BEFORE THE HONORABLE TRIBUNAL ESTABLISHED PURSUANT TO CHAPTER XI OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

ODYSSEY MARINE EXPLORATION, INC.
(CLAIMANT)

V.

UNITED MEXICAN STATES
(RESPONDENT)

(ICSID CASE No. UNCT/20/1)

COUNTER MEMORIAL

COUNSEL FOR THE UNITED MEXICAN STATES:
Orlando Pérez Gárate

ASSISTED BY:

Secretaría de Economía
Laura Mejía Hernández
Alan Bonfiglio Ríos
Antonio Nava Gómez
Francisco Diego Pacheco Román
Rafael Alejandro Augusto Arteaga Farfán

Pillsbury Winthrop Shaw Pittman LLP
Stephan E. Becker
David Stute

Tereposky & De Rose
Greg Tereposky
Alejandro Barragán

23 February 2021

[Courtesy Translation]

Index

GLOSSARY

Short	Complete name
Claims Agreement	International Claims Enforcement Agreement
Agro Nitrogenados	Agro Nitrogenados, S.A. de C.V.
AHMSA or Altos Hornos	Altos Hornos de México S.A. de C.V.
AIA	Environmental Impact Authorization ("*Autorización de Impacto Ambiental*")
AIDA	Asociación Interamericana para la Defensa del Ambiente
AIG	Australian Institute of Geoscientists
AP	Project Area ("*Área del Proyecto*")
APF	Federal Public Administration ("*Administración Pública Federal*").
APFC	Federal Public Centralized Administration ("*Administración Pública Federal Centralizada*")
API	Administración Portuaria Integral
ASF	Federal Audit Authority ("*Auditoría Superior de la Federación*")
AusIMM	The Australasian Institute of Mining and Metallurgy
Gray whale	*Eschrichtius robustus*
Boskalis	Royal Boskalis Westminster R.V.
CEMDA	Centro Mexicano de Derecho Ambiental, A.C.
CFE	Federal Electricity Commission ("*Comisión Federal de Electricidad*")
ICSID	International Centre for Settlement of Investment Disputes
CIBNOR	Centro de Investigaciones Biológicas del Noreste, S.C.
CICIMAR	Centro Interdisciplinario de Ciencias Marinas
CIM	Canadian Institute of Mining, Metallurgy and Petroleum
CIMVAL	International Mineral Valuation Committee
Code VALMIN	The Australasian Code for the Public Reporting of Technical Assessments and Valuations of Mineral Assets
CONABIO	Comisión Nacional para el Conocimiento y Uso de la Biodiversidad
CONAGUA	Comisión Nacional del Agua
CONANP	Comisión Nacional de Áreas Naturales Protegidas
CONAPESCA	Comisión Nacional de Acuacultura y Pesca
CONMECCOP	Confederación Mexicana de Cooperativas Pesqueras y Acuícolas
Consulting Council	Consulting Council on Sustainable Development of SEMARNAT
Constitution or CPEUM	Constitution of the United Mexican States
CPF	Federal Criminal Code ("*Código Penal Federal*")
Respondent or Mexico	United Mexican States
DGIRA	General Directorate of Impact and Environmental Risk ("*Dirección General de Impacto y Riesgo Ambiental*")
DOF	Federal Official Gazette ("*Diario Oficial de la Federación*")

Short	Complete name
Don Diego or Project	Dredging project of black phosphate sands in the Don Diego deposit
Drumcliffe	Drumcliffe Partners IV LLC
EIA	Environmental impact assessment ("*Evaluación de Impacto Ambiental*")
EPC	Engineering, Procurement and Construction
Epsilon	Epsilon Acquisitions, LLC
ESSA	Exportadora de Sal, S.A. de C.V.
ExO	Exploraciones Oceánicas, S. de R.L. de C.V.
FEDECOOP	Federación Regional de Sociedades Cooperativas Pesqueras
Fertinal	Grupo Fertinal, S.A. de C.V.
FGR	General Attorney Office ("*Fiscalía General de la República*")
Fosforitas del Pacífico	Fosforitas del Pacífico, S.A. de C.V.
IIO	Instituto de Investigaciones Oceanológicas de la Universidad Autonóma de Baja California
INAPESCA	Instituto Nacional de Pesca
IPN	Instituto Politécnico Nacional
LFRASP or LFRA	Federal Law of Administrative Liabilities of Public Servants
LGEEPA	General Law of Ecological Balance and Environmental Protection
LGRA	General Law of Administrative Liabilities
LOAPF	Federal Public Administration Law
Mako Resources	Mako Resources, LLC
MCA	Minerals Council of Australia
MIA	Environmental impact statement ("*Manifestación de Impacto Ambiental*")
MIA-R	environmental impact statement regional modality
MINOSA	Minera del Norte, S.A. de C.V.
Monaco	Monaco Financial, LLC
Nasdaq	National Association of Securities Dealers Automated Quotation
NOM	Mexican official standard ("*Norma Oficial Mexicana*")
NOM-059-SEMARNAT	Norma Oficial Mexicana NOM-059-SEMARNAT-2010
NOM-131-SEMARNAT	Norma Oficial Mexicana NOM-131-SEMARNAT-2010
NYSE	The New York Stock Exchange
Oceánica Resources	Oceánica Resources, S. de R.L.
Odyssey or Claimant	Odyssey Marine Exploration, Inc.
OIC	Internal Control Body ("*Órgano Interno de Control*")
NGO	Non-governmental Organization
PEIA or EIA Proceeding	Environmental impact assessment proceeding
Pemex	Petróleos Mexicanos
Phosmex	Corporación Fosforica Mexicana, S.A. de C.V

Short	Complete name
Poplar	Poplar Falls, LLC
PRIMMA	Programa de Investigación de Mamíferos Marinos
PROFEPA	Procuraduría Federal de Protección al Ambiente
El Chaparrito Project	ESSA's project at the El Chaparrito port
Laguna Verde Project	CFE's project located at Laguna Verde
Puerto Matamoros Project	Project located in Matamoros, Tamaulipas
Puerto Veracruz Project	Project located in Veracruz port
Santa Rosalía Project	Project Santa Rosalía, Baja California Sur
Sayulita Project	Project located in Sayulita, Nayarit
FPS	Full protection and security
Quadrant	Quadrant Economics, LLC
REIA or RLGEEPAMEIA	Regulations of the Mexican General Law of Ecological Balance and Environmental Protection in Environmental Impact Assessment
RISEMARNAT or Internal Regulations	Internal Regulations of the SEMARNAT
Rofomex	Rofomex II, S.A. de C.V.
S.C.P.P. or Cooperativa Puerto Chale	Sociedad Cooperativa de Pescadores Puerto Chale
SADER	Ministry of Agriculture ("*Secretaría de Agricultura y Desarrollo Rural*")
SAGARPA	Ministry of Agriculture formerly known as "*Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación*"
SAR	Regional Environmental System ("*Sistema Ambiental Regional*")
SAT	Tax Authority ("*Servicio de Administración Tributaria*")
SCT	Ministry of Communications and Transportation ("*Secretaría de Comunicaciones y Transportes*")
SEC	U.S. Securities and Exchange Commission
SEMARNAT	Ministry of the Environment and of Natural Resources ("*Secretaría de Medio Ambiente y Recursos Naturales*")
SFP	Public Administration Ministry ("*Secretaría de la Función Pública*")
Solcargo	Solórzano, Carvajal, González y Pérez Correa, S.C.
Subsea Minerals	Subsea Minerals Ltd.
TFJA	Federal Administrative Tribunal ("*Tribunal Federal de Justicia Administrativa*")
FET	Fair and Equitable Treatment
NAFTA	North American Free Trade Agreement
caretta caretta or yellow turtle	Sea turtle also known as caguama, yellow turtle or loggerhead
UABCS	Universidad Autónoma de Baja California Sur

Short	Complete name
UNAM	Universidad Nacional Autónoma de México
UNESCO	United Nations Educational Scientific and Cultural Organization
WGM	Watts, Griffis and McOuat Limited
EEZ	Exclusive Economic Zone

I. INTRODUCTION

1. As will be analyzed in this Counter Memorial, the present case lacks merit.

2. The matter before this Tribunal, and the manner in which it is presented by the Claimant affects the integrity of the arbitration mechanism provided in Chapter XI of the North American Free Trade Agreement (NAFTA). In general terms, the Claimant seeks that the Arbitral Tribunal become an appellate court or replace a Mexican authority specialized in environmental impact to evaluate *de novo* a previous resolution, based on mere suppositions that lack factual support and on a legal strategy devised *ex post*. Indeed, the Claimant claims that the the denial of its requet for an environal authorization constitutes a breach of various NAFTA provisions. However, the main support of its claim is based on [redacted]

3. The Claimant also accompanies its Memorial with 9 witness statements and 12 expert reports, with which it seeks to misrepresent the facts that actually happened regarding the Don Diego project, and to divert attention from the actual facts.

4. What actually happened is that the Mexican environmental authority analyzed, heard and resolved an environmental impact application and determined that the project was not environmentally sustainable under the applicable law. ExO exercised its right to challenge that decision and the environmental authority fully complied the determination of the local court. Notwithstanding, the Claimant insists that it is right, even though neither the facts nor the law support it. It is enough to consider the challenge the Claimant submitted to national courts –in parallel to this arbitration– to confirm that the Claimant intends that the Tribunal become an instance of appeal or environmental authorization.

5. Indeed, what the Claimant ultimately requests is that Tribunal condemn the Mexican State to pay a multi-million –and merely speculative– amount for having exercised its sovereign right to protect the environment from the uncontroversial risk that arises from a sea floor dredging mining pproject. Although the Claimant does not agree with the legitimate exercise of the right to regulate, that does not mean that it has a right to appeal beforeto this Tribunal and pretend that it conduct an analysis *de novo* of the scientific and technical matters that only correspond to the

specialized Mexican authority –the *Dirección General de Impacto y Riesgo Ambiental* of SEMARNAT–.

6. As addressed in this Counter Memorial, Mexico decided to protect several turtle species that have officially and internationally been declared endangered, instead of promoting the sea floor dredging –an internationally controversial activity–. That regulatory decision was sustained scientific and technically.

7. Precisely, the evidence submitted with this Counter Memorial shows that the Claimant is a purely a speculative company that profits from the promotion and sale of shares derived from its only experience and main economic activity, which is the marine treasure hunting.

8. The Claimant submitted a claim for a grossly inflated amount of USD$2.364.700.000.00 – based on mere speculation. That claimed amount contrasts with the uncontroversial fact that the Don Diego project was at a stage that could be considered as "Little more than an initial exploration project".

9. The contemporary evidence on the environmental assessment proceedings is clear: The Claimant's project was not environmentally sustainable, nor feasible, and therefore was not authorized. It is uncontroversial, and the Claimant does not dispute it, that these proceedings were transparent and that ExO, as well as a plurality of parties (authorities, international agencies, non-governmental entities, communities' residents, among others) actively participated and in accordance with law.

10. Although the Claimant clearly intends to ask this Tribunal to rule on the feasibility of its dredging pproject, that is no the Tribunal's role. The Respondent does not consider it appropriate – or pertinent– that within an investor-State arbitration, technical-scientific issues that have already been submitted before the national regulatory body are reevaluated. Undoubtedly, this investment arbitration is not the ideal forum to evaluate the technical characteristics of Don Diego, and to determine if it was an environmentally feasible project.

11. On the contrary, the Tribunal analysis should focus on determining whether it was reasonable for the DGIRA to deny the environmental authorization of a pproject that sought to uninterruptedly dredge the seafloor of the Gulf of Ulloa for 50 years, a place that constitutes a

natural treasure and of utmost importance for Mexico and the world. The answer of such question is simple for the Tribunal, having in consideration the following non-disputed facts:

- The Claimant does not have any proved experience in underwater mining;
- The dredging of a seafloor is an activity that invariably produces an environmental impact due to its nature;
- The Gulf of Ulloa, the place where the dredging was sought, is a unique area in the world, due to its natural wealth, part of the migratory routes of whales and for being the home of a great population of marine turtles, included the turtle *caretta caretta*;
- Mexico has the sovereign right to protect and regulate its environment, choosing the adequate level of protection that considers appropriate for the specific activity of dredging that involves underwater mining; and
- There is no investor, nor investment, in Mexico, much less in the world, that can be compared with the mining activity and the place where the Claimant wished to carry out the dredging of the seafloor.

12. Due to the simplicity of these facts, which implies having to dismiss the claim, the Claimant has had to resort to [redacted] have, at the least, severe credibility problems. Indeed, as a matter of fact, such witness statements do not coincide with reality and rather contradict it. For example, it is implausible that [redacted] on the other hand, [redacted] A statement of this nature fails to take into consideration what is established in the applicable legislation, which contradicts the statements of said witnesses and constitutes an irrefutable fact for the Tribunal.

13. The statements expressed by the Claimant, based on mere sayings of its two [redacted] requires support from robust and irrefutable evidence, which is not provided by the Claimant. In addition, [redacted] Furthermore, the fact that the Claimant itself is hiding information regarding the

economic arrangements it entered with unknown consultants that depend of the outcome of this arbitration, reveals the frivolity with which the Claimant has acted in submitting this claim.

14. Based on the above, it is clear that the Claimant lacks factual elements to support its case. Therefore, the Respondent requests the Tribunal to provide due deference to the decisions that the regulatory body (DGIRA) issued on the Don Diego project, and dismiss the Claimant's claim. The above, without prejudice to requesting, at the appropriate procedural time, security for the expenses and costs of this arbitration, since the contract entered between the Claimant and the company that is financing this arbitration makes no provision for that matter.

II. FACTS

15. Following, the Respondent will discuss the measures referred by the Claimant in order to clarify the real context in which they were adopted and to put the Tribunal in a correct perspective on the legality of such measures.

16. Mexico will provide a comprehensive view of the Claimant's background, revealing its lack of experience in marine mining, and how it's supposed project –which was never approved from the environmental perspective–, is disputed before an investment arbitral tribunal. In addition, it will be shown that, behind the denial of environmental impact authorization, there was no political motivation or "command orders", but only a project that is not environmentally friendly and is incompatible with Mexican law. The Respondent would like to emphasize that this Arbitral Tribunal established under NAFTA Chapter XI cannot become an environmental authority, that replaces the national authority, to determine whether a specific project is environmentally sustainable in accordance with the applicable national law.

17. The Respondent does not intend to address point by point the facts presented by the Claimant. The foregoing should in no way be construed as a tacit acceptance of their arguments. On the contrary, for the sake of efficiency, the Respondent will only focus on the points it considers decisive to contribute the Arbitral Tribunal in the resolution of the case.

A. Odyssey's activities

18. Before explaining Odyssey's activities, the Respondent considers it essential to explain what Odyssey is not:

- Odyssey is not a Company with experience in the mining industry, much less can it be considered a leader in such industry.
- Odyssey is not a Company that is financially sound.
- Odyssey did not submit before the environmental authorities a sustainable or environmentally feasible industrial project.
- Odyssey is not a company that received improper or inadquate NAFTA treatment.
- Odyssey did not have –nor has it currently– the technical and financial capacity to initiate a project as Don Diego.
- Neither Odyssey nor the project were the subject of a politically motivated campaign.

19. Indeed, contrary to what the Claimant asserts or infers, Odyssey does not have experience in the mining sector, much less experience in seafloor dredging projects to extract phosphate.[1]

20. Based on the information provided by the Claimant in this arbitration, Odyssey is a Company dedicated to offer marine services and its "expertise" is focused on treasure hunting.[2]

21. The Claimant is indeed listed on Nasdaq under the name OMEX. In 2010 Odyssey informed the investing public that, in addition to its exploration and marine treasure hunting activities, it would diversify its business lines to try to carry out a complex industrial activity: marine mining. However, this "desire" by Odyssey to carry out such a complex industrial activity does not mean that the Claimant has experience in marine mining, and much less that is a leading Company or with expertise in exploration and extraction or minerals from the sea floor.[3]

22. The exploration of shipwrecks, treasures and archeological objects are not activities comparable to marine mining. Despite this, the Claimant and its Witnesses, without providing any additional element or explanation, states that Odyssey has allegedly participated in some marine mining projects in Vanuatu, the Solomon Islands, Papua New Guinea, New Zealand and Tonga.[4]

---

1 *See* **C-0015**.

2 Odyssey annual report 2019 (*Form K*). **C-0190**, p. 4.

3 Odyssey annual report 2019 (*Form K*). **C-0190**, p. 4. Witness Statement of Mr. Mark Gordon, ¶¶ 19-21. Odyssey press release, November 20,2009. **R-0001.**

4 Claimant's Memorial, ¶¶ 17-18. Apparently, the projects mentioned by the Claimant are in fact projects of Bluewater Metals, an Odyssey's partner. *See*, Odyssey's press release November 20, 2009. **R-0001.**

However, not even the annual reports submitted by the Claimant before the Securities Exchange Commission provides information on the results of these marine mining projects. The reality is that, when it comes to marine mining, Odyssey is an inexperienced or *amateur* Company.

23. Odyssey's marine explorations have not been exempt from media scandals. In 2007, Odyssey took some assets from the site of the Spanish frigate "Nuestra Señora de las Mercedes", sunk in 1804 in the Atlantic Ocean.[5] This case, also known as "Black Swan Project", led to legal proceedings before the courts of the United States, in which Spain sought to obtain the restitution of the assets extracted from the area of the shipwreck. This situation gave rise to criminal proceedings in Spain against Messrs. Gregory P. Stemm and John Morris, Odyssey's directors, and against the Claimant itself, for crimes of damage to cultural heritage, theft and smuggling.[6]

24. Curiously, in a very hermetic way, Odyssey's financial information mentions those civil and criminal proceedings faced by Company executives and the Claimant itself.[7]

25. Similarly, international organizations such as UNESCO have expressed their concern over the damage and destruction of cultural heritage caused by "treasure hunting" companies, including Odyssey. The damage caused by these activities can be understood as follows:

> The treasure-hunting company [Odyssey] had publicly estimated that the economic value of the pillaged Mercedes cargo was around 500 million USD. Its press release featured a picture of the company's CEO surrounded by more than five hundred white plastic boxes. Only one was open and completely filled with well-preserved silver coins, making the venture look attractive to investors. With the announcement of the discovery the company increased the value of its shares by more than 300 million USD, years later, when the cargo was returned to Spain, the actual contents of the boxes were analyzed. They were only filled to a third of their capacity and most of the coins had not yet received the appropriate conservation treatment. Some of the coins had been damaged by heavy electrolysis treatment. The actual value of the cargo did not exceed 13 million USD, not including costs related to equipment, boats and staff expenses, as well as conservation treatments, the latter being left mainly unattended to by the salvors. The real value of the wreck could have only been "recovered" if its scientific value had been carefully researched.

---

5 Vicente Olaya, El Segundo Tesoro de las "Mercedes", El País, June 16, 2020. **R-0002.**

6 Admission of criminal complaint, December 3, 2017, **R-0003** ("The archeological remains that would have been obtained by the ships of the defendant company would have –according to the narration of the facts contained in the complaint- later been transferred to Gibraltar, also without having authorization from the competent authority to, afterwards, be transported by air to the United States in April and May 2007 in airplanes Boing 757 "container" chartered for that purpose and destined to the Company's headquarters in Tampa").

7 Odyssey Annual Report 2013 (Form K), p. 12. **R-0004** ("Without concluding that the coins and artifacts recovered were owned by the Kingdom of Spain, the Court upheld the order to transfer all property to Spain based upon a finding that it was once carried aboard the Nuestra Senora de Las Mercedes, a Spanish naval vessel".).

[…]

> Treasure hunters, moreover, intentionally over-estimate the value of cargoes to attract investment. Treasure hunting is popular with the public and with the media. Salvage ventures thus continue to draw massive sums of money from investors expecting a big return, although detailed research shows that returns are extraordinarily rare.[8]

26. Claimant's financial and stock market activities are also not uncontroversial. In 2013, Meson Capital Partners published a detailed report on Odyssey's activities, the content of which is shocking:

> We believe the purpose of OMEX is to serve as a vehicle for OMEX insiders to live a life of glamour (sic) hunting the ocean while disappointed investors foot the bill.
>
> […]
>
> We estimate literally 100% of OMEX's 17 projects over 16 years were disappointments relative to initial public expectations. We find this consistency incredible. We believe OMEX's executive's core competency resides solely in selling stock to investors based on wild promises that go unfulfilled.
>
> […]
>
> The company has faced increasing UNESCO headwinds for the last several years […][9]

27. Based on the foregoing, the Respondent considers it essential to detail some dates, the formation of some Odyssey subsidiaries and certain actions carried out by Odyssey aimed at obtaining financing to primarily carry out marine exploration projects.

1. Odyssey's subsidiaries

28. In 1997, Odyssey was incorporated under the laws of Nevada, United States, and since its beginnings it has sought to obtain financing through the issuance of equity and debt.[10] The Respondent assumes that this form of financing is due to the difficulties of obtaining traditional loans from banking institutions because the exploration of treasures is an attractive but not profitable activity.

29. The Claimant has mentioned four subsidiary companies that are indirectly related with the Don Diego Project (Project or Don Diego): *i)* Odyssey Marine Exploration Holdings (EUA); *ii)*

---

8 "*The impact of treasure-hunting on submerged archaelogical sites*", UNESCO (2016), pp. 3 and 13. **R-0005.**

9 Meson Capital Report, pp. 3, 12, 22. **R-006.**

10 *See* **C-0033**. Prior to the incorporation of Odyssey, some of the Claimant's founders incorporated Seahawk Deep, a Company also dedicated to "treasure hunting" activities that has also faced legal proceedings and has been involved in scandals. Meson Capital Partners Report, pp. 9-10. **R-0006.**

Odyssey Marine Enterprise (Bahamas); *iii)* Oceanica Resources (Panamá) and *iv)* Exploraciones Oceánicas o ExO (México).[11] In that regard, it is important to open a parenthesis to explain two issues. *First*, ExO is the company that holds the concessions. *Second*, the Claimant only has indirect control over ExO, specifically 53.89% of ExO.

30. Like Odyssey, none of these subsidiaries is considered a leading company in the mining sector. Neither subsidiary has participated in a relatively successful mining or treasure hunting project. Also, and based on Odyssey's own stock market information, none of these companies is financially solvent; they are companies dedicated to issuing capital and debt to finance the Claimant as will be detailed further in this Counter Memorial.

2. AHMSA, Mr. Ancira and the Odyssey's commercial partners in the Don Diego Project

31. The Respondent understands that Odyssey has sought to start different marine exploration projects (treasure hunting and minerals) around the world, but none with apparent success.

32. Without capital and without the necessary "*expertise*", the Claimant alleges that it sought to start the Project. However, Odyssey did not have the capacity to start a project to dredge the seabed and to extract phosphate ore, which is why it sought to partner with different companies.

33. One issue to consider is that some of the Claimant's service providers became its business partners. The Respondent is aware that, at least three providers of legal services and legal consultancy services, eventually became business partners of the Claimant.[12] This situation is not normal.

34. It is strange that Hamdan Manzanero and Mr. Fernández de Ceballos, ExO's legal advisors, have a stake in Oceanica Resources, the holding company of Exploraciones Oceánica.[13] It is also unusual that Subsea Minerals, a Company hired by Odyssey to design the Project´s engineering,

---

11 Claimants' Memorial, ¶ 197 y fn. 71. Odyssey's Annual Report 2019 (*Form K*). **C-0190**, p. 137.

12 Specifically the legal firm Hamdan Manzanero ExO's legal advisor and shareholder of Oceanica Resources), Subsea Minerals (advisor in design and engineering and shareholder ofOceanica Resources) and Mr. Diego Fernandez de Ceballos (legal and corporative advisor of ExO and minority shareholder of any Claimant' subsidiary). *See* Oceanica Resources Public deed, May 15, 2020. **R-0007**. **C-0134**, p. 50. Witness Statement of Mr. Claudio Lozano, ¶ 69. **C-0057**, p. 8.

13 Meson Capital Partners Report, pp. 46-47. **R-0006**. **C-0134**, p. 257 ("Its two principal partners are equity investors in the Don Diego project […]").

participates in Oceanica Resources equity.[14] A world leader in marine mining would not carry out this type of corporate scheme. The Respondent infers that these schemes allowed the Claimant to pay for the services of providers through the equity of some subsidiaries.

35. In addition, it is' important to mention two Claimant's partners: Altos Hornos de México, S.A.B. de C.V. (Altos Hornos o AHMSA) and Mr. Alonso Ancira. Starting in 2014, the Claimant began negotiations with Altos Hornos de México (AHMSA), one of the largest companies in Mexico focused on steel production, in order to find a new commercial partner and financing.[15]

36. In turn, AHMSA has three subsidiaries, one of them being Minera del Norte, S.A. de C.V. (MINOSA), which is focused on the extraction of steel ore and coal.[16]

37. One of the shareholders, and until a couple of years ago the Chairman of the Board of Directors of AHMSA, is Mr. Alonso Ancira. Mr. Ancira has an economic interest in the Project and as of 2015 he began to act as ExO's spokesperson before SEMARNAT. As will be detailed further, the loans granted to the Claimant by MINOSA and Epsilon have been AHMSA's and Mr. Alonso Ancira's gateway to the Project and Odyssey.

38. As part of Odyssey's obligations to MINOSA, AHMSA participates in the Claimant's corporate activities. As an example, AHMSA has a Board of Directors comprised of various members, one of them being Mr. Juan R. Elvira, former Ministry of SEMARNAT.[17] In addition to Mr. Elvira, Messrs. John C. Abbott and James Pignatelli, executives and members of the Board of Directors of AHMSA, are also members of the Board of the Claimant.[18]

---

[14] Witness Statement of Mr. Craig Bryson, fn. 1 ("*I am informed that Robert Goodden subsequently acquired a 0.1% investment stake in the Don Diego Project beneficially held through Subsea Minerals Ltd*").

[15] AHMSA's Annual Report 2017, p. 22. **R-0008.**

[16] AHMSA's Annual Report 2017, p. 22. **R-0008.**

[17] Mr. Juan R. Elvira Quezada was the Secretary of SEMARNAT from 2006 to 2012, period in which Mr. Mauricio Limón, legal advisor of ExO, was the Undersecretary of Management for Environmental Protection of SEMARNAT. Claimant's Memorial, ¶ 92. AHMSA's anual report 2017, p. 22. **R-0008. C-0098**, p. 3.

[18] Schedule 14 of Odyssey, 2016, pp.12-13. **C-0190**, p. 76. AHMSA's Annual Report 2017, p. 92. **R-0008.**

39. AHMSA and Mr. Ancira are not exempt from political and legal scandals, such as the sale of Agro Nitrogenados to the Pemex company.[19] The company has not been listed again on the Mexican Stock Exchange and on the NYSE due to suspension of payments in favor of creditors.[20]

40. Similarly, it has been reported that Mr. Ancira is being investigated by the FGR for possible crimes of corruption and transactions involving resources derived from illicit sources (i.e., money laundering).[21] In 2019, Mr. Ancira was arrested in Spain and is currently in preventive detention in Mexico City after being extradited.[22] Recently, AHMSA announced that it seeks to pay US$ 200 million to the Mexican State to compensate the patrimonial damage caused, as well as the departure of Mr. Ancira from AHMSA.[23]

41. Taking a step back, in 2015 and 2016, the Claimant celebrated the incorporation of MINOSA and Mr. Ancira as Odyssey's business partners and their participation in Don Diego. In the words of Messrs. Gordon and Stemm:

> We are looking forward to working with the MINOSA team as we build the growth potential of Odyssey. During the time that we have been working on this transaction, we have come to gain great respect for the depth of expertise and resources available through their team.
>
> […]
>
> The Odyssey management team has been working closely with the MINOSA team throughout the past year," said Mark Gordon, Odyssey's chief executive officer. "Although the initial closing of the SPA has taken longer than originally contemplated due to the extended environmental approval process for the Oceanica project, the continued assistance provided by MINOSA and this recent agreement with Epsilon reinforces our

---

[19] AHMSA's Annual Report 2017, p. 22. **R-0008.** On January 26, 2017, the Superior Auditor of the Federation (ASF) issued an opinion on an audit on the purchase of Agro Nitrogenados. Part of its conclusions were as follows: "The ascquistion of the fertilizer facility was performed without valuating all the conditions of the assets, because, in accordance with Pemex: "the seller was against it because he would lose the security of the assets ….". Regarding this, it needs to be pointed out that the facility has 14 years without operations and in the business usual practice it's not normal to provide securities to assets with such antiquity and without operations […] In conclusion, the ascquistion of the the fertilizer plant was not executed under the best price conditions and quality"). January 26,2017 ASF opinion, p. 28. **R-0009.**

[20] AHMSA's Annual Report 2017, pp. 80-81. **R-0008.**

[21] Witness Statement of Mr Mark Gordon, fn 2.

[22] El Universal, *Dan prisión preventiva al empresario Alonso Ancira por caso Agro Nitrogenados*, 4 February 2021. **R-0010.** El Financiero, *Alonso Ancira arriba a México tras ser extraditado desde España*, 3 February 2021. **R-0011.**

[23] *See* also, Morning press conference from National Palace, Friday December 11, 2020. President AMLO, minutes 25 to 50. Available at: https://www.youtube.com/watch?v=jp0nUkUhR_w

> belief that MINOSA is the right partner for Odyssey's offshore mineral exploration business.
>
> […]
>
> We continue to be pleased with the level of support we are receiving from MINOSA and view the recent notification from Epsilon Acquisitions of their intent to convert $3 million of debt owed by Odyssey into Odyssey equity very positively." Epsilon is an investment vehicle controlled by Mr. Alonso Ancira, who is the chairman of MINOSA's parent company, AHMSA.
>
> […]
>
> The recent transaction with Epsilon Acquisitions LLC, an affiliate of MINOSA, to convert $3 million in Odyssey debt to Epsilon into Odyssey common stock at $5.00 per share, made them one of the largest Odyssey stockholders and further aligns the interests of Odyssey and MINOSA. We continue to be pleased with the level of support we are receiving from MINOSA.[24]

42. The relationship between AHMSA and the Claimant is so close [redacted] participated in Don Diego's evaluation.[25] [redacted] cited several times in the Claimant's Memorial, indicates the enthusiasm that existed for AHMSA's participation in the Project's operations:

> [redacted][26]

43. The Respondent understands that Odyssey aspired to commercialize phosphate rock in Mexico due to the "strategic partnership" developed in cooperation with AHMSA.[27] Undoubtedly,

---

[24] Odyssey's press release, March 13, 2015. **R-0012.** Odyssey's press release, March 22, 2016. **R-0013.** Odyssey's press release, March 10, 2017. **R-0014.** Odyssey statement on first quarter 2017 results, May 11, 2017. **R-0015.**

[25] Witness Statement of Mr. Craig Bryson, ¶ 185 ("*One of AHMSA's investors,* [redacted] *asked for an updated business plan that incorporated this new configuration and lined up production targets and pricing assumptions with commercial market opportunities"*).

[26] [redacted] **C-0134**.

[27] [redacted] Witness Statement of Mr. John Longley, ¶21. Witness Statement of Mr. Mark Gordon, ¶66.

this aspiration or expectation was generated by AHMSA, Mr. Ancira and the directors of Odyssey themselves. This is possibly the reason why, as of 2015, Mr. Ancira began to be ExO's main spokesperson before SEMARNAT.[28]

3. Financing acquired for the Don Diego Project

44. Odyssey is a company that subsists thanks to financial leverage backed by the issuance of equity. This situation has led to several companies acquiring equity in some Odyssey subsidiaries, *e.g.*, in Oceanica Resources.

45. In 2019, the Claimant had more than US$ 34 million in debt with different creditors, some of which obtained an equity interest in Odyssey subsidiaries.[29] In addition, the Claimant has had several years of net losses and has confirmed that it will continue to do so.[30] In 2015, Odyssey reported that the accumulated debt could lead to an auction of the company's assets:

> We have pledged certain assets, such as equipment and shares of subsidiaries as collateral under our loan agreements. Some suppliers have the ability to seize some of our assets if we do not make timely payments for the services, supplies, or equipment that they have provided to us. If we were unable to make payments on these obligations, the lender or supplier may seize the asset or force the sale of the asset.[31]

46. Furthermore, since 2016 the Claimant has reported that some company's assets and profits have been assigned or pledged to its lending creditors:

> Our consolidated non-restricted cash balance at December 31, 2015 was $2.2 million which is insufficient to support operations through the end of 2016. We have a working capital deficit at December 31, 2015 of $21.1 million. Our largest loan of $14.75 million from MINOSA has a maturity date of March 18, 2017. **We sold a substantial part of our assets to Monaco and its affiliates on December 10, 2015 and we have pledged the majority of our remaining assets to MINOSA, and its affiliates, and to Monaco, leaving us with few opportunities to raise additional funds from our balance sheet** […][32]

---

[28] Witness Statement of Mr. Claudio Lozano, ¶¶ 40-43, 53, 65-67, 74-75. Witness Statement of Mr. Mark Gordon, ¶¶ 70, 73, 79, 83.

[29] Odyssey's Annual Report 2019 (*Form K*), p. 50. **C-0190**.

[30] Odyssey Annual Report 2019 (Form K) ("We have experienced several years of net losses and may continue to do so […]"), p. 72. **C-0190**.

[31] Odyssey Annual Report 2015 (*Form K*), p. 13. **R-0016.**

[32] *See* Odyssey Annual Report 2015 (*Form K*), p. 24, **R-0016** [added emphasis]. *See* also Odyssey's Annual Report (*Form K*), p. 27, **R-0017** and Odyssey Annual Report (*Form K*), p. 28. **C-0190**.

47. The Respondent will further explain generally the financing of the Claimant given its relevance, this being part of the reason why the Claimant only has 53.89% of the equity of Oceanica Resources, ExO's holding company.[33]

a. The Mako Resources financing

48. On February 2013, the Claimant, through Odyssey Marine Enterprises, sold shares (known in Panama as "cuotas") of Oceanica Resources to Mako Resources. With that, Odyssey obtained a loan of US$ 27.5 million and sold 31% of Oceanica Resources, which was materialized in a Purchase Option Agreement (*Unit Option Agreement*).[34]

49. The Respondent understands that in March 2015, the Claimant sought to settle its debts through the issuance of 4 million of Oceanica Resources cuotas granted in favor of Mako Resources.[35]

50. The Claimant has not only issued equity from subsidiaries in order to pay for the services of certain providers (*e.g.*, Hamdan Manzanero and Subsea Minerals), but also, this practice has been used to pay off loans.

b. The Monaco Financial LLC financing

51. On August 2014, the Claimant concluded a loan agreement with Monaco Financial, LLC (Monaco), "marketing partner" of Odyssey and coin dealer.[36] The loan has been restructured several times. Pursuant to the agreed terms, Monaco had –or has– the possibility of converting all or part of the loan balance into cuotas of Oceanica Resources under the control of Odyssey, up to an amount of shares with a value of US$10 million.[37]

---

[33] The respondent reserves its right to request documents in this regard at the appropriate procedural moment.

[34] Odyssey Annual Report 2013 (*Form K*) de Odyssey, pp. 11, 23, 72. **R-0004.** Report Meson Capital, p. 40. **R-0006.**

[35] Odyssey Annual Report 2015 (Form K) de Odyssey, pp. 317 y 335. **R-0016.** ("*In three equity transactions in 2013 and in exchange for $27.5 million, Odyssey sold 31% of its equity stake in Oceanica to Mako Resources, LLC, an independent financial investor group*.")

[36] 2019 (*Form K*) de Odyssey, p. 6. **C-0190**. Odyssey Annual Report 2014 (*Form K*) de Odyssey, p. 22. **R-0018**.

[37] Odyssey Annual Report 2019 (*Form K*). **C-0190**, p. 6. ("In August 2014, we entered into a loan agreement with Monaco Financial, LLC, a marketing partner. Under terms of that agreement, Monaco may convert all or part of the loan balance into Oceanica shares held by us to purchase Oceanica shares from us at a pre-defined price (See NOTE H). This loan was amended in December 2015 and again in March 2016, extending the maturity date of the

52. In addition, in 2018 Odyssey sold assets to Monaco with costs of approximately US$4.6 million. Among the assets sold to Monaco are the Sunken Ship Database and a Research Library.[38]

c. The AHMSA MINOSA financing

53. In 2015, Odyssey's finances were troubled and the company decided to reduce its expenses and seek new forms of financing. To this end, the Claimant began negotiations with MINOSA.[39]

54. Initially, MINOSA did not accept Odyssey's proposals due to its financial status.[40] After months of negotiations, on March 11, 2015, MINOSA, Penelope Mining LLC (a subsidiary of MINOSA) and Odyssey entered into a Share Purchase Agreement, backed by the pledge on cuotas from Oceanica Resources. Through this contract, MINOSA granted a loan of US$ 14.75 million to Odyssey.[41] The MINOSA loan has been modified on several occasions, which is relevant because it demonstrates the Claimant's inability to obtain financing through more conventional or traditional channels.[42]

55. Indeed, it is unusual that one of the obligations adopted by the Claimant vis-à-vis MINOSA is the call option that MINOSA has to acquire 54% of Oceanica Resources for US$ 40 million.[43] Furthermore, the Purchase Agreement, the pledge of cuotas and the participation of MINOSA in the Claimant's activities are subject to different conditions by Odyssey, apparently remarkably favorable for MINOSA.[44] As can be observed, there is an intimate commercial relationship between AHMSA-MINOSA and the Claimant.

---

loan to April 1, 2018 and allowing Monaco to retain the call option on the $10.0 million worth of Oceanica shares held by Odyssey until April 1, 2018").

38 Odyssey Annual Report 2015 (*Form K*), pp. 5, 48, 50. **R-0016.**

39 Odyssey Annual Report2015 (*Form K*), p. 51. **R-0016.**

40 Odyssey Annual Report 2015 (*Form K*), p. 55. ("[…] considering MINOSA's view of the Company's financial condition, MINOSA would no longer be willing to proceed with the transaction as then contemplated, but MINOSA would be willing to provide debtor-in-possession financing for the purposes of keeping the Company's estate running and developing the Oceanica business, but not the Company's other activities […]"). **R-0016**

41 Odyssey Annual Report 2019 (*Form K*) de Odyssey, pp. 6, 20. **C-0190.**

42 Odyssey Annual Report 2015 (*Form K*) de Odyssey, p. 57. **R-0016.**

43 Odyssey Annual Report 2019 (*Form K*) de Odyssey, p. 50. **C-0190**.

44 ("The equity financing is subject to the satisfaction of certain conditions, including the approval of our stockholders which occurred on June 9, 2015, and MINOSA and Penelope are currently under no obligation to make the preferred share equity investments"), p. 28. **C-0190**

d. The Epsilon Acquisitions LLC financing

56. On March 18, 2016, Odyssey and Epsilon Acquisitions LLC (Epsilon) entered into a Purchase Agreement by which the Claimant has obtained a loan of more than US$ 6 million.[45] Epsilon loans were also backed by pledges on cuotas from Oceanica Resources.[46] The following statement from Mr. Gordon, CEO of Odyssey, is relevant:

> We are continuing to work closely with Minera del Norte S.A. de c.v. (MINOSA) with whom we have an investment agreement for the potential purchase of new equity securities that would represent a majority of the equity in our company. In addition, Epsilon Acquisitions LLC, which is an affiliate of MINOSA, recently converted $3 million in indebtedness we owed to Epsilon into Odyssey common stock at $5.00 per share, making them one of the largest Odyssey stockholders and further aligning the interests of Odyssey and MINOSA. [47]

57. Epsilon is an investment vehicle of Mr. Alonso Ancira, situation that also demonstrates Odyssey's close relationship with AHMSA and Mr. Ancira.

e. The Poplar Drumcliffe financing

58. As informed by the Claimant, on June 14, 2019, the Claimant, ExO and Poplar Falls LLC (Poplar Falls) entered into an International Claims Enforcement Agreement (or Claims Agreement).[48] Poplar Falls is a subsidiary company of Drumcliffe, which is a firm dedicated to financing litigation and disputes.

59. Essentially, through the Claims Agreement, Odyssey obtained financing to initiate this investment arbitration. As of December 31, 2019, the financing received by the Claimant amounted to US$ 3 million and the agreed limit amount was US$ 6.5 million.[49]

60. On January 31, 2020, Odyssey and Poplar entered into an agreement amending the Claims Agreement. Thus, the Claimant received additional financing of US$ 2.2 million. The Respondent understands that some of the obligations adopted by Odyssey vis-à-vis Poplar are the following:

---

45 Odyssey Annual Report 2019 (*Form K*) de Odyssey, pp. 53 y 55. **C-0190**.

46 Odyssey Annual Report 2016 (*Form K*) de Odyssey, p. 18. **R-0017.**

47 Schedule 14A 2017 Odyssey, p. 4. **R-0019.**

48 Odyssey Annual Report (*Form K*) de Odyssey, p. 59. **C-0190**. Comunicación del 4 de diciembre de 2020 de la Demandada. **R-0020.**

49 Odyssey Annual Report 2019 (*Form K*), pp. 59. **C-0190**.

> A warrant was issued to purchase our common stock which is exercisable for a period of five years beginning on the earlier of (a) the date on which the Claimholder ceases the Subject Claim for any reason other than a full and final arbitral award against the Claimholder or a full and final monetary settlement of the claims or (b) the date on which Proceeds are received and deposited into escrow. The exercise price per share is $3.99, and the Funder can exercise the warrant to purchase the number of share of our common stock equal to the dollar amount of Arbitration Support Funds provided to us pursuant to the Restated Agreement divided by the exercise price per share (subject to customary adjustments and limitations) […][50] [Emphases added]

61. Based on the aforementioned, Poplar has the possibility to acquire shares in Odyssey (or a subsidiary, such as Oceanica Resources) in the event that the Claimant breaches the Claims Agreement.

62. In addition, on December 21, 2020, the Claimant disclosed that it received additional financing of US$10 million from Poplar.[51] The Respondent reserves the right to request the production of documents related to this financing at the appropriate procedural moment.

63. All this financing, as well as the close relationship with AMHSA and Mr. Ancira, reveal the lack of solidity and financial and economic viability of Odyssey, as an investment company.

B. The mining industry for the extraction of phosphate ore

64. The extraction of phosphate from the seabed is a controversial activity. One fact that cannot be disputed by the Claimant is that this activity has a real impact on the environment and the sea floor. The dispute arises due to the level of impact on the environment that a State could accept when evaluating a project. It is also common that applicants or companies seeking an environmental authorization minimize the impact, and present arguments to justify it through the adoption of mitigation measures. However, it for the State to analyze each project, according to its own characteristics and particular circumstances, and determine the level of environmental impact that could be legally acceptable. In that assessment, the environmental authority is obliged to strictly observe the national law regarding the protection of the environment and natural resources, as happened in the present case.

65. Mexico is not the only State that has acted in a measured manner when authorizing seabed dredging projects for the purpose of extracting phosphate. Countries such as New Zealand and

---

50 Odyssey Annual Report 2019 (*Form K*), p. 61. [added emphasis]. **C-0190**.

51 Odyssey's communication, December 21, 2020. **R-0021.**

Namibia have chosen not to authorize these projects or, where appropriate, have decided to suspend them.[52] Dredging a specific area of the seabed for 24 hours, seven days a week and for 50 years without a doubt has a significant impact on the environment. Even some of the most advanced projects in the field (known as Chatam Ridge and Sandpiper) have not been able to obtain the necessary environmental permits to start operations.[53]

66. As we have indicated, the Respondent does not expect this arbitration to be a technical or judicial review procedure on what the Mexican authorities and courts have ruled. The Respondent also does not consider that an investor-State arbitration is the appropriate forum for scientific discussions on such controversial aspects as the impact on the environment, the implications for marine species and their habitat, and the impact on the marine ecosystem, consequence of activities marine mining. However, the Respondent will make certain clarifications to reply to certain aspects stated by the Claimant in the Claimant's Memorial.

67. The main source of phosphate is phosphate rock sediment and, in general terms, it is a non-renewable natural resource that contains one or more phosphate minerals and constitutes the raw material for the production of phosphate concentrate, used for the production of fertilizers and feed supplements for animals.[54]

68. As WGM, the Respondent's mining industry expert, indicates, one of the sources of phosphate is the offshore deposits or deposits that exist around the world, including some in Mexico. However, none of these deposits has commercial production due to the environmental impact that extraction activities can produce and the high costs involved in implementing projects of this nature.[55]

69. Alongside with Brazil, Mexico is indeed one of the Latin American countries that imports the most phosphate.[56]

---

52 *Ver* WGM Expert Report, ¶ 22.

53 WGM Expert Report, ¶ 22.

54 WGM Expert Report, ¶ 16. **C-0055**, p. 7. Claimants' Memorial, ¶ 26.

55 WGM Expert Report, ¶ 21.

56 WGM Expert Report, ¶¶ 36-37. **C-0055**, p. 4.

70. Generally speaking, the only relevant phosphate producer in Mexico is Fertinal, a company that was acquired recently by Pemex.[57] Fertinal does not conduct marine mining activities, but through subsidiaries –including one known as Rofomex– it conducts exploration and exploitation activities of phosphorite ore in Baja California Sur.[58]

71. Don Diego has not been the only project in Mexico that has sought to extract phosphate rock from the Mexican seafloor. In 2010 and 2012, Fosforitas del Pacífico and Phosmex, respectively, obtained concessions for the exploration and exploitation of phosphate mineral, precisely in the Gulf of Ulloa.[59] None of these projects have started operations. The fact that the Claimant fails to refer to these projects is relevant.

C. The Don Diego Project

72. The Respondent does not consider that investment arbitration is the appropriate way to reassess or reconsider technical aspects submitted for consideration by national authorities, much less when dealing with the protection of the environment and natural resources of a sovereign State. As will be explained in this Counter Memorial, the Respondent considers it essential that the Tribunal grants deference to the decisions issued by the DGIRA. Notwithstanding, the Respondent considers it necessary to make four clarifications in relation to the Don Diego project that will make clear the reasons why the project was not feasible for an inexperienced company, nor was it legally feasible from the point of view of environmental protection. and the preservation of non-renewable natural resources.

73. *First,* it is impossible to state that the technology to be implemented by the Claimant (*e.g*, the "eco-tube" or the "Trailing Suction Hopper Dredger") would not affect the environment and the species of the concession area. The Project sought to implement new production concepts that technologically have not been proven, comparatively, in conventional phosphate extraction projects.[60] The documentation presented by ExO in the EIA Procedure of the MIA 2014 shows that a large part of the Project was based solely on bibliographic studies and did not have precise or accurate information on the dredging plan.[61]

---

57 Claimant's Memorial, ¶ 34.

58 *See* **C-0008**, p. 210.

59 Technical opinión of SEMARNAT's Advisory Council, November 4, 2014, p. 6. **R-0022.**

60 WGM Expert Report, ¶ 85.

61 Additional information submitted by ExO before DGIRA on May 26, 2015, pp. 16 y 31. **R-0023.**

74. *Second*, Odyssey is a company whose existence depended mainly on financing, it did not have the infrastructure or expertise and, on the contrary, it lacked the necessary resources to start a project like Don Diego. Although the Claimant does not mention it literally, Odyssey apparently planned to outsource a wide range of services to get the Project underway. An example of this are the services that Odyssey sought to ensure for the charter of the Discovery vessel in charge of carrying out explorations and sonar studies in the Gulf of Ulloa (owned by Hays Ships Ltd.), the performance of oceanic exploration (in charge of Neptune Minerals, Inc.) and seafloor dredging activities (by Bosaklis).[62] None of these activities would be performed by Odyssey, which means that it would only be dedicated to managing the Don Diego project.

75. The risk of causing damage to the environment is obviously greater when the operation of an industrial project is conducted by a company without experience and without the necessary financial resources to compensate for the damage.

76. *Third*, notwithstanding the impact on the environment that Don Diego would have caused, it is totally speculative to affirm that the phosphate deposit that exists in the ExO concession area "is one of the largest in the world".[63] There is no certainty that Odyssey would find the amount of phosphate ore it had projected. It does not go unnoticed that the discovery of the Project's phosphate deposit is merely bibliographic, and specifically the source is a dissertation from the 1960's called "D'Anglejan-Chatillon".[64]

77. *Fourth*, there is also no certainty that Odyssey would have been able to commercialize the phosphate mineral in Mexican and international markets as it stated.[65]

78. Regarding the third specification, the Arbitral Tribunal must take into consideration that a mining project must comply with a series of stages in order to be implemented. Based on the analysis conducted by WGM, these stages can be classified as follows: *i) early exploration*; *ii) advanced exploration*; *iii) scoping studies* or *preliminary economic assessment*; *iv) preliminary*

---

62 Furthermore, t is strange that Odyssey sought to pay for the services of subcontractors with shares or participations in the equity of Claimant's subsidiaries. *See* Witness statement of Mr. Mark Gordon, ¶¶ 20-25. *See* also **C-0134**, p. 117.

63 Claimant's Memorial, ¶ 57.

64 Claimant's Memorial, ¶ 23. Witness statement of Mr. Oppermann, ¶ 15.

65 Expert Report of WGM, ¶¶ 95-96.

feasibility study; *v) feasibility study*; *vi) financing, construction and operations or "EPC"* and *vii)* closure.[66]

79. WGM has concluded that Don Diego Project was "just a bit more than an initial exploration project",[67] *i.e.*, it did not even reach an advanced exploration stage. WGM has also concluded that [redacted] cannot be considered a preliminary economic analysis.[68] The following WGM consideration is especially relevant:

> As shown, the development of a mining project involves a series of steps and there is no certainty that it will successfully progress through each stage. To put this into context, fewer than 1 in 10,000 early exploration projects become an operational mine.[69] Relatively few exploration projects make it to the feasibility study stage, and many feasibility study stage projects do not become operational mines. For many phosphate projects, the reason is primarily due to characteristics of the ore, competition for financing, competition with other projects and changes in market conditions. If the company decides not to or is unable to proceed, for whatever reason, the entire feasibility, permitting, and financing phases may need to start over or be updated, and this can occur many times. Advancing an initial discovery to the point of a defined mineral resource can be a very long process. Advancing a project from the mineral resource definition stage through to actual production typically averages 7-11 years. Because of market complexities, phosphate deposits are subject to other factors which may further impede their development.
>
> […]
>
> In WGM's opinion, the Don Diego Project as of the Valuation Date was at the Exploration Stage. Exploration Stage projects have insufficient data with respect to mineral resources, market and techno-economic factors to enable application of discounted cash flow analysis (DCF) techniques for project valuation.[70]

80. Again, the Claimant argues that it discovered "the world's most important sedimentary deposit of phosphate sands off the coast of Baja California Sur in the Gulf of Ulloa" and that 7 million tons of phosphate sands would be extracted of the Gulf of Ulloa, annually.[71] The Respondent seriously questions these two assertions since they are entirely speculative.

---

66 WGM Expert Report ¶ 40.

67 WGM Expert Report, ¶ 114.

68 WGM Expert Report, ¶ 40.

69 Mining Information Kit for Aboriginal Communities, Mineral Exploration, Natural Resources Canada, p. 10 of PDF. **WGM-14**

70 WGM Expert Report, ¶¶ 39 y 56.

71 **C-0002**, p. 24. Claimants' Memorial, ¶¶ 2, 57, 385, 402. **C-0134**, pp. 14-20. Executive summary of the MIA 2014, p. 3. **R-0024.**

81. Regarding the fourth argument –hypothetically supposing that the Project produced the estimated amounts of phosphate sands– there is no evidence that the Claimant's potential clients would purchase phosphate ore at the estimated prices. In the words of WGM:

> No evidence is presented in the CRU report to justify the assumption that Fertinal would be such a substantial customer aside from the comment that Fertinal had high production costs at its San Juan mine and a lower priced third-party sourced material could be financially attractive.
>
> Such an assumption, unsubstantiated by any evidence of discussions between Odyssey and Fertinal indicating potential interest in such an arrangement is pure speculation, and cannot be used to support the market projection […][72]

82. Indeed, there is no indication whatsoever that companies such as Fertinal, Agrium or another company would buy the phosphate ore under the Claimant's projections.[73] As an example, on one hand, the Claimant qualifies Fertinal as an "erratic and unreliable" company.[74] On the other hand, [redacted] with the help of AHMSA, Don Diego's production was designed to supply phosphate ore to a "captive market" formed, inter alia, by Fertinal.[75] The Respondent finds no logic between Odyssey's business aspirations and its claims in this arbitration.

83. Again, the answer to this is simple: Don Diego did not even reach the advanced exploration stage. All that exists are aspirations created by Odyssey's own executives and / or its business partners.

D. The Gulf of Ulloa

84. The Claimant sought to start the Project in Mexico's ZEE, inside the Gulf of Ulloa, located in the western coast of Baja California Sur, Mexico. The Claimant ignored several relevant aspects regarding the place where it sought to develop the Project, which the Respondent is in need to explain.

85. The Gulf of Ulloa is a place of extreme importance for Mexico and the world. It is not a protected natural area *per se*, however, it is surrounded by two protected natural areas called "*Las*

---

72 WGM Expert Report, ¶¶ 95-96.

73 *See* **C-0134**, p. 14. Mr. Bryson's Witness Statement, ¶¶ 148 y 153. Mr. Longley's Witness Statement, ¶¶ 13 y 21. Mr. Mark Gordon's Witness Statement, ¶¶ 60-64.

74 Claimants' Memorial, ¶ 34.

75 [redacted] **C-0134**.

Islas del Pacífico" and "*El Vizcaíno*".[76] Additionally, the "*Bahía Magdalena*" is located in the same area, which is an important feeding area for four species of endangered sea turtles and a breeding area for the gray whale.[77]

86. The regulation on environmental impact establishes the figure of "environmental system", which is a finite space defined based on the interactions between the abiotic, biotic and socio-economic environments of the region where it is intended to establish a project, generally formed by a set of ecosystems and within which an analysis of the problems, restrictions and environmental and exploitation potentialities will be applied.[78] The Don Diego Regional Environmental System (SAR) was far from *Las Islas del Pacífico*, Bahía Magdalena, and there was a discussion regarding a possible "overlaping" between the Project area and a portion of "*El Vizcaíno*".[79]

87. *El Vizcaíno* is formed by lagoons, for example "*Ojo de Liebre*" and "*San Ignacio*", inter alia. *El Vizcaíno* is not only the biggest protected natural area in Mexico, the Biologist Benito Bermude, public official of the CONANP, a Respondent's witness, and a person with over 25 years of expertise on the developing and implementation of conservation programs for protected natural areas and the protection of endangered species, explains that *El Vizcaíno* is considered a "biosphere reserve" as well, and, since 1993, it is registered as a World Heritage Site at the UNESCO World Heritage Center.[80] Additionally, the CONABIO has classified *El Vizcaíno, San*

---

[76] Decree by which the "El Vizcaíno" Biosphere Reserve is declared, located in the Municipality of Mulegé, B. C. S., published on December 5, 1988 in the DOF. **R0025.** Decree by which it is declared Protected Natural Area, with biosphere reserve status, the region known as Pacific Islands of the Baja California Peninsula, published on December 5, 2016 in the DOF. **R-0026.**

[77] **C-0009**, p. 74. MIA 2014, Chapter IV, pp. 28. **R-0027.**

[78] *See* Regional MIA Guide, DGIRA, p. 52. **R-0028.** As an observation, the Claimant offered as evidence a guide prepared by the DGIRA for the presentation of environmental impact statements in a particular modality (**C-0014**), which was not applicable to Don Diego. *See* Memorial, fn. 181.

[79] *See* **C-0009**, pp. 70-75. MIA 2014, Chapter IV, pp. 17, 26. **R-0027.** CONANP's technical opinion on November 25, 2015. **C-0006**, p. 8.

[80] A biosphere reserve is a type of protected natural area representative of one or more ecosystems that have not been altered by human action or that need to be preserved or restored, and in which species representative of the national biodiversity, including endemic, threatened or endangered species, inhabit. The activities that alter ecosystems within the "core zones" of biosphere reserves are prohibited. Article 48 of the LGEEPA. **C-0014**. World Natural and Mixed Heritage, Mexico 2012-2018, CONANP, p. 51. p. 107. **R-0029.** *See* **C-0109**, p. 326. Biologist Benito Bermúdez Witness Statement, ¶¶ 1, 13-17.

Ignacio and *Bahía Magdalena* as priority marine regions.[81] As can be seen, there are countless reasons why the Gulf of Ulloa is a unique place in the world and at least three aspects demonstrate it.

88. *First*, the Gulf of Ulloa is part of the gray and blue whale route, and the lagoons that constitue *El Vizcaíno* are recognized as the most important place in the world for the reproduction of the gray whale; this area is even considered a "whaling sanctuary".[82] It is estimated that 90% of the world's gray whales are born in Mexico, which is why the Mexican State considers it very important to take care of the sanctuaries and migration routes of this species.[83] Additionally, the Gulf of Ulloa is a prime area for the cetaceans' feeding and growth.[84]

89. *Second*, the Gulf of Ulloa concentrates a unique population in the world of the *caretta caretta* turtle (also known as "loggerhead", "bighead" or "yellow" turtle). The Gulf of Ulloa has a unique natural phenomenon of its kind. Biologist Bermúdez realizes that the yellow turtle is born in Japan and migrates to Mexico to grow and feed, precisely, in the Gulf of Ulloa. Later, these populations of yellow turtles return to Japanese shores to breed.[85]

---

81 **C-0009**, pp. 73-74. The CONABIO implemented the Priority Marine Regions Program of Mexico with the support of the agency The David and Lucile Packard Foundation (PACKARD), the United States Agency for International Development (USAID), the Mexican Fund for the Conservation of Nature (FMCN) and the World Wide Fund for Nature (WWF). The purpose of the program is to identify coastal and oceanic areas considered a priority due to their high biodiversity, the diversity in the use of their resources and their lack of knowledge about biodiversity. In the same way, threats to the marine environment with the highest incidence or with significant impacts were identified. The program seeks to develop a reference framework to contribute to the conservation and sustained management of oceanic environments that considers the sites with the greatest biodiversity and those of current or potential use in Mexico. **R-0030.** *See* NOM-131 SEMARNAT, p. 1. **R-0031.** Biologist Benito Bermúdez' Witness Statement, ¶¶ 22.

82 World Natural and Mixed Heritage, Mexico 2012-2018, CONANP, p. 51. p. 107. **R-0029.** NOM-131 SEMARNAT ("[…] the gray whale (*Eschrichtius robustus*) breeds only in lagoons on the Pacific coast of Baja California Sur and usually disperses within the Gulf of California […]"). **R-0031**, p. 1.

83 Grey Whale, Mexican by birth, SEMARNAT, September 19, 2018. **R-0032.** Mr. Benito Bermúdez's Witness Statement, ¶¶ 13-17.

84 *See* ExO's additional information of May 26, 2015, p. 83. **R-0023.** Mr. Benito Bermúdez's Witness Statement, ¶¶ 13-17.

85 *See* Second technical opinion of the CIBNOR-IPN, pp. 13-14. **R-0033.** Mr. Benito Bermúdez's Witness Statement, ¶¶ 15 y 22.

90. *Third*, The Gulf of Ulloa is also home to many other marine mammals, such as the bottlenose dolphin, the California sea lion, and the harbor seal, as well as countless species of migratory and breeding birds, and benthic organisms.[86]

91. Unfortunately, some of the species inhabiting the Gulf of Ulloa have been threatened and are even in danger of extinction. The *caretta caretta* turtle is a species classified in danger of extinction and for several years Mexico has made efforts to reduce its mortality. From 2013 to 2015, a binational dialogue took place between Mexico and the United States related to the need to adopt additional measures to protect and reduce the mortality of *caretta caretta* turtles in Mexico.[87] As part of the measures adopted, on April 10, 2015, Mexico established a fishing refuge zone and measures to reduce the possible interaction of fishing with sea turtles in the Gulf of Ulloa.[88]

92. At the national level, according to the General Law on Wildlife and NOM-059, the *caretta caretta* turtle is considered an endangered species and since 2014 it has been part of the list of priority species for conservation.[89] On June 5, 2018, SEMARNAT declared the Gulf of Ulloa as a refuge area for the yellow turtle.[90] The image in Figure 1 is illustrative.

---

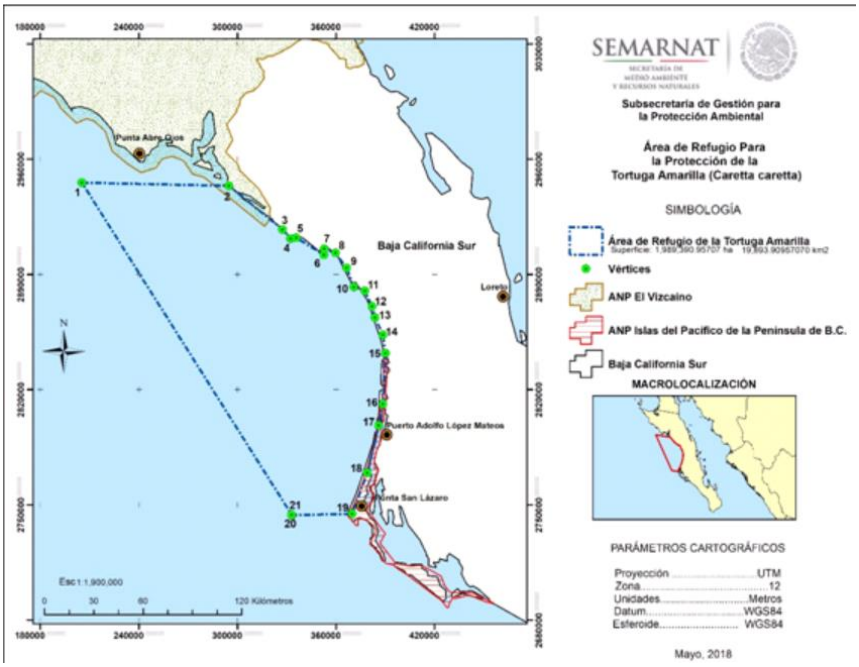
[86] World Natural and Mixed Heritage, Mexico 2012-2018, CONANP, p. 51. p. 108. **R-0029.** *See* Second technical opinion of the CIBNOR-IPN, p. 13. **R-0033.**

[87] In 2013, some non-governmental organizations asked the United States authorities to apply sanctions against Mexico for lack of protection programs for *caretta caretta* turtles. Petition for Pelly Certification and PLMR Action to Halt Loggerhead Sea Turtle Bycatch in Mexico, *Center for Biological Diversity y Turtle Island Restoration Network* of April 30, 2013. **R-0034.** *See* Claimants' Memorial, ¶ 136.

[88] Agreement establishing a fishing refuge zone and measures to reduce the possible interaction of fishing activity and sea turtles of April 10, 2015. **R-0035.** To this day, Mexican authorities, such as the CONANP, carry out and implement programs for the conservation of the *caretta caretta* turtle in Mexico. *See* Action Program for the Conservatio of the Species, Loggerhead turtle, CONANP, 2018. **R-0036**.

[89] In addition to the caretta caretta turtle, other species of cetaceans, including the gray and blue whale, are on the list of priority species and populations. Agreement disclosing the list of priority species of March 5, 2014. **R-0037.** NOM-059, p. 77. **R-0038.** Article 58, section a, of the General Law on Wildlife. **R-0039.**

[90] Agreement establishing the refuge area for the loggerhead turtle (*Caretta caretta*) in the Gulf of Ulloa, Baja California Sur. **R-0040.**



1. Image from the Agreement establishing the refuge area for the loggerhead turtle. R-0040.

93. At the international level, the *caretta caretta* turtle is included in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and in the red list of the International Union for the Conservation of the Nature.[91]

94. Biologist Bermúdez also explains that in June, 2015, the 7th Conference of members of the Inter-American Convention for the Protection and Conservation of the Sea Turtles (CIT) was held and some of the commitments adopted consisted on working in a coordinated manner to implement recovery plans and common strategies to reduce any impact that affect yellow turtle populations.[92]

95. As can be seen, the Respondent has made many efforts to preserve the Gulf of Ulloa and surrounding areas, as well as the species inhabiting the area.

96. At first glance, the Gulf of Ulloa's wealth is evident, and despite the Respondent's efforts to protect it, it is a delicate area sensible to impacts caused by economic activities such as fishing, salt extraction, and tourism.[93] During the environmental impact assessment procedures initiated

---

91 See Mr. Sergio Flores-Ramírez' expert report ¶ 88. Convention on International Trade in Endangered Species of Wild Fauna and Flora. **R-0041.** *See Red List* de la *International Union for Conservation of Nature.* **R-0042.**

92 Biologist Benito Bermúdez's Witness Statement, ¶ 23.

93 World Natural and Mixed Heritage, Mexico 2012-2018, CONANP, p. 51. p. 108. **R-0029.**

with MIA 2014 and MIA 2015, national and international authorities expressed their concerns about the Project. The reason is obvious. A mining project that sought to dredge the seabed 52 weeks a year, seven days a week, 24 hours a day, over 50 years, would affect the Gulf of Ulloa in one way or another.[94]

E. Fishing in the Gulf of Ulloa

97. The fishing activity carried out in the Gulf of Ulloa is a very important economic source for the inhabitants of the zone and, from the beginning of the Project, fishermen's organizations and cooperative societies expressed their concerns before the environmental authorities. Even the public consultations of the MIA 2014 and MIA 2015 were carried out at the request of fishermen from the municipality of Comondú.

98. Baja California Sur is one of the Mexican federal states with the highest fishing production and, at the same time, this activity can increase the *caretta caretta* turtles' mortality. This situation has caused an environmental conflict in the area. The Mexican authorities have implemented a series of measures in the Gulf of Ulloa to mitigate the impact of protected species by fishing activity.

99. In addition to the declaration of April 10, 2015, that established the Gulf of Ulloa as a fishing refuge area, on June 23, 2016, SAGARPA implemented new measures to reduce the possible interaction of fishing with sea turtles.[95]

100. It is important to consider that, depending on the type of fishing to be carried out, it is necessary to obtain a concession or a fishing permit. To carry out commercial fishing activities, it is necessary to obtain a concession from SAGARPA. The Gulf of Ulloa is subdivided into six fishing zones and there are various fishermen's organizations and cooperative societies.[96]

---

94 *See* **C-0108**, p. 19.

95 Agreement establishing a fishing refuge zone and measures to reduce the possible interaction of fishing activity and sea turtles in the western coast of Baja California Sur, published on June 23, 2016 in the DOF. **C-0010.** *See* Agreement that extends the validity of the similar one that establishes the fishing refuge zone and measures to reduce the possible interaction of fishing activity and sea turtles in the western coast of Baja California Sur, published on June 23, 2016 in the DOF. **C-0011.**

96 Communication of the Fishing Societies of Baja California, of May 28, 2015. **R-0043.**

101. The Claimant and its witnesses argue that the Project would not affect the local fishermen, since it would be carried out in a place "historically" avoided by fishermen.[97] The reality is different:

> That the area where said project would be located, is inside the quadrant where it was established the aforementioned fishing refuge zone, thus, the concession granted for the development of the project overlaps with the concessions granted to the Puerto Chale Cooperative Society for Fisheries S.C.L. and La Poza Fishermen's Cooperative Society for Fisheries S.C.L. […] the developing of the mining project inside the fishing refuge zone is deemed as incongruous and disturbing, due to the deficiencies in their environmental impact statement, which will be explain later in this document […] g) Affectation to more than 5000 fishermen within the zone and the families which depend on them.[98]

102. The fishermen's concern is not minor. Some environmental organizations estimate that more than 40% of Baja California Sur's fishing takes place in the Gulf of Ulloa.[99]

103. The discussion was due, in part, to the fact that, since the beginning, ExO indicated that the Project would be developed outside of concession areas for fishing.[100] However, several fishermen's organizations said the opposite, pointing out that, in reality, ExO ignored the areas granted by concession for such activity.[101]

104. On November 3, 2014, the Baja California Sur Congress, at the request of local fishermen, issued a communication to SEMARNAT in which it reported that the Baja California Sur Congress opposed the Don Diego project, inter alia, due to the impact it would cause on the region's fisheries.[102]

105. Based on that, it is evident that the citizens and fishermen's organizations of Comondú, as well as state authorities and environmental organizations, were concerned about the environmental impacts that the Project would cause. Despite this, it is important to point out that the citizens and fishermen's organizations participated in the EIA Procedures before the DGIRA in accordance

---

97 Claimants' Memorial, ¶ 107.

98 Communication of the Fishing Societies of Baja California, of May 28, 2015, pp. 2-3. **R-0043.**

99 CEMDA, Proposed Mining project could extract 350 million tons of phosphate sand from the seabed in BCS, October 7, 2014. **R-0044.**

100 MIA 2014, Chapter 2, pp-23-70. **R-0027.**

101 FEDECOOP's Communication of October 31, 2014, p. 3. **R-0045.**

102 Baja California Sur Congress' Point of Agreement, of November 3rd, 2014, p. 10. **R-0046.** For a better understanding, a "point of agreement" is a statement made by the Legislative Power in which it invites or recommends to an authority something about political, cultural, economic or social matters that could affect a particular community or group.

with the applicable legal framework. There were no acts of violence against the Claimant, his representatives or the authorities themselves. The citizens, fishermen, authorities and organizations simply exercised their rights by participating in the EIA Procedures.

106. In contrast, the Claimant did carry out questionable acts against inhabitants of the community of Comondú, representatives of fishermen's organizations and local journalists through criminal complaints that were even questioned by international organizations, such as *Article 19*.[103] None of this is mentioned in the Memorial.

F. Mining regulation in Mexico

107. The mining industry is regulated in Mexico through various federal laws, the most important is the Mining Law. In adpuntodition, there are regulatory and administrative provisions and compliance with mandatory provisions or technical regulations, which under Mexican law are known as Mexican Official Standards or "NOMs", focused on standardizing production methods and processes for industrial sector activities, including mining.

108. In order to start up a project such as Don Diego, ExO not only had to comply with the provisions set forth in the Mining Law. Mr. Kunz, Claimant's expert, states that once ExO obtained the AIA from the DGIRA, ExO had to comply with the provisions of the Mining Law, "únicamente requeriría de otros cuatros permisos".[104]

109. Mr. Kunz's analysis failed to consider many other requirements and conditions that the Claimant should have complied with before being able to operate the Project. A project of this nature had to comply with federal, state and municipal permits and authorizations, and comply with multiple legal requirements.

110. According to the analysis prepared by Solcargo and Mr. Rábago, Respondent's experts, Mr. Kunz's assertion that, once the Project was approved by the DGIRA, there would not have been "any other reason to deny those four permits".[105] This is false. The experts of Mexico explains

---

[103] Artículo 19, "*Alerta. Periodista en Baja California Sur es denunciado penalmente por revelar afectaciones al medio ambiente*", 13 March 2015. **R-0047.**

[104] The permits are: i) a permit for exploration and exploitation works and workings under Article 20 of the Mining Law; ii) permit for dredging activities granted by the Secretariat of Navy and the SCT; iii) permit for dumping materials into the sea granted by the Secretariat of Navy and iv) a permit for the discharge of waste water granted by. Expert Report by Mr. Federico Kunz, ¶¶ 9, 22-56.

[105] Mr. Federico Kunz Expert Report, ¶ 10. Solcargo-Rábago Expert Report, ¶¶ 233-246.

that “each of these permits requires compliance with various requirements different from the environmental impact authorization granted by the DGIRA”.[106] These administrative procedures are not mere "formalities", as Claimant’s expert pretends to appear.

111. It is important to point out that, according to Respondent’s Political Constitution of the United Mexican States, the State has direct domain over the mineral substances found within the national territory. In other words, natural resources are property of the Mexican State.[107]

112. Mexico’s Constitution provides that the State has full ownership over all natural resources, including those found on the continental shelf and submarine areas.[108]

1. The mining concession under the mexican legal system

113. Likewise, the Mexican legal system provides a regime for mining concessions. Through the concessions, the Mexican State grants to natural people and legal entities a temporary, right of exclusivity for the exploitation, use and utilisation of mineral resources.[109] A special observation must be made. According to the legal system of the Respondent, mining concession does not confer real rights (“*in rem*”) over the minerals located in the subsoil, nor over the area of the concession.[110]

114. As Solcargo explains, as long as the minerals remain in the subsoil, these continue to be property of the Mexican State and only become part of the concessionaire’s property when the mineral is extracted from the subsoil.[111] That is to say, as long as the mineral is part of a deposit on ground or subsoil of seabed, the Mexican State maintains the direct control over the mineral.

---

106 Solcargo-Rábago Expert Report, ¶ 231.

107 The General Law on National Assets itself established the following in a literal manner: Article 16. The concessions, permits and authorizations on assets subject to the Federation's public domain regime do not create in rem rights; they simply grant, before the administration and without prejudice to third parties, the right to carry out the use or exploitation, in accordance with the rules and conditions established by the laws and the concession, the permit or the corresponding authorization, themselves. (Emphasis added). **R-0048** [Emphasis added]. **R-0048** (quoted by Mr. Kunz, Claimant’s expert as FKB-0003). Solcargo-Rábago Expert Report, ¶¶ 68-71.

108 Article 27 of the Constitution (“[…] The Nation has full ownership over all natural resources of the continental shelf and the seabed and subsoil of the submarine areas of the islands; over all minerals or substances in veins, layers, masses or ore pockets, constituting […] deposits susceptible to be utilized as fertilizers […]). **R-0049.**

109 The administrative concession is the act by means of which an individual receives a grant for the management and exploitation of a public service or the exploitation and use of property owned by the State. Solcargo-Rábago Expert Report, ¶ 67.

110 Solcargo-Rábago Expert Report, ¶ 70.

111 Solcargo-Rábago Expert Report, ¶ 71.

When a mining concessionaire detaches, separates or extracts the mineral, he becomes the owner of that mineral and can give it the destination that he deems appropriate.

115. For a better understanding, an extract of the Solcargo analysis is transcribed:

> […] although Exploraciones Oceánica, S. de R.L. de C.V. ("ExO"), in its capacity as concessionaire, was the only person empowered to extract and take advantage of the minerals located inside the concession area, this does not mean that these minerals, per se, are part of its asstes, nor that ExO had a real right over them, since the appropriation occurs until they leave the subsoil.
>
> 73. To carry out the mining activity, the concession granted by the State is not enough, as it is necessary for ExO to comply with the regulatory requirements, particularly those concerning environmental matters, to be able to carry out their activities. Therefore, without due compliance with these requirements, it is not possible to affirm that ExO, by the mere fact of being the holder of a concession, would necessarily incorporate all the minerals object of said concession to its heritasstesage. [112]

116. Thus, the concessions only grant a temporary right of exclusivity. The Mining Law specifies the rights that mining concessions confer to their holders, among are:

- To perform projects and exploration and exploitation works within covered mining lots;
- To dispose of the mineral products obtained in said lots as a result of the projects and works that are developed during their validity; and
- To dispose of the land within the covered surface, unless they come from another existing mining concession.[113]

117. Based on the aforementioned, three aspects are of particular importance. *First*, mining concessions only grant an exclusive right to exploit minerals for a limited time. *Second*, concessions granted by the Mexican State to ExO did not confer rights in rem over phosphate mineral located in seabed of the Gulf of Ulloa, nor did they confer rights *in rem* over the concession area. *Third*, the utilisation of concessions is bound to comply with applicable regulations, and specifically environmental regulation.

---

112 Solcargo-Rábago Expert Report, ¶¶ 72-73.

113 Article 19, sections I, II y III, of the Mining Law. **R-0050.**

2. ExO mining concessions

118. In accordance with the Mining Law, mexican individuals or legal entities can obtain mining concessions for exploration and exploitation of minerals bound to meeting certain conditions and requirements established in the Mining Law.[114]

119. If the concerned person or company meets the conditions and requirements of the law, the General Directorate of Mines issues in their favour a concession title specifying the "mining lot", which surface is referred as "mining land", and concessionaire will be able to explore for a certain period of time.

120. ExO has three concessions, that for greater clarity are referred to as Don Diego, Don Diego Norte and Don Diego Sur.[115]

Concession	Validity	Extension
240744 (Don Diego)	28/June/12 – 27/June/2062	268,235 Has.
244813 (Don Diego Reduction)	16/February/16 – 27/June/2062	80,050.4546 Has.
242994 (Don Diego Norte)	30/April/2014 – 29/April/2064	14,300 Has.
242995 (Don Diego Sur)		20,425 Has.

121. Contrary to what the Claimant asserts, the Don Diego Norte and Don Diego Sur Concession did not "extend" the Don Diego Concession.[116] The mining regulation does not allow concession extensions, but it does allow a concessionaire to "group" or "unify" neighboring concessions, a right that ExO never enforced.[117] Each concession (Don Diego, Don Diego Sur and Don Diego Norte) is independent even though they are located in nearby areas. Even the Don Diego Norte

114 *See* articles 10, 12 and 16 of Mining Law. **R-0050** (cited by Mr. Kunz, Claimant expert, as FKB-0005).

115 *See* Don Diego Concession, **C-0012**; Don Diego Norte Concession; Don Diego Sur Concession, **C-0092**, and Don Diego Concession Reduction, **C-0013**.

116 Claimant's Memorial, fn. 74, p. 20.

117 Article 19 of Mining Law ("Reduce, divide and identify the surface of the lots that they protect, or unify it with other adjoining concessions; […] Group two or more [concessions] […]. **R-0050.**

and Don Diego Sur concessions identify the Don Diego concessioned lot as adjacent and not as if they were part of the same concession area.[118]

122. As can be seen, on June 28, 2012, ExO obtained the Don Diego Concession. Later, on July 30, 2015, ExO requested a considerably significant reduction (approximately 70% of the mining lot) of Don Diego Concession.[119] This situation is unusual and contradicts the assertions of the Claimant.

123. On one hand, Claimant argues that Odyssey discovered the most important sedimentary deposit of phosphate sands in the world.[120] In addition, Odyssey points out that the Project was environmentally sustainable and responsible, that it would not materially impact the flora and fauna of the region, and that there was an "extremely small" possibility of impacting sea animals (*e.g.*, turtles and whales).[121]

124. On the other hand, Claimant has indicated the reason why it reduced Don Diego Concession was because the reduced areas were "less rich in phosphate resources compared to other parts of the Concession".[122] In addition, Claimant has also indicated that it decided to release concession areas to further "move the Project site even farther away from the migration routes of grey whales and coastal foraging areas for sea turtles".[123]

125. The fact that Claimant surrendered 70% of the concession area under Don Diego Concession shows that it is entirely speculative to assert that Claimant discovered the largest deposit of phosphate mineral and undermines the credibility of alleged sustainability of the Project.

126. Likewise, despite the fact ExO has the Concessions, the company is forced to acquire a serie of permits and authorizations to exploit the concession area. In words of Mexico experts: "To

---

118 **C-0092**, pp. 4 and 10.

119 Through Don Diego Concession, ExO acquired mining lots previously franchised to Fosforitas México and Phosmex, which were not exploited. *See* Don Diego Concession Reduction Request. **R-0051.**

120 Claimant's Memorial, ¶ 2.

121 Claimant's Memorial, ¶¶ 4, 17, 107.

122 Claimant's Memorial, ¶ 134. Form 10-K of Odyssey september 16, 2020, **R-0052**, p. 35 ("ExO applied for and was granted additional mining concession areas by the Mexican government. These additional areas are adjacent to the zones with the highest concentration of mineralization in the original mining concession area. ExO also relinquished certain parts of the granted concession areas where the mineral concentration levels were less attractive for mining purposes").

123 Claimant's Memorial, ¶ 42.

carry out the mining activity, the concession granted by the State is not enough, as it is necessary for ExO to comply with the regulatory requirements, particularly those concerning environmental matters, to be able to carry out their activities".[124] The Environmental Impact Authorization (AIA) is one of the most relevant authorizations that a mining concessionaire must have, in accordance with Mexican legislation and regulation, however, it is not the only one. The Concessions punctually indicates this situation in the text of the concession title.[125]

G. The sovereign right of Mexico to regulate the environment and its discretion margin to do so

127. Environmental Law is regulated in Mexico by different norms from different levels of government (federal, local and municipal). In accordance with the principle of "constitutional supremacy", the Constitution is hierarchically the highest legal norm in Mexico.[126]

128. From a general scope, the Constitution includes provisions that are relevant for the protection of the environment and human rights, since it provides that "all authorities, in their areas of competence, are obliged to promote, respect, protect and guarantee Human Rights,".[127] Similarly, the Constitution provides the fundamental right to a healthy environment and empowers and orders the State to guarantee the protection of said right, establishing direct liability for anyone who causes environmental damage or deterioration.[128] Due to this, Respondent is obliged to guarantee the protection of the environment at all times.[129]

129. Article 25 of the Constitution states the following:

> Article 25.- […] Social and private sector enterprises shall be supported and fostered under criteria of social equity, productivity and sustainability, subject to the public interest and

---

124 Solcargo-Rábago Expert Report, ¶ 73.

125 At the bottom of the Concessions, some of the obligations of the concession holders are indicated: "The mining works and works developed under this title may only be carried out with authorization [...] likewise, the holders must comply with the official standards related to the mining-metallurgical industry in terms of safety, ecological balance and environmental protection...". Artícle 28 de la LGEEPA". **C-0014**. *Ver* **C-0012**, **C-0013** y **C-0092**.

126 Solcargo-Rábago Expert Report, ¶ 47.

127 Article 1 of the Constitution. **R-0049.**

128 Article 4 of the Constitution ("Article 4.- […] Everyone has the right to a healthy environment for their development and well-being. The State will guarantee this right. Environmental damage and deterioration will generate responsibility for whoever causes it in terms of what is provided by law […]"). **R-0049**. Under Mexican legal system, fundamental rights are human rights recognized in the Constitution.

129 Solcargo-Rábago Expert Report, ¶¶ 49-50.

> to the use of the productive resources for the general good, preserving them and the environment. […][130]

130. Based on that, protection of the environment is not a matter of interpretation, but one of the constitutional cornerstones of the Respondent. The fact that the Mexican State expressly states that in its supreme law provides clarity about its relevance, as well as the obligation of the Mexican State to support and promote companies, both social and private, as long as said support is not to the detriment of the environment. As Solcargo states, "the conservation of productive resources and environment allows to see the limitations that companies must abide by virtue of the public interest".[131]

131. Article 27 of the Constitution not only establishes the ownership of the Mexican State over natural resources in national territory, but also establishes that the Respondent has the right to regulate natural resources susceptible of appropriation in order to preserve their conservation. Also, Article 27 of the Constitution establishes the following:

> Artículo 27.- […] Consequently, appropriate measures shall be issued to put in order human settlements and to define adequate provisions, reserves and use of land, water and forest. Such measures shall seek construction of infrastructure; planning and regulation of the new settlements and their maintenance, improvement and growth; preservation and restoration of environmental balance; division of large rural estates; collective exploitation and organization of the farming cooperatives; development of the small rural property; stimulation of agriculture, livestock farming, forestry and other economic activities in rural communities; and to avoid destruction of natural resources and damages against property to the detriment of society.[132]

132. Therefore, the Respondent is required to adopt measures for regulate the use and conservation of natural resources, as well as to preserve and restore the ecological balance.

1. Federal laws and the concurrent participation of federal, state and municipal authorities on environmental matters

133. Environmental matters are regulated in three different levels of government.[133] The exercise of attributions in environmental matters corresponds to *i)* the Federation, *ii)* the federal

---

130 Article 25 of the Constitution [Emphasis added]. **R-0049**.

131 Solcargo-Rábago Expert Report, ¶ 58. Article 25 of the Constitution. **R-0049.**

132 Article 27 of the Constitution [Emphasis added]. **R-0049**.

133 Solcargo-Rábago Expert Report, ¶58. Article 25 of the Constitution. **R-0049.**

states (*e.g.*, Baja California Sur); and *iii)* the municipalities (*e.g.*, Comondú). This principle of concurrency is established in the Constitution of Mexico.[134]

134. According to the hierarchy of norms, after the Constitution and international treaties on environmental matters, federal laws are the most important regulations, being the most relevant the General Law of Ecological Balance and Environmental Protection (LGEEPA).[135] The LGEEPA establishes the distribution of competencies and coordination in environmental matters among the different levels of government. Pursuant to the LGEEPA, the federal government, *inter alia*, is responsible for:

- The formulation and conduct of the national environmental policy.
- The regulation of actions for the preservation and restoration of the ecological balance and protection of the environment that are performed in property and areas of federal jurisdiction.
- The attention to matters that affect the ecological balance in the national territory or in the areas subject to the sovereignty and jurisdiction of the nation.
- The issuance of Official Mexican Norms and the monitoring of their compliance in the matters provided for in the LGEEPA.
- The evaluation of environmental impact and, where appropriate, the issuance of corresponding authorizations for various projects or activities, including exploration, exploitation and benefit of minerals and substances reserved to the Federation under Mining Law terms.

---

134 Article 73, section XXIX-G of the Constitution. **R-0049.** *See* article 1 section VIII of the LGEEPA. **C-0014**.

135 Legal framework on environmental matters of the Respondent is broad and specialized. In addition to the LGEEPA, some of the relevant federal laws are: Federal Environmental Responsibility Law; General Law of Sustainable Fishing and Aquaculture; National Waters Law; the General Wildlife Law; Sustainable Rural Development Law, General Law for the Prevention and Comprehensive Management of Waste; Law of Biosafety of Genetically Modified Organisms; General Law on Climate Change, among others. Solcargo-Rábago Expert Report, ¶ 61.

- The regulation of activities related to exploration, exploitation and benefit of minerals, substances and other subsoil resources that belong to the nation, with regard to the effects that such activities may generate on the ecological balance and the environment.[136]

135. According to the LGEEPA, the evaluation of an environmental impact on exploration, exploitation and benefit of minerals and substances is a power reserved to the federal government, through the DGIRA, without prejudice to the aditional municipal and state permits that must be obtained.[137] In simple terms, a concession title is not enough to performed mining exploration and exploitation activities.

2. Mexican Official Regulations and Norms on environmental matters

136. In addition to federal laws, the Mexican environmental legal framework establishes regulations for federal laws and Official Mexican Norms (NOMs) on environmental matters. Essentially, the regulations seek to regulate aspects contained in the federal laws, some of them have a procedural nature.[138] As already indicated, the NOMs seek to standardize certain processes or production methods of various industrial activities that could have an impact to the preservation and restoration of the quality of the environment; the sustainable use of natural resources and flora and fauna; sewage discharge; different aspects in mining, among others.[139]

137. The NOMs are mandatory technical regulations whose essential purpose is to ensure that certain industrial processes are safe and to guarantee the protection of among legitimate objectives of public interest, including the protection of the environment and exhaustible natural resources. The Ministries of the State–such as SEMARNAT–, act as standardizing authorities, which means that they are empowered to issue NOMs, which are binding.[140]

---

136 *See* Articles 5 and 28 LGEEPA. **C-0014**.

137 Article 5 of the LGEEPA. **C-0014**.

138 Regarding environmental impact, the Regulation of the General Law of Ecological Balance and Environmental Protection in Matters of Environmental Impact Assessment is extremely important (RLGEEPAMEIA). **C-0097.**

139 Article 32 Bis, section IV of the Organic Law of the Federal Public Administration. **C-0032.**

140 Article 37 Bis, LGEEPA ("The official mexican norms on environmental matters are mandatory in the national territory and will indicate their scope of validity, validity and gradualness in their application" [emphasis added]). **C-0014**. Some of the most relevant NOMs are NOM-001-SEMARNAT-1996 (establishes the maximum permissible limits of pollutants in wastewater discharges into national waters and goods), NOM-021-SEMARNAT-2000 (on fertility specifications, salinity and soil classification, study, sampling and analysis); NOM-052-

3. Environmental national authorities

138. The relevant authority in environmental matters at the federal level is SEMARNAT. [141] For the study, planning and dispatch of its affairs, SEMARNAT is supported by different Administrative Units and Decentralized Bodies. [142] The functions of those Administrative Units and Decentralized Bodies are regulated in the Internal Regulations of the SEMARNAT (RISEMARNAT or Internal Regulations).[143]

139. As part of SEMARNAT's Administrative Units there are three Undersecretariats, as well as different General Directorates, including the General Directorate of Impact and Environmental Risk (DGIRA)

140. The article 18 of the RISEMARNAT provides that:

> ARTICLE 18. Each of the general directorates shall be headed by a general director, who shall assume its technical and administrative direction and shall be responsible to the superior authorities for its proper operation. The general directors shall be assisted by the deputy general directors, directors, deputy directors, heads of department and other public officials required by the needs of the service.[144]

141. The DGIRA is the only administrative area of SEMARNAT entitled to apply the general policy on environmental impact and risk, as well as to evaluate environmental impact statements.[145] As Solcargo states in its report, "the DGIRA Director General is the highest authority in the PEIA".[146]

142. Aditionally to the SEMARNAT, there are other Agencies and Adminsitrative Units that carry out functions with a favorable impact on the environment, which contibute with the functions

---

SEMARNAT-2005 (on the characteristics, identification procedure, classification and lists of hazardous wastes) and of course NOM-059-SEMARNAT-2010 (focused on the environmental protection of native species of Mexico from wild flora and fauna, and which establishes risk categories).

141 Organic Law of the Public Federal Administration, Article 32 Bis. **C-0032.**

142 Internal Regulations of the SEMARNAT, Article 2. **R-0053.**

143 The Claimant submitted an outdated versión of the Internal Regulations of the SEMARNAT of 2003 (C-0035). The Respondent request to the Tribunal that consider the Internal Regulations of the SEMARNAT of 2012 (used by Mr. Herrera as HH-001), applicable to the time that when ExO submitted the application for the MIA, as it will be discussed below in this Counter Memorial. **R-0053.**

144 Internal Regulations of the SEMARNAT, Article 18 [emphasis added]. **R-0053.**

145 Internal Regulations of the SEMARNAT, Article 28. **R-0053**; Solcargo-Rábago Expert Report, ¶¶ 79-80.

146 Solcargo-Rábago Expert Report, ¶ 79.

of the SEMARNAT like the SCT, SADER through the INAPESCA and the National Commission of Aquaculture and Fisheries, or the CONABIO.

4. International treaties entered by Mexico in environmental matters

143. The Constitution, laws issued by the Congress of the Union that arised from the Constitution, as well as the international treaties that are according to it, namely, concluded by the President of the Republic with the approval of the Senate, are considered the Supreme Law of the Union for the Respondent.[147]

a. Human right to the environment

144. As discussed above, Article 4 of the Constitution recognizes the fundamental right to a healthy environment for the development and well-being of each person.[148] Additionally, the Political Constitution of Baja California Sur, in accordance with the Constitution, Article 13, paragraph 5, provides that "[a]ll the inhabitants of the [s]tate have the right to a healthy environment for their development and well-being."[149]

145. Similarly, different international treaties and declarations have indicated that the right to a healthy environment is a human right, including the Protocol of San Salvador and the Rio Declaration.[150]

146. As can be derived, both in the Mexican legal system and in the international sphere, the right to a healthy environment has been recognized, without doubt, as a human right.

---

147 Constitution, Article 133. **R-0049.**

148 Solcargo-Rábago Expert Report, ¶¶ 49-50.

149 As a federal republic, the federal states of Mexico (*e.g.*, Baja California Sur) have their own local constitution. Article 13 of the Constitution of the Political State of the Free and Sovereign State of Baja California Sur. **R-0054.**

150 The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights "Protocol of San Salvador" was signed on december 12th of 1995. ("Article 11. Right to Healthy Environmen. 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment.") [emphasis added]; Rio Declaration on Environment and Development (Principle 1- Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.). **R-0055**.

b. International Commitments adopted by Mexico

147. As discussed above, the international commitments adopted by the Respondent are Supreme Law of the Union, under the Article 133 of the Constitution.[151]

148. As a part of the international treaties with environmental protection provisions, to which the Respondent is party, the following stand out:

- United Nations Convention on the Law of the Sea;
- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter;
- 1996 Protocol to Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter;
- International Convention for the Prevention of Pollution from Ships;
- Convention on Biological Diversity;
- Convention on International Trade in Endangered Species of Wild Fauna and Flora;
- Convention concerning the Protection of the World Cultural and Natural Hertiage;
- Convention on Wetlands of International Importance especially as Waterfowl Habitat;
- Inter-American Convention for the Protection and Conservation of Sea Turtles;[152] and
- International Convention for the Regulation of Whaling.

149. Derived from the right to a healthy environment, understood as a fundamental human right, which has been addressed and developed by the aforementioned international treaties, it can be concluded that it is present in two areas: 1) the Respondent has the power to demand and the duty to uphold *erga omnes* to preserve the sustainability of the environment, which implies not affecting or damaging the environment; and 2) it is the Respondent's obligation to monitor, preserve and

151 *See* Solcargo-Rábago Expert Report, ¶¶ 62-65.

152 *See* Witness Statement of Mr. Benito Bermúdez, ¶ 22.

protect the environment in accordance with its national legislation and in accordance with the obligations it has acquired under the international treaties it has signed.[153]

5. Internationally recognized guiding principles of environmental legislation

150. At the national and international level, there are several environmental principles.[154] For the purposes of this arbitration, Respondent finds it relevant to clarify two main principles: 1) Principle of Prevention, and 2) Precautionary Principle.

a. Principle of Prevention

151. We must understand that the principle of prevention is applicable when there is empirical and scientific knowledge that warns of potential consequences, both environmental impacts and deterioration produced by a certain activity, and therefore it is necessary to adopt the appropriate preventive measures to avoid them.[155]

b. Precautionary Principle

152. The precautionary principle, contained in Principle 15 of the Rio Declaration on Environment and Development, provides that when there is a threat of serious and irreversible damage, the necessary measures must be adopted to prevent environmental impacts, even if there is no scientific certainty about the damage that will be caused.[156]

H. Environmental impact authorization

153. The Environmental Impact Assessment (EIA) is the procedure through which the DGIRA establishes the conditions to which the execution of works and activities that may cause ecological

---

153 This was settled by the Supreme Court of Justice of the Nation, i.e., the highest court in Mexico, in a jurisprudence entitled, RIGHT TO AN ADEQUATE ENVIRONMENT FOR DEVELOPMENT AND WELLBEING. ASPECTS IN WHICH IT IS DEVELOPED. **R-0056.**

154 Some of the most relevant environmental principles are: Principle of Sustainability, Principle of Good Neighbourliness and International Cooperation, Principle of Prevention, Precautionary Principle, Principle of Internalization of Costs, Principle of Environmental Responsibility, Principle of Interdependence, Principle of Citizen Participation, Principle of the Primacy of Persuasion over Coercion, Principle of Congruence, Principle of Non-Regressivism.

155 Solcargo-Rábago Expert Report, ¶ 89.

156 Solcargo-Rábago Expert Report, ¶¶ 90-91.

imbalance or exceed the limits and conditions to protect the environment and preserve and restore ecosystems, in order to avoid or minimize their negative effects on the environment.[157]

154. For that, those who intend to carry out any work or activity referred to in Article 28 of the LGEEPA, including the exploration, exploitation and benefit of minerals and substances reserved to the Federation under the terms of the Mining Law, require prior authorization from SEMARNAT, through the DGIRA, in matters of environmental impact.[158]

1. The application for environmental impact authorization and the MIA.

155. In order to obtain an authorization for the exploration, exploitation and benefit of minerals and substances reserved to the Federation, stakeholders must submit a MIA before the DGIRA.[159]

156. The MIA is the document by which, based on studies, the significant and potential environmental impact that a work or activity would generate is made known, as well as the way to avoid or mitigate it in case it is negative.[160]

157. There are two modalities of MIA: 1) MIA Particular modality (MIA-P) and 2) MIA Regional modality (MIA-R).[161] As Solcargo points out in its report, due to its characteristics, the Don Diego project should have been submitted to the EIA procedure through a MIA-R.[162]

158. The requirements that the MIA-R must include are set out in Article 13 of the Regulations (RLGEEPAMEIA) and include, inter alia, the SAR of the project, an environmental impact assessment conducted by the applicant based on technical and scientific evidence, and strategies to prevent and mitigate environmental impacts.[163]

2. The environmental impact assessment procedure

159. In order for the SEMARNAT, through the DGIRA, to conduct the EIA procedure and be able to grant or deny authorization to perform the work or activity in question, the interested party

---

157 LGEEPA Art. 28. **C-0014**.

158 LGEEPA Art. 28. **C-0014**.

159 LGEEPA Art. 30. **C-0014.**

160 Article 3 section XXI of the LGEEPA. **C-0014**; Solcargo-Rábago Expert Report, ¶ 82.

161 Article 10 of the RLGEEPAMEIA. **C-0097**; Solcargo-Rábago Expert Report, ¶ 83.

162 Article 11 section IV of the RLGEEPAMEIA. **C-0097**; Solcargo-Rábago Expert Report, ¶ 83.

163 Article 13 of the REIA. **C-0097**; Solcargo-Rábago Expert Report, ¶¶ 85-86.

must submit a MIA of the project, an executive summary of the project, pay the corresponding fees and a risk study in the case of highly risky activities.[164]

160. Once the above is done, the DGIRA reviews the application, integrates the file and is able to conduct the environmental impact assessment, whose resolution should be issued sixty days after the submission of the MIA and required documentation. If justified, the DGIRA may extend the deadline for issuing its resolution by up to sixty additional days.[165]

161. In cases where the MIA presents inadequeacies that prevent the evaluation of the project, the DGIRA may request clarifications, rectifications or extensions to the content of the MIA to the applicant, which must be provided within sixty days of the date on which they were requested. In such case, the term for the DGIRA to issue a resolution is suspended.[166]

a. Request for tecnichal opinions

162. As part of the EIA procedure, the DGIRA may request the technical opinion of any agency or entity of the Federal Public Administration, as well as consult groups of experts when, due to the complexity or specialty of the circumstances of execution and development, it is considered that their opinions may provide better elements for the formulation of the relevant resolution.[167]

163. When doing so, the DGIRA notifies the applicant the purposes of the consultation and sends a copy of the received opinions, so that the applicant during the procedure, express what is in their best interest.

b. Public consultation

164. The MIA and its respective file are made available to the public, keeping confidential information provided by the applicant confidential, in order to be consulted by any person. The DGIRA, at the request of any person of the community concerned, may carry out a public consultation.[168]

---

164 Article 17 of the REIA. **C-0097**; Solcargo-Rábago Expert Report, ¶ 87.

165 LGEEPA, Articles 35 y 35 BIS. **C-0014.**

166 LGEEPA, Articles 35 BIS. **C-0014;** REIA, Article 22. **C-0097**; Solcargo-Rábago Expert Report, ¶¶ 98-99.

167 REIA, Article 24. **C-0097**; Solcargo-Rábago Expert Report, ¶¶ 100-104.

168 LGEEPA, Article 34. **C-0014;** REIA, Articles 37 a 43. **C-0097;** Solcargo-Rábago Expert Report, ¶ 105.

165. The public consultation process allows stakeholders to provide their comments and propose the establishment of additional prevention and mitigation measures. It is also possible to hold a public information meeting in which the applicant presents the project and answers questions from the audience, in the case of works or activities that may generate serious ecological imbalances or damage to public health or ecosystems.[169]

166. The results of the public consultation or the minutes of the public information meeting held are included in the EIA Procedure file.

c. Environmental impact assessment resolution

167. When evaluating environmental impact statements, SEMARNAT, through the DGIRA, considers three elements:

1) The possible effects of the works or activities to be developed on the ecosystem or ecosystems in question, analyzing not only the resources to be exploited or affected, but also the set of elements that make up these ecosystems;

2) The use of natural resources in a way that respects the functional integrity and carrying capacities of the ecosystems of which such resources form part, for indefinite periods of time; and

3) As the case may be the SEMARNAT, through the DGIRA, considers the preventive and mitigation measures, as well as any other measures voluntarily proposed by the applicant, to avoid or minimize negative effects on the environment.[170]

168. Once the evaluation has been completed, the DGIRA must issue the corresponding resolution, properly supported and warranted, in which the following may be issue

- Authorize the execution of the work or activity under the stated terms and conditions;
- Conditionally authorize, in whole or in part, the execution of the work or activity (the execution of the work or activity can be subject to the modification of the project or the establishment of additional prevention and mitigation measures by DGIRA); or

169 LGEEPA, Article 34. **C-0014;** REIA, Artículos 37 a 43. **C-0097**; Solcargo-Rábago Expert Report, ¶ 107.

170 *See* article 44 of the RLGEEPAMEIA. **C-0097**.

- Deny the authorization (in those cases in which it contravenes the laws, regulations and Official Mexican Standards, and other applicable legal provisions; the work or activity may cause one or more species to be declared as threatened or endangered or when one of said species may be affected; or the information provided by the applicants is false).[171]

169. DGIRA's resolution contains the information generated in the PEIA, including the technical opinions requested, the comments and observations made by the stakeholders in the public consultation process, as well as the extract of the project published during the process, the guarantees granted and the modifications that may have been made to the project.[172]

170. The execution of the work or the conduction of the activity in question must be subject to the provisions of the respective resolution, official Mexican standards and other applicable legal provisions.[173] The authorizations issued by SEMARNAT only refer to the environmental aspects of the works or activities concerned, for the established term.[174]

I. The procedure of liability of public officials

171. Under the Mexican legal system, the organization of the Centralized Federal Public Administration (APFC) involves a hierarchical structure of command controlled by the executive branch, i.e. the President of the Republic. [175] This type of organization implies that the higher-ranking officials give instructions and the lower-ranking officials receive them and, if necessary, execute them.[176] However, this hierarchical relationship and the consequences derived from it (chain of command) have their limits. Indeed, in Mexico the law provides -through the regulation of the responsibility of public servants- mechanisms for reporting, investigating and sanctioning

---

171 Solcargo-Rábago Expert Report, ¶¶ 110-113. *See* article 35 of the LGEEPA. C-0014-SPA; *See* article 45 of the RLGEEPAMEIA. **C-0097**.

172 *See* articles 26 y 41, section IV, of the RLGEEPAMEIA. **C-0097**.

173 *See* articles 47 of the RLGEEPAMEIA. **C-0097**.

174 *See* articles 49 of the RLGEEPAMEIA. **C-0097**.

175 Articles 1o y 2o of the LOAPF. **C-0032.**

176 "Each Ministry of State shall formulate, with respect to the matters within its competence; [...] and orders of the President of the Republic". *See* article 12 of the LOAPF. "At the head of each Ministry shall be a Minsiter of State, who shall be assisted by the Undersecretaries, Head of the Administration and Finance Unit, Heads of Unit, Directors, Deputy Directors, Department Heads and other officers, under the terms provided in the respective internal regulations and other legal provisions, for the handling of the matters of his competence. […]" *See* article 14 of the LOAPF. **C-0032.**

that prevent the abuse of power that may derive from the exercise of the functions of public officials in the APF.[177]

172. According to the hierarchical structure of the APFC, in the superior chain of command is the President, who in the exercise of his powers and to address the administrative business is supported by the Secretariats of State,[178] which have equal rank among themselves. At the head of each Ministry is a Minister of State, who for the performance of the functions within its competence, will be assisted by, among others, the Undersecretaries, General Directors, Directors, Deputy Directors, Heads of Department, and other officials, under the terms provided in the respective internal regulations and other legal provisions.[179] Accordingly, SEMARNAT follows the following organizational structure

1. SEMARNAT's Hierarchical Structure

173. In accordance with the RISEMARNAT, it is made up of several administrative units, among others, three sub-secretariats, which in turn are made up of different general directorates,[180] as well as an Internal Control Body ("*Órgano Interno de Control*"),[181] an independent body for the investigation, processing, substantiation and resolution of procedures and appeals in matters of liability of public officials,[182] as shown in Figure 2.

Figure 2. **Organization Chart of SEMARNAT'S Undersecretariats**

177 *See* CPEUM, Title Four, The liabilities of public officers. **R-0049**. See also LGRA. **R-0057.**

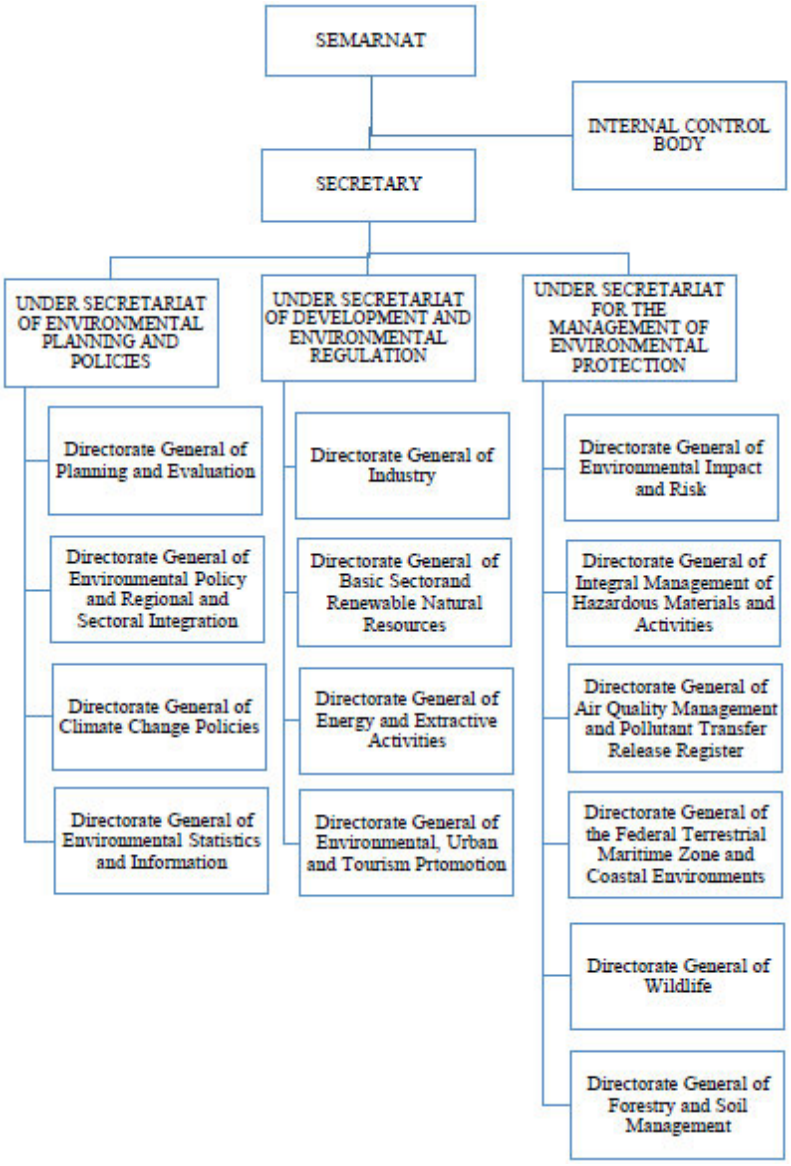
178 Article 2o of the LOAPF. **C-0032.**

179 *See* article 14 of the LOAPF. **C-0032**.

180 Article 2 of RISEMARNAT. **R-0053**.

181 Articles 2, second last paragraph and 8 of RISEMARNAT. **R-0053**.

182 Article 4 of the LFRASP (in forcé until July, 19 of 2017). **R-0058**. *See* also article 3, section XXI of LGRA. **R-0057**.



174. As can be seen in Figure 2, DGIRA is assigned and subordinated to the Undersecretariat for the Management of Environmental Protection. However, the Internal Regulation itself recognizes that each of the general directorates - in this case DGIRA - is in charge of a general director, who assumes its technical and administrative direction and is responsible to the higher authorities for its proper functioning.[183]

175. In fact, the Internal Regulation itself recognizes that the General Directors have as generic powers, among others, to subscribe and resolve matters on authorizations related to the exercise of

[183] Article 18 of RISEMARNAT. **R-0053.**

their attributions.[184] Likewise, the Internal Regulations provide, in a particular and express manner, the specific powers of DGIRA's General Director, among them, to evaluate and decide on the environmental impact applications, as explained in the following section.

2. DGIRA and decision making for the issuance of Environmental Impact Authorizations

176. Although Mexican law provides that the heads of the State Ministries –in this case SEMARNAT– are originally responsible for the procedure and resolution of the matters within their competence, it also recognizes that for a better organization of their work they may delegate to lower level officials –Under Secretaries, General Directors, Directors, Sub-Directors, etc. – any of their powers, with the exception of those that, according to the internal regulations, must be exercised precisely by said heads.[185] In this respect, the Internal Regulations establish precisely the non-delegable powers of the Minister and the Undersecretaries, among which the evaluation or authorization of environmental impact statements is not included. This power is expressly granted by law to the DGIRA:

> ARTÍCULO 28. General Directorate of Impact and Environmental Risk shall have the following attributions:
>
> […]
>
> II. To evaluate the regional environmental impact statements, the risk studies that are integrated into them in terms of article 30 of the General Law of Ecological Balance and Environmental Protection; to evaluate the particular environmental impact statements when risk studies are therein included, as well as the environmental impact statements, regional or particular ones, that are submitted for projects promoted by agencies and entities of the Federal Public Administration, States or municipalities or located in the territory of the Federal District; and to issue the corresponding resolution;[186] [Emphasis added]

177. Clearly, Mexican law recognizes that the environmental impact assessment implies a technical-scientific procedure that must be carried out precisely by a body of that nature, in this case, the DGIRA.

178. The above, without prejudice that only exceptionally and with prior authorization of the Minister, the Undersecretary can attract for its resolution and resolve, the administrative files

---

184 Article 19, section XXIII and XXV of RISEMARNAT. **R-0053.**

185 *See* article 16 of LOAPF. **C-0032.**

186 Artículo 28, fracción II del RISEMARNAT. **R-0053.**

related to acts of authority within the competence of the general directorates of his assignment –in this case the DGIRA–, when their special characteristics, interest or importance merit the case.[187] However, in the particular case of Don Diego, these powers of the Minister and the Undersecretary were not exercised, that is to say, the DGIRA decides with complete freedom what it considered scientifically and technically justified. In fact, DGIRA's power to decide environmental impact applications is exercised and maintained even after its resolutions have been challenged before administrative and judicial courts:

> ARTÍCULO 28. General Directorate of Impact and Environmental Risk shall have the following attributions:
>
> […]
>
> IV. To Authorize, when appropriate, the modification of the authorizations on environmental impact that have been granted, as well as suspend, revoke or cancel them in compliance with administrative or judicial resolutions and to analyze, where appropriate, the respective risk studies;

179. The exclusive power of the DGIRA, as the only entity responsible for resolving environmental impact applications, contrasts with the attributions and powers of the General Directorates of other environmental authorities, *e.g.*, PROFEPA, whose decisions are subject to the consideration of the hierarchical superior:

> ARTÍCULO 54. The General Directorate of Audits' Planning and Promotion will have the following powers:
>
> I. To formulate and submit for the consideration of the hierarchical superior, the issuance of plans, strategies or guidelines for the development of the National Environmental Audit Program;
>
> […]
>
> III. To formulate and submit for the consideration of the hierarchical superior the evaluation mechanisms of the National Environmental Audit Program, including indicators of the companies' environmental performance, as well as indicators of the Program's management;
>
> […]
>
> XII. To instruct and, where appropriate, resolve the procedures for the application of administrative sanctions applicable to environmental auditors, in accordance with the corresponding legislation, and report it to the hierarchical superior;
>
> […]

[187] Articles 5, section XXXIV y 9 section II of RISEMARNAT. **R-0053.**

> ARTÍCULO 58. The General Directorate of Impact and Environmental Risk and Federal Terrestrial Maritime Zone shall have the following attributions:
>
> […]
>
> VI. To develop, submit to the consideration of the hierarchical superior and apply the rules and methodologies to determine the degree of environmental impact caused or that could be caused by the performance of works and activities that require submitting to the environmental impact assessment procedure and do not have the corresponding authorization;
>
> […]
>
> ARTÍCULO 64. The General Directorate of Control of Administrative Procedures and Consultation will have the following attributions:
>
> […]
>
> VI. To substantiate the administrative procedures and, in general, all the resources established in the various legislations whose application falls within the jurisdiction of the General Attorney's Office, to develop the respective resolutions, and submit for the signature of the corresponding hierarchical superior; as well as to assist in the legal representation of the General Attorney's Office in the attention of the review appeals filed before the Federal Institute for Access to Information and Data Protection;
>
> […]

180. The difference in the wording with respect to the attributions and powers of the DGIRA's General Director as the only person responsible for ruling on environmental impact matters, without having to submit his decision to the consideration of his hierarchical superior, *i.e.*, the Minister or Undersecretary, *vis-à-vis*cor the powers and attributions of other General Directors who expressly must submit their decisions to the consideration of their hierarchical superior or even to signature, should not be disregarded. In Solcargo's opinion, the environmental impact assessment of the Don Diego project corresponded to DGIRA's General Director and not to the Undersecretary for the Management of Environmental Protection, nor to the Minister of Environment and Natural Resources.[188]

3. Procedure before the Internal Control Body

181. As mentioned above, the APFC in Mexico has mechanisms to prevent, identify and punish acts of corruption in order to ensure that public officials conduct themselves in accordance with the law. For that, each entity and agency, in this case the Ministries of State, *i.e.*, SEMARNAT, has an Internal Control Body (OIC by its acronym in Spanish) that is in charge of implementing

[188] Solcargo-Rábago Expert Report, ¶ 80.

administrative procedures against public servants for irregularities in the performance of their duties.

182. Until before July 2017 –[redacted] the first resolution denying the environmental impact authorization to ExO–, the Federal Law of Responsibilities of Public Officials (LFRSP by its acronym in Spanish) was the law in force in that matter. However, such law was abrogated by the General Law of Administrative Liabilities (LGRA by its acronym in Spanish), in force as of July 2017 and applicable on the date of issuance of the second resolution by which [redacted] the environmental impact authorization.

183. The distinction between the applicable law to the actions of the public officials –Messrs. [redacted]–, prior to the first resolution by which the authorization was denied *vis-à-vis* the second resolution that also denied the authorization, is merely formal, because, in substance and for the purposes of the arbitration, both laws imply the existence of mechanisms for complaint, investigate and sanction illegal actions by public officials.

184. Indeed, as a matter of fact, the Respondent does not intend to omit the functioning of the APFC in Mexico and how the hierarchical relationships and chain of command within the public administration among public officials are governed. However, in accordance with the foregoing, it is sufficient to noted that the LFRSP provided a procedure to substantiate complaints that involves the alleged liability of public officials, which includes the notification to the alleged responsible, the offering of evidence, proceedings tending to investigate the alleged liability, request for information, a hearing, the right to appear with an advocate, pleadings stage, the issuance of a resolution that may include the application of sanctions,[189] as well as the possibility of challenge the resolution.[190] For easy reference, Figure 3 shows a flow chart of the procedure described above.

189 Article 21 of LFRASP. **R-0058.**

190 Articles 26 to 30 of LFRASP. **R-0058.**

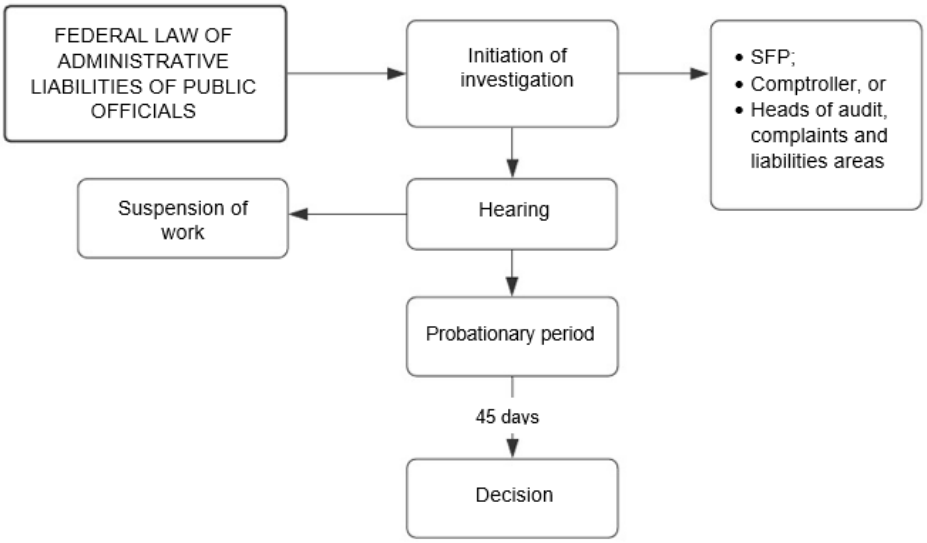


Figure 3. Flowchart of the liability of public officials' proceedings provided for in the previous LFRSP. R-0058.

185. The procedure provided for in the LGRA also involves an investigation that may be initiated ex officio, by a complaint or as a result of an audit. It also provides for a hearing, pleadings and challenge stage, the phases of the proceedings are illustrated in Figure 4.

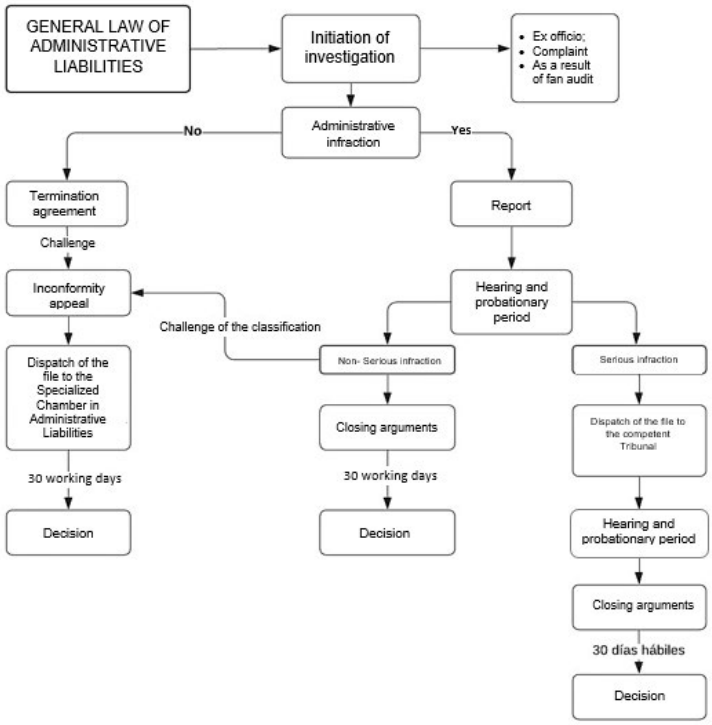


Figure 3. Flowchart of the liability of public officials' proceedings provided for in the current LGRA. R-0057.

186. As shown in Figures 3 and 4, Mexico has a mechanism for reporting, investigating and sanctioning the conduct of officials that are contrary to the regulations and powers conferred upon them.

a. [redacted] to report any irregularity.

187. According to [redacted] witness statement, [redacted] as described below.

188. At first, during the first AIA application in 2014 –which was withdrawn *motu proprio* by ExO–, [redacted] states that [redacted][191] However, [redacted] also acknowledges that such situations were outside the law.

> […] [redacted]
>
> […]
>
> [redacted][192]

189. In a second moment, with the second application for authorization filed by ExO in 2015, [redacted] tells that [redacted] However, [redacted]

---

191 Witness Statement of [redacted] ¶ 11.

192 Witness Statement of [redacted] ¶ 12.

[redacted][193] [redacted] attempts to explain, [redacted][194] [redacted]

[redacted]

> […] [redacted][195]

190. In a third moment, as a result of the TFJA ruling that ordered the DGIRA to issue a new resolution -second resolution-, [redacted] has stated that [redacted][196] In this regard, even though [redacted] speculates about the possible reasons for the alleged order to deny the environmental impact authorization, he again acknowledges that this situation is not in accordance with the law.

> [redacted][197]

191. After working [redacted],[198] Mr. [redacted] knew, or should have known, the legislation that governed his actions and those of public officials in general, including his superiors. In this respect, the LFRSP governed the actions of [redacted] the first resolution that denied the authorization of the MIA, which provides:

> ARTICULO 8.- All public servants will have the following obligations:
>
> […]
>
> VII.- Communicate in writing to the head of the agency or entity in which it provides its services, the well-founded doubts raised about the origin of the orders received and that they could imply violations of the Law or any other legal or administrative provision, for the purpose of that the owner dictates the measures that proceed in law, which must be notified to the public servant who issued the order and the interested party;
>
> […]

---

193 Witness Statement of [redacted] ¶ 20.

194 Witness Statement of [redacted] ¶ 20.

195 Witness Statement of [redacted] ¶ 23.

196 Witness Statement of [redacted] 29.

197 Witness Statement of [redacted] 32.

198 Witness Statement of [redacted] ¶ 2.

> XVIII.- Report in writing to the Secretariat or the internal comptroller, the acts or omissions that in exercise of their functions could be aware about any public servant who may constitute administrative responsibility in the terms of the Law and other provisions applicable;
>
> […]
>
> XXIV.- Refrain from any act or omission that implies breach of any provision legal, regulatory or administrative related to public service.[199] [Emphasis added]

192. Likewise, the LGRA in force and applicable as of July 2017, that is, upon the issuance of the second resolution [redacted] the authorization of the MIA provides a series of guidelines and obligations to which officials are subject:

> Artículo 7. Public Servants shall observe in the performance of their employment, position or commission, the principles of discipline, legality, objectivity, professionalism, honesty, loyalty, impartiality, integrity, accountability, effectiveness and efficiency that govern the public service. For the effective Application of these principles, Public Servants will observe the following guidelines:
>
> I. Act in accordance with the laws, regulations and other legal provisions attributed to their job, position or commission, so they must know and comply with the provisions that regulate the exercise of its functions, powers and attributions;
>
> […]
>
> Artículo 49. The public servant shall incur in non-serious infraction when his acts or omissions breach or violate the following obligations:
>
> […]
>
> II. To report the acts or omissions that in the exercise of its functions may notice, that might constitute administrative infractions, in accordance with Article 93 of this Law;
>
> III. To follow the instructions of their superiors, provided that these are in accordance with the provisions related to the public service.
>
> In the event of receiving an instruction or comisión contrary to such provisions, he shall report this cirsumstance in accordance with article 93 of this Law;
>
> […]
>
> Artículo 93. The complaint must contain the data or indications that allow to alert of the alleged administrative liability for the commission of administrative infractions, and may be submitted electronically through the mechanisms established for such purpose by the investigating authorities, without prejudice to the digital platform determined, for such purpose, by the National Anticorruption System.

---

[199] Article 8 of LFRASP. **R-0058.**

193. In accordance with the foregoing, even though for purposes of the organization of the APFC there is a chain of command among officials of different ranks, there are obligations of each official that must be observed at all times during his service. In fact, Mexican law provides mechanisms to prevent officials –Secretaries and Undersecretaries– hierarchically superior to others –General Directors– from abusing their position. This situation cannot be ignored. The foregoing is without prejudice to the fact that Mexican law itself also specifically establishes the attributions and powers that correspond to each public official. In this case, neither the Secretary nor the Undersecretary had any attribution to determine the meaning of a technical-scientific resolution in matters of environmental impact assessment. Rafael Pacchiano himself acknowledges this situation and denies [redacted] assertions based on the regulatory framework that governed his actions

> […] Every public official knows that there are laws on administrative accountability and knows the supervision and surveillance bodies that exists in the APF.
>
> 38. In accordance with the foregoing, I find it inconceivable that [redacted] I find it even more incomprehensible that he would go so far as to [redacted] without a thorough analysis [redacted]
>
> In this regard, the objection or reservation against an undue or illegal instructions is not a right of a public servant, but an obligation derived from their civil servant statutes. Therefore, and considering the [redacted] in the APF, having received an illegal instruction or improper suggestion –which is denied–, their obligation was to make it known to the authority, on the grounds that the execution of an illegal order would generate [redacted] liability [redacted][200]

194. Based on the aforementioned, the fact of pointing out that a hierarchical superior issued instructions and these were executed without any further reason or question, despite the fact that they did not agree with them or they were considered illegal, cannot be simply brushed aside.

195. It is enlightening that there is no evidence that this situation had been reported at the time, on the contrary, the evidence [redacted] […]".[201] It is until now that, in light of this arbitration [redacted]

---

200 Declaración testimonial del Sr. Rafael Pacchiano, ¶¶ 37-39.

201 Witness Statement [redacted] ¶ 3.

[redacted] The fact is that [redacted] his agreement with its content, so his statements must be evaluated in light of this fact. The assumptions of what would have happened,[202] without any support and the lack of complaint about the alleged instruction during the administrative process [redacted] must be carefully considered in light of other facts that are presente dan supported with evidence provided below.

b. [redacted] with the content of the signed and initialed resolutions

196. Despite the fact that [redacted],[203] he points out that he [redacted] […]".[204] In this regard, Eng. Rafael Pacchiano has categorically rejected that he had given instructions regarding the sense of the resolutions [redacted]

> [redacted] The same situation occurred regarding the second resolution of October 2018, for which the authorization was denied again. The fact that [redacted] denied the authorization of Don Diego project, means [redacted] with the content and outcome of said resolutions. Therefore, it is questionable that they now intend to dissociate themselves from those decisions and disengage from any responsibility under the pretext of an alleged existence of instructions and blaming me ex post facto for their actions. In this sense, it is false that [redacted] The legislation that governs the actions of public servants is clear in stating that public servants must proceed to report when they receive instructions or orders contrary to the law.

---

202 [redacted] Witness Statement [redacted] ¶ 21.

203 Witness Statement of Mr. [redacted] ¶ 3.

204 Witness Statement of Mr. [redacted] ¶ 11.

> Consequently, [redacted] due to the alleged existence of orders under my charge (which is false), they should have resorted to the legal procedures that existed internally to report and express such disagreements, leaving a written record of it. However, they did not do so for the simple reason that they never received an order or suggestion from me to deny the granting of the aforementioned environmental authorization.[205] [Added emphasis]

197. As already explained above, Mexican regulation expressly provides that the DGIRA and its General Director- [redacted] - have the authority and are responsible for issuing authorizations on environmental impact matters. [redacted] himself seems to agree with this, stating that [redacted][206] Oddly, [redacted] affirms without any legal support that [redacted][207]

198. There is no support whatsoever to affirm that the Secretary or Undersecretary had the ultimate authority over the technical-scientific decisions made by the DGIRA, nor evidence that shows that the Secretary or Undersecretary ordered [redacted] to deny the authorization of the MIA to ExO, much less contemporary evidence to show that [redacted]- reporting this situation to the ICB. What does exist is an administrative liability procedure against Mr. [redacted] for the breach of his obligations derived from the performance of his duties, as described in the following section.

4. Investigations against [redacted]

199. [redacted]

---

205 Witness Statement of Mr. Rafael Pacchiano, ¶¶ 35-36.

206 Witness Statement of Mr. [redacted] ¶ 2.

207 Witness Statement of Mr. [redacted] ¶ 2.

[redacted]

[redacted][210].

200. In fact, Mr. Rafael Pacchiano informed about this situation in his witness statement: [redacted]

[redacted][211] [redacted]

201. [redacted]

[redacted]

208 [redacted]

209 [redacted]

210 [redacted]

211 Witness Statement of Mr. Rafael Pacchiano, footnote 1.

212 [redacted]

[redacted][213]

202. Despite the initial authorization that was granted by DGIRA, subsequently and as a result from various administrative and judicial proceedings, Mr. [redacted] denied the authorization of this project.[214] It is noteworthy [redacted] Mr. Mauricio Limón - now curiously legal representative of ExO- served as Undersecretary of Management for Environmental Protection,[215] however this is a fact that [redacted] in their Witness Statement s in order to clarify or rule out a possible conflict of interest.

203. Another situation that has not been disclosed by [redacted]

This fact is relevant, since although it does not have to do with the Don Diego project as indicated, it is a situation that shows that [redacted] knew how the mechanisms for administrative liability operated and, despite this, he dares to make the following statements:

213 [redacted]

214 [redacted] Mr. [redacted] *See* **R-0064.**

215 [redacted] **R-0065**.

216 Witness Statement [redacted] ¶ 29.

[redacted][217]

204. Despite the fact that Mr. [redacted] failed to reveal his relationship with Mr. Mauricio Limón and to explain [redacted] he considered it more important to refer to "Los Cardones" case,[218] which is unrelated to the Don Diego project. The foregoing, in order to try to support his allegations against Mr. Rafael Pacchiano. However, as happened with the denial resolutions of the Don Diego, [redacted]

[redacted] **R-0066.**

[redacted]

217 Witness Statement of Mr. [redacted] ¶¶ 29, 30, 31 y 33.

218 Witness Statement of Mr. [redacted] ¶ 23.

205. Eng. Rafael Pacchiano has clarified the reference made by [redacted] to "Los Cardones" project, to explain that, according to the attributions of his position, he did not have the legal power to decide issues regarding environmental impact matters, [redacted]

> My position was always to comply with the law and that the technical and scientific considerations prevailed no matter the political repercussions they could generate. Proof of the above is precisely the "Los Cardones" mining project, in which certainly there was much resistance from the public opinion and the population of Baja California Sur. However, the DGIRA authorized the Project in compliance with the laws and provisions on the matter, making the final decision based on purely scientific and technical grounds. In this regard, it is questionable that [redacted] refers to said case to argue that [redacted] Once again, [redacted] final resolution of that Project and completely ignore that [redacted]
>
> The reference to "Los Cardones" project [redacted] Moreover, the resolution of the Project itself confirms that neither the Secretary nor Undersecretary of SEMARNAT have any interference in the final decision, as it is confirmed by the resolution itself that in its last page states that I was only notified "for [my] knowledge".[219]

206. Therefore, the only evident simile that emerges between the Don Diego project and Mr. [redacted] reference to Los Cardones case is that it is false to state that "Pacchiano had authorized the MIA of a very controversial mining project ("Los Cardones")".[220]

5. The resignation of Messrs. [redacted]

207. [redacted] However, Mr. [redacted] that [redacted]

---

219 Witness Statement of Mr. Rafael Pacchiano, ¶¶ 45-46. *See also* Exhibit **RPA-001**.

220 Witness Statement of Mr. [redacted] ¶ 23.

[redacted]. [221] On his part, [redacted] Apparently, [redacted] now work as [redacted] environmental consultants and it is also coincidental that [redacted] [222]

208. It is important to mention that [redacted] However, they [redacted] to testify [redacted] and not only against Mexico, but also [redacted] There is no apparent reason to explain this situation, however, this matches precisely with the fact that they stopped working for the Government of Mexico.

209. In fact, [redacted] in various meetings with the defense team of the Government of Mexico and provided environmental advice, supported the Respondent in the consultation process, as well as in the exchange of communications via email regarding the status and legal strategy of the arbitration.[223] In this context, and while continuing working for the Government of Mexico, [redacted] in any of the meetings that were held between the various agencies that we were analyzing the notice of intention to submit a claim to arbitration submitted by Odyssey, [redacted] [224] In fact, in the working meetings, the clear possibility that [redacted] [225]

---

221 Witness Statement of Mr. [redacted] ¶ 37.

222 Witness Statement of Mr. [redacted] ¶ 1 and Witness Statement of Mr. [redacted] ¶ 1.

223 Email dated February 22, 2019 from the Ministry of Economy; Emails dated April 1, 2019 exchanged between officials of the Ministry of Economy and SEMARNAT; email dated April 12, 2019 sent by Respondent to SEMARNAT; Emails dated April 5, 2019 exchanged between the Respondent and SEMARNAT officials; email dated May 31, 2019 sent by the Respondent to SEMARNAT. **R-0067 a R-0071.**

224 Witness Statement of Mr. Salvador Hernández, ¶ 10.

225 Witness Statement of Mr. Salvador Hernández, ¶ 7.

210. It is questionable that, precisely with their departure as [redacted] Government of Mexico, [redacted] Such incongruous behaviour must be evaluated in light of the facts that have been presented in this section.

J. The Environmental Impact Manifestation submitted by ExO in 2014

211. With a high degree of secrecy, the Claimant has narrated the facts related to the MIA 2014 and the EIA Procedure that began after ExO corrected some errors in the presentation of the MIA 2014.[226] On September 3, 2014, ExO submitted the MIA 2014 to DGIRA. Technically, this was the first of three MIAs submitted by ExO to DGIRA.[227]

212. Once the errors incurred by ExO in filing the MIA 2014 were corrected, on September 18, 2014, DGIRA began the EIA Procedure, which ended on June 22, 2015 due to the decision *motu proprio* of ExO to withdraw the MIA 2014.[228]

213. The Claimant has made a series of assertions about the MIA 2014 that the Respondent needs to correct.

1. Technicals opinión about the MIA 2014

214. On September 12, 2014, ExO published an extract in the local newspaper "El Sudcaliforniano", in compliance with environmental legislation, and "with the aim of ensuring wide dissemination and social participation in the Environmental Impact assessment process for the Project, and with the purpose of safeguarding the right of citizens to participate in said process".[229] Having done the above, on October 1, 2014, SEMARNAT made the MIA 2014 available to the public for any citizen of the community could consult it, in compliance with the provisions of the LGEEPA.[230]

---

226 **C-0115**.

227 The MIA 2014 was presented under the "regional" modality and was accompanied by various annexes. As with the MIA 2015, ExO made several mistakes when filing the MIA 2014. On September 11, 2014, the DGIRA prevented ExO from correctly filing the MIA 2014. *See* DGIRA official letter dated September 11 from 2014 **R-0072.**

228 Official letter of june 22, 2015 from DGIRA. **R-0073.**

229 Extract of Don Diego project published on september 9, 2014 in El Sudcaliforniano. **R-0074.** *See* Article 34, section I, LGEEPA. **C-0014.**

230 *See* Article 34 of LGEEPA. **C-0014.**

215. Once the EIA Proceeding was initiated, between October 2014 and March 2015, DGIRA requested more than 20 technical opinions about the Project from various organizations, authorities and academic institutions, in accordance with article 24 of the RLGEEPAMEIA.[231] Likewise, various people and organizations expressed their concerns to the DGIRA and presented information for the DGIRA to consider when deciding about the 2014 EIM.[232]

216. The Respondent does not intend to carry out a "revaluation" of the Project in this investment arbitration, nor does it consider that the Tribunal should do so. However, some of the technical opinions received by DGIRA are of great importance. Furthermore, the Tribunal must consider that it was DGIRA itself that requested the technical opinions in the exercise of its own powers and in accordance with the applicable legal framework. [redacted]

217. On October 10, 2014, the General Directorate of Environmental Policy and Regional and Sector Integration of SEMARNAT presented a technical opinion to the DGIRA and informed it that it was working on the preparation of the Ecological Program, which among other objectives, was to establish that the mining activities on the seabed should not cause the mortality of the yellow turtle, to prevent dredging waste materials from causing contamination by heavy metals and/or toxic substances, and not generate "sublethal effects" on priority species. [233]

218. Regarding this last aspect, the General Directorate of Environmental Policy, Regional and Sectorial Integration, emphasized that there was not only the risk that Don Diego would increase

---

231 *See* Article 24 of REIA. **C-0097.** Initially, on October 2014, DGIRA requested technical opinions for the 2014 MIA. However, on November 21, 2014, the DGIRA required ExO to expand, clarify or rectify the 2014 MIA. On March 6, 2015, ExO submitted a considerable number of additional information to the DGIRA in order to comply with the November 2014 requirement. In view of this, the DGIRA again requested technical opinions from different authorities and organizations, inter alia, from the General Directorate of Wildlife of SEMARNAT; the Interdisciplinary Center for Marine Sciences of the National Polytechnic Institute (CICIMAR); to the Centro de Investigaciones Biológicas del Noroeste, S.C. (CIBNOR); to the General Directorate of Environmental Policy and Regional and Sector Integration-SEMARNAT; the Institute of Marine Sciences and Limnology of the UNAM; the Institute of Oceanological Sciences of the Autonomous University of Baja California (IIO); among other. *See* **R-0075 to R-0080**. *See* communication of November 19, 2014 from Wild Coast-CostaSalvaje. **R-0081.**

232 Official letter of november 27, 2014 of DGIRA send to Representative Oropeza. **R-0082.** Official letter of january 15, 2015 from DGIRA to Unión de Armadores del Litoral del Océano Pacífico, A.C. **R-0083.** Official letter of june 12, 2015 from DGIRA to representatives of the residents of Ulloa Gulf. **R-0084.**

233 Technical opinion of October 10, 2014 of the General Directorate for Environmental Policy -SEMARNAT, pp. 1, 12-13. **R-0085.**

the mortality of the caretta caretta turtle, but that physiological and behavioral changes could also be produced in caretta caretta turtles and reduce their food sources.[234]

219. On November 3, 2014, SEMARNAT's Advisory Council for Sustainable Development (Advisory Council) issued a technical opinion in which it recommended SEMARNAT not to approve the Project. In summary, the Advisory Council requested that the precautionary principle have to be taken into consideration, in accordance with Principle 15 of the Rio Declaration on Environment and Development, since, in its opinion, the Project involved a type of mining that had not been authorized in other markets.[235] Similarly, the Advisory Council reported that there was a lack of scientific certainty in the MIA 2014.

220. One of the concerns of the Advisory Council was that dredging activities can release trace elements with high degrees of toxicity. In addition, it emphasized the fact that the MIA 2014 did not explain whether the uranium detected in some analyzes was radioactive, this being a large omission in the study carried out by ExO. [236] Also, the Advisory Council said that the operation of the Project could increase red tides in the area due to the release of high amounts of phosphate into the sea.[237]

221. On November 4, 2014, the Marine Mammal Research Program (PRIMMA) of the Autonomous University of Baja California Sur issued a technical opinion with special concerns and observations to the MIA 2014 regarding the impact on cetaceans. In consideration of PRIMMA, "the MIA lacks of an adequate methodology to analyze the spatial-temporal distribution of cetaceans in the Ulloa Bay area, which means that any interpretation of the analysis of the effect of the frequency ranges emitted during mining operations on the different species of marine mammals, cannot be considered from a scientific point of view".[238]

---

234 Technical opinion of October 10, 2014 of the General Directorate for Environmental Policy -SEMARNAT, p. 11. **R-0085.**

235 In general terms, the Advisory Council is a consultative body in which public administration entities, academic institutions and social and business organizations participate. Part of its functions consist of providing advice and monitoring the Respondent's environmental policy, and it is empowered to issue opinions. *See* Article 159 of LGEEPA. **C-0014**. Technical opinion of Advisory Council of november 4, 2014, p. 2. **R-0086.**

236 Technical opinion of Advisory Council of november 4, 2014, p. 3. **R-0086.**

237 Technical opinion of Advisory Council of november 4, 2014, pp. 2-3. **R-0086.** The Institute of Marine Sciences of the UNAM also expressed its concerns about the toxic effects that could be caused by dredging. *See* Technical opinion of Instituto de Ciencias del Mar-UNAM of June 15, 2015, p. 5. **R-0087.**

238 Techinical opinión of PRIMMA-UABCS, p. 3. **R-0088.**

222. The following PRIMMA concerns are relevant:

> The area called Ulloa Bay includes the entrance to Laguna San Ignacio to Boca de la Soledad and Magdalena Bay, which are fundamental areas for the breeding and reproduction of the gray whale that spends the winter in the waters of the Peninsula of Baja California. Notwithstanding the foregoing, the MIA does not mention or present a clear analysis of the use that these species give to the area.
>
> […]
>
> For the gray whale, which will perhaps be the most affected species, no density or habitat suitability models are presented, much less it is mentioned if it was sighted in its surveys.
>
> […]
>
> The MIA mentions that "the sound level generated by the extractive processes, by the dredge, by the barge and by the auxiliary boat are of a very similar intensity to the boats dedicated to whale watching […] in the aforementioned text this situation is not explained. Furthermore, the noise generated by a boat with an outboard motor (panga) is not comparable with the one of a dredge, neither in intensity nor in exposure time.[239]

223. Based on this, PRIMMA did not consider as correct several statements indicated in the MIA 2014, the methodology and analysis carried out by ExO regarding the impact of the Project on marine mammals and, above all, questioned the fact that noise caused by the Project's dredge was comparable to that of a whale watching boat.

224. On November 7, 2014, the CIBNOR of the IPN issued a technical opinion in which it expressed its concerns about the lack of monitoring work and bioassay to be able to accurately assess the impact of the Project in the Gulf of Ulloa and the effects that the release or exposure of phosphate could generate, as well as the destruction of the benthic environment.[240] The CIBNOR also considered that the statements of ExO were incorrect in relation with the fact that the Project would be carried out outside of fishing areas and emphasized the socioeconomic effect that the impact on the region's fisheries would generate.[241]

225. Months later, CIBNOR submitted a second technical opinion on the additional information filed by ExO. In this regard, CIBNOR once again raised its concerns about the Project and

---

239 Technical opinion of PRIMMA-UABCS, pp. 3, 5, 9 [Added emphasis] **R-0088.**

240 Technical opinion of CIBNOR-IPN, p. 5. **R-0089.**

241 Technical opinion of CIBNOR-IPN, p. 5. **R-0089.**

considered that the noise pollution from the dredge could interfere "in communication between all species of marine mammals present in the area for 50 years."[242]

226. On December 16, 2014, the Government of Baja California Sur submitted a technical opinion in which it informed DGIRA that it did not consider the Project viable. On the consideration of the Government of Baja California Sur, ExO presented a series of monitoring programs that technically could not be considered mitigation measures, even though if they were implemented, the environmental effects would generate significant changes in the habitat and increase the social problems with the fishing sector in the area. The Government of Baja California Sur also emphasized that, after many years, Mexico had managed to preserve the habitat of the gray whale and for this, it was no longer considered a critically endangered species, which is why it was contradictory to approve a project that would again jeopardize an environmental achievement.[243]

227. On March 2, 2015, DGIRA received a communication from Islands Seas, in which it stated that the extraction of phosphate from the seabed could "irreversibly devastate the local ecosystem in the San Ignacio and Magdalena bays, and potentially change the global balance of the ocean ecosystem".[244] In addition, Islands Seas had a serious concern about the impact on phytoplankton caused by dredging:

> The natural upwelling of nitrate, phosphate and silicate supplies in the "Los Lodazales" area is believed to act as natural regulators of phytoplankton bloom […] These so-called "dead zones" actually act as production and support factories of nutrients in the world of the sea.
>
> […]
>
> Phytoplankton is a key element in the trophic system that acts as a check and balance for each animal population that exists in today's ocean ecosystems. The gray whale is extremely dependent on phytoplankton to survive […] It is not clear whether the increase in chemical levels per upwelling caused by dredging and the return of used materials will unnaturally affect phytoplankton production.[245]

---

242 Second Technical opinion of CIBNOR-IPN, p. 10. **R-0090.**

243 Second Technical opinion of CIBNOR-IPN, p. 11. **R-0090.**

244 Technical opinion of Islands Seas of March 2nd, 2015, p. 2. **R-0091.**

245 Technical opinion of Islands Seas of March 2nd, 2015, pp. 2-3. **R-0091.** *See* Second Technical opinion of CIBNOR-IPN, p. 12. **R-0090.**

228. As it has been discussed, Islands Seas questioned ExO's assertion that some Project areas had low levels of marine life and biodiversity. Another issue of particular concern to Islands Seas was also the noise pollution from the Project. The noise from the Project, in essence, could disturb a variety of species, including sea lions, birds, turtles, and of course cetaceans:

> The frequency range is of particular concern when considering the health and well-being of the protected whales and endangered sea turtles that live within the proposed dredging area.
>
> […]
>
> The Don Diego Project is directly in the path of whale migration […] noise pollution from this dredging operation can scare younger whales and first-time mothers away from the most nutrient-rich areas that are safer along the coast […] As a consequence whales and their young calves will be pushed into deeper waters creating an unnatural migration route that will make young calves easy prey for large predators.
>
> […]
>
> The Don Diego project will severely impact the ability of young calves to obtain the necessary nutrients to survive and have the ability to prepare for their 8,000 kilometer migration to northern feeding grounds.
>
> […]
>
> Independent scientific studies presented by HR Wallingford for the Don Diego dredging project cannot be conclusive as scientific knowledge since it is not available for the current whale and turtle populations in the dredging area.[246]

229. Practically all the technical opinions received by the DGIRA shared the same concern: there was a repeated lack of information, inconsistencies and contradictions in the MIA 2014. As a result, it was not possible to clearly determine the degree of impact of the Project on the SAR. Faced with this panorama, and the absence of certainty, some organizations asked the DGIRA to apply the principle "*in dubio pro natura*" or precautionary, *i.e*., in the face of the possible danger of serious and irreversible damage to the environment, and in the absence of scientific certainty, it should be select to preserve the environment.[247]

---

246 Technical opinion of Islands Seas of march 2nd, 2015, pp. 5-6. **R-0091.**

247 Technical opinion of Centro Mexicano para la Defensa del Medio Ambiente, A.C., january 8, 2015, pp. 12-13. **R-0092.** Technical opinion of la Sociedad de Historia Natural Niparajá, A.C., January 8, 2015, pp. 12-13. **R-0093.**

2. The popular complaint against the Project

230. There is a situation that the Claimant has not mentioned in the Memorial that deserves to be commented. On June 11, 2014, the SEMARNAT Advisory Council filed a popular complaint before PROFEPA to investigate activities performed by ExO in the Gulf of Ulloa, between December 2012 and March 2013, which raised concerns among local fishermen.[248] On October 1, 2014, PROFEPA reported this to SEMARNAT.[249]

231. The Advisory Council noted that local fishermen found some dead marine mammals in the Magdalena Bay during the time that ExO carried out certain activities using a vessel, and expressed their concerns that a marine project would be carried out in the Gulf of Ulloa due to the environmental impact it could cause. [250] Along with this, some local media in Baja California Sur reported on the activities performed by ExO.[251]

232. PROFEPA notified ExO of the complaint filed, conducted site inspections, and allowed ExO to comment on it. At the end, PROFEPA concluded that ExO distorted the facts that were narrated in the popular complaint and closed the file.[252]

233. After this, in 2015 ExO filed criminal complaints against local fishermen and against a local journalist who reported on the activities performed by ExO that alarmed fishermen of the area. Some international organizations such as *Article 19* considered that ExO sought to criminalize and harass inhabitants and the journalist in question through these criminal procedures, which in English is referred as "SLAPP" or "*strategic lawsuit against public participation*". [253]

---

248 Any person, social group or non-governmental organization can report to PROFEPA facts, acts or omissions that produce or may produce ecological imbalance or damage to the environment or natural resources, in violation of the LGEEPA or environmental laws. Articles 189 y 190 of LGEEPA. **C-0014**. Popular Complaint of the Advisory Council of june 11, 2014, p. 2. **R-0094.**

249 Official letter of PROFEPA from October 1st, 2014. **R-0095.** The media reported this situation and pointed out that ExO had drilled without the required authorizations. Roberto Galindo, "La criminalización del periodismo en Baja California Sur", Contralinea, April 19, 2015. **R-0096**.

250 Popular complaint of the Advisory Council of June 11, 2014, p. 2. **R-0094.**

251 Article 19, "*Alerta. Periodista en Baja California Sur es denunciado penalmente por revelar afectaciones al medio ambiente*", March 13, 2015. **R-0097.**

252 **C-0008**, pp. 9, 20, 173.

253 Frontera Norte Sur, "The Battle over Mexican Ocean Mining", New Mexico University, march 17, 2015. **R-0098.** Available on: Article 19, "*Alerta. Periodista en Baja California Sur es denunciado penalmente por revelar afectaciones al medio ambiente*", March 13, 2015. **R-0097.**

The Respondent reserves the right to request documents about this situation at the appropriate procedural moment.

3. The 2014 public consultation

234. Once the MIA 2014 was submitted, the concerns of the residents of the Municipality of Comondú did not wait. On September 19, 2014, residents of Comondú and representatives of the Puerto Chale Fishing Production Cooperative Society (Puerto Chale Cooperative) and some NGOs requested to DGIRA to submit the Project to public consultation. [254] Following this, on September 26, 2014, DGIRA began the public consultation proceeding within the PEIA and made the MIA 2014 available to the public. [255] Thus, any interested person could attend and participate in the public consultation, and even propose additional prevention and mitigation measures.[256]

235. On November 5, 2014, the public consultation of the Project was held in the municipality of Comondú, Baja California Sur. It was a crowded event, in which there were 30 registered presentations and more than 400 attendees.[257] As it was discussed, the environmental public consultation is a democratic exercise in which the interested public can participate. In the case of the Project, representatives of the Claimant had the opportunity to present the Project. Similarly, residents, NGOs, universities, authorities and specialists on different matters expressed their points of view and were able to make presentations through lectures.

236. For example, in the presentation by representatives of PRIMMA from the Autonomous University of Baja California Sur, they pointed out that "the western coast of the Baja California peninsula [Gulf of Ulloa] is one of the areas with the greatest diversity of marine mammal species in the country, since up to 75% of the species found in Mexico are distributed there, so any development plan that may affect both the habitat and the species must be carefully analyzed ".[258]

237. For its part, the Puerto Chale Cooperative explained in its presentation that, contrary to what the MIA 2014 indicated, the Project area would be located within the concessioned zone to

---

254 Communication of September 19, 2014 from the Puerto Chale Cooperative. **R-0099.** Communication of October 21, 2014. **R-0100.** Communication of September 26, 2014 from PRONATURA. **R-0101.**

255 Oficio del 26 de septiembre de 2014 de la DGIRA. **R-0102.**

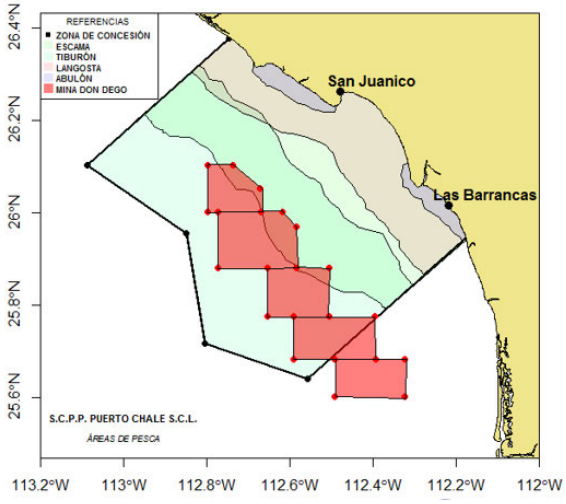
256 Article 34, section IV of LGEEPA. **C-0014**. Article 41, section III of REIA. **C-0097.**

257 Public consultation minute of the 2014 EIM, p. 2. **R-0103.**

258 Presentation of Lorena Viloria del PRIMMA- UABCS. **R-0104.**

fishing cooperatives. Figure 6 shows the map prepared by the Puerto Chale Fishermen's Society, which is illustrative.[259]

Figure 6. Map of the concession area and fishing areas of S.C.P.P. Puerto Chale S.C.L. R-0105.



238. Some environmental NGOs also expressed their concerns. The organization Medio Ambiente y Sociedad A.C. expressed concern about Claimant's lack of experience in mining projects, as its "only experience is in the extraction of gold bars, silver and jewelery on vessels that were shipwrecked centuries ago. So the promoter is not a mining company, much less has experience in underwater mining".[260]

239. Some attendees of the public consultation were upset about the fact that Mr. Narváez, a director of Odyssey and shareholder of ExO, withdrew from the meeting without hearing the presentations. Similarly, some attendees considered that the Claimant's responses to questions raised in the public consultation were ambiguous, confusing, and unclear.[261]

4. DGIRA concerns

240. Once the public consultation was done and some technical opinions were received, [redacted] Mr. [redacted] Mr. [redacted]

259 Presentation of MC. Edgardo Camacho, Sociedad Cooperativa Puerto Chale. **R-0105.**

260 Request for presentation of Juan Trasviña-Medio Ambiente y Sociedad A.C. **R-0106.**

261 Public consultation minute 2014, p. 4. **R-0103.**

[redacted] In other words, the DGIRA asked ExO to rectify, expand and clarify the MIA 2014. The following observation from DGIRA demonstrates its concerns:

> On the matter and derived from the analysis carried out to the MIA-R of the project, this DGIRA identified insufficiencies and inconsistencies in the environmental and technical information presented that do not allow an objective evaluation of the studies submitted […] this administrative unit [DGIRA] requests for the only time to the petitioner, to continue with the environmental impact assessment of the project, the expansion, rectification or clarification of the information […] [262]

241. As can be seen, DGIRA not only required additional information and raised questions, like the Claimant argues.[263] DGIRA identified several mistakes in the MIA 2014 and due to the concerns reflected in the technical opinions required by DGIRA, it asked ExO to clarify various aspects related to chapters II, IV, V and VI of the MIA 2014. Even the DGIRA suspended the EIA Procedure in accordance with the LGEEPA and the RLGEEPAMEIA, until ExO gave response to the DGIRA's concerns.[264]

242. It is not necessary to transcribe DGIRA's concerns, but it is relevant to mention some serious concerns due to the lack of clarity in the narration made by the Claimant:[265]

- Regarding dredging, DGIRA asked ExO for more information because the studies that were annexed with the MIA 2014 were executed in the United Kingdom, a place "where there are different environmental conditions and in projects that do not correspond to the extraction of phosphatic sands".[266]
- Regarding the place where the Project would be executed, DGIRA indicated that "the project affects areas of fishing concession, therefore, what was stated by the applicant does not correspond to the information and comments received in the public information meeting", in light of which ExO had to increase the respective information.[267]

---

262 Communication of November 21 from DGIRA. **C-0100**, p. 1.

263 Claimant´s Memorial, ¶¶ 121-22.

264 Communication of November 21 from DGIRA. **C-0100**, p. 8. Article35 Bis of LGEEPA. **C-0014**. Article 22 of REIA. **C-0097.**

265 Claimant´s Memorial, ¶¶ 122-23.

266 Official letter of november 21 from DGIRA. **C-0100**, p. 2.

267 **C-0100**, p. 2.

- Inconsistencies regarding the useful life of the Project, since, based on the data provided by ExO, "it would take at least 912.7 years to dredge the entire project [work area]".[268]
- Regarding to the diversity and richness of species in the Gulf of Ulloa, DGIRA identified a contradiction in the information submitted by ExO and the one presented in the public consultation. Given this, ExO had to expand the information on the high values of diversity and species richness in the work area, taking into account that it is considered a refuge and feeding area for the caretta caretta turtle.[269]
- Submit studies that allow to identify the existing microbial diversity and expand the information on oceanographic phenomena.[270]
- Increase monitoring and mortality studies of turtles, mammals, sea cucumbers and large species to seasonal cycles and not only for short and specific periods of time, including geo-referencing of migratory routes of the caretta caretta sea turtle, together with prevention and mitigation measures to avoid dredge suction and mortality.[271]
- Identify, describe and reassess the environmental impacts that the Project would cause in the different environmental components of the SAR, including the effects of the increase in water turbidity, the real impact on the benthic habitat, suction effects and noise disturbance of the dredge, the sublethal effects on the caretta caretta turtle population, the severity of potential pollutants and heavy metals, among others.[272]
- Rectify, expand and propose prevention, mitigation and compensation measures to reduce the noise caused.[273]

243. DGIRA's requirements were not minor and many requests for rectification, extension and clarification were based on the technical opinions received by the DGIRA. Perhaps DGIRA's

---

268 **C-0100**, p. 3.
269 **C-0100**, p. 5.
270 **C-0100**, p. 5.
271 **C-0100**, p. 6.
272 **C-0100**, p. 7.
273 **C-0100**, pp. 7-8.

greatest concerns were focused on ExO's alleged strategy for the prevention and mitigation of environmental impacts.[274]

244. All of these elements are technical and scientific and they are fully far away from any political nature. [redacted] Mr. [redacted]

[redacted]

5. ExO's additional information and the withdrawal of the MIA 2014

245. Following the communication of November 21, 2014, in which the DGIRA informed ExO about some concerns and inaccuracies regarding the MIA 2014, ExO, in a desperate attempt to amend the MIA 2014, submitted a considerable amount of information before the DGIRA.

246. On March 6, 2015, ExO submitted additional information aimed at responding to DGIRA's concerns, and to clarify and extend the MIA 2014, chapters II, IV, V y VI.[275] The information submitted before the DGIRA consisted in a report of nearly 500 pages. Therefore, as part of its faculties, on March 11, 2015, the DGIRA extended the evaluation period of the MIA 2014.[276]

247. On May 27, 2015, ExO submitted "Supplementary or additional information before the DGIRA", aimed to respond DGIRA's concerns as well. This information consisted of a report of more than 400 pages.[277] From this information, a statement of ExO is relevant to consider:

> […] due to the complexity of the factors determining the dredging plan, we would like to clarify the following. The depth or thickness of the phosphoric sand deposit in Don Diego has not yet been determined and this greatly limits the possibility to assert with absolute certainty how long the extractive process will take on each of the stripes outlined here. A very clear dredging order, described herein, will be followed and the SEMARNAT will be informed in a timely manner as soon as the work is started. […][278]

248. Apparently, ExO did not have exact and precise information about the depth and thickness of the phosphate sand deposits, but "as soon as" they started working, ExO would inform SEMARNAT about this. This kind of circumstances show that the Project did not reach an advance stage of explorations, as WGM explains.

---

274 **C-0100**, pp. 7-8.

275 *See* C-0107 y C-0108.

276 DGIRA's communication of March 11, 2015. **C-0109**.

277 ExO's communication and information of May 26, 2015. **R-0023.**

278 ExO's communication and information of May 26, 2015, pp. 16 y 31. **R-0023.**

249. Once the public consultation was carried out and the technical opinions from authorities, people and organizations were issued, it was clear that there were concerns on the part of the DGIRA regarding the MIA 2014, due to the lack of accuracy in several technical and legal matters. The Claimant argues that Mr. [redacted] the MIA 2014 [redacted][279] The communications signed by the DGIRA show otherwise.

250. On June 19, 2015, ExO asked the DGIRA to deem as withdrawn the MIA 2014, "in order to comply with certain additional requirements […] and with the intention to collect the complementary data and information that support the project's environmental development".[280] Similarly, the Claimant informed the SEC –and the investing public– that it had decided to withdraw the MIA 2014, in order to have additional time to review more information.[281]

251. Mexico's experts realize that, in practice, it is usual for applicants for environmental authorizations to withdraw MIAs in order to reinforce them and re-file them before the DGIRA, they even provide a series of examples in which applicants withdrew the environmental impact assessments.[282] The following explanation becomes relevant:

> It is a common practice that in projects of great magnitude or significant environmental impacts it is necessary for the proponents to have to file more than one EIAP to obtain the requested EIA, since the magnitude of such impacts requires additional design efforts and human and material resource.
>
> Likewise, the negative resolutions issued within a EIAP allow the proponents to improve and complement their subsequent EIAs, in light of the technical deficiencies pointed out by SEMARNAT that motivated the rejection in the first place. In other words, once SEMARNAT rejects a project, there is an area of opportunity for the consultant and the proponent to identify its inadequacies and propose appropriate measures to correct them, allowing SEMARNAT to authorize the project at a later date.[283]

252. As if that was not enough, the Claimant published some statements made by its own executives in this regard:

> "This additional time is intended to allow ExO to brief the Governor, Congressmen, Mayors and community leaders in the Baja California Sur State who were elected June 7 so they can thoroughly understand the details of the project and the positive effects it will

279 Claimants' Memorial, ¶ 128.

280 *See* **C-0115**.

281 **C-0190**, p. 7. ("In June 2015, ExO withdrew its EIA application to allow additional time for review and regional briefings.")

282 Solcargo-Rábago Expert Report, ¶¶ 120-152.

283 Solcargo-Rábago Expert Report, ¶¶ 125-126.

> have on their state and communities. It is important to demonstrate how the phosphate sands extraction initiative will bring substantial economic benefits to their constituencies and help provide a stable supply of inexpensive fertilizer to the agricultural industry and entire nation with minimal environmental impact," commented Daniel de Narvaez, managing director of ExO in Mexico.
>
> Under the Mexican legal process, the only mechanism to extend the EIA time frame, thereby allowing the briefings to occur after Monday, June 22, is to resubmit the EIA, which is expected to take place in the coming weeks.
>
> "In making this decision, ExO is coordinating with the technical and environmental team at MINOSA, Odyssey's strategic investor, which has extensive experience and a successful track record of navigating environmental and regulatory procedures in Mexico. Their team will also manage the outreach program to address any questions from newly-elected officials and community leaders who will obviously have a significant interest in this initiative," noted Mark Gordon, Odyssey's president and chief executive officer.[284]

253. Based on this, on June 22, 2015, DGIRA terminated the EIA Procedure and the MIA 2014 "since the administrative procedure withdrawal was carried out".[285] Mr. [redacted]

6. ExO and SEMARNAT meetings

254. The Claimant makes a series of assertions regarding meetings held with senior officials of SEMARNAT that must be clarified. It is unusual for the applicant of a MIA to request and obtain meetings with high-level officials, such as the Secretary or the Undersecretary of the SEMARNAT, prior the submission of the request of a MIA or even during its processing. In any case, these kinds of meetings are only a courtesy by public officials, with the only intention to listen to the AIA's applicant, without being obliged to attend such meetings or to resolve the matter in the way a particular person would like.

255. It should be considered that the first meeting between ExO and the SEMARNAT apparently took place on August 14, 2014, when the MIA 2014 was not even submitted yet.[286]

256. Despite this, the Claimant argues that several meetings with SEMARNAT were successful; that the DGIRA deemed the MIA as "outstanding" and that SEMARNAT's Secretary would

---

284 Odyssey's communication of June 22, 2015. **R-0107.**

285 DGIRA's communication of June 22, 2015. **R-0073.**

286 Claimants' Memorial, ¶¶ 117-18.

inform the President of Mexico about the Project.[287] The Claimant also argues that DGIRA's officials deemed the MIA 2014 as "meticulous, thorough and complete".[288] It should be taken into account, that the PEIA Procedure is a formalistic administrative procedure, of strict respect for the rule of law and that concludes with the issuance of an administrative resolution. Again, such a meeting is merely a courtesy and any impressions or expectations of ExO are the product of their own misrepresentation of the events.

257. The Respondent is emphatic that the Engineer Pacchiano, being SEMARNAT's Undersecretary, did not inform – or request – Mr. Alonso Ancira that ExO should withdraw the MIA 2014. That is totally false. The Engineer Pacchiano himself refutes this allegation made against him:

> On June 18, 2015 I received Mr. Ancira once again in my office. In that occasion, he insisted me again to support the Don Diego project and that I order the authorization of the MIA request of the project as soon as possible.
>
> Once again, I explained Mr. Ancira that the DGIRA was the only area of SEMARNAT empowered to authorize, reject or conditionally authorize the MIA of the Don Diego project. Likewise, I insisted that the DGIRA would resolve according to the law and in accordance with purely technical considerations.
>
> I remember that in that occasion I informed Mr. Ancira that it would not go unnoticed the fact that the Don Diego project would be carried out in an area of great importance for Mexico due to the fact that in the Gulf of Ulloa there are populations of the Caretta caretta turtles and whale migration routes. Mr. Ancira seemed annoyed.
>
> I understand that the Claimant and their witnesses argue that in that meeting I asked Mr. Ancira that ExO should withdraw the 2014 MIA and should present it again accompanied by documents that will include support of the project by different organizations. That is false, I never asked nor suggested ExO representatives to withdraw the MIA, much less did I required letters or "supporting evidence" of the project. In any case, I had nothing to do with the MIA withdrawal and I do not know the reasons why ExO decided to withdraw the 2014 MIA.[289]

258. In this regard, the Tribunal should consider four matters. *First*, the Claimant does not provide any evidence regarding the alleged requirement of Engineer Pacchiano to withdraw the MIA 2014. *Second*, the Claimant has announced the reasons why it actually withdrew the MIA

---

287 Claimants' Memorial, ¶¶ 117, 128.

288 Claimants' Memorial, ¶ 115.

289 Mr. Rafael Pacchiano's witness statement, ¶¶ 61-64.

2014: to have some additional time to review more information and be able to submit it again with more elements.[290] *Third*, ExO had the advice of, at least, three legal firms to prepare the MIA 2014 and to represent ExO during the EIA Procedure, including a retired Undersecretary.[291] It seems strange that none of ExO's legal counsel recommended to start legal proceedings against a request "without legal reasons", as the Claimant points it out.[292] *Fourth*, ExO's new interlocutor before SEMARNAT was an important businessman, who is currently in prison facing investigations.

259. It is strange that an influential businessman, after having insisted – and even demanded – the authorization of the Project, within previous meetings, decided to follow an "instruction" from Engineer Pacchiano.[293] Odyssey's factual arguments, like its plan to conduct marine mining, is more fictional than reality.

K. The Environmental Impact Statement submitted by ExO in 2015

260. Some days after ExO withdrew the MIA 2014, the company submitted a new environmental impact statement application. Just as it happened to the MIA 2014, the MIA 2015 started with setbacks and raised concerns that are reflected in the technical opinions that were received – and requested – by the DGIRA, and in the communications expressed during the EIA Procedure by the Comondú residents, fishermen, non-governmental organizations, authorities and international organizations.

261. Thus, on June 26, 2015, ExO filed a new request to obtain an environmental impact statement, before DGIRA.[294] On June 30, 2015, the DGIRA requested ExO to rectify some errors within the MIA 2015, before the EIA Procedure started.[295]

262. The greatest concerns were reflected in the DGIRA's communications informing ExO that there were some errors and inconsistencies within the MIA 2015 and, due to this, it requested

---

290 **C-0190**, p. 7. Odyssey's communication of June 22, 2015. **R-0107.**

291 The legal firms are lawyers Hamdan Manzanero y Asociados, S.C., QVGA and Mr. Mauricio Limón. Memorial, ¶ 92. **C-0124**, p. 257. Mr. Rafael Pacchiano's witness statement, ¶¶ 65.

292 Claimants' Memorial, ¶ 131.

293 Witness Statement of Mr. Rafael Pacchiano, ¶ 60.

294 ExO's communication of June 26, 2015. **R-0108.** In accordance with the normative regulations, some of the procedures to obtain permits or concessions required a payment of rights to be made. The request of a MIA is not the exception. As an example of the closeness between AHMSA-MINOSA-Ancira with the Claimant, the payment of rights for the MIA 2015 was made directly by MINOSA. *See* MINOSA's payment of rights bill. **R-0109.**

295 *See* First Resolution DGIRA, **C-0008**, p. 1.

clarifications and extension of information, and even suspended the EIA Procedure until ExO complied with the DGIRA requirements.

263. On August 13, 2015, ExO required the DGIRA an extension in order to comply with its requirements.[296] On August 21, 2015, ExO filed before the DGIRA a new application for the environmental impact statement (MIA 2015), replacing the one submitted on June 26, 2015. Technically, this would be the third application for the environmental impact statement. Then, DGIRA started the EIA Procedure of the MIA 2015.[297]

264. This is relevant to demonstrate the lack of "expertise" and diligence of ExO regarding the environmental administrative procedures.[298] Likewise, the foregoing demonstrates that DGIRA showed flexibility to prevent ExO about the errors in the submission of the MIA request of June 26, 2015, by asking ExO to amend such mistakes and by extending the deadlines so ExO could submit the corresponding information. It is evident, again, that ExO did not receive unfavorable treatment.

265. This investment arbitration is not the appropriate forum to analyze the technical differences between the MIA 2014 and the MIA 2015. Indeed, ExO incorporated some technical elements in the MIA 2015 such as the term "eco-tube". The Claimant itself acknowledges this situation.[299] This situation should be considered as an additional element confirming that ExO, voluntarily, decided to withdraw the MIA 2014 in order to submit a different version with further elements that, according to ExO itself, might be more convincing to the DGIRA.

266. From the documentary evidence itself, it is clear that the decision to submit additional elements to the MIA 2015 was solely made by the Claimant. The insinuations made stating that the additional elements included in the MIA 2015 were the result of the "technical feedback" and previous meetings with SEMARNAT, CONAPESCA e INAPESCA, are false and they lack any technical validity, and even demonstrate the inexperience of the Claimant and Odyssey.[300]

---

296 ExO's communication of August 14, 2015. **R-0110.**

297 ExO's communication of August 21, 2015. **R-0111.**

298 *See* Solcargo-Rábago Expert Report, ¶¶ 153-155.

299 *See* Claimants' Memorial, ¶¶ 133-134.

300 *See* Claimants' Memorial, ¶¶ 133-135.

1. The Public Consultation of 2015

267. On July 7, 2015, the DGIRA received requests from the Comondú residents to start a period of consultations.[301] It is important to mention that the public consultation is a democratic exercise and it is about citizen participation, and, since ExO filed a new request to obtain an environment impact statement, a new EIA Procedure started, and many people had the right to request a public consultation meeting.

268. Prior the public consultation meeting, residents, fishermen and institutions filed dozens of requests for presentations to express their concerns about Don Diego. Some of the concerns were the following:

- The lack of information in the MIA 2015 regarding the fishing productivity and pelagic resources at the Project site;
- The effect of the noise on different species;
- The increase of red tides;
- The lack of expertise of Odyssey on marine mining activities;
- The effect and long-term negative impacts caused by the Project;
- The lack of accuracy in the MIA 2015 regarding the cetacean species inhabiting the Golf of Ulloa; the impact on the *caretta caretta* turtle, and the poor implementation of species sighting techniques and sampling periods.[302]

269. Thus, the public consultation regarding the Project was carried out on October 8, 2015, where more than 30 presentations were made and more than 500 people attended.[303] Just as it happened in the consultation public meeting carried out on November 5, 2014, the meeting of

---

301 Communication of August 27, 2015. **R-0112.** First Resolution of the DGIRA of April 7, 2016, p. 22. **C-0008**.

302 Cooperativa Puerto Chale member's presentation request. **R-0113.** Cooperativa Las Barrancas member's presentation request. **R-0114.** FEDECOOP executive's presentation request. **R-0115.** Presentation request of Costa Salvaje, A.C. **R-0116.** Presentation request of the representative in the Center for Biological Diversity. **R-0117**. AIDA's presentation request. **R-0118.** The Respondent emphasizes that some of the presentation requests submitted by organizations, (*e.g.*, Center for Biological Diversity) were based on scientific sources, including Dr. Seminoff's research. The Claimant asserts – without providing any evidence – that Dr. Seminoff deemed the project as "environmentally sound and socially responsible". The Respondent disputes this assertion. *See* Memorial, ¶ 139.

303 **C-0136**, p. 2.

October 8, 2015, was conducted in a peaceful and orderly manner; here, ExO, as the applicant of the environmental impact authorization, presented the Project before the Comondú residents, fishermen, authorities and organization, who also had the opportunity to express their points of view.[304]

2. The technical opinions regarding the MIA 2015

270. As it happened in the EIA Procedure of the MIA 2014, from August 28, 2015, the DGIRA requested dozens of technical opinions to organizations, authorities and academic institutions. Some people and organization informed the DGIRA their concerns about Don Diego.[305]

271. It must be remembered that a technical opinion is not a simple "note", as Odyssey tries to characterize them.[306] Once again, SEMARNAT, through the DGIRA, may consult authorities, groups of experts, organizations or scientific institutions, when due to the complexity or specialty of the circumstances of a project, or its execution and development, it is deemed necessary to have greater technical elements, so it is able to resolve the request of an environmental impact statement filed by any applicant.[307]

272. ExO was fully aware of the technical opinions requested and received by the DGIRA throughout the EIA Procedure and had the opportunity to express its point of view on them. Besides, the Tribunal should remember that [redacted] Mr. [redacted] to request technical opinions regarding Don Diego, *i.e.*, Mr. [redacted] requested technical-scientific opinions from several entities.

---

304 The annex **C-0003** is the alleged presentation used by ExO in the public consultation of October 8, 2015. However, this version does not seem to be the presentation that ExO actually used in the public consultation. The Respondent asks the Tribunal to take into consideration the **R-0119.**

305 Some of the technical opinions requested by the DGIRA were directed to: the Institute of Marine Sciences and Limnology of the UNAM; to the CICIMAR; to the General Office on Wild Life of the SEMARNAT; to the CIBNOR; INAPESCA; CONABIO; CONANP; to the General Office of Environmental Policy, Regional and Sectorial Integration -SEMARNAT inter alia. *See* **C-0008**, pp. 4-8.

306 Claimants' Memorial ¶ 141.

307 *See* article 24 of the REIA. **C-0097.**

a. The concerns of the CONANP

273. On November 20, 2015, the CONANP issued a technical opinion on Don Diego, and M.Biol. Benito Bermúdez, Respondent's witness, was in charge of coordinating the preparation of the document.[308] The CONANP's concerns were not minor. The first concern was that the SAR of the Project covered an area of influence of *El Vizcaíno*, mainly because the MIA 2015 failed to mention some elements which demonstrated the importance of that zone to the gray whale species (*e.g.*, the use of the habitat and its importance for the breeding, reproduction and refuge), after the near extinction of this species.[309]

274. On the other hand, CONANP deemed it concerning that the MIA 2015 did not include information that had scientific support regarding the implications of the noise ranges generated by the dredging activities:

> Marine mammals, especially cetaceans, rely on sound almost entirely to communicate, find, catch prey, avoid predators and, in general, perceive the environment in which they live. Increased industrial activities, maritime navigation and other human activities contribute to increase levels of marine noise.
>
> […] according to the UN Secretary-General Report on the oceans and the Law of the Sea, interoceanic noise of anthropogenic origin was related to impacts on marine biodiversity, recognizing the phenomenon as one of the five greatest threats to whale and other cetacean populations. […]
>
> In general, the information contained in MIA-R is inaccurate with respect to the noise sensitivity ranges of cetaceans, and their special modelling, as well as does not indicate habitats, feeding and reproduction areas, migratory routes, the sound ranges to which they communicate, sensitivity to noise, so it follows that the Promoter does not present identification, description and assessment of the environmental impact to different species of marine mammals.[310]

275. Another important concern of the CONANP was that the Project would remove the *caretta caretta* turtle from its habitat and would eliminate some important species for its diet (*e.g.*, red

---

308 Witness Statement of the Mr. Benito Bermúdez, ¶¶ 22-25.

309 CONANP's technical opinion, pp. 4, 8-9. **C-0006**. Witness Statement of Mr. Benito Bermúdez, ¶¶ 22-25.

310 CONANP's technical opinion, p. 19. **C-0006.**

lobster).[311] In the words of the CONANP and the Biologist Bermúdez, "it is undeniable that the efforts made to achieve the yellow turtle preservation could be affected".[312]

276. The CONANP also informed to the DGIRA that the UNESCO World Heritage Centre requested information about the Project, since it might seriously threaten Gulf of Ulloa's marine species and ecosystems.[313]

277. The Tribunal may note that the CONANP did not issue a simple "note". It also may note that the technical opinion was requested and directed to the DGIRA (not to ExO), and that those technical opinions expressed serious concerns about Don Diego; therefore, DGIRA considered that the Project violated the environmental legislation.[314]

278. The Claimant and its witnesses argue that in February, 2016, representatives of ExO held a meeting with the former head of the CONANP and that, after that meeting, the CONANP was satisfied with ExO's arguments and explanations.[315] The Respondent doubts this; the technical opinion represents the CONANP's institutional opinion on Don Diego, and therefore, the Respondent requests the Tribunal to consider the full text of the document, including the following operative paragraph:

> […] "THE PROJECT", having not taken into account and analyzed a number of environmental effects that could cause serious impacts on migratory species, such as grey whale (*Eschrichtius robust*) and yellow turtle (*Caretta caretta*), critical habitats for species considered endangered or under special protection, as well as non-compliance with obligations under international treaties, such as the Convention concerning the Protection of the World Cultural and Natural Heritage and RAMSAR Convention; CONTRAVENES the provisions of the current environmental legislation.[316]

b. NGOs's concerns

279. Shortly after ExO filed the application for the MIA dated on June 26, 2015 – that ExO eventually replaced by the MIA 2015- dozens of people and organizations expressed their concerns about the Project, throughout communications submitted before the DGIRA.

---

311 CONANP's technical opinion, p. 29. **C-0006**.

312 CONANP's technical opinion, p. 30. **C-0006**. Witness Statement of Mr. Benito Bermúdez, ¶¶ 24.

313 CONANP's technical opinion, p. 32. **C-0006**. Witness Statement of Mr. Benito Bermúdez, ¶¶ 18.

314 CONANP's technical opinion, p. 33. **C-0006**.

315 Claimants' Memorial, ¶ 142.

316 CONANP's technical opinion, p. 34. **C-0006**. *See* Witness Statement of Mr. Benito Bermúdez, ¶¶ 26-27.

280. On July 30, 2015, a group of environmental organizations, included the CEMDA, Oceans Future Society of Jean Michel Cousteau, the Interamerican Association for Environmental Defense (AID) and WildCoast, asked the DGIRA to request technical opinions and evaluations from various scientific institutions, about the Project since, from their point of view, marine dredging is an incompatible activity to the conservation and sustainable development of the Gulf of Ulloa.[317]

281. On September 15, 2015, WildCoast concerns were raised and submitted to the MIA 2015 before the DGIRA as it was identified that the Claimant would contract third parties to perform various activities during the Project, such as transportation of the extracted material. WildCoast's principal concern in this case was that ExO would set out liabilities regarding the environmental impact generated by subcontractors during the Project development.[318]

282. On January 16, 2016, AIDA requested the denial of the Project's AIA since it was technically insufficient to guarantee that it would prevent potential damages to the marine ecosystem.[319] AIDA emphasized that the Project approval would cause the breach by Mexico of various international treaties, *inter alia*, the Convention on Biological Diversity and the Inter-American Convention for the Protection and Conservation of Sea Turtles.[320] In addition, AIDA emphasized the lack of expertise of ExO in marine mining activities, the lack of information in the MIA 2015 and the lack of certainty regarding some elements of the Project that ExO did not know in detail by then, such as the depth and thickness of the phosphate sands deposit.[321]

283. On April 6, 2016, Greenpeace sent a communication to the DGIRA underlying the importance -and critical status- of the Gulf of Ulloa for the gray whale, the *caretta caretta* turtle and for thousands of families that depends on fishing activity.[322]

284. On April 11, 2016, the Mexican Center for Environmental Defense informed the DGIRA that the Project would significantly disrupt the ecosystem where different species of cetaceans move and are located – including the gray whale and humpback whale – and the *caretta caretta*

317 Communication of June 30, 2015, of CEMDA, Oceans Future Society and others. **R-0120.** First Resolution of the DGIRA of April 7, 2017. **C-0008**, p. 2.

318 Observations to the MIA 2015, by WildCoast, p. 3. **R-0121.**

319 AIDA's communication of January 12, 2016. **R-0122.**

320 AIDA's communication of January 12, 2016, pp. 4-5. **R-0122.**

321 AIDA's communication of January 12, 2016, p. 8. **R-0122.**

322 Greenpeace's communication April 6, 2016. **R-0123.**

turtle. Since there was no scientific certainty, the Mexican Centre for Environmental Defense requested the DGIRA to apply the "*in dubio pro natura*" principle and, thus, to deny the AIA of the Project. [323]

c. The concerns of the universities and scientific centers

285. From September 2015, DGIRA started receiving various technical opinions from the universities and scientific centers.

286. On September 28, 2015, the CIBNOR submitted a technical opinion regarding the MIA 2015, in response to the DGIRA's request, in which it considered, *inter alia*, that the MIA 2015 did not have enough evidence to demonstrate its hypothesis which stated that the noise would not affect the sea mammals; similarly, it considered that there were inconsistencies regarding the identification of the sea mammals inhabiting the Project's site.[324] The CIBNOR found it disconcerting that the MIA 2015 stated that the sound frequencies and the decibel level of the dredger's suction were similar to those of a fishing vessel.[325] From the CIBNOR's point of view, a project like Don Diego would imply continuous noise during 50 years and that the passage of large-tonnage freighters to transport tons of material, food and people, would substantially change the ecosystem.[326]

287. On November 3, 2015, the Marine Sciences Institute of UNAM submitted before the DGIRA a technical opinion focused exclusively on sedimentation analysis. The conclusions of UNAM were critical:

> It is clear that the discharge of the residual fine material from the phosphate sand recovery process will significantly change the sedimentary accumulation rate, textual and consolidation characteristics of the bottom of the extraction zone and surrounding ecosystems. The habitat will be completely transformed into a soft sediment habitat that will not return to its present state when the activity is over and therefore it will not be possible to recover ecological characteristics for a long period of time.
>
> […]

---

323 Observations to the MIA 2015, Mexican Center for Environmental Defense, pp. 8-9. **R-0124.**

324 CIBNOR's technical opinion of September 28, 2015, p 5. **R-0125.** Due to additional information submitted on December 3, 2015 by ExO, on January 6, 2016 the CIBNOR submitted a new technical opinion by request of the DGIRA, confirming the content of the first opinion. *See* **R-0126.**

325 CIBNOR's technical opinion of September 28, 2015, p 8. **R-0125.**

326 CIBNOR's technical opinion of September 28, 2015, p 10. **R-0125.**

> Radioactivity: phosphorite deposits have often been associated with high radionuclide content […] This is (sic) the reason why phosphorite exploitation and the phosphate fertilizer industry are considered potential sources of natural radioactivity contamination, which must be taken into account during the operation. [...] it is Essential to know the concentrations of natural radionuclides in the material that is intended to dredge and in the water that will be discarded during the sand washing process. Also, since radionuclides tend to concentrate on fine material, with the separation of sands during the process, it is highly likely that the fine material to be returned to the sea had a higher concentration of radionuclides than the dredged material initially had. The possible dispersion of this unrein bound material (during the process itself or due to the action of bottom currents) may be a potential source of radioactive contamination for ecosystems surrounding the area of exploitation of phosphate sands and, by troffic transfer, to humans.[327]

288. Thus, one of the highest authorities on marine sciences in Mexico considered that the MIA 2015 was not conclusive on a major aspect: the radioactivity of the material that the Claimant sought to extract and its impact on the environment and human beings.

289. On March 28, 2016, the Society for Marine Mammalogy – probably world's most important scientific association on marine mammals– submitted a technical opinion in response to DGIRA's request.[328] The Society for Marine Mammalogy informed that seven researchers independently reviewed the MIA 2015, concluding that, since there was not enough information, the Project *i)* would cause impacts on the sea mammals due to the noise; *ii)* would impact on the habitat and *iii)* that there were inconsistencies in the MIA 2015 regarding the use that various cetaceans gives to the Gulf of Ulloa:[329]

> Several reviewers noted the poor or inaccurate information on blue whale occurance.
>
> […]
>
> Mitigation measures list a proposed suspension of dredging operations for the major week of blue whale transit each year but clearly with the more important prolonged and extensive use of this area for feeding for many months this would not provide much of a mitigation since the main impact of concern would be on feeding blue whales.
>
> The proposers did not justify why they did not consider impacts of mining operations on other cetaceans known to be in the area including humpback, fin, and Bryde's whales and

---

327 Technical opinion of the Marine Sciences Institute of UNAM, issued on November 3, 2015, pp. 3-4 (emphasis added). **R-0127.**

328 *See* technical opinion of the Society for Marine Mammalogy. **R-0128.**

329 Technical opinion of the Society for Marine Mammalogy, pp. 2-3. **R-0128.**

> numerous small cetaceans including pilot whales, Risso's dolphins, long-beaked common dolphins and Pacific white-sided dolphins.[330]

290. It is not a minor fact that the highest authority on sea mammals informed the DGIRA about its concerns regarding Don Diego and that it recommended to do not authorize the Project until some concerns would be resolved.[331]

d. National authorities' concerns

291. On September 17, 2015, the CONABIO informed to the DGIRA that part of the Project area would overlap with Magdalena Bay. Additionally, the CONABIO pointed out that the MIA 2015 was not supported by a special and congruent statistical analysis, it particularly emphasized that the mitigation measures proposed by ExO would not minimize negative effects caused by mining on the biodiversity of the Project area.[332]

292. On October 6, 2015, the Advisory Council raised to the DGIRA its concerns about the composition of sediments that the dredge would release, including arsenic, mercury and uranium.[333] The following observation of the Advisory Council is of utmost relevance:

> We reiterate as an advisory body of the Semarnat; that it is not possible to carry out serious studies and viable proposals for the reduction of environmental damage, if the promoter, as well as the institutions or people involved in the presentation of the MIA, do not recognize that the seabed is a medium, as important as any terrestrial environment [...]. Promoting one MIA, almost immediately after withdrawing another, does not provide enough time to study the phenomena involved in order for the balance and phenomena present in the area described are at least known [...][334]

293. The General Directorate on Environmental Policy, Regional and Sectorial Integration and the General Directorate of Wildlife, both from SEMARNAT, expressed some of the same concerns of the Advisory Council and the Marine Sciences Institute of UNAM. In the technical opinions issued on October 19 and 28, 2015, respectively, they stated that the extraction of phosphorite would cause the release of heavy metals and radioactive materials.[335] Likewise, they informed to

---

330 Technical opinion of the Society for Marine Mammalogy, p. 3. **R-0128.**

331 Technical opinion of the Society for Marine Mammalogy, p. 3. **R-0128.**

332 CONABIO's technical opinion of September 17, 2015. pp. 2-3, **R-0129.**

333 Technical opinion of the Advisory Council of October 6, 2015, pp. 2-3. **R-0130.**

334 Technical opinion of the Advisory Council of October 6, 2015, p. 8. **R-0130.**

335 Technical opinion of the General Office on Environmental Policy of October 19, 2015. **R-0131.**

the DGIRA that, like the MIA 2014, the MIA 2015 did not include information related to changes in the behavior of *caretta caretta* turtles as a result of the seabed alteration, the impact on their food source, and various sub-lethal effects in said species.[336]

294. On March 29, 2016, INAPESCA submitted a technical opinion to the DGIRA and explained that the Project would be performed within the polygons granted by concession to the Puerto Chale Cooperative Society and the La Poza Fishermen's Society.[337] INAPESCA also stated that the Gulf of Ulloa is a "center of biological activity", *i.e.* a place of biological and marine productivity, rich in fishing resources that supports communities dedicated to riparian fisheries.[338] INAPESCA also informed the DGIRA that the MIA 2015 did not have quantitative analysis on the effect of dredging operations on fisheries, but only inconclusive assertions.[339]

295. The Claimant and its witnesses insist that between January and February, 2015, they attended a meeting with INAPESCA and CONAPESCA officials, and that, based on those meetings the Claimant decided to implement the "eco-tube" in the Project's operations.[340] There are three relevant matters with respect to that assertion.

296. *First*, the alleged meetings were held during the EIA Procedure of the MIA 2014, which corroborates the fact that ExO, *motu proprio,* decided to withdraw the MIA 2014 in order to provide further elements to the DGIRA, so it could obtain the Project's AIA.

297. *Second*, the Claimant confuses the purpose of a courtesy meeting with public officials, with "meetings and constructive discussions" through which the Claimant decided to implement the "eco-tube".[341] In other words, the fact that SEMARNAT, CONANP, INAPESCA or CONAPESCA accepted to meet with executives of ExO does not mean that possible joint solutions arose in order to resolve the existing concerns regarding Don Diego (*e.g.* about the sedimentation plume to return material to the seabed).[342]

---

336 Technical opinion of the General Office on Environmental Policy of October 19, 2015. **R-0131.** Technical opinion of the General Office of Wildlife of October 28, 2015, p. 2. **R-0132.**

337 INAPESCA's technical opinion of March 29, 2016, p. 2. **R-0133.**

338 INAPESCA's technical opinion of March 29, 2016, p. 1. **R-0133.**

339 INAPESCA's technical opinion of March 29, 2016, p. 6.y 8. **R-0133.**

340 Claimants' Memorial, ¶ 124-125.

341 *See* Witness Statement of Mr. Claudio Lozano, ¶ 37.

342 Witness Statement of Mr. Claudio Lozano, ¶ 37. Claimants' Memorial, ¶¶ 77 y 125.

298. *Third*, despite the alleged "constructive discussions", INAPESCA's technical opinion demonstrates its institutional position and its serious concerns with respect to the Project.

e. The Comondú residents and fishermen's concerns

299. After the MIA 2015 was made available to the public, it caused concerns among the Comondú residents and fishermen, as well as within the Baja California Sur government. Thus, dozens of citizens reported their concerns to the DGIRA with respect to the Project and the negative impact that it would cause to the environment and the local fishing, which is an important source of resources for the area.[343] Comondú residents informed the DGIRA that, some years ago, Rofomex performed phosphorite extractions in Baja California Sur and those extractive activities affected mangroves and the cetaceans habitat.[344]

300. Various fishermen groups and cooperatives were concerned as well about the project since the activities performed by ExO would take place in areas granted by concession for fishing.[345]

301. On the other hand, the local government of Baja California Sur also informed the DGIRA of its concerns with respect to Don Diego. On September 29, 2015, the Government of Baja California Sur issued a technical opinion in which it expressed that, from its point of view, the Project was not environmentally viable.[346]

f. The international organizations' concerns

302. The UNESCO World Heritage Centre informed to SEMARNAT about its concerns regarding the Project since the EIA Procedure of the MIA 2014 started. This situation was not a minor issue; from the point of view of the international organization there was the possibility that

---

343 *See* DGIRA's First Resolution of April 7, 2016, pp. 196-218. **C-0008.**

344 DGIRA's First Resolution of April 7, 2016, p. 210. **C-0008** ("ROFOMEX, S.A. de C.V. carried out the extraction of phosphorite for 10 years in La Bocana. The consequences of such activity were that the mangroves around the site disappeared and the number of gray whales entering the canal decreased during the years of operation and for a couple more years, after the company left the facility. To date, after 15 years without activities, the area has not yet fully recovered"). *See* Cooperativa Mangle's communication. **R-0134.**

345 CONMECOOP's communication of December 17, 2015. **R-0135.** FEDECOOP's communication of October 6, 2015. **R-0136.** The Claimant provides as evidence three fishermen's group communications of March 30, 2016. None of the submissions indicates verbatim that the fishermen's groups supported the project, but simply point out that such groups would support SEMARNAT's decision to issue the MIA 2015. *See* **C-0142**, **C-0143**, **C-0144** and **C-0145**.

346 Technical opinion of the Government of Baja California Sur of September 29, 2015, p. 11. **R-0137.**

Don Diego could affected *El Vizcaíno*, a place that, since 1993, is considered a world heritage site and the most important place in the world for the reproduction of gray whales.[347]

303. Thus, on April 13, 2015, the Director of the World Heritage Centre informed the Respondent that it was aware of the Project due to different sources and it pointed out that there was a concern that the activities to be carried out would endanger different species and marine ecosystems.[348]

304. In 2016, as a result of the PEIA of the MIA 2015, the World Heritage Centre reiterated its concerns:

> […] the submitted EIA does not evaluate potential impacts of the Project on the Outstanding Universal Value (OUV) of the Whale Sanctuary El Vizcaino property. While IUCN notes that the proposed project area does not overlap with the property and that it is located at some distance from it, potential impacts on the property should nonetheless be evaluated, particularly taking into account the fact that the migration routes of the grey and blue whales, which are key elements of the property's OUV, also stretch outside its boundaries. In view of the potential sensitivity of the marine environment to disturbance, including acoustic disturbance as well as physical disturbance or pollution impacts, this aspect is considers as particularly important.[349]

305. The fact that an international organization such as UNESCO have expressed dismay at the Project shows that the concerns ascended to an international level. Likewise, UNESCO's position undermines the Claimant's allegations of an alleged campaign with political motivations against Odyssey and Don Diego. In other words, the Respondent had no influence whatsoever on the position taken by an international organization such as UNESCO regarding Don Diego.

3. The DGIRA's concerns regarding the MIA 2015

306. DGIRA was also concerned about the MIA 2015 and Don Diego, just as were the Comondú residents and fishermen, federal and local authorities, non-governmental organizations, universities, scientific centers and international organizations.

---

347 Documental memory 2012-2018, CONANP, p. 108. **R-0029.** Additional information related to *El Vizcaino* whale's sanctuary may be found in the website of the UNESCO World Heritage Centre. *See* UNESCO, Whale Sanctuary of *El Vizcaíno*. **R-0155**.

348 Some of the sources of information referred to by UNESCO make reference to the criminal complaints filed by ExO against local journalists and fishermen. *See* Communication of the World Heritage Centre of April 13, 2015, p. 5. **R-0038.**

349 Communication of the World Heritage Centre of April 18, 2016. **R-0139.**

307. On October 30, 2015, the DGIRA –[350] Just as it happened in the EIA Procedure of the MIA 2014, Mr. "inadequacies and inconsistencies in the environmental and technical information submitted" that did not allow to "conduct an objective evaluation of the studies submitted".[351] Mr. only once ExO to extend, rectify or clarify the information contained within the MIA 2015, in order for the EIA Procedure to continue. Meanwhile, the EIA Procedure was suspended.[352]

308. The Respondent does not consider it necessary to transcribe every observation made by the DGIRA. In general, some of the errors and omissions in the MIA 2015 were the following:

- The need for additional studies and simulation models with registered information of the SAR about the quick recolonization of dredged areas.
- Information on the overlap between the Project area and the feeding and refuge area of the Caretta caretta turtle.
- Studies on the physical, chemical and biological characteristics of the benthic and pelagic species that exist in the Project area, noting that ExO did not even include them in the MIA 2015.
- Expand monitoring studies of turtles, mammals, sea cucumbers, and large marine species.
- Information on the impact of sediment return to the seabed
- Evaluations on the impact on red pelagic crab, which is the main food of the yellow turtle.
- The effects of the dredge suction and noise disturbance of the entire Project and its impact on marine mammals

350 Claimants' Memorial, ¶ 138.

351 Communication of October 30, 2015, p. 1. **C-0004**.

352 Communication of October 30, 2015, pp. 2 y 11. **C-0004.** ("The REIA provides the promoter a period of up to sixty days to vent the request for information, during which the authority's time limit for resolving the EIAC is suspended"). Solcargo-Rábago Expert Report, ¶ 99.

- Analysis of mortality rates of sea turtles, sea cucumbers, marine mammals and larger species.
- Amend various aspects of the programs for the prevention and mitigation of environmental impacts.[353]

309. The Claimaint characterizes the DGIRA's requirement reflected in the communication of October 30, 2015 as "a further investment of time and expense".[354] The reality is that the DGIRA, in the excercise of its regulatory powers and administrative discretion, requested ExO to amend serious errors and omissions in the MIA 2015 that questioned the viability of the Project. In addition, they show the "methodological inadequacies of ExO's EIS, which prevented a true assessment of the environmental impacts to be generated by the Project".[355]

4. Additional information submitted by ExO regarding the MIA 2015

310. During the EIA Proceeding, ExO submitted additional information before the DGIRA, including a document called "technical annex" of more than 400 pages, in response to DGIRA's communication of October 30, 2015.[356]

311. With the presentation of the technical annex, DGIRA annulled the suspension of the EIA Procedure of the MIA 2015 and continued with its environmental impact assessment analysis. Since the information submitted by ExO was extensive, the DGIRA informed ExO that it would extend the term of the EIA Proceeding and would again request technical opinions from authorities and scientific institutions on the new information provided by ExO, in accordance with the LGEEPA and REIA.[357]

312. The additional information submitted by ExO was considered by the DGIRA when resolving the MIA 2015. Furthermore, the fact that the DGIRA received the additional information submitted by ExO and decided to continue with the PEIA –despite the shortcomings and

353 **C-0004**, pp. 2-11 Solcargo-Rábago Expert Report, ¶¶ 175-179.

354 Claimant's Memorial, ¶ 139.

355 Solcargo-Rábago Expert Report, ¶ 177.

356 ExO Communication December 3, 2015. **C-0005**. *See* **C-0007** and **C-0148**.

357 First Resolution of the DGIRA on April 7, 2016, pp.17-18. *See* Article 46 of the REIA**. C-0097.** Article 35 Bis of the LGEEPA, **C-0014** ("when, due to the complexity and dimensions of a work or activity, the Secretariat requieres a longer period for its evaluation, it may be extended up to sixty additiona days, provided that it is justified accordingly to the provisions of the regulations of this Law").

inconsistencies in the environmental and technical information submitted by ExO– demonstrates that ExO was not treated unfairly or disproportionately. ExO had the opportunity to try to amend the errors and omissions identified by the DGIRA, and to provide further elements in the EIA Proceeding. In other words, the EIA Proceeding and the DGIRA´s actions were conducted in accordance with the applicable legal framework.

5. The meetings between ExO and SEMARNAT

313. The Claimant and its witnesses make a series of assertions regarding alleged meetings between ExO representatives and Mr. Pacchiano, held during the MIA 2015 EIA Proceeding (in particular, in March and May 2016), which is important to clarify.

314. Essentially, the Claimant asserts that on March 12, 2016, Mr. Ancira met with Mr. Pacchiano to present the Project again and Mr. Ancira emphasized that, if the Project was not approved shortly, ExO would resort to legal instances. Mr. Pacchiano testifies that this meeting was not held and also explains that the Claimant erroneously states that the meeting was held on a day that was not even a business day. [358] Similarly, the Claimant and its witnesses allege that in May 2016, Mr. Ancira met again with Mr. Pacchiano and the result of said meeting was "conciliatory," and they even state that at said meeting Mr. Pacchiano, assured that he would approve the Project.[359] That is false. By that time, the DGIRA had already rejected the Project´s AIA and there was already ongoing litigation initiated by ExO. Furthermore, Mr. Pacchiano testifies that such meeting was not even held.[360]

315. Is it true that on other occasions representatives of ExO requested meetings with Mr. Pacchiano, and he, just for courtesy, had received them in his office to hear their positions. However, the context of such meetings and the subjects covered in those meetings were distorted by Claimant and its witnesses.

---

358 Witness statement of Mr. Rafael Pacchiano, ¶¶ 66 ("First of all, it should be noted that March 12, 2016 was a weekend and I have never used to have work meetings on non-working days. Nor do I remember having attended a meeting in March 2016 related to the Don Diego project.").

359 Clamaint´s Memorial. ¶ 157. Witness statement of Mr. Claudio Lozano ¶¶ 74-75. Witness statement of Mr. Mark Gordon, ¶¶ 83.

360 Witness statement Mr. Rafael Pacchiano, ¶ 67 ("Likewise, I also do not remember having participated in a meeting held in May 2016[…]")

316. Mr. Pacchiano explains that as of 2015, meetings with ExO began to be attended by Mr. Alonso Ancira, who constantly insisted on the need for DGIRA to issue Don Diego's AIA. The Witness statement of Mr. Pacchiano is relevant:

> I did not commit –neither with Mr. Ancira, nor with ExO, nor ever with other MIA applicant– that I would approve or favor the ExO MIA application subject to certain conditions imposed by me. That is also false.
>
> In relation with all the projects subject to obtaining a MIA authorization (including the Don Diego project), my work was limited to ensuring that the areas under my charge complied with the law and that the DGIRA resolved in accordance with the applicable legislation, as well as based on the technical and scientific information información in the files of each MIA request.[361]

317. Mr. Pacchiano also explains that he was always respectful and measured in said meetings, despite the insistence, anger and threatening tones that the ExO interlocutors had (i.e Messrs. Ancira and Fernández de Ceballos).[362]

318. It is regrettable that the Claimant's claims revolve around factual distortions regarding these meetings. As clarified in the Witness statement of Mr. Rafael Pacchiano: i) in June 2015, in his capacity as Undersecretary of Management for Environmental Protection, he never asked ExO to withdraw the MIA 2014; ii) also he did not assure to ExO that the DGIRA would issue the AIA of the Project if it presented a new MIA "with letters of support" from CONAPESCA and fishermen, and iii) in his capacity as head of SEMARNAT he did not "antagonize" the representatives of ExO, as the Claimant falsely alleges.[363]

319. Likewise, Mr. Pacchiano did not commit to the ExO representatives to authorize Don Diego, despite the fact that the DGIRA had already issued a first resolution in which it denied the Project.[364] All of this is false and Mr. Pacchiano testifies so:

> […] I never allowed that interests groups captured the independency or the decision of the DGIRA, [redacted] In this regard, I remember that in accordance to what I was informed, the resolutions to reject the Don Diego project were based strictly in technical and scientific

361 Witness statement of Mr. Rafael Pacchiano, ¶¶ 52-53.

362 *See* Witness statement of Mr. Rafael Pacchiano, ¶¶ 58-73.

363 Claimant´s Memorial, ¶¶ 131-132, 145.

364 Claimant´s Memorial, ¶ 157.

> grounds. In this sense, I can confirm that the actions of SEMARNAT during my tenure were carried out in a scrupulous scientific, technical and strict compliance with the law.[365]

L. The DGIRA resolution in 2016

320. [redacted] Mr. [redacted] the administrative resolution by which he resolved to "REJECT THE AUTHORIZATION requested for the project called "Dredging of black phosphate sands in the Don Diego Deposit", submitted by ExO.[366] The foregoing, derived from the technical analysis carried out by DGIRA and by which it was concluded that:

> […] there is a direct effect on the Caretta caretta turtle species listed in the endangered status list in NOM-059-SEMARNAT-2010 standard, and the effects on the other four sea turtle species [*Lepidochelys olivacea, Dermochelys coriácea, Chelonia mydas* and *Eretmochelys ímbricata]*, this **DGIRA** determines that **the approval request for the project submitted by the petitioner is denied**. (original emphasis)

321. This determination is consistent with the analysis, methodology and conclusions made by DGIRA. It should be noted that DGIRA is an administrative unit with technical functions within SEMARNAT, with extensive experience in analyzing the environmental impact of various projects. Thus, and in accordance with its powers, the resolution includes a section entitled "Technical analysis", in which the DGIRA conducts an exhaustive evaluation of the information submitted by the petitioner, as explained in the following section.

1. The DGIRA had sufficient elements to determine that the MIA 2015 could not be authorized

322. As a result of the evaluation of the information that was submitted regarding the set of elements that constitute the ecosystem where the project is purported to be developed, the DGIRA warned that:

> […] the natural element of greatest relevance, due to their status of endangered species, are the five species of sea turtles, all of them migratory species, among which Caretta caretta stands out by reason of its relevance due to its abundance and distribution in the Gulf of Ulloa.[367]

---

365 Witness statement of Mr. Rafael Pacchiano, ¶ 50.

366 **C-0008**, p. 233.

367 **C-0008**, pp. 219-220.

323. Thus, and in accordance with the applicable environmental regulations, [368] the DGIRA considered the possible effects of the works or activities to be developed both in the Project Area ("*Área del Proyecto*" in Spanish or AP) and within the Regional Environmental System (SAR), taking into account "the set of elements that […] integrate them [the area] and not only the resources object of use or impact.".[369] Some of the factual findings on which the DGIRA based its decision were the following:

- The biodiversity of the AP and the SAR, particularly the presence of five species of sea turtles: *Caretta caretta, Lepidochelys olivacea, Dermochelys coriacea, Chelonia mydas* y *Eretmochelys ímbricata.*
- The endangered status of the five species of sea turtles present in the AP and the SAR
- The Golf of Ulloa is habitat for the *Caretta caretta* turtle species.
- The high concentrations of the *Caretta caretta* turtle in the Gulf of Ulloa, which uses it as a refuge and feeding area.
- The Golf of Ulloa constitutes the physical space for the development of part of the biological cycle of the *Caretta caretta* turtle.
- The abundance of *Caretta caretta* turtles in proportions between 1-28 and 54-85 turtles per Km^2 in different areas of the AP.
- The presence of the *Caretta caretta* turtle in an area of 86.6% (53,682.67 hectares) of the total hectares of the AP (61,989.23 hectares).
- The AP in which the dredging will be performed will be precisely on a significant area for the dynamics of the survival behaviors of the *Caretta caretta* turtle.
- The dredging activity-sucking the marine sediment-implies a significant environmental impact for the species that growth there since it alters and affects the local distribution and diversity of benthic organisms that serve as food.

368 Article 44 sections I y II of the REIA. **C-0097.**

369 **C-0008**, p. 219.

- The interruption of the trophic (food) chain of the species that growth in the AP and, therefore, the alteration of their biological cycle.

324. The aforementioned factual findings coincide with the result of the evaluation of the most relevant or significant environmental impacts due to their incidence –without the application of specific mitigation measures–, which were:

- Impact on the local distribution of benthic organisms.
- Loss of sea turtle individuals.
- Loss of habitat.
- The alteration in the composition and transport of sediments.
- The alteration in the quality of sea water.
- Increase of turbidity and solids in the water column.

325. ExO recognized and identified the generation of the following residual and cumulative environmental impacts derived from the Don Diego project:

- **Residual impacts:** i) impact on the local distribution of benthic organisms; ii) habitat loss; iii) alteration in the composition and transport of sediments; and iv) changes in the topography of the seabed.[370]
- **Cumulative impacts:** i**:** i) loss of individuals of sea turtle species; ii) underwater noise pollution; iii) loss or damage to individuals of ichthyofauna; iv) affectation of individuals of species of marine mammals and cartilaginous fish (Elasmobranches); and v) impact on fishing activity.[371]

326. The ExO company itself sought to minimize the significant nature of environmental impacts through a proposal related to the application of mitigation measures:

---

[370] The impact that persists after the application of mitigation measures, Article 3, section X of the REIA. **C-0097.**

[371] The effect on the environment that results from the increase in the impacts of particular actions caused by the interaction with others that took place in the past or that are occuring in the present. Article 3, section VII of the REIA. **C-0097.**

> In conclusion, the **petitioner** stated that none of these impacts was considered relevant, provided the proposed mitigation measures are applied, in particular with respect for impacts identified as significant, and provided the possible effects of activities under the project do not represent a risk for the structure and functioning of ecosystems described in the **SAR**.[372] (emphasis added)

327. Although ExO proposed "mitigation and compensation" measures through a General Program that was conformed of various Programs and Subprograms,[373] the DGIRA noted that these programs and measures were merely descriptive and ineffective since they were based on technical information that was not according to the reality of the AP:

> With respect to the programs listed above, this **DGIRA** notices that they provide a general description without clearly indicating the actions to be undertaken in order to define their efficacy; that they do not provide for specific indicators; that it is not possible to assess whether they are technically and environmentally viable to address the adverse environmental impact identified; and they are therefore not quantitatively measurable, nor are they objectively proposed to guarantee that the actions set forth in them will reduce or eliminate their impact on the marine environment and the biodiversity present in it..[374]

328. Therefore, it is evident that, if the mitigation and compensation measures proposed by ExO are inefficient to reduce or eliminate the significant environmental impacts generated by the Don Diego project, it is justified that the DGIRA has denied the authorization for that reason, as found, for example, with respect to the Sea Turtle Monitoring Program:

- The measurement starts from a baseline that is not supported by quantitative data on the habitat of the turtles.
- To define the baseline, only 5 individuals of the *Chelonia mydas* species were included, without presenting data from the other species.
- The baseline did not include information on the *Caretta caretta* species, despite the fact that the scientific information available and the one submitted reports an important abundance and distribution of this species in the AP.
- The information submitted was not based on "the best available scientific data".

372 **C-0008**, p. 142.
373 **C-0008**, pp. 146-147.
374 **C-0008**, p. 147.

- The so-called "monitoring" does not function as such since it is rather a program for the rescue of individuals of sea turtles.
- "Monitoring" is proposed in a general and theoretical way without generating conviction about its effectiveness in protecting the *Caretta caretta* species.
- There is no technical justification for how "monitoring" will mitigate the impact on the trophic chain of the *Caretta caretta* species generated by dredging activities.
- The effectiveness of the use of baffles and tickle chains cannot be assessed because it starts from a baseline that is not clear by not identifying the distribution and abundance of turtles in the AP.
- The lack of a correct baseline does not allow to calculate the probability of damage to the turtle population, nor to establish indices to determine the effectiveness of the baffles and tickler chains.
- Pumping protocols, i.e., suspending suction during positioning of the dredge, are not mitigation measures or measures that protect the turtles because they are actions of normal dredging operation.
- The "observation on board" does not mitigate the impacts on the trophic chain since stopping the operation before the sight of an individual does not prevent the impact of the seabed from continuing to be generated.

329. The DGIRA also analyzed the effectiveness of the mitigation measures presented by ExO in its "Seabed Restoration Program", constitued by the following actions: *i)* monitoring the order established for the dredging; and *ii)* the report to SEMARNAT of the start and end of dredging in each strip of seabed. In this regard, the DGIRA analyzed these measures in light of the predictive model that was presented by ExO,[375] in order to determine if the recolonization of the dredged areas would recover the seabed in the AP in the manner and timeframes suggested by ExO. The DGIRA recognized that the recolonization of the benthic species is decisive, not only for the regeneration of the seabed, but also for the trophic chain of species of environmental relevance.

[375] According to ExO, this model allows the prediction and identification of the sets of species that will appear throughout the repopulation process of a site subject to a dredging process. **C-0008**, p. 224.

Based on the foregoing, the DGIRA made the following findings regarding the "Seabed Restoration Program":

- The predictive model of ExO was based only on one factor *i.e* the benthic species found in the samplings it carried out.
- The effectiveness of the mitigation measure could not be evaluated because ExO failed to consider the physical and chemical factors in its predictive model, which are relevant aspects to determine the function of the ecosystem.
- A project identical to ExO in other parts of the world does not have homogeneous or equal impacts as in the ecosystems of the Gulf of Ulloa, so the model that has worked for other parts of the world does not guarantee the recovery of the sea floor.
- ExO did not accredit the identity between physical, chemical and biological factors in other parts of the world and those of the Gulf of Ulloa, therefore the results of its predictive model cannot be extrapolated to that specific region.
- ExO omitted to consider that the temperature factor and the direction of the marine currents of the North Sea are different in the Gulf of Ulloa, both aspects are important because they determine the transport and distribution of nutrients that favor opportunistic species in the recolonization process.
- ExO did not provide indicators that would allow quantifying the recovery of the seabed and, with it, the effectiveness of the proposed mitigation measures.

330. Although ExO also proposed mitigation measures in the form of Water Quality Control and Monitoring Programs, Environmental Education, and Protection and Monitoring of Marine Fish and Benthic Invertebrates, they did not have specific quantitative indicators for groups of species to assess relative abundance, richness and diversity. Even though ExO identified the impacts of the project by groups of species and associated them with each proposed measure, its mitigation measures were merely descriptive and imprecise, as the DGIRA found:

> [The] mitigation measures, they shall be linked to the impacts generated by the project and the species and natural resources affected by such impacts, among them, the Caretta caretta species, that, as an endangered species, constitutes one of the most relevant environmental resources within the PA; thus, it is enough to described the contents of the program submitted as a mitigation measure, it is necessary to justify the actions that constitute such measures, which shall mitigate the impact and reestablish or compensate

the environmental conditions that existed before the disturbance caused by the project […][376] (emphasis added)

331. In particular, the DGIRA made the following findings regarding the mitigation measures included in the Water Quality Control and Monitoring, Environmental Education and Protection and Monitoring of Marine Fish and Benthic Invertebrates Programs:

- When developing each measure, ExO did not expose the actions that help the recovery of the benthic fauna and its ecosystems in relation to the red pelagic crab (*pleuroncodes planipes*) –a vital and essential element in the trophic chain of the *Caretta caretta* turtle and other marine species –.
- ExO did not explain the compensation measures in the event that the recovery of the benthic fauna is not being performed in accordance with the predictions of the recovery model that it presented, also in relation to the red pelagic crab.
- ExO did not specify whether the Don Diego project affects the availability of food for the *Caretta caretta* turtle, namely the red pelagic crab, or the mitigation measures that guarantee its availability as a food source.
- ExO did not demonstrate that the Don Diego project does not affect the alternative food sources of the *Caretta caretta* turtles: snails, mollusks and other benthic fauna other than the red pelagic crab.
- The frequency of dredging does not allow habitat recovery, not even with the alternate operation dredging plan proposed by ExO, since extraction eliminates an important source of food: the red pelagic crab.
- The return and deposit of sediment volumes in areas adjacent to the extraction areas also causes the displacement of the benthic feeding sources of the *Caretta caretta* turtle.
- Sediment depositions affects non-impacted habitats, forcing species to move to undisturbed areas or burying them in the process.
- ExO did not provide elements to guarantee that the supposed recolonization of benthic species derived from the formation of furrows, favors the abundance and availability

[376] **C-0008**, p. 226.

of food under the conditions that currently feed the *Caretta caretta* –which is in danger of extinction–.

- The lack of food availability –even temporary– evidently affects an endangered species, such as the *Caretta caretta* turtle.
- The displacement of the *Caretta caretta* turtle´s food source, as well as its distancing as a consequence of the tickling chains and deflectors, can alter their habits and growth during the juvenile to mature stage.

332. Many of the DGIRA's conclusions were made regarding the *Caretta caretta* species, however, these findings are also applicable to the other species, i.e the leatherback or *Dermochelys coriacea*, the green turtle or *Chelonia mydas* and the hawksbill turtle or *Eretmochelys imbricata*, since they all share the same habitat. In particular, the DGIRA determined that all turtle species would also suffer feeding effects and that no proposed mitigation measure guaranteed the abundance and availability of food for these species, nor that the dredging activity would not affect their trophic chain or migratory habits.[377] In fact, the DIGRA´s conclusion regarding mitigation and compesation measures was as follows:

> In this sense, the mitigation and compensation measures go from a series of data that do not technically, scientifically and environmentally support their feasibility and efficiency to show that the environmental impacts generated by phosphatic sand dredging on the seabed do not represent a severe or irreversible damage danger, and that the execution of the proposed measure actually makes sure the adverse environmental impacts are avoided or reduced to the minimum to ensure the conservation and restoration of the Caretta caretta turtle habitat, as well as the other four endangered turtle species..[378]

333. Furthermore, the DGIRA was not obliged to authorize the Project on a conditional basis. Solcargo states:

> […] DGIRA was not required to conditionally authorize the Project […] ExO did not provide sufficient elements to prove the effectiveness of its mitigation measures. On the other hand, DGIRA, based on its technical and scientific experience available at the date of its resolution, did have elements to consider that the impacts to be produced by the project would be unacceptable, and at the same time, it lacked elements to determine the possibility of mitigating the environmental impacts in a satisfactory manner. […] if ExO

377 **C-0008**, p. 229.

378 **C-0008**, p. 229.

was unable to demonstrate how the Project could be developed with effective mitigation measures, DGIRA was not obligated to supplement ExO's Project […][379]

334. Based on the aforementioned determinations, as a result of a technical-scientific analysis, the DGIRA decided to deny the authorization of the MIA 2015, presented by ExO.

2. It is false that Secretary Pacchiano instructed that the MIA 2015 be denied

335. As explained *supra*, in accordance with the structure of SEMARNAT, as well as the legislation that regulate and establish the competencies and attributions of its different administrative areas, neither the Under Secretary nor the Secretary of SEMARNAT have any interference with respect to the result of the decisions and determinations adopted by the DGIRA. Indeed, Engr. Rafael Pacchiano has confirmed in his witness statement that the accusations against him, according to which he instructed or ordered to deny the authorization in matters of environmental impact, are false:

> Therefore, I affirm before this Arbitral Tribunal that I never gave an order or instruction, neither explicit, nor tacit, for the DGIRA to decide authorizing or rejecting the Don Diego project. In fact, as Head of the Ministry I did not have the power to issue said order or instruction. [redacted][380] [Emphasis added].

3. DGIRA's "projects" of resolution lacks legal value

336. In its witness statement, [redacted].[381] However, that assertion stands in constrast to contemporary evidence for which ExO acknowledged that the MIA was withdrawn because it was incomplete.[382] A fact regarding which ExO and its witnesses –based on mere sayings–, now contradict each other by trying to again blame this conduct –attributable solely to the Company itself–, on Engr. Rafael Pacchiano.

---

379 Solcargo-Rábago Expert Report, ¶ 199.

380 Witness statement of Mr. Rafael Pacchiano, ¶ 11.

381 Witness statement [redacted] ¶ 11.

382 Odyssey Press Release, June 22, 2015. **R-0107.**

337. In that regard, Engr. Rafael Pacchiano himself has stated that it is false that he asked the representatives of ExO to withdraw the MIA:

> Notwithstanding, I would like to emphasize that I never asked ExO representatives to withdraw the MIA presented on September 3, 2014 (MIA 2014). This is false.
>
> […]
>
> I understand that the Claimant and their witnesses argue that in that meeting I asked Mr. Ancira that ExO should withdraw the 2014 MIA and should present it again accompanied by documents that will include support of the project by different organizations. That is false, I never asked nor suggested ExO representatives to withdraw the MIA, much less did I required letters or "supporting evidence" of the project. In any case, I had nothing to do with the MIA withdrawal and I do not know the reasons why ExO decided to withdraw the 2014 MIA.
>
> It should be noted that ExO was represented by a large team of lawyers and influential businessmen. Without prejudice to specifying any assertation that the Claimant and their witnesses make against me, a request to withdraw the MIA –in the terms that the company Odyssey intends to impute to me– would have constituted a sanctionable conduct. In that sense, ExO had the opportunity to denounce this situation to the relevant authorities. However, they did not do so because that claim is false.[383]

338. In any event, the Claimant and its witnesses intend to make the Tribunal believe that, [redacted] there were plans or opinions to issue the resolution in a different meaning than that which actually occurred. In other words, the Claimant relies on its witnesses to attribute legal value to what [redacted][384] but that simply did not happen. Indeed, [redacted] the following, respectively:

[redacted][385]

[redacted][386]

383 Witness statement of Mr. Rafael Pacchiano, ¶ 51, 64-65.

384 Witness statement [redacted] ¶ 21.

385 Witness statement [redacted] ¶¶ 19 y 20.

386 Witness statement [redacted] ¶ 7.

339. First, there is no evidence in the record that shows that there were draft resolutions in a sense other than that in which the resolution was issued. Second, even if there were such draft resolutions, they would only be "projects" without any legal value that do not reflect the technical analysis that was conducted, taking into consideration the information submitted by the petitioner. It should be noted that, like any administrative act, all documents begin with a previous project that is adjusted as the integration of the file and its analysis progresses.

340. In any case, the final resolution was legally adopted, denying the AIA to ExO two times, and that decision corresponded, by law, only [redacted] would or would not have done under certain circumstances is irrelevant.[387] [redacted] however, this did not happen and therefore it is meaningless to speculate on mere assumptions and hypotheses. In this sense, Engr. Rafael Pacchiano has also rejected having received draft resolutions in a sense other [redacted]

> In accordance with the foregoing, I never received any draft resolution of the Environmental Impact Manifestations of the Don Diego project (or of any other project) for the simple reason that the technical and scientific considerations to deny said project [redacted] In this sense, [redacted] In fact, I found out the outcome of the resolution of the 2015 MIA by ExO once the resolution was going to be notified. I should mention that when I found out the outcome of the resolution, the decision of the DGIRA did not appear strange to me. The above, not only because I knew the DGIRA had received a considerable number of technical opinions that expressed concerns about the Don Diego project, [redacted][388]

4. The General Director of DGIRA was ultimately responsible for the 2016 resolution

341. As previously indicated, in accordance with Mexican law, the DGIRA has the power and authority to evaluate the environmental impact statements.[389] For this purpose, the DGIRA has a General Director who assumes its technical and administrative direction and is responsible before

---

387 Witness statement [redacted] ¶ 21.

388 Witness statement of Mr. Rafael Pacchiano, ¶ 41.

389 Article 28 section II of the RISEMARNAT. **R-0053.**

higher authorities of its correct operation.[390] The general directors have the power to sign the documents related to the exercise of their powers, as well as to resolve the issues regarding authorizations concerning their powers.[391]

342. [redacted]

Figure 7. [redacted] **C-0006**

[redacted]

343. Mexican law itself provides that general directors are assisted by deputy general directors, directors, deputy directors and other public officials that the service requires. In that regard, the 2016 resolution was also endorsed by the DGIRA team that participated in its preparation and in the analysis of the MIA. [redacted]

Figure 8. [redacted]

[redacted]

390 Artícle 18 of the RISEMARNAT. **R-0053.**

391 Artícle 19 sections XXIII y XXV of the RISEMARNAT. **R-0053.**

344. The legal rules applicable to the operation of SEMARNAT also expressly provide the powers of the Under-secretary of Management for Environmental Protection, as well as the non-delegable powers of the Secretary, which does not include authorization for environmental impact. In fact, although the law provides that, with authorization of the Secretary, the Under-secretary may attract for resolution the files related to the acts of auhtority competence of the general directorates of his assignment –due to their special characteristics, interest or significance–,[392] that power was not exercised in the case of the MIA authorization request submitted by ExO.

345. As a matter of law –and not only of fact–, the national courts also agree that the refusal to authorize the MIA fell on Mr. [redacted] As can be deduced from the extract of the sentence of the TFJA, - Mexican administrative court - [redacted]

[redacted]

346. Therefore, in accordance to Mexican law, [redacted]

M. The Resolution of April 7, 2016 and the challenges of ExO

347. As mentioned above, on April 7, 2016, the DGIRA [redacted] decided to deny the authorization requested for the Don Diego dredging project.

---

392 Article 5 Section XXXIV and Article 9 Section II of the RISEMARNAT. **R-0053**.

348. As a result of the foregoing, ExO did not agree with the DGIRA's decision and has filed various appeals and challenges before administrative courts, one of which is still ongoing. The following subsections explain in detail the legal scope of these proceedings, as well as the scope of the judgments issued by the administrative courts.

1. The Appeal for Review 74/2016

349. In accordance to the Mexican legal system, the final decisions issued in administrative proceedings can be challenged by those affected, through an appeal for review or before the competent jurisdictional bodies.[393] The appeal for review is filed directly before the authority that issued the contested resolution, who must admit it and transmit it to its hierarchical superior for its final resolution.

350. In this case, on April 29, 2016, ExO decided to exercise the legal remedies provided by the national legislation and filed an appeal for review, based on the absolute premise that the MIA it presented was "perfect", as stated in the following assertion:

> The appealed resolution is illegal since the MIA submitted by **EXPLORACIONES OCÉANICAS, S DE R.L. DE C.V.** which was not approved by the DGIRA, has absolutely nothing wrong, incorrect, irregular or illegal, both from a technical and environmental point of view, which is why it causes the appellant the following: [grievances].[394]

351. Based on the aforementioned statement, ExO raised five grievances or reasons why it did not agree with the DGIRA´s decision:

1) Lack of legal argument of the appealed resolution, by not indicating which is the hypothesis to apply article 35 of the LGEEPA, since the authority allegedly did not specify the incise of section III that would be applicable to the case;

2) Undue motivation of the resolution due to the improper application of the general wildlife law, by apparently not indicating specifically what was its rationale to determine why the project affects the habitat of the turtles and why said affectation implies an affectation to an endangered species;

---

393 Artilce 176 of the LGEEPA. **C-0014.**

394 Appeal for review 74/2016. **R-0141.**

3) Undue motivation for the improper interpretation and application of section III of article 35 of the LGEEPA, by supposedly confusing the concepts of species, individuals and population, to justify the refusal arguing the affectation of a marine species (*Ca*retta caretta);

4) Undue rationale and motivation for the inaccurate application of various legal provisions, because, allegedly, it simply referred or transcribed various articles without precisely indicating the applicable legal precept or precepts; and

5) Lack of motivation due to the improper interpretation and application of articles 28, 30 and section III of article 35 of the LGEEPA, allegedly not knowing the scope and meaning of the concepts "mitigation and compensation" and not authorizing the project subject to the establishment of additional measures.

352. Since the Undersecretariat did not resolve the appeal for review within three months from the date on which it was filed,[395] a legal fiction became applicable which, according to Mexican law, is known as "confirmativa ficta", that means that, by ministry of law, it was determined that the Undersecretary confirmed the DGIRA's resolution by which the authorization on environmental impact matters was denied. In fact, it was the TFJA who verified it at the request of ExO, as will be discussed in the following section.[396]

2. The Annulment proceeding: TFJA's Judgement of March 21, 2018

353. On January 27, 2017, ExO filed a complaint with the TFJA to request the nullity of the "confirmativa ficta" by which the decision of the DGIRA was confirmed, and which was applicable due to the lack of response from the Undersecretariat to the appeal for review. Indeed, although the Undersecretariat expressly resolved ExO´s appeal for review on February 27, 2017, it did so extemporaneously after the three months established by law.

354. As a result of the foregoing, on March 21, 2018, the TFJA resolved the following:

1) That the confirmativa ficta to the appeal for review filed by ExO was applied; and

---

395 Artilce 17 of the Federal Law of Administrative Procedure. **R-0142.**

396 **C-0170**, pp. 26, 34, 55 y 57.

2) The nullity of the express resolution of February 24, 2017 since there cannot validly coexist two resolutions on the same appeal.

355. Given that, within the framework of the procedure, the Undersecretariat did express the facts and the law to support the confirmativa ficta, the TFJA analyzed them to determine their legality. In this sense, the dispute that was resolved by the TFJA dealt substantively with two aspects:

i. If the appealed resolution, through which the Environmental Impact Authorization (hereinafter MIA) was denied to the plaintiff, was duly based on the law and facts, and;

ii. If in the appealed resolution, the defendant authority ruled in regard to the mitigation measures proposed in the MIA by the plaintiff. [397]

356. Regarding the first contested aspect, the TFJA considered that the DGIRA did not duly justified its decision,[398] on the grounds that it should have supported its determination in scientific studies that denote the veracity of its expressions,[399] *i.e*,, support its determination with the most reliable scientific data available.[400]

357. With regard to the second contested issue, the TFJA concluded that the DGIRA did not adequately furnished the legal grounds of its resolution regarding the reasons for which the dredging activities would imply a significant environmental impact to the habitat of the loggerhead sea turtles and other species, so that the proposed mitigation activities would not be sufficient to protect the habitat of those species.[401]

358. In summary, the TFJA determined that the DGIRA should have provided greater detail and furnished the legal reasons, based on all the circumstances and conditions that justified its

---

397 **C-0170**, p. 120.

398 **C-0170**, p. 145.

399 **C-0170**, p. 150.

400 No pronouncement was made regarding certain arguments expressed by ExO, there was not provided the reasoning for which it is considered that the dredging activity implies a significant environmental impact for the species that grow there; it was not indicated which species of benthic organisms that growth in the dredging site would affect, it was not specified what was the affectation and the alteration that could be caused by the dredging process, and it was omitted to specify what was the environmental impact derived from the marine sediment dredging and why this impact is significant. *See* **C-0170**, pp. 161-163.

401 **C-0170**, p. 166.

denial as well as the elements and the scientific basis in which it based its determination, analyzing and ruling on all the issues.

359. The following section explains in detail the legal scope of the TFJA's decision. Although the TFJA recognized that it was empowered to order the DGIRA to grant or deny the authorization on environmental impact, it pointed out that, as it did not have elements and technical knowledge on the matter, it limited itself to issue the nullity of the appealed resolution in the following sense.

3. Scope and meaning of the TFJA's decision: it is false that the DGIRA has been ordered to issue a favorable resolution for ExO

360. Although ExO requested the TFJA to order the DGIRA to authorize the MIA conditioned to the compliance of the mitigation measures ExO proposed, theTFJA recognized that, even when the TJFA is empowered to do so, it would not do it since it does not had enough elements and technical knowledge in the matter and since there could be additional species that could be affected by the project:

> […] the Tribunal does not have the technical capacity to analyze said proposals, and if they are analyzed by this Tribunal, it would be substituting itself in the powers that are proper and exclusive of the Ministry of Environment and Natural Resources (SEMARNAT).
>
> In addition to the above, one more impediment for this Tribunal to could determine whether or not to authorize the MIA from the complainant, is that the dispute raised in the judge at hand, deals exclusively with the possible damage that could be caused to the species of the turtles in question, however, the content of the administrative file in which the refusal to the MIA was issued, it is noted that there are several additional species that could be affected, such as: gray whales, dolphins, sharks, fish, mollusks, migratory birds, among others, and this Tribunal does not have the technical resources to make an analysis of this kind.
>
> Likewise, nor could this Tribunal analyze other possible environmental impacts that the project in question represents, such as for instance: water, air, and pollution, among others.[402] [Emphasis added]

361. According with the foregoing, the TJFA limited itself to issue the nullity of the appealed resolutions in the following sense:

> "it proceeds *to declare the* ***NULLLITY of the contested resolution*** **as well as the one originally appealed, for the purpose** that the authority***, within a period of four months from the date this ruling is final, issues a new resolution, that resolves the request of authorization of the MIA of the complainant in the terms of article 35, fourth paragraph of the General Law of Ecological Balance and Environmental Protection,***

402 **C-0170**, p. 187.

> *in which analyzes each and every one of the aspects that were exposed in the request and its scope by the complainant, including the mitigation measures proposed by the applicant in the MIA, and that are detailed in the expansion of the complaint of this judgement, as well as also analyze, where appropriate, other additional prevention and mitigation measures, so that environmental impacts likely to produce with the project subject to authorization are avoided, mitigated or compensated, so that in case that the authority determines to authorize the project in a conditional manner —determination that must furnish the legal basis and grounds— in terms of section II, of the aforementioned legal precept, the authority conditions said authorization to the compliance of certain prevention and mitigation measures; and once done the above, the defendant authority* ***adequately furnishes the legal basis and grounds of its determination****, based on the most reliable scientific data available, with full freedom on the use of its powers and attributions, the aspects already commented and specified in the present ruling, specifically that it rules on the argument of the complainant in the sense that the activities of the dredging project submitted for its consideration, would be carried out in a depth that would not affect the habitat of the sea turtles in question, leaving the powers of the Ministry of Environment and Natural Resources (SEMARNAT) to resolve what in law corresponds.*[403]

362. As can be inferred from the previous quote, the TFJA did not determine that the DGIRA issued a new resolution in a certain way. On the contrary, the TFJA recognized the powers and autonomy of the DGIRA and requires it to issue —with full freedom of its powers— a new resolution in accordance with the following guidelines: (i) in a certain timeframe; (ii) analyzing each and every one of the aspects exposed in the application submitted by the Claimant, including the mitigation measures that it proposed; (iii) ruling on ExO's argument that the project's dredging activities would be performed at a depth that would not affect turtle's habitat; and (iv) furnishing the legal basis and grounds based on the most reliable scientific data available.

363. Therefore, since the TFJA granted full jurisdiction to the DGIRA to issue a new resolution in the outcome that the DGIRA considers applicable, it is false to affirm that the TFJA had ordered to the DGIRA to issue a decision to authorize the MIA.

4. The DGIRA complied with what was ordered by the TFJA

364. In compliance with was ordered by the TFJA, the DGIRA issued a new resolution following the guidelines established by the jurisdictional authority.[404] In that new resolution, the

---

403 **C-0170**, pp. 211 and 212.

404 The guidelines established by the TFJA, were duly attended by the 2018 resolution *See* **C-0009**, pp. 219-515.

DGIRA, [redacted] denied once again the authorization requested for the Don Diego project submitted by ExO.[405]

N. The DGIRA's resolution of 2018 and the ongoing administrative procedure initiated before the TFJA

365. [redacted] Said determination was mainly based on the following:

> That is why under the technical analysis performed to **MIA-R, IF, IA, and IC**, the scientific information this DGIRA follows, and which is contained in Legal Reasonings No. XVI and XVII, as well as the adverse effects derived from the project, analyzed in Legal Reasonings No. XVIII and XXI of this Resolution, **and based on article 35, fraction III, section b) of the Ecological Balance General Law** that empowers this administrative authority to deny the authorization requested whenever it is affected a threatened or endangered species, without the Legislator having given any degree to such an adverse effect; that is to say, the law does not stipulate that a negative has to be supported on a serious or significant adverse effect, it only empowers the environmental authority to deny a request upon the existence of an adverse effect against species classified in a given special risk or protection status, as happens in this case, since it was demonstrated based on the scientific information analyzed in Legal Reasoning No. XVI that **AP** is located in the Gulf of Ulloa, which tridimensional space constitutes the habitat of the loggerhead sea turtle, which species is classified as endangered in accordance with NOM-059-SEMARNAT-2010, also reporting the existence of other three species of sea turtles also classified as endangered, such as "Lepidochelys olivacea" or the Pacific ridley sea turtle, the "Dermochelys coriacea" or leatherback sea turtle, the "Chelonia mydas" or green turtle and the "Eretmochelys imbricate" or hawksbill sea turtle, with respect to which there are no specific analysis, there are only sightings during scientific works on loggerhead turtle **and in article 5, fraction II of the Wildlife General Law**, which sets forth that in no case shall the lack of scientific certainty be used as a justification to postpone the adoption of efficient measures for the comprehensive preservation and management of wildlife and the habitat thereof, considering that the chelonians species mentioned above, as well as the sea big mammals species mentioned in the Legal Reasoning No. XVII of this Resolution, what proceeds is the **DENIAL OF THE AUTHORIZATION** so requested, since the works and activities of the project adversely affect an endangered species and also the mitigation measures proposed by **petitioner**, as analyzed and shown in the Legal Reasoning No. XXI of this official document fail to guarantee that all the effects of the **project** will not adversely affect the sea species governed by the Wildlife General Law, for they are listed in the categories contemplated in NOM-059-SEMARNAT-2010, and that have been referred to, in Legal Reasoning No. XVII of this instrument.[406] [Emphasis in original]

---

405 *See* Solcargo-Rábago Expert Report, ¶ 218.

406 **C-0009**, p. 516

366. Particularly, and following the instructions of the TFJA, the DGIRA furnished the grounds and legal basis according to the law, providing in more detail the reasons why it denied the authorization of the MIA:

- That the activities and works of the project are not only done on the seabed as it is indicated by the applicant before that administrative authority, as well as in various manifestations that it made even before the jurisdictional authority, since the technical analysis of that resolution shows that the project aims to carry out works and activities in the three-dimensional space that constitutes the habitat of the Caretta caretta turtles, that means, on the marine surface: through the route of the dredge, barge, tugboat, and the transport of dry product (separated mineral); in the water column, though the water column, through the suction tube of the dredge and the tube of discharge of returned sediments; and on the benthic or seabed through dredging up to 7 meters deep from the seabed and the return of unused sediments to the seabed.[407]

- That the assertion of Dr. Douglas Clarke regarding the abundance of Caretta caretta turtles, in which in a qualitative manner indicates that in that protected area there are few turtles found, is not consistent with what is stated in the available scientific information established in said resolution.[408]

- That the sighting period conducted in the works referred to by the applicant (which it identified as "Oceanographic Campaigns") was conducted at the time of lower productivity in the Gulf of Ulloa, even though this factor (the productivity) is associated with the abundance and distribution of the Caretta caretta turtle and characterized by the presence of high concentrations of plankton and red pelagic crabs (Pleuroncodes pianipes). Taking into account that the time of the greatest productivity is the Winter-Spring, according to various authors cited, the oceanographic campaigns referred to by the applicants were carried out in August, so it is evident that they could not obtain sufficient data to identify the abundance and distribution of the turtle in that area.[409]

---

407 **C-0009**, p. 468. *See* also Resolution of the Complaint 353/17 issued by the TFJA. **R-0140**, pp. 102-103.

408 **C-0009**, p. 471. *See* also Resolution of the Complaint 353/17 issued by the TFJA.**R-0140**, p. 103.

409 **C-0009**, p. 472. *See* also Resolution of the Complaint 353/17 issued by the TFJA. **R-0140**, p. 104.

- That this authority conclusively considers, based on the information submitted, as well as based on the most reliable scientific information that were at his disposal when proving the existence of the Caretta caretta turtle habitat, that the project of marine mining have irreversible impacts in the habitat where they are developed, without there being proven mitigation measures that could return it to its original state.[410]

- That as a result of the cause-effect analysis performed, it was concluded that dredging implies the removal of benthos (which contains infauna and epifauna organisms, as well as sediment) which will have as consequence the following effects:

  Primaries. – Loss of benthic organisms, the decrease in primary productivity (loss of biomass, nutrients and amount of plankton).

  Secondaries. – Loss of red crab in its pelagic phase in form of larvae and juveniles in the water column, loss of dermal and pelagic fish.

  Tertiaries. – Loss and decrease of prey fish and red crab; and affectation of commercial fishing.

  Quaternaries. - Affectation of foraging activities in the loggerhead turtle.

- Adverse environmental impact: Loss of individuals of said turtles.[411]

367. Regarding to the mitigation measures, the DGIRA also carried out a major analysis to strengthen its legal basis and grounds in accordance to what was ordered by TFJA:

- The denominated "Program for the Protection of Sea Turtles in the Bay of Ulloa" proposed, aims to attend diverse environmental impacts of loss or affectation of habitat, loss or affectation of individuals of species of sea turtles and affectation to the fishing activity; however, it only establishes a series of activities in the dredging operation and use of technology to avoid the turtles being sucked into the dredge through the use of baffles or "tickler chains", that do not represent a set of actions to reduce or eliminate the loss or

410 **C-0009**, p. 472. *See* also Resolution of the Complaint 353/17 issued by the TFJA. **R-0140**, pp. 104-105.

411 **C-0009**, pp. 488-489. *See* also Resolution of the Complaint 353/17 issued by the TFJA. **R-0140**, pp. 105-106.

affectation of the habitat, nor the loss or affectation to individuals of species of sea turtles.[412]

- That it is not acceptable what was stated in the MIA in the sense that the potential deaths of sea turtles by the project are not relevant, because in the case of a species classified as endangered, it does not matter if the affectation is of an individual or several, since any affectation deserves special attention.[413]

- That the loss of biodiversity will be inevitable because mining destroys directly the habitat and indirectly degrades large volumes of the water column and areas of the seabed due to the generation of sediment plumes enriched with bioavailable metals, and additionally it is known that none remedial action can be applied to the water column.[414]

- That significant environmental impacts will be produced with the activities of the project, such as:

  Affectation to the local distribution of benthic organisms (marine organisms that live associated with the substrate of the seabed, whether buried, on it, or that move themselves or inhabits its surroundings); and

  Loss of habitat, alteration in the composition and transport of sediment; alteration in the quality of the sea water; increase of turbidity and suspended solids in the water column.[415]

- That rejects the specific programs such as those denominated as: "Control and Monitoring of Plume Sediments in the Marine Environment "; " Monitoring of the quality of the water in the marine environment program"; " Management of integral residues program"; "Environmental education program"; "Protection and monitoring of sea fish and benthonic invertebrates program"; "Protection of marine fauna and acoustic monitoring in the marine environment program"; " Management of integral residues program "; "Control of emissions to the atmosphere program " and "Protection of seabirds program", for the following reasons:

---

412 **C-0009**, p. 503. *See* also Resolution of the Complaint 353/17 issued by the TFJA. **R-0140**, pp. 106-107.

413 **C-0009**, pp. 503-504. *See* also Resolution of the Complaint 353/17 issued by the TFJA. **R-0140**, p. 107.

414 **C-0009**, p. 508. *See* also Resolution of the Complaint 353/17 issued by the TFJA. **R-0140**, pp. 107-108.

415 **C-0009**, pp. 509-510. *See* also Resolution of the Complaint 353/17 issued by the TFJA. **R-0140**, p. 108

i) Because they contained generic descriptions that are not correlated with the adverse environmental impacts for which they were created;

ii) They do not establish specific actions and indicators of effectiveness and performance to measure the rates of reduction or elimination of adverse effects in the area of the project, the area of influence of the project (Gulf of Ulloa) and the SAR (Peninsula of Baja California)

iii) They do not technically and environmentally demonstrate that adverse environmental impacts are not causing an ecological imbalance and that their results maintain the variables of functional integrity and load capacity of the ecosystem (productivity and biodiversity).[416]

- That the measures of mitigation proposed do not ensure that there will not be danger of serious or irreversible damage, it is considered that in the absence of scientific evidence, the decision of the environmental authority is subject to the application of the "precautionary" principle, which postulates that when there is obvious threat or serious irreversible damage that threatens the environment, the absence of scientific evidence cannot constitute an obstacle to propose measures that prevent deterioration and environmental degradation in terms of article 15 of the Rio Declaration (Nonna & Radvich, 2016) as well as article 194 of the United Nations Convention on the Law of the Sea, section 11, of the General Law on Wildlife, that establishes that in the formulation and conduction on wildlife habitat, shall be observed by that authority, the principles established in article 15 of the General Law on Ecological Balance and Environmental Protection, as well as the provision of section 11 of said Law.[417]

368. The conclusions of the DGIRA on the mitigation measures, were the following:

> Conclusion:
>
> It determined to deny the authorization of the MIA, mainly, because the works and activities of the Project affects the species declared endangered, Loggerhead turtle or caretta caretta, among others, because the mitigation measures proposed in the MIA "fail to guarantee that all the effects of the project will not adversely affect the sea species

416 **C-0009**, p. 504. *See* also Resolution of the Complaint 353/17 issued by the TFJA. **R-0140**, pp. 108-110.

417 **C-0009**, pp. 512-513. *See* also Resolution of the Complaint 353/17 issued by the TFJA. **R-0140**, pp. 110-111.

governed by the Wildlife General Law, for they are listed in the categories contemplated in NOM-059-SEMARNAT-2010."[418]

369. As is evident, the DGIRA elaborated with the greatest possible detail on the reasons why the authority determined that it was technically and scientifically feasible to deny the request of authorization of the MIA submitted by ExO. Clearly for the Claimant, no reason that the DGIRA expresses to deny its request of authorization is or will be sufficient, however, it is undeniable that from a technical-scientific point of view the reasons given by the competent specialized authority are reasonable and correct from a legal point of view.

370. Mexico considers that it is untenable that the Claimant intends to challenge this decision on the argument that there were motives unrelated to the technical and scientific ones that were expressed. In this sense, the Arbitral Tribunal should only consider the reasonableness of the arguments put forward by said Mexican authority.

1. [redacted]

371. As mentioned *supra*, [redacted][419] It is not a matter of a mere formalism, on the contrary, according to Mexican Law, there is a clear and specifically delimited structure for the purpose of conferring attributions to the public officials in the exercise of their functions. In this sense, [redacted]

Figure 10. [redacted]

418 **C-0009**, pp. 515-516. *See* also Resolution of the Complaint 353/17 issued by the TFJA. **R-0140**, p. 111.

419 *See* Section II.I.2.

372. From Figure 10, stands out the fact that

373. Despite that [420]

374.

[420] Witness Statement ¶¶ 32 and 33.

[redacted]

2. The TFJA verified that the DGIRA complied with its judgement (Resolution to the complaint appeal)

375. [redacted] ExO considered, and so it argues in its Notice of Intent,[421] its notice of Arbitration,[422] and in the Claimant's Memorial,[423] that the DGIRA had allegedly flouted TFJA's order by issuing its decision apparently after the deadline and repeating its decision to deny the authorization of the MIA. However, the TFJA rejected those assertions when resolving the challenge that ExO filed in the respective complaint procedure

> RESOLVES
>
> I. It is inadmissible the instance of complaint by omission attempted by the plaintiff;
>
> II. It is admissible but UNFOUNDED, the complaint for repetition of the act promoted by the plaintiff, consequently;
>
> […][424]

376. The reasoning to reject ExO's challenge regarding the argument that the authority allegedly did not resolve within the established period of time was as follows:

> Having specified the foregoing, it turns out that the COMPLAINT FOR OMISSION filed by the legal representative of the plaintiff in its brief submitted on October 4, 2018, does IS INAMISSIBLE, since when it was promoted, the period of 4 months that the defendant authority had to comply with the judgement of March 21, 2018 had not yet expired, for the reasons and legal basis set forth below.
>
> […]
>
> Thus, the four month term that was specified in the respective judgement and that it is provided for that purpose in article 57 of the Federal Law of Administrative Contentious Procedure, for the issuance of the new resolution, must be computed from June 19 to October 19, 2018, to the extent that the beginning of that period, attends to the moment in which the defendant authority had full knowledge that the March 21, 2018 definitive judgement had become final, meaning that it is from that moment that the four month

---

421 Notice of Intent, January 4, 2019, ¶¶ 7 and 102-105.

422 Notice of Arbitration, April 5, 2019, ¶¶ 7 and 115-118.

423 Claimant's Memorial, ¶ 20.

424 Resolution of the Complaint 353/17 issued by the TFJA. **R-0140**, p. 118.

> period starts for the aforementioned authority so that it can comply with the respective judgement, […][425]

377. On the other hand, the TJFA rejected ExO's argument on the alleged repetition of the act and confirmed that the DGIRA had full autonomy to resolve on the outcome of the new resolution issued, as it did. In particular, the TFJA pointed out that:

> From all that has been exposed, this Adjudicative Body arrives to the conviction that IN THE PRESENT CASE THE REPETITION OF THE ACT RAISED BY THE PLAINTIFF IS NOT APPLICABLE, since it is observed that both resolutions (the annulled one and the one issued in compliance) constitute different acts, that although they coincide in the outcome of the resolution in the sense that they DENY the authorization of the MIA requested by the plaintiff, to the extent that the authority warns that the adverse activities, specially to the habitat of the Caretta caretta turtles, the truth is that the resolution dated October 12, 2018 in compliance with the judgement issued by this Jurisdictional Plenum, it does not reiterate in identic terms the legal basis and grounds of the resolution annulled dated April 7, 2016,therefore the complaint is UNFOUNDED.
>
> […] this Adjudicative Body warns that those two core points of the new resolution issued in compliance with the judgement of this Jurisdictional Plenum are not aspects that were referred in the annulled resolution in said judgement, that is, they are not aspects that the authority would have reiterated, meaning that they constitute part of the new legal basis and grounds of the resolution in compliance, and therefore, it cannot be said that there is a repetition of the annulled act, to the extent that by complying the definitive judgement the defendant environmental authority did not issued a resolution in identical terms that the annulled one, for the considerations hereby exposed; hence the reasons why the complaint for repetition is UNFOUNDED.
>
> Without being an obstacle to the foregoing, the argument of the plaintiff in the sense that the authority repeated the refusal to authorize the MIA because in any case, the judgement of March 21, 2018, was clear in the sense of specifying that "the powers of the Ministry of Environment and Natural Resources (SEMARNAT) to resolve what in law corresponds" were left, that is, that the nullity decreed by this Adjudicative Body in no way constricted the environmental authority to grant the authorization of the MIA, but the nullity decreed was only for the purpose of issuing a new resolution, dully furnishing the legal basis and grounds, in which the authority analyzed the aspects that unduly omitted to do in its first resolution –specified in the respective ruling – and resolve as appropriate.[426]

378. Therefore, it is false that the DGIRA has failed to comply with the order of the TFJA, in the sense of issuing its resolution after the deadline or having repeated the act. On the contrary,

---

425 Resolution of the Complaint 353/17 issued by the TFJA. **R-0140**, pp. 11-12 and 14.

426 Resolution of the Complaint 353/17 issued by the TFJA. **R-0140**, pp. 101-102 and 113.

the TFJA found that the DGIRA complied with what was ordered in its judgement of March 21, 2018.[427]

3. Odyssey's claim is pending of resolution by the TFJA (second annulment lawsuit initiated by ExO)

379. As stated *supra*, ExO filed a complaint for omission and repetition alleging that, apparently the DGIRA did not issue the second resolution within the deadline and allegedly disobeyed what was ordered by the TFJA by issuing the same resolution. However, ExO's appeal was dismissed and the TFJA did not analyzed the merits of the new resolution issued by the DGIRA because it was not part of the *litis*. In this sense, the TFJA warned ExO pointing out that it could file a new lawsuit since ExO appeared to dispute the new legal basis and grounds of the resolution issued in compliance.

380. Based on the foregoing, on August 19, 2019, ExO submitted a new annulment lawsuit before the TFJA by which it requested the resolution of the DGIRA of October 12, 2018 to be annulled and to be ordered to issue a favorable resolution

> FIFTH. Once the procedure is conducted, […], declaring the nullity of the administrative resolution contested, issued by the Defendant authority on October 12, 2018 and, having assessed and relied on the evidence offered, to order the Defendant authority to issue a favorable resolution, authorizing the MIA for the project […], with the understanding that the corresponding Manifestation of Environmental Impact in its Regional Modality, will be conditioned to the compliance of the mitigation and compensation measures proposed by EXPLORACIONES OCEÁNICAS, S. DE R.L. DE C.V., which were indicated in the Fact 13 of this lawsuit, as well as the compliance of other additional mitigation and compensation measures that the defendant authority could reasonably indicate, in order to avoid, mitigate, or compensate the possible environmental impacts that the referred project could produce.[428]

381. It is worth highlighting the fact that, in the challenge, ExO specifically mentioned as defendant authority the "General Director of Environmental Impact and Risk, within the Under secretariat of Management for Environmental Protection, of SEMARNAT". Indeed, in the "claims that are deduced" section, ExO specified:

> To declare the nullity of the administrative resolution contained in the communication number SGPA/DGIRA/DG/07852, issued on October 12, 2018 by the General Director of Environmental Impact and Risk, of the Under secretariat of Management for Environmental Protection, of SEMARNAT through which the requested MIA for the

---

427 *See* Solcargo-Rábago Expert Report, ¶¶ 219-224.

428 **C-0186**, p. 197.

project called "Dredging of black phosphate sands in the Don Diego deposit", submitted by ExO was denied; and

382. [redacted] simply lacks credibility and any factual and legal basis.

383. The The procedure is still pending of resolution and according to the powers of the TFJA it may

- Confirm the resolution of the DGIRA;
- Declare the nullity for the purpose that the DGIRA issues a new resolution with freedom of decision; or
- Declare the nullity by ordering the DGIRA to issue a resolution with a specific outcome.[429]

384. As is clear from the foregoing, in any of the aforementioned cases, the TFJA's decision will invariably have effects on the present arbitral procedure, that means, will affect the merits and substance of the case. This situation shows that the function of the Arbitral Tribunal must be distinguished from that of the TFJA under domestic law. In this sense, the Arbitral Tribunal will not pertain to resolve the viability of the Project since that is a technical question that pertains ultimately to the Mexican authorities (DGIRA). The jurisdiction of the Tribunal would be limited to determining whether the decision to deny the MIA of the Don Diego Project was, in and of itself a violation to NAFTA, recognizing that full due process has been provided, which remains available in Mexico to the Claimant

4. Journalistic articles about the Don Diego Project are alien to actions of the DGIRA

385. The Claimant invokes various journalistic articles to sustain and support its theory that the [redacted] were done by Mr. Rafael Pacchiano. However, the scope and relevance that the Claimant intends to give to said journalistic notes does not coincide with what they indicate nor with the facts of the case

429 *See* Solcargo-Rábago Expert Report, ¶¶ 229-230.

themselves. In this sense, Mr. Rafael Pacchiano specifies the scope of this statements and how they have been decontextualized:

> 73. During my career as a politician and public official, I always conducted myself with moderation and respect in press conferences, interviews and public statements. I have reviewed the journalistic articles of El Excélsior and La Crónica de Jalisco, published on April 19 and 20, 2018, respectively, cited by the Claimant. I do not consider that these journalistic articles reveal an improper action on my part or SEMARNAT. Despite the inaccuracies of these articles, I believe that these articles only reflect the journalistic practice of both newspapers.[430]
>
> 74. I also reviewed the audio of the September, 2018 conference. To be precise, that conference was in reality a working meeting in which SEMARNAT officials reported on a project aimed at the creation of a protected natural area in the Sea of Cortés and in the Pacífico of Baja California Sur. After the meeting, I attended the media that covered the event.[431]
>
> 75. First, I consider that the transcript used by the Claimant does not accurately reflect my responses to the media, much less it consists in a verbatim transcription. Secondly, as can be seen from the video provided by the Claimant, when I spoke to the media, I pointed out that "now [SEMARNAT] is about to issue a new resolution in compliance with a judicial ruling". The video does not reveal any statement on my part assuring that DGIRA would again reject the 2015 MIA. I believe that the Claimant seeks to distort and decontextualize the responses I did during the press conference.[432]

386. Surely, as the newspapers that refer to other controversial environmental cases, [redacted]

5. It is false that Secretary Pacchiano had instructed the outcome of DGIRA's resolution of 2018

387. Despite [redacted] the AIA of the Don Diego project, there is no evidence to support their assertions. In fact, Mr. Rafael Pacchiano declaration itself refutes the accusations that [redacted] against him:

> 44. All the instructions that I directed to the Director General of the DGIRA during my tenure as Undersecretary and Secretary were done in writing. Undoubtedly there were

430 Witness Statement of Mr. Rafael Pacchiano, ¶ 73.

431 Witness Statement of Mr. Rafael Pacchiano, ¶ 73.

432 Witness Statement of Mr. Rafael Pacchiano, ¶ 75.

working reunions in which the DGIRA verbally kept me informed about Project under their analysis, including the Don Diego project. However, it is false that in any reunion or in any other way I ordered the "instruction" to deny the Don Diego project or I informed that the project would not be approved [redacted] Messrs. [redacted][433]

38. In accordance with the foregoing, I find it inconceivable that [redacted]. I find it even more incomprehensible that he would go so far as to imply that [redacted] without a thorough analysis [redacted].[434]

6. Mr. [redacted] the legality of the Resolution even after Mr. Rafael Pacchiano ceased to be Secretary of SEMARNAT

a. Mr. [redacted] within the defense team of Mexico in prior stages to the start of the arbitration and once it began

388. Despite [redacted],[435] he has omitted to mention that he was part [redacted] For greater context, the Respondent details some relevant dates:

- On January 4, 2019, Odyssey submitted the Notice of Intent.[436]
- On February 22, 2019, the Respondent formally informed SEMARNAT about the Notice of Intent and contact points were established within said Ministry of State.[437]
- On April 1, 2019, a work meeting was held at the offices of SEMARNAT in which the Respondent's lawyers and SEMARNAT officials participated to prepare the position of the Mexican State in the public consultations to be held the next day. That day there

433 Witness Statement of Mr. Rafael Pacchiano, ¶ 44.

434 Witness Statement of Mr. Rafael Pacchiano, ¶ 38.

435 Witness Statement [redacted] ¶ 1.

436 Claimant's Memorial, ¶ 179.

437 Email of the Ministry of Economy on February 22, 2019. **R-0067.**

was an exchange of communications between the Respondent and SEMARNAT. [redacted][438]

- On April 2, 2019, representatives of Odyssey and the Respondent held a consultation meeting.[439] That same day, [redacted] went to the offices of the Ministry of Economy to provide technical advice and to attend work meetings in which the Claimant's claims were discussed.[440]
- On April 5, 2019, Odyssey submitted the Notice of Arbitration.[441] That same day, the Respondent informed [redacted] about the submission of the Notice of Arbitration and there was an exchange of emails.[442]
- On April 12, 2019, the Respondent informed [redacted] of the communication sent by the Claimant in which it explored the possibility of resuming dialogue with a view to reaching a mutually satisfactory solution, without prejudice of the submission of the Notice of Arbitration.[443]
- On May 31, 2019, the Respondent informed [redacted] of the communication sent on May 30, 2019 by the Respondent in which it was aware of the change of the head of SEMARNAT and explored the possibility to resume dialogue with a view to reaching a mutually satisfactory solution without prejudice of the submission of the Notice of Arbitration.[444]
- [redacted][445]
- [redacted] the witness statement.[446]

---

438 Emails from April 1, 2019 exchanged between officials of the Ministry of Economy and SEMARNAT. **R-0068.**

439 Claimant's Memorial, ¶ 211.

440 Access records of the Executive Tower of the Ministry of Economy of April 2, 2019. **R0143.**

441 Claimant's Memorial, ¶ 179.

442 Emails from April 5, 2019 exchanged between the Respondent and SEMARNAT officials. **R-0070.**

443 Email from April 12, 2019 sent by the Respondent to SEMARNAT. **R-0069.**

444 Email from May 31, 2019 sent by the Respondent to SEMARNAT. **R-0071.**

445 Witness Statement of [redacted] ¶ 2.

446 Witness Statement of [redacted] p. 4.

- On September 4, 2020, the Claimant submitted its Memorial, accompanied, *inter alia*, with the Witness Statement [redacted]

389. According to the foregoing, [redacted] In fact, [redacted] knows some aspects of the legal strategy of Mexico and the deliberative work of the legal team of the Respondent, as will be explained in the subsequent section.

b. [redacted] in the defense of the Mexican State and knows the deliberative work of the Respondent

390. [redacted] in at least two meetings with representatives of the Respondent in which there were discussed Odyssey's claims, facts related with Don Diego and ExO, technical aspects of the Project and the environmental unfeasibility of the Project.

391. Likewise, [redacted] that on a periodical basis were informed on the development of the arbitration. Proof of this are at least four series of emails exchanged between SEMARNAT officials and representatives of Mexico, as well as the witness statement of Mr. Salvador Hernández Silva, a DGIRA public official, and person who was temporarily appointed as General Director of the DGIRA [redacted][447]

392. Through these emails, the Respondent requested SEMARNAT to provide information on the Don Diego Project and formulated questions with the purpose to prepare its legal strategy. This means that at least, from April 1, 2019 to September 1 2019 [redacted]

447 *See* Witness Statement of Mr. Salvador Hernández, ¶¶ 4-10.

393. Proof of this is the email from April 1, 2019 sent by the Respondent [redacted][448]

> Dear colleagues:
>
> Following up with the consultations that will be held with the company Odyssey tomorrow, April 2 at 11:00 am in the offices of the Ministry of following are some comments:
>
> I attach a series of questions to SEMARNAT that will help us to better understand certain aspects. This is solely for internal use of the defense team. In the same document I refer for your consideration and comments some questions that we will make to Odyssey. It would be useful to have your inputs or additional questions on your side, if you consider it convenient.
>
> We need to know who will attend the meeting from SEMARNAT, I will be very grateful if you send me the list of names.
>
> Finally, it is necessary to hold a coordination meeting between Economy and SEMARNAT, we invite you today, Monday at 16:00 h. If it would not be possible to hold the meeting I propose you to have a phone conference at the same time.
>
> I appreciate you the support.
>
> Best regards.

394. In greater context, on April 1, 2019 a meeting was held at the offices of SEMARNAT in which the Respondent's lawyers and SEMARNAT officials participated. [redacted] In that meeting members of the legal team of Mexico [redacted] During those meetings even at the express question of the legal team of the Respondent, [redacted][449]

395. The next day, on April 2, 2019, the consultation meeting between the Respondent and Odyssey representatives was held at the offices of the Ministry of Economy. [redacted] the offices of the Ministry of Economy with the purpose of providing technical support on environmental matters to the Mexican legal team if necessary. Thus, [redacted]

---

448 Email from April 1, 2019 exchanged between Ministry of Economy officials and SEMARNAT. **R-0068.**

449 Witness Statement of Mr. Salvador Hernández, ¶¶ 7-9.

[redacted] The access records to the Executive Tower of the Ministry of Economy give proof of this.[450]

O. The port and infrastructure projects identified by the Claimant

396. In a desperate attempt to expand its claims, the Claimant argues that Don Diego received less favorable treatment tan six projects in alleged similar circumstances, namely: *i)* El Chaparrito Project; *ii)* Sayulita Project; *iii)* Laguna Verde Project; *iv)* Puerto Veracruz Project; *v)* Puerto Matamoros Project and *vi)* Santa Rosalía Project (Six Projects).[451]

397. The Six Projects selected by the Claimant and Mr. Pliego involve activities supervised by state-owned enterprises, parastatal companies or local governments, meaning, initially, the subjects to be compared are clearly different from Odyssey and it is questionable whether they can be considered as "national investors" or "investments of national investors". In fact, when raising its claim, the Claimant points out that "[t]he SEMARNAT […] *treated other projects of government entities* differently than the Don Diego Project of ExO".[452] Indeed, Claimant's analysis and its instructions to its legal experts were limited to compare "other similar dredging projects locally owned".[453] Since the Claimant's analysis focused in comparing dredging projects and not the treatment accorded to domestic investors or their investments, the claim of the Claimant is incorrect as a matter of law. In any case, even if the Tribunal accepted as a legal standard to compare "dredging projects" with Odyssey or its investment, all those projects are not in similar circumstances considering the sector of the investment, the area of the investment, the applicable *lex specialis* to the investor's mining concession, the applicable legal framework to the mining sector in particular, as well as the products or goods object of the investment. Therefore, the assertions of the Claimant are incorrect as discussed in Section III.D.4. d. (1) to (6).

---

450 Access records of the Executive Tower of the Ministry of Economy of April 2, 2019. **R-0143.** Witness Statement of Mr. Salvador Hernández, ¶ 8.

451 Claimant's Memorial, ¶ 182.

452 Claimant's Memorial, ¶ 325.

453 Claimant's Memorial, ¶ 325.

III. LEGAL ARGUMENT

A. Jurisdiction: Claimants Lack Article 1117 Standing

398. Under NAFTA Article 1117(1), "[a]n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breach an obligation."

399. The Claimant asserts that it controls the Mexican entity Exploraciones Oceianicas, S. de R.L. de C.V. ("Exo").[454] According to the Claimant, it has control because ExO is owned 99.99% by a Panamanian entity, Oceanica Resources S. de R.L. ("Oceanica"), which, in turn is owned 53.89% by Odyssey Marine Enterprises Ltd, a Bahamian entity, itself owned by Odyssey. In support, the Claimants submitted testimony from Odyssey CEO and Chairman Mark Gordon, ExO, Odyssey stock ownership certificates, and Odyssey's U.S. Securities and Exchange Commission annual filing for 2019.[455]

400. The Claimant's assertions as to ownership and control cannot carry their burden with respect to Article 1117 standing. Tribunals recognize that the claimant bears the burden of proof as to ownership, finding that if the burden is not met, a respondent has no burden to establish jurisdictional defenses.[456] Specifically, when, as here, the treaty in question requires that an investor be the "owner[]" of the company or "that is under their direct or indirect control", a claimant must provide all necessary evidence regarding the circumstances of ownership and control at all relevant times, especially when reasonable doubts have been raised about actual ownership or control over the business seeking protection.[457]

401. Taking the Claimant's standing assertions as true *arguendo*, 54% does not rise to the level of "ownership" and likewise, without more, does not establish control. In a recent NAFTA case, *B-Mex, LLC v. United Mexican States*, the tribunal concluded that ownership requires "full ownership or virtually full ownership of the [Mexican] company,"[458] explaining that:

---

454 Claimant's Memorial, ¶¶ 197-98.

455 Claimant's Memorial, ¶¶ 197-98.

456 *See, e.g.*, *Emmis International Holding, B.V. v. Hungary*, ICSID Case No. ARB/12/2, Award, Apr. 16, 2014, ¶ 171. **RL-0001.**

457 *CCL v. Republic of Kazakhstan*, SCC Case No. 122/2001, Jurisdictional Award, Jan. 1, 2003 ¶ 82. **RL-0002.**

458 *B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, ¶198. **CL-0019.**

> First, Article 1117 refers to owning "an enterprise". It does not refer to owning "equity securities of an enterprise". That choice of words should be given due weight. Elsewhere in Chapter 11, when defining "investment", the drafters of the Treaty took care to distinguish between "(a) an enterprise" and "(b) an equity security of an enterprise". If the drafters of the Treaty would have wanted to equate ownership of an "enterprise" with ownership of a certain number of the "equity securities of an enterprise", this suggests they knew how to do so, and that they would have done so.
>
> Second, Article 1117 does not refer to any share ownership threshold that, on the Claimants' case, must be reached to "own" the enterprise. The Claimants suggest that it is 50% + 1. But it would have been easy for the drafters of the Treaty to say that if that is what they had in mind. […]
>
> Third, while Article 1117 does not specify an ownership threshold, its context indicates that the NAFTA Parties envisaged a shareholding threshold that must always, regardless of applicable law or bylaws, be sufficient to confer the legal capacity to control the enterprise[.]
>
> As the facts of this case show, the requisite share ownership that confers the legal capacity to control is not necessarily 50% + 1 of the outstanding stock. What that threshold is will vary for each enterprise, depending on what its by laws [sic] and/or the governing law provide for. The only equity holding that will always, independently of the circumstances, confer the legal capacity to control is ownership of all or virtually all of the outstanding stock. [459]

402. Accordingly, under the NAFTA, the Claimant cannot be deemed to "own" ExO, nor can an assumption be made that the Claimant exercised direct control.

403. To support a jurisdictional finding of indirect control, the Claimant would need to prove either that it had the legal capacity to control, *i.e.*, *de jure* control, or that it exercised the actual power, *de facto* control, to do so.[460] The self-serving assertion in Odyssey's SEC filing, contemporaneous with the notice of arbitration, that it "control[s] Exploraciones Oceanicas, S. de R.L. de C.V."[461] is insufficient in this regard and has no support in international law.[462]

---

459 *B-Mex, LLC and Others c. Estados Unidos Mexicanos*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, ¶¶ 200-03 (original emphasis). **CL-0019.**

460 *Id.*, ¶¶ 215-18.

461 Odyssey Marine Exploration, Inc. Form 10-K for the period ending Dec. 31, 2019, filed Mar. 20, 2020, p. 4. **C-190.**

462 *B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, ¶ 204 ("The Tribunal also did not find 'any relevant rules of international law applicable in the relations between the parties' within the meaning of Article 31(3)(c) of the VCLT that would affect this plain reading of "ownership" in Article 1117. The definitions of 'ownership' in GATS Article XXVIII(n) and Article 13(a)(ii) of the MIGA Convention are of limited import because, as argued by the Respondent, the NAFTA Parties' choice not to further define 'ownership' under Article 1117 must be respected."). **CL-0019.**

Additionally, in Section II.A.3 of this pleading, the Respondent identifies some of the financing acquired by the Claimant to perform the Don Diego project, which shows the inexistence of ownership and control.

404. As the tribunal in *Thunderbird* explained, "[i]n the absence of legal control however, the Tribunal is of the opinion that de facto control must be established beyond any reasonable doubt."[463] Later tribunals have confirmed that "de facto control will typically, and logically, present a greater evidentiary challenge."[464] Claimants would need to demonstrate by introducing board minutes and other supporting documentation that, at all relevant times, they had the "ability to exercise significant influence on the decision-making" or that they were the "driving force" in the company.[465]

405. The Claimant's burden in this case is particularly high because of the *prima facie* evidence that others had control over ExO. In particular:

- The Claimant's own filings with the SEC state that it has pledged the majority of its assets to MINOSA and to Monaco.[466]
- The Claimants appears to have sold a substantial interest in this arbitration to the firm Poplar Falls LLC.[467]
- As discussed above, the Mexican company AHMSA (the parent of MINOSA) and the Mexican national Alonso Ancira appear to have had the lead roles in pursuing the required approvals from SEMARNAT.

406. It is therefore incumbent on the Claimant to meet its burden of proof that it actually owned and controlled ExO. Otherwise, its claim on behalf of ExO under NAFTA Article 1117 must be rejected.

---

463 *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award, Jan. 26, 2006, ¶ 106. **RL-0003.**

464 *B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, ¶ 220 (citing *Thunderbird* and *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, Oct. 21, 2005). **CL-0019.**

465 *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award, Jan. 26, 2006, ¶ 108. **RL-0003.**

466 Odyssey Annual Report 2019 (Form 10K), p. 50. C-0190.

467 Odyssey Annual Report 2019 (Form 10K), p.61. C-0190.

B. There are Serious Problems about the credibility of Claimant's witnesses

407. Claimant's claims on an alleged breach of NAFTA Articles 1105 and 110 are based largely on [redacted] Witness statement.[468] However, there are important reasons why the Witness statement [redacted] and potentially the statemen of other witnesses are not credible.

408. [redacted][470] In simple terms, [redacted] However, [redacted] now submits a Witness statement [redacted][471] which, as discussed below, lacks credibility.

1. The Witness statement [redacted] must be rejected by the Tribunal and eliminated from the arbitration record, ori f applicable, it must not be given any probative value

409. As discussed in detail in the following subsections [redacted] Witness statement is contrary to Mexican law and violates basic principles of international arbitration, therefore, the Tribunal should reject it.

a. The Witness statement [redacted] is ilegal in accordance to Mexican law

410. The Mexican legal system establishes administrative sanctions and crimes that public officials may incur even when they have already retired from public office. On the one hand, the General Law of Administrative Responsibilities (LGRA) establishes the principles and obligations that all federal public officials must comply with, as well as the administrative offenses and

468 Claimant's Memorial, ¶¶ 114-249-253, 268.

469 Witness statement [redacted] ¶ 2.

470 [redacted] **CL-0002**.

471 Witness statement [redacted] ¶ 1.

penalties that they may incur. A clear prohibition provided in the LGRA is that a public official uses his position to obtain or pretend to obtain a benefit or that a third party obtain a benefit.[472]

411. The LGRA establishes a catalogue of serious administrative offenses, one of them being the use of privileged government information in an improper manner.[473] The LGRA defines "privileged information" as the information obtained by the public official on the occasion of his duties and that is not of the public domain. This obligation is applicable to those people who have retired from a public job or position for up to a period of one year.[474]

412. [redacted] This makes it clear that [redacted] an administrative fault in accordance with the LGRA.[475]

[redacted]

---

472 Article 7 of the LGRA ("Public Servants shall observe in the performance of their employment, position or commission, the principles of discipline, legality, objectivity, professionalism, honesty, loyalty, impartiality, integrity, accountability, effectiveness and efficiency that govern the public service. For the effective Application of these principles, Public Servants will observe the following guidelines: […] Act honestly, without using its job, position, or commission to obtain or pretend to obtain any benefit, profit or personal advantage or in favor of third parties, nor seek or accept compensation, benefits, handouts or gifts from any person or organization;"). **R-0057.**

473 Article 55 of the LGRA. **R-0057.**

474 Article 56 of the LGRA ("For the purposes of the previous article, the information obtained by the public servant on the occasion of his duties and that is not in the public domain. The restriction provided for in the previous article will be applicable even when the public servant has retired from employment, position or commission, for up to one year."). **R-0057.**

475 It should be noted that this type of conduct could lead to potential crimes. Indeed, the Federal Penal Code establishes the crimes that federal public officials may commit. As an example, article 214 of the CPF establishes some conducts that can give rise to a crime in the illicit exercise of public service. Likewise, article 220 of the CPF establishes the crime of abusive exercise of functions. *See* Article 220 of the Criminal Federal Code. ("The public servant who, using the information that it possesses by reason of his employment, position or commission, whether or not subject of its functions, and which is not of the public domain, carries out, by himself or through a third party, investments, disposals or acquisitions, or any other act that produces any undue economic benefit for the public servant or to any of the persons mentioned in the first section."). **R-0144**. The Office of the Attorney General, in its capacity as the federal public ministry, is the authority in charge of investigating these crimes, with a supervisory judge being the body empowered to determine crimes by a public official. However, these examples show that the Mexican legal system does not take lightly the illicit behaviors in which public officials may engage.

b. The Witness statement [redacted] is in violation of the standards and principles that govern international arbitration

413. In accordance with Articles 9.2 and 9.3 of the IBA Rules, the Tribunal must reject the Witness statement [redacted] because it constitutes unlawful evidence and is contrary to the best practices in international arbitration and any ethical rule.[476] Indeed, as mentioned in the preceding subsection and in Section II.N.6 *supra*, and in accordance with Mexican law –which constitutes a matter of fact for the Tribunal–, [redacted] administrative violations. [redacted] the obligation not to use privileged government information related to this arbitration, and based on his previous capacity as [redacted] he has violated the statement of truthfulness of his Witness statement.

414. In different investment arbitrations it has been determined that there are limits to the admissibility of this type of evidence. The tribunal in *Methanex v. United States* refused to admit evidence obtained by a private investigative firm hired by the claimant through acts of intrusion and violations of local ordinances.[477] Quoting Professor Reisman, the United States government successfully argued the following:

> [I]nternational courts have questioned the admissibility of evidence where that evidence "was secured in a manner that the court deemed harmful to public order and that it did not wish to encourage." As recognized by Professor Reisman, "[r]etroactive validation of illegal seizures of evidence . . . could [result in] frustration of the fundamental purposes of international adjudication." Thus, illegally obtained evidence should be deemed inadmissible.[478]

415. The claimant in said case acted under the advice of a legal firm, and as a result the tribunal concluded that the evidence provided by the claimant violated the general principle of good faith

---

476 Article 9.2 (g) of the IBA Rules on the Taking of Evidence in International Arbitration. **RL-0004.**

477 *Methanex Corporation v. United States of America*, UNCITRAL, Final Award (August 3, 2015) Part II, Ch. I, ¶ 58. **CL-0074**.

478 Methanex Corporation v. United States of America, UNCITRAL, Motion of Respondent United States of America to Exclude Certain of Methanex's Evidence (18 de mayo de 2004) pp. 3-4. **RL-0005**.

and constituted an offense to *"the basic principles of justice and fairness required of all parties in every international arbitration."*[479]

416. Obtaining evidence illegally falls within the doctrine of "*the unclean hands*" which is an expression of the Roman doctrines *nullus commodum capere (potest) de sua injuria propria* (ie, no one will take advantage of their own error of others) and *ex injuria jus non oritur* (ie, illicit acts can never create right).[480] Common law, through its principles, has also recognized the doctrine of "*unclean hands*" and has condemned not only illegal methods of obtaining evidence, but also *"[a]ny willful conduct that is iniquitous, unfair, dishonest, fraudulent, unconscionable, or performed in bad faith."*[481]

417. Based on the ruling in *Methanex v. United States*, these principles find their expression in the general requirement of good faith, which is recognized in both domestic and international law.[482]

418. Similarly, the tribunal in *EDF (Services) v. Rumania*, by adopting the *Methanex v. United States* approach, excluded a covertly obtained audio recording of a conversation between one of Romania's witnesses and the claimants representative.[483] After considering the IBA Rules on the Taking of Evidence in International Arbitration - and in particular Article 9 (2) (g), which refers to "considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling"–, the tribunal concluded that the recordings were *"contrary to the principles of good faith and fair dealing required in international arbitration".*[484]

---

479 *Methanex Corporation v. United States of America*, UNCITRAL, Final Awardl (August 3, 2015) Part II, Ch. I, ¶ 59. **CL-0074**.

480 Grégoire Betrou & Sergey Alekhin, The Admissibility of Unlawfully Obtained Evidence in International Arbitration: Does the End Justify the Means?, Paris J. of Int'l Arb. 2018-4, p. 53. **RL-0006**.

481 Grégoire Betrou & Sergey Alekhin, The Admissibility of Unlawfully Obtained Evidence in International Arbitration: Does the End Justify the Means?, Paris J. of Int'l Arb. 2018-4, p. 54. **RL-0006.**

482 Grégoire Betrou & Sergey Alekhin, *The Admissibility of Unlawfully Obtained Evidence in International Arbitration: Does the End Justify the Means?*, Paris J. of Int'l Arb. 2018-4, pp. 53, 55 ("[T]he Methanex tribunal appears to have considered acts of trespass by the claimant party to obtain evidence as unlawful under US law, but also characterized the same acts as contrary to the general duty of good faith stemming from international law."). **RL-0006**.

483 *EDF (Services) v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 3 (August 29, 2008), ¶ 38. **RL-0007**.

484 *EDF (Services) v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 3 (August 29, 2008), ¶ 38. **RL-0007**.

419. These decisions show that a respondent State and the claimant investor are subject to the same rules. In fact, recently the tribunal in *OOO Manolium-Processing v. Bielorrusia*, citing the IBA Rules and *Methanex v. United States*, concluded that there is a duty of all parties not to obtain evidence by inappropriate methods:[485]

> Parties in an investment arbitration have a duty to not obtain evidence through improper means. This is derived from the obligations to arbitrate fairly and in good faith, and the principle of equality of arms implicit in all international arbitrations between a State and a foreign investor [...] Whilst the capacity for a foreign investor to obtain evidence from a State party through improper means is significantly reduced, *the duty not to engage in improper activities applies equally to a foreign investor*.[486]

420. The Respondent reserves the right to request documents on the participation [redacted] in this arbitration as a witness for the Claimant and on any compensation that he may have received - or is receiving - from the Claimant or from whoever is financing the costs of the Claimant in this arbitration.

421. Thus, the Respondent considers that there are limits to the admissibility of the Witness statement [redacted] However, if the Tribunal were to determine that the Witnes statement [redacted] is not inadmissible, the Respondent considers that it should not be given any probative value for the following. [redacted] the Claimant. The testimony of [redacted] reflects a totally different position on Don Diego and is contradictory to the explanations and information that he provided to the Respondent for several months.[487]

422. Some tribunals have shown this. In *Azininian v. Mexico*, the tribunal refused to take into consideration the witness statement of Mr. Goldestein, offered by the claimant, because the statement of said witness was for his own benefit and was not consistent with what existed in the

485 *OOO Manolium-Processing v. Belarus*, PCA Case No. 2018-06, Decision on Claimant´s Interim Measures Request, (December 7, 2018), ¶ 154. **RL-0008**.

486 *OOO Manolium-Processing v. Belarus*, PCA Case No. 2018-06, Decision on Claimant´s Interim Measures Request, (December 7, 2018), ¶¶ 159-60. **RL-0008**.

487 Witness statement of Mr. Salvador Hernández, ¶ 10.

record, which ultimately affected the credibility of the claimant.[488] As in that case, the witness statement of [redacted] causes surprise and disappointment to the Respondent.

423. All of the above is contrary to the best practices in international arbitration, to procedural justice and fairness, and to any ethical rule.

2. Claimants' Expert Reports and Witness Statements Lack Probative Value as Evidence Because of Shadow Contingent Economic Incentives

424. To try to demonstrate an alleged political and non-technical decision, Claimant's case is heavily dependent on the statements of two witnesses, who being officials at the time and who determined that the Don Diego project was environmentally unsustainable, now they decided to give a different version of the facts that they analyzed and determined. The Claimant also desperately seeks the Tribunal to analyze a myriad of expert reports of a technical nature. In particular, the Claimant pretends the Tribunal to position itself as the authority responsible for determining the environmental impact of a marine mining Project, based on statements [redacted][489] Claimant further commissioned six so-called expert reports in addition to their damages report.[490] In Claimant's own words, "in light of the testimony [redacted] Lozano and the expert witnesses, there is little question that as a consequence of Mexico's refusal to grant the MIA, which resulted from Secretary Pacchiano's illegitimate political interests, ExO has been forced to halt the Project."[491]

425. Curiously, Odyssey's most recent filing with SEC makes clear that at least two undefined "consultants" have entered into contingency compensation contracts for this arbitration in

---

488 *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, November 1°, ¶¶ 119-123. **RL-0009**. ("The list of demonstrably unreliable representations made before the Arbitral Tribunal is unfortunately long. The arbitrators are reluctant to dwell on it in this Award, because they believe that the Claimants' counsel are competent and honourable professionals to whom a number of these revelations came as a surprise. […] The credibility gap lies squarely at the feet of Mr Goldenstein, who without the slightest inhibition appeared to embrace the view that what one is allowed to say is only limited by what one can get away with").

489 Claimant's Memorial, ¶ 6.

490 Claimant's Memorial, ¶¶ 354-355.

491 Claimant's Memorial, ¶ 370.

exchange for 1.5 million equity Odyssey shares, presently traded at approximately US$6 each, as well as a fixed success fee of US$700,000:

> During March 2016, our Board of Directors approved the grant and issuance of 3.0 million new equity shares of Oceanica Resources, S.R.L. ("Oceanica") to two attorneys for their future services. During January 2020, our Board of Directors approved two four-month contracts with two advisory consultants in connection with the litigation of our NAFTA arbitration which would allow them to receive 1.5 million new equity shares each if they proved to be successful in the facilitation of the process. This equity is only issuable upon the Mexican's government approval and issuance of the Environmental Impact Assessment ("EIA") for our Mexican subsidiary. All possible grants of new equity shares were also approved by the Administrators of Oceanica. We also owe consultants contingent success fees of up to $700,000 upon the approval and issuance of the EIA. The EIA has not been approved as of the date of this report.[492] [Énfasis añadido]

426. These contingency compensation schemes, which the Claimant fails to disclose in its Memorial, affects the credibility of any testimony, are improper and indicate bias.

427. The IBA Guidelines on Party Representation in International Arbitration permit counsel to pay "(a) expenses reasonably incurred by a Witness or Expert in preparing to testify or testifying at a hearing; (b) reasonable compensation for the loss of time incurred by a Witness in testifying and preparing to testify; and (c) reasonable fees for the professional services of a Party-appointed Expert."[493] The IBA Guidelines, however, do not permit "success" or "contingency" compensation. This is because "[o]bjectivity could be impaired if an expert participated in an arbitration proceeding and it was shown that she/he would obtain an economic benefit if the outcome of the proceeding were favorable to the retaining party."[494]

428. As Jeffrey Waincymer explains:

> All would agree that any opinion [experts] present should certainly be honest, objective and independent, even though the relationship itself cannot be described as wholly independent. The opinion of an expert should not be distorted for the benefit of the party appointing. The Chartered Institute of Arbitrators Protocol states that '(a)n expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any party'. . . . The CIArb Protocol makes clear that receiving a fee does not in and of itself impact upon independence. Nevertheless, most

---

492 Odyssey's Annual Report 2019 (*Form K*), p. 69 (emphasis added). **C-0190**.

493 IBA, IBA Guidelines on Party Representation in International Arbitration, May 25, 2013, Guideline 25. **RL-0010.**

494 *Italba Corp. c. República Oriental del Uruguay*, Caso No. ARB/16/9, Award, Mar. 22, 2019. **RL-0011**.

> would see a contingency fee based on success in the proceedings as being an unacceptable interference with independence.[495]

429. Others have added:

> is my view that an expert should never be engaged on a lump sum basis and absolutely never on a contingency arrangement. A lump sum fee potentially restricts an expert's ability to assist the Court or tribunal fully because, subconsciously or otherwise, an expert is in danger of curtailing work in line with a lump sum fee, while a contingency fee is clearly inconsistent with the duty of independence. Most, if not all, professional guidelines and protocols state that an expert should be paid at hourly rates on the basis of the time reasonably spent.[496]

430. This is in accord with the American Bar Association's Model Rule 3.4(3), which states that "it is improper to pay an expert witness a contingent fee." New York Rule of Professional Conduct 3.4(b) similarly states that attorneys are prohibited from "offer[ing] an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter." California Rule of Professional Conduct 3.4 mirror that prohibition: "A member shall not . . . (B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case."[497]

431. Thus, there is widespread recognition that compensating a witness contingent on the outcome of the case undermines the credibility of the witness and that the practice is restricted. At a minimum, the Claimant needs to identify the witness statements or expert reports that are subject to the above contingency fee arrangement and disclose those contracts in their entirety. The Tribunal should then strike any affected statements or reports from the record, and to the extent that Claimant's evidence is maintained in the record, the Tribunal should not give it any weight.

---

[495] Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer 2012), pp. 942-43. **RL-0012**.

[496] John Molloy, *The Far Reaching Consequences of Expert Evidence*, 17 Asian Disp. R. 150 (2015), p. 152. **RL-0013**.

[497] The Washington, D.C. Rules of Professional Conduct also state: "(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person." D.C. Rules of Professional Conduct, Rule 4.4(a). **RL-0014**.

C. General considerations on the assessment of the denial of the authorization of environmental impact pursuant to Chapter XI of NAFTA

432. This arbitration refers to the refusal of an authorization in environmental matters. Claims for violations of Articles 1102 (National Treatment), 1105 (Minimum Standard of Treatment) and 1110 (Expropriation) of NAFTA must be evaluated by this Tribunal in light of this situation.

433. The NAFTA preamble refers to the achievement of its objectives, including the objective of "[ensure] a predictable commercial framework for business planning and investment". It also refers to the objective of "[strengthen] the development and enforcement of environmental laws and regulations". The language of said preamble is part of the context of Articles 1102, 1105 and 1110 of the NAFTA and, by virtue of Article 31 of the Vienna Convention, it must be taken into account for the interpretation of these provisions.

434. Likewise, Article 1114(1) of the NAFTA establishes tha:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

435. In addition to these express provisions of NAFTA, customary international law recognizes that governments are free to act in the broader public interest to protect the environment and that reasonable government regulation of this kind cannot be achieved if any company claiming having been affected could ask for compensatio.[498] The margin that a government enjoys when adopting an environmental measure, which has a legitimate objective, is wide, particularly in the framework of NAFTA.[499] By demonstrating that a government action or regulation is aimed at addressing a serious environmental concern, which is the situation in this arbitration, a respondent State can demonstrate that the act was not arbitrary or discriminatory.[500] Indeed, when a measure is

---

498 *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1 Award, December 16, 2002 ¶ 103. **CL-0068**.

499 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Reasons for Order, 13 January 2004 ¶ 30. **RL-0015**.

500 *Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, Part IV Ch. D ¶¶ 14-15 (holding that, given the respondent's scientific impetus for implementing the regulation at issue and the manner in which the regulation was promulgated, the claimant failed to show the respondent's actions were discriminatory). **CL-0074**.

reasonably linked to a legitimate objective of the State and the means chosen are proportional to achieve said objective, the measure is neither disproportionate nor arbitrary.[501]

436. Regarding discrimination under NAFTA Article 1102, to the extent that there are differences in treatment between investors and investments, such differences will be justified when it can be shown that they have a reasonable connection with rational government policies that do not distinguish, either *de facto*, between foreign-owned and domestic-owned companies, and that they do not unduly undermine NAFTA's investment liberalization objectives.[502]

D. Claimants Have Not Established a Violation on the Merits

1. Mexico Did Not Fail to Accord Fair and Equitable Treatment to Odyssey's Investments

437. Claimant begins its argument under NAFTA Article 1105 by stating: "[a]t root, the facts underlying Respondent's breach of Article 1105 are not complicated and cannot be seriously contested".[503] However, contrary to what the Claimant asserts, the facts are clearly and seriously contestable. In the first place, it is false that "career civil servants" have determined that the "Project did not pose any non-mitigable environmental risks and should be approved".[504] [redacted]

There is no contemporary evidence to support the sayings [redacted] on the contrary, contemporary evidence shows that the Project was not environmentally viable and that is why its authorization was denied as reflected in the resolutions.

438. [redacted]

501 *9REN Holding S.a.r.l c. Reino de España*, Caso CIADI No. ARB/15/15, Award, May 31, 2019, ¶ 323. **RL-0016**.

502 Pope & Talbot Inc. v. Government of Canada, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, ¶ 78. **CL-0090**.

503 Claimant's Memorial, ¶ 219.

504 Claimant's Memorial, ¶ 219.

505 Claimant's Memorial, ¶ 219.

[redacted] under Mexican law to decide on environmental impact authorizations. Indeed, as explained in Section II.I.2 *supra*, in accordance with Mexican law, which is applicable as a matter of fact for this Tribunal, Mr. Pacchiano did not have any powers or interference in the resolution of applications for environmental impact authorization. In fact, the environmental regulation itself recognizes that since it is a technical-scientific issue, that decision corresponds solely and exclusively [redacted][506]

439. Third, it is false that Mr. Rafael Pacchiano has "abused the public authority entrusted to him for his own, personal gain".[507] Odyssey's conjectures about the apparent reasons that motivated the alleged actions of Mr. Rafael Pacchiano lack any factual support. Mr. Rafael Pacchiano never aspired to have, did not have, does not have, nor will he have any benefit due to the meaning [redacted] These accusations are mere speculations that contradict reality. Indeed, Mr. Rafael Pacchiano retired from the public sphere and it is false that he had any interference in the DGIRA's decision derived from an alleged political interest, as indicated in his Witness statement.[508]

440. Fourth, it is also false that Mr. Rafael Pacchiano has allowed "the same approval process to work as intended for dredging project proposals from similarly-situated Mexican companies".[509] There is no evidence which shows that Mr. Rafael Pacchiano authorized the aforementioned projects, for the simple reason that it was not his responsibility to do so. Indeed, Mr. Rafael Pacchiano was not in charge of authorizing or denying the projects, [redacted] This is an undeniable fact that, to use Claimant's words, "only multiplied and magnified the extent" of the illusory nature of Claimant's assertions, which is based on mere sayings that without any support it presents as fact. The Respondent draws the attention of the Tribunal to consider this misconduct in the allocation of costs.

---

506 *See* section II.L.4.

507 Claimant's Memorial, ¶ 220.

508 Witness statement of Mr. Rafael Pacchiano, ¶ 10.

509 Claimant's Memorial, ¶ 220.

510 *See supra* Sections II.I.2, II.L.4 y II.N.1.

441. Fifth, it is false that the Mexican authorities are in contempt with what was ordered by the TFJA as the Claimant has wrongly affirmed in the Notice of Intent, the Notice of Arbitration and now in the Memorial.[511] As mentioned above, the interpretation (misrepresentation) that the Claimant presents of the TFJA's decision is incorrect. The TFJA clearly ordered the DGIRA to issue a new resolution with full freedom of decision on the resolution meaning.[512]

442. Sixth, evidently the Claimant does not agree with the meaning of the resolution, but that is not a reason that justifies the claim that it presents and that it intends to reinforce based on the statements of [redacted] going so far as to allege that Mr. Rafael Pacchiano "direct[ed] his officials to render a manifestly unreasonable conclusion which showed nothing but contempt for the TFJA and for the rule of law as a whole."[513] It is false that the DGIRA resolution constitutes a "manifestly unreasonable conclusion". It is not at all unreasonable that the authorization of the Project was denied to ExO due to the possible damage that it would imply for the turtles, and other marine species, that inhabit that area and are officially declared endangered.[514] It highlights the fact that not even the TFJA made a statement of this nature. On the contrary, it observed that the DGIRA is the only technical authority empowered to resolve and that, in fact, there could be other concerns that the TFJA could not appreciate:

> […] The Court does not have the technical capacity to analyze said [mitigation] proposals, and if they are analyzed by this Court, it would be substituting itself in the powers that are proper and exclusive to the Ministry of Environment and Natural Resources (SEMARNAT).
>
> In addition to the foregoing, one more impediment for this Court could determine whether or not the plaintiff's MIA should be authorized, is that the litigation raised in the lawsuit that concerns us deals exclusively with the possible damage that could be caused to the species of turtles, however, from the content of the administrative file in which the refusal to the MIA was issued, it is noted that there are several additional species that could be affected by the project, such as: gray whales, dolphins, sharks, fish , mollusks, migratory birds, among others, and this Court does not have the technical resources to conduct an analysis in this regard. Likewise, this Court could not conduct an analysis on other possible environmental impacts that the project in question represents, such as: water, air, noise pollution, among others. [515]

---

511 Claimant's Memorial, ¶ 220.

512 It is false that the DGIRA has been ordered to issue a favorable resolution for ExO. *See supra,* Section II.M.3.

513 Claimant's Memorial, ¶ 220.

514 *See supra*, Section II.D.

515 **C-0170**, p. 187.

443. The DGIRA resolution is currently being reviewed by the TFJA, which will determine if the refusal was duly justified and motivated. Therefore, there is no justification whatsoever to affirm that the DGIRA Resolution reflects a "manifestly unreasonable conclusion", much less to claim that said resolution shows "nothing but contempt for the TFJA and for the rule of law as a whole".[516]

444. Seventh, Claimant asserts that SEMARNAT forsook its statutory mandate and applicable environmental law" by allegedly "following Secretary Pacchiano's directive and denying the permit for illegitimate reasons." However, the one who seems to ignore the regulations and legal mandate applicable to the DGIRA resolution is the Claimant itself, who, without further investigation, assumes as true the assertions [redacted] As already discussed in Section II.I.2 *supra*, [redacted] and the Secretary could not have - nor did he have - any interference in the DGIRA resolution. For this reason, it is untenable for the Claimant to indicate that "Secretary Pacchiano's secret marching orders twice forced SEMARNAT officials to act against their professional judgment, [...]".[517] [redacted]

a. It is Claimants' burden to show both the content of the customary international law minimum treatment standard and that it has been breached

445. NAFTA Article 1105 provides in pertinent part:

> Minimum Standard of Treatment
>
> 1. Each 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.

446. Indeed, that standard "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors

---

516 Claimant's Memorial, ¶ 220.

517 Claimant's Memorial, ¶ 220.

of another Party"[518] and the standard evolves.[519] However, establishing and meeting the applicable FET standard is not as straightforward a matter as Claimants suggest.

447. First, the Claimant has the burden of establishing the existence and applicability of a norm of customary international law:

> [T]he proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted. [520]

448. Second, it is widely accepted that "the identification of rules of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice and whether such general practice is accepted as law (that is, accompanied by *opinio juris*).".[521] As summarized by the International Court of Justice:

> In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be "a settled practice" together with opinio juris (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 44, para. 77). Moreover, as the Court has also observed, [i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them" (*Continental Shelf (Libyan Arab Jamahiriya/Malta))*, Judgment, I.C.J. Reports 1985, pp. 29-30, para. 27). [522]

---

[518] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2011. **CL-0082**.

[519] *ADF v. United States*, ICSID Case No. ARB(AF)/00/1, Mexico's Second Article 1128 Submission, p. 11 (22 July 2002), "Mexico agrees that customary international law evolves.". **RL-0017.**

[520] *Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2,* Award, Sept. 18, 2009, ¶ 273. **CL-0027**. Other NAFTA tribunals have reached similar conclusions. *See, e.g., ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award, Jan. 9, 2003, ¶ 185 ("The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts."). **CL-0005**. *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, June 8, 2009, ¶ 601 ("[A]s a threshold issue, the Tribunal notes that it is Claimant's burden to sufficiently" show the content of the customary international law minimum standard of treatment). **CL-0055**.

[521] Charles Chernor Jalloh, *Statement of the Chair of the Drafting Committee on Identification of Customary International Law*, International Law Commission, May 25, 2018, p. 3. **RL-0018**.

[522] *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening) I (Judgment of 3 February 2012), I.C.J., Feb. 3, 2012, pp. 99, 122-123. **RL-0019.**

449. The standard for finding governmental behavior that is incompatible with the minimum level of treatment is high. The tribunal in *Waste Management v. Mexico II* 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 Claimants if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes Claimants to sectional or racial prejudice, or 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.[523]

450. The *Cargill* tribunal expanded on this issue:

> As outlined in the Waste Management II award quoted above, the violation may arise in many forms. It may relate to a lack of due process, discrimination, a lack of transparency, a denial of justice, or an unfair outcome. But in all of these various forms, the "lack" or "denial" of a quality or right is sufficiently at the margin of acceptable conduct and thus we find . . . that the lack or denial must be "gross," "manifest," "complete," or such as to "offend judicial propriety"".[524]
>
> * * *
>
> To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety. [525]

451. Recently the tribunal in the *Vento v. Mexico* recognized that the interpretation of the *Waste Management II v. Mexico* on the legal standard applicable to Article 1105 turns out to be the most appropriate:

> As already indicated above, the Parties have endorsed the formulation of the minimum standard in Waste Management II. The Claimant even "recommends" that the Tribunal apply the formulation in this case. The Respondent has noted that the standard set by Waste Management II is high and has referred to Cargill, which it considers an amplification of Waste Management II. The Cargill tribunal observed that the words used to describe conduct in breach of the minimum standard, although imprecise, are

---

523 *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004, ¶ 98. **CL-0121**.

524 *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009, ¶ 285. (added emphasis). **CL-0027**.

525 *Id.*, ¶ 296 (added emphasis).

> significantly narrower than the standard present in the Tecmed award. 287 On the other hand, the Claimant refers to Waste Management II as a point of departure to expand the content of the minimum standard by relying on principles of good faith and due process and drawing wide ranging conclusions for which the Claimant finds support in Tecmed. The Parties' argument for a standard higher or lower do not detract from Waste Management II, which, in the view of the Tribunal, reflects a proper understanding of the minimum standard of treatment.[526] [footnotes omitted]

452. In the words of McLachlan, Shore and Weiniger:

> […] Many tribunals have observed that States retain a "wide regulatory 'space' for regulation" and that an international arbitral tribunal "does not have an open-ended mandate to second-guess government decision-making." An international tribunal should give particular weight to governmental regulatory decisions taken in good faith in the interests of public morals, health or the environment.[527]

453. General claims of injustice and perceived subjective "expectations" are insufficient to support a violation of the fair and equitable treatment standard, especially when, as here, it is a regulatory decision.

454. Mexico considers that the Claimant has not described a conduct that constitutes a violation of the minimum standard of treatment contained in NAFTA Article 1105. The foregoing, without prejudice to the fact that there is no rule of customary international law that prohibits the notion of "marching orders" with which the Claimant characterizes the conduct claimed.

b. The "marching order" conduct on which the Claimant bases its claim does not reach the threshold of violation established by NAFTA jurisprudence

455. It is clear that the measure claimed by the Claimant is, basically, the denial of environmental authorization, however, to support said claim, it elaborates a theory about the alleged existence of "secret marching orders" that led to public officials to issue a resolution contrary to the interests of ExO.[528] Due to the importance that the Claimant attributes to said theory, it is relevant to refer to the recent NAFTA jurisprudence that set the threshold required to

---

526 *Vento Motorcycles Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3,Award, July 6, 2020, ¶ 283. **RL-0020**.

527 Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2017), ¶ 7.24 (citing *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award, Jan. 26, 2006, ¶ 127; S.*D. Myers, Inc. v. Government of Canada*, Partial Award (Merits), Nov. 13, 2000, ¶ 261). **RL-0021.**

528 Claimant's Memorial, ¶ 221.

be able to sustain a violation of Article 1105 based on conduct that is characterized as "marching orders.".

456. Indeed, in the *Vento v. Mexico*, the claimant claimed the violation of NAFTA Article 1105 based, precisely, on the alleged existence of “marching orders”. The parallelism that emerges between this case and the present is significant:

- It was an administrative procedure conducted by federal authorities (in that case was regarding verification of origin matters).
- It involved the issuance of administrative resolutions in a negative sense and contrary to the interests of the claimant.
- It was alleged that the meaning of the final resolutions was based on secret marching orders.
- The entire theory of command orders or "marching orders" was based on the saying of four former SAT officials who participated as witnesses for the CLAIMANT.[529]
- The witnesses and former officials who declared, ex post facto, not agreeing with the meaning of the SAT resolution, were the same ones who initialed and signed the resolutions.
- Claimant’s witnesses declared that they had been pressured by their hierarchical superiors to follow the command orders against the claimant.
- Claimant’s witnesses declared that the reasoning and application of the legal precepts used to issue the decision in the negative sense were novel and that there were no precedents.
- Claimant’s witnesses and the claimant itself alleged discriminatory treatment for allegedly not applying the same legal reasoning to other cases that were clearly not comparable.

[529] Messrs. Gabriel Arriaga, Guillermo Massieu, José Alberto Ortúzar and Daniel Ortiz Nashiki. *See Vento Motorcycles Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, July 6, 2020, ¶ 21 y 27. **RL-0020.**

- Claimant alleged a smear campaign that involved journalistic statements by SAT officials.
- The claimed amount was exorbitant and clearly speculative.

457. The tribunal reasoning in *Vento v. Mexico*, to reject the existence of marching orders and, therefore, the claim of Article 1105 of NAFTA is relevant for the resolution of this case, for which the elements are specifically presented below.

(1) [redacted] in the issuance of the resolutions

458. In the first place, the tribunal noted that the witnesses spoke in the third person to refer to the conduct they carried out. Indeed, the importance of the direct involvement of the witnesses who participated in the resolution was highlighted, which implied the drafting of the resolutions and their own signature in conformity. Likewise, emphasis was placed on the responsibility that the witnesses had as public officials and in accordance with domestic law to ensure the legality of the resolution:

> The Claimant submitted the evidence of Gabriel Arriaga Callejas who testified that "the determination made by SAT to Vento had no precedent, and it was a complete manipulation of the regulations at hand in order to determine a breach in terms of Rule 2(a)." In the view of the Tribunal, there is very little credibility to be given to Gabriel Arriaga Callejas's testimony. For one thing, while he speaks of SAT as though it were a third person, he was part of SAT himself, and he was personally and directly involved as a lawyer in drafting and issuing the 2004 and 2005 determinations in question. Indeed, he initialed the 2004 determination before José Alberto Ortúzar Cárcova signed it and it was notified to Vento. By April 2004, when the determination was issued, both Gabriel Oliver García and José Ramón Jáuregui Tejeda, Gabriel Arriaga Callejas's immediate superior, had left SAT and neither of their positions had been filled. Thus, Gabriel Arriaga Callejas was at that time the senior lawyer within ACAFI and the official who was ultimately responsible for ensuring the legality of that determination.[530]

459. Despite the fact that Mr. [redacted] states without any support that [redacted],[531] as already indicated *supra*,[532] in accordance with Mexican law –and as a matter of fact for this

---

530 *Vento Motorcycles Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, July 6, 2020, ¶ 290. **RL-0020**.

531 Witness statement of Mr. [redacted] ¶ 4.

532 *See supra*, Sections II.I.2, II.L.4 y II.N.1.

Tribunal– Mr. [redacted] the two resolutions that denied the MIA's request for authorization, [redacted]. It is questionable that Mr. [redacted]

(2) The checks and balances in the lines of authority or chains of command established by law

460. The tibunal in *Vento v. Mexico* highlighted a relevant element that must be taken into consideration as a matter of fact to determine whether a claim based on marching orders can succeed, namely, the limits and controls that domestic law itself establishes to prevent abuse by hierarchical superiors. In particular, the tribunal noted:

> In every hierarchical structure there is an inherent line of authority or command. The executive branch of essentially all governments is organized in this manner. Instructions are given, received and executed as a matter of course. To say that officials lower in the hierarchy receive and execute instructions or orders given by higher-ranking officials is nothing more than to describe one aspect of how governments —at least their executive branches— operate. Nonetheless, it is not unusual for governments to introduce checks and balances into these lines of authority or command.[533]

461. As already discussed above, the hierarchical structure of SEMARNAT prevents the Secretary or Undersecretary from having any interference in a decision of a technical-scientific nature [redacted].[534] Therefore, it is unlikely that Mr. [redacted] now declares that [redacted].[535] This statement is openly opposed to his more than 16 years of experience in SEMARNAT in which he knew, or should have known, the operation, powers, attributions, competencies and responsibilities of the management under his charge.[536]

462. It is notable that the Claimant and its witnesses have completely ignored the legal functioning provided by Mexican law regarding the environmental impact assessment procedure

---

533 *Vento Motorcycles Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, July 6, 2020, ¶ 312. **RL-0020**.

534 *See supra*, Sections II.I.1, II.I.2, II.L.2, II.L.4 y II.N.1.

535 Witness statement of Mr. [redacted] ¶ 25.

536 *See supra*, Sections II.I.1, II.I.2, II.I.3, II.I.2, II.L.2, II.L.4, II.N.1 y II.N.5.

and, at the same time, affirm that the DGIRA's decision deviated from the law and allegedly obeyed merely political reasons.

(3) The absence of complaints of the alleged illegal conduct

463. In *Vento v. México*, the tribunal also seriously considered the absence of complaints by the former officials - and now witnesses - regarding the marching orders that they were allegedly pressured to carry out. In fact, another element that the tribunal highlighted in rejecting the existence of "marching orders" was the clear contradiction between the statements of the witnesses in their witness statements and what actually happened in the facts:

> Gabriel Arriaga Callejas also testified to the existence of the so-called marching orders. Mr. Arriaga asserted that "[a]ny official who transgresses these informal rules will likely lose any opportunity for promotions and in some cases could be regarded as disobeying an order of a superior, which leads to the immediate dismissal from the position." At the Hearing he testified that he considered that the situation surrounding issuance of the determinations was absolutely irregular. Yet, he not only failed to report it as such (he testified that he had no one to report it to, which the Tribunal finds very hard to believe), but he continued to work at SAT for five more years and was promoted twice (while his immediate superiors, as noted, had left SAT prior to the first determination being issued).[537] [footnotes omitted]

464. In this case, it is notable that [redacted]. On the contrary, [redacted] cites the Los Cardones project to hold Mr. Rafael Pacchiano responsible for that resolution and thereby support his accusation regarding the alleged existence of marching orders to deny the authorization of the Don Diego project. However, as discussed *supra*,[538] the case cited in his statement is contradicted by the fact that [redacted][539]

(4) The express acknowledgment of having committed an irregularity and benefiting from it by not reporting it in a timely manner

---

537 *Vento Motorcycles Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, July 6, 2020, ¶ 291. **RL-0020**.

538 *See* Section II.I.4. *See* also Witness statement of Mr. Rafael Pacchiano, ¶¶ 45-4 and RPA-001.

539 DGIRA's resolution on the authorization of los Cardones project. **R-0066**.

465. Notably, the tribunal in *Vento v. Mexico*, emphasized the lack of credibility of an official who declares to have committed an irregularity and benefits from it, i.e., while continuing to work for the government:

> [Mr. Gabriel Arriaga Callejas] continued to work at SAT for five more years and was promoted twice (while his immediate superiors, as noted, had left SAT prior to the first determination being issued).
>
> The evidence before this Tribunal does not show anything irregular about the application of Rule 2(a), but there is very little credibility to be given to the statement of a witness who accepts that he committed an irregularity and, by his own admission, benefitted from that. In any event, whatever Gabriel Arriaga Callejas may have believed then or now, even the Claimant accepts that SAT's determinations, and specifically its application of Rule 2(a), were "plausible enough to survive judicial scrutiny" and, more importantly, the overwhelming and consistent evidence of Mexican administrative authorities on appeal, and four —likely five— different Mexican federal courts (the TFJFA on separate cases brought by Vento and AED, respectively, and three federal amparo courts, the Fourth and Ninth Circuit Courts in amparo actions brought by Vento involving, respectively, SAT's 2004 and 2005 determinations, as well as the Eighteenth Circuit Court (and likely another circuit court in a different amparo proceeding brought by AED)) is that SAT's determinations of 2004 and 2005 are a correct application of Mexican law.[540]

466. It is well known that [redacted][541] However, [redacted][542] Despite the fact that the Claimant supposedly knew about this situation and also his now witness, [redacted] during which time [redacted] in the same sense as the previous one.

467. [redacted] in various meetings with the legal team and formed part of the conversations and email exchanges related to this arbitration.[543] It is until the submission of the

---

540 *Vento Motorcycles Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, July 6, 2020, ¶¶ 291-292. **RL-0020**.

541 Witness statement [redacted] ¶ 25.

542 Witness statement [redacted] ¶ 26.

543 *See supra*, Section II.N.6.

Claimant's Memorial that the government of Mexico is aware of the participation of Messrs. [redacted] in the arbitration, a fact [redacted]

468. Based on the inquiries followed by the tribunal in the case of *Vento v. Mexico*, this Tribunal will be able to determine without any difficulty that in the present case there were no marching orders and, therefore, the Claimant's claim is lacks merits.

469. An additional element that the Tribunal must take into consideration regarding the *Vento v. Mexico* case is that the tribunal benefited from the existence of judgments of Mexican administrative and judicial courts that confirmed the interpretation and meaning of the resolution of the Mexican authorities. This situation does not occur in this case because the Claimant has decided to litigate a measure that is susceptible to change as a result of the ongoing proceeding before administrative courts. This fact shows that the task of this Tribunal is not to act as an appeal body, much less to "put itself in the position" of the DGIRA to resolve and decide on the MIA request by ExO. The Tribunal's role is not to conduct a *de novo* analysis of the request made by ExO, but is limited to determining whether the DGIRA's decision was reasonable as a technical-scientific entity specialized in deciding on these types of issues.

470. Given that the Claimant bases its entire claim on the allegation that the the resolution was issued in response to alleged "marching orders" motivated by political considerations, the Tribunal can easily reject the Claimant's claim by finding that there is no evidence to support said claim. On the contrary, the evidence in the record clearly demonstrates that the Claimant's witnesses' statements are false and lack credibility.

c. "Good faith" is not an autonomous obligation under the fair and equitable treatment standard

471. Aside from quoting grandiose language from decades-old scholarship pronouncing good faith an "indisputable rule of international law,"[544] the Claimant does not bother to discuss the specific role of good faith within the fair and equitable treatment standard, its specific definition, or what facts based on legal authorities would "violate" this supposed good faith principle. In

[544] Claimant's Memorial, ¶ 230 (citing F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BYIL 241 (1981), p. 249).

other words, the Claimant skip over the role of good faith under the umbrella of the FET standard. Rather, it simply asserts that, "[o]f course," it is confident that "a lack of good faith is sufficient to show a violation of Article 1105".[545]

472. In fact, according to a major NAFTA treatise, itself citing abundant of scholarship on the issue,: "[w]hat is clear is that good faith is not an autonomous stand-alone obligation under the FET standard (like arbitrariness or denial of justice)".[546] NAFTA parties have consistently maintained that Article 1105 does not impose any free-standing, substantive obligation of good faith, and NAFTA tribunals have concurred.[547]

473. Good faith then is merely a principle "for applying" the FET standard under Article 1105[548] that "adds only negligible assistance in the task of determining or giving content to a standard of fair and equitable treatment".[549] Meanwhile, in Waste Management II, "[t]he tribunal clearly d[id] not refer to good faith as a stand-alone obligation under Article 1105," when it noted in dicta, in the context of unproven conspiracy accusations, and in denying an Article 1105(1) claim that "[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."[550] Even outside of NAFTA, "[t]he ICJ [for instance] has also come to the conclusion that the principle of good faith is 'not in itself a source of obligation where none would otherwise exist".[551]

---

545 Claimant´s Memorial ¶ 232.

546 Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105 (Kluwer 2013), pp. 222-23**. RL-0022.**

547 *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, United States Counter-Memorial, Dec. 22, 2008, ¶ 94. **RL-0023**. *Methanex v. United States*, UNCITRAL, United States Rejoinder, Apr. 23, 200, ¶¶ 25-26. **RL-0024**. *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, ICSID Administered, Award, Mar. 31, 2010, ¶¶ 186-87. **CL-0070**. *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Canada's Counter-Memorial, June 22, 2005, ¶¶ 915, 921. **RL-0026**.

548 *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Separate Opinion Thomas Wälde, Dec. 1, 2005, ¶ 25. **RL-0027**.

549 *See, e.g., ADF v. United States*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, ¶ 191. **CL-0005**.

550 *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004 ¶ 138. **CL-0121**.

551 *Concerning Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, Dec. 20, 1988, ICJ Rep. 1988, ¶¶ 105-06. **RL-0028**.

474. Indeed, scholars[552] and tribunals[553] alike have come to the conclusion that the FET standard is simply an expression of the principle of good faith.[554] Newcombe and Paradell, for instance, find that *"[t]he commitment to fair and equitable treatment is an expression of the principle of good faith*", y que "*the various elements of fair and equitable treatment, including due process, due diligence and the protection of legitimate expectations, are manifestations of the more general principle of good faith*".[555]

475. In light of these authorities, the Claimant's assertion that lack of good faith alone could establish an FET violation is plainly incorrect. Indeed, the memorial struggles to make out a single instance of a stand-alone good faith violation, however defined, when it refers to the "lack of good faith and arbitrary nature of both Denials";[556] "arbitrary and lack of good faith conduct,"[557] lack of a fair evaluation and "intention of engaging in a good faith review";[558] lack of good faith as "the epitome of an arbitrary action,";[559] "sophistry again reflected [in] an arbitrary, unfair process, as such assertions simply could not have been made in good faith";[560] and, finally, that the alleged conduct "was manifestly arbitrary and the product of a process entirely lacking in good faith or due process".[561]

476. In essence, the Claimant seeks to argue that the fact that its request was not approved, in and of itself, constitutes "lack of good faith." This would lead to the absurd that any resolution in the negative sense of the competent authority regarding the authorization of environmental impact

---

552 Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties. Standards of Treatment* (Kluwer 2009), p. 276, n. 206. **RL-0029**. Roland Kläger, *Fair and Equitable Treatment in International Investment Law* (Cambridge 2011), p. 132. **RL-0030.** Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford 2012), p. 145. **RL-0031**.

553 *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, ¶ 153. **CL-0112**. *Sempra Energy International c. Argentina*, Caso CIADI No. ARB/02/16, Laudo, Sept. 28, 2007, ¶ 298. **RL-0032.** *Siemens AG c. Argentina*, Laudo, Enero 17, 2007, ¶ 308. **CL-0107**.

554 Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105 (Kluwer 2013), p. 223. **RL-0022**.

555 Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties. Standards of Treatment* (Kluwer 2009), p. 277. **RL-0029**.

556 Claimant's Memorial, ¶ 248 (c).

557 Claimant's Memorial, ¶ 254.

558 Claimant's Memorial, ¶ 255.

559 Claimant's Memorial, ¶ 276.

560 Claimant's Memorial, ¶ 279.

561 Claimant's Memorial, ¶ 287.

would be considered as the work of a "lack of good faith" That is not a coherent legal standard recognized under international law or by NAFTA Article 1105.

477. In fact, as described above, the Claimant was given substantial opportunities to seek the SEMARNAT approval, and the process was treated with great seriousness and handled in full accordance with the applicable law.

d. The standard for arbitrariness under NAFTA is exceedingly demanding and seldomly met

478. With regard to the allegations of arbitrariness, the Claimant's selective quotes from the ICJ's seminal *ELSI* case omit most of the relevant language, namely that arbitrary conduct for purposes of FET requires "*willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*".[562] As this language makes plain, *ELSI*'s influential definition articulated "*a high threshold of liability for finding a breach of arbitrary conduct*".[563]

479. NAFTA tribunals, relying on *ELSI* and despite Article 1105's failure to refer to "arbitrariness" or its variants,[564] have employed language denoting an equally high threshold. *S.D. Myers*, for example, referred to arbitrary treatment that would need to "*rise[] to the level that is unacceptable from the international perspective*";[565] *Waste Management II.* referred to "wholly arbitrary" conduct";[566] *Thunderbird v. México* referred to "manifest arbitrariness failing below international standards";[567] and *Glamis v. United States* required "*something greater than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasoning*".[568]

480. The *Cargill v. Mexico* tribunal added that:

> [T]o determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were . . . arbitrary beyond a merely inconsistent or questionable application of administrative or

---

562 *Sicula S.p.A. (ELSI)* (United States v. Italy), ICJ Rep. 1989, Judgment, July 20, 1989, p. 124. **CL-0028**.

563 Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105 (Kluwer 2013), p. 182. **RL-0022**.

564 Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer 2013), p. 203. **RL-0022**.

565 *S.D. Myers, Inc. v. Canada*, First Partial Award, Nov. 13, 2000, ¶ 263. **CL-0103**.

566 *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Abr. 30, 2004, ¶ 115 (énfasis añadido). **CL-0121**.

567 *International Thunderbird Gaming Corp. c. Mexico*, UNCITRAL, Award, Jan. 26, 2006, ¶ 194. **RL-0003**.

568 *Glamis v. United States*, UNCITRAL, Award, June 8, 2009, ¶ 617. **CL-0055**.

> legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive.[569]

481. Applying this demanding standard, NAFTA tribunals have been exceedingly guarded in finding arbitrariness. For instance, failure to abide by a country's own laws does not amount to arbitrary conduct under Article 1105 so long as it is not an "outright and unjustified repudiation" of such laws or regulations.[570] Dolzer and Schreuer concur when they add that "*a violation by the host State of its own law will not automatically amount to a breach of the FET standard*".[571] And so does McLachlan in stating that "*[a] finding that the host State is in breach of its own law will not breach the standard*".[572] This would be the case only if the violations were "*systemic and were to affect the stability and transparency of the investment's legal environment*".[573]

482. Another scholar surmised with respect to the NAFTA parties that any theory that would equate the rule of law with the FET standard would: "*probably [be] better suited for interpreting FET clauses contained in BITs involving States or at least one State where the domestic law does not offer the basic rule of law protection" – something "simply not . . . necessary in the context of NAFTA Chapter 11 which involves three democracies applying the rule of law*".[574]

483. A mistake likewise does not amount to arbitrary conduct,[575] nor does an agency's action "*in a way with which the tribunal disagrees*".[576] To the contrary, as UNCTAD remarked, NAFTA's high threshold "*provides assurance to host States that they will not be exposed to*

---

569 *Cargill, Inc. c. Estados Unidos Mexicanos,* Caso CIADI No. ARB(AF)/05/2, Laudo, Sept. 18, 2009, ¶¶ 293, 296. **CL-0027**.

570 *Gami Investments, Inc. c. Mexico*, UNCITRAL, Laudo Final, Nov. 15, 2004, ¶103. **CL-0053.**

571 Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* (OUP 2012), p. 152. **RL-0031**.

572 McLachlan, Shore & Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2nd ed. 2017), ¶ 7.17. **RL-0021**.

573 Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford 2012), p. 22. **RL-XXX.** *Gami v. Mexico*, UNCITRAL, Award, Nov. 15, 2004, ¶ 93. **RL-0031**.

574 Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer 2013), p. 263. **RL-0022**.

575 *S.D. Myers, Inc. v. Canada*, First Partial Award, Nov. 13, 2000, ¶ 261. **CL-0103**.

576 *Glamis v. United States*, UNCITRAL, Award, June 8, 2009, ¶ 625. **CL-0055**.

international responsibility for minor malfunctioning of their agencies and that only manifest and flagrant acts of maladministration will be punished".[577]

484. Likewise, a treatise states:

> NAFTA tribunals have not endorsed any of the comprehensive theories put forward by writers which have equated the FET standard with the rule of law under domestic law or, more generally, the idea of justice."
>
> [W]hile 'simple' (or 'mere') arbitrariness may violate the rule of law under domestic law, NAFTA tribunals have consistently affirmed that such conduct was not severe enough to constitute a breach of the FET standard under Article 1105"[578]

485. To date, only the tribunal in *Cargill* v. has found arbitrary conduct that violated Article 1105.[579] This finding was premised, however, on deliberate and intentional targeting of a U.S. investor in retaliation for U.S. trade policy.[580]

486. The Claimant asserts in error that NAFTA tribunals other than *Cargill* have found "violations" based on arbitrariness.[581] *Metalclad v. México* never so much as referred to "arbitrary' conduct.[582] In *Pope & Talbot v. Canadá*, the tribunal mentioned the allegation of "arbitrary' conduct *once* in describing some of claimant's allegations but found that particular conduct "reasonable".[583] Moreover, the tribunal never so much as referred to arbitrariness in its own interpretation of Article 1105.[584] Finally, despite a sole mention of conduct that was "unjust or

---

577 United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, UNCTAD/DIAE/IA/2011/5 (2012), p. 88. **RL-0033**.

578 Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105 (Kluwer 2013), pp. 262-263. **RL-0022**.

579 Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105 (Kluwer 2013), p. 205. **RL-0022**.

580 *Corn Products International, Inc. v. México*, Caso CIADI No. ARB (AF)/04/1, Decisión sobre Responsabilidad, Ene. 15, 2008, ¶¶ 243, 288. **CL-0041**.

581 *Cargill, Inc. c. los Estados Unidos Mexicanos,* Caso CIADI No. ARB(AF)/05/2, Laudo, Sept. 18, 2009, ¶ 237. **CL-0027**.

582 *Cf. Metalclad Corporation c. los Estados Unidos Mexicanos*, Caso CIAD No. ARB(AF)/97/1, Laudo, Ago. 30, 2000. **CL-0071**.

583 *Pope & Talbot Inc v. Canada*, UNCITRAL, Award and Merits of Phase 2, Apr. 10, 2001, ¶ 124. **CL-0090**.

584 *Pope & Talbot Inc v. Canada*, UNCITRAL, Award and Merits of Phase 2, Apr. 10, 2001, ¶¶ 105-18. **CL-0090**.

arbitrary" in describing potential Article 1105 violations, the tribunal in *S.D. Myers* did not find any violation based on arbitrariness.[585]

487. Notably, citations to non-NAFTA awards must be regarded with a degree of skepticism in this context. As Stone explains and as alluded to *supra*, "*non-NAFTA arbitral tribunals have been willing to entertain lower thresholds for finding arbitrariness than their NAFTA counterparts*".[586]

488. In any event, there is actually no evidence of any type of arbitrariness in this case. ExO participated in a well-established procedure and its request for approval was denied. As discussed above, DGIRA collected a tremendous amount of information from ExO and other interested parties and conducted a thorough analysis. The fact that Odyssey preferred a different outcome is insufficient to establish a claim of arbitrariness under any legal standard.

e. Claimants received all the process they were due

489. The Claimant's discussion of "due process and procedural propriety" contains little if any substance.[587] While it repeats the uncontroversial proposition that due process is part of the fair and equitable standard of treatment, the Claimant does not attempt to explain what "due process" means in investor state claims or NAFTA in particular. NAFTA tribunals have stated that Article 1105 acts as a bar only to a "complete lack of due process"[588] or "an utter lack of due process so as to offend judicial propriety."[589] Similarly, no due process obligation arises when mere administrative "irregularities" are committed.[590] Further, the "*administrative due process requirement is lower than that of a judicial process*",[591] or as a leading treatise puts it,

---

585 *S.D. Myers, Inc. v. Canada*, First Partial Award, Nov. 13, 2000, ¶ 258-69. **CL-0103.** See also Jacob Stone, Arbitrariness, The Fair and Equitable Treatment Standard and the International Law of Investment, 25 Leiden J. Int'l L. 77 (2012), p. 103 (noting that "[NAFTA] tribunals have yet to find a single instance of arbitrary conduct that amounts to a breach of Article 1105, whereas [non-NAFTA] tribunals have found several breaches occasioned by arbitrariness"). **RL-0034**.

586 Jacob Stone, Arbitrariness, The Fair and Equitable Treatment Standard and the International Law of Investment, 25 Leiden J. Int'l L. 77 (2012), p. 103. RL-0034.

587 *See* Claimant's Memorial, ¶¶ 242-43.

588 *Glamis v. United States*, UNCITRAL, Award, June 8, 2009, ¶¶ 22, 24, 614, 616, 625, 627. **CL-0055**.

589 *Cargill, Inc. v. Mexico*, Caso ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009, ¶ 296. **CL-0027**.

590 *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award, Jan. 26, 2006, ¶ 200. **RL-0003**.

591 *International Thunderbird Gaming Corp. v. MExico*, UNCITRAL, Award, Jan. 26, 2006, ¶ 200. **RL-0003**.

"*[p]rocedural rights that are essential to a fair judicial process may not be required as due process in administrative decision-making*".[592]

490. Prior tribunals have stated that a gross violation may occur when an investor is denied an opportunity to be heard [593] or failure to give notice [594]– neither of which is at issue here. Conversely, no such violation can occur, where, as here, the Claimant received a full opportunity to be heard and to present evidence and the proceedings, as here, were subject to judicial review.[595]

491. As with arbitrariness for purposes of public international law or NAFTA discussed supra, the FET "standard will not be breached simply because the host State's administrative procedures did not comply with its internal law".[596] After all, "[i]nternational tribunals […] do not sit as appellate courts with authority to review the legality of domestic measures under a Party's own domestic law".[597] Instead, "international tribunals [must] to exercise caution in cases involving a state regulator's exercise of discretion, particularly in sensitive areas involving protection of public health and the well-being of patients".[598] This is just one more expression of what has been described as "the NAFTA's general reluctance to substitute arbitral for governmental decision-making on matters within the purview of each NAFTA Party".[599]

492. In this case, ExO pursued the opportunity to appeal the denial by DHIRA to the TFJA, and the TFJA found certain procedural defects in the DHIRA's determination, without opining on the substance of the determination. Subsequently, the DHIRA issued a new determination that complied with the TFJA's ruling. [ExO has subsequently filed another appeal of the DHIRA's

---

592 McLachlan, Shore & Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2nd ed. 2017), ¶ 7.16. **RL-0021**.

593 *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000, ¶ 91. **CL-0071**.

594 *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB (AF)/00/2, May 29, 2003, ¶ 162. **CL-0112**.

595 *International Thunderbird Gaming Corp. c. Mexico*, UNCITRAL, Award, Jan. 26, 2006, ¶¶ 197-201. **RL-0003**.

596 Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2017), ¶ 7.198. **RL-0021**.

597 *Mesa Power Group, LLC, v. Government of Canada*, PCA Case No. 2012-17, Second Submission of the United States of America, June 12, 2015, ¶¶ 21-22. **RL-0035**.

598 *Apotex v. United States*, ICSID Case No. ARB(AF)/12/1, Award, Aug. 24, 2014, ¶ 9.37. **RL-0036**.

599 *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Separate Statement of Dean Ronald A. Cass, 24 May 2007, ¶ 125. **RL-0037**.

new determination, which remains pending.] The Claimant has not made any allegations of mistreatment by the TFJA, nor could it.

493. Nonetheless, it appears that Claimant is asking to the Tribunal to review the conclusions reached by the DHIRA, independent of the review already conducted by the TFJA and the review that is still pending. But as tribunals in prior NAFTA arbitrations have made clear, "*[a] NAFTA claim cannot be converted into an appeal against the decisions of municipal courts*".[600] Further "*[u]nder NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal*".[601] The Tribunal therefore should reject the claim on this basis.

f. The Claimant has failed to demonstrate that there is a violation of the FET standard based on an alleged rejection of the environmental impact authorization for political reasons

494. The Tribunal may find that an alleged "manifestly arbitrary", "unfair" treatment, contrary to good faith and due process, and "expropriation", based on political motivations, cannot be demonstrated with such precarious probative material as the offered by the Claimant. Indeed, the Respondent has indicated, on at least 15 occasions,[602] that Don Diego's AIA was rejected for political reasons, which in his opinion caused the Mexican State to breach the minimum standard of treatment and that Odyssey's investment received expropriation treatment.[603] However, the only evidence provided by the Claimant is seriously questionable:

- The witness statement [redacted] in accordance with the Internal Regulations of SEMARNAT.[604]

---

600 *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Final Award, 26 June 2003, para. 134. **RL-0038**.

601 *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002, para. 126. **CL-0078**.

602 Claimant's Memorial, ¶¶ 87, 118, 139, 200, 221, 234-235, 240, 248, 254, 288, 291-295, 310-311.

603 *See* Claimant's Memorial, ¶¶ 287-295, 309-310.

604 *See* Witness statement of Mr. Pacchiano, ¶¶ 8, 31-36.

- The witness statement [redacted] by misusing government privileged information.[605]
- The witness statement of Mr. Claudio Lozano, an employee of the Claimant and who, at best, can be considered as "hearsay" witness. The facts of which Mr. Lozano testifies are summarized in conversations with Mr. Ancira, and attendance at an alleged meeting in which, in any case, he did not participate.[606]
- A fragment no longer than 30 seconds from a press conference held in September 2018, in which the former Secretary Pacchiano answered a series of questions, including one about Don Diego, whch is decontextualized by the Claimant in this arbitration.[607]
- A "*retweet*" made by the Secretary Pacchiano on October 18, 2018, to a statement published on Twitter by SEMARNAT.[608]

495. With the aforementioned elements, it is evident that the Claimant simply does not meet the burden and standard of evidence necessary to demonstrate a violation of Article 1105 of the NAFTA.

(1) The Claimant's allegation of an alleged political campaign against it is based on a mere unsupported legal strategy

496. In practice, it is usual for claimant investors to argue, as a legal strategy, that their investment was affected by political motives or reasons on the part of the defendant State.[609] Odyssey replicates this legal strategy unconvincingly and ineffectively.

---

605 Emails from April 1, 2019, **R-0068**; Registration of access to the Executive Tower of the Ministry of Economy of April 2, 2019. **R-0143**Email from April 12, 2019, **R-0069**; Emails from April 5, 2019, **R-0070** and Email from May 31, 2019, **R-0071.**

606 Witness statement of Mr. Claudio Lozano ¶¶ 41, 74, 75 ("I did not participate in this meeting, but I later spoke with Mr. Ancira […] and that I should wait in the hallway [of the office] […] Once we were in a car back to the office, Mr. Ancira said to me: "we did it, we are now in a good position.".

607 **C-0176**, ¶¶ 1.28–1.53.

608 C-0177.

609 *See* Claimant's Memorial, ¶ 235. Bonnitcha Jonathan and Zoe F. Williams, "State liability for "political" motivated conduct in investment treaty regime", Leiden Journal of International Law (2020), p. 78 y 81 ("*The narrow*

497. Bonnitcha and Williams (*i.e.*, nor the Respondent as Odyssey suggests) identify some cases in which investment tribunals have considered that, in one way or another, there was some kind of political influence.[610] The Bonnitcha and Williams analysis classifies these cases into "pressure types" and "measurement sources". The types of pressure may come from: *i)* "*broad interest group/ electoral pressure"; ii) "special interest group pressure";* and *iii)* state actors that *"intent to harm investors*".[611] The source of the measure may be in charge of the Executive, Legislative and Judicial brances, respectively.[612] Odyssey's facts and claims are not analogous to any of these classifications.

498. Contrary to what the Claimant affirm, the fact that national and international authorities, scientific institutions, residents of Comondú and fishing societies have expressed their concerns regarding Don Diego does not make this arbitration comparable to what happened, for example, in *Tecmed v. Mexico, Bear Creek c. Peru and Abengoa v. Mexico*.

499. In *Tecmed v. Mexico*, the investor claimed that environmental permits were revoked and the operation of a hazardous waste plant was affected by municipal, state and federal authorities due to political circumstances related to the change in municipal authority and pressure from the local community.[613] Don Diego does not resemble *Tecmed c. Mexico*.

500. In *Abengoa v. Mexico*, the investor claimed that it received arbitrary treatment by municipal authorities and contradictory to the treatment provided by state and federal authorities, which culminated in the revocation of operating licenses and the closure of a hazardous waste plant.[614] Don Diego was an extremely premature project compared to the Abengoa plant.

---

definition also obscures the fact that investors seem to be using the term 'political' as part of a common litigation strategy to discredit the state conduct in question in a wide variety of cases). **RL-0039**.

610 Claimant's Memorial, ¶ 235.

611 Bonnitcha Jonathan and Zoe F. Williams, "State liability for "political" motivated conduct in investment treaty regime", Leiden Journal of International Law (2020), p. 88. **RL-0039**.

612 Bonnitcha Jonathan and Zoe F. Williams, "State liability for "political" motivated conduct in investment treaty regime", Leiden Journal of International Law (2020), p. 88. **RL-0039**.

613 *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case CIADI No. ARB(AF)/00/02, Award, May 29, 2003, ¶¶ 42, 127-128. **CL-0112**.

614 *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2) Award, April 18, 2013, ¶¶ 348-356, 650. **CL-0002**.

501. In *Bear Creek v. Peru*, the claimant claimed that local communities threatened and attacked the claimant's facilities, there were protests that led to strikes, road blocks, and all of the above was followed by legal acts carried out by state entities that sought to annul the investor's mining concessions.[615] In the present case, Odyssey has its Concessions and Don Diego's environmental assessment procedures were completely peaceful.

(2) The evidence shows that the denial of the MA authorization request was not a political decision, much less based on a political campaign against Odyssey

502. Essentially, Don Diego was a very premature mining project that had not yet started operations; it has not obtained operating permits due to its environmental unfeasibility; the Concessions have not been revoked or canceled; there were no violent protests or "social unrest" around Don Diego; All positions against the Project were made in a transparent manner and in compliance with environmental regulations within the EIA Procedures of the MIA 2014 and the MIA 2015.[616]

503. None of the above can be considered as a "politically motivated campaign" against Don Diego. Assume it otherwise, would mean that each technical opinion and communication received by DGIRA during the EIA Procedure of MIA 2014 and MIA 2015, in which the environmental viability of the Project was questioned - including those of renowned institutions such as the *Society for Marine Mammalogy*, *WildCoast*, AIDA, CONANP and UNESCO - were all set to affect Odyssey's investment. That is simply false. The reality is that there were serious concerns about Don Diego due to his possible environmental risks.[617]

504. On the other hand, no group with specific interests (e.g., competitors) sought to prevent Don Diego from starting operations. Likewise, no act of the Mexican government was intended to

---

615 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, Nov. 30, 2017, ¶¶ 152-155, 182-183, 202-216. **CL-0016**.

616 *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/02, Award, 29 May 2003, ¶ 160. **CL-0112**. *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, Nov. 30, 2017, ¶¶ 401-408. **CL-0016**. *Abengoa, S.A. y COFIDES, S.A. c. Estados Unidos Mexicanos*, Caso CIADI No. ARB(AF)/09/2) Laudo, 18 de abril de 2013, ¶¶ 348-356. **CL-0002**.

617 *See Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Dissenting opinion of Professor Philippe Sands, September 12, 2017, ¶¶ 35. **RL-0040**. *See* Witness Statement of Mr. Benito Bermúdez, ¶ 18.

affect the Claimant's investments and, as previously stated, the Respondent has been unable to demonstrate that Mr. Rafael Pacchiano attempted to harm Odyssey's investment.[618]

505. What has been shown, and therefore must be considered by the Tribunal, is that the authority empowered to resolve the MIA 2015 acted rationally and the decision to deny Don Diego's authorization derives from a legal-technical procedure, oblivious to political influences. The following facts show this:

- Between October, 2014 and March, 2015, [redacted] at least 20 technical opinions on the MIA 2014. Practically all the communications and opinions received questioned the feasibility of Don Diego.
- On November 21, 2014, the DGIRA [redacted] informed ExO that the MIA 2014 was insufficient and inconsistent.[619]
- Odyssey, on its own will and decision, decided to withdraw the MIA 2014 in order to evaluate and gather further information. A press release and Odyssey's Annual report 2019 filed before the SEC attest this.[620]
- As of August 2015, DGIRA requested dozens of technical opinions on the MIA 2015. Once again, the DGIRA received dozens of technical opinions and communications that questioned Don Diego's environmental feasibility.
- As in 2014, on October 30, 2015, DGIRA informed ExO that the MIA 2015 was insufficient and inconsistent.[621]

506. Based on the foregoing, the Claimant has not been able to demonstrate that there were political reasons behind the rejection of the Project.

---

618 *See S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, ¶¶ 122 and 168. **CL-0103**. Bonnitcha Jonathan and Zoe F. Williams, "State liability for "political" motivated conduct in investment treaty regime", Leiden Journal of International Law (2020), p. 84. **RL-0039**.

619 DGIRA's Communicaion of November 21. **C-0100**, p. 1.

620 Odyssey's Press reléase of June 22, 2015. **R-0107** ("*Odyssey […] reported that Exploraciones Oceanicas [...] has opted to extend the review period for their Environmental Impact Assessment (EIA) by resubmitting the EIA […] In making this decision, ExO is coordinating with the technical and environmental team at MINOSA, Odyssey's strategic investor*")**.** C-0190, p. 7. ("*In June 2015, ExO withdrew its EIA application to allow additional time for review and regional briefings*.")

621 Communication of October 30, 2015, p. 1. **C-0004**.

g. There has Been No Violation Based on "Legitimate Expectations"

507. The Claimant attempts to reinforce its arguments with generalities about "legitimate expectations".[622] On closer examination, their selective portrayal of this possible factor falls apart both as a matter of doctrine and based on the facts alleged.

508. Before discussing the substance of what may constitute legitimate expectations for FET purposes in the NAFTA context, what applied to good faith is equally true here: such expectations cannot furnish a freestanding ground for liability. Rather, expectations, to the extent they are legitimate, may at most constitute a factor to be considered in evaluating an alleged FET breach. McLachlan notes with respect to investment treaty FET claims generally that the doctrine of legitimate expectations "*is a relevant factor in the application of the investment treaty's guarantee of fair and equitable treatment and does not supply an independent treaty standard of its own*".[623] The same observation applies to NAFTA Article 1105.[624] Accordingly, the Tribunal should be cautious about relying on investor expectations as a source for Respondent's obligations. For example, the *MTD v. Chile* Annulment Committee observed:

> The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.[625]

509. Next, legitimate expectations stand or fall depending on whether specific representations have in fact been made. McLachlan states that "*[t]he making of specific representations has been the decisive factor in the cases in which this ground of decision has been successfully invoked […] [c]onversely, the absence of representations is a material factor in leading to a finding that the standard has not been breached*".[626] Dolzer and Schreuer concur, stating that "*[s]pecific*

---

622 Claimant's Memorial, ¶¶ 244-46.

623 McLachlan, Shore & Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2nd ed. 2017), ¶ 7.179. **RL-0021.**

624 Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer 2013), pp. 157-58. **RL-0022.**

625 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, Mar. 21, 2007, ¶ 67. **RL-0041.**

626 McLachlan, Shore & Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2nd ed. 2017), ¶¶ 7.185, 7.187. **RL-0021.**

representations play a central role in the creation of legitimate expectations",[627] and adding further: "[*p]articularly important in the creation of legitimate expectations are specific assurances and representations made by the host state in order to induce investors to make investments*".[628] Fietta adds, "*the more specific the assurances that are given, the more likely they are to give rise to some basis for a legitimate expectations-based claim*".[629] To be sure, expectations themselves are "never to be seen as an iron-clad guarantee – comparable to a long-term concession contract with a stabilization guarantee".[630]

510. In light of these unanimous authorities, it is inexplicable that the Claimant effectively skips over the requirement, and that its 175-page memorial contains no discussion of assurances or guarantees of any kind – let alone those that would give rise to expectations that meet the exacting standard applicable here. Under NAFTA in particular, expectations must "*arise through targeted representations or assurances made explicitly or implicitly by a state party*".[631] Such representations must be so "definitive, unambiguous and repeated" as to constitute a quasi-contractual relationship.[632] This formulation by the *Glamis c. Estados Unidos* tribunal "*suggests the adoption of an even narrower interpretation of the concept of legitimate expectations*",[633] and the qualification that the assurances must also have been made "*purposely and specifically*"[634] "*further narrow[s] down the scope of application of the concept of legitimate expectations under Article 1105*".[635]

---

627 Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford 2012), p. 145. **RL-0031.**

628 Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford 2012), p. 149. **RL-0031.**

629 Stephen Fietta, *Legitimate Expectations Principle under Article 1105 NAFTA-International Thunderbird Gaming Corporation v. Mexico*, 7 J. World Invest. & Trade 423 (2006), p. 431. **RL-0042.**

630 *International Thunderbird Gaming Corp. c. México*, UNCITRAL, Opinión Independiente Thomas Wälde, Dic. 1, 2005, ¶ 102. **RL-0027.**

631 Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award, Jan. 12, 2011, ¶¶ 141-42. **CL-0057.**

632 *Glamis Gold Ltd. v. United States of America*, Award, June 8, 2009, ¶ 802 (quoting *Metalclad*). **CL-0055.**

633 Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer 2013), p. 166. **RL-0022.**

634 *Glamis Gold Ltd. v. United States of America*, Award, June 8, 2009, ¶ 766. **CL-0055.**

635 Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105 (Kluwer 2013), p. 166. **RL-0022.**

511. A host state's existing law, such as legislation, cannot give rise to legitimate expectations. As the *Grand River* tribunal confirmed that U.S. federal legislation could not "*serve as a source of reasonable or legitimate expectations for the purposes of a NAFTA claim*".[636] This followed so long as there was "*at least a colorable argument under domestic law for application of the […] measures to his activities*".[637]

512. Reiterating the importance of deference to administrative domestic law expertise, the *Grand River c. Estados Unidos* tribunal stated that it was "*not expressing agreement with the argument in favor of state regulation. The point is that the relative strength of this argument and the range of relevant domestic judicial precedents were such that Mr. Montour was not in a position to reasonably harbor an expectation, upon which he would be entitled to rely under NAFTA, that he would be free from application of the . . . measures*".[638] In sum, an investor "*takes the law of the host State as it finds it and cannot subsequently complain about the application of that law to its investment*".[639]

513. To be clear, regulatory action must not be perfect. Although the *Tecmed c. México,* tribunal, in *dictum*, spoke of the need for "the host State to act in a consistent manner, free from ambiguity and totally transparently," and that "[a]ny and all State action conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations,"[640] that "standard," never adopted by a NAFTA tribunal. In words of Professor Douglas, "*is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should*

---

636 *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, Jan. 12, 2011, ¶141. **CL-0057.**

637 Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award, Jan. 12, 2011, ¶¶ 141-42. **CL-0057.**

638 Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award, Jan. 12, 2011, ¶¶ 141-42. **CL-0057.**

639 Meg Kinnear, *The Continuing Development of the FET Standard*, *in* Investment Treaty Law: Current Issues III 35 (Andrea Bjorklund, Ian Laird & Sergey Ripinsky eds., British IICL 2009), p. 22. **RL-0043.**

640 *Técnicas Medioambientales Tecmed, S.A. c. Mexico,* ICSID Case No. ARB (AF)/00/2, May 29, 2003, ¶ 154. **CL-0112.**

aspire but few (if any) will ever attain".[641] Others have likewise surmised that the standard is "*nearly impossible to achieve*".[642]

514. Even if the Claimant went so far as to allege – and prove – that assurances were given that would satisfy the above exacting requirements as to forming expectations, it would need to establish that those expectations were also objectively reasonable.

515. McLachlan states that "*[t]he requirement of reasonableness of reliance carries the consequence that breach of the standard is determined objectively and not by reference to the investor's subjective expectations*".[643] The tribunals in *Waste Management II*, *Thunderbird*, and *Glamis Gold*, among others,[644] have confirmed this to be the case.

516. Such an objective test presupposes a proper risk assessment. After all, inherent in the word "legitimate" is the principle that the host country should not be responsible for losses resulting from risky commercial decisions. Professor Muchlinski explains as to international investment cases:

> [There] appears to be a developing principle that the investor is bound to assess the extent of the investment risk before entering the investment, to have realistic expectations. . . . This is a principle consistent with good business practice, as it requires the investor to take responsibility for the normal commercial risk associated with the investment . . . .[645]

517. UNCTAD adds that "*[i]nvestors have a due diligence obligation to determine the extent of the risk to which they are subjected, including country and regulatory risks, and to have*

---

641 Zachary Douglas, Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex, 22 Arb. Int'l 27 (2006), p. 28. **RL-0044.**

642 United Nations Conference on Trade and Development, *Fair and Equitable Treatment under NAFTA*, UNCTAD/DIAE/IA/2011/5 (2012), p. 65. **RL-0033.**

643 McLachlan, Shore & Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2nd ed. 2017), ¶ 7.190. **RL-0021.** Meg Kinnear, *The Continuing Development of the FET Standard*, *in* Investment Treaty Law: Current Issues III 35 (Andrea Bjorklund, Ian Laird & Sergey Ripinsky eds., British IICL 2009), p. 26 (stating that investor's expectations "must be objective and reasonable, rather than subjective or held by one party alone"). **RL-0043.**

644 *See, e.g.*, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, Sept. 11, 2007, ¶ 331. **RL-0045.** *Glamis Gold Ltd. v. United States*, UNCITRAL, Award, June 8, 2009, ¶ 621. **CL-0055.**

645 Peter Muchlinski, *'Caveat Investor'? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, 55 Int'l & Comp. L. Q. 527 (2006), p. 542. **RL-0046.**

expectations that are reasonable in all the circumstances".[646] That obligation of due diligence, as confirmed by a sting of awards, is a high one.[647]

518. Especially when environmental regulation is at issue, approvals cannot reasonably be expected to be certain. This is particularly true in what the U.S. Supreme Court, quoted by in the *Methanex c. Estados Unidos tribunal,* described as "*complex and heavily regulated transaction[s] . . . , where public entities and public and elected officials with changing policies and constituencies are involved, and the transaction spans many years*".[648] Mining is a highly regulated industry in Mexico, the United States, and elsewhere, and any reasonable investor would have anticipated the possibility that a project such as the one proposed by ExO would be rejected. The *Methanex* tribunal, for example, noted that investors should "*appreciate[] that the process of regulation in the United States involve[s] wide participation of industry groups, non-governmental organizations, academics and other individuals, many of these actors deploying lobbyists*".[649] It is the same in Mexico.

519. As stated by the tribunal in *S.D Myers c. Canadá:*

> When interpreting and applying the 'minimum standard', a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.[650]

520. This point was reinforced by the tribunal in *International Thunderbird Gaming v. Mexico*:

> [I]t is not up to the Tribunal to determine how [the state regulatory authority] should have interpreted or responded to the [proposed business operation], as by doing so, the Tribunal

---

646 United Nations Conference on Trade and Development, *Fair and Equitable Treatment,* UNCTAD/DIAE/IA/2011/5 (2012), p. 78. **RL-0033.**

647 Alexandra Diehl, The Core Standard of International Investment Protection: Fair and Equitable Treatment (Kluwer 2012), pp. 415, 429. **RL-0047.**

648 *Mondev International Ltd. v. United States of America*, ICSID No. ARB(AF)/99/2, Award, Oct. 11, 2002, ¶ 130. **CL-0078.**

649 *Methanex v. United States,* UNCITRAL, Final Award on Jurisdiction and Merits, Aug. 3, 2005, Part IV, ¶ 9. **CL-0074.**

650 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, Nov. 13, 2000, ¶ 261. **CL-0103.**

> would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters (which may vary from country to country).[651]

521. The *Glamis Gold* tribunal applied *Thunderbird*, noting with respect to a claim brought under Article 1105 that:

> [T]his [standard] is not [met] with a mere appearance of arbitrariness—a tribunal's determination that an agency acted in [a] way with which the tribunal disagrees or a State passed legislation that the tribunal does not find curative of all the ills presented; rather, this is a level of arbitrariness that, as *International Thunderbird* put it, amounts to a "gross denial of justice or manifest arbitariness falling below acceptable international standards." . . . It is Claimant's burden to prove a manifest lack of reasons . . . , and the Tribunal holds that it has not met this burden.
>
> [The] Tribunal agrees with Defendant's assertion that governments must compromise between the interests of competing parties and, if they were bound to please every constituent and address every harm with each piece of legislation, they would be bound and useless.[652]

522. Another tribunal added that "the r[o]le of a Chapter 11 Tribunal is not to second-guess the correctness of a science-based decision making of highly specialized national regulatory agencies".[653] In addition, the tribunal in Joshua Dean Nelson v. México, as several tribunals have indicated, this Tribunal must grant some deference to the regulator in technical matters".[654]

523. These NAFTA authorities led a later tribunal to refer to: "*the need for international tribunals to exercise caution in cases involving a state regulator's exercise of discretion, particularly in sensitive areas involving protection of public health and the well-being of patients*".[655] This is just one more expression of what has been described as "*the NAFTA's general reluctance to substitute arbitral for governmental decision-making on matters within the purview of each NAFTA Party*".[656]

524. This raises the issue of how the Claimant could possibly have legitimately expectations that it could obtain all required regulatory approvals if it had conducted proper due diligence. El

---

651 *International Thunderbird Gaming Corp. c. México*, UNCITRAL, Laudo, Ene. 26, 2006, ¶ 160. **RL-0003.**

652 *Glamis Gold Ltd. v. United States*, UNCITRAL, Award, June 8, 2009, ¶¶ 803-04. **CL-0055.**

653 *Chemtura v. Canada*, UNCITRAL, Award, August 2, 2010, ¶ 134. **CL-0033.**

654 *Joshua Dean Nelson v. Estados Unidos Mexicanos*, Caso CIADI No. UNCT/17/1, Laudo, 5 de junio de 2020, ¶ 257. **CL-0127**.

655 *Apotex v. United States*, ICSID Case No. ARB(AF)/12/1, Award, Aug. 24, 2014, ¶¶ 9.37. **RL-0036.**

656 *UPS v. Canada*, ICSID Case No. UNCT/02/1, Separate Statement of Dean Ronald A. Cass, May 24, 2007, ¶ 125. **RL-0037.**

The successful development of a deep sea mining concession is notoriously uncertain, as the experts of the Respondent has mentioned:

> Offshore phosphate occurrences of relatively recent age such as the Don Diego project are known to be present in many locations throughout the world, especially offshore southern Africa, e.g. Namibia and South Africa; as well as Mexico, Peru, the United States and New Zealand. However, none of these occurrences have been placed in commercial production. The primary reason noted is environmental considerations, as well as project economics. The most advance projects, Chatham and Sandpiper have not been able to obtain required environmental permits despite exploration and development work on the projects extending over many years, if not decades.[657]

525. The Claimant has never successfully developed such a project, and DGIRA statistics demonstrate just how exacting and unpredictable the outcome of the DGIRA's process is.[658] Importantly, the Claimant itself has conceded this point in the its SEC filings:

> We have invested in marine mineral companies that to date are still in the exploration phase and have not begun to earn revenue from operations. We may or may not have control or input on the future development of these businesses. There can be no assurance that these companies will achieve profitability or otherwise be successful in capitalizing on the mineralized materials they intend to exploit.[659]

526. In fact, no investor could have a legitimate expectation that because a mining concession has been obtained, the environmental permits are guaranteed to follow. In this case, the following additional points are relevant:

- The Gulf of Ulloa is a highly sensitive area of the ocean, bordering two protected natural areas and an important feeding place for four species of endangered sea turtles and a breeding area for the gray whale. It is also area with substantial fishing activity.
- ExO was proposing to use a new, previously untested production concept and to dredge the sea floor continuously on a year-round basis for 50 years.
- ExO was highly leveraged and did not have the infrastructure, expertise, and resources to launch a project like Don Diego.

---

657 WGM Expert Report, ¶ 22.

658 Solcargo-Rábago Expert Report, ¶¶ 81 y 152.

659 Odyssey Marine Exploration, Inc. Form 10-K for the period ending Dec. 31, 2019, filed Mar. 20, 2020, p. 10. **C-0190**.

527. The Claimant's speculative extrapolating is perhaps most absurd when comparing its 2019 revenues of $3.1 million [660]– none from deep sea mining – with the kinds of future revenues and profits projected in their memorial based on "expert" opinions. The Claimant had no legitimate expectation of obtaining approval for the project or that it would be successful.

2. There Was No Breach of the Obligation to Provide Full Protection and Security

528. The Claimant conceives of "full protection and security" as a catch-all that provides a backstop standard of protection to its claims alleged elsewhere. Specifically, its asserts in arguments spanning just two pages that "*[b]y denying Claimants environmental approval based on improper motives, and where based on the law and reason, the permit should have been granted, all as set forth above*", Respondent denied full protection and security under Article 1105.[661]

529. To be sure, "*the full protection and security standard is one of the more venerable international obligations in treaties relating to the treatment of foreigners and their property*".[662] But historical origins indicate that "*[b]oth treaties and customary law appear to have focused on the physical security of foreigners and their property*", y que "*arbitral decisions adopted this understanding of protection and security, focusing on physical security, but not legal or economic protectio*n".[663] Nevertheless, Claimants posit that FPS "extends beyond police protection and includes economic regulatory powers."[664] Their understanding is incorrect.

530. Article 1105's plain text provides no support for extending FPS's ambit to legal protection as security is *not* qualified by "legal" as in other investment treaties:[665]

> Each Party shall accord to investments of another Party treatment in accordance with international law, including . . . full protection and security.

---

660 Odyssey's Press release, March 30, 2020, **R-0157**.

661 Claimant's Memorial, ¶¶ 295-98.

662 Noah Rubins, et al., *Investor-State Arbitration* (OUP 2019), p. 679. **RL-0048.**

663 Noah Rubins, et al., *Investor-State Arbitration* (OUP 2019), pp. 680-81. **RL-0048.**

664 Claimant´s Memorial, ¶ 296.

665 *Cf. Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, Feb. 6, 2007, ¶ 303. **CL-0107.**

531. Moreover, NAFTA Free Trade Commission's Note, cited by the Claimant, states merely that:

> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.[666]

532. It says nothing about extending to "legal" security, but merely that NAFTA's FPS standard does not exceed that of customary international law.

533. The Claimant cannot cite a single NAFTA case, let alone supporting its interpretation, and do not explain how, even if legal security were part of Article 1105, the denial of an environmental permit generally and this permit in particular could amount to an FPS violation. In fact, the Claimant makes no effort to grapple with the text of Article 1105 at all.

534. Prior cases confirm that the FPS obligation of the minimum treatment standard of customary international law, referenced explicitly in Article 1105, is confined to the physical security of investors. Landmark cases such as *AAPL c. Sri Lanka*,[667] *AMT c. Zaire*[668] and *Wena Hotels Ltd c. Egypt*[669] are concerned with destruction to people and property during internal armed conflicts, riots, and acts of violence. What is more, the tribunal in *Saluka c. Czech Republic*, "*canvassing the developments of the concept in customary international law, explained the modern protection standard*"[670] as follows:

> [T]he standard obliges the host State to adopt all reasonable measures to protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners. The practice of arbitral tribunals seems to indicate, however, that the 'full security and protection' clause is not meant to cover just any kind of impairment

---

666 NAFTA Free Trade Commission, *Note of Interpretation of Certain Chapter 11 Provisions*, July 31, 2001, p. 2. **CL-0082.**

667 *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990. **CL-0011.**

668 *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, Feb. 21, 1997. **RL-0049**.

669 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, Dec. 8, 2000. **RL-0050**.

670 Noah Rubins, et al., *Investor-State Arbitration* (OUP 2019), p. 681. **RL-0048.**

> of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force.[671]

535. In another case, the tribunal noted that the full protection and security standard was developed in the context of physical security and that it could not be extended to the ambit of legal security where the alleged violation could be addressed under the FET standard.[672]

536. Restricting the protection and total security to an investor's physical security makes sense when – as under Article 1105 – both the FET standard and the FPS standard are incorporated under the title of minimum standard of treatment of customary international law. McLachlan have pointed out that, given that investment treaties also provide for fair and equitable treatment and protection from expropriation, treating the FPS standard in the same way as the other two would render it redundant:

> A failure in full protection and security is only one of the grounds upon which the minimum standard of treatment may be invoked at customary international law. For this reason, both NAFTA and the US model BIT (in a formulation now also widely exported into other free trade agreements) state that the minimum standard of treatment at customary international law *includes* both fair and equitable treatment and full protection and security. The incorporation of both of these standards into an investment treaty requires an interpretation in accordance with the principle of effectiveness or *effet utile* that accords a distinct meaning to each. If the terms were synonymous, the inclusion of both would be otiose.[673]

537. Indeed, the Free Trade Commission itself appears to have resisted a synonymous reading of these causes of action: "A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."[674] In addition, the McLachlan treatise is in line with *Suez v.*

---

671 *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006, ¶ 484. **CL-0105.**

672 PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007, ¶ 258. **CL-0092.**

673 Campbell McLachlan, Laurence Shore & Matt Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2017), pp. 334-35. **RL-0021**.

674 NAFTA Free Trade Commission, Note of Interpretation of Certain Chapter 11, 31 July 2001, 2001, p. 2. **CL-0082.**

Argentina.[675] Like Claimants here, Suez argued that full protection and security extended to legal protection.[676] The tribunal explained:

> Traditionally, the cases applying full protection and security have dealt with injuries to physical assets of investors committed by third parties where host governments have failed to exercise due diligence in preventing the damage or punishing the perpetrators. In the present case, Claimants are attempting to apply the protection and security clause to a different a different type of situation. They do not complain that third parties have injured their physical assets or persons, as in the traditional protection and security case.[677]

538. The tribunal categorically rejected Suez's argument and held that:

> [T]his Tribunal is of the view that the stability of the business environment and legal security are more characteristic of the standard of fair and equitable treatment, while the full protection and security standard primarily seeks to protect investment from physical harm.[678]

539. The *Enron* tribunal likewise was troubled by the possible overlap:

> There is no doubt that historically this particular standard has been developed in the context of physical protection and security of the company's officials, employees or facilities. The Tribunal cannot exclude as a matter of principle that there might be cases where a broader interpretation could be justified, but then it becomes difficult to distinguish such situation from one resulting in the breach of fair and equitable treatment, and even from some form of expropriation.[679]

540. The Claimant cites cases that are inapposite or stand for propositions other than those proffered. For example, the *Azurix v. Argentina* tribunal determined that FET and FPS obligations were the same, and did not perform any FPS analysis.[680] The same applies to its progeny in that the *Biwater Gauff v. Tanzania* tribunal's sole cited reason to adopt *Azurix* over *Saluka* was that not doing so would be "*unduly artificial*",[681] without further explanation. In the same mold, the *Renée Rose Levy* tribunal stated summarily that it "fully agrees with the description made by the Claimant

---

675 *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID No. ARB/03/19, Decision on Liability, July 30, 2010. **RL-0051.**

676 *Id.*, ¶ 160.

677 *Id.*, ¶ 165.

678 *Id.*, ¶ 173.

679 *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007, ¶ 286. **RL-0052.**

680 *Azurix Corp. c. La República Argentina*, Caso CIADI No. ARB/01/12, Laudo, Julio 14, 2006, ¶ 408. **CL-0014.**

681 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, pp. 728-29. **CL-0018.**

that the standard of full protection and security has gone from referring to mere physical security and has evolved to include, more generally, the rights of investors."[682]

541. Next, the tribunal in *Vivendi v. Argentine* concerned a very different treaty provision with no express reference to customary international law, and failed to address the *effet utile* argument altogether.[683]

542. The Claimant also cites *CME v. Czech Republic*, where, indeed, the tribunal held the host state responsible for "*ensur[ing] that neither by amendment of its laws nor by actions of its administrative bodies . . . the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued*".[684] But besides the lack of any such alleged action here, the tribunal in *Lauder v. Czech Republic* – within days and on the basis of the very same facts – reached a more circumspect result, namely that "protection and security" was limited to providing the investor access to the state judicial system,[685] which Claimants here do not assert they lacked.

543. In investment arbitrations, which lack a system of binding precedent, "*[t]ribunals must . . . examine critically the precedents cited to them. . . . [Only t]hose that are compelling are adopted. . . . To be of assistance to a tribunal, counsel must take care to explain the relevant factual background, the precise nature of the legal principles identified and the reasons contended for those principles.*[686] Stated differently, "*[i]n international investment law, an award should be only as persuasive as its reasoning*".[687] After all, "*the term 'persuasive' indicates that an adjudicator needs to follow non-binding decisions only if she is convinced by the strength of their reasoning*".

---

682 *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, Feb. 26, 2014, ¶ 406, **RL-0053.**

683 *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, ¶¶ 7.4.14-17. **CL-0037.**

684 *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, Sept. 13, 2001, ¶ 613. **CL-0034.**

685 *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, Sept. 3, 2011, ¶ 314. **CL-0097.**

686 Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2017), ¶¶ 3.172, 3.174. **RL-0021.**

687 Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 Va. J. Int'l L. 545 (2014), pp. 575, 577. **RL-0055.**

544. Neither the awards cited nor Claimants' explanations thereof provides reasons for this Tribunal to adopt them.[688] The Tribunal should therefore reject the Claimant's attempt to recycle its other claims as a violation of Article 1105 of the NAFTA.

3. There Was No Indirect Expropriation

545. The Claimant's indirect expropriation theory is deeply flawed. NAFTA Article 1110(1) states in relevant part that "[n]o party may directly or indirectly nationalize or expropriate an investment of an investor of another party it its territory or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation'). . ."

a. The Claimant had no right or rights capable of expropriation

546. As a threshold matter, Article 1110(1) requires an interest capable of expropriation.[689] The Claimant, acknowledging that requirement [690] nevertheless characterizes its interest in exceedingly vague – arguably evasive – and trite terms. They state the obvious when they quote scholarship from the early 1980s that the "notion of 'property' is not limited to chattels";[691] describe their rights as "whatever rights they had in the Project";[692] then characterize their "investment" as "including the bundle of rights" without further explication;[693] and finally refer to the "value, legitimate expectations, and associated bundle of rights of their investment"[694] "– again without explication. As such, the Claimant's argument sheds no light on what "rights" the Claimant purports to have been expropriated.

547. The UNCTAD has stated that "[t]he determination whether a particular right qualifies as a 'property right' . . . would have to be made in light of the domestic law of the host State

---

688 Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 Colum. J. Transnat'l L. 418 (2013), p. 442. **RL-0056.**

689 *Chemtura v. Canada*, UNCITRAL, Award, Aug. 2, 2010, ¶ 242. **CL-0033.** *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID No. ARB/03/19, Decision on Liability, July 30, 2010, ¶ 118. **RL-0051.**

690 Claimant's Memorial, ¶ 305.

691 Claimant's Memorial, ¶ 306.

692 Claimant's Memorial, ¶ 307.

693 Claimant's Memorial ¶ 310.

694 Claimant's Memorial, ¶ 313.

concerned."[695] As explained by the Respondent's legal experts,[696] in addition to having a concession, the Claimant needed an environmental authorization and to comply with other requirements, i.e., federal, state and municipal permits. In this sense, ExO did not obtain approval for its AIA, but there were also other requirements that it had to meet.

548. The Concessions did not entitle the Claimant to mine the deposits, rather they were only an initial step in the approval process. Even under the concessions themselves, minerals in the ground (or under the sea) remain owned by the Mexican state until they are actually extracted, and remain contingent on compliance with environmental regulations. Thus, the Claimant's "rights" under the Concessions were extremely limited. At the time of the alleged expropriation, the Claimant had not obtained any of the required approvals for the exploitation phase of mining project – a long and complex process that many would-be mining companies never complete.[697]

549. In fact, neither ExO nor Odyssey have *ever* successfully obtained environmental in Mexico or anywhere in the world, rendering their assertions with respect to environmental stewardship suspect. According to Odyssey's own website, its portfolio consists of no more than two projects, including the Mexican one, neither of which has progressed past the exploration phase.[698] To say the least, whether the Claimant would have acquired all regulatory approvals to develop the deposit was by no means inevitable.

550. Importantly, even if the Claimant could make out some sort of contingent right to develop the deposit, such right would not be cognizable for expropriation purposes. As the tribunal in *Generation Ukraine Inc. v. Ukraine* stressed, "*[s]ince expropriation concerns interference in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when allegedly expropriatory acts occurred*."[699] Thus, it is the rights the Claimant held when the expropriation occurred, not some right that might exist at some point in the future. Not every potential harm to future valuation of an investment constitutes a

---

695 United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, UNCTAD/DIAE/IA/2011/5 (2012), p. 20. **RL-0033.**

696 Solcargo-Rábago Expert Report, ¶ 231.

697 *See supra*, Sections II.F.1-2.

698 Odyssey Marine Exploration, *Our Projects*, https://www.odysseymarine.com/our-projects.

699 *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, Sept. 16, 2003, ¶ 6.2 [emphasis added]. **RL-0057.**

protected property interest for expropriation purposes – even if it may figure into quantum To this point, the *Methanex v. USA* tribunal, in rejecting an Article 1110 claim, held that "*items such as goodwill and market share may . . . constitute . . . an element of the value of an enterprise and as such […] may figure in valuation. But it is difficult to see how they might stand alone, in a case like the one before the Tribunal*".[700]

551. Incidentally, all the cases cited by the Claimant for the untenable proposition that "expropriation occurs when a state regulatory body fails to provide, or revokes, a permit,"[701] involved rights that were more defined, had vested, or were otherwise distinguishable from those involved here.

552. In *Abengoa v. Mexico*, under the Spain-Meixco BIT, the processing "Plant [already] had all the administrative and environmental authorizations necessary for its operation," and the cancellations of the operating license were "manifestly contrary to the position repeatedly confirmed by the federal authorities."[702] The *Abengoa* tribunal therefore found that:

> What is relevant in this arbitration is that the Respondent, through its competent bodies, not only granted the Operating License, but also all other necessary administrative and environmental authorizations (including the environmental impact authorization), and repeatedly confirmed its support for the project and his belief that the Plant was being built and operating on a perfectly regular basis.[703]

553. The same applies to *Metalclad v. Mexico*, where the tribunal cited specifically the municipality of Guadalcazar's failure to issue a construction permit even after the federal authorities had "fully approved and endorsed" the project.[704] After all, so the tribunal, "the exclusive authority for siting and permitting hazardous waste landfill resides with the Mexican federal government."[705]

---

700 *Methanex v. United States*, UNCITRAL, Award, Final Award on Jurisdiction and Merits, Aug. 3, 2005, Part IV, ¶ 17. **CL-0074.**

701 Claimant's Memorial, ¶ 309.

702 *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, Award, Apr. 18, 2013, ¶¶ 611, 614. **CL-0002.**

703 *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, Award, Apr. 18, 2013, ¶ 616. **CL-0002.**

704 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000, ¶ 104. **CL-0071.**

705 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000, ¶ 105. **CL-0071.**

554. Similarly, *Bear Creek Mining Corporation v. Peru* concerned the *revocation* of existing authorizations to "acquire, own, and operate the corresponding mining concessions".[706] Meanwhile, *Tecmed v. Mexico*, also under the Spain-Mexico BIT, concerned the failure to renew a permit after a landfill site had already been purchased and a prior "authorization to operate as a landfill, . . . , and the subsequent permits granted by INE, including the Permit" had already been issued, causing the claimant to make its investment taking "into account . . . the time and business required to recover such investment and obtain the expected return upon making its tender offer for the acquisition of the assets related to the Landfill".[707]

555. *South American Silver v. Bolivia* is wholly inapposite. There, Bolivia's president himself referred to the need to expropriate a mining concession by decree, which went so far as to spell out that the relevant agency should hire, and in fact did hire, an independent firm to value the expropriated investment.[708]

556. *Tethyan v. Pakistan* is also distinguishable on its facts. First, as the tribunal emphasized, the Pakistani government there had agreed contractually "*to convert the exploration license into a mining lease 'subject only to compliance with routine Government requirements*".[709] Second, the claimant expended "more than US$ 240 million on its exploration work",[710] only to then see the government itself use the claimant's feasibility study in effectively taking over the project. The tribunal found an indirect expropriation "*in light of the contractual and regulatory framework as well as the direct assurances given by Government officials on the basis of which [the claimant] decided to invest more than US$ 240 million*".[711]

---

706 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, Nov. 30, 2017, ¶ 149. **CL-0016.**

707 *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, ¶ 150. **CL-0112.**

708 *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, Nov. 22, 2018, ¶¶ 625-26, 628. **CL-0108.**

709 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, November 10, 2017, ¶ 1323. **RL-0058.**

710 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, November 10, 2017, ¶ 814. **RL-0058.**

711 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, November 10, 2017, ¶ 1230. **RL-0058.**

557. The lack of a cognizable right sets this case apart from other cases cited; it is also but one of several fatal defects in Claimants' indirect expropriation claim.

b. Mexico acted within the proper exercise of its police powers

558. Even if the Claimant could show that it had rights capable of expropriation,[712] it still would need to prove that the measure taken by Respondent was in fact expropriatory and resulted in a substantial deprivation.[713] That is not the case where the measure falls within the state's police powers. In *Fireman's Fund v. Mexico* and many other cases, tribunals applying NAFTA Article 1110 have recognized that government regulatory action may fall within such police powers,[714] especially when they are "*invoked in matters concerning the protection of the environment*".[715]

559. In *Chemtura v. Canada*, Canada's federal pest regulatory agency had "*formed the view that the [health and environmental] risk assessment findings warranted regulatory action by way of suspension or termination of lindane registrations*" and accordingly terminated the claimant's registrations for authorized lindane-containing products.[716] The tribunal found:

> In summary, the evidence shows that the measures did not amount to a substantial deprivation of the Claimant's investment.
>
> Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Defendant's police powers. … [T]he PMRA [Pest Management Regulatory Agency] took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation.[717]

---

712 *See generally Crompton (Chemtura) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award, Aug. 2, 2010, ¶ 257. **CL-0033.**

713 *Crompton (Chemtura) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award, Aug. 2, 2010, ¶ 257. **CL-0033.**

714 *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, July 17, 2006, ¶¶ 176 (j). **CL-0049.**

715 Alain Pellet, *Police Powers or the State's Right to Regulate*, *in* Building International Investment Law: The First 50 Years of ICSID (Meg Kinnear et al. eds., Kluwer 2015), p. 448. **RL-0059.**

716 *Crompton (Chemtura) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award, Aug. 2, 2010, ¶ 29. **CL-0033.**

717 *Crompton (Chemtura) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award, Aug. 2, 2010, ¶¶ 265-66. **CL-0033.** *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006, ¶ 262. **CL-0105.**

560. Importantly, the tribunal clarified:

> […] it is not its task to determine whether certain uses of lindane are dangerous, whether in general or in the Canadian context . . . . As Canada has noted, the rule of a Chapter 11 Tribunal is not to second-guess the correctness of the science-based decision-making of highly specialized national regulatory agencies. . . . Irrespective of the state of the science, however, the Tribunal cannot ignore the fact that lindane has raised increasingly serious concerns both in other countries and at the international level since the 1970s.[718]

561. Similarly, in this case, it is not the role of the Tribunal to second-guess the correctness of scientific decision-making of DGIRA, nor can it ignore that there are endangered species of turtles and other environmentally sensitive features of the Gulf of Ulloa.

c. Taking the Claimant at its word, it continues to "control" ExO and therefore cannot have suffered a "substantial deprivation"

562. Police powers aside, substantial deprivation "*is a fact-sensitive exercise to be conducted in the light of the circumstances of each case*",[719] and treatises have found that "*continued control of an enterprise by the investor strongly militates against a finding that an indirect expropriation has occurred*".[720]

563. For example, in *Azurix v. Argentina*, concerning alleged breaches of a water concession, the tribunal denied an indirect expropriation claim because the investor had retained control over the enterprise that held the concession.[721] Another tribunal, *LG&E v. Argentina*, arrived at the same conclusion with respect to an oil and gas concession, explaining that "*[o]wnership or enjoyment can be said to be 'neutralized' where a party no longer is in control of the investment, or where it cannot direct the day-to-day operations of the investment. . . . Interference with the*

---

[718] *Crompton (Chemtura) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award, Aug. 2, 2010, ¶¶ 134-35. **CL-0033.**

[719] *Crompton (Chemtura) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award, Aug. 2, 2010, ¶¶ 249, 365 (finding no substantial detriment). **CL-0033.**

[720] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford 2012), p. 117. **RL-0031.**

[721] *Azurix Corp. c. La República Argentina*, Caso CIADI No. ARB/01/12, Laudo, Julio 14, 2006, ¶ 322. **CL-0014.**

investment's ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished".[722]

564. In *Pope & Talbot v. Canada*, the NAFTA tribunal rejected a claim of expropriation, reasoning that "*the Investor remains in control of the Investment, it directs the day-to-day operations of the Investment, and no officers or employees of the investment have been detained by virtue of the Regime*".[723] he tribunal in *Feldman* agreed, citing *Pope & Talbot* in concluding that "the regulatory action (enforcement of longstanding provisions of Mexican law) has not deprived the Claimant of control of the investment" despite the fact that the claimant "has lost the effective ability to export cigarettes."[724] Citing these cases, the tribunal in *ADM v. Mexico* rejected an indirect expropriation claim, where there was no expropriation of physical assets nor any indirect expropriation of the Claimants' investment, and "[t]he Claimants have remained in full title and possession of their investment, controlling at all times . . . production, sales and distribution of its products."[725] Many other tribunals have reached the same result.[726]

d. The Claimant lacked any basis for expectations that the Concessions would yield a certain return, let alone "legitimate expectations"

565. Finally, "*[a]n issue that is not novel as such but has more recently received increasing attention, is the existence of legitimate expectations on the part of the investor[…]. Legitimate expectations play a key role in the interpretation of the fair and equitable treatment standard; but they have also entered the law governing indirect expropriations*".[727]

---

722 *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. c. República de Argentina*, Caso CIADI No. ARB/02/1, Decisión sobre Responsabilidad, 3 de octubre de 2006, ¶¶ 188, 191. **RL-0060.**

723 *Pope & Talbot v. Government of Canada*, Interim Award, June 26, 2000, ¶ 100. **CL-0089.**

724 *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, Dec. 16, 2002, ¶¶ 142, 152. **CL-0068.**

725 *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, Nov. 21, 2007, ¶ 245. **CL-0010.**

726 *See e.g., Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Award, Oct. 5, 2012, ¶ 90. **CL-0083.** *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶¶ 263-64. **CL-0035.** *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007, ¶ 278. **CL-0092.**

727 Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* (OUP 2012), p. 115. **RL-0031.**

566. Since at least *Metalclad*, where the investor had at least acted in reliance on explicit assurances to the effect that all necessary permits would be issued [728] "*international tribunals have generally considered the 'reasonably to be expected' economic benefit of property as being one of the touchstones for an assessment of the validity of an expropriation claim*".[729] Typically, "[t]he question is whether the foreign investor could reasonably have expected that the economic value of its property would have been lost in whole or significant part by the regulatory measures taken by the state."[730]

567. To be sure, the standard for expectations to be legitimate is demanding under any circumstances – even more so in the context of alleged indirect expropriation.[731] Dolzer y Schreuer states "*[t]o the extent that the state of the law was transparent and did not violate minimum standards, an investor will hardly be able to convince a tribunal that the proper application of that law led to an expropriation*".[732] Moreover, it is also objective in that expectations are only "reasonable" to the extent that an objective third person would have them.[733]

568. The *Thunderbird* tribunal explained:

> [T]he 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 party 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.[734]

---

728 Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* (OUP 2012), p. 116. **RL-0031.**

729 Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2017), ¶ 8.121. **RL-0021.**

730 Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2017), ¶ 8.122. **RL-0021.**

731 Alexandra Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (Kluwer 2012), pp. 427-28 ("Investment tribunals have also appeared to use a higher threshold concerning investor expectations for purposes of expropriation claims. Where investors are not specifically made to believe in certain State assurances, as in the Metalclad case, or where they are entering a high-risk market, their expectations appear to be regarded as less legitimate for property protection purposes."). **RL-0047.**

732 Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* (OUP 2012), p. 115. **RL-0031.**

733 Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2017), ¶ 7.190 (citing *Waste Management II*, *Thunderbird*, and others). **RL-0021.**

734 *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award, 26 Jan. 2006, ¶ 147. **RL-0003.**

569. The Claimants cannot demonstrate any contractual or other commitment that could arguably have induced any kind of reliance. Indeed, if the Concessions themselves gave rise to legitimate expectations, the regulatory process would be a nullity as the Concessions themselves would work to circumvent the regulatory process and agency expertise. As discussed *supra*, at the time of the alleged expropriation, the Claimant had not obtained any of the required approvals for the exploitation phase of mining project. In fact, neither ExO nor Odyssey have *ever* successfully obtained full approvals for a mining project in Mexico or anywhere in the world. Nor can the Claimant point to any contractual terms or official representations that would have induced it to believe that the DGIRA approval was a foregone conclusion.

570. McLachlan notes, as here, "*the absence of specific representations is a material factor in leading to a finding that the standard has not been breached*".[735] To this point, "*[t]he threshold for legitimate expectations may vary depending on the nature of the violation alleged under the NAFTA*",[736] and further:

> [A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[737]

571. Tribunals must probe the specific assurance alleged. For example, in *Thunderbird*, the tribunal held that the official statement from the relevant Mexican State agency could not generate such an expectation as it gave no assurance that gaming machines would be approved.[738]

572. The Claimant therefore has not demonstrated an indirect expropriation under NAFTA.

---

[735] Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2017), ¶¶ 7.187, 8.122 n. 228 (cross-referencing the legitimate expectations discussion in the FET context). **RL-0021.**

[736] *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award, 26 Jan. 2006, ¶ 147. **RL-0003.**

[737] *Methanex v. United States*, UNCITRAL, Award, Final Award on Jurisdiction and Merits, Aug. 3, 2005, Part IV, ¶ 7. **CL-0074.**

[738] *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award, 26 Jan. 2006, ¶¶ 146-64. **RL-0003.**

4. The Respondent did not violate the NAFTA Standard of National Treatment of Article 1102

a. A legal standard under Article 1102 of the NAFTA

573. NAFTA Article 1102 establishes the principle of non-discriminatory treatment, both in relation to domestic investors and to investments made by such national investors:

> Artículo 1102: National Treatment
>
> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

574. According to several NAFTA tribunal decisions, there are three elements that must be met in order to successfully claim a national treatment violation:

> First, it must be shown that the Respondent State has accorded to the foreign investor or its investment "treatment ... with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition" of the relevant investments.
>
> Secondly, the foreign investor or investments must be "in like circumstances" to an investor or investment of the Respondent State ("the comparator").
>
> Lastly, the treatment must have been less favourable than that accorded to the comparator.[739]

575. Corresponds to the Claimant to prove these three elements and establish more than one *prima facie* case.[740] The three elements are cumulative, however, if it happens that from the outset the alleged investor or the investment is not in similar circumstances to its "comparable subjects/objects", there is no reason why the treatment should be compared. and, therefore, the claim would fail as a matter of law. The Tribunal of *Archer Daniels v. Mexico* states in this way:

> Pursuant to the ordinary meaning of Article 1102, the Arbitral Tribunal shall: (i) identify the relevant subjects for comparison; (ii) consider the treatment each comparator receives;

---

[739] *Corn Products International Inc. c. Estados Unidos Mexicanos*, Caso CIADI No. ARB(AF)/04/1, Decision on Responsibility, 15 de enero de 2008, ¶ 117. **CL-0041**. *See William Ralph Clayton ¶ 607.* **CL-0122**.

[740] *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2008, ¶¶ 7.11-7.14. **RL-0061.**

> and (iii) consider any factors that may justify any differential treatment. The logic of Articles 1102.1 and 1102.2 thus suggests that the Arbitral Tribunal does not need to compare the treatment accorded to ALMEX and the Mexican sugar producers unless the treatment is being accorded "in like circumstances." Therefore, it is necessary to consider the question of "like circumstances" before the question of "no less favorable treatment" because if the circumstances are not "like," no obligation arose for the Respondent State to accord Claimants' HFCS investment the best treatment accorded to Mexican cane sugar investments.[741]

576. Claimant's discrimination claim is flawed because it fails to take into consideration the fundamental principle under which a discrimination analysis must be conducted; the treatment in question must be analyzed between situations that are "comparable" in order to made a fair comparison. This is the basis of the term "comparator", which refers to the points of comparison that are used in a discrimination analysis. In the investment context, there is a wide range of comparability elements that may be relevant. These elements will be specific to the facts and circumstances of the investments that will be compared. If a relevant element is omitted at the time of comparison, the construction of the comparative analysis will be flawed and it would not be possible to made a fair comparison. The "like circumstances" requirement, which is a major aspect of the national treatment obligation, must be taken into account for these elements. Additionally, it ensures the construction of appropriate comparators in order to made a fair comparassion and an accurate determination of discrimination can be made.

577. In the case of complex investments, such as the one that is object in this arbitration, greater care must be taken in identifying comparables in order to make a fair comparison. The more complex an investment is, the greater the number of relevant comparability elements. Moreover, the measures that affects such investments, by their very nature, could result in superficial differences in the treatment of the investments being compared. However, the existence of such differences does not mean that the treatment is discriminatory under the national treatment obligation. As will be explained below, such differences are not discriminatory if they are rationally connected to differences under comparability elements that reflect legitimate policy and regulatory objectives.

578. Claimant incorrectly applies the "like circumstances" requirement by omitting comparative elements. As a result, the comparables used by the Claimant are flawed and they cannot be used

---

741 *Archer Daniels Midland y Tate & Lyle Ingredients Americas, Inc. v Mexico*, ICSID Case, Award, 21 November 2007, ¶ 196. **CL-0010**.

in order to made a proper discrimination analysis. In the present case, Claimant has failed to demonstrate that it is in "like circumstances" with regard to the Six Projects, therefore its claims under NAFTA Article 1102 fail.

b. The comparable "subject" or "object" must be an "investor" or "investment"

579. Claimant seeks to use as objects of comparison six infrastructure projects, for water treatment, port maintenance and nuclear plant facility maintenance, all of them performed by government entities, in which some dredging work has been performed. None of these dredging activities had the purpose of mineral exploration or exploitation, and all of the projects are conducted by federal or state government entities.

580. The public entities in charge of the Six Projects are not "investors" under NAFTA Article 1102, and the purpose of most of the activities that are performed by such public entities is to provide public services, *i.e.*, they are not intended to engage in private profit-making activities, such as the exploitation of a mining concession. Therefore, the Tribunal must dismiss the national treatment claim on this sole situation.

c. The Claimant has not identified any company in genuinely similar circumstances

581. Claimant proposes to use the following elements in order to identify comparable subjects/objects:

- The Project involved dredging activities;
- The Project required a MIA authorization;
- Don Diego and the Six Projects took place in "coastal ecosystems";
- The Project involved "significant impacts on the seabed and its organisms";
- The Project may impact the water column because of sediment plumes; and
- The Project reported temporary or permanent presence of protected and or endangered species.[742]

[742] Claimant's Memorial, ¶ 326.

582. However, Claimant's proposed comparable subjects/objects fails to take into account all of the comparability elements, leading to the conclusion that they are not in like circumstances to ExO's proposed operations and work. Respondent reiterates that the "like circumstances" analysis must identify appropriate comparables based on the following criteria:

- What must be compared is the "treatment";
- The analysis is not limited to whether the Claimant and the comparable subjects/objects sought to performed any dredging activity. What is required is a careful analysis of all the comparability factors;
- Significant deference should be given to the decision making of public entities; and
- There is no discrimination in those cases in which there is no evidence of the kind of discrimination and if it is based on irrational policies or bad faith.[743]

583. The precedents are clear in stating that it is not enough to analyze the economic activity of the same sector and that other factors must be analyzed, such as the regulatory regime applicable to the same service.[744]

584. Claimant's approach is in effect a "like product" comparative rather than a "like circumstances" comparative analysis. This approach was categorically rejected by the tribunal in *Cargill v Mexico*. In that case, the tribunal confirmed that the concept of "like circumstances" referred under NAFTA Article 1102 (*i.e.*, the national treatment provision under that treaty) is not the same as "like products" under the GATT:

> In this regard, the approach of the Tribunal is in accord with that in G*AMI and Pope & Talbot*. In each of these cases, the investor and domestic producers were not in "like circumstances" even though they produced the same product and competed in the same market. Thus, something more than the likeness of goods being produced has to be shown in order to establish that the investor and domestic producers are in "like circumstances", particularly where there are other factors that potentially differentiate the situation of the

743 Mexico's Submission under NAFTA Article 1128 submmitted in *Mercer International Inc v. Government of Canada*, **RL-0062**.

744 *Merrill & Ring Forestry L.P. v. Canada*, (UNCITRAL), Award, 31 March 2010, ¶ 89, **CL-0070**. *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, (UNCITRAL), Award, 12 January 2011, ¶ 166. **CL-0057**.

investor or its investment from that of domestic producers of the "like goods" in question.[745]

585. The "like circumstances" requirement, needs more than just a "similarity of goods [or services]", as it was confirmed by the tribunal in *Corn Products.*[746] Whereas under the WTO system "a determination of "likeness" [...] is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products.",[747] – in the field of international investment law the term "like circumstances" is broader.

586. All applicable international investment law jurisprudence reaffirms that the mere fact that an investor and a comparator produce the same product or provide the same service, within the same market, is not enough to establish "like circumstances". To do so, the Claimant must also demonstrate the likeness of the applicable legal framework and the basis of the policy in question.[748]

d. None of the Six Projects are in "like circumstances" with Don Diego Project

587. In order to demonstrate that the Don Diego Project (the investment) is not in like circumstances to the Six Projects, some general characteristics of the project should be recalled.

- Sector. Don Diego was a marine mining project performed by a private company, *i.e.*, it had a profit-making purpose and was specially focused on the extraction of phosphate sands from the seabed, using trailing suction hopper dredgers, known as "Trailing Suction Hopper Dredgers" or "TSHD", to depths of 80 meters.[749] Additionally, in the MIA 2015, the "eco tube" was incorporated with the purpose of returning "non economic" sediments to seafloor.[750]

---

745 *Cargill, Incorporated v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 195. **CL-0027**.

746 *Corn Products International, Inc. (CPI) v. Mexico*, ICSID Case No. ARB(AF)/04/01, Decision on Liability, 15 January 2008, ¶ 122. **CL-0041**.

747 *See* Appellate Body Report, EC – Asbestos (DS135), ¶ 99. **RL-0063.**

748 *See Merrill & Ring Forestry L.P. v. Canada,* (UNCITRAL), Award, 31 March 2010, ¶¶ 89 and 305, **CL-0070**, y *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America,* (UNCITRAL), Award, 12 January 2011, ¶ 166. **CL-0057**.

749 Claimant's Memorial, ¶ 76.

750 Claimant's Memorial, ¶ 77.

- Investment area. Don Diego was a project that was sought to be performed in the Gulf of Ulloa, a completely unique and incomparable area for its natural wealth - located in Mexico's ZEE, on the west coast of Baja California Sur and approximately 22 km from the coast.[751]

- *Lex specialis* of the mining concession. In order to started the performance of the Project, ExO requires to have a concession isusued in accordance with the Minin Law, which granted a temporary exclusivity right for the exploit, use and utilization of phosphate mineral.[752] Don Diego's activities would last 50 years, *i.e.* they were subject to the temporariness of the concessions. In accordance with the mining law, the granting of a concession is without prejudice of obtaining an environmental authorization to operate the project.

- Legal framework applicable to the mining sector. Sprecifically, ExO sought to explore and exploit phosphate, which is a mineral of federal jurisdiction.[753] This means that the specific legal framework of Don Diego is the Mining Law.

- Investment products or goods. The objective of Odyssey's mining Project was the production of phosphate, mineral which in turn would be used for the production of fertilizers.

588. Like Don Diego, the Six Projects are subject to the LGEEPA and the REIA and also required to be evaluated by the DGIRA. This is because such works and activities (*e.g.*, hydraulic works, works related to general communication routes and developments near coastal ecosystems) may cause ecological imbalances or exceed limits and conditions established in different legal and regulatory instruments focused on environmental protection and preservation of ecosystems.[754]

589. However, none of the Six Projects involves marine mining activities, they're purpose was not to dredge phosphate sands to extract phosphate mineral for subsequent marketing as a raw material in the production of fertilizers. Therefore, none of the Six Projects are focused on mining sector activities. Mexico's experts explain that:

---

751 **C-0002**, p. 3. Claimant's Memorial, ¶ 330.

752 Solcargo-Rábago Expert Report, ¶¶ 70-72.

753 Solcargo-Rábago Expert Report, ¶ 76. Art. 4 Mining Law. **R-0050.**

754 Artículo 28 de la LGEEPA. **C-00014**. Art. 5 REIA. **C-0097.**

> […] as can be seen, none of these projects is a mining sector project, in addition to the fact that in four of the six projects dredging would only be carried out for maintenance purposes. In addition, there are substantial differences with respect to the dredging surface, the volume of dredging, the depth at which the works are carried out, the characteristics of the ecosystem where they are carried out and the timing of the dredging activities.
>
> […]
>
> Mr. Vladimir Pliego, Claimant's expert, just tries to compare Don Diego, with projects of much smaller dimensions, where much smaller equipment is used; several of them for maintenance dredging, not capital dredging; all in shallow waters of estuaries or ports, not in the open sea. Therefore, the six projects cited are not comparable to the Don Diego project as Claimant argues.
>
> […]
>
> In the Don Diego case, there is no evidence that less favorable treatment has been given with respect to other projects in similar circumstances, since, as has been demonstrated, these are not projects in similar circumstances and therefore they are not reasonably comparable, and therefore the discussion of which of the seven projects produces greater environmental impacts is idle. Since they are not similar projects, it is evident that each one was evaluated by SEMARNAT taking into account the particular circumstances of each one of them, without there being differentiated or more favorable treatment for one or another project, since not only are they not in the same sector, but there is also no sameness of the legal regime applicable to the Claimant and its alleged comparators. [755]

590. Respondent does not consider it necessary to go into technicalities since the very characteristics of the Six Projects provide evidence of the differences with Don Diego.

(1) "El Chaparrito Project" in charge ESSA: maintenance work related to salt mining activities

591. El Chaparrito Project consists of maintenance activities for service station and navigation channels at the El Chaparrito dock, owned by Exportadora de Sal, S.A. de C.V. (ESSA), a state-owned company engaged in the production of salt.[756] El Chaparrito Project is located in Guerrero Negro, Mulegé, Baja California Sur, within facilities that have existed since 1959. As a port infrastructure maintenance project, El Chaparrito Project is regulated by the Ports Law. In May 2008, the DGIRA conditionally authorized El Chaparrito Project.[757]

---

755 Solcargo-Rábago Expert Report, ¶¶ 253, 301 y 303.

756 Solcargo-Rábago Expert Report, ¶ 255.

757 Resolution of El Chaparrito Project, p. 69. **C-0104**.

592. Dredging is performed for a few weeks ot the year at depths ranging between 6 and 8 meters, and the material extracted consists of sediments that are accumulated during the operation of the El Chaparrito Port channel, which is deposited in terrestrial sites within ESSA's facilities.[758] According to Mr. Rábago, the amount of phosphate sands dredged and extracted at Don Diego would be 530 times greater than the amount of sediments dredged at the El Chaparrito Project.[759] In addition, the dredged area of Don Diego is 180 times larger than the dredged area of the El Chaparrito Project.[760]

(2) "Laguna Verde Project" in charge of CFE: maintenance of nuclear power plant.

593. The Laguna Verde Project consists on maintenance activities of hydraulic infrastructure located in the facilities of the nuclear power plant known as Laguna Verde, on the coast of the Gulf of Mexico.[761] The Federal Electricity Commission is in charge of the Works, which is a Sate owned company. As a hydraulic equipment maintenance project, Laguna Verde Project is regulated by the National Waters Law. On March 2016 it was conditionally authorized by DGIRA.[762]

594. The Laguna Verde Project has a 10-year duration, but routine maintenance dredging is performed every two months for three days, and major maintenance dredging is performed every three years for periods that depend on the conditions generated at the site.[763] The purpose of this dredging is to maintain the depth of the channels and ensure the flow of water required by the Laguna Verde nuclear power plant's cooling systems. The extracted material - particularly fine sands - is deposited in a discharge area within the nuclear power plant facilities..[764]

595. The dredging is done at 6 meters below sea level, in an area of 26.72 ha, that is, in an area 770 smaller than the Don Diego dredging area.[765]

---

758 Solcargo-Rábago Expert Report, ¶ 258.

759 Solcargo-Rábago Expert Report, ¶ 259.

760 Solcargo-Rábago Expert Report, ¶ 259.

761 Resolution Laguna Verde Project, p. 7. **C-0110**.

762 Resolution Laguna Verde Project, p. 57. **C-0110**.

763 Resolution Laguna Verde Project, pp. 7 y 50. **C-0110**.

764 Resolution Laguna Verde Project Verde, p. 9. **C-0110**.

765 Resolution Laguna Verde Project, p. 12. **C-0110**.

(3) "Sayulita Project" in charge of the Water Supply and Sewerage State Commission of Nayarit: wastewater plant.

596. The Sayulita Project consists on the rehabilitation and expansion of a wastewater treatment plant located in the coastal area of Sayulita, Nayarit, on Mexico's Pacific coast.[766] The Water Supply and Sewerage State Commission of Nayarit La Comisión Estatal de Agua Potable y Alcantarillado de Nayarit is in charge of the Sayulita Project, and being hydraulic work it is subject to the National Water Law. In April 2018 the DGIRA conditionally authorized the Sayulita Project.[767]

597. Part of the Sayulita Project work involves dredging activities to install certain water treatment plant infrastructure that took place over the course of a year.[768] In other words, the Sayulita Project dredging does not resemble to the Don Diego dredging activities in the least.

598. Based on Engineer Rabago's analysis, the Don Diego work area would be approximately 858,000 times larger than the Sayulita Project and the volumes extracted by ExO would be 1.25 million times greater than the volumes extracted at the Sayulita Project..[769]

(4) "Veracruz Port Project" in charge of API Veracruz: port expansion works

599. The Veracruz Port Project is in charge of Administración Portuaria Integral de Veracruz, S.A. de C.V., and is located in the bay of one of the most important ports in Mexico.[770] The activities to be performed consist of the expansion of a port and involve, *inter alia*, the construction of breakwaters, boat docks and access channels.[771] The Veracruz Port Project is of a port nature and belongs to the communications and transportation sector and is regulated by the Ports Law. In November 2013 it was conditionally authorized by the DGIRA.[772]

---

766 Resolution Sayulita Project, p. 8. **C-0116**.

767 Resolution Sayulita Project, p. 35. **C-0116**.

768 Resolution Sayulita Project, pp. 12 y 35. **C-0116**.

769 Solcargo-Rábago Expert Report, ¶ 274. Resolution Sayulita Project, p. 12. **C-0116**.

770 Un *Administración Portuaria Integral* is a comercial Company partially or totally controlled by the State, but with operative and budgetary autonomy, focused on the construction, operation and development of ports, terminals and port facilities.

771 Resolution Puerto Veracruz Project, pp. 35-41. **C-0119**.

772 Resolution Puerto Veracruz Project, p. 139. **C-0119**.

600. The Veracruz Port Project requires dredging of sands with shell fragments to enable the expansion of the port and to accommodate breakwaters, channels and inlet and outlet piers. The dredging is carried out in different phases over 10 years, in an area of 451.63 ha (which means that Don Diego's dredging area is 45.6 times larger than that of the Veracruz Port Project) and at a depth of no more than 18 meters below mean sea level.[773]

(5) "Matamoros Project" in charge of API Tamaulipas: construction of a port complex

601. The Puerto Matamoros Project consists on the construction of a port complex that includes infrastructure for the supply of materials to deep well drilling platforms in the Gulf of Mexico, a housing development, a commercial zone, transportation infrastructure, government offices, small-scale fishing piers, among other aspects.[774] Matamoros Port Project is in charge of API Tamaulipas and is located in the northeast of the State of Tamaulipas. As port and housing construction activities, the Matamoros Port Project is regulated by the General Law of Human Settlements, Land Planning and Urban Development and the Ports Law.[775] On September 2015 it was conditionally authorized by DGIRA.[776]

602. The Puerto Matamoros Project requires seabed dredging to, *inter alia*, facilitate navigation to a new fishing pier. The dredging area is 89.99 ha, and part of the dredged material is reused to reclaim eroded beaches.[777] The duration of the dredging is 6 years.[778] According to Mr. Rábago, the amount of material dredged from Don Diego is 78 times greater than the one of Puerto Matamoros Project and the dredged area of Don Diego is 241 times greater than the dredged area of the Puerto Matamoros Project.[779]

603. It is relevant that the MIA of the Matamoros Port Project was submitted for evaluation twicw before the DGIRA. On January 2015, API Tamaulipas withdrew the first MIA and months

---

773 Solcargo-Rábago Expert Report, ¶ 281.

774 Resolution Puerto Matamoros Project, pp. 7-9. **C-0130**.

775 Solcargo-Rábago Expert Report, ¶ 287.

776 Resolution Puerto Matamoros Project, p. 143. **C-0130**.

777 Resolution Puerto Matamoros Project, pp. 7-9. **C-0130**.

778 Resolution Puerto Matamoros Project, p. 144. **C-0130**.

779 Solcargo-Rábago Expert Report, ¶ 290.

later submitted it for assessment again.[780] This shows that, in practice, some developers request the withdrawal of MIA applications in order to strengthen technical and legal aspect.[781]

(6) "Santa Rosalía Project" in charge of API Baja California Sur: maintenance works at the port

604. The Santa Rosalía Project consists on maintenance works at the Santa Rosalía port, located at the east coast of Baja California Sur, with access to the Sea of Cortez. The Santa Rosalía Project is in charge of API Baja California Sur and is a port project of the communications and transportation sector, subject to the Ports Law. On December 2019, the DGIRA conditionally authorized the Santa Rosalía Project.[782]

605. The work to be performed requires six months of dredging, performed at 2 and 9 meters below mean sea level, in an area of 5.47 ha. Due to the passage of hurricanes and marine currents, the purpose of the dredging is to remove sediments and facilitate the circulation of vessels.[783] Mr. Rábago explains that the amount of phosphate sands that Don Diego sought to dredge was 4,407 times the amount of sediments dredged during the Santa Rosalía Project works.[784] Likewise, Mr. Rábago explains that the Don Diego work area was 3,765 times larger than the Santa Rosalía Project dredging área.[785] There is simply no likeness between the two projects.

e. SEMARNAT did not give a less favorable treatment to Don Diego project

606. Based on the previous sections, two conclusions are evident: *i)* the Six Projects – that the Complainant has chosen to argue for alleged discriminatory treatment – are not in like circumstances to Don Diego's project and, as a natural consequence, there can be no less favorable treatment of Don Diego's project.; *ii)* notwithstanding the foregoing, SEMARNAT, through the DGIRA, in fact, it did not give less favorable treatment to Don Diego.

---

780 Resolution issued on 20 January 2015 by DGIRA regarding the Puerto Matamoros Project. **R-0145.**

781 Informe pericial Solcargo-Rábago, ¶ 122.

782 Resolution Santa Rosalía Project, p. 32. **C-0122**.

783 Resolution Santa Rosalía Project, pp. 5-7. **C-0122**.

784 Solcargo-Rábago Expert Report, ¶ 296.

785 Solcargo-Rábago Expert Report, ¶ 296.

607. Although some of the Six Projects are located at adjacent areas to and within the influence of natural protected areas, and in some projects there are species protected by NOM-059, this situation does not mean that the Six Projects are not consistent with environmental regulations or that they are not environmentally viable through the implementation of certain mitigation measures and conservation programs.[786] Therefore, the Respondent wants to emphasize the following:

- None of the Six Projects is aimed at marine mining activities in Mexico's ZEE.
- None of the Six Projects share the same geographic and environmental characteristics (*e.g.* the same SAR) as Don Diego.
- None of the Six Projects is being managed by private companies seeking to exploit mining concessions by extracting minerales from the seabed.
- The dredging activities of the Six Projects are completely different from the dredging that ExO sought to perform. Tehse differences are evident when considering the clear differences in duration, location, extent, volumen, type of sediment dredged, dredging methods and technologies of each of the Six Projects and the Don Diego Project.
- None of the Six Projects are subject to the Minin Law as Don Diego.

608. Despite these obvious differences, the Claimant contends that "all of these projects are comparable to the Project and that they have all been granted a much more favorable treatment than the one afforded to the Project by SEMARNAT".[787] That is false.

609. Mr. Vladimir Pliego maintains that the Six Projects are comparable to Don Diego according to "three technical-legal elements" (activity, regulations and location) and "three practical elements" (impacts on protected species, the seabed and the water column).[788] It is clear that this is also false.

---

786 *See* Resolution Santa Rosalía Project, pp. 9, 20, 31. **C-0122**. Resolution Puerto Matamoros Project, pp. 141-143. **C-0130**. Resolution Sayulita Project, pp. 15, 38-43. **C-0116**. Resolution Puerto Veracruz Project, pp. 52, 126-137. **C-0119**.

787 Claimants' Memorial, ¶ 183.

788 Mr. Vladimir Pliego Expert Report, ¶ 280.

610. It does not go unnoticed that four of the Six Projects [redacted][789] Nor does it go unnoticed that [redacted][790] Much less goes unnoticed the fact that Mr. Vladimir Pliego was a CONANP official in the period when Don Diego - and possibly the Puerto Matamoros Project and the Puerto Veracruz Project - was subjected to environmental impact assessment procedures.[791] The Respondent reserves the right to request documents at the appropriate procedural moment related to this situation to clarify whether there are illicit conducts or [redacted]

611. Notwithstanding the foregoing, the Respondent considers it regrettable that former public officials are willing to make statements lacking technical and legal support in an arbitration proceeding claiming more than US$ 2.3 billion against the Mexican State. It is even worrying that neither the Claimant, nor its own witnesses and experts have made the pertinent declarations of impartiality and the absence of a possible conflict of interest..[792]

f. The treatment granted is fully justified by reasonable government objectives

612. The Respondent's actions related to the evaluations and conditional authorizations of the Six Projects previously described were transparent, rational, and in accordance with legitimate objectives and policies. They were in no way discriminatory.

613. In conclusion, despite the fact that the burden of proof rests with the Claimant, the Respondent has shown that the Six Projects are not in "like circumstances". Furthermore, even if the Tribunal were to accept as valid the "comparable subjects / objects" identified by the Respondent, any difference in the treatment granted would not be discriminatory under the content of Article 1102 of the NAFTA for the reasons described above.

---

789 *Ver* Resolution Puerto Matamoros Project, p. 168. **C-0130**; Resolution Sayulita Project, p. 45. **C-0116**; Resolution Puerto Veracruz Project, p. 139. **C-0119** and Resolution Laguna Verde Project, p. 57. **C-0110.**

790 Resolution Laguna Verde Project, p. 58. **C-0110**.

791 *See* annex 73 of Mr. Vladimir Pliego Expert Report.

792 *See supra,* Sections III.B.1y III.B.2.

IV. DAMAGES

614. The following submissions are without prejudice to the Respondent's legal arguments. Nothing in this section should be interpreted as an admission of liability or as a waiver of any of the defenses on the merits.

615. The Claimant is claiming aggregate damages (gross of taxes) of USD $1.383 billion.[793] Its damages case is fundamentally flawed, both in relation to the legal arguments in the Claimant's Memorial and to the *quantum* of damages in the Claimant's expert report prepared by Professor Pablo Spiller and Pablo Lopez Zadicoff of Compass Lexecon (Compass Lexecon Report).

616. The Claimant undertook a high risk and complex investment in a subject matter in which it had no experience and in which no experienced company has been able to advance into commercial production anywhere in the world. Contrary to what the Claimant suggests, the success of the Project was by no means guaranteed or even reasonably certain immediately before the first denial of the MIA on 7 April 2016.

617. In claiming damages against the Respondent as if the investment's profitability had been established, the Claimant is: (i) ignoring that the Project was still in the early exploration stage, (ii) ignoring that no Feasibility Study (FS) nor Pre-feasibility Study (PFS) had been completed, (iii) ignoring past, present and future risks associated with its investment; and (iv) avoiding responsibility for the consequences of its lack of experience. Moreover, the claimed damages are entirely speculative and reflect profits that the Claimant naively and unrealistically hoped for; not ExO's fair market value (FMV) as of the Valuation Date. Investment treaties are not insurance policies against commercial risk and unrealistic expectations.[794]

618. As explained in this damages section and in the supporting expert reports prepared by Mr. Joe Hinzer, P. Geo., of Watts, Griffis and McQuat Limited (WGM Report)[795] and Dr. Daniel Flores

---

793 Claimant's Memorial, ¶ 357.

794 *Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶¶ 114 and 177, **CL-0121**. *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, LCIA Case No. UN 7927, Preliminary Objections to Jurisdiction, 19 September 2008, ¶ 39, **RL-0064**.

795 WGM Report.

of Quadrant Economics (Quadrant Report),[796] if this Tribunal finds that the denial of the environmental permit (MIA) amounts to a breach of the Respondent's obligations under NAFTA Chapter 11, the damages attributable to that breach would be at most USD $19.1 million for the Claimant's 53.89% share and US$ 39.2 million for the entire Project.[797]

A. The Claimant has not specified whether the damages it claims are in relation to its claim under Article 1116 or Article 1117 of the NAFTA

619. At paragraph 188 of the Memorial, the Claimant argues that it "has the right to bring a claim on its own behalf or on behalf of an enterprise of another entity that the investor owns or controls." Yet, Odyssey neglects to state clearly and unequivocally whether the claim is being made on its own behalf under Article 1116 or on behalf of ExO under Article 1117. This is an important issue for *quantum* because any potential damages suffered by Odyssey as an indirect shareholder in ExO would *not* be equivalent to the damages suffered by ExO itself.

620. Identifying the nature of the claim is also important because, when a claim is made under Article 1116, any damages arising thereof are paid directly to the investor. However, pursuant to Article 1135(2): "where a claim is made under Article 1117(1): [...] (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise".[798] The Respondent will observe that ExO still exists as a company and, therefore, if the claim was submitted on behalf of ExO, any potential damages *must* be paid to ExO.

621. It also bears noting that a claim under Article 1116 would likely overlap with a claim under Article 1117 and therefore, the two types of claims cannot coexist. For example, the Claimant would not be able to claim damages based on the loss of value of its indirect shareholding in ExO under Article 1116, and *separately* claim damages equivalent to the FMV of ExO under Article

796 Quadrant Report.

797 Quadrant Report, ¶¶ 70, 93. Note: These estimates assume that 100% of Odyssey's market capitalization is attributable to the Don Diego Project and investors in Odyssey did not ascribe any value to Odyssey's other business activities. As explained in the Quadrant Report, Dr. Flores does not currently have enough information to break down Odyssey's market capitalization by business line.

798 Article 1135 (Final Award). Emphasis added.

1117.[799] These claims completely overlap and if allowed to run simultaneously that could lead to double recovery.

622. The Claimant must clarify whether its claim was submitted under Article 1116 or Article 1117 because this has implications for the defense, and the Respondent should not be put in a position that requires it to guess the nature of the claim it faces. Because the Respondent cannot properly set out its defense without this information, for the purpose of this Counter Memorial, it will assume that: (i) the Claimant "owns or controls" ExO; (ii) [800] the investment at issue is ExO; (iii) that the claim was brought on behalf of ExO under Article 1117; (iv) the value of ExO is equivalent to the value of the Don Diego Project; and (v) no claim under Article 1116 was submitted to arbitration. The Respondent reserves the right to change its entire position on damages if any of these assumptions prove to be incorrect upon the Claimant's clarification.

1. The Claimant has failed to identify the investment underlying its claim for damages

623. At paragraphs 203-204, the Claimant identifies several investments in order to establish the Tribunal's jurisdiction *ratione materiae*. With respect to the claim Odyssey brings on its own behalf, the Claimant identifies: "Odyssey's 53.89% shareholding in ExO", funds expended for "the exploration work and concession fees" and financing of "ExO's work and investments of resources in furtherance of the Don Diego project".[801] With respect to the claims brought on behalf of ExO, it identifies: "the Concession", the "Don Diego Norte Concession", the "Don Diego Sur Concession" and unspecified "associated rights".[802] (Surprisingly, the Claimant does not identify ExO as an investment despite purporting to bring a claim on its behalf under Article 1117.)

624. However, in the damages section, the Claimant equivocates with respect to the investment which value it seeks to determine. Heading V.B of the Memorial suggests that the investment at issue is the "[e]ntirety of ExO's Concession and Claimant's investments in Mexico". The next paragraph –i.e., ¶ 373– the Claimant argues that "compensation in this case should reflect the fair

---

799 A similar point can be made about a claim for the FMV of ExO and a simultaneous and separate claim for the FMV of ExO's concessions. Because ExO owns the concessions, its FMV would include the FMV of the concessions it owns.

800 As explained above, the Claimant has not proven this condition for a claim under Article 1117.

801 Memorial, ¶ 203.

802 *Id.*, ¶ 204.

market value of the entirety of Claimant's investment in Mexico, as encapsulated in the contemporaneous value of ExO." Three paragraphs down, at paragraph 376, the Claimant switches position once again by arguing that "the appropriate measure of damages, [...] is the fair market value of the Don Diego Project [...]". Needless to say, that the value of ExO's concessions, the value of ExO and the value of the Don Diego Project are not necessarily the same. By failing to clarify this and by conflating the value of these assets/investments, the Claimant has failed to meet its burden to prove damages. Moreover, it has prevented the Respondent from raising a proper defense to the damages claim because it is not clear to the Respondent what exactly is being measured.

625. It is also worth noting that "the Project" is not *per se* a covered investment under the NAFTA, as it does not fall within any of the categories of investment listed in Article 1139. Moreover, a concession (for example) cannot be accorded treatment inconsistent with the Minimum Standard of Treatment (MST) and/or National Treatment (NT) obligations established in Articles 1102 and 1105; only an investor of another Party or an enterprise owned or controlled by an investor of another Party can be subject to discrimination or accorded treatment inconsistent with the MST. For this reason, the Respondent will proceed on the basis that the investment at issue is ExO and reserves the right to modify its position if this assumption proves to be incorrect upon clarification by the Claimant.

626. In any event, the amount of damages claimed in this case is predicated upon the purported FMV of "the Project" as of 7 April 2016 (the Valuation Date), which the Claimant appears to equate to the FMV that ExO had on that date. The Respondent will assume, for the time being, that the assumption is valid, but reserves the right to modify its position if that assumption proves to be incorrect as new information becomes available.

B. Legal principles applicable to damages

1. Burden of proof

627. It is a well-established principle that the party alleging a fact has the burden of proving it. In the context of damages, it is always the claimant party who alleges loss arising from a breach

of the treaty and, therefore, bears the burden of proving the fact and amount of the loss, as well as the causal link between the breach and the loss.[803]

2. Standard of compensation

628. The Claimant argues that the appropriate standard of compensation for an unlawful expropriation and other breaches of the NAFTA, such as a violation of Articles 1105 or 1102, is full reparation.[804] It cites Article 31 of the Articles of State Responsibility for the proposition that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act", and Article 36 for the proposition that compensation "shall cover any financially assessable damage including loss of profits insofar as it is established." Moreover, it argues that "the starting point is the principle of 'full reparation', expressed by the Permanent Court of International Justice in the *Chorzów Factory* case."[805] Based on these principles, the Claimant contends that "the aim of a monetary award in this case must also be to wipe out all of the consequences of Mexico's wrongful conduct and return Odyssey to the position it would have been in had Mexico not breached the treaty".[806]

629. The Claimant goes on to state that "[t]o give effect to the principle of full reparation, compensation in this case should reflect the fair market value of the entirety of Claimant's investment in Mexico, as encapsulated in the contemporaneous value of ExO, the business of which exclusively concerned development of the Project".[807] Citing to *Crystallex v. Venezuela*, the Claimant further argues that "awarding compensation based on the investment's fair market value ensures that the injured party is restored to the situation it would have been in but for the internationally wrongful acts".[808]

---

803 Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, pp. 161-162. **RL-0065**. See also, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 316. **CL-0103**; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican Sta*tes, ICSID Case No. ARB(AF)/04/05, Decision on the Requests for Correction, Supplementary Decision and Interpretation, 10 July 2008, ¶ 38. **RL-0066**; and *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Award, 12 January 2011, ¶ 237, **CL-0057**.

804 Memorial, ¶ 360.

805 *Id.*, ¶ 366.

806 *Id.*, ¶ 371.

807 *Id.*, ¶ 373. Emphasis added.

808 *Id.*, ¶ 375.

630. The Claimant thus concludes: "Accordingly, the appropriate measure of damages, pursuant to the *Chorzów Factory* standard, is the fair market value of the Don Diego Project prior to SEMARANT's first denial of the MIA, regardless of whether the Tribunal finds a breach of only one or of all three of the aforementioned articles."[809]

631. The Claimant also relies on the following definition of FMV espoused by the Iran-U.S. Claims Tribunal: "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."[810] Hence, as per the Claimant's own analysis, full reparation in this case would entail awarding damages in an amount equivalent to the price that a buyer would be willing to pay to a willing seller for ExO, each with good information and not under duress or threat, immediately prior to the first denial of the MIA, which occurred on 7 April 2016. The Respondent notes that, for all practical purposes, the Claimant is proposing the measure of compensation established in Article 1110(2) of the NAFTA.[811]

632. The Respondent agrees that the FMV of ExO determined immediately before the expropriation –i.e., on 6 April 2016– is the proper measure compensation if the Tribunal finds that: the Claimant had a right or rights that were part of its investment that were capable of being expropriated; and (a) the Respondent expropriated the investment, or (b) the Respondent breached Articles 1102 and/or 1105 and those violations had an effect tantamount to expropriation –which is implicit in the Claimant's position that the amount of compensation should be the same "regardless of whether the Tribunal finds a breach of only one or of all three of the aforementioned articles".[812] The Respondent rejects the proposed measure of compensation in any other scenario.

633. For the avoidance of doubt, while the Respondent agrees with the measure of compensation proposed by the Claimant in the circumstances laid out in the previous paragraph, it strenuously disagrees with the Claimant's quantification of those alleged damages. The Respondent submits

---

809 *Id.*, ¶ 376. Emphasis added.

810 *Id.*, ¶ 374.

811 Article 1110(2) states: "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." This is the measure of compensation proposed by the Claimant at paragraph 376 of the Memorial.

812 Memorial, ¶ 376.

that awarding damages in an amount consistent with the FMV of a fully operational and profitable ExO, as the Claimant is attempting to do in this case, would put the investor in a far better position than it enjoyed as of 7 April 2016 –i.e., the Valuation Date employed by the Claimant.

3. Valuation date

634. At paragraph 380 the Claimant takes the position that "[t]he date of valuation is 7 April 2016, the date of SEMARNAT's first denial". It adds that Compass Lexecon has based its damages assessment on the Project's FMV "at the date immediately before SEMARNAT denied the MIA [...]". These two statements are not compatible. The MIA was denied on 7 April 2016, so the "date immediately before" the denial would be 6 April 2016.

635. While this change may be seen as inconsequential, it is not. On 6 April 2016, no decision on the MIA application had been issued yet. Consequently, no reasonably informed willing buyer (or seller) would have assumed that the MIA had already been approved or that its future approval was a certainty. Yet, this is precisely what Compass Lexecon assumes for the purposes of valuation:

> Permitting: In performing our valuation we assume that the Project would have been permitted, and that, consequently, it was ready to start contracting. This because the MIA constituted the last regulatory hurdle for the Project.[813]
>
> [Emphasis added]

636. The MIA approval was only a possibility on 6 April 2016, and this fact should be reflected in the value of ExO. In fact, in its "reasonability analysis" Compass Lexecon acknowledges that the pre-permit value of OMEX shares would be lower, and uses this as the rationale for a 50% premium on the shares:

> While as of the Date of Valuation the market knew that the MIA had been filed and was expecting its approval, investors in OMEX were yet uncertain as to the likelihood of the permit being granted. Consequently, the stock market was reflecting a pre-permit value before the Date of Valuation. [...][814]
>
> [Emphasis added]

---

813 Compass Lexecon Report, ¶ 8(a). It is also worth noting that the MIA was not the "last regulatory hurdle." As explained in the Statement of Facts, and acknowledged by the Claimant's own expert, ExO still needed several permits in order to operate the project. See, footnote 10 to the Compass Lexecon's First Report.

814 *Id.*, ¶ 121(b).

637. Compass Lexecon errs in assuming away the uncertainty of the MIA approval both in its main FMV determination and by applying a "permit value premium adjustment of 50%" to account for the fact that "the stock market was reflecting a pre-permit value before the Date of Valuation" in its "reasonability analysis".

638. The Respondent, therefore, maintains that the proper Valuation Date is 6 April 2016, and that the proper assumption for valuation purposes is that the MIA was being evaluated by DGIRA and the decision was pending.

4. Legally relevant damage

a. Causation

639. As a general principle, a state is only responsible for the injury caused by the illegal act. Hence, a critical aspect of any claim for damages is establishing a sufficient causal link between the alleged breach and the damages, and that burden lies with the claimant party.[815]

640. Causation is inextricably linked to the concept of full reparation. Article 31 of the ILC Articles limits the obligation of the State to make full reparation to the "injury caused" by the internationally wrongful act and defines "injury" as "any damage, whether material or moral, caused by the internationally wrongful act of a State".[816] Causation is also implied in the *Chorzow Factory* dictum by reference to the objective of reparation –i.e., "wipe out all the consequences of the illegal act".[817] In this arbitration, the Respondent would be obliged to make reparation only for injury caused by the acts that the Tribunal finds to be inconsistent with the NAFTA.[818]

641. Causation has two spectrums: factual causation and legal causation. Both factual and legal causation are relevant in determining the existence of the required causal relationship, but factual causation alone is insufficient.[819] Factual causation refers to whether the wrongful conduct played part in bringing about the harm or injury and is determined by means of what is commonly known as the "but-for" test: would the harm have occurred but for the unlawful conduct?

---

815 Ripinsky & Williams, *Damages in International Investment Law*, BIICL (2008), p. 135. **RL-0065.**

816 **CL-0059**, Article 31.

817 Ripinsky & Williams, *Damages in International Investment Law*, BIICL (2008)., p. 87. **RL-065**.

818 *Id.*, p. 135: "A State responsible for an internationally wrongful act is under an obligation to make reparation only for the injury caused by that act."

819 *Id.*

642. Under the legal test of causation, the question is whether the wrongful conduct is a sufficient, proximate, adequate, foreseeable, or direct cause of the harm or injury. This element of the test partially defines the legally relevant damage, which is important because it stems from the need to limit the liability for the respondent party, so as to reach an outcome that would be equitable and acceptable. Without this limitation, the factual chain of causation can potentially continue to unfold and generate losses virtually endlessly.

643. In the words of the *Methanex* tribunal:

> In a legal instrument such as NAFTA, Methanex's interpretation would produce a surprising, if not an absurd, result. The possible consequences of human conduct are infinite, especially when comprising acts of governmental agencies; but common sense does not require that line to run unbroken towards an endless horizon. In a traditional legal context, somewhere the line is broken; and whether as a matter of logic, social policy or other value judgment, a limit is necessarily imposed restricting the consequences for which that conduct is to be held accountable. For example, in the law of tort, there must be a reasonable connection between the defendant, the complainant, the defendant's conduct and the harm suffered by the complainant; and limits are imposed by legal rules on duty, causation and remoteness of damage well-known in the laws of both the United States and Canada. Likewise, in the law of contract, the contract-breaker is not generally liable for all the consequences of its breach even towards the innocent party, still less to persons not privy to that contract. It is of course possible, by contract or statute, to enlarge towards infinity the legal consequences of human conduct; but against this traditional legal background, it would require clear and explicit language to achieve this result.[820]

b. Reasonable certainty

644. The second element that defines the legally relevant loss or damages is the principle of reasonable certainty, which applies to both the fact of the loss and the amount of the loss. While it is true that damages need not to be proven with absolute certainty, international tribunals have consistently held that claims that are too uncertain, speculative, or unproven should be rejected, even if the State's liability is established. Examples of the application of this principle abound:

- In *Amoco v. Iran* the Tribunal observed that "[o]ne of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded. This holds true for the existence of the damage and of its effect as well."[821] [Emphasis added]

---

820 *Methanex v. United States*, UNCITRAL, Final Award on Jurisdiction and Merits, August 3, 2005, ¶ 138. **CL-0074**.

821 *Amoco Int'l Finance Corp. v. Iran*, Iran-US Claims Tribunal, Partial Award, 14 July 1987, ¶ 238. **RL-0067.**

- In *Gemplus/Talsud v. Mexico*, the tribunal concluded that "[u]nder international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent."[822] [Emphasis added]
- In *BG Group v. Argentina*, the tribunal held that "damages that are 'too indirect, remote, and uncertain to be appraised' are to be excluded", and further noted that "an award for damages which are speculative would equally run afoul of 'full reparation' under the ILC Draft Articles."[823] [Emphasis added]
- In *Asian Agricultural Products v. Sri Lanka* the tribunal observed that "according to a well established rule of international law, the assessment of prospective profits requires proof that: 'they were reasonably anticipated; and that the profits anticipated were probable and not merely possible'".[824] [Emphasis added]
- In *S.D. Myers v. Canada*, the tribunal noted that "[t]he quantification of loss of future profits claims can present special challenges. On the one hand, a claimant who has succeeded on liability must establish the quantum of his claims to the relevant standard of proof; and, to be awarded, the sums in question must be neither speculative nor too remote. [...]"[825] [Emphasis added]

645. The fact that the principle of reasonable certainty applies to *quantum* is further confirmed by the vast number of cases in which international tribunals have rejected the use of the DCF methodology on the grounds that its use would be too speculative absent a sufficient track record of profitable operations to reliably project future cash flows:

- In *Metalclad v. Mexico,* a case that involved a hazardous waste landfill that never became operational due to a lack of a local permit, the tribunal noted that the FMV of a going concern which has a history of profitable operation may be subject to a DCF analysis "[h]owever, where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value"[826]. In the end, the tribunal sided with Mexico and held that DCF analysis was inappropriate because "the

---

822 *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010, Part XII, ¶ 56. **CL-0054**.

823 *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007, ¶ 428. **RL-0068**.

824 *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 104. **CL-0011**.

825 *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, ¶ 173. **RL-0069**.

826 *Metalclad Corporation v. United Mexican States*, CIADI Case No. ARB(AF)/97/1, Award, August 30, 2000, ¶ 120. **CL-0071** [Emphasis added] .

landfill was never operative and any award based on future profits would be wholly speculative".[827] [Emphasis added]

- In *Merill & Ring v. Canada*, the tribunal noted that future estimates are "unavoidably extracted" from historic risks and, lacking "items for an educated estimate," "the future scenario will be characterized more by speculation than by educated estimates, an approach which has not been favored by arbitration tribunals, and upon which this Tribunal would not be prepared to base an award of damages".[828]
- In *Gemplus v. Mexico,* the tribunal rejected the DCF method even though the investment was a running business that had operated for some months: "[t]he Tribunal does not consider the DCF method to be an appropriate methodology to apply on the facts of the present case […]. The Tribunal accepts the Respondent's submissions to the effect that the status of the Concessionaire as a business, during the period from August/September 2000 up to the relevant valuation date of 24 June 2001, was far too uncertain and incomplete to provide any sufficient factual basis for the DCF method."[829] [Emphasis added]
- In C*engiz Insaat Sanayi ve Ticaret A.S. v. Libya*, the tribunal rejected a DCF after finding that the claimant had not proven that the earnings could be reasonable anticipated and were probable, not merely possible: "the Tribunal concludes that Cengiz' loss of profit claim is highly speculative. The evidence proves that it is unlikely that Cengiz would have been able to successfully conclude the Projects as foreseen in the Contracts, and extremely unlikely that Cengiz would be able to clinch a 30.5% rate of profit from the Contracts.[830] [Emphasis added]

646. As will be further developed below, all of this is relevant because the Claimant's expert has resorted to a DCF approach to estimate the damages despite the fact that ExO never operated and the economic viability of the Project had not been established by the Valuation Date.

C. Important terms and mining concepts

647. Before discussing the legal principles discussed in the preceding section in the context of this dispute and the evidence before this Tribunal, it is important to define certain terms and concepts that carry a specific meaning within the mining industry.

---

827 *Id.*, ¶ 121.

828 *Merrill & Ring Forestry L. P. v. Government of Canada*, CIADI Case UNCT/07/1, ICSID Administrated, Award, March 31, 2010, ¶ 264, footnote 179, **CL-0070**, citing *LG&E Energy Corp. et al. v. Argentine Republic*, Award and *PSEG Global Inc et al. v. Republic of Turkey*, Award, ¶¶ 312-313.

829 *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 and ARB(AF)/04/4, Award, June 16, 2010, Part XIII, ¶ 72. Emphasis added. **CL-0054**.

830 *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ, "Award," November 7, 2018, ¶¶ 602-603 and 616. **RL-0070**.

648. A Mineral Resource is defined by the Canadian Institute of Mining, Metallurgy and Petroleum (CIM) as "a concentration or occurrence of solid material of economic interest in or on the earth's crust in such form, grade or quality and quantity that there are reasonable prospects for eventual economic extraction". Depending on their level of geological confidence, mineral resources are sub-divided into inferred, indicated, and measured categories. An Inferred Mineral Resource has a lower level of confidence than that applied to an Indicated Mineral Resource. An Indicated Mineral Resource has a higher level of confidence than an Inferred Mineral Resource but has a lower level of confidence than a Measured Mineral Resource.[831]

649. In turn, a Mineral Reserve is defined as "the economically mineable part of a measured and/or Indicated Mineral Resource. It includes diluting materials and allowances for losses, which may occur when the material is mined or extracted and is defined by studies at pre-feasibility or feasibility level as appropriate that include application of Modifying Factors. Such studies demonstrate that, at the time of reporting, extraction could reasonably be justified."[832] As in the case of mineral resources, "Mineral Reserves are sub-divided in order of increasing confidence into Probable Mineral Reserves and Proven Mineral Reserves. A Probable Mineral Reserve has a lower level of confidence than a Proven Mineral Reserve."[833] Importantly, "[t]he public disclosure of a Mineral Reserve must be demonstrated by a Pre-Feasibility Study or Feasibility Study"[834].

650. As explained in the WGM Report, mining projects progress through various stages of exploration and development, with each stage adding information and providing increased confidence on its potential viability.[835] These stages are: Early Exploration, Advanced Exploration, Scoping Study or Preliminary Economic Assessment (PEA), Preliminary Feasibility Study (PFS), Feasibility Study (FS), Financing Construction and Operations and Closure. For the convenience of the Tribunal, the Respondent reproduces below WGM's description of four of these stages that are particularly relevant to the instant case:

> Early Exploration: Geologists use available technology including satellite imagery, airborne geophysical surveys, and historical exploration data to select targets for testing.

831 CIM Definition Standards for Mineral Resources & Mineral Reserves, p. 4. **Exhibit R-0152**.

832 *Id.*, p. 6. **Exhibit R-0152**. Emphasis added.

833 *Id.*

834 *Id.*

835 WGM Report, ¶ 40.

> This is followed by detailed airborne and ground surveying and preliminary surface sampling, trenching and initial drilling of encouraging targets.
>
> Advanced Exploration: Potential targets are explored with detailed sampling and extensive drilling, assaying and other studies to define the quantity and quality of a Mineral Resource and to assess its potential viability. This generally includes metallurgical testing to determine the potential for recovery of the mineral.
>
> Scoping Studies or (Preliminary Economic Assessment): Once Mineral Resources of sufficient quantity and quality are defined, operators may undertake an initial scoping study. Such studies are primarily conceptual in nature and are used to assess the potential economic viability of a project at a level of capital and operating cost estimates of ±30 50% for internal planning purposes before progressing to advanced planning. Technical studies to support capital and operating cost assumptions, process flow sheets, metallurgical recoveries, product quality and evaluation of potential markets are typically completed at a very high level using significant assumptions, "rules of thumb", similar project comparisons and generic cost data bases. Market analyses are typically generalized overviews of the market.
>
> Preliminary Feasibility Study ("PFS"): In this type of technical study, sufficient geology, metallurgical test work, and basic engineering are conducted to develop processing parameters and design the flow sheet required for the definition of Ore Reserves. This study allows for: equipment selection; flowsheet selection; the development of production and development scheduling; and capital and operating cost estimates. The level of accuracy for a PFS is approximately ±25%.[836]

651. The Claimant alleges that "[t]he collective opinion of the industry and technical experts is that as of 7 April 2016, the Project was at a Pre-Feasibility level."[837] The Respondent and its expert (WGM) disputes this assessment.

D. Application to the facts of this case

1. The Claimant has failed to meet its burden of proof with respect to the fact of loss

652. At paragraph 199 of the Memorial the Claimant alleges that "[j]urisdiction *ratione materiae* has been established because it is manifest that the measures at issue related to Odyssey and/or ExO and that both sustained loss and/or damage arising from the adoption and maintenance of such measures in a manner inconsistent with Articles 1102, 1105, and 1110 of NAFTA".[838] The Respondent disputes this assertion.

---

836 *Id.*, ¶ 40-41.

837 Claimants' Memorial, ¶ 387.

838 Emphasis added by the Respondent.

653. Contrary to what the Claimant suggests, it is not "manifest" that either ExO or Odyssey sustained loss and/or damage. In fact, there is no evidence that ExO had any value to begin with. As of 7 April 2016, ExO was in an early exploration stage, was not in production and therefore, had no sources of revenue.[839] Moreover, the economic viability of the Project had not been established through a feasibility study or even a pre-feasibility study.

654. As noted by Compass Lexecon: "[a]ssets have value because they are expected to produce net cash flows to the investor at some point."[840] It follows that absent compelling evidence demonstrating future profitability with reasonable certainty, the investment would have little value (if any) in the eyes of a reasonably informed potential buyer. To be clear, the mere existence of phosphate deposits in the Don Diego area does not confer any value to ExO. Only upon demonstration that those resources could be mined and commercialized at a profit can a reasonably informed potential buyer reach the conclusion that ExO had any value.

655. The only contemporaneous study that would have been available to a hypothetical willing buyer at the time is the [redacted] which, contrary to what the name suggests, was prepared by the Claimant itself. [redacted] is not a PFS; a fact, that the Claimant seems to acknowledge at paragraph 386 by stating that when the MIA was denied, it "had not yet collated and packaged the information that would otherwise feed into a formal Pre- Feasibility Study."[841]

656. Odyssey seeks to artificially elevate [redacted] to the level of a PFS to convey the idea that the future profitability of the Project had been established by the Valuation Date. It is telling, however, that neither the Claimant nor its experts dare to characterize [redacted] as a PFS. Instead, they claim that the information available at the time, and the Project in general, was "at a Pre-Feasibility level."[842]

657. In WGM's opinion [redacted] can be considered, at best, an internal scoping study because, *inter alia,* "it is not in compliance with regulatory disclosure requirements

839 Quadrant Report, ¶ 8. See also Section III.

840 Compass Lexecon Report, ¶ 48.

841 Memorial, 386.

842 *Id.*, ¶ 387, bullets a through d.

and consequently cannot be used for a financial analysis."[843] WGM also observes that its opinion on the [redacted] is consistent with the expert review of Mr. Fuller, who concludes that "the level of project detail set out in the available documents is consistent with a AACE Class 5 estimate" which, as noted by WGM, are designed for "concept screening" and cannot be used to support economic analyses.[844]

658. Scoping studies or Preliminary Economic Assessments (PEAs) are performed once mineral resources of sufficient quantity are defined in order to assess the potential economic viability of a project for internal planning purposes, before progressing to advanced planning.[845] Importantly, at this stage, "[t]echnical studies to support capital and operating cost assumptions, process flow sheets, metallurgical recoveries, product quality and evaluation of potential markets are typically completed at a very high level using significant assumptions, 'rules of thumb', similar project comparisons and generic cost data bases. Market analyses are typically generalized overviews of the market."[846] This is why scoping studies are only used to demonstrate that progress towards a PFS can be reasonably justified.[847]

659. Further evidence that a scoping study is insufficient to establish the economic viability of a project can be found in the CRIRSCO International Reporting Template (CRIRSCO Template). The CRIRSCO Template warns that "[a] Scoping Study must not be used as the basis for estimation of Mineral Reserves."[848] The Tribunal will recall that the term "Mineral Reserves" refers to "the economically mineable part of a measured and/or Indicated Mineral Resource."

660. The CRIRSCO Template also states that "[f]or all Scoping Studies, the company must include a cautionary statement in the same paragraph as or immediately following the disclosure of the Scoping Study", and offers the following example of such cautionary statement:

> "The Scoping Study referred to in this report is based on low-level technical and economic assessments and is insufficient to support estimation of Mineral Reserves or to

843 WGM Report, ¶ 40, fifth bullet.

844 *Id.*, ¶ 40 last bullet.

845 *Id.*, ¶ 40 fourth bullet.

846 *Id.*, ¶ 40 fourth bullet.

847 CRIRSCO International Reporting Template 2019, p. 32. **R-0153**.

848 *Id.*

provide assurance of an economic development case at this stage, or to provide certainty that the conclusions of the Scoping Study will be realised."[849]

661. The Respondent submits that no reasonably informed willing buyer would take a "low-level technical and economic assessment" at face value and be prepared to use it as the basis for determining the price he would be willing to pay for the Project.

662. Regardless of whether the Claimant's failure to prove that Odyssey and/or ExO have sustained loss and/or damage goes to jurisdiction *ratione materiae*, as the Claimant seems to suggest in its Memorial[850], or is regarded as a failure to discharge its burden of proof, the result should be the same: the Tribunal must dismiss the claim for damages in its entirety.

2. The Claimant has failed to establish the causal linkage between the alleged breach and the loss

663. The Claimant has not met its burden to establish a causal linkage between the alleged breach and the loss. Its damages case is fundamentally flawed because it measures the damages caused by the denial of an environmental permit for an undersea exploration project as if that project were in full commercial production and future profits were a reality. This is manifestly not the case. Among other things, the Claimant's damages case fails to take into account the following:

- The Claimant's project was in the early exploratory stage with several crucial stages ahead, including: (i) Scoping Study, (ii) Preliminary Feasibility Study (PFS); (iii) Feasibility Study (FS); and (iv) Engineering, Procurement, and Construction (EPC). The WGM report puts this into context: "fewer than 1 in 10,000 early exploration projects become an operational mine. Relatively few exploration projects make it to the feasibility study stage, and many feasibility study stage projects do not become operational mines."[851]
- The project concerns offshore phosphate deposits. Although such deposits exist in many locations around the world, none have advanced into commercial production, primarily because of environmental considerations (e.g., denial of environmental permits) and unsatisfactory project economics.[852]

---

849 *Id.*

850 See Memorial, ¶ 199, quoted *supra*.

851 WGM Report, ¶¶ 42.

852 *Id.*, ¶ 22.

- The Claimant has no experience in exploring, developing and commercially exploiting offshore phosphate deposits.[853]
- The concessions do not give legal ownership to the phosphates prior to their actual exploitation. Moreover, even if the Claimant were granted the environmental permit at issue, it would still have to obtain various other permits and authorizations in order to exploit the concession area.[854]
- The existence of commercially exploitable phosphates has not been proven. At most, the phosphates asserted by the Claimant are inferred, indicated and measured resources, not proven or even probable reserves.[855]
- The market for the type of phosphate products that the Claimant asserts will result from the Project is fully supplied and the nature of the market is such that new entrants such as the Claimant will have a difficult time developing a customer base.[856] No viable market for the phosphates has been proven to exist through sales contracts, letters of intent, offtake agreements, memoranda of understanding, or other appropriate mechanisms.[857]

664. By failing to even recognize these and other factors in its damages case, the Claimant has utterly failed to establish the causal linkage between any potential breaches that the Tribunal could find in relation to the denial of the environmental permit and the damages claimed. In short, there is nothing to suggest that but-for the MIA denial, the Project would have advanced through the several stages that lied ahead, obtain the remaining permits, implement the new extraction methods it intended to use in a cost-efficient manner, become a profitable operation and gain the significant market share it projected in the DCF.

3. The Claimant engages in undue speculation in determining the amount of damages (failure to meet its burden to prove *quantum* with reasonable certainty)

665. As will be explained in the following sub-sections, the Claimant's damages assessment is wholly speculative and does not reflect the FMV of the Project as of the Valuation Date. The Claimant's valuation is not based on the Project as it existed on 7 April 2016, but rather on an *ex-*

853 *Id.*, ¶ 110. See also, Quadrant Report, ¶ 14 and footnote 37.

854 *See* Sections II.F.1 and II.F.2, *supra*.

855 WGM Report, ¶¶ 49-56.

856 *Id.*, ¶¶ 23-25, 31-37.

857 *Id.*, ¶¶ 53-116.

post revisionist evaluation designed to justify its reclassification as a "development stage" project which, in turn, would justify the use of an income approach to quantify damages.

a. Claimant's impermissible use of the income approach to assess damages

666. The Claimant's expert estimates damages using two methodologies within the income approach family: a DCF model to estimate damages arising from Phase I of the Project and Real Options Value (ROV) to estimate the damages from Phase II.[858]

667. The Respondent has already referred to the vast jurisprudence supporting the rejection of the DCF approach where, as in the present case, the enterprise has no track record of profitable operations. This alone should be enough to reject the Claimant's approach to the quantification of damages and its conclusion concerning the Project's value. However, the speculative nature of a DCF is further exacerbated in this case by a multitude of factors that include: Odyssey's lack of significant prior experience in the mining sector, the novel nature of the mining operation it intended to pursue and the stage of the project as of the Valuation Date. The Respondent's industry experts observe that underwater phosphate deposits exist in many parts of the world, however, no mining company, even experienced ones, has been able to successfully exploit such deposits.[859]

668. It is also worth noting that the mining sector has its own guidelines and standards for valuing mineral properties, which the Claimant not only acknowledges but claims to have applied in this case. Indeed, according to the Claimant, "Compass Lexecon was informed by the Canadian Institute of Mining, Metallurgy and Petroleum's guidelines and standards on the valuation of mineral properties ("CIMVAL")" and "the Australasian Institute of Mining and Metallurgy and the Australian Institute of Geoscientists ("VALMIN") Code for Public Reporting of Technical Assessments and Valuations of Mineral Assets".[860] It is thus worthwhile to examine what those guidelines and standards recommend in situations like this.

(1) Standards and guidelines for the valuation of mineral properties

858 It bears noting that the ROV also relies on discounted cash flows.

859 WGM Expert Report, ¶ 22.

860 Claimants' Memorial, ¶ 382.

669. In 1999, the Council of the Canadian Institute of Mining, Metallurgy and Petroleum (CIM) approved the formation of a Special Committee on Valuation of Mineral Properties (CIMVAL). Its mandate was to recommend standards and guidelines for the valuation of mineral properties to be used by the mining industry in general and by Canadian securities regulators and stock exchanges.[861] Over the next four years, the Committee reviewed papers on valuation of mineral properties, prepared an initial framework for discussion, solicited input and comments from numerous organization and individuals and prepared draft standards and guidelines, which were also subject to various rounds of review and comments. The final document –the CIMVAL Standards and Guidelines for the Valuation of Mineral Properties– was approved on 9 March 2003 and has since become a reference for the valuation of mineral properties in Canada.[862]

670. The other commonly used set of guidelines is the Code for the Technical Assessment and Valuation of Mineral and Petroleum Assets and Securities for Independent Expert Reports (VALMIN Code). Its stated purpose is "to provide a set of fundamental principles, minimum requirements and supporting recommendations to assist in the preparation of relevant Public Reports on Mineral Assets. The VALMIN Code is based on international good practice as currently employed in the Mineral industry, but allows for professional judgement in certain instances".[863] The VALMIN Code was prepared by the VALMIN Committee, a joint committee of The Australasian Institute of Mining and Metallurgy (AusIMM) and the Australian Institute of Geoscientists (AIG), with the participation of the Minerals Council of Australia (MCA) and other key stakeholder representatives.[864]

671. As noted in the CIMVAL, mineral property valuations are carried out for a variety of reasons, including mergers and acquisitions, initial public offering of stock, preparation of audited financial statements, litigation, expropriation compensation, among others.[865] Both CIMVAL and VALMIN recognize the three main approaches to valuation and provide specific guidance as to the applicable valuation approach depending on the stage of the project.

---

861 CIMVAL Standards and Guidelines 2003, ¶¶ P1.1-P1.3. **C-0196**.

862 *Id.*, ¶¶ P1.5-P1.9.

863 VALMIN Code 2015, p. 6. **C-0195**.

864 *Id.*, p 3.

865 *Id.*, p.15.

672. CIMVAL's and VALMIN's recommendations are summarized in the two tables below. The first one contains CIMVAL's recommendations and the second VALMIN's[866]:

TABLE 1. Valuation Approaches for Different Types of Mineral Properties

Valuation Approach	Exploration Properties	Mineral Resource Properties	Development Properties	Production Properties
Income	No	In some cases	Yes	Yes
Market	Yes	Yes	Yes	Yes
Cost	Yes	In some cases	No	No

TABLE 1

Valuation Approach	Exploration Projects	Pre-development Projects	Development Projects	Production Projects
Market	Yes	Yes	Yes	Yes
Income	No	In some cases	Yes	Yes
Cost	Yes	In some cases	No	No

673. As can be seen, in both cases the use of the income approach –which includes the two methods used by Compass Lexecon to assess damages in this case (DCF and ROV)– is limited to projects or properties in the "development" and "production" stage. For projects in the exploration phase, such as the Project, CIMVAL and VALMIN recommend either the market or the cost approach.

674. To determine whether the Don Diego Project can be classified in the "exploration" or "development" stage it is important to consider the definitions of such categories. CIMVAL defines "Development Property" as: "a Mineral Property that is being prepared for mineral production and for which economic viability has been demonstrated by a Feasibility Study or Prefeasibility Study and includes a Mineral Property which has a Current positive Feasibility Study or Prefeasibility Study but which is not yet financed or under construction."[867] VALMIN, similarly, defines the term "Development Projects" as: "Tenure holdings for which a decision has

866 CIMVAL Standards and Guidelines, p. 22. **C-0196**.

867 CIMVAL 2003, p. 10. Emphasis added. **C-0196**.

been made to proceed with construction or production or both, but which are not yet commissioned or operating at design levels. Economic viability of Development Projects will be proven by at least a Pre-Feasibility Study."[868]

675. Based on these definitions, and the absence of a PFS or FS as of the Valuation Date, it can be concluded that the project was not in the "development stage" as the Claimant contends. WGM confirms in its report that the proper classification for the Project would be "early exploration stage":

> In WGM's opinion, the Don Diego Project had passed the initial stage of exploration but had not yet completed sufficient work to classify the project as an Advanced Exploration project as of the Valuation Date. This opinion is based on the amount of drilling and sample analysis completed as well as the very limited amount of bench scale metallurgical test work completed as of the Valuation date.[869]

676. The absence of a PFS or FS and the classification of the Project in the early exploration stage is an obvious problem for the Claimant, as it would preclude the use of a DCF approach under recognized mining guidelines and practices. This largely explains the Claimant's attempts to characterize the Project as one in the "development stage", and to suggest that the information available as of the Valuation Date was at a PFS level through the numerous expert reports filed with their Memorial. For example:

- At paragraph 388 of its Memorial, Odyssey claims that "[b]ased on these expert opinions [i.e., the opinions of Dr. Selby, Dr. Sheehan, Mr. Gruber, and Mr. Fuller], Professor Spiller and Mr. López Zadicoff concluded that Phase I of the Project is properly classified as a Development Property/Project, and therefore that it should be valued using an income approach." [Emphasis added]
- At paragraph 387 of its Memorial, the Claimant alleges that "[t]he collective opinion of the industry and technical experts is that as of 7 April 2016, the Project was at a Pre-Feasibility level [...]" and then it goes on to quote certain passages from the expert reports of Dr. Selby, Dr. Sheehan, and Messrs. Gruber and Fuller. [Emphasis added]

677. The Respondent maintains that the Project was in the early exploration stage, *inter alia*, because no PFS or FS existed at the time. This fact cannot be rebutted through *ex-post facto* expert reports prepared for the purposes of this litigation that, in any event, would not have been available to the hypothetical willing buyer and seller on 7 April 2016.

---

868 Valmin Code 2015, p. 39. Emphasis added. **C-0195**.

869 WGM Expert Report, ¶ 40, third bullet.

678. The Claimant's position that the Project was in the development stage is also inconsistent with the available contemporaneous evidence, such as the NI 43-101 Study prepared by Dr. Lamb and Odyssey's SEC 10-K filling for 2016. The former places the Project squarely in the exploration stage:

> The Don Diego Phosphorite Project is in the exploration stage with sufficient data to confirm the geology continuity of the deposit and the initial estimation of measured, indicated and inferred resource tonnes of marketable quality phosphate rock concentrates. [...][870]
>
> [Emphasis added]

679. Likewise, as explained in the Quadrant Report, the SEC 10-K filing acknowledges that "we[Odyssey] have invested in marine mineral companies that to date are still in the exploration phase and have not begun to earn revenue from operations."[871] The Quadrant Report also points out that the Claimant's marketing pricing expert (CRU) described the Project as "speculative".[872] It is worth noting that under the U.S. SEC Industry Guides "mining companies in the exploration stage should not refer to themselves as development stage companies in the financial statements"[873].

680. The only contemporaneous assessment of the Project's value is the [redacted] which is not a PFS, and cannot be used to establish the economic viability of the Project. The "Cautionary Note to U.S. Investors" [redacted] should give this Tribunal some pause, especially since Compass Lexecon, like [redacted]

[redacted]

870 NI 43-101 prepared by Dr. Lamb, p. 13 (p. 15 on the Claimant's numbering). **C-0084**.

871 Quadrant Report, ¶ 21 citing Exhibit Quadrant Report-CLEX-7 – Odyssey SEC 10-K Filing, 31 December 2016, p. 8. Emphasis added. **R-0017**.

872 Quadrant Report, ¶ 21.

873 U.S. SEC Industry Guides, p. 31. **R-0154**.

[redacted]

681. This type of warnings corroborates the speculative nature of the Claimants assessment of damages and flies in the face of the requirement of reasonable certainty that applies to damages. The Quadrant Report contains a sensitivity analysis that shows the impact of changing certain assumptions in the Claimant's DCF model. As shown in Figure 4 of the report, applying more realistic assumptions has a significant impact on Compass Lexecon's valuation..[875]

682. The Respondent submits that this Tribunal should take the same approach followed by the Bear Creek tribunal and "*focus on whether, having regard to the factual circumstances of this case, a willing buyer might have been found who would have paid a price calculated by the DCF method, as Claimant alleges*."[876] For the reasons explained above, the Respondent further submits that the short answer to that question is "no".

(2) The available case law does not support the use of DCF in projects in the state of development as the Don Diego Project

683. In addition to the various cases in which the Tribunal reached that a DCF approach is not appropriate in cases where no track record exists, there are two cases involving pre-operational mining projects that are especially relevant to this case: *SA Silver v. Bolivia* and *Bear Creek v. Peru.*

684. *S. A. Silver v. Bolivia* is a case involving the expropriation of a silver mine in Bolivia by means of a Supreme Court Decree ordering the reversal of the claimant's mining concessions (the Reversion). The case is particularly relevant because of its similarities with the present case: the project was at an early stage, the economic viability of the project had not been established through a PFS or FS, it had no reserves, a significant part of its mineral resources was classified as

874 [redacted] **C-0134**.

875 Quadrant Report, ¶¶ 38-47.

876 *Bear Creek Mining Corporation v. Republic of Peru,* ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 598. **CL-0016**.

"inferred", and it involved the use of a novel technology (a metallurgic process in that case). The following paragraph summarizes the findings of the tribunal:

> 823. In sum, the Tribunal finds that, at the time of Reversion, (i) the Project was not at an advanced stage since it only had the PEA 2011 and had not conducted a prefeasibility or feasibility study; (ii) it did not have mineral reserves, but merely resources, most of them inferred; and (iii) there was no certainty that the metals could be economically extracted through the Metallurgical Process. The Tribunal considers that the Project's state of progress cast serious doubt as to its economic viability and, based on the reasons elaborated below, they preclude acceptance of the valuation presented by the Claimant.[877]

685. Also worth noting is that the parties to that dispute acknowledged that the valuation approach depended on the state of exploration or development and that the DCF could not be used given the circumstances:

> 805. The Parties do not dispute that the appropriate valuation approach depends on the state of exploration or development of the relevant mineral property. Similarly, the Parties do not dispute that, based on the categories proposed by CIMVal, the Project would qualify as a "mineral resource property," corresponding to those mineral properties that have "mineral resources" which have not been demonstrated to be economically viable in a feasibility study or a prefeasibility study.[878]
>
> [...]
>
> 826. The case before this Tribunal is about a Project that is not in the production stage and for which it is not possible, as accepted by both Parties, to estimate future cash flows. Bolivia considers that the investment is worth at most what the Claimant invested in the Project and the Claimant considers that its value is substantially higher. It is for the Claimant to establish this higher value with a degree of certainty that allows the Tribunal to conclude that, absent the State's conduct at issue, it is highly probable that the investor would have received the amount it claims.[879]
>
> [Footnotes omitted; emphasis added]

686. Another similarity is that, as of the date of expropriation, SA Silver had completed a Preliminary Economic Assessment (PEA) which the tribunal described as "a preliminary study – a first level study for the economic evaluation of a mining project – based mainly on assumptions which simply indicates whether further exploration should be pursued, without offering any certainty whatsoever as to the economic viability of the project".[880] This is relevant because,

---

877 *S. A. Silver v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, ¶ 823, **CL-0108**.

878 *Id.*, ¶ 805.

879 *Id.*, ¶ 826.

880 *Id.* ¶ 814.

despite the Claimant's attempts to elevate [redacted] to the level of a PFS, it was an internal PEA at best.[881]

687. In *Bear Creek v. Peru*, the tribunal found that a decree enacted by Peru that eliminated the legal prerequisite of the claimant's ownership of mineral concessions in the border region (Supreme Decree 032) constituted an indirect expropriation of the claimant's investment in the Santa Ana silver mining project.[882] In their damage's analysis, the tribunal noted that the Santa Ana project was at an early stage and that it had not received many of the government approvals it needed to proceed:

> 600. The Tribunal notes that the Santa Ana Project was still at an early stage and that it had not received many of the government approvals and environmental permits it needed to proceed. On the basis of the evidence before it, the Tribunal concludes that there was little prospect for the Project to obtain the necessary social license to allow it to proceed to operation, even assuming it had received all necessary environmental and other permits. The Tribunal notes that no similar projects operated in the same area, and there was no evidence to support a track record of successful operation or profitability in the future.[883]

688. Importantly, the tribunal rejected the use of the DCF methodology because the Claimant did not produce any evidence of its ability to generate future profits. The tribunal considered the project "too speculative and uncertain" to allow such method to be utilized:

> 601. Claimant points out that in investment treaty cases some tribunals have endorsed DCF for early-stage projects. In this context, Claimant refers to *Vivendi v. Argentina*, in which, although the tribunal rejected the DCF model, it nonetheless explained how such a model could be accepted in appropriate circumstances. That tribunal noted that an absence of a history of profitability does not absolutely preclude the use of DCF methodology, but clarified the necessity that "*claimants might be able to establish clearly that an investment, such as a concession, would have been profitable by presenting sufficient evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances.*" In the present case, Claimant concedes that to overcome a lack of history of profitability, it would need to produce convincing evidence of its ability to produce profits in the particular circumstances it faced. Such evidence could include experience (of its own or of experts) or corporate records that establish on the balance of probabilities it would have produced profits from the concession in the face of the risks involved.

---

881 WGM Report, ¶ 40, fourth bullet.

882 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶¶ 202 and 429. **CL-0016**.

883 *Id.*, ¶ 600.

> 602. In the view of the Tribunal, such convincing evidence has not been produced by Claimant. Beyond the above-mentioned uncertainties regarding the realization of the Project, the Tribunal notes that, in view of the widespread social unrest related to the Project, Respondent not only issued Supreme Decree 032, but, right after on June 25, 2011, also issued a general suspension of admissions of mining petitions for the Department of Puno by Supreme Decree 033 for a period of 36 months and later continued that suspension by Supreme Decree 021-2014.
>
> 603. A realization and assurance of the profitability of Claimant's Santa Ana Project could therefore not be expected in the foreseeable future, if at all. Thus, Claimant has not fulfilled the test introduced by Claimant itself by its reference to *Vivendi*, as it has not been "*able to establish clearly that an investment, such as a concession, would have been profitable by presenting sufficient evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances*."
>
> 604. In view of the above considerations, the Tribunal concludes that the calculation of Claimant's damages in the present case cannot be carried out by reference to the potential expected profitability of the Santa Ana Project and the DCF method. The Project remained too speculative and uncertain to allow such a method to be utilized. Instead, the Tribunal concludes that the measure of damages should be made by reference to the amounts actually invested by Claimant.[884]

689. Like the Claimant in *Bear Creek*, Odyssey had no proven track record of profitability of mining concessions and had not operated similar projects anywhere else in the world. Hence, the applicability of a DCF cannot be established by considering Odyssey's experience in the mining sector or other similar projects.

(3) The jurisprudence cited by the Claimant does not support the Claimant's position

690. The Claimant argues that the tribunal in *Gold Reserve v. Venezuela* endorsed the "point - that a commodity-based business… lends itself more easily to a lost profits analysis".[885] In support of that proposition, the Claimant misleadingly quotes a passage from the award that leaves out a very significant fact that led the tribunal to that conclusion. The following side-by-side shows the quote as it appears in the Memorial (left) with the complete passage (right) which makes it clear that the tribunal arrived at that conclusion largely because the parties' experts agreed that a DCF could be used in the circumstances of that case:

Although the Brisas Project was never a functioning mine and therefore did not have a	830. [...]Although the Brisas Project was never a functioning mine and therefore did not have a

884 *Id.*, ¶¶ 601-604.

885 Claimants' Memorial ¶ 393.

history of cashflow which would lend itself to the DCF model, the Tribunal accepts [. . .] that **a DCF method can be reliably used in the instant case because of the commodity nature of the product** and detailed mining cashflow analysis previously performed.[886]

[Claimant's emphasis]

history of cashflow which would lend itself to the DCF model, **the Tribunal accepts the explanation of both Dr Burrows (CRA) and Mr Kaczmarek (Navigant)** that a DCF method can be reliably used in the instant case because of the commodity nature of the product and detailed mining cashflow analysis previously performed. **The Tribunal also notes that the experts agreed on the DCF model used, and it is only the inputs that are contested**. Many of these have already been discussed above, with the remaining variables discussed below.

[Footnotes omitted; emphasis added]

691. In addition to the fact that the experts in *Gold Reserve* agreed on the applicability of the DCF methodology, that case can be distinguished on the facts: Unlike ExO, Gold Reserve had concluded feasibility studies[887] and the DCF it submitted only considered proven reserves.[888]

692. The Claimant also relies on *Crystallex v. Venezuela* to argue that international tribunals have accepted that "income in mining projects can be forecasted with a reasonable degree of certainty".[889] Specifically, the Claimant highlights the following passage from Crystallex:

> The Tribunal thus accepts that predicting future income from ascertained reserves to be extracted by the use of traditional mining techniques – as is the case of Las Cristinas – can be done with a significant degree of certainty, even without a record of past production.[890]

693. In the present case there were no "ascertained reserves" and the extraction was not going to be done through traditional mining techniques. Under the Crystallex tribunal's analysis, a conclusion that predicting future income in this case could be done with a significant degree of certainty is nothing more than an illusion.

694. Moreover, in *Crystallex*, the tribunal used an income approach to assess damages, notwithstanding that the mine had not started operations because the investor: (i) demonstrated its future profitability through feasibility studies that were approved by Venezuelan authorities; (ii)

---

886 Claimants' Memorial ¶ 393 citing *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)09/1, Award, 22 September 2014, ¶ 830, **CL-0056**.

887 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)09/1, Award, 22 September 2014, ¶ 833. **CL-0056**.

888 *Id.*, ¶¶ 691 and 731.

889 Memorial, ¶ 394.

890 *Id.*

had proven and probable reserves, and; (iii) the property was considered a "development property":

> 878. […] During the years in which it was active on the ground, Crystallex had completed the exploration (drilling and testing) activities and the feasibility studies produced by the Claimant (and approved by the Ministry of Mines) show that that the nature of the Las Cristinas deposit was well known. In particular, the MDA 2007 Technical Report confirmed that Las Cristinas had proven and probable reserves estimated at 16.86 million ounces of gold in situ, and measured and indicated resources of 20.76 million ounces and inferred resources of 6.28 million ounces. The Tribunal sees no reason to cast into doubt the accuracy of the studies that those well-known consultants prepared contemporaneously for the Claimant throughout the years. As noted by the tribunal in *ADC v. Hungary*, a business plan "constitutes the best evidence before the Tribunal of the expectations of the parties at the time of expropriation for the expected stream of cash flows"
>
> [...]
>
> 884. The CIMVal Guidelines define "development property" as "a Mineral Property that is being prepared for mineral production and for which economic viability has been demonstrated by a Feasibility Study or Prefeasibility Study and includes a Mineral Property which has a Current positive Feasibility Study or Prefeasibility Study but which is not yet financed or under construction". It is undisputed that the Ministry of Mines had approved Crystallex's Feasibility Study on 6 March 2006. Las Cristinas should thus be considered a "development property" within the meaning of the Guidelines (as opposed to a less advanced "exploration property"). In relation to "development properties", the CIMVal Guidelines advise in favor of the application of income- and market-based methodologies, and against the use of cost-based methodologies.[891]
>
> [Emphasis added]

695. The *Crystallex* case, if anything else, demonstrates the importance of the stage of the project at issue for the decision of whether to use an income approach method to determine damages.

[891] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 878 and 884. **CL-0042**.

b. Other considerations for rejecting a DCF approach in this case

696. The Quadrant and WGM reports identify many other assumptions and flaws in the DCF valuation submitted by the Claimant. The Respondent invites the Tribunal to read both reports with care but nevertheless, offers the following summary of some of the key points[892]:

On the size of the Don Diego Deposit and classification of the mineral resources

- Mr. Lamb's continuity assumptions for the deposit are unsupported. His report does not provide statistical summary tables or plots for all variables used in the estimation of resources; maps and cross-sections for estimation data; and evidence that geostatistical methods were used to evaluate statistics for the project.[893]
- Mr. Lamb's classification of the mineral resources fail to meet the requirements of CIM Mineral Resource and Mineral Reserve Guidelines and the specific guidelines regarding industrial minerals, por example, a) mineral resources are insufficiently defined based on CIM definitions to qualify as measured or indicated resources; b) the classification of resources as inferred resources (the lowest confidence level) is questionable due to significant missing sample data (24%); and c) the classification of resources as measured or indicated fails to recognize the associated requirements and conditions related to such classifications.[894]

On the estimated demand and other market considerations

- [redacted] This is simply not credible from a newcomer to the industry, particularly given the fact that most phosphate producers are vertically integrated.[896] WGM is of the view that this is an example of the classical error in market analysis: "The market is size X and our production will be only size Y, therefore there is a market for the product".[897]
- The Claimant has not provided any evidence in support of its assumption on the projected demand. CRU identifies Fertinal and Agrium as potential customers but neither Odyssey nor ExO have a demonstrated the existence of a market for its product

---

892 This is not and exhaustive summary of the Respondent's expert's opinions. For a complete explanation of these and other issues please refer to the WGM and Quadrant expert reports. For a more complete explanation please refer to the Quadrant Report, Section III at ¶¶ 31 *et seq*.

893 WGM Report, ¶¶ 65-67.

894 *Id.*, ¶¶ 47-78.

895 [redacted]

896 WGM Report, ¶ 80.

897 *Id.*, ¶ 99.

(manifested by documented Letters of Intent ("LOI") or Memoranda of Understanding ("MOU") with any potential buyers.)[898]

- CRU's hypothesis that "Fertinal would have shut down its captive San Juan de la Costa mine" and instead used Don Diego's product is also not realistic.[899] Quadrant observes that it was unlikely that Fertinal would have closed its own mine and source phosphate from ExO. [900]

Prices

- Quadrant concludes that "as of the Date of Valuation no potential buyers for the Don Diego's products were found, and CRU's opinions about who those buyers could be are entirely speculative.[901]"

Costs and production

- The Don Diego project involves novel production concepts and unproven technology compared to phosphate conventional mining: "The lack of any testing and significant basic engineering in the project design and operating plans has left the project with major exposure to technical issues that could impact assumed capital and operating costs and potential project feasibility".[902]
- "The projected time frame for project development to production as outlined [redacted] does not reflect the level of geological understanding, status of metallurgical test work, and basic engineering of the process design or start-up requirements as of the Valuation Date".[903]
- "Compass Lexecon's timeline is unrealistic. It assumes that other necessary milestones including obtaining all the necessary financing for the Project, securing OTAs, and completing all the procurement and construction arrangements – would be achieved in seven months. This is speculative and unrealistic. It is implausible that financing would be provided without a finalized construction contract and OTAs. Hence, these milestones would need to be sequential, not contemporaneous to the project design finalization as Compass Lexecon assumes. Therefore, its timeline is excessively short."[904]

697. The Quadrant Report also identifies various flaws in the DCF analysis performed by Compass Lexecon that would disqualify it for the purposes of assessing damages in this case, even in the unlikely event that this Tribunal finds that an income approach is acceptable. The

898 *Id.*, ¶¶ 12, 94-97 and 116.

899 Quadrant Report, ¶ 130.

900 *Id.*, ¶ 130-131.

901 *Id.*, ¶ 135.

902 WGM Report, ¶ 115.

903 *Id.*, ¶ 110.

904 Quadrant Report, ¶ 120.

Respondent believes that it is not worth belaboring on this point because, based on the overwhelming evidence and case law, a DCF approach should not be used in this case. However, if this is something the Tribunal wishes to explore, the defects in the Claimant's DCF are clearly explained in Annex A of the Quadrant Report (¶¶ 111 *et seq*).

4. Respondent's alternative market approach valuation

698. Since Odyssey is a publicly traded company and sufficient information is available, Quadrant proposes an alternative valuation based on Odyssey's market capitalization. This methodology is a market approach that is approved by CIMVAL standards and guidelines for the purposes of valuing mineral properties in the exploration stage.[905]

699. Quadrant notes that this is the same approach used by Compass Lexecon in its "reasonability analysis". However, Dr. Flores –the author of the Quadrant Report– takes issue with several assumptions and adjustments made by Compass Lexecon including, *inter alia*: starting with the distorted market capitalization that existed as of the Valuation Date; the 50% premium that Compass Lexecon adds to account for the MIA approval; the 32.3% premium that Compass Lexecon adds on account of the controlling interest[906], and; ignoring the short selling of the stock and liquidity constraints faced by Odyssey.

700. Quadrant first criticizes Compass Lexecon's starting market capitalization of USD $ 65.5 million. Dr. Flores observes that the price of Odyssey's shares and therefore, its market capitalization, "more than doubled, from less than US$20 million to about US$40 million in just one week, between 29 February and 7 March."[907] Quadrant attributes this artificial increase to the airing of a show called "Billion Dollar Wreck" by the History Channel, noting also that Odyssey did not publish press releases or technical reports related to the Project during that time and therefore, nothing else could explain the increase.[908]

701. Because this upswing was unrelated to the Project, and the price of the shares reverted to its previous level immediately after the end of the show, Quadrant is of the view that this temporary

905 *Id.*, ¶ 48.

906 Compass Lexecon Report, Table 8 at p. 64 (see "Acquisition Premium").

907 Quadrant Report, ¶ 59.

908 *Id.* ¶ 59.

distortion should be excluded from the analysis and the starting point should be Odyssey's market capitalization as of 29 February 2016 (USD $19.1 million).

702. Compass Lexecon also assumes that the MIA would have been approved. As explained in previous sections, this assumption is incorrect because it is incompatible with the measure of compensation that the Claimant argues –and the Respondent agrees– would be applicable in this case if the Tribunal finds that an indirect expropriation took place. That measure of compensation is the FMV of the Project determined "immediately before SEMARNAT denied the MIA", that is, without the presumption that the MIA had been granted. However, even if this obvious problem were to be ignored, Dr. Flores, nevertheless, disagrees with the 50% premium that Compass Lexecon adds on account of the MIA approval. The Quadrant Report explains that such increase in share prices occur when certain events are unexpected. Hence, the application of this kind of premiums "cannot be done mechanically based on averages of what has happened to other companies based on average of what has happened in other companies, as Compass Lexecon has done"[909] and therefore, "[c]onsidering the effects of permitting on the market capitalization of Odyssey requires assessing which expectations were embedded in Odyssey's share price and market capitalization".[910]

703. Dr. Flores also disagrees with the addition of a control or acquisition premium (32.3%) because, as noted in the Compass Lexecon report: "stock prices represent transactions of individual shares that do not convey control over OMEX, nor over the Don Diego Project."[911] Moreover, Dr. Flores observes that negative premiums also occur "because large buyers are able to conduct due diligence on the company's business and learn much more about it than a retail buyer who only has access to publicly available information, such as company press releases, which often tend to be overly optimistic and gloss over the shortcomings of the company"[912]

704. Finally, Dr. Flores disagrees with Compass Lexecon that short-selling activity and liquidity constraints can be "wished away" when valuing the Project and, therefore, also disagrees that the stock market capitalization of OMEX does not provide a reliable basis to determine the fair market

909 Quadrant Report, ¶ 82.

910 Quadrant Report, ¶¶ 81-83.

911 Compass Lexecon Report, ¶ 121(a).

912 Quadrant Report, ¶ 71.

value of the Don Diego Project.[913] In his view, both are material facts that must be considered in the valuation.

5. The 15% premium on account of the alleged strategic value of the Project is completely speculative and without support

705. The Claimant increases Compass Lexecon's valuation by 15% based on the alleged project's strategic value because of certain features that, according to it, enhances the value of the Project in ways that are not captured by the DCF of Phase I or the option value of Phase II.[914] According to the Claimant, among these features are Don Diego's size, location close to the Americas and with easy access to the Pacific Rim Countries, and its cost structure. [915] The only evidence that the Claimant submits in support of the 15% increase is Mr. Longley's witness statement. Mr. Longley opines that from the perspective of a potential purchaser, the Project's intrinsic features increases its value and "make it a important strategic play, both offensively (to secure low-cost phosphate resources in a geopolitically advanced location) and defensively (to prevent a competitor from capitalizing on a project that has distinct advantages in location, costs, grade an environment impact".[916] Furthermore, he contends that:

> The valuation method used by Compass Lexecon does not take into account the strategic value of the Don Diego Project. I estimate that the strategic value of this Project would accrue a 15% premium above the base valuation performed by Compass Lexecon.
>
> I estimate the premium based not only on the attributes listed above, but on the fact that the resources is so significant in size that it can produce product for a generation with the current, measured, indicated and inferred resources. [917] [Emphasis added]

706. It is telling that it is a witness rather than the Claimant's damages expert who recommends the addition of this premium which begs the question: why did Compass Lexecon not consider this premium in its assessment? Regardless of the answer to the foregoing question, Mr. Longley does not explain, let alone justify, how he arrived at this 15% premium which hinders the Respondent's ability to adequately analyze the issue and prepare a response. Mr. Longley's views on the strategic value of the Project are insufficient evidence to support a [redacted]

913 *Id.*, ¶ 89.

914 Memorial, ¶¶ 414-415.

915 *Id.*, ¶¶ 408 and 412.

916 Witness Statement of Mr. Longley, ¶ 32.

917 Witness Statement of Mr. Longley, ¶¶ 33-34. Emphasis added.

[redacted] the Claimant's own valuation of the Project. The Claimant has not established that the Project was economically viable to begin with, let alone that it had any strategic value.

707. Quadrant further observes that both the premium for the alleged "strategic value" of the Project, as well as the value of the "lost opportunity" addressed in the next section, would be included in Quadrant's market approach valuation of Odyssey.[918]

6. The damages claimed on account of the alleged "lost opportunity" are likewise speculative and unsupported

708. The Claimant also claims additional damages amounting [redacted] on account of ExO's alleged lost opportunity to explore and develop parts of the Don Diego deposit that were not included in the NI 43-101 Report prepared by Dr. Lamb. The Claimant argues that "[b]ut for the denial of the MIA, Odyssey and Exo would have commenced a new coring campaign to further explore, quantify and characterize the resource."[919]

709. There is absolutely no merit to this claim. The Claimant not only speculates about the profitability of the operation but on the existence, volume, and value of additional resources within its concessions. Moreover, like in the case of the premium for strategic value discussed in the previous subheading, the entirety of this claim relies on the opinion of Mr. Longley –i.e., a witness, not an independent expert– rather than the view of the Claimant's damages expert. The Respondent notes that if there was indeed any value in this alleged "lost opportunity", there would be no reason not to reflect it in the FMV of ExO immediately before the denial of the MIA. Yet, Compass Lexecon did not consider this alleged additional source of value.

710. The extent of the analysis backing this claim is Mr. Longley's back-of-the-envelope calculation described at paragraph 420 of the Memorial:

> 420. To quantify this lost opportunity, Mr. Longley assigns a reasonable value for the *in situ* contained P2O5 of [redacted] and multiples it by the [redacted] of contained P2O5 Odyssey estimates the Concessions contain. This result gives a value of [redacted] for the lost opportunity of exploring and developing the further parts of the Don Diego Deposit not included within the NI 43-101 Technical Report.[920]

---

918 Quadrant Report, ¶ 49.

919 Claimants' Memorial ¶ 418.

920 *Id.*, ¶ 420.

711. By any measure this is not adequate support for a [redacted] head of damages. No tribunal would award damages in these circumstances.

7. Tax gross-up

712. The Respondent submits that the tax gross-up requested by the Claimant is inappropriate because it is based on the free cash flows net of taxes that were projected under the DCF approach which, as explained in previous sections, it is not an appropriate methodology in the circumstances of this case. In any event, the amount of the gross-up would depend on the tax position of ExO at all relevant times and that cannot be determined at this time without additional information from the Claimant. ExO likely has accumulated losses over the years which it could use to offset taxes payable on a potential award. In other words, part of the gross-up that the Claimant is requesting would likely not be paid in taxes by ExO and therefore constitutes a windfall for the Claimant.

713. The Respondent also observes that the Claimant's expert did not considered the mandatory 10% of PTU[921] that would have applied to ExO's profits as a Mexican enterprise. However, this additional discount would only apply in case the Tribunal decides that an income approach should be used in this case. PTU, while not properly a tax, is calculated as 10% of the taxable base used to calculate income tax.[922] This omission artificially increases cash flows and consequently the estimation of damages.

8. Interest

714. As noted in the Quadrant Report, Compass Lexecon applies a 13.95% rate with annual compounding to calculate pre-award interest. This outrageously high interest rate explains why approximately 44% of the damages is attributable to interest. Indeed, from the USD $2.4 billion claimed by Odyssey, only USD $524 million correspond to the alleged FMV of the Project as of the Valuation Date.

715. The rate is based on Compass Lexecon's estimate of the Project's WACC and as observed by Dr. Flores, it is inappropriate from an economic perspective. In the opinion of Dr. Flores, the

---

921 PTU is the Spanish acronym for Worker's Profit Share ("Participación de los Trabajadores en la Utilidad").

922 *See* "*Resolución del Consejo de Representantes de la Quinta Comisión Nacional para la PTU*", 3 February 2009, **R-0097.**

appropriate rate should be a short-term risk-free rate, such as the yield one-year U.S. Treasury Bill. As explained in the Quadrant Report:

> 103. Had Claimant received additional funds in, say, 2016, it would be faced with the decision of what to do with those funds. By applying the WACC to those past amounts, Compass Lexecon is assuming that any funds received from this Arbitration would have been reinvested in endeavors with the same risks as Don Diego. Had Claimant done so, those risks could have materialized as negative returns. But Claimant was never exposed to those risks, and thus it would be wholly inappropriate to compensate them for risks they never faced.[923]

716. The Respondent further notes that the only guidance in the NAFTA as to the applicable interest rate is provided in Article 1110(4) which provides, in the context of compensation owed for an expropriation, that "[i]f 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". At the risk of stating the obvious, the Project's WACC is neither a "commercial" rate nor is it a "reasonable" rate for USD denominated amounts.

717. For a complete explanation of why the rate is not appropriate, the Respondent refers the Tribunal to the Quadrant Report.[924]

V. REQUEST

718. The Respondent requests this Tribunal to order the Claimant to pay the costs and expenses it has incurred as a result of this arbitration, including:

(i) the part of the Tribunal's expenses that corresponds to Mexico;

(ii) the part of ICSID administrative expenses that corresponds to Mexico;

(iii) the fees of Mexico's external legal advisers; and

(iv) the payment of experts hired by Mexico.

719. The Respondent is entitled to an award of costs in its favor for the following reasons:

- The Respondent did not violate any of its obligations under NAFTA.
- The Claimant has submitted a claim without merit to try to obtain an improper benefit.

---

923 Quadrant Report, ¶ 103.

924 *Id.*, Section VI, ¶¶ 102-110.

VI. CONCLUSION

720. Pursuant to the foregoing, this Tribunal is respectfully requested to dismiss Claimant's claim in its entire part, as well as the corresponding determination of the payment of costs in favor of the Defendant in accordance with the request for costs referred to *supra*.

23 de febrero de 2021

Respectfully submitted

El Director General de Consultoría Jurídica de Comercio Internacional

Signature

Orlando Pérez Gárate