by due process violations possibly brought about through corruption.

vii. Conclusion

525. In sum, México acted for an improper purpose, launching a politically-motivated campaign against Oro Negro because of its refusal to pay bribes and/or out of a desire to benefit

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[896] Perforadora and its employees are challenging the PGR's failure to respond in Mexican courts via *amparos*. Exhibits **C-9** – **C-13** are these *amparos* (the "PGR Investigation *Amparos*"). The *amparos* are pending. *Amparos* are challenges against government conduct on the ground that the government violated a constitutional right; Izunza Expert Report, **CER-2**, ¶ 22.

[897] *See* Gil Statement, **CWS-1**, ¶ 112.

[898] Izunza Expert Report, **CER-2**, ¶¶ 24-25.

[899] Section II.M.1-7.

Seamex and its Mexican shareholder. Then it further retaliated against Oro Negro in proceedings that lacked basic due process. As established in Section III.B., México is responsible for Pemex's actions because Pemex is a state entity and it acts under delegated governmental authority. Furthermore, by tolerating and failing to prevent pervasive corruption by Pemex officials, México failed to exert regulatory control and supervision over Pemex to ensure that its officials did not expect bribes in connection with public contracting.

526. México violated the Claimants' legitimate expectations that the State would "conduct itself vis-à-vis [its] investment in a manner that [is] reasonably justifiable and [would] not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination."[900] México fundamentally disregarded the rule of law, acted "beyond its authority,"[901] violated the company's due process rights and adopted all three types of arbitrary measures: those (i) that inflict damage on the investor without serving any apparent legitimate purpose; (ii) that are not based on legal standards but on discretion, prejudice, or personal preference; and (iii) that are taken for reasons that are different from those put forward by the decision maker.[902]

527. México's various unreasonable, arbitrary, discriminatory acts and omissions both together and in isolation constitute a breach of México's obligation under Article 1105 of the Treaty to provide fair and equitable treatment to Claimants' investment.

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[900] *Ioannis,* Award, ¶ 441, **CL-134**; *see also Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (Jul. 28, 2015), ¶ 546 (agreeing with and quoting Claimants' submission, noting that "[a] State is thus expected to behave . . . in a 'consistent, even handed, unambiguous, transparent, candid' manner"), **CL-130**.

[901] *Alpha Projektholding,* Award, ¶ 422, **CL-173**.

[902] *EDF v. Romania*, Award, ¶ 303, **CL-161**; *Lemire,* Decision on Jurisdiction and Liability, ¶ 262, **CL-177**; *CME,* Partial Award, ¶ 158 ("[T]he determination of reasonableness is in its essence a matter for the arbitrator's judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behavior in light of the goals of the Treaty."), **CL-118**.

E. Respondent Breached Its Obligation To Provide Claimants' Investment Full Protection and Security Under Article 1105 of the NAFTA

1. The Full Protection and Security Standard

528. Pursuant to Chapter 11 of the NAFTA, "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including . . . full protection and security."[903]

529. The obligation to provide full protection and security refers to the general minimum standard of treatment that the host State must provide to a foreign investment. Specifically, the host State must exercise due diligence to protect foreigners and foreign property from physical and legal harm.

530. This minimum standard of treatment under NAFTA Chapter 11 incorporates principles of customary international law.[904] As described in the previous section, tribunals interpreting NAFTA have confirmed that the customary international law minimum standard can change: "like all customary international law, the international minimum standard has evolved and can evolve . . . the sets of standards which make up the international law minimum standard, including principles of full protection and security, apply to investments."[905]

531. A breach of full protection and security under Chapter 11 requires "something more than simple illegality or lack of authority under the domestic law of a State."[906] Rather, as is the case here, there must be several actions demonstrating a systemic failure of full protection. In this case,

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[903] NAFTA Article 1105, **CL-59**.

[904] *Mondev*, Award, ¶¶ 110–112, **CL-73**. The tribunal also clarified that when determining the applicable customary international law, explanations given to the government's legislature in the course of ratification constitutes part of the *travaux préparatoires* for purposes of demonstrating *opinio juris*.

[905] *Mondev*, Award, ¶ 124, **CL-73**.

[906] *GAMI*, Final Award, ¶ 98, **CL-71**.

"the record as a whole"[907] shows that México has denied protection to Claimants' investment, as it has permitted, and at times even encouraged, its agencies and instrumentalities to physically and otherwise interfere with Claimants' investment.

i. The Full Protection and Security Standard Includes Protection from Third Parties

532. The obligation to accord full protection and security requires the State to enforce its laws in a manner reasonably expected to protect covered investments and to refrain from colluding with third parties to destroy an investment. Arbitral tribunals have consistently held that the minimum standard of protection required under full protection and security "complements the fair and equitable standard by providing protection towards acts of third parties, *i.e.*, non-State parties, which are not covered by the FET standard."[908] As the tribunal in *Ulysseas v. Ecuador* found under a BIT that required treatment no "less than that required by international law," host States have a "duty of due diligence for the prevention of wrongful injuries inflicted by third parties to persons or property."[909]

ii. Full Protection and Security Extends Beyond Physical Protection to Legal Protection and Security of Investments

533. The obligation to accord full protection and security requires the State to enforce its laws in a manner reasonably expected under the circumstances to protect covered investments.

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907 *GAMI*, Final Award, ¶103, **CL-71**.

908 *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Award (Dec. 17, 2015), ¶ 353, **CL-207**.

909 *Ulysseas, Inc. v. The Republic of Ecuador* ("*Ulysseas*"), PCA No. 2009-19, Final Award (Jun. 12, 2012), ¶¶271–274, (citing *El Paso v. Argentina*, ¶¶522 –523) (full protection and security entails "vigilance and care by the State under international law comprising of a duty of due diligence for the prevention of wrongful injuries inflicted by third parties to persons or property of aliens in its territory or, if not successful, for the repression and punishment of such injuries."), **CL-208**. Also in *Ulysseas*, Final Award, ¶ 272, the Tribunal went on to say that "[w]hat matters in our case is that the treatment of foreign investors do not fall below this minimum international standard, regardless of the protection afforded by the Ecuadorian legal order."), **CL-208**. The BIT under which this case was decided states that "fair and equitable treatment" and "full protection and security" are accompanied by treatment no "less than that required by international law." *See* Ecuador-United States Bilateral Investment Treaty, Art. 3(a), **CL-209**.

Arbitral tribunals have consistently held that, while the standard certainly includes the obligation to provide police protection, it also relates broadly to the State's obligation to provide protection and security to investments through the enforcement of laws and by maintaining and making available a legal system capable of providing adequate remedies against harms.[910] As Dolzer and Stevens have described, "the standard provides a general obligation for the host State to exercise due diligence in the protection of foreign investment."[911]

534. Tribunals have focused on the fact that a good faith interpretation of the ordinary meaning of a treaty requires the obligation to extend to protection against legal harm. In *Azurix v. Argentina*, the tribunal explained:

> [F]ull protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view … [W]hen the terms "protection and security" are qualified by "full" and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.[912]

535. Moreover, tribunals have recognized that "[t]reatment that is not fair and equitable automatically entails an absence of full protection and security of the investment."[913]

536. While the terms of the Treaty provide that the obligation to provide "'full protection and security' . . . do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens,"[914] the conclusion that the obligation extends to legal protection and security and is not limited to providing protection and

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[910] C. Schreuer, *Full Protection and Security*, J. INT'L DISP. SETTLEMENT (2010), p. 1 ("[m]ore recently tribunals have found that provisions is of this kind also guaranteed legal security enabling the investor to pursue its rights effectively."), **CL-210**.

[911] Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* 61 (1995), **CL-210**.

[912] *Azurix*, Award, ¶ 408, **CL-141**.

[913] *Occidental v. Ecuador*, Final Award, ¶ 187, **CL-144**.

[914] México-Singapore BIT, Art. 4(2), **CL-212**.

security against physical harm remains valid. As a result, many subsequent tribunals have adopted the reasoning of the tribunal in *Azurix v. Argentina* finding that full protection and security extends to protection from legal harms as well as physical harms.[915] In *Biwater Gauff v. Tanzania*, the tribunal indicated that full protection and security inherently "implies a State's guarantee of stability in a secure environment, both physical, commercial and legal."[916]

537. A plain reading of what full security requires confirms this. Indeed, the *National Grid* tribunal expressly indicated that it would be "unduly artificial to confine the notion of '*full security*' only to one aspect of security, particularly in light of the use of this term in a [treaty] directed at the protection of commercial and financial investments."[917]

538. In *Total v. Argentina*, the tribunal analyzed an analogous BIT using the identical language of "full protection and security" conforming to the principles of international law.[918] This tribunal also found that a "plain reading of the terms . . . [full protection and security] shows that the protection provided . . . to covered investors and their assets is not limited to physical protection but includes also legal security."[919]

539. Other tribunals that have specifically inquired into what the international law standard requires have echoed this interpretation in the Energy Charter Treaty context. Though the ECT treaty language refers to "constant" instead of "full" protection,[920] the relevant standard is analogous

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[915] *See also National Grid*, Award, ¶¶ 144–145 (finding that that full protection and security is not inherently limited to protection and security of physical assets), **CL-162**.

[916] *Biwater v. Tanzania*, Award, ¶ 729, **CL-140**.

[917] *Id*., **CL-140.**

[918] Argentina-France Bilateral Investment Treaty, Art. 5 ("full protection and security") and Art. 2 ("in conformity with principles of international law"), **CL-213**.

[919] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (Dec. 27, 2010), ¶ 343, **CL-214**.

[920] Energy Charter Treaty §10(1), **CL-216**.

insofar as it interprets the language to require the minimums required by customary international law. In *Al-Bahloul v. Tajikistan*, the award noted that other "tribunals have applied [protection and security] more broadly to encompass legal security as well. Therefore, it could arguably cover a situation in which there has been a demonstrated miscarriage of justice."[921]

iii. The Host State's Duty Is Not Limited To Preventing Damaging Acts by Private Actors, but also the State Itself

540. The obligation to accord full protection and security also requires due diligence around State actions themselves in the protection of a foreign investment. As indicated by the tribunal in *Biwater Gauff v. Tanzania,* "[t]he Arbitral Tribunal also does not consider that the 'full security' standard is limited to a State's failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself."[922]

541. In *CME v. Czech Republic*, a regulatory media authority ("Media Council"), through certain actions, created a substantially altered regulatory environment that enabled an investor's local partner to suddenly terminate the contract on which the investment depended. The investment suffered accordingly. In the words of the tribunal:

> The Media Council's actions in 1996 and its actions and inactions in 1999 were targeted to *remove the security and legal protection* of the Claimant's investment in the Czech Republic. . . . The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued. This is not the case. The Respondent therefore is in breach of this obligation.[923]

542. Relatedly, the tribunal in *Tecmed v. México* analyzed treaty language that required contracting parties to provide "treatment in accordance with international customary law, including

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[921] *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan* ("*Al-Bahloul*"), SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability (Sept. 2, 2009), ¶ 246, **CL-217**.

[922] *Biwater v. Tanzania*, Award, ¶730, **CL-140**.

[923] *CME,* Partial Award, ¶613 (emphasis added), **CL-118**.

. . . full protection and security." [924] Mexican municipal and state authorities encouraged a local community's adverse movements against a landfill operation, and the Claimant "allege[d] that Mexican authorities, including the police and the judicial authorities, did not act as quickly, efficiently and thoroughly as they should have to avoid, prevent or put an end to the adverse social demonstrations expressed through disturbances in the operation of the Landfill or access thereto." However, the tribunal found that "there [was] not sufficient evidence supporting the allegation that the Mexican authorities, whether municipal, state, or federal, have not reacted reasonably, in accordance with the parameters inherent in a democratic state."[925] The tribunal's reasoning discussed the fact that there can be situations where the dysfunction of the host State authorities and their active encouragement of adverse actions can lead to a violation of the minimum requirements of the full protection and security standard, but that the facts did not rise to that level here. This indicates that encouragement of an adverse action that affects an investment will be found to violate minimum standards when more direct evidence of this action is present.

iv. México Failed To Provide Full Protection and Security from Third Parties

543. As the tribunal's reasoning in *CME v. Czech Republic* and *Tecmed v. México* supports, the direct collusion between the Bondholders and México to damage the Integradora in order to have capital flow back to the Bondholders is a violation of the NAFTA's obligation on host States to provide full protection and security to investors of another NAFTA Party.[926] Through its acts set out in detail above,[927] México failed to provide physical as well as legal protection and

[924] México-Spain Bilateral Investment Treaty, Art. 4(1), Article 4(1), **CL-215**.

[925] *Tecmed*, Award, ¶177, **CL-101**.

[926] *Tecmed*, Award, ¶175 (where Claimant alleged that the Mexican municipal and state authorities encouraged the community's adverse movements against the Claimant's investment), **CL-101**.

[927] *See supra* §§ II.H-I.

security, including from third parties, to the investment made by the shareholders of Integradora. Among other things:

(a) Pemex and the Bondholders used information from a demonstrably false spreadsheet which reflects that from 2014 to 2017, Perforadora had supposedly issued invoices to 16 companies that are blacklisted by the Mexican government as companies that facilitate tax evasion. México and the Bondholders used that information to initiate another meritless criminal investigation in September 2018, which resulted in the seizure of all of Perforadora's cash and in a court order authorizing the Bondholders to take over the Rigs.[928]

(b) México also failed to protect the rigs from the third parties who physically intruded on them. As previously described, the physical intrusion onto the rigs happened with the active assistance of the Mexican government. In addition to Judge Cedillo's Take-Over Order,[929] to ensure the Bondholders would have all possible assistance from the Mexican governments to enforce the order, Judge Cedillo also issued orders to the *Agencia de Investigation Criminal* (the "AIC") to provide all possible assistance to the Bondholders in taking over the Jack-Up Rigs.[930]

(c) Further, the physical takeover of the rigs themselves included an officer from the Mexican *Agencia de Investigation Criminal* on a helicopter that attempted to land on a Jack-Up Rig by force on October 19.[931]

544. México also failed to afford the Claimants legal protection and security. Among other things:

(a) Insofar as a failure to provide fair and equitable treatment is failure to provide full protection and security, México also failed in its treatment of Perforadora's contracts as compared to other investors. Pemex, in affiliation with the Ad-Hoc group, acted intentionally to take the rigs from Oro Negro and then lease them back to Pemex through another service provider.[932]

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[928] Request for Interim Measures ("RFIM"), ¶41. First, "there is no record…of Perforadora ever issuing an invoice to these sham companies." RFIM at ¶ 56. Second, the determination was made "[s]olely based on Mr. Contreras' interview," and "despite the patent falsity of the Bondholders accusations" which was proved multiple times. RFIM at ¶ 57.

[929] RFIM at ¶ 58; *see supra* at Section II.M.

[930] RFIM at ¶ 64; *see supra* at Section II.M.

[931] RFIM at ¶ 65; *see supra* at Section II.M.

[932] *See supra* at Section II.H-I.

(b) México failed to stop the reputational attacks against the Claimants from one of the largest media conglomerates in México and likely played a part in its creation.[933] Furthermore, the General Counsel of Pemex personally appeared in a ten-minute television clip run by the same media conglomerate, where he falsely stated that Perforadora is corrupt, incompetent, and that it had been a deficient services provider to Pemex.[934]

(c) México initiated baseless tax audits against Integradora and four of its subsidiaries, including Perforadora, which are still pending.[935] These are comprehensive investigations into the finances and operations of Integradora.[936] Notably, one of these seven tax audits began in April 2018, one month after Claimants delivered to México their Notice of Intent and four of these seven tax audits began in August 2018, two months after Claimants delivered to México their Notice of Arbitration.[937] It therefore abused its sovereign police powers to harass and intimidate Claimants and their investments.

(d) Pemex has also refused to pay Perforadora approximately USD 24 million in past due daily rates even though it had a legal obligation to do so.[938] Pemex's refusal to pay Perforadora contributed to the erosion of the investment insofar as it led to devaluation of the company and forced it into bankruptcy.[939]

545. México's actions in fabricating or perpetrating the use of fabricated evidence, initiating the frivolous tax investigations and refusing to pay Perforadora monies that it is owed are blatant violations of Mexican law[940] and are analogous to the Media Council's actions in *CME*. There, the tribunal found the Media Council's various administrative actions against the Claimants

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933 *See* TV Azteca clip entitled "Corrupción y Fraude: La Historia De Oro Negro" at 05.09 – 05.33, **C-32.** The "clip launches a series of outrageous, incendiary and defamatory accusations against Integradora, Perforadora and Mr. Gil and his father, including that they are engaged in influence peddling and money laundering and that they have defrauded the bondholders."; *see also* RFIM at ¶ 8.

934 *See id.* at 05.09 – 05.33, **C-32**; s*ee supra* at Section II.M.7.

935 *See* **Appendix C**; *see supra* at Section II.M.12.

936 *See supra* at Section II.M.12.

937 *See supra* at Section II.M.12.

938 *See supra* at Section II.M.17.

939 *See supra* at Section II.M.17.

940 Izunza Expert Report, **CER-2**, ¶ 18.

to be a breach of full protection and security.[941] Through each of these actions, the State played a role in creating a precarious legal situation—either by allowing baseless proceedings or ignoring the rule of law by failing to follow other court orders—such that by its legal and administrative actions it caused the investment to be devalued.[942]

546. When a court cannot "legitimately reach the substantive law conclusions which they did,'[943] tribunals have found a violation of full protection and security.[944] Video recordings of the hearings in which the Bondholders sought to take over the rigs reflect that GGB simply provided an approximately 40 minute summary of the purported facts and then, without asking any questions and without reviewing one single document or one single piece of evidence, Judge Cedillo granted the Rigs Take-Over Order.[945] In this case, the Mexican courts "could not legitimately reach the substantive law conclusions which they did"[946] based on Mexican law and basic principles of the rule of law.[947]

547. The same can be said for Judge Cedillo's unlawful refusal to withdraw the Rigs Take-Over order on the instruction of the *Concurso* judge.[948]

548. Finally, the extent of México's obligation under the customary international law standard for full protection and security is not reduced simply because its resources may be more

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941 *CME*, Partial Award, ¶ 613 ("The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment with-drawn or devalued."), **CL-118**.

942 *Id.*, **CL-118**.

943 *Al-Bahloul*, Partial Award on Jurisdiction and Liability, ¶ 247 (suggesting that if it found that the Tajik courts could not legitimately reach the substantive law conclusions which they did, this would be a violation of constant protection and security), **CL-217**.

944 *Al-Bahloul*, Partial Award on Jurisdiction and Liability, Section XI, **CL-217**.

945 RFIM at ¶ 64.

946 *Al-Bahloul*, Partial Award on Jurisdiction and Liability, ¶ 247, **CL-217**.

947 Izunza Expert Report, **CER-2**, ¶ 36.

948 *See* RFIM at ¶ 67.

limited than the resources of the investor's home State, because México's interaction with the Bondholders generated the need for protection of the Claimants' investment. In *Pantechniki v. Albania*, the tribunal indicated that a failure to protect investments due to limited resources extended only to events beyond a State's control because "there is no issue of incentives or disincentives with regard to unforeseen breakdowns of public order."[949] Here, in contrast, México and the Bondholders together initiated meritless criminal, tax, and other investigations leading to the seizure of cash and the court order to take over the Jack-Up Rigs. These events were not beyond México's control and are not excusable, as México itself initiated and facilitated these actions, and as such, they are violations of full protection and security under the NAFTA.[950]

IV. DAMAGES

A. Claimants Are Entitled to Damages for México's NAFTA Violations

549. As demonstrated in Section III above, México breached the provision of the NAFTA prohibiting unlawful expropriation without compensation, as well as the provisions requiring México to afford Claimants fair and equitable treatment and full protection and security. These Treaty breaches caused direct and substantial harm to Claimants for which they seek compensation in this arbitration.

550. In accordance with well-settled principles of international law, Claimants seek full reparation for the losses they suffered as a result of México's violations of the NAFTA and

[949] *Pantechniki SA Contractors & Engineers v The Republic of Albania*, ICSID Case No ARB/07/21, Award (Jul. 30, 2009) ¶ 77, **CL-218**. In this case there were riots in front of an investor's facility but no full protection violation—for lack of stopping the riots, but also for lack of putting in precautionary measures—was found because Albanian authorities were powerless in the face of social unrest of this magnitude.

[950] RFIM at ¶¶ 25–93.

international law, in the form of monetary compensation sufficient to wipe out the consequences of México's wrongful acts.[951]

551. Claimants' claim for damages is explained and quantified in the Compass Lexecon Report submitted with this Statement of Claim by economists Pablo Spiller and Carla Chavich, both experts with extensive experience in the valuation and quantification of damages (the "Compass Lexecon Report").[952] The Compass Lexecon Report relies on the fair market value of Claimants' investments in México and the resulting damages flowing from México's internationally wrongful conduct. On the basis of Compass Lexecon's report, Claimants estimate that their damages caused by México's breaches are at least USD 270 million as of October 1, 2019, plus applicable interest, costs and taxes.[953]

552. In the following sections, Claimants address: (A) the applicable standard and methodology for the assessment of compensation; (B) the quantum of compensation owed to Claimants; (C) interest; and (C) tax.

B. Applicable Standard and Methodology

1. Full Compensation is the Appropriate Standard of Reparation Under Customary International Law

553. It is a well-established principle of international law that a State must afford "full reparation for the injury caused by [its] internationally wrongful act."[954] Reparation may take the form of restitution, compensation or satisfaction, either individually or in combination.[955] Here,

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951 ILC Articles, Art 31, **CL-81**.

952 Compass Lexecon Report, **CER-3**, ¶¶ 8–15.

953 Compass Lexecon Report, **CER-3**, ¶ 7.

954 ILC Articles, Art. 31(1), **CL-81**.

955 ILC Articles, Art. 34, **CL-81**.

restitution in kind is neither possible nor practical.[956] Claimants' investment has been destroyed; the investments' only assets, the rigs, have been taken; and Claimants' and their investment's reputation has been ruined. Thus, the only appropriate remedy is monetary compensation sufficient to erase the consequences of México's internationally wrongful conduct.

554. It is firmly established that the customary international law principle governing recovery from injury for internationally wrongful acts is that of "full reparation."[957] As established in *Chorzów Factory* by the Permanent Court of International Justice (**PCIJ**) in 1928:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that *reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed*.[958]

555. The obligation to provide full reparation is also reflected in the International Law Commission's Articles on State Responsibility,[959] which provide that a State "responsible for an internationally wrongful act is under an obligation to compensate [the investor] for the damage

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[956] *See, e.g.*, *CMS Gas Transmission Company v. The Republic of Argentina,* ICSID Case No. ARB/01/8, Award (May 12, 2005), ¶ 406, **CL-221**.

[957] ILC Articles, Art. 31 ("1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."), **CL-81**.

[958] *Case Concerning the Factory at Chorzów (Germany/Poland)* (Merits) [1928] PCIJ Series A, No 17, p. 47 (emphasis added), **CL-223**; *see also* ILC Articles, Art. 34 ("Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination"), **CL-81**.

[959] The ILC Articles, and in particular Article 36, have frequently been invoked in investment treaty decisions in relation to compensation issues. *See, e.g.*, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007), ¶ 350, **CL-105**; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶ 8.2.6, **CL-79**; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. United Mexican States*, ICSID Case No ARB(AF)/04/05, Award (Nov. 21, 2007), ¶¶ 280–281, **CL-100**; *Gemplus SA and others v. United Mexican States, and Talsud SA v. United Mexican States*, ICSID Case Nos ARB(AF)/04/3 and ARB(AF)/04/4), Award (Jun. 16, 2010), ¶¶ 13.79–13.81, **CL-224**; *Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Award (Mar. 28, 2011), ¶¶ 151, 245, **CL-225**; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), ¶ 710, **CL-155**.

caused thereby" and that such compensation "shall cover any financially assessable damage including loss of profits insofar as it is established."[960]

556. Tribunals have repeatedly confirmed the "full reparation" principle set out above as the international law standard applicable to the compensation owed for breaches of bilateral investment treaties.[961] For example, as explained recently in *Gold Reserve v. Venezuela*:

> [I]t is well accepted in international investment law that the principles espoused in the *Chorzow Factory* case, even if initially established in a State-to-State context, are the relevant principles of international law to apply when considering compensation for breach of a BIT. It is these well-established principles that represent customary international law, including for breaches of international obligations under BITs, that the Tribunal is bound to apply.[962]

557. Thus, any monetary award must put Claimants in the economic position that they would have been in had the internationally wrongful act not occurred at all.[963] In other words, the valuation must reflect the situation that would have existed *but for* the State's wrongful conduct. As explained by the tribunal in *SD Myers v. Canada*, damages "should reflect the general principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation."[964] As the tribunal in *Vivendi v. Argentina II* stated:

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[960] ILC Articles, Art. 36, **CL-81**.

[961] *See CMS Gas Transmission Company v. The Republic of Argentina,* ICSID Case No. ARB/01/8, Award (May 12, 2005), ¶ 400, **CL-221**. *See also Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), ¶ 400, **CL-164**; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶¶ 8.2.4-8.2.5, **CL-79**; *Biwater v.* Tanzania, Award, ¶¶ 773, 775, **CL-140**.

[962] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014) ¶ 678, **CL-152**.

[963] *Case Concerning the Factory at Chorzów (Germany/Poland)* (Merits) [1928] PCIJ Series A, No 17, pp. 46-47, **CL-223**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016), ¶¶ 847–849, **CL-108**; *Petrobart Limited v. Kyrgyz Republic*, SCC Case No 126/2003, Arbitral Award (Mar. 29, 2005), pp. 78-79 ("The Arbitral Tribunal agrees that, insofar as it appears that Petrobart has suffered damage as a result of the Republic's breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred."), **CL-226**.

[964] *SD Myers v. Canada*, ¶ 315, **CL-75**; *El Paso*, Award, ¶ 700, **CL-155**.

> Based on these principles [of international law], and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to *eliminate the consequences of the state's action*.[965]

2. The NAFTA Provides a Compensation Standard for Lawful Expropriations Only and No Standard for Unlawful Expropriations or Breaches of FET or FPS; Thus the Customary International Law Standard Applies

558. The only compensation standard provided in the NAFTA is for a *lawful* expropriation. As explained in Section III.C.1., NAFTA Article 1110(1) lists the four necessary criteria for a lawful expropriation.[966] The fourth criterion states that "payment of compensation [shall be] in accordance with paragraphs 2 through 6 below." Paragraph 2 of Article 1110 immediately follows Article 1110(1) and provides that "[c]ompensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place . . . ."[967] The placement of the Article 1110(2) compensation standard, and the explicit link to the clause discussing a lawful expropriation make clear that Article 1110(2) applies only to compensation for lawful expropriations. The NAFTA does not provide a standard of compensation for an *unlawful* expropriation nor does it provide a compensation standard for breaches of fair and equitable treatment or full protection and security.

559. In the absence of *lex specialis*, the relevant standard for the determination of the compensation owed to Claimants with respect to México's breaches of the NAFTA must be assessed

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965 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶ 8.2.7 (emphasis added), **CL-79**.

966 NAFTA Article 1110(1), **CL-59**.

967 NAFTA Article 1110(2), **CL-59**.

with reference to applicable principles of customary international law as discussed above.[968] As the tribunal stated in *Vivendi v. Argentina II*,

> There can be no doubt about the vitality of [the Chorzów Factory] statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ's successor, the International Court of Justice. It is also clear that such a standard permits, if the facts so require, a higher rate of recovery than prescribed in [the BIT] for lawful expropriations.[969]

560. Similarly, the tribunal in *Houben v. Burundi* noted that where a treaty provides that the amount of compensation for expropriation should be calculated on the basis of the investment value on the eve of the expropriation, that standard should be interpreted to mean that it applies to *lawful expropriation, not unlawful expropriations*.[970] Further, the tribunal held that if the treaty in question is silent on the method for calculating the amount of compensation for unlawful expropriation, customary international law shall apply, and in particular, the *Chorzów* standard.[971] Thus, in this case, customary international law applies to the question of damages for unlawful expropriation and other breaches of the NAFTA.

561. Where the compensation standards for lawful expropriations under NAFTA and breaches under customary international law coincide is in establishing the fair market value standard as the appropriate standard for full reparation. As discussed below, the fair market value standard is

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[968] *See Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016), ¶ 846, **CL-108**; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Reconsideration and Award (Feb. 7, 2017), ¶ 160, **CL-266**; *ADC*, Award, ¶¶ 481, 483, **CL-120**; *Iran-U.S. Claims Tribunal, Amoco Int'l Finance Corp. v. Iran, 15 IRAN-U.S. C.T.R.,* ¶¶ 189, 191-93, **CL-117**; *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, Stockholm Chamber of Commerce, Arbitral Award (Dec. 16, 2003), ¶ 5.1, **CL-262**.

[969] *Compañia de Aguas de Aconquija S.A. and Vivendi Universal S.A. v. Republic of Argentina*, ICSID Case No. ARB/97/3, Award (Jul. 25, 2007), para. 8.2.5, **CL-79**.

[970] *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award (Jan. 12, 2016) [French], ¶¶ 219-220, **CL-227**.

[971] *Id.* at ¶ 220, **CL-227**.

the most commonly accepted damages standard for full reparation, and also appropriate for this case.[972] The only difference relevant to this case between the NAFTA standard for lawful expropriation and the customary international law standard is the date of valuation, which is discussed later in this section.

3. Compensation Must Be Equal to Fair Market Value

562. The proper method for calculating Claimants' damages in this case is to determine the fair market value ("FMV") of Claimants' assets.[973]

563. According to the International Law Commission's Articles on State Responsibility, "[c]ompensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the 'fair market value' of the property lost."[974] The 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment are similarly clear, providing that compensation for expropriation "will be deemed 'adequate' if it is based on the fair market value of the taken asset."[975]

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[972] *Metalclad,* Award, ¶ 118, **CL-95**; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award (Mar. 14, 2003), ¶¶ 498–500, **CL-228**; J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), p. 225 (stating that "[c]ompensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the 'fair market value' of the property lost."), **CL-229**.

[973] C. N. Brower and J.D. Brueschke, *The Iran-United States Claims Tribunal* (1998), p. 539 (stating that "market price is the most reliable indicator of the actual value of an asset at a determined date"), **CL-231**; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶¶ 8.2.9-8.2.11, **CL-79**.

[974] ILC Articles, Art. 36, Commentary ¶ 22, **CL-81**. *See* Brower and Brueschke, The Iran-United States Claims Tribunal, p. 539, (1998), ("[M]arket price is the most reliable indicator of the actual value of an asset at a determined date."), **CL-231**; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), ¶ 404, **CL-164**; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16 , Award (Oct. 2, 2006), ¶ 499, **CL-120**.

[975] World Bank Group, *Guidelines on the Treatment of Foreign Direct Investment*, (1992) Vol(2) ICSID Review–Foreign Investment Law Journal 297, p. 6, **CL-233**. *See also* J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), pp. 225-226, **CL-229**.

564. The Iran-U.S. Claims Tribunal has defined FMV as "the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat."[976]

565. As recently recognized by the tribunal in *Crystallex v. Venezuela*, proper assessment of an investment's FMV ensures that the injured party is restored to the situation it would have been in *but for* the internationally wrongful acts:

> [I]t is well-accepted that reparation should reflect the "fair market value" of the investment. Appraising the investment in accordance with the fair market value methodology indeed *ensures that the consequences of the breach are wiped out and that the situation which would, in all probability, have existed if the wrongful acts had not been committed is reestablished*.[977]

566. International tribunals have regularly applied the FMV standard in cases involving both breaches of the fair and equitable treatment,[978] full protection and security[979] and expropriation[980] clauses of bilateral investment treaties. Given that the NAFTA prescribes FMV for expropriation breaches and customary international law prescribes FMV for all treaty breaches, the

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[976] *Starrett Housing Corporation and others v. Government of the Islamic Republic of Iran*, Final Award (Aug. 14, 1987), (1987-Volume 16) Iran-US Claims Tribunal Report, ¶ 277, **CL-234**.

[977] *Crystallex International Corporation v. Bolivarian Republic of Venezuela* ("*Crystallex*"), ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016), ¶ 850, **CL-108** (emphasis added). *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014), ¶ 681 ("As the consequence of the serious breach in the present situation was to deprive the investor totally of its investment, the Tribunal considers it appropriate that the remedy that would wipe-out the consequences of the breach is to assess damages using a fair market value methodology."), **CL-152**; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶ 8.2.10, **CL-79**.

[978] *See, e.g., CMS Gas Transmission Company v. The Republic of Argentina,* ICSID Case No. ARB/01/8, Award (May 12, 2005), ¶ 410, **CL-221**; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (Jul. 14, 2006), ¶ 424, **CL-141**; *Enron Corporation and Ponderosa Assets LP v. Argentine Republic*, ICSID Case No ARB/01/3, Award (May 22, 2007), ¶¶ 359-363, **CL-235**; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), ¶¶ 403-404, **CL-164**; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), ¶¶ 702-703, **CL-155**.

[979] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (Jul. 14, 2006), ¶ 442, **CL-141**.

[980] *See, e.g.*, *Metalclad,* ¶ 118, **CL-95**; *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Final Award (Mar. 14, 2003), ¶¶ 496-499, **CL-228**; *Bernardus,* ¶ 124, **CL-130**.

standard for calculating compensation for México's expropriation is the same—*i.e.*, FMV—for any breaches of the NAFTA by Respondent.

4. DCF Is the Most Appropriate Methodology To Assess the FMV of Oro Negro

567. The relevant method for the assessment of the FMV of an asset depends on the circumstances and characteristics of each individual case. In *Crystallex v. Venezuela*, the tribunal explained as follows:

> Tribunals may consider any techniques or methods of valuation that are generally acceptable in the financial community, and whether a particular method is appropriate to utilize is based on the circumstances of each individual case. A tribunal will thus select the appropriate method basing its decision on the circumstances of each individual case . . . .[981]

568. In accordance with these observations, in order to reliably assess the quantum of damages Claimants are owed, Compass Lexecon carefully considered the individual characteristics of Integradora and Perforadora as well as the applicable financial and industry standards. After this consideration, Compass Lexecon determined that the discounted cash flow ("DCF") method, and in particular, the free cash flow to equity ("FCFE") approach is the most appropriate method to accurately capture the value of Oro Negro.[982]

569. Favored in both international finance and international law,[983] the DCF method is an income-based approach that projects the anticipated future net cash flows that a company would have generated for equity-holders in the absence of wrongful government conduct.[984] This sort of

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[981] *Crystallex,* Award, ¶ 886, **CL-108**.

[982] Compass Lexecon Report, **CER-3**, ¶ 32.

[983] *See, e.g.*, World Bank Group, pp. 6-7, **CL-233**; P. D. Friedland and E Wong, *Measuring Damages for the Deprivation of Income-Producing Assets: ICSID Case Studies*, (1991) Vol 6(2) ICSID Review–Foreign Investment Law Journal 400, pp. 407-408, **CL-237**; W. C. Lieblich, *Determinations by International Tribunals of the Economic Value of Expropriated Enterprises*, (1990) Vol 7(1) Journal of International Arbitration 37, p. 1, **CL-238**; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014), ¶ 831, **CL-152**.

[984] Compass Lexecon Report, **CER-3**, ¶ 33–38.

forward-looking valuation method provides an appropriate determination of fair market value.[985] In this way, the DCF methodology reflects the transaction price at which willing buyers and sellers in the marketplace would assess the value of income-producing assets as of the valuation date.[986]

570. Compass Lexecon explains that the DCF method measures the value of a business by adding the free cash flows ("FCF") that the business expects to generate in the future discounted at a rate that reflects the company's cost of raising capital.[987] The FCF expected by the business are computed by netting cash inflows against cash outflows.[988] The company's cost of raising capital considers the risks of the business's projected cash flows.[989] Also, the stream of annual expected FCF is expressed as of a singular date and takes into account the value of time, as one dollar today is worth more than one dollar tomorrow.[990]

571. The FCFE approach is a variation of the general DCF approach and directly assesses the equity value of a project, computed as revenues net of costs, taxes and debt-related payments.[991] Under the FCFE approach, one computes the value to equity holders by discounting expected FCFE at the relevant discount rate, which is the cost of equity.[992]

572. The DCF method is the appropriate valuation methodology to measure the Claimants' damages in this case because the valuation of Oro Negro stems from its anticipated future net cash

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[985] Compass Lexecon Report, **CER-3**, ¶ 34.

[986] Compass Lexecon Report, **CER-3**, ¶ 34, *see also infra* Section IV.A.5.

[987] Compass Lexecon Report, **CER-3**, ¶ 33.

[988] Compass Lexecon Report, **CER-3**, ¶ 33.

[989] Compass Lexecon Report, **CER-3**, ¶ 33.

[990] Compass Lexecon Report, **CER-3**, ¶ 33.

[991] Compass Lexecon Report, **CER-3**, ¶ 37–38.

[992] Compass Lexecon Report, **CER-3**, ¶ 38. As discussed later in this section and in the Compass Lexecon Report, the cost of equity based on the CAPM reflects the operating and financing risks faced by equity holders.

flows based on a business that was a going concern with expected revenues.[993] Further, as Compass Lexecon explains and as referenced above, the DCF is one of the most widely accepted techniques in valuation analysis, particularly in international disputes.[994] The DCF method has been widely endorsed and applied by international arbitral tribunals to determine the appropriate compensation due as a result of expropriation, as well as other breaches of investment treaties.[995]

573. In *Chorzów Factory*, the PCIJ specifically noted that "future prospects," "probable profit" and future "financial results" were factors material to the valuation.[996] Similarly, in the case of *Phillips Petroleum v. Iran* the Iran-U.S. Claims Tribunal explained that:

> [A]nalysis of a revenue-producing asset . . . must involve a careful and realistic appraisal of the revenue-producing potential of the asset over the duration of its term, which requires appraisal of the level of production that reasonably may be expected, the costs of operation, including taxes and other liabilities, and the revenue such production would be expected to yield, which, in turn, requires a determination of the price estimates for sales of the future production that a reasonable buyer would use in deciding upon the price it would be willing to pay to acquire the asset.[997]

574. Integradora and Perforadora were both "going concerns" at the time of México's measures. Compass Lexecon has taken into account their contracts with Pemex in the calculation of damages, as these contracts were in force at the time of México's measures.[998] Therefore, Compass

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[993] Compass Lexecon Report, **CER-3**, ¶ 34.

[994] Compass Lexecon Report, **CER-3**, ¶ 35.

[995] *See, e.g., CMS*, Award, ¶¶ 411-417, **CL-221**; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3*Award (May 22, 2007), ¶ 385, **CL-235**; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (Jul. 24, 2008), ¶ 793, **CL-140**; *National Grid plc v. The Argentine Republic*, UNCITRAL, Award (Nov. 3, 2008), ¶ 275, **CL-162**.

[996] *Case Concerning the Factory at Chorzów (Germany/Poland)* (Merits) [1928] PCIJ Series A, No 17, pp. 50-51, **CL-223**.

[997] *Phillips Petroleum Company Iran v. Islamic Republic of Iran and the National Iranian Oil Company*, Award, (June 29, 1989), (1989-Volume 21) Iran-U.S. Claims Tribunal Report, ¶ 111 (emphasis added), **CL-239**.

[998] Compass Lexecon Report, **CER-3**, ¶ 45.

Lexecon's DCF analysis appropriately takes into account the value of future cash flows that Integradora and Perforadora would have generated in the absence of México's unlawful conduct.[999]

575. In order to reflect the *Chorzów Factory* "full reparation" principle, the value normally creates two DCF models, one projecting future cash flows assuming the offending measures are in place (the "actual" model), and one assuming that the government had never breached the treaty (the "but-for" model).[1000] The difference in the value of the company in the "but-for" and the "actual" model then provides the primary measure of damages.[1001] In the present case, the full expropriation of Integradora and Perforadora means that the "actual" value of these investments is necessarily zero— in other words, México's wrongful conduct caused the loss of the full value of the company.

576. For the reasons set out above, the DCF method is the appropriate method to assess the FMV of the expropriated investments in Integradora and Perforadora, and is the methodology Compass Lexecon adopts in its expert report.

5. The Appropriate Valuation Date Is the Date of the Award

577. Pursuant to the full reparation principle, the injured claimant must be made whole, and the consequences of the State's internationally wrongful conduct must be entirely wiped out. This standard of full reparation is the guiding principle affecting all aspects of the valuation analysis—including the appropriate date of valuation.

578. NAFTA Article 1110(2) provides a fixed valuation date for lawful expropriations as "immediately before the expropriation took place."[1002] However, the NAFTA is silent on the valuation date for breaches of other provisions of the Treaty, such as fair and equitable treatment and

[999] Compass Lexecon Report, **CER-3**, ¶ 41, 45.

[1000] Compass Lexecon Report, **CER-3**, ¶ 41.

[1001] Compass Lexecon Report, **CER-3**, ¶ 41.

[1002] NAFTA Article 1110(2), **CL-59**.

full protection and security, as well as the valuation date for *unlawful* expropriations. Therefore, here, where the State has committed an *unlawful* expropriation and breaches of non-expropriation provisions of the Treaty, no applicable *lex specialis* exists, and the Tribunal should determine the appropriate valuation date.[1003]

579. As has been articulated in the Journal of Damages in International Arbitration, "the current state of the law appears reasonably clear: where they have been victims of unlawful state action, claimants are entitled to select either the date of expropriation or the date of award as the date of valuation."[1004] Thus, for unlawful expropriations and breaches of non-expropriation provisions of the NAFTA, Claimants may choose the valuation date that provides them with the higher amount of damages.[1005]

580. Where the value of an investment has increased following the government measures, "full reparation may require . . . the valuation date to be fixed at the date of the award."[1006] This was the conclusion reached by the tribunal in the *ADC v. Hungary* case, which explained that, for cases in which the value of an investment actually increases following an expropriation, "the *Chorzów Factory* standard requires that the date of valuation should be the date of the Award and not the date of expropriation, *since this is what is necessary to put the Claimants in the same position as if the*

[1003] *SD Myers v. Canada*, ¶ 309 (NAFTA's silence indicates the drafters' intentions to generally "leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case."), **CL-75**; *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), ¶ 700, **CL-155**.

[1004] Lavaud, Floriane and Guilherme Recena Costa. "Valuation Date in Investment Arbitration: A Fundamental Examination of Chorzow's Principles," in The Journal of Damages in International Arbitration, p. 34, **CL-240**.

[1005] *Yukos Shareholders v. Russia*, UNCITRAL, PCA Case No. AA227, Final Award, ¶¶ 1763-9, **CL-241**; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award (Mar. 3, 2010), ¶ 514, **CL-134**.

[1006] *Crystallex*, Award, ¶ 843, **CL-108**. *See also Ioannis*, Award, ¶ 514 ("full reparation for an unlawful expropriation will require damages to be awarded as of the date of the arbitral Award."), **CL-134**; G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals: Volume I* (1957) p. 660 ("[T]he value of the property at the time of the indemnification, rather than that of the seizure, may constitute a more appropriate substitute for restitution."), **CL-242**.

expropriation had not been committed."[1007] The same reasoning has been repeatedly applied by other tribunals.[1008] As the *Quiborax v. Bolivia* tribunal noted, this approach reflects the fact that "what must be repaired is the actual harm done, as opposed to the value of the asset when taken."[1009]

581. Additionally, when determining the appropriate valuation date for an unlawful expropriation, the tribunal must "ensure full reparation and [] avoid any diminution of value attributable to the State's conduct leading up to the expropriation."[1010] México's actions that diminished Oro Negro's value prior to the expropriation should be taken into account when calculating the final valuation.

582. In this case, the valuation date for the NAFTA breaches must take into account the full measure of the harm done to Claimants' investment to date. In order to effectively put Claimants in the same position as if the breaches had not been committed, the ultimate valuation date for México's violations of the NAFTA must be the date of the Award. Because the date of an eventual Award is as yet unknown, the valuation date in the Compass Lexecon Report is October 1, 2019 ("**Valuation Date"**), the date shortly before Claimants filed this Statement of Claim. This date includes the various measures described in Sections II and III, which led to the financial strangulation and ultimate destruction of Integradora and Perforadora, as well as their ability to enter

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[1007] *ADC*, Award, ¶ 497, **CL-120**; *see Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No AA 227, Final Award (Jul. 18, 2014), ¶¶ 1767-1769, **CL-241**.

[1008] *See, e.g.*, *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award (Jul. 28, 2015), ¶ 764, **CL-243**; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), ¶ 706, **CL-155**; *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos ARB/08/1 and ARB/09/20, Award (May 23, 2012), ¶ 307, **CL-244**.

[1009] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (Sept. 16, 2015), ¶ 377, **CL-245**.

[1010] *Ioannis*, Award, ¶ 517, **CL-134**. Although NAFTA Article 1110(2) notes that compensation "shall not reflect any change in value occurring because the intended expropriation had become known earlier," this clause is applicable only to compensation for lawful expropriations.

into future contracts. Claimants and Compass Lexecon will update the valuation date and the corresponding damages amount in the Reply based on factors known at that time.

C. Calculation of the FMV of Claimants' Investment

583. Compass Lexecon's FMV calculation comprises a DCF analysis, which considers losses incurred both before and after the Valuation Date.[1011]

1. Historical Losses

584. To calculate the historical losses suffered prior to the Valuation Date and the FMV as of the Valuation Date, Compass Lexecon computes the revenues and costs of the companies as they would have been but for México's unlawful conduct.[1012]

585. Compass Lexecon's valuation is driven by three components: (i) revenues; (ii) operating and capital costs; and (iii) debt. Each component, along with working capital and taxes, is addressed below.

i. Revenues

586. Compass Lexecon projected revenues based on the existing Oro Negro Contracts and forecasts from analysts covering the industry.[1013] A rig owner generates revenues by supplying a rig and a drilling crew to an oil company, and the oil company is responsible for all the work required to drill and complete the well, including the time it takes.[1014] In return for their services, the rig owner receives a dayrate, which is generally fixed for the duration of the contract.[1015] In the but-for scenario, Compass Lexecon projected revenues after the unlawful termination of the contracts based

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[1011] Compass Lexecon Report, **CER-3**, ¶¶ 33-34.

[1012] Compass Lexecon Report, **CER-3**, ¶ 41.

[1013] Compass Lexecon Report, **CER-3**, ¶ 48.

[1014] Compass Lexecon Report, **CER-3**, ¶ 44.

[1015] Compass Lexecon Report, **CER-3**, ¶ 44.

upon the existing Oro Negro Contracts, as summarized in the table below.[1016] In total, the Oro Negro Contracts had remaining revenues of $841 million at termination.[1017]

Rig	Dayrate (USD)	End of Contract	Nominal Revenues Outstanding at Termination (USD Millions)
Primus	158,999	Apr-19	87
Laurus	158,999	Apr-20	145
Fortius	161,125	Jan-21	193
Decus	161,125	Feb-21	197
Impetus	130,000	May-22	219
Total			**841**

587. Compass Lexecon assumes that beyond the end of the Oro Negro Contracts, that the Rigs will continue to operate, either in the Mexican market or internationally.[1018] In conducting this analysis, Compass Lexecon projects future dayrates for the Rigs based upon global expectations for similar jack-up rigs and expected utilization of similar jack-up rigs.[1019] Specifically, Compass Lexecon relies on forecasts from several analysts in the industry.[1020] Given the range of the projections available, Compass Lexecon projects dayrates at USD 120,000 and utilization at 85% by 2022.[1021]

588. Below is a figure from the Compass Lexecon Report, which demonstrates the revenue forecasts.[1022]

[1016] Compass Lexecon Report, **CER-3**, ¶ 45.

[1017] Compass Lexecon Report, **CER-3**, ¶ 30.

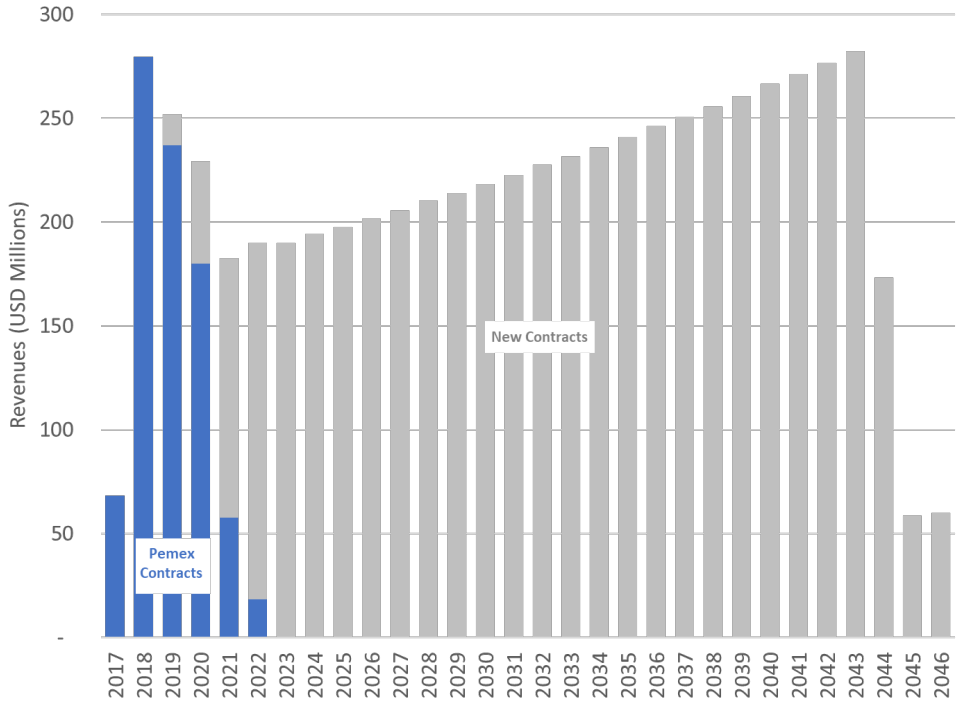
[1018] Compass Lexecon Report, **CER-3**, ¶ 46; Compass Lexecon assumes a 30 year useful life for each of the rigs. At the end of the 30 year life, they assume that the rigs will be sold for scrap.

[1019] Compass Lexecon Report, **CER-3**, ¶ 46.

[1020] Compass Lexecon Report, **CER-3**, ¶ 48.

[1021] Compass Lexecon Report, **CER-3**, ¶ 47.

[1022] Compass Lexecon Report, **CER-3**, ¶ 51.



ii. Costs

589. Because operating the Rigs incurs a variety of costs, Compass Lexecon also projected these costs in its analysis. First, they projected operating costs of $35,000/day while the Rigs were utilized and $9,000/day while the Rigs were not utilized.[1023] This calculation is based on the Rigs' daily costs and their utilization is based upon the Rigs' costs during 2017, adjusted by inflation.[1024] Compass Lexecon projected the Rigs' utilization rates based on forecasts from analysts covering the industry.[1025]

590. Compass Lexecon also assumes that each rig will incur USD 5.2 million in maintenance costs every five years, adjusted for inflation.[1026] They further project general and

[1023] Compass Lexecon Report, **CER-3**, ¶ 53 & n. 49.

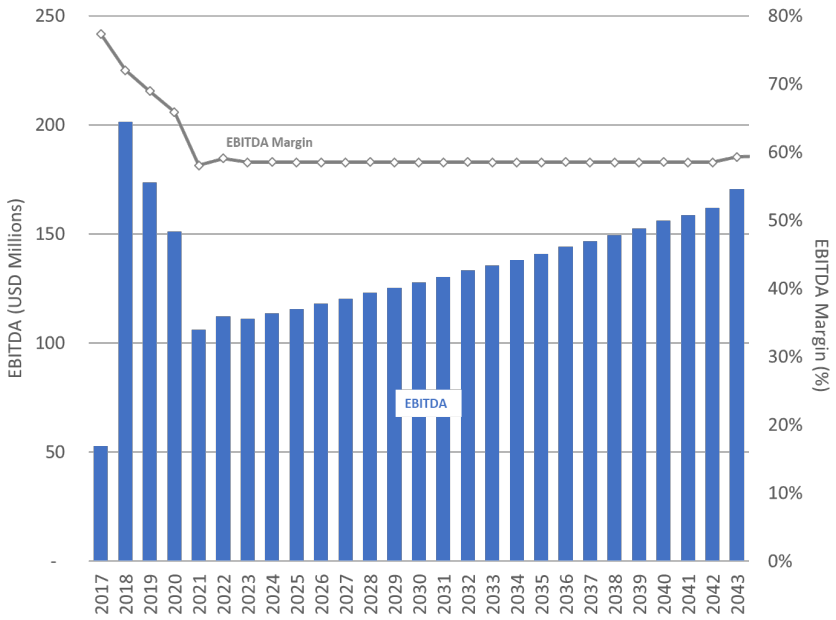
[1024] Compass Lexecon Report, **CER-3**, ¶ 53 & n. 49.

[1025] Compass Lexecon Report, **CER-3**, ¶ 50.

[1026] Compass Lexecon Report, **CER-3**, ¶ 53 & n. 51.

administrative support costs at USD 9 million per year based on 2017 expenses, adjusted by inflation.[1027]

591. Compass Lexecon's projected EBITDA margin for Oro Negro stabilizes at 59% by 2022.[1028]



iii. Debt

592. Compass Lexecon also considers and incorporates Oro Negro's debt in its analysis. Oro Negro, through its Singaporean subsidiary, issued bonds in April 2016 for a USD 939 million at an interest rate of 7.5%.[1029] Upon maturity in January 2019, Oro Negro was to repay 103% of the outstanding amount of the bonds plus any accrued interests.[1030]

[1027] Compass Lexecon Report, **CER-3**, ¶53 & n. 50.

[1028] Compass Lexecon Report, **CER-3**, ¶ 54.

[1029] Compass Lexecon Report, **CER-3**, ¶ 59.

[1030] Compass Lexecon Report, **CER-3**, ¶ 59.

593. As of December 31, 2017, Oro Negro had an outstanding debt balance of USD 945 million.[1031] Compass Lexecon projects that, in the *but-for* scenario, Oro Negro would have used its additional cash flows, excess cash, and the prepayments to pay down this debt in 2017 and 2018.[1032] Compass Lexecon applies to debt repayments Oro Negro's excess cash balance as of December 31, 2017 at USD 38 million, the USD 125 million prepayments to the shipyard for the *Vastus*, *Supremus*, and *Animus* rigs, and any additional cash flows generated by Oro Negro in a *but-for* scenario until January 2019.[1033]

594. Upon maturity in January 2019, Compass Lexecon projects that Oro Negro would have needed to issue new debt in the amount of USD 580 million to repay the existing bondholders, with an interest rate that we estimate at 5.6%.[1034] They further assume that the FCF generated would have been used to cancel all the debt before being available to equity holders.[1035] The following table summarizes Oro Negro's outstanding debt balance:

[1031] Compass Lexecon Report, **CER-3**, ¶ 59.

[1032] Compass Lexecon Report, **CER-3**, ¶ 60.

[1033] Compass Lexecon Report, **CER-3**, ¶ 60.

[1034] Compass Lexecon Report, **CER-3**, ¶ 61.

[1035] Compass Lexecon Report, **CER-3**, ¶ 61.

USD Millions			
	31-Dec-17	31-Dec-18	01-Oct-19
Additional FCF to the Firm (October 3, 2017 - October 1, 2019)	**53**	**220**	**136**
Existing Net Debt Balance Beginning of Period	**945**	**729**	
Interest on Existing Debt (7.5%)		55	
Capital Payments	216	166	
Excess Cash Available (as of December 2017)	*38*		
Prepayment	*125*		
Additional Free Cash Flows after Interest Payments	*53*	*166*	
Existing Debt Balance End of Period	**729**	**563**	
New Debt Balance as of January 2019 (103% of Existing Debt)			**580**
Interest on New Debt (5.6%)			*24*
Capital Payments			*111*
New Debt Balance as of October 1, 2019			**469**

2. Discount Rate

595. Compass Lexecon calculates a discount rate that reflects the cost of raising equity for a project with risks comparable to those inherent to Oro Negro. Given the international mobility of the Rigs, they rely on Damodaran's assessment for a global oilfield services/equipment company, which incorporates the risk of operating in different jurisdictions.[1036]

596. Compass Lexecon uses the Capital Asset Pricing Model (**CAPM**) to compute the cost of equity of Oro Negro.[1037] In this model:

a. The risk-free rate represents the return on a security or portfolio of securities that has no default risk. Compass Lexecon uses the average yield on the 10-year U.S. Treasury Bond as the measure of the risk-free rate, resulting in a risk-free rate of 2.6% as of September 1, 2019.[1038]

b. The market risk premium represents the additional return over the risk-free rate that an investor expects from holding a market portfolio of riskier securities. Following

[1036] Compass Lexecon Report, **CER-3**, ¶ 62.

[1037] Compass Lexecon Report, **CER-3**, ¶ 64.

[1038] Compass Lexecon Report, **CER-3**, ¶ 64.

Prof. Damodaran, Compass Lexecon uses a global market risk premium of 7.4% for 2019.[1039]

c. The beta reflects the company exposure to general market risk. Compass Lexecon uses an unlevered beta of 0.98 for a global oilfield services/equipment company based on Prof. Damodaran's assessment. To compute Oro Negro's levered beta Compass Lexecon accounts for Oro Negro's leverage in each period.[1040]

597. Compass Lexecon calculates their discount rate to reflect the incremental return demanded by investors for an investment in a country or location where the investment is exposed to greater risk than would be the case in a more stable economy, such as the U.S.[1041] Given the global nature of the business linked to the world oil market and the global mobility of the Rigs, along with the short-term nature of jackup contracts, Oro Negro's business is not subject to the risk of one specific jurisdiction.[1042] As such, Compass Lexecon captures global risk through Damodaran's global market risk premium, which incorporates the risk of operating in different jurisdictions.[1043]

598. Compass Lexecon calculates an unlevered cost of equity of 10% for Oro Negro (the annual levered cost of equity depends upon Oro Negro's annual leverage).[1044]

3. Total DCF Damages

599. Compass Lexecon concludes that the total DCF damages suffered by Integradora and Perforadora amount to USD 625 million as per the table below.[1045]

[1039] Compass Lexecon Report, **CER-3**, ¶ 64.

[1040] Compass Lexecon Report, **CER-3**, ¶ 64.

[1041] Compass Lexecon Report, **CER-3**, ¶ 63.

[1042] Compass Lexecon Report, **CER-3**, ¶ 63.

[1043] Compass Lexecon Report, **CER-3**, ¶ 63.

[1044] Compass Lexecon Report, **CER-3**, ¶ 65.

[1045] Compass Lexecon Report, **CER-3**, ¶ 67.

600. As noted above, Compass Lexecon then allocates the appropriate proportion of the damages to the Claimant shareholders of Integradora and Perforadora, consisting of at least USD 270 million.[1046]

USD Millions		2019*	2020	2021	2022	2023	2024	2025	2030	2035	2040	2045
Free Cash Flows to the Firm		45	157	117	95	95	95	96	105	115	126	42
Debt Payments		45	157	117	95	95	27	-	-	-	-	-
Free Cash Flows to Equity		-	-	-	-	-	**68**	**96**	**105**	**115**	**126**	**42**
Discount Factor to October 1, 2019							*0.6*	*0.6*	*0.4*	*0.2*	*0.1*	*0.1*
Discounted Free Cash Flows to Equity		-	-	-	-	-	**42**	**54**	**37**	**25**	**17**	**4**
Oro Negro's Equity Valuation as of October 1, 2019	**625**											
Claimants' Shareholding	*43.2%*											
Damages to Claimants	**270**											

601. Compass Lexecon concludes that the total damages under the DCF model amount to USD 270 million as of October 1, 2019. To whatever sum calculated at the date of Award, the Tribunal must eventually add applicable costs and ensure in its award that the amount received by Claimants is net of taxes (see below) to make Claimants whole.

602. Compass Lexecon has also calculated the value of Oro Negro had Pemex actually paid liquidated damages as required under its contracts as a result of Pemex's purported terminations. As mentioned earlier, Pemex paid liquidated damages to ODH under a liquidated damages provision similar to Oro Negro's when Pemex terminated ODH's contract. Therefore, a scenario where Pemex pays Oro Negro liquidated damages is plausible for valuation purposes. In that calculation, Compass demonstrates that had Pemex paid the liquidated damages in 2017 as required under the contract, and then Oro Negro continued to operate elsewhere, as it would have been under its rights to do, Claimants damages would be approximately USD 460 million. This

[1046] Compass Lexecon Report, **CER-3**, ¶ 67.

demonstrates that at the very least, Claimants are entitled to its claimed damages of at least USD 270 million.

D. Full Reparation Requires Claimants To Be Awarded Post-Award Interest at a Commercially Reasonable Rate

1. Claimants Should Receive Post-Award Interest at a Rate that Ensures "Full Reparation"

603. The NAFTA specifies that "compensation [for lawful expropriation] shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.[1047] Interest is also an integral component of full compensation under customary international law for breaches of other treaty obligations and unlawful expropriations.[1048] A State's duty to make reparation arises immediately after its unlawful actions cause harm, and to the extent that payment is delayed, the claimant loses the opportunity to invest the compensation.[1049] As the ILC Articles specify, when interest is awarded it should run "from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled."[1050] When the valuation date is the date of the award, this encompasses post-award interest.[1051]

[1047] NAFTA Article 1110(4), **CL-59**.

[1048] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶ 9.2.1, **CL-79** ("the liability to pay interest is now an accepted legal principle"); ILC Articles, Art. 38, ¶ 2 ("As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgment or award concerning, the claim and to the extent that it is necessary to ensure full reparation."); J. Y. Gotanda, *Awarding Interest in International Arbitration*, (1996) Vol 90 The American Journal of International Law 40, p. 57, **CL-246**; *Maffezini v. Kingdom of Spain*, ICSID Case No ARB/97/7, Award (Nov. 13, 2000), ¶ 96, **CL-247**; *Santa Elena*, Final Award, ¶¶ 96–97, **CL-97**. *See Siemens*, Award, ¶ 395, **CL-105**.

[1049] *Metalclad*, Award, ¶ 128, **CL-95**; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, (Aug. 20, 2007), ¶ 9.2.3, **CL-79**.

[1050] ILC Articles, Art. 38(2), **CL-89**.

[1051] If the Tribunal were to set the date of valuation at the date of the expropriation or date of the breach instead of the date of the award, then pre-award interest would obviously be necessary to adequately compensate Claimants.

604. Since the payment of interest is an integral element of reparation, the purpose of an award of interest is the same as that of an award of damages for breach of an international obligation: the interest awarded should place the victim in the economic position it would have occupied had the State not acted wrongfully.[1052] On this basis, international arbitral tribunals accept that interest is not an award *in addition* to reparation; rather, it is a component of, and should give effect to, the principle of full reparation.[1053] The requirement of full reparation must therefore inform all aspects of an interest award, including the appropriate rate of interest, whether interest should be simple or compound and the periodicity of compounding.[1054]

605. As a result, Claimants are entitled to receive interest *until México effectively pays the Award* at a rate that reflects the damage that was suffered for not having received the sums México owes to them for the breaches of the NAFTA. The purpose of post-award interest is "to compensate the additional loss incurred from the date of the award to the date of final payment."[1055] Any delays in payment of a damages award should therefore be reflected and accounted for through the determination of post-award interest. This rate should be a commercially reasonable rate.[1056]

[1052] ILC Articles, Art. 38(1) ("Interest on any principal sum due […] shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result."), **CL-89**.

[1053] *See Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (Jun. 27, 1990), ¶ 114 ("the case-law elaborated by international arbitral tribunals strongly suggests that in assessing the liability due for losses incurred the interest becomes an integral part of the compensation itself"), **CL-248**; *Middle East Cement Shipping*, Award, ¶ 174 ("Regarding such claims for expropriation, international jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation due"), **CL-96**. *See generally* Gotanda, *Awarding Interest in International Arbitration*, **CL-246**; J. Y. Gotanda, *A Study of Interest*, (2007) Villanova Law Working Paper Series, **CL-249**.

[1054] Compounding periodicity is the regularity with which interest accrued is added to the underlying capital amount. Capital growth increases when the compounding period is shortened. *See* Gotanda, *A Study of Interest,* p. 63, **CL-249**.

[1055] *Autopista Concesionada de Venezuela, CA v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Award (Sept. 23, 2003), ¶ 380, **CL-250**.

[1056] NAFTA Article 1110(4) ("If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment."). **CL-59.** Compass Lexecon will recommend a commercially reasonable rate in the Reply, which is closer to the date of Award.

Interest shall keep accruing until full payment of the Award by México, including on any accrued post-award interest.

2. Interest Should Be Compounded Annually

606. The only way to fully compensate Claimants for México's unlawful conduct is to compound the post-award interest rate on an annual basis.[1057] Tribunals have frequently noted that compound interest best gives effect to the rule of full reparation.[1058] Compound interest ensures that a respondent State is not given a windfall as a result of its breach, as compounding recognizes the time value of the claimant's losses.[1059] It also "reflects economic reality in modern times" where "[t]he time value of money in free market economies is measured in compound interest."[1060] On this basis, interest awarded to Claimants should be subject to reasonable compounding. The appropriate periodicity of the compounding is annual.

E. Full Compensation Requires that Any Award of Damages Be Net of Tax

607. As explained above, the valuations set out in the Compass Lexecon Report have been prepared net of tax. Consequently any taxation by México of the eventual Award in this arbitration would result in Claimants being effectively taxed twice for the same income, thereby undermining

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[1057] *See* Gotanda, *A Study of Interest*, p. 34 ("[T]he opportunity cost in a commercial enterprise is a forgone investment opportunity. Thus, awarding compound interest at the claimant's opportunity cost would be the most appropriate way to compensate it for the loss of the use of its money."), **CL-249**; *see also ADC,* ¶ 522 ("[T]ribunals in investor State arbitrations in recent times have recognized economic reality by awarding compound interest"), **CL-120**.

[1058] *See, e.g.*, *Azurix*, Award, ¶ 440, **CL-141**; *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (May 8, 2008), ¶¶ 709, 712, **CL-251**; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No ARB/03/9, Award, (Sept. 5, 2008), ¶¶ 308-313, **CL-252**; *National Grid plc v. The Argentine Republic*, UNCITRAL Award (Nov. 3, 2008), ¶ 294, **CL-162**; *Impregilo SpA v. The Argentine Republic*, ICSID Case No ARB/07/17, Award (Jun. 21, 2011), ¶ 382, **CL-253**; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), ¶ 746, **CL-155**. *See Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award (May 16, 2012), ¶ 325, **CL-244**; *Quasar de Valores SICAV SA and others v. Russian Federation*, SCC Case No 24/2007, Award (July 20, 2012), ¶ 226, **CL-254**.

[1059] T. J. Sénéchal and J. Y. Gotanda, *Interest as Damages*, (2008-2009) Vol 47 Columbia Journal of Transnational Law 491, p. 532-533, **CL-255**. *See* A. X. Fellmeth, *Below-Market Interest in International Claims Against States*, (2010) Vol 13(2) Journal of International Economic Law 423, p. 437-440, **CL-260**.

[1060] *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008), ¶ 309, **CL-252**.

the very purpose of the Award—*i.e.*, place Claimants in the financial position in which they would have been had México not breached its obligations under the Treaty. This principle has been confirmed by the tribunal in *Rusoro v. Venezuela* in the following terms:

> The BIT specifies that the compensation for expropriation must be "prompt, adequate and effective" and "shall be paid without delay and shall be effectively realizable and freely transferable". . . . If the Bolivarian Republic were to impose a tax on Rusoro's award, Venezuela could reduce the compensation "effectively" received by Rusoro. A *reductio ad absurdum* proves the point: Venezuela could practically avoid the obligation to pay Rusoro the compensation awarded by fixing a 99% tax rate on income derived from compensations issued by international tribunals, thereby ensuring that Rusoro would only effectively receive a compensation of 1% of the amount granted [. . .] In conclusion, the Tribunal declares that the compensation, damages and interest granted in this Award are net of any taxes imposed by the Bolivarian Republic and orders the Bolivarian Republic to indemnify Rusoro with respect to any Venezuelan taxes imposed on such amounts.[1061]

608. To secure the finality of the Tribunal's Award in this arbitration, Claimants request that the Tribunal declare that: (i) its Award is made net of all applicable taxes; and (ii) México may not tax or attempt to tax the Award.

F. Summary of Damages

609. As established above and in the Compass Lexecon Expert Report, Claimants are entitled to full compensation for México's breaches of the Treaty. Such compensation amounts to a total figure of at least USD 270 million.[1062]

610. A commercially reasonable interest rate should accrue on these amounts after the Award is issued and until payment in full by México.

611. The compensation should be paid without delay, be effectively realizable and be freely transferable, and bear interest at a compound rate sufficient fully to compensate Claimants for

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[1061] *Rusoro Mining*, Award, ¶¶ 852-855, **CL-139**. *See Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata BV .v Petróleos de Venezuela SA*, ICC Case No 16848/JRF/CA, Final Award (Sept. 17, 2012), ¶¶ 313, 333(1)(vii), **CL-256**; *Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/23, Award (Dec. 12, 2016), ¶¶ 788-792, **CL-257**.

[1062] Compass Lexecon Report, **CER-3**, ¶ 67.

the loss of the use of their capital as at the respective date of valuation for its investment. The award of damages and interest should be made net of all taxes; México should not tax, or attempt to tax, the payment of the Award.

II. REQUEST FOR RELIEF

612. On the basis of the foregoing, without limitation and reserving Claimants' right to supplement these prayers for relief, including without limitation in the light of further action which may be taken by México, Claimants respectfully request that the Tribunal:

(i) DECLARE that México has breached Article 1110 (Expropriation) and Articles 1105 (Fair and Equitable Treatment and Full Protection and Security) of the Treaty;

(ii) ORDER México to compensate Claimants for their losses resulting from México's breaches of the Treaty and international law for an amount of at least USD 270 million as of October 1, 2019, to be supplemented in a subsequent report, plus interest until payment at a commercially reasonable rate, compounded annually;

(iii) DECLARE that: (a) the award of damages and interest be made net of all taxes; and (b) México may not deduct taxes in respect of the payment of the award of damages and interest;

(iv) AWARD such other relief as the Tribunal considers appropriate; and

(v) ORDER México to pay all of the costs and expenses of these arbitration proceedings.

Respectfully submitted on behalf of Claimants,

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