BEFORE THE HONORABLE ARBITRAL TRIBUNAL ESTABLISHED UNDER CHAPTER XI OF THE NORTH AMERICAN TRADE AGREEMENT (NAFTA) AND THE TREATY BETWEEN MEXICO, THE UNITED STATES AND CANADA (USMCA)

SILVER BULL RESOURCES, INC.
(CLAIMANT)
C.
UNITED MEXICAN STATES,
(RESPONDENT)
(ICSID Case No. ARB/23/24)

COUNTER-MEMORIAL

BY THE UNITED MEXICAN STATES:
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Courtesy Translation

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GLOSSARY

Abbreviation	Full name
2000 Contract	Rights transfer agreement between Metalín and Mineros Norteños signed on August 30, 2000.
Concession Agreements	It refers jointly to the 1997 Contract and the 2000 Contract.
AIA	Environmental Impact Authorization.
AMLO	Andrés Manuel López Obrador.
Amparo 4/2016	Amparo indirecto lawsuit 4/2016 filed by Metalín on April 6, 2016 before the First Unitary Court of Chihuahua.
Amparo 750/2019	Constitutional remedy 750/2019 filed by Mineros Norteños before the Third Collegiate Court of Chihuahua.
Appeal 7/2015	Appeal filed by Metalín on May 11, 2015 before the Second Unitary Court of Chihuahua.
Appeal 12/2017	Appeal filed by Mineros Norteños before the Second Unitary Court of Chihuahua.
ILC Articles	Articles of the International Law Commission on the International Responsibility of States.
Force Majeure Notice	Communication sent by SVB to South32 on October 11, 2019.
BBVA	BBVA México, S.A., Institución de Banca Múltiple, Grupo Financiero.
Chapter XI	Chapter XI of the NAFTA.
ICSID	International Center for Settlement of Investment Disputes.
CJF	Federal Judiciary Council.
CNPP	National Code of Criminal Procedures.
Valdez concessions	Mining concessions named La Perla, La India and La India Dos.
CONAGUA	National Water Commission.
1997 Contract	"Exploration and unilateral promise of sale contract" signed by Star Morning and Mineros Norteños on August 30, 1997.
Contract with the Valdez family	Promise of assignment of rights agreement entered into by the Valdez and Metalín on April 21, 2010.
Option Agreement	Agreement signed on June 1, 2018 between the Claimant and

	South32.
CPEUM or Mexican Constitution	Political Constitution of the United Mexican States.
VCLT	Vienna Convention on the Law of Treaties.
Respondent, Mexico or Mexican State	United Mexican States.
Claimant, Silver Bull or SVB	Silver Bull Resources Inc.
DOF	Official Journal of the Federation.
United States	United States of America.
Termination Date	The termination date of the NAFTA is July 1, 2020.
Valuation Date	August 31, 2021.
Ha	Hectares.
Metalín facilities	Offices, machinery and personal property related to its operation in Sierra Mojada.
Eighth District Judge of Coahuila	Eighth District Judge in the State of Coahuila.
First Civil Judge of Morelos	First Civil Judge of the Judicial District of Morelos.
First Civil Judge of Torreon	First Judge of First Instance in Civil Matters of the Judicial District of Torreon Coahuila.
Second Civil Judge of Torreon	Second Judge of First Instance in Civil Matters of the Judicial District of Torreon, Coahuila.
Commercial lawsuit 2/2015	Commercial lawsuit filed by Mineros Norteños against Metalín dated May 2014.
Mining Law	Mining Law regulating article 27 of the CPEUM, published on June 26, 1992 in the Official Gazette of the Federation.
LGEEPA	General Law of Ecological Balance and Environmental Protection.
LGDFS	General Law of Sustainable Forestry Development.
LGPGIR	General Law for the Prevention and Integral Management of Waste.
LOFGC	Organic Law of the Attorney General's Office of the State of Coahuila de Zaragoza.

The Valdez or Valdez family	Jaime Valdez Farias, Maria Asuncion Perez and Antonio Valdez Perez.
Lots	Land included in the Unificación Mineros Norteños and Vulcano concessions.
Metalline	Metalline Mining Company.
MIA	Environmental impact assessment.
Minera Metalín, Metalín or the subsidiary	Minera Metalín, S.A. de C.V.
Mineros Norteños or MN	Sociedad Cooperativa de Explotación Minera "Mineros Norteños", S.C.L.
MXN	Refers to Mexican pesos.
NMT or MST	Minimum Standard of Treatment in accordance with customary international law.
CLC Interpretative Note	2001 NAFTA Free Trade Commission Interpretative Note FTC Interpretative Note.
NSR	Net smelter return royalty.
Objection of Incompetence	Argument presented by Metalín in lawsuit 2/2015 to challenge the jurisdiction of the First Civil Judge of Morelos.
Objection of Term or Condition	Argument presented by Metalín in lawsuit 2/2015 to argue that Mineros Norteños lacked standing.
Prescription Objection	Argument presented by Metalín in lawsuit 2/2015 pointing out that Mineros Norteños' action had been filed outside the legal deadline.
Limitation Period	The maximum period of three years established in the NAFTA for submitting a claim to arbitration.
PJF	Federal Judiciary.
Plenary of the Regional Court of Coahuila	Regional Chamber of the Superior Court of Justice of Cohuila.
First Unitary Court	First Unitary Court of Chihuahua.
Project, Sierra Mojada Project or the investment	Sierra Mojada Project through which the Claimant intended to explore and exploit 20 mining concessions of which it claims to be the owner.
FPS	Full Protection and Security.

United Kingdom	United Kingdom of Great Britain and Northern Ireland.
RPM	Public Mining Registry.
RPP	Public Registry of Property of Coahila.
SCJN	Supreme Court of Justice of the Nation.
RFA	Request for Arbitration.
Section A	Section A of Chapter 11 of the NAFTA.
Section B	Section B of Chapter 11 of the NAFTA.
Second Unitary Court	Second Unitary Court of Chihuahua.
SEGOB	Ministry of the Interior.
SEMARNAT	Ministry of Environment and Natural Resources.
South32	South32 International Investment Holdings Pty Ltd.
Star Morning	Minera Star Morning, S.A. de C.V.
Third Collegiate Court of Chihuahua	Third Collegiate Court in Civil and Labor Matters of Chihuahua
FET	Fair and Equitable Treatment.
NAFTA	North American Free Trade Agreement.
USMCA	Treaty between the United Mexican States, the United States of America and Canada.
Superior Court of Justice of Coahuila	Superior Court of Justice of the Judicial Branch of the State of Coahuila.
US $	U.S. dollars.
FMV	Fair market value.

I. INTRODUCTION

A. Summary of Claimant's Claim

1. In its Memorial, Claimant seeks to convince the Tribunal of a history of violence, political motivations and lack of order in the Municipality of Sierra Mojada that resulted in the loss of its investment in the mining project located in Sierra Mojada, Coahuila, Mexico. Claimant asserts that the social demonstrations initiated by community members belonging to the Mineros Norteños cooperative were the direct cause of its inability to continue developing the Sierra Mojada Project.

2. However, as developed in this Counter-Memorial, the social problems related to Mineros Norteños arose from SVB's failure to comply with its commitments to the Sierra Mojada community. Since 1997, SVB had generated expectations in the community of Sierra Mojada about the operation of the mining project in the short term. These expectations were the reason why the members of the Mineros Norteños cooperative agreed in 1997 and 2000 to sign contracts for the assignment of rights, through which the Claimant obtained the mining concessions that make up the Sierra Mojada Project.

3. Specifically, SVB generated expectations in the community of Sierra Mojada and its inhabitants that *(i)* a mining project would be developed and put into operation no later than 2001, *(ii)* the Project would generate royalties of up to USD$ 6'875,000 to be distributed among the members of the Mineros Norteños cooperative, and *(iii)* jobs and a strong social investment would be generated in favor of the community. The Sierra Mojada community waited for 22 years for SVB to comply with the commitments it had made at the time of signing the assignment of rights contracts.

4. As explained throughout this Counter-Memorial, SVB did not comply with its commitments and, seemingly, never intended to do so. Its business, according to its own description, is limited to the exploration of the Project and not to its exploitation or operation.

5. Claimant seeks to convince this Tribunal that the claims of the Sierra Mojada community are illegitimate and those of Mineros Norteños in particular are nothing more than a kind of "extortion" to obtain an undue benefit. However, as developed *infra*, in 2015 a District Judge recognized that the Claimant had indeed agreed to a four-year term in the 1997 Contract, counted from the acquisition of the rights to the mining concessions, to start exploration and production

works and, with that, the obligation to pay royalties to Mineros Norteños was confirmed. However, Mineros Norteños' claim was rejected solely due to a statute of limitations issue.

6. This situation made the Mineros Norteños impatient, who had "trusted the company and the word of its representatives, who gave us their word".[1] Mr. Fraire, a member of the cooperative, explains in his witness statement that in the absence of means to subsist, they sought to reach an agreement with the Claimant. The evidence shows that the Claimant decided not to consider the requests of the Mineros Norteños seriously nor did it make serious offers to negotiate a solution to the social problems.[2] Instead, it decided to abandon the Project facilities and suspend all activities. This, despite having an Option Agreement in place with South32. The reason behind this decision is simple.

7. As explained below, during 2015, two members of the Sierra Mojada community, who were not involved in this arbitration, initiated legal proceedings against Metalín, SVB's Mexican subsidiary, for non-payment of a promise of assignment of rights agreement. Minera Metalín refused to pay its debts voluntarily, despite having received a court order. As a result, control over several assets related to the Sierra Mojada Project will eventually pass to a third party due to several liens.

8. In resolving this case, the Tribunal must take into account the Claimant's conduct and its level of participation in the generation and maintenance of the dispute with the members of the Sierra Mojada community. The question it must resolve is whether SVB took such actions as were within its power to resolve a conflict that was generated by its own failures to live up to its expectations of the Sierra Mojada community.

9. The discourse with which the Claimant raises its claim is worrisome and casts doubt on the proper functioning of the investor-State dispute settlement system by pitting the interest of the system as an investment protection mechanism against the general interest of the community in which an investment is established. One thing is clear. The investor-state dispute settlement system cannot serve as an insurance policy against social problems generated by the investor itself, nor can it favor investors whose record of conduct shows a strong disinterest in contributing to the

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1 Witness Statement of Mr. Fraire, ¶ 12.

2 Witness Statement of Mr. Fraire, ¶ 24.

economic development of the community in which they decide to establish themselves. There are fundamental backgrounds in this case that it is essential to evaluate objectively. This includes, of course, a pattern of conduct by SVB and its subsidiaries, their relationship with the local communities of Sierra Mojada, and their responsibility for creating and exacerbating social conflict.

10. The situation before this Tribunal is clear. The Claimant seeks to recover a business that it could not develop on its own and that it lost as a result of its own business decisions.

11. In this Counter-Memorial, the Respondent contests the allegations presented by the Claimant. In addition, this Memorial is accompanied by the expert reports of Messrs. Carlos del Razo Ochoa (on environmental and regulatory law) and Tiago Duarte-Silva (on damage valuation). Respondent's approach to this brief is explained below.

12. *First*, it refutes those facts that the Claimants have erroneously presented in their Memorial, and points out some facts relevant to this dispute. *Second,* the Respondent presents its objections to the Tribunal's jurisdiction. *Third,* the Respondent refutes the arguments relating to the alleged NAFTA violations. *Fourth*, in the alternative, Mexico submits a correct quantification of damages for the alleged breaches of the Treaty.

B. Facts

13. The parties to this dispute are Silver Bull Resources Inc. (SBV) and the United Mexican States. SVB argues that it conducts business in Mexico through a Mexican company named Minera Metalín, S.A. de C.V. of which it owns 100% of the capital stock.

14. The present dispute arises from a dispute between Metalín and Sociedad Cooperativa de Explotación Minera Mineros Norteños, S.C., located in the municipality of Sierra Mojada, Coahuila, Mexico, within the northwestern region of the country. The dispute between these two entities arises from the payment of approximately US $7 million in royalties that Metalín agreed to pay to Mineros Norteños in exchange for the rights associated with two mining concessions held by Mineros Norteños.

15. For further context, in 1997, Star Morning S.A. de C.V. (Star Morning) - Metalín's predecessor - entered into an exploration and unilateral promise of sale agreement with Mineros Norteños (1997 Contract) to explore, for three years, the mineral deposits comprised in two mining

concessions, owned by Mineros Norteños.[3] The 1997 Contract also included a "unilateral promise of sale" whereby Mineros Norteños granted Star Morning the option to acquire the mineral rights derived from such concessions for US$ 3.6 million plus the payment of a royalty equivalent to 2% of the "net amount of the smelter settlements or first sale and purchase invoices", up to an amount equivalent to US$ 10.47 million.[4] This "purchase option" could be exercised during the term of the agreement, which was for three years.[5] The 1997 Contract also records Star Morning's commitment to use its best efforts to "bring the Lots [*i.e.*, the concessions] into production" within four years from the execution of the agreement.[6]

16. On August 30, 2000, Metalín and Mineros Norteños entered into a second rights transfer agreement ("2000 Contract", and together with the 1997 Contract the "Concession Agreements") whereby Metalín decided to exercise its option to purchase under the 1997 Contract. In exchange for the two concessions, Metalín agreed to pay MN a consideration consisting of an initial payment of US$ 3.6 million, plus royalty payments equivalent to 2% of the value of what was sold up to an amount of US$ 6.9 million, once the mine went into production.[7] It should be noted that this royalty amount, although significantly reduced from the amount originally agreed in the 1997 Contract, still constituted approximately two-thirds of the total consideration payable by Metalín to MN for the concessions.

17. Although Star Morning had committed to reach the productive phase within four years from the date of execution of the 1997 Contract, no significant progress was ever made on that front. By May 2014, after more than a decade of waiting in good faith for Metalín to honor its contractual commitments, the desperation of Mineros Norteños was untenable, taking the decision to resort to national courts to demand payment of royalties owed. Thus, on May 20, 2014, Mineros Norteños filed a commercial lawsuit against Metalín for breach of the 2000 Contract. The lawsuit was unsuccessful because, according to the Commercial Code, Mineros Norteños had a 10-year term to claim the breach of contract and that term was time-barred.

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3 1997 Contract, Clause One, p. 2. **R-0002**.

4 1997 Contract, Third & Fifth Clauses, pp. 2-3. **R-0002**.

5 1997 Contract, Clause Three, p. 2. **R-0002**.

6 1997 Contract, Clause Fifth, p. 3. **R-0002**.

7 2000 Contract, Clause Seven, p. 3. **C-0009**.

18. Claimant alleges that the various Mexican courts that heard the commercial lawsuit and other proceedings brought by Mineros Norteños found in favor of Metalín. However, Claimant fails to mention that such courts also determined that Metalín *(i)* had the obligation to pay royalties to Mineros Norteños and to start mining operations within a period of four years from the date of execution of the 1997 Contract, which implied starting to pay royalties to MN within the same period, and *(ii)* had failed to comply with such obligation. Despite this, the passage of time and the consequent statute of limitations did not allow the Mexican courts to resolve the legal and social problem faced by Mineros Norteños.

19. In September 2019, faced with the impossibility of resolving the dispute before the Mexican courts due to the statute of limitations on the claim, Metalín's lack of seriousness in its proposals and the suffering and hopelessness faced by the members and families of Mineros Norteños, the cooperative decided to initiate a social demonstration - which Claimant calls a "blockade" - to demand the payment of royalties. Mineros Norteños made several proposals to Metalín, which were summarily rejected and interpreted by Claimant as attempts at extortion. Apparently, Claimant considers it fair and proper to explore the properties indefinitely at the expense of Mineros Norteños, who, today, 27 years after the execution of the 1997 Contract, are still awaiting payment of approximately two thirds of the consideration originally agreed for the concessions. The economic and social prosperity promised to Mineros Norteños by Claimant has simply not been delivered.

20. In that context, this arbitration arises because Claimant alleges that Mexico, by its "passivity" in the face of the so-called "blockade" of Mineros Norteños, and the consequent withdrawal of financing for the Project by South32, SVB's financing partner, has expropriated Claimant's investment in breach of NAFTA Article 1110. It further alleges that Mexico has breached the obligation to provide treatment in accordance with Article 1105 and Articles 1102 and 1103, respectively. For all these violations, Claimant claims a total of US$ 362.7 million plus pre- and post-award interest. This amount, according to Claimant, corresponds to the fair market value (FMV) of its investment as of August 30, 2022. None of this is supported, as will be seen in this Counter-Memorial and throughout this arbitration.

C. Jurisdiction

21. The Respondent raises three objections to the Tribunal's jurisdiction. On the one hand, an objection *ratione temporis* in relation to the claim for breach of NAFTA Article 1105 (Minimum Standard of Treatment). Respondent contends that, as the treaty text clearly indicates, the three-year limitation period under Articles 1116(2) and 1117(2) is to be counted from the time the investor "*first* had knowledge or should have had knowledge of the alleged breach, as well as knowledge that it suffered loss or damage".

22. Since Claimant submitted its claim to arbitration on June 28, 2023, in order for it to be cognizable by the Tribunal, the *dies a quo* or "cut-off date" in this case would have to be June 28, 2020. However, the Respondent considers that the Claimant had (or should have had) knowledge of the alleged breach and that it suffered damages as a result thereof before that date; during the 9 months between the date of the Second Blockade and June 28, 2020. Therefore, the conclusion that the Tribunal will readily reach is that the claim for breach of NAFTA Article 1105 is time-barred.

23. On the other hand, Mexico raises an objection *ratione temporis* and *ratione voluntatis* in relation to the alleged breach of Article 1110 (Expropriation). Simply put, such a claim cannot be submitted to arbitration under Annex 14-C of the USMCA because the alleged breach occurred at a date when the Respondent was no longer subject to the obligations of NAFTA Article 1110. As the Tribunal will surely bear in mind, the NAFTA was terminated on July 1, 2020 and, as of that date, the three Parties to the Treaty ceased to be bound by their obligations. Contrary to Claimant's apparent contention, Annex 14-C *does not* extend the term of the obligations of Section A of NAFTA Chapter 11 (Section A) for three years from the date of termination of NAFTA.

24. Finally, Respondent raises an objection *ratione materiae* on the grounds that Claimant *(i)* has not demonstrated that it maintained control and ownership over a covered investment, *(ii)* Respondent's interest in the Option Agreement is not an investment covered Article 1139 and *(iii)* the Option Agreement is not an investment under the ICSID Convention because it does not meet the *Salini* test.

25. But, even if this Tribunal were to dismiss these three objections and determine that it has jurisdiction over Claimant's claims, Respondent contends that they should be dismissed in their entirety for lack of merit.

D. Merits

26. The Respondent contests the arguments on the alleged violations of NAFTA Articles 1102, 1103, 1105 and 1110.

27. *First*, the claim for the alleged breach of Article 1110 lacks merit because the Claimant has failed to demonstrate that an indirect expropriation has occurred. The precedents on the subject are clear in establishing that an indirect expropriation involves the total (or near-total) and permanent loss of value of an investment. Claimant asserts, without any basis, that "the investment has been indirectly expropriated in its entirety, *leaving no residual value in the real scenario*" [emphasis added].[8] The latter has not been proven despite the fact that the Claimant had the burden of proof.

28. The Respondent contends that the Sierra Mojada Project (Project) retains much of its value because, as Claimant's expert asserts, a mineral property derives its value from the resources it can economically exploit, and nothing has changed in relation to the volume and quality of minerals discovered in the concessions the Claimant claims to own. The only reduction in the value of the property that can be anticipated is the amount that would have to be paid to Mineros Norteños to defuse its demonstration so that it could resume activities - i.*e.*, the US$ 6.9 million that Metalín had committed to pay under the Concession Agreements. The fact that the Sierra Mojada Project apparently cannot move forward without a settlement with the Mineros Norteños does not mean that it has lost *all* value. In addition, the fact that SVB has not had the will or the resources necessary to reach an agreement with Mineros Norteños and pursue exploration activities on its own does not imply that the Project has no value.

29. *Second*, the Respondent also challenges the merits of the claims based on alleged violations of Articles 1102 (National Treatment) and 1103 (Most-Favored-Nation Treatment). In both cases, the Claimant has failed to even establish a *prima facie* case of discrimination. On the one hand, in relation to the alleged violation of Article 1102, the Claimant merely asserts that Metalín has received less favorable treatment than that accorded to Mineros Norteños.[9] However, the Claimant does not identify what that less favorable treatment (or the more favorable treatment accorded to Mineros Norteños) was on which its claim is based. Nor does it explain why the Mineros Norteños cooperative society should be considered an investor or an investment that received more favorable

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8 Memorial, ¶ 5.11.

9 Memorial, ¶ 4.65.

treatment in circumstances similar to Metalín. Without such explanations, it is simply not possible to conduct the relevant analysis to demonstrate discriminatory treatment under NAFTA Article 1102.

30. On the other hand, regarding the alleged violation of Article 1103, the Respondent notes that all of the examples of allegedly more advantageous treatment granted to other transnational corporations *(i.e.* Fresnillo plc and Americas Gold and Silver Corporation) occurred after the NAFTA was terminated, and for that reason, do not (and cannot) constitute examples of discrimination during the term of the NAFTA. Nor is it clear that the examples offered by the Claimant are appropriate, as it has not been demonstrated that the companies offered as "comparators" actually are. The Claimant has offered no information about the other alleged blockades that would establish similar circumstances between the treatment offered to the affected companies and the treatment accorded to Metalín. In sum, the Claimant has failed in its attempt to demonstrate discrimination on the basis of nationality in apparent violation of NAFTA Articles 1102 and 1103.

31. Finally, on the alleged violation of Article 1105, the Mexican authorities have complied with the obligation to provide a Minimum Standard of Treatment (MST). It is noted that what Claimant has presented here as a "Continuous Blockade" is in fact a peaceful demonstration to which the members of Mineros Norteños are entitled and which the Mexican State is under an obligation to respect under both domestic and international law.

32. Undoubtedly the use of force would not only have been unnecessary, but would have exacerbated the problems between Metalín and the Mineros Norteños. In any case, taking advantage of members in a difficult socio-economic situation of a local mining cooperative by making them wait almost two decades for the agreed royalties is not a sensible strategy for a project that relied heavily on the cooperation of the local community.

33. To mention some aspects of the demonstration, today, the Mineros Norteños are not blocking access to Metalín's facilities, nor are they impeding Metalín's activities. This company simply abandoned the Project and to evade a negotiation with the Mineros Norteños to fulfill a contractual promise validated by national judges and made more than two decades ago. Also, the Mexican authorities acted within their duties and exercised due diligence considering the

circumstances. For example, the Claimant's failure to exhaust the procedures required by local law to intervene or investigate liability in this type of circumstance.

E. Damages

34. With respect to the claim for damages, the Respondent contends that the Claimant has failed to prove its claim. In particular, it has failed to demonstrate the existence of the necessary causal link between the alleged breach and the damage. The Claimant simply attributes the alleged loss of value of the Project to the Second Blockade, but ignores facts such as the litigation with Antonio Valdez Pérez and María Asunción Pérez (the Valdez) - another Sierra Mojada family with whom Metalín entered into mining contracts that it breached - that resulted in the seizure of 17 of their concessions. The Respondent, therefore, posits that this is the real cause why the Project could not and cannot proceed, and not the peaceful and legitimate demonstration of the Mineros Norteños or the actions or omissions of the Mexican authorities.

35. The Respondent further contends that the Claimant contributed significantly to any harm it may have suffered as a result of the Second Blockade and the alleged inaction of authorities. It did so by failing for more than two decades to fulfill its commitments to Mineros Norteños. It did so by resisting to find a serious agreement with that cooperative, which was naturally displeased with Metalín's non-compliance. The Claimant had multiple opportunities to resolve the conflict that it itself provoked, but failed to take advantage of them.

36. But it also did so by not seeking to mitigate the harm allegedly generated, for example, by trying to sell its assets and recover part of what it claims to have lost, even though its investment is still viable and could be attractive to other investors. For that reason, in the unlikely event that the Tribunal imputes liability to the Respondent, Mexico respectfully requests that the amount of damages be significantly reduced.

37. Should this Tribunal nevertheless conclude that Mexico breached its obligations and must compensate the Claimant for damages, the Respondent contends that the amount calculated by Claimant's expert is exaggerated and highly speculative. The Respondent submits an alternative computation, prepared by Dr. Tiago Duarte Silva of Charles River Associates, based on two widely accepted methods that yield a result that is less than one-third of the value arrived at by the Claimants' expert. However, it should be made clear that this amount is still extremely high, as the

Tribunal must consider the Claimant's contribution to the damage suffered, and the Claimant's lack of a serious effort to mitigate damages.

38. If this Tribunal determines that Mexico indirectly expropriated the Claimant's investment and were to order the Mexican State to pay compensation in this regard, the Respondent contends that SVB must assign to it, upon payment of the award, all assets associated with the Project, including concessions, studies, samples and data collected during the exploration phase. Otherwise, the Claimant would receive an undue benefit: it would receive the FMV of the investment through arbitration and retain the assets of the investment, which it could resell to a third party for additional profit.

II. FACTS

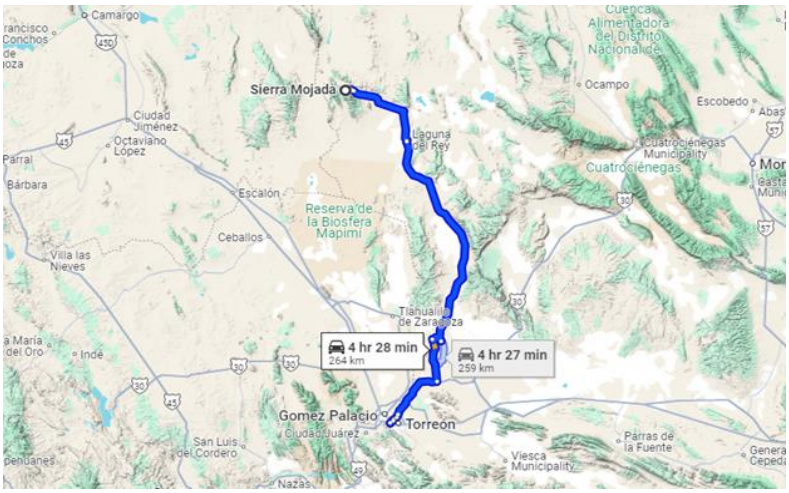
A. Sierra Mojada and Mineros Norteños

39. The municipality of Sierra Mojada is geographically located in the extreme west of the state of Coahuila de Zaragoza, Mexico. Sierra Mojada is located on the western border with the state of Chihuahua and to the south with the state of Durango in a region known as the Bolsón de Mapimí. It has an area of 6,966 km^2 and a population of approximately 6,744 inhabitants.[10] Of these, more than 60% live in conditions of poverty or social vulnerability, which is equivalent to 4,262 people. It is a relatively isolated community, since, despite being 268 km from Torreón (the capital city of Coahuila and the nearest urban center), the trip by car takes about four and a half hours.[11]

Image 1: Driving distance from Sierra Mojada to Torreón

[10] In particular, approximately 25% of the population is in poverty, while an additional 38.2% faces social deprivation or insufficient income. In other words, almost 2 out of every 3 inhabitants of Sierra Mojada face economic or social difficulties. *See* Secretaria de Bienestar, "Informe anual sobre la situación de pobreza y rezago social 2022 en Sierra Mojada". **R-0003**. Consejo Nacional de Evaluación dela Política de Desarrollo Social, "Glosario de Medición de la Pobreza". **R-0004**. The population living in *poverty* comprises the population living in *extreme poverty* plus the population living in *moderate poverty*. The population *vulnerable due to social deprivation* is that population that presents one or more social deprivations (educational backwardness, restricted access to health services and food backwardness, among others), but whose income is above the poverty line. The population *vulnerable by income* is that which does not present social deprivations but whose income is less than or equal to the poverty line.

[11] Government of the State of Coahuila, Monograph of Sierra Mojada. **R-0005**.



Source: Google maps.

40. It is important to know and understand the socioeconomic situation of Sierra Mojada and the concerns of Mineros Norteños. Mining has been their main livelihood, and the Sierra Mojada Project promised a stable source of income.

41. To provide a frame of reference for the socioeconomic situation of Mineros Norteños, the average salary of a resident of Sierra Mojada is $6,930 Mexican pesos (MXN) per month, or approximately US$ 342.[12] However, these are salary statistics that do not reflect the reality of the income of families in Sierra Mojada, which can be much more precarious. In addition, a large part of the population of Sierra Mojada does not have quality housing, nor do they have access to basic services, nor do they have an adequate health system. For example, the nearest hospital is four hours away from the municipality of Sierra Mojada. [13]

42. According to the annual report on the situation of poverty and social backwardness, in 2010, 10% of the families in Sierra Mojada did not have access to drinking water, 17.2% did not have access to health services and 41.8% had not completed basic education.[14] These figures reflect the reality that the members of Mineros Norteños and their families have been living in for several years: a community that only wanted to work to survive in the midst of multiple shortages. The worst part of this situation is that SVB is now accused not only of blocking the Project, but also of

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12 Average monthly salary in Sierra Mojada in 2024. **R-0006.**

13 Annual Report on Poverty and Social Gap in Sierra Mojada 2022. **R-0003**.

14 Ministry of Welfare, Annual Report on Poverty and Social Backwardness 2023 in Sierra Mojada. **R-0007**.

having committed serious crimes, such as extortion, robbery and kidnapping. As will be seen in this Memorial, these allegations are unfounded and unacceptable.

43. Mining activity in this region dates back several years. The municipality of Sierra Mojada has its origin in the Villa de Sierra Mojada, which was founded in May 1879 after the discovery of a silver deposit, soon after the site was populated.

44. Since its founding in 1879, the main economic activity in the municipality of Sierra Mojada has been mining, mainly silver, iron, lead, copper and zinc. The mining resources of the area have given rise to several conflicts since the founding of Villa de Sierra Mojada, especially between the states of Coahuila and Durango, which disputed this territory at the end of the 19th century.[15] However, at the beginning of the 20th century silver production went into decline and the town began to lose population until it was practically abandoned. [16]Currently, the main economic activity in the region is mining, complemented by low-scale and seasonal agriculture and small-scale cattle ranching.[17]

45. Currently, Sierra Mojada is one of the 38 municipalities of the State of Coahuila. The municipality includes the communities of Hercules, La Esmeralda, Sierra Mojada, San José de Carranza and Salina del Rey. A Municipal President is elected every 3 years. [18]

Image 2: Map of communities in the Municipality of Sierra Mojada.

[15] Ministry of Welfare, Annual Report on Poverty and Social Backwardness 2010 in Sierra Mojada. **R-0008**.

[16] Government of the State of Coahuila, Monograph of Sierra Mojada. **R-0005**.

[17] Witness Statement of Mr. Fraire, ¶ 8.

[18] Mexico is a federal republic. There are federal, state and municipal authorities.

Source: Google earth.

46. Mineros Norteños was incorporated as a Mining Cooperative Society on December 1, 1948,[19] with the primary objective of exploiting a mine called *La Suiza*, which was backed by mining concession 51710, covering an area of 30.7665 hectares located in the municipality of Sierra Mojada.[20] Mineros Norteños also obtained concession 83507 for the mining exploitation of the lot called "Vulcano".[21]

47. During the decades following its founding, Mineros Norteños engaged in artisanal and small-scale mining activities in the region, focusing primarily on the extraction of silver, zinc and lead.[22] By 1956, Mineros Norteños had successfully exploited the area, in particular, the mines called "San Salvador", "Encantada", "Fronteriza", "Esmeralda" and "Parrena".[23] The cooperative began trading zinc, copper and silver ores with smelting companies located in Mexico and abroad, demonstrating the viability of mining activity in the community.[24]

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19 Under Mexican law, a cooperative is a social business corporation formed by individuals who join together to achieve common objectives, such as producing or selling products or sharing services. Its purpose is to help its members meet their needs in a way that benefits everyone equally. The members contribute money, goods or labor, and important decisions are made democratically at meetings called General Assemblies.

20 Initial Statement of Claim, Juicio Ordinario Mercantil No. 2/2015-II, p. 2. **R-0009.**

21 Initial Statement of Claim, Juicio Ordinario Mercantil No. 2/2015-II, p. 2. **R-0009.**

22 Memorial, ¶ 2.15

23 Memorial, ¶ 2.15

24 Memorial, ¶ 2.15

48. However, due to the limited technical capabilities of the cooperative, Mineros Norteños was never able to exploit the deposits located within its concessions on a large scale.[25] For this reason, by the 1990s Mineros Norteños was willing to establish relationships with mining companies that could maximize the potential of the deposits and provide employment in the community. Thus, in 1997, Mineros Norteños entered into a contractual relationship with Star Morning, Metalín's predecessor, by signing the 1997 Contract

B. SVB and Minera Metalín

49. SVB claims to be a U.S. mining company based in Vancouver, Canada, which owns, directly and indirectly, 100% of Minera Metalín, a company incorporated under Mexican law that, according to the Claimant, is the holder of 20 mining concessions that it intended to explore and exploit in the municipality of Sierra Mojada.[26]

50. The concessions acquired from Mineros Norteños constitute only a part of the total Sierra Mojada project. Of the 20 concessions that Claimant claims to hold, Minera Metalín only held 19 concessions, of which: (i) two were acquired from Mineros Norteños *(Unificación Mineros Norteños and Vulcano*); (ii) three were acquired directly from certain individuals; (iii) one was acquired from another mining company; and (iv) 13 were managed and obtained directly by Metalín. The mining concessions held by Metalín in Mexico are shown in the following table:

Table 01. Mining concessions held by Minera Metalín S.A. de C.V.

No.	Lot name	Number	Original Holder	Holder Current	Validity	Area (Ha)
1	Unification Mineros Norteños	169343	Sociedad Cooperativa Mineros Norteños	Metalín Mining	November 11, 1981 to November 10, 2031	336.7905
2	Vulcano	236714	Sociedad Cooperativa Mineros Norteños	Metalín Mining	August 25, 2010 to August 24, 2060	4.5996
3	Fortuna	160461	Gilberto Valdés Farías	Metalín Mining	August 21, 1974 to August 20, 2024	13.9582
4	Olympia	195811	Juan Antonio Farías Herrera	Metalín Mining.	N/A	8.9747

[25] Memorial, ¶ 2.16

[26] In its Memorial, Claimant indicates that it has made multiple investments in Mexico, including 20 registered mining concessions. However, according to the information provided by the General Directorate of Mines of the Ministry of Economy, only 19 concessions have been identified, in which Minera Metalín is listed as the holder.

					September 22, 1992	
5	The Ramones	223093	La Parreña Mining Company.	Metalín Mining.	October 15, 2004 to October 14, 2010	8.6039
6	Dolores Volcano	224873	Dora Alicia Valdez Perez	Metalín Mining	June 16, 2005 to June 15, 2055	10.4946
7	Esmeralda	212169	Metalin Mining.	Metalín Mining	September 22, 2000 to September 21, 2050	117.5025
8	La Blanca	220569	Metalin Mining.	Metalín Mining	August 28, 2003 to August 27, 2053	33.5044
9	Sierra Mojada	235371	Metalin Mining	Metalín Mining	November 18, 2009 to November 29, 2043	4818.485
10	Sierra Mojada Fraction I	235372	Metalin Mining	Metalín Mining	November 18, 2009 to November 29, 2043	0.0472
11	Sierra Mojada Fraction II	235373	Metalin Mining	Metalín Mining	November 18, 2009 to November 29, 2043	0.0082
12	Sierra Mojada Fraction III	235374	Metalin Mining	Metalín Mining	November 18, 2009 to November 29, 2043	0.3287
13	Sierra Mojada Fraction IV	235375	Metalin Mining	Metalín Mining	November 18, 2009 to November 29, 2043	1.1835
14	Emerald I	238678	Metalin Mining	Metalín Mining	October 11, 2011 to March 30, 2050	95.532
15	Esmeralda I fraction I	238679	Metalin Mining	Metalín Mining	October 11, 2011 to March 30, 2050	0.7404
16	Esmeralda I fraction II	238680	Metalin Mining	Metalín Mining	October 11, 2011 to March 30, 2050	0.0349
17	Allotment fraction VI	239512	Metalin Mining	Metalín Mining	December 15, 2011 to December 14, 2061	7.5386
18	Single Tail	245216	Metalin Mining	Metalín Mining	November 15, 2016 to August 22, 2061	622
19	Asleep	245217	Metalin Mining	Minera	November 15, 2016 to April 9, 2057	405

51. It should be noted that the concession called "Fortuna" was acquired from an individual in 2000 and expired on August 21, 2024.[27] Since there is no record of a request for extension, the concession expired on that date, *i.e.*, Metalín no longer has the right to exploit that concession or

[27] Mining concession with title No. 160461, corresponding to the lot called "Fortuna". **C-002**.

its 13.9 hectares. It is also known that SVB applied for two additional mining concessions on the "Alote Fracc. II" and "San Antonio" lots, but those concessions were not granted.[28] On six other concessions, the Claimant also lost its title for not having complied with mining regulatory obligations or for not having obtained its title.[29] This is relevant because it sheds light to the Tribunal on the Claimant's pattern of non-compliance with contractual and regulatory requirements, an aspect that is central to this arbitration and will be repeated in this Memorial.

52. It should also be noted that, in its Memorial, the Claimant did not submit the purchase contracts for the other concessions acquired from third parties, nor did it provide information on the terms under which they were acquired, despite the fact that they are all part of its claim. Respondent reserves the right to request documents at the appropriate procedural time or to have its claims adjusted in accordance with information of this nature that becomes known or disclosed at a later date. Claimant has also omitted to explain whether the concessions are free of encumbrances or any legal limitations that would allow Metalín to dispose of its right to them, such as judicial liens. This aspect is not minor, nor is Claimant's omission, and will be addressed later in this Memorial.

C. Regulatory framework regarding mining concessions, their typology and the rights and obligations of concessionaires

53. The legal framework applicable to mining in Mexico for the relevant events of this arbitration is mainly regulated by Article 27 of the Political Constitution of the United Mexican States (CPEUM), the Mining Law regulating such article, published on June 26, 1992 in the Official Gazette of the Federation, formerly known as the "Mining Law", and its Regulations,

[28] In general terms, Minera Metalín did not obtain these two concessions because during the administrative procedures the company did not comply with the legal requirements to do so. In addition, a reform to the Mining Law went into effect. Due to this regulatory change, and because Minera Metalín did not take any administrative action, much less file any lawsuit, Minera Metalín's concession applications were dismissed.

[29] Concessions for which it lost its title are: (i) El Retorno with title No. 216681, (ii) El Retorno Fracc. I with title No. 223154, (iii) Mojada 3 with title No. 226756, (iv) Mojada 2 with title No. 227585, and (v) Agua Mojada with title No. 232165. The concession called Vera Rica or La Iglesia with title No. 236837 was never transferred.

published on October 12, 2012. This regulatory body establishes the legal figure of the "concession" as a fundamental instrument for the development of mining projects in Mexico.[30]

1. Article 27 of the CPEUM

54. Pursuant to Article 27 of the CPEUM, "[t]he ownership of the lands and waters within the limits of the national territory originally belongs to the Nation, which has had and continues to have the right to transfer ownership of them to individuals, thereby constituting private property.".[31] That same article establishes, a little further on:

> The nation shall at all times have the right to impose on private property the modalities dictated by the public interest, as well as to regulate, for the benefit of society, the use of natural elements susceptible of appropriation, with the purpose of making an equitable distribution of public wealth, taking care of its conservation, achieving the balanced development of the country and the improvement of the living conditions of the rural and urban population The Nation shall always retain the right to impose conditions on private property as dictated by public interest, as well as to regulate, for social benefit, the use of natural elements subject to appropriation, with the aim of achieving an equitable distribution of public wealth, conserving resources, promoting balanced national development, and improving the living conditions of both rural and urban populations.

55. Likewise, Article 27 clarifies that:

> The Nation has direct ownership of all natural resources on the continental shelf and the submarine zones of the islands; all minerals or substances found in veins, layers, masses, or deposits whose nature is distinct from the components of the land, such as minerals used to extract metals and metalloids for industry; deposits of precious stones, salt, and salt flats formed directly by seawater; products resulting from the decomposition of rocks when their exploitation requires underground works; mineral or organic deposits containing materials usable as fertilizers; solid mineral fuels; petroleum and all hydrocarbons, whether solid, liquid, or gaseous; and the space over national territory to the extent and under the terms established by International Law.

56. This article also explains the manner in which the nation allows the exploitation, use or exploitation of resources located in the subsoil to private parties. Specifically, it establishes that:

> In the cases referred to in the preceding two paragraphs, the Nation's ownership is inalienable and imprescriptible, and the exploitation, use, or utilization of the resources in question by individuals or companies established under Mexican law may only be carried out through concessions granted by the Federal Executive, in accordance with the rules and conditions established by law, except for broadcasting and telecommunications, which shall be granted by the Federal Telecommunications

[30] Although it is "necessary to obtain the concession title" for the operation of mining projects, this "is not sufficient to provide viability, operability and continuity to the project in question". Expert Report of Mr. Carlos del Razo, ¶ 52.

[31] CPEUM, Art. 27. **R-0010**.

> Institute. The legal norms relating to works or activities for the exploitation of the minerals and substances mentioned in the fourth paragraph shall regulate the execution and verification of those carried out or to be carried out from their effective date, regardless of the date the concessions were granted, and their non-compliance will result in their cancellation. [...]

57. In conclusion, the Mining Law, as a regulatory law of Article 27 of the CPEUM, serves to understand how mining works, and is exploited, in Mexico. This is relevant because, as the Tribunal will observe, it is the State that has dominion over natural resources and has the power to grant certain rights over such assets to private parties, subject to compliance with the applicable legal requirements.

2. The Mining Law and the new Mining Law

58. In accordance with Mexican regulations, a concession is an administrative act by which the State grants a private party the power to provide a public service, exploit public property or perform both activities.[32] This means that the concession is a figure that combines "regulatory and contractual elements coexist, subject to modifications in the legal framework that governs it, while also guaranteeing the interests of the concessionaires.".[33] Based on this, the State, through the figure of the concession and subject to compliance with specific conditions, grants rights to private parties, for which it is indispensable to carry out activities of exploration, exploitation and exploitation of minerals from the soil and/or subsoil in Mexican territory, such as the extraction of silver and zinc that the Claimant allegedly intended to carry out.[34]

59. Over time, the regulation of the mining sector has changed. Prior to 1992, the sector was regulated through the so-called "Mining Law". However, in June 1992, the Mining Law came into effect, which was amended in 2023.

60. Under the Mining Law, prior to the 2023 reform, there were two types of concessions: (i) *exploration* concessions and (ii) *exploitation* concessions.[35] The former covered "[t]he works and activities carried out on the land with the purpose of identifying mineral deposits or substances, as

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[32] Thesis [A.]: I.4o.A.73 A (10a.), T.C.C., Semanario judicial de la Federación y su Gaceta, Tenth Epoch, December 2013, Digital Reg. 2005171**. R-0011**.

[33] Expert Report of Mr. Carlos del Razo, ¶ 25.

[34] Expert Report of Mr. Carlos del Razo, ¶ 20. *See* also Mining Law, (in effect as of December 18, 2024), DOF, May 8, 2023, Article 3 and 4**.**

[35] Mining Law, article 10. **R-0012.**

well as quantifying and evaluating the economically exploitable reserves they contain".[36] The purpose of the latter was "works and activities aimed at the preparation and development of the area that includes the mineral deposit, as well as those intended to detach and extract the mineral products or substances contained […]"[37]

61. However, as of 2023, with the reforms to the Mining Law, in order to carry out *exploration* activities it is now necessary to enter into collaboration agreements with an agency of the Mexican Government called the Mexican Geological Service, for a non-extendable term of up to five years.

62. Currently, for resource *exploitation* activities, mining concessions are granted for a period of 30 years from the date of registration in the Public Mining Registry (RPM),[38] and may be extended for a period of 30 years if the concessionaire does not incur in grounds for cancellation. For this purpose, the extension is requested within two years prior to its expiration and up to one year before its expiration.[39]

63. Article 10 of the Mining Law further provides that exploration and exploitation of minerals may be carried out through mining concessions granted to those who can prove that they have the technical, legal, economic and administrative capacity. This is another fundamental limitation, as it makes it clear that the rights granted by the concessions were in the hands of Metalín, not the Claimant. Therefore, it is Metalín and not the Claimant on its own behalf who can claim damages for the alleged expropriation of those rights.

64. The rights granted by mining concessions are established in Article 19 of the Mining Law and include the right to: (i) carry out works and exploitation works within determined mining lots; (ii) take advantage of the products obtained from the lots after the notice of commencement of exploitation; (iii) dispose of the land within the concession, unless they come from another current concession; (iv) request easements or temporary occupation for works, deposits or subway passage; (v) use waters for exploitation, benefit and domestic use, notifying and paying fees; (vi) transfer the ownership of the concession as established in the Mining Law; (v) reduce, divide,

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36 Mining Law, article 3. **R-0012**

37 Mining Law, article 3. **R-0012**

38 Prior to the 2023 reform, exploitation concessions were granted for a term of 50 years.

39 Mining Law, Article 15. **R-0012**

identify or unify lots with adjoining concessions; (vi) terminate early the concession; (vii) group concessions; (viii) request administrative corrections or duplicates of concessions; and (ix) occupy national lands by covering the corresponding payment.

65. In turn, the obligations derived from the mining concessions are set forth in Article 27 of the Mining Law in force.[40] Considering that Silver Bull claims to have acquired its concession titles between 1998 and 2000, as well as the evolving nature of the obligations applicable to the concessions,[41] Minera Metalín had, *inter alia*, the following obligations: (i) execute works and works in accordance with the Mining Law and give notice within 90 days after registering the concession; (ii) pay duties, contributions and considerations in accordance with the Mining Law; (iii) give notice of the radioactive minerals discovered in the development of the exploration, exploitation and beneficiation works and works[42] ; (iv) submit to applicable safety and environmental standards; (v) not remove installations necessary for the stability of the mines; (vi) maintain in good condition the location sign of the starting point; (vii) submit reports on works, technical and financial aspects carried out; (viii) allow verification visits by the Ministry of Economy; (ix) deliver geological-mining reports at the end of the concession; (x) report every six months to the Mexican Geological Service on works and production; (xi) notify the Ministry of Energy of hydrocarbon findings; (xii) accumulate, register and periodically provide the Ministry of Energy with information on the recovery and use of gas associated with the coal deposits[43] . (xiii) notify the Ministry of Energy about the discovery of gas not associated to coal deposits derived from coal exploration and exploitation concessions[44] ; (xiv) deliver the gas associated to coal deposits at the connection point indicated by Petróleos Mexicanos, unless it is destined for

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40 It emphasizes that, due to the evolutionary nature of the concessions, and as noted in Respondent's Expert Report, they were subject to the regulatory changes of the Mexican legal system, thus, Silver Bull, as concessionaire, is subject to the most recent obligations under the Mining Law of 2023. Expert Report of Mr. Carlos del Razo, ¶¶ 24 and 25

41 The evolving nature of the obligations is reinforced by Article 27 of the Mining Law which states that the obligations of the holders of mining concessions exist "regardless of the date of their granting", as well as by Respondent's Expert Report which states that the concessions are limited by the provisions of the applicable legal order, including the modifications that the legal order undergoes. Expert Report of Mr. Carlos del Razo, ¶ 43.

42 Mining Law, Transitory Articles. **R-0012.** This obligation was repealed on April 28, 2005.

43 Mining Law, Transitory Articles. **R-0012.** This obligation was repealed on June 26, 2006.

44 Mining Law, Transitory Articles. **R-0012.** This obligation was repealed on June 26, 2006.

self-consumption[45] ; (xv) guarantee social impact measures through financial instruments; (xvi) notify the Ministry of Economy of unauthorized mineral discoveries; (xvii) report accidents or safety incidents within 72 hours; (xviii) designate a person responsible for safety standards when starting operations; (xix) avoid deposits in protected or environmentally hazardous areas; (xx) have authorization for mine restoration and closure programs; (xxi) comply with provisions on social impact and indigenous consultation; (xxii) report permits, certifications and legal acts related to the mining operation; (xxiii) implement measures to recycle at least 60% of wastewater; and (xxiv) carry out additional activities in accordance with applicable provisions.

66. Pursuant to Article 23 of the Mining Law, "[t]he Secretariat [*i.e.*, the Secretariat of Economy] may authorize the transfer of ownership of mining concessions" provided that the new beneficiary of the concession complies with the requirements of the original concession and pays the corresponding fees. Once the transfer is authorized, the Ministry of Economy must update the concession data, considering the remaining term and in the understanding that the transferred concession will have the same legal effects of the original one and the new holder will have the same rights and obligations included in the original title.

67. Another relevant provision in the context of this claim is Article 25 of the Mining Law. This provision allows the grouping of mining concessions into a single unit as long as the lots comprised in the concessions to be consolidated are adjacent or constitute a mining or metallurgical mining unit from a technical and administrative point of view. The Respondent understands that in 2016 Minera Metalín applied to be considered a "mining unit" and obtained the grouping of 17 of its concessions under this provision.[46]

68. In addition to the obligations imposed by the Mining Law, mining projects are subject to additional federal and local regulations, as noted in the report of Mr. Carlos de Razo, Respondent's regulatory expert.[47] These regulations include the following:

- Federal: General Law of Ecological Balance and Environmental Protection (LGEEPA) and its Regulations; General Law of Sustainable Forestry Development (LGDFS); General

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45 Mining Law, Transitory Articles. **R-0012.** This obligation was repealed on June 26, 2006.

46 Oficio No. SE/181/00093/2016, identifying the 17 mining concessions that make up the Mining Unit. **R-0013**.

47 Expert Report of Mr. Carlos del Razo, ¶ 116

Law for the Prevention and Integral Management of Waste (LGPGIR); National Water Law, and; General Law of Firearms and Explosives.

- Local: Law of Human Settlements, Land Planning and Urban Development of the State of Coahuila de Zaragoza; Law of Ecological Balance and Environmental Protection of the State of Coahuila; Regulations of the Law of Ecological Balance and Environmental Protection of the State of Coahuila de Zaragoza in Matters of Environmental Impact; Regulation of the Law of Ecological Equilibrium and Environmental Protection of the State of Coahuila de Zaragoza on the Prevention and Control of Atmospheric Pollution; Law for the Prevention and Integral Management of Waste for the State of Coahuila de Zaragoza; Law of Civil Protection of the State of Coahuila, and the Law of Finance for the State of Coahuila de Zaragoza.

69. Based on this, it can be noted that the feasibility of a project such as the one claimed by the Claimant depends, among other factors, on complying with various regulations that go far beyond the concessions. Not having the entire universe of permits and licenses inherent to such a project makes it unfeasible or inoperative.

D. Non-compliances and omissions of Minera Metalín with respect to its obligations as holder of mining concessions in Mexico

70. As explained in the previous section, there is an extensive body of regulations in the mining sector. With this in mind, it must also be considered that there is evidence of Metalín's failure to pay for the rights to the concessions identified as El Retorno, El Retorno Fracción I, Esmeralda I (211158), Agua Mojada and Mojada 2.

71. The omissions to pay and report referred to in the preceding paragraph are obligations of the holders of mining concessions, pursuant to Article 27 of the Mining Law.[48] Therefore, the Claimant's omissions amount to a breach of obligations with respect to at least six of its mining concessions.

72. Again, the regulatory requirements to maintain and operate a viable mining project are diverse and are found in several laws. However, there are particularities to be considered in three

[48] See section II.C.2.

areas: (i) some administrative aspects related to mining concessions; (ii) the Environmental Impact Authorization (AIA); and (iii) the registration of work in the open-pit zone.

- Mining concessions: The Claimant stated that it has mining concessions acquired between 1996 and 2000, covering a reported area of 9,530.4 hectares, however, only a total of 6,485.3269 hectares were found in official records. In addition, no works or investments have been made in the concessions, and they remain without production. This, together with the lack of AIA, casts doubt on the viability of the project and could lead to the cancellation of the concessions in accordance with Article 42 of the Mining Law, as they have not complied with the activity requirements for more than two consecutive years.[49]

- AIA: In 2008, Minera Metalín filed an Environmental Impact Assessment (MIA) request with the Ministry of Environment and Natural Resources (SEMARNAT) for a mining project in Sierra Mojada, Coahuila. Although a conditional authorization was granted, the Claimant requested a suspension of the evaluation process and subsequently withdrew the authorization, indicating that no works or activities were carried out. Since then, no new MIA applications have been filed by Minera Metalín (now under the control of Silver Bull), implying that the Sierra Mojada project did not actually have an AIA in place, a fundamental requirement for its development. This reinforces the conclusion that the project is unviable and inoperable.[50]

- Works records in the free well zone: Based on information from the water regulatory body - the National Water Commission or CONAGUA - it can be concluded that Minera Metalín has records of free well works in the Laguna del Rey aquifer, Coahuila, but does not have concession titles for the use and exploitation of national waters. Given that current regulations require specific concession titles for industrial use in mining, the existing records do not meet the legal requirements for operating a mining project. This calls into question the continuity of the project, as the lack of concession for the use and exploitation of national waters could lead to the cancellation of the mining concessions, in accordance with Article 42 of the Mining Law.[51]

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49 Expert Report of Mr. Carlos del Razo, ¶¶ 97-101

50 Expert Report of Mr. Carlos del Razo, ¶¶ 102-106

51 Expert Report of Mr. Carlos del Razo, ¶¶ 107-112

73. The official records show that the Claimant only complied with one of the 19 administrative acts indispensable for the development of a mining project of the scale that the Claimant claims the Sierra Mojada Project intends to develop. These requirements represent the fundamental obligations for the continuity and future operation of the Project, and the lack of compliance in 18 of them reinforces the absence of regulatory support for the intended mining project.[52]

74. From the above, it is concluded that the Project, today would not comply with the essential regulatory requirements for its development and operation in Mexico. This implies that it never met the necessary requirements and, based on this, it would not be able to move on to the operation phase. The lack of compliance with these requirements demonstrates that the qualifiers surrounding the Project are exaggerations. In other words, it is questionable that Claimant and its witnesses consider the Project to be "Mexico's next big silver story" when it did not even have basic permits and authorizations.[53]

75. The non-compliances with respect to the concessions, which can be inferred from the information provided by the Claimant, would entitle the Ministry of Economy to cancel the mining concessions of the project. This, without taking into account those obligations that, due to lack of documentary evidence, are considered to be unfulfilled.[54]

76. Taken together, these shortcomings are evidence not only that the Project lacks the legal and administrative basis necessary for its development,[55] but also that the Claimant never really intended to put it into operation.[56]

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52 Expert Report of Mr. Carlos del Razo, ¶ 116.

53 Memorial, ¶ 2.31. Witness Statement of Mr. Edgar, ¶ 5.24.

54 Reports, the authorization of the Restoration, Closure and Post-closure Program for mines and the concession for the use, exploitation and exploitation of national waters under the Industrial Mining Use. Another example that was not addressed is the non-compliance in labor matters. As can be seen from the testimony given by Mr. Fraire, the Mineros Norteños never had labor contracts in contravention of Mexican labor legislation.

55 Expert Report of Mr. Carlos del Razo, ¶ 117.

56 Expert Report of Mr. Carlos del Razo, ¶¶ 120 and 121.

E. Contracts between Metalín and Mineros Norteños

1. The 1997 Contract

77. The business relationship between Mineros Norteños and Claimant does not date back to 2000, as Claimant suggests in its Memorial, but to 1997 when Star Morning, Metalín's predecessor, signed the 1997 Contract with Mineros Norteños. Interestingly, Claimant does not refer to the 1997 Contract in its Memorial, nor did it submit it as a documentary annex.

78. The 1997 Contract granted Star Morning the exclusive right to explore the concessions identified as "Unificación Mineros Norteños" and "Vulcano" (Lots) for a period of 3 years.[57] It also granted Star Morning the option (but not the obligation) to acquire the concessions, as well as the associated surface rights, water rights and wells, within the same period. [58]

79. In exchange for these rights, Metalín agreed to make certain payments to Mineros Norteños of up to US $3.6 million, which would be taken as an advance payment in the event Metalín decided to exercise its option to acquire the concessions.[59] The payment schedule under Clause Four of the 1997 Contract provided as follows: [60]

i) At the signing of the 1997 Contract	US$ 27,500.00
ii) 6 months after the signing of the 1997 contract	US$ 27,500.00
iii) 12 months after signing of the 1997 Contract	US$ 82,500.00
iv) 18 months after the signing of the 1997 Contract	US$ 82,500.00
v) 24 months after signing of the 1997 Contract	US$ 110,000.00
vi) 36 months after the signing of the 1997 Contract	US$ 3,270,000.00
Total	US$ 3,600,000.00

80. The 1997 Contract also provided that, in the event it exercised its purchase option, Metalín would be obligated to pay to Mineros Norteños, in addition to the US$ 3.6 million, a 2% net smelter

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57 1997 Contract, Clause One. **R-0002.**

58 1997 Contract, p. 1. **R-0002.**

59 1997 Contract, Third Clause, p. 9. **R-0002.**

60 1997 Contract, Clause Four, p. 3, **R-0002.**

return royalty (NSR) to be calculated based on the net revenues obtained from the sale of minerals extracted from the Lots comprised in the concessions, up to a maximum of US$ 10'475,000.00.[61] As can be seen, these royalties represented approximately 75% of the consideration that Star Morning agreed to pay to Mineros Norteños for the "Unificación Mineros Norteños" and "Vulcano" concessions.

81. It is also important to note that the 1997 Contract establishes that Star Morning/Metalin *committed* to use its best efforts to commence mineral extraction within four years of signing the contract.

> "LA EXPLORADORA" commits to making its best efforts as a diligent miner to bring "LOS LOTES" into production no later than four years after entering into this contract, provided it has purchased the rights to them from "LA COOPERATIVA".[62]

82. This provision reflects the understanding that the ultimate objective of the joint venture between Minera Metalín and Mineros Norteños was to bring the Sierra Mojada Project into production and generate economic benefits for both parties within a reasonable period of time. In other words, this commitment created a reasonable expectation that Minera Metalín would develop the concessions in the medium term and in that same term, Mineros Norteños would begin to receive the negotiated royalties.

83. Clause Five of the 1997 Contract also states that, in the event that the exploration rights to the lots were transferred to third parties in the following three years, Metalín undertook to cause the acquirer to undertake to pay the cooperative the agreed royalties and amounts on the agreed terms and conditions.

84. Pursuant to Clause Ten, Minera Metalín additionally committed to, *inter alia*, "spend US$1 million on exploration work to define the potential of the district". In the same paragraph, it was established that "the explorer [*i.e.,* Star Morning] committed to contract the cooperative to carry out exploration work for up to 30% of the committed expenditure, provided that it [sic] is capable and efficient to execute them competitively." As will be seen below, Minera Metalín did not even formalize labor relations with people from the Sierra Mojada community.

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61 1997 Contract, Fifth Clause, p. 3. **R-0002.**

62 1997 Contract, Clause Fifth, second paragraph. **R-0002z.**

2. The 2000 Contract

85. After the three-year exploration period contemplated in the 1997 Contract, Metalín decided to exercise its option to purchase the mining concessions from Mineros Norteños. On August 30, 2000, the parties signed the 2000 Contract, and together with the 1997 Contract, thereby formalizing the transfer of the concession rights to Metalín.

86. The 2000 Contract reproduces key terms of the 1997 Contract, including the advance payment of US$ 3.6 million (the "purchase price" under the 2000 Contract), however, the amount of the royalties was reduced from US$ 10'475,000.00 to US$ 6'875,000.[63]

87. Under the 2000 Contract, Metalín assumed full control and responsibility for the development and operation of the Project. However, the company never commenced development of the properties nor did it make significant progress towards that end. It did not do so within the 4 years stipulated in the 1997 Contract or any other term. The company continued to "explore" the concessions for 22 years (from 1997 to 2019) clearly without paying royalties to Mineros Norteños which, as explained above, represented the most substantial part of the compensation agreed for the concessions (approximately 66%), even with the reduction of the amount described in the previous paragraph.

88. As can be seen, what Claimant describes as an extortion attempt by Mineros Norteños is nothing more than a claim for the consideration agreed to in the 2000 Contract, which Metalín never intended to pay. The Claimant apparently considers acceptable to spend more than 22 years exploring concessions that it committed to put into operation in 4 years and thus avoid paying royalties to Mineros Norteños. Paradoxically, it now seeks compensation from the State for the alleged lost opportunity that it failed to take advantage of in those 22 years.

89. Documents prepared by the Claimant itself show that it never had any serious intention to start up the concessions. For example, in its 2009 annual report - 12 years after the 1997 Contract was signed - Claimant acknowledged that the proceeds from a recent round of financing, totaling approximately US$ 2.99 million, would be used "to increase exploration activities at Sierra Mojada and for general working capital."[64] Nothing is mentioned about the exploitation of the concessions

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63 2000 Contract, Clause Seven. **C-0009**.

64 Silver Bull press release dated December 24, 2009. **R-0014.**

despite the fact that the statement was made 9 years after the end of the original 4-year term to which it had committed to the Minero Norteños.

90. Corporate documents of Claimant's group of companies confirm that its business is mineral exploration, not exploitation. The annual report of Metalline Mining Company (Metalline), a subsidiary of SVB and a shareholder of Metalín, describes it as "an exploration-stage company *engaged in the business of mineral exploration*."[65] [emphasis added] This characterization was repeated in 2010 and in subsequent years.[66] Even today in 2024, on the Toronto Stock Exchange, Silver Bull is described as a company engaged solely in exploration:

> Silver Bull Resources Inc is an exploration stage company engaged in acquiring and developing mineral properties [...].[67] [Emphasis added]

91. These statements, made several years after the deadline for commencing mining had expired, confirm that Claimant's efforts remained firmly focused on exploration and not on the development of an operational mine at Sierra Mojada.

92. It should be noted that in all this time, a significant number of the Mineros Norteños who originally signed the 1997 Contract with Metalín's predecessor, died without ever receiving the promised benefits.[68] Today, Mineros Norteños has only 70 of the 143 members it had in 1997,[69] virtually all of whom are senior citizens. The remaining members of the cooperative, who for all practical purposes were stripped of their concessions, continue to wait for the company to come to the negotiating table to reach an agreement.[70] However, no representative of Minera Metalín has responded to this call since 2022, when the last contact between the company and the members of Mineros Norteños took place. Needless to say, the company's representatives left Minera Metalín's facilities. In other words, since the demonstration carried out by Mineros Norteños in September 2019 and never returned to the Sierra Mojada Project site.

93. Metalín took advantage of the precarious situation of the Sierra Mojada community to obtain notoriously unfavorable conditions for the community, without offering any form of social

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65 Silver Bull press release dated December 24, 2009. **R-0014.**

66 Silver Bull press release dated December 9, 2010. **R-0015.**

67 Toronto Stock Exchange, profile of Silver Bull Resources Inc. **R-0016**.

68 Witness statement of Mr. Fraire, ¶ 13.

69 Witness statement of Mr. Fraire, ¶ 21.

70 Witness statement of Mr. Fraire, ¶ 37.

investment in exchange. It took over Mineros Norteños' concessions through an initial payment representing one third of the total consideration, apparently without any intention of putting the mine into operation, which would oblige it to pay the rest of the agreed amount through royalty payments. There was also a clear imbalance between the two parties to the agreement. The Mineros Norteños did not have the necessary knowledge to fully evaluate the implications of the agreement and the abusive terms that Metalín intended to impose on them. The community acted in good faith and under the expectation of receiving royalties in the medium term (*i.e.,* four years at the most),[71] but in the end, the promise of development for the community never materialized and, instead of bringing progress, Metalín left the communities of Sierra Mojada in an even more precarious situation.

94. This is the fundamental background for assessing the facts and claims alleged in this arbitration. This includes, of course, the pattern of conduct of SVB and its subsidiaries, their relationship with the local communities of Sierra Mojada and their responsibility for generating and exacerbating social conflict in the area. Such background is only compounded by Metalín's conduct in the domestic litigation that, in the absence of a response from Metalín, and more than a decade later, had to be initiated by the Mineros Norteños.

F. Disputes between Minera Metalín and Mineros Norteños

95. This case has an important background of complex domestic disputes that cannot be overlooked. In this section, the various legal remedies that Mineros Norteños filed against Metalín for breach of the Concession Agreements will be analyzed. However, before entering into this topic and for the Tribunal's clarity, a summary of the Mexican judicial system and the legal concepts that are relevant to this arbitration will also be presented, including the types of local lawsuits and the main legal remedies available to challenge judicial decisions in the country.

96. Considerable time has passed since the Concession Agreements were executed. Mineros Norteños has been waging a legal battle against the Claimant in Mexican courts for over a decade. These lawsuits were filed as commercial disputes for breach of the 2000 Contract and, from the beginning, Metalín has denied having any obligation to pay. The judges and magistrates who heard

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[71] Núria Ginés Castellet, *"La ventaja o explotación injusta en el ¿futuro? Derecho Contractual. Revista para el Análisis del Derecho,"* (October 2016). **R-0017.** *See* also Código Civil Federal (in force as of December 18, 2024), DOF, January 17, 2024, Article 17. **R-0018.**

these lawsuits, however, have confirmed in all instances both the existence of Minera Metalín's obligation and its breach. As will be explained below, the commercial lawsuit was dismissed because it was filed out of time.

1. The judicial system in Mexico

97. The justice system in Mexico resides mainly in the Federal Judicial Branch (PJF), which is in charge of guaranteeing compliance with the Constitution and the laws derived therefrom. The PJF is composed of the Supreme Court of Justice of the Nation (SCJN), the Electoral Court, the Regional Plenary Courts, the Collegiate Circuit Courts, the Collegiate Courts of Appeal and the District Courts, among other jurisdictional bodies. Additionally, each Federal State (as is the case of Coahuila) has its own state judicial branch.

98. Pursuant to Article 1049 of the Commercial Code, a "commercial trial" is considered to be one in which a dispute arising from commercial acts is to be resolved.[72] Mexican law, through the Commercial Code, establishes what should be considered as commercial acts, among which are: i) all acquisitions, disposals and leases made for commercial purposes and ii) purchases and sales of real estate, when they also have commercial purposes.

99. The Mining Law, on the other hand, establishes which acts must be governed by commercial law and, therefore, constitute the subject matter of commercial lawsuits. Thus, Article 23 of the Mining Law established prior to the 2023 amendment, *i.e.*, during the development of the lawsuits against Minera Metalín that "[t]he acts, contracts and agreements related to the transfer of the ownership of mining concessions or the rights derived therefrom, as well as the disputes arising therefrom, shall be subject [...] to the provisions of the commercial law".[73]

100. Thus, commercial lawsuits deal with the application and enforcement of laws on matters such as commercial law and commercial contracts, including contracts on the transfer of ownership of mining concessions such as Concession Agreements.

101. The mercantile matter is "concurrent", which means that local or federal courts can resolve the dispute. In the case of Mercantile Lawsuit 2/2015, initiated by Mineros Norteños against Metalín, a District Court of the Federal Judiciary heard the dispute.

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72 *See* Code of Commerce, Article 1049. **R-0019**.

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

102. The resolutions issued by the District Judges may be challenged through appeals and are decided by the Collegiate Courts of Appeals. In addition, there are various remedies or means of challenge that the parties may use in a commercial lawsuit depending on the challenged act:

- **Incidents:** These are proceedings within a main trial to resolve specific issues that arise during its development without suspending the proceedings. For example: precautionary measures or incompetence of the court. Judgments issued within the incidents may be challenged by means of an appeal. [74]
- **Appeal on the merits against a final judgment:** As its name indicates, this appeal allows the parties in dispute to challenge a final judicial decision by the court of first instance and are resolved by a hierarchical superior. [75]

103. The final judgments of second instance in commercial lawsuits may also be challenged through an *amparo proceeding*, and in case of disagreement with the result of an amparo proceeding, the parties may exceptionally resort to an *amparo in review*

104. In general terms, the amparo proceeding is a constitutional control mechanism available to any individual or legal entity that considers itself affected by acts of authority that violate fundamental rights established in the Constitution or in international human rights treaties ratified by Mexico. In other words, the amparo trial is a proceeding in which the constitutionality of the act of authority is challenged.

105. The amparo trial is divided into two types: *direct amparo*, which proceeds against final judgments, and *indirect amparo*, which proceeds against acts of authority other than final judgments such as, for example, acts in a trial -like an interlocutory judgment- that are impossible to repair, meaning those that materially affect rights established in the Constitution and in international treaties to which Mexico is a party. *Indirect amparo* suits are resolved by District Courts and Collegiate Courts of Appeal, while *direct amparo suits* are resolved by Collegiate Circuit Courts.

106. In both types of amparo proceedings, judicial rulings may be challenged through an appeal for review. The appeal for review in the case of a *direct amparo* is exceptional and only proceeds when, in the opinion of the Mexican Supreme Court, the controversy is related to an exceptional interest in constitutional or human rights matters. In the case of an *indirect amparo*, the appeal for

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74 *See* Code of Commerce, Article 1349 to 1358. **R-0019**.

75 *See* Code of Commerce, Article 1344. **R-0019**.

review proceeds against: i) judgments issued in these proceedings; ii) resolutions declaring the dismissal of the proceeding; iii) resolutions deciding a motion for the reinstatement of evidence; and iv) resolutions granting or denying the definitive suspension, or modifying or revoking the agreement granting or denying such suspension. [76]

2. The commercial lawsuit 2/2015 between Mineros Norteños and Minera Metalín and its multiple instances.

107. In May 2014, approximately 14 years after the execution of the 2000 Contract, Mineros Norteños filed a lawsuit against Metalín claiming breach of the 2000 Contract by failing to pay any royalties to Mineros Norteños. [77]

108. Claimant has referred to these facts in its Memorial, but has merely asserted that (i) Mineros Norteños' claims were without legal merit; (ii) that Mexican courts at all levels determined that the statute of limitations for claims for breach of the 2000 Contract had expired and, consequently, on March 11, 2021, all of Mineros Norteños' claims were dismissed[78] ; and (iii) that, even if Mineros Norteños' claims were not time-barred, Metalín did not owe royalties to the cooperative because, pursuant to the 2000 Contract, royalties were only payable until the Sierra Mojada Project entered the exploitation phase.[79]

109. Mexico does not deny that this was the outcome, but Claimant has omitted relevant information. Respondent considers that Claimant's narrative gives an incorrect impression of what happened in Commercial Litigation 2/2015 and in the following phases, focusing only on what it considers relevant. At no point does the Claimant address in detail the findings of the various

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[76] For the Tribunal's convenience, in the amparo proceeding a suspension of the challenged act may be granted, similar to an injunction in countries with a common law legal system. There are two types of suspensions: provisional and definitive. The provisional suspension is granted or denied at the time of the admission of the amparo action (generally its granting is ex parte), the standard for its granting is less rigorous and its effects generally last until the granting of the definitive suspension is resolved. The definitive suspension is granted or denied in a subsequent act, called an incidental hearing, in which all parties to the amparo proceeding generally participate. The standard for its concession is more rigorous than the one applicable to the provisional suspension and its effects last until a final judgment is issued in the amparo trial.

[77] Memorial, ¶ 2.60.

[78] Memorial, ¶ 2.69.

[79] Memorial, ¶ 2.63.

judges and magistrates who heard the disputes and which are not aligned with the Claimant's interests.

110. Mineros Norteños claimed: (i) the payment of US$ 6'875,000.00; (ii) the payment of MXN 225 per day for each of the 143 cooperative members until the resolution of the case, for damages resulting from the inactivity of the two mines that "traditionally were the only source[s] of employment in the region"; (iii) expenses and costs of the trial, and (iv) interest. The case was registered under file number 2/2015 and, initially, the First Judge of Morelos heard this dispute.[80]

111. On August 21, 2014, Metalín filed its answer to the lawsuit and, among other things, asserted the following exceptions or defenses[81] : (i) that the First Civil Judge of Morelos was incompetent to hear the matter, since it was a dispute involving the ownership of the assignment of mining concession rights that not only affected the rights of individuals but also federal rights (Objection of Incompetence); (ii) that Mineros Norteños did not have standing to file a lawsuit due to the fact that no deadline had been set to start exploitation works and, therefore, the necessary condition for the payment of royalties had not been met (Objection of Time or Condition), and; (iii) that the action was time-barred as the lawsuit had been filed in 2014 (Prescription Objection).[82] It is important to highlight that Metalín did not deny the obligation it had to pay royalties to Mineros Norteños, it alleged that it did not have a term to start the exploitation works that would give rise to the royalties.

112. Regarding the deadlines to resolve the objections that are raised in a commercial lawsuit, the Objection of Incompetence must be resolved as soon as it is admitted by the Judge before whom it is filed. Likewise, procedural objections, such as the Objection of Time or Condition are regulated and, as a general rule, must be resolved by means of an incident -which is why it is resolved before deciding on the merits. All other exceptions that do not have a specific time limit for their resolution must be resolved through the final judgment.[83] Due to this, the Objections of

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80 Amparo 375/2020 ruling, pp. 12-13. **C-0040**.

81 In Mexican law the term "exception" refers to the procedural means that allows a defendant to oppose the Claimant's allegations. *See*, jurisprudence 1a./J. 9/2001, First Chamber, Semanario Judicial de la Federación y su Gaceta, Novena Época, May 2001, Digital Reg. 189627No. 189627. **R-0020.**

82 Answer to Minera Metalín's Complaint in the Mercantile Lawsuit 2/2015. pp. 38-40. **R-0021**.

83 *See* Code of Commerce, Articles 1117, 1119, 1127-1129**. R-0019**.

Incompetence and Time were resolved prior to the issuance of the judgment of the Commercial Judgment 2/2015 as will be explained below.

113. By virtue of the Objection of Incompetence filed by Metalín, the First Civil Judge of Morelos declared himself incompetent to resolve the case, and on January 23, 2015 the Eighth District Judge in the State of Coahuila (Juez Octavo de Distrito de Coahuila) assumed jurisdiction over the lawsuit.

114. Following up on this, on March 12, 2015, the Eighth District Judge decided to admit, in the form of an "incident", Metalín's Objection of Time or Condition.[84] As explained above, this objection was based on the idea that no deadline had been set for the commencement of operations of the mine that would trigger the payment of royalties.

115. On April 24, 2015, the Eighth District Judge resolved the incident and determined that, contrary to Metalín's arguments, the parties had agreed to a four-year term in the 1997 Contract, counted from the acquisition of the rights to the mining concessions, to begin exploration and production works and, with this, the obligation to pay royalties to Mineros Norteños was confirmed.[85]

116. For these reasons, the Eighth District Judge declared the Objection of Term or Condition unfounded.[86]

a. Appeal 7/2015 and the decision of the Second Unitary Court.

117. Dissatisfied with this determination, on May 11, 2015 Metalín filed an appeal before the Second Unitary 17th Circuit Court of Chihuahua (Second Unitary Court). This appeal was registered as Appeal 7/2015.[87]

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84 Order of Admission for Incident of Non-Compliance with Term or Condition dated March 12, 2015. **R-0022**. Based on the Mexican legal system, incidents are "matters that are promoted in a trial and have immediate relation with the main business [...]", they are proceedings that are processed at the same time as the trial, that is, without suspending the processing of the main trial. Code of Commerce, Articles 1349 and 1350. **R-0019**.

85 Judgment of the Motion for Failure to Comply with a Term or Condition, p. 15. **R-0023.**

86 Judgment on the Incident of Non-Compliance with Term or Condition, pp. 15 and 17. **R-0023**.

87 Appeal Judgment 7/2015, p. 1. **R-0024**.

118. On March 7, 2016, the Second Unitary Court issued Appeal Judgment 7/2015, in which it determined that: (i) the Eighth District Judge had properly interpreted the Concession Agreements; (ii) Metalín was indeed obligated to put the mining lots into production no later than within four years and (iii) Metalín had not demonstrated that the payment of royalties to Mineros Norteños was subject to having "prepared and developed the mineral deposit, detached and extracted the mineral product and that smelter settlements had been obtained or such product had been sold".[88]

119. The Second Unitary Tribunal even pointed out that there was no evidence that Metalín had taken any steps to start the exploitation of the mining lots

> However, Minera Metalín did not provide any evidence to demonstrate that it carried out any such procedure before the competent authority and that it was denied, or that as a result of any of the studies it mentions, it was not possible to exploit the mining lots.[89]

120. Therefore, the Second Unitary Tribunal not only confirmed the April 24, 2015 ruling of the Eighth District Judge that recognized the existence of an obligation of Metalín to bring the concessions to production phase in 4 years and to start paying the agreed royalties to Mineros Norteños, but also evidenced Metalín's non-compliance with those two commitments. It is firmly established that international tribunals cannot act as appellate bodies with respect to decisions issued by competent local authorities.

b. Minera Metalín's Amparo 4/2016.

121. Dissatisfied with the two previous decisions, on April 6, 2016 Metalín filed an amparo lawsuit against the Judgment of Appeal 7/2015, which was resolved by the First Unitary Court of 17th Circuit, which was registered as Amparo 4/2016.

122. Metalín argued that Appeal Judgment 7/2015 was incorrect, given that, in its consideration, (i) the Second Unitary Tribunal should not have ruled on the existence of the deadline to start the exploitation of the mine, and (ii) its conclusions were incorrect from a legal point of view.[90]

123. On August 23, 2016, the First Unitary Court issued Amparo Judgment 4/2016, in which it concluded that, contrary to what Minera Metalín argued, Appeal Judgment 7/2015 had correctly

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88 Appeal Judgment 7/2015, pp. 20, 23, 26-27, 33, 35-36. **R-0024.**

89 Appeal Judgment 7/2015, p. 35. **R-0024.**

90 Judgment in amparo proceeding 4/2016, pp. 22, 30, 42-43. **R-0025.**

concluded that there was an obligation to put the concessions into productive stage within four years, and Metalín had not made any effort to achieve this end. [91]

124. Consequently, the First Unitary Court confirmed the judgment of Appeal 7/2015. More importantly, the First Unitary Court confirmed by Amparo Ruling 4/2016 that the Concession Agreements established a term for Minera Metalín to start the exploitation works of the mining lots and to start paying the agreed royalties to Mineros Norteños.[92]

c. Minera Metalín's Recurso de Revisión 145/2016.

125. On September 13, 2016, Metalín filed an appeal for review against the Amparo 4/2016 Judgment, which was registered as Recurso de Revisión 145/2016, before the Tercer Tribunal Third Collegiate Court in Civil and Labor Matters 17th of Chihuahua (Third Collegiate Court of Chihuahua).

126. In essence, the Third Collegiate Court determined that Amparo 4/2016 was inadmissible since the determination that was being challenged -i.*e.*, Appeal Judgment 7/2015- did not constitute an act whose effects were impossible to repair. [93]

127. In that order of ideas, the effect of the Ruling in Appeal for Review 146/2016 was to confirm what was previously resolved by the Second Unitary Tribunal in the Ruling of Appeal 7/2015, that is, that the obligation to put the mining lots into production and to pay royalties to Mineros Norteños was indeed subject to a certain term.

d. The judgment of the Commercial Judgment 2/2015.

128. Once Minera Metalín's challenges were exhausted, on October 4, 2017, the Eighth District Judge issued the judgment of the Commercial Judgment 2/2015. The Eighth District Judge confirmed that Minera Metalín, pursuant to clause five of the 1997 Contract and clause seven of the 2000 Contract, had the obligation to commence mining work on the mining lots within four years, which expired on August 30, 2001.[94]

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91 Judgment in amparo proceeding 4/2016, pp. 26- 27, 39-41, 49-51 and 56. **R-0025.**

92 Judgment in amparo proceeding 4/2016, p. 29. **R-0025.**

93 Recurso de Revisión 145/2016 ruling, pp. 17 and 37. **R-0026.**

94 Judgment of the Mercantile Judgment 2/2015, p. 14. **R-0027.**

129. Specifically, with respect to the fifth clause of the 1997 Contract, the Eighth District Judge stated the following:

> From this clause, I interpret that the parties agreed that in the event that the exploration company purchased the rights of the cooperative society, it undertook to put the mining lots into production no later than four years after the execution of the aforementioned contract.[95]
>
> [Emphasis added]

130. It should be clarified that, according to the Eighth District Judge, although the 2000 Contract did not establish the term from which the mine exploitation works (and, therefore, the payments to Mineros Norteños) had to start, this was due to the fact that the 1997 Contract had already stated this matter.[96] In fact, for the Eighth District Judge, the obligation to commence mine work began on August 30, 2001.[97]

131. In addition, the Eighth District Judge noted that under Mexican law -i.*e.*, Articles 1040 and 1047 of the Commercial Code- and unless otherwise stated, the statute of limitations for a claim of this nature is 10 years "from the day on which the action could have been legally exercised in court". In this case, Mineros Norteños' legal action could have been brought as of the day after the date on which the breach began, *i.e.*, as of August 31, 2001. Therefore, Mineros Norteños had until August 31, 2011 to file its legal action against Minera Metalín.[98] Due to the fact that the Mercantile Judgment 2/2015 was initiated on May 20, 2014, the Eighth District Judge concluded that Mineros Norteños' action was time-barred.[99]

132. It is important to note that the Mexican legal system distinguishes between formal objections and the merits of a case. While the statute of limitations as a procedural matter precludes Mineros Norteños' claim, it does not go against the fact that various Mexican judges and courts ruled on the existence of the obligation to commence exploitation of the mining lots within four years, which relates more to the merits of the dispute. These issues are not mutually exclusive. In fact, Mexican courts have corroborated this point by stating that "the statute of limitations does

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95 Judgment of the Mercantile Judgment 2/2015, p. 12, para. 30. **R-0027**.

96 Judgment of the Mercantile Judgment 2/2015, p. 14, para. 36. **R-0027**.

97 Judgment of the Mercantile Judgment 2/2015, p. 14, para. 37. **R-0027**.

98 Judgment of the Mercantile Judgment 2/2015, pp. 15-16, paras. 40-43. **R-0027.**

99 Judgment of the Mercantile Judgment 2/2015, pp. 15 and 19. **R-0027.**

not in itself eliminate the right to payment or performance of the obligation, but rather, it extinguishes the creditor's right to bring an action before the courts and demand performance by the debtor."[100]

133. Simply stated, although Mineros Norteños cannot enforce the 1997 Contract and the 2000 Contract through a commercial lawsuit, Metalín continued to have the obligation to pay for the concessions.

e. Challenges against the judgment issued in the Commercial Judgment 2/2015.

134. Claimant devotes only two paragraphs in the Memorial to explain the challenges filed against the Judgment in Commercial Judgment 2/2015.[101] In order to provide the Tribunal with a more complete picture, a brief summary of the challenges related to that judgment follows.

(1) Mineros Norteños Appeal 12/2017

135. Mineros Norteños filed an appeal against the Judgment of the Commercial Judgment 2/2015, which was heard by the Second Unitary Court and was registered as Appeal 12/2017. The central issue of Mineros Norteños' claim was the date from which the statute of limitations period of the action filed against Minera Metalín should be counted (*dies a quo*) and, consequently, the statute of limitations date of the claim, 10 years later (*dies ad quem*)

136. For Mineros Norteños, the *dies a quo* was not the day following four years after the execution of the 1997 Contract (*i.e.*, August 31, 2001), in which case the *dies ad quem* would be August 31, 2011, but August 31, 2004, *i.e.*, the day following four years after the execution of the 2000 Contract, in which case the *dies ad quem* would be August 31, 2014. For Mineros Norteños,

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[100] For the Tribunal's convenience, similar to the *common law* system of judicial precedents, the Mexican judicial system establishes judicial criteria that guide the adoption of rulings. Thus, in Mexico, relevant non-binding criteria may be adopted in the form of isolated theses and binding criteria in the form of jurisprudence. The criteria become binding for all courts in Mexico -regardless of their hierarchy or whether they are local or federal courts- in the following ways: (i) by binding precedents, (ii) by reiteration, and (iii) by contradiction of theses. See, Amparo Law, Articles 218 and 222 to 225. **R-0063.** In this case, the court considered that, although the negative prescription is a way of getting rid of an obligation due to the passage of time, it does not eliminate the right to the performance of an obligation, but only extinguishes the right to go before the courts and demand performance. Thesis: I.11o.C.47 C (10th), T.C.C., Semanario judicial de la Federación y su Gaceta, Tenth Epoch, March 2014, Digital Reg. 2006064. **R-0028**

[101] Memorial, ¶¶ 2.69 and 2.71**.**

this was so because it was as of the date of signature of the 2000 Contract that Minera Metalín effectively acquired the mining concession rights (as stipulated in the 1997 Contract). [102]

137. Indeed, in reviewing the dates, the Tribunal will note that Mineros Norteños filed its claim in May 2014, several months before the *dies ad quem*, according to its interpretation. What was at stake with one and the other interpretation was not a minor issue: if the *dies a quo* was August 31, 2001, Mineros Norteños would be considered a negligent party because it took longer than allowed by law to file its claim and, consequently, it would lose its right to claim. Conversely, if the *dies a quo* was August 31, 2004, Mineros Norteños was in time and its claim could proceed.

138. Mineros Norteños also claimed that the Eighth District Judge had incorrectly interpreted the 1997 Contract and the 2000 Contract, illegally revoking his own determinations. Mineros Norteños argued that, contrary to what was stated in the Judgment of the Commercial Judgment 2/2015: (i) there was a term to start the exploitation of the mine; (ii) it had established the basis to define such term; and (iii) that the term to comply with the obligation to start the exploitation works started with the acquisition of the rights over the concessions, and, therefore, expired on August 30, 2004.[103]

139. On July 31, 2019, the Second Unitary Court issued the Judgment of Appeal 12/2017 in which it confirmed the Judgment of the Commercial Judgment 2/2015.[104] In essence, the Second Unitary Court considered that Mineros Norteños had not explained why the interpretation on the *dies a quo* was incorrect.[105]

140. As regards the illegal revocation argument, the Second Unitary Court explained that the Judgment of the Objection of Term or Condition had been substituted by the Judgment of Appeal 7/2015, so that the starting and ending date of the term for Metalín to comply with its obligation would be a matter to be resolved in the Judgment of the Commercial Judgment 2/2015.[106]

(2) Amparo 750/2019 of Mineros Norteños

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102 Appeal Judgment 12/2017, pp. 6-7. **R-0029.**

103 Appeal Judgment 12/2017, pp. 14, 21-23. **R-0029.**

104 Amparo 375/2020 ruling, pp. 18-19. **C-0040**.

105 Appeal Judgment 12/2017, p. 36. **R-0029**.

106 Appeal Judgment 12/2017, pp. 33-34. **R-0029.**

141. Dissatisfied with the result obtained in Appeal 12/2017, Mineros Norteños filed an amparo lawsuit, which was heard by the Third Collegiate Court and registered as Amparo 750/2019. In its claim, Mineros Norteños argued that Articles 14 and 16 of the Constitution had been breached, since Mineros Norteños had offered reasons to question the decision according to which the *dies a quo* began to be counted as of the execution of the 1997 Contract.[107]

142. On January 24, 2020, the Third Collegiate Court issued Amparo 750/2019 which it ruled in favor of Mineros Norteños, and instructed the Second Unitary Court to issue a new judgment in which it resolved whether the interpretation made by the Eighth District Judge on the date from which the *dies a quo* should be counted had been incorrect due to the nature of the 1997 Contract and the 2000 Contract.[108]

143. In response to the Amparo 750/2019 Judgment, the Second Unitary Court vacated the first judgment of appeal 12/2017 and issued a second judgment on March 10, 2020. In this second judgment, the Second Unitary Court again confirmed the decision of the Commercial Judgment 2/2015, *i.e.*, it determined that Minera Metalín had the obligation to start the exploitation works of the mining lots as of August 30, 2001, also confirming that Mineros Norteños' action was barred by the statute of limitations.[109]

(3) Mineros Norteños Amparo 375/2020

144. On August 3, 2020, Mineros Norteños filed a new Amparo lawsuit against the second judgment issued in Appeal 12/2017, which was also heard by the Third Collegiate Court, which was registered as Amparo 375/2020.

145. On March 11, 2021, the Third Collegiate Court issued the judgment in Amparo 375/2020 in which it concluded that the Second Unitary Court had not violated any constitutional rights of Mineros Norteños by issuing the second judgment in Appeal 12/2017. The Third Collegiate Court terminated Mineros Norteños' claim raised in Juicio Mercantil 2/2015.[110] In essence, the Third Collegiate Court concluded that the Second Unitary Court made a correct interpretation of the

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107 Amparo 375/2020 ruling, pp. 19-20. **C-0040**.

108 Amparo 375/2020 ruling, pp. 19-21. **C-0040**.

109 Amparo 375/2020 ruling, p. 22. **C-0040**.

110 Amparo 375/2020 ruling, p. 107. **C-0040**.

1997 Contract and the 2000 Contract, by stating that the *dies a quo* was as of the signing of the 1997 Contract and therefore the *dies ad quem* was August 30, 2001.

146. However, derived from all these lawsuits and challenges, the following can be concluded:

- There was an obligation for Metalín to commence mining works and pay the royalties owed to Mineros Norteños within four years from the signing of the 1997 Contract.
- It was demonstrated that there was no evidence that Minera Metalín had even taken the necessary steps to begin the exploitation of the mining lots, much less the exploitation itself.
- The claims of Mineros Norteños did not succeed because they were time-barred, but not because Minera Metalín's obligation to the cooperative did not exist.

147. As the Tribunal will note, contrary to the Claimant's assertion, Metalín did have an obligation to commence mining work in order to pay royalties to Mineros Norteños as of August 30, 2001. Various courts and tribunals at all levels of the Mexican justice system have confirmed this interpretation. Despite this, Metalín prevailed in these proceedings because of a formality: the statute of limitations on the claim. Mineros Norteños, mistakenly relied on Metalín's good faith and took too long to file its claim, most likely because it did not have adequate and, above all, timely legal advice.

148. However, the final outcome of Commercial Judgment 2/2015 does not render ineffective the determinations of various authorities of the Judiciary regarding Metalín's obligations and their breach. Respondent does not intend for this Tribunal to act as an appellate body or to review the decisions made by various judicial bodies. However, Metalín's breach of contract is fully established and cannot go unnoticed by this Tribunal. As can be seen from this recounting of the domestic proceedings, the Claimant's narrative that Mineros Norteños' arguments raised in Commercial Judgment 2/2015 would be without merit is absolutely false.

G. The 2016 Demonstration

149. The Claimant, in its Memorial, has referred to a "First Blockade" of 2016 and a "Second Blockade" of 2019.[111] The Respondent considers it essential to clarify that these events, which the Claimant exaggeratedly presents as violent episodes where multiple crimes were committed, were in fact two peaceful demonstration movements by Mineros Norteños.[112] The sole purpose of both demosntrations was to seek an amicable solution to a legitimate conflict arising from Metalín's repeated breach of contract, which has been duly accredited by several Mexican courts.

150. On February 4, 2016, while domestic litigation initiated by MN against Metalín over the scope of the 2000 Contract remained pending, Mineros Norteños initiated what the Claimant has referred to as the First Blockade of the Project.[113] The Claimant refers to this demosntration as an event in which "Mineros Norteños decided to take matters into its own hands and extort alleged royalties from Minera Metalín directly by illegally blockading the Project site."[114] In addition, the Claimant alleges that at around 10:00 p.m. on that same day, prosecutors from Monclova Coahuila, accompanied by the police, ordered the protesters to leave the Project site.[115] That same day, says the Claimant, the blockade had been removed and the following day Metalín was able to resume work at the mine.[116]

151. Again, the Claimant's description of the actions of the Mineros Norteños at this first demonstration is inaccurate and contrary to the narration of the Claimant's witness, Mr. López Ramírez (Country Manager of the Project).[117] Mr. López Ramírez's statement indicates that the Mineros Norteños "kept shouting, threatening me and demanding to speak with Tim Barry".[118] However, the image provided with his statement is not consistent with this narrative and in no way demonstrates any aggression, verbal or physical, against him or any other Metalín employee.

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111 For the Tribunal's convenience, Respondent also refers in this Memorial to such events as the First and Second Blockade. This, however, does not imply that Respondent agrees with Claimant's characterization.

112 Witness statement of Mr. Fraire, section IV and VI.

113 Memorial, ¶ 2.77.

114 Memorial, ¶ 2.72.

115 Memorial, ¶ 2.84.

116 Memorial, ¶ 2.86.

117 Witness statement of Mr. López Ramírez, ¶ 6.15.

118 Witness statement of Mr. López Ramírez, ¶ 6.15.

Beyond Mr. López Ramírez's testimony there is no evidence that on February 4, 2016, at what SVB calls the First Blockade, there was any violence or attempts to forcibly enter the Claimant's premises.

152. The Respondent categorically denies that this was a blockade or hostage taking, as Mr. López Ramírez claims.[119] It was a social demonstration by which Mineros Norteños sought to establish direct communication with the company's representatives (*i.e.*, Tim Barry).

153. The Claimant's version of events also presents inconsistencies since, on the one hand, the Claimant argues that Mineros Norteños entered Minera Metalín's property,[120] and, on the other hand, Mr. López Ramírez himself acknowledges that Mineros Norteños remained outside the entrance to the site.[121]

154. Another key aspect about the 2016 Demonstration, is the fact that on that same day the Mineros Norteños voluntarily and peacefully withdrew from the entrance of Minera Metalín's offices. The voluntary withdrawal was mainly due to two aspects. The first was the expectation of establishing direct communication with Mr. Barry,[122] and the second was the intervention of the Municipal Syndic, Mrs. Esmeralda Olguín Aguilar,[123] who, on behalf of the Governor of Coahuila, indicated that actions would be taken by high officials to seek a convenient solution for both parties in the conflict,[124] to which the cooperative responded once again in good faith and with the best attitude towards dialogue, lifting the demonstration.

155. Although there are discrepancies in the Claimant's statements and what actually occurred that day, what is undisputed is that there was no complaint by the Claimant against the Mineros Norteños, and that no act of violence ever occurred. Quite simply, the Mineros Norteños withdrew in the expectation that they would be able to communicate with Minera Metalín's management and reach a solution to their claims.[125]

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119 Witness statement of Mr. López Ramírez, ¶¶ 6.21 and 6.23.

120 Witness statement of Mr. López Ramírez, ¶ 8.18.

121 Witness statement of Mr. López Ramírez, p. 21.

122 Letter from Tim Barry to Juan Manuel Lopez dated February 4, 2016. **JMLR-011.**

123 Memorial, ¶ 2.79. Witness Statement of Mr. López Ramírez, ¶ 6.15.

124 Witness statement of Mr. Fraire, ¶ 17.

125 Witness statement of Mr. Fraire, ¶¶ 18 and 22.

156. According to Mr. Lopez Ramirez, Mr. Tim Barry was asked to meet with Mineros Norteños to seek a solution, to which he agreed, under the commitment that there would be no more alleged blockades by Mineros Norteños.[126]

157. Regarding the alleged threats against Mr. López Ramírez and the Claimant's workers, it is important to note that what Mr. Fraire actually said only referred to the fact that the Mineros Norteños would do anything to defend their rights, but Mr. López misinterpreted it as a threat by modifying what Mr. Fraire actually said.[127] Mr. Fraire's testimony attests to this:

> Having clarified the reason why we withdrew, I would like to clarify something that Mr. Juan Manuel López pointed out in his witness statement. He claims that I told him: "if there is a tragedy, you will be responsible, and if they have to die there, they will die there". This is totally false, what I said was that we would not withdraw until Mr. Barry attended to us and that if we had to die of starvation waiting there, then so be it.[128]

158. The foregoing denies that any type of threat or action that could have threatened the lives of any of those present that day had occurred. In addition, another aspect clarified by Mr. Fraire, was that no member of Mineros Norteños put padlocks or chains on the gates of the site, since it was the workers of Minera Metalín themselves who put the chains and padlocks to prevent Mineros Norteños from entering the premises.[129]

159. Although, according to the Claimant's witness, Metalín's employees were facing a complex situation and even considered themselves hostages, Mr. López Ramírez himself confirms that he limited himself to making: (i) a phone call to the Química del Rey prosecutor's office, (ii) another call to the Director of Public Safety and Citizen Attention Department of the city of Saltillo, and (iii) sending a letter to the local police. However, there was no disturbance of the public order, improper entry to its properties or any situation that would have endangered the life of any person or Minera Metalín itself. It seems that Mr. López Ramírez takes two positions in dealing with these matters: when the 2016 Demonstration occurred, he did not consider it serious enough to file a formal complaint, but he has no objection to treat the Mineros Norteños as criminals in this arbitration for the same facts.

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126 Witness statement of Mr. López Ramírez, ¶ 7.1.

127 Memorial, ¶ 2.81. Witness Statement of Mr. López Ramírez, ¶ 6.21.

128 Witness statement of Mr. Fraire, ¶ 19.

129 Witness statement of Mr. Fraire, ¶ 16.

160. In any case, Mr. Lopez cannot point out that he was a "hostage" during the 2016 Demonstration, since he himself acknowledges that it was his decision to stay overnight that night at Minera Metalín's facilities.[130] In addition, his statement presents serious inconsistencies. For example, he states that he spent the night of February 4, 2016 at Minera Metalín's stations, but that on February 5, 2016 he returned to the Project site, a situation that reveals a lack of consistency. In addition, he includes two photographs of "[c]chains and locks placed [...] by Mineros Norteños" on the front and back gate of the Project[131] , but does not provide any additional evidence to confirm that it was indeed Mineros Norteños who placed these locks. In particular, Mr. López Ramírez himself stated in his own statement that he himself had locked the doors.[132]

161. For its part, the alleged letter sent to Mineros Norteños to seek a solution to the conflict,[133] decontextualizes the facts, since Minera Metalín workers were never put at risk and much less were they held hostage.[134] Contrary to what Mr. López Ramírez argues, that letter is not addressed to the Mineros Norteños and there is no evidence that it was actually delivered to its members. Nor does the letter contain any reference to there having been hostages or an illegal invasion of the property.

162. The letter also mentions the intention of Mr. Barry's trip in 2016 to seek a solution to the conflict, a fact that confirms the expectation of Mineros Norteños to seek a solution to their demands; an expectation that, however and following Metalín's pattern of behavior, was not fulfilled.

163. Another inconsistency in the Claimant's argument consists of an alleged letter to request the support of various authorities that was submitted on February 3, 2016 to the Municipal Government of Sierra Mojada and other authorities. However, the document provided by the Claimant does not even have a signature and lacks any reference identifying that it was indeed submitted to the Municipal Government of Sierra Mojada.[135]

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130 Witness statement of Mr. López Ramírez, ¶ 6.24.

131 Witness statement of Mr. López Ramírez, p. 17.

132 Witness statement of Mr. López Ramírez, ¶ 6.15.

133 Letter from Tim Barry to Juan Manuel López dated February 4, 2016. **JMLR-011.**

134 Witness statement of Mr. López Ramírez, 7.2.

135 Letter from Minera Metalín dated February 5, 2016. **C-070.**

164. Additionally, the Claimant mentions that the acts of the Mineros Norteños constitute a form of extortion.[136] If that were so, it must be considered that extortion is a crime,[137] about which a complaint was never filed with the Coahuila Prosecutor's Office or with the Attorney General's Office.

165. In any event, the list of requests submitted by the Mineros Norteños cannot be construed as extortion.[138] Again, the factual narrative of the Claimant and its witnesses presents inconsistencies.[139]

166. The only contemporaneous thing that exists is a unilateral statement of Mr. López Ramírez taken the following day, in which he states his statement and does not provide further elements to confirm a crime.[140] The Respondent does not consider that this type of conduct, which also requires a clear and convincing degree of proof, can be proven with the unilateral statements of a witness who, in addition, has submitted a statement riddled with inconsistencies and evidentiary defects.

167. It is surprising that, despite the seriousness of the alleged events experienced by Mr. López Ramírez, there is no formal complaint for the crimes that allegedly occurred. If the events had occurred in the manner in which the Claimant contextualizes them, there would at least exist a complaint or a formal minute made by the officials of the Public Prosecutor's Office who were present that day during the 2016 Demonstration, but this was not the case. The only thing that exists is a statement by Mr. López Ramírez, which is highly questionable.[141]

H. Option Agreement with South 32

168. The Claimant explains that "[f]ollowing the end of the initial blockade and after investing significant time and resources [...] SVB sought additional financing from a major mining group to bring the Sierra Mojada project into the production phase."[142] To secure project financing, on June 1, 2018, SVB, Minera Metalín and Contratistas de Sierra Mojada S.A. de C.V. ("Contratistas")

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136 Memorial, ¶ 2.72.

137 *See* Federal Criminal Code, Article 390. **R-0030.**

138 Witness statement of Mr. López Ramírez, ¶ 7.15.

139 *See* Witness Statement of Mr. López Ramírez, ¶ 7.16; as well as Exhibit **JMLR-013**.

140 Unilateral statement of facts dated February 5, 2016. **C-027-SPA.**

141 Unilateral statement of facts dated February 5, 2016. **C-027-SPA.**

142 Memorial, ¶ 2.88. Respondent's translation.

entered into an Option Agreement with South32, which granted South32 the option to purchase up to 70% of the shares of Minera Metalín and 70% of the shares of Contratistas (Option Agreement) for US$100 million.[143] In exchange, South32 agreed to contribute US$10 million to fund four years of exploration.[144]

169. The Option Agreement provided for an initial 4-year financing program in which South 32 would provide upfront capital payments for SBV, Minera Metalín and Contractors to continue activities at the Sierra Mojada Project.[145] South32 could exercise the Option for a total amount of 100 million upon completion of any of the phases.[146] The capital contributions would be divided into 4 phases, one for each year, as follows:

- Phase One (2018): Equity contribution by South32 of not less than $3 million to Minera Metalín, together with any additional equity contribution by South32 to Minera Metalín to fund additional expenditures that would have been approved under the Agreement.[147]
- Second Phase (2019): Equity contribution by South32 to Minera Metalín in an amount not to exceed $3 million, together with any additional equity contribution by South32 to Minera Metalín to fund additional expenditures that would have been approved pursuant to the Agreement. In the event that the first phase would have exceeded the $3 million amount, the excess would reduce the maximum amount of this phase.[148]
- Third Phase (2020): Equity contribution by South32 to Minera Metalín in an amount not to exceed $2 million, together with any additional equity contribution by South32 to Minera Metalín to fund additional expenditures that would have been approved under the Agreement. In the event that the first and second phases would have exceeded the $6 million amount, the excess would reduce the maximum amount of this phase.[149]

143 Memorial, ¶ 2.93.

144 Memorial, ¶ 2.93.

145 Option Agreement, Clause 1.1(106). **C-0031**.

146 Option Agreement, Clause 1.1(109). **C-0031**.

147 Option Agreement, Clause 1.1(57). **C-0031**.

148 Option Agreement, Clause 1.1(101). **C-0031**.

149 Option Agreement, Clause 1.1(115). **C-0031**.

- Fourth Phase (2021): Equity contribution by South32 to Minera Metalin in an amount not to exceed $2 million, together with any additional equity contribution by South32 to Minera Metalin to fund additional expenditures that would have been approved pursuant to the Agreement. In the event that the first, second and third phases would have exceeded the $8 million amount, the excess would reduce the maximum amount of this phase.[150]

170. The Option Agreement contained an approved schedule of activities that conditioned the funding of each phase. Each phase was necessary for South32 to exercise the Option Agreement.

171. The Option Agreement provided for South32's ability to terminate the Agreement at any time upon a simple notice.[151] In the event of termination without exercising the option, South32 would pay SVB an indemnity to cover termination payments to workers who had been hired during the Option period, South32 would have no interest in Minera Metalin or the Contractors or payments made pursuant to the Initial Financing and each party would be released from the obligations contained in the Option Agreement.[152]

172. In addition, the Option Agreement provided that, in the event of force majeure, any term set forth in the Agreement would be extended for the time equivalent to the delay caused by the force majeure or a longer period depending on the circumstances. During the period of force majeure, South32 would not be obligated to make prepayments in accordance with the phases described *above*.[153] In this regard, neither the Option Agreement nor the Termination Agreement states that the force majeure had a direct relationship with the Termination of the Option Agreement. What is certain is that the Option Agreement provided for a contingency plan in the event of a force majeure situation such as the one that occurred with Mineros Norteños.

173. As developed in SectionII.L.3, the Claimant omits certain relevant facts related to the legal status of the Project that occurred around the date on which South32 decided to terminate the Option Agreement. These facts confirm that the alleged blockades by Mineros Norteños do not have the relevance the Claimant assigns to them.

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150 Option Agreement, Clause 1.1(115). **C-0031**.

151 Option Agreement, Clause 4.9. **C-0031**.

152 Option Agreement, Clause 4.10. **C-0031**.

153 Option Agreement, Clause 8.4. **C-0031**.

I. The 2019 Demonstration

174. On September 8, 2019, members of Mineros Norteños held a demonstration outside the Project site and again demanded payment of royalties.[154] According to the Claimant, its representatives "pleaded" with the Mexican Government, from the municipal to the state and federal levels, to withdraw what it called the Second Blockade, but the Mexican authorities took no action.[155]

175. Claimant labels the events of 2019 as a "Continuous Blockade", which is incorrect and only part of the exaggerated rhetoric of its Memorial. As already explained, the first peaceful demonstration of Mineros Norteños in 2016 was only a small demonstration, outside Metalín's facilities that was dissolved in good faith by the miners' own free will under the expectation of reaching a mutually satisfactory agreement with the company.

176. The Tribunal cannot lose sight of the fact that these demonstrations do not come out of the blue. Contrary to how the Claimant would have it appear, it is neither the trade nor the custom of the Mineros Norteños, a group of workers facing extreme poverty, to blockade the mines in the Sierra Mojada on which their livelihood depends.

177. With this in mind, regarding the events of September 8, 2019, it is important to contextualize that the entrance to Minera Metalín's premises, unlike the offices, is only controlled by a rope that crosses certain points of the facilities.[156] In other words, in the first access there is no physical barrier preventing entry that would have to be destroyed to gain access. The Mineros Norteños entered the premises on foot, without the need to breach any gates or fences. Likewise, their entry was peaceful and without weapons of any kind.[157] At the moment of entry, Mr. López, being the person responsible for Minera Metalín's facilities and for the safety of its workers, decided to leave the facilities immediately, went to his home and deliberately avoided talking to the Mineros Norteños.[158]

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154 Memorial, ¶ 2.111.

155 Memorial, ¶ 1.5.

156 Witness statement of Mr. Fraire, ¶ 29.

157 Witness statement of Mr. Fraire, ¶¶ 31, 33, 38 and 39.

158 Witness statement of Mr. Fraire, ¶ 32.

178. Mr. Lopez's action is not a minor issue, since even though he is responsible for the facilities and its personnel, he deliberately left 6 workers supposedly at the offices of Minera Metalín,[159] knowing that they have no authority to represent the Claimant. Another aspect to highlight is that Mr. Lopez went to his home in La Esmeralda, a community in the municipality of Sierra Mojada, but at no time did he personally go to request the support of the municipal police, the Coahuila Prosecutor's Office or any other authority; even knowing the relevance that in his understanding this situation had. Mr. Lopez, being responsible for the project in Mexico, only made phone calls to the authorities.

179. According to the Claimants' witness, it was not until the afternoon of that day that Mr. Rubén Navidad contacted him to inform him that the Mineros Norteños were meeting and expressing their discontent, but he never indicates that there was chaos or any type of risk.

180. The account of events given by the Claimant's witnesses is ambiguous, but it is a fact that Minera Metalín's employees left on their own feet and without any risk to their lives. Mr. Melnyk and Mr. Velázquez left the same day.[160] To the Respondent's knowledge, there was never any threat or action that would lead them to believe that their lives were in danger or that they were being held hostage or kidnapped.[161]

181. The actions of the authorities were in accordance with the facts, since: (i) there was never a situation that could endanger the life of any person, (ii) there was no violence or armed acts, (iii) there were peaceful demonstrations, (iv) the Claimant's representative left the place, and (v) a formal complaint had not been filed with the Prosecutor's Office until four days after the demonstration had begun (*i.e., there* was never a willingness to go directly to one of the Prosecutor's Offices to report the alleged crimes) and all alleged support actions were phone calls by Mr. Lopez from his home, (vi) there was never a formal complaint filed by the Claimant's representative, there was never a willingness to go directly to one of the prosecutor's offices to denounce the alleged crimes) and all of the alleged support efforts were phone calls by Mr. Lopez from his home

159 Witness statement of Mr. López Ramírez, ¶ 7.22.

160 Witness statement of Mr. López Ramírez, ¶ 8.31.

161 Witness statement of Mr. Fraire, ¶ 38.

182. Although in Mr. Lopez's opinion, this was a delicate situation and 6 employees of Minera Metalín were being held hostage, he never made any additional effort to denounce these events in person; he only limited himself to making phone calls. The municipal police were present that same day, but only to guard a peaceful demonstration. There were no arrests for alleged crimes such as those alleged by the Claimant. Nor is there any evidence of vandalism or theft by Mineros.

183. Once the Mineros Norteños realized that there was no intention on the part of the Claimant's representatives to dialogue, they made the decision to remain outside the main gate.[162] This camp is not located within Metalin's premises and does not obstruct the public road. Therefore, there is no reason for the authorities to intervene.

Image 3: Photograph of the 2019 Demonstration.

Source: Municipal Presidency of Sierra Mojada.

184. Mr. Lorenzo Fraire himself, President of Mineros Norteños, has indicated that they never threatened, kidnapped or took any action against the Minera Metalín workers.[163] Mr. Lopez explains that the four workers stayed until September 12 and 19, 2019. According to his testimony those employees stayed because he requested them to do so, and he himself drew up the plans so

162 Witness statement of Mr. López Ramírez, ¶ 8.35.

163 Witness statement of Mr. Fraire, ¶ 38.

that they could leave without being detected by Mineros Norteños. This, of course, does not imply that Mineros Norteños would have assaulted them if they had tried to leave through the front door. Nor does it constitute evidence of aggression against Metalin's employees.[164]

185. For the Tribunal's clarity, Mr. Fraire explains that the access roads to the mines consist of mostly free entry and exit properties; having only certain controlled access points, but outside of these specific entry points, anyone can enter or exit thousands of hectares because there is no fence, wall or any delimitation that divides the properties.[165] This implies that, although there are entry and exit gates as a reference, the geography of the mines and the lack of fencing on the totality of hectares, implies that access to the properties is free access. As stated in his statement.[166]

> Before addressing the events of that day, it is necessary to explain what the area of the mines and the offices of Minera Metalín are like, since the entrance to Minera Metalín's lots is mostly free access and there is no wall, perimeter fence or any other type of division. There are only a few access and exit points controlled by a rope or wire fence, but these do not cover all the hectares encompassed by the mines. For greater clarity, we are talking about hundreds of hectares of land and it would be impossible for Mineros Norteños to block access to all of these lots. Only the offices, dining room, dormitories and administrative area are fenced with cyclone mesh.

186. Mr. Fraire also details that Minera Metalín's offices in Sierra Mojada is the only area that has a separation to prevent free access through a cyclone mesh. This is an important fact, because Mr. Fraire clarifies that the Mineros Norteños never entered Minera Metalín's offices.

187. Regarding the removal of three of the four people who were still inside the offices of Minera Metalín, Mr. Fraire has stated that it is not true that the Mineros Norteños threatened or held these people against their will. It should be borne in mind that what Mr. López Ramírez stated does not consist of facts that he is aware of because he was not at the site. The opposite situation occurs in the testimony of Mr. Fraire, who denies any type of threat or violence to the company's employees.[167] Furthermore, there is no evidence to support the accusation that they were being held or restricted in their freedom, since the fear that some of their workers may have had does not imply that the Mineros Norteños have carried out threats or actions against those workers. The employees were inside the offices, which are fenced and isolated.

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164 Witness statement of Mr. López Ramírez, ¶¶ 8.35 to 8.37.

165 Witness statement of Mr. Fraire, ¶ 29.

166 Witness statement of Mr. Fraire, ¶ 29.

167 Witness statement of Mr. Fraire, ¶¶ 31 and 33.

188. There is evidence that they were allowed to leave or enter the facilities, as in the case of the watchman of the Minera Metalín offices, a person who went out to receive food that his relatives brought him on a daily basis, and the fact that certain Minera Metalín workers frequently went to the company's facilities to feed farm animals that were located inside the land that includes the offices. [168]

189. The Claimant asserts that Mineros Norteños illegally exploits its mines, but does not provide any evidence to confirm that this is the case or any complaint in which it has reported this illegal activity to the corresponding authority. According to Mr. Fraire's testimony, they have not taken any illegal action against Minera Metalín.

190. On the other hand, all the facts that Mr. Lopez narrates about the internal meetings of the Mineros Norteños associates or the meetings between the Mineros Norteños and Deputy Borrego are inaccurate or erroneous. It is noted at the outset that Mr. López Ramírez was not present at any of them. Everything he narrates in his testimony is *hearsay*.[169] It is also surprising that all the evidence supporting Mr. López Ramírez's testimony is emails exchanged between him and Mr. Barry, which do not even include the entire email chain. It would appear that the Claimant cherry-picked the emails that suited its purposes.

191. On the other hand, the conversations between relatives or friends that could be given in support of an affective bond, needless to say, lack merit, as is the apparent support requested by Mr. López Ramírez to his wife's cousin, who is a policeman and who is in charge of other types of issues, including drug trafficking issues.[170]

J. Actions of the authorities in the face of the Second Blockade

192. The actions of the Mexican authorities were in accordance with the legal framework of their competence and in conformity with the requests actually made by the Claimant, taking into account the facts known to each authority at the time.

193. The Coahuila Prosecutor's Office first learned of the events, four days after they occurred, through a complaint filed by a third party. The Coahuila District Attorney's Office confirmed that

168 Witness statement of Mr. Fraire, ¶¶ 36, 38-40.

169 Witness statement of Mr. López Ramírez, ¶¶ 8.2 to 8.7.

170 Witness statement of Mr. López Ramírez, ¶¶ 8.3, 8.12 and 8.46.

there was no deprivation of liberty of any worker (*i.e.,* kidnapping or hostages), and investigated everything related to the alleged dispossession of Minera Metalín's property. Also, the Coahuila Prosecutor's Office was able to confirm that the Mineros Norteños camp was off site. The Coahuila Prosecutor's Office made additional requests for information to the Claimant, but it is known that no such information was provided. Consequently, the authority was unable to make much progress in its investigation, as explained *below*.

194. For its part, the Sierra Mojada Municipal Police was present during the events of September 2019. It is important to note that the municipal police do not have powers to investigate crimes ex officio, as the Coahuila Prosecutor's Office does. The Municipal Police is in charge of maintaining public order in Sierra Mojada, that is, to protect the life, integrity and patrimony of the people within the municipality and to provide protection and assistance to anyone who requests it.[171] As previously stated, during the Mineros Norteños demonstration in 2019 there was no crime or situation of extreme urgency that merited the intervention of the municipal police. The demonstration was peaceful.

195. It is also worth bringing to the Court's attention that the Police are legally prevented from using public force against peaceful demonstrators. Specifically, the National Law on the Use of Force states:

> For no reason may weapons be used against those participating in peaceful demonstrations or public meetings with a lawful purpose. In these cases, police action must ensure the protection of the demonstrators and the rights of third parties, as well as guarantee public peace and order. The intervention of the public security forces shall be carried out by persons with specific experience and training for such situations and under protocols of action issued by the Council of the National Public Security System.[172]

196. The Second Blockade or Demonstration of 2019 constituted a peaceful demonstration due to a social protest, in which there was no evidence of an illegal act or crime, such as those alleged by Claimant, for example, deprivation of liberty, theft or dispossession of private property or goods. Simply put, the employees of Minera Metalín were in the company's offices of their own

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171 Public Safety, Transit and Traffic Regulations of the Municipality of Sierra Mojada, Article 21. **R-0031**.

172 National Law on the Use of Force, Chapter VII Police Actions in Demonstrations and Public Meetings, Article 27, **R-0032.**

free will, there was no invasion or trespassing of the fence dividing the administrative offices and much less was there any indication of theft or similar acts. The foregoing, in addition to the fact that, at that time, there was no report of the alleged crimes. Needless to say, even if there had been some type of disturbance, the use of public force was not justifiable and should be applied in a reasonable manner and in accordance with the situation.[173]

197. When speaking of the use of public force, it is internationally recognized that this is "a last resort that, qualitatively and quantitatively limited, is intended to prevent a more serious occurrence than that caused by the State's reaction"[174] . Moreover, for the use of this *exceptional* resource it is necessary to comply with well-defined principles, such as legality, absolute necessity, and proportionality.[175]

198. The exceptional nature and high standard for the use of public force is reflected in the Mexican legal system, in which the following principles have been recognized: [176]

- Legitimacy: which consists of the fact that public force can only be used in specific cases, when other means are ineffective (including legal means, which in this case were not exhausted by the interested party, i.e. Minera Metalín);
- Necessity: implies that it must be the last resort after exhausting non-violent methods, assessing whether the situation represents a real or imminent danger (a situation that did not arise because the Claimant did not resort to the Mexican legal process);
- Adequacy: the force used must be adequate to achieve an objective proportional to the conflict; and

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[173] National Law on the Use of Force, Chapter VII Police Action in Demonstrations and Public Gatherings, Article 28. **R-0032.** "When demonstrations or public gatherings turn violent, the police shall act in accordance with the different levels of force established in this Law."

[174] Inter-American Commission on Human Rights, *Protest and Human Rights*, September 2019, ¶102**. R-0033.**

[175] Inter-American Commission on Human Rights, *Protest and Human Rights*, September 2019, ¶¶102 - 106. **R-0033.**

[176] First Chamber of the Supreme Court of Justice of the Nation, Thesis: 1a. CCLXXXVII/2015 (10a.), Semanario Judicial de la Federación y su Gaceta, Tenth Epoch, Book 23, Volume II, October 2015, p. 1653, Reg. digital: 2010093. **R-0034.**

- Proportionality: which states that there must be a balance between the force used and the resistance offered (for example, it is nonsense to consider the application of public force where there is no violence)[177]

199. The Sierra Mojada municipal police officers who went to the site did not witness any illegal act or crime, so there was no need to intervene with force.[178] There were simply no elements for any federal, state or municipal authority to remove the protesters by force, since they were not on the company's private property (*i.e.*, they were camped on the public road), they had not committed any crime, there were no complaints against them and, furthermore, they had -and have- the constitutional right to demonstrate and express themselves freely, in a peaceful manner.[179] The authorities cannot intervene simply because the company wants them to, especially considering the exceptional and well-established nature of the use of force during peaceful demonstrations.

Image 4: Main access to the Project site as of December 2024.

Source: Municipal Presidency of Sierra Mojada.

200. Another federal authority that at the time was aware of the situation and sought a solution to the social conflicts in the area was the Secretaría de Gobernación (SEGOB), which is responsible for dealing with social conflicts at the national level. SEGOB contacted the Mineros Norteños and

177 Plenary Court of the Supreme Court of Justice of the Nation, Thesis: P. LX/2010, Judicial Weekly of the Federation and its Gazette, Ninth Era, Mexico, October 2010, Digital Record: 162957.. **R-0035**.

178 National Law on the Use of Force, Chapter VII Police Action in Demonstrations and Public Gatherings, Article 28. **R-0032**. "When demonstrations or public gatherings turn violent, the police shall act in accordance with the different levels of force established in this Law."

179 Political Constitution of the United Mexican States, Article 6**. R-0010**.

the representatives of Minera Metalín to know the position of each party and, if necessary, to act as conciliator. However, it was the Claimant itself who expressly requested not to get involved.[180]

201. It should also be noted that the General Directorate of Mines and Mining Public Registry has no authority or powers to resolve social, mercantile or criminal conflicts.[181] This explains why the officials of this agency could not intervene. In its case, the information reported by the Claimant before the General Directorate of Mines only consisted of reports in which it unilaterally narrates the existence of actions of a third party to justify its obligations arising from the concession titles.

K. Criminal Proceedings

202. The Claimant repeatedly refers to the actions of the Mexican criminal authorities and the Police in relation to the 2019 demonstration. Because of this, it is important to briefly describe the functioning of the Mexican criminal system.

1. The Mexican criminal system

203. Currently, the procedural rules in criminal matters are concentrated in a single law, the National Code of Criminal Procedures (CNPP). However, substantive criminal law remains regulated in each state criminal code and in the Federal Criminal Code.

204. Pursuant to Article 211 of the CNPP, the criminal procedure has the following three stages or phases: (i) the investigation stage; (ii) the intermediate or trial preparation stage; and (iii) the trial stage.[182]

205. In turn, the investigation stage is divided into two phases: (a) the initial investigation that begins with the filing of a complaint or accusation and concludes when the person accused of having committed a crime is brought before a judge in order to be charged; and (b) the complementary investigation that is carried out from the moment the accusation is formulated and concludes when the time granted by the judge for this to be carried out is exhausted.[183]

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180 Juan Manuel López email exchange with SEGOB. **R-0036**.

181 Memorial, ¶¶ 2.158, 2.162 and 2.192.

182 National Code of Criminal Procedures, Article 211. **R-0037**.

183 National Code of Criminal Procedures, Articles 309 and 321**. R-0037**. The formulation of the indictment is "the communication that the Public Prosecutor's Office makes to the accused, in the presence of the Judge and control, that an investigation is being carried out against him/her...".

206. The purpose of the investigation stage is to gather evidence to clarify the facts and, if necessary, to gather evidence to support the initiation of criminal proceedings, that is, to formally file charges against a specific person or persons.[184]

207. The Public Prosecutor's Office in charge of the investigation stage is the Public Prosecutor's Office in charge of state prosecutors' offices or the Attorney General's Office, which investigates federal crimes. Likewise, the Public Prosecutor's Office is in charge of coordinating the police and the expert services and, as mentioned above, of deciding on the exercise of the criminal action.[185]

2. The Public Prosecutor's Office in Coahuila

208. As mentioned above, the Public Prosecutor's Office is in charge of conducting the investigation stage and gathering evidence.

209. The organization of the Public Prosecutor's Office in the state of Coahuila is regulated by the Organic Law of the Attorney General's Office of the State of Coahuila de Zaragoza (LOFGC), which establishes that the Public Prosecutor's Office will be organized in a general prosecutor's office, which will be headed by an attorney general.[186]

210. In order to carry out its functions, the Coahuila Attorney General's Office has regional delegations comprised of public prosecutors, investigative police, experts and other officials.

211. The competence of the regional delegations is delimited by territorial jurisdiction, based on the presence of judicial districts, the incidence of crimes, geographic circumstances, demographic situation, among other issues.[187]

212. In general, the state of Coahuila has seven regional delegations. Specifically, the municipality of Sierra Mojada is located within the jurisdiction of the "Laguna II" Delegation of

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184 National Code of Criminal Procedures, Article 213. **R-0037**.

185 National Code of Criminal Procedures, Article 127. **R-0037**.

186 Organic Law of the Attorney General's Office of the State of Coahuila de Zaragoza, Article 3. **R-0038**.

187 Organic Law of the Attorney General's Office of the State of Coahuila de Zaragoza, Article 17 section II. **R-0038**.

the Attorney General's Office of Coahuila and is located approximately 232 kilometers from Sierra Mojada, which takes approximately four hours by car.[188]

3. Research 2019

213. It was until September 12, 2019 that Mr. Fabián Landeros Arenas, representative of Minera Metalín, formally filed a complaint of facts before the Coahuila Prosecutor's Office, for alleged actions of Mineros Norteños.[189]

214. Derived from the complaint filed by Minera Metalín, the Public Prosecutor's Office initiated investigation folder 0902/SP/UISO/2019 for the possible crimes of dispossession and deprivation of liberty. The investigation folder is the file initiated by the Public Prosecutor's Office during the investigation stage.

215. On September 24, 2019, Minera Metalín filed a brief in which it limited itself to making practically the same arguments that it alleged in the Mercantile Trial 2/2015 and in the challenges related to this trial, despite the fact that criminal and mercantile proceedings have different objects and purposes. Likewise, it informed the Public Prosecutor's Office about the existence of said judicial proceedings. [190]

216. On October 9, 2019, Minera Metalín filed another brief in which it narrated facts prior to those stated in its complaint. These facts covered the background of its business relationship with Mineros Norteños.[191] Similarly, it argued again that since the mine had never been built and there had been no production no royalty was due - a matter which, as noted above, is erroneous, but which also has no bearing whatsoever on the subject matter of the criminal proceedings.[192] The Tribunal should bear in mind that the criminal proceedings, and specifically the criminal investigations, are not the appropriate avenue for Claimant to make arguments related to its commercial disputes, and therefore both pleadings are futile.[193]

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188 Map of the regional delegations of the Attorney General's Office of the state of Coahuila. **R-0039**.

189 Factual report dated September 12, 2019. **C-0034**.

190 Written communication of Minera Metalín dated September 24, 2019. **R-0040**.

191 Minera Metalín's letter dated October 9, 2019. **TB-011**.

192 Minera Metalín's submission of October 9, 2019, p. 2. **TB-011.**

193 Specifically, the purpose of criminal proceedings is the prosecution and punishment of crimes. *See*, National Code of Criminal Procedures, Article 2, **R-0037**.

217. Respondent should point out that criminal investigations in Mexico are classified information. This means that no one can have access to such investigations except the parties and the Public Prosecutor's Office. This is due to the "*sigilo*" or criminal secrecy that exists in the Mexican legal system and is set forth in Article 218 of the CNPP, which states:

> The records of the investigation, as well as all documents, regardless of their content or nature, objects, voice and image records or things that are related to them, are strictly reserved, so that only the parties may have access to them, with the limitations established in this Code and other applicable provisions. [194]

218. Notwithstanding the foregoing, and without violating criminal secrecy and the Mexican legal system, Respondent learned that the Public Ministry has carried out various investigative measures, the last of which was directed to Minera Metalín to request certain information. To the best of Respondent's knowledge, Claimant did not comply with the Public Ministry's request.[195]

219. This omission on the part of the Claimant and its companies not only reflects a lack of diligence, but also calls into question the seriousness of its allegations about the alleged blockades. If it truly believed that the measures taken by the Mexican authorities were insufficient or detrimental, it would have actively cooperated with the criminal investigations by providing the required information. Instead, its inaction suggests disinterest, undermining the credibility of its allegations, and suggesting, once again, that it is its own lack of diligence, not that of the Mexican authorities or the Mineros Norteños members, that has led to its current situation.

220. Likewise, the Tribunal must take into account that, according to the Mexican legal system, complying with this type of request is not a right, but an obligation. Article 215 of the CNPP establishes that every person is obliged to provide the information required by the Public Prosecutor's Office or the police in the exercise of their investigative powers.[196]

221. Consequently, the Claimant's failure to cooperate with the Mexican authorities has had a direct impact on the ability of the Public Prosecutor's Office to continue with the investigation in order to clarify the facts that Metalín claims in arbitration.

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194 National Code of Criminal Procedures, Article 218**. R-0037**

195 Communication from the Public Prosecutor's Office of Coahuila dated December 18, 2024. **R-0041**.

196 National Code of Criminal Procedures, Article 215. **R-0037**

222. In addition, Mr. Fraire noted:[197]

> The alleged kidnappings, threats, robberies or property damage that Mineros Norteños are accused of were investigated by the Public Prosecutor's Office of Coahuila. No member of Mineros Norteños has been implicated or convicted for those events.[198]

223. Mr. Fraire even states that the Public Prosecutor's Office carried out investigative activities since they were interviewed, however, it was not "proven that we had retained the workers or that we had dispossessed or robbed Minera Metalín of its property."[199]

224. In conclusion, the Tribunal must consider that the Public Prosecutor's Office acted correctly and in accordance with its attributions in the face of Metalín's complaint, however, it was the latter who omitted its obligation to provide it with the information it required to continue fulfilling its functions and clarify the facts that, in Metalín's opinion, constituted a crime. On the contrary, it is important to mention that the investigation carried out by the Public Prosecutor's Office did not prove that Mineros Norteños had committed any criminal conduct.

L. The Valdez family's lawsuit against Minera Metalín

225. Metalín's actions have had a serious impact on the region, demonstrating a disregard for the obligations it should have fulfilled as a responsible and good faith investor. Instead of promoting development and mutual benefit, this company has adopted litigious and abusive practices that have caused social and economic conflicts, leaving behind a trail of frustration among the inhabitants of Sierra Mojada.

226. Unlike what happened in the Mineros Norteños case, where procedural aspects prevented the full exposure of Metalín's lack of commitment to the cooperative, the Valdez case is a clear example of how Metalín has repeatedly failed to comply with its contractual commitments, but above all of the legal consequences of this abusive conduct. Metalín's behavior, far from being evidence of an investor committed to local development, reflects hidden intentions to make profits at any cost, without considering the social and economic repercussions of its actions.

227. Claimant attempted to downplay the importance of the Valdez case which it mentions in its Request for Arbitration[200] (RFA) but deliberately omitted in the Memorial. However, the

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197 Witness Statement of Mr. Fraire, ¶ 42

198 Witness Statement of Mr. Fraire, ¶ 41.

199 Witness Statement of Mr. Fraire, ¶ 42.

200 Request for Arbitration, ¶¶ 3.57-3.63.

enforcement of the judgment related to this case - which resulted in the seizure of 18 mining concessions - is a material element in this arbitration. That seizure left Metalín materially bereft of mining concessions, a situation attributable solely to its financial insolvency, contractual breaches, lack of flexibility in its negotiations and its discriminatory treatment of the Mexican communities with which it had dealings. The Respondent contends that it was probably this, and not the actions of Mineros Norteños, that led to South 32's exit.

1. Facts related to the Valdez family trial

228. On April 21, 2010, the Valdez signed a promise of assignment of rights agreement with Metalín (Contract with the Valdez), to transfer three mining concessions named *La Perla*, *La India* and *La India Dos* (Valdez concessions), effective until 2055. The contract stipulated staggered payments, which depended on whether and when the right to acquire the concessions was exercised

229. Thus, according to Clause Two of the Contract with the Valdez family, the following payments were to be made:

- US$ 100,000.00 at the time the contract was ratified;
- US$ 200,000.00 at maturity of the first year;
- US$ 300,000.00 at maturity of the second year:
- US$ 400,000.00 at maturity of the third year;
- US$ 3'000,000.00 as a final payment if it is decided to finish paying the price for the transfer of the concessions within the third year;
- US$ 500,000.00 if Metalín opted to request an extension for one more year to cover the price for the transfer of the concessions. In that case, if Metalín opted to cover the final price for such transfer during the fourth year, such price would be US$ 4 million, and
- If Metalín had decided to acquire the rights and make the final payment after 5 years, the price would have been US$ 5 million.[201]

[201] Contract of promise of assignment of onerous rights between the Valdez and Metalín, pp. 2-3. **R-0042.**

230. In the event that Metalín chose not to acquire the concessions, the Contract with the Valdez family stated that it could terminate the contract, provided that it gave written notice, signed by the legal representative, at least 30 days prior to the date on which it would vacate the mining lots.[202]

231. Metalín complied with the payments, corresponding to the years 2010, 2011 and 2012, for a total of US$ 600,000, but did not make the payment for the third year or the extension for one more year, corresponding to 2013 and 2014 (US$ 900,000), and much less paid the final amount for the transfer of the Valdez concessions (US$ 5 million). Nevertheless, it continued to occupy the lots of the Valdez concessions and did not send the termination notice required in the Contract with the Valdez.[203]

232. In view of Metalín's non-compliance, the Valdez family required the payment of the amount owed through a non-contentious proceeding under file number 440/2015. The Valdez family requested the Second Judge of First Instance in Civil Matters of the Judicial District of Torreon Coahuila (Second Civil Judge of Torreon) to formally require Metalin to pay the amounts owed.[204] Metalín resisted payment.

233. Before going into the details of the litigation between Metalín and the Valdez, it should be noted that, as was the case with Mineros Norteños, the company had in its hands the possibility of ceasing the disputes with the Valdez, by complying with its contractual commitments. This could have been the notification, in due form, of its intention not to continue with the contract, or the payment of the amounts owed. However, it did not do so.

234. Metalín's strategy is irrefutably reflected in a message sent by Mr. Tim Barry to Mr. Antonio Valdez on July 18, 2022, seeing himself soon to be defeated in the domestic litigation initiated by the Valdez family against Minera Metalín.[205] In such communication, Mr. Barry confirms that Metalín is willing to extend this type of litigation to several years, generating high legal costs and taking the lawsuits to all possible instances, even appealing any unfavorable decision and counterclaiming the claimants in all the points that are raised:

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202 Contract of promise of assignment of onerous rights between the Valdez and Metalín, p. 4. **R-0042.**

203 Appeal Judgment 87/2020, pp. 1072-1074. **C-0029**.

204 Non-contentious proceeding brief 440/2015, p. 5. **R-0044.**

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

> It seems we are heading into a very protracted court battle that will require us to spend lots of money on lawyers going forward. To sort this out will also take years which we both do[n't] want to waste our time on.
>
> Although we are very confident we will ultimately win in court - as we are prepared to take this to the highest court possible and appeal every decision and then counter sue you on every point, I suggest we meet to discuss a way forward and settle this one and for all. [206]

There is no doubt that it is these same attitudes of Metalín that have led to their social conflicts in the Sierra Mojada, instead of being solved by means of an agreement.

a. Civil Suit 103/2016 initiated by the Valdez family.

235. On February 15, 2016, the Valdez's sued for payment of the amounts owed and the performance of the Contract with the Valdez's before the First Civil Judge of Torreon (Juez Primero Civil de Torreon). The lawsuit was registered as Juicio Civil 103/2016.

236. Metalín defended itself arguing that: (i) it had terminated the Contract with the Valdez; (ii) payments were not due without a prior formal demand; and (iii) the breach was not justified.[207] On March 17, 2017, the First Civil Judge of Torreón considered that Metalín had terminated the contract and that it had not incurred in a breach of contract, finding that the Valdez did not properly justify their claims. [208]

(1) The Valdez family's 87/2020 Appeal

237. Once the Valdez were notified of the judgment in Civil Suit 103/2016, the Valdez family filed Appeal 87/2020 before the Regional Chamber of the Superior Court of Justice of Coahuila on June 17, 2020.[209]

238. On October 1, 2020, the Plenary of the Regional Chamber of the Superior Court of Justice of Coahuila (Plenary of the Regional Chamber of Coahuila) issued the Ruling of Appeal 87/2020 in which it determined that Metalín had breached the contract entered into with the Valdez by failing to issue the corresponding termination notice and continuing to occupy the concession lots without making the stipulated payments.[210]

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

207 Judgment in Civil Suit 103/2016, pp. 3, 12 - 13. **R-0046**.

208 Judgment in Civil Suit 103/2016, p. 14. **R-0046**.

209 Appeal brief 87/2020. **R-0043**.

210 Appeal Judgment 87/2020, pp. 31-34, **C-0029**.

239. In this regard, the Plenary of the Regional Court of Coahuila revoked the decision of the First Civil Judge of Torreón and ordered Metalín to pay US $5.9 million for the breach of the promise-assignment of rights agreement entered into with the Valdez family, US$ 400,000 corresponding to the expiration of the third year; US$ $500,000, derived from the failure to request an extension, and US$ 5 million for the expiration of the five-year term. [211]

240. It is noteworthy that one of the criteria considered by the Plenary of the Regional Chamber of Coahuila to decide in favor of the Valdez family, in addition to Metalín's improper notification, was its continued occupation of the concession lots.[212] In other words, despite continuing to take economic advantage of the land, Minera Metalín defended itself by cynically claiming that it had terminated the contract with the Valdez family.

(2) Interlocutory Judgment 214/2019 of the First Civil Judge of Torreon.

241. Because Appellate Ruling 87/2020 stated the amount Metalín was to pay the Valdez in dollars and established that the payment in foreign currency would be made at the exchange rate in effect at the place and date on which the payment was to be made, and given that the dollar is not legal tender in Mexico, on August 31, 2021, the Valdez filed a motion for settlement and conversion from dollars to pesos before the First Civil Judge of Torreon.

242. By interlocutory judgment dated October 22, 2021, the First Civil Judge of Torreon, declared that the incidental proceeding was admissible and approved the conversion from dollars to pesos of the total amount owed by Metalin to the Valdez family, resulting in a total of 119,298,000.00 MXN, *i.e.*, approximately US$ 5.9 million.[213]

2. Execution of the Judgment in favor of the Valdez family

243. As explained *above*, a mining concession title is an administrative act that grants an individual the exclusive right to exploit, use and exploit minerals for a determined period of time. These rights include the disposition of the mineral products obtained from the mining lots, the use of the land within the area covered by the concession, and the possibility of transferring its ownership or rights. However, such rights are subject to limitations established in the legislation,

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211 Appeal Judgment 87/2020, pp. 1, 51-53, **C-0029**.

212 Appeal Judgment 87/2020, pp. 45-46, **C-0029**.

213 Interlocutory Judgment 214/2021, pp. 10-11. **R-0047.**

such as those set forth in Article 27 of the Mining Law, which emphasize the public nature of mineral resources and the need for state regulation.

244. With that in mind, it should be considered that the seizure procedure, in general terms, entails the following steps:

- *First*, a demand for payment and warning of seizure is issued.[214]
- *Second*, if payment is not made, the defendant must point out sufficient assets to cover what is being claimed, and if he fails to do so, the claimant seeking the attachment will point out the assets.[215] At this point, the garnishment has been constituted and the garnished goods cannot be used, sold or transferred by the debtor.
- *Third*, the defendant is summoned for the attachment,[216] followed by the deposit of assets and the registration of the attachment itself.[217] The registration ensures that the creditor has priority to receive payment of its claim over other possible creditors.[218]
- *Fourth*, if the assets initially seized are insufficient to cover the debt and court costs, the seizure may be extended after an expert appraisal.[219]
- *Fifth*, the sale of assets or direct award is made.[220]
- *Sixth*, the procedure concludes with the adjudication and deed of the property. [221]

245. It is essential to note that, under Mexican law, it is the debtor who has the option to pay its obligations before its assets are seized. This means that Metalín had, and has always had, the option to end its contractual disputes with the communities by paying the obligations it owes, but has refused to do so.

246. Since Metalín did not comply voluntarily and did not pay the debt to the Valdez family within the term granted by the First Civil Judge of Torreón, on March 3, 2022, the Valdez family

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214 *See* Code of Civil Procedure for the State of Coahuila, Articles 939 and 940**. R-0049.**

215 *See* Code of Civil Procedure for the State of Coahuila, Article 941. **R-0049.**

216 *See* Code of Civil Procedure for the State of Coahuila, Article 944**. R-0049.**

217 *See* Code of Civil Procedure for the State of Coahuila, Article 945**. R-0049.**

218 *See* Code of Civil Procedure for the State of Coahuila, Article 944, section XII. **R-0049.**

219 *See* Code of Civil Procedure for the State of Coahuila, Articles 957, section IV and 965**. R-0049.**

220 *See* Code of Civil Procedure for the State of Coahuila, Articles 963, 972 and 975-978. **R-0049.**

221 *See* Code of Civil Procedure for the State of Coahuila, Article 984**. R-0049.**

requested the Execution of Final Judgment 184/2020.[222] On May 12, 2022 the First Civil Judge of Coahuila declared the right of Metalín to make the payment voluntarily precluded and ordered the forced execution of the judgment. For this purpose, he ordered Metalín to designate attachable assets, of its property, to adjudicate them and pay the amount owed.[223]

247. On May 19, 2022 Metalín, represented by Mr. Juan Manuel López Ramírez, proposed as attachable property the land corresponding to the mining concession called *Dormidos*.[224] However, the Valdez family stated that such property was insufficient to cover the total amount of the execution and that the documentation exhibited - consisting of a simple copy of the concession title - could not prove its ownership, nor its suitability for seizure.[225]

248. Accordingly, on May 30, 2022, the Valdez filed a formal request for the attachment of several assets, including bank accounts and Metalín's facilities in Sierra Mojada, including its offices, machinery and personal property related to its operation, as well as several mining concessions related to the Project.[226] The request included:

- Bank account at BBVA.
- The following real estate:[227]
  - Lot 1: 42.134 hectares with specified boundaries.
  - Lot 3: 16,643 hectares, with the main house of the Hacienda de la Esmeralda.
  - Lot 4: 47,400 hectares with administrative offices.
  - Lot 6: 4 hectares with administrative buildings.
  - Lot 7: Land with offices and industrial workshops.
- Various mining concessions.

222 Request for initiation of execution of final judgment 184/2020. **R-0050.**

223 Order for the marking of assets of the defendant of May 12, 2022, p. 1. **R-0051.**

224 The above contradicts clause 5.2 of the Option Agreement. **C-0031.**

225 Act of attachment May 19, 2022. **R-0052.**

226 Formal request for attachment dated May 30, 2022, pp. 1-3. **R-0053.**

227 Formal request for attachment dated May 30, 2022, p. 3. **R-0053.** These properties are registered under entry 6601, book 67, section one of the Public Property Registry of Monclova.

249. On July 7, 2022, i.e., approximately one month before South32 notified SVB of its intention to withdraw from the Project, Metalin's bank accounts and facilities were placed under seizure. [228]

250. Curiously, on August 30, 2022, BBVA, the banking institution from which the seizure of Metalín's account was requested, informed that the account had been cancelled on July 15, 2022-just over a month after the Valdez family requested its seizure-so that the entity was "[...] materially and legally unable to proceed [...]".[229] This, naturally, led to informing the Prosecutor assigned to that court to determine possible legal responsibilities.[230] In simple terms, it was possible that Minera Metalín sought to hide assets in order to comply with the seizure.

251. The liens on the real estate were formally registered in the Public Registry of Property of the city (RPP) of Monclova, Coahuila, on September 6 and November 10, 2022[231]

252. Subsequently, in order to determine the value of the foreclosed assets, on April 12, 2023 an appraiser issued an appraisal in which he estimated the commercial value of the properties at $7,382,370.00 MXN.[232]

253. As a result, the Valdez family requested an extension of the seized assets, which was authorized by the First Civil Judge of Torreon on May 3, 2023.[233] As a result, on June 2, 2023, the rights of 19 concessions related to the Sierra Mojada Project were included for seizure.[234] In said resolution it was expressly stated that "[T]hey are declared well and formally seized for the amount of MXN $111,915,630.00 [...]".[235]

254. To formalize the above, on July 17, 2024, the RPM was requested to make the corresponding entries in its records, which culminated on August 21, 2024, date on which the

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228 Order of admission of the assets designated by the Claimant for seizure of July 5, 2022, pp. 1-3. **R-0054.**

229 Bank account cancellation notice dated August 30, 2022. **R-0055.**

230 Order granting a hearing to the Public Prosecutor's Office of October 18, 2022. **R-0056.**

231 Registration of foreclosed properties in the Public Registry of the Property of Monclova, pp. 1-15. **R-0057.**

232 Real estate appraisal report, p. 5. **R-0058.**

233 Authorization of extension of the lien. **R-0059.**

234 Writ of attachment of mining concessions, pp.1-3. **R-0060**.

235 Writ of attachment of mining concessions, p.1. **R-0060**.

seizure was formally registered in favor of the Valdez family.[236] It should be noted that one concession could not be seized since it was not registered in Metalín's name.[237]

255. Therefore, the extension of the lien in favor of the Valdez family was made on the following 18 concessions related to the Sierra Mojada project. [238]

No.	Title Number	Lot Name
1.	160461	Fortuna
2.	169343	Unification Mineros Norteños
3.	195811	Olympia
4.	212169	Esmeralda
5.	220569	La Blanca
6.	223093	The Ramones
7.	224873	Dolores Volcano
8.	235371	Sierra Mojada
9.	235372	Sierra Mojada Fraction I
10.	235373	Sierra Mojada Fraction II
11.	235374	Sierra Mojada Fraction III
12.	235375	Sierra Mojada Fraction IV
13.	236714	Vulcano
14.	238678	Emerald I
15.	238679	Esmeralda I Fraction I

[236] Registration of the lien of concessions in the Public Registry of Mining of August 21, 2024, p.1. **R-0061**.

[237] Registration of the seizure of concessions in the Public Registry of Mining of August 21, 2024, p.1. **R-0061**. This is the Veta Rica or La Inglesa" concession, with title number 236837.

[238] Registration of the embargo of concessions in the Mining Public Registry of August 21, 2024, p.2. **R-0061**.

16.	238680	Esmeralda I Fraction II
17.	239512	Allotment Fraction IV
18.	245216	Single Tail

3. Termination of the Option Agreement and its relation to the Liens on the Sierra Mojada Project

256. Out of frustration over Metalín's abuse and lost time, Antonio Valdez, son of the Valdez family, submitted a report to South32 on June 20, 2022, through the company's ethics hotline. Considering its content, it is not a minor issue that this report reached South32 just a few weeks before his effective departure from the Project. In the report, he stated the following:

> This report is about your business partner Silver Bull Resources (Minera Metalín in Mexico). It is about a lawsuit that I won for 7 million USD that Minera Metalín owes me, making proposals that are a derision (please do not confuse with Mineros Norteños lawsuit). Minera Metalín has done the impossible for not paying. Invariably, your company will be seen stained for the unethical act of its partner. If you wish, I have all the legal file to show you, and you decide if it is an honorable act of your partner[239]

257. The report reflects the Valdez's dissatisfaction with the actions of Metalín, who, despite having been ordered to pay more than $US 7'000,000.00 for contractual breaches, persisted in avoiding compliance with their obligations through delaying tactics. Mr. Antonio Valdez warned South32 how these behaviors could tarnish the company's reputation by maintaining ties with an unethical business partner. He also offered to provide the legal files of the case for South32 to directly evaluate Metalín's actions.

258. The Option Agreement between South32 and Silver Bull Resources remained in force until August 31, 2022.[240] Claimant argues that the loss of the financial backing of its business partner "marked the end of the project and left Claimant with no choice but to initiate these proceedings",[241] because "no reasonable investor would be interested in a mining project illegally blocked for almost three years with no hope of Government intervention".[242] However, the evidence presented by Claimant does not confirm a clear relationship between the conflict with

239 Report from Antonio Valdez to South32 dated June 20, 2022. **R-0062.**

240 Termination Agreement. **C-0031**.

241 Memorial, ¶ 1.6.

242 Memorial, ¶ 2.209.

Mineros Norteños and South32's decision to terminate the Option Agreement. In fact, the Option Agreement Termination Agreement makes no reference to SBV's dispute with Mineros Norteños.

259. In addition, Claimant omits certain relevant facts relating to the legal status of the Project around the date on which South 32 decided to terminate the Option Agreement. These facts confirm that the alleged blockades by Mineros Norteños do not have the relevance Claimant assigns to them and suggest that the real cause of the termination of the Option Agreement was the imminent seizure of the concessions comprising the Project.

260. *First*, clause 5.2 of the Option Agreement provided that SVB and Metalín could not create or allow liens to remain on Metalín, Metalín's properties or assets, unless approved by South 32.

> 5.2 Encumbrances on Property and Assets
>
> Except as expressly provided otherwise by this Agreement or in an Approved Program and Budget, during the term of this Agreement the Company and Contractors must not, respectively, create, or if created, permit to remain, any encumbrance, other than the Permitted Encumbrances, upon the Company, the Property or other Assets of the Company or upon Contractors or the Assets of Contractors without express prior written approval of South31 first being obtained (which approval may be refused, withheld or conditioned at the absolute discretion of South32).[243]

261. In this regard, the Option Agreement stated that it was Respondent's obligation to keep the Sierra Mojada Project free of any encumbrances and to proceed with all due diligence to challenge and release them if they arose. [244]

262. *Second*, on July 5, 2022, Tim Barry and Andrew Roy of South32 discussed the intention to terminate the Option Agreement.[245] In that email, Tim Barry, representative of Silver Bull, acknowledged that South32 was not investing resources in the Sierra Mojada Project because of the Mineros Norteños blockade, "when the blockade first kicked in, we quickly agreed with the South32 team and said we would take over the costs of maintaining the project".[246] In this sense,

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243 Option Agreement, Clause 5.2. **C-0031**.

244 Option Agreement, Clause 6.6 (5). ("Operator's Obligations [...] (5) except fot the Permitted Encumbrances, keep the Property free and clear of all Encumbrances (except liens for taxes not yet due, other inchate liens and liens contested in good faith by the Operator) and to proceed with all diligence to contest and discharge any such Encumbrances that is filed").

245 Correspondence between Tim Barry and South32 regarding the termination of the Option Agreement. **C-0126**.

246 Correspondence between Tim Barry and South32 regarding the termination of the Option Agreement, p.5. **C-0126**.

South32 and the Option Agreement were not being economically affected during the period in which the blockade was maintained.

263. Since the beginning of the blockade, South32 had been waiting for the Claimant to continue its operations and take actions towards the resolution of the issue with Mineros Norteños. However, it was not until 2022 when the liens and adjudications on the Project in the Valdez lawsuit were clarified that South32 decided to terminate the Option Agreement. The situation at that time was clear: the Claimant had lost control over the Project and the Option Agreement was no longer viable for South32. These facts, which were the direct consequence of Metalín's negligent actions, do not appear in its Memorial.

264. *Third*, Claimant notes that the termination of the Option Agreement left it with no alternative option to submitting to this arbitration.[247] However, on September 16, 2022, following the filing of the liens arising from Judgment 103/2016 and faced with the impossibility of reversing them, Mr. Darren Klinck, President of Silver Bull, sent the Valdez a letter of intent proposing a "partnership" to develop the Sierra Mojada Project jointly and mitigate the effects of the related litigation.[248]

265. Instead of offering compensation to cover the amount owed, the letter of intent stated, *inter alia*, the following:[249]

- The Valdez family would transfer the mining concessions of the Sierra Mojada Project to Minera Metalin;
- A partnership would be formed between the Valdez and Minera Metalín, in which 10% of the Sierra Mojada Project would pass to Mr. Valdez;
- Both parties would terminate any existing litigation;
- Both parties would seek a new partner, replacing South32; and,

247 Memorial, ¶ 1.6.

248 Letter of Intent sent by SBV to the Valdez family, September 16, 2022. **R-0045**.

249 Letter of Intent sent by SBV to the Valdez family, September 16, 2022. **R-0045**.

- Both parties undertook to seek to reactivate mining activities on a smaller scale to generate cash flow, seek to sell the project and examine the metallurgical options available for the project.

266. The Valdez did not accept SVB's offer and proceeded with the execution of the judgment obtained on October 1, 2020. As a result, Metalín lost control over the concessions, land and assets of the Sierra Mojada Project.

267. The facts are clear. SVB did not lose control of its investment as a consequence of the conflict with Mineros Norteños, but for breaching its contractual obligations with the Valdez family and, subsequently, avoiding compliance, for more than two years, with the Final Judgment 184/2020 that condemned Minera Metalin to pay US $5.9 million for the breach of said contract.

268. The Claimant no longer has control over Metalín's Sierra Mojada facilities and 18 of the concessions that make up the Sierra Mojada Project. It is clear that the Claimant was aware of this situation.

269. At the time of filing the Request for Arbitration (June 28, 2023), Silver Bull was already facing an unfavorable judgment arising from the contractual dispute with the Valdez family and likely had full knowledge that it would not be able to cover the debt. By the date of filing of the RFA, Metalín had lost control over its offices, machinery and personal property related to its operation. Similarly, it is noted that the seizures were made on July 7, 2022 and June 2, 2023. Both dates are prior to the filing of the Memorial and none of this is mentioned therein.

270. In a further display of bad faith, Claimant cancelled a judicially seized bank account and may have engaged in unlawful conduct. If such an act were proven, it would not only violate Mexican legal provisions, but would also demonstrate a total lack of integrity on the part of SVB.

271. But regardless of the Claimant's conduct in this arbitration, the outcome of the Valdez dispute raises legitimate doubts about the existence of a protected investment under NAFTA at the date of the alleged expropriation-i.*e.* August 31, 2022-and the merits of the Claimant's claims.

III. LEGAL ARGUMENT

A. Objections to the jurisdiction of the Court

272. The Respondent raises three objections to the Tribunal's jurisdiction which can be summarized as follows

273. The *First Objection* is an objection *ratione temporis* that relates to the claim for breach of Article 1105 (NAFTA Minimum Standard of Treatment). The Respondent contends that the claim is time-barred because it was filed outside the 3-year limitation period set forth NAFTA Articles 1116(2) and 1117(2), respectively. According to these provisions, the statute of limitations period begins when the investor "first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage". The Respondent contends that the Claimant knew or should have known of the breach and the damages caused by the breach shortly after the "Second Blockade"/Demonstration of 2019 by Mineros Norteños occurred on September 8, 2019, and certainly within the 9 months and 3 weeks that elapsed between the beginning of the Second Blockade and the *dies a quo*. For that reason, the claim for violation of Article 1105 is untimely and the Tribunal lacks jurisdiction *ratione temporis* to resolve it.

274. However, if this Tribunal were to determine that the untimeliness of the claim is a matter of the admissibility of the claim and not of the Tribunal's jurisdiction, the Respondent contends in the alternative that the result would be the same: the claim would be inadmissible and would have to be dismissed by the Tribunal.

275. The *Second Objection* is an objection *ratione voluntatis* and *temporis* that relates to the claim for indirect expropriation, *i.e.*, the alleged violation of Article 1110. Simply put, that claim cannot be submitted to arbitration under Annex 14-C because the alleged violation occurred at a time when the Respondent was no longer subject to the obligations set forth in NAFTA Article 1110.

276. According to the Claimant's Memorial, the indirect expropriation materialized in August 2022, *i.e.*, more than two years after the termination of NAFTA and its replacement by the USMCA. Contrary to what the Claimant appears to believe, Annex 14-C does not extend the application of the substantive investment obligations set forth in Section A for three years from the date of termination of NAFTA (*i.e.*, July 1, 2020).

277. As stated in Article 13 of the International Law Commission's Articles on the International Responsibility of States (ILC Articles) "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by that obligation at the time the act occurs".[250]

[250] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), Chapter IV.E.1, November 2001, Article 13, **RL-0017**.

Also, Article 70(1) of the Vienna Convention on the Law of Treaties (VCLT) provides that the termination of a treaty "shall release the parties from the obligation to continue to perform the treaty" unless the treaty provides or the parties agree otherwise.[251] Given that NAFTA terminated on July 1, 2020 and neither NAFTA nor the USMCA contain an agreement by the Parties to maintain in force the substantive obligations of Section A for a period of three years following its termination, it is concluded that such obligations, including those of Article 1110, ceased to be binding on the NAFTA Parties.

278. Finally, the *Third Objection* is an objection *ratione materiae and personae* on the grounds that (i) the Claimant's investments are not covered by NAFTA, as it has no ownership or control over the assets it considers investments, (ii) the Claimant has not demonstrated a direct causal link between the measures claimed and the Claimant's alleged investments, and (iii) it has also not been proven that the Option Agreement between the Claimant and South32 qualifies as an investment under NAFTA Article 1139.

279. The Respondent will elaborate on these three objections in the following sections. In doing so, it will adopt the usual practice of taking the Claimant's factual account and allegations as true on a *pro tem basis*, however, the Respondent reserves the right to change its position should it obtain relevant information contradicting such positions and allegations during the document production round, as well as the right to assert new objections to the Tribunal's jurisdiction based on new information received. Therefore, nothing in the following sections should be construed as an admission of the facts as described in the Claimant's Memorial or as an admission of the Respondent's international responsibility.

1. The Court does not have jurisdiction *ratione temporis* over the claim for violation of Article 1105 (Minimum Standard of Treatment)

280. NAFTA Articles 1116(2) and 1117(2) establish a maximum period of three years to submit a claim to arbitration (Limitation Period). This time limitation is established by the phrase "may not bring a claim...", followed by the condition that triggers the restriction, *i.e.*, "if more than three years have elapsed from the date on which first had knowledge or should have had knowledge of the alleged breach, as well as knowledge that it suffered loss or damage":

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[251] Vienna Convention on the Law of Treaties, Article 70, **RL-0018**.

> [Article 1116]
>
> 2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage..[252]
>
> - o -
>
> [Article 1117]
>
> 2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.
>
> [Emphasis added]

281. Several NAFTA tribunals have determined that the temporal restriction established by these two provisions is clear and rigid. The first to do so was probably the tribunal in *Feldman v. United Mexican States*, observing that "as in many other legal systems, NAFTA Articles 1117(2) and 1116(2) introduce a *clear and rigid* statute of limitations exception *that, as such, is not subject to suspension (see supra, par. 58), prolongation or other qualification*".[253] However, other courts have reached similar conclusions. Such is the case of the court in *Grand River v. United States*, which decided to bifurcate the proceeding with the following reasoning:

> 29. Since Articles 1116(2) and 1117(2) introduced a clear and rigid limitation defence - not subject to any suspension, prolongation or other qualification - the Tribunal decided to bifurcate the time limitation issue for trial as a preliminary issue. [...] [254]

282. The language used in Articles 1116(2) and 1117(2) is also clear that compliance with the 3-year period conditions the submission of a claim to arbitration and, therefore, forms part of the conditions under which the respondent State offered its consent to resolve the dispute through arbitration. As the tribunal found in *Methanex Corporation v. United States*:

> In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-

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252 NAFTA Articles 1116(2) and 1117(2).

253 *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶ 63, Respondent's emphasis. **RL-0019**.

254 *Grand River Enterprises Six Nations, Ltd. v. United States, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 29. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006, ¶ 29. **RL-0020**.

> 1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.[255]

283. The text of Articles 1116(2) and 1117(2) also provides that the limitation period starts from when the investor knew or "*should have first acquired*" of the breach and the damage suffered. This means that the "knowledge" of the breach and the damage may be actual or "constructive", i.e., it may be imputed to an investor based on what a third party, acting with reasonable diligence, would have known at a given point in time. In the words of the tribunal in *Grand River v. United States*:

> 58. *Constructive Knowledge*. The Tribunal accordingly must consider whether the Claimants "should have" first acquired knowledge of these matters. The word "should" is the past tense of "shall" - ordinarily implying a duty or obligation (although usually an obligation of propriety or expediency, or a moral obligation). The duty or responsibility involved usually falls short of a legal obligation to do something, although the Tribunal believes that the existence of such a legal obligation may help to show that something "should" have been done or known.
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> 59. As noted above, both Parties used the term "constructive knowledge" to describe the relevant requirements under Article 1116(2) and 1117(2). The Tribunal agrees that this concept, well rooted in national legal systems familiar to both Parties, is useful in this regard. "Constructive knowledge" of a fact is imputed to person if by exercise of reasonable care or diligence, the person would have known of that fact. Closely associated is the concept of "constructive notice." This entails notice that is imputed to a person, either from knowing something that ought to have put the person to further inquiry, or from willfully abstaining from inquiry in order to avoid actual knowledge. [256]
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> [Emphasis added]

284. It is also noted that the 3-year limitation period begins on the date on which the investor "*first* became or should have *first* become aware [...]" of the alleged breach and the damage caused by such breach. Contrary to the Claimant's suggestion, the period does not begin on the date on

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[255] *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, August 7, 2002, ¶ 120, **RL-0021**. See also *Merrill & Ring Forestry L. P. v. Government of Canada*, UNCITRAL, Administered by ICSID, Decision on a Motion to Add a New Party, January 31, 2008, ¶ 29, **RL-0022** and *Canfor Corporation v. United States of America, Tembec Inc. et. al. v. United States of America and Terminal Forest Products Ltd. v. United States of America, Tembec Inc. et. al. v. United States of America,* UNCITRAL, Decision on Motion to Add a New Party, January 31, 2008, ¶ 29, **RL-0022**. *United States of America and Terminal Forest Products Ltd. v. United States of America, UNCITRAL, ¶ 29, RL-0022. United States of America*, UNCITRAL, Decision on the Preliminary Issue, June 6, 2006, ¶ 171, **RL-0023**.

[256] *Grand River Enterprises Six Nations, Ltd. v. United States of America, UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006, ¶ 58-56, 66. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006, ¶ 58-59, 66. **RL-0020**.

which the losses "crystallized" in August 2022.[257] As will be explained a little later, it is the actual or constructive knowledge of the *existence* of the damage, and not its exact amount, which, together with the actual or constructive knowledge of the breach, marks the beginning of the 3-year limitation period.

285. In sum, it follows from the text of Articles 1116(2) and 1117(2) and the way it has been interpreted by various NAFTA tribunals that the two elements necessary for purposes of establishing the Tribunal's jurisdiction *ratione temporis* are: (i) the date on which the investor first had actual or constructive knowledge the alleged breach, and (ii) the date on which the investor first had actual or constructive knowledge that it suffered damages as a result of the alleged breach.[258]

a. The *dies a quo, single date or cutoff date*

286. Given that the RFA was filed on June 28, 2023, the only way in which the Claimant could have complied with the 3-year limitation period would be if it first became aware of the breach a date after June 28, 2020 - *i.e.*, the *dies a quo*. Otherwise, more than 3 years would have elapsed and Article 1116(2) and/or 1117(2), as the case may be, would be violated.

287. The Respondent submits that it is reasonable to assume that the Claimant knew or should have known of the breach and the existence of damages during the more than 9 months that elapsed between the beginning of the Second Blockade and the *dies a quo*. This is especially true in the case of constructive knowledge. Given the alleged continuing nature of the Second Blockade alleged by the Claimant, a prudent investor would have sought legal advice to assess possible legal action in the face of the alleged inaction of the authorities, and would have sought to estimate the possible financial and operational impacts of the Second Blockade on its investment. Nor is it venturesome to assume that such investigations would have revealed the existence of a breach of Article 1105 and harm resulting from the breach, particularly if the obligations set forth in that provision are interpreted in the manner the Claimant does.

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257 Memorial, ¶ 3.28-3.29.

258 *Eli Lily v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, March 16, 2017, ¶ 167. **RL-0024**.

288. In this case, it is even likely that the Claimant had actual knowledge of the breach and damage as the Memorial suggests that SVB took many of the actions described in the preceding paragraph prior to the *dies a quo*. The *force majeure* notice that Metalin sent to South32 on October 11, 2019 (Force Majeure Notice),[259] is evidence that Claimant was aware that the Second Blockade interfered with its investment and prevented it from complying with the obligations assumed vis-à-vis South32.

289. It notes, for example, that the Force Majeure Notice identified as force majeure impediments the following: (i) "Mineros Norteños has illegally blocked our access to our property and interrupted our lawful business"; (ii) "Mineros Norteños has illegally blocked Major Drilling, our drilling contractor, from access to its equipment that is worth hundreds of thousands of dollars" and; (iii) "Mineros Norteños have refused all attempts by us to meet in Torreon to try and resolve this." Therefore, it cannot seriously contend now that it only learned of the violation of Article 1105 and its economic consequences until approximately two years after the commencement of the Second Blockade.

290. The following subsections will elaborate on these arguments. However, since the alleged breach of Article 1105 (Minimum Standard of Treatment) is broken down into two separate breach allegations - of the obligation of full protection and security (FPS) and of the obligation to accord fair and equitable treatment (FET) - the Respondent will address them separately.

(1) Claimant knew of the alleged breach of the obligation to provide full protection and security prior to the *dies a quo*

291. The Claimant alleges that the Respondent breached its obligation to provide full protection and security because the Mexican authorities "failed to protect SVB's investments from the Continuous Blockade and failed to take any reasonable action within their power to restore SVB's and Minera Metalín's access to the Project site."[260] In particular, it alleges that the Mexican authorities did not take "any reasonable action within their power to dislodge Mineros Norteños and its encampment from SVB's property, or to sanction Mineros Norteños and its representatives

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259 Letter from SVB to South32, October 11, 2019, p. 2, **C-0035**.

260 Memorial, ¶ 4.38.

for their unlawful actions".[261] Citing *Cengiz v. Libya*, Claimant further argues that the full protection and security standard imposes an affirmative obligation to prevent third parties from causing physical damage to the investment. [262]

292. While it is true that there may be cases in which the date of the breach may differ from the date on which the investor first became or should have first become aware of the breach,[263] this is not one of those cases. Although it is impossible to determine the exact date on which Claimant first became aware of the breaches and the damage it is reasonable to assume that this knowledge was obtained either on the date of the Second Blockade, or shortly thereafter. [264]

293. The Claimant alleges that the Respondent's omissions in connection with the Second Blockade constitute a "continuing act" that began in September 2019 and continues to date.[265] Pursuant to Article 14(2) of the ILC Articles:

> The breach of an international obligation by an act of a State having a continuing character *extends over the entire period during which the act continues* and remains not in conformity with the international obligation.[266] [Emphasis added]

294. However, that same provision states, in its third paragraph:

> The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.[267] [Emphasis added]

295. This implies that, even in the case of a continuing act, the relevant date for determining the limitation period under Articles 1116(2) and 1117(2) is the date on which the breach occurred, particularly if one accepts the Claimant's assumption that "[t]he full protection and security standard imposes an obligation of due diligence or vigilance, and requires the State to exercise reasonable care and take reasonable measures within its power to prevent harm or injury to the

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261 Memorial, ¶ 4.38.

262 Memorial, ¶¶ 4.30, 4.32.

263 *Tennant Energy, LLC v. Government of Canada*, CPA Case No. 2018-54, Final Award, October 25, 2022, ¶ 405**. RL-0025**.

264 Memorial, ¶ 2.111.

265 Memorial, ¶ 3.25.

266 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), Chapter IV.E.1, November 2001, Article 14(2), **RL-0017**.

267 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), Chapter IV.E.1, November 2001, Article 14(3), **RL-0017**.

investment".[268] The Claimant evidently considers the lack of a prompt response by the authorities to prevent the Second Blockade or to resolve it promptly to be a breach of Article 1105, but incongruously suggests that it did not become aware of the breach or damage until more than 2 years after the commencement of the Second Blockade, when South32 decided to withdraw from the Project in August 2022.

296. As noted by the tribunal in *Resolute Forrest v. Canada*, the fact that the effects of a violative measure are prolonged in time has no effect on the date on which the investor first became aware of it.[269] In other words, the continuing nature of an act or omission in breach of the Treaty has no bearing on the three-year limitation period set out in Articles 1116(2) and 1117(2).

297. Another example is the *Grand River v. Canada* case, which arose out of litigation brought by 40 U.S. state attorneys general against four major tobacco producers in the 1990s. After several rounds of negotiations, the tobacco producers and a group of state prosecutors reached an agreement (the so-called "*Master Settlement Agreement*" or MSA) that was subsequently adopted by the 46 states involved, the District of Columbia and five U.S. territories. [270]

298. The claimants in that case argued that the implementation of the MSA involved individual acts by each of the adopting states and, therefore, that there was no single limitation period under Articles 1116(2) and 1117(2). The tribunal dismissed the argument, *inter alia*, because the Claimant's proposed analysis would render the NAFTA's Limitation Period ineffective, as the claimant could base its claim on the most recent breach, even if it had prior knowledge of the breach and damages:

> 81. […] Moreover, this analysis seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries. [...] [271]

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[268] Memorial, ¶ 4.30. Respondent's emphasis.

[269] *Resolute Forest Products Inc. v. Government of Canada*, CPA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018, ¶ 158. **RL-0027**.

[270] *Grand River Enterprises Six Nations v. United States of America,* UNCITRAL, Award, 12 January 2011, ¶ 7. **RL-0028.**

[271] *Grand River Enterprises Six Nations v. United States of America,* UNCITRAL, Award, 12 January 2011, ¶ 81. **RL-0028**.

299. The same reasoning applies to the present claim. Even in the case of a continuing act, the relevant date for the computation of the Limitation Period is the date on which the investor *first* became aware of the breach and the damage. Claimant cannot resort to the continuing act argument to choose a different date - *e.g.*, the date on which the damage "crystallized" - that would allow it to avoid the clear and rigid temporal restriction of Articles 1116(2) and 1117(2).

300. The same omission that, according to the Claimant, would have breached the Full Protection and Security obligation of Article 1105 in August 2022 -*i.e.*, the failure of the Mexican authorities to intervene to lift the Second Blockade-, would also have taken place in the 9 months that elapsed between the beginning of the Second Blockade and the *dies a quo.* Therefore, Claimant cannot claim that it had no knowledge of the breach and the associated damages, let alone that a third party, acting with due diligence, would not have been aware of it.

301. Indeed, the Memorial suggests that Claimant's representatives expected the Mexican authorities to *prevent* the Second Blockade before it began. The Memorial notes, for example, that Mr. López Ramírez communicated with Mr. Márquez, a Coahuila law enforcement officer, who believed that "the police would restrict Mineros Norteños from trespassing beyond the property line"[272] and that he witnessed, on the same date as the Second Blockade, that "[t]he police officers made no attempt to stop them."[273] However, this alleged violation, in any event, did not occur in August 2022, but as of September 2019, when the Second Blockade began. Given Claimant's position on the scope of the Article 1105 obligation, Respondent insists that it is reasonable to assume that Claimant had at least *constructive* knowledge of the breach and damage prior to June 28, 2021 (i.e., the *dies a quo*).

302. Even if Claimant did not expect the authorities to resolve the blockade immediately, as allegedly happened in the case of the First Blockade, Claimant notes that on September 10, 2019, an official from the Coahuila Prosecutor's Office informed Mr. López Ramírez "he could not come to the site to intervene unless Mineros Norteños did something violent, and he would not come to the site just to tell Mineros Norteños that its conduct was improper."[274] That same day, according

272 Memorial, ¶ 2.121.

273 Memorial, ¶ 2.125.

274 Witness statement of Mr. López Ramírez, ¶ 8.33.

to Claimant, "the police had left the Sierra Mojada project site at that point" and "the Mayor in Sierra Mojada refused to provide us with any support."[275] According to the Claimant, when the Coahuila Prosecutor's Office went to the site on September 18, 2019, it took no action.[276]

303. The foregoing again demonstrates that Claimant had actual or constructive knowledge of the Mexican State's alleged failure to provide Full Protection and Security from the day the Second Blockade began. It is simply not credible that Claimant had no knowledge of the alleged omission imputed to the Mexican State during the 9 months and 20 days that elapsed between the date the Second Blockade began and the *dies a quo* (June 28, 2020)

304. Nor is it reasonable to assume that the Claimant was unaware of the economic repercussions of the work stoppage in those same 9 months and 20 days. In fact, the Claimant itself has admitted to having suffered damages and to have been aware of it before the *dies a quo*. [277]

(2) The Claimant became aware of the alleged breach of the obligation to provide fair and equitable treatment prior to the *dies a quo.*

305. As in the previous case - *i.e.*, the breach of the obligation to afford Metalín Full Protection and Security - the Tribunal's jurisdiction to resolve the alleged breach of Fair and Equitable Treatment *ratione temporis* depends on the date on which the Claimant *first* had actual or constructive knowledge of the breach and of the damage.

306. The Claimant alleges that the Respondent breached its obligation to grant Metalín FET because the Mexican authorities' "failure […] to take any reasonable action within their power to end the Continuing Blockade and to protect SVB's personnel and facilities was arbitrary, as well as grossly unreasonable, unfair and unjust".[278] According to the Claimant, "Mexico [also] violated SVB's legitimate expectations by, among other things, failing to address or sanction the Continuing Blockade or the damage inflicted on the Project's facilities".[279]

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275 Witness statement of Mr. López Ramírez, ¶ 8.34.

276 Memorial, ¶ 2.146.

277 See the section on damages later in this Counter-Memorial.

278 Memorial, ¶ 4.49.

279 Memorial, ¶ 4.51.

307. Mexico disputes that the Article 1105 Minimum Standard of Treatment standard is as described by the Claimant, however, it will take it as valid *pro tem* for purposes of analyzing the Tribunal's jurisdiction *ratione temporis*. In other words, it will assume for purposes of this objection that Mexico violated Article 1105 by failing to take any reasonable measures within its power to end the Continuing Blockade (*quod non*)

308. Respondent reiterates that, if that were the case, the Claimant had or should have had actual or constructive knowledge of the breach and consequent damages prior to June 28, 2020. It is unreasonable to assume that the Claimant would have considered that the omission it attributes to the Respondent was not of the gravity necessary to constitute an FET breach during the last quarter of 2019 or the first half of 2020, but was in August 2022.

309. In this context, Mexico considers that it is important for the Tribunal to take into consideration that the First Blockade was resolved in one day[280] and, therefore, the Claimant surely expected a similarly prompt response to the Second Blockade. As noted by Mr. López Ramírez, the conduct of the Mexican authorities in response to the Second Blockade "was obviously in contrast to the attitude taken by the prosecutors during the 2016 blockade."[281] No duly informed and diligently acting third party would wait more than 9 months to conclude that the FET obligation of Article 1105 had been breached, all the more so if the alleged failure of the Mexican authorities to intervene was "arbitrary, as well as grossly unreasonable, unfair and unjust" as the Claimant asserts.[282]

310. The Claimant will surely argue that it did not take any legal action at the time because it expected the problem to be resolved in a few days. Clearly, that is its prerogative. However, it cannot reasonably expect the Respondent to bear the consequences of that choice. The Claimant had ample time to file a claim for violation of Article 1105 before the statute of limitations expired and consciously chose not to exercise that right.

(3) Claimant had knowledge of the loss or damage prior to June 28, 2020.

280 Memorial, ¶ 2.86.

281 Witness statement of Mr. López Ramírez, ¶ 8.33.

282 Memorial, ¶ 4.49.

311. The Claimant asserts that the alleged violations of NAFTA Article 1105 resulted in loss or damage to SVB. This loss or damage resulted from being "foreclosed from the Project site for years," as well as physical harm and damage to SVB's representatives, personnel, facilities and equipment, including "substantial damage to SVB's facilities[283]

312. Claimant argues that its claims are not time-barred because the date on which its losses and damages "crystallized" was August 31, 2022.[284] Claimant's position is incorrect as a matter of law. As briefly explained above, Articles 1116(2) and 1117(2) do not establish a limitation period based on the date on wich, the losses and damages "crystallized", but on the date on which the investor *first* became or should have *first* become aware the breach and the damage suffered as a result of such breach. Both knowledge of the breach and the *damage* would have to arise after the *dies a quo* for the claim to be within the three-year statute of limitations period. [285]

313. Several NAFTA tribunals have held that Articles 1116(2) and 1117(2) do not require full or precise knowledge of the loss or damage, otherwise the commencement of the limitation period could be unreasonably postponed to the detriment of the respondent State. In the words of the tribunal in *Bilcon v. Canada*:

> The Tribunal agrees with the reasoning of its predecessors on this point. The plain language of Article 1116(2) does not require full or precise knowledge of loss or damage. It might be that some qualification can be read into the plain language, such as a requirement that the loss be material. To require a reasonably specific knowledge of the amount of loss would, however, involve reading into Article 1116(2) a requirement that might greatly prolong the inception of the three-year period and add a whole new dimension of uncertainty to the time-limit issue; it would have to be determined in each case not only whether there is actual or constructive knowledge of loss of damage, but whether the investor has knowledge that is sufficiently "actual" or "concrete". [286]

314. That same tribunal noted that, although there are practical considerations that militate in favor of waiting until a clearer idea of the breach and the damage caused before filing a claim, not

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283 Memorial, ¶¶ 4.48, 4.50.

284 Memorial, ¶ 3.28-3.29.

285 *Mobil Investments Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, July 13, 2018, ¶ 154. **RL-0029**.

286 *William Clayton v. Government of Canada*, PCA Case No. 2009-4, Award on Jurisdiction and Liability, March 17, 2015, ¶ 275. **RL-0030**.

all of them support a liberal interpretation of Article 1116(2) that expands the claimant's options for bringing its claim:

> 277. However, pragmatic observations like the ones just mentioned are not all on the side of interpreting Article 1116(2) in a manner that expands the timing options open to an investor. A host state can be prejudiced by a loss of institutional memory or documents on its part concerning the alleged breaches. Delay in bringing a claim might result in a situation where a host state is unknowingly carrying on acts or omissions for which it might be ordered to pay compensation. [287]

315. *Mondev v. United States* is also relevant in this context. The claimant in that case argued that it could not know of the loss or damage until the U.S. courts ruled on the actions taken by the city of Boston in relation with its investment-*i.e.*, a project involving the construction of a department store, a shopping mall and a hotel in a dilapidated area of the city of Boston.[288] In addressing that part of the claim, the tribunal observed, *obiter dictum:* "[a] claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear" and, for that reason, would have rejected the claimant's argument.[289]

316. Respondent's position is that it was not necessary to wait until South32's departure for Claimant to have knowledge that it had suffered loss as a consequence of Respondent's alleged inaction, even if it could not determine the exact amount. This "knowledge" of the fact of loss, together with knowledge of the breach, is sufficient to trigger the 3-year period under Articles 1116(2) and 1117(2).

317. According to the Memorial itself, since 1993, SVB and its predecessors had been involved in the acquisition and development of mining properties.[290] The Claimant further admits that it believed that "the Sierra Mojada Project was poised to be a successful, sustainable and economical mining project".[291] However, in order for the project to advance to the development phase and succeed, Metalín needed to complete the exploration phase, and the blockade abruptly halted those exploration efforts. This means that, at a minimum, the Claimant would have had to have been

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287 *William Clayton v. Government of Canada*, PCA Case No. 2009-4, Award on Jurisdiction and Liability, March 17, 2015, ¶ 277. **RL-0030**.

288 *Mondev International Ltd. v. United States United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, October 11, 2002, ¶ 52, **RL-0031**.

289 *Mondev International Ltd. v. United States United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, October 11, 2002, ¶ 87, **RL-0031.**

290 Memorial, ¶ 2.1.

291 Memorial, ¶ 2.52.

aware of the losses resulting from delays in exploration and mine development. It is unrealistic to suggest that an investor with SVB's experience would take more than 9 months to realize that the Second Blockade had caused losses or damage to an investment it considered so relevant.

318. Although it is unrealistic to assume that the stoppage of all activities of a mining project for more than 9 months does not cause any damage to the miner, this Tribunal does not need to resort to a finding of constructive knowledge to conclude that the Claimant knew of the existence of damages arising from the Claimant's alleged inaction. There is evidence adduced by the Claimant itself demonstrating that SVB and Metalín were aware of this.

319. For example, the Memorial accuses Mineros Norteños of cutting a hole in a fence and stealing various items, including "thousands of liters of diesel fuel," furniture and other household items from the buildings, as well as tires and stereos from vehicles inside Claimant's facilities in Mexico.[292] The Claimant also alleges that Mineros Norteños has been selling the stolen diesel in water bottles, has been extracting and selling approximately 40 tons of minerals from the Project site, and extorted $30,000 pesos from a third party who owned two tanker trucks parked at the Project site to allow their recovery. [293]

320. While it is possible that the Claimant was not aware of all economic consequences of the Second Blockade, including the termination of the Option Agreement with South32 on August 31, 2022, the fact that Mr. Barry, CEO of SVB, decided to send the Force Majeure Notice to South32 on October 11, 2019, would contradict the idea that he did not foresee damages at that time. [294]

321. Indeed, in that Force Majeure Notice, Mr. Barry identifies, *inter alia*, the losses arising from the stoppage of the drilling program, the closure of the exploration program[295] and the withdrawal of all personnel from the site.[296] All of this had occurred within approximately one month of the commencement of the Second Blockade. The Claimant also agreed to "cover all

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292 Memorial, ¶¶ 2.168, 2.169, 2.189, 2.197.

293 Witness statement of Mr. López Ramírez, ¶¶ 12.4, 14.7, 15.5; Memorial, ¶ 2.199.

294 Memorial, ¶ ¶ 2.202-2.203. See also Notice of Force Majeure on the Sierra Mojada Project, p. 2. **C-35**.

295 Memorial, ¶ 2.203.

296 Memorial, ¶ 2.203.

expenses during the force majeure period" as well as losses due to the "inability to access the Project site and progress the works for nearly three years".[297]

322. Despite having at least constructive knowledge of the breach and actual and constructive knowledge of the damage, Claimant decided to present its claim until June 28, 2023, after the expiration of the 3-year limitation period set forth in NAFTA Articles 1116(2) and 1117(2). Consequently, the claims for breach of Article 1105 are time-barred and the Tribunal lacks jurisdiction *ratione temporis* to adjudicate them.

2. The Tribunal does not have jurisdiction *ratione temporis* or *ratione voluntatis* with respect to the claim of indirect expropriation.

323. Claimant alleges in its Memorial that "Mexico unlawfully expropriated SVB's protected investments in the Sierra Mojada Project through a series of acts and omissions, the effect of which was the taking of the Project in breach of NAFTA Article 1110(1)".[298] Claimant alleges that the expropriation was indirect and *materialized* on August 31, 2022 when South32 withdrew from the Project. According to Claimant, "the termination of the Option Agreement [with South32] resulted in the complete loss of the Project's value, as well as the value of the amounts SVB invested to acquire and develop the Project."[299]

324. Since the alleged indirect expropriation occurred two years after the termination of NAFTA, the claim for breach of Article 1110 is outside the Tribunal's jurisdiction *ratione temporis* and *ratione voluntatis*. By that date, the NAFTA obligations were no longer binding on the NAFTA Parties (*ratione temporis* element). In addition, the consent extended through Annex 14-C of the USMCA does not cover claims arising from post-termination NAFTA measures, as set out in the general principles of treaty interpretation, including Articles 12 and 13 of the ILC Articles and Article 70 of the VCLT (*ratione voluntatis* element).

(1) Indirect expropriation is a discrete event that cannot be temporary, recurrent or continuous.

297 Memorial, ¶ 2.206.

298 Memorial, ¶ 4.2

299 Memorial, ¶ 4.16.

325. Unlike a breach of the obligation to grant FET to an investment that may be of a continuing nature, an indirect expropriation is a discrete event that materializes when the loss of value of an investment caused by a treaty breach is permanent and exceeds a certain threshold. Although there is no universal definition of indirect expropriation, numerous NAFTA tribunals agree that an indirect expropriation has *equivalent* effects *to a direct expropriation* and, therefore, implies that "the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed ."[300] Also, the loss of value must be "permanent, and not ephemeral or temporary," and importantly "[m]ere restrictions on the property rights do not constitute takings."[301]

326. Two conclusions can be drawn from these characteristics. The first is that an indirect expropriation occurs when the loss of value of the investment reaches a certain level, *i.e.*, when it approaches the fair market value of the investment or, to paraphrase the *Tecmed* tribunal, when the economic value of the investment has been "neutralized or destroyed". There can be no indirect expropriation before that threshold is reached regardless of whether the indirect expropriation is the product of a single measure or of multiple measures-*i.e*., what is commonly known as "creeping expropriation."

327. The second conclusion to be drawn from the definition adopted by the tribunals cited above is that, even if the loss in value occurs over a period of time, an indirect expropriation is a discrete event that occurs when the loss threshold is reached or exceeded. In the words of the *Iran-U.S. Claims Tribunal*:

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300 *Técnicas Medioambientales Tecmed S.A. v. United Mexican United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶¶ 116-117, cited in *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, Nov. 21, 2022, ¶ 497. **RL-0032.** See also: *Fireman's Fund Insurance Company v. United Mexican States, ICSID Case No. UNCT/15/2, Final Award, November 2022, ¶ 492. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, July 17, 2006, ¶ 176. **RL-0033**; *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, November 21, 2022, ¶ 497, **RL-0032** and *Glamis Gold, Ltd. v. United States of America, Final* Award, November 21, 2022, ¶ 497, **RL-0032** and *Glamis Gold, Ltd. v. United States of America, Final* Award, November 21, 2022, ¶ 497, **RL-0032**. *United States of America*, Final Award, June 8, 2009, ¶ 357, **RL-0034**.

301 *Glamis Gold, Ltd. v. United States, UNCITRAL, Final Award, June 8, 2009, ¶ 357 RL-0034. United States of America*, UNCITRAL, Final Award, June 8, 2009, ¶ 357 **RL-0034**, citing OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, (OECD Working Papers on International Investment), (2004/4), p. 11**.**

> Where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of the property, the breach forming the cause of action is deemed to take place on the day when the interference has ripened into a more or less irreversible deprivation of the property rather than on the beginning date of the events.[302]
>
> [Emphasis added]

328. Claimant asserts that the economic value of its investment was "destroyed" on August 31, 2022.[303] Prior to this date, both Claimant and South32 considered that there was still "hope of resolving the Mineros Norteños dispute and resuming the development of the Project" and, therefore, that the threshold necessary to consider that an indirect expropriation had occurred had not been reached.[304] Accordingly, the Respondent agrees with the Claimant to consider August 31, 2022 as the date of expropriation for purposes of determining whether the Tribunal has jurisdiction *ratione temporis* and *voluntatis* over the expropriation claim under Annex 14-C of the USMCAUSMCA.

329. As will be explained in the next section, the Respondent was no longer bound by the obligations set forth in Article 1110 when the alleged expropriation took place. Therefore, the claim does not fall within the scope of Annex 14-C of the USMCAUSMCA, and the Tribunal lacks jurisdiction *ratione temporis* and *voluntatis*.

(2) The claimed expropriation occurred when NAFTA was no longer in force.

330. The Respondent has repeatedly taken the position that Annex 14-C does not extend the application of the substantive investment protections contained in Section A of NAFTA Chapter XI beyond the July 1, 2020 termination date of NAFTA. This position has been reflected in Mexico's submissions in *Legacy Vulcan, LLC v. United Mexican States*,[305] the jurisdictional submissions in *Coeur Mining v. United Mexican States*, the jurisdictional submission in *Access v.*

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302 *Reza Said Malek v. Government of the Republic of Iran*, IUSCT Case 193. Final Award, August 11, 1992, ¶114, **RL-0036**, cited in: Ripinsky, Sergey, Williams, Kevin, *Damages in International Investment Law*, OUP (2008), p. 246-247. **RL-0037**.

303 Memorial, ¶ 4.16.

304 Memorial, ¶ 2.205.

305 *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Respondent's Counter-Memorial on the Ancillary Claim [redacted], 19 December 2022, ¶¶ 407-414 **RL-0038**. *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Respondent's Rejoinder on the Ancillary Claim, April 21, 2023 [Spanish], ¶¶ 258-287. **RL-0039**.

United Mexican States, as well as in its non-disputing party submissions under Article 1128 in *TC Energy Corporation, TransCanada Pipelines Limited v. United States of America.*[306]

331. Pursuant to Article 1131(1) of Section B of NAFTA Chapter XI (Section B), "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law. Two principles of international law are particularly important in the context of this objection.

332. The first is the principle of inter-temporal law codified in Article 13 of the ILC Articles which reads: "[a]n act of a State does not constitute a breach of an international obligation *unless the State is bound by the obligation in question at the time the act occurs*".[307] The second principle of international law that is relevant to this objection is codified in Article 70.1(a) of the Vienna Convention on the Law of Treaties (the "VCLT"):

> Article 70
>
> Consequences of the termination of a treaty
>
> 1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> (a) releases the parties from any obligation further to perform the treaty;
>
> (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.
>
> [...][308] [Emphasis added].

333. Claimant acknowledges in its RFA that NAFTA was terminated on July 1, 2020 (Termination Date).[309] Therefore, in the absence of an explicit agreement extending the Section A obligations beyond the Termination Date, such obligations ceased to bind the Parties as of July 1, 2020. Neither NAFTA nor the USMCA contain such an agreement

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306 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Non-Disputing State Party Submission of the United Mexican States Pursuant to NAFTA Article 1128, September 11, 2023, ¶¶ 3-16. **RL-0040**.

307 Crawford James, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries, Cambridge University Press (2005), Article 13 at p. 63.

308 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), Chapter IV.E.1, November 2001, Article 70, **RL-0017**.. See also, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)*/99/2. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, October 11, 2002, ¶ 69. **RL-0031**. See also, Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331**. RL-0018**.

309 RFA, ¶ 5.4

334. Unlike most international treaties signed by Mexico, NAFTA does not have a "sunset clause" that extends or prolongs the effectiveness of the substantive provisions of the treaty for a determined period of time after its termination.

335. For its part, Annex 14-C says nothing about the continuity of Section A obligations during the three years following termination. Its text refers to *consent* to arbitrate a dispute under Section B *alleging* a breach of an obligation under Section A, among others. This, of course, does not imply that the breach can occur at a date after the termination of NAFTA.

336. The silence in Annex 14-C on the continuation of Section A obligations is intentional. If the Parties had intended to extend the application of such obligations beyond the termination of NAFTA, they would have done so explicitly, as they did in Article 34.4 of the USMCA for Chapter 19 and certain binational panel reviews:

> Chapter Nineteen of NAFTA 1994 shall continue to apply to binational panel reviews related to final determinations published by a Party before the entry into force of this Agreement.

337. The deliberate absence of this language in relation to Section A or Chapter 11 leads inevitably to the conclusion that it was not contemplated to apply beyond June 30, 2020, the last day of the NAFTA. Therefore, pursuant to Article 70 of the VCLT, it must be assumed that the termination of NAFTA "release[d] the parties from any further obligation to perform the treaty."

338. In *TC Energy v. United States* the respondent State successfully objected to the tribunal's jurisdiction on the basis that the measures giving rise to the dispute were taken after the termination of NAFTA and, therefore, the United States was not subject to the obligations allegedly breached. The majority of the tribunal agreed that the absence of a survival clause and the fact that the United States has never included an *implicit* survival clause in its treaties pointed to the fact that the Parties to the USMCA never intended Annex 14-C to have effects equivalent to a survival clause:

> 176. [...] The absence of such language in USMCA and the fact that no other treaty signed by the United States ever included a sunset clause in an implicit way suggest that the parties did not intend to introduce a provision having the effects of a sunset clause in Annex 14-C.[310]

[310] *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, July 12, 2024 [redacted], ¶ 176. **RL-0042**.

339. As explained above, Annex 14-C extends *consent* to arbitrate, under Section B mechanism, claims for breach of Section A (*inter alia*) that, for whatever reasons, could not be submitted to arbitration prior to the termination of NAFTA. The structure of Annex 14-C and its repeated references to the "consent" of the Parties confirm this:

- Paragraph 1 of Annex 14-C refers to the *consent of* the Parties to submit a claim to arbitration under Section B of a claim, with respect to an existing investment, alleging, *inter alia*, a breach of one or more obligations under Section A.
- Paragraph 2 states that "*consent under paragraph 1*" satisfies the requirements of Chapter II of the ICSID Convention, Article II of the New York Convention and Article I of the Inter-American Convention;
- Paragraph 3, in turn, sets the duration of the "*consent under paragraph 1*" at three years from the termination of NAFTA. Importantly, it *does not* refer to the validity or enforceability of Section A obligations.

340. This point was also accepted by the majority of the Tribunal in *TC Energy*:

> There is however no indication in USMCA that the parties intended to extend the substantive provisions of Section A beyond 30 June 2020. To the contrary, both Annex 14-C and the relevant other provisions in the Protocol, in Chapter 14 and in the Final Provisions of USMCA point to the conclusion that Annex 14-C only extended NAFTA in respect of the offer to arbitrate included in Section B. Because Section A expired on 30 June 2020, the conclusion must be that the offer to arbitrate contained in Article 1 of Annex 14-C is only maintained in respect of facts predating the expiry of NAFTA.[311]
>
> [Emphasis added]

341. It is equally clear that Annex 14-C does not require Section A obligations to extend beyond the termination of NAFTA in order to take effect. Annex 14-C was intended to resolve issues related to the transition between NAFTA and the USMCA, for example, a claim arising from a breach that occurred a few days before the date of termination of NAFTA.

342. In the absence of Annex 14-C, a hypothetical investor, in the situation described in the preceding paragraph, would not have been able to submit its claim to arbitration under Annex 14-D of the USMCA because the breach would have occurred before the USMCA entered into force

311 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, July 12, 2024 [redacted], ¶ 156. **RL-0042**.

and, therefore, no tribunal would have jurisdiction *ratione temporis* over the claim. Likewise, it could not have submitted its claim to arbitration under NAFTA because it could not have complied with the 90-day notice requirement under Article 1119 or the 6-month period under Article 1120(1).

343. This position was also accepted by the majority of the court in the *TC Energy* case, which concluded:

> 146. In the ordinary meaning of its terms, Annex 14-C therefore operates to establish consent to arbitrate certain claims: the intention of the State parties was to allow the submission to arbitration, after 30 June 2020, of claims for breaches of an obligation under Section A. This, however, does not imply that they also agreed to extend Section A itself. This is perfectly understandable in the context of the transition between NAFTA and USMCA. Pursuant to Article 70(1) VCLT, the termination of a treaty releases the parties from any obligation to further perform the treaty. That applies to the substantive provisions of the treaty as well as to an offer to arbitrate contained in the treaty. Consequently, absent any transitory provision, the termination of NAFTA would have had the consequence not only that its substantive provisions would no longer be applicable past 30 June 2020, but also that investors would no longer be able to accept the offer to arbitrate contained in Section B, irrespective of the date of the alleged breach. As correctly noted by Prof. Schreuer,128 the USMCA parties could have agreed to make an exception to that general rule by extending the offer to arbitrate, by extending the substantive provisions of NAFTA, or both. The ordinary terms of Annex 14- C indicate that they agreed to extend the offer to arbitrate. They did however not agree to also extend Section A.[312]
>
> [Emphasis added]

344. Annex 14-C, therefore, provides an exception to the lapse of consent provided in Article 1122 of Chapter XI; an exception that is only available to certain investments and investors. Annex 14-C cannot be understood as an exception to the termination of Section A's substantive investment obligations.[313] By allowing a claim based on alleged breaches of a treaty that was no longer in force at the time the breaches occurred, the Tribunal would be overturning a balance carefully negotiated by the Parties to the USMCA with respect to the claims allowed under Annex 14-C and the general dispute settlement regime under the USMCA.

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312 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, July 12, 2024 [redacted], ¶ 146. **RL-0042**.

313 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, July 12, 2024 [redacted], ¶ 151. **RL-0042**.

3. The Tribunal does not have jurisdiction *ratione materiae* over some assets that the Claimant considers investments

a. The Tribunal lacks jurisdiction because the Claimant does not have ownership and/or control of certain assets.

345. The general rule of interpretation set forth in Article 31 of the VCLT provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The VCLT also provides that "a special meaning shall be given to a term if it is established that the parties so wish". Article 1139 defines "investment of an investor of a Party"' as follows:

> investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;

346. However, the terms "ownership" and "control" are not defined in NAFTA. For that reason, the analysis must begin with the ordinary meaning of the terms. The Oxford Dictionary defines "*ownership*" as "right to use, possess, and dispose of property".[314] The Dictionary of the Spanish language defines "*property*" as "the right or power to possess something and to dispose of it within legal limits".[315]

347. NAFTA also does not define the term "control". The Oxford Dictionary defines it as: "The fact or power of directing and regulating the actions of people or things".[316] The Dictionary of the Spanish language defines "*control*" as: "Dominance, command, preponderance".[317]

348. Based on this, SVB did not have - nor does it have - *ownership of* certain assets that it considers investments under NAFTA, nor did it have - nor does it have - *control* over them, including the concessions that were part of the Sierra Mojada Project. For this purpose, some dates should be recalled:

- On May 30, 2022, the Valdez family filed a formal request for the attachment of various assets, including bank accounts and Metalín's facilities in Sierra Mojada -including its

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314 Oxford Dictionary, *Ownership.* **R-0064.**

315 Dictionary of the Royal Spanish Academy, Property. **R-0065**.

316 Oxford Dictionary, *Control.* **R-0064.**

317 Dictionary of the Royal Spanish Academy, Control. **R-0065**.

offices, machinery and personal property- as well as several mining concessions related to the Project. [318]

- On July 7, 2022, Metalín's bank accounts and facilities were seized. [319]
- On September 6, 2022 and November 10, 2022, the seizures on the real estate were formally recorded in the Public Registry of Property of Monclova.
- On March 2, 2023, the Claimant filed the Notice of Intent.
- On June 3, 2023, by instructions of a decision of the First Civil Court of Torreon dated May 3, 2023, the embargo against Minera Metalin included 19 concessions related to the Sierra Mojada project.[320]
- On June 28, 2023, the Claimant filed the Request for Arbitration.

349. It is irrelevant that it was not until 2023 and 2024 that the necessary actions were taken to formalize the transfer of ownership of the assets and concessions in favor of the Valdez family. What is relevant is that at the time the Claimant filed its Request for Arbitration on June 28, 2023 pursuant to Articles 1116 and 1117, it did not have, at least, control of "[...] 20 registered mining concessions" and did not have ownership of "[...] surface rights in relation to various land plots at Sierra Mojada [...] equipment and infrastructure", so it cannot claim to have an investment under NAFTA.[321]

350. Article 1139 requires that the investment be "owned" or "controlled" by the investor in order to bring a claim. Having failed to meet this requirement, the Tribunal lacks jurisdiction. In any event, it is the Claimant that bears the burden of proof to demonstrate that it had ownership and control of the assets that it considers to be investments at the relevant times.

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318 *See* SectionII.L.2 *supra*.

319 *See* SectionII.L.2 *supra*.

320 Order of embargo of mining concessions of the First Civil Court of Coahuila of June 2, 2023, pp.1-3. **R-0060**.

321 Memorial ¶ 3.13. *Carlos Sastre and others v. Mexico*, ICSID Case No. UNCT/20/2, Award, 21 November 2022, ¶¶ 157. **RL-0043.** ("the Parties accepted what multiple tribunals have stated; that is to say, that generally the relevant dates for assessing issues of jurisdiction are: (i) the date when the alleged breach took place, and (ii) the date when the request for arbitration was lodged.").

b. The Tribunal lacks jurisdiction *ratione materiae* because it has not been demonstrated that the Option Agreement qualifies as an "investment" under NAFTA Article 1139 and the ICSID Convention.

351. In its Memorial, Silver Bull states that it made "several qualifying investments in Mexico, including [...] SVB's and Minera Metalín's interests arising from commercial arrangements entered into with third parties subject to production operations, including, amongst other things, the Option Agreement".[322] On this basis, the Claimant seeks to rely on the definition of NAFTA Article 1139(h)(ii) to characterize the Option Agreement as a protected investment. This strategy is futile and wholly inappropriate.

352. The Claimant has the burden of demonstrating how a commercial contract, *i.e.*, the Option Agreement with South32, qualifies as an investment under NAFTA Article 1139 and the ICSID Convention.

(1) Minera Metalín's interest under the Option Agreement is not covered by NAFTA Article 1139(h).

353. NAFTA Article 1139 (h) (ii) states the following:

> Investment means;
>
> [....]
>
> (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
>
> [...]
>
> (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

354. The Option Agreement with South32 does not fit this definition. In simple terms, an Option Agreement is an agreement between a buyer and a seller of a property, in this case the Sierra Mojada Project, where the seller (SVB, Minera Metalin and Contratistas, collectively "Silver Bull") grants the buyer (South32) the option to purchase such property. This means that the seller grants the purchase preference to a third party without the buyer having the obligation to purchase.

355. In this case, Silver Bull granted the put option to South32 for a 4-year option period. In order to maintain the option right, South32 was required to make advance capital payments to

[322] Memorial, ¶ 3.13.

cover exploration activities according to a budget approved by both parties. At the end of the 4-year period, South32 could exercise the option to purchase, covering the remainder of the agreed amount (US $100 million). Under the terms of the Option Agreement, the initial capital contributions or the exercise of the call option by South32 cannot be considered as "remuneration" that "depends on the production, revenues or profits of a company".

356. The initial principal payments made by South32 to Silver Bull could, at most, be identified as a pecuniary claim arising solely from "the extension of credit in connection with a commercial transaction", which are excluded from the definition of investment under NAFTA Article 1139(i). In any event, the Option Agreement cannot be qualified as an investment under NAFTA Article 1139, since an investment does not mean a "claims to money [...] that do not involve the kinds of interests set out in subparagraphs (a) through (h)" of NAFTA.

357. The function of NAFTA Article 1139 is to delimit the type of assets that may be considered investments for purposes of the Treaty, and which will therefore receive protection under the Treaty and its standards of treatment. If the asset in question does not constitute a protected investment (for example, because the applicable treaty expressly excludes it), no matter how much it is alleged that an act of the State-whether or not a sovereign act-has affected that asset, the Tribunal will have no jurisdiction.

358. Accordingly, the Tribunal lacks jurisdiction *ratione materiae* to rule on those aspects described in the Memorial concerning the Option Agreement. Respondent reserves the right to expand its objection during the next phases of this arbitration, given the lack of clarity in the arguments raised by Claimant.

(2) Claimant has failed to demonstrate that its interest in the Option Agreement is an investment within the meaning of Article 25 of the ICSID Convention.

359. In the event that the Tribunal considers that the Claimant's interest in the Option Agreement is a covered investment under NAFTA Article 1139, the Respondent considers that the appropriate test for this Tribunal to analyze whether the Option Agreement is an investment is through the so-called *Salini* test, *i.e.* to determine whether the Claimant demonstrated that the Option Agreement

made: *i)* a contribution, *ii)* has a duration, *iii)* has a risk and *iv)* constitutes a contribution to the economic development of the host State.[323]

360. The Claimant has the burden of proving that the Tribunal has jurisdiction under Article 25 of the ICSID Convention, yet SVB has merely stated that its claim is brought pursuant to that provision. This only highlights the fact that the Claimant does not have an investment in terms of Article 25 of the ICSID Convention and therefore the Tribunal does not have jurisdiction *ratione materiae* over the dispute.

361. *First,* the Option Agreement does not involve risk for purposes of the *Sailni* test. Several investment tribunals have noted that the risk criterion refers to "investment risks" as opposed to "commercial risks" or "sovereignty risks". As the tribunal in *Romak v. Uzbekistan* explained*:*

> All economic activity entails a certain degree of risk. As such, all contracts - including contracts that do not constitute an investment - carry the risk of non-performance.
>
> However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction.
>
> An "investment risk" entails a different kind of alea, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations...[324]

362. In this sense, one of the fundamental elements of investment risk is that the investor is uncertain about the return on its investment, however, the risk under the Option Agreement was solely of a commercial nature, *i.e.,* that South32 would decide not to exercise the option right. The very nature of the Option Agreement involved a commercial risk that South32 would decide not to exercise the option right even after it had made the initial capital contributions because, quite simply, the Option Agreement did not establish a purchase obligation on the part of South32. In any event, the Claimant was certain of the date on which South32 could exercise its Option right and the amount it would receive for each year in which South32 decided to retain the Option right.

363. *Second,* the Option Agreement also did not involve a contribution by Silver Bull to the economic development of the Host State. In any event, the contribution belonged to South32

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[323] *Salini Costruttori S.P.A. and Italstrade S.P.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 16, 2001, ¶ 52**.**

[324] *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award, November 26, 2009, ¶¶ 229-230. **RL-0045**.

through its capital contributions under the Option Agreement that would allow exploration activities to continue.

364. The Respondent considers that, in order to analyze the benefit that an investment may have generated in the economic development of the State, one must begin by studying the territorial nexus between the investment and the host State, i.e., Mexico.

365. The territorial nexus between "the claimant's contribution of capital and the economy of the host state is also a fundamental aspect of the economic materialization of the investment", and this territorial nexus between the investor and the State must be "direct rather than indirect or consequential".[325] However, the Option Agreement is governed by the laws of British Columbia and any dispute arising thereunder was to be resolved by commercial arbitration under the rules of the BCICAC based in Vancouver.[326]

366. This is relevant because, as noted by the *Bayview* tribunal, a fundamental characteristic of a covered investment is that it is governed by the laws of the host state of investment. [327]

367. Therefore, the Tribunal lacks jurisdiction *ratione materiae* to hear the issues surrounding the Notes, as the Notes cannot be considered an investment since they do not meet the elements of Article 25(1) of the ICSID Convention.

B. Merits

368. As detailed in this section, the Claimant has failed to prove violations of NAFTA Articles 1102, 1103, 1105 and 1110.

1. Claims of nationalism are unfounded

369. In its Memorial, SVB has made strong assertions about an alleged nationalist policy of the Mexican Government that Mexico considers irrelevant to this arbitration, but which, given the gravity of these, it cannot fail to answer. In particular, the Claimant alleges that the victory of Mexico's former President, Mr. Andrés Manuel López Obrador (known as AMLO) "has made

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325 Zachary Douglas, The International Law of Investment Claims, Cambridge University Press, p. 191**. RL-0046**.

326 Option Agreement, Clause 14.16. **C-0031**.

327 *Bayview Irrigation District et al. v. United Mexican States, ICSID Case No. ARB(AF)/05/1, Award United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, June 19, 2007, ¶ 98. **RL-0047**.

Mexico a hostile environment for the mining industry, stifling competition, eroding transparency. and favoring state-run companies over foreign investors, such as SVB."[328] Likewise, Claimant attempts, futilely, to link this political change with the facts related to the Project. However, this is not the case.

370. As explained in this Memorial, the facts claimed by the Claimant are attributable only to itself, to its lack of diligence in fulfilling its contractual commitments and to its mismanagement of the social conflicts that it has sown, over several decades, throughout the Sierra Mojada region. However, even if the political context in Mexico had any relevance in this arbitration or in the Project, SVB's attempt to make its situation attributable to these circumstances is frustrated since it also failed to provide evidence to support its arguments about the responsibility it attributes to Mr. López Obrador's presidency.

371. The Respondent considers that allegations as serious as attributing the failure of a project to apparent political persecution must meet a high evidentiary standard. However, the Claimant did not provide, nor did it make the slightest effort to demonstrate, that the change of government was related to the claims it alleges.

372. In dispute settlement proceedings, as in the case of investment arbitration, the existence and prevalence of the principles of burden of proof and standard of proof are internationally recognized. The first of these derives from the principle *actori incumbit probatio* and implies that the party making an allegation must assume the responsibility of proving it.[329] This principle, which may be considered as a general principle in international proceedings, cannot be ignored, and even less so under the gravity of the Claimant's allegations.

373. On the other hand, the standard of proof refers to the amount of evidence or level of proof that is necessary to prove an aspect of a dispute.[330] In this regard, the Respondent emphasizes that the more serious an allegation, the greater the weight of evidence that must be provided to prove

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328 Memorial, ¶ 2.108.

329 See, e.g., *Avena and Other Mexican Nationals* (United Mexican States v. United States), Judgment, I.C.J. Reports 2004, ¶ 55, **RL-0048**; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, April 12, 2002, ¶¶ 89-90. **RL-0049**.

330 *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013, ¶ 178. **RL-0050**.

that allegation.[331] This is particularly important in the case of alleging claims of considerable gravity against a State, since in such cases a high and convincing evidentiary standard must be met.[332]

374. In this case, the Claimant seeks to link the alleged lack of response from the Mexican authorities to the change of government that occurred in Mexico in 2018, without providing any evidence other than a couple of news stories.[333] In particular, the Claimant blames Mexico's previous government for the reform to the Mining Law and condemns it for making it more "complicated" to obtain concessions.[334] However, the Claimant seems to forget that Mexico has a sovereign prerogative to regulate economic activities in its territory, in particular by promoting environmental, social and economic values.[335]

375. This has been well established in the investment arbitration setting, for example, in the case of *Feldman v. United Mexican States,* where the tribunal noted:

> […] At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.[336]

376. In the absence of convincing arguments by the Claimant that even demonstrate the nexus between its allegations and its conclusion, there is no room to waste further arguments to refute the Claimant's futile allegations, and the Respondent requests the tribunal to dismiss any consideration of SVB's Memorial in this regard. The Respondent further invites the Claimant to

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331 *The Case Concerning Oil Platforms* (Iran v. United States), Separate Opinion of Judge Higgins, 2003, ¶ 33 **RL-0051**.

332 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, ¶ 178 ("The Court, after recalling that "claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive"") **RL-0052.**

333 Memorial, ¶¶ 2,103-2110

334 Memorial, ¶ 2.107.

335 Both from its Memorial, (¶ 2.107) and from the analysis set forth in this brief, it appears that Respondent disparages these values, however, that does not detract from their relevance, much less prescribe Mexico's sovereign power to pursue them.

336 *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/01, Award, December 16, 2002, ¶ 103. **RL-0019**.

refrain from making such allegations, as so many other exaggerated claims in its Memorial, unless it has the clear and convincing evidence to prove them.

2. The Claimant has not demonstrated a violation of Article 1110 (Expropriation).

a. Content of the expropriation regulation

377. NAFTA Article 1110 provides in relevant part as follows:

> 1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6.
>
> [Emphasis added]

378. NAFTA does not define the term "expropriation," however, the Claimant notes in its Memorial that "[a]n indirect expropriation occurs where, as here, the covered investor is substantially deprived of the value of its investment by conduct attributable to a NAFTA Party."[337] The Respondent agrees with this definition. An indirect expropriation involves the total (or almost total) loss of the value of the investment.

379. The Claimant's definition is also consistent with the decisions of several international tribunals that have interpreted that term under NAFTA and other treaties. Such was the case of the Tribunal in *Corn Products International v. Mexico,* in which the tribunal determined that indirect expropriation required a substantially complete deprivation of the use and economic enjoyment of property rights or identifiable and distinct parts thereof, approaching total impairment:

> 91. Thirdly, where there is no physical taking of property or forcible transfer of title, in the words of the FFIC award, "the taking must be a substantially complete deprivation of the economic use and enjoyment of rights to the property, or of identifiable distinct parts thereof (i.e. it approaches total impairment)".[338]

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337 Memorial, ¶ 4.5.

338 *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Liability, January 15, 2008 [redacted], ¶ 91. **RL-0053.**

380. It is also consistent with the position the Respondent has taken in other arbitral proceedings. An example of the foregoing is the position articulated in the non-disputing Party submission that Mexico filed in *Windstream v. Canada I* under Article 1128:

> Mexico submits that a breach of Article 1110 based on an indirect expropriation requires, at a minimum, a finding that the measure or series of measures attributable to the host State resulted in the effectively permanent and substantially complete deprivation of the economic benefits of an "investment," as defined in Article 1139, that is (or was) owned or controlled by an investor of another Party.
>
> Measures that adversely affect the value or financial viability of an investment do not amount to an expropriation unless they rise to the level of an effective taking by rendering the investment economically worthless. Measures that otherwise result in diminishing the value or reducing the benefits of an investment do not amount to an indirect expropriation.[339]

381. The Claimant also asserts that "[a]n indirect expropriation may occur even in the absence of a formal transfer of title, and even if the host State has not obtained any economic benefit."[340] The Respondent also fundamentally agrees with this proposition. Indeed, an indirect expropriation would in no case involve the formal transfer of title, for if it did, the expropriation would be direct

382. For the Respondent, the key factor in determining the existence of an indirect expropriation is the effect on the investment of the measure or measures alleged to be in breach of the treaty that are attributable to the State.[341] The Claimant appears to agree with this position, since towards the end of paragraph 4.7 of its Memorial it is noted that: "in assessing whether a NAFTA Party's conduct constitutes an indirect expropriation, tribunals have focused on 'the effects of the measures on the owner of the assets or on the benefits derived from such assets affected by the measures'."[342]

383. Finally, it should be added that for a measure or set of measures to have expropriatory effects, the loss of value of the investment has to be permanent. There is no such thing as a

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339 *Windstream Energy LLC v. Government of Canada I*, CPA Case No. 2013-22, Mexico Article 1128 Submission, January 12, 2016, ¶¶ 9-10. **RL-0054**.

340 Memorial, ¶ 4.5.

341 *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, November 21, 2022, ¶ 497. **RL-0032.** See also *Archer Daniels Mide land Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award of November 21, 2007, ¶ 240; **RL-0055**. *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award of September 27, 2016, ¶ 285**; RL-0056**.

342 Claimant cites the *Tecmed* case in this context (see footnote 466 of the Memorial) even though that case is not a NAFTA case. That dispute arose out of the 1995 APPRI between Mexico and Spain. Notwithstanding this error, Claimant's proposition is correct.

temporary, ephemeral or recurrent expropriation. This was the conclusion of the *Copper Mesa v. Ecuador* tribunal:

> 6.58. As regards a measure amounting to a direct expropriation under the Treaty, the Tribunal considers that its constituent legal parts requires: (i) that the measure deprive the investor of its investment permanently; (ii) that the resulting deprivation finds no justification as the legitimate exercise of the Respondent's police or regulatory powers and (iii) the non-application of Article XVII(3) of the Treaty. [...][343]
>
> [Emphasis added]

384. The tribunal in *Fireman's Fund v. Mexico* reached the same conclusion. After reviewing the indirect expropriation precedents then available under NAFTA, it summarized their general attributes as follows:

> (a) Expropriation requires a taking (which may include destruction) by a government-type authority of an investment by an investor covered by the NAFTA.
>
> (b) The covered investment may include intangible as well as tangible property.
>
> (c) The taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment).
>
> (d) The taking must be permanent, and not ephemeral or temporary.
>
> (e) The taking usually involves a transfer of ownership to another person (frequently the government authority concerned), but that need not necessarily be so in certain cases (e.g., total destruction of an investment due to measures by a government authority without transfer of rights).
>
> (f) The effects of the host State's measures are dispositive, not the underlying intent, for determining whether there is expropriation.
>
> (g) The taking may be *de jure* or *de facto*.
>
> (h) The taking may be "direct" or "indirect."
>
> (i) The taking may have the form of a single measure or a series of related or unrelated measures over a period of time (the so-called "creeping" expropriation).
>
> (j) To distinguish between a compensable expropriation and a noncompensable regulation by a host State, the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the bona fide nature of the measure.

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[343] *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, March 15, 2016, ¶ 6.58. **RL-0057**.

> (k) The investor's reasonable "investment-backed expectations" may be a relevant factor whether (indirect) expropriation has occurred.[344]
>
> [Emphasis added, footnotes omitted].

385. In the context of this case, subparagraphs (a), (c), (d) and (f) are particularly relevant, as they confirm that an indirect expropriation involves the total and permanent loss of the value of the investment. It must also be the product of one or more measures attributable to the State and violate one of the conditions set forth in Article 1110(1)(a) through (d) to give rise to a breach of Article 1110

386. Having established the fundamental characteristics of an indirect expropriation, the Respondent will address the Claimant's proposed procedure for determining whether an indirect expropriation has occurred and its application in the context of this claim.

a. Claimant has failed to prove indirect expropriation of its investment.

387. The Claimant argues that "[i]n determining whether an indirect expropriation has taken place, "the practice of NAFTA tribunals has been to follow a three-step approach focusing on (i) whether there is an investment capable of being expropriated, (ii) whether that investment has in fact been expropriated, and (iii) whether the conditions set forth in Article 1110(1)(a)-(d) have been satisfied" [345]

388. The Respondent agrees that the above outlines the typical procedure for determining whether a violation of Article 1110 has occurred. Nor does it dispute that the Claimant has any investment in Mexico (*i.e.*, the first step), although it considers that the Claimant has not identified precisely which investment it considers to have been expropriated, and this is essential to both its claim and Mexico's defense. The Respondent is particularly unclear as to whether what is claimed is the indirect expropriation of Metalín (the Claimant's Mexican subsidiary), the 20 concessions allegedly held by Metalín, or something else entirely. Until the Claimant clarifies its position, the Respondent will proceed on the basis that the claim is for the indirect expropriation of Metalín, and reserves the right to change its position if the Claimant departs from this assumption.

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344 *Fireman's Fund Insurance Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, July 17, 2006, ¶ 176, **RL-0033.**

345 Memorial, ¶ 4.6.

389. The second step of the analysis is to determine "whether that investment has in fact been expropriated." The Respondent contends that this has not been demonstrated because it has not been shown that the investment would have lost substantially all of its value as a result of the omission it attributes to the Respondent in connection with the Second Blockade. To be clear, the Respondent does not dispute that the Claimant suffered losses from the work stoppage it attributes to the Second Blockade, what it argues is that those damages were not of the amount necessary to consider that an indirect expropriation has occurred (*i.e.*, they do not approximate the FMV of the investment). This would obviously render irrelevant the third step of the process, *i.e.*, determining whether the conditions set forth in Article 1110(1)(a) to (d) are met

390. In *Corn Products v. United Mexican States*, the tribunal dismissed the claimant's indirect expropriation claim for precisely this reason: the respondent failed to show that the investment had lost its permanent value as a result of the State's interference - in that case, an excise tax on the use of HFCS for the production of soft drinks in Mexico (CPI is a producer of HFCS):

> 92. Applying that test to the claim advanced by CPI, the Tribunal has concluded that CPI has failed to make good its claim under Article 1110. In the absence of a physical taking or transfer of ownership, CPI needed to show that there had been such a degree of interference as to sterilise its business; in the words of the tribunal in FFIC "the taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof' Ithas failed to do so..[...] [346]
>
> [Emphasis added]

391. A similar situation occurred in *Glamis Gold Ltd v. United States of America*. The value of the claimant's investment was reduced by approximately US $29.1 million (more than half of its alleged value) as a result of the challenged measure. However, the Tribunal dismissed the expropriation claim with the following reasoning:

> 536. In light of this significantly positive valuation, the Tribunal holds that the first factor in any expropriation analysis is not met: the complained of measures did not cause a sufficient economic impact to the Imperial Project to effect an expropriation of Claimant's investment. The Tribunal thus holds that Claimant's claim under Article 1110 fails.[347]

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346 *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Liability, January 15, 2008 [redacted], ¶ 92. **RL-0053.**

347 *Glamis Gold, Ltd. v. United States, UNCITRAL, Final Award, June 8, 2009, ¶¶ 362, 532. United States of America*, UNCITRAL, Final Award, June 8, 2009, ¶¶ 362, 536**. RL-0034.**

392. The Respondent contends that this is a similar case in the sense that the allegedly expropriated investment - *i.e.*, the Sierra Mojada Project - largely retains its value, as explained below.

393. According to the Claimant itself, the expropriation of its investment materialized with South32's exit from the Project in August 2022. The Memorial describes this event and its consequences as follows:

> 4.16 On 31 August 2022, as a result direct of the Continuing Blockade, the inability to access the Project site or progress the exploration works for nearly three years, and the continued lack of any action by the Mexican authorities, South32 and SVB terminated the Option Agreement for the Project.[481] With the loss of SVB's critical financing and development partner for the Project, SVB understood that it would not be able to progress the Project further.[482] This was because no reasonable investor would be interested in a mining project illegally blockaded for nearly three years with no hope of any Government intervention.[483] Thus, the termination of the Option Agreement resulted in the complete loss of the Project's value, as well as the value of the amounts SVB invested to acquire and develop the Project.

394. Footnote 483 towards the end of the underlined text refers to paragraph 8.7 of Mr. Barry's witness statement and paragraphs 7.7 to 7.9 of Mr. Edgar's witness statement. Mr. Barry states in the referenced paragraph:

> 8.7 After the termination of South32's Option Agreement, we came to realise that we were not going to be able to further progress the Project. Put another way, when South32 – who had demonstrated a real commitment to the Project through nearly three years of the Continuing Blockade – pulled out, we realised that we had lost the financing and development partner necessary to progress the Project. We also realised that no other reasonable investors would be interested in a mining project that continued to be illegally blockaded after three years with no hope of Government intervention. Indeed, I spoke with existing shareholders and investors of Silver Bull, and they all agreed that additional investors would not be interested in the Project given the Continuing Blockade and the Government's failure to act, and that Silver Bull should move to pursue projects elsewhere
>
> [Emphasis added]

395. Mr. Edgar, for his part, testifies as follows in the paragraphs identified in footnote 483 of the Memorial:

> 7.7 On 11 October 2019, owing to the fact that the blockade had prohibited any work at the Projectfor more than a month, Silver Bull and Minera Metalín issued a notice of force majeure to South32 pursuant to the Option Agreement. Under the terms of the Option Agreement, the four-year option to acquire a 70% stake was to be extended by a corresponding period of delay caused by the event that gave rise to the notice of force majeure.

> 7.8 The blockade did not let up, however. Despite our best attempts to seek an amicable resolution of the blockade and our numerous requests to the Mexican government to intervene and break up the blockade, three years later, in August 2022, Mexico refused to intervene, and the blockade remained ongoing. With no end in sight, on 31 August 2022, Silver Bull acceded to South32's request to terminate the Option Agreement based on our inability to access the project site for nearly three years.
>
> 7.9 South32 paid Silver Bull USD $518,000 as a final payment for the exploration costs, which Silver Bull incurred during the blockade, and released South32 from all claims as the date of termination. As of the writing of this witness statement, the blockade continues and Mineros Norteños remains in control of the Project Site.

396. As can be seen from these two testimonies, the only evidence that Claimant's investment lost all of its value is the subjective assessment of Mr. Barry and "Silver Bull's current shareholders and investors" that "no other reasonable investor would be interested in a mining project that was still illegally blocked after three years." Respondent contends that Mr. Barry's testimony is not sufficient to prove the loss of value of the investment and, therefore, Claimant has failed to prove its claim for indirect expropriation.

397. Claimant asserts that on August 31, 2022 - *i.e.*, the date of South32's departure and the Valuation Date used by its expert witness - the allegedly expropriated investment was worth US $362.7 million and the only obstacle to the Project's continuation was Mineros Norteños' Second Blockade. There is also evidence that Mineros Norteños was open to reaching an agreement to end the Second Blockade. Indeed, paragraph 2.173 of the Memorial notes that, on August 12, 2020, *i.e.*, approximately two years before South32 decided to withdraw from the Project, Mr. López Ramírez met with Mineros Norteños and was presented with a letter setting out five negotiation points that included the following potential commitments from SVB/Metalin:

- The payment of an advance of US $2 million for unpaid royalties and;
- The payment of US$ 50,000 for each member of *Mineros Norteños* who had worked on the Sierra Mojada project in the past, but was no longer able to work.

398. The Memorial also records that on May 11, 2022, shortly before South32's withdrawal, Metalin sent a communication to the leader of Mineros Norteños requesting him to appoint a representative to enter into settlement negotiations.[348] According to the Memorial, on May 17, 2022, Mineros Norteños responded to the communication "*reiterating its demand for the full*

[348] Memorial, ¶ 2.185.

amount of royalty payments [i.e. royalties] owed under the 2000 Agreement."[349] It will be recalled that in the 2000 Contract, Metalin undertook to pay Mineros Norteños royalties up to the amount of USD $6,875,000 when the mine became operational. It will also be recalled that the domestic courts determined on 3 separate occasions that Metalin had a contractual obligation to commence operations and begin paying these royalties.

399. In sum, according to Claimant, no investor would have been willing to acquire an investment valued at US $362.7 million because of a blockage that could be resolved with a payment of less than US $7 million to Mineros Norteños. This, of course, makes no economic sense. Any investor who believed the investment to be worth US $362 million in August 2022 would be willing to pay, at most, the equivalent of that amount *minus* the US $7 million that Mineros Norteños was demanding to lift the blockade - *i.e.*, approximately US $355 million.

400. The assertion that the Project has "no residual value in the real scenario" is also inconsistent with the Claimant's own contention that the market price of mineral resource properties is largely driven by the volume and quantity of resources.[350] The Respondent notes that if this proposition is assumed to be true, it would logically follow that the Sierra Mojada Project retains most of its value because the Sierra Mojada Project, today, has the same volume of mineral resources as it had on the Valuation Date or on the date of commencement of the Second Blockade for that matter.[351] As noted above, the dispute with Mineros Norteños is not unresolvable. The cooperative members are simply demanding to be paid what they were promised

401. Thus, the Claimant's argument seems to boil down to this: since SVB did not have the resources necessary to pursue exploration on its own and pay the amount owed to Mineros Norteños, it must be concluded that the Project has lost all value. As explained above, this is a *non-sequitur*. There is no indication that the Project has lost all or substantially all of its value.

402. The Respondent further contends that the alleged "failure" of the Project was not the consequence of the Second Blockade or of the omission that SVB imputes to the Respondent; it was primarily the consequence of the Claimant's intransigence. Of its continued refusal to negotiate an agreement with Mineros Norteños to reach a compromise that would allow the

349 Memorial, ¶ 2.186.

350 Memorial, ¶ 5.11

351 Memorial, ¶ 5.14. Claimant refers to comparable companies in this context.

cooperative to obtain the royalties they had been promised 22 years ago and thereby open the door for the Project to continue. This will be explored in more detail in the damages section on causation.

403. In any event, it was incumbent upon the Claimant to prove that the Project has "no residual value in the actual scenario" and it has failed to do so. The opinion of the Claimant's CEO is not an objective and independent opinion and is not corroborated by any document. Simply put, the interference experienced by the Claimant is neither permanent (since it is possible to reach an agreement with Mineros Norteños) nor of such magnitude as to have caused a complete deprivation of the economic use and enjoyment of the investment.

3. Claimant has not demonstrated a violation of Article 1105 (Minimum Standard of Treatment).

a. Scope of the obligation contained in Article 1105

404. Article 1105 provides in its first paragraph: "[e]ch 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." However, the content of the rule was subsequently clarified by the NAFTA Parties through an Interpretative Note of the Free Trade Commission issued on July 31, 2001 (FTC Interpretative Note).

405. In the first paragraph of Section B, the Interpretative Note states that the first paragraph of Article 1105, reproduced in the preceding paragraph, 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*".[352] This is not an autonomous standard subject to interpretation, but a standard well established through the consistent practice of States applying it from a perceived legal obligation to do so.

406. The Interpretative Note also clarifies, in the second paragraph of Section B, that the FET and FPS concepts of Article 1105 do not require treatment *in addition to* or beyond that required by the so-called "*customary international law minimum standard of treatment of aliens*" or

[352] FTC Interpretative Note, Section B, ¶¶ 1-3. **RL-0058**.

MST.[353] The obligation assumed by the Parties under Article 1105 is a single obligation including FET and FPS.

407. Finally, the third paragraph of Section B of the Interpretative Note notes that a determination that there has been a violation of some other provision of NAFTA or a separate international treaty does not establish a violation of Article 1105(1).[354] This is relevant given the Claimant's position that mistakenly seeks to equate a violation of Article 1105 with a violation of Article 1102 or 1103.[355] While discrimination could become an element of a violation of Article 1105, it cannot be the exclusive basis for such a claim.

(1) Content of the FET obligation

408. The starting point for determining the content of the FET obligation under NAFTA Article 1105 is the standard set out in *Neer*, which refers to conduct amounting to "outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that any reasonable and impartial man would readily recognize its insufficiency".[356] While it is true that parties and arbitral tribunals may - and indeed often do - have differences of opinion as to whether the FET goes beyond this standard, the Respondent submits that the *Neer* standard should, at a minimum, serve as a common benchmark for this analysis

409. To the extent that the Claimant contends that the standard has evolved since then, the burden is on the Claimant to prove it. As the NAFTA Parties and other tribunals have confirmed, a change in a customary standard must be evaluated in light of *opinio juris* and settled State practice.[357] In the context of available NAFTA precedent, perhaps the most widely used interpretation of the content of the FET standard in Article 1105 is that of the tribunal in *Waste Management II v. United Mexican States*, which was formulated on the basis of other NAFTA arbitral awards:

> 98. The search here is for the Article 1105 standard of review, and it is not necessary to consider the specific results reached in the cases discussed above. But as this survey

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353 FTC Interpretative Note, Section B, ¶ 2. **RL-0058**.

354 FTC Interpretative Note, Section B, ¶ 3. **RL-0058.**

355 Memorial, ¶¶ 4.52-4.54.

356 *L.F. Neer v. Mexico,* 1927 AJIL 555 at 556**. RL-0059.**

357 *Glamis Gold v. United States of America,* UNCITRAL, "Final Award", June 8, 2009, ¶ 602**. RL-0034**. *Merrill and Ring Forestry L.P. v. Government of Canada,* ICSID Case UNCT/07/1, "Award", March 31, 2010, ¶ 193. **RL-0060**.

> shows, despite certain differences of emphasis a general standard for Article 1105 is emerging. Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—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. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[358]
>
> [Emphasis added]

410. This articulation of the *obligation containe*d in Art*icle 1105 has been cited w*ith approval by several NAFTA and non-NAFTA tribunals, such as: *GAMI v. Mexico*[359] *, Mobil and Murphy v. Canada*[360] *, Merrill Ring v. Canada*[361] *, Cargill v. Mexico*[362] *, Glamis Gold v. United States*[363] *, Thunderbird v. Mexico*[364] *, TECO v. Guatemala*[365] *and RDC v. Guatemala*.[366] A common denominator of these referred decisions is that the obligation of Article 1105 must be understood as an absolute minimum, "*a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner*.[367]

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358 *Waste Management, Inc. v. United States II*, ICSID Case No. ARB(AF)/00/3), Award, April 30, 2004, ¶ 98**.**

359 *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, November 15, 2004, ¶¶ 95-97. **RL-0062.**

360 *Mobil Investments Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, July 13, 2018, ¶ 141. **RL-0029.**

361 *Merrill and Ring Forestry L.P. v. Government of Canada*, ICSID Case UNCT/07/1, "Award," March 31, 2010, ¶¶ 199, 208. **RL-0060.**

362 *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 283. **RL-0063.**

363 *Glamis Gold v. United States of America*, UNCITRAL, "*Final Award*," June 8, 2009, ¶ 559**.**

364 *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006, ¶ 43**.**

365 *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, ¶¶ 454-455. **RL-0065.**

366 *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 219. **RL-0066.**

367 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, ¶ 259. **RL-0067**. See also *Glamis Gold v. United States of America* UNCITRAL, "Final Award", June 8, 2009, ¶ 619 where it states: "As explained above, the minimum standard of treatment of aliens established by customary international law, and by reference to which the fair and equitable treatment standard of Article 1105(1) is to be understood, is an absolute minimum, a floor below which the international

411. Also, given that it is a *minimum* standard of treatment, the international tribunals charged with assessing it have agreed that the threshold for violating it is high, even if considers that the standard has evolved since the *Neer* decision.[368] In *Lone Pine v. Canada*, the court noted:

> Based on the above, the Tribunal concludes that, notwithstanding an evolution from the *Neer* standard, the customary international law minimum standard of treatment for FET continues to bear a high threshold. This position has been consistently recognized by international arbitral tribunals. The Tribunal does not consider the *Waste Management* award as departing from this high threshold.[369]

412. The *GAMI* tribunal further identified four basic implications arising from *Waste Management II*'s formulation of the FET obligation under NAFTA:

> 97. Four implications of Waste Management II are salient even at the level of generality reflected in the passages quoted above. (1) The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law. (2) A failure to satisfy requirements of national law does not necessarily violate international law. (3) Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements. (4) The record as a whole - not isolated events - determines whether there has been a breach of international law. It is in this light that GAMI's allegations with respect to Article 1105 fall to be examined.[370]

413. The Respondent agrees with these implications, in particular, the latter which requires that the assessment of a breach of Article 1105 must consider all relevant facts and circumstances, and not isolated facts. This is consistent with the decisions of several NAFTA tribunals which have recognized that "international law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs".[371] As explained in *Bilcon v. Government of Canada* and subsequently accepted by the tribunal in *Mesa Power Group v. Government of Canada*:

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community will not condone conduct. To maintain fair and equitable treatment as an absolute floor, a breach must be based upon objective criteria that apply equally among States and between investors." **RL-0034.**

368 *IC Power and Kenon v. Peru*, ICSID Case No. ARB/19/19, Award, October 3, 2023, ¶ 300. **RL-0068** *Montauk Metals v. Republic of Colombia*, ICSID Case No. ARB/18/13, Award, June 7, 2024, ¶ 940**. RL-0069**.

369 *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, ¶ 367. **RL-0070**.

370 *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, November 15, 2004, ¶ 97, **RL-0062.**

371 *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, March 24, 2016, ¶ 505**. RL-0071.** See also *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, November 21, 2022, ¶ 623**. RL-0032.**

> Even when state officials are acting in good faith there will sometimes be not only controversial judgments, but clear-cut mistakes in following procedures, gathering and stating facts and identifying the applicable substantive rules. State authorities are faced with competing demands on their administrative resources and there can be delays or limited time, attention and expertise brought to bear in dealing with issues. The imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard.[372]

414. In turn, as noted above, NAFTA tribunals have repeatedly held that they are not authorized by NAFTA or customary international law to act as appellate tribunals.[373] As the *Cargill v. Mexico* Tribunal noted arbitrariness can lead to a breach of a State's duties under Article 1105, but only when the State's actions go beyond a merely inconsistent or questionable application of an administrative or legal policy or procedure, to the extent that the action constitutes an unexpected and shocking repudiation of the very purpose and objectives of a policy, or otherwise manifestly subverts a domestic law or policy with an ulterior motive.[374]

415. Thus, the alleged inaction of the Mexican government in the face of the Second Blockade must consider the causes of the blockade, as well as the consequences that a more vigorous action by the State against Mineros Norteños would have had, among other factors. Only in this way can the Respondent's actions and omissions in this case be properly assessed and ensure consistency with the applicable standard for finding a violation of Article 1105.

416. As regards the concept of "arbitrariness" in the context of the FET obligation of Article 1105, NAFTA tribunals have opted for the definition used in the *ELSI* case[375] , in which it was ruled that arbitrary conduct requires a "*wilful disregard of due process of law, an act which shocks,*

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372 *Mesa Power Group LLC v. Government of Canada*, CPA Case No. 2012-17, Award, March 24, 2016, ¶ 505**. RL-0071**.

373 *Joshua Dean Nelson v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, June 5, 2020, ¶ 377**. RL-0072.**

374 *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶¶ 292-293. **RL-0063.**

375 *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 291; **RL-0063**. *Glamis Gold, Ltd. v. United States of America*, UNCITRAL Award, June 8, 2009, ¶ 625 **RL-0034**; *Joshua Dean Nelson v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, June 5, 2020, ¶ 324**. RL-0072.**

or at least surprises, a sense of juridical propriety".[376] This has been accepted by both Canada and Mexico as a benchmark for finding a breach of FET under Article 1105. [377]

(2) Content of the obligation to grant FPS

417. As regards the obligation of full protection and security included in the MST under Article 1105, the Respondent reiterates that it is not a "stand-alone" obligation, but part of the minimum standard of treatment of aliens under customary international law. In that sense, like the FET obligation, the FPS obligation does not impose obligations beyond that minimum standard. In *Clayton/Bilcon v. The Government of Canada*, the tribunal found the following in relation to this point.

> 432. According to the Investors, the FTC Notes are only one element that the Tribunal should use, whereas Canada took the view that the Tribunal was limited to the authentic interpretation of the fair and equitable treatment standard provided by the FTC. The Tribunal agrees with Canada on this point. In light of the FTC Notes and in the specific context of NAFTA Chapter Eleven in which this Tribunal operates, "fair and equitable treatment" and "full protection and security" cannot be regarded as "autonomous" treaty norms that impose additional requirements above and beyond what the minimum standard requires. [378]
>
> [Emphasis added]

418. On the other hand, the Claimant acknowledges that "the full protection and security standard imposes an obligation of due diligence or vigilance and requires the State to exercise reasonable care and take reasonable actions within its power to prevent harm or injury to the investment".[379] The Respondent agrees with the above, however, it notes that, in other parts of the Memorial, the Claimant appears to argue that the State had an affirmative obligation to *prevent* the

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376 *Elettronica Sicula S.p.A* (ELSI) (United States v. Italy), 1989 ICJ Reports 15 (July 20, 1989), ¶ 128, **RL-0073.**

377 See, e.g., *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Rejoinder, May 2, 2007, ¶¶ 328-329; **RL-0074.** *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, Jan. 9, 2003, ¶ 121 (describing Canada's approval of the standard). **RL-0075**; *Joshua Dean Nelson v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, June 5, 2020, ¶ 324**. RL-0072.** *Lion Mexico Consolidated L.P. v. United Mexican States, ICSID Case No. UNCT/17/1, Final Award, June 2020, ¶ 324. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, September 20, 2021, ¶ 279**. RL-0076**. *Crompton (Chemtura) Corp. v. Government of Canada*, CPA Case No. 2008-01, Respondent's Answer (Public Version), October 20, 2008 [Part B], ¶ 47. **RL-0077.**

378 *William Clayton v. Government of Canada*, PCA Case No. 2009-4, Award on Jurisdiction and Liability, March 17, 2015, ¶ 432**. RL-0030**.

379 Memorial, ¶ 4.30. Emphasis added.

Second Blockade and *avoid* Claimant's losses.[380] To the extent that the foregoing reflects the Claimant's position, the Respondent submits that this would not be consistent with a "due diligence" obligation. Rather, it would suggest an obligation of strict liability, which is inconsistent with the standard set forth in Article 1105 and available precedent. The Respondent will elaborate on this point below when it addresses the standard applied to the facts of this case.

(3) Additional clarifications

419. The Respondent considers it pertinent to make some additional clarifications in order to determine the scope of the obligations set forth in Article 1105. First, it is noted that the obligation is not assumed with respect to the investor, but with respect to "*investments of investors of another Party*". This follows not only from the ordinary meaning of the terms of the provision in their context, as required by the general rule of interpretation of the VCLT, but also from NAFTA arbitral decisions, as in *Nelson v. Mexico*:

> 312. From the text of the treaty, it is clear that the obligation of fair and equitable treatment is limited to the treatment of "investments of investors". Therefore, before reviewing Claimant's allegations of unfair and inequitable treatment, the Tribunal must first clarify what is the investment that, according to Claimant, suffered from unfair and inequitable treatment.. [381]
>
> [Emphasis added]

420. This is relevant because it implies that SVB does not have standing to bring such a breach claim *in its own name under Article 1116*. It can only bring it *on behalf of Metalin under Article 1117* and, pursuant to Article 1135(2) and 1135(2)(b), any damages associated with a claim brought under Article 1117 would have to be paid to the company.

421. Secondly, it should be noted that the obligation of fair and equitable treatment and full protection and security vary considerably from one treaty to another. In some cases they are autonomous standards. In other cases, the obligation relates to norms under international law, and, in still other cases, such as NAFTA, the obligation refers to the "*customary international law minimum standard of treatment of aliens*." This implies that not all precedents are directly

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380 Memorial, ¶ 4.32.

381 *Joshua Dean Nelson v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, June 5, 2020, ¶ 312. **RL-0072**.

applicable. Special attention must be paid to the content of the underlying obligation to determine whether the precedent is applicable.

422. The Claimant relies on decisions that are not directly applicable to the present case for the reasons set out in the preceding paragraph. For example, it cites *Wena Hotels v. Egypt* to argue that Article 1105 encompasses two "different obligations" and that "breach of one [obligation] often entails breach of the other."[382] However, it does not seem to notice that the underlying treaty in that dispute was a BIT that makes no reference to international law or customary international law and, instead, imposes an autonomous standard.[383] Indeed, Article 2 of the Egypt-UK investment agreement provides that, "*investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security*."[384] There is no indication that the tribunal in *Wena* applied the same standard as set forth in Article 1105 and, therefore, its findings are not directly applicable to the present dispute. The same can be said of other cases cited by the Claimant, such as *Tecmed v. United Mexican States*.

423. Third, it should be noted that it is the Claimant that has the burden of proving a breach of a specific rule of the minimum standard of treatment in accordance with customary international law, and it must do so on the basis of consistent State practice and *opinio juris*. In *ADF v. United States*, the tribunal, after noting that it was not convinced that the investor had demonstrated an autonomous FET and FPS requirement, confirmed that it is the claimant that bears the burden of proof:

> 183 The Tribunal considers that the issue relating to the structure and content of the customary international law minimum standard of treatment has not been adequately litigated, and that neither the Investor nor the Respondent has been able persuasively to demonstrate the correctness of their respective contentions. We are not convinced that the Investor has shown the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is, from specific rules

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382 Memorial, ¶ 4.45 citing *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, **CL-049**, ¶ 95. Memorial, ¶ 4.46 citing *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.* (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II), ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, **CL-0066**, ¶ 171.

383 *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case ARB/98/4, Award, December 8, 2000, ¶ 99,

384 Egypt-UK BIT. **RL-0078.**

> addressing particular, limited, contexts) to accord fair and equitable treatment and full protection and security to foreign
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> [...]
>
> 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[385]
>
> [Emphasis added]

424. In *Vercara v. Colombia*, although relying on past decisions the tribunal concluded that the MST has evolved with customary international law, it emphasized that "this does not mean that the burden or standard of proving a violation of this principle has necessarily become less stringent".[386] This means that, even if this tribunal were to determine that the standard of NAFTA Article 1105 has been relaxed - a premise that the Respondent rejects and that the Claimant has failed to prove - SVB is still obliged to prove in accordance with the requirements of public international law any change in international custom, as well as the existence of a breach that meets the requirements of the standard. In other words, merely arguing an evolution of the MST does not relieve the Claimant of its high evidentiary burden, nor does it impose additional burdens on the Respondent. The standard of proof required remains rigorous, and any deviation from the traditional standard must be adequately supported.

425. The observation is relevant given certain arguments of the Claimant such as, for example, that the frustration of its reasonable expectations constitutes a breach of Article 1105 (FET specifically).[387] The Claimant has not demonstrated that the legitimate expectations are covered by the obligation set forth in that article based on consistent State practice and *opinio juris*. [388]

426. The need to have these elements to prove a change in international custom is not only given by the rules of public international law,[389] but has been confirmed in arbitral practice. An example of this is the decision of the tribunal in *Lone Pine v. Canada*, where the following is highlighted:

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385 *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, ¶¶ 183, 185, **RL-0075.**

386 *Vercara Holdings Ltd. v. Republic of Colombia*, ICSID Case No. ARB/21/15, Final Award, September 20, 2024, ¶ 603. **RL-0079**.

387 Memorial, ¶ 4.50.

388 Memorial, ¶ 4.50-4.51.

389 See, for example, Article 38(1)(b) of the ICJ Statute. **RL-0080.**

> 595. Respondent, thus, rightly posits that the content of custom is best evidenced by proof of consistent and widespread State practice that is adopted out of a sense of legal obligation. This position is not disputed by Claimant and is also accepted by the non-disputing NAFTA parties.
>
> 600. [...] For avoidance of any doubt, the Tribunal clarifies that arbitral awards rendered by international arbitral tribunals do not constitute State practice or opinio juris and, as such, do not create customary international law. Having said that, arbitral awards may serve as illustrations of custom, particularly those awards containing an examination of customary international law. Furthermore, whether an arbitral tribunal's articulation of the standard of customary international law has been consistently followed by later arbitral tribunals and is also relied on by States in other proceedings is a relevant guiding consideration in the analysis of the current standard of customary international law[390]
>
> [Emphasis added]

427. It is also essential to recall that the International Court of Justice (ICJ) itself has confirmed that provisions in international investment protection agreements or arbitral decisions are not sufficient to demonstrate a change in customary norms. [391] The Claimant's unsupported allegations suggesting that the protection of reasonable expectations is part of the obligation under Article 1105 thus lack a legal basis. This would not be the first time that a tribunal has dismissed an argument such as the Claimant's in the absence of evidence to that effect. Tribunals such as *Red Eagle v. Colombia* have concluded that legitimate expectations are not part of the MST:

> 293. The majority of the Tribunal is of the view that on the record before it there is insufficient evidence to support the proposition that the doctrine of legitimate expectations, which forms a part of the FET standard in other treaties, is part of the customary MST. The Claimant has not provided the Tribunal with any evidence of either state practice or opinio juris to support the existence of such a rule, and the Tribunal is aware of none. The most that can be said is that a State's failure to fulfil a promise made to an investor may amount to a breach of the customary MST if it can be shown that the State's actions fall foul of the usual standard outlined above. Legitimate expectations do not, however, receive any privileged treatment under the MST.[392]
>
> [Emphasis added]

428. By virtue of the foregoing considerations, the Respondent contends that a claim for violation of the standard set forth in Article 1105 must be reviewed on the basis of the following four fundamental guidelines:

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390 *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, November 21, 2022, ¶¶ 595, 600, **RL-0032.**

391 *Ahmadou Sadio Diallo* (The Republic of Guinea v. The Democratic Republic of the Congo), Preliminary Objections, (2007) ICJ Rep. 582, ¶ 90. **RL-0081**.

392 *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Award, February 28, 2024, ¶ 293. **RL-0082**.

- The FET is not an autonomous standard, but an expression of the MST and does not grant protections beyond those provided by customary international law;
- The standard for finding a violation of the MST is high and must be assimilated to conduct so outrageous that any reasonable person would recognize it as manifestly arbitrary;
- Inappropriate conduct by the host State, even if contrary to its standards, is not sufficient to establish a violation of the MST, the actions of the local authorities must be reviewed with deference; and
- A breach of this standard must be assessed on the basis of all the evidence available to the tribunal, not in isolation, and taking into account the defendant's good faith efforts to comply with its obligations.

429. Finally, it is noted that the remaining two paragraphs of Article 1105 (*i.e.*, the second and third) do not appear to be relevant to the present dispute. The second paragraph states

> Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.[393] [Emphasis added]

430. Since the present case does not relate to an armed conflict or civil strife, the content of this obligation will not be elaborated further, except for one observation: unlike the obligation in the first paragraph of Article 1105, the obligation in the second paragraph applies both to "investors of another Party" and to "investments of investors of another Party." This is important because it demonstrates that the Parties knew how to narrow or extend the scope of an obligation and, in the case of the one set forth in the first paragraph of Article 1105, the Parties consciously decided to limit it to investments of investors of another Party.

431. The third paragraph of Article 1105 provides that "[p]aragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b)." This exclusion also does not concern this claim and therefore will not be elaborated upon.

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393 NAFTA Article 1105.2.

b. The alleged evolution of the Minimum Standard of Treatment under customary international law has not been demonstrated.

432. The Claimant relies on *Mondev v. United States* to argue that "each NAFTA State party has accepted that the minimum standard of treatment [required by customary international law] 'can evolve' and 'has evolved'".[394] This is correct in general terms, but it is up to the Claimant to demonstrate this evolution in case its claim departs from the original content of the obligation, as the tribunal in *Cargill v The United Mexican States* warned at the time:

> The burden of establishing any new elements of this custom is on Claimant. […] If Claimant does not provide the Tribunal with the 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.. [395]
>
> [Emphasis added]

433. Moreover, while it is true that the tribunal in *Thunderbird v. United Mexican States* recognized that the standard in NAFTA Article 1105 has evolved since the *Neer* decision, as Claimant asserts, it also clarified that the threshold remains high.[396] In particular, the *Thunderbird* tribunal, concluded that acts leading to a violation of the MST, weighed in the factual context, must amount to a flagrant denial of justice or manifest arbitrariness that falls below acceptable international standards.[397] Claimant, however, omitted any reference to this conclusion in its Memorial.

434. Similarly, in *Resolute Forest vs. The Government of Canada*, the tribunal emphasized that, while the FET test may evolve, such evolution must be grounded in the evolution of customary international law.[398] As noted above, this must be done on the basis of international custom and

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394 Memorial, ¶ 4.42; *Mondev International Ltd. v. United States of United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶¶ 119, 124, **RL-0031.**

395 *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 273. **RL-0063.**

396 *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, January 26, 2006, ¶ 194. **RL-0064.**

397 International Thunderbird Gaming Corporation v. United Mexican States, UNCITRAL, Award, January 26, 2006, ¶ 194. **RL-0064.**

398 *Resolute Forest Inc. v. Government of Canada,* CPA Case No. 2016-13, Final Award, July 25, 2022, ¶668. **RL-0083**.

opinio juris.[399] The Claimant, however, has made no reference in its Memorial to either of these concepts. Nor has it even explained what the alleged evolution of the MST it alleges consists of and how it relates to this case. It has merely stated, without more, that it has occurred, which clearly does not satisfy the Claimant's burden of proof.

c. Mexico did not violate the standard established in Article 1105.

435. The Respondent alleges that Mexico violated Article 1105 in several ways:

- having incurred in actions and omissions that the Claimant classifies as unjust, arbitrary, unreasonable and in violation of due process[400] , as well as not fair, unequal, unequivocal, transparent or frank[401] , all of which are contrary to the MST;
- by failing to grant FPS to SVB's investment[402], in particular, because the Mexican authorities failed to protect it and its investment from the Second Blockade and did not take any reasonable steps within their power to restore SVB's and Metalín's access to the Project site, despite its multiple requests for assistance[403] ;
- by not giving SVB's investments[404] an FET either, specifically because
    - Mexico has not dealt with or sanctioned in any fair or reasonable manner (i) the continued blockade and illegal occupation of the Project site; (ii) the unlawful confinement and actual kidnapping of SVB personnel at the camp; and (iii) the significant damage to SVB's facilities and illegal exploitation by Mineros Norteños;
    - Mexico frustrated SVB's legitimate expectations in connection with the Project;[405] and

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399 *Resolute Forest Inc. v. Government of Canada*, CPA Case No. 2016-13, Final Award, July 25, 2022, ¶668. **RL-0083**.

400 Memorial, ¶ 4.48.

401 Memorial, ¶ 4.49.

402 Memorial, ¶ 4.26.

403 Memorial, ¶ 4.38.

404 Memorial, ¶ 4.40.

405 Memorial, ¶ 4.50.

- Mexico treated SVB and its protected investments in a discriminatory manner.[406]

436. These arguments will be addressed below.

1) The alleged violation of Article 1105 for discriminatory treatment is without merit.

437. The Claimant alleges that there is "clear evidence of discriminatory treatment in breach of the minimum standard of treatment of fair and equitable treatment".[407] It further adds that in light of the "corrective measures" taken by the Respondent "against blockades imposed on other mining projects in Mexico," the fact that Respondent has "opt[ed] not to take any similar measures with respect to the [Second] Blockade is clear evidence of discriminatory treatment in violation of the minimum standard of fair and equitable treatment."[408] This is nothing more than a rehash of its claim for violation of Articles 1102 and 1103.

438. The Respondent respectfully submits that the Claimant confuses the obligation under Article 1105 with the anti-discrimination protections embodied in NAFTA Articles 1102 and 1103. As mentioned above, the Interpretative Note clarifying the content of the Article 1105 obligation states, at the third paragraph of Section B, that a determination that there has been a violation of some other provision of NAFTA or a separate international treaty does not establish a violation of Article 1105(1). Mexico submits that it does not help to include an element of discrimination in the FET claim, except to introduce ambiguity where there is none, thereby unnecessarily complicating the analysis.

439. Not only has the Claimant failed to demonstrate discrimination, without more, in violation of Article 1105, but it has also failed to identify the specific elements that would be required to establish the existence of discrimination in violation of Article 1105, and how this analysis would differ from that required by Articles 1102 and/or 1103. Nor has it demonstrated on the basis of consistent State practice and *opinio juris* that discrimination is part of the customary international law minimum standard of treatment of aliens that was incorporated into NAFTA with Article 1105.

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406 Memorial, ¶ 4.52.

407 Memorial, ¶ 4.53

408 Memorial, ¶¶ 4.52-53.

440. Therefore, a violation of Article 1103 or Article 1102 is neither determinative nor particularly relevant to resolve a claim for a violation of Article 1105. [409] Extending the scope of Article 1105 to include discriminatory treatment covered by Articles 1102 and 1103 would be redundant and contrary to the text of the treaty. This was the conclusion of the tribunal in *Mercer v. Canada* (relying in turn on *Methanex v. United States*):

> 7.58 So far as concerns the Claimant's claims of "discriminatory treatment" contrary to NAFTA Article 1105(1), the Tribunal's agrees with the non-disputing NAFTA Parties' submissions that such protections are addressed in NAFTA Articles 1102 and 1103, rather than NAFTA Article 1105(1).
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> 7.59 The Tribunal also notes the approach taken in the Final Award in *Methanex v USA*. 276 There, the NAFTA tribunal decided that, even without the FTC Interpretation:
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> "... *the plain and natural meaning of the text of Article 1105 does not support the contention that the 'minimum standard of treatment' precludes governmental differentiations as between nationals and aliens. Article 1105(1) does not mention discrimination; and Article 1105(2), which does mention it, makes clear that discrimination is not included in the previous paragraph. By prohibiting discrimination between nationals and aliens with respect to measures relating to losses suffered by investments owing to armed conflict or civil strife, the second paragraph imports that the preceding paragraph did not prohibit - in all other circumstances - differentiations between nationals and aliens that might otherwise be deemed legally discriminatory - inclusion unius est exclusion alterius. The textual meaning is reinforced by Article 1105(3), which makes clear that the exception in paragraph 2 is, indeed, an exception.*[410]
>
> [Emphasis added]

441. Based on this reasoning, the tribunal concluded that the claimant's claim for discriminatory treatment under Article 1105(1) "*add[s] nothing to the Claimant's claims under NAFTA Articles 1102 and 1103*".[411]

442. The Respondent contends that we are before a similar case. The Claimant has brought discrimination claims under Articles 1102 and 1103, and has done so on the basis of the same facts and the same evidence. Thus, if this Tribunal were to determine that there was indeed discrimination against the Claimant (which the Respondent strongly denies) that violation would be covered by the claims brought under Articles 1102 and 1103. It is neither necessary nor

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409 See, e.g., *Crompton (Chemtura) Corp. v. Government of Canada*, CPA Case No. 2008-01, Mexico Article 1128 Submission, July 31, 2009, ¶ 4. **RL-0084.**

410 *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, December 10, 2018, ¶ 7.59. **RL-0085**.

411 *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, December 10, 2018, ¶ 7.60. **RL-0085.**

appropriate to expand the content of the obligation under Article 1105 and, in any event, the burden would be on the Claimant to demonstrate that the minimum standard of treatment under customary international law prohibits discrimination. The Claimant has failed to meet this burden.

(1) Article 1105 does not cover the Claimant's legitimate expectations and the Claimant has not met its burden of proving that claim.

443. The Respondent has taken the position that the Claimant has not demonstrated that the minimum standard of treatment referred to in Article 1105 includes the protection of reasonable expectations. In this regard, Mexico disagrees and emphatically rejects that legitimate expectations are incorporated in the MST, since, among other things, it considers that the minimum level of protection reflected in this standard is not compatible with the excessively broad interpretation that is usually given to legitimate expectations.

444. However, the Respondent also acknowledges that several international tribunals, departing from state practice on the matter, have interpreted the MST standard of Article 1105 as including such protection. However, even in these cases tribunals have found that reasonable expectations arise from specific representations or commitments that were intended to induce investment, not from mere generic statements or promises in the context of investment attraction strategies

- In *UAB E Energija v. Latvia*, the tribunal rejected the claimant's legitimate expectations claim after considering that, for purposes of assessing this type of claim, it must be considered whether (i) the expectations are indeed "reasonable and legitimate"; (ii) such expectations are based on more than a "basic expectation"; (iii) "there must have been reliance by the investor with respect to making the investment"; and (iv) "that reliance must be reasonable".[412]

- Likewise, in *Duke Energy v. Ecuador Ecuador*, although the tribunal recognized that these expectations "are an important element of fair and equitable treatment" it also said that it was "mindful of their limitations" and proceeded to explain that these "must be legitimate and reasonable at the time when the investor makes the investment", and that they must be

[412] *UAB E Energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, December 22, 2017, ¶ 835. **RL-0086**.

evaluated taking into account "all circumstances", including "the political, socioeconomic, cultural and historical conditions prevailing in the host State".[413]

- Similarly, in *Total v. Argentina*, the tribunal clarified that representations made by a host State are enforceable and justify the investor's reliance on them "only when they are specifically addressed to a particular investor".[414]
- On this basis, the NAFTA tribunals in *Mobil v. Canada* and *Grand River v. United States* determined that, in the absence of evidence indicating that the claimant was induced to make an investment based on the State's conduct, it cannot be determined that legitimate expectations arose.[415]

445. The Claimant has not referred to any specific commitment made by the Respondent that induced the investment and thus gave rise to reasonable expectations, the breach of which would be capable of becoming a claim under Article 1105.

446. It is also true that decisions such as *Tecmed v. Mexico* have been widely criticized for accepting this component of the FET obligation (even under an autonomous standard such as the one applicable in that case). For example, in *MTD Equity v. Chile Chile*, the Annulment Committee referred to the criticisms of two noted experts (Mr. Jan Paulsson and Sir Arthur Watts) on the *dictum* in the *Tecmed* case, and observed

> 67. The Committee can appreciate some aspects of these criticisms. For example the TECMED Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable. 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

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413 *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, ¶ 340. **RL-0087.**

414 *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, December 27, 2010, ¶ 120. **RL-0088.**

415 *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, May 22, 2012 [Redacted] ¶ 170. **RL-0089**. *Grand River Enterprises Six Nations v. United States of America*, UNCITRAL, Award, January 12, 2011, ¶ 141. **RL-0028**.

> under the BIT might well exceed its powers, and if the difference were material might do so manifestly. .[416]
>
> [Emphasis added]

447. The Respondent agrees with this observation. To interpret the obligation set forth in Article 1105 by considering the expectations that an investor may have formed would leave States completely helpless, as they would have no way of determining the scope of their obligation. All the more so when the Claimant has not referred to a specific commitment undertaken by the Claimant on which the Claimant has relied in order to make the investment (as is the case here)

(2) Respondent did not violate the MST

448. The Claimant alleges that the Respondent's "failure to take any reasonable action [...] to end the [Second Blockade] and protect SVB's personnel and facilities" was, inter alia, arbitrary" [emphasis added].[417] It adds that the Respondent "did not act in an even-handed, unambiguous, transparent or candid manner."[418]

449. Regarding the alleged omission of the authorities not to attend or lift the so-called Second Blockade, it is important to consider that the demonstrations organized by Mineros Norteños have been and continue to be peaceful.[419] This means that such popular mobilizations are protected by the constitutional right to protest, enshrined in Article 6 of the CPEUM and ratified by multiple decisions of the national courts.[420] The right to protest is not only guaranteed by the Respondent's Constitution, but also forms part of Mexico's international human rights commitments.[421] In this regard, some comments are in order.

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416 *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision of the Ad Hoc Annulment Committee, March 21, 2007, ¶ 67. **RL-0090**.See also *LESI S.p.A. and Astaldi S.p.A. v. Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award, November 12, 2008, ¶ 151. **RL-0091.**

417 Memorial, ¶4.49.

418 Memorial, ¶ 4.49.

419 Witness statement of Mr. Fraire, ¶¶ 31, 33, 38 and 39.

420 Political Constitution of the United Mexican States, Article 6. **R-0010**. "The manifestation of ideas shall not be subject to any judicial or administrative inquisition, except in the event that it attacks morals, private life or the rights of third parties, provokes a crime, or disturbs public order; the right of reply shall be exercised under the terms provided by law. [Emphasis added]

421 See for example Article 19 of the International Covenant on Civil and Political Rights **RL-0092**; Articles IV and XXI of the American Declaration of the Rights and Duties of Man **RL-0093** and/or; Article 13 of the American Convention on Human Rights.**R-0018.**

450. *First*, it is erroneous to call the 2019 demonstration an "ongoing blockade," as it is a peaceful demonstration that did not trespass on the Claimant's private property. In fact, today, Mineros Norteños only has a small encampment of a few people outside the Claimant's property, *i.e*., on the public road, and without affecting the Claimant's property.

451. As explained,[422] the Claimant's alleged approaches to multiple federal, state and municipal authorities were dealt with within the framework of the powers of each authority and the authorities acted in accordance with the facts found. Mexican authorities cannot intervene or act with the use of public force, as the Claimant seems to suggest, in circumstances that do not warrant the use of force against peaceful demonstrators and on facts that do not establish violations or crimes.[423]

452. *Second,* the Claimant has failed to take the necessary legal actions to formally request the intervention of the competent authorities. Part of the Claimant's omissions are:

- It did not file a complaint with the Coahuila Prosecutor's Office until four days after the events of the alleged blockade of September 8, 2019.
- It did not advance any steps before the competent Mexican authorities to address its situation. On the contrary, it submitted letters of support to various authorities that are not competent to investigate crimes, use public force or resolve social or commercial disputes (*e.g.*, General Directorate of Mines).[424]
- It did not accept the support of the entities that could be involved in this type of matters and, rather, refused the follow-up and support of the Mexican Ministry of the Interior, the authority in charge of domestic policy and coordinator of various authorities in charge of public security.[425]

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422 *See* section II. K.

423 National Law on the Use of Force, Chapter VII Police Actions in Demonstrations and Public Meetings, Article 27, **R-0032.**

424 *See* section II. K.

425 Juan Manuel López email exchange with SEGOB. **R-0036.**

- It did not file a complaint for theft[426] or vandalism[427] of goods or private property before any investigating authority (*i.e.*, Public Prosecutor's Office or District Attorney's Office). It is surprising that his claim includes this type of argument when he never asserted it before the competent authority.

453. With regard to the alleged crimes of kidnapping of Metalín's workers, there is no evidence that this has happened and, if any, months after the events occurred, the Claimant itself and its representatives failed to respond to the requests of the Public Prosecutor's Office for more information in order to continue with the investigation of the alleged hostage-taking and dispossession of their property.

454. It was the Claimant that abandoned its project. The Respondent is not aware of any effort by the Company, subsequent to September 2019, to resume exploration. Mineros Norteños is not within its ownership, much less in control or possession of its mines or its offices. In that vein, Metalín's offices are currently abandoned by the Claimant's own will. This is not surprising, since Metalín has made it clear that, in its view, the Project lost all value with the departure of South32, an assertion that the Respondent has already explained is totally unfounded.

455. The Claimant's inaction not only evidences its lack of interest in resolving the dispute with Mineros Norteños; it also suggests that its real objective is not to regain control and start up its operations in Sierra Mojada, but to obtain financial compensation in this arbitration for an investment that it was unable to develop for 22 years. This type of strategy contravenes the fundamental purpose of investor-state arbitration, which is to ensure the protection of legitimate and active investments, not to facilitate the improper collection of compensation based on unfounded expectations or lack of corporate due diligence.

The situation in which the Claimant finds itself derives from its own conduct; from the breach of its commitments, not only with Mineros Norteños, but also with various concessionaires in Sierra Mojada. Now it wants to evade any responsibility and pass the bill to the government because it

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[426] In the case of the crime of theft, according to the provisions of Article 286 of the Criminal Code of Coahuila de Zaragoza, it is stated that it is prosecuted by Querella, that is to say, at the request of a Party. The Claimant's inaction prevented the authorities from acting against claims of this type. **R-0066**.

[427] As in the case of robbery, this figure is prosecuted by Querella, that is to say, at the request of a party, consequently, the authority is prevented from acting if there is no express request from a party. *See* Articles 46, 301, and 302 of the Penal Code of Coahuila. **R-0066**.

refused to use public force to resolve the conflict that it itself generated.

(3) Respondents have acted within the scope of their authority or powers.

456. The Respondent has acted in accordance with its legal framework and in conformity with the facts known to the competent authorities, this in light of the following: *i)* that we are dealing with a peaceful demonstration; *ii)* and that the authorities followed due process under the criminal and public safety laws.

457. As explained *above*, the exceptional nature of the use of public force is conceived as a "last resort". In the Mexican legal system, its application also requires compliance with the principles of "legitimacy, necessity, adequacy and proportionality.[428]

458. The Mexican authorities did no more than respond to a peaceful demonstration in an appropriate and proportional manner, that is, without resorting to the use of force, because they simply did not have the legitimacy to do so, and there was no need to do so. The Claimant was omissive and negligent in its actions towards the Mexican authorities, of which it suggests that they did not act diligently, but there is no legal coherence between the actions actually requested and the events that took place; as well as evidence that the only one that abandoned its project was itself.

459. On the other hand, when speaking of criminal proceedings, as explained *above*, the Claimant ignored not only Mexican criminal procedure, but its own obligations within the process of filing a complaint with the Public Prosecutor's Office.[429] The authorities cannot be forced to go beyond the provisions of the law, that would be not only against the law, but against well-established principles such as legality.

4. Claimant has not demonstrated a breach of NAFTA Articles 1102 and 1103.

460. The Claimant asserts that Mexico breached its obligations under NAFTA Articles 1102 (National Treatment) and 1103 (Most-Favored-Nation Treatment).[430] While acknowledging that it

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428 See ¶¶ 179-181 *supra*.

429 See section J and ¶¶ 212, 258-60.

430 Memorial, ¶¶ 4.55-4.70.

has the burden of establishing a *prima facie* case for these claims, the Claimant has provided no evidence or argument to support its allegations.

a. The applicable standard under Articles 1102 and 1103 and the burden of proof

461. To establish a breach of Article 1102 or Article 1103 an investor must demonstrate that it or its investment received treatment less favorable than that accorded, in like circumstances, to domestic investors or investments. Note that, contrary to the Claimant's contention, the phrase "like circumstances" applies to *treatment* accorded to the investor/investment "with respect to the establishment, acquisition, expansion, management, conduct, operation, sale or other disposition of investments," and not to the investor/investment *per se*.[431]

462. This issue was explored in *Mercer v. Canada*. Citing the tribunal in *Cargill v. Mexico* (which in turn relied on *GAMI v. Mexico* and *Pope & Talbot v. Canada*), the *Mercer* tribunal described the issue in the following terms:

> 7.18 *Like Circumstances*: The next question confronted by the Tribunal is whether it is required to determine whether it is the investor or the treatment received by the investor that is to be "in like circumstances". [432]
>
> [Emphasis added]

463. Subsequently, the tribunal referred to the positions of the parties and ruled in favor of the interpretation of Canada and Mexico, which had supported Canada's interpretation through a non-disputing party submission filed under Article 1128:[433]

> 7.19 The Claimant's submissions focus on the circumstances of the investor. The Respondent contends that that is inappropriate and contrary to the plain wording of NAFTA Articles 1102 and 1103, which require the Claimant to prove that the treatment accorded to the investor or its investments was "in like circumstances". In its submission made under NAFTA Article 1128, Mexico agrees with the Respondent on this issue.
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> 7.20 The Tribunal agrees with the Respondent and with Mexico. In its view, the clearest explanation of the position is found in the NAFTA award in *Cargill v Mexico*:
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> "Thus, in both GAMI and Pope & Talbot, 'like circumstances' was determined by reference to the rationale for the measure that was being challenged. It was not a

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431 Memorial, ¶ 4.61. Claimant states in that paragraph: "The second element is to identify comparable investors or investments 'in like circumstances' to those of Claimant or its investments".

432 *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, December 10, 2018, ¶¶ 7.18. **RL-0085**.

433 Non-disputing Party submission of Mexico in *Mercer International Inc. v. Government of Canada*. **RL-0094**.

> determination of 'like circumstances' in the abstract. The distinction between those affected by the measure and those who were not affected by the measure could be understood in light of the rationale for the measure and its policy objective. Indeed, it is possible that in respect of other, different measures, the mills in GAMI and the lumber producers in Pope & Talbot could have been found to be in 'like circumstances' ..."
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> 7.21 In this case, therefore, the question for the Tribunal is whether Celgar's treatment is in "like circumstances" with any comparator with respect to the particular measures in question[434]
>
> [Emphasis added]

464. In its non-disputing party submission in *Mercer*, Mexico added that it agreed with the United States and Canada that a "like circumstances" analysis involves a careful review of *all* relevant factors and circumstances. It even referred to the possibility that a complaining party and the comparables do not operate in the same sector and yet are considered to be in like circumstances in the context of the measure at issue.[435]

465. A similar conclusion was reached in *Resolute Forest Products v. Canada*. Citing the decision in *Pope & Talbot vs. Canada*, the tribunal determined that for purposes of distinguishing between discrimination based on nationality and other differences in treatment unrelated to nationality, it is the concept of "*treatment accorded in like circumstances*" that is relevant:

> 575. As to the ultimate way to distinguish between nationality-based discrimination and other differences in treatment that do not relate to nationality, the Tribunal will follow the approach adopted by many other NAFTA Chapter 11 tribunals which have relied on the concept of treatment accorded "in like circumstances" for this purpose. [...].[436]

466. It is therefore false that "[t]he second element is to identify *comparable investors or investments* 'in like circumstances', as the Claimant or its investments" as proposed by the Claimant.[437] What must be identified is investors/investments that have been granted *differential treatment in like circumstances*.

467. For the same reason, it is also incorrect to state that "[t]he concept of 'like circumstances' is flexible and does not require the *comparator investors or investments to be in identical*

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434 *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, December 10, 2018, ¶¶ 7.19 - 7.21. **RL-0085**.

435 *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Mexico Article 1128 Submission, May 8, 2015, ¶12. **RL-0094**.

436 *Resolute Forest Inc. v. Government of Canada*, CPA Case No. 2016-13, Final Award, July 25, 2022, ¶ 575**. RL-0083.**

437 Memorial, ¶ 4.61.

circumstances."[438] It is true that the standard does not require identical circumstances, but it is reiterated that the phrase "like circumstances" applies to the treatment accorded by the authorities to different investors or their investments and not to the circumstances in which a particular investor or group of investors with whom the comparison is sought to be made is found

468. The Claimant concedes that "[t]he legal burden with respect to NAFTA Articles 1102 and 1103 rests on SVB." However, relying on *Bilcon v. Canada,* it asserts immediately thereafter that "the evidentiary burden shifts to the respondent State to raise a positive defense once a *prima facie* case has been demonstrated."[439] This is incorrect in the context of a like circumstances analysis. Other NAFTA tribunals have determined that the burden of proof with respect to the three elements for proving a violation of Articles 1102 and 1103 rests on the claimant and never shifts to the respondent. In *UPS v. Canada*:

> 84. Failure by the investor to establish one of those three elements will be fatal to its case. This is a legal burden that rests squarely with the Claimant. That burden never shifts to the Party, here Canada. For example, it is not for Canada to prove an absence of like circumstances between UPS Canada and Canada Post regarding article 1102[440]
>
> [Emphasis added]

469. The Respondent agrees with this determination. It is not the Respondent State's burden to prove the non-existence of similar circumstances. Proving a negative proposition would be an unreasonable burden. It is for the Claimant to demonstrate that the comparison it proposes is valid to show discrimination, as it is the Claimant that makes that allegation.

470. Another factor to consider is that the interpretation of the term "like circumstances" varies according to the particularities of each case. As stated by the court in *Pope & Talbot,* the application of the "like circumstances" standard requires a thorough evaluation of *all* the facts surrounding a given situation:

> 75. The Tribunal must resolve this dispute by defining the meaning of "like circumstances." It goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, "circumstances" are context dependent and have no unalterable meaning across the spectrum of fact situations. And the concept of "like" can have a range of meanings, from "similar" all the way to "identical". In

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438 Memorial, ¶ 4.61.

439 Memorial, ¶ 4.58.

440 *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, ¶ 84, **RL-0095.**

> other words, the application of the like circumstances standard will require evaluation of the entire fact setting surrounding, in this case, the genesis and application of the Regime.[441]
>
> [Emphasis added]

471. It is not possible to reduce the analysis of like circumstances to membership in the same economic or business sectors, or to competition in terms of the goods or services they offer, or to the fact that the investors or their investments are subject to comparable legal regimes or regulatory requirements. All of these *may be* relevant factors in determining whether a particular treatment was provided in like circumstances, but this has to be justified on a case-by-case basis.[442] None of them is usually sufficient on its own.

472. The decision in *Merrill & Ring v. Canada* is relevant in this regard. That tribunal explained that "like circumstances" cannot be determined simply on the basis of the economic sector (as Claimant seeks to do), but that multiple factors must be considered:

> 87. In the strict context of a trade treaty, such as the GATT or a number of NAFTA Chapters, the Tribunal might be inclined to understand "in like circumstances" as relating to the need to ensure equality of treatment in respect of competitive opportunities and other trade objectives. But, it must also note that NAFTA, and some other free trade agreements, includes matters that go beyond trade so as to provide for broader mechanisms of economic integration and coordination of economic policies. This is the case of NAFTA Chapter Eleven in respect of investments. It would thus be limiting to relate the concept exclusively to trade objectives and it is thus necessary to understand it in a broader sense that will allow for the comparison of other relevant elements, not excluding trade where appropriate.
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> 88. This explains why NAFTA tribunals have, on a number of occasions, considered various factors in assessing whether investors are "in like circumstances", as evidenced by the references noted above to *S.D. Myers*, *UPS* and *Pope & Talbot*. The environment, trade, the nature of services and functions, and public policy considerations are found among such factors. This also explains why it is not enough on occasions to undertake the comparison solely in the same sector of economic activity and it might be necessary, as in *Occidental*, to consider whole sectors of the economy and business.[443]
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> [Emphasis added]

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441 *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Phase 2 Award on the Merits, April 10, 2001 ¶ 75**.**

442 *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, ¶ 8.15. **RL-0097**.

443 *Merrill and Ring Forestry L.P. v. Government of Canada*, ICSID Case UNCT/07/1, "Award," March 31, 2010, ¶ 88**.**

473. As will be explained below the Claimant has not made out even a *prima facie* case of discrimination and, therefore, has not discharged its burden of proving its claim.

b. In general, the mining projects identified by the Claimant are not comparable to the Project.

474. The Claimant argues that "Mexico's acts and omissions in this case were discriminatory" because "Mexican authorities during this same time period took swift action against other blockades imposed on other mining projects in Mexico."[444] The four projects selected by the Claimant and their respective blockades cannot be used as comparators because none of these projects received more favorable treatment in circumstances similar to that accorded to the Sierra Mojada Project.

475. Specifically, unlike the Project, the four projects that the Claimant identifies as comparable (i) are in an exploitation and not exploration phase, (ii) are under different obligations under the applicable regulatory framework, (iii) a workforce with access to union rights and social security, and (iv) had the active participation of company personnel in negotiations with company management and disgruntled workers.

476. Given that the Claimant's analysis focuses on comparing mining projects that are in the exploitation phase, Claimant fails to identify a valid comparator. In order to demonstrate that the Project is not in similar circumstances to the four projects, some general characteristics of the Project must be specified:

- Type of project or business: the Project began its exploration phase in 1997.[445] SVB's involvement in the Project commenced until April 2010, when Metalline entered into the Agreement and Plan of Merger and Reorganization with Dome to continue exploration activities. The Project has not commenced any commercial production. As already demonstrated by the Respondent, SVB's objective was to carry out exclusively exploration

444 Memorial, ¶¶ 4.21, 4.52.

445 Contract 1997. **R-0002.**

activities in order to subsequently sell the Project. [446]The mining legislation itself distinguishes between exploration and exploitation activities.[447]

- Applicable legal framework: As explained by Mr. Carlos del Razo, "the viability and development of mining projects are also contigent upon obtaining the corresponding authorizations, permits and licenses".[448] In this case, SVB and Minera Metalín did not have all the permits and authorizations required by the regulatory framework for projects in the initial phase, much less those required in an operational or exploitation phase, including, *inter alia*, a MIA, an AIA, an operating license for emission sources, an urban impact report, and a mine waste management plan.[449]

- Labor Relations: the Claimant notes that "through its Mexican subsidiary Minera Metalin, has, over the years, hired hundreds of people to work at the Sierra Mojada Project site. However, its SEC filings show that, Minera Metalin did not have any workers in the period of 2014-2018.[450] This means that SVB did not have any employment relationship with Mineros Norteños that was covered by the Federal Labor Law. Consequently, the Mineros Norteños working at the Sierra Mojada Project did not have access to social security benefits or union rights.

- Product or goods object of the investment: SVB's Sierra Mojada Project had as its objective the exploration of a silver and zinc mine, for subsequent sale to a third party that would carry out the exploitation of the project. [451]

477. For clarity, the characteristics of the Four Projects identified by the Claimant are set out below.

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446 Memorial, ¶ 2.1.

447 Mining Law, Article 3. **R-0012**.

448 Expert Report of Mr. Carlos del Razo, ¶ 54.

449 Expert Report of Mr. Carlos del Razo, ¶ 116.

450 Silver Bull Resources 2014 10K Report. **R-0067**. Silver Bull Resources 2015 10K Report. **R-0068**. Silver Bull Resources 2016 10K Report. **R-0069**. Silver Bull Resources 2017 10K Report. **R-0070**. Silver Bull Resources 2018 10K Report. **R-0071**. The reports state that "Minera Metalin, our wholly-owned mineral holding company in Mexico, does not have any employees."

451 Memorial, ¶ 2.1.

(1) La Herradura Mine

478. The La Herradura mine is located in Sonora, Mexico and is owned by Minera Penmont. This mine began exploration activities in 1991, construction began in 1997 and commercial production/operation began in 1998. La Herradura is one of Mexico's leading gold producers. Its annual gold production is 355,485 OZ.[452]

479. In addition, it has approximately 1929 employees and 839 contractors.[453] These workers have social security and collective rights recognized by the Secretariat of Labor and Social Security through a collective bargaining agreement with the Sindicato Nacional Minero Metalúrgico Frente.

480. The problem at the La Herradura mine was caused by the company's refusal to pay its workers the corresponding profits. In addition, the workers sought to claim ownership of the collective bargaining agreement. This controversy was resolved through a proceeding before federal labor courts. [454]

481. It is important to mention that the action of the Prosecutor's Office in lifting the blockade was related to a court order issued as a result of the complaint filed by Minera Penmont before the Sonora Prosecutor's Office for the crimes of threats, obstruction of communication routes and dispossession.[455]

(2) Los Filos Mine

482. Los Filos Mine is located in Guerrero, Mexico and is owned by Equinox Gold Corporation. Los Filos is a complex comprised of three open pit mines and two subway mines that has been producing and processing gold since 2008. In 2023, Los Filos produced 159,071 OZ of gold.[456]

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452 Fresinillo plc, Information on La Herradura, 2024. **R-0072**.

453 Fresinillo plc, Information on La Herradura, 2024. **R-0072**.

454 La Jornada, "Workers of the La Herradura Mine in Caborca Profit-Sharing Payment", May 3, 2023. **R-0073**.

455 El Sol de Hermosillo, "Prosecutor's Office Evicts La Herradura and Noche Buena Mines Following Company Complaint", May 12, 2023. **R-0074**

456 Equinox Gold, "Our Perfomance in 2023", 2024. **R-0075**.

483. By 2023, Los Filos had 1,813 employees in Mexico, of which more than 60% are local workers and 72% are part of a union.[457]

484. The conflict at Los Filos mine arose from the alleged breach of a social contract signed in 2019 with the members of the Ejido where the mine operates.[458] The conflict was resolved through a negotiation process between the company and the ejidatarios who maintained the blockade. Such negotiation led to the signing of an amended agreement.[459]

(3) San Rafael Mine

485. The San Rafael Mine is located in Sinaloa, Mexico and is part of Americas Gold and Silver's Cosalá Project. Project development was completed in 2018 and mining operations commenced in 2019. This mine produces silver, zinc and lead.

486. The conflict at the San Rafael mine was of a labor nature and was related to the dispute over the ownership of the collective bargaining agreement between various unions, as well as the improvement of working conditions at the mine. The conflict was resolved through the participation of the Secretariat of Labor and Social Security through negotiation tables that led to the signing of an agreement between the company and the workers' union.[460]

(4) La Colorada Mine

487. The La Colorada Mine is located in Zacatecas, Mexico and is owned by Pan American Silver Corporation. La Colorada is a producing subway mine silver. It has produced about 4.4 MOZ of silver.[461] This mine has been in operation since 1998.[462]

488. In this case there was no blockade of the mine, but rather a temporary suspension of operations at the La Colorada mine, which was a decision made by Pan American after a criminal

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457 Equinox Gold, Los Filos Information, 2024. **R-0076**.

458 El Universal, "Ejidatarios Keep Los Filos Mine in Guerrero Closed", September 9, 2020. **R-0077**.

459 Mexico Business News, "Blockade Lifted At Equinox Gold's Los Filos Mine", 2 August 2021 **C-0122**.

460 Mexico Business News, "San Rafael Mine is No Longer Blocked", 15 September 2021, **C-0123**.

461 Pan American Silver Co, La Colorada Information, 2024. **R-0078**.

462 Latinus, Zacatecas goverment promises protection to canaidian mine. **C-0136**.

act occurred inside its facilities.[463] Activities were resumed once it was determined that it was safe to continue operations.

c. The Claimant has failed to establish a violation of Article 1102

489. The Claimant admits in its Memorial that "[t]he first element [in proving a breach of Article 1102 or 1103] is to identify "treatment" with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." However, it omitted this analysis with respect to its claim for breach of Article 1102.

490. The national treatment is based on the allegation that the Mexican authorities granted more favorable treatment to *Mineros Norteños* compared to that granted to SVB or Metalín. In particular, it asserts that "the Mexican authorities have accorded more favorable treatment to Mineros Norteños, [...] by permitting Mineros Norteños to blockade, occupy, possess and exploit the Sierra Mojada Project site unlawfully for its own financial gain."[464] However, the Claimant has not identified the treatment offered in similar circumstances to SVB or Metalin in order to determine whether *Mineros Norteños* did indeed receive more favorable treatment.

491. The Claimant misapplies the like circumstances analysis. As explained in the previous section, it is not the foreign investors (or their investment) that have to be in like circumstances to a domestic investor (or its investment) for purposes of comparison, but the *treatment* accorded to the foreign investor (or its investment) versus that accorded to a domestic investor (or its investment). [465]

492. If SVB or Metalin had attempted to illegally block, occupy, possess or exploit a third party's project, and the Mexican authorities had prevented it, the Claimant's argument would make some sense. Similarly, if Mineros Norteños had suffered a similar blockade at the hands of a third party and the Mexican authorities had prevented or quickly resolved it, the Claimant's argument would also make some sense. But the Claimant argues neither. Indeed, it makes no comparison between

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463 Aristegy news "Temporary closure of La Colorada mine in Zacatecas announced". **R-0079**

464 Memorial, ¶ 4.65.

465 *Mercer International Inc. v. Government of Canada,* ICSID Case No. ARB(AF)/12/3, Award, December 10, 2018, ¶¶ 7.19 - 7.21. **RL-0087.** *Mercer International Inc. v. Government of Canada,* ICSID Case No. ARB(AF)/12/3, Mexico Article 1128 Submission, May 8, 2015, ¶12. **RL-0094.** *Merrill and Ring Forestry L.P. v. Government of Canada,* ICSID Case UNCT/07/1, Award, March 31, 2010, ¶ 88. **RL-0060.**

the treatment it or its investment received and the treatment accorded to *Mineros Norteños*. As noted above, the Respondent merely asserts that the breach of Article 1102 consists in having allowed "Mineros Norteños to blockade, occupy, possess and exploit the Sierra Mojada Project site for its own financial gain". This, even if true, would not demonstrate discrimination against SVB or Metalin vis-à-vis domestic investors or investments.

493. Moreover, the Claimant has omitted basic facts of its claim, such as the date of the alleged breach of Article 1102, which not only weakens its argument but also prevents it from analyzing issues such as, for example: (i) whether the claim was filed within the 3-year period under Articles 1116(2) and 1117(2) or (ii) whether the obligation existed at the time of the alleged breach (*i.e.*, whether the Tribunal has jurisdiction *ratione temporis* and *ratione voluntatis* over the claim).

494. In view of the foregoing, the Respondent submits that the claim for breach of Article 1102 lacks the requisite specificity and, therefore, the Claimant has failed to establish the existence of a national treatment violation, even on a *prima facie* basis. The Respondent reserves the right to elaborate on its arguments should the Claimant provide the relevant details and justifications with its Reply.

d. The Claimant has failed to establish a violation of Article 1103

495. The Claimant further asserts that "[t]he Mexican authorities have also accorded more favorable treatment to foreign mining companies Fresnillo plc (United Kingdom) and Americas Gold and Silver Corporation (United States), by ending the blockades imposed on their mining operations, while permitting the Continuing Blockade in Sierra Mojada to continue unabated and without sanction".[466] The Claimant considers this to be "clear evidence of discrimination", which is impermissible under NAFTA Article 1103. [467]

496. To support this assertion, Claimant provides four examples of similar alleged blockades of mining projects owned by other foreign companies that, unlike the Second Blockade, were resolved by the Mexican authorities within a reasonable period of time. These are the blockades to: a) Minera Penmont in Sonora in 2023; b) Equinox Gold in Guerrero in 2021; c) Americas Gold

466 Memorial, ¶ 4.65.

467 Memorial, ¶ 4.66.

and Silver in Sinaloa in 2021; and d) Pan American Silver in Zacatecas in 2023.[468] However, it does not provide any details on these blockades to determine whether the treatment granted by the Mexican authorities was granted in similar circumstances to that granted to these other foreign-owned mining companies

497. Indeed, the Memorial does not discuss the reasons for the blockades or their legality; it does not explain the relationship between the blockaded companies and the individuals who carried out the blockade; it does not discuss how it was resolved -*e.g*., whether any agreement was reached between the company and the individuals who carried out the blockades-, nor the long etcetera of aspects that would have to be analyzed to carry out a proper analysis of similar circumstances. This is not surprising, because even a cursory review of the characteristics of these other blockades reveals completely different circumstances.

498. For example, according to the report cited by the Claimant in the Memorial, the La Colorada silver mine (owned by Pan America Silver) did not face a "blockade". On the contrary, it suspended its operations in 2023 to protect its workers in the face of security concerns "after an armed commando intercepted Pan American Silver's units on a highway in Zacatecas."[469] The report cited by Claimant further states that "[t]he State Public Security Ministry said that joint actions to guarantee the operation of the mine will be announced soon [...]".[470] It is clear that the circumstances of the alleged "blockade" of Pan American Silver and the response of the authorities are not comparable to those of the Second Blockade nor to those of the treatment accorded to Claimant and its investment in connection with the Second Blockade.

499. Something similar can be said in relation to the case of Americas Gold and the San Rafael mine in the state of Sinaloa. The report cited by the Claimant notes that, in 2021, access points to the mine's facilities were blocked *due to concerns about unsafe working conditions*.[471] The blockade ended after the company reached an agreement with Triturados Mineros del Noroeste,

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468 Memorial, ¶ 2.193.

469 LatinUs, "Zacatecas government promises protection to Canadian miner that suspended operations after organised crime robberies" (October 7, 2023), latinus.us, **C-0136**, available here.

470 LatinUs, "Zacatecas government promises protection to Canadian miner that suspended operations after organised crime robberies" (October 7, 2023), latinus.us, **C-0136**, available here.

471 Mexico Business News, "San Rafael Mine is No Longer Blocked" (September 15, 2021), mexicobusiness.news, **C-0123**, available here.

the Union and inspectors from the Ministry of Labor. Shortly thereafter, representatives of the parties visited the mine and discussed "the company's restart plans in order to guarantee safe conditions for workers[472]

500. But the most important flaw in the Claimant's analysis is that none of the examples it offered occurred while NAFTA was in force. All of the blockages referred to in the Memorial occurred between 2021 and 2023 and, as explained above, NAFTA was replaced by the USMCA as of July 1, 2020, and its obligations ceased to apply between the Parties. The Claimant cannot use the treatment accorded to a third country investor at a date after the termination of NAFTA to demonstrate a breach of NAFTA. Accordingly, none of the examples offered by the Claimant constitute evidence of a breach of Article 1103.

501. But even if the foregoing were not an obstacle to considering the examples offered by the Claimant (*quod non*), Mexico submits that the Claimant's argument would fail in any event. This is because the Claimant failed to conduct any analysis of similar circumstances.The Claimant does not explain the causes or origin of these blockades, nor does it provide details on their alleged resolution by the authorities. Without this information, it would be impossible to determine whether the treatment accorded by the Mexican authorities was granted in like circumstances and, therefore, whether the treatment accorded to SBV and Metalin was less favorable, in violation of Article 1103.

502. The Claimant also fails to clarify whether the violation of Article 1103 relates to the treatment accorded to SVB or Metalín (or both). In other words, it does not specify whether the claim was brought under Article 1116 or 1107 (or both). This is also a critical piece of information for purposes of the like circumstances test. If the treatment in question was that according to SVB, the analysis would have to focus on *foreign investors* that have received different treatment in like circumstances. Conversely, if the treatment to be assessed is that accorded to Metalín, the comparables would have to be *domestic mining companies* that have received unequal treatment in like circumstances. These two comparisons are not equivalent.

503. However, the Claimant offers *the same comparables* for purposes of its claim for breach of Article 1103 regardless of whether it brought it in its own name under Article 1116, or in the

[472] Mexico Business News, "San Rafael Mine is No Longer Blocked" (September 15, 2021), mexicobusiness.news, **C-0123**, available here.

name of Metalin under Article 1117 (and the same can be said of the claim for breach of Article 1102). As will be explained below in the damages section, this distinction is not trivial, as it has implications for the type of damages that can be claimed, and who should be compensated for the damages caused by the breach.

504. By virtue of the foregoing, the Respondent contends that the Claimant has not only failed to prove a violation of Article 1103, but has not even shown legal cause on a *prima facie* basis.

IV. DAMAGE

505. The Claimant in this case claims damages in the amount of US $362.7 million for the indirect expropriation of its investment in Mexico. The Claimant also claims the alleged violation of Articles 1105, 1102 and 1103, but has not provided an assessment of the damages caused by these alleged violations. Its position appears to be that these alleged violations had expropriatory effects. The Claimant further requests the payment of pre- and post-award interest determined on the basis of the Respondent's cost of funding in dollars.

506. The Respondent considers that the claim is poorly specified, as it does not identify precisely *which* investment was allegedly indirectly expropriated; it does not specify *who* brings each of the claims -*i.e.*, whether they are brought in its own name or in the name of Metalin- and, as mentioned in the previous paragraph, it does not calculate the damages associated with each of the breaches. The details and consequences of this strategy are set out in Section A.

507. The Claimant asserts that the applicable standard is the full reparation standard, but further argues that, under that standard, what proceeds in this case is to determine the fair market value of the investment on the Valuation Date, which it defines as August 31, 2022, which is the date on which South32 withdrew from the Project. It is clear to the Respondent that the full reparation standard does not require the application of a specific measure of damages such as fair market value (FMV) nor does it pronounce on the methodology to be used to determine the amount of compensation. The selection of the applicable measure of compensation depends on the specific circumstances of the case. Section B addresses this issue.

508. The delimitation of legally relevant damage is discussed in Section C, in particular, the issues of causation, reasonable certainty and their application to the facts of this case. The Respondent contends that the Claimant has failed to demonstrate that the damages it claims were

caused by the alleged omission attributed to the Respondent vis-à-vis the Second Blockade. For Mexico, it is clear that the Second Blockade or sit-in of 2019 was the product of a long-standing dispute between Mineros Norteños and Metalín over a contractual breach by the latter. The Claimant, in essence, seeks to blame the Government of Mexico for a problem that it itself generated with its breach and its reluctance to negotiate a solution to the conflict with Mineros Norteños.

509. Regardless of the foregoing, there is evidence that, as a result of the litigation with the Valdez, 17 of Metalin's concessions, including the two concessions acquired from Mineros Norteños were seized to secure a debt of approximately US $6 million that Metalin had refused to pay. It is clear to the Respondent that the Project could not have continued as a result of this litigation which has nothing to do with the Respondent or Mineros Norteños. Therefore, the real cause of the failure and loss of value of the Project (if it ever had any) is the Claimant's failure to comply with the obligation Metalin assumed to the Valdez.

510. The Respondent further contends that, in any event, the Claimant negligently and materially contributed to its harm, not only by breaching its contractual commitments to Mineros Norteños over two decades and refusing to accept a negotiated settlement of the dispute; it also materially contributed to its loss by failing to seek to mitigate its losses through the sale of the concessions and other assets of the Project. The issue of mitigation and concurrent fault is discussed in detail in Section D.

511. The various valuations of the Claimant's damages expert (BRG) and the main criticisms of the Respondent's damages expert (CRA) are addressed in Section E. The Respondent contends that BRG's main valuation and its alternatives are grossly exaggerated and importantly do not reflect the Project's FMV and sunk costs.

512. Finally, the issue of interest is discussed in Section F, although there does not appear to be much disagreement between the parties on this issue.

513. Nothing in this section shall be construed as an admission of the Respondent's international liability or as a waiver of the defenses set forth in the legal arguments section. In addition, the Respondent reserves the right to elaborate further on certain aspects related to *quantum* in light of developments in the Valdez family litigation and based on information the Respondent obtains in the document production phase.

B. The Claimant's claim for damages is not adequately specified

514. The Claimant claims a breach of four provisions of NAFTA - Articles 1102, 1103, 1105 and 1110. However, it has submitted a single damage estimate that neither separates the damages caused by each of these violations nor explains, in the alternative, why each of these violations would cause the same damages. By grouping its claims in this manner, the Claimant implicitly takes the position that the alleged violations of Articles 1102, 1103 and 1105 had, both individually and collectively, expropriatory effects. This decision by the Claimant has certain implications that, in Respondent's respectful opinion, should be considered by this Tribunal.

515. *First*, if this Tribunal were to conclude that there was a breach of Articles 1102, 1103 and/or 1105, but not an indirect expropriation of the Claimant's investment, there would be no estimate of the damage and thus no basis on which this Tribunal could award any compensation in relation to those breaches. Simply put, the Claimant has failed to demonstrate and quantify the damages allegedly suffered from a breach of Articles 1105, 1102 and/or 1103 *that does not have expropriatory effects*.

516. *Second*, the Claimant's position on indirect expropriation renders the claims for violation of Articles 1102, 1103 and 1105 redundant and unnecessary, since it is impossible for a violation of Article 1105 to have indirect expropriatory effects without also violating Article 1110 (and the same can be said of the alleged violations of Articles 1102 and 1103). Therefore, regardless of whether the alleged indirect expropriation was the result of discrimination against domestic or third-country investors or investments, or the failure to accord the Claimant's investment a Minimum Standard of Treatment, at the end of the day the claim is for indirect expropriation of its investment, *i.e.*, a violation of Article 1110. It is reiterated that Claimant only assessed damages on the basis that there was an indirect expropriation of its investment.

517. *Third*, although the Claimant identifies several investments in the Memorial, it has not identified precisely which investment was allegedly expropriated, and this is fundamental for the quantification of damages. It is not necessarily the same to value the company Metalín, as it is to value the concessions it holds, or to value the "Sierra Mojada Project" as such. The Claimant should have specified exactly what is the investment whose value it estimates at US $362.7 million and it has not done so. Therefore, the Respondent will temporarily proceed on the assumption that

the allegedly indirectly expropriated investment was Metalín, but reserves the right to change its position upon any clarification offered by the Claimant on this point.

518. *Fourth*, the Claimant asserts in its Memorial that it brings these claims in its own name under Article 1116 and on behalf of an enterprise owned or controlled by it under Article 1117 (i.e., Metalín). However, it has not identified which of the claims were submitted on its own behalf and which were submitted on behalf of the investment. In this context, it is important to note that, according to Article 1135(2)(b), "*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*". This implies that it is necessary to have clarity on the claims submitted on behalf of Metalín since, if successful, the damages associated with such claims would have to be paid to Minera Metalín and not to SVB.

519. Determining which of the claims were brought under Article 1117 and which under Article 1116 is important for a second reason: certain provisions, such as Article 1105(1), only apply to "investments of investors of another Party," so SVB would not have standing to bring a claim for the alleged breach of Article 1105 on its own behalf. This was explained above in the Legal Argument of this Counter-Memorial.

520. Claim specificity problems also affect claims for breach of Articles 1102 and 1103. In both cases the obligation is owed to the investor and to its investments, however, it is necessary to distinguish the treatment accorded to the investor from that accorded to an investor-owned enterprise in order to properly analyze these types of claims. For example, the set of comparables required for the "like circumstances" analysis required by Articles 1102 and 1103 will differ depending on who brings the claim. In the case of a self-petition, the appropriate comparables would be investors that received differential treatment in circumstances similar to those of SVB, while in the case of a claim brought on behalf of the company, the appropriate comparables would be Mexican mining companies that received differential treatment in circumstances similar to those of Minera Metalin.

521. In sum, the question of who brings each claim is also central to certain legal and damages issues that the Claimant has raised before this Tribunal. Without properly specified claims neither the Respondent nor the Tribunal can properly assess their merits.

C. Compensation standard

522. According to the Claimant, NAFTA only defines the measure of damages in cases of *lawful expropriation* and, therefore, "[a]s multiple NAFTA tribunals have found, principles of customary international law accordingly provide the relevant standard of compensation." for any other breach.[473] On this basis, the Claimant takes the position that the "State has an obligation to make "full reparation" for the injuries caused by its internationally wrongful acts."[474]

523. Citing *AAPL v. Sri Lanka*, the Claimant further argues that the amount of compensation must be calculated in a manner that adequately reflects the full value of the investment lost, as well as the damages incurred as a result of such loss.[475] Immediately thereafter, the Claimant concludes that "[t]he principle of full reparation thus requires Mexico to place SVB in the financial position it would have been in, had the wrongful acts never occurred."[476]

524. Also, relying on *Crystallex v. Venezuela*, the Claimant explains that "[a]lthough NAFTA Article 1110(2) applies specifically in the context of a lawful expropriation, the measure of the fair market value of an investment may also be taken into consideration to determine the value lost as a result of an unlawful expropriation."[477] However, the Claimant does not explain why FMV should be used as a measure of compensation in this particular case, as opposed to sunk costs (or another method of the cost approach), which, as will be explained below, is the measure of compensation most commonly relied upon by international tribunals when the claim relates to pre-operational stage mining projects.[478]

525. The Respondent agrees that NAFTA only defines the measure of compensation in the case of a lawful expropriation. For any other violation, including national treatment (Article 1102), most favored nation (Article 1103), minimum standard of treatment (Article 1105) and unlawful

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473 Memorial, ¶ 5.3

474 Memorial, ¶ 5.4

475 Memorial, ¶ 5.5

476 Memorial, ¶ 5.5

477 Memorial, ¶ 5.6

478 It should also be noted that Claimant does not apply NAFTA Article 1110(2), which provides that "[c]ompensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place...". Claimant, on the contrary, argues that damages should be determined on the basis of the FMV that the company had in the counterfactual scenario, which is completely different. See Memorial, ¶ 5.10

expropriation, the standard of compensation is that of full reparation. The Respondent also agrees that the measure of compensation set out in Article 1110(2)-*i.e.*, the fair market value (FMV) determined immediately prior to the expropriation-is compatible with the principle of full reparation *in some cases*. Whether this is one of those cases remains to be seen, and the burden of proving it is on the Claimant, as it is the party advocating the use of FMV under the full reparation standard.

526. The Respondent submits that the full reparation standard specifies neither the measure of damages, nor the approach, nor the methodology for determining compensation. As the Claimant correctly points out, the principle of full reparation is satisfied when the compensation places the investor in the situation it would, likely, have found but for the alleged unlawful conduct. Whether this can be achieved by determining the FMV of the investment or some other method, such as sunk costs, depends on the facts and circumstances of each case.

D. Legally relevant damages

527. As explained in a frequently cited publication, relevant damages are defined on the basis of two widely accepted legal principles: the principle of causation and the principle of reasonable certainty. [479] The following subsections discuss these principles in general and their application to the factual matrix of this case.

1. Causality

II. Legal principle

528. Under the principle of causation "[t]he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.".[480] It is a principle that is implicit in the famous passage from the *Chorzow Factory* case, which describes the purpose of reparation as "*wipe-out all the consequences of the illegal act and re-establish the situation which would, in. all probability, have*

[479] Ripinsky, Sergey, Williams, Kevin; *Damages in International Investment Law*, BIICL (2008), pp. 114-115. **RL-0037**.

[480] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), Chapter IV.E.1, November 2001, Article 36, **RL-0017**.

existed if that act had not been committed".[481] Thus, a critical aspect of any claim for damages is to demonstrate that there is a sufficient causal link between the alleged breach and the damages sought. This burden falls squarely on the Claimant, as has been documented in several investor-State cases. [482]

529. Causation has two aspects: causation in fact and causation in law. Causation in fact refers to whether the wrongful conduct played a role in producing the harm, and is usually identified by what is commonly known as the "*but-for*" test: would the harm have occurred in the absence of the wrongful conduct?

530. Causation as a matter of law answers the question of whether wrongful conduct is a sufficient, proximate, foreseeable or direct cause of the harm or injury. This element of the test stems from the need to limit the Respondent's liability to ensure a result that is both equitable and acceptable. Without this limitation, the chain of causation can continue to develop *ad infinitum*. 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.[483]

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481 *The Factory At Chorzów (Claim for Indemnity) (The Merits)*, PCIJ, Ser. A., No. 17, 1928, Judgment, 13 September 1928, p. 40, emphasis added. **RL-0098.**

482 Ripinsky & Williams, *Damages in International Investment Law*, BIICL (2008), p. 135. **RL-0037**.

483 *Methanex v. United States*, UNCITRAL, Final Award on Jurisdiction and Merits, August 3, 2005, ¶ 138, **RL-0099**.

531. Both factual causation and causation in law are relevant to determine the existence of the required causal relationship; factual causation alone is insufficient. In both cases, the burden of proving causation is on the Claimant.

III. Application to the facts

532. The Claimant in its Memorial refers to two types of damages: (i) the physical damage to its facilities and other assets, and (ii) the interference with its Project which, according to the Claimant, amounts to an indirect expropriation.

533. With respect to the first category, the Claimant asserts in its Memorial that the Sierra Mojada Project has suffered extensive physical damage following the Second Blockade. Specifically, it claims that a hole has been opened in a fence, and that it has suffered the theft of various items, including "thousands of liters of diesel", furniture and other "household items" from the buildings, as well as tires and sound equipment from vehicles that were inside Claimant's facilities in Mexico.[484] The Claimant also alleges that *Mineros Norteños* has been selling the stolen diesel in water bottles, has been extracting and selling approximately 40 tons of minerals from the Project site, and extorted 30,000 pesos from a third party who owned two tanker trucks parked at the Project site to allow their recovery.[485] However, these damages have not been quantified, so it is not clear to the Respondent whether they form part of the claim. The Respondent will define its position on these damages when the Claimant submits the corresponding clarification.

534. In any event, the Claimant has offered no credible evidence to support these allegations. The evidence provided by Mr. López Ramírez is largely based on information he "learned" from others - *i.e.*, hearsay -[486] , and he even admits that he does not "know for sure" but "presumes" that *Mineros Norteños* was responsible.[487] This type of evidence is insufficient to demonstrate the requisite causal nexus between the damages and the Respondent's alleged wrongful conduct. There is nothing to suggest that these facts are attributable to the Respondent (they are not) or that the damages could have been avoided but for the alleged breaches.

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484 Memorial, ¶¶ 2.168, 2.169, 2.189, 2.197.

485 Witness statement of Mr. López Ramírez, ¶¶ 12.4, 14.7, 15.5; Memorial, ¶ 2.199.

486 Witness statement of Mr. López Ramírez, ¶¶ 12.4, 15.5.

487 Witness statement of Mr. López Ramírez, ¶ 12.4.

535. As to damages arising from the alleged indirect expropriation, the Respondent's position is that the Claimant: (i) has not shown that an indirect expropriation occurred, which was set out in the legal argument section and will be briefly returned to in this section; (ii) much less has it shown that the total loss of its investment was caused by the Respondent's inaction in the face of the Second Blockade and, in any event, there is an element of contributory fault that cannot be ignored; and (iii) there is no evidence that the association with South32 was terminated because of the Second Blockade.

536. With respect to the first point, it is first reiterated that the Claimant has not demonstrated that the Project was economically viable or, in other words, that but for the alleged breach it would have generated future returns for its owners and, therefore, that it had the value it claims to have lost as a result of the Respondent's actions. It should be remembered that many mining projects do not reach the production stage and have to be abandoned at a loss. There is nothing in the record to suggest that the Project was or would become economically viable and, therefore, that it would likely have moved into production but for the alleged violations.

537. The economic viability of a mining project is established through feasibility (FS) and pre-feasibility (PFS) studies. A feasibility study is defined in the CIMVAL Code[488] as a:

> [...] comprehensive technical and economic study of the selected development option for a mineral project that includes appropriately detailed assessments of applicable Modifying Factors together with any other relevant operational factors and detailed financial analysis that are necessary to demonstrate, at the time of reporting, that extraction is reasonably justified (economically mineable). The results of the study may reasonably serve as the basis for a final decision by a proponent or financial institution to proceed with, or finance, the development of the project. The confidence level of the study will be higher than that of a Pre-Feasibility Study (CIM Definition Standards).[489]
>
> [Emphasis added]

538. A feasibility or pre-feasibility study is also required to declare "mineral reserves", which in the CIMVAL Code are defined as:

> [T]he 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 a Pre-Feasibility or Feasibility

488 *The CIMVAL Code for the Valuation of Mineral Properties*, November 29, 2019. **R-0080**.

489 *The CIMVAL Code for the Valuation of Mineral Properties*, November 29, 2019, p. 36. **R-0080**.

> level as appropriate that include application of Modifying Factors. Such studies demonstrate that, at the time of reporting, extraction could reasonably be justified [490]
>
> [Emphasis added].

539. Claimant did not have a feasibility study or a pre-feasibility study at the valuation date. In other words, it did not know what proportion of the mineral resources discovered on the lands within its concessions could be economically extracted. A real possibility was that the resources found within the Project's concessions (or part of them) were of reduced value given the costs of extraction or were not economically exploitable. In that case, the Project would have marginal value if any.

540. The fact that the Claimant spent decades "exploring" the concessions without even taking the first steps to develop a mine and put it into operation also does not give much confidence about the future outlook for the operation. SVB either did not consider it profitable to exploit the concessions or never really intended to do so. Paradoxically, it is now looking to the Mexican government to compensate it for the opportunity it failed to take advantage of all this time.

541. But the problem is not only that it has not been shown that the Project ever had the value that the Claimant now attributes to it, it is also that it has not been shown that it has lost it. As will be recalled, the Claimant alleges that the investment has "no residual value in the real scenario", which is meaningless because the dispute with Mineros Norteños is not irresolvable.

542. Talking about causation under these conditions is difficult, since it implies analyzing the causes of something that did not happen (*i.e.*, the indirect expropriation of Claimant's investment). But regardless of this, Respondent considers that it is appropriate to take into account the origin of the Second Blockade for the purpose of establishing causation. The real reasons why the Project was frustrated.

543. The Claimant, after exploring the deposit for 22 years (i.e., from 1997 to 2019), had not paid any royalties to *Mineros Norteños* arguing that the mine was not yet in production. While this is true, it is unreasonable for the Claimant to assume that it could have continued to explore the property indefinitely without paying royalties to *Mineros Norteños* and without facing any problems for non-payment. Especially considering that the Claimant had committed in the 1997 Contract to use its best efforts to commence production within 4 years. Mineros Norteños had the

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490 *The CIMVAL Code for the Valuation of Mineral Properties*, November 29, 2019, p. 38. **R-0080**.

expectation that the company would fulfill the commitment, however, in September 2019, 22 years after the signing of the 1997 Contract, the Project was not even close to starting operations

544. The Respondent postulates that had it not been for Metalin's failure to comply with its commitments to Mineros Norteños, the Project could have continued, but it is easier for the Claimant to blame the Respondent for not solving the problem that it itself generated with its actions.

545. Thus, the Respondent contends that the primary causes of the alleged "failure" of the Project, and the reason for any losses incurred by the Claimant, were: (i) Metalin's failure to pay the royalties to which it had committed and (ii) the Claimant's intransigence that prevented it from reaching an agreement with *Mineros Norteños*.

546. The first point has been addressed in detail in the factual section. The Respondent has proven that Metalin had the obligation to pay the royalties and failed to comply with its commitment. As stated at the time, this constitutes a legal fact on which the competent courts have already ruled.

547. On the Claimant's intransigence, it is worth making some additional comments given the evidence (from the Claimant itself) that *Mineros Norteños* was willing to enter into a settlement involving an advance of outstanding royalties because, evidently, abandonment of the Project was not in the cooperative's interest either.

548. Indeed, paragraph 2.171 of the Memorial notes that on August 11, 2020, Mr. López Ramírez received a letter from Mineros Norteños requesting a meeting. According to the Claimant, Mr. Barry specifically instructed Mr. Lopez to communicate to Mineros Norteños that "we are very open to finding a way to figure this out and want to find a way forward but until now their demands have been wholly unreasonable and have left us with nowhere to go."[491] The next paragraph recounts how, the following day (approximately two years before South32 decided to withdraw from the project), Mr. Lopez met with Mineros Norteños, who presented him with a letter setting out five negotiation points including: (i) payment of a US$2 million *advance* against outstanding royalties; and (ii) payment of US$50,000 as payment to the "graduates".[492] In

[491] Memorial, ¶ 2.172.

[492] Respondent understands this term to refer to the Mineros Norteños Members who worked on the project, but were no longer able to continue.

exchange, Mineros Norteños offered to withdraw the claims against Minera Metalin before the national courts and to assist in the exploration of the Project. Mineros Norteños also inquired in that communication about any counterproposal that Minera Metalin might have. There is no evidence of any counterproposal.

549. The Claimant rejected the proposal because "the US$ 2 million payment proposed was double the payment that Mineros Norteños had requested in the negotiations held in March 2016 after the Initial Blockade"[493] Indeed, as it can be seen, the 2020 proposal was not the only one. The Claimant had multiple opportunities to resolve the conflict that it itself provoked, which it failed to take advantage of.

550. For the Claimant, Mineros Norteños' proposals were nothing more than attempts at "extortion," "demands [that] have been totally unreasonable and have left us with nowhere to go."[494] With all due respect, the only thing unreasonable here is the Claimant's lack of introspection and intransigence. The ones with "nowhere to go" are the Mineros Norteños, not SVB.

551. The Respondent contends that the proximate cause of the failure of the Project is not the Respondent's unwillingness to resolve the conflict with *Mineros Norteños* by force but, rather, the Claimant's unwillingness to negotiate a solution with *Mineros Norteños*. The Respondent further contends that the use of force in this case would have exacerbated, rather than resolve, the conflict between Metalin and the Mineros Norteños. Taking advantage of impoverished members of a local mining cooperative by making them wait almost two decades for agreed royalties is not a sensible strategy for a project that relied heavily on the cooperation of the local community.

552. But before leaving the causation issue, the Respondent wishes to make an additional point. It is not entirely clear to the Respondent that South32 withdrew from the Project because of the Second Blockade. This is relevant because the Claimant attributes the loss value of the Project and the inability to continue it to South32's departure. It further suggests that it was "Mexico's unlawful failure to take any reasonable action to end the continuing blockade caused South32 to terminate the Option Agreement, marking the end of the Project and the loss of SVB's entire investment."[495] However, it has not shown that this was indeed the reason for South32's exit, *i.e.*, it has not

493 Memorial, ¶ 2.173. See also C-0119.

494 Memorial, ¶ 2.172.

495 Memorial, heading "(H)" beginning at ¶ 2.202.

demonstrated the necessary causal link between the Respondent's alleged inaction in the face of the Second Blockade and South32's exit which, in turn and in its view, caused the loss of the investment.

553. This approach is doubted not only because the Claimant has offered no evidence of it beyond Mr. Barry's testimony, but because of certain relevant facts that the Claimant deliberately left out of its Memorial, even though it alludes to them in its RFA. These facts relate to a dispute between Metalin and the Valdez in connection with an Option Agreement to purchase 3 mining concessions entered into in April 2010 by Mr. Valdez and Metalin. [496]

554. The Respondent described this litigation in the factual section of this Counter-Memorial. However, it is worth contrasting this description with what the Claimant alleged in its RFA. In relevant part, the RFA states:

> 3.57 In parallel to the Initial and Continuing Blockades, Mr Jaime Valdez, another former concession-holder with whom Minera Metalín had entered into an option agreement in April 2010 (the "Valdez Option Agreement") brought vexatious claims against Minera Metalín in the local Mexican courts. The Valdez Option Agreement provided for biannual payments to Mr Valdez as long as SVB wished to continue exploration works in the relevant property.
>
> 3.58 Ultimately, SVB decided not to continue with the exploration works and issued a termination notice, which was served via an officer of the court who signed off on delivering the notice to the address provided in the Valdez Option Agreement. Notwithstanding SVB following the appropriate procedures, Mr. Valdez claimed spuriously that the notice was never served on him. [Emphasis added].

555. The Claimant asserts in its RFA that, although Metalin prevailed in the first instance, Mr. Valdez succeeded in annulling the first instance judgment in an appeal process -which it calls "suspicious" and "irregular"- in which it was resolved that Metalin should pay US $5 million to Mr. Valdez for the occupation of the concessions.[497] Metalin challenged this judgment through an amparo proceeding, however, this was dismissed.[498]

556. The Claimant included this narrative as "*yet another example of the Mexican authorities' failure to accord SVB's investment with the protections under the NAFTA*", however, as noted

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496 See sectionII.L of this Counter-Memorial.

497 RFA, ¶¶ 3.60-3.63.

498 RFA, ¶ 3.62.

above, this is not addressed in the Memorial and therefore does not form part of the claim brought under Article 1105.

557. According to the information available, on March 3, 2022, the Valdez family requested the First Civil Court of Coahuila a judgment execution proceeding, and on March 15, 2022, upon Metalin's failure to pay within the granted term, Metalin's right to make the voluntary payment was declared precluded, which opened the door to the forced execution of the judgment pursuant to the Code of Civil Procedure. Thus, on June 24, 2022, *barely two months after South32 withdrew from the Project*, the Valdez family requested authorization to seize 14 of the concessions (including the 3 they had acquired from Mineros Norteños without paying royalties).

558. Without the concessions that have been seized to secure Metalin's indebtedness, the Project would not have been able to continue regardless of what happened in relation to the dispute with Mineros Norteños and the Second Blockade. The Respondent contends that there is reason to believe that this was indeed the cause of South32's departure in August 2022 and, consequently, of the Claimant's alleged loss of investment. The Claimant simply seeks to pass the bill for its bad decisions to the Mexican government.

559. The Respondent has not been able to collect all relevant information because it believes that much of it is in the Claimant's possession and there has not yet been an opportunity to request documents from opposing counsel. The Respondent reserves the right to expand or modify its position to the extent that the document production procedure reveals additional information.

560. By virtue of the foregoing, the Respondent contends that the Claimant has failed to establish the necessary causal link between the alleged breach and the damage. The real causes of the failure of the Project and any losses to the Claimant and Metalin were (i) Metalin's failures to pay royalties, (ii) the Claimant's intransigence in resisting a settlement with Mineros Norteños and (iii) the outcome of the Valdez litigation.

1. Reasonable certainty

561. The second element defining legally relevant loss or damage is the principle of reasonable certainty, which applies to both the fact and the amount of loss. The Claimant is correct in asserting that it is not necessary to prove damages with absolute certainty, however, international tribunals have consistently held that claims that are too uncertain, speculative or unproven must be rejected,

even if State responsibility is established. There are numerous examples of the application of this principle:

- 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*".[499]

- 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*."[500] [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*."[501] [Emphasis added]

- In *Asian Agricultural Products v. Sri Lanka*, the tribunal noted 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.'*"[502] [Emphasis added]

- In *S.D. Myers v. Canada*, the tribunal noted: "[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*

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499 *Amoco Int'l Finance Corp. v. Iran*, Iran-US Claims Tribunal, Partial Award, July 14, 1987, ¶ 238**. RL-0100.**

500 *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States, ICSID Case Nos. United Mexican States*, ICSID Case No. ARB(AF)/04/3 and ARB(AF)/04/4, Award, June 16, 2010, Part XII, ¶¶ 12-56. **RL-0101.**

501 *BG Group Plc. v. Republic of Argentina*, UNCITRAL, "Award", December 24, 2007, ¶ 428**. RL-0102.**

502 *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka*, ICSID Case. ARB/87/3, "Final Award", June 27, 1990, ¶ 104. **RL-0103.**

be awarded, the sums in question must be neither speculative nor too remote. [...]".[503] [Emphasis added].

562. Nor should it be forgotten that the principle of reasonable certainty applies not only to the fact causing the damage, but also to the *quantum*. This is confirmed by the large number of cases in which international tribunals have rejected valuations with inherently speculative elements.[504] Although this debate normally arises in the context of a DCF valuation, the methodologies comprised in the market approach used by BRG are not immune to excessive speculation and manipulation, as will be demonstrated later in the section devoted to the analysis of the valuation of BRG, the Claimant's damages expert.

B. Mitigation and concurrent fault

563. As noted in the previous section, the Claimant had several options to avoid all or part of the damages it claims in this proceeding, and it is well established that the claimant is obliged to take reasonable measures to mitigate the damage. The commentaries to Article 31 of the ILC Articles attest to the existence of this obligation and its consequences:

> A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to liability. It is rather that a failure to mitigate by the injured party my preclude recovery to that extent. The point was clearly made in this sense by the International Court in the *Gabcíkovo-Nagymaros Project* case:
>
> > "Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. I stated that 'It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage it has sustained.' It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the

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503 *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, "Second Partial Award", October 21, 2002, ¶ 173**. RL-0104**.

504 See, e.g., *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, ¶ 120. **RL-0105**; *Merrill & Ring Forestry L. P. v. Government of Canada*, Case UNCT/07/1, administered by ICSID, "Award," March 31, 2010, ¶ 264, footnote 179. **RL-0060**; *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ, "Award," November 7, 2018, ¶¶ 602-603 and 616**. RL-0106**.

> calculation of damages, it could, on the other hand, justify an otherwise wrongful act".[505]

564. A little further on, it is clarified that the concurrent fault of the Claimant must be taken into account to determine the amount of damages:

> Often two separate factors combine to cause damage. [...] Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault. [...][506]

565. This duty to seek to avoid damages has also been recognized by arbitral tribunals. In *Lion Mexico Consolidated v. Mexico*, for example, the tribunal ruled on LMC's duty to mitigate losses associated with a claim before domestic courts seeking to hold it liable for a third party's legal expenses:

> 839. Lion, in turn, has a duty to mitigate its losses, and consequently must continue defending the claim for Legal Fees filed by the Debtor, with the same diligence as it would be defending its own interest, exhausting non obviously futile local remedies. (There is no suggestion by Mexico that Lion up to now has breached its duty to mitigate).[507]

566. It is not clear to the Respondent why SVB found it "unreasonable" to even give an advance of USD $1 million to the cooperative on account of the 14 years that had elapsed between the execution of the 2000 Contract and the submission of Mineros Norteños' August 2014 proposal. Nor is it clear to Respondent the alleged "unreasonableness" of the 2020 proposal which, 6 years after the 2014 proposal, proposed a $2 million advance. But even if the rejection of the bids was not the product of SVB's intransigence but of its lack of economic resources or sources of financing, it could have sold the investment to another mining company to mitigate its damages upon South32's exit. Evidently it would have had to compensate that third party for the amounts it would have had to pay to Mineros Norteños to resolve the conflict, but SVB would have recovered a very significant part of the value it is now claiming from the Mexican government.

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505 Crawford, James, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, Cambridge University Press (2002), pp. 205 paragraph 11**.**

506 Crawford, James, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, Cambridge University Press (2002), pp. 205-206. **RL-0041.**

507 *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, September 20, 2021, ¶ 839**. RL-0076.**

567. There is no evidence that SVB has made *any* effort to mitigate its damages, which is perhaps explained by the litigation with the Valdez that resulted in the seizure of 17 of the concessions held by Metalin. This, however, is not the responsibility of the Respondent.

568. The Respondent submits that it would be incorrect to attribute the entirety of the losses to a governmental measure if the losses are due, in part, to negligent, reckless decisions or inaction on the part of the investor. In such circumstances, a deduction has to be made from the amount of damages to take into account the claimant's contribution to the materialization of those damages. This principle is codified in Article 39 of the ILC Articles:

> Article 39
>
> Contribution to the injury
>
> In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.[508]

569. The commentary to Article 39 clarifies that this article refers to a situation in which the damage caused by an internationally wrongful act is attributable to a State, but the Claimant, who has been the individual victim of the breach, has materially contributed to the damage by some intentional or negligent act or omission. It focuses on situations that domestic legal systems refer to as "contributory negligence", "comparative fault", "faute de la victime", etc.[509]

570. There are several precedents for the application of this principle in investor-State cases. In *MTD v. Chile*, the tribunal concluded that the investor had contributed to its own damage by failing to investigate whether it was possible to obtain the various licenses and approvals necessary for its project before acquiring the land on which it would be developed. Accordingly, the tribunal reduced the damages by 50%:

> 242. […] As already noted, the Claimants, at the time of their contract with Mr. Fontaine, had made decisions that increased their risks in the transaction and for which they bear responsibility, regardless of the treatment given by Chile to the Claimants. They accepted to pay a price for the land with the Project without appropriate legal protection. A wise investor would not have paid full price up-front for land valued on the assumption of the realization of the Project; he would at least have staged future

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[508] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), Chapter IV.E.1, November 2001, Article 19, **RL-0017**.

[509] Crawford, James, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, Cambridge University Press (2002), p. 240, ¶ 1. RL-0041.

> payments to project progress, including the issuance of the required development permits.
>
> 243. The Tribunal considers therefore that the Claimants should bear part of the damages suffered and the Tribunal estimates that share to be 50% after deduction of the residual value of their investment calculated on the basis of the following considerations.[510]

571. The Respondent contends that SVB actively and negligently contributed to its loss, not only through its failure to comply with its *obligation* to commence operations within 4 years and its intransigence in the face of Mineros Norteños' proposals. It also did so by failing to attempt to mitigate its losses by selling the investment to a third party. Therefore, the Respondent respectfully submits that SVB should bear a very significant portion of the damages, in the unlikely event that the Tribunal finds the Respondent liable for a breach of NAFTA

572. The alleged inaction of the secondary authorities did not cause the conflict between Mineros Norteños and Metalin. The alleged inaction of the authorities did not cause the commercial litigation that Mineros Norteños brought against Metalin for breach of contract in 2014. Nor did the alleged inaction of the authorities cause the First Blockade or the Second Blockade, to which the Claimant attributes the failure of its Project. Nor is it the cause of Metalin and Mineros Norteños' failure to reach an agreement or SVB's failure to sell the Project to a third party. All of this was the result of the Claimant's actions and omissions. Nor did the alleged inaction of the authorities cause the Valdez family to exercise its rights to claim a default by Minera Metalin.

573. The Claimant simply seeks to make the State bear the cost of a problem that arose more than 20 years before the Second Blockade and of the violations that the Claimant attributes to the Respondent from the Second Blockade onwards. This, in the Respondent's respectful opinion, would be a terrible injustice.

C. Valuation

574. This section will address the Claimant's damage valuation (prepared by Mr. Dellepiane of BRG). For purposes of analyzing the reasonableness of this estimate, the Respondent retained Mr.

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[510] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, ¶¶ 242-243. **RL-0090**. See also, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, *ICSID Case No. ARB//06/11, Award*, October 5, 2012, ¶¶ 670, 686-687. **RL-0107**.

Tiago Duarte-Silva of the firm *Charles River Associates* (CRA). The Respondent also asked Mr. Duarte-Silva for an alternative valuation of the damage in case it considered that BRG's estimate was inappropriate.

575. This section explains the various assessments made by the BRG and the CRA's and the Respondent's main criticisms of this analysis. However, for reasons of space, the Respondent will only address the main criticisms. For further (and better) explanations, the Respondent refers the reader to the CRA's expert report.

1. Methodology

576. The Claimant's expert uses three methods to calculate the fair market value (FMV) of the Project, two under the market approach and one more under the cost approach:

- Comparable Transactions - This estimate is based on a sample of nine transactions involving mineral properties that BRG believes have similar characteristics to the Project.[511] Based on this method BRG arrives at a valuation of US $362.7.
- Public Guideline Companies - This estimate is based on a sample of 41 publicly traded mining companies that control projects/properties that BRG believes have similar characteristics to the Project.[512] Based on this method BRG arrives at a valuation of US $528.3.
- Multiple of Past Exploration Expenditure (MEE). This estimate is based on the amount of sunk exploration expenditures for the Project. BRG adjusts this amount for inflation and then applies a Prospectivity Enhancement Multiplier (PEM) of 3x - *that* is, multiplies the total amount of inflation-adjusted sunk costs by 3.[513] Based on this method BRG arrives at a valuation of US $488.5 million.

577. Although BRG claims to have followed international guidelines for the valuation of mineral properties (*i.e.*, CIMVAL) its analysis has a number of significant shortcomings. BRG proposes, in addition to these three estimates, an additional valuation according to the sunk cost

511 BRG First Report, ¶ 13.

512 BRG First Report, ¶ 14.

513 BRG First Report, ¶ 15.

methodology. The main criticisms of the Respondent and its expert to these valuation exercises are summarized below.

IV. Criticism of valuations by the "Comparable Transactions" and "Public Guideline Companies" methods.

578. The *Comparable Transactions* and *Public Guideline Companies* methods follow the same valuation principle; they seek to derive the value of a company or asset from a set of "comparables": comparable transactions in the first case and comparable public companies in the second.

579. The procedure can be *roughly* described as follows: (i) obtain a sample of comparables by using appropriate selection criteria to ensure comparability; (ii) select and calculate an indicator or multiple for each comparable in the sample, (iii) make the necessary adjustments to compensate for any relevant differences between the comparable and the target enterprise, and (iii) apply the multiple from the sample of comparables (usually the median of the sample) to the target enterprise to derive its value. The multiple used by BRG in this case is EV/Resources, where EV stands for enterprise value and the denominator is the adjusted volume of resources (to be discussed a little later).

580. The criteria for selecting comparables are detailed in BRG's First Expert Report.[514] By way of example, the criteria used by BRG to select comparable transactions are reproduced below.

> First, I exclude transactions which do not have available data on implied enterprise value or resources in the three years prior to the transaction date. This reduced the sample to 50 transactions.
>
> Second, since SVB had not yet commissioned a feasibility study to quantify reserves as of the Date of Valuation, I excluded transactions of assets with reported reserves up to two years before the transaction date. This reduced the sample to 36 transactions.
>
> Third, since different minerals have different market drivers and expected supply and demand trends, I excluded transactions with total silver and zinc below 50% of total weighted resources. This reduced the sample to nine transactions.[515]

581. CRA considers, first, that BRG did not correctly apply the criteria it claims to have used to select the sample of comparables. According to CRA, a strict application of such criteria would

514 BRG First Report, ¶¶ 80(a) to (c) and 88(a) to (c).

515 BRG First Report, ¶¶ 80(a) through (c).

result in smaller samples of comparable transactions and companies. Specifically, the sample of comparable transactions would be reduced from 9 to 7 and the sample of public companies from 41 to 13 companies. [516]

582. In addition, CRA believes that some of the resulting transactions and companies are not appropriate comparables because they involve several properties, some of which do not yet have mineral resource declarations.[517] Including these companies and transactions in the sample leads to an overestimate of the multiple used to derive the target company value, as the numerator (EV) would include the value of properties that do not yet have resource declarations and therefore that volume is not yet reflected in the denominator.[518] Similarly, CRA considers that some of the companies in the cleaned sample are also not comparable in terms of their size. For that reason CRA excluded any company with less than 20 million silver ounces or equivalent (AgEq oz). [519]

583. By excluding these other companies/transactions for comparability reasons, the samples are reduced to 2, in the case of comparable transactions, and to 4 in the case of purchasable companies.[520] This reduction in sample size has significant effects on the final value.

584. In the case of comparable transactions the median is reduced from US $0.90 to $0.18 and the resulting value would be reduced to US $81.4 million.[521] However, CRA believes that, given the small sample size, the comparable transactions method is not appropriate in this case.[522] In the case of comparable public companies, the median is reduced from US $1.17 to US $0.11 and the resulting value would be reduced to US $48 million.[523]

585. The second problem with the CSR market estimates is the use of weightings that attempt to express the different types of resources in terms of "reserves". CRA concludes that these weightings not only lack adequate documentary support, but also constitute minimum thresholds

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516 First CRA Report, ¶¶ 28, 53-55.

517 First CRA Report, ¶¶ 29, 56, 71.

518 First CRA Report, ¶¶ 56-57

519 First CRA Report, ¶ 73.

520 First CRA Report, ¶¶ 29, 61-67, 84-85.

521 First CRA Report, Table 3, and ¶¶ 66-67.

522 First CRA Report, ¶ 67.

523 First CRA Report, ¶¶ 84-85.

related to the relative certainty of each type of resource. Neither the 2012 JORC code nor the CIMVAL guidelines support the use of these generic weightings that do not take into account the particular characteristics of mineral resources (e.g., their grade or quality). [524]

586. As explained a moment ago, mineral reserves are defined as: "the economically mineable part of a Measured and/or Indicated Mineral Resource". And they are defined through feasibility or pre-feasibility level studies that include the application of Modifying Factors that CIMVAL defines as: "*considerations used to convert Mineral Resources* These Modifying Factors are particular to each project as they include, but are not limited to: "*mining, processing, metallurgical, infrastructure, economic, marketing, legal, environmental, social and governmental factors (CIM Definition Standards)*".[525] As can be seen, this is a complex and costly process that involves the consideration of a multitude of project-specific factors, which rules out the idea that generic factors can be used to estimate or derive reserves.

587. BRG does not even rely on the opinion of a mining expert to justify the appropriateness of its weightings and, therefore, there is no basis for assuming that these factors are applicable to the Claimant's Project. They are completely arbitrary and speculative values that introduce an unacceptable level of uncertainty into any analysis using them.

588. A third problem with the results of both methods discussed in this section is that BRG artificially boosts the valuation by applying a 33% control premium to the companies and transactions it uses as comparables when calculating multiples and, in addition, uses a 30-day average of market capitalization to calculate EVs of comparable companies.[526] Both decisions bias the estimate upward, are inappropriate and are not supported by the literature.[527]

V. Criticism of BRG's valuation under the Multiple of Past Exploration Expenditure (MEE) method

589. The MEE method consists of assigning a premium or discount (as the case may be) to the relevant and actual expenditure base. This premium or discount is called the "Prospectivity

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524 First CRA Report, ¶¶ 30, 112-115.

525 *The CIMVAL Code for the Valuation of Mineral Properties*, November 29, 2019, pp. 38-39. **R-0080**.

526 First CRA Report, ¶ 31, 107-111.

527 First CRA Report, ¶ 31, 107-111.

Enhancement Multiplier" (PEM) which is directly related to the success or failure of exploration to date and an assessment of the future prospects of the Project. [528]

590. BRG cites a paper prepared by Mr. M. J. Lawrence entitled "*An Overview of Valuation Methods for Exploration Properties*" to explain that the MEE method captures the historical investments that have been made as of the valuation date to justify the use of this method.[529] However, this is not entirely accurate. According to the paper:

> Valuations by this method should use as components of the Expenditure Base only the current owner's/joint venturer's relevant and effective past exploration expenditure together with any firmly committed future exploration expenditures (for no more than one budget year in advance, unless there are contractually firmly committed funds for a longer period).[530]

591. Contrary to BRG's assertion, the expense base should *not* include *all* historical investments that have been made as of the valuation date, but only those made by the "current" owner or joint venture, which are "relevant" and "effective". However, neither BRG nor the Claimant provide a breakdown of the expenditures included in the base and, therefore, it cannot be known whether these restrictions were applied. All indications are that they did not.

592. As noted by CRA in its first report, BRG includes expenditures that have not been audited or reviewed by BRG in any way. It also includes expenditures that are not related to exploration, and others that do not appear to have expanded the knowledge base of the project - *i.e.*, they are not relevant and effective expenditures.[531] This would be the first criticism of the BRG exercise.

593. CRA's second criticism is that BRG adjusted the expense base for inflation, and only after doing so does it apply an EMP of 3x. This has the effect of doubling the expense base before multiplying it by 3.[532] There is no support for this, in addition to the fact that it has not been demonstrated that the PEM is a factor that can be applied to a base expressed in real terms - *i.e.*, adjusted for inflation.

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528 SD-15, p. 208, second column, under the heading "Multiple Valuation Method for Exploration Expenses".

529 BRG First Report, ¶ 15.

530 SD-15, p. 208.

531 First CRA Report, ¶ 36.

532 First CRA Report, ¶ 36.

594. CRA's third criticism is that the PEM or 3x multiplier used by BRG is unsupported and artificially increases the valuation.[533] BRG also states in this context that "*industry literature indicates that PEMs values range between 0.5x and 5.0x, being 3.0x for mineral resource properties*".[534] However, it does not cite any source.

595. Mr. Lawrence's paper (quoted above) states, "the selected PEM would usually range from 0.5 to 3.0" and that it could be "as low as zero and as high as 5, depending on the circumstances (which should be clearly outlined)."[535] However, nowhere does it say 3.0x for mineral resource properties, as BRG suggests. In fact, the document notes a little further on that PEM "*is related only to the inherent prospectivity of the ground*" and is something that has to be determined by an "*independent, appropriately qualified and experienced resources industry technical professional, who is also considered reputable and competent to assess the situation appropriately*", precisely because the particular characteristics of the project play an important role in determining PEM.[536] In the author's words "*A geologist is required because what is being assessed is the current and likely exploration potential of the tenement in question*".[537] Mr. Dellepiane, author of the BRG report, is not a geologist and does not refer to the opinion of a technician to support his use of an PEM of 3.0x.

596. Two additional observations may be made in this regard. The first is that everything seems to indicate that the PEM is also a factor to be considered by an independent expert based on the specific characteristics of a project. There is nothing to indicate that a generic PEM factor can be used to evaluate any mineral property. Second, BRG did not consult an independent mining expert to determine the PEM applicable to the Project. In fact, there is no evidence that it relied on the support of a mining expert to support any aspect of its report.

597. For CRA, there is insufficient information at this time to follow such a cost methodology.

VI. Criticism of the sunk cost estimate

533 First CRA Report, ¶ 36.

534 BRG First Report, ¶ 15.

535 SD-015, p. 210 first column.

536 SD-015, p. 209, second column, last paragraph.

537 SD-015, pp. 209-210.

598. As stated by CRA in its first report, BRG presents an additional valuation under the sunk cost methodology as an alternative to the FMV. This estimate would seek to put the investor in the same position it would have been in had it not made the investment in Sierra Mojada. However, CRA notes that if this were the objective, the valuation would have to exclude any investment made by a third party, such as South32 , Peñoles or North Limited, who at different points in the history of the Sierra Mojada Project, had joint ventures with Metalin and/or SVB.[538] Otherwise, it would be compensated for the investments made by third parties. Unfortunately, at this time there is no information available to separate these expenditures.

599. The second problem with this estimate is that BRG updates sunk costs using the industry's cost of capital or a market index as a *proxy* for the returns earned by the mining industry.[539] CRA believes that this is incorrect because it would be compensating the Claimant for risks it never faced. It also notes that even if there were investment opportunities with an equivalent expected return, such investments would not guarantee a positive return because of the risk involved.

600. Under these circumstances, this estimate is also not appropriate in the circumstances of this case.

1. Methods incorrectly discarded by BRG

601. BRG claims to have considered additional indicators of the Project's FMV. These are: the market capitalization of SVB and previous transactions such as the private placement of securities in 2018 and the option acquired by South32. However, BRG dismissed them as relevant indicators arguing that (i) they do not capture the value of additional exploration carried out after the transaction, such as the discovery of what Claimant calls a "massive sulphide mineralization"; (ii) they do not capture the increase in the international price of silver between the date of the transaction and the valuation date; (iii) because of the alleged negative impact of the commercial lawsuit filed by Mineros Norteños against Metalin that would have impacted the value; and, (iii) specifically in the case of market capitalization, because, according to BRG, SVB's shares are not traded efficiently.[540]

538 CRA First Report, ¶ 37.

539 CRA First Report, ¶¶ 37-38.

540 CRA First Report, ¶¶ 33-34.

602. CRA does not agree that the reasons offered by BRG justify disregarding these references. CRA is of the opinion, for example, that it is not a fact that there would have been an increase in the value of the transactions with the additional exploration that took place after the transactions. As an example, it points out that the NI 43-101 report conducted in 2023 did not assign any value to the discovery of massive sulphide mineralization.[541]

603. CRA also does not consider that market demand necessarily impacts transactions such as the Sout32 transaction, since, among other things, the demand already existed when that contract was entered into and, therefore, it must be assumed that this information was incorporated into the price.[542] The argument about the increase in silver prices post-transaction is also unconvincing since the *MSCI ACWI Select Silver Investable Market Index*, which BRG itself uses, shows a decrease during the period in which BRG claims that the silver price increased and would have had a positive effect on the value of the Project.[543]

604. But the most important criticism is the one that seeks to dismiss market capitalization. CRA is of the opinion that there is no evidence to conclude that SVB shares are not traded efficiently. CRA's Dr. Duarte-Silva explains in his report that there is no evidence that SVB's share price does not react to relevant events and news in the public domain and, therefore, it cannot be concluded that it is traded inefficiently.

605. For that reason, CRA considers that the market capitalization immediately prior to the Second Lock-Up, updated to the Valuation Date (August 2022) provides the best approximation of the FMV of the Project in the counterfactual scenario. That adjusted capitalization value amounts to US $16 million.[544]

B. Interest

606. As explained in CRA's First Report, the Claimant proposes that pre- and post-award interest be calculated at a rate equivalent to the cost of capital of the Project or the cost at which the Respondent can borrow in dollars. CRA correctly notes that using the Claimant's or the

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541 CRA First Report, ¶¶ 93-94.

542 CRA First Report, ¶¶ 90-92.

543 CRA First Report, ¶¶ 34, 95-96.

544 CRA First Report, ¶¶ 34-35, 97-106.

Project's cost of capital would compensate the Claimant for risks it did not and will not face in the future and is therefore not appropriate.[545] The Respondent adds that it is common for the Claimant to raise this argument, however, to its knowledge, no international tribunal has ever granted it. Normally, the argument is rejected for the reason stated above.

607. Regardless, it is clear that the Claimant does not have much confidence in its argument, as its expert only calculates interest based on the Respondent's dollar funding cost. If this tribunal awards damages to the Claimant, the Respondent agrees to determine interest using Mexico's cost of funding in dollars.

V. PETITIONS

608. In view of the foregoing, the Respondent requests that the Tribunal:

i) Determines that it does not have jurisdiction *ratione temporis* to hear the Claimant's Article 1105 claims because the measures are time-barred. In any event, it has no jurisdiction *ratione temporis*, nor *ratione voluntatis*, because the alleged expropriation took place after the termination of NAFTA. Additionally, it does not have jurisdiction because some assets do not constitute an investment under NAFTA and the ICSID Convention.

ii) In the event that the Tribunal determines that it has jurisdiction, the Respondent requests that the Tribunal recognizes that the Claimant's claims lack merit, in addition to the fact that they have not been proven;

iii) Should the Tribunal consider finding the Respondent liable, it is requested that the Tribunal take into account the adjusted capitalization value calculated by CRA in determining damages and that the amount be significantly reduced due to the Claimant's contribution to the materialization of those damages.

iv) In the event that the Tribunal determines that there was an expropriation, order the Claimant to transfer ownership of all Project assets, including the concessions (free of attachment) to the Respondent against payment of the award.

609. Order the Claimant to pay the legal costs and expenses related to this arbitration.

Respectfully submitted,
The General Council of International Trade Legal Consulting

Alan Bonfiglio Rios

[545] CRA First Report, ¶¶ 39-40.