(ICSID Case No. ARB/23/29)

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

MARIO NORIEGA WILLARS

Claimant,

v.

UNITED MEXICAN STATES,

Respondent.

CLAIMANT'S CLAIM MEMORIAL

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Claimant, Mario Noriega Willars ("**Mr. Willars**," "**Investor**," or "**Claimant**"), on his behalf and on behalf of Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V. ("**CFCM**" or "**Company**"), serves this Claim Memorial ("**Memorial**") on the United Mexican States ("**Mexico**," "**State**," or "**Respondent**"), pursuant to Article 1120 of the North American Free Trade Agreement ("**NAFTA**" or the "**Treaty**"), Annex 14-C of the United States-Mexico-Canada Agreement, which entered into force on 1 July 2020 ("**USMCA**"), Rule 30 of the Arbitration Rules of the International Centre for Settlement of Investment Disputes ("**ICSID Rules**"), and the Tribunal's Procedural Order No. 1, dated 22 July 2024, and submits the following requests to the Tribunal:

REQUEST FOR RELIEF:

(i) A declaration that the dispute is within the jurisdiction and competence of the Arbitral Tribunal;

(ii) A declaration that Mexico breached the Treaty and international law. Specifically that:

a. Mexico breached Article 1110 of NAFTA by failing to pay full, prompt, adequate, and effective compensation after expropriating Mr. Willars' investment in contravention of the Treaty and international law;

b. Mexico breached Article 1105 of NAFTA and violated its obligation under the Treaty to treat Mr. Willars' investment fairly and equitably;

c. Mexico breached Article 1105 of NAFTA and violated its obligation under the Treaty to grant Mr. Willars' investment full protection and security; and

d. Mexico breached Article 1102 of NAFTA and violated its obligation under the Treaty to not treat Mr. Willars, or his investment, less favorably than its own nationals or their investments.

(iii) An order directing Mexico to compensate Claimant for his losses resulting from Mexico's breaches of the Treaty and international law, with such compensation to be paid without delay, be effectively realizable and be freely transferable, and bear (pre- and post-award) interest at a compound rate sufficient to fully compensate Claimant for the loss of the use of this capital from the date of Mexico's breaches of the Treaty;

(iv) An order directing Mexico to pay pre-award and post-award interest to Claimant at the applicable rate until the date of Mexico's full and effective payment;

(v) A declaration that the award of damages and interest be calculated on a pre-tax basis;

(vi) An order directing Mexico to pay all of Claimant's costs relating to the present arbitration proceedings, including the fees and expenses of the Tribunal, the fees and expenses of ICSID, the fees and expenses relating to Claimant's legal representation, and the fees and expenses of any expert appointed by Claimant or the Tribunal, plus interest; and

(vii) An order granting any further relief to Mr. Willars that the Tribunal deems just and appropriate under the circumstances.

Claimant also reserves its right to alter, amend, and/or supplement its claims as necessary and in accordance with the applicable rules during the course of this arbitral proceeding.

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I.

INTRODUCTION

1. This dispute arises from Mexico's continued breach of its international obligations, specifically, its failure to pay full, prompt, adequate, and effective compensation after it directly expropriated Claimant's investment.

2. On 26 August 1999, the *Secretaría de Comunicaciones y Transportes* (now called the *Secretaría de Infraestructura, Comunicaciones y Transportes*) ("**SCT**") awarded a concession ("**Concession**") to CFCM for the operation, exploitation, and maintenance of two of Mexico's major railroads, the Chiapas railroad and the Mayab railroad, which link the Yucatán Peninsula to the Pacific coast and the Guatemalan border. The Chiapas and Mayab railroads are critical to Mexico's railway system, as they are the only lines that service the southeast region of the country.

3. Under the Concession, Mexico granted CFCM the exclusive right to operate and exploit the Chiapas-Mayab Railway, along with a wide range of supporting assets, for a 30-year term. Additionally, Mexico granted CFCM an exclusive right to provide freight services on the Chiapas-Mayab Railway for 18 years.

4. From the outset, CFCM diligently met its obligations under the Concession, undertaking substantial rehabilitation works and investing heavily in its operations. Between 1999 and 2005, CFCM successfully operated the Concession and turned a profit.

5. In 2005, however, external factors caused CFCM to face significant challenges in its operation of the Concession. Specifically, Hurricane Stan struck the southeastern region of Mexico, and in the process, severely damaged key infrastructure of the Chiapas-Mayab Railway, including tracks and bridges, virtually halting CFCM's operations. As the damaged infrastructure belonged to the State, and the hurricane constituted a force majeure event, the financial responsibility for the necessary repairs to restore the railway was solely Mexico's to bear. The SCT acknowledged this obligation and agreed to assume the repair and rehabilitation costs. In the interim, CFCM remained committed to working with the SCT to restore the Concession, as swiftly as possible.

6. From this point onward, however, the SCT began delaying its responses and actions regarding the Concession and improperly delayed taking action to restore the Concession. Despite months of waiting, the SCT failed to provide the necessary funds to repair and restore the tracks. During this period, CFCM retained its workforce, maintained salaries, provided relief and rescue services to affected communities, and used its own resources to conduct emergency work to mitigate the impact on its clients. Meanwhile, the SCT did virtually nothing. Ultimately, CFCM, unable to sustain the operational losses caused by the inability to operate the Concession, had no choice but to suspend providing freight transportation services altogether.

7. Consequently, the SCT imposed a "*modalidad*" on the Concession—a legal mechanism applicable in cases of *force majeure*—enabling the State, through a state-owned company, to use, operate, and maintain the Chiapas-Mayab Railway while repairs were underway.

8. Facing prolonged delays by Mexico in restoring the Concession, CFCM's original shareholders sought to sell their interests in the company. Ultimately, Viabilis Holding, S.A. de C.V. ("**Viabilis**"), along with related parties, acquired CFCM, committing to invest in enhancing the railway in exchange for the SCT's promise to return the operation of the Concession to CFCM and to extend the Concession's term. Relying on, among other factors, Mexico's representations, Viabilis acquired CFCM.

9. Following Viabilis's acquisition, CFCM took diligent steps to prepare for the reinstatement of the Concession, including preparing a detailed market study for the operation of the Concession, negotiating a plan with the SCT to restore the operation of the Concession, and performing several track and equipment inspections. Importantly, CFCM also designed—in conjunction with the SCT—a thorough and comprehensive business plan that would ensure the Concession's financial prosperity moving forward. Under the agreed business plan, CFCM committed to invest over USD $200 million upon resuming operations of the Concession, with SCT agreeing to extend the Concession in order to provide CFCM a viable return.

10. In 2012, the SCT—based on the agreed business plan and acknowledging CFCM's compliance with its obligations—agreed to amend and extend the Concession until 2049, granting CFCM a total 50-year term, and extended its exclusive freight transportation service rights from 18 to 30 years. Further, the amendment also provided that operation of the Concession would be returned to CFCM by February 2013—it was not.

11. With the business plan now approved and the Concession amended, CFCM made extensive preparations and took the required measures to be able to resume operations of the Concession. CFCM hired essential personnel, negotiated labor and union agreements, obtained necessary equipment, formulated an insurance plan, and reestablished client relationships, thus meeting the SCT's requirements. In parallel, the SCT made repeated assurances that CFCM would resume operations and that the SCT would invest significant sums in the Chiapas-Mayab Railway. In line with its prior conduct, however, and contrary to its express commitments, the SCT consistently delayed the return of the Concession to CFCM.

12. By 2014, despite the numerous delays, CFCM's resumption of operations of the Concession appeared imminent. By this time, the SCT had proposed a new investment scheme to fund the Concession and committed, in Mexico's National Infrastructure Program, to invest over MXN $6 billion in the Concession. CFCM had also secured additional investments, which would ensure its liquidity. In 2015, CFCM's then main owner had to sell most of his shares in CFCM and Viabilis. As a result, Claimant was invited to participate in CFCM's business and acquired a controlling interest in 2015.

13. In 2016, despite Mexico's repeated assurances that CFCM would be allowed to operate the railway for the Concession's term, the SCT abruptly and unexpectedly expropriated the Concession through a *rescate* declaration. While Mexico initially promised to compensate CFCM for its expropriation, this promise has gone unfulfilled. Rather than providing compensation for the expropriation, Mexico's actions have prompted years of expensive litigation in the Mexican courts, which have yielded no resolution. Mexico's judicial branch has done nothing but prevent CFCM from receiving the appropriate compensation it is rightfully due. To date, the SCT has also failed to issue a final determination on the compensation owed to CFCM as a consequence of the *rescate*, leaving Claimant uncompensated for over 8 years.

14. Contrary to its treatment of Claimant and his investment, Mexico has fully and promptly compensated its own nationals facing similar or analogous circumstances. Indeed, in 2023, following the *rescate* declaration over part of Ferrosur, S.A. de C.V.'s concession—a Mexican entity owned by Germán Larrea, a prominent Mexican businessman—Mexico swiftly agreed to pay full compensation within two weeks. Ferrosur had no need to wait or litigate to be compensated. Mr. Willars, a foreigner, was not afforded that preferential treatment.

15. Mexico's conduct represents a continued breach of the provisions of NAFTA prohibiting expropriation without full, prompt, adequate, and effective compensation, as well as its provisions that require Mexico to afford fair and equitable treatment, full protection and security, and treatment no less favorable than that afforded to its own nationals. These violations have caused direct and substantial harm to Claimant. Under well-settled principles of international law, Claimant seeks full reparation for the losses incurred due to Mexico's violations of NAFTA and international law in the form of monetary compensation sufficient to remediate the harm caused by Mexico's wrongful and unlawful acts.

16. Accordingly, Claimant is entitled to compensation reflecting the fair market value of his investment. To this end, Claimant has engaged two leading experts in damage calculation, Messrs. Gustavo De Marco and Ariel Medvedeff of Compass Lexecon. Messrs. De Marco and Medvedeff have used for their valuation the most reliable evidence as a starting point: the business plan agreed and approved by both CFCM and the SCT, which provides the reasonable expectations of the business before the government's unlawful measures. Messrs. De Marco and Medvedeff have independently evaluated, verified, and, where appropriate, adjusted the business plan to derive their own independent valuation of the fair market value of Claimant's investment. Their analysis establishes that Claimant's investment, but-for Mexico's wrongful conduct, would be worth ██████████, rising to ██████████ after accounting for full compensation, including pre-award interest owed to Claimant.

II.

THE PARTIES

A. CLAIMANT: MR. MARIO NORIEGA WILLARS

17. Mr. Willars is a citizen of the United States of America and of legal age.

Proofs:

a. **C-1-ENG** (Copy of Mr. Mario Noriega Willars' United States Passport) (evidencing that Mr. Willars' is a citizen of the United States of America).

18. Presently, Mr. Willars owns a controlling interest in CFCM, a Mexican company incorporated under the laws of Mexico on 25 March 1999, by public deed number 37,606.

Proofs:

a. **C-4-SPA** (CFCM's Deed of Incorporation) (evidencing that CFCM was incorporated in Mexico).

19. Specifically, Mr. Willars owns a 51.76% majority ownership interest in CFCM. That interest is exercised through: (i) ownership, in his personal capacity, of 16.38% of the outstanding shares of CFCM; and (ii) ownership of 48% of the outstanding shares in Viabilis Holding, S.A. de C.V., which owns 73.71% of the outstanding shares of CFCM. Mr. Willars' controlling interest in CFCM is illustrated below:

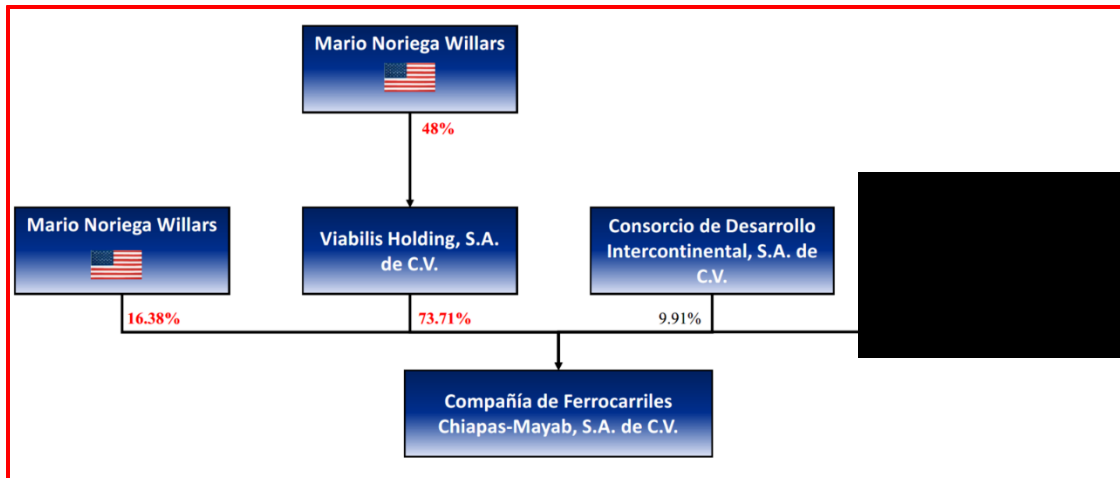


Image 1: CFCM's Corporate Chart (C-28-SPA)

Proofs:

a. **C-2-SPA** (CFCM's Shareholder Registry) (reflecting that Mr. Willars directly owns a 16.38% interest in CFCM and that Viabilis directly owns a 73.71% interest in CFCM);

b. **C-3-SPA** (Viabilis Holding, S.A. de C.V.'s Shareholder Registry) (evidencing that Mr. Willars owns a 48% interest in Viabilis);

c. **C-28-SPA** (CFCM's Corporate Chart) (reflecting Mr. Willars' controlling interest in CFCM).

B. RESPONDENT: THE UNITED MEXICAN STATES

20. Mexico is a sovereign state located in the southern part of North America. Mexico has the second-largest economy in Latin America and is a party to NAFTA and the USMCA.

Proofs:

a. **CL-3-ENG**, Chapter 14 (United States-Mexico-Canada Agreement);

b. **CL-4-ENG** (Protocol replacing North American Free Trade Agreement with the Agreement between Canada, the United States of America, and the United Mexican States);

c. **CL-5-ENG** (North American Free Trade Agreement).

21. Mexico's SCT, and Mexico's Federal Administrative Tribunal, are "organs" of Mexico. Mexico is responsible for the actions of these entities. The actions of these entities are attributable to Mexico.

Proofs:

a. **CL-12-ENG**, Article 4 (International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries) ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State … the principle in article 4 applies equally to organs of the central government and to those of regional or local units").

22. Similarly, the Ferrocarril del Istmo de Tehuantepec, S.A. de C.V. ("**FIT**") is a parastatal company owned by Mexico. FIT's primary objective is to control the Istmo de Tehuantepec Railway, an inter-oceanic railroad corridor under the direction of Mexico's federal government. As such, FIT is a state-owned enterprise for which Mexico is also responsible.

Proofs:

a. **C-30-SPA** ("Antecedentes e Inicio de Operaciones del Ferrocarril del Istmo de Tehuantepec, S.A. de C.V.", published in FIT's oficial website: https://www.ferroistmo.com.mx/pagina-ejemplo/) ("La Secretaría de Hacienda y Crédito Público … autorizó la constitución de la empresa de participación estatal mayoritaria Ferrocarril del Istmo de Tehuantepec, S.A. de C.V. cuyo objeto social consiste principalmente en la operación y explotación de

la vía general de comunicación ferroviaria del Istmo de Tehuantepec");

b. **CL-12-ENG**, Article 5 (International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries) ("The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance").

III.

FACTUAL BACKGROUND

A. THE CHIAPAS-MAYAB RAILWAY IS VITAL TO MEXICO'S ECONOMY

23. Prior to 1995, the Mexican government exclusively controlled the country's rail transport industry (including the provision of freight services) through a state-owned company called Ferrocarriles Nacionales de México. By 1995, however, rail freight services lagged far behind what Mexico's economy needed to put the country on the path towards rapid economic development. Thus, as part of its 1995-2000 National Development Plan, Mexico designated the railway sector as an industry ripe for modernization, to be achieved by attracting national and foreign private investments. In furtherance of that vision, Mexico amended its Constitution to allow for the participation of the private sector in the provision of railway services, and issued the *Ley Reglamentaria del Servicio Ferroviario* (the "**Railway Service Law**"), aimed at promoting the development of the rail transport industry in Mexico through competition in the free market. According to the Railway Service Law, railway transport was an economic activity of top priority.

Proofs:

a. **CWS-3-SPA**, ¶8 (Witness Statement- [redacted] Claim Memorial) ("El servicio público de transporte ferroviario fue hasta 1995 una actividad reservada exclusivamente al Estado. Ferrocarriles Nacionales de México ("FNM") era la compañía ferroviaria estatal de México y era la única entidad habilitada para prestar este servicio. El 2 de marzo de 1995, se reformó el artículo 28 de la Constitución Política de México ("Constitución"). Esta reforma mantuvo a los ferrocarriles como áreas prioritarias para el desarrollo nacional, pero permitió al Estado otorgar concesiones o permisos sobre las vías ferroviarias para que pudieran ser operadas por entidades privadas");

b. **C-31-SPA**, pp. 131-132 (1995-2000 National Development Plan) ("Durante años, los ferrocarriles han presentado rezagos que obligan para su operación a dotarlos de importantes subsidios públicos… Con base en el nuevo marco jurídico, se promoverá el desarrollo de un nuevo sistema ferroviario seguro, competitivo y eficiente. **La clave para lograrlo será la atracción a este sector de capital privado, nacional y extranjero**, mediante reglas transparentes y estables, y un proceso de privatización eficaz") (emphasis added);

c. **CL-2-SPA**, Article 28, paragraph 4 (Political Constitution of the United Mexican States) ("La comunicación vía satélite y los ferrocarriles son áreas prioritarias para el desarrollo nacional en los términos del artículo 25 de esta Constitución");

d. **CL-13-SPA**, Article 1 (Mexico's Railway Service Law) ("…El servicio ferroviario es una **actividad económica prioritaria** y corresponde al Estado ser rector de su desarrollo") (emphasis added).

24. As part of the privatization of the rail transport industry, Mexico divided its railway infrastructure into several segments. One of those segments is comprised of the Chiapas and Mayab railroads ("**Chiapas-Mayab Railway**"). The Chiapas-Mayab Railway has always been a vital part of Mexico's railway system. It has the only railroads that service the southeast portion of the country, including five Mexican states (*i.e.*, Veracruz, Chiapas, Tabasco, Campeche, and Yucatán), and most of the Yucatan Peninsula. The image below illustrates the Chiapas-Mayab Railway in yellow:

Image 2: Map of Mexico's Railway System (C-8-SPA)

Proofs:

a. **CWS-3-SPA**, ¶12 (Witness Statement-█████ █████Claim Memorial) ("Además de las "rutas troncales," existían otros tramos importantes de ruta, aunque más pequeños, que se les denominaron "vías cortas." Entre estas "vías cortas" se encontraban las vías Chiapas y Mayab, que en su conjunto representaban las vías cortas con mayor extensión dentro del país");

b. **C-8-SPA** (Map of Mexico's Railway System, available at https://www.proyectosmexico.gob.mx/proyecto_inversion/279-viaferroviaria-chiapas-y-mayab/ (reflecting the location of the Chiapas and Mayab lines in the Mexican territory);

c. **C-91-SPA** (Map of Mexico's Railway System and the Chiapas-Mayab Railway) (showing the location of the Chiapas-Mayab Railway);

d. **C-193-SPA** (Chiapas-Mayab Technical Description) (showing the location of the Chiapas-Mayab Railway).

25. The Chiapas-Mayab Railway has been in operation for at least 100 years and provides essential freight services. It consists of two distinct railroad lines: the Mayab line ("**Mayab Line**") and the Chiapas line ("**Chiapas Line**"). The Mayab Line, inaugurated in 1874, is approximately

1,090 kilometers long and connects Valladolid, in the Yucatan Peninsula, with El Chapo, in Veracruz. The Mayab Line plays a vital role in Mexico's transportation infrastructure. It serves the state of Veracruz, known for its agricultural and oil industries, as well as the oil-rich states of Tabasco and Campeche. The line also connects the key shipping ports of Coatzacoalcos, Campeche, and Progreso, making it an essential part of the region's logistical infrastructure. From 1992 to 1998, cargo transported by the Mayab Railroad grew at an annual rate of 2.3%, reaching 1.5 million tons by 1998.

Proofs:

a. **C-32-SPA**, p. 2 (SCT, Call for bids for the Concession dated 24 March 1999) ("Las Vías Cortas Chiapas y Mayab se integran en tos términos siguientes…Vía Corta Mayab…La longitud de los tramos mencionados es de 1.090.406 kilómetros, localizados en los Estados de Veracruz, Tabasco, Chiapas, Campeche y Yucatán [sic]");

b. **C-33-SPA**, pp. 48-50 (Brochure of the Chiapas-Mayab Railway prepared by IXE Grupo Financiero, dated March 1999) (demonstrating that the Mayab Line plays a vital role in Mexico's transportation infrastructure);

c. **C-143-SPA** (News article published by T21 titled "El Chiapas-Mayab, ¿A Toda Máquina?) (evidencing the strategic location and vital role of the Chiapas-Mayab Railway);

d. **C-194-SPA** (SCT, "El Transporte Regional en el Sureste Mexicano" dated 2001) (showing that the Chiapas-Mayab Railway has a strategic location and have been a priority for the Mexican government).

26. As further evidence of the importance of the Mayab Railroad, in 2018, Andrés Manuel López Obrador (who was running to be President of Mexico at the time) focused his campaign on the construction of the Mayan Train (*Tren Maya*), which would become the signature infrastructure project of his future administration. The Maya Train project, worth at least USD $23 billion, would connect the Mayab Line to Mexico's world-renowned archaeological sites and beaches. The construction of the Maya Train started in 2020 and, to date, twenty-four of the thirty-four train stations are operational. According to the project's website, the Maya Train is the "most important railway infrastructure in Mexico." While the Mayan Train provides transportation to both passengers and freight, the project's financial viability is based on freight transportation. The Train's director has commented that freight transportation would generate around MXN $30 billion annually (approximately USD $1.5 billion), representing between 60 and 70% of the Mayan Train's income.

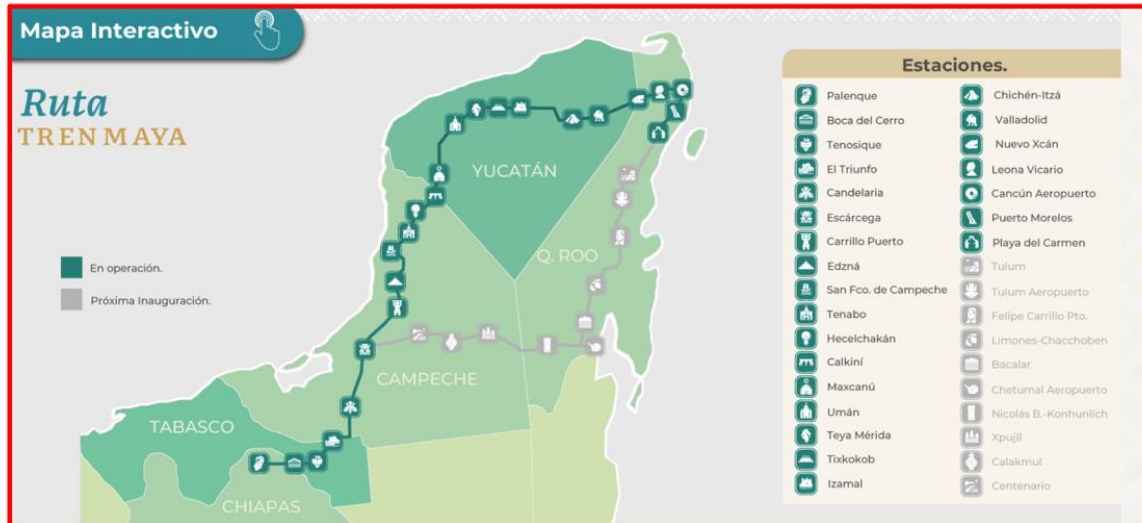


Image 3: Map of the Maya Train (C-34-SPA)

Proofs:

a. **C-34-SPA** (Map of the Mayan Train, available at www.tranmaya.gob.mx (last accessed on 13 August 2024)) (showing the location of the Mayan Train in the Yucatan peninsula);

b. **C-35-SPA** (Map of the Chiapas-Mayab Railway and the Maya Train) (evidencing the location of the Chiapas-Mayab Railway in the Yucatan peninsula and the location of the Maya Train);

c. **C-36-SPA** (BBC, "Tren Maya: así es el ambicioso proyecto que propone AMLO y tiene un costo de miles de millones de dólares para México") (evidencing that Tren Maya was the flagship infrastructure project of former Mexico's President Lopez Obrador);

d. **C-37-ENG** (The Yucatan Times, "Portuguese company to start building first Tren Maya stretch on April 30th" dated 27 April 2020) (evidencing that Tren Maya was the flagship infrastructure project of former Mexico's President Lopez Obrador);

e. **C-38-ENG** (Reuters, "Mexico's flagship train inauguration masks delay, cost concerns" dated 15 December 2023) (noting that the Mayan Train will cost more than USD $23 billion to construct);

f. **C-165-SPA** (T21, "Tren Maya obtendrá la mayoría de sus ingresos por manejo de carga" dated 6 August 2019) (noting that freight transportation would generate around MXN $30 billion annually, and 60-70% of the Train's income).

27. The Chiapas Line, on the other hand, is approximately 459 kilometers long and connects Ciudad Hidalgo, in the state of Chiapas (at the international boundary with Guatemala), and Ixtepec, in Oaxaca. The Chiapas Railroad was inaugurated in 1908 and, since its inception, has been a vital artery for the economic relationship between Mexico, Guatemala, and the rest of Central America. By the 1990's, the Chiapas Railroad serviced three main industries: the concrete industry, the oil and gas industry, and the corn industry. Between 1992 and 1998, cargo transported

by the Chiapas railroad was increasing at an average annual rate of 10.5%, moving 965,000 tons by 1998.

Proofs:

a. **C-32-SPA**, p. 2 (SCT, Call for bids for the Concession dated 24 March 1999) ("Las Vías Cortas Chiapas y Mayab se integran en tos términos siguientes: Vía Corta Chiapas: Línea "K", tramo Ixtepec- Cd. Hidalgo, del Km 0.000 al Km 459.434 con una longitud total de 459.434 kilometros, localizado en los estados dede Oaxaca y Chiapas");

b. **C-33-SPA**, pp. 20, 25-26 (Brochure of the Chiapas-Mayab Railway prepared by IXE Grupo Financiero, dated March 1999) (demonstrating that the Chiapas Line plays a vital role in Mexico's transportation infrastructure).

28. Although the Chiapas and Mayab Lines were not connected, a third railroad line ran from one railroad to the other between El Chapo and Ixtepec. The railroad line connecting both railroads is called Istmo de Tehuantepec Railway, an interoceanic corridor which is assigned to and controlled by FIT, a state-owned company, since 1999.

Proofs:

a. **C-33-SPA**, pp. 71-72 (Brochure of the Chiapas-Mayab Railway prepared by IXE Grupo Financiero, dated March 1999) (describing the state of the infrastructure and the freight business in the areas of the Concession).

B. MEXICO AWARDED A CONCESSION OVER THE CHIAPAS-MAYAB RAILWAY TO CFCM

29. Recognizing the importance of the Chiapas-Mayab Railway, on 24 March 1999, the SCT published a call for bids for a thirty-year concession, which included the right to operate the Chiapas-Mayab Railway, the ability to provide public freight services on both the Chiapas and Mayab Lines, as well as the ability to purchase related movable assets (previously defined as the Concession). Under the Concession, the concessionaire would also be able to transport cargo from one railroad to the other by using the Istmo de Tehuantepec Railway.

Proofs:

a. **C-32-SPA** (SCT, Call for bids for the Concession dated 24 March 1999) (showing that Mexico opened a bid for the operation of the Chiapas-Mayab Railway);

30. On 29 April 1999, the SCT amended the call for bids to require the concessionaire to invest an additional MXN $91,600,000 because the Mayab Line was in need of urgent repairs. Consequently, the SCT then postponed the deadline for the filing of proposals in order to allow bidders time to review the updated terms of the bids.

Proofs:

a. C-40-SPA, p. 1 (SCT, Amendments to the call for bids for the Concession, dated 29 April 1999) ("Que toda vez que de conformidad con la evaluación técnica realizada a la vía corta Mayab se desprende que el rezago en el mantenimiento y rehabilitación de la misma, requiere de una inversión inmediata para que se realicen las obras necesarias de rehabilitación para preservar la prestación del servicio ferroviario, el cual es indispensable para el desarrollo económico de la región…").

31. On 25 June 1999, CFCM submitted a bid for the Concession amounting to MXN $141 million payment for the title of the Concession, [redacted].

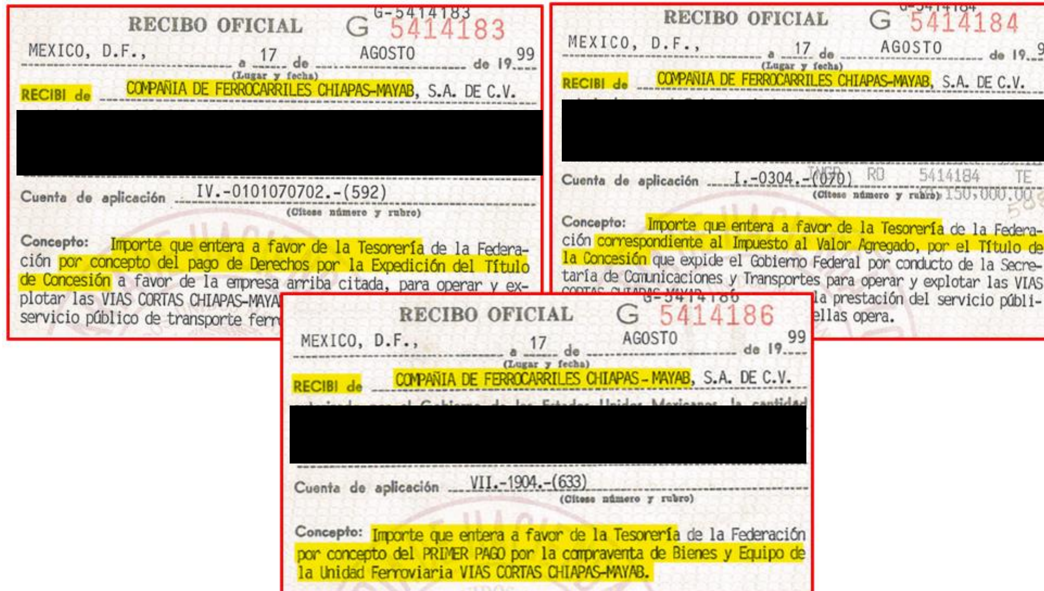
CONCEPTO		MONTO
d)	+ Aprovechamiento por el Monto Total del Título de Concesión de la Vía corta Chiapas-Mayab	141'000,000.00
[redacted]		

Image 4: CFCM's offer for the Concession (C-41-SPA)

Proofs:

a. C-41-SPA (CFCM's Bid for the Concession) (evidencing CFCM [redacted]).

32. On 9 July 1999, the SCT awarded the Concession to CFCM as it was the economically best option and provided the State with the most favorable contracting terms. On 17 August 1999, CFCM paid Mexico MXN $141 million for the title of the Concession, [redacted]


RECIBO OFICIAL G 5414183
MEXICO, D.F., a 17 de AGOSTO de 1999
(Lugar y fecha)
RECIBI de COMPAÑIA DE FERROCARRILES CHIAPAS-MAYAB, S.A. DE C.V.
Cuenta de aplicación IV.-0101070702.-(592)
(Cítese número y rubro)
Concepto: Importe que entera a favor de la Tesorería de la Federación por concepto del pago de Derechos por la Expedición del Título de Concesión a favor de la empresa arriba citada, para operar y explotar las VIAS CORTAS CHIAPAS-MAYA[...] servicio público de transporte ferr[...]

RECIBO OFICIAL G 5414184
MEXICO, D.F., a 17 de AGOSTO de 1999
(Lugar y fecha)
RECIBI de COMPAÑIA DE FERROCARRILES CHIAPAS-MAYAB, S.A. DE C.V.
Cuenta de aplicación I.-0304.-(070)
(Cítese número y rubro)
Concepto: Importe que entera a favor de la Tesorería de la Federación correspondiente al Impuesto al Valor Agregado, por el Título de la Concesión que expide el Gobierno Federal por conducto de la Secretaría de Comunicaciones y Transportes para operar y explotar las VIAS [...] la prestación del servicio públi- [...] ellas opera.

RECIBO OFICIAL G 5414186
MEXICO, D.F., a 17 de AGOSTO de 1999
(Lugar y fecha)
RECIBI de COMPAÑIA DE FERROCARRILES CHIAPAS-MAYAB, S.A. DE C.V.
Cuenta de aplicación VII.-1904.-(633)
(Cítese número y rubro)
Concepto: Importe que entera a favor de la Tesorería de la Federación por concepto del PRIMER PAGO por la compraventa de Bienes y Equipo de la Unidad Ferroviaria VIAS CORTAS CHIAPAS-MAYAB.

Image 5: ████████ for the title of the Concession and related assets (C-42-SPA)

Proofs:

a. C-9-SPA (Official Communication from the SCT to CFCM, declaring CFCM the winner of the public bidding process of the Concession dated 9 July 1999) (evidencing that CFCM was awarded the Concession given its superior economic and technical proposal);

b. C-42-SPA (Payment Certificates issued to CFCM dated 17 August 1999) (indicating that CFCM paid the price of the Concession and the price of the movable assets purchased under the Concession);

c. C-43-SPA (Purchase agreement between the SCT and CFCM dated 17 August 1999) (indicating that CFCM purchased the movable assets related to the Concession);

d. C-44-SPA (Trust agreement between CFCM, Sociedad Nacional de Crédito and the SCT dated 17 August 1999) (evidencing that CFCM created a trust that would manage the funds intended to cover the costs of the rehabilitation works in the Mayab Line);

e. C-205-SPA (Certificate CFCM and the SCT dated 31 August 1999) (showing that Mexico handed over the public assets that form of the Concession to CFCM).

33. Additionally, CFCM and the SCT executed several *actas de entrega recepción* (certificates of delivery and receipt) whereby the SCT handed ownership to CFCM of the movable assets, track equipment, train cars, and locomotives used to operate the Chiapas-Mayab Railway (subject to the completion of the rehabilitation works in the Mayab Line).

Proofs:

a. **C-45-SPA** (Delivery minutes executed by CFCM and the SCT dated August 1999) (showing that the SCT handed over the movable assets found in the Concession's railroad stations to CFCM);
b. **C-46-SPA** (Certificates of delivery and receipt executed by CFCM and the SCT dated August 1999) (showing that the SCT handed over the movable assets found in the Merida and Campeche workshops of the Concession to CFCM);
c. **C-47-SPA** (Certificate of delivery and receipt executed by CFCM and the SCT dated 26 August 1999) (showing that the SCT handed over the movable assets found in the Tonala workshop of the Concession to CFCM);
d. **C-48-SPA** (Certificate of delivery and receipt executed by CFCM and the SCT dated 30 August 1999) (showing that the SCT handed over the track equipment of the Concession to CFCM);
e. **C-49-SPA** (Certificates of delivery and receipt executed by CFCM and the SCT dated August 1999) (showing that the SCT handed over the train cars of the Concession to CFCM);
f. **C-50-SPA** (Certificates of delivery and receipt executed by CFCM and the SCT dated 30 – 31 August 1999) (showing that the SCT handed over the locomotives of the Concession to CFCM);
g. **C-51-SPA** (Certificates of delivery and receipt executed by CFCM and the SCT dated 27 September 1999) (showing that the SCT handed over the chemical lab in Mérida of the Concession to CFCM).

34. On 26 August 1999, the SCT (on behalf of Mexico) and CFCM executed Concession title ("**Concession Agreement**"). Under the Concession Agreement, Mexico granted CFCM the right to operate the 1,549-kilometer-long Chiapas-Mayab Railway, including the strip of land required for the adequate use of the railroads (*derecho de vía*), the traffic control centers, and the railway signs. Moreover, Mexico granted CFCM the right to exploit an extensive list of public domain assets that formed part of the Chiapas-Mayab Railway. Mexico granted these rights to CFCM ***exclusively*** for the ***entire thirty-year duration*** of the Concession.

Proofs:

a. **C-10-SPA**, Sections 1.2.1 and 1.2.2 (Concession Agreement, without exhibits) ("Objeto. Por el presente título se concesiona: 1.2.1. Las vías generales de comunicación ferroviaria, así como su operación y explotación, que corresponde a las Vías Cortas Chiapas y Mayab… Cada vía general de comunicación ferroviaria comprende la Vía Corta, el derecho de vía, los centros de control de tráfico y las señales para la operación ferroviaria; 1.2.2. Los Bienes del dominio público que se describen en el Anexo tres … así como su uso, aprovechamiento y explotación");
b. *Id.*, Section 1.4.1 ("Los derechos a que se refieren los numerales 1.2.1 y 1.2.2 **se otorgan de manera exclusiva**, durante la vigencia del presente título") (emphasis added);

c. **C-39-SPA**, pp. 22-26 (Annex 1) (Concession Agreement, with exhibits) (describing the railroads included in the Chiapas-Mayab Railway);

d. **C-39-SPA**, pp. 28-436 (Annex 3) (Concession, with exhibits) (describing the public domain assets included in the Chiapas-Mayab Railway).

35. Additionally, Mexico granted CFCM the ***exclusive*** right to provide freight services on the Chiapas-Mayab Railway for ***eighteen years***. After that, the SCT could allow freight services by third parties, provided that: (i) it was technically and financially feasible; and (ii) it was in accord with international railway regulations. Moreover, Mexico granted CFCM non-exclusive rights to provide freight services on other railway lines, provided that CFCM acquired a right of way with the corresponding concessionaires.

Proofs:

a. **C-10-SPA**, Section 1.2.3 (Concession Agreement, without exhibits) ("Objeto. Por el presente título se concesiona… 1.2.3. La prestación del servicio público de transporte ferroviario de carga en las Vías Cortas. Asimismo, el Concesionario **podrá prestar el servicio público de transporte ferroviario de carga en las demás vías troncales, vías cortas o ramales** integrantes del Sistema Ferroviario Mexicano, siempre que cuente con derechos de paso o derechos de arrastre") (emphasis added);

b. *Id.*, Section 1.4.2 ("El presente título confiere derechos de exclusividad al Concesionario para prestar el servicio público de transporte ferroviario de carga a que se refiere el primer párrafo del numeral 1.2.3 **por un periodo de dieciocho años contados a partir del inicio de la vigencia del presente título**…Tratándose del servicio de carga, cuando el Concesionario deje de contar con derechos de exclusividad, siempre que sea factible económica y técnicamente, sea congruente con las tendencias internacionales en la regulación ferroviaria y exista reciprocidad, especialmente en el caso de convenios internacionales") (emphasis added);

c. **C-39-SPA**, pp. 570-572 (Annex 10) (Concession Agreement, with exhibits) (describing the right of way that CFCM was entitled to receive under the Concession Agreement).

36. Mexico also granted CFCM rights to provide supplemental services along with its freight services, including the operation of railway terminals to load, unload, and transfer cargo between trains, for the entire thirty-year Concession.

Proofs:

a. **C-10-SPA**, Section 1.3 (Concession Agreement, without exhibits) ("Servicios auxiliares. La presente concesión comprende los permisos para prestar los servicios auxiliares que se indican en el Anexo cinco, en los términos y condiciones que en este título y en el citado Anexo se señalan");

b. *Id*. Section 3.2 ("… Asimismo, el Concesionario tiene derecho para que se le otorguen los derechos de paso y los derechos de

arrastre conforme a los términos y condiciones que se indican en el Anexo diez");

c. **C-39-SPA**, p. 438 (Annex 5) (Concession Agreement, with exhibits) (describing the auxiliary services that CFCM was entitled to provide under the Concession).

37. In cases of *force majeure*, the Concession Agreement allowed the SCT to impose a modality (*modalidad*) on the operation of the Chiapas-Mayab Railway. According to the Railway Service Law and the regulation implementing the Railway Service Law ("**Railway Services Regulation**"), a modality allowed the SCT to take any measure aimed at addressing the effects of the *force majeure* event, provided that the party affected by the modality receives compensation for the damages caused by same.

Proofs:

a. **C-10-SPA**, Section 2.17 (Concession Agreement, without exhibits) ("Modalidades. En caso fortuito o fuerza mayor, la Secretaría estará facultada para imponer modalidades en la operación y explotación de las Vías Cortas, así como en la prestación de los servicios ferroviarios, en los términos establecidos en la Ley y el Reglamento");

b. **CL-13-SPA**, Article 23 (Mexico's Railway Service Law) ("Para atender necesidades derivadas de caso fortuito o de fuerza mayor, la Secretaría estará facultada para imponer modalidades en la operación y explotación de las vías férreas y en la prestación del servicio público de transporte ferroviario, sólo por el tiempo y proporción que resulte estrictamente necesario. **En su caso, el afectado percibirá la indemnización que corresponda por la afectación habida en virtud de la modalidad impuesta**") (emphasis added);

c. **CL-14-SPA**, Article 160 (Mexico's Railway Service Regulation).

38. The Concession Agreement had a term of thirty years, but CFCM could request an extension not exceeding fifty years. Further, the Concession Agreement could be amended, provided that the SCT and CFCM mutually agreed to the amendment and that the amendment was made in accordance with the law.

Proofs:

a. **C-10-SPA**, Section 5.1 (Concession Agreement, without exhibits) ("Vigencia. La presente concesión estará en vigor por treinta años…");

b. *Id.*, Section 5.2 (Concession Agreement, without exhibits) ("Modificación de condiciones. Las condiciones establecidas en el presente título podrán revisarse y modificarse por acuerdo entre la Secretaría y el Concesionario conforme a la Ley, el Reglamento y demás disposiciones aplicables");

c. **CL-13-SPA**, Article 11 (Mexico's Railway Service Law) ("Las concesiones se otorgarán hasta por un plazo de 50 años, y podrán ser prorrogadas, en una o varias ocasiones, hasta por un plazo que en total no exceda de 50 años…").

39. Throughout the term of the Concession, CFCM had to implement a business plan (the "**1999 Business Plan**"), which had to be updated every five years. In the 1999 Business Plan, CFCM set out the minimum projected investments to operate the Concession. [redacted].

Proofs:

a. **C-10-SPA**, Section 2.4 (Concession Agreement, without exhibits) ("Plan de negocios. **El Concesionario deberá ajustarse, como mínimo, a los compromisos de inversión establecidos en el plan de negocios** que, como Anexo siete, forma parte integrante del presente título, el cual deberá actualizarse cada cinco años, remitiéndose la documentación respectiva a la Secretaría, en el entendido de que dicha actualización no deberá tener como efecto la reducción de la inversión o de los compromisos previstos en el plan de negocios original, salvo autorización por escrito de la Secretaría") (emphasis added);

b. **C-39-SPA**, pp. 444-501, 506-558 (Annex 7, Annex 8) (Concession Agreement, with exhibits) (evidencing the business plan presented by CFCM for the operation of the Chiapas-Mayab Railway).

40. The 1999 Business Plan outlined several market strategies aimed at increasing the productivity of the Concession. [redacted].

Proofs:

a. **C-39-SPA**, Annex 7, pp. 8-13 (Concession Agreement, with exhibits) (evidencing the business plan presented by CFCM for the operation of the Chiapas-Mayab Railway).

C. CFCM SUCCESSFULLY OPERATED THE CONCESSION FROM 1999 TO 2005

41. From the outset, CFCM diligently performed its obligations under the Concession Agreement. CFCM's first priority was to address the urgent rehabilitation works required on 150 kilometers of railroad track on the Mayab Line. By April 2001, CFCM had completed all required repairs [redacted].

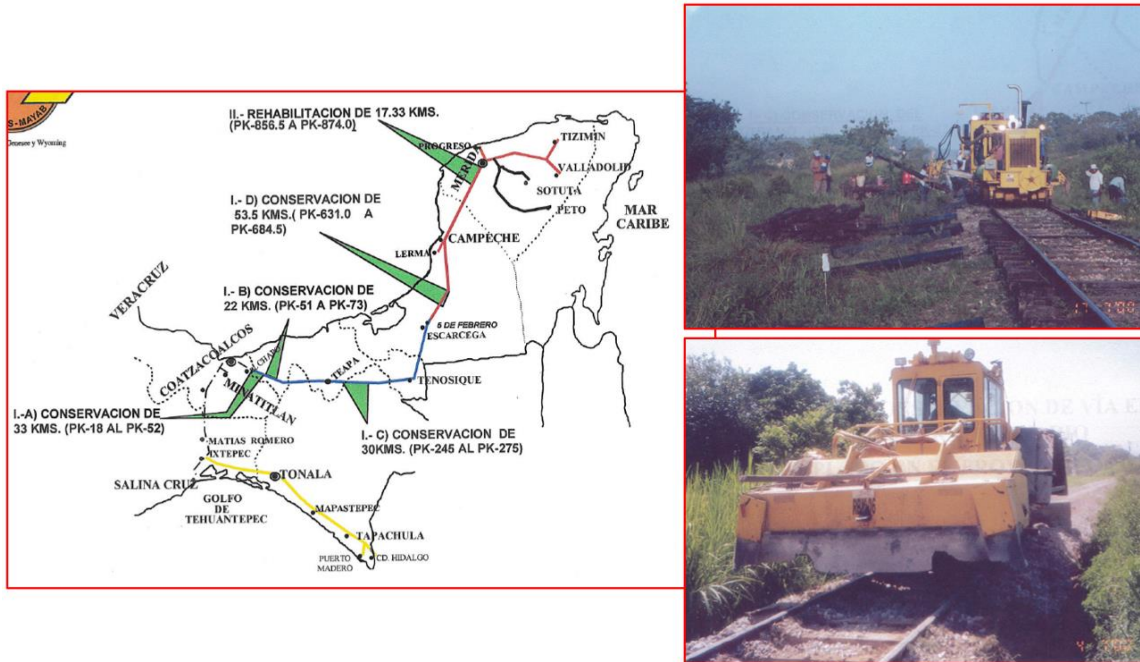


Image 6: Rehabilitation works performed by CFCM in the Mayab Line between 2000 and 2001 (C-53-SPA)

Proofs:

a. C-52-SPA, p. 3 (Letter from CFCM to the SCT dated 23 April 2001) (showing that CFCM completed the urgent rehabilitation works in the Mayab Line required under the Concession);

b. C-53-SPA (Report detailing the rehabilitation and conservation works performed under contract in the years 2000 and 2001 dated April 2001) (showing that CFCM completed the urgent rehabilitation works on the Mayab Line required under the Concession).

42. After verifying the completion of the rehabilitation works, the SCT reimbursed the funds held as guarantee for the completion of these works to CFCM, and transferred the full property of the movable assets purchased by CFCM alongside the Concession.

Proofs:

a. C-54-SPA (Official Letter No. 120.-1225/2001 dated 22 August 2001) (showing the SCT authorized the trust to transfer the balance of the funds available in the irrevocable trust created by CFCM on 17 August 1999 to CFCM because it successfully completed the rehabilitation works on the Mayab Line);

b. **C-55-SPA** (Official Letter No. 5.-753 dated 24 November 2003) (showing the SCT transferred the full property of the movables assets purchased by CFCM together with the Concession).

43. Further, CFCM invested significant amounts into the Concession, beyond the cost of the rehabilitation works performed in the Mayab Line. Indeed, in the first half of 2002, CFCM informed the SCT that it had invested [redacted] and expected to invest [redacted].

Proofs:

a. **C-56-SPA** (Letter No. 000349 from CFCM to the SCT dated 15 March 2002) (showing CFCM expected to invest additional amounts to the Chiapas-Mayab Railroad throughout 2002);
b. **C-57-SPA** (Letter No. 000360 from CFCM to the SCT dated 22 April 2002) (showing CFCM invested [redacted] to the Chiapas-Mayab Railroad throughout 2001).

44. To operate the Concession, CFCM [redacted].

Proofs:

a. **C-58-SPA** (Letter No. 000324 from CFCM to the SCT dated 17 January 2002) (showing CFCM transported [redacted] cargo in 2001, and had [redacted] in operation);
b. **C-59-SPA** (Agreement between CFCM and PEMEX dated 30 January 2002) (showing that CFCM diligently executed the Concession between 1999 and 2005);
c. **C-60-SPA** (Car leasing agreement [redacted] dated 8 August 2001) (showing that CFCM diligently executed the Concession between 1999 and 2005);
d. **C-61-SPA** (Car leasing agreement [redacted] dated 1 December 2003) (showing that CFCM diligently executed the Concession between 1999 and 2005).

45. The operation of the Concession was lucrative. [redacted]

Proofs:

a. **C-62-SPA** (CFCM's 2000-2001 Financial Statements) (demonstrating that the operation of the Concession was profitable and that CFCM complied with its investments commitments);
b. **C-63-SPA** (CFCM's 2001-2002 Financial Statements) (demonstrating that the operation of the Concession was profitable and that CFCM complied with its investments commitments);
c. **C-64-SPA** (CFCM's 2002-2003 Financial Statements) (demonstrating that the operation of the Concession was profitable and that CFCM complied with its investments commitments);
d. **C-65-SPA** (CFCM's 2003-2004 Financial Statements) (demonstrating that the operation of the Concession was profitable and that CFCM complied with its investments commitments);
e. **C-196-SPA** (Chiapas-Mayab Railway White Book) (showing that CFCM successfully operated the Concession as of 1999).

D. Hurricane Stan Damaged the Chiapas-Mayab Railway

46. On 4 October 2005, Hurricane Stan ("**Hurricane Stan**" or "**Stan**") landed in southern Mexico, bringing heavy rains over the steep mountains of the Yucatan Peninsula, resulting in deadly floods and landslides. According to the NASA Earth Observatory, Stan was one of the most devastating hurricanes to hit the region since 1998. According to Mexico's National Disaster Prevention website, Hurricane Stan caused approximately MXN $21 billion worth of damage across the country, with 71% of the total damage and 86 of the 98 reported deaths occurring in the state of Chiapas.

Image 7: Effects of Hurricane Stan in the state of Chiapas (C-66-ENG)

Proofs:

a. **C-66-ENG** (NASA Earth Observatory, "Hurricane Stan Floods Central America" dated 5 October 2005) (evidencing Hurricane Stan was one of the most devastating hurricanes in the Central America's recent history);

b. **C-67-SPA** (Centro Nacional de Prevención de Desastres, "A 15 años de los huracanes Stan y Wilma" dated 20 October 2020) (evidencing Hurricane Stan's disastrous consequences in Mexico).

47. Meteorological forecasts warned of Hurricane Stan only a few days before it would land in Mexico. Despite the short notice, CFCM, aware of the possibility of flooding due to the expected heavy rain, took substantial action to mitigate any potential damage to the Concession's assets, including instructing its personnel to relocate all train cars to the highest altitude zones, where they would be less likely affected. Moreover, CFCM had an insurance policy in place—accepted by the SCT—to cover damage [REDACTED] to the goods and the infrastructure of the Concession.

Proofs:

a. **CWS-2-SPA**, ¶20 (Witness Statement-[REDACTED] [REDACTED]Claim Memorial) ("CFCM contaba con pólizas de seguro por daños a la propiedad hasta por [REDACTED], sobre todos sus bienes y equipos, así como los bienes de la Concesión");

b. **C-197-SPA** (Allianz Insurance Policy [REDACTED] [REDACTED]).

48. Unfortunately, Hurricane Stan was much more devastating than anticipated and compromised the infrastructure of the Concession despite CFCM's best efforts to mitigate losses. On 5 October 2005, CFCM reported to the SCT and other operators of the Mexican railway system that freight services were suspended in portions of the Chiapas Line due to the effects of Hurricane Stan. After conducting an extensive review of the damage suffered, CFCM issued a detailed report indicating the extent of the damage, noting that approximately 280 kilometers of railroad track in the Chiapas Line were obstructed, and estimating the cost of rebuilding the damaged railroads, bridges, and other assets at USD $19.06 million.

Image 8: Pictures of the damage caused by Hurricane Stan in the Chiapas Line (C-69-SPA)

Proofs:

a. **C-68-SPA** (Letter from CFCM to the SCT dated 5 October 2005) (evidencing that CFCM suspended railroad services due to Hurricane Stan);

b. **C-69-SPA** (Report detailing damages sustained by CFCM due to Hurricane Stan, dated October 2005) (evidencing Hurricane Stan caused significant damage to the infrastructure of the Concession);

c. **C-212-SPA** (Fax from CFCM to the SCT dated 4 November 2005) (evidencing that CFCM informed the SCT the urgent need to rebuild the damaged roads and bridges).

49. As a direct consequence of the destruction to the Chiapas Line, CFCM's operations plummeted. On 22 December 2005, CFCM updated the 1999 Business Plan for the years 2005-2009 ("**2005 Business Plan**"). The 2005 Business Plan reflected the severity of the damages caused by Hurricane Stan and its impact on the Concession. Indeed, as the trend lines below reflect, October 2005 marked a substantial deviation of CFCM's historical performance as measured by the number of loaded cars and the number of tons per kilometer transported through the Concession.

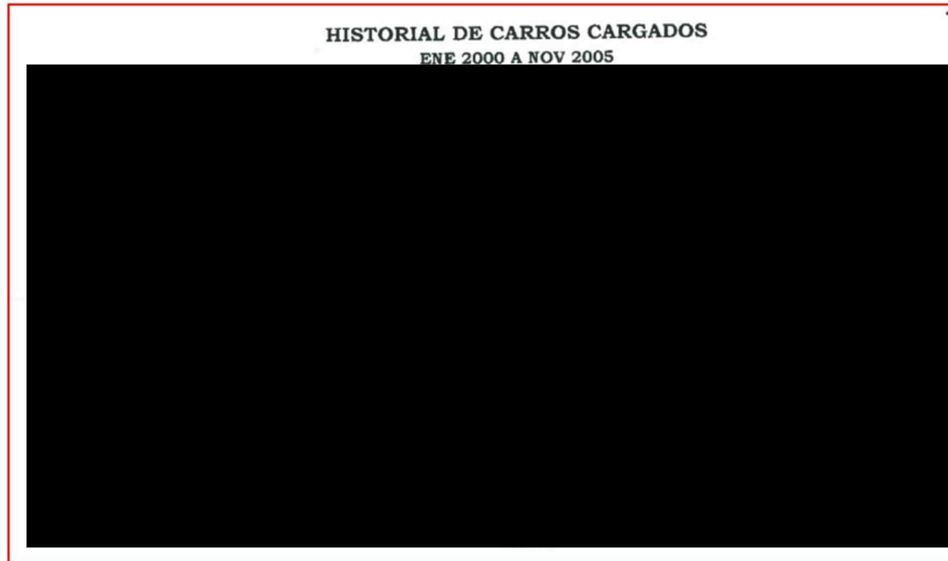


Image 9: CFCM's car traffic history for the years 2000-2005 (C-70-SPA)

Proofs:

a. **C-70-SPA**, pp. 16-17 (Updated business plan issued by CFCM dated 20 December 2005) (reflecting the effects of Hurricane Stan in the operation of the Concession).

50. On 24 January 2006, CFCM informed the SCT that because the damages were the result of a natural disaster, CFCM was not responsible for the cost to repair and rebuild the railroads. In fact, CFCM noted it had complied with its investment commitments under the 1999 Business Plan and had, until that date, invested [redacted] into the Concession. Moreover, CFCM noted that the Railway Service Law permitted interruption of freight services for reasons of a *force majeure* event, which allowed CFCM to validly suspend railroad services because of the damages caused by Hurricane Stan. CFCM also noted that the SCT was empowered to issue a modality until CFCM was able to resume the operation of the Chiapas Line, provided that CFCM be reimbursed for the costs incurred by the modality.

Proofs:

a. **C-71-SPA**, p. 2 (Memorandum from CFCM to the SCT dated 24 January 2006) ("…tanto la Ley, como el Reglamento y el título de la Concesión **prevén la interrupción de dicho servicio en el caso de fuerza mayor**, hasta en tanto exista dicho evento, sin que dicha interrupción pueda considerarse como un incumplimiento…**la SCT puede imponer modalidades a la Empresa para lograr la reanudación de la operación de las Vías Férreas** y de la prestación del Servicio Público de Transporte Ferroviario, y en la medida en que dicha modalidad ocasione un daño a la Empresa, esta tendrá derecho a una indemnización … La Empresa **no se encuentra obligada a reconstruir las Vías Ferreas por los daños sufridos en virtud de un acontecimiento de fuerza mayor**, como ha sido el caso del mencionado huracán 'Stan'") (emphases added);

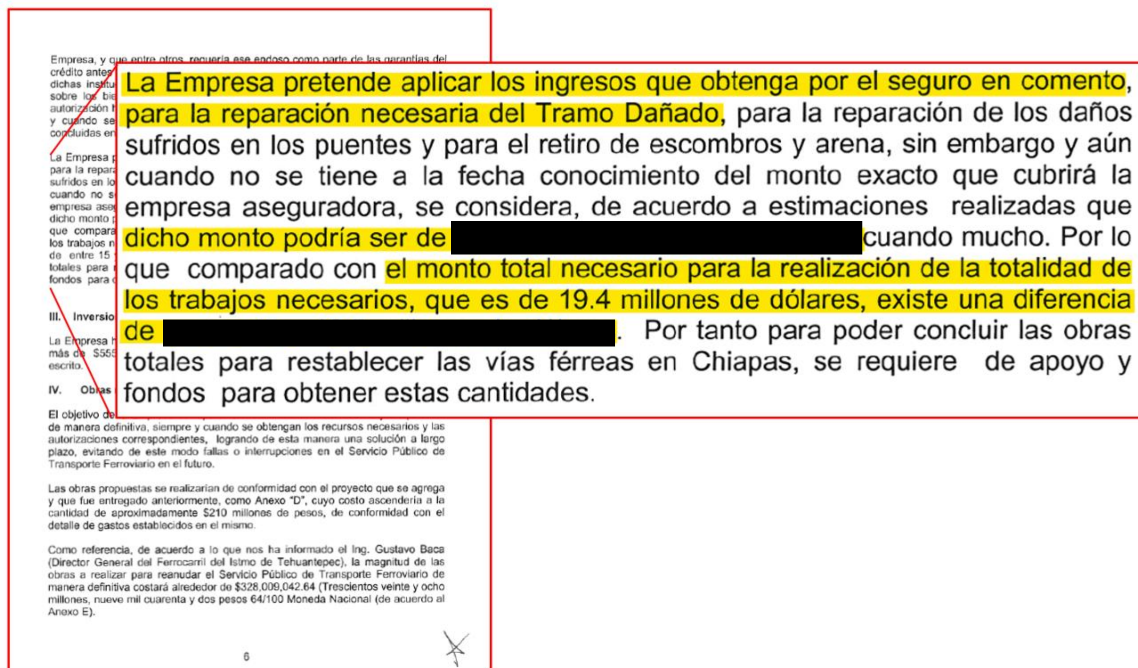
b. *Id.*, p. 6 ("La Empresa ha realizado a la fecha inversiones en los tramos concesionados por más de ██████████, tal y como se desglosa en el anexo C de este escrito").

51. Additionally, CFCM informed the SCT of the condition of the Concession's infrastructure, the steps CFCM was taking to maintain freight services, and the required repairs to restore the Chiapas Line. CFCM noted that: (i) 41 bridges were either damaged or destroyed; (ii) 13.2 kilometers of railroads were either washed away or buried by debris; and (iii) 16 locomotives and 537 freight cars were trapped in debris or destroyed railroads. In fact, CFCM explained that it had invested almost MXN $6 million to dismantle trapped train cars and rebuild them elsewhere and conducted urgent repairs of bridges throughout the railroad. CFCM also informed the SCT that it had provided relief and rescue services to affected communities and carried out emergency works from out-of-pocket funds to reduce the impact of the emergency on its clients.

Proofs:

a. **C-71-SPA**, pp. 3-4 (Memorandum from CFCM to the SCT dated 24 January 2006) (describing the damages caused by Hurricane Stan in the Chiapas Line, the steps CFCM was taking to maintain freight services, and the required repairs to the Chiapas Line).

52. Further, CFCM estimated that the construction to repair the Chiapas Line would cost around USD $19 million. CFCM explained to the SCT that in addition to contributions already made it would contribute the funds that it would recover from the insurance policies, which it calculated to total approximately ██████████. CFCM made it clear, however, that it would need external support to finance the repairs to the Chiapas Line.



La Empresa pretende aplicar los ingresos que obtenga por el seguro en comento, para la reparación necesaria del Tramo Dañado, para la reparación de los daños sufridos en los puentes y para el retiro de escombros y arena, sin embargo y aún cuando no se tiene a la fecha conocimiento del monto exacto que cubrirá la empresa aseguradora, se considera, de acuerdo a estimaciones realizadas que dicho monto podría ser de ██████████ cuando mucho. Por lo que comparado con el monto total necesario para la realización de la totalidad de los trabajos necesarios, que es de 19.4 millones de dólares, existe una diferencia de ██████████. Por tanto para poder concluir las obras totales para restablecer las vías férreas en Chiapas, se requiere de apoyo y fondos para obtener estas cantidades.

de manera definitiva, siempre y cuando se obtengan los recursos necesarios y las autorizaciones correspondientes, logrando de esta manera una solución a largo plazo, evitando de este modo fallas o interrupciones en el Servicio Público de Transporte Ferroviario en el futuro.

Las obras propuestas se realizarían de conformidad con el proyecto que se agrega y que fue entregado anteriormente, como Anexo "D", cuyo costo ascendería a la cantidad de aproximadamente $210 millones de pesos, de conformidad con el detalle de gastos establecidos en el mismo.

Como referencia, de acuerdo a lo que nos ha informado el Ing. Gustavo Baca (Director General del Ferrocarril del Istmo de Tehuantepec), la magnitud de las obras a realizar para reanudar el Servicio Público de Transporte Ferroviario de manera definitiva costará alrededor de $328,009,042.64 (Trescientos veinte y ocho millones, nueve mil cuarenta y dos pesos 64/100 Moneda Nacional (de acuerdo al Anexo E).

6

Image 10: CFCM's memorandum to the SCT detailing the damages caused by Hurricane Stan (C-71-SPA)

Proofs:

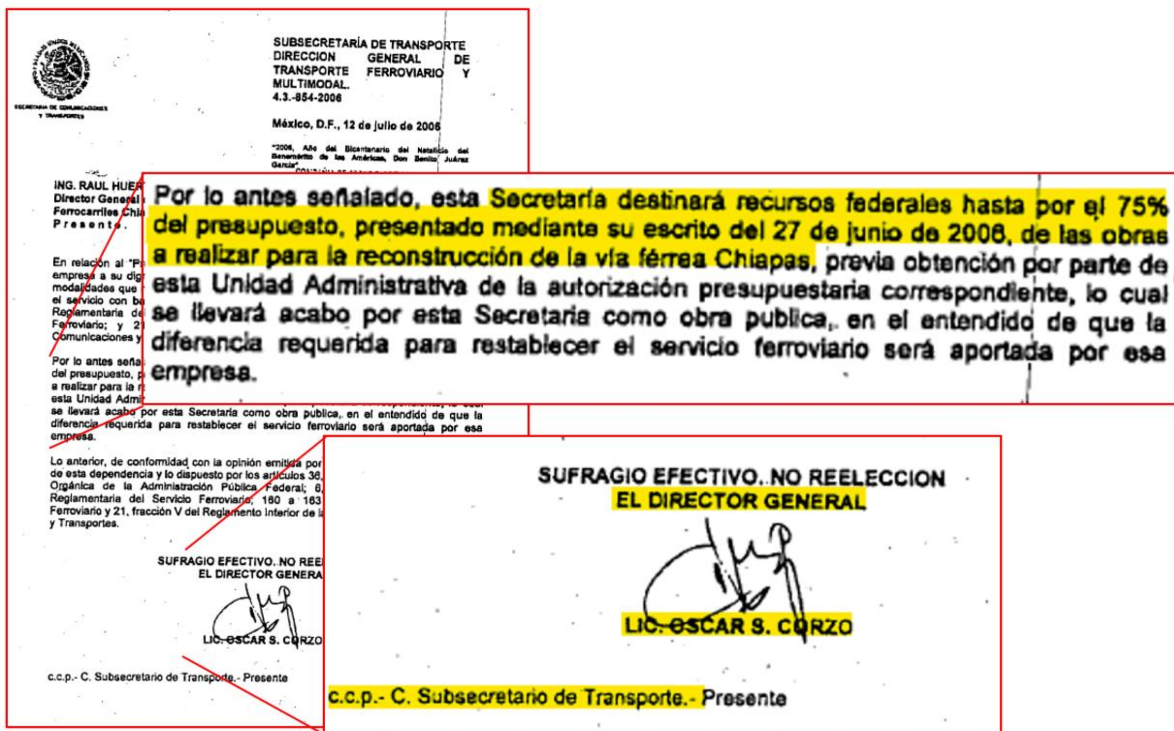
a. **C-71-SPA**, p. 6 (Memorandum from CFCM to the SCT dated 24 January 2006) (describing the amount estimated to complete the repairs to the Chiapas line).

53. From 24 to 26 May 2006, engineers from the SCT visited and inspected the Chiapas Line and verified that CFCM had performed rehabilitation works and corroborated that the railroads, embankments and bridges had suffered severe damage, as previously described by CFCM. Understanding the severity of the *force majeure* event, the SCT requested CFCM to produce a detailed budget and a timeline for the reconstruction of the Chiapas Line.

Proofs:

a. **C-72-SPA** (Minutes of the technical inspection performed by the SCT in the Chiapas Line, dated 26 May 2006) (showing the SCT verified the damages caused by Hurricane Stan on the Chiapas Line).

54. On 28 June 2006, CFCM issued a budget calculating the cost of construction at approximately MXN $208 million. CFCM proposed to cover MXN $50.6 million of the costs to rebuild with funds provided by its insurance policy, while Mexico would cover MXN $157.8 million. Shortly thereafter, on 12 July 2006, the SCT informed CFCM in a letter that it would cover up to 75% of the costs identified in CFCM's reconstruction budget.



SUBSECRETARÍA DE TRANSPORTE
DIRECCION GENERAL DE TRANSPORTE FERROVIARIO Y MULTIMODAL.
4.3.-854-2006

México, D.F., 12 de julio de 2006

Por lo antes señalado, esta Secretaría destinará recursos federales hasta por el 75% del presupuesto, presentado mediante su escrito del 27 de junio de 2006, de las obras a realizar para la reconstrucción de la vía férrea Chiapas, previa obtención por parte de esta Unidad Administrativa de la autorización presupuestaria correspondiente, lo cual se llevará acabo por esta Secretaria como obra publica, en el entendido de que la diferencia requerida para restablecer el servicio ferroviario será aportada por esa empresa.

SUFRAGIO EFECTIVO. NO REELECCION
EL DIRECTOR GENERAL

LIC. OSCAR S. CORZO

c.c.p.- C. Subsecretario de Transporte.- Presente

Image 11: the SCT committed to cover 75% of the reconstruction costs of the Chiapas Line (C-74-SPA)

Proofs:

a. **C-73-SPA** (Letter from CFCM to the SCT presenting a budget for the reconstruction of the Chiapas Line, dated 28 June 2006) (showing that CFCM calculated the cost of the reconstruction of the Chiapas Line at approximately MXN $208 million);
b. **C-74-SPA** (Letter from the SCT to CFCM dated 12 July 2006) (informing that the SCT would cover up to 75% of the repair costs to reconstruct the Chiapas Line);
c. **C-198-SPA** (General Aspects of the General Reconstruction Project of the Chiapas Line) (demonstrating that CFCM designed a general reconstruction project of the Chiapas Line and a plan to make the necessary repairs).

55. CFCM was committed to working with the SCT to restore the Chiapas Line as soon as possible and resume normal freight operations. In furtherance of this, CFCM retained all personnel that worked on the Chiapas Line (despite the closing of the railroad in October 2005) and paid their salaries while negotiations with the SCT were ongoing.

Proofs:

a. **CWS-2-SPA,** ¶24 (Witness Statement-[redacted] [redacted] Claim Memorial) ("Durante los años posteriores al huracán Stan, CFCM mantuvo a su personal contratado y mantuvo sus equipos y materiales disponibles para retomar la operación de la Concesión, sin poder hacerlo debido a la falta de reparación de las Vías").

56. Despite the assurances provided in its correspondence, the SCT did not take any further action to carry out its commitments. On 11 October 2006, one year after Hurricane Stan hit Mexico, Genesee & Wyoming, Inc. ("**G&W**"), the majority shareholder of CFCM at the time, informed the SCT of the dire financial consequences for CFCM arising from the loss of the Chiapas Line. G&W also informed the SCT that CFCM was no longer a viable business despite more than [redacted] in investments since taking over the Concession, and that the government's failure to promptly act in light of this critical situation would likely cause CFCM to go bankrupt.

Proofs:

a. **C-75-SPA** (Letter from G&W to the SCT dated 11 October 2006) ("We presented to you the dire conditions facing FCCM caused by many factors beyond the control of the company… **The most important factor leading to this precarious financial condition was the loss of the Chiapas line due to Hurricane Stan and the inability to reach a conclusion regarding the line's reconstruction after one year of discussion with your office**. This development and the other factors that we presented to you mean that FCCM is no longer a viable business despite millions of dollars of cash investment made by Genesee & Wyoming Inc. ("GWI") since Hurricane Stan in the expectation that a solution to Chiapas was soon forthcoming. As I explained to you, GWI is no longer able to continue to provide cash support under the current conditions…

> **Failure to act on one of these two alternatives will likely cause FCCM to go bankrupt this month**") (emphases added).

57. As G&W's letter reflects, the SCT's delay in providing the promised funding for the necessary repair work on the Chiapas Line severely affected CFCM's finances. The Chiapas Line was practically inoperable and thus not generating sufficient revenues to keep the Concession afloat. Moreover, CFCM paid the salaries of the personnel that previously worked in the Chiapas Line for over a year while awaiting the SCT to rebuild the railroad, which was an additional expense. Further, despite CFCM's best efforts to salvage all train cars affected by Hurricane Stan, many remained trapped. Most of these cars were leased and were subject to fees until returned to the lessors.

Proofs:

a. **CWS-2-SPA,** ¶24 (Witness Statement-[redacted] [redacted]Claim Memorial) ("Durante los años posteriores al huracán Stan, CFCM mantuvo a su personal contratado y mantuvo sus equipos y materiales disponibles para retomar la operación de la Concesión, sin poder hacerlo debido a la falta de reparación de las Vías. Eventualmente, ante la falta de reparación y rehabilitación, Genesee & Wyoming (quien en ese momento controlaba a CFCM) consideró inviable que CFCM continuara soportando el déficit operativo causado por esta situación y emprendió acciones para suspender la prestación del servicio");

b. **C-199-SPA** (Letter 4.3.-1452/2006 dated 23 October 2006) (showing that SCT's delay in providing the promised funding for the necessary repair work on the Chiapas Line severely affected CFCM's finances).

58. On 19 October 2006, CFCM formally requested the SCT to impose a modality on the Concession consisting of: (i) the temporal and partial suspension of railway services in the Concession on the affected portions of the Chiapas Line; (ii) an order instructing CFCM to repair the Chiapas Line, financed by the federal government pursuant to the funds committed by the SCT in its 12 July 2006 letter; and (iii) payment of all damages and costs incurred by CFCM due to the imposition of the modality. On 23 October 2006, the SCT responded to CFCM's communications of 11 and 16 October 2006, and rejected CFCM's request, but confirmed CFCM that ***it had already secured funds*** for the reconstruction project.

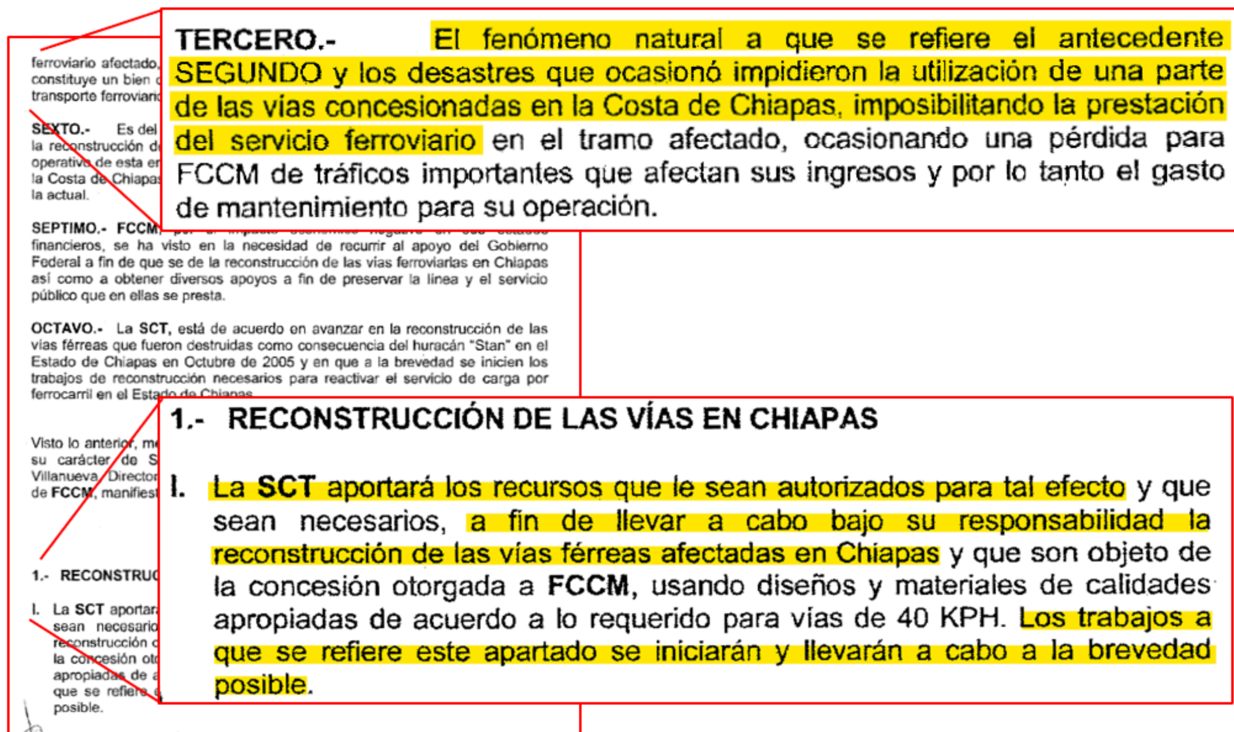
Proofs:

a. **C-75-SPA** (Letter from G&W to the SCT dated 11 October 2006) (evidencing that G&W requested the transfer of the concession to a third party and that the SCT's failure to act will likely cause CFCM to go bankrupt);

b. **C-76-SPA** (Letter from CFCM to the SCT dated 16 October 2006) (indicating that CFCM requested the imposition of a modality on the Concession to address the consequences of Hurricane Stan);

c. **C-77-SPA** (Letter from the SCT to CFCM dated 23 October 2006) (indicating that the SCT represented to CFCM that it had secured funding to finance the reconstruction of the Chiapas Line).

59. More than one year after Hurricane Stan, the SCT agreed to formalize its commitment to rebuild the Chiapas Line. On 30 November 2006, the SCT (on behalf of Mexico), CFCM, and FIT (a state-owned company) signed a letter of intent concerning the restoration of the Chiapas Line ("**LOI**"). In the LOI, the parties recognized that Hurricane Stan made freight services impossible in the affected areas, and that CFCM's financial situation had been affected as a consequence. For that reason, the SCT committed to contribute public funds and carry out the restoration of the Chiapas Line. FIT was designated to lead the construction project. For its part, CFCM committed to providing funds to finance the reconstruction works disbursed by its insurance company, in an amount up to █████████. The terms of the LOI closely followed those of CFCM's reconstruction budget and made good on the SCT's previous express commitment to fund the rebuild of the Chiapas Line.



TERCERO.- El fenómeno natural a que se refiere el antecedente SEGUNDO y los desastres que ocasionó impidieron la utilización de una parte de las vías concesionadas en la Costa de Chiapas, imposibilitando la prestación del servicio ferroviario en el tramo afectado, ocasionando una pérdida para FCCM de tráficos importantes que afectan sus ingresos y por lo tanto el gasto de mantenimiento para su operación.

SEPTIMO.- FCCM [...] financieros, se ha visto en la necesidad de recurrir al apoyo del Gobierno Federal a fin de que se de la reconstrucción de las vías ferroviarias en Chiapas así como a obtener diversos apoyos a fin de preservar la línea y el servicio público que en ellas se presta.

OCTAVO.- La **SCT**, está de acuerdo en avanzar en la reconstrucción de las vías férreas que fueron destruidas como consecuencia del huracán "Stan" en el Estado de Chiapas en Octubre de 2005 y en que a la brevedad se inicien los trabajos de reconstrucción necesarios para reactivar el servicio de carga por ferrocarril en el Estado de Chiapas.

1.- RECONSTRUCCIÓN DE LAS VÍAS EN CHIAPAS

I. La **SCT** aportará los recursos que le sean autorizados para tal efecto y que sean necesarios, a fin de llevar a cabo bajo su responsabilidad la reconstrucción de las vías férreas afectadas en Chiapas y que son objeto de la concesión otorgada a **FCCM**, usando diseños y materiales de calidades apropiadas de acuerdo a lo requerido para vías de 40 KPH. Los trabajos a que se refiere este apartado se iniciarán y llevarán a cabo a la brevedad posible.

Image 12: The SCT's commitment to restore the Chiapas Line in the LOI (C-78-SPA)

Proofs:

a. **C-78-SPA** (Letter of Intent executed by the SCT, CFCM and FIT, dated 30 November 2006) (showing that the CFCM, the SCT and FIT agreed to rebuild the Chiapas Line according to CFCM's June 2006 reconstruction budget).

60. The LOI also expressed other commitments from the SCT made to support CFCM while repair of the Chiapas Line was ongoing, including negotiating several contracts that would

benefit the Mayab Line in the interim and reviewing the Concession Agreement to extend the term of the Concession.

Proofs:

a. **C-78-SPA**, p. 4 (Letter of Intent executed by the SCT, CFCM and FIT, dated 30 November 2006) ("A efecto de apoyar a FCCM por los daños sufridos a causa del caso fortuito (Huracan "STAN"), la SCT llevará a cabo la revisión y análisis de las disposiciones jurídicas aplicables para modificar el titulo de concesión de FCCM, con el objeto ajustar la clausula de vigencia aumentando el plazo original por el tiempo que transcurra entre la fecha del siniestro y la entrega de la vía reparada").

E. MEXICO IMPOSED A "*MODALIDAD*" AND APPOINTED FIT TO OPERATE THE CHIAPAS-MAYAB RAILWAY AND TO REPAIR THE TRACKS

61. CFCM understood that the SCT would promptly follow through on its commitments under the LOI. None of the SCT's commitments, however, came to fruition. In March 2007, four months after the execution of the LOI, FIT's Director General issued its first report of the year to its board of directors, informing them of the relevant aspects of FIT's operations. The thirteen-page document only made a passing reference to FIT's recent appointment to rebuild the Chiapas Line. Indeed, the report only noted that the construction timeline and budget for the Chiapas Line were already in place, but that the project otherwise remained at a standstill because the SCT had not issued any resolutions formally approving the repairs.

Proofs:

a. **C-79-SPA**, p. 8 (Report of the Director General of FIT, dated 1 March 2007) ("Promover ante la SCT la reconstrucción de la vía de la costa de Chiapas**. Ya se presentó presupuesto y programa, se espera la resolución que emita la SCT**… El desastre provocado en la costa de Chiapas por el Huracán STAN, durante el mes de octubre de 2005, ocasionó una pérdida en el manejo de carga por ferrocarril de un 33% con respecto a 2005 y de 43.7% con respecto a lo programado para 2006, situación que prevalece debido a que **aún no se reconstruye la vía férrea de la costa de Chiapas** que además conecta con la frontera de Guatemala") (emphases added).

62. By July 2007, and despite its express and repeated promises, Mexico had taken no material steps to address the necessary repairs to the Chiapas Line, nor had it imposed a modality on the Concession. Left with no other viable options, CFCM suspended the freight services in the Concession.

Proofs:

a. **C-86-SPA**, p. 3 (Official Letter No. 4.3.-1081/2007 dated 10 August 2007) (showing that CFCM suspended freight services in July 2007).

63. The SCT had been well aware of CFCM's operational and financial challenges since, at the very latest, October 2006. In the LOI, the SCT expressly recognized that Hurricane Stan had significantly affected CFCM's revenues. Notwithstanding, absent support from the SCT, CFCM's suspension of freight services was imminent. Despite being duly on notice of CFCM's challenges, the SCT rejected CFCM's application to suspend the services.

Proofs:

a. **C-83-SPA** (Official Letter No. 4.3.-897/2007 dated 3 July 2007) (noting that the SCT objected to CFCM's request to suspend the Concession);
b. **C-84-SPA** (Official Letter No. 4.3.-1032/2007 dated 24 July 2007) (noting that the SCT objected to CFCM's request to suspend the Concession).

64. Moreover, the SCT blamed CFCM for the consequences of the SCT's ***own inaction*** by initiating a proceeding against CFCM for sanctions on 8 August 2007. In addition, the SCT ordered the sequestration of CFCM's assets and designated FIT as the depositary (*depositario*) of same. FIT was also appointed "*verificador especial*," in charge of supervising CFCM as needed to ensure that the railroads were properly restored. In doing so, the SCT not only took control of assets part of the public domain, but sequestered assets owned by CFCM and purchased when it assumed the Concession in 1999.

Proofs:

a. **C-85-SPA**, p. 22 (Official Letter 4.3.-1076/2007 dated 8 August 2007) ("Por lo expuesto y fundado, es de resolverse y se resuelve: PRIMERO.- Se instruye procedimiento de imposición de sanciones a Compañía de Ferrocarriles Chiapas y Mayab, S.A. de C.V.…SEGUNDO.- A fin de garantizar la continuidad en la prestación del servicio público de transporte ferroviario de carga…se dispone el aseguramiento de bienes afectos a la prestación del servicio ferroviario y operación de las vías ferroviarias Chiapas y Mayab…TERCERO.- Se designa a la empresa Ferrocarril del Istmo de Tehuantepec, S.A. de C.V., como depositario de los bienes asegurados y…se designa también a esa empresa como verificador especial");
b. *See supra*, Section III.B.

65. Finally, on 10 August 2007, the SCT imposed a modality on the Concession, ordering FIT to use, operate, and maintain the Chiapas-Mayab Railway ("**Modality**"). The Modality would last until: (i) 31 January 2008; or (ii) a new concession was awarded on the Chiapas-Mayab Railway; or (iii) the SCT informed FIT that the Modality expired, whichever happened first. As

further explained below,[1] the Modality extended through November 2012, when the SCT formally terminated it.

Proofs:

a. **C-86-SPA**, p. 4 (Official Letter No. 4.3.-1081/2007 dated 10 August 2007) ("…ante la necesidad de continuar la operación y explotación de las vías Chiapas y Mayab, y la prestación del servicio público de transporte ferroviario, se impone a FIT modalidad para que opere, explote y mantenga la vías Chiapas y Mayab y preste el servicio público de transporte ferroviarios…hasta que: i) se otorgue concesión respecto de las vías Chiapas y Mayab, o ii) esta Secretaría le notifique que han cesado las causas que motivan el presente oficio, o iii) el 31 de enero de 2008, lo que ocurra primero");

b. **C-87-SPA**, p. 5 (Letter No. 4.3.-121/2009 from the SCT to FIT dated 29 January 2009) (indicating that the SCT extended the Modality imposed on FIT to operate the Chiapas-Mayab Railway until 31 January 2010);

c. **C-88-SPA**, p. 5 (Letter No. 4.3.-143/2010 from the SCT to FIT dated 28 January 2010) (reflecting that the SCT indefinitely extended the Modality imposed on FIT to operate the Chiapas-Mayab Railway);

d. **C-89-SPA**, pp. 2-3 (Letter No. 4.3.-812/2012 from the SCT to FIT dated 29 November 2012) (showing that the SCT lifted the Modality imposed on FIT to operate the Chiapas-Mayab Railway).

66. The Modality was to be a provisional measure that ultimately would lead to the return of the operation of the Concession to CFCM, and would be in place for only the period strictly necessary. The SCT was aware that it could not expect CFCM to continue bearing operational losses without addressing the required track repairs. The Modality was designed to allow for the partial continuation of freight services while repairs were undertaken. It, however, extended beyond any justifiable timeframe.

Proofs:

a. **CWS-3-SPA**, ¶39 (Witness Statement-[redacted] [redacted]Claim Memorial) ("A medida que se extendía la modalidad, comencé a alertar al subsecretario de la SCT—pasaron diferentes funcionarios por ese cargo en aquella época—que esto implicaba un riesgo jurídico importante por la extensión en el tiempo de una medida eminentemente provisional");

b. *Id.*, ¶36 ("La imposición de la modalidad tenía sentido en su momento ya que esta debía limitarse a un periodo de tiempo reducido, y solo el que fuese necesario para responder al evento de fuerza mayor. …La SCT estaba consciente de que no podía esperarse que CFCM continuara asumiendo el déficit operativo

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[1] *See infra*, Section III.G.4.

de la Concesión sin que la SCT reparara las vías. Al mismo tiempo, la SCT no había iniciado los trabajos de reparación y rehabilitación requeridos. Ante esas circunstancias, la modalidad permitía a la SCT garantizar la prestación parcial del servicio de transporte ferroviario en el sureste de México, mientras cumplía con su obligación de realizar las reparaciones necesarias");

c. *Id.*, ¶37 ("A pesar de que la modalidad, en su momento, tenía una explicación razonable, ésta se alargó por un plazo mayor a lo justificable").

F. VIABILIS ACQUIRED CFCM RELYING ON COMMITMENTS MADE BY THE SCT

67. Notwithstanding the challenges impacting the continued operation of the Concession, G&W reached out to the SCT to ensure the continuity of the Concession and informed the SCT of its desire to transfer the Concession to another company. Indeed, the SCT and G&W held several in person meetings at the SCT's offices at the end of 2007 to find a solution to the operation of the Chiapas-Mayab Railway. Mr. [redacted] ("[redacted]"), former [redacted] [redacted] at the SCT participated in these meetings. Mr. [redacted] notes that the SCT proposed that G&W find an investor to acquire CFCM and propose a new business plan in order to resume the operation of the Concession. The SCT also recommended to G&W the names of several companies that it could contact that could be interested in acquiring the Concession, including Viabilis.

Proofs:

a. **CWS-3-SPA**, ¶41 (Witness Statement-[redacted] [redacted] Claim Memorial) ("A fines de 2007, los accionistas de CFCM informaron a la SCT de su deseo de enajenar sus acciones. Ante ello, la SCT no mostró oposición. La SCT informó a los accionistas de CFCM que simplemente debían conseguir a algún inversionista que los sustituyera, para lo cual la SCT sugirió una serie de empresas que podrían estar interesadas en asumir la Concesión, incluyendo entre otras empresas, a Viabilis Holding, S.A. de C.V. ("Viabilis"). La SCT también señaló que la empresa que adquiriera las acciones en CFCM debía cumplir con los términos de la Concesión y presentar un nuevo plan de negocios que fuera aceptable para la SCT").

68. Thus, G&W contacted several companies, including those suggested by the SCT, and offered to sell its shares in CFCM. In January 2008, G&W met with Viabilis, a company headed by Mr. [redacted] [redacted] to discuss the acquisition of CFCM. Viabilis was a known player in the infrastructure sector in Mexico. In 2008, Viabilis was the 50% owner of a concession to build and operate the Los Remedios-Ecatepec highway, a MXN $6 billion project located close to Mexico City. Viabilis showed interest in the project and agreed to hold meetings with G&W and the SCT to determine the status of the Concession and the steps needed to restore its full operation.

Proofs:

a. **C-90-SPA**, p. 2 (Letter from Viabilis to the SCT dated 19 September 2008) ("Durante los meses de enero, febrero y marzo de 2008, Genesee & Wyoming Inc. ("G&W"), empresa propietaria (directamente y/o a través de distintas subsidiarias o afiliadas) de acciones representativas del 100% (cien por ciento) del capital social de CFCM (las "Acciones"), y Viabilis Holding, S.A. de C.V. ("Viabilis"), sostuvieron diversas reuniones de trabajo con usted y con otros servidores públicos de la SCT y del FIT, a fin de analizar la posibilidad y conveniencia de que Viabilis tomara el control del proyecto, mediante la adquisición de las Acciones y la aportación de recursos frescos para el mejoramiento de la vía en la línea del Mayab").

69. Between January and March of 2008, CFCM and Viabilis held several meetings with Óscar Corzo Cruz ("**Mr. Corzo**"), then Director General of Multimodal and Railroad Transport of the SCT, to discuss terms for the acquisition of CFCM. FIT also participated in the meetings as the current operator of the Chiapas-Mayab Railway under the Modality. In the meetings, Viabilis committed to invest to improve the quality of the Mayab Line. In exchange, the SCT committed to discontinue all judicial and administrative proceedings initiated against CFCM, rebuild the Chiapas Line, return its control to CFCM in 2009, and extend the term of the Concession Agreement.

Proofs:

a. **C-90-SPA**, pp. 2-3 (Letter from Viabilis to the SCT dated 19 September 2008) ("Para tales efectos, **la SCT se comprometió, entre otras cosas, a resolver definitivamente el Procedimiento de Sanción, terminar los procedimientos legales en contra de CFCM, reconstruir la Línea Chiapas y entregarla al concesionario durante el primer semestre de 2009, así como a autorizar una modificación a la Concesión**, de modo que los términos de esta fueran similares a los del resto de las concesiones otorgadas por la SCT") (emphases added).

70. Relying on the SCT's representations, on 14 March 2008, G&W and Viabilis informed the SCT about a preliminary agreement for G&W to sell the majority of CFCM's shares to Viabilis. Additionally, Viabilis commissioned an inspection of the Mayab Line to [redacted] [redacted] on 30 April 2008. [redacted] conducted a thorough inspection of the Mayab Line, reviewing in detail the state of almost 900 kilometers of railroads ("**Technical Due Diligence**"). Given that the SCT had committed to rebuilding the Chiapas Line, Viabilis did not conduct a technical due diligence of the Chiapas Line.

Proofs:

a. **CWS-2-SPA**, ¶29 (Witness Statement-[redacted] [redacted]Claim Memorial) ("En 2008, Viabilis contrató los servicios de [redacted] [redacted] para realizar un dictamen

sobre la situación de la Vía Mayab y efectuar una evaluación de la inversión necesaria para operar la misma a 30 kilómetros por hora. La línea de Chiapas no se incluyó en el estudio porque existía el compromiso de la SCT de reconstruir los daños que la misma sufrió tras el paso del Huracán Stan");

b. **C-92-SPA** (Railroad Inspection and Report issued by [redacted] [redacted] de Mexico to Viabilis dated 29 July 2008) (demonstrating that Viabilis conducted a detailed technical due diligence on the state of the Mayab Line);

c. **C-93-SPA** (Railroad Inspection and Report issued by [redacted] [redacted] de Mexico to Viabilis dated 29 July 2008, Annex 1) (showing that the Technical Due Diligence thoroughly inspected the state of the Mayab Line);

d. **C-213-SPA** (Letter from G&W and Viabilis to the SCT) (demonstrating that G&W and Viabilis expressed to the SCT their intent to comply with the conditions imposed by the SCT).

71. According to the results of the Technical Due Diligence, improving the Mayab Line to allow train cars to operate at faster speeds would cost approximately USD $75 million over a seven-year schedule: USD $31.6 million in priority repairs to be executed within the first three years of operation; and USD $43.8 million in further improvements to the Mayab Line in years three to seven.

Proofs:

a. **C-94-SPA** (Railroad Inspection and Report issued by [redacted] [redacted] de Mexico to Viabilis dated 29 July 2008, Annex 2) (demonstrating that [redacted] calculated a budget to improve the Mayab Line totaling USD $75 million);

b. **CWS-2-SPA**, ¶29 (Witness Statement-[redacted] [redacted] Claim Memorial) ("El 29 de julio de 2008, [redacted] proporcionó a Viabilis su dictamen en el que, entre otras cuestiones, realizó una serie de recomendaciones a implementar en materia de equipo, material y trabajos de ingeniería, para aumentar la velocidad del servicio de transporte a 30 kilómetros por hora… Entre otras cuestiones, [redacted] propuso un programa de rehabilitación para la línea Mayab con las inversiones necesarias para financiarlo").

72. Following this and other due diligence, G&W, Viabilis and the SCT held further meetings to discuss Viabilis' draft business plan for the Concession. In these meetings, the SCT agreed to Viabilis' business plan, and requested additional information.

Proofs:

a. **C-90-SPA**, p. 3 (Letter from Viabilis to the SCT dated 19 September 2008) ("Posteriormente, en cumplimiento de los acuerdos alcanzados, **Viabilis presentó a usted** y a otros servidores públicos de la SCT, un **proyecto de nuevo plan de negocios de CFCM**…con el fin de mejorar el estado en el que se encuentran actualmente tanto la vía del Mayab como el equipo tractivo, así como para incrementar la velocidad y en general en aras de mejorar la prestación del servicio ferroviario.

> En diversas reuniones de trabajo, **la SCT manifestó su conformidad con el proyecto de plan de negocios referido** y solicitó, por su digno conducto, que **Viabilis acreditara ante la SCT su capacidad financiera y operativa**, esta última mediante la incorporación de un operador de prestigio como socio del concesionario o mediante la contratación de un operador de prestigio que prestara el servicio correspondiente") (emphases added).

73. Viabilis believed in the Concession. If the SCT honored its previous commitments to repair the Chiapas Line and extended the term of the Concession, then the Chiapas-Mayab Railway would be a very lucrative investment. Thus, based on the SCT's representations and the Technical Due Diligence, Viabilis and G&W (together with GW Servicios S.A. de C.V., and GW CM Holdings Inc.) executed a first share purchase agreement for the sale of CFCM's shares on 4 July 2008.

Proofs:

a. **CWS-2-SPA**, ¶26 (Witness Statement-[redacted] [redacted]Claim Memorial) ("El acuerdo se celebró inicialmente el 4 de julio de 2008 y la transacción se cerró el 21 de agosto de 2009");

b. **C-95-SPA**, p. 4 (Amendment to the Conditional Share Purchase Agreement dated 7 November 2008) ("Con fecha 4 de julio de 2008, las Partes celebraron este Contrato de Compraventa de Acciones sujeto a Condición Suspensiva (el 'Contrato')").

74. The SCT, however, stalled Viabilis' acquisition of CFCM. From September to November of 2008, the SCT requested additional documentation to approve the restitution of the Concession to CFCM, which Viabilis provided promptly in writing. To illustrate, Viabilis presented, at the SCT's request, letters of support from [redacted] as a technical partner to operate the Concession, and [redacted] [redacted], as a financing partner. Later, Viabilis would replace [redacted] with [redacted] Inc. ([redacted] as a technical partner. In short, the SCT approved and had full knowledge of Viabilis and its capabilities and did not object to its acquisition.

Proofs:

a. **C-96-SPA** (Letter from Viabilis to the SCT dated 5 September 2008) (reflecting that Viabilis secured financing and technical support to take over CFCM's control);

b. **C-90-SPA** (Letter from Viabilis to the SCT dated 19 September 2008) ("Desde hace varios meses, Viabilis acreditó ante la SCT su capacidad financiera y operativa, en los términos antes señalados e incluso manifestó su disposición de garantizar en términos de mercado el cumplimiento de la obligación a su cargo, consistente en aportar los recursos previstos en el proyecto de plan de negocios. En ese sentido, …Viabilis presentó a la SCT: (i) una carta … en la que [redacted] [redacted] S.A., manifiesta que otorgará el

financiamiento requerido …; y (ii) una carta … en la que [redacted] confirma que prestará a Viabilis los servicios de asesoría técnica requeridos…");

c. **C-97-SPA** (Letter from Viabilis to the SCT dated 26 September 2008) (indicating that Viabilis requested access to all the information pertaining to the Concession and/or CFCM present in Mexico's Railroad Registry);

d. **C-98-SPA** (Letter from Viabilis to the SCT dated 3 October 2008) (showing that Viabilis secured [redacted] as technical support to take over CFCM's control);

e. **C-99-SPA** (Letter from Viabilis to the SCT dated 26 November 2008) (showing that Viabilis confirmed the execution of the share purchase agreement to the SCT).

75. Regrettably, the SCT's additional requests delayed the execution of the share purchase agreement ***eleven times***. Thus, on 7 November 2008, Viabilis and G&W substituted the initial share purchase agreement for an amended version (the "**Viabilis SPA**").

Proofs:

a. **C-95-SPA**, Section Two (Amendment to the Conditional Share Purchase Agreement dated 7 November 2008) (demonstrating that Viabilis agreed to purchase CFCMs control).

76. Throughout 2009, the SCT and Viabilis held additional meetings to discuss the acquisition of CFCM and the commitments that each party would undertake to ensure the resumed operations of the Chiapas-Mayab Railway. In these meetings, the SCT reaffirmed its previous commitments of bearing financial responsibility for the construction of and repairs to the Chiapas Line. Additionally, the SCT reassured Viabilis that it would not oppose CFCM's acquisition and that it would extend the term of the Concession. The SCT did, however, request that Viabilis prepare an updated, more detailed business plan to operate the Concession that would ensure the profitability of the project in the long term.

Proofs:

a. **CWS-3-SPA**, ¶41 (Witness Statement-[redacted] [redacted]Claim Memorial) ("…los accionistas de CFCM informaron a la SCT de su deseo de enajenar sus acciones. Ante ello, la SCT no mostró oposición. … La SCT también señaló que la empresa que adquiriera las acciones en CFCM debía cumplir con los términos de la Concesión y presentar un nuevo plan de negocios que fuera aceptable para la SCT");

b. **C-213-SPA** (Letter from G&W and Viabilis to the SCT) (demonstrating that G&W and Viabilis expressed to the SCT their intent to comply with the conditions imposed by the SCT).

77. Satisfied by these conditions, and in reliance of the SCT's commitments, Viabilis and G&W ultimately closed the Viabilis SPA [redacted].

Proofs:

a. **C-100-SPA** (Letter from Viabilis and G&W to the SCT dated 21 August 2009) (indicating that Viabilis and Mr. ████ ████ assumed full control of CFCM).

G. THE SCT COMMITTED TO RETURN THE CONCESSION TO CFCM

78. Following Viabilis' acquisition, CFCM and the SCT negotiated and agreed to the return of the Concession to CFCM. In that context, CFCM took several steps to be ready to operate the Concession, as soon as possible. CFCM prepared a detailed market study of the operation of the Concession and began negotiations to recover the operation of the Chiapas-Mayab Railway with the SCT and FIT. As a result of these measures, the SCT agreed to return the Concession and its assets to CFCM, and to extend the term of the Concession Agreement for an additional twenty years.

Proofs:

a. *See infra*, Sections III.G.1 – III.G.4.

1) CFCM Prepared a Detailed Market Study of the Operation of the Concession

79. In response to the SCT' request, CFCM sought proposals from international consulting companies to create projections of freight traffic demand for the Concession, and develop a business plan to operate same. Viabilis accepted a proposal from ████████████ ████ (██████ on 21 January 2010. According to their website, ████ is a global logistics and transport consultancy that has provided comprehensive services since 1988, ranging from strategy development to implementation, covering the entire life cycle of businesses in the transport infrastructure, territorial development, and logistics industries for both the public and private sectors.

Proofs:

a. **C-101-SPA** (Letter from Viabilis to ████ dated 21 January 2010) (indicating that Viabilis hired ████ to conduct an updated business plan);

b. **C-204-ENG** (████ website, available at ████ Global business and strategy consulting firm (██████████)) (evidencing that ████ is a global logistics and transport consultancy that has provided comprehensive services since 1988).

80. As part of its services, ████ conducted independent site visits throughout the Chiapas-Mayab Railway. During its visits, ████ interviewed past and potential clients, including the nautical ports that operated close to the Chiapas-Mayab Railway that utilized the railroads, logistics companies operating in the surrounding area, and other parties interested in using the Concession's infrastructure.

Proofs:

a. **C-103-SPA**, p. 36 (Study of Rail Freight Demand prepared by ████ for CFCM, dated June 2010) (showing that ████ interviewed eleven companies operating in sectors likely to use rail freight services, including some of CFCM's former clients).

81. In June 2010, ████ issued its analysis of the demand for rail freight services in the region of the Concession (the "████ **Report**"). The ████ Report included a comprehensive study of the macroeconomic outlook of the "zone of influence" of the Chiapas-Mayab Railway, the expected future demand for rail freight services in the region of the Concession, and the expected evolution of the main industries serviced by the Concession. On that basis, ████ modeled traffic projections for the Concession, and prepared a preliminary business plan.

Proofs:

a. **C-103-SPA** (Study of Rail Freight Demand prepared by ████ for CFCM, dated June 2010) (showing that ████ performed a comprehensive demand study, including expected future demand and expected evolution of main industries);
b. **C-102-SPA** (Business Plan prepared by ████ for CFCM, dated June 2010) (showing that ████ prepared a preliminary business plan with modeled traffic projections for the Concession).

82. The conclusions of the ████ Report were promising. The ████ Report emphasized that the zone of the Concession was highly influenced by the petroleum industry (particularly in the states of Campeche and Veracruz), as well as commerce and the manufacturing, transport, food, and chemical industries. Additionally, the Chiapas Line had a high exposure to foreign trade with Guatemala. The ████ Report also indicated that freight transport through rail in Mexico had kept a constant growth trajectory in recent years. In the case of the Concession, ██.

Proofs:

a. **C-103-SPA**, pp. 10-14 (Study of Rail Freight Demand prepared by ████ for CFCM, dated June 2010) (noting the prevalent industries in the zone of influence of the Concession);
b. *Id.*, pp. 23, 27 (noting growth trends in freight traffic in Mexico as well as the prevalent industries in the zone of influence of the Concession).

83. As the ████ Report explained, the close proximity of the Concession to major nautical ports was another key driver of freight demand, which made the Concession a highly

valuable asset. To illustrate, [redacted]

Proofs:

a. **C-103-SPA**, pp. 29-30 (Study of Rail Freight Demand prepared by [redacted] for CFCM, dated June 2010) (showing the origins and destinations of freight flows in the Concession).

84. Significantly, the [redacted] Report identified a large segment of freight transported via highways that was highly susceptible to rail freight. The [redacted] Report in fact noted that [redacted] freight transported through highways were shipped in high volumes and in high concentration, which made them ideal for rail freight transport. [redacted].

Proofs:

a. **C-103-SPA**, p. 32 (Study of Rail Freight Demand prepared by [redacted] for CFCM, dated June 2010) (showing that [redacted] freight transported through highways was highly susceptible to be transported via rail).

85. Additionally, the [redacted] Report identified a solid network of producers of cement, grain, beer, and other products in the area of the Concession. [redacted]. The presence of these industries in the region ensured stable, long-term demand for rail freight in the Concession.

[2] "TKM" means net tons per kilometer, and is a traffic measurement unit which considers weight and distance and it is computed as the product between the net tons of load transported by train and the number of kilometers over which the load is transported.

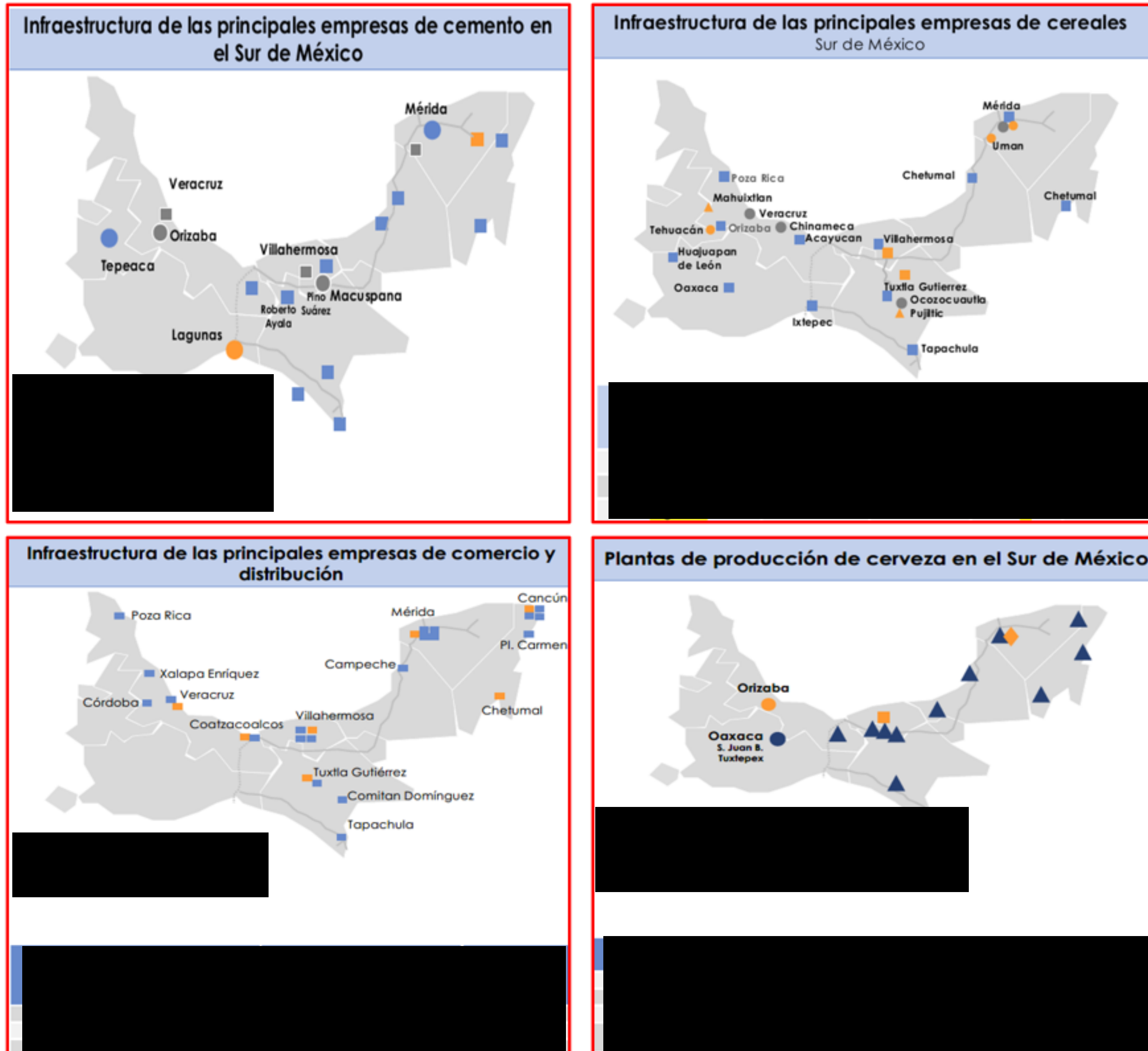


Image 13: Location of cement, grain, and beer producers, as well as retail stores in the region of the Concession according to the ███ Report (C-103-SPA)

Proofs:

a. C-103-SPA, pp. 43, 51, 53, 60 (Study of Rail Freight Demand prepared by ███ for CFCM, dated June 2010) (showing the existence of a solid of network of cement, grain, and beer producers, as well as retail stores in the region of the Concession).

86. Considering these circumstances, ███ estimated that the potential freight traffic for the Concession totaled ███ ███ ███. Additionally, ███ calculated that CFCM would capture additional lines of business ███ ███. This meant that the CFCM's operation would yield ███

█████████████████████ during the lifetime of the Concession. The ramp-up in freight services would be rapid in the case of traditional products and clients already serviced by the Concession. New products, however, would take longer to develop and were estimated to bring additional freight traffic starting on the fifth year of operation.

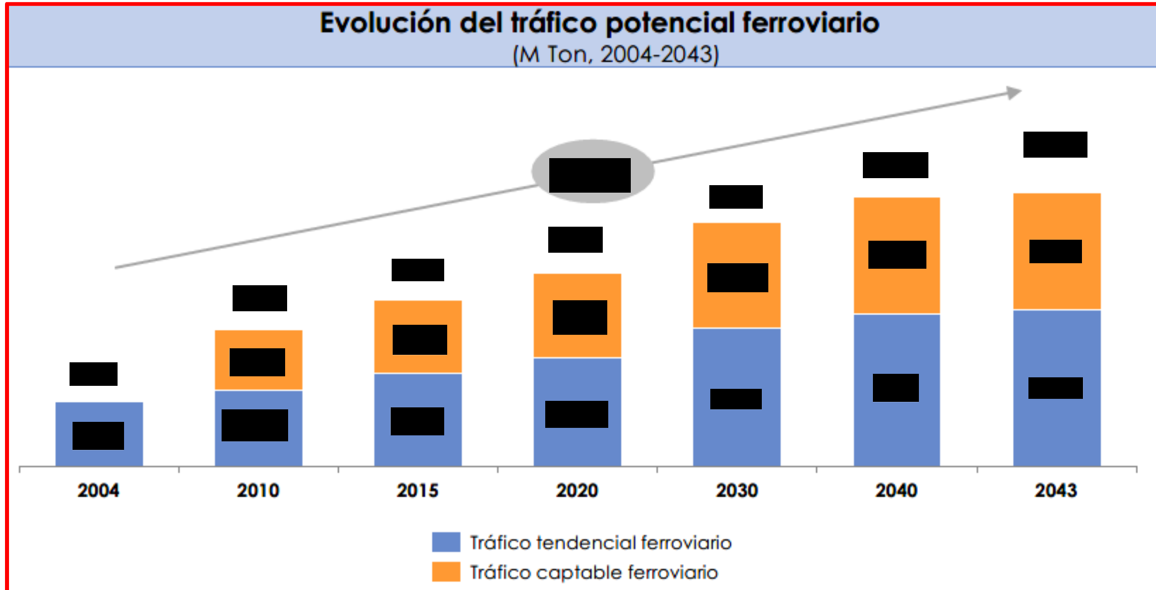


Image 14: Freight traffic estimates according to the ███ Report (C-103-SPA)

Proofs:

a. **C-103-SPA**, pp. 75, 78 (Study of Rail Freight Demand prepared by ███ for CFCM, dated June 2010) (showing freight traffic estimates for the Concession).

87. Based on these conservative freight traffic estimates, the ███ Report included a preliminary business plan that, as discussed below, was later revised with SCT's input.

Proofs:

a. **C-102-SPA** (Business Plan prepared by ███ for CFCM, dated June 2010) (showing that ███ prepared a preliminary business plan with modeled traffic projections for the Concession).

2) CFCM Negotiated the Restitution of the Chiapas-Mayab Railway with the SCT and FIT

88. In parallel, as the ███ study of the Chiapas-Mayab Railway was ongoing, CFCM contacted the SCT and FIT to meet and negotiate the new business plan together with a plan to restore the operation of the Concession to CFCM. As part of this process, on 29 January 2010, CFCM requested the SCT to abide by its commitment to repair the Chiapas Line and demanded payment for the use of CFCM's goods and equipment to operate the Chiapas-Mayab Railway throughout the term of the Modality. On 3 and 5 February 2010, CFCM sent additional letters to the SCT to coordinate meetings in order to discuss these matters. Without receiving any answer, on 26 March 2010, CFCM sent another communication reiterating its requests.

Proofs:

a. **C-104-SPA** (Letter from Viabilis to the SCT dated 29 January 2010) (showing that CFCM requested the SCT to abide by its commitments to repair the Chiapas Lines);
b. **C-105-SPA** (Letter from CFCM to the SCT dated 3 February 2010) (showing that CFCM pushed forward meetings with the SCT to negotiate the restitution of the Concession);
c. **C-106-SPA** (Letter from CFCM to the SCT dated 5 February 2010) (showing that CFCM pushed forward meetings with the SCT to negotiate the restitution of the Concession);
d. **C-81-SPA** (Letter from CFCM to the SCT dated 26 March 2010 (showing that CFCM reiterated its requests and pushed forward meetings with the SCT to negotiate the restitution of the Concession).

89. The SCT took several months to consider CFCM's request. On 25 April 2011, CFCM and FIT finally initiated an inspection process to determine whether the Concession and CFCM's assets were in good condition. The inspection process took over a month, and included the review of: (i) locomotives, their maintenance schedule and related equipment; (ii) railway repair works undergone by FIT throughout the operation of the Modality; (iii) train cars; (iv) vehicles; (v) the telecommunications infrastructure of the Concession; (vi) railroad materials; (vii) movable assets; (viii) workshops; and inventories of other matters.

Proofs:

a. **CWS-2-SPA**, ¶33 (Witness Statement-███ ███Claim Memorial) ("Como parte de mi proceso de revisión de la Concesión, tuve conocimiento de ciertas inspecciones realizadas en 2011, de manera conjunta entre el FIT y CFCM, de los bienes, materiales y equipo bajo el control del FIT, así como de ciertos trabajos realizados por el FIT en las Vías. Este proceso de inspección se desarrolló en el marco de las negociaciones que mencioné en el punto anterior para confeccionar un nuevo plan de negocios que fuera viable a criterio de la SCT y CFCM. El resultado principal de las inspecciones del año 2011 fue tener una lista única de todos los bienes, materiales y equipo que la SCT había asegurado y que

se encontraban bajo el control del FIT para operar la Concesión desde 2007, mismos que CFCM solicitaba que fueran devueltos como parte de las premisas de partida para el desarrollo del nuevo plan de negocios");

b. **CWS-3-SPA**, ¶49 (Witness Statement-[redacted] [redacted]Claim Memorial) ("Entre otras cuestiones, la SCT y CFCM acordaron realizar una serie de inspecciones sobre los bienes, materiales y equipo de CFCM que se encontraban asegurados por la SCT y en posesión del FIT, así como una inspección sobre el estado físico de las vías Chiapas y Mayab. Estas inspecciones se llevaron a cabo entre abril y mayo de 2011, en conjunto por personal de CFCM, la SCT y el FIT.");

c. **C-107-SPA** (Certificate of the start of the inspection process executed between FIT and CFCM, dated 25 April 2011) (showing that CFCM and FIT inspected the assets of the Concession in FIT's custody);

d. **C-108-SPA** (Inspection Certificates for the locomotives and related equipment in FIT's custody, from 27 April to 27 May 2011) (reflecting that CFCM and FIT inspected the assets of the Concession in FIT's custody);

e. **C-109-SPA** (Inspection Certificates for repair works undergone by FIT throughout the operation of the Modality, from 25 April to 27 May 2011) (reflecting that CFCM and FIT inspected the assets of the Concession in FIT's custody);

f. **C-110-SPA** (Inspection Certificates for train cars in FIT's custody, from 26 April to 21 May 2011) (reflecting that CFCM and FIT inspected the assets of the Concession in FIT's custody);

g. **C-111-SPA** (Inspection Certificates for vehicles in FIT's custody, from 2 to 18 May 2011) (reflecting that CFCM and FIT inspected the assets of the Concession in FIT's custody);

h. **C-112-SPA** (Inspection Certificates for the telecommunications infrastructure in FIT's custody, from 28 April to 20 May 2011) (reflecting that CFCM and FIT inspected the assets of the Concession in FIT's custody);

i. **C-113-SPA** (Inspection Certificates for railroad materials in FIT's custody, from 6 to 13 May 2011) (reflecting that CFCM and FIT inspected the assets of the Concession in FIT's custody);

j. **C-114-SPA** (Inspection Certificates for machinery in FIT's custody, from 4 to 20 May 2011) (reflecting that CFCM and FIT inspected the assets of the Concession in FIT's custody);

k. **C-115-SPA** (Inspection Certificate for movable assets in FIT's custody, from 30 April to 20 May 2011) (reflecting that CFCM and FIT inspected the assets of the Concession in FIT's custody);

l. **C-116-SPA** (Inspection Certificate for "Cores" inventory in FIT's custody, dated 27 May 2011) (reflecting that CFCM and FIT inspected the assets of the Concession in FIT's custody);

m. **C-117-SPA** (Inspection Certificate for telemetry equipment and other assets in FIT's custody, from 11 to 13 May 2011) (reflecting that CFCM and FIT inspected the assets of the Concession in FIT's custody);

n. **C-214-SPA** (Inspection Certificate for pumping and diesel facilities in FIT's custody, dated 27 May 2011) (reflecting that

CFCM and FIT inspected the assets of the Concession in FIT's custody);

o. **C-215-SPA** (Inspection Certificate for environmental control, dated 25 May 2011) (reflecting that CFCM and FIT inspected the assets of the Concession in FIT's custody);

p. **C-216-SPA** (Inspection Certificate for inventories in Mérida's general warehouse in FIT's custody, dated 18 May 2011) (reflecting that CFCM and FIT inspected the assets of the Concession in FIT's custody);

q. **C-217-SPA** (Inspection Certificate for special equipment in FIT's custody, dated 18 May 2011) (reflecting that CFCM and FIT inspected the assets of the Concession in FIT's custody);

r. **C-218-SPA** (Inspection Certificate for the train workshop in Merida in FIT's control, dated 18 May 2011) (reflecting that CFCM and FIT inspected the assets of the Concession in FIT's custody);

s. **C-219-SPA** (Inspection Certificate for consumables inventory at Merida's general warehouse in FIT's custody, dated 18 May 2011) (reflecting that CFCM and FIT inspected the assets of the Concession in FIT's custody);

t. **C-220-SPA** (Inspection Certificate for computing and telecommunications equipment in FIT's at Merida's general warehouse in FIT's custody, dated 18 May 2011) (reflecting that CFCM and FIT inspected the assets of the Concession in FIT's custody).

3) CFCM and the SCT agreed on a Business Plan to Run the Concession

90. Based on the Technical Due Diligence prepared by ███████[3] the ████ Report[4] and all the inspections conducted by the SCT and FIT, CFCM and the SCT held several additional meetings designed to agree on a comprehensive business plan that would ensure the Concession's financial prosperity. In doing so, the parties were mindful of the SCT's past commitments to rebuild the Chiapas Line and to extend the term of the Concession to fifty years.

Proofs:

a. **CWS-2-SPA**, ¶50 (Witness Statement-████████████████ ██████Claim Memorial) ("50. Bajo la dirección del Licenciado Duarte, la SCT también realizó una serie de revisiones y estableció una serie de mesas de trabajo para evaluar y revisar el plan de negocios que la SCT había solicitado a CFCM para la devolución de la operación y explotación de la Concesión. El plan de negocios fue compartido, revisado y discutido dentro de la SCT, y los

[3] *See supra*, Section III.F (The "Technical Due Diligence" is the thorough inspection of the Mayab Line conducted by ██████ reviewing in detail the state of almost 900 kilometers of railroads).

[4] *See supra*, Section III.G.1 (In 2010, ███ prepared an analysis of the demand for rail freight services in the region of the Concession).

funcionarios tuvimos la oportunidad de revisar los componentes del plan");

b. **CWS-3-SPA**, ¶50 (Witness Statement-[redacted] Claim Memorial) ("…la SCT también realizó una serie de revisiones y estableció una serie de mesas de trabajo para evaluar y revisar el plan de negocios que la SCT había solicitado a CFCM para la devolución de la operación y explotación de la Concesión. El plan de negocios fue compartido, revisado y discutido dentro de la SCT, y los funcionarios tuvimos la oportunidad de revisar los componentes del plan");

c. *See infra*.

91. As the parties' negotiated, however, it was revealed that the Chiapas Line was not fully operational. As a result of the damage caused by Hurricane Stan, the railroads had sustained significant damage, including the connection between the Chiapas Line and Guatemala. Part of the problem was the damage to the railroad infrastructure in the city of Tapachula. To address this concern, the SCT and FIT commissioned studies to develop an 11-kilometer alternate path through the city that would restore the connection of the Chiapas Line to Ciudad Hidalgo, which borders Guatemala (the "**Tapachula Beltway**"). The SCT's conclusion of the construction of the Tapachula Beltway, however, was still pending.

Proofs:

a. **CWS-2-SPA**, ¶37.a (Witness Statement-[redacted] Claim Memorial) ("El Plan de Negocios de 2012 se elaboró sobre la base de las siguientes premisas: … La SCT se comprometió a entregar la Vía Chiapas en condiciones óptimas de operación con todas las obras de reconstrucción terminadas");

b. *Id.*, ¶50 ("…la SCT se comprometió a finalizar ciertas obras en proceso, incluyendo el libramiento ferroviario de Tapachula (en la Vía Chiapas) e incorporarlo a la Concesión, así como concluir el acceso a las instalaciones de Pemex en Tapachula (en la Vía Chiapas), el acceso a puerto Chiapas y la entrada de Guatemala");

c. **C-118-SPA** (News article from T21, "Concluirá en noviembre reconstrucción del Chiapas-Mayab" dated 8 April 2010) (evidencing that the Chiapas Line was not fully operational, and that the conclusion of the construction was pending).

92. CFCM also informed the SCT regarding the results of the Technical Due Diligence, where [redacted] estimated that repairing the Mayab Line to allow car speeds of 30 km/hr would require an investment of approximately USD $75 million. Additionally, CFCM shared the results of the [redacted] Report with the SCT, which contemplated more than USD $200 million of investments from CFCM throughout the lifetime of the Concession.

Proofs:

a. **CWS-2-SPA**, ¶37.b (Witness Statement-[redacted] Claim Memorial) ("CFCM se comprometió a

implementar un nuevo plan de inversiones por un valor aproximado de USD $201 millones una vez se le devolviera la operación de la Concesión. A nivel de inversiones en vía, el programa incluía inversiones importantes en la Vía Mayab para que se pudieran operar carros a una velocidad de 30 kilómetros por hora a lo largo del periodo de Concesión, tal y como determinó ████ en su estudio…");

b. **C-92-SPA** (Railroad Inspection and Report issued by ████ ████ to Viabilis dated 29 July 2008) (evidencing that ████ determined the parameters required to operate the tracks with car speeds of 30 km/hr);

c. **C-94-SPA** (Railroad Inspection and Report issued by ████ ████ to Viabilis dated 29 July 2008, Annex 2) (showing that ████ determined an investment requirement of approximately USD $75 million to allow car speeds of 30 km/hr);

d. **C-102-SPA**, p. 89 (Business Plan prepared by ████ for CFCM, dated June 2010) (showing that ████ preliminary business plan contemplated more than USD $200 million of investments from CFCM).

93. As a result of these negotiations, the parties agreed on a detailed business plan for the Concession in February 2012 ("**2012 Business Plan**"). Specifically, Mr. ████ on behalf of the SCT, and Mr. ████ on behalf of CFCM, agreed on the final terms of the 2012 Business Plan. The 2012 Business Plan incorporated the parties' agreement to extend the term of the Concession until 2049, CFCM's investments of more than USD $201 million in the Concession once the operation was returned, and the SCT's ***commitment to return the Chiapas Line in optimal operating conditions***. This commitment extended to the completion of the construction of the Tapachula Beltway, and additional works that were needed to restore and improve the services in the Chiapas Line. These works included the construction of railroads connecting the Chiapas Line to the port of Chiapas and PEMEX's facilities in Tapachula.

1- Caracte

- El PN considera la ampliación de la concesión hasta 2049. El actual Título vence en 2029.
- El PN incluye un plan de inversiones de más de 200 millones USD por parte de CFCM que iniciará en 2013 en caso de que la operación se devuelva a CFCM durante el primer semestre de 2012 (·).
- El PN considera que la operación del ferrocarril se devuelve a CFCM con la línea de Chiapas en condiciones óptimas de operación (incluido el libramiento de Tapachula, la conexión a Puerto Chiapas y la conexión con las instalaciones de Pemex en Tapachula).

Concepto	
Tasa Interna de Retorno	
Tasa de Descuento	8%
Margen EBITDA	20%
Operación con saldo positivo	A partir de 2018

Image 15: Commitments of the parties under the 2012 Business Plan (C-119-SPA)

Proofs:

a. **CWS-2-SPA**, ¶35 (Witness Statement-[redacted] [redacted] Claim Memorial) ("Para esta mesa de trabajo, CFCM me designó como interlocutor único, mientras que la SCT designó al señor [redacted] El Sr. [redacted] y yo tuvimos diversas reuniones de trabajo principalmente durante los meses de enero y febrero de 2012, en las que intercambiamos opiniones respecto de diferentes aspectos de la propuesta de plan de negocios…");

b. *Id.*, ¶36 ("Finalmente, después de que CFCM atendiera diversos comentarios de la SCT y del FIT, se llegó a un plan de negocios que contó con la aprobación de la SCT en febrero de 2012);

c. *Id.*, ¶41 ("El Plan de Negocios de 2012 también reflejaba el acuerdo de CFCM de invertir más de USD$ 200 millones a partir de 2013 para mejorar el servicio de transporte y reactivar la operación de la Concesión. …Como mencioné, las obras de reparación de la Vía Chiapas eran obligación de la SCT, pues el Gobierno de México continuaba siendo la propietaria de las Vías y de la infraestructura dañada por el huracán Stan. Por su parte, CFCM acordó realizar las inversiones contempladas en el Plan de Negocios de 2012 solo una vez que la SCT le devolviera a CFCM la operación de la Concesión y rehabilitara la Vía Chiapas");

d. **C-119-SPA**, p. 3 (New business plan agreed by the SCT and CFCM dated 2012) (evidencing that the SCT and CFCM agreed on a detailed business plan for the Concession in February 2012, which was the basis for the Concession's Amendment);

e. *Id.* p. 18 ("Para el correcto desarrollo del Plan de Negocios es imprescindible la entrega por parte de la Secretaría de la Línea Chiapas en condiciones operativas óptimas para transitar a 40 kms/hr a lo largo de toda la línea así como la devolución de todos los bienes asegurados incluidos en el inventario único de fecha 1 de julio de 2011 en el mismo estado en el que fueron entregados por la Concesionaria");

f. **C-120-SPA**, p. 2 (Letter from CFCM to the SCT dated 29 March 2012) ("A la fecha, **CFCM ha presentado el nuevo Plan de Negocios que cuenta con el visto bueno de la DGTFM**. Este Plan de Negocios se presentó en varias ocasiones, la última en junio de 2011 ante los actuales funcionarios de la DGTFM y sufrió posteriores modificaciones en atención a algunas observaciones realizadas por la DGTFM y por el FIT. Dichas **modificaciones fueron atendidas e incluidas conjuntamente en diversas reuniones de trabajo entre representantes de la DGTFM y de CFCM durante los meses de enero y febrero de 2012**") (emphases added).

94. The 2012 Business Plan was dependent, in part, on the SCT's assistance to recover lost clients during the Modality, especially from public entities. Additionally, the 2012 Business Plan considered the SCT's commitment to return the Concession without labor debt, grant CFCM a one-year grace period to comply with applicable laws and regulations, and indemnify CFCM for any losses arising from environmental damage caused during FIT's operation of the Concession. Finally, the SCT also agreed to be responsible—as it had always been—for any damages caused

to the Concession's infrastructure due to natural disasters that exceeded the funds recoverable through insurance policies.

Proofs:

a. **C-119-SPA**, p. 14 (New business plan agreed by the SCT and CFCM dated 2012) ("La operación de las Vías Cortas Chiapas y Mayab se entrega a CFCM **sin pasivo laboral alguno**. Se **otorgará a CFCM un periodo de gracia de 1 año** para cumplir cabalmente con la normativa aplicable. La SCT responderá por cualquier daño ambiental durante la modalidad impuesta a la concesión…Se tiene contemplado contratar pólizas de seguro en términos del Título de Concesión. En la modificación al Título de Concesión se establecerá **la responsabilidad del Gobierno Federal para los casos de desastres naturales que produzcan daños por montos que excedan el monto de los seguros** que razonablemente se puedan contratar en términos de mercado") (emphases added).

95. CFCM intended to focus its commercial efforts in in an effort to increase the flow of traffic into the region of the Concession. CFCM also planned to .

Proofs:

a. **C-119-SPA**, pp. 17-18 (New business plan agreed by the SCT and CFCM dated 2012) ("").

96. Having agreed to the 2012 Business Plan, the next step was for the SCT to formally approve the amendment of the Concession Agreement.

Proofs:

a. **CWS-3-SPA**, ¶52 (Witness Statement- Claim Memorial) ("El 4 de junio de 2012, CFCM solicitó formalmente a la SCT que se aprobara una enmienda a la Concesión que permitiera ejecutar el plan de negocios aprobado por la SCT. El plan de negocios se presentó ante la

SCT junto con una solicitud por parte de CFCM para la prórroga de la Concesión…");

b. **CWS-2-SPA**, ¶42 (Witness Statement-[redacted] Claim Memorial) ("42. Como ya he comentado, la implementación del Plan de Negocios de 2012 requería extender los plazos de la Concesión. La extensión del plazo era necesaria para que CFCM pudiera financiar el nuevo programa de inversiones y generar un retorno sobre la inversión viable para CFCM. Por ello, CFCM solicitó la extensión del plazo de la Concesión y del periodo de exclusividad para prestar el servicio de transporte de carga. La SCT estuvo de acuerdo con esta ampliación de plazo. Así, la inversión que realizaría CFCM sería únicamente después de que la operación fuera devuelta a CFCM, y a cambio de la extensión del plazo de la Concesión");

c. **C-120-SPA**, p. 2 (Letter from CFCM to the SCT dated 29 March 2012) ("A la fecha, **CFCM ha presentado el nuevo Plan de Negocios que cuenta con el visto bueno de la DGTFM**. Este Plan de Negocios se presentó en varias ocasiones, la última en junio de 2011 ante los actuales funcionarios de la DGTFM y sufrió posteriores modificaciones en atención a algunas observaciones realizadas por la DGTFM y por el FIT. Dichas **modificaciones fueron atendidas e incluidas conjuntamente en diversas reuniones de trabajo entre representantes de la DGTFM y de CFCM durante los meses de enero y febrero de 2012**") (emphases added).

4) CFCM and the SCT amended the Concession Agreement

97. Based on the approval of the 2012 Business Plan, on 6 June 2012, CFCM requested the SCT to amend the Concession Agreement. As CFCM explained in its request, all conditions were in place to restart the operation of the Concession under CFCM's control.

Proofs:

a. **C-121-SPA**, pp. 4-6 (Letter from CFCM to the SCT dated 4 June 2012) (showing that CFCM requested amendment of the Concession Agreement, along with the formal approval of the 2012 Business Plan, the termination of the Modality, and the restitution of CFCM's assets in FIT's custody);

b. **CWS-3-SPA**, ¶52 (Witness Statement-[redacted] Claim Memorial) ("El 4 de junio de 2012, CFCM solicitó formalmente a la SCT que se aprobara una enmienda a la Concesión que permitiera ejecutar el plan de negocios aprobado por la SCT. El plan de negocios se presentó ante la SCT junto con una solicitud por parte de CFCM para la prórroga de la Concesión…").

98. On 17 July 2012, the *Dirección General de Transporte Ferroviario y Multimodal* ("**DGTFM**"), a subdivision of the SCT, authorized the amendment to the Concession based on the 2012 Business Plan. Following that, CFCM and the SCT executed several documents memorializing its commitments to the Concession.

Proofs:

a. **C-11-SPA**, p. 4 (Amended Concession dated 22 October 2012) (demonstrating that the DGTFM approved the 2012 Business Plan negotiated between the SCT and CFCM);

b. **CWS-3-SPA**, ¶53 (Witness Statement-[redacted] Claim Memorial) ("La solicitud [de aprobación del plan de negocios] de CFCM fue aprobada por la Dirección General de Transporte Ferroviario y Multimodal, la subdivisión de la SCT encargada del transporte ferroviario, el 17 de julio de 2012…");

c. *See infra.*

99. ***First***, CFCM and the SCT executed an amendment to the Concession Agreement on 22 October 2012 ("**Amendment**"). The Amendment noted that the SCT approved the changes to the Concession Agreement in light of the parties' commitments in the 2012 Business Plan, and CFCM's compliance with the terms of the Concession, as demonstrated by the systematic inspections performed by the SCT.

X. La Dirección General de Transporte Ferroviario y Multimodal de la "SECRETARÍA" realizó el análisis de la solicitud de el "CONCESIONARIO", y con fecha diecisiete de julio de 2012 determinó que es procedente realizar las modificaciones solicitadas, derivado de los compromisos de inversión que el "CONCESIONARIO" señala en el Plan de Negocios presentado, conforme a las constancias que obran en el expediente que al efecto lleva la citada unidad administrativa; aunado al hecho de que la ampliación del plazo solicitado se encuentra permitido por la legislación aplicable y ha cumplido con las condiciones previstas en la concesión que le fue otorgada; de acuerdo con las verificaciones sistemáticas practicadas.

Image 16: The Amendment recognizes that CFCM complied with the terms of the Concession Agreement (C-11-SPA)

Proofs:

a. **C-11-SPA**, p. 4 (Amended Concession dated 22 October 2012) (indicating that CFCM complied with all the terms of the Concession Agreement);

b. **CWS-3-SPA**, ¶54 (Witness Statement-[redacted] Claim Memorial) ("…La Concesión Enmendada fue el resultado de la aprobación por parte de la SCT del Plan de Negocios de 2012");

c. **CWS-2-SPA**, ¶46 (Witness Statement-[redacted] Claim Memorial) ("Considero importante resaltar que la SCT reconoce expresamente en la Concesión Enmendada que CFCM había cumplido con todas sus obligaciones bajo la Concesión hasta esa fecha…").

100. Based on CFCM's investments and its prior conduct, the Amendment also extended the term of the Concession Agreement twenty years from the original thirty years, for a total of fifty years. Moreover, CFCM's exclusive right to provide the freight transportation service in the

Chiapas-Mayab Railway was extended twelve years from the original eighteen years, for a total of thirty years.

PRIMERA. Se modifica el primer párrafo de la condición 1.4.2. del Título de Concesión para quedar como sigue:

> *"**1.4.2.** El presente título confiere derechos de exclusividad al Concesionario para prestar el servicio público de transporte ferroviario de carga a que se refiere el primer párrafo del numeral 1.2.3 por un periodo de treinta años, contados a partir del inicio de la vigencia del presente título, con excepción de los derechos de paso y los derechos de arrastre que se detallan en el Anexo nueve y en el numeral 2.13 de la presente Concesión.*

SEGUNDA. Se modifica el primer párrafo de la condición 5.1. del Título de Concesión para quedar como sigue:

> *"**5.1. Vigencia.** La presente Concesión estará en vigor por cincuenta años, contados a partir de la fecha de conclusión de la diligencia de entrega-recepción de las Vías Cortas y de los Bienes, o a partir del 1 de septiembre de 1999, lo que ocurra primero. ..."*

Image 17: The Amendment extended the terms of the Concession Agreement (C-11-SPA)

Proofs:

a. **C-11-SPA**, pp. 4-5 (Amended Concession dated 22 October 2012) (indicating that the Amendment extended the term of the Concession Agreement);

b. **CWS-3-SPA**, ¶54 (Witness Statement-[redacted] [redacted]Claim Memorial) ("El 22 de octubre de 2012, CFCM y la SCT llegaron a un acuerdo sobre las modificaciones que se realizarían a los términos originales de la Concesión: (**a**) el plazo de la Concesión se extendería a 50 años, hasta 2049; y (**b**) el periodo de exclusividad para que CFCM prestara el servicio de transporte en las vías se extendería hasta 2029…");

c. **CWS-2-SPA**, ¶46 (Witness Statement-[redacted] [redacted]Claim Memorial) ("Finalmente, el 22 de octubre de 2012, se firmó la enmienda a la Concesión. Entre otras cuestiones, las modificaciones a la Concesión reflejaban que: (**a**) el plazo de la Concesión se extendería por 20 años adicionales (hasta 2049); y (**b**) el periodo de exclusividad para que CFCM prestara el servicio de transporte en las vías se extendería por 12 años (hasta 2029)…").

101. ***Second***, on 23 October 2012, CFCM and the SCT executed a separate contract to memorialize the other agreements reached between the parties concerning the operation of the Concession ("**2012 Convenio**"). The express objective of the 2012 Convenio was to ensure the operative and financial future of rail freight services in the region of the Concession in the long term. In furtherance of that purpose, the SCT ratified its commitment to finish the Tapachula Beltway and incorporate it into the Concession Agreement; and complete the construction works

that would provide access to the PEMEX facilities in Tapachula and to the port of Chiapas, as well as its entry to Guatemala.

2. OBLIGACIONES DE LA "SCT".

2.1. Analizar con dependencias y entidades de la Administración Pública Federal y en su caso con aseguradoras y reaseguradoras, las alternativas y viabilidad de aseguramiento de la infraestructura ferroviaria contra riesgos catastróficos derivados de desastres naturales.

2.2. Realizar las acciones tendientes a concluir el Libramiento Ferroviario de Tapachula, Chiapas e incorporarlo al Título de Concesión una vez concluido. Asimismo, realizar las acciones tendientes a concluir el acceso a las instalaciones de Pemex en Tapachula, Chiapas; el acceso a puerto Chiapas; y la entrada a Guatemala.

Image 18: The SCT committed to return the Chiapas Line back to CFCM in optimal conditions (C-122-SPA)

Proofs:

a. **C-122-SPA**, Clause 2 ("Convenio" executed between CFCM and the SCT dated 23 October 2012) (showing that the SCT committed to insure the infrastructure of the Concession, finalize the Tapachula Beltway and other repair works in the Chiapas Line);

b. **CWS-2-SPA**, ¶46 (Witness Statement-[redacted] Claim Memorial) ("…el 23 de octubre de 2012, CFCM y la SCT celebraron un convenio para procurar la viabilidad operativa y financiera del transporte ferroviario en el sureste del país, en donde la SCT se comprometió a finalizar ciertas obras en proceso, incluyendo el libramiento ferroviario de Tapachula (en la Vía Chiapas) e incorporarlo a la Concesión, así como concluir el acceso a las instalaciones de Pemex en Tapachula (en la Vía Chiapas), el acceso a puerto Chiapas y la entrada de Guatemala…").

102. ***Third***, as CFCM prepared to initiate the operation of the Concession, the SCT requested CFCM to waive its objections to the sanctions proceeding initiated by the SCT in 2007. With CFCM's agreement, the SCT issued a resolution terminating the sanctions proceeding filed by the SCT in 2007 against CFCM, issuing a nominal fine, which CFCM promptly paid. As a consequence, the SCT also:

- Lifted the sequestration of the Concession's assets to allow CFCM to operate the Concession and provide freight services according to the Concession Agreement;
- Terminated FIT's designation as custodian of the assets, and instructed FIT to return the facilities and assets to CFCM ***within four months***; and
- Terminated FIT's designation as "*verificador especial*."

Proofs:

a. **C-123-SPA** (Letter from CFCM to the SCT dated 16 November 2012) (showing that CFCM and the SCT agreed to close the sanctions proceeding against CFCM if CFCM waived its objection to the sanctions proceeding);

b. **C-124-SPA**, p. 14 (Official Letter 4.3.809/2012 dated 22 November 2012) (showing that the SCT instructed FIT to return the facilities and assets of the Concession to CFCM within four months);

c. **C-125-SPA** (Letter CFCM-DGTFM-0002/12 dated 11 December 2012) (showing that CFCM paid the nominal fine imposed by the SCT).

103. ***Fourth***, on 22 November 2012, via resolution 811/2012 ("**Resolution 811**"), the SCT informed CFCM that the ***Concession's assets would be returned in good physical and operational condition*** through the execution of certificates of delivery and receipt ("**Inspection Process**"). If the infrastructure or the assets in FIT's possession were not in good condition, then the SCT agreed to compensate CFCM for any damage to the infrastructure or the assets of the Concession. In fact, as Mr. [redacted] (former [redacted] of the SCT) explains in his declaration, the SCT informed that it would return ***both tracks*** (Chiapas and Mayab) and all the sequestered assets in good physical and operating conditions.

> Al efecto, la Secretaría entregará a CFCM los bienes asegurados y las vías concesionadas en buen estado físico y de mantenimiento, así como en buenas condiciones de operación. Para efectos del presente escrito, por bienes asegurados se entiende todos y cada uno de los bienes propiedad o en la legal posesión de CFCM y en poder o resguardo del FIT, que enunciativa y no limitativamente se relacionan en la lista de fecha 1° de julio de 2011, suscrita por el FIT y CFCM, copia de la cual se agrega al presente escrito como Anexo "A".

> La Secretaría y CFCM deberán acordar la forma y términos conforme a los cuales CFCM deberá ser restituida, en caso de que existan bienes asegurados y/o partes de las vías concesionadas que no se encuentren en buen estado físico y de mantenimiento, o cuyas condiciones de operación no sean buenas.

Image 19: The SCT committed to return CFCM's assets and the infrastructure of the Concession in good condition (C-12-SPA)

Proofs:

a. **C-12-SPA**, pp. 1-2 (Official Letter 4.3.811/2012 dated 22 November 2012) (indicating that the SCT committed to return the Concession to CFCM in good condition, and compensate CFCM for any damage caused to the Concession's infrastructure or assets);

b. **CWS-3-SPA**, ¶54 (Witness Statement-[redacted] Claim Memorial) ("Asimismo, la SCT se obligó a asumir la responsabilidad de devolver las vías y los bienes asegurados a CFCM en buen estado físico y de mantenimiento y en buenas condiciones de operación. …Es decir, la SCT

reiteró los compromisos que ya había adquirido con CFCM mediante la Carta de Intención y nuevamente aceptó la responsabilidad de concluir la reparación de las vías para que CFCM pudiera operar la Concesión.).

104. According to the schedule agreed to in Resolution 811, the Inspection Process would run from 26 November to 21 December 2012. This timeline would afford CFCM enough time to be in a position to commence the operation of the Concession on 28 February 2013, at the latest.

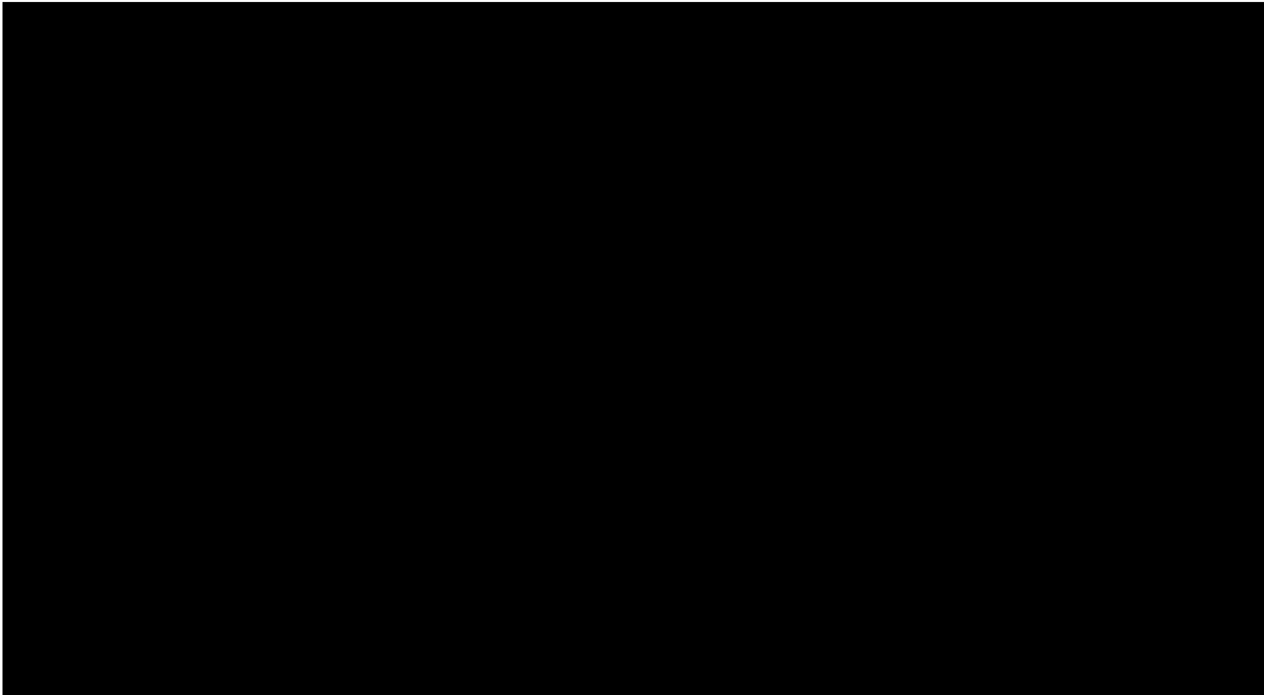


Image 20: The SCT agreed to return the operation of the Concession no later than 28 February 2013 (C-12-SPA)

Proofs:

a. **C-12-SPA**, p. 99 (Official Letter 4.3.811/2012 dated 22 November 2012) (showing that the SCT agreed to return the operation of the Concession by 28 February 2013).

105. ***Finally***, on 29 November 2012, the SCT terminated the Modality and ordered FIT to stop the operation of the Chiapas-Mayab Railway and return the assets of the Concession under its custody to CFCM. In line with the Inspection Process, the SCT also ordered FIT to collaborate with CFCM in the inspection of the Concession's facilities and return the operation of the Chiapas-Mayab Railway to CFCM by 28 February 2013. Moreover, in its communication to FIT, the SCT recognized that CFCM was "***in condition to operate and exploit the Chiapas and Mayab Lines***."

Proofs:

a. **C-89-SPA**, pp. 2-3 (Letter No. 4.3.-812/2012 from the SCT to FIT dated 29 November 2012) ("esta Secretaría de Comunicaciones y Transportes por conducto de esta Unidad

Administrativa **da por terminada la modalidad impuesta al FIT en términos del presente oficio**…la empresa concesionaria Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V., se encuentra en condiciones de operar y explotar las Vías Chiapas y Mayab, y por lo tanto continuará prestando el servicio público de transporte ferroviario de carga y servicios auxiliares") (emphasis added);

b. *Id.*, pp. 3-4 ("Por lo anteriormente expuesto esta Unidad Administrativa resuelve lo siguiente… **Se ordena al FIT dejar de operar y explotar las vías Chiapas y Mayab**, así como la prestación del servicio público de transporte ferroviario de carga y los servicios auxiliares en dichas vías, el 28 de febrero de 2013… Se ordena al FIT que entregue a esta Secretaría…los bienes asegurados a la Compañía de Ferrocarriles Chiapas-Mayab…Se ordena al FIT que entregue a esta Secretaría…las Vías Cortas Chiapas y Mayab… **Se instruye al FIT entregar a CFCM la operación y la explotación de las vías Chiapas y Mayab**… así como, dar acceso a toda la información y documentación de carácter legal, comercial, laboral y técnica relacionada con la operación, el mantenimiento y fa conservación de las vías concesionadas y los bienes asegurados… **Se instruye al FIT para que otorgue a CFCM las facilidades necesarias y el apoyo para facilitar la continuidad en la prestación de los servicios**…") (emphases added).

106. In short, CFCM and the SCT negotiated, agreed to, and formalized all the conditions necessary for CFCM to resume the operation of the Concession. As explained before, the SCT would finish the rehabilitation of the Chiapas Line in accordance with the 2012 Business Plan and the Amendment, and the SCT would return the operation of the Concession by 28 February 2013. CFCM's assets would also be returned in good condition and the SCT guaranteed compensation in case they had suffered any damage. In exchange, CFCM would execute the investments agreed to with the SCT in the 2012 Business Plan, with the support of its technical and financial partners.

Proofs:

a. *See supra.*

H. THE INSPECTION PROCESS REVEALED THE POOR STATE OF THE CONCESSION AND THE NEED FOR ADDITIONAL INVESTMENTS BY MEXICO

107. On 29 November 2012, the Inspection Process began with a kickoff meeting of the teams designated by the SCT, FIT, and CFCM. CFCM retained a certified expert on railroad maintenance to join the Inspection Process with his own team and complete additional inspections to ensure a thorough analysis of the condition of the railroad infrastructure. Throughout the Inspection Process, the SCT, FIT, and CFCM signed certificates of delivery and receipt indicating the condition of the infrastructure, facilities, assets, and goods of the Concession.

Proofs:

a. **CWS-2-SPA**, 53 (Witness Statement-[redacted] [redacted]Claim Memorial) ("El 29 de noviembre de 2012, CFCM, la SCT y el FIT sostuvieron una reunión introductoria en Mérida, Yucatán, para el arranque de las inspecciones");
b. *Id.*, ¶55 ("…CFCM adicionalmente contrató los servicios de un perito especialista y certificado como perito dictaminador en vías férreas que acompañó a las partes en la inspección para obtener un análisis detallado e independiente sobre el estado de las Vías");
c. **C-126-SPA** (Minutes of meeting between the SCT, FIT, and CFCM dated 29 November 2012) (showing the SCT, FIT, and CFCM initiated the joint inspection of the assets of the Concession);
d. **C-127-SPA** (Inspection certificates of the Inspection Process) (showing that the SCT, FIT and CFCM inspected the assets of the Concession and signed certificates of delivery and receipt indicating the condition of the assets);
e. **C-82-SPA** (Letter CFCM-DGTFM-0006/12 delivered 2 January 2013) (showing CFCM requested additional private inspections to the railroad).

108. Contrary to the mutually agreed-upon timeline to complete the Inspection Process scheduled by the SCT in Resolution 811 (29 November 2012 to 21 December 2012), the inspections were delayed on numerous occasions because of the SCT's failure to provide approvals. Additionally, to CFCM's surprise, the parties could not complete a visual inspection of the entirety of the tracks because significant portions were inaccessible due to abandonment or negligent maintenance. Those sections of the railroad that could be inspected showed signs of deterioration, preventing the operation of the Chiapas-Mayab Railway in accordance with minimal safety conditions.

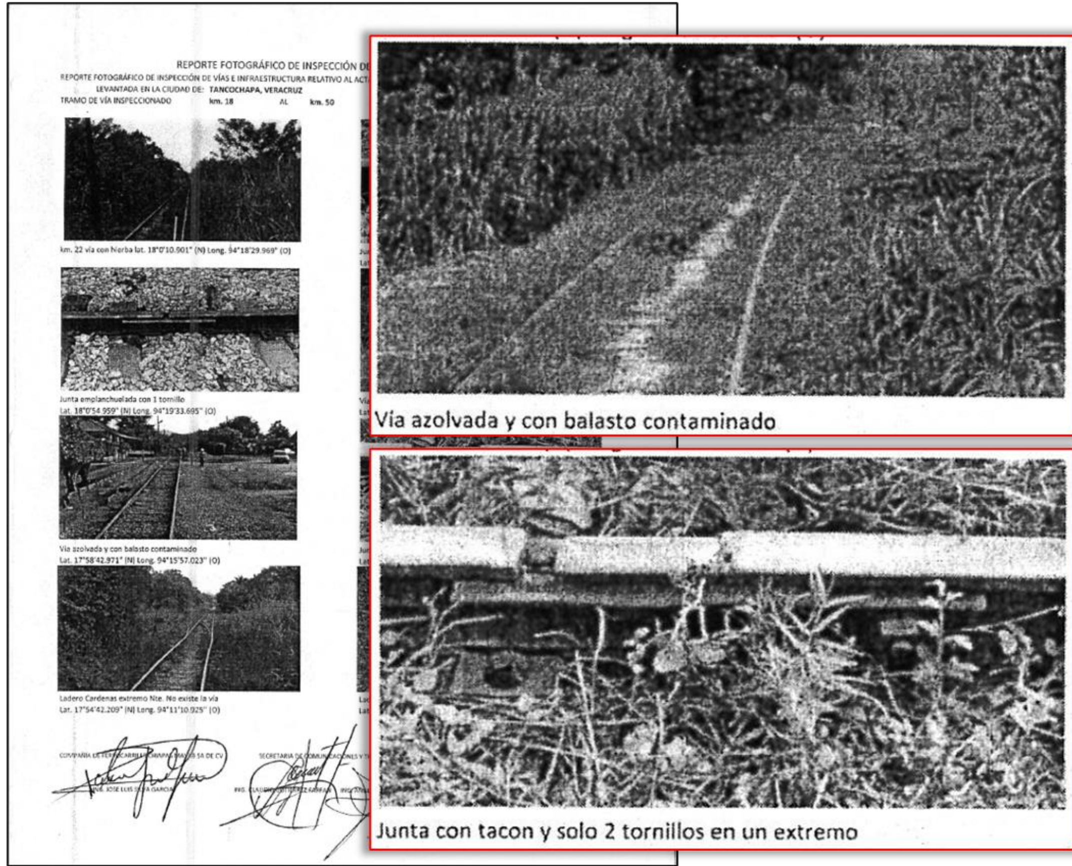


Image 21: Inspection Process (C-127-SPA)

Proofs:

a. CWS-2-SPA, ¶53 (Witness Statement- Claim Memorial) ("Sin embargo, debido al retraso de la SCT y el FIT, las inspecciones comenzaron el 10 de diciembre de 2012 y concluyeron solo en julio de 2013, más de siete meses después del plazo originalmente acordado");

b. C-128-SPA (Letter CFCM-DGTFM-0003/12 dated 19 December 2012) (showing the SCT delayed the start of the Inspection Process);

c. C-129-SPA (Letter CFCM-DGTFM-0005/12 dated 28 December 2012) (showing the Inspection Process was delayed);

d. C-130-SPA (Letter CFCM-DGTFM-0006/13 dated 8 February 2013) (showing the Inspection Process was delayed and that the railroads of the Concession were not properly maintained);

e. C-206-SPA (Letter CFCM-DGTFM-0025/13 dated 26 April 2013) (showing the Inspection Process was delayed and that the railroads of the Concession were not properly maintained).

109. Despite the SCT's commitments, CFCM could not inspect a significant percentage of the Concession's assets sequestered under FIT's custody. By 22 February 2013, CFCM still had not received access to inspect 394 car trains, 10 vehicles, 9 Hi-Rail vehicles (used in rail track maintenance), 6 bulldozer trucks, and thousands of pieces of machinery, equipment, and materials owned by CFCM but subject to FIT's custody and control. Moreover, in terms of those assets that

could be inspected, of the twenty-six locomotives owned by CFCM that were under FIT's custody, only ten units were found to be in working condition.

Proofs:

a. **CWS-2-SPA**, ¶55 (Witness Statement-██████████ ██████Claim Memorial) ("En resumen, las inspecciones revelaron que: a) importantes secciones de las Vías no se encontraban en buenas condiciones físicas y de operación, principalmente por materiales en mal estado, materiales faltantes y trabajos de mantenimiento deficientes y b) muchos bienes asegurados no estaban en buenas condiciones físicas y de operación…");

b. **C-131-SPA**, p. 1 (Letter CFCM-DGTFM-0008/13 dated 22 February 2013) ("…se inspeccionaron 26 locomotoras propiedad de FCCM que se encuentran aseguradas por la Secretaría. De estas 26 locomotoras, sólo 10 unidades se reportaron en estado de funcionamiento aunque con diversos problemas en cuanto a su estado físico y de mantenimiento");

c. **C-132-SPA**, p. 1 (Letter CFCM-DGTFM-0024/13 dated 24 April 2013) ("…se inspeccionaron 26 locomotoras propiedad de FCCM que se encuentran aseguradas por la Secretaría. De estas 26 locomotoras, sólo 10 unidades se reportaron en estado de funcionamiento aunque con diversos problemas en cuanto a su estado físico y de mantenimiento").

110. As a direct consequence of the state of the railroads and the SCT's delays, the Inspection Process was rescheduled on several occasions, and was ultimately completed in July 2013. Thus, the operation of the Concession was ***not*** returned to CFCM by 28 February 2013. With the help of the expert retained to assist in the Inspection Process, CFCM drafted a detailed report with the findings and conclusions of the inspections on the Chiapas-Mayab Railway, which it shared with the SCT on 9 September 2013 ("**Inspection Report**").

Proofs:

a. **CWS-2-SPA**, ¶57 (Witness Statement-██████████ ██████Claim Memorial) ("Esta solicitud fue acompañada del informe final preparado por el perito dictaminador en vías férreas contratado por CFCM, que fue compartido con la SCT el 9 septiembre de 2013");

b. **C-133-SPA**, p. 6 (Report on the state of the Chiapas-Mayab Railway dated 9 September 2013) ("…FCCM encargó a un perito especialista en la materia y certificado como perito dictaminador en vías férreas, un peritaje de vía para que se determinara el estado físico, de mantenimiento y de operación de las vías en base a una inspección más a detalle que permitiera acercarse más aún a la realidad actual de la vía. Los resultados de dicho peritaje están, contenidos como parte del presente informe (Anexo 1)").

111. The Inspection Report concluded that almost the entirety of the Chiapas-Mayab Railway was in poor condition. Amongst the many problems identified in the Inspection Report,

the expert noted that inspection of the railroad tracks showed a significant number of railroad elements missing or in poor condition, and poor maintenance practices that led to higher levels of deterioration of the railroad. The majority of the rails were worn out and had to be replaced.

Proofs:

a. C-133-SPA, pp. 8, 11, 13 14, 16-19, 21, 28 (Report on the state of the Chiapas-Mayab Railway dated 9 September 2013) ("En 126 kms de la línea, se tiene riel de calibre 80 lbs/yd a los cuales **presentan fisuras y quebraduras** en juntas y soldaduras (que aparentan ser tacones de vía pero que realmente son trozos de riel producto de quebraduras en sus extremos), **contabilizándose en promedio 6 por km de vías, resultando esto un riesgo permanente de que ocurran descarrilamientos en cualquier momento**…A lo largo de toda la vía concesionada, existe un número muy elevado de materiales de vía en mal estado físico, de mantenimiento y/o de operación que es necesario sustituir. Un claro ejemplo de lo anterior son los rieles que en la mayoría de los casos **presentan un estado de desgaste tan avanzado que han agotado o están al límite de su vida útil**... Por lo tanto, todo el riel de calibre 100 lbs/yda o inferior deberá ser reemplazado por riel de un calibre mayor …Se observa que muchos elementos que conforman la vía no han recibido mantenimiento o lo han recibido de manera deficiente …") (emphases added).

112. In summary, the Inspection Report showed that only 17 kilometers of rail tracks, or 1% of the rail tracks in the Concession were in good condition, and around 73% were in bad or very bad condition.

5.- CONCLUSIONES

1.- En base a los datos de campo obtenidos, la vía principal concesionada presenta el siguiente estado a lo largo de su longitud:

Línea /Estado	Bueno (Kms)	Regular (Kms)	Malo (Kms)	Pésimo (Kms)	Total (Kms)
FA	17	147	571	126	**861**
K	0	254	130	75	**459**
FD	0	0	0	177	**177**
FX	0	0	0	36	**36**
FL	0	0	0	9	**9**
FN	0	0	0	32	**32**
Total	**17 Km (1.08 %)**	**401 Km (25.48 %)**	**701 Km (44.54 %)**	**455 Km (28.90 %)**	**1,574 Km**

Por lo tanto, a lo largo de los 1,574 km de vía principal, sólo existen 17 kilómetros de vía que se encuentran en buen estado.

Image 22: The state of the Chiapas-Mayab Railway according to the Inspection Report (C-133-SPA)

Proofs:

a. **C-133-SPA**, p. 28 (Report on the state of the Chiapas-Mayab Railway dated 9 September 2013) ("Por lo tanto, a lo largo de los 1,574 km de vía principal, sólo existen 17 kilómetros de vía que se encuentran en buen estado").

113. Based on this analysis, the expert concluded that the amount of investment needed to return the Chiapas-Mayab Railway to a good physical and operational condition was approximately MXN $8 billion, plus taxes. A portion of the investment budget would be set aside for replacement of rail tracks assessed to be in bad or very bad condition and would substitute them for a higher-caliber rail. According to the expert, the repair works would have to be made gradually in order to prevent interrupting freight services on the Chiapas-Mayab Railway. As such, the expert concluded that a five-year program should be adopted to carry out the required repair works to the Concession.

Línea FA	$	5,047'348,506.53
Línea FD	$	1,037'613,337.23
Línea FX	$	214'400,235.98
Línea FN	$	190'780,266.59
Línea FL	$	52'677,492.48
Patios Mérida y Campeche	$	33'718,799.51
Suma Línea Mayab	**$**	**6,576'538,638.31**
Línea K	$	1,432'548,009.30
Suma Línea Chiapas	**$**	**1,432'548,009.30**
Total del Presupuesto	**$**	**8,009'086,647.61**

Image 23: The Inspection Report investment needed to restore the Chiapas-Mayab Railway to good operating condition according to the Inspection Report (C-133-SPA)

Proofs:

a. **C-133-SPA**, p. 32 (Report on the state of the Chiapas-Mayab Railway dated 9 September 2013) ("En base a dicho programa, se concluye que el monto de **inversión necesario para dejar las vías concesionadas en buen estado físico, de mantenimiento y de operación, supera los 8,000 millones de pesos, más IVA**, sin incluir las actuaciones para resolver los problemas que afectan a los puentes y otras estructuras que forman parte de las vías concesionadas…Este presupuesto contempla la **sustitución de todo el riel en mal estado físico, de mantenimiento o de operación, por un riel de calibre 115 lbs/yda** aunque desde el punto de vista de FCCM se debe de

valorar la conveniencia de utilizar riel de 136 lbs/yda para homologar tecnológicamente las Vías Cortas Chiapas y Mayab con el resto del sector ferroviario de carga en México") (emphases added).

I. THE SCT AGREED TO MAKE ADDITIONAL INVESTMENTS TO THE CONCESSION

114. Based on the results of the Inspection Process and the Inspection Report, CFCM invited the SCT to discuss the terms according to which CFCM would be compensated for the poor condition of the railroad and the rehabilitation works in the Concession would be finished, as agreed in Resolution 811.

Proofs:

a. **CWS-2-SPA**, ¶58 (Witness Statement- [redacted] Claim Memorial) ("Cuando la SCT advirtió los problemas y las condiciones en las que se encontraban las Vías, nos manifestaron que buscarían darle solución. En ese momento, se inició un nuevo periodo de negociaciones entre CFCM y la SCT para que la SCT cumpliera su compromiso y compensara a CFCM por el mal estado de las Vías y los bienes asegurados");

b. **C-200-SPA** (Letter from CFCM to the SCT dated 26 June 2013) (evidencing that CFCM requested the SCT to compensate it for the failure to deliver the tracks and the sequestered assets in good physical and operational condition).

c. **C-29-SPA** (Letter from CFCM to the SCT dated 9 September 2013) (evidencing that CFCM requested the SCT to comply with the rehabilitation works in the Concession).

115. In these negotiations, the SCT proposed that Mexico provide federal funds to compensate CFCM. The SCT's proposal was supported by the then recent publication of the 2013-2018 National Development Plan ("**Development Plan**"), which emphasized the development of Mexico's railway infrastructure as an essential step in increasing Mexico's competitive edge in the global economy. Thus, the SCT proposed the execution of an agreement where the SCT and CFCM would to contributing funds to finance the rehabilitation of the Chiapas-Mayab Railway. The first draft of the agreement was sent on 12 September 2013.

De: Pablo Negrete Solis [mailto:pnegrete@sct.gob.mx]
Enviado el: jueves, 12 de septiembre de 2013 11:33 a.m.
Para: ██████████; ██████
CC: Jesus Alzua Perez; Jorge Eliseo Herrera Villalobos
Asunto: Proyecto de Convenio

Estimados Manuel y Paulo,

Por instrucciones superiores y en seguimiento a la reunión del día de ayer, adjunto se remite para su amable consideración el proyecto de convenio que celebrarían la SCT y CFCM. Quedamos en espera de los comentarios que sirvan emitir al particular.

Saludos cordiales,

Pablo Negrete Solís
Dirección de Asuntos Legales
Dirección General de Transporte Ferroviario y Multimodal.
Calle Nueva York #115, 5° piso. Colonia Nápoles, 03810 México D.F.
Directo: +52 (55) 50116485
Cisco: 19017

Image 24: the SCT proposed the execution of an agreement committing further funds to the Concession (C-134-SPA)

Proofs:

a. **CWS-2-SPA**, ¶59 (Witness Statement-██████ Claim Memorial) ("Durante estas nuevas negociaciones, la SCT se mostró dispuesta a llegar a una solución y planteó desde un inicio la aportación de recursos federales por parte del Gobierno de México con el objetivo de rehabilitar las Vías, y así cumplir con su compromiso de devolver los bienes en buen estado físico y operativo");

b. *Id.*, ¶61 ("La SCT estuvo de acuerdo con la solicitud de CFCM y propuso la ejecución de un convenio que reflejara los nuevos compromisos de inversión de la SCT…");

c. **C-134-SPA** (Email chain between Pablo Negrete Solis, ██████ and ██████ (showing the SCT proposed to sign an agreement where the SCT would contribute federal funds to the rehabilitation of the Concession);

d. **C-135-SPA**, p. 9 (Mexico's 2013-2018 National Development Plan) ("El Plan Nacional de Desarrollo…Detalla el camino para impulsar a las pequeñas y medianas empresas, así como para promover la generación de empleos. También ubica el desarrollo de la infraestructura como pieza clave para incrementar la competitividad de la nación entera");

e. **C-136-SPA** (Draft "convenio" prepared by the SCT dated 12 September 2013) (indicating that the SCT proposed the execution of an agreement to CFCM with respect to the rehabilitation of the Chiapas-Mayab Railway).

116. A draft agreement dated 2 December 2013 reflecting the parties' agreements reached thus far included a commitment by the SCT to provide funds totaling MXN $4.1 billion to restore the Chiapas-Mayab Railway. For its part, CFCM agreed to provide funds totaling MXN $2.3 billion, in line with the investments it committed to make in the 2012 Business Plan.

SEGUNDA. **De algunas Obligaciones de las Partes.** Por virtud del presente Convenio: las partes se comprometen a invertir la cantidad de $6,400'000,000.00 (seis mil cuatrocientos millones de pesos 00/100 moneda nacional) en la forma siguiente:

a) la Concesionaria se obliga a invertir la cantidad de $2,300'000,000.00 (dos mil trescientos millones de pesos 00/100 moneda nacional), principalmente para la modernización de la vía; y

b) la Secretaría se obliga a aportar al proyecto la cantidad de $4,100'000,000.00 (cuatro mil cien millones de pesos 00/100 moneda nacional), para rehabilitar las líneas Chiapas y Mayab, con la finalidad de mejorar el estado físico y de mantenimiento (así como las condiciones de operación) de las vías concesionadas, de modo que se pueda prestar un servicio ferroviario de carga más eficiente en su operación y financieramente viable, a cuyo efecto, solicitará oportunamente a la Secretaría de Hacienda y Crédito Público (y gestionará) la autorización de recursos presupuestales para cumplir en tiempo los compromisos de aportación de recursos que asume en este Convenio.

Image 25: the SCT agreed to commit MXN $4.1 billion to restore the Chiapas-Mayab Railway (C-137-SPA)

Proofs:

a. **CWS-2-SPA**, ¶61 (Witness Statement-[redacted] [redacted] Claim Memorial) ("…Inicialmente, la SCT propuso comprometer recursos federales por MXN$4,100 millones durante los primeros cinco años…");

b. **C-137-SPA**, p. 3 (Draft "convenio" prepared by the SCT dated 2 December 2013) (indicating that the SCT agreed to commit MXN $4.1 billion to restore the Chiapas-Mayab Railway).

117. CFCM and the SCT agreed on a final version of the draft agreement in a meeting held on 12 February 2014. The agreements reached in that meeting were memorialized by the SCT in a final draft agreement shared by the SCT on 14 March 2014 (the "**2014 Convenio**").

Proofs:

a. **CWS-2-SPA**, ¶62 (Witness Statement-[redacted] [redacted] Claim Memorial) ("Después de varias discusiones e intercambios para formalizar la aportación de la SCT de recursos federales a la Concesión, finalmente en una reunión mantenida en febrero de 2014, CFCM dio su visto bueno a un borrador de convenio propuesto por la SCT… El documento aprobado lo envió la SCT a CFCM por escrito en un oficio de 14 de marzo de 2014.");

b. **C-13-SPA**, p. 1 (Official Letter 4.3.286/2014 dated 14 March 2014) ("Sobre el particular, como es de su conocimiento, se han llevado a cabo diversas reuniones entre su representada y esta Dirección General **a efecto de precisar los alcances del Convenio de mérito, asimismo, siendo en la última reunión del día 12 de febrero del año en curso, donde su representada emitió visto bueno a la última versión del Convenio, la cual se adjunta para pronta referencia**…") (emphasis added).

118. The 2014 Convenio noted the parties' agreement that the repair works of the Concession required funds totaling MXN $6.058 billion following an estimate made by FIT at SCT's request. According to the negotiations between the parties, the SCT would provide an amount based on this budget, whereas CFCM would keep its investment commitments under the 2012 Business Plan. This way, the parties would reach a total investment budget exceeding MXN $6 billion, taking into consideration the budget proposed by the Inspection Report. The 2014 Convenio also clarified that the facilities and assets of the Concession would be returned to CFCM by 31 March 2014. The SCT would also exempt CFCM from complying with maintenance and operating regulations until the rehabilitation works in the Concession were completed.

Proofs:

a. **CWS-2-SPA**, ¶61 (Witness Statement-[redacted] Claim Memorial) ("… El FIT, después de realizar su análisis, concluyó que la inversión que era requerida era de MXN$6,058,370,175.00 (aproximadamente USD$459,273,619.9, al tipo de cambio vigente en ese momento, siendo éste de MXN$13.191200 por dólar)");

b. *Id.*, ¶63 (Witness Statement-[redacted] Claim Memorial) ("El Convenio de Inversión establecía que las Partes invertirían MXN$6,058,370,175.00 para reparar y modernizar las Vías y devolver las vías a CFCM (es decir, el monto que había propuesto el propio FIT). El Convenio de Inversión también fijó la nueva fecha para la entrega de la operación a CFCM al 31 de marzo de 2014");

c. **C-14-SPA**, p. 4 (Draft agreement between CFCM and the SCT dated 14 March 2014) ("SEGUNDA. DE ALGUNAS OBLIGACIONES DE LAS PARTES. Por virtud del presente Convenio: **las Partes se comprometen a invertir la cantidad de $6,058'370,175.00**") (emphasis added);

d. *Id.* ("La Secretaria y la Concesionaria **se obligan a concluir el proceso de entrega de los bienes asegurados y de las vías concesionadas, en términos de lo establecido sobre el particular en el Oficio 811, a más tardar el 31 de marzo de 2014**…hasta, en tanto no se concluya el programa de inversión y aportación de recursos previsto en este Convenio, no serán exigibles a la Concesionaria estándares y o indicadores de mantenimiento, operación y explotación inalcanzables, considerando el estado actual de los bienes asegurados y las vías concesionadas") (emphasis added).

119. To implement the 2014 Convenio, the SCT required CFCM to secure a technical advisor to operate the Concession. Even though CFCM had already secured letters of intent signed by [redacted] in October 2008, and again in August 2013, confirming the company's commitment to provide CFCM with technical and operational advisory services, CFCM signed a formal contract with [redacted] on 2 April 2014, as required by the 2014 Convenio.

Proofs:

a. **C-98-SPA** (Letter from Viabilis to the SCT dated 3 October 2008) (showing Viabilis secured ███ as technical support to take over CFCM's control);

b. **C-138-ENG** (Letter from ███ ███ Inc. to CFCM dated 7 August 2013) (███ ███ Inc. (███ hereby expresses its commitment, subject to entering into a Consulting Agreement, to provide FCCM with technical and operational advisory services in various aspects of railway operations, which are part of its business lines described below, as it may be needed, for such resumption in operations");

c. **C-139-SPA**, p. 1 (Letter FCCM-DGTFM-0004/14 dated 4 April 2014) ("…una vez obtenido el visto bueno de su Dirección General en las diversas reuniones de trabajo mantenidas hasta la fecha, les informamos que **Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V. (FCCM) ha firmado un contrato con la empresa ███ ███ ███ INC.(███ por el cual dicha empresa prestará a favor de FCCM servicios de asesoría técnica especializada en materia ferroviaria** para la operación, explotación y prestación del servicio público de transporte ferroviario de carga en las denominadas Vías Cortas Chiapas y Mayab") (emphasis added).

120. Additionally, the SCT required CFCM to secure financial support to operate the Concession and required proof of additional investments. Even though CFCM had already secured letters of intent signed by ███ in October 2008,[5] and the parties had already agreed on the 2012 Business Plan, CFCM informed the SCT that it had secured further equity investments from Consorcio de Desarrollo Intercontinental, S.A. de C.V. ("**Consorcio**")███ ███.

Proofs:

a. **C-140-SPA**, p. 1 (Letter FCCM-DGTFM-0005/14 dated 7 April 2014) ("adjunto al presente encontrará copia del acta de la Asamblea General Ordinaria de Accionistas de Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V. (FCCM), de fecha 15 de marzo de 2014 (Anexo 1), en la que se aprobaron diversos actos que fortalecen la capacidad financiera de FCCM, mismos que fueron acordados previamente con su Dirección General de cara a la celebración del Convenio que se indica en el propio oficio de referencia… se han incorporado como accionistas de FCCM las personas morales Consorcio de Desarrollo Intercontinental, S.A. de C.V. ███ ███"):

[5] *See supra*, Section III.F (From September to November of 2008, the SCT requested additional documentation to approve the restitution of the Concession to CFCM. Viabilis presented, at the SCT's request, letters of support from ███ as a technical partner to operate the Concession, and ███ as a financing partner).

b. **C-96-SPA** (Letter from Viabilis to the SCT dated 5 September 2008) (reflecting that Viabilis secured financing and technical support to take over CFCM's control);

c. **C-90-SPA** (Letter from Viabilis to the SCT dated 19 September 2008) ("Desde hace varios meses, Viabilis acreditó ante la SCT su capacidad financiera y operativa, en los términos antes señalados e incluso manifestó su disposición de garantizar en términos de mercado el cumplimiento de la obligación a su cargo, consistente en aportar los recursos previstos en el proyecto de plan de negocios. En ese sentido, …Viabilis presentó a la SCT: (i) una carta … en la que [redacted] [redacted] manifiesta que otorgará el financiamiento requerido …; y (ii) una carta … en la que [redacted] [redacted] de México confirma que prestará a Viabilis los servicios de asesoría técnica requeridos…").

121. The SCT's commitment to finance the rehabilitation of the Chiapas-Mayab Railway were incorporated into Mexico's 2014-2018 National Infrastructure Program ("**Infrastructure Plan**"), which closely follows and implements the Development Plan. The Infrastructure Plan notes that investment in infrastructure projects is a strategic priority for Mexico and emphasizes the importance of repairing and maintaining the railroad infrastructure in the Concession to improve connectivity in the region.

Proofs:

a. **C-15-SPA**, p. 1 (Mexico's 2014-2018 National Infrastructure Program) ("La inversión en infraestructura es un tema estratégico y prioritario para México porque representa el medio para generar desarrollo y crecimiento económico y es la pieza clave para incrementar la competitividad");

b. *Id.*, p. 8 ("la infraestructura ferroviaria requiere ser fortalecida y expandida en algunos rubros…**los diversos fenómenos naturales afectan las vías, particularmente en la zona Sur-Sureste, por lo que resulta imperativo invertir en su reparación y mantenimiento**, tanto para mejorar su conectividad como para mitigar diversos problemas sociales asociados con el lento paso de los trenes por esta región") (emphasis added).

122. In addressing the importance of maintaining railroad infrastructure, the Infrastructure Plan expressly listed the repair works in the Chiapas-Mayab Railway as one of its main investment projects. Significantly, the Infrastructure Plan noted that the rehabilitation of the Chiapas-Mayab Railway would take place between 2014 and 2018, and would involve a total investment of MXN $6.058 billion, ***exactly*** as provided in the 2014 Convenio. This way, in conjunction with CFCM's investments in accordance with the 2012 Business Plan, the parties would reach a total investment budget of approximately MXN $8 billion, in line with the budget proposed in the Inspection Report. Significantly, the funds committed to rehabilitate the Concession were part of a broader investment package allocated to the southeast region of the country, which included fifty-six government commitments worth MXN $130 billion. This broader injection of funds into the region would also indirectly benefit the long-term profitability of the Concession.

Mantenimiento de líneas ferroviarias Chiapas â Mayab.- El proyecto se llevará a cabo a partir de 2014 y hasta 2018, con un monto total de inversión de **6,058 mdp**. Incluye la rehabilitación de vías, mantenimiento a puentes y alcantarillas; así como la adquisición de rieles y cambio de durmientes, herrajes y juegos de cambio para un total de 1,046 km de líneas ferroviarias. Dicha obra beneficiará el transporte de carga ya que permitirá transportarla a mayores velocidades y con costos más competitivos entre la frontera de Guatemala y la Península de Yucatán con el interior del país.

Image 26: Infrastructure Plan confirmed Mexico's investment commitments to the Concession (C-15-SPA)

Proofs:

a. **CWS-2-SPA**, ¶66 (Witness Statement-[redacted] Claim Memorial) ("Posteriormente, en abril de 2014, el Gobierno de México publicó el Programa Nacional de Infraestructura 2014-2018, el cual incluía una descripción de las inversiones de infraestructura a ser realizadas por el Gobierno de México entre 2014 y 2018. El Programa incluyó el compromiso de México de invertir MXN$6,058 millones para reparar las Vías. Este aporte, junto con las aportaciones comprometidas por CFCM por MXN$2,300 millones, aseguraban el monto de inversión en vía necesario para realizar todas las reparaciones identificadas en el informe pericial del perito dictaminador en vías férreas");

b. **C-15-SPA**, p. 17 (Mexico's 2014-2018 National Infrastructure Program) (showing Mexico confirmed it would invest MXN $6.058 billion in the Concession);

c. *Id.*, p. 19 ("Principales proyectos de inversión…Construcción del Tren Transpeninsular (primera etapa).- La construcción de este tren de pasajeros será un proyecto que detone la movilización de pasajeros en la península de Yucatán, así mismo será fundamental para el desarrollo y expansión del turismo en la región. Se iniciará en 2014 con una inversión de 17,954 mdp y finalizará en 2017");

d. *Id.*, p. 103 ("REGIÓN SUR-SURESTE. Para esta región se tienen 56 Compromisos de Gobierno que implicarán recursos de inversión por un monto total de 130,904 mdp, que representa una tercera parte de los recursos destinados para tal fin en el PNI 2014-2018").

123. As explained, CFCM diligently complied for more than six years with all of the SCT's requests to receive the operation of the Concession, despite the SCT's delay in the return of the Concession to CFCM. CFCM secured experts to prepare a program to repair the Chiapas-Mayab Railway (as reflected in the Inspection Report) and to project a reasonable business plan that would make the Concession profitable (as reflected in the 2012 Business Plan). Further, CFCM secured additional investors (specifically, [redacted] and procured [redacted] as technical advisor to ensure the highest technical standards in the operation of the Concession. None of these requests were mandated by the Concession Agreement, the Amendment, or the law. CFCM, however, collaborated in good faith with the SCT, relying on the SCT's promises and encouragements, with the expectation that working collaboratively would revitalize the southeastern region of Mexico and allow the Concession be returned to CFCM. The 2014 Convenio and the Infrastructure Plan all evidenced the SCT's commitments and CFCM's expectations that the return of the operation of the Concession was imminent.

Proofs:

a. *See supra.*

J. The SCT Again Delayed the Return of the Concession to CFCM

124. Despite the great progress in negotiating and agreeing on funds to compensate CFCM for the condition of the Chiapas-Mayab Railway after more than six years of FIT's operation, CFCM did not receive the operation of the Concession on 31 March 2014. In fact, since the Amendment and the termination of the Modality, FIT *de facto* continued to operate the Chiapas-Mayab Railway, notwithstanding having no legal ground to do so, and despite CFCM's opposition. Due to the poor condition of the infrastructure, FIT's operation resulted in a high number of accidents throughout 2013 and 2014.

Proofs:

a. **C-141-SPA** (Letter FCCM-DGTFM-0040/13 dated 3 September 2013) ("…el **descarrilamiento del Ferrocarril** Chiapas-Mayab el domingo 25 de agosto de 2013…que lamentablemente **resultó en la muerte de más de 10 personas y en daños sustanciales a los bienes asegurados, las vías concesionadas** y bienes propiedad de terceros…**el FIT sigue operando ilícitamente dichas vías**") (emphases added);
b. **C-142-SPA**, p. 1 (Letter FCCM-DGTFM-0008/14 dated 25 August 2014) ("…las comprobadas condiciones de inseguridad en las que el FIT opera (indebida e ilegalmente) las líneas Chiapas y Mayab, suponen un riesgo para la viabilidad operativa de la conexión ferroviaria de todo el sureste mexicano y de la frontera con Guatemala y, por lo tanto, ponen también en peligro la viabilidad financiera del sistema ferroviario formado por las líneas Chiapas y Mayab").

125. CFCM was ready to reassume the operation of the Concession. It had secured technical support from [redacted] and obtained additional investments from Consorcio and [redacted] Additionally, it had hired key personnel and provided all documentation required by the SCT to resume operation—even though most of those documents were not required under applicable law. Most importantly, CFCM met with old and prospective clients to direct freight flows to the Concession, as soon as the operation resumed.

Proofs:

a. *See infra.*

126. At the time the Amendment was executed, CFCM had already identified and hired key personnel to run the operation of the Concession. Some of these executives and employees had worked in CFCM when G&W controlled the company, before the imposition of the Modality in 2007. Their reinstatement was important to resume the operation of the Concession.

Proofs:

a. **CWS-2-SPA**, ¶70 (Witness Statement-[redacted] Claim Memorial) ("En cuanto al personal directivo y gerencial, para 2012, CFCM ya tenía contratado al personal cubriría las posiciones clave y muchos de ellos tenían experiencia previa trabajando para CFCM en las Vías. [redacted]…").

127. CFCM was also in a position to absorb employees to work in the Concession from FIT. When the Modality was imposed, FIT assumed the operation of the Concession with CFCM's unionized workers. Now that the Modality was over, CFCM expected to retain this workforce. In furtherance thereof, CFCM held several meetings with the workers' union to negotiate the terms of employment of the workforce under CFCM's renewed operation. CFCM had also informed the SCT of a detailed list of 304 unionized employees that were required to resume the operation of the Concession.

Proofs:

a. **CWS-2-SPA**, ¶¶71-72 (Witness Statement-[redacted] Claim Memorial) ("En cuanto al personal sindicalizado (maquinistas, operarios, técnicos de taller, etc.), el FIT había absorbido el mismo personal sindicalizado que había laborado con CFCM cuando operaba la Concesión y estaba bajo el control de Genesee & Wyoming. El plan era recontratar a ese mismo personal una vez que el FIT terminara su relación laboral como resultado de la terminación de la modalidad, como estaba previsto en el Oficio 811 de la SCT… De hecho, CFCM sostuvo reuniones con el sindicato desde el arranque del proceso de entrega… El sindicato se mostró satisfecho con las iniciativas para revitalizar el servicio ferroviario de la región y receptivo frente a las necesidades que el proyecto tenía de ajustar las condiciones del contrato colectivo que el FIT había celebrado. La propuesta que se le hizo al sindicato fue respetar transitoriamente las mismas condiciones del convenio colectivo de trabajo que se tuvo celebrado con CFCM cuando ésta era controlada por Genesee & Wyoming y, una vez iniciadas las operaciones, CFCM realizaría una renegociación del contrato colectivo");

b. **C-144-SPA**, p. 1 (Letter FCCM-DGTFM-0017/13 dated 11 April 2013) ("En cumplimiento de lo previsto en el Oficio SCT 1, FCCM ha iniciado la negociación el contrato colectivo referido con el Sindicato. Sin embargo, no es posible concluir el convenio ni proceder a la contratación del personal, mientras

no sea liquidado el personal contratado por el Ferrocarril del Istmo de Tehuantepec, S.A. de C.V. para la operación de las vías concesionadas, tal como se establece en el propio Oficio SCT 1");

c. *Id.*, p. 1 ("Por lo que se refiere a la plantilla de personal, adjunto al presente escrito, como Anexo "A", encontrará la plantilla preliminar de personal que FCCM requeriría para llevar a cabo a operación de la Concesión, asumiendo la operatividad de la totalidad de las vías concesionadas");

d. **C-145-SPA** (Letter FCCM-DGTFM-0017/13, Annex A, dated 11 April 2013) (showing CFCM informed the SCT of the unionized workers required to resume the operation of the Concession);

e. **C-208-SPA** (Letter FCCM-DGTFM-0042/13) (showing that CFCM proposed to the union to respect the same conditions of the union agreement entered with Genesee & Wyoming).

128. Additionally, CFCM provided all the documentation required by the SCT to resume the operation of the Concession. Even though some documents could only be provided after the operation resumed. By September 2013, CFCM had already furnished proof of:

- CFCM's operational structure of the company;
- The telecommunications system that would be used to operate the railroads;
- The fees that would be charged to clients pursuant to Article 170 of the Railway Services Regulation;
- A program to address contingencies or disasters in the railroads, pursuant to Article 200 of the Railway Services Regulation;
- A program to protect units owned by third parties transiting through the Chiapas-Mayab Railroad;
- Information about the locomotive cars owned by CFCM but sequestered under FIT's custody;
- The Internal Transport Regulation (*Reglamento Interno de Transporte)*;
- The trains' schedules;
- An employee training program pursuant to Article 157 of the Railway Services Regulation; and
- An insurance policy program.

Proofs:

a. **C-146-SPA**, p. 5 (Letter FCCM-DGTFM-0042/13 dated 5 September 2013) (showing CFCM provided the documentation required by the SCT to resume the operation of the Concession);

b. **C-147-SPA** (Letter FCCM-DGTFM-0017/13, Annex C dated 11 April 2013) (showing CFCM provided the documentation required by the SCT to resume the operation of the Concession);

c. **C-148-SPA** (Letter FCCM-DGTFM-0017/13, Annex D dated 11 April 2013) (showing CFCM provided the documentation required by the SCT to resume the operation of the Concession);

d. **C-149-SPA** (Letter FCCM-DGTFM-0017/13, Annex E dated 11 April 2013) (showing CFCM provided the documentation required by the SCT to resume the operation of the Concession);

e. **C-150-SPA** (Letter FCCM-DGTFM-0017/13, Annex F dated 11 April 2013) (showing CFCM provided the documentation required by the SCT to resume the operation of the Concession);

f. **C-151-SPA** (Letter FCCM-DGTFM-0017/13, Annex G dated 11 April 2013) (showing CFCM provided the documentation required by the SCT to resume the operation of the Concession);

g. **C-152-SPA** (Letter FCCM-DGTFM-0017/13, Annex H dated 11 April 2013) (showing CFCM provided the documentation required by the SCT to resume the operation of the Concession);

h. **C-153-SPA** (Letter FCCM-DGTFM-0017/13, Annex I dated 11 April 2013) (showing CFCM provided the documentation required by the SCT to resume the operation of the Concession);

i. **C-154-SPA** (Letter FCCM-DGTFM-0017/13, Annex J dated 11 April 2013) (showing CFCM provided the documentation required by the SCT to resume the operation of the Concession);

j. **C-155-SPA** (Letter FCCM-DGTFM-0017/13, Annex K dated 11 April 2013) (showing CFCM provided the documentation required by the SCT to resume the operation of the Concession);

k. **C-156-SPA** (Letter FCCM-DGTFM-0017/13, Annex L dated 11 April 2013) (showing CFCM provided the documentation required by the SCT to resume the operation of the Concession).

129. To prepare to operate the Concession, CFCM also reached out to past, current, and prospective clients in an effort to capture the immense freight flow potential of the region. CFCM's main objective was to retain the clients that still used the Chiapas-Mayab Railway throughout FIT's operation.

Proofs:

a. **CWS-2-SPA**, ¶77 (Witness Statement-[redacted] [redacted]Claim Memorial) ("Durante todo el proceso de negociación y coordinación con la SCT, CFCM mantuvo comunicación constante con los clientes del ferrocarril, tanto con los que mantenían contratos vigentes con el FIT, como clientes que habían utilizado el ferrocarril en el pasado. De esta forma, los clientes estuvieron informados de los planes que CFCM tenía para mejorar el servicio y se les fue actualizando sobre los avances en el proceso de negociación con la SCT. Los clientes estaban entusiasmados con la posibilidad de que CFCM retomara la operación y se realizaran las inversiones necesarias

para mejorar los estándares de calidad del servicio. Los clientes mostraron interés en usar el ferrocarril como medio de transporte para las actividades de su industria");

b. *Id.*, ¶78 ("Además de mantener a los clientes que ya tenían contratos celebrados con el FIT o que ya habían sido clientes de CFCM, el Estudio de Demanda de ████ de 2010 identificó nuevas oportunidades de clientes que CFCM exploraría una vez retomada la operación de la Concesión").

130. CFCM also contacted the leasing company for the locomotives that leased to FIT, to maintain the same leasing conditions for equipment, and designed a general insurance plan to insure the assets and equipment.

Proofs:

a. **CWS-2-SPA**, ¶74 (Witness Statement-████████████████ ██████Claim Memorial) ("Además de los bienes asegurados, el FIT había celebrado ciertos contratos de arrendamiento de locomotoras adicionales. …CFCM mantuvo contactos con la arrendadora de dicho equipo para mantener dichas locomotoras arrendadas, en las mismas condiciones que el FIT");

b. **C-209-SPA** (Lease Agreement for Locomotives dated December 2012) (evidencing that FIT had entered into agreements to lease additional locomotives);

c. **CWS-2-SPA**, ¶75 (Witness Statement-████████████████ ██████Claim Memorial) ("En cuanto a la contratación de las pólizas de seguro, CFCM desarrolló las condiciones generales del plan de seguros que se requería para asegurar cada uno de los bienes y equipos. CFCM planteó a la SCT la estrategia de prorrogar las pólizas contratadas por el FIT. La aseguradora que había emitido las pólizas de seguro en favor FIT (Aseguradora Interacciones) envió una carta a CFCM manifestando su interés de continuar asegurando los bienes y equipos mediante la renovación de las pólizas que tenía contratadas por el FIT");

d. **C-210-SPA** (Letter FCCM-DGTFM-0042/13 dated 5 September 2013, Annexes 1 and 2) (showing that the insurance company that insured the assets during FIT's operation of the Concession was interested in continuing insuring the assets).

131. In other words, CFCM had taken the steps necessary to be in a position to reassume the operation of the Concession. The SCT, however, delayed restoring the Concession. On 25 August 2014, CFCM formally requested the SCT to sign the 2014 Convenio, instruct FIT to cease its illegal operation of the Chiapas-Mayab Railway, reinstate the Concession's assets to CFCM, and fulfill its commitments under the 2012 Convenio and Resolution 811. On 23 October 2014, CFCM noted in a second letter that it had attempted to engage with the SCT for weeks to address the SCT's inaction with respect to the Concession, and that CFCM remained at the SCT's disposal to work together to resume the operation of the Concession.

Proofs:

a. **C-142-SPA** (Letter FCCM-DGTFM-0008/14 dated 25 August 2014) (demonstrating that CFCM requested the SCT to return the operation of the Concession);

b. **C-157-SPA** (Letter FCCM-DGTFM-0009/14 dated 23 October 2014) ("…**la Secretaría ha acumulado retrasos importantes en el cumplimiento de los acuerdos firmados** hasta la fecha en relación con el mencionado Título de Concesión y esta situación está generando importantes daños y perjuicios a mi representada. Le reitero que **me encuentro a su entera disposición para encontrar soluciones a los problemas que se han presentado y trabajar conjuntamente** en el desarrollo de un servicio ferroviario seguro y eficiente en el sureste mexicano") (emphases added).

K. Mr. Willars Acquired an Interest in CFCM

132. In 2015, Mr. [redacted] informed Mr. Willars about his involvement in the operation of the Chiapas-Mayab Railway, and presented him with the opportunity to become involved in the project. Mr. [redacted] and Mr. Willars had been business partners in other enterprises. Together, they had established [redacted], a company that manufactured steel fittings and components for the oil and gas industry. [redacted] operated successfully until 2002. Mr. [redacted] and Mr. Willars continued their professional relationship and had partnered in other businesses and had become good friends.

Proofs:

a. **CWS-1-ENG**, ¶9 (Witness Statement-Mario Noriega Willars-Claim Memorial) ("In 2015, Mr. [redacted] presented me with the opportunity to become involved in the Mexico rail transport industry by investing in two Mexican companies, which were part of the same corporate group: (1) Viabilis Holding, S.A. de C.V. ("Viabilis") and (2) Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V. ("CFCM"), a subsidiary of Viabilis");

b. *Id.*, ¶¶7-8 (Witness Statement-Mario Noriega Willars-Claim Memorial) ("[redacted]").

133. Mr. Willars is a decorated war veteran and successful businessman. He served in the United States military from 1965 to 1976, and received a Purple Heart and Air Medal of Valor for his service. After his military service, Mr. Willars graduated from the American Technological University and worked for a number of companies in the lead smelting and oil and gas industries in a managerial capacity, including [redacted]. In 1998, Mr. Willars left [redacted] to pursue his own business endeavors, including [redacted] and other companies.

Proofs:

a. **CWS-1-ENG**, ¶¶5-6 (Witness Statement-Mario Noriega Willars-Claim Memorial) ("Following completion of my military service, I attended the American Technological University (later renamed University of Central Texas), from where I graduated in 1978 with a Bachelor of Science in Aviation…I went on to work for a number of companies in the lead smelting and oil and gas industries in a managerial capacity. The last company I worked for before shifting my focus to pursuing my own business endeavors was [redacted] [redacted], a leading subsidiary of [redacted], where I worked as a Manufacturing Consultant").

134. Mr. [redacted] informed Mr. Willars of the potential investment in detail, including the history of the Concession since its inauguration in 1999. Mr. Willars reviewed the relevant documents negotiated and agreed with the SCT, including the 2012 Business Plan, which explained the project structure, the cash flow projections of the company, and the investment commitments undertaken by the SCT to repair the Chiapas-Mayab Railway.

Proofs:

a. **CWS-1-ENG**, ¶10 (Witness Statement-Mario Noriega Willars-Claim Memorial) ("Mr. [redacted] provided me with several documents so that I could evaluate the investment opportunity");

b. *Id.*, ¶¶21-22 ("CFCM's approved Business Plan was comprehensive. In my view, the Business Plan contained all the information required to evaluate the business opportunity, including CAPEX and OPEX requirements, payroll expenses, leasing expenses, debt commitments, and revenue models. …In reviewing the Business Plan, I found it to be transparent, supported by sound financial advice, and well structured");

c. **C-158-ENG**, pp. 22-24 (Share Purchase Agreement between [redacted] [redacted] [redacted] and Mario Noriega Willars) (indicating that Mr. Willars was informed about the history of the Concession and the state of negotiations with the SCT by 2015).

135. After reviewing the information about CFCM, the Concession, and the SCT's commitments to the project, Mr. Willars believed that committing to this project would be a worthwhile investment. On 14 December 2015, Mr. [redacted] and Mr. Willars signed a share purchase agreement ("**Willars SPA**") for the purchase of shares in CFCM and Viabilis.

Proofs:

a. **CWS-1-ENG**, ¶30 (Witness Statement-Mario Noriega Willars-Claim Memorial) ("Pursuant to the Agreement, I acquired a 16.38% direct interest in CFCM, and a 48% direct interest in Viabilis [redacted] [redacted]. On the same date, [redacted] [redacted]

”);

b. **C-158-ENG,** (Share Purchase Agreement between Vargas and Mario Noriega Willars) (evidencing that Mr. Willars acquired an interest in CFCM in 2015).

136. .

Proofs:

a. **C-158-ENG**, p. 17 (Share Purchase Agreement between and Mario Noriega Willars) (evidencing that Mr. Willars acquired an interest in CFCM in 2015);

b. *Id.*, p. 25 (“ ”).

137. Mr. Willars’ shares equated to a 51.76% interest in CFCM. His CFCM’s shares represented a 16.38% direct interest in the company, whereas his Viabilis’ shares represented a 35.38% indirect interest in CFCM.

Proofs:

a. **C-158-ENG**, p. 24 (Share Purchase Agreement between and Mario Noriega Willars) (“The Directly Owned CFCM Shares represent 16.38% of the total CFCM outstanding stock shares, and the indirectly Owned CFCM Shares represent 35.38% of the total CFCM outstanding stock shares. Therefore, the Directly Owned CFCM Shares and the Indirectly Owned CFCM Shares, together, represent approximately 51.76% of the total CFCM outstanding stock share”).

138. On the same day as the execution of the SPA, Mr. assigning the agreed shares in CFCM (or 16.38% of outstanding shares) and shares in Viabilis (or 48% of outstanding shares) to Mr. Willars

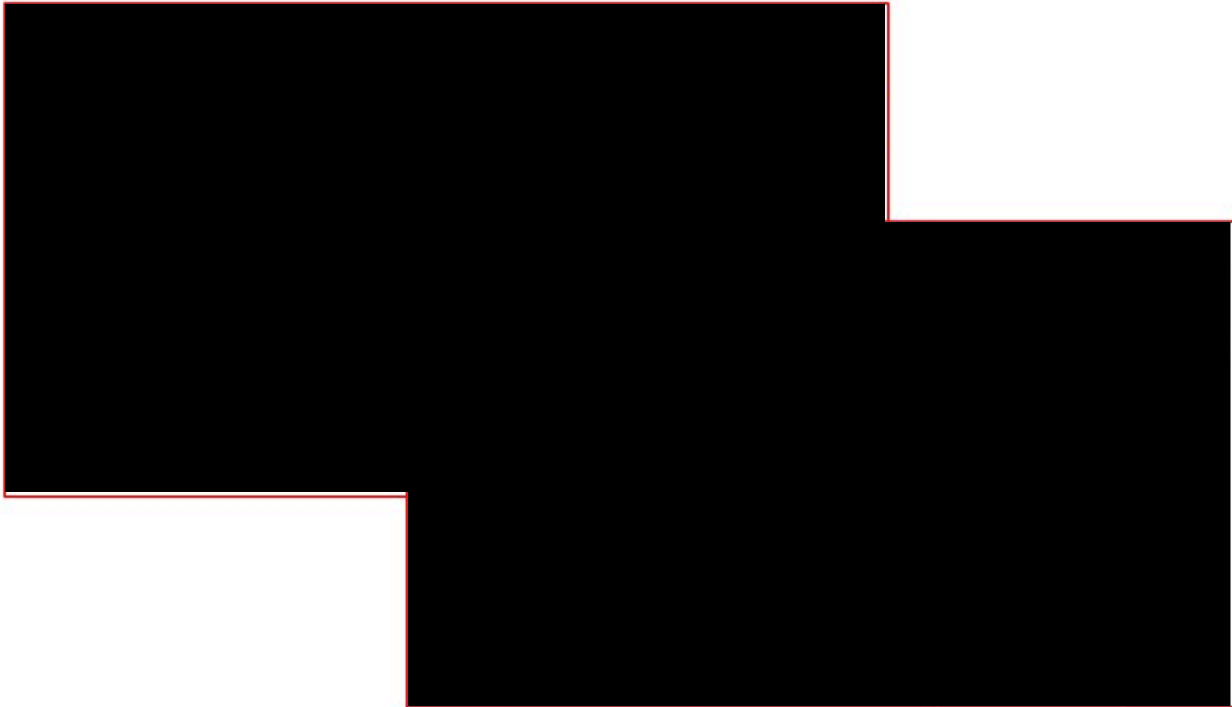


Image 27: Mr. Willars paid the first installment of the SPA (C-159-ENG, C-160-ENG)

Proofs:

a. C-159-ENG (Bill of Sale of CFCM executed by [redacted] [redacted] [redacted] dated 14 December 2015) (evidencing that Mr. Willars acquired an interest in CFCM in 2015);

b. C-160-ENG (Bill of Sale of Viabilis executed by [redacted] [redacted] [redacted] dated 14 December 2015) (evidencing that Mr. Willars acquired an interest in Viabilis in 2015).

139. The Willars SPA and the Bills of Sale gave Mr. Willars a 51.76% majority ownership interest in CFCM: (i) a 16.38% direct interest in CFCM; and (ii) a 35.38% indirect interest through its participation in Viabilis, which owned 73.31% of the outstanding shares of CFCM.

Proofs:

a. C-2-SPA (CFCM's Shareholder Registry) (reflecting that Mr. Willars directly owns a 16.38% interest in CFCM and that Viabilis directly owns a 73.71% interest in CFCM);

b. C-3-SPA (Viabilis Holding, S.A. de C.V.'s Shareholder Registry) (evidencing that Mr. Willars owns a 48% interest in Viabilis).

L. Without Warning, Mexico Triggered a Rescate Proceeding to Revert the Concession to the State

1) The SCT declared the *rescate* of the Concession

140. Thus, CFCM continued with its efforts to communicate with the SCT to ensure the restitution of the Chiapas-Mayab Railway as soon as possible.

Proofs:

a. **CWS-2-SPA**, ¶68 (Witness Statement-[redacted] Claim Memorial) ("Sin embargo, pasaron varios meses sin recibir noticias de la SCT. No obstante, al consultar a los funcionarios de la SCT sobre el estado de los compromisos incluidos en el Convenio de Inversión, estos informaban que su implementación era cuestión de tiempo y que se iban a cumplir los acuerdos establecidos. Eventualmente, la espera se fue alargando sin que la SCT devolviera la operación").

141. Notwithstanding the Amendment and other assurances provided by the SCT, on 4 May 2016, Fernando José Bueno Montalvo ("**Mr. Bueno**"), head of the legal department of the SCT, notified CFCM that the SCT was initiating, *ex officio*, a *rescate* proceeding to expropriate the Concession and revert it back to Mexico for reasons of public interest, public utility, and national security ("**Rescate Notice**"). The Rescate Notice was based on Mexico's General Law on National Assets (the "**GLNA**"), the Railway Services Law, and the National Security Law. The Rescate Notice came ***without prior notice*** and caught Mr. Willars and CFCM by complete surprise.

Proofs:

a. **CWS-1-ENG**, ¶¶32-33 (Witness Statement-Mario Noriega Willars-Claim Memorial) ("Regrettably, a few months after I acquired control of CFCM, CFCM's directors informed me that the SCT had unexpectedly expropriated the Concession through a legal vehicle called "rescate." I learned that a "rescate" equated to a regulatory taking of the Concession by the government for reasons of public interest. No lack of compliance on the part of CFCM was al-leged or provided in the government's reasoning for the expropriation. When I invested in 2015, I had no indication or warning that Mexico would expropriate the Concession. To the contrary, the documents I reviewed, and the publicly available information reflected that the SCT and the Mexican government were committed to repairing the railroad tracks and intended to comply with their obligation to return the tracks to CFCM in good operat-ing condition. Thus, the "rescate" declaration came as a complete shock");

b. **CWS-2-SPA**, ¶¶80-81 (Witness Statement-[redacted] Claim Memorial) ("Para nuestra sorpresa, después de todos los esfuerzos conjuntos de la SCT y CFCM de devolver la operación a CFCM, y a pesar de que CFCM había

hecho un esfuerzo financiero por mantener el personal necesario para retomar la operación, la SCT repentinamente y sin previo aviso determinó el rescate de la Concesión. No existió indicio previo de que la SCT pretendiera rescatar la Concesión. Todas las comunicaciones con la SCT reflejaban una intención de devolver la operación a CFCM, quien se encontraba completamente lista para operar. Sin embargo, el 2 de mayo de 2016, la SCT notificó a CFCM que había iniciado el proceso de rescate para expropiar la Concesión…");

c. **C-161-SPA**, p. 11 (Rescate Notice issued by the SCT dated 4 May 2016) ("De conformidad con el marco jurídico vigente, particularmente con el artículo 20, fracción IV de la Ley Reglamentaria del Servicio Ferroviario y demás disposiciones aplicables, en relación con los artículos 19 y 74, fracción V de la Ley General de Bienes Nacionales, resulta procedente iniciar el presente procedimiento de rescate de la concesión otorgada a CFCM, por causas de interés público, utilidad pública o seguridad nacional, como a continuación se expone").

142. Pursuant to Article 19 of the GLNA, a *rescate* is a type of expropriation proceeding that terminates a concession and seeks to return public-domain assets managed by concessionaries back to the State, for reasons of utility, public interest, or national security. This distinguishes a *rescate* from an ordinary expropriation proceeding in Mexico, where the State takes over private property. A *rescate* is the expropriation of a concession granted by the State. By virtue of a "rescate declaration" (*declaratoria de rescate*), the assets subject to a concession legally return to the possession, control, and management of the public entity that issued the concession. The assets that are directly used to operate the concession, but do not form part of the concession itself (*i.e.*, do not belong to the State), can also be acquired by the public entity terminating the concession.

Proofs:

a. **CER-2-SPA**, ¶¶54-55 (Expert Report-Marco Antonio de la Peña-Claim Memorial) ("El rescate, en Derecho Mexicano, es un acto administrativo por virtud del cual la autoridad concedente pone fin anticipadamente a una concesión, recuperando la administración de los bienes concesionados, por causa de utilidad pública y mediante indemnización. El rescate, en su naturaleza jurídica, es muy similar a una expropiación. La particularidad del rescate es que, a través de él, el Estado recupera la administración y explotación de bienes propios del Estado, y puede incluir también que el Estado adquiera bienes propiedad de la concesionaria. En esencia, el rescate es una expropiación sobre una concesión otorgada por el propio Estado");

b. **CL-1-SPA**, Article 19 (Mexico's General Law of National Assets) ("Las dependencias administradoras de inmuebles y los organismos descentralizados podrán rescatar las concesiones que otorguen sobre bienes sujetos al régimen de dominio público de la Federación, mediante indemnización, por causas de utilidad, de interés público o de seguridad nacional").

143. In exchange for the concession being reverted to the State, Article 19 of the GLNA entitles the concessionaire to compensation. The compensation awarded to the concessionaire for the *rescate* is fixed in a resolution issued by the governmental entity conducting the *rescate*. If the concessionaire disagrees with the amount of compensation determined by the expropriating entity, the concessionaire can request that a court determine the final amount of compensation.

Proofs:

a. **CER-2-SPA**, ¶62 (Expert Report-Marco Antonio de la Peña-Claim Memorial) ("En segundo lugar, el rescate debe realizarse en todos los casos mediando el pago de una indemnización al concesionario. Como nota la frase final del artículo 19 de la LGBN, la autoridad concesionante debe emitir una resolución determinando el monto de la indemnización");

b. **CL-1-SPA**, Article 19 (Mexico's General Law of National Assets) ("**En la declaratoria de rescate se establecerán las bases generales que servirán para fijar el monto de la indemnización que haya de cubrirse al concesionario**, tomando en cuenta la inversión efectuada y debidamente comprobada, así como la depreciación de los bienes, equipos e instalaciones destinados directamente a los fines de la concesión, pero en ningún caso podrá tomarse como base para fijarlo, el valor de los bienes concesionados. Si el afectado estuviese conforme con el monto de la indemnización, la cantidad que se señale por este concepto tendrá carácter definitivo. **Si no estuviere conforme, el importe de la indemnización se determinará por la autoridad judicial, a petición del interesado**, quien deberá formularla dentro del plazo de quince días hábiles contados a partir de la fecha en que se le notifique la resolución que determine el monto de la indemnización") (emphases added).

144. The Rescate Notice indicated that Mexico had suddenly—disregarding years of negotiations between CFCM and the SCT—reached the conclusion that the Concession could not realize its economic potential because current investment commitments to repair the Chiapas-Mayab Railway were limited. In doing so, the Rescate Notice omitted any mention of the SCT's commitments to compensate CFCM for the poor condition of the Chiapas-Mayab Railway. Notably, even though the Rescate Notice made frequent reference to the Infrastructure Plan, it failed to acknowledge the SCT's MXN $6.058 billion commitment to repair the Chiapas-Mayab Railway.

Proofs:

a. **C-161-SPA**, p. 8 (Rescate Notice issued by the SCT dated 4 May 2016) ("El programa de inversión del plan de negocios presentado por el concesionario al modificar la concesión mantiene las vías en condiciones que equivalen a una categoría de Clase 6. El plan de negocios de la Concesión establece un compromiso de inversión en vías férreas únicamente por 78.9 millones de dólares").

145. According to the Rescate Notice, the expropriation of the Concession was required for reasons of public interest, public utility, and national security. In particular, the Rescate Notice provided that the public interest in the region of the Concession required investments of at least MXN $10 billion to upgrade its railroads to Class 3. These purported capital requirements thus allegedly exceeded the USD $78.9 million of investments committed under the Concession. The SCT also deemed the expropriation to be justified because it would satisfy an "urgent" need—a need never before disclosed to CFCM—to integrate the Chiapas-Mayab Railway with FIT's transoceanic corridor. Finally, the expropriation of the Concession was required to ensure safety conditions in the provision of freight services Chiapas-Mayab Railway.

Proofs:

a. **C-161-SPA**, pp. 11, 15 (Rescate Notice issued by the SCT dated 4 May 2016) ("resulta procedente iniciar el presente procedimiento de rescate de la concesión otorgada a CFCM, por causas de interés público, utilidad pública o seguridad nacional, como a continuación se expone…");

b. *Id.*, p. 18 ("A mayor abundamiento, la SCT considera urgente la necesidad de constituir una vía troncal en el sureste del país y elevar la eficiencia del servicio público de transporte ferroviario. Por tal motivo, resulta indispensable disponer de las vías cortas Chiapas y Mayab para integrarlas con la línea Z…");

c. *Id.*, p. 21 ("Frente al estado de inseguridad que prevalece en las vías cortas Chiapas y Mayab…resulta indispensable que se lleve a cabo, de manera urgente, un conjunto de medidas tendientes a proteger y mantener en adecuadas condiciones de seguridad la infraestructura para la prestación del servicio público de transporte ferroviario").

146. Notably, the Rescate Notice was not based on any alleged breach by CFCM of the Concession Agreement or the Amendment. Indeed, as the SCT had made clear in the Amendment, CFCM had ***complied with all of its obligations*** under the Concession Agreement.

Proofs:

a. **CWS-2-SPA**, ¶82 (Witness Statement- [redacted] Claim Memorial), ("Un primer punto relevante sobre la decisión de rescate es que la SCT no manifestó en momento alguno que CFCM hubiese incumplido con sus obligaciones o acuerdos. Por el contrario, la determinación del rescate se tomó, de acuerdo con la propia SCT, por razones de interés público, utilidad pública y seguridad nacional…");

b. **CWS-3-SPA**, ¶66 (Witness Statement- [redacted] Claim Memorial) ("El rescate de una concesión ferroviaria solamente puede declararse por causas de utilidad pública, de interés público o de seguridad nacional. Solamente esas razones son suficientes para que exista un rescate sobre una concesión. …Otras causas como incumplimientos del concesionario o impedimentos para prestar el servicio podrían generar otras consecuencias como la revocación de la concesión, pero no un rescate");

c. **C-161-SPA** (Rescate Notice issued by the SCT dated 4 May 2016) (indicating that the Rescate Notice was issued for reasons of public interest, public utility, and national security);

d. **C-11-SPA**, p. 4 (Amended Concession dated 22 October 2012) (indicating that CFCM complied with all the terms of the Concession Agreement) ("…el "CONCESIONARIO"…ha cumplido con las condiciones previstas en la concesión que le fue otorgada, de acuerdo con las verificaciones sistemáticas practicadas").

147. The SCT gave CFCM only ***ten business days*** to respond to the Rescate Notice, and registered the Rescate Notice proceeding under number 75.18.311.01/16 (the "**Rescate File**"). Even though CFCM requested access to the Rescate File, full access to the documentation was delayed until the day on which CFCM's response to the Rescate Notice was due.

Proofs:

a. **C-162-SPA** (Certifications issued by the SCT noting CFCM's request to access the Rescate File, dated 18 May 2016) (showing that CFCM repeatedly requested and was only provided a full copy of the Rescate File on 18 May 2016).

148. Despite this, CFCM submitted its reply in opposition to the Rescate Notice on 18 May 2016 ("**Response to the Rescate Notice**"), and reiterated its opposition in subsequent submissions. As CFCM asserted, the Rescate Notice was nothing more than an attempt by the SCT to cover up its myriad of unfulfilled commitments under the Amendment, the Infrastructure Plan, the 2014 Convenio, the 2012 Convenio, Resolution 811, the 2012 Business Plan, and many other express, written, and unconditional commitments it made over the years to CFCM. CFCM thus requested that the *rescate* proceeding be dismissed, and that the SCT and FIT be ordered to comply with their obligations and with applicable regulations. CFCM filed ***46 pieces of evidence*** supporting the Response to the Rescate Notice.

Proofs:

a. **C-163-SPA**, p. 53 (Response to the Rescate Notice issued by CFCM dated 18 May 2016) ("Por lo anteriormente expuesto solicito respetuosamente…Que la SCT y el FIT **cumplan todas sus obligaciones**…Que la SCT y el FIT **procedan de conformidad con la legislación aplicable**…En el momento oportuno se dicte resolución **declarando la improcedencia del rescate**, con motivo de que la autoridad administrativa no ha comprobado los requisitos legales para decretarlo") (emphases added);

b. *Id.*, p. 1 ("Aunque la Secretaría de Comunicaciones y Transportes (la 'SCT') pretende disfrazar sus actos en el procedimiento en que se actúa como un 'rescate', en realidad **todo esto no es sino un mecanismo para eludir, una vez más, el cumplimiento de las obligaciones que mantiene respecto de CFCM**") (emphasis added);

c. **C-164-SPA** (Written submission by CFCM opposing the Rescate Notice dated 29 June 2016) (showing CFCM opposed

the Rescate Notice and demanded full compensation in case the Rescate Notice was granted).

149. Despite the lack of legal or factual bases for issuing the Rescate Notice, CFCM clarified that any expropriation of the Concession required ***immediate*** and ***full*** compensation. In particular, the SCT was bound to compensate CFCM for any damages suffered as a consequence of the expropriation, including all lost profits for the entire duration of the Concession.

Proofs:

a. **C-163-SPA**, p. 28 (Response to the Rescate Notice issued by CFCM dated 18 May 2016) ("Independientemente de que en opinión de CFCM el procedimiento administrativo de rescate iniciado por la SCT, carece por completo de sustento jurídico, en el presente caso hay un punto innegable consistente en que, de conformidad con el artículo 23 de la Ley Reglamentaria del Servicio Ferroviario (la "Ley Ferroviaria"), **el Gobierno Federal está obligado a indemnizar a CFCM por la imposición de la modalidad**") (emphasis added);

b. *Id.*, pp. 29, ("Suponiendo sin conceder que se han actualizado los supuestos para rescatar los bienes afectos a la Concesión, la SCT debe considerar que **todo rescate se debe llevar a cabo mediante indemnización**…la SCT, en caso de determinar el rescate de la Concesión, deberá establecer, conforme a lo dispuesto en el artículo 19 de la Ley General de Bienes Nacionales, las bases generales para fijar el monto de la indemnización por el rescate, las cuales deberán **incluir, además de todos los daños que se irrogarán a CFCM, todos los perjuicios correspondientes al tiempo que resta de vigencia a la Concesión, es decir, hasta 2049**") (emphases added).

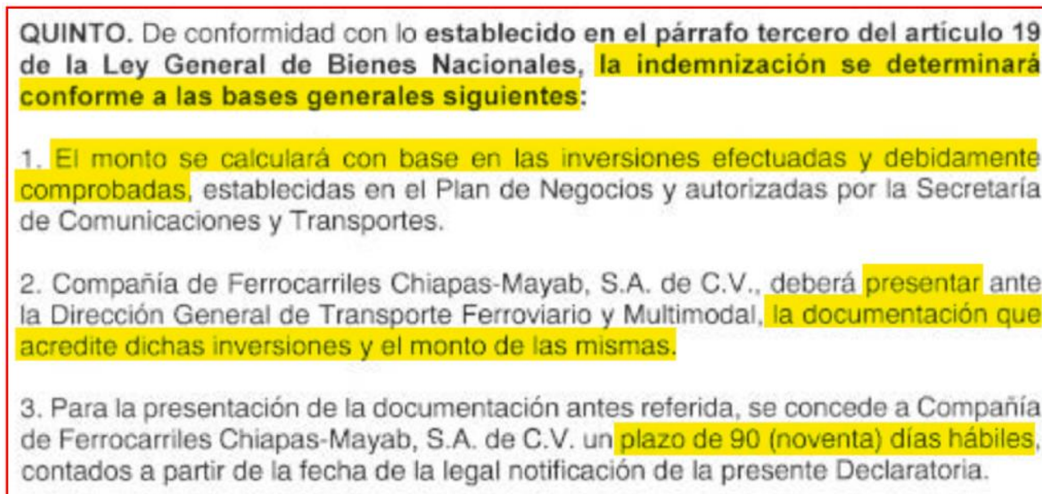
150. On 13 July 2016, the SCT dismissed CFCM's objections and officially declared the *rescate* (the "**Rescate Declaration**"). The Rescate Declaration was signed by Mr. Gerardo Ruiz Esparza ("**Mr. Ruiz**") as Minister of the SCT, served on CFCM on 26 July 2016, and published in the Official Gazette on 23 August 2016. According to the Rescate Declaration, CFCM's objections had no relation to the considerations that led to the Rescate Notice and did not deny the existence of a public interest, a public utility and a national security interest that justified the *rescate*.

Proofs:

a. **C-16-SPA**, p. 67 (Rescate Declaration dated 13 July 2016, served on CFCM on 26 July 2016) ("Por causas de interés público, utilidad pública y seguridad nacional se declara el rescate de la Concesión otorgada en favor de Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V., respecto de las vías generales de comunicación ferroviaria Chiapas y Mayab, en términos del Título de Concesión, de fecha 26 de agosto de 1999 y modificado con fecha 22 de octubre de 2012");

b. **C-166-SPA** (Mexico's Federal Official Gazette dated 23 August 2016) (showing that the SCT published the Rescate Declaration expropriating the Concession to CFCM).

151. Notwithstanding, the Rescate Declaration ***expressly recognized CFCM's right to compensation under Article 19 of the GLNA***. To calculate the compensation owed by the SCT, CFCM was required to submit, within ninety business days, documentation establishing the investments made in the Concession, but only those ***included in CFCM's business plan*** and ***authorized by the SCT***. The SCT, however, refused to compensate CFCM's damages arising from the Rescate Declaration, including lost profits arising from its inability to operate the Concession through the end of its term.



QUINTO. De conformidad con lo **establecido en el párrafo tercero del artículo 19 de la Ley General de Bienes Nacionales**, **la indemnización se determinará conforme a las bases generales siguientes**:

1. El monto se calculará con base en las inversiones efectuadas y debidamente comprobadas, establecidas en el Plan de Negocios y autorizadas por la Secretaría de Comunicaciones y Transportes.

2. Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V., deberá presentar ante la Dirección General de Transporte Ferroviario y Multimodal, la documentación que acredite dichas inversiones y el monto de las mismas.

3. Para la presentación de la documentación antes referida, se concede a Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V. un plazo de 90 (noventa) días hábiles, contados a partir de la fecha de la legal notificación de la presente Declaratoria.

Image 28: The Rescate Declaration recognized CFCM's right to compensation for the expropriation of the Concession (C-16-SPA)

Proofs:

a. **C-16-SPA**, p. 16 (Rescate Declaration dated 13 July 2016, served on CFCM on 26 July 2016) ("En cuanto a incluir en la indemnización por el rescate los daños y perjuicios correspondientes al tiempo que resta de vigencia a la Concesión … resultan infundadas e inoperantes las manifestaciones realizadas por CFCM");

b. *Id.*, p. 68 (indicating that the Rescate Declaration declared that CFCM had a right to compensation due to the expropriation of the Concession).

152. On this purported basis, the Rescate Declaration declared the *rescate*—or expropriation—of the Concession. Accordingly, once the Rescate Declaration was legally served on CFCM: (i) the Concession would be extinguished and would cease to have effect; (ii) the assets that formed part of the Concession would legally return to the possession, control, and management of the SCT; and (iii) all assets, goods, equipment, and facilities that directly served the purposes of the Concession (including CFCM's assets) would become the SCT's property, unless CFCM claimed them. Thus, CFCM was given a sixty-day term to identify the assets it would retrieve from the Concession.

Proofs:

a. **C-16-SPA**, pp. 67-68 (Rescate Declaration dated 13 July 2016, served on CFCM on 26 July 2016) ("La Secretaria de Comunicaciones y Transportes autoriza a Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V. a retirar y disponer de los bienes, equipos e instalaciones de su propiedad afectos a la concesión. Para tal efecto, se le concede un plazo de 60 (sesenta) días hábiles, contados a partir de la fecha de la legal notificación de la presente Declaratoria").

2) The SCT declined to reconsider the Rescate Declaration

153. On 15 August 2016, CFCM filed a reconsideration request (*recurso de revisión*) (the "**Reconsideration Request**") before the SCT, seeking to suspend and void the Rescate Declaration. The Reconsideration Request also maintained that the SCT was bound to compensate CFCM for the damages resulting from the Rescate Declaration. CFCM noted that Article 19 of the GLNA did not exclude compensation for damages, and a correct interpretation of the Railway Service Law as well as the legal framework for concessions confirmed this view.

Proofs:

a. **C-167-SPA**, pp. 109-111 (Reconsideration Request filed by CFCM against the Rescate Declaration dated 15 August 2016) ("Por todo lo dicho, en este acto respetuosamente solicito lo siguiente: a) Que se suspenda la Resolución de Rescate; b) Que se declare la nulidad de la Resolución de Rescate…");

b. *Id.*, p. 63 ("…el artículo 19 de la Ley General de Bienes Nacionales…tan sólo dispone, sin ningún tipo de duda, que la indemnización tomará en cuenta la inversión efectuada y debidamente comprobada, más no que la indemnización corresponda exclusivamente a esa inversión reconocida. Eso significa que la autoridad deberá de tomar en cuenta dicha inversión precisamente para calcular parte de los daños (pero no la totalidad de los mismos, ni los perjuicios) por la indemnización, sin perjuicio de los demás componentes conforme a derecho").

154. Moreover, the Rescate Declaration incorrectly limited the compensation to those investments ***included in the 2012 Business Plan*** and ***authorized by the SCT***, whereas Article 19 of the GLNA had no such limitations. In attempting to limit the scope of Article 19 of the GLNA, the SCT violated the principle of legality and impermissibly reduced the scope of compensation that could be awarded to CFCM.

Proofs:

a. **C-167-SPA**, p. 66 (Reconsideration Request filed by CFCM against the Rescate Declaration dated 15 August 2016) ("Por otra parte, la SCT pretende excederse respecto del contenido del artículo 19 de la Ley General de Bienes Nacionales. Dice la SCT en el resolutivo quinto del rescate… La Ley se limita a

> inversiones efectuadas y debidamente comprobadas **sin exigir que las mismas fueran autorizadas por la SCT o estuvieran contempladas en el Plan de Negocios**…Así, los parámetros o conceptos que la SCT pretende establecer en relación con la cuantificación de la indemnización por el rescate violan el principio de legalidad") (emphasis added).

155. On 7 November 2016, Mr. Ruiz, on behalf of the SCT, dismissed the Reconsideration Request ("**Resolution 268/2016**"). Resolution 268/2016, like the Rescate Declaration, dismissed the evidence and the arguments advanced by CFCM because they were "not related" to the legal justifications forming the basis of the Rescate Declaration. Further, Resolution 268/2016 rejected CFCM's request or compensation for the damages resulting from the Rescate Declaration. According to the SCT, compensation for damages was excluded because Article 19 of the GLNA did not mention the words "damages" or "lost profits" (*daños y perjuicios*).

Proofs:

a. **C-168-SPA** (Resolution 1.-268 issued in case file RR/001/2016 by the SCT dated 7 November 2016) (indicating that the SCT rejected the Reconsideration Request for the same reasons of the Rescate Declaration);

b. *Id.,* p. 76 (Resolution 1.-268 issued in case file RR/001/2016 by the SCT dated 7 November 2016) ("En el caso concreto, existe disposición expresa sobre los conceptos que procede incluir en la indemnización. Como lo reconoce expresamente CFCM, el invocado artículo 19 de la LGBN no prevé los 'daños y perjuicos (sic)'").

3) The SCT refused to return the assets owned by CFCM

156. As explained before, CFCM challenged the validity of the Rescate Declaration from the moment it was issued. The SCT, however, refused to suspend the effects of the Rescate Declaration while the Reconsideration Request was pending. CFCM was thus forced to exercise the rights granted by the Rescate Declaration, while reserving all other rights.

Proofs:

a. **C-169-SPA**, p. 8 (Resolution 1.-189 issued in case file RR/001/2016 dated 22 August 2016) (showing that the SCT refused to suspend the effects of the Rescate Declaration);

b. *See infra.*

157. According to the Rescate Declaration, CFCM was first entitled to retrieve its property from the Concession. CFCM, however, did not have control over its property because the SCT failed to return it after the Inspection Process in 2013. Thus, FIT was still in possession of such property. As a consequence, on 19 October 2016, and pursuant to Article 19 of the GLNA, CFCM requested the SCT to provide a detailed description of the assets that formed part of the Concession that the SCT did not consider useful for the Concession, as well as their location and condition, so

CFCM could determine whether it would request the return of those assets. In doing so, CFCM reserved all its rights.

Proofs:

a. **CL-1-SPA**, Article 19 (Mexico's General Law of National Assets) ("La declaratoria de rescate hará que los bienes materia de la concesión vuelvan, de pleno derecho, desde la fecha de la declaratoria, a la posesión, control y administración del concesionante y que ingresen a su patrimonio los bienes, equipos e instalaciones destinados directamente a los fines de la concesión. **Podrá autorizarse al concesionario a retirar y a disponer de los bienes, equipo e instalaciones de su propiedad afectos a la concesión, cuando los mismos no fueren útiles al concesionante y puedan ser aprovechados por el concesionario**; pero, en este caso, su valor no se incluirá en el monto de la indemnización") (emphasis added);

b. **C-16-SPA**, p. 68 (Rescate Declaration dated 13 July 2016, served on CFCM on 26 July 2016) ("CUARTO. La Secretaria de Comunicaciones y Transportes **autoriza a Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V. a retirar y disponer de los bienes, equipos e instalaciones de su propiedad afectos a la concesión**. Para tal efecto, se le concede un plazo de 60 (sesenta) días hábiles, contados a partir de la fecha de la legal notificación de la presente Declaratoria") (emphasis added);

c. **C-170-SPA**, p. 2 (Letter from CFCM to the SCT dated 19 October 2016) ("Por lo anteriormente expuesto, se solicita a esa Dependencia: (a) informar a mi representada la relación detallada de todos y cada uno de los bienes y equipos que la propia Secretaría ha puesto a su disposición por no ser útiles a esa Secretaría y el motivo por el que no lo son, en términos del oficio de referencia; (b) informar a mi representada la localización, así como el estado físico y de operación, de todos y cada uno de los bienes y equipos que fueron objeto del aseguramiento y depósito referidos, y (c) establecer un plazo adicional, a partir de que le sea proporcionada a mi representada la información solicitada, para que ésta se pronuncie sobre si los bienes y equipos en cuestión son aprovechables por ella").

158. On 28 March 2017, CFCM informed the SCT that it had failed to respond to CFCM's letter and requested an immediate response. On 30 March 2017, the SCT provided a sixty-day term for CFCM to prove ownership of its assets and retrieve them from the Chiapas-Mayab Railway. Incredibly, the SCT ignored CFCM's assertion that the assets were not in its possession but in the possession of FIT (and, therefore, under the control of the SCT). Thus, the SCT's "extension" did not solve CFCM's inability to access its own assets. The SCT ***provided no further response***, preventing CFCM from regaining possession of its assets under FIT's custody.

Proofs:

a. **C-171-SPA**, p. 2 (Letter from CFCM to the SCT dated 28 March 2017) ("En vista de que el plazo de tres meses establecido en la LFPA, indicado en el párrafo previo, ya

transcurrió para el asunto en cuestión, en este acto respetuosamente se solicita que esa Secretaría notifique de inmediato a CFCM la respuesta a lo solicitado por ésta en su documento entregado el 19 de octubre de 2016, arriba referido, o, de no existir tal respuesta, expida constancia de esta circunstancia, dentro de los dos días hábiles siguientes a la presentación de este escrito, conforme a lo dispuesto en el artículo señalado de la LFPA");

b. **C-172-SPA**, p. 2 (Official Letter 1.-52 dated 30 March 2017) ("De acuerdo con lo solicitado en el inciso c) del escrito de referencia, se concede a CFCM un plazo adicional de 60 (sesenta) días hábiles, una vez que acredite fehacientemente la propiedad, para retirar y disponer de sus bienes, equipos e instalaciones").

4) The SCT failed to compensate CFCM for the Rescate Declaration

159. According to the Rescate Declaration, CFCM was entitled to receive compensation as a result of the Rescate Declaration. In order to calculate the amount of such compensation, CFCM was required to submit proof of the investments it made in the Concession.

Proofs:

a. **C-16-SPA**, p. 68 (Rescate Declaration dated 13 July 2016, served on CFCM on 26 July 2016) ("…la indemnización se determinará conforme a las bases generales siguientes: 1. **El monto se calculará con base en las inversiones efectuadas y debidamente comprobadas**, establecidas en el Plan de Negocios y autorizadas por la Secretaría de Comunicaciones y Transportes. 2. **Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V. deberá presentar ante la Dirección General de Transporte Ferroviario y Multimodal, la documentación que acredite dichas inversiones y el monto de las mismas**") (emphases added).

160. As it turned out, however, the SCT had no intention of complying with its obligation to compensate CFCM. On 26 August 2016, before CFCM even filed the documentation proving the investments it made in the Concession, Mr. Ruiz, the SCT's Minister and the public officer in charge of awarding compensation to CFCM, was quoted in national news outlets, publicly declaring that ***CFCM would not receive the Concession back, and would receive no compensation for the Rescate Declaration***:

“Cero” indemnización a ex concesionario de La Bestia, advierte Ruiz Esparza

by 24 Horas
agosto 26, 2016

El titular de la Secretaría de Comunicaciones y Transportes (SCT), **Gerardo Ruiz Esparza**, aseguró que no habrá ningún tipo de indemnización, ni se devolverá la concesión a la Compañía de Ferrocarriles Chiapas-Mayab por la operación de la ruta del tren de ***La Bestia***.

Image 29: Mr. Ruiz’s statements to the press before CFCM’s reconsideration request and request for compensation were decided (C-173-SPA)

Proofs:

a. **C-166-SPA** (Mexico’s Federal Official Gazette dated 23 August 2016) (showing that the SCT published the Rescate Declaration expropriating the Concession to CFCM);

b. **C-173-SPA** (News article published in 24 Horas titled “‘Cero’ indemnización a ex concesionario de La Bestia, advierte Ruiz Esparza,” dated 26 August 2016) (reflecting that the SCT’s Secretary decided not to return the Concession or grant compensation to CFCM before CFCM’s reconsideration request and request for compensation were decided);

c. **C-221-SPA** (News article published in La Jornada titled “Cancela SCT concesión a operador de La Bestia; carece de capacidad técnica” dated 26 August 2016) (“…Gerardo Ruiz Esparza [a]seguró que la indemnización para la empresa Genesse Wyoming será cero…”);

d. **C-222-SPA** (News article published in El Financiero titled “SCT no indemnizará a exconcesionario de ‘La Bestia’” dated 25 August 2016) (“La Secretaría de Comunicaciones y Transportes (SCT) no indemnizará a la Compañía de Ferrocarriles Chiapas-Mayab, quien hasta ayer contaba con la concesión del ferrocarril de carga conocido como ‘La Bestia’”);

e. **CWS-3-SPA**, ¶62 (Witness Statement-[redacted] [redacted]Claim Memorial) (“Lo más sorprendente para mí no fue solamente la decisión de rescatar la Concesión, sino las declaraciones públicas del Licenciado Ruiz Esparza, Secretario de Comunicaciones y Transportes, de que no existiría ningún tipo de indemnización para CFCM por el rescate. El Licenciado Ruiz Esparza públicamente declaró que no se pagaría un solo peso como indemnización a CFCM, a pesar de haber rescatado la Concesión”).

161. Despite this, CFCM took all steps necessary to safeguard its rights and proceeded in accordance with the Rescate Declaration, while reserving all its rights. On 1 December 2016, CFCM submitted the documentation required to prove its investments in the Concession and the damages caused by the Rescate Declaration (the “**Compensation Request**”). The Compensation

Request was submitted together with an extensive list of annexes (together with the Compensation Request, the "**Compensation File**"). The Compensation Request noted that the SCT had inspected all assets related to the Concession and was thus aware of all the investments made by CFCM in connection with the Concession.

Proofs:

a. C-174-SPA, p. 1 (Letter from CFCM to the SCT dated 1 December 2016) ("…Al respecto, por el presente escrito CFCM hace entrega de la documentación que acredita las inversiones realizadas por CFCM, sin que exista o pueda entenderse aceptación alguna de mi representada a lo actuado por esa Dependencia en el procedimiento del cual deriva dicho oficio o como consecuencia del mismo");

b. *Id.*, pp. 2-3 ("… [la SCT] **se ha pronunciado ya favorablemente en cuanto al alcance y características de las inversiones realizadas por CFCM** en el marco de la Concesión, al igual que sobre el cumplimiento por parte de mi representada al resto de las condiciones establecidas en el Título de la Concesión") (emphasis added);

c. C-11-SPA, p. 4 (Amended Concession dated 22 October 2012) (indicating that CFCM complied with all the terms of the Concession Agreement) ("…el "CONCESIONARIO"…ha cumplido con las condiciones previstas en la concesión que le fue otorgada, de acuerdo con las verificaciones sistemáticas practicadas").

162. The Compensation Request identified the investments made by CFCM in the Concession, as well as the damages caused by the Rescate Declaration. With regard to investments, the Compensation Request claimed [redacted].

Proofs:

a. C-174-SPA, p. 3 (Letter from CFCM to the SCT dated 1 December 2016) ("Corresponde al monto pagado por CFCM al Gobierno de los Estados Unidos Mexicanos, por concepto de [redacted] CFCM pudo operar la concesión con normalidad durante el periodo comprendido entre el inicio de la vigencia de la concesión, el 1 de septiembre de 1999…y principios del mes de octubre de 2005…[redacted]").

163. According to the Compensation Request, [redacted] Given that CFCM could not operate the Concession after the imposition of the Modality [redacted].

Proofs:

a. **C-174-SPA**, p. 26 (Letter from CFCM to the SCT dated 1 December 2016) ("[redacted]") (emphasis added);

b. *Id.*, pp. 25-26 ("En resumen, los conceptos por los que CFCM debe de ser indemnizado son: 1) **Valor actualizado, a la fecha efectiva de pago** de la indemnización, de las inversiones realizadas por CFCM en términos de los incisos a), b) y c) del numeral I (Inversiones)") (emphasis added).

164. The Compensation Request also identified the damages suffered by CFCM as a consequence of the Rescate Declaration, [redacted].

Proofs:

a. **C-174-SPA**, p. 15 (Letter from CFCM to the SCT dated 1 December 2016) ("[redacted]").

165. CFCM also invited the SCT to coordinate working groups to discuss the sums claimed by CFCM in the Compensation Request to arrive at a fair compensation in accordance with the law.

Proofs:

a. **C-174-SPA** , p. 27 (Letter from CFCM to the SCT dated 1 December 2016) ("Por último, solicitamos respetuosamente a la SCT y a la DGTFM que tanto durante la integración del expediente relativo a la indemnización como durante la posterior participación del Instituto de Administración y Avalúos de Bienes Nacionales, se organicen reuniones de trabajo entre representantes de los entes públicos antes

mencionados y de CFCM con la finalidad de facilitar el entendimiento de la documentación aportada por CFCM y alcanzar un precio justo por la indemnización que en términos de Ley le corresponde a CFCM").

166. The SCT, however, did not reply to the Compensation Request. On 29 March 2017, CFCM informed the SCT that it had failed to respond to the Compensation Request, and again invited the SCT to discuss the content of the Compensation Request. Still, the SCT remained silent.

Proofs:

a. **C-175-SPA** (Letter from CFCM to the SCT dated 29 March 2017) ("En vista de que el plazo de tres meses establecido en la LFPA, indicado en el párrafo previo, ya transcurrió para el asunto en cuestión, en este acto respetuosamente se solicita que esa Secretaría notifique de inmediato a CFCM la resolución respecto de la indemnización indicada o, de no existir ésta, expida constancia de esta circunstancia, dentro de los dos días hábiles siguientes a la presentación de este escrito, conforme a lo dispuesto en el artículo señalado de la LFPA").

167. On 23 October 2018, almost ***two years*** after the Compensation Request was filed, the SCT notified CFCM of an opinion issued by the *Instituto de Administración y Avalúos de Bienes Nacionales* ("**INDAABIN**") regarding the compensation owed to CFCM due to the Rescate Declaration ("**INDAABIN Report**"). INDAABIN is an entity that forms part of Mexico's Ministry of Finance and Public Credit (*Secretaría de Hacienda y Crédito Público*) that provides valuation analyses at the request of public entities.

Proofs:

a. **C-176-SPA** (Official Letter 75.18.311.01/2016 dated 22 October 2018) (indicating that the SCT notified the INDAABIN Report to CFCM);
b. **CL-15-SPA**, Article 3 (INDAABIN Regulation dated 14 May 2012) ("El Instituto tendrá las siguientes atribuciones: IV. Emitir los avalúos y justipreciaciones de rentas que soliciten las dependencias y entidades, así como todo tipo de trabajos valuatorios a nivel de consultoría que soliciten las instituciones públicas").

168. According to the INDAABIN Report, INDAABIN estimated that the compensation owed to CFCM due to the Rescate Declaration should be ***zero*** (MXN $0). The INDAABIN Report incorrectly argued that CFCM had a duty to cover the cost of rehabilitating the Chiapas-Mayab after Hurricane Stan for the amount of ***MXN $537.8 million***. Thus, according to the INDAABIN Report, any compensation owed to CFCM for the Rescate Declaration would have to be offset by CFCM's purported debt.

Proofs:

a. **C-177-SPA**, pp. 9-10 (INDAABIN Report dated 16 October 2018) ("Como se puede apreciar, en su propio escrito, CFCM reconoció en enero de 2006 que la obligación que tiene de reparación de las vías asciende a $328,009,042.84 pesos").

169. Additionally, the INDAABIN Report suggested not to award compensation to CFCM for the present value of the Concession's cash flows.

Proofs:

a. **C-177-SPA**, p. 10 (INDAABIN Report dated 16 October 2018) (indicating that the INDAABIN Report suggested not to award compensation to CFCM for the present value of the Concession's cash flows).

170. INDAABIN, however, did not inspect the Concession before issuing the INDAABIN Report. Instead, INDAABIN based its analysis only ***on the information provided by the SCT***. Because of this, INDAABIN conditioned his opinion to an express reservation of rights, waiving any liability for the incorrectness of the information provided by the SCT to prepare the INDAABIN Report. Thus, the INDAABIN Report's accuracy depended on the accuracy of the information provided by the SCT to prepare the valuation.

Por haber sido el promovente el que identifica los activos e inversiones para la realización del presente servicio valuatorio, es el único responsable de su correcta identificación y cuantificación. Por lo anterior, este dictamen valuatorio se supedita a la base informativa proporcionada por SCT, en consecuencia podría haber variaciones en caso de que existan diferencias con respecto a la documentación legal que ampare la propiedad y situación jurídica de las inversiones reportadas, liberando al INDAABIN, al perito valuador de bienes nacionales, al representante legal, así como al personal técnico involucrado en la ejecución del presente servicio valuatorio de cualquier responsabilidad al respecto.

En este sentido, se supone que los activos destinados directamente a los fines de la concesión al momento del rescate, son aquellos que se reportaron como existentes en el acta Número 33, mediante la cual personal de la Notaría Pública Número 33 da fe del inventario de los bienes asegurados a la empresa Compañía de Ferrocarriles Chiapas Mayab, S.A. de C.V. elaborada el día 29 de febrero de 2008.

Image 30: INDAABIN waived all liability for any inaccurateness in the valuation analysis of the INDAABIN Report (C-177-SPA)

Proofs:

a. **C-177-SPA**, p. 2 (INDAABIN Report dated 16 October 2018) ("…**[N]o se realizó visita de inspección física, ni reporte fotográfico de los bienes reportados** en el Acta no. 33 proporcionada por S.C.T. como base informativa del presente servicio valuatorio") (emphasis added);

b. *Id.*, p. 3 (demonstrating that INDAABIN did not inspect the Concession before issuing the INDAABIN Report);

c. *Id.*, p. 11 ("El Monto de Indemnización por el Rescate de la Concesión otorgada en favor de Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V., de conformidad con lo establecido en el Artículo 19 de la Ley General de Bienes Nacionales y el Resolutivo QUINTO de la Declaratoria de rescate de fecha 23 de agosto de 2016, descrito en el presente documento asciende a: $0.00").

171. CFCM, however, was not served copies of the information provided by the SCT to INDAABIN, and was not afforded an opportunity to present evidence to INDAABIN. Moreover, the SCT did not coordinate meetings between CFCM, the SCT and the INDAABIN to discuss the Compensation Request, as CFCM had expressly requested in its previous correspondence. Thus, on 31 October 2018 CFCM requested the SCT to provide copies of the information provided to the INDAABIN to issue the INDAABIN Report.

Proofs:

a. **C-174-SPA**, p. 27 (Letter from CFCM to the SCT dated 1 December 2016) ("Por último, solicitamos respetuosamente a la SCT y a la DGTFM que tanto durante la integración del expediente relativo a la indemnización como durante la posterior participación del Instituto de Administración y Avalúos de Bienes Nacionales, se organicen reuniones de trabajo entre representantes de los entes públicos antes mencionados y de CFCM con la finalidad de facilitar el entendimiento de la documentación aportada por CFCM y alcanzar un precio justo por la indemnización que en términos de Ley le corresponde a CFCM").

b. **C-178-SPA** (Letter from CFCM to the SCT dated 31 October 2018) (demonstrating that CFCM requested copies of the documents provided by the SCT to INDAABIN to prepare the INDAABIN Report).

172. To CFCM's surprise, the INDAABIN Report was based on an opinion issued by the SCT on 15 May 2018 on the amount of compensation owed to CFCM due to the Rescate Declaration ("**SCT Report**"). The SCT Report did not provide a final determination on the amount of compensation owed to CFCM. However, the SCT Report incorrectly claimed that CFCM had a duty to cover the cost of rehabilitating the Chiapas-Mayab after Hurricane Stan. This was the basis for the same argument raised by the INDAABIN Report to reduce the compensation owed to CFCM. In other words, the INDAABIN Report relied almost exclusively on the ***assumed*** accuracy of the SCT Report to suggest CFCM be compensated zero (MXN $0).

Proofs:

a. **C-179-SPA**, p. 24 (Opinion issued by the SCT on CFCM's Compensation Request, dated 15 May 2018) ("…CFCM debió entregar a la SCT el monto de los seguros y cubrir la diferencia del costo de reconstrucción de las vías. Ello constituye un adeudo a cargo de CFCM que deberá tomarse en cuenta para los efectos de la determinación del monto de la indemnización");

b. *Id.*, p. 24 ("**El monto considerado para efecto de la indemnización está sujeto al dictamen que rinda el INDAABIN** en términos de los artículos 19 y 143, fracción IX de la Ley General de Bienes Nacionales") (emphasis added).

c. **C-177-SPA**, p. 2 (INDAABIN Report dated 16 October 2018) ("…**[T]omando en consideración el soporte documental proporcionado** para la elaboración del dictamen valuatorio, se desprende que **CFCM adeuda la cantidad de 328 millones** por

concepto de las obras que debió realizar para la conservación y mantenimiento de la infraestructura…") (emphases added).

173. As additional evidence of the violations to due process, Article 143, section IX of the GLNA dictates that the amount of compensation as a consecuence of *rescates* needs to be determined ***before*** the *rescate*. Contrary to this provision, the SCT issued the Rescate Declaration without consulting INDAABIN first, and without determining the compensation amount.

Proofs:

a. **CWS-3-SPA**, ¶67 (Witness Statement-[redacted] [redacted]Claim Memorial) ("Durante mi gestión en la SCT, la SCT cumplía con la regulación en materia de rescate. Por ejemplo, en 2012, cuando yo aún laboraba en la SCT, participé en varios procesos de rescate de las concesiones otorgadas sobre la banda de frecuencia de 2.5 Ghz del espectro radioeléctrico. En ese momento, la SCT declaró el rescate de 68 títulos de concesión para usar, aprovechar y explotar bandas de frecuencia del espectro radioeléctrico para usos determinados en la banda 2.5 GHz. **En esos casos, el INDAABIN realizó el avalúo respectivo de manera previa al rescate** y el Instituto Federal de Telecomunicaciones indemnizó a los concesionarios por el número de MHz que tenían concesionados en la banda de 2.5 Ghz para prestar los servicios de televisión y audio restringidos") (emphasis added);

b. **CL-1-SPA**, Article 143, Section IX (Mexico's General Law of National Assets) ("**Previamente a la celebración de los actos jurídicos a que se refiere el presente artículo** en los que intervengan las dependencias, las unidades administrativas de la Presidencia de la República y, en su caso, las entidades, corresponderá a la Secretaría dictaminar: …XI. **El monto de la indemnización** en los casos en que la Federación rescate concesiones sobre bienes sujetos al régimen de dominio público de la Federación") (emphases added).

M. CFCM Challenged the INDAABIN Report Before Mexico's Courts

174. On 7 December 2018, CFCM promptly challenged the validity of the INDAABIN Report and the INDAABIN Notice before Mexico's courts, and filed an *amparo* requesting the invalidity of the INDAABIN Report and the INDAABIN Notice on 21 March 2019 ("**INDAABIN Amparo**").

Proofs:

a. **C-180-SPA** (Lawsuit filed by CFCM against the SCT dated 7 December 2018) (demonstrating that CFCM promptly challenged the validity of the INDAABIN Report and the INDAABIN Notice);

b. **C-181-SPA** (Decision by the Administrative Tribunal of the First Circuit dated 20 June 2019) (showing that CFCM promptly challenged the validity of the INDAABIN Report).

175. However, on 20 June 2019, the INDAABIN Amparo was rejected. According to Mexico's courts, the INDAABIN Notice was not the SCT's final decision as to the amount of compensation owed to CFCM. Given that the SCT still ***had*** to issue a resolution determining the amount of compensation, the INDAABIN Notice only served the purpose of notifying CFCM of the INDAABIN Report's content. In other words, the amount of compensation owed to CFCM was not fixed by the INDAABIN Report, and was still subject to further review by the SCT.

Proofs:

a. **C-181-SPA**, p. 23 (Decision by the Administrative Tribunal of the First Circuit dated 20 June 2019) ("…Actos que, como lo destacó la Sala fiscal, no constituyen resoluciones definitivas impugnables mediante el juicio contencioso administrativo, puesto que el primero, se trata de una providencia de trámite dictada dentro del procedimiento de rescate…y, respecto del segundo, no constituye la última resolución determinante emitida en el mismo");

b. *Id.*, pp. 27-28 ("conforme a los artículos 19 y 143, fracción IX de la Ley General de Bienes Nacionales aplicable al procedimiento de mérito, **corresponde a la Secretaría de Comunicaciones y Transportes, dictaminar el monto de la indemnización**") (emphasis added).

176. To this day, against the decisions of Mexico's own courts, the SCT has surprisingly ***refused*** to issue a final decision fixing the amount of compensation owed under the Rescate Declaration, leaving CFCM uncompensated for over eight years.

Proofs:

a. *See infra.*

N. CFCM CHALLENGED THE *RESCATE* PROCEEDING BEFORE MEXICO'S COURTS

177. As a result of the SCT's conduct, CFCM was deprived of the Concession, of the ability to retrieve its property from the Concession, and of any compensation for the damages it suffered. Indeed, CFCM saw the prospects of developing a successful business that would revitalize the southeast region of Mexico quickly transform into a complete expropriation of its investment, through a *rescate* proceeding fraught with unjustified, arbitrary conduct. CFCM thus challenged the validity of the Rescate Declaration before Mexico's courts.

Proofs:

a. *See infra*, Sections III.N.1 – III.N.5.

1) CFCM requested the annulment of the *rescate* proceeding

178. On 10 January 2017, CFCM requested the Federal Administrative Tribunal, to annul the Rescate Notice, the Rescate Declaration, and Resolution 268/2016 (the "**Annulment Request**"). The Annulment Request explained that the Rescate Declaration was the SCT's attempt to avoid complying with a long list of unfulfilled commitments it owed to CFCM. For years, the SCT had assured CFCM that it would resume operation of the Concession and would invest significant sums into the Concession. However, the SCT's promises never materialized.

Proofs:

a. **C-182-SPA**, pp. 5, 8, 12 (Annulment Request filed by CFCM against the Rescate Declaration dated 10 January 2017) (demonstrating that the SCT breached the LOI, the 2012 Convenio, Resolution 811 and the 2014 Convenio).

179. Further, the Rescate Notice was null and void because the SCT had not complied with the legal requirements to initiate a *rescate* proceeding and had failed to demonstrate the existence of a public interest, a public utility or a national security interest justifying the expropriation of the Concession.

Proofs:

a. **C-182-SPA**, p. 15 (Annulment Request filed by CFCM against the Rescate Declaration dated 10 January 2017) ("…todas las violaciones indicadas al artículo 3 de la LFPA **provocan la nulidad** del Acuerdo de Inicio de Rescate, de la Resolución de Rescate y de la Resolución SCT, conforme a lo dispuesto en el artículo 6, primer párrafo, del propio ordenamiento") (emphasis added);
b. *Id.*, p. 21 ("La Resolución SCT es ilegal pues ésta debió determinar la nulidad de la Resolución de Rescate debido a que la Resolución de Rescate está afectada de nulidad, ya que existe un error en la causa, está indebidamente motivada ya que no se acreditan las causales de interés y utilidad públicos");
c. *Id.*, p. 43 ("La Resolución SCT es ilegal pues ésta debió determinar la nulidad de la Resolución de Rescate debido a que la Resolución de Rescate está afectada de nulidad debido a que existe un error en la causa y en la finalidad, a que está indebidamente motivada y a que no se acredita la causal de seguridad nacional").

180. The Rescate Declaration was also invalid because it failed to compensate CFCM for the damages resulting from the *rescate* proceeding. Moreover, the SCT improperly minimized the scope of Article 19 of the GLNA by allowing CFCM to seek compensation only for those investments that had been ***authorized by the SCT*** and that ***formed part of the 2012 Business Plan***.

Proofs:

a. **C-182-SPA**, p. 53 (Annulment Request filed by CFCM against the Rescate Declaration dated 10 January 2017) (demonstrating that CFCM claimed compensation for the damages arising from the Rescate Declaration);

b. *Id.*, p. 57 ("Así, **los parámetros o conceptos que la SCT pretende establecer en relación con la cuantificación de la indemnización por el rescate violan el principio de legalidad**…puesto que la dependencia hace una interpretación restrictiva del alcance del marco legal aplicable para la determinación de dichos parámetros o conceptos") (emphasis added).

181. Aside from the invalidity of the *rescate* proceeding, CFCM also requested an order to stay the *rescate* resolutions to avoid producing irreparable harm to CFCM pending resolution of its claims.

Proofs:

a. **C-182-SPA**, p. 88 (Annulment Request filed by CFCM against the Rescate Declaration dated 10 January 2017) ("…se solicita la suspensión de la ejecución de las resoluciones impugnadas a través de la presente demanda, a efecto de que la SCT se abstenga de realizar cualquier acto tendiente a conceder a cualquier tercero, ya sea a través de asignación, concesión u otro, cualquier derecho sobre las vías cortas Chiapas y Mayab o sobre cualesquiera de los bienes afectos a la Concesión").

2) The Federal Administrative Tribunal determined that CFCM is owed full compensation for the Rescate Declaration

182. On 23 January 2017, the Federal Administrative Tribunal decided not to stay the effects of the *rescate* proceeding, as requested by CFCM. The tribunal, however, clarified that CFCM was in no risk of irreparable harm that would justify the stay of the Rescate Declaration because ***the SCT had to compensate CFCM for the damages suffered by the Rescate Declaration***. In doing so, the Federal Administrative Tribunal recognized that CFCM's right to compensation extended to the damages caused by the Rescate Declaration.

Por tanto, al ser el rescate de las vías férreas un procedimiento administrativo a través del cual se extingue anticipadamente una concesión y se recuperan las vías cuyo uso había sido otorgado a un particular, a quien tendrá que indemnizarse por los daños y perjuicios causados, es que esta Juzgadora estima igualmente infundado el agravio de la actora en el sentido de que de no concederse la medida cautelar solicitada se le causaría un daño irreparable.[34]

Image 31: the Federal Administrative Tribunal confirmed that SCT must compensate CFCM for the damages caused by the Rescate Declaration (C-183-SPA)

Proofs:

a. **C-183-SPA**, p. 8 (Interlocutory decision rendered by the Federal Administrative Tribunal dated 23 January 2017) (demonstrating that the Federal Administrative Tribunal determined that CFCM was owed full compensation for the Rescate Declaration).

183. Having decided that CFCM was in no risk of harm, the Federal Administrative Tribunal decided to move the proceeding forward without staying the effects of the *rescate* proceeding. On 20 June 2019, however, the INDAABIN Amparo was decided by Mexico's courts. In the INDAABIN Amparo, Mexico's courts did not grant constitutional protection to CFCM because the INDAABIN Report was not a final determination on the compensation owed to CFCM. As Mexico's courts clarified, the SCT still had to make a final determination on the compensation owed due to the Rescate Declaration. However, the SCT ***never issued a final decision awarding compensation to CFCM***. Thus, CFCM incorporated these new pieces of evidence to the proceeding to ensure that the Federal Administrative Tribunal could review the SCT's conduct and force the SCT to decide the compensation owed to CFCM, or grant the compensation itself.

Proofs:

a. **C-184-SPA**, p. 8 (Decision rendered by the Federal Administrative Tribunal dated 29 January 2020) (indicating that the SCT Report and the INDAABIN Report were admitted as evidence in the Annulment Request proceeding).

3) Contradicting its previous decision, the Federal Administrative Tribunal failed to award CFCM full compensation for the Rescate Declaration

184. The Federal Administrative Tribunal issued a judgment rejecting the Annulment Request and deciding that the *rescate* resolutions were valid on 29 January 2020 ("**2020 Decision**"), and served on CFCM on 18 February 2020.

Proofs:

a. **C-185-SPA**, p. 2 (Amparo request filed by CFCM against the 2020 Decision dated 13 March 2020) ("La resolución se publicó en el Boletín el día 18 de febrero de 2020 y surtió efectos el día 21 de febrero de 2020");

b. *Id.*, pp. 98-99, 115 (demonstrating that the 2020 Decision found the Rescate Notice was validly issued).

185. With respect to compensation, the 2020 Decision ***recognized that CFCM had a right to compensation for the rescate proceeding***. However, it decided that Article 19 of the GLNA only allowed compensation for investments made in the Concession, excluding damages. In doing so, the Federal Administrative Tribunal contradicted its own interlocutory decision of 23 January 2017, where it recognized that Article 19 of the GLNA granted CFCM the right to compensation

for damages caused by the Rescate Declaration. In fact, that reasoning allegedly supported the court's decision not to stay the effects of the *rescate*.

En virtud de lo hasta aquí expuesto, se concluye que la pretensión de la accionante es infundada, pues no es posible incluir en el cálculo de la indemnización los daños y perjuicios a que alude, ello al no ser conceptos que se encuentren especificados en el artículo 19 referido y por no haber disposición legal o criterio jurisprudencial que así lo permita.

Image 32: the 2020 Decision did not grant CFCM compensation for damages caused by the Rescate Declaration (C-184-SPA)

Proofs:

a. **C-184-SPA**, p. 359, 368 (Decision rendered by the Federal Administrative Tribunal dated 29 January 2020) (indicating that the 2020 Decision recognized that Article 19 of the GLNA limits compensation to investments made in a concession);

b. **C-183-SPA**, p. 8 (Interlocutory decision rendered by the Federal Administrative Tribunal dated 23 January 2017) ("Por tanto, al ser el rescate de las vías férreas un procedimiento administrativo a través del cual se extingue anticipadamente una concesión y se recuperan las vías cuyo uso había sido otorgado a un particular, **a quien tendrá que indemnizarse por los daños y perjuicios causados**, es que esta Juzgadora estima igualmente infundado el agravio de la actora en el sentido de que de no concederse la medida cautelar solicitada se le causaría un daño irreparable") (emphasis added).

186. Moreover, the 2020 Decision claimed the Rescate Declaration did not breach Article 19 of the GLNA by reducing compensation to investments contemplated in the 1999 Business Plan and authorized by the SCT. According to the 2020 Decision, it was "evident" that CFCM would not make investments beyond those contemplated in CFCM's business plans and authorized by the SCT.

Proofs:

a. **C-184-SPA**, pp. 370-371 (Decision rendered by the Federal Administrative Tribunal dated 29 January 2020) ("…las inversiones que en su caso realizara la hoy actora debían establecerse en el plan de negocios las cuales a su vez debían contar con la autorización de la Secretaría de Comunicaciones y Transportes, en ese sentido se advierte que en virtud de la declaratoria de rescate no se están exigiendo mayores requisitos a la actora, ni se están incorporando cuestiones que le sean ajenas o desconocidas a ésta, ya que desde el otorgamiento de la concesión se vio obligada a cumplir con dichos supuestos.…").

4) The Sixth Circuit Court also failed to award CFCM full compensation for the Rescate Declaration

187. As a last resort, CFCM filed an *amparo* request against the 2020 Decision on 13 March 2020 ("**Rescate Amparo**"). The Rescate Amparo was adjudicated under case file number 175/2020 by the Sixth Administrative Tribunal of the First Circuit ("**Sixth Circuit Court**").

Proofs:

a. **C-185-SPA** (Amparo request filed by CFCM against the 2020 Decision dated 13 March 2020) (indicating that CFCM requested the annulment of the Rescate Notice, the Rescate Declaration and Resolution 268/2016).

188. As explained, the 2020 Decision suffered several flaws, and failed to review the validity or the content of the SCT Report and the INDAABIN Report. Thus, the Rescate Amparo requested the annulment of the 2020 Decision for breach of the principle of legality, due process and the right of access to justice contemplated in Mexico's Constitution, and the American Convention on Human Rights.

Proofs:

a. **C-185-SPA**, p. 3 (Amparo request filed by CFCM against the 2020 Decision dated 13 March 2020) ("Los artículos 1, 14, 16, 17 y 89, fracción I, de la Constitución en relación con el principio de legalidad, el debido proceso y el derecho de acceso a la justicia, así como el artículo 25 de la Convención Americana sobre Derechos Humanos (la "Convención") en relación con el derecho de acceso a la justicia").

189. On 28 January 2021, the Sixth Circuit Court issued a decision dismissing the Rescate Amparo and confirming the 2020 Decision ("**2021 Decision**").

Proofs:

a. **C-18-SPA**, p. 141 (Decision of the Sixth Circuit Court in the direct amparo 175/2020) ("La Justicia de la Unión NO AMPARA NI PROTEGE a COMPAÑÍA DE FERROCARRILES CHIAPAS-MAYAB, SOCIEDAD ANÓNIMA DE CAPITAL VARIABLE, contra la sentencia de veintinueve de enero del dos mil veinte, dictada por el Pleno Jurisdiccional de la Sala Superior del Tribunal Federal de Justicia Administrativa en el juicio de nulidad 53/17-16-01-5/8/18-PL-04-04).

190. The 2021 Decision refused to compensate CFCM for the damages caused by the Rescate Declaration, and declared that compensation was only due for investments contemplated under the 1999 Business Plan, and authorized by the SCT. According to the Sixth Circuit Court,

the limitation on the amount of compensation that CFCM could receive under Article 19 of the GLNA was justified because ***common sense dictated that CFCM would not make investments beyond the 1999 Business Plan***.

En consecuencia, toda la inversión que realizó la quejosa se encuentra comprendida en el plan de negocios, incluidos aquellos que refiere por concepto de mantenimiento de vías, pues no es factible asumir que realizó inversiones adicionales que no estén establecidas en tal documento. Por razones de sentido común, ninguna empresa realizaría gastos adicionales que no estén previstos en su plan de negocios, pues cada uno de los gastos que efectúe deben estar fiscalizados y ser demostrables.

Image 33: the 2021 Decision assumed CFCM would not make investments beyond the 1999 Business Plan (C-18-SPA)

Proofs:

a. **C-18-SPA**, pp. 124-125, 140 (Decision of the Sixth Circuit Court in the direct amparo 175/2020) ("La postura de la demandante carece de sustento jurídico porque no es posible acceder a su petición de que el monto de la indemnización deba incluir el pago de daños y perjuicios, porque la norma es clara al establecer que únicamente debe tomarse en cuenta, entre otros elementos, la inversión efectuada y debidamente comprobada que hubiera efectuado al concesionario").

5) Mexico's Supreme Court also failed to award CFCM full compensation for the Rescate Declaration

191. On 26 March 2021, CFCM filed a *revision* against the 2021 Decision before Mexico's Supreme Court ("**Rescate Revision**"). The Rescate Revision requested the Supreme Court to overturn the 2021 Decision due to its failure to recognize CFCM's right to full compensation according to Mexico's Constitution and the international treaties signed by Mexico.

Proofs:

a. **C-186-SPA**, p. 24 (Revision request filed by CFCM against the 2021 Decision dated 26 March 2021) ("Por las consideraciones constitucionales y convencionales expuestas, revocar la sentencia de 28 de enero de 2021 y dictar una nueva en la que se declaren los alcances del derecho que corresponde a la quejosa, hoy recurrente").

192. On 8 June 2022, the Supreme Court rejected the Rescate Revision ("**2022 Decision**"). The Supreme Court did not analyze the merits of the 2021 Decision and did not opine on the CFCM's right to compensation under Article 19 of the GLNA, or other international treaties signed by Mexico.

Proofs:

a. **C-187-SPA** (Judgment of Mexico's Supreme Court dated 8 June 2022) (demonstrating that Mexico's Supreme Court failed to award CFCM full compensation for the Rescate Declaration).

193. As a consequence of the 2022 Decision, the Rescate Declaration became final, confirming the expropriation of the Concession. CFCM was deprived of the Concession, and it was not allowed to recover the assets ***of its own property*** that were used in the Concession. Moreover, the SCT never issued a final determination on the compensation owed due to the Rescate Declaration, leaving CFCM ***without compensation*** for the damages caused by the Rescate Declaration, despite the SCT's glaring obligation to compensate CFCM pursuant to Article 19 of the GLNA.

Proofs:

a. **CER-2-SPA**, ¶94 (Expert Report-Marco Antonio de la Peña-Claim Memorial) ("En consecuencia, con la decisión de la Suprema Corte el 8 de junio de 2022, la Sentencia del 2020 emitida por la Sala Superior del TFJA quedó firme…");
b. *See supra.*

O. WHILE FAILING TO COMPENSATE CFCM, THE SCT AWARDED FULL, PROMPT COMPENSATION FOR THE FERROSUR *RESCATE*

194. Mexico's conduct, however, has been inconsistent and discriminatory against foreign investors. Mexico failed to award CFCM any compensation for the Rescate Declaration ***contradicting*** the treatment it has given to other Mexican railroad companies subject to *rescate* proceedings.

Proofs:

a. *See infra.*

195. On 19 May 2023, Mexico declared the *rescate* of several sections of the railroad concession operated by Ferrosur, S.A. de C.V. ("**Ferrosur**"), a Mexican company owned by Grupo Mexico. Ferrosur operates a concession over a railroad that connects to the Mayab Line to the west.

Proofs:

a. **C-19-SPA** (Decree containing the rescate declaration of several sections of the Ferrosur Concession, dated 19 May 2023)

(demonstrating that the SCT discriminated against CFCM awarding full compensation to Mexican railroad companies subject to rescate proceedings);

b. **C-8-SPA** (Map of Mexico's Railway System, available at https://www.proyectosmexico.gob.mx/proyecto_inversion/279-viaferroviaria-chiapas-y-mayab/) (reflecting the location of the Chiapas and Mayab lines in the Mexican territory).

196. According to Ferrosur's *rescate* declaration, the SCT would take over approximately 120 kilometers of rail tracks from the Ferrosur concession ("**Ferrosur Rescate**"). Unlike CFCM's *rescate*, however, the Ferrosur Rescate did not attempt to restrict or limit the amount of compensation owed to Ferrosur. It did not request Ferrosur to prove its investments in the concession, nor required those investments to be authorized by the SCT. It simply noted that Ferrosur would be compensated according to the law.

Proofs:

a. **C-19-SPA**, p. 26 (Decree containing the rescate declaration of several sections of the Ferrosur Concession, dated 19 May 2023) ("TERCERO. Con motivo de la entrada en vigor del presente decreto, el Corredor Interoceánico del Istmo de Tehuantepec debe cubrir con su presupuesto autorizado el monto de la indemnización que en términos de ley deba pagarse a quienes acrediten su legítimo derecho, de conformidad con los avalúos del Instituto de Administración y Avalúos de Bienes Nacionales").

197. On 1 June 2023, within ***two weeks*** of the publication of the Ferrosur Rescate in the Official Gazette, Mexico noted that it had reached an agreement with Ferrosur to return the rail tracks subject to the *rescate* back to the State. Mexico also noted that the INDAABIN had valued the *rescate* in approximately MXN $837 million.

Proofs:

a. **C-188-SPA**, p. 2 (Press release issued by Mexico's Ministry of Interior (Secretaría de Gobernación) dated 1 June 2023) ("En las instalaciones de la Primera Región Naval, López Hernández enfatizó que **se pidió una opinión de valor al Instituto de Administración y Avalúos de Bienes Nacionales (Indaabin), quien determinó un monto de 836 millones 894 mil pesos**") (emphasis added).

198. Only a few days later, on 7 June 2023, Mexico and Ferrosur reached an agreement to amend the Ferrosur concession. In the amendment, Mexico noted that it would compensate Ferrosur for the *rescate* in-kind, by extending the term of Ferrosur's concession, and would request INDAABIN's opinion to determine the amount of compensation, ***contradicting*** Mexico's previous statements noting that INDAABIN had already issued a valuation analysis of the *rescate*.

VII.- Con base en los objetivos del Gobierno Federal y para el cumplimiento del objeto del CIIT, el Gobierno Federal y "EL CONCESIONARIO" convinieron: (i) excluir de la Concesión la operación, explotación y prestación del servicio público de transporte ferroviario de carga de los tramos de las líneas "Z", "ZA" y "FA", que corren de Coatzacoalcos a Medias Aguas, de Hibueras a Minatitlán y de Coatzacoalcos a El Chapo, respectivamente, y establecer derechos de paso a "EL CONCESIONARIO" respecto de esos mismos tramos. Como indemnización en especie por el rescate de dichas vías el Gobierno Federal otorgará la primera prórroga de "EL TÍTULO DE CONCESIÓN" y la ampliación de la exclusividad, con base en la opinión de valor del Instituto de Administración y Avalúos de Bienes Nacionales.

Image 34: the SCT agreed to compensate Ferrosur for the Ferrosur Rescate (C-19-SPA)

Proofs:

a. **C-22-SPA** (News Articles explaining the agreement reached by Mexico and Grupo Mexico regarding the rescate of the Ferrosur Concession, dated 2 June 2023) (demonstrating that the SCT discriminated against CFCM awarding full compensation to Mexican railroad companies subject to rescate proceedings);

b. **C-23-SPA**, p. 2 (Amendment to the Ferrosur Concession published in the Federal Official Gazette on 23 June 2023, dated 7 June 2023) (demonstrating that the SCT discriminated against CFCM awarding full compensation to Mexican railroad companies subject to rescate proceedings).

199. On 14 September 2023, the INDAABIN issued a report valuing the expropriated rail tracks in approximately ***MXN $837 million*** (“**Ferrosur Valuation**”), the same amount announced by Mexico in its 1 June press release. Significantly, the Ferrosur Valuation was signed by Mr. Luis Celerino Medina Flores, the ***same expert*** that issued the INDAABIN Report in CFCM’s *rescate* proceeding. Unsurprisingly, the Ferrosur Valuation relied exclusively on the information provided by the SCT.

Proofs:

a. **C-189-SPA** (INDAABIN Report dated 14 September 2023) (“El presente trabajo valuatorio se realizó con la base informativa proporcionada por el solicitante, por lo que es responsabilidad de la promovente la veracidad de la información proporcionada. Cualquier información distinta a la proporcionada inicialmente, no será elemento de reconsideración y se atenderá conforme a lo indicado en la circular PRES/092/2020, publicada en el Diario Oficial de la Federación, el 9 de octubre de 2020”).

200. Significantly, the Ferrosur Valuation relied on Ferrosur’s financial statements as evidence of the investments made by Ferrosur in the concession, ***while denying their utility*** in the INDAABIN Report. Likewise, the Ferrosur Valuation does not contain the restrictive interpretation of Article 19 of the GLNA, and did not limit Ferrosur’s investments to those established in the business plan.

Proofs:

a. **C-189-SPA**¸ p. 6 (INDAABIN Report dated 14 September 2023) (“La base documental proporcionada por el promovente para la realización del presente servicio valuatorio es la

siguiente…**Estados financieros dictaminados de la Empresa Ferrosur de los aos 1998 a 2022**") (emphasis added);

b. **C-177-SPA**, p. 7 (INDAABIN Report dated 16 October 2018) ("Por lo anterior, **no basta con que las inversiones hayan sido reportadas en los Estados Financieros**, sino que deben ser comprobadas, autorizadas por la SCT y establecidas en el Plan de Negocios") (emphasis added).

201. Mexico did not give Mr. Willars or CFCM the same treatment as Ferrosur. The Rescate Declaration significantly curtailed CFCM's rights to seek full compensation for the expropriation of its investment. Moreover, the SCT did not respond to CFCM's good faith efforts to reach an agreement about the compensation owed for the Rescate Declaration, and INDAABIN applied discriminatory criteria to assess CFCM's investments in the Concession, even though the Ferrosur Valuation and the INDAABIN Report are both signed by the same individual. To top it off, Mexico has not paid ***any*** compensation to CFCM for the Rescate Declaration, more than eight years after it was issued and after six years litigating before Mexico's courts. The SCT has not even issued a resolution determining the amount of compensation, as required by law.

Proofs:

a. *See supra*.

IV.

THE CONDITIONS FOR JURISDICTION UNDER NAFTA AND THE ICSID CONVENTION HAVE BEEN MET

202. As discussed in the Request for Arbitration, this dispute is within the competence of the Tribunal. All requirements for jurisdiction have been met. Claimant and Mexico have both consented to arbitrate this dispute, and all requirements under NAFTA and the ICSID Convention for submission of this dispute to arbitration have been met. Each element is discussed below.

Proofs:

a. *See* Claimant's Request for Arbitration, Section IV.
b. *See infra* Sections IV.A – IV-D.

A. THE PARTIES CONSENTED TO ARBITRATION UNDER NAFTA, ANNEX 14-C OF THE USMCA AND THE ICSID CONVENTION

203. Mr. Willars, on his own behalf and on behalf of CFCM, consented to the submission of this dispute to ICSID under Annex 14-C of the USMCA by filing the Request for Arbitration. As set out below, Mexico also consented to arbitrate this dispute under Annex 14-C of the USMCA and the ICSID Convention.

Proofs:

a. *See* Claimant's Request for Arbitration.
b. *See infra*, Sections IV.A.1 – IV.A.2.

1) Mexico consented to arbitration under NAFTA and the ICSID Convention

204. Mexico signed NAFTA on 17 December 1992 and the Treaty entered into force on 1 January 1994.

Proofs:

a. **CL-5-ENG** (NAFTA), Chapter 11, Article 2203 ("This Agreement shall enter into force on January 1, 1994, on an exchange of written notifications certifying the completion of necessary legal procedures").

205. In Chapter 11 of NAFTA related to "Investments," Mexico consented to arbitration in the following terms:

> 1. Each Party consents to the submission of a claim in arbitration in accordance with the procedures set out in this Agreement.
> 2. The consent given by paragraph 1 and the submission of a disputing investor of a claim to arbitration shall satisfy the

> requirement of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties […].

Proofs:

a. **CL-5-ENG** (NAFTA), Chapter 11, Article 1122;
b. **C-190-ENG** (UNCTAD's webpage on NAFTA) (indicating that NAFTA entered into force on 1 January 1994 for all three Parties).

206. Further, under Articles 1116(1) and 1117(1) of NAFTA, Mexico agreed to arbitrate disputes brought by an investor of a Party for breaches of Section A of Chapter 11 of NAFTA, either on its own behalf or on behalf of a juridical person that the investor owns or controls directly or indirectly:

> An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: a. Section A […].
> An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under: a. Section A […].

Proofs:

a. **CL-5-ENG** (NAFTA), Chapter 11, Articles 1116(1) and 1117(1).

207. The present dispute between Mr. Willars, a U.S. citizen, and Mexico, a Party to NAFTA, satisfies all the requirements set out in Articles 1116(1) and 1117(1) of NAFTA:

- Mr. Willars is an "investor of a Party:" Mr. Willars is a national of the United States of America, which is a Party to NAFTA;
- Mr. Willars brings this claim on his own behalf and on behalf of "an Enterprise of another Party that is a juridical person:" Mr. Willars submitted the Request for Arbitration on his own behalf and on behalf of CFCM, a Mexican company incorporated under the laws of Mexico on 25 March 1999, by public deed number 37,606, which he owns and controls;
- Mr. Willars "owns [and] controls directly [and] indirectly" CFCM: as discussed above, Mr. Willars majority owns and controls CFCM;
- Mr. Willars submitted a claim to arbitration based on Mexico's breach of an obligation under "Section A" of Chapter 11 of NAFTA: as

described in the Request for Arbitration and in this Memorial, Mr. Willars alleges a breach of Articles 1102, 1105 and 1110 of Section A of Chapter 11 of NAFTA;

- CFCM "incurred loss or damage by reason of, or arising out of, that breach:" as a result of Mexico's arbitrary refusal to provide prompt and full compensation to CFCM following its *rescate* of the Concession, CFCM has lost the entire value of its investments in the Concession, thereby causing loss and damage to CFCM and Mr. Willars.

Proofs:

a. **C-1-ENG** (Copy of Mr. Willars's American Passport);
b. *See* Claimant's Request for Arbitration, ¶1 ("Mario Noriega Willars (the "Investor" or "Mr. Willars"), on his behalf and on behalf of Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V. ("CFCM," and together with Mr. Willars, the "Claimants") serves this Request for Arbitration against the United Mexican States") and ¶99 ("Specifically, Mexico violated the following provisions of Chapter 11 of NAFTA: (a) Article 1110: Expropriation and Compensation; (b) Article 1105: Minimum Standard of Treatment; (c) Article 1102: National Treatment; and (d) Article 1103: Most-Favored-Nation Treatment");
c. **C-4-SPA** (CFCM's Deed of Incorporation) (evidencing that CFCM was incorporated in Mexico);
d. *See supra*, Section III.K (Mr. Willars Acquired an Interest in CFCM).

208. The present dispute also satisfies the requirements to establish Mexico's consent under Chapter II of the ICSID Convention, which includes Article 25 of the ICSID Convention, as required under Article 1122(2) of NAFTA:

- Mexico is a "Contracting State" for the purposes of the ICSID Convention: on 27 July 2018, Mexico deposited its instrument of ratification of the ICSID Convention, which entered into force in Mexico on 26 August 2018.
- Mr. Willars is a "national of another Contracting State:" Mr. Willars is and has been at all relevant times a U.S. citizen. The United States of America is also a Contracting State to the ICSID Convention, and has been since 14 October 1996.
- A "legal dispute arising directly out of an investment" exists between Mr. Willars and Mexico: as set out in the Request for Arbitration and in this Memorial, Mr. Willars is suing Mexico as a result of Mexico's arbitrary refusal to provide prompt and full compensation to CFCM following the *rescate* of the Concession in which Mr. Willars holds a controlling interest, which, as discussed below, is a covered investment

under NAFTA and the ICSID Convention. There is, therefore, a dispute arising directly out of Mr. Willars's investments.

Proofs:

a. **CL-6-ENG** (ICSID Convention), Article 25(1);
b. **C-191-ENG** (ICSID, List of Contracting States and Other Signatories of the Convention) (see "Mexico" and "United States");
c. **C-1-ENG** (Copy of Mr. Willars's American Passport).

209. Additionally, the conditions precedent to submission of a claim to arbitration, as provided for in Article 1121(2) of NAFTA, have also been met. Claimant has submitted the requisite consents to arbitration and waivers in the form contemplated by Article 1121(2) and (3) in support of the Request for Arbitration, a copy of which (along with the Request for Arbitration and supporting documentation) was delivered to Respondent.

Proofs:

a. **C-24-ENG** (Claimant's Written Waiver in compliance with Article 1121 of NAFTA);
b. *See* Request for Arbitration, ¶82 ("As for Claimants, they express their written consent to arbitrate by filing this Request for Arbitration. In compliance with Article 1121 of NAFTA, Claimants further attach to this Request for Arbitration their "written waiver").

2) Mexico consented to arbitration arising out of a legacy investment under the USMCA

210. Mexico is also party to the USMCA, which entered into force on 1 July 2020. In Annex 14-C(1) to the USMCA, Mexico has consented to arbitrate claims alleging breaches of obligations under Section A of Chapter 11 of NAFTA arising from legacy investments until three years after NAFTA's termination on 1 July 2020:

> 1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:
> (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
> […]
> 2. The consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of:

> (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;
> […]
> 3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.

Proofs:

a. **CL-3-ENG**, Annex14-C(1) (USMCA, Chapter 14);
b. **CL-4-ENG** (Protocol replacing NAFTA with USMCA, dated 30 November 2018).

211. All of the requirements for submitting a claim to arbitration under Annex 14-C are met here:

- The claim is "with respect to a legacy investment:" paragraph 6 of Annex 14-C defines a "legacy investment" as "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement". Mr. Willars holds a "legacy investment" for the purposes of the USMCA. As discussed below, Mr. Willars's investments were all made between the date of entry into force of NAFTA (1 January 1994) and prior to its termination (1 July 2020) and existed on the date of entry into force of the USMCA.
- The claim alleges breaches of Section A of Chapter 11 of NAFTA: in this arbitration, Mr. Willars alleges breaches of Articles 1102, 1105 and 1110 of Section A of Chapter 11 of NAFTA.
- The claim is submitted "[i]n accordance with Section B of Chapter 11 (Investment) of NAFTA:" as set out below, Mr. Willars complied with all requirements stipulated in Section B of Chapter 11 of NAFTA.
- The claim was submitted during the three-year transition period: Mr. Willars submitted its Request for Arbitration on 29 June 2023, prior to the expiration of the NAFTA's transition period on 30 June 2023.

Proofs:

a. **C-158-ENG**, p. 17 (Share Purchase Agreement between ████ █████ █████ and Mario Noriega Willars) (evidencing that Mr. Willars acquired an interest in CFCM in 2015);
b. *See infra*, Section IV.C (Claimant Holds Covered Investments under NAFTA, Annex 14-C of the USMCA and the ICSID Convention);
c. *See infra*, Section V (Mexico Breached its Obligations under NAFTA and International Law);
d. *See* Claimant's Request for Arbitration.

212. Accordingly, all the conditions for Mexico's consent under Annex 14-C of the USMCA have been met.

Proofs:

a. *See supra*.

B. Mr. Willars is a Covered Investor under NAFTA, Annex 14-C of the USMCA and the ICSID Convention

213. Mr. Willars is a protected investor under NAFTA, Annex 14-C of the USMCA and Article 25(2)(a) of the ICSID Convention. Paragraph 6(b) of Annex 14-C of the USMCA clarifies that the term "investor" has the same meaning as in Chapter 11 of NAFTA. Under Article 1139 of NAFTA, an "investor of a Party" is defined as "a national or an enterprise" of a Party "that seeks to make, is making or has made an investment." Likewise, under Article 25(2)(a) of the ICSID Convention, the investor must be "a national of another Contracting State," which includes "any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute" to arbitration.

Proofs:

a. **CL-3-ENG**, Annex14-C(1), paragraph 6(b) (USMCA, Chapter 14) ("*"investment", "investor", and "Tribunal" have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994*");
b. **CL-5-ENG**, Chapter 11, Article 1139 (NAFTA) (which sets out the definition of a covered "investor");
c. **CL-6-ENG**, Article 25(2)(a) (ICSID Convention) (which sets out the definition of a "National of another Contracting State" for natural persons).

214. Mr. Willars is a U.S. citizen by birth and has always been a U.S. citizen. In addition, as explained below, Mr. Willars has made investments in Mexico. Mr. Willars therefore qualifies as a protected investor under Chapter 11 of NAFTA and Article 25(2)(a) of the ICSID Convention.

Proofs:

a. **C-1-ENG** (Copy of Mr. Willars's American Passport) (confirming that Mr. Willars is a U.S. citizen by birth and held a valid U.S. passport at the time the Request for Arbitration was filed on 29 June 2023);

b. **CL-5-ENG**, Chapter 11, Article 1117(1) (NAFTA) ("An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under: a. Section A […] and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach").

C. CLAIMANT HOLDS COVERED INVESTMENTS UNDER NAFTA, ANNEX 14-C OF THE USMCA AND THE ICSID CONVENTION

215. Mr. Willars has made covered investments under the relevant provisions of NAFTA, the USMCA and the ICSID Convention. Moreover, CFCM, on behalf of which Mr. Willars is bringing this claim, holds several protected investments under these provisions.

Proofs:

a. *See infra*, Sections IV.C.1 – IV.C.2.

1) Claimant holds covered investments under NAFTA and Article 14-C of the USMCA

216. Under Annex 14-C of the USMCA, the term "investment" is attributed the same meaning as in Chapter 11 of NAFTA. Article 1139 of NAFTA provides an asset-based definition of "investment," which includes the following:

> (a) an enterprise;
> (b) an equity security of an enterprise;
> (c) a debt security of an enterprise where (i) the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise;
> (d) a loan to an enterprise where (i) the enterprise is an affiliate of the investor, or (ii) the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise;
> (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

> (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
> (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
> (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 (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.

Proofs:

a. **CL-3-ENG**, Annex14-C(1), paragraph 6(b) (USMCA, Chapter 14) ("'investment', 'investor', and 'Tribunal' have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994");
b. **CL-5-ENG**, Chapter 11, Article 1139 (NAFTA) (definition of an "investment").

217. Mr. Willars has made several qualifying investments in the territory of Mexico. As stated above, Mr. Willars owns a controlling interest (51.76%) in CFCM, a Mexican company incorporated under the laws of Mexico on 25 March 1999. Mr. Willars' controlling interest in CFCM qualifies as: (i) an "equity security of an enterprise;" (ii) "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;" and (iii) "an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution" under Articles 1139(a), (b), (e) and (f) of NAFTA.

Proofs:

a. **CL-5-ENG**, Chapter 11, Article 1139(a)(b)(e)(f) (NAFTA);
b. *See supra*, Section II.A and Image 1;
c. **C-2-SPA** (CFCM's Shareholder Registry) (reflecting that Mr. Willars directly owns a 16.38% interest in CFCM and that Viabilis directly owns a 73.71% interest in CFCM);
d. **C-3-SPA** (Viabilis Holding, S.A. de C.V.'s Shareholder Registry) (evidencing that Mr. Willars owns a 48% interest in Viabilis);
e. **C-28-SPA** (CFCM's Corporate Chart) (reflecting Mr. Willars' controlling interest in CFCM).

218. Additionally, CFCM, on behalf of which Claimant is bringing this claim, qualifies as an "enterprise" for the purposes of Article 1139(a) of NAFTA, and has acquired or used several movable assets to operate the Concession that are covered investments under Article 1139(g) of

NAFTA. These include, *inter alia*: (i) all movable assets related to the Concession that CFCM purchased upon the award of the Concession and of which CFCM acquired full ownership on 24 November 2003, when the SCT was satisfied that the rehabilitation of the Mayab Line had been successfully completed; and (ii) the machinery and equipment necessary to operate the Chiapas-Mayab Railway that the SCT transferred to CFCM.

Proofs:

a. **CL-5-ENG**, Chapter 11, Article 1139(g) (NAFTA);
b. **C-42-SPA** (Payment Certificates issued to CFCM dated 17 August 1999) (indicating that CFCM paid the price of the Concession and the value of the movable assets purchased under the Concession);
c. **C-43-SPA** (Purchase agreement between the SCT and CFCM dated 17 August 1999) (indicating that CFCM purchased the movable assets related to the Concession);
d. *See supra* Section III.B (detailing the machinery and equipment handed over by SCT to CFCM at the start of the Concession);
e. **C-55-SPA** (Official Letter No. 5.-753 dated 24 November 2003) (showing the SCT transferred the full property of the movables assets purchased by CFCM together with the Concession, because CFCM successfully completed the rehabilitation works on the Mayab Line).

219. CFCM's Concession also gives rise to protected "interests arising from the commitment of capital or other resources in the territory" of Mexico "to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or ***concessions***" under Article 1139(h) of NAFTA and from "claims to money" arising from the interests detailed in sections (a) to (h) of Article 1139 of NAFTA. These interests include, for example, CFCM's exclusive rights to: (i) use and exploit the railway and public domain assets pertaining to the Chiapas-Mayab Railway; (ii) provide freight services on the Chiapas-Mayab Railway; and (iii) provide services ancillary to freight services on the Chiapas-Mayab Railway, such as loading and unloading cargo.

Proofs:

a. **CL-5-ENG**, Chapter 11, Article 1139(h) (NAFTA);
b. **C-10-SPA,** Section 1.2.1 and 1.2.2 (Concession Agreement, without exhibits) ("Objeto. Por el presente título se concesiona: 1.2.1. Las vías generales de comunicación ferroviaria, así como su operación y explotación, que corresponde a las Vías Cortas Chiapas y Maya […]; 1.2.2. Los Bienes del dominio público que se describen en el Anexo tres…así como su uso, aprovechamiento y explotación"), Section 1.2.3 ("Objeto. Por el presente título se concesiona… 1.2.3. La prestación del servicio público de transporte ferroviario de carga en las Vías Cortas.[…]");
c. *Id.*, Section 1.4.1 ("Los derechos a que se refieren los numerales 1.2.1 y 1.2.2 se otorgan de manera exclusiva, durante la vigencia del presente título"), Section 1.4.2 ("El presente título confiere derechos de exclusividad al Concesionario para prestar

el servicio público de transporte ferroviario de carga a que se refiere el primer párrafo del numeral 1.2.3 por un periodo de dieciocho años contados a partir del inicio de la vigencia del presente título […]");

d. C-39-SPA, Annex 1 (Concession Agreement, with exhibits) (describing the railroads included in the Chiapas-Mayab Railway);

e. C-39-SPA, Annex 3 (Concession Agreement, with exhibits) (describing the public domain assets included in the Chiapas-Mayab Railway).

220. CFCM acquired these interests in return for the commitment of significant capital and resources to Mexico. As noted above, the SCT required the concessionaire of the Chiapas-Mayab Railway to make an initial investment of MXN $91.6 million to carry out the necessary rehabilitation of the Mayab Line to maintain rail service. CFCM's concession proposal included a MXN $141 million payment for the title of the Concession, plus the purchase of all related movable assets for MXN $116.8 million. CFCM further agreed to cover the cost of the critical investments required to repair the Mayab Line, amounting to MXN $91.6 million. [redacted].

Proofs:

a. *See supra*, Sections III.B – III.C;

b. C-40-SPA, p. 1 (SCT, Amendments to the call for bids for the Concession dated 29 April 1999) ("Que toda vez que de conformidad con la evaluación técnica realizada a la vía corta Mayab se desprende que el rezago en el mantenimiento y rehabilitación de la misma, **requiere de una inversión inmediata para que se realicen las obras necesarias de rehabilitación para preservar la prestación del servicio ferroviario**, el cual es indispensable para el desarrollo económico de la región […]") (emphasis added);

c. C-41-SPA (CFCM's Bid for the Concession) (evidencing CFCM offered to pay [redacted] for the Concession, plus the costs to repair the Mayab line);

d. C-42-SPA (Payment Certificates issued to CFCM dated 17 August 1999) (indicating that CFCM paid the price of the Concession and the value of the movable assets purchased under the Concession);

e. C-43-SPA (Purchase agreement between the SCT and CFCM dated 17 August 1999) (indicating that CFCM purchased the movable assets related to the Concession);

f. C-57-SPA (Letter No. 000360 from CFCM to the SCT dated 22 April 2002) (showing CFCM [redacted] to the Chiapas-Mayab Railway throughout 2001).

2) Claimant holds protected investments under Article 25 of the ICSID Convention

221. Claimant also holds protected investments under Article 25 of the ICSID Convention, which limits the jurisdiction of the ICSID Centre to "any legal dispute *arising directly out of an investment* between a Contracting State […] and a national of another Contracting State."

Proofs:

a. **CL-6-ENG**, Article 25(1) (ICSID Convention), Article 25(1) ("The jurisdiction of the Centre shall extend to any legal dispute **arising directly out of an investment**, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally") (emphasis added).

222. While the ICSID Convention does not provide a definition of the term "investment," it is widely accepted that covered investments under the applicable investment treaty will also qualify as protected investments under the ICSID Convention. As stated above, Mr. Willars holds several protected investments under NAFTA.

Proofs:

a. **CL-16-ENG**, ¶56 (*Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/3, Excerpts of Award, 9 February 2004) ("The Respondent further argues that Claimant's activity does not qualify as an investment as it does not satisfy the objective requirements in this respect. Respondent mentions the fact that such activity does not constitute a long-term operation nor is it materialized by a significant contribution of resources, and that it is not of such importance for the State's economy that it distinguishes itself from an ordinary commercial transaction. The Tribunal notes, however, that these elements, **while they are frequently present in investment projects, are not a formal requirement for the finding that a particular activity or transaction constitutes an investment**. Such a concept, as long as it is not supplemented by the appropriate restrictions, does equally include, under the ICSID Convention, and, **as demonstrated, under the BIT, "smaller" investments of shorter duration and with more limited benefit to the host State's economy**") (emphases added);

b. **CL-17-ENG**, ¶93 (*SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010) ("[I]n most cases—including, in the Tribunal's view, this one—**it will be appropriate to defer to the State parties' articulation in the**

instrument of consent (e.g. the BIT) of what constitutes an investment. The State parties to a BIT agree to protect certain kinds of economic activity, and when they provide that disputes between investors and States relating to that activity may be resolved through, inter alia, ICSID arbitration, that means they believe that that activity constitutes an "investment" within the meaning of the ICSID Convention as well. **That judgment, by States that are both Parties to the BIT and Contracting States to the ICSID Convention, should be given the greatest weight**. A tribunal would have to have very strong reasons to hold that the mutually agreed definition of investment should be disregarded") (emphases added);

c. **CL-18-ENG**, ¶329 (*Garanti Koza LLP v. Turkmenistan,* ICSID Case No. ARB/11/20, Award dated 19 December 2006) ("[A]s the tribunal in Enron v. Argentina explained, "As the ICSID Convention did not attempt to define 'investment,' **this task was left largely to the parties to bilateral investment treaties or other expressions of consent**") (emphasis added).

223. In any event, Mr. Willars' long-term interest in CFCM, the assets acquired and used by CFCM to operate the Concession, and the Concession all meet the commonly accepted criteria for an "investment" under the ICSID Convention, namely a contribution of money or assets, a certain duration, and an element of risk.

Proofs:

a. **CL-19-ENG**, ¶191 (*Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018) ("[I]n the present case, all of the Salini criteria are fulfilled, including that of contribution to the host State's development. Thus, **Claimants' shareholdings in L&E and, indirectly, in ENJASA**, coupled with the undertakings made as part of the privatization process to invest in the gaming, lottery, and tourism sector in Salta, **constitute a substantial commitment of resources by Claimants**; this commitment has been made **to achieve profits and returns for a substantial duration**; and it **also entails the assumption of risk**") (emphases added);

b. **CL-20-ENG**, ¶¶145, 149-151 (*Longreef Investments A.V.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/5, Decision on Jurisdiction, 12 February 2014) ("There can be no serious doubt that, in the ordinary use of language, the acquisition of a majority shareholding in a company - a fortiori a 100% shareholding - is an 'investment'. […] **the purchase of CAFAMA's shares by Longreef involved the payment of a substantial sum of money and was clearly a 'contribution' by Longreef**. […] Venezuela does not contend that the elements of duration and risk were not present. […] As regards risk, the Tribunal considers it to be self-evident that **the purchase of a trading company such as CAFAMA with its existing liabilities and potential risks satisfies this criterion**") (emphases added).

224. As discussed above, Mr. Willars made a significant commitment by agreeing to pay ████████████████████ in exchange for the acquisition of a 51.76% interest in CFCM, in the Willars SPA that Mr. Willars and Mr. ████ executed on 14 December 2015.

Proofs:

a. *See supra*, Section III.K;
b. **C-158-ENG**, p. 17 (Share Purchase Agreement between ███ ███ ███ and Mario Noriega Willars) (evidencing that Mr. Willars acquired an interest in CFCM in 2015 for a total amount of ████████);
c. *Id.*, p. 24 ("The Directly Owned CFCM Shares represent 16.38% of the total CFCM outstanding stock shares, and the indirectly Owned CFCM Shares represent 35.38% of the total CFCM outstanding stock shares. Therefore, the Directly Owned CFCM Shares and the Indirectly Owned CFCM Shares, together, represent approximately 51.76% of the total CFCM outstanding stock share").

225. As any capital investment, Mr. Willars' acquisition of an interest in CFCM involved some risk, but Mr. Willars was willing to take that risk after carefully reviewing CFCM's and the SCT's agreed 2012 Business Plan, which indicated that the Concession was a profitable business opportunity. As Mr. Willars explains:

> CFCM's approved Business Plan was comprehensive. In my view, the Business Plan contained all the information required to evaluate the business opportunity, including CAPEX and OPEX requirements, payroll expenses, leasing expenses, debt commitments, and revenue models…
>
> In reviewing the Business Plan, I found it to be transparent, supported by sound financial advice, and well structured.

Proofs:

a. **CWS-1-ENG**, ¶¶23-24 (Witness Statement-Mario Noriega Willars-Claim Memorial).

226. From the above, Claimant's investments qualify as protected investments under Chapter 11 of NAFTA, Annex 14-C of the USMCA and Article 25 of the ICSID Convention.

Proofs:

a. *See supra.*

D. Claimant Has Satisfied the Other Procedural Requirements to Bring Claims Under NAFTA

227. Claimant has satisfied all the other procedural requirements set out in NAFTA.

Proofs:

a. *See infra.*

228. ***First***, Claimant complied with Article 1119 of NAFTA pursuant to which the disputing investor must "deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted." Claimant submitted the Notice of Intent to Mexico on 30 March 2023, 91 days before the Request for Arbitration was filed on 29 June 2023. Moreover, the Notice of Intent contained all information required under Article 1119.

Proofs:

a. **CL-5-ENG**, Chapter 11, Article 1119 (NAFTA) ("The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify: a. the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise; b. the provisions of this Agreement alleged to have been breached and any other relevant provisions; c. the issues and the factual basis for the claim; and d. the relief sought and the approximate amount of damages claimed");
b. **C-25-ENG** (Notice of Intent dated 30 March 2023);
c. **C-26-SPA** (Official communication where Mexico's Ministry of Economy acknowledges receipt of Mr. Willars' Notice of Intent) (evidencing that Mexico received Mr. Willars Notice of Intent on 30 March 2023));
d. *Id.*, ¶¶1-3 (setting out the name and address of Mr. Willars and that of CFCM on behalf of which Mr. Willars brings a claim), ¶8 (setting out the provisions alleged to have been breach), ¶¶9-33 (setting out the issues and the factual basis of the claim), and ¶34-35 (setting out the relief sought and the approximate amount of damages claimed);
e. *See* Claimant's Request for Arbitration dated 29 June 2023.

229. ***Second***, Claimant attempted to settle his claim through negotiation with Mexico as required under Article 1118 of NAFTA. Subsequent to the issuance of the Notice of Intent, Mr. Willars and Mexico held an in-person meeting in Mexico City, Mexico, on 6 June 2023, in an attempt to reach an amicable resolution of this dispute. Since these discussions did not result in a mutually agreeable resolution of the claim, and because more than six months had passed since the events giving rise to the dispute, Mr. Willars filed the Request for Arbitration on his own behalf and on behalf of CFCM on 29 June 2023.

Proofs:

a. **CL-5-ENG**, Chapter 11, Article 1118 (NAFTA) ("The disputing parties should first attempt to settle a claim through consultation or negotiation.") and 1120 ("Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under: a. the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention");

b. *See* Claimant's Request for Arbitration dated 29 June 2023, ¶87.

230. ***Third***, Claimant's claims are timely under Articles 1116(2) and 1117(2) of NAFTA because Claimant submitted the Request for Arbitration less than three years after he first acquired knowledge of (i) Mexico's breach of NAFTA and (ii) that he has incurred losses arising out of this breach. Given the continuing nature of Mexico's breach of NAFTA in this case, this specific issue is closely intertwined with the merits and is therefore addressed below.

Proofs:

a. **CL-5-ENG**, Chapter 11, Articles 1116(2) (NAFTA) ("An investor may not make a claim if more than three years have elapsed from the date on which the investor f**irst acquired, or should have first acquired**, **knowledge of the alleged breach *and* knowledge that the investor has incurred loss or damage**");

b. *Id.*, 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**") (emphases added);

c. *See infra,* Section VI ("Claimant Initiated This Arbitration Within the Temporal Limits Set Out in NAFTA and Article 14-C of the USMCA").

d. **CL-21-ENG**, ¶90 (*Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction dated 19 September 2008) ("The actual determination of which acts specifically meet the continuing requirement is a matter for the merits because it is only then that it can be decided which acts amount to breaches and when this took place. At the jurisdictional stage only the principle can be identified").

231. Therefore, pursuant to Articles 1118, 1119 and 1120, Claimant has fulfilled all procedural requirements for bringing his claims before this Tribunal.

Proofs:

a. *See supra*.

V.

MEXICO BREACHED ITS OBLIGATIONS UNDER NAFTA AND INTERNATIONAL LAW

232. Mexico's conduct is unlawful under NAFTA and international law. Mexico has violated Articles 1110 (Expropriation and Compensation), Article 1105 (Minimum Standard of Treatment) and Article 1102 (National Treatment) of NAFTA. These breaches are detailed below.

Proofs:

a. *See infra,* Sections V.A (Expropriation), V.B (Fair and Equitable Treatment), V.C (Full Protection and Security) and V.D (National Treatment).

A. MEXICO FAILED TO COMPENSATE CFCM FOLLOWING ITS EXPROPRIATION OF CLAIMANT'S INVESTMENTS IN BREACH OF NAFTA ARTICLE 1110

1) NAFTA protects investors against expropriation

233. Article 1110 of NAFTA expressly prohibits NAFTA Parties (such as Mexico) from directly or indirectly expropriating an investor's investment or taking measures "tantamount to nationalization or expropriation" unless certain conditions are met:

> 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 except:
> a. for a public purpose;
> b. on a non-discriminatory basis;
> c. in accordance with due process of law and Article 1105(1) [(i.e., "in accordance with international law, including fair and equitable treatment."]); and
> d. ***on payment of compensation*** in accordance with paragraphs 2 through 6 below.
>
> 2. ***Compensation shall be equivalent to the fair market value of the expropriated investment*** immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

> 3. ***Compensation shall be paid without delay*** and be fully realizable […].

Proofs:

a. **CL-5-ENG**, Chapter 11, Article 1110 (NAFTA).

234. Where an expropriation takes place and these stated conditions are not met, the expropriating party is deemed to have committed an unlawful expropriation in violation of Article 1110 of NAFTA.

Proofs:

a. **CL-5-ENG**, Chapter 11, Article 1110 (NAFTA).

235. Direct expropriation refers to formal acts of outright seizure or transfer of protected investments to the State. Tribunals have found that a State's termination of a concession agreement may amount to direct expropriation or a measure tantamount to direct expropriation if the concession agreement is a protected investment under the applicable treaty.

Proofs:

a. **CL-22-ENG**, ¶496 (*Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, 21 November 2022) ("The Metalclad tribunal describes direct expropriation as an "open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State […].". The formal transfer of title from the investor to the host State or to a third party at the behest of the host State is an identifying criterion of direct expropriation");
b. **CL-23-ENG**, ¶¶454-455 (*Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (II), ICSID Case No. ARB/06/11, Award dated 5 October 2012) ("[T]he Respondent maintains that it did not expropriate the Claimants' investment because the termination of a contract in accordance with its terms and governing law is not an expropriation, and that the Caducidad Decree was a bone fide administrative sanction in furtherance of a legitimate regulatory policy.[…] **the taking by the Respondent of the Claimants' investment by means of this administrative sanction was a measure "tantamount to expropriation" and thus in breach of Article III.1 of the Treaty**") (emphasis added);
c. **CL-24-ENG**, ¶98 *(Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award dated 8 December 2000) ("[A]n expropriation is not limited to tangible property rights. As the panel in SPP v. Egypt explained, "there is considerable authority for the proposition that Contract rights are entitled to the protection of international law and that the

taking of such rights involves an obligation to make compensation therefore");

d. **CL-25-ENG**, ¶241 (*Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award and Dissenting Opinion, 19 August 2005) ("There is an amplitude of authority for the proposition that when a State deprives an investor of the benefit of its contractual rights, directly or indirectly, it may be tantamount to a deprivation in violation of the type of provision contained in Article 5 of the Treaty. The deprivation of contractual rights may be expropriatory in substance and in effect").

236. This is typically the case when the State terminates a contractual agreement in the exercise of its sovereign powers (*puissance publique*) rather than as an ordinary contracting party.

Proofs:

a. **CL-26-ENG**, ¶692 (*Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated 4 April 2016) ("**[T]he pivotal question is whether the Respondent, in terminating the contract, acted in the exercise of its sovereign powers (puissance publique) rather than as an ordinary contracting party**. The presence of this element allows distinguishing between mere breaches of contracts (which would normally not give rise to international responsibility) and acts which, while expressed as contractual, are in reality sovereign acts which may implicate state responsibility") (emphasis added);

b. **CL-27-ENG**, ¶664 (*Rasia FZE and Joseph K. Borkowski v. Republic of Armenia*, ICSID Case No. ARB/18/28, Award dated 20 January 2023) ("**[A] State's effective repudiation of a contract may give rise to an expropriation, at least when undertaken in an exercise of sovereign authority rather than as an ordinary contract counterparty**. A fundamental requirement is that the State conduct must have deprived the investor of the right in question, or have rendered the right effectively useless by depriving it of all benefit or value") (emphasis added).

237. Indirect expropriation includes measures that result in the substantial deprivation of the use or economic benefit of an investor's investment, even though the investor may retain nominal ownership of the rights that constitute the investment.

Proofs:

a. **CL-28-ENG**, ¶103 (*Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award dated 30 August 2000) ("[E]xpropriation […] includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also **covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host**

State") (emphasis added);

b. **CL-29-ENG**, ¶240 (*Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award dated 21 November 2007) ("An expropriation occurs if the interference is substantial and deprives the investor of all or most of the benefits of the investment. There is a broad consensus in academic writings that the intensity and duration of the economic deprivation is the crucial factor in identifying an indirect expropriation or equivalent measure");

c. **CL-30-ENG**, ¶107 (*Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, dated 12 April 2002) (finding that an expropriation results when "measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment").

238. Investment tribunals have found indirect expropriation of shareholdings where the shares and the rights deriving therefrom have lost all significant commercial value, or where the state's conduct effectively freezes or destroys the owner's ability to reasonably exploit the economic potential of his shares.

Proofs:

a. **CL-31-ENG**, ¶¶339-341 (*Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award dated 29 April 2014) ("[T]here can be little doubt that, as of now, **the commercial value of the Claimants' rights in its shareholding in Enkev Polska has been adversely affected, albeit not destroyed, by the predicament facing Enkev Polska**. The question therefore arises whether such diminution in value amounts in this case to an indirect deprivation of the Claimant's investment within the meaning of Article 5 of the Treaty. […] [T]**he Claimant must prove, on the facts of this case, that its investment in the form of shares in Enkev Polska and rights deriving from such shares has lost all or almost all significant commercial value**") (emphases added);

b. **CL-32-SPA**, ¶¶998-999 (*Latin American Regional Aviation Holding S. de R.L. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/19/16, Award dated 13 February 2024) ("[U]na serie de medidas ilícitas puede tener el efecto de expropiar una inversión realizada en una compañía aunque las mismas no hayan privado al inversionista de su control jurídico sobre las acciones. En el presente caso, el efecto expropiatorio de las medidas consiste en **el hecho de que han llegado a paralizar la compañía, poniéndola en una situación de imposibilidad de continuar con sus actividades y privando así la inversión de todo su valor**. La situación en la cual las medidas habían puesto a la compañía fue la causa de que la Demandante **tuviera que ceder sus acciones a Uruguay sin compensación**. Como indica el tribunal del caso Compañía del Desarrollo de Santa Elena c. Costa Rica citado por la Demandada, una medida es expropiatoria si **"effectively freezes or blights the possibility**

for the owner reasonably to exploit the economic potential of the property". Este es exactamente la situación a la cual se enfrentó el inversionista como consecuencia de las medidas en disputa, las cuales equivalen por lo tanto a una privación sustancial del derecho de propiedad de la inversión") (emphases added);

c. **CL-33-ENG**, ¶305 (*UP (formerly Le Chèque Déjeuner) and C.D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018) ("**Even if shares remain legally held by a claimant, if a State's measures result in the loss of the shares' economic value, this may be considered an indirect expropriation**. This is confirmed by a wide body of jurisprudence such as the awards in RosInvest, Burlington Resources, and others. The Metalclad tribunal defined indirect expropriation as an interference which has the effect of depriving the owner "of the use or reasonably-to-be-expected economic benefit of property[.]" It has further been established that such a loss of value must be substantial and sufficiently permanent, though a substantial deprivation alone will suffice") (emphasis added).

239. For instance, in *Westwater Resources v. Türkiye*, the tribunal found that the State's cancellation of a local subsidiary's uranium licenses constituted an indirect expropriation of the claimant's shares in a local subsidiary, which had lost all their value.

Proofs:

a. **CL-34-ENG**, ¶253 (*Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46, Award dated 3 March 2023) ("[T]he cancellation of Adur's licenses constitutes an indirect expropriation of Westwater's investment, being its shares in Adur, which have lost all their value. The taking of the license deprived Adur and its uranium project of any value and as a consequence deprived Westwater's share of their value. In terms of compensation, the result is the same").

2) Mexico's conduct violates NAFTA's protection against expropriation

240. As discussed, CFCM duly complied with its obligations under the Concession Agreement. The SCT explicitly recognized that CFCM "***ha[d] complied with the conditions in the concession granted to it****, in accordance with the systematic verifications made*" when it entered into the Amendment on 22 October 2012.

Proofs:

a. **C-11-SPA** (Amended Concession, dated 22 October 2012) (where the SCT certified that "[CFCM] ha[d] complied with the conditions in the concession granted to it, in accordance with the systematic verifications made");

b. *See supra*, Section III.G.4 (CFCM and the SCT amended the Concession Agreement).

241. While CFCM continued to hold up its end of the bargain, regrettably Mexico did not. Indeed, despite Mexico's and CFCM's agreement that the SCT would return the operation of the Chiapas-Mayab Railway to CFCM, including by "deliver[ing] to CFCM the sequestered assets and the concessioned tracks in good physical, maintenance and operating conditions" by 28 February 2013, the SCT failed to deliver the rail lines and to make sure that they were ready to be safely operated. As the Inspection Process revealed, the Chiapas-Mayab Railway was in poor physical, maintenance and operating conditions.

Proofs:

a. **C-12-SPA**, pp. 1-2 (Official Communication 4.3.811/2012 by the SCT, dated 22 November 2012) (evidencing that the SCT committed to deliver the assets and the rail lines to CFCM in good operating condition);

b. *See supra*, Sections III.G.4 (CFCM and the SCT amended the Concession Agreement) and III.H (The Inspection Process Reveales the Poor State of the Concession and the Need for Additional Investments by Mexico).

242. Despite CFCM's good faith attempt to find a way forward, including by investing additional funds and resources into the Concession, the SCT once again disregarded the terms of its commitments towards CFCM. Indeed, the SCT further delayed the return of the Concession to CFCM and ended up declaring the *rescate* of the Concession, which effectively expropriated CFCM's and Mr. Willars' investments.

Proofs:

a. *See supra,* Sections III.I (The SCT Agreed to Make Additional Investments to the Concession), III.J (The SCT Again Delayed the Return of the Concession to CFCM) and III.L (Without Warning, Mexico Triggered a Rescate Proceeding to Revert the Concession to the State);

b. *See infra*.

243. ***First***, the *rescate* entailed a direct expropriation of the assets that CFCM had acquired to operate the Concession. Indeed, although the Rescate Declaration had authorized CFCM to "remove and dispose of the assets, equipment and facilities of its property and used for the concession," the SCT did not allow CFCM to remove and dispose of them. Thus, the *rescate* resulted in the forcible and permanent transfer of the assets that CFCM had acquired to operate the Concession to SCT.

Proofs:

a. **C-16-SPA**, p. 67 (Rescate Declaration dated 13 July 2016, served on CFCM on 26 July 2016) (the fourth "Resolutivo" provides that the SCT "**autoriza a Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V. a retirar y disponer de los bienes, equipos e instalaciones de su propiedad afectos a la concesión**. Para tal efecto se le concede un plazo de 60 (sesenta)

días hábiles, contados a partir de la fecha la legal notificación de la presente Declaratoria") (emphasis added);

b. CWS-2-SPA, ¶89 (Witness Statement-[redacted] Claim Memorial) ("Desafortunadamente, desde 2016 y hasta la fecha, la SCT no ha pagado cantidad alguna a CFCM como compensación por el rescate. **De hecho, la SCT ni siquiera ha permitido a CFCM disponer de sus activos y equipos que se encuentran en las Vías. En esencia, la SCT se apropió de los activos de la CFCM afectos a la Concesión, sin hacer un solo pago a cambio**") (emphasis added);

c. CER-2-SPA, ¶¶54-55 (Expert Report-Marco Antonio de la Peña-Claim Memorial) ("El rescate, en Derecho Mexicano, es un acto administrativo por virtud del cual la autoridad concedente pone fin anticipadamente a una concesión, recuperando la administración de los bienes concesionados, por causa de utilidad pública y mediante indemnización. El rescate, en su naturaleza jurídica, es muy similar a una expropiación. La particularidad del rescate es que, a través de él, el Estado recupera la administración y explotación de bienes propios del Estado, y puede incluir también que el Estado adquiera bienes propiedad de la concesionaria. En esencia, el rescate es una expropiación sobre una concesión otorgada por el propio Estado");

d. *See supra*, Section III.L.3.

244. ***Second***, the *rescate* expropriated CFCM's contractual rights in the Concession. Indeed, as made clear in the Rescate Declaration, "as of the legal notification of the […] the Rescate Declaration, **the Concession [was] extinguished**," without any breach on CFCM's part.

Proofs:

a. C-16-SPA, p. 67 (Rescate Declaration dated 13 July 2016, served on CFCM on 26 July 2016) (the second "Resolutivo" provides that "**a partir de la legal notificación de la presente resolución que contiene la Declaratoria de rescate, queda extinguida y sin efectos la Concesión**") (emphasis added);

b. CER-2-SPA, ¶57 (Expert Report-Marco Antonio de la Peña-Claim Memorial) ("El rescate produce tres efectos: (a) Extinción de la concesión. Su fundamento se encuentra en el artículo 20, fracción IV, de la Ley del Servicio Ferroviario. Esa previsión usualmente se replica en las leyes que regulan otros tipos de concesiones…").

245. Indeed, as Mr. [redacted] (former [redacted] at the SCT) explains, a *rescate* declaration terminates a concession through no contractual breach on the part of the concessionaire. This is because a *rescate* is a sovereign prerogative of the Mexican State, which can "**only be declared for reasons of public interest, public utility and national security, not for breaches by the concessionaire** that could justify a lack of compensation."

Proofs:

a. CWS-3-SPA, ¶65-66 (Witness Statement-[redacted] Claim Memorial) ("El rescate es una forma de

terminación de las concesiones. **La declaratoria de rescate termina la concesión**, provoca que los bienes materia de la concesión vuelvan, de pleno derecho, desde la fecha de la declaratoria, a la posesión, control y administración del concesionante (en este caso la SCT) y que ingresen a su patrimonio los bienes, equipos e instalaciones destinados directamente a los fines de la concesión … El rescate de una concesión ferroviaria **solamente puede declararse por causas de utilidad pública, de interés público o de seguridad nacional**. Solamente esas razones son suficientes para que exista un rescate sobre una concesión. … **Otras causas como incumplimientos del concesionario o impedimentos para prestar el servicio podrían generar otras consecuencias como la revocación de la concesión, pero no un rescate**") (emphasis added);

b. **C-16-SPA**, p. 67 (Rescate Declaration dated 13 July 2016, served on CFCM on 26 July 2016) (the first "Resolutivo" provides that "**[p]or causas de interés público, utilidad pública y seguridad nacional** se declara el rescate de la Concesión otorgada en favor de Compañía de Ferrocarriles Chiapas-Mayab, S.A de C.V., respecto de las vías generales de comunicación ferroviaria Chiapas y Mayab […]") (emphasis added);

c. **CWS-2-SPA**, ¶82 (Witness Statement-[redacted] Claim Memorial) ("Un primer punto relevante sobre la decisión de rescate es que **la SCT no manifestó en momento alguno que CFCM hubiese incumplido con sus obligaciones o acuerdos**. Por el contrario, la determinación del rescate se tomó, de acuerdo con la propia SCT, por razones de interés público, utilidad pública y seguridad nacional") (emphasis added);

d. **CER-2-SPA**, ¶61 (Expert Report-Marco Antonio de la Peña-Claim Memorial) ("…el rescate debe estar **motivado por causas de utilidad, de interés público o de seguridad nacional**. En cuanto a este punto, **el rescate se da con independencia del cumplimiento del concesionario a los términos de la concesión**, ya que estos no constituyen el fundamento del rescate…") (emphases added).

246. This was also confirmed in the 2020 Decision in the following terms:

Atendiendo a dicha norma, tenemos que el rescate de las concesiones que las dependencias administradoras de inmuebles y los organismos descentralizados otorguen sobre bienes sujetos al régimen de dominio público de la Federación, es una forma anormal y anticipada de terminar con dicha concesión, que no tiene un carácter sancionador (como en el caso de la terminación de concesiones por incumplimiento del concesionario) y cuya finalidad es la protección del interés público o interés general, que a su vez lleva implícita la protección de la seguridad nacional.

Y si bien la decisión de rescatar supone el ejercicio de una potestad administrativa discrecional, dicha discrecionalidad se entiende

Image 35: the 2020 Decision confirmed CFCM did not breach the Concession Agreement (C-184-SPA)

Proofs:

a. **C-184-SPA**, p. 240 (Decision rendered by the Federal Administrative Tribunal, dated 29 January 2020).

247. This was the case with the Rescate Declaration, which does not include a single reference to any breach of CFCM's obligations under the Concession, but rather makes clear that it was issued for reasons of "public interest, public utility and national security."

Proofs:

a. **C-16-SPA** (Rescate Declaration dated 13 July 2016, served on CFCM on 26 July 2016) (evidencing that the SCT expropriated CFCM's Concession).

248. ***Third***, the *rescate* resulted in an indirect expropriation of Mr. Willars' shareholding interest in CFCM. As the *Westwater Resources v. Türkiye* tribunal explained, the taking of a license deprived the investor's shares of all their value. Similarly, here, Respondent's *rescate* proceedings had the effect of depriving Mr. Willars of the entire value of its investment, which was inextricably linked to CFCM's ability to manage, operate and use the Chiapas-Mayab Railway under the Concession and Amended Concession.

Proofs:

a. **CL-34-ENG**, ¶253 (*Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46, Award dated 3 March 2023) ("[T]he cancellation of Adur's licenses constitutes an indirect expropriation of Westwater's investment, being its shares in Adur, which have lost all their value. The taking of the license deprived Adur and its uranium project of any value and

as a consequence deprived Westwater's share of their value. In terms of compensation, the result is the same");

b. **CER-1-ENG**, ¶94 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial) ("the 2016 Recovery Declaration resulted in the complete deprivation of both CFCM's value and the value of the Claimant's shareholding in CFCM, since: (i) CFCM's sole purpose was to operate the Concession; and (ii) the 2016 Recovery Declaration expropriated the assets CFCM had acquired to operate the Concession and it deprived CFCM of its rights under the Concession Agreement").

249. Mexico's direct and indirect expropriation of CFCM's and Mr. Willars' investments was unlawful because, in addition to the violations to due process describe above,[6] it was carried out without compensation.

Proofs:

a. *See infra*, Section V.A.3.

3) Mexico's expropriation was unlawful because it was carried out without compensation

250. Mexico's expropriation of Claimant's investments does not satisfy the cumulative requirements for a lawful expropriation under Article 1110(1) of NAFTA. Indeed, NAFTA prohibits expropriations unless they are done: (i) for a public purpose, (ii) on a non-discriminatory basis, (iii) in accordance with due process of law, and (iv) in exchange for prompt and adequate payment of compensation. NAFTA also requires that an expropriation be done in a manner consistent with the "minimum standard of treatment" prescribed in Article 1105, and Mexico's violations of that Article are addressed in Section V.B, below (Fair & Equitable Treatment). Because these requirements are cumulative, Mexico's breach of ***any*** of these requirements renders its expropriation unlawful under NAFTA and under international law.

Proofs:

a. **CL-5-ENG**, Chapter 11, Article 1110(1) (NAFTA) (stating that an expropriation is unlawful unless it is made "(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).

251. In this case, Mexico's *rescate* of the Concession was in breach of NAFTA's requirement that any direct, indirect or any measure tantamount to expropriation be carried out

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[6] *See supra*, Sections III.L (Without Warning, Mexico Triggered a Rescate Proceeding to Revert the Concession to the State), III.M (CFCM Challenged the INDAABIN Report Before Mexico's Courts) and III.N (CFCM Challenged the Rescate Proceeding Before Mexico's Courts).

"***on payment of compensation***", which "shall be equivalent to the ***fair market value of the expropriated investment*** immediately before the expropriation took place", and "***paid without delay*** and be fully realizable."[7]

Proofs:

a. **CL-5-ENG**, Chapter 11, Articles 1110(1)(d), 1110(2) and 1110(3) (NAFTA).

252. As reasoned by the tribunal in *Westwater Resources v. Türkiye*, Article 1110 of NAFTA "calls for compensation at fair market value and [yet] the Respondent ***never agreed even to negotiate fair market value let alone make a settlement proposal on that basis***." In fact, not only has Mexico failed to compensate CFCM for the fair market value of its investment in the Concession, but it has explicitly denied CFCM such a right through the decisions rendered by the SCT and its judiciary. Even before any decision on compensation had been rendered, the Head of the SCT was quoted in national news outlets, publicly declaring that ***CFCM would receive no compensation for the Rescate Declaration***.

Proofs:

a. **CL-34-ENG** (*Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46, Award dated 3 March 2023), ¶274 ("**To be lawful, the expropriation must satisfy all of the BIT criteria. The BIT calls for compensation at fair market value and the Respondent never agreed even to negotiate fair market value let alone make a settlement proposal on that basis**. […] The expropriation was a violation of the BIT and Westwater is entitled to compensation for breach of the BIT") (emphasis added);

b. **C-173-SPA** (News article published in 24 Horas titled "'Cero' indemnización a ex concesionario de La Bestia, advierte Ruiz Esparza," dated 26 August 2016) (reflecting that the SCT's Secretary decided not to return the Concession or grant compensation to CFCM before CFCM's reconsideration request and request for compensation were decided);

c. **C-221-SPA** (News article published in La Jornada titled "Cancela SCT concesión a operador de La Bestia; carece de capacidad técnica" dated 26 August 2016) ("…Gerardo Ruiz Esparza [a]seguró que la indemnización para la empresa Genesse Wyoming será cero…");

d. **C-222-SPA** (News article published in El Financiero titled "SCT no indemnizará a exconcesionario de 'La Bestia'" dated 25 August 2016) ("La Secretaría de Comunicaciones y Transportes (SCT) no indemnizará a la Compañía de Ferrocarriles Chiapas-Mayab, quien hasta ayer contaba con la concesión del ferrocarril de carga conocido como 'La Bestia'");

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[7] Claimant limits its expropriation claim to Mexico's failure to comply with Article 1110(d) of NAFTA, but expressly reserves the right to assert claims based on Mexico's breaches of additional requirements for a lawful expropriation under Article 1110(a), (b), or (c) of NAFTA.

e. **CWS-3-SPA**, ¶62 (Witness Statement-███████ ███ Claim Memorial) ("Lo más sorprendente para mí no fue solamente la decisión de rescatar la Concesión, sino las declaraciones públicas del Licenciado Ruiz Esparza, Secretario de Comunicaciones y Transportes, de que no existiría ningún tipo de indemnización para CFCM por el rescate. El Licenciado Ruiz Esparza públicamente declaró que no se pagaría un solo peso como indemnización a CFCM, a pesar de haber rescatado la Concesión");

f. **C-177-SPA**, p. 2 (INDAABIN Report dated 16 October 2018) (reflecting that the amount of compensation owed to CFCM was zero);

g. **C-184-SPA**, pp. 359, 368-369 (Decision rendered by the Federal Administrative Tribunal dated 29 January 2020) (indicating that the 2020 Decision recognized that Article 19 of the GLNA limits compensation to investments made in a concession);

h. **C-18-SPA**, pp. 124-126 (Decision of the Sixth Circuit Court in the direct amparo 175/2020) (indicating that CFCM is not entitled to damages and lost profits);

i. **C-187-SPA** (Judgment of Mexico's Supreme Court dated 8 June 2022) (demonstrating that Mexico's Supreme Court failed to award CFCM full compensation for the Rescate Declaration);

j. *See supra*, Sections III.L.4, III.M and III.N.

253. On 1 December 2016, CFCM submitted a detailed request to the SCT in order to be compensated for the losses arising out of the *rescate*, which included, *inter alia*, ████ ██████████ ██████████ ██████ As Mr. ██████ ("**Mr.** ███"), then Director General at CFCM, recalls, CFCM's request for compensation "was prepared with care and thoroughness, and CFCM provided all relevant documentation supporting its request for payment." Indeed, CFCM provided no less than 43 annexes to justify its request for compensation.

Proofs:

a. **C-17-SPA** (CFCM's communication to the SCT requesting compensation, dated 1 December 2016);

b. **CWS-2-SPA**, ¶89 (Witness Statement-███████ ███ Claim Memorial) ("Esta solicitud fue preparada con detenimiento y cuidado, y CFCM aportó toda la documentación pertinente que sustentaba su solicitud de pago. CFCM aportó 43 anexos sustentando cada una de las inversiones realizadas y compensación debida");

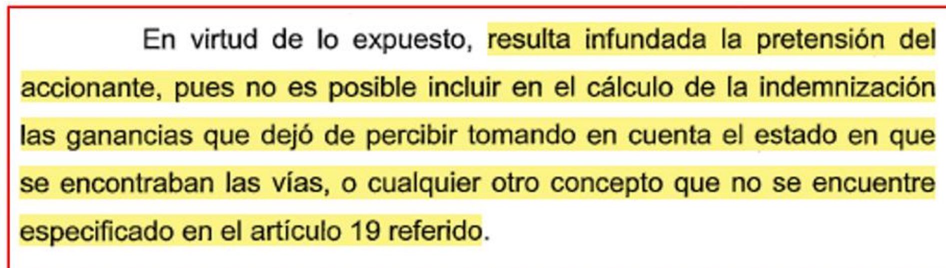
c. *See supra*.

254. In the absence of any response or reaction from the SCT, on 10 January 2017, CFCM started judicial proceedings in Mexico to challenge the legality of the *rescate* of the Concession, including the lack of compensation resulting from it.

Proofs:

a. **C-182-SPA** (Annulment Request filed by CFCM against the Rescate Declaration dated 10 January 2017) (demonstrating that CFCM claimed compensation for the damages arising from the Rescate Declaration).

255. CFCM's efforts were in vain. On 29 January 2020, more than three years after CFCM had initiated these proceedings, the Federal Administrative Tribunal denied CFCM's request to be compensated for the damages and lost profits it had suffered as a result of the *rescate* proceedings, alleging that Article 19 of the GLNA only allowed compensation for investments made in the Concession, excluding damages:



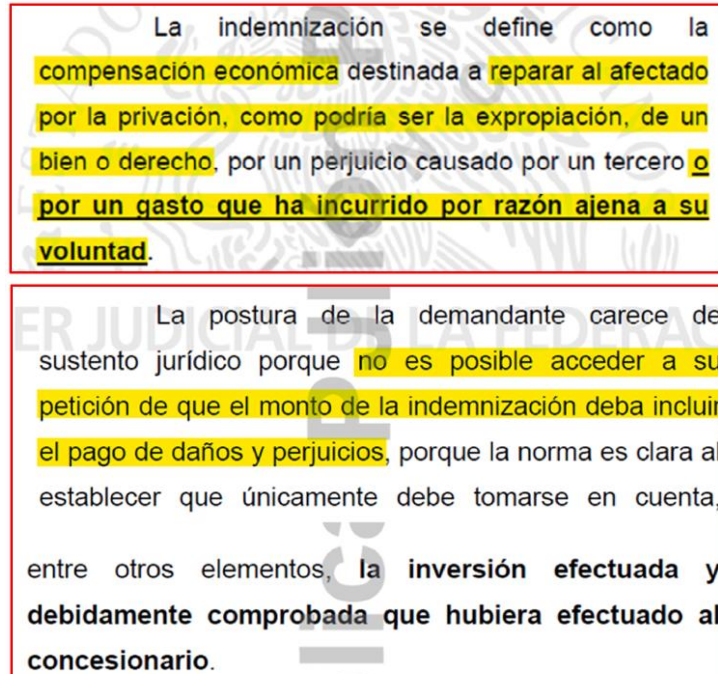
En virtud de lo expuesto, resulta infundada la pretensión del accionante, pues no es posible incluir en el cálculo de la indemnización las ganancias que dejó de percibir tomando en cuenta el estado en que se encontraban las vías, o cualquier otro concepto que no se encuentre especificado en el artículo 19 referido.

Image 36: the 2020 Decision did not grant CFCM compensation for damages caused by the Rescate Declaration (C-184-SPA)

Proofs:

a. **C-184-SPA**, p. 359 (Decision rendered by the Federal Administrative Tribunal dated 29 January 2020) (indicating that the 2020 Decision recognized that Article 19 of the GLNA limits compensation to investments made in a concession).

256. CFCM challenged this decision through the Rescate Amparo. On 28 January 2021, the Sixth Circuit Court issued the 2021 Decision in which it acknowledged that compensation was due and that the purpose of compensation was to "repair" the aggrieved party for the deprivation of rights and for damages caused, ***but nevertheless refused to compensate CFCM for the damages and lost profits suffered as a result of the rescate***:


La indemnización se define como la compensación económica destinada a reparar al afectado por la privación, como podría ser la expropiación, de un bien o derecho, por un perjuicio causado por un tercero **o por un gasto que ha incurrido por razón ajena a su voluntad**.

La postura de la demandante carece de sustento jurídico porque no es posible acceder a su petición de que el monto de la indemnización deba incluir el pago de daños y perjuicios, porque la norma es clara al establecer que únicamente debe tomarse en cuenta,

entre otros elementos, **la inversión efectuada y debidamente comprobada que hubiera efectuado al concesionario**.

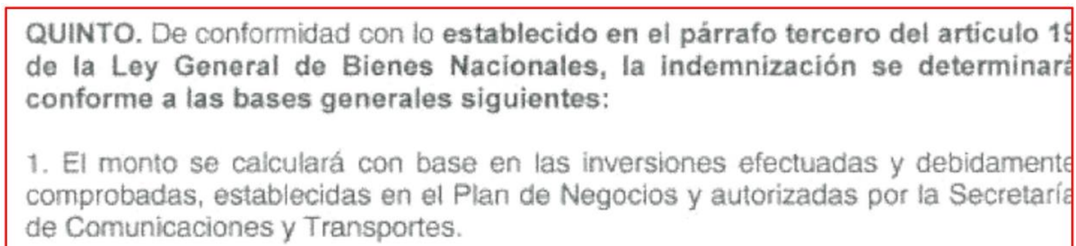
Image 37: the 2021 Decision refused to compensate CFCM for the damages and lost profits resulting from the Rescate Declaration (C-18-SPA)

Proofs:

a. **C-185-SPA** (Amparo request filed by CFCM against the 2020 Decision dated 13 March 2020) (indicating that CFCM requested the annulment of the Rescate Notice, the Rescate Declaration and Resolution 268/2016);

b. **C-18-SPA**, pp. 124-125, 140 (Decision of the Sixth Circuit Court in the direct amparo 175/2020) (confirming that CFCM was not entitled to full compensation).

257. CFCM filed the Rescate Revision against the 2021 Decision before Mexico's Supreme Court. The Supreme Court's rejection of the Rescate Revision meant that compensation to be paid to CFCM would be limited to the cost of the investment made by the concessionaire (*damnum emergans*). Even faced a decision by its own courts that some compensation is due, to date, Mexico has not paid ***any*** compensation to CFCM, not even the cost of the investments made by CFCM to operate the Concession, which Mexico undertook to pay in the Rescate Declaration, pursuant to Article 19(3) of the *Ley General de Bienes Nacionales*:


QUINTO. De conformidad con lo **establecido en el párrafo tercero del artículo 1[9] de la Ley General de Bienes Nacionales, la indemnización se determinar[á] conforme a las bases generales siguientes:**

1. El monto se calculará con base en las inversiones efectuadas y debidament[e] comprobadas, establecidas en el Plan de Negocios y autorizadas por la Secretarí[a] de Comunicaciones y Transportes.

Image 38: the Rescate Declaration afforded CFCM compensation for the cost of its investments (C-16-SPA)

Proofs:

a. **C-16-SPA** (Rescate Declaration dated 13 July 2016, served on CFCM on 26 July 2016), p. 68 (the fifth "Resolutivo" provides that "**[d]e conformidad con lo establecido en el párrafo tercero del articulo 19 de la Ley General de Bienes Nacionales, la indemnización se determinará conforme a las bases generales siguientes** […].") (emphasis added);

b. **CL-1-SPA** (Mexico's General Law of National Assets), Article 19(3) ("En la declaratoria de rescate se establecerán las bases generales que servirán para fijar el monto de la indemnización que haya de cubrirse al concesionario, tomando en cuenta la inversión efectuada y debidamente comprobada, así como la depreciación de los bienes, equipos e instalaciones destinados directamente a los fines de la concesión, pero en ningún caso podrá tomarse como base para fijarlo, el valor de los bienes concesionados").

258. As Mr. [redacted] testifies, "since 2016 and to date, the SCT has not paid ***any amount*** to CFCM as compensation for the *rescate*." Nor has Mr. Willars received any compensation for the indirect expropriation of his controlling interest in CFCM.

Proofs:

a. **CWS-2-SPA**, ¶89 (Witness Statement-[redacted] Claim Memorial) ("Desafortunadamente, desde 2016 y hasta la fecha, **la SCT no ha pagado cantidad alguna a CFCM como compensación por el rescate**…") (emphasis added);

b. **CWS-1-ENG**, ¶38 (Witness Statement-Mario Noriega Willars-Claim Memorial) ("Unfortunately, to date, and after several unsuccessful judicial and administrative proceedings, **I have received zero compensation for the expropriation, either directly or through CFCM**") (emphasis added).

259. The lack of ***any*** compensation for destroying a multi-million-dollar Concession is unjust, illegal under both Mexican and international law, and sufficient in and of itself to render Mexico's expropriation of the Concession illegal.

Proofs:

a. **CER-2-SPA**, ¶67 (Expert Report-Marco Antonio de la Peña-Claim Memorial) ("En consecuencia, al no haber emitido una resolución determinando el monto de la indemnización debida a CFCM, y al no haber pagado indemnización alguna a CFCM por el Rescate, la SCT incumplió su obligación legal de compensar bajo la declaratoria del Rescate y el artículo 19 de la LGBN");

b. **CL-1-SPA**, Article 19 (Mexico's General Law of National Assets);

c. **CL-34-ENG**, ¶274 (*Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46, Award dated 3 March 2023), ¶274 ("**To be lawful, the expropriation must satisfy**

> **all of the BIT criteria. The BIT calls for compensation at fair market value and the Respondent never agreed even to negotiate fair market value let alone make a settlement proposal on that basis**. […] The expropriation was a violation of the BIT and Westwater is entitled to compensation for breach of the BIT.") (emphasis added).

260. By failing to promptly compensate CFCM for the fair market value of its investment in the Concession and by denying CFCM's right to full compensation, Mexico has failed to satisfy one of the cumulative requirements for an expropriation to be lawful under NAFTA's Article 1110.[8] Mexico therefore illegally expropriated Claimant's investments in violation of NAFTA's Article 1110.

Proofs:

a. *See supra.*

B. MEXICO DENIED CLAIMANT FAIR AND EQUITABLE TREATMENT IN BREACH OF NAFTA ARTICLE 1105

261. Mexico's failure to compensate CFCM for the fair market value of its investment in the Concession also breaches its obligation to provide fair and equitable treatment to Mr. Willars and its investments under NAFTA's Article 1105.

Proofs:

a. *See infra* Sections V.B.1 – V.B.2.

1) NAFTA's fair and equitable treatment standard includes protection against a broad array of harmful State conduct

262. Article 1105(1) of NAFTA titled "Minimum Standard of Treatment" provides that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

Proofs:

a. **CL-5-ENG**, Chapter 11, Article 1105(1) (NAFTA).

263. It is well accepted that the "minimum standard of treatment" under international law is not a singular, defined requirement of baseline treatment, but instead should be understood as

[8] As stated above, Claimant limits its expropriation claim to Mexico's failure to comply with Article 1110(d) of NAFTA, but expressly reserves the right to assert claims based on Mexico's breaches of additional requirements for a lawful expropriation under Article 1110(a), (b), or (c) of NAFTA.

"an umbrella concept incorporating a set of rules that over the centuries have crystallized into customary international law in specific contexts."

Proofs:

a. **CL-35-ENG**, p. 2 (*ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and Pope & Talbot dated 27 June 2002).

264. NAFTA's minimum standard of treatment in Article 1105 directly incorporates "fair and equitable treatment," a "flexible standard" that "allows for independent and objective third-party determination" of infringements upon the investor's legal position.

Proofs:

a. **CL-36-ENG**, pp. 186-230 (R. Dolzer, U. Kriebaum and Ch. Schreuer, Principles of International Investment Law, Third Edition, (OUP), 2022);
b. *Id.*, p. 187 ("In actual practice it is impossible to anticipate in the abstract the range of possible types of infringements upon the investor's legal position. **The principle of FET allows for independent and objective third-party determination of this type of behaviour on the basis of a flexible standard**. Therefore, it is not devoid of independent legal content. Like other broad principles of law, it is susceptible of specification through judicial practice") (emphasis added).

265. On 31 July 2001, the NAFTA Free Trade Commission ("**Commission**") concluded that Article 1105 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 other NAFTA Parties.

Proofs:

a. **CL-37-ENG** (NAFTA Free Trade Commission, Note of Interpretation of Certain Chapter 11 Provisions (31 July 2001)).

266. Based on the Commission's interpretation, NAFTA tribunals have sought to enforce the NAFTA Parties' obligation to afford fair and equitable treatment to investors in a manner consistent with the minimum standard of treatment prescribed in international law. For example, in the often-cited *Waste Management II* decision the tribunal found:

> Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves

> a lack of due process leading to an outcome which offends judicial propriety […]. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

Proofs:

a. **CL-38-ENG**, ¶98 (*Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004).

267. The standard set out in *Waste Management II* has been applied by numerous tribunals since then, and has been explicitly accepted by Mexico in its submissions in *Odyssey Marine Exploration, Inc. v. Mexico*.

Proofs:

a. **CL-39-ENG**, ¶284 (*Vento Motorcycles, Inc. v. Mexico*, ICSID Case No. ARB/(AF)/17/3, Award, dated 6 July 2020) ("the Tribunal will analyze the claims that the Respondent's actions breached NAFTA Article 1105 against the minimum standard of treatment as formulated by the Waste Management II tribunal that both Parties agree is a correct expression of NAFTA Article 1105");
b. **CL-40-ENG**, ¶321 (*Joshua Dean Nelson v. Mexico*, ICSID Case No. UNCT/17/1, Award dated 5 June 2020) ("[T]he 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. The [t]ribunal agrees with [c]laimant in that the Waste Management standard has been widely accepted and followed by other NAFTA tribunals");
c. **CL-41-ENG**, ¶1019 (*Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Final Award dated 20 December 2023) ("*Both Parties have invoked the standard as described by the NAFTA arbitral tribunal in Waste Management II. The Tribunal finds this standard to be an accurate statement of the fair and equitable treatment standard under customary international law […]*");
d. **CL-42-SPA**, ¶¶449 and 551 (*Odyssey Marine Exploration, Inc. v. Mexico*, ICSID Case No. UNCT/20/1, Excerpt from Mexico's Counter Memorial, dated 23 February 2021) (accepting the fair and equitable treatment standard as expressed in Waste Management II).

268. Investment tribunals have applied the fair and equitable treatment standard in a broad range of circumstances and have found that it captures principles of: (i) stability and consistency;

(ii) the protection of the investor's legitimate expectations; (iii) transparency; (iv) compliance with contractual obligations; (v) procedural propriety and due process; (vi) freedom from coercion and harassment; and (vii) good faith.

Proofs:

a. **CL-36-ENG**, pp. 205-228 (R. Dolzer, U. Kriebaum and Ch. Schreuer, Principles of International Investment Law, Third Edition, (OUP), 2022).

269. For instance, in *Tecmed v. Mexico*, a case concerning the withdrawal of a license for a landfill for hazardous waste, the tribunal defined the fair and equitable treatment standard broadly in the following terms:

> The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires **the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment**. **The foreign investor expects the host State to act in a consistent manner**, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations [...]. **The foreign investor also expects the host State to act consistently**, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. **The investor also expects the *State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation*.**

Proofs:

a. **CL-43-ENG**, ¶154 (*Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, dated 29 May 2003).

270. Thus, NAFTA's fair and equitable treatment standard encompasses a broad array of protections for investors. NAFTA tribunals have repeatedly recognized that a Party breaches its

obligation to afford investors fair and equitable treatment under Article 1105(1) when it engages in conduct that: (i) contradicts the investor's basic expectations when making its investment; (ii) is unfair, unpredictable, arbitrary, inconsistent, non-transparent, or inequitable, including bad faith actions; or (iii) otherwise violates due process.

Proofs:

a. **CL-38-ENG**, ¶98 (*Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004) (quoted above);

b. **CL-44-ENG**, ¶296 (*Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, dated 18 September 2009) ("In summation, the Tribunal finds that the obligations in Article 1105(1) of the NAFTA are to be understood by reference to the customary international law minimum standard of treatment of aliens. The requirement of fair and equitable treatment is one aspect of this minimum standard. To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an un-expected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety").

271. Applying these principles, investment tribunals have held that government interference with a contract between an investor and a state entity, including termination of such a contract, could amount to a violation of the fair and equitable treatment standard. For instance, in *Rumeli v. Kazakhstan*, the tribunal found the host State's decision "to terminate the Contract without prior suspension" to be in breach of the applicable investment contract and "arbitrary, unfair, unjust, lacked in due process and did not respect the investor's reasonable and legitimate expectations."

Proofs:

a. **CL-45-ENG**, ¶615 (*Rumeli Telekom v. Kazakhstan*, ICSID Case. No. Arb/05/16, Award, dated 29 July 2008) ("The Arbitral Tribunal considers that in deciding to terminate the Contract without prior suspension, the Republic breached the Investment Contract. This was admitted by the Republic in two letters sent to the Ministry of Industry and Trade on May 14, 2003 by officials of the Ministry of Finance and the Ministry of Economy and Budget planning. Since the Investment Committee is an organ of the State, and in the particular circumstances of this case discussed above, this breach amounts to a breach of the BIT by the Republic. **The decision was arbitrary, unfair, unjust, lacked in due process and did not**

respect the investor's reasonable and legitimate expectations") (emphasis added).

272. This will typically be the case where the state (or its instrumentalities) misuses its public power or sovereign prerogatives (*prérogatives de puissance publique*) to repudiate a contract or fail to comply with their contractual or regulatory obligations towards the investor. For instance, in *Eureko v. Poland*, the tribunal considered that Poland's refusal to honor its contractual commitment "for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character" was in breach of its fair and equitable treatment obligation. Similarly, in *Crystallex v. Venezuela*, the tribunal found that a state's non-compliance with its regulatory framework amounts to a breach of the fair and equitable treatment standard where "there is proof of arbitrary, or nontransparent conduct in the application of the laws in question or some form of abuse of power."

Proofs:

a. **CL-25-ENG**, ¶¶233-234 (*Eureko B.V. v. Republic of Poland*, Partial Award dated 19 August 2005) ("The Tribunal has found that the RoP, by the conduct of organs of the State, **acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character**. The Tribunal has no hesitation in concluding that the "fair and equitable" provisions of the Treaty have clearly been violated by the Respondent. In the opinion of the Tribunal, in the present case, the conduct of the RoP could even be characterized as "outrageous" and "shocking", even though, to constitute breach of treaty, actions and inactions need not be of that degree of extremity") (emphasis added);

b. **CL-26-ENG**, ¶552 (*Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated 4 April 2016);

c. **CL-46-ENG**, ¶¶260, 266-270 (*Impregilo v. Pakistan,* ICSID Case No. ARB/03/3, Decision on Jurisdiction dated 22 April 2005) (where the tribunal found that a misuse of public power in the breach of a contract would amount to a violation of the FET standard);

d. **CL-47-ENG**, ¶467 (*Muszynianka Spólka z Ograniczona Odpowiedzialnoscia v. Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020) (where the tribunal confirmed that "non-compliance with domestic laws by State authorities may form the basis of a successful FET claim, if (i) there is proof of arbitrary conduct in the application of the laws in question; or (ii) there is some form of abuse of power").

273. Tribunals have also found that a state's "blatant disregard of the applicable law, a clear and malicious misapplication of the law, or a complete lack of candor or good faith in the application of the law" will characterize a breach of the fair and equitable treatment obligation. Applying this principle, the tribunal in *Quiborax v. Bolivia* found that the cancellation of a concession in a manner that was discriminatory and inconsistent with Bolivian law violated the fair and equitable treatment standard.

Proofs:

a. **CL-48-ENG**, ¶878 (*Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award dated 26 July 2018) ("An erroneous application of the law by a State may be sufficient to implicate treaty standards where it is established that there was a blatant disregard of the applicable law, a clear and malicious misapplication of the law, or a complete lack of candor or good faith in the application of the law");

b. **CL-49-ENG**, ¶292, 304 (*Quiborax v. Bolivia*, ICSID Case. No. ARB/06/2, Award, dated 16 September 2016) ("In the context of its analysis of the Claimants' expropriation claim, the Tribunal has already held that the revocation of the concessions was discriminatory and unjustified under Bolivian law. By the same token, it also violates the fair and equitable treatment standard, even if it were to be equated with the customary international law minimum standard of treatment");

c. **CL-50-ENG**, ¶239 (*Zelena N.V. and Energo-Zelena d.o.o Indija v. Republic of Serbia*, ICSID Case No. ARB/14/27, Award, 9 November 2018) (where the tribunal observed that the investor "did have a right to expect […] serious and visible efforts at the implementation and enforcement of the relevant law" and concluded that a State's failure to enforce its own legislation amounts to a violation of the fair and equitable treatment standard).

274. This is because investors are entitled to expect that the host State will "comply with its laws and regulations and act transparently, grant due process and refrain from taking arbitrary or discriminatory measures or exercising coercion."

Proofs:

a. **CL-51-ENG**, ¶679 (*Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award dated 21 July 2017);

b. **CL-36-ENG**, p. 222 (R. Dolzer, U. Kriebaum and Ch. Schreuer, Principles of International Investment Law, Third Edition, (OUP), 2022) (explaining that "[i]nvestors are entitled to expect that the host State will comply with its laws and regulations." and citing to the following awards: **CL-52-ENG**, ¶¶490-496 (*Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (I)*, ICSID Case No. ARB/11/26, Award dated 29 January 2016); **CL-51-ENG**, ¶679 (*Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award dated 21 July 2017); **CL-53-ENG**, ¶287 (*RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain,* ICSID Case No. ARB/13/30, Decision on Responsibility and Principles of Quantum, 30 November 2018)).

275. As demonstrated below, Mexico's *rescate* of the Concession was carried out in breach of the fair and equitable treatment standard of NAFTA's Article 1105.

Proofs:

a. *See infra*, Section V.B.2.

2) Mexico's *rescate* of the Concession breached NAFTA's fair and equitable treatment protection

276. By carrying out the *rescate* of the Concession without providing ***any compensation*** to CFCM, Mexico frustrated Mr. Willars' and CFCM's basic expectations that Mexico would comply with its laws and regulations and refrain from expropriating their investment without compensation. Likewise, Mexico's failure to provide full compensation to CFCM breached its fundamental obligations not to engage in unfair, unpredictable, arbitrary, inconsistent, non-transparent, discriminatory and inequitable conduct.

Proofs:

a. *See infra*.

277. ***First***, Mexico's conduct frustrated CFCM's and Mr. Willars' basic expectations that Mexico would refrain from expropriating their investments without compensation. These expectations were based, *inter alia*, on Mexico's commitment, both in its laws and regulations and in the Concession, to comply with its domestic and international obligations. Mexico's commitment is expressly stated in Article 14, second paragraph of the Mexican Constitution, which provides that no individual can be deprived of his property of rights without complying with existing laws and regulations. As discussed above, Article 19 of the GLNA also provides that a *rescate* is subject to the payment of compensation.

Proofs:

a. **CER-2-SPA**, ¶62 (Expert Report-Marco Antonio de la Peña-Claim Memorial) ("En segundo lugar, el rescate debe realizarse en todos los casos mediando el pago de una indemnización al concesionario. Como nota la frase final del artículo 19 de la LGBN, la autoridad concesionante debe emitir una resolución determinando el monto de la indemnización");

b. **CL-2-SPA**, Article 14, paragraph 2 (Political Constitution of the United Mexican States) ("**Nadie podrá ser privado de la libertad o de sus propiedades, posesiones o derechos, sino mediante juicio** seguido ante los tribunales previamente establecidos, en el que se cumplan las **formalidades esenciales del procedimiento y conforme a las Leyes** expedidas con anterioridad al hecho.") (emphasis added).

278. Further, Mexico's commitment was expressly reiterated in the Concession Agreement. Indeed, in Clause 1.5 of the Concession Agreement, the SCT agreed that the operation

and exploitation of the Concession, including the use, enjoyment and exploitation of the assets of the Concession and the services provided under the Concession would be subject to Mexican laws and regulations, including, in particular, the GLNA and international treaties such as NAFTA (which expressly provides that expropriation should be carried out against payment of compensation equal to the fair market value of the expropriated investment and without delay):

1.5. Legislación aplicable. La operación y explotación de las Vías Cortas; el uso, aprovechamiento y explotación de los Bienes, así como la prestación del servicio público de transporte ferroviario de carga y de los servicios auxiliares, se sujetarán a la Ley y su Reglamento, la Ley de Vías Generales de Comunicación, la Ley General de Bienes Nacionales, la Ley General del Equilibrio Ecológico y la Protección al Ambiente, la Ley Federal de Competencia Económica y los tratados internacionales, leyes, reglamentos, decretos y normas oficiales mexicanas.

Image 39: Mexico subjected the Concession Agreement to the GLNA (C-10-SPA)

Proofs:

a. **C-10-SPA**, Section 1.5 (Concession Agreement, without exhibits) (showing that the Concession is subject to the GLNA);

b. **C-11-SPA** (Amended Concession, dated 22 October 2012) (the Amended Concession did not make any change to that provision).

279. As Mr. Willars explains in his witness statement, he could have had no reason to expect or foresee that the SCT would end up carrying out a *rescate* of the Concession. Indeed, at the time Mr. Willars acquired his investment in CFCM, the efforts of the SCT and CFCM were focused on finding a solution so that CFCM could immediately operate and manage the Chiapas-Mayab Railway. In addition, Mexico—through the SCT—had committed to restoring the Chiapas-Mayab Railway to good working order and to return it to the management and operation of CFCM without delay.

Proofs:

a. **CWS-1-ENG**, ¶35 (Witness Statement-Mario Noriega Willars-Claim Memorial) ("**When I invested in 2015, I had no indication or warning that Mexico would expropriate the Concession.** To the contrary, the documents I reviewed, and the publicly available information reflected that the SCT and the Mexican government were committed to repairing the railroad tracks and intended to comply with their obligation to return the tracks to CFCM in good operating condition. **Thus, the "rescate" declaration came as a complete shock**") (emphases added);

b. **CWS-2-SPA**, ¶80 (Witness Statement-[redacted] Claim Memorial) ("Para nuestra sorpresa, después de todos los esfuerzos conjuntos de la SCT y CFCM de devolver la operación a CFCM, y a pesar de que CFCM había hecho un esfuerzo financiero por mantener el personal necesario para retomar la operación, **la SCT repentinamente y sin previo**

aviso, determinó el rescate de la Concesión. No existió indicio previo de que la SCT pretendiera rescatar la Concesión. Todas las comunicaciones con la SCT reflejaban una intención de devolver la operación a CFCM, quien se encontraba completamente lista para operar") (emphasis added);

c. *Id.*, ¶80 ("**Previo a la declaración de rescate, no existió advertencia de que el Gobierno Federal de México pretendiera expropiar la Concesión.** Todo lo contrario. El rescate se dio después de muchas negociaciones y acuerdos entre CFCM, el FIT y la SCT, con el propósito de reparar las Vías, que CFCM retomara el control de la Concesión, y realizara inversiones adicionales para mejorar el servicio de transporte ferroviario") (emphasis added);

d. **C-12-SPA** (Official Letter 4.3.811/2012 from the SCT dated 22 November 2012) (assuring CFCM that the SCT "**will deliver to CFCM the sequestered assets and the concessioned tracks in good physical, maintenance and operating conditions**") (emphasis added);

e. **C-13-SPA**, p. 1 (Official Letter 4.3.286/2014 dated 14 March 2014) ("Sobre el particular, como es de su conocimiento, se han llevado a cabo diversas reuniones entre su representada y esta Dirección General a efecto de precisar los alcances del Convenio de mérito, asimismo, siendo en la última reunión del día 12 de febrero del año en curso, donde **su representada emitió visto bueno a la última versión del Convenio, la cual se adjunta para pronta referencia**…") (emphasis added);

f. **C-14-SPA**, p. 1 (Draft agreement between CFCM and the SCT dated 14 March 2014) ("Que el presente instrumento se ubica dentro del eje fundamental de lograr un México Prospero previsto en el Plan Nacional de Desarrollo 2013-2018. Conforme a la estrategia 4.9.1 del referido Plan Nacional de Desarrollo, es necesario modernizar, ampliar y conservar la infraestructura de los diferentes modos de transporte, así como mejorar su conectividad bajo criterios de estrategias y de eficiencia");

g. *See also supra*, Section III.L.

280. Even less could CFCM or Mr. Willars anticipate or foresee that Mexico would carry out the *rescate* of the Concession without paying ***any compensation*** to CFCM. This would have defied the most elementary logic, especially in a state, such as Mexico, that claims to respect the rule of law.

Proofs:

a. **CWS-1-ENG**, ¶36 (Witness Statement-Mario Noriega Willars-Claim Memorial) ("While I was disheartened to learn about the expropriation of my latest business venture, **I understood that, as with any taking, the Mexican government would compensate me for my losses.** In fact, the "*rescate*" declaration made an express reference that compensation would be paid to CFCM in accordance with Mexican law") (emphasis added);

b. **CL-2-SPA**, Article 14, paragraph 2 (Political Constitution of the United Mexican States) ("**Nadie podrá ser privado de la**

> **libertad o de sus propiedades, posesiones o derechos, sino mediante juicio** seguido ante los tribunales previamente establecidos, en el que se cumplan las **formalidades esenciales del procedimiento y conforme a las Leyes** expedidas con anterioridad al hecho.") (emphasis added)

281. ***Second***, Mexico's failure to compensate CFCM following its *rescate* was unfair, unpredictable, arbitrary, inconsistent, non-transparent, discriminatory and inequitable. Indeed, as explained above, a fundamental requirement for the validity of a *rescate* is that it be carried out against the payment of prompt compensation to the concessionaire. More than eight years have passed since the SCT initiated the *rescate* of the Concession, and Mexico has not paid ***any compensation*** to CFCM or Mr. Willars. This is a blatant disregard of the applicable law, including Article 19, paragraph 3 of the GLNA.

Proofs:

a. **CL-1-SPA**, Article 19, paragraph 3 (Mexico's General Law of National Assets) ("En la declaratoria de rescate se establecerán las bases generales que servirán para fijar el monto de la indemnización que haya de cubrirse al concesionario, tomando en cuenta la inversión efectuada y debidamente comprobada, así como la depreciación de los bienes, equipos e instalaciones destinados directamente a los fines de la concesión, pero en ningún caso podrá tomarse como base para fijarlo, el valor de los bienes concesionados");

b. **CWS-3-SPA**, ¶66 (Witness Statement-[redacted] [redacted]Claim Memorial) ("[E]l rescate de una concesión **requiere una indemnización** en favor del concesionario") (emphasis added);

c. **CER-2-SPA**, ¶67 (Expert Report-Marco Antonio de la Peña-Claim Memorial) ("En consecuencia, al no haber emitido una resolución determinando el monto de la indemnización debida a CFCM, y al no haber pagado indemnización alguna a CFCM por el Rescate, la SCT incumplió su obligación legal de compensar bajo la declaratoria del Rescate y el artículo 19 de la LGBN");

d. **CWS-2-SPA**, ¶89 (Witness Statement-[redacted] [redacted]Claim Memorial) ("Desafortunadamente, desde 2016 y hasta la fecha, **la SCT no ha pagado cantidad alguna a CFCM como compensación por el rescate**") (emphasis added);

e. **CWS-1-ENG**, ¶38 (Witness Statement-Mario Noriega Willars-Claim Memorial) ("Unfortunately, to date, and after several unsuccessful judicial and administrative proceedings, **I have received zero compensation for the expropriation, either directly or through CFCM**") (emphasis added).

282. Moreover, as Mr. [redacted] former [redacted] at the SCT, observes, the SCT's conduct was inconsistent because it "was contrary to the common practice of the SCT." In every *rescate* proceeding in which Mr. [redacted] had been involved, the SCT had ensured the concessionaire received compensation.

Proofs:

a. **CWS-3-SPA**, ¶63 (Witness Statement-[redacted] [redacted]Claim Memorial) (where, Mr. [redacted] observes, referring to the statement by Mr. Ruiz Esparza's (then Minister of Communications and Transport) that there would be no compensation for CFCM for the rescate, that "dicha postura es contraria a la ley mexicana, ya que la propia Ley General de Bienes Nacionales establece que debe existir una indemnización al concesionario");

b. **C-223-SPA** (News article published by Jenaro Villamil titled "Anunció SCT el "rescate" de la banda 2.5 Ghz; rupture con MVS" dated 8 August 2012) (evidencing that in other *rescate* proceedings, the SCT provided compensation);

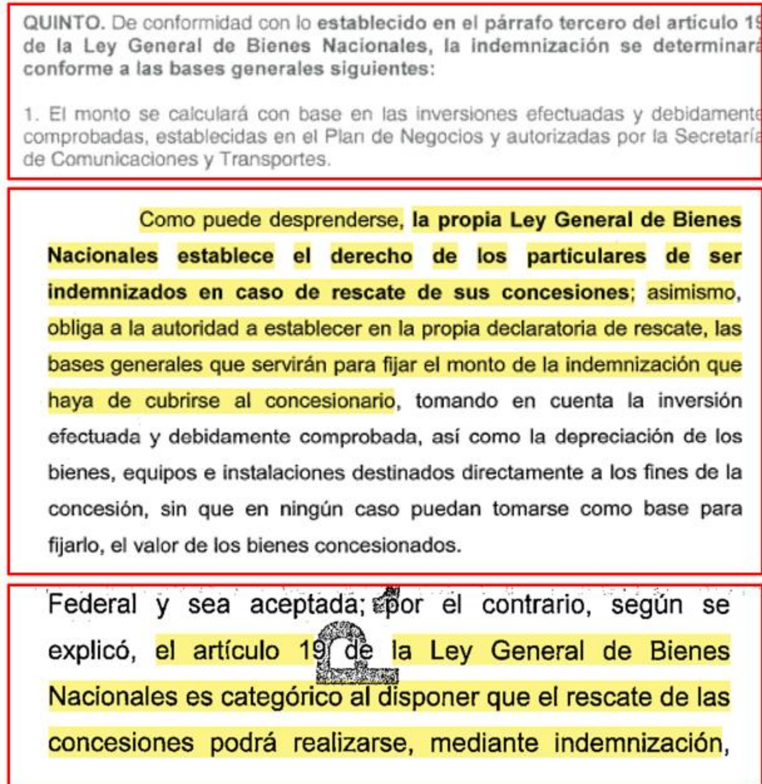
c. **C-80-SPA** (News article published by La Jornada titled "Rechaza tribunal suspender el rescate de la banda de 2.5 Ghz" dated 28 December 2012) (evidencing that in other *rescate* proceedings, the SCT provided compensation);

d. **C-195-SPA** (Press release by the Mexican government titled "Dionisio Pérez-Jácome Friscione, sobre "Reordenamiento de la Banda de 2.5 GHz" dated 8 August 2012) (evidencing that in other *rescate* proceedings, the SCT provided compensation);

e. **C-201-SPA** (News article published by Expansion titled "TDS Comunicaciones y Megacable recibirán 84 mdp por devolver la banda 2.5 GHz" dated 28 August 2017) (evidencing that in other *rescate* proceedings, the SCT provided compensation);

f. **C-202-SPA** (News article published by Expansión titled "Indemnización a MVS, solo por inversion" dated 15 August 2012) (evidencing that in other *rescate* proceedings, the SCT provided compensation).

283. The inconsistency in Mexico's conduct is even more striking given its clear and repeated commitments, through both the SCT and its judiciary, to uphold Mexican law in the implementation of the *rescate*. This included the obligation to compensate CFCM in accordance with Article 19, paragraph 3 of the GLNA. Mexico reiterated this commitment to CFCM on multiple occasions, including in: (i) the Rescate Declaration; (ii) the 2020 Decision; and (iii) the 2021 Decision, as follows:



QUINTO. De conformidad con lo establecido en el párrafo tercero del artículo 19 de la Ley General de Bienes Nacionales, la indemnización se determinará conforme a las bases generales siguientes:

1. El monto se calculará con base en las inversiones efectuadas y debidamente comprobadas, establecidas en el Plan de Negocios y autorizadas por la Secretaría de Comunicaciones y Transportes.

Como puede desprenderse, **la propia Ley General de Bienes Nacionales establece el derecho de los particulares de ser indemnizados en caso de rescate de sus concesiones**; asimismo, obliga a la autoridad a establecer en la propia declaratoria de rescate, las bases generales que servirán para fijar el monto de la indemnización que haya de cubrirse al concesionario, tomando en cuenta la inversión efectuada y debidamente comprobada, así como la depreciación de los bienes, equipos e instalaciones destinados directamente a los fines de la concesión, sin que en ningún caso puedan tomarse como base para fijarlo, el valor de los bienes concesionados.

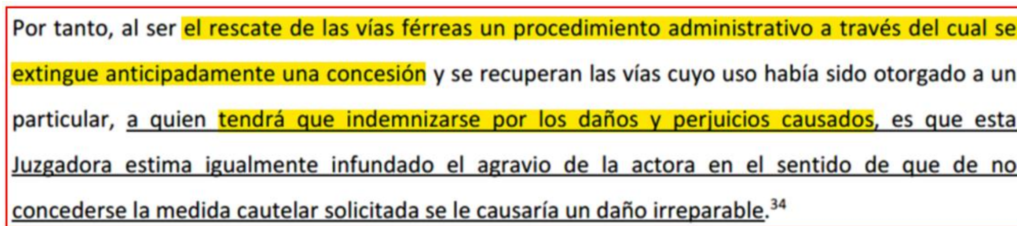
Federal y sea aceptada; por el contrario, según se explicó, el artículo 19 de la Ley General de Bienes Nacionales es categórico al disponer que el rescate de las concesiones podrá realizarse, mediante indemnización,

Image 40: the Rescate Declaration, the 2020 Decision, and the 2021 Decision ratified CFCM's right to compensation (C-16-SPA, C-184-SPA, C-18-SPA)

Proofs:

a. **C-16-SPA**, p. 67 (Rescate Declaration dated 13 July 2016, served on CFCM on 26 July 2016) (evidencing that the SCT expropriated CFCM's Concession);
b. **C-184-SPA**, p. 344 (Decision rendered by the Federal Administrative Tribunal dated 29 January 2020);
c. **C-18-SPA**, p. 24 (Decision of the Sixth Circuit Court in the direct amparo 175/2020).

284. Mexico's failure to compensate CFCM for the *rescate* further contradicted the terms of the Federal Administrative Tribunal's 23 January 2017 decision. In that decision, the Federal Administrative Court had refused to stay the effects of the Rescate Declaration due to a lack of irreparable harm stating that CFCM was entitled to compensation for the "***daños y perjuicios causados***" (damages and lost profits):



Por tanto, al ser el rescate de las vías férreas un procedimiento administrativo a través del cual se extingue anticipadamente una concesión y se recuperan las vías cuyo uso había sido otorgado a un particular, a quien tendrá que indemnizarse por los daños y perjuicios causados, es que esta Juzgadora estima igualmente infundado el agravio de la actora en el sentido de que de no concederse la medida cautelar solicitada se le causaría un daño irreparable.[34]

Image 41: the Federal Administrative Tribunal confirmed that SCT must compensate CFCM for the damages caused by the Rescate Declaration (C-183-SPA)

Proofs:

a. **C-183-SPA**, p. 8 (Interlocutory decision rendered by the Federal Administrative Tribunal dated 23 January 2017) (confirming that CFCM is entitled to receive compensation for the damages, that is the "daños y perjuicios causados" by the Rescate Declaration).

285. Further, as demonstrated below, Mexico's failure to compensate CFCM after the *rescate* was also discriminatory. In similar circumstances, Ferrosur, a Mexican company that operates other parts of Mexico's railways, was compensated within two weeks of the SCT's declaration of a *rescate* of its concession. The speed with which Mexico compensated Ferrosur stands in stark contrast to its treatment of Mr. Willars' and CFCM's investments in this case.

Proofs:

a. *See infra*, Section V.D.2.

286. In short, Mexico's failure to comply with its obligation to compensate CFCM under Mexican law, together with its obligation to pay "without delay" compensation "equivalent to the fair market value of the expropriated investment" under Article 1110 of NAFTA, frustrated Claimant's legitimate expectations, was arbitrary, grossly unfair, contradictory, and discrimnatory and therefore violated Mexico's fair and equitable treatment obligation under Article 1105 of NAFTA.

Proofs:

a. *See supra.*

C. MEXICO FAILED TO PROVIDE CLAIMANT'S INVESTMENTS FULL PROTECTION AND SECURITY IN BREACH OF NAFTA ARTICLE 1105

287. The standard of full protection and security is expressly included in Article 1105(1) of NAFTA, which requires that "[e]ach Party ***shall accord to investments of investors*** of another Party treatment in accordance with international law, including fair and equitable treatment and ***full protection and security***."

Proofs:

a. **CL-5-ENG**, Chapter 11, Article 1105(1) (NAFTA).

288. While this standard has historically been developed in the context of the physical protection and security of a company's officials, employees or facilities, tribunals have gradually extended the scope of this standard beyond the context of mere physical protection where the applicable treaty does not expressly limit its scope. This is particularly true where the applicable standard, as in Article 1105(1) of NAFTA, is one of "***full***" protection and security. Indeed, as the tribunal explained in *Biwater Gauff v. Tanzania*:

> ***[W]hen the terms "protection" and "security" are qualified by "full", the content of the standard may extend to matters other than physical security. It implies a State's guarantee of stability in a secure environment, both physical, commercial and legal***. It would in the Arbitral Tribunal's view be unduly artificial to confine the notion of "full security" only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments.

Proofs:

a. **CL-54-ENG**, ¶729 (*Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008);

b. *See also* **CL-55-ENG**, ¶187 (*National Grid PLC v. The Argentine Republic*, Award, 3 November 2008) ("In Article 2(2), the obligation to protect and provide constant security of the Contracting Parties is linked to the fair and equitable treatment standard. As noted in the UNCTAD study referred to by the Claimant, this obligation has typically been applied in situations involving physical threats or destruction. However, Article 2(2) does not provide for such limitation nor limits the protection to physical assets. Given that these terms are closely associated with fair and equitable treatment, which is not limited to such physical situations, and in the context of the protection of investments broadly defined to include intangible assets, the Tribunal finds no rationale for limiting the application of a substantive protection of the Treaty to a category of assets -physical assets- when it was not restricted in that fashion by the Contracting Parties").

289. Thus, tribunals have held that the obligation to afford full protection and security extends to the provision of a legal framework that affords investors legal protection, including both substantive provisions to protect investments and adequate procedures to enable investors to vindicate their rights.

Proofs:

a. **CL-56-ENG**, ¶263 (*Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award dated 12 November 2010) ("Contrary to Respondent's assertions, it is apparent that the duty of protection and security extends to providing a legal framework that offers legal protection to investors – including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights");

b. *Id.*, ¶273 ("In this Tribunal's view, where the acts of the host state's judiciary are at stake, "full protection and security" means that the state is under an obligation to make a functioning system of courts and legal remedies available to the investor,"

noting however that "the fact that protection could have been more effective, procedurally or substantively, does not automatically mean that the full protection and security standard has been violated").

290. In *Scholtz v. Morocco*, the tribunal held that while the standard of full protection and security does not entail an obligation to ensure the stability of the legal and regulatory framework applicable to an investment, it does require that the State provide the investor with the means and remedies necessary to ensure the protection and security of the investors and their investments.

Proofs:

a. **CL-57-FR**, ¶383 (*Scholz Holding GmbH v. Kingdom of Morocco*, ICSID Case No. ARB/19/2, Award dated 1 August 2022) ("Sur le premier point, le Tribunal arbitral estime que le standard de protection et de sécurité de l'article 4 vise, selon ses termes clairs, la protection et la sécurité des investissements. […] La protection et la sécurité des biens et des personnes exigent certes que l'État mette à la disposition de l'investisseur les moyens et les recours juridiques nécessaires à cette fin, mais elles n'impliquent nullement qu'on lui garantisse que le cadre législatif et réglementaire dans lequel s'inscrit son investissement ne soit pas altéré dans un sens qui puisse lui être préjudiciable").

291. Similarly, in *A.M.F. Aircraftleasing v. Czech Republic*, the tribunal considered that the full protection and security standard "extends beyond physical protection to include the provision of legal security, in the sense of ***a duty of due diligence in maintaining a functional judicial system that is available to foreign investors seeking redress***."

Proofs:

a. **CL-58-ENG**, ¶661(i) (*A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, Final Award, dated 11 May 2020).

292. Mexico failed to comply with this standard of due diligence in this case. As evidenced by the unsuccessful outcome of CFCM's years of litigation to challenge the *rescate* in Mexico, Mexico failed to provide any legal protection for Mr. Willars' investment. This is particularly evident when considering the findings of the Federal Administrative Court and the Sixth Circuit Court declaring that CFCM is not entitled to obtain full compensation following Mexico's expropriation of its investments.

Proofs:

a. *See supra*, Section III.N.

293. This is also particularly evident when considering the fact that, to date, neither CFCM, nor Mr. Willars have received any compensation for their multi-million-dollar investments in the Concession and that the SCT has not even issued a final decision determining the amount of

compensation owed to CFCM under that declaration, thereby depriving CFCM of any legal remedy in Mexico to challenge the SCT's failure to compensate CFCM.

Proofs:

a. *See supra*, Section III.N

294. Mexico has failed to provide a legal and judicial framework that would have allowed CFCM and Mr. Willars to protect their investments. Mexico's failure to observe its due diligence requirement has resulted in the complete deprivation of the use, value and enjoyment of CFCM's and Mr. Willars' investments, in breach of Mexico's full protection and security obligation under Article 1105 of NAFTA.

Proofs:

a. *See supra*.

D. MEXICO DISCRIMINATED AGAINST CLAIMANT AND ITS INVESTMENT, BY TREATING MEXICAN ENTITIES MORE FAVORABLY THAN IT TREATED CLAIMANT, IN BREACH OF NAFTA ARTICLE 1102

1) Mexico was required under Article 1102 of NAFTA to provide Claimant and its investments treatment no less favorable than that accorded to Mexican investors and investments

295. Article 1102 of NAFTA provides national treatment protection as follows:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

Proofs:

a. **CL-5-ENG**, Chapter 11, Article 1102 (NAFTA).

296. The NAFTA tribunal in *Corn Products Inc. v. Mexico* observed that the national treatment standard "embodies a principle of fundamental importance, both in international trade law and the international law of investment, that of non-discrimination."

Proofs:

a. **CL-59-ENG**, ¶109 (*Corn Products International Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, dated 15 January 2008);
b. *See also* **CL-42-SPA**, ¶574 (*Odyssey Marine Exploration, Inc. v. Mexico*, ICSID Case No. UNCT/20/1, Excerpt from Mexico's Counter Memorial, dated 23 February 2021) (citing the national treatment standard outlined in Corn Products with approval).

297. Article 102(1) of NAFTA also specifically mentions "national treatment" as an example of the "principles and rules" that "elaborate" the objectives of NAFTA. As discussed below, Mexico breached this fundamental principle by granting more favorable treatment to the Mexican company Ferrosur than to CFCM.

Proofs:

a. **CL-5-ENG**, Chapter 1, Article 102(1) (NAFTA);
b. **CL-59-ENG**, ¶109 (*Corn Products International Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, dated 15 January 2008);
c. *See infra*, Section V.D.2.

298. NAFTA tribunals examining alleged violations of Article 1102 have often applied a three-step analysis. As the tribunal in *Archer Daniels Midland v. Mexico* explained, "[p]ursuant to the ordinary meaning of Article 1102, the Arbitral Tribunal shall: (i) identify the relevant subjects for comparison; (ii) consider the treatment each comparator receives; and (iii) consider any factors that may justify any differential treatment."

Proofs:

a. **CL-29-ENG**, ¶196 (*Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award dated 21 November 2007);
b. **CL-60-ENG**, ¶83 (*United Parcel Service of America, Inc. (UPS) v. Government of Canada*, Award dated 24 May 2007).

299. ***First***, the "relevant subjects for comparison" must, according to the terms of Article 1102, be in "like circumstances" to the investment or investor to which those subjects are being compared. As the *S.D. Meyers* tribunal found, "the interpretation of 'like' must depend on all circumstances of each case," and:

> [t]he concept of 'like circumstances' invites an examination of whether a non-national investor complaining of less favourable treatment is in the same 'sector' as the national investor. The [t]ribunal takes the view that the word 'sector' has a wide connotation that includes the concepts of 'economic sector' and 'business sector.'

Proofs:

a. **CL-5-ENG**, Chapter 11, Article 1102 (NAFTA);
b. **CL-61-ENG**, ¶250 (*S.D. Myers, Inc. v. Government of Canada*, Partial Award on the Merits dated 13 November 2000).

300. The *Bilcon* tribunal further emphasized that "the operative word in Article 1102 is **'similar', not 'identical**'," and so tribunals should "giv[e] the reasonably broad language of Article 1102 its due, [and] take into account the objects of NAFTA, which include according to Article 102(1)(c) 'to increase substantially investment opportunities in the territories of the Parties." In short, an investor or investment in a similar situation and line of business to the investment or investor at issue is in "like circumstances" and therefore is comparable for purposes of Article 1102.

Proofs:

a. **CL-62-ENG**, ¶692 (*William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Award on Jurisdiction and Liability, dated, 17 March 2015).

301. ***Second***, Article 1102 requires a determination of whether the investor or investment in like circumstances has suffered treatment "less favorable" than treatment of a local investor or investment. The tribunal in *Archer Daniels Midland v. Mexico* explained:

> Article 1102 prohibits treatment which discriminates on the basis of the foreign investor's nationality. Nationality discrimination is established by showing that a foreign investor has unreasonably been treated less favorably than domestic investors in like circumstances. Accordingly, Claimants and their investment are entitled to the best level of treatment available to any other domestic investor or investment operating in like circumstances.

Proofs:

a. **CL-29-ENG**, ¶205 (*Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, dated 21 November 2007).

302. The *Merrill & Ring* tribunal clarified that the scope of "treatment" "is very broad, as it "includes almost any conceivable measure that can be with respect to the beginning, development, management and end of an investor's business activity." In *S.D. Meyers*, the tribunal determined that "treatment" violative of Article 1102's standard must have a practical impact on the investment; merely demonstrating motive or intent behind a measure is insufficient. But discriminatory intent is not required to find a violation of the national treatment standard, which merely requires demonstrating that discrimination occurred.

Proofs:

a. **CL-63-ENG**, ¶79 (*Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/1, Award dated 31 March 2010) (finding that the scope of national treatment "includes almost any conceivable measure that can be with respect to the beginning, development, management and end of an investor's business activity");
b. **CL-61-ENG**, ¶254 (*S.D. Myers, Inc. v. Government of Canada*, Partial Award on the Merits dated 13 November 2000);
c. **CL-64-ENG**, ¶183 (*Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award dated 16 December 2002) ("Article 1102 by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances").
d. **CL-59-ENG**, ¶115 (*Corn Products International Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, dated 15 January 2008) ("*[t]he parties in the present case agreed that Article 1102 embraces de facto as well as de jure discrimination. The Tribunal agrees*").

303. ***Third and finally***, a tribunal must consider whether there are any factors justifying different treatment between the investor or investment and domestic investors or investments. As the tribunal in *Feldman* found, once "the [c]laimant has made a *prima facie* case for differential and less favorable treatment," the host state can attempt to address how, objectively, the conduct was not a denial of equal competitive opportunities in light of the strictures of Article 1102. Once a claimant proves its prima facie case of discrimination, the burden shifts to the respondent to "introduce credible evidence into the record to rebut that presumption."

Proofs:

a. **CL-64-ENG**, ¶183 (*Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, dated 16 December 2002).

304. In *S.D. Meyers*, for example, claimant had established an investment in Canada to collect and send a particular type of waste ("**PCBs**") to its treatment facility in the United States

of America. Canada then issued an order prohibiting export of that type of waste at least partially because Canada was "concerned to ensure the economic strength of the Canadian industry [and] wanted to maintain the ability to process PCBs within Canada in the future." The tribunal determined that Canada's goal in imposing this measure was legitimate, but that the way in which the measure was imposed—an outright effective cancellation of the investor's investment—was illegitimate and discriminatory in violation of NAFTA Article 1102. Thus, even where the State's goals were legitimate, a State's differential treatment violates Article 1102 of NAFTA when the treatment was illegitimate.

Proofs:

a. **CL-61-ENG**, ¶255-256 (*S.D. Myers, Inc. v. Government of Canada*, Partial Award on the Merits dated 13 November 2000).

305. Mexico's preferential treatment of Ferrosur, a Mexican entity owned by Grupo México, another Mexican entity, is in breach of the national treatment standard enshrined in Article 1102 of NAFTA.

Proofs:

a. *See infra*, Section V.D.2.

2) Mexico's discriminatory treatment of CFCM violates NAFTA's national treatment standard

306. Within two weeks of Mexico's *rescate* declaration against Ferrosur on 19 May 2023, the Mexican federal government and Ferrosur reached an agreement by virtue of which Ferrosur agreed to return to Mexico 127 kilometers of rail racks in exchange for an eight-year extension of the term of the Ferrosur Concession and Ferrosur's exclusive right to manage it. In their agreement, Mexico's federal government and Ferrosur expressly referred to this eight-year extension of the Ferrosur Concession as "compensation in kind" for the *rescate:*

VII.- Con base en los objetivos del Gobierno Federal y para el cumplimiento del objeto del CIIT, el Gobierno Federal y "EL CONCESIONARIO" convinieron: (i) excluir de la Concesión la operación, explotación y prestación del servicio público de transporte ferroviario de carga de los tramos de las líneas "Z", "ZA" y "FA", que corren de Coatzacoalcos a Medias Aguas, de Hibueras a Minatitlán y de Coatzacoalcos a El Chapo, respectivamente, y establecer derechos de paso a "EL CONCESIONARIO" respecto de esos mismos tramos. Como indemnización en especie por el rescate de dichas vías el Gobierno Federal otorgará la primera prórroga de "EL TÍTULO DE CONCESIÓN" y la ampliación de la exclusividad, con base en la opinión de valor del Instituto de Administración y Avalúos de Bienes Nacionales.

CUARTA. - Toda vez que "EL CONCESIONARIO" cumple con los requisitos previstos en el Artículo 11 de la Ley Reglamentaria del Servicio Ferroviario, se otorga la primera prórroga de "EL TÍTULO DE CONCESIÓN" por un plazo de ocho (8) años, adicional al originalmente previsto en el mismo.

Image 42: Mexico gave preferential treatment to Ferrosur (C-23-SPA)

Proofs:

a. **C-23-SPA**, Whereas VII and Article 4 (Amendment to the Ferrosur Concession published in the Federal Official Gazette

on 23 June 2023, dated 7 June 2023).

307. On 4 October 2014, INDAABIN assessed the value of this compensation in-kind at MXN $836.9 million.

Proofs:

a. **C-192-SPA** (INDAABIN's response to CFCM's request for information dated 4 October 2024).

308. This conduct constitutes discriminatory treatment. Indeed, Ferrosur and CFCM (i) were involved in the ***same line of business***, the management and operation of Mexico's concessioned railroads; (ii) were subject to the ***same type of expropriation***, Mexico's rescate of their concessions and termination of their exclusive rights thereunder under Article 19 of the GLNA; but (iii) were ***treated diametrically differently***.

Proofs:

a. *See infra*.

309. Indeed, while Ferrosur was able to reduce the scope of the *rescate* to 127km of rail racks in exchange for an eight-year extension of the Ferrosur Concession within two weeks of Mexico's *rescate* declaration, CFCM, after almost eight years of costly litigation, has been deprived of the full scope of its Concession over the Chiapas-Mayab Railway, has not received ***any form of compensation*** from Mexico to date, and has been denied its right to full compensation by Mexico's judicial and executive branches.

Proofs:

a. **C-19-SPA** (Decree containing the rescate declaration of several sections of the Ferrosur Concession, dated 19 May 2023);
b. **C-16-SPA** (Rescate declaration of CFCM dated 13 July 2016 and served on CFCM on 26 July 2016);
c. **C-23-SPA**, Whereas VII and Article 4 (Amendment to the Ferrosur Concession published in the Federal Official Gazette on 23 June 2023, dated 7 June 2023) (encapsulating the terms of Mexico's compensation in kind for the *rescate* of Ferrosur's concession);
d. **C-18-SPA**, pp. 125-126 (Decision of the Sixth Circuit Court in the direct amparo 175/2020).

310. It follows that Mr. Willars, a U.S. investor, and his investments, received treatment less favorable than that afforded to Ferrosur, a Mexican investor. Thus, Mexico violated the national treatment standard included in Article 1102 of NAFTA.

Proofs:

a. *See supra.*

VI.

CLAIMANT INITIATED THIS ARBITRATION WITHIN THE TEMPORAL LIMITS SET OUT IN NAFTA AND ANNEX 14-C OF THE USMCA

311. As set out in Section V above, Claimant's claims in this arbitration relate to Mexico's continuing breach of its obligation to provide compensation following its expropriation of Mr. Willars' and CFCM's investments. This conduct predates the termination of NAFTA on 1 July 2020. Indeed, Mexico's continuing breach started on 1 March 2017, when the SCT failed to pay compensation owed to CFCM due to the *rescate* of the Concession.

Proofs:

a. *See supra*, Section V (*"*Mexico Breached Its Obligations Under NAFTA and International Law");
b. **CER-2-SPA**, ¶68 (Expert Report-Marco Antonio de la Peña-Claim Memorial) ("La obligación de indemnización de la SCT bajo el Rescate es una obligación prevista en ley. Nació a partir de que se notificó a CFCM la resolución administrativa del Rescate el 26 de julio de 2016 y se incumplió a partir del 1 de marzo de 2017");
c. *Id*., ¶69 ("dado que la SCT no ha emitido una resolución determinando la indemnización debida a CFCM, **esta violación se mantiene subsistente por todo el tiempo que la SCT retrase la resolución sobre el monto de compensación**") (emphases added).

312. Moreover, Mr. Willars initiated this arbitration within the three-year limitation period set out in Articles 1116(2) and 1117(2) of NAFTA pursuant to which "[a]n investor [or an enterprise on behalf of which the investor is claiming] 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 [or enterprise on behalf of which the investor is claiming] has incurred loss or damage***." As investment tribunals have consistently held, Articles 1116(2) and 1117(2) require actual or constructive knowledge of two cumulative events: (i) the occurrence of the alleged breach ***and*** (ii) the occurrence of the loss or damage resulting from that breach.

Proofs:

a. **CL-5-ENG**, Chapter 11, Articles 1116(2) and 1117(2) (NAFTA);
b. **CL-65-ENG**, ¶153 (*Mobil Investments Canada Inc. v. Canada (II)*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility dated 13 July 2018) ("[T]he limitation period starts to run **only when the investor or enterprise has not only acquired** (or ought to have acquired) **knowledge of the alleged breach *but also* has acquired** (or ought to have acquired) k**nowledge that it has incurred loss or damage as a result**. The date on which an investor or enterprise first acquires (or ought to have acquired) knowledge that it has suffered loss or

damage may not be the same as the date on which it first acquires (or ought to have acquired) knowledge of the alleged breach which causes that damage") (emphases added);

c. **CL-66-ENG**, ¶153 (*Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility dated 30 January 2018) ("[T]he specified conditions must be fulfilled: **the alleged breach must actually have occurred, the resulting damage must actually have been incurred, and the claimant must know**, or be in a position such that it should have known, **of these facts**") (emphases added).

313. The critical date at which an investor is deemed to have actual or constructive knowledge of the occurrence of the breach and the ensuing losses varies depending on the nature of the breach alleged. For example, different rules apply to continuing breaches arising from "an act of a State having a continuing character [that] extends over the entire period during which the act continues and remains not in conformity with the international obligation." Continuing breaches typically include the failure to meet a payment obligation, such as Mexico's failure to compensate CFCM following its *rescate* of the Concession.

Proofs:

a. **CL-12-ENG**, Article 14(2) (Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries) ("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");

b. **CL-68-ENG**, ¶167 (*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction dated 29 January 2004) ("It is not, however, necessary for the Tribunal to consider whether Article VIII of the BIT applies to disputes concerning breaches of investment contracts which occurred and were completed before its entry into force. At least it is clear that it applies to breaches which are continuing at that date, **and the failure to pay sums due under a contract is an example of a continuing breach**") (emphasis added);

c. **CL-69-ENG**, ¶124 (*Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction dated 18 May 2010) ("There is consistent arbitral case law considering "continuing acts" in breach of a treaty when their occurrence spans a period before and after a treaty enters into force. […] The tribunal in SGS v. Philippines considered a continuing breach the persistent failure to pay sums due under a contract");

d. **CL-70-ENG**, ¶2.93 (*Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, 1 June 2012) ("The Tribunal notes that this same general approach was adopted **for the omission to pay a debt (which omission lasts as long as the debt remains unpaid)** in SGS v. Philippines, where the tribunal decided that: "… the failure to pay sums due under a contract is

an example of a continuing breach." A similar analysis was made by the tribunal in African Holding […]") (emphasis added).

314. In such cases, the *dies a quo* or starting point of the time limitation period "can be established ***only after the end of the time of commission of the wrongful act itself***." This is because, as the *UPS v. Canada* tribunal explained, "continuing courses of conduct constitute ***continuing breaches of legal obligations and renew the limitation period accordingly***."

Proofs:

a. **CL-60-ENG**, ¶28 (*United Parcel Service of America, Inc. (UPS) v. Government of Canada*, Award dated 24 May 2007) ("[C]ontinuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly. This is true generally in the law, and Canada has provided no special reason to adopt a different rule here");

b. **CL-71-ENG**, footnote 437 (International Law Commission, "Report of the International Law Commission on the work of its thirtieth session, 8 May – 28 July 1978", in Yearbook of the International Law Commission, 1978, vol. II, Part Two, A/33/10, p. 91) ("[I]n the case of a "continuing" wrongful act, however, this dies can be established only after the end of the time of commission of the wrongful act itself");

c. **CL-72-ENG**, p. 431 (Joost Pauwelyn, "The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems" (1995) 66 BYIL 415) ("The general principle is that a claim can only be inadmissible on the ground of lapse of time once the breach has ceased to exist, that being the earliest date from which any time limit can possibly start to run");

d. **CL-73-ENG**, ¶¶228-229 (*Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award dated 22 August 2016) (explaining that the approach to statute of limitations adopted in the *UPS* case is to be adopted whenever a "connection exists between the acts performed before the [critical date] and those which occurred thereafter").

315. In this case, Mexico's continuing breach of its obligation to provide compensation under Article 1110 of NAFTA began on 1 March 2017, when the SCT failed to pay compensation for the Rescate Declaration to CFCM, and continues to date. Indeed, the SCT has not paid any compensation to CFCM or allowed CFCM to remove or dispose of its assets and equipment related to the Concession. Even more remarkably, despite assuring CFCM that it is entitled to compensation under Article 19 of the GLNA in the Rescate Declaration, the SCT has not even issued a final decision determining the amount of compensation owed to CFCM under that declaration, depriving CFCM of any legal remedy in Mexico to challenge the SCT's failure to compensate CFCM, and leaving CFCM and Mr. Willars uncompensated for over 8 years.

Proofs:

a. *See supra*, Section V ("Mexico Breached Its Obligations Under NAFTA and International Law");

b. **CWS-2-SPA**, ¶89 (Witness Statement-[redacted] Claim Memorial) ("Desafortunadamente, desde 2016 y hasta la fecha, la SCT no ha pagado cantidad alguna a CFCM como compensación por el rescate. De hecho, la SCT ni siquiera ha permitido a CFCM disponer de sus activos y equipos que se encuentran en las Vías. En esencia, la SCT se apropió de los activos de la CFCM afectos a la Concesión, sin hacer un solo pago a cambio");

c. **CWS-1-ENG**, ¶38 (Witness Statement-Mario Noriega Willars-Claim Memorial) ("Unfortunately, to date, and after several unsuccessful judicial and administrative proceedings, **I have received zero compensation for the expropriation, either directly or through CFCM**") (emphasis added);

d. **CER-2-SPA**, ¶68 (Expert Report-Marco Antonio de la Peña-Claim Memorial) ("La obligación de indemnización de la SCT bajo el Rescate es una obligación prevista en ley. Nació a partir de que se notificó a CFCM la resolución administrativa del Rescate el 26 de julio de 2016 y se incumplió a partir del 1 de marzo de 2017, ya que la SCT omitió determinar el monto de la indemnización");

e. *Id.*, ¶69 ("dado que la SCT no ha emitido una resolución determinando la indemnización debida a CFCM, **esta violación se mantiene subsistente por todo el tiempo que la SCT retrase la resolución sobre el monto de compensación**, con independencia de que se considere que existe una *negativa ficta*. En otras palabras, **la obligación de la SCT de responder por escrito sigue siendo exigible a la fecha** sin perjuicio de la negativa ficta") (emphases added).

316. This is sufficient to conclude that Mexico's breaches of its obligations under Chapter 11 of NAFTA continue to date and, consequently, that the Request Arbitration was filed within the three-year limitation period set forth in Articles 1116(2) and 1117(2) of NAFTA.

Proofs:

a. **CL-5-ENG**, Chapter 11, Articles 1116(2) and 1117(2) (NAFTA).

317. In any event, the Tribunal would reach the same conclusion if it were to find that Mexico's breaches of NAFTA constituted a series of discrete breaches rather than a continuing breach (*quod non*). Indeed, as investment tribunals have consistently held, an investor cannot be deemed to have actual or constructive knowledge of a loss or damage "until that loss or damage ***actually has been incurred***," and a loss or damage cannot be deemed to have actually been incurred until the conduct giving rise to that loss or damage has become final and irreversible.

Proofs:

a. **CL-65-ENG**, ¶154 (*Mobil Investments Canada Inc. v. Canada (II)*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, dated 13 July 2018) ("Moreover, the language of Article 1116(2) and Article 1117(2) is quite clear in requiring knowledge that loss or damage has been incurred. It is impossible to know that loss or damage has been incurred until

that loss or damage actually has been incurred. Thus, even if Mobil had first acquired knowledge of the enforcement of the 2004 Guidelines in 2004, it could not have acquired knowledge that it had incurred loss or damage in consequence until that loss or damage had actually been sustained");

b. **CL-74-ENG**, ¶167 (*Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, dated 16 March 2017) ("An investor cannot be obliged or deemed to know of a breach before it occurs").

318. Applying this principle, the majority of the tribunal in *Infinito Gold v. Costa Rica* held that the claimant could not have acquired knowledge of the loss resulting from the application of a mining ban adopted by Costa Rica until a cassation decision confirmed the application of that mining ban to the claimant in a decision that was final and irreversible. As the tribunal explained, this was because "the deprivation of the Claimant's investment only became a permanent loss with the 2011 Administrative Chamber Decision. Indeed, ***it is only with this judgment that the 2010 TCA Decision became final (firme)***."

Proofs:

a. **CL-75-ENG**, ¶239 (*Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award dated 3 June 2021) ("[A] judicial expropriation cannot occur through a decision by a first instance court, the execution of which is stayed pending an appeal, because it lacks finality and enforceability. A judicial expropriation can only occur when a final judgment is rendered or when the time limit to appeal has expired. Here, the procedural framework of the relevant court action shows that the deprivation of the Claimant's investment only became a permanent loss with the 2011 Administrative Chamber Decision. Indeed, **it is only with this judgment that the 2010 TCA Decision became final (firme), the casación proceedings having suspensive effect over the 2010 TCA Decision**. From a legal perspective, the expropriation occurred at the time the suspension was lifted, that is, upon issuance of the cassation decision") (emphasis added);

b. *See also* **CL-65-ENG**, ¶155 (*Mobil Investments Canada Inc. v. Canada (II)*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility dated 13 July 2018) (where the tribunal found that the claimant (which had challenged a set of 'Guidelines' that had affected its oil projects by requiring it to spend millions of dollars in additional research and development activities) "could not have had the requisite knowledge that it would incur loss or damage as a result of those Guidelines **until the Canadian courts had finally disposed of its challenge to the Guidelines**.") (emphasis added);

c. *See also* **CL-74-ENG**, ¶167 (*Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award dated 16 March 2017) (where the tribunal held that the NAFTA's three-year limitation period could not have started to run before the Canadian Supreme Court denied claimant's leave to appeal the invalidation of its patents).

319. In this case, Mr. Willars and CFCM could not have had actual or constructive knowledge of the occurrence of the losses resulting from Mexico's refusal to pay ***full*** compensation to CFCM until the Supreme Court's 2022 rejection of CFCM's Rescate Revision against the 2021 Decision. Indeed, it is only with the Supreme Court's 2022 rejection of the Rescate Revision that Mexican courts finally and firmly ruled on the validity of the Rescate Declaration and that Mexico's refusal to pay full compensation to CFCM in the Rescate Declaration became final.

Proofs:

a. *See supra*, Section III.N ("CFCM Challenged the *Rescate* Proceedings Before Mexico's Courts");

b. **CER-2-SPA**, ¶94 (Expert Report-Marco Antonio de la Peña-Claim Memorial) ("En consecuencia, con la decisión de la Suprema Corte el 8 de junio de 2022, la Sentencia del 2020 emitida por la Sala Superior del TFJA quedó firme conforme a las reglas del derecho mexicano").

320. ***And even then***, Claimant could still not have had actual or constructive knowledge that Mexico would end paying ***zero*** compensation to CFCM. Indeed, Mexico had continuously assured CFCM, through both the SCT and its judiciary, that it was entitled to receive compensation, including for the "*daños*" and "*perjuicios*" arising out of the *rescate* proceedings. Even the Sixth Circuit Court. In the 2021 Decision, acknowledged that compensation was due and that the purpose of compensation was to "repair" the aggrieved party for the deprivation of rights and for damages caused.

Proofs:

a. **C-183-SPA**, p. 8 (Interlocutory decision rendered by the Federal Administrative Tribunal dated 23 January 2017) (confirming that CFCM is entitled to receive compensation for the damages, that is the "daños y perjuicios causados" by the Rescate Declaration);

b. **C-18-SPA** (Decision of the Sixth Circuit Court in the direct amparo 175/2020) (recognizing that compensation was due and that its purpose is to "repair" the aggrieved party for the deprivation of rights);

c. *See supra*.

321. Claimant has therefore instituted these proceedings within the temporal limits set out in NAFTA and Annex 14-C of the USMCA.

Proofs:

a. *See supra*.

VII.

MEXICO IS REQUIRED TO COMPENSATE CLAIMANT FOR THE FAIR MARKET VALUE OF ITS INVESTMENT AND WIPE OUT ALL CONSEQUENCES OF ITS UNLAWFUL CONDUCT

322. Claimant is entitled to be compensated by Mexico for the damages that it has suffered as a result of Mexico's breaches of NAFTA. As discussed below, the applicable standard of compensation requires an award of compensation to wipe out all consequences of Mexico's unlawful conduct. That assessment requires, among others, evaluating the reduction in the fair market value of Claimant's investment as a result of Mexico's measures that are found to have breached NAFTA.

Proofs:

a. *See infra*, Sections VII.A-VII-F.

323. Here, Mexico's conduct entirely destroyed the value of Claimant's investment. Thus, Claimant is entitled to compensation based on the full reparation standard. To calculate damages under this standard, an income-based approach is appropriate, and Compass Lexecon has provided a reliable income-based valuation. Compass Lexecon has also provided an alternative, reliable cost-based valuation of the damages. Finally, in order to be fully compensatory, the Award should also grant Claimant compound interest on the damages awarded.

Proofs:

a. *See infra*, Sections VII.A-VII-F.

A. MEXICO'S UNLAWFUL CONDUCT DESTROYED THE VALUE OF CLAIMANT'S INVESTMENT AND THE VALUE OF CFCM

324. Mexico's wrongful conduct entirely destroyed the value of Claimant's investment. The value of Claimant's investment was derived from the contractual rights contained in the Concession, to which CFCM was a party. When Mexico issued the *rescate* declaration without paying compensation rightfully due, CFCM's value and Claimant's investment were rendered valueless as CFCM could no longer operate the Chiapas-Mayab Railway, provide freight transportation services, or enjoy the revenues to which it was entitled under the Concession. In other words, Claimant had no way to monetize its investment.

Proofs:

a. *See infra*.

325. Valuating the damages suffered by Claimant requires determining the fair market value of the investment in the absence of (*i.e.*, "but-for") Mexico's unlawful conduct. On 25 July 2016, the day before the SCT notified CFCM of the *rescate* of the Concession, CFCM was ready

to resume the operation of the Concession. CFCM had all the required personnel to operate the Concession. CFCM owned the equipment that was being used by FIT to operate the tracks and, therefore, had a right to use the same equipment. CFCM would operate the tracks with the same clients that used the rail tracks under FIT's operation and had contacted additional clients to provide freight transportation services. CFCM had a thorough business plan approved by the SCT to operate the Concession. The company was well capitalized and had a firm commitment by Mexico that it would invest additional amounts to repair and improve the rail tracks.

Proofs:

a. *See supra,* Section III.J (The SCT Again Delayed the Return of the Concession to CFCM);
b. **CWS-2-SPA**, ¶¶69-79 (Witness Statement-[redacted] [redacted]Claim Memorial) (demonstrating that CFCM was fully ready to resume the operation of the Concession).

326. Mexico's actions destroyed the value created by CFCM through years of work and investment that went into resuming the operation of the Concession. Indeed, just prior to the *rescate*, CFCM was ready to resume operation of the Concession. Mexico's unlawful conduct thus prevented Claimant from receiving the profits to be derived from exploitation of those rights. Under both Mexican and international law, Claimant is entitled to receive compensation by reference to those lost profits of which it was deprived. Mexico, however, has refused to compensate CFCM for the *rescate*.

Proofs:

a. **C-16-SPA** (Rescate Declaration dated 13 July 2016, served on CFCM on 26 July 2016) (evidencing that the SCT expropriated CFCM's Concession);
b. **CER-2-SPA**, ¶62 (Expert Report-Marco Antonio de la Peña-Claim Memorial) ("…el rescate debe realizarse en todos los casos mediando el pago de una indemnización al concesionario");
c. **CL-1-SPA**, Article 19 (Mexico's General Law of National Assets);
d. **CL-5-ENG**, Chapter 11, Article 1110 (NAFTA);
e. *See supra,* Section V.A.3 (Mexico's expropriation was unlawful because it was carried out without compensation).

327. Claimant has instructed its retained experts, Mr. Gustavo De Marco, the Executive Vice President at Compass Lexecon, and Mr. Ariel N. Medvedeff, Executive Vice President at Compass Lexecon, to assess and value the damages that Claimant and CFCM suffered as a result of Mexico's unlawful measures. Mr. De Marco is a leading damages expert specializing in economic, financial, contractual, and regulatory analysis; valuation of businesses and other assets; and the assessment of monetary damages for dispute resolution and litigation support. He has more than 15 years of experience in the valuation of business interests and the quantification of economic damages. Likewise, Mr. Medvedeff is a leading expert with over 15 years of experience performing financial, economic, regulatory, and public policy analysis.

Proofs:

a. **CER-1-ENG**, Section II (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

328. Compass Lexecon's analysis shows that CFCM and Claimant suffered damages totaling at least [redacted]. These valuations were made inclusive of the application of pre-award interest.

Proofs:

a. **CER-1-ENG**, Table 20 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

329. CFCM's damages represent 100% of the damages suffered by the company as a consequence of Mexico's unlawful actions. Claimant brings this claim on its own behalf and on behalf of CFCM pursuant to Article 1117 of NAFTA. Claimant is thus entitled to 100% of the damages suffered by CFCM. Notwithstanding, Claimant, individually, is entitled to the amount corresponding to his 51.76% ownership interest in CFCM.

Proofs:

a. **C-2-SPA** (CFCM's Shareholder Registry) (reflecting that Mr. Willars directly owns a 16.38% interest in CFCM and that Viabilis directly owns a 73.71% interest in CFCM);
b. **C-3-SPA** (Viabilis Holding, S.A. de C.V.'s Shareholder Registry) (evidencing that Mr. Willars owns a 48% interest in Viabilis);
c. **C-28-SPA** (CFCM's Corporate Chart) (reflecting Mr. Willars' controlling interest in CFCM).

B. Claimant is Entitled to Compensation based on the Full Reparation Standard Calculated by Reference to the Value of its Investment before the "Rescate"

330. Claimant is entitled to compensation based on the full reparation standard, which ought to be calculated by reference to the value of CFCM and Claimant's investment before the *rescate* of the Concession, *i.e.*, on 25 July 2016.

Proofs:

a. *See infra*.

331. NAFTA provides that an investor may submit claims for breaches of the Treaty to arbitration provided that it has "incurred loss or damage by reason of, or arising out of [a] … breach" of a provision in NAFTA, Chapter 11. The only compensation standard, however, expressly set out in NAFTA is that for a lawful expropriation carried out in accordance with the criteria set forth in Article 1110. NAFTA establishes no express compensation standard for

Mexico's treaty breaches described above:[9] namely, for its ***unlawful*** expropriation of Claimant's investment in breach of Article 1110, for its unfair and inequitable treatment of Claimant's investment in breach of Article 1105, or for its breach of the national treatment standard established in Article 1102.

Proofs:

a. **CL-5-ENG**, Chapter 11, Article 1116 (NAFTA) ("An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A … and that the investor has incurred loss or damage by reason of, or arising out of, that breach.");

b. *Id.*, Article 1117 ("An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under: (a) Section A … and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.");

c. *Id.*, Article 1110 ("2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('date of expropriation'), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value. 3. Compensation shall be paid without delay and be fully realizable.").

332. In the absence of a treaty compensation standard for those breaches, customary international law provides the remedies for Mexico's unlawful conduct. While the computation of damages under the customary international law standard differs from the Treaty standard of compensation for lawful expropriation (under Article 1110 of NAFTA), the two standards may ultimately lead to similar results as they both are ultimately designed to, at a minimum, compensate for the loss in the fair market value of the investment.

Proofs:

a. **CL-76-ENG**, ¶481 (*ADC Affiliate Ltd. et. al. v. Hungary*, ICSID Case No. ARB/03/16, Award, dated 2 October, 2006) ("The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate the compensation for a lawful expropriation with damages for an unlawful expropriation.");

b. **CL-77-ENG**, ¶8.2.3 (*Compañia de Aguas del Aconquija S.A and Vivendi universal S.A. v. Argentina*, ICSID Case. No.

[9] *See supra*, Section V (Mexico Breached its Obligations Under NAFTA and International Law).

ARB/97/3, Award, dated 20 August 2007) ("The treaty […] it does not purport to establish a *lex specialis* governing the standards of compensation for *wrongful* expropriations. As to the appropriate measure of compensation for the breaches other than expropriation, the Treaty is silent.").

333. Customary international law rules on remedies for breaches of international law are set out in the International Law Commission Articles on Responsibility of States of Internationally Wrongful Acts ("**ILC Articles**"). The ILC Articles provide that the primary remedies for breaches of international law include, among others, the duty to make full reparation, preferably through restitution.

Proofs:

a. **CL-12-ENG**, Articles 29-31; 34-39 (International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)) ("Article 34. Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.").

334. The duty to make "full reparation" for internationally wrongful acts was established in 1928 by the Permanent Court of International Justice ("**PCIJ**") in the *Chorzów Factory* case, indicating that reparation must wipe out all the consequences of the illegal act and reestablish the situation which would have existed if the illegal act had not been committed. In that case, the PCIJ ruled as follows:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if the act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

Proofs:

a. **CL-78-ENG**, p. 47 (*Factory at Chorzów (Germany v. Poland)*, Merits, PCIJ (Ser. A) No. 28, dated 13 September 1928);
b. **CL-79-ENG**, ¶122 (*Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, dated 30 August 2000) ("The award to Metalclad of the cost of its investment in the landfill is consistent with the principles set forth in Chorzow Factory (Claim for Indemnity) (Merits),

Germany v. Poland, P.C.I.J. Series A., No. 17 (1928) at p.47, namely, that where the state has acted contrary to its obligations, any award to the claimant should, as far as is possible, wipe out all the consequences of the illegal act and reestablish the situation which would in all probability have existed if that act had not been committed (the status quo ante).");

c. **CL-80-ENG**, ¶¶399-402 (*CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, de 12 de mayo de 2005) ("It is broadly accepted in international law that there are three main standards of reparation for injury: restitution, compensation and satisfaction…. Restitution is the standard used to reestablish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation…. Compensation is designed to cover any 'financially assessable damage including loss of profits insofar as it is established.' …The loss suffered by the claimant is the general standard commonly used in international law in respect of injury to property, including often capital value, loss of profits and expenses.");

d. **CL-76-ENG**, ¶484 (*ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, ICSID Case No. ARB/03/16, Award, de 2 de octubre de 2006) ("The customary international law standard for the assessment of damages resulting from an unlawful act is set out in the decision of the PCIJ in the Chorzów Factory case…".).

335. ILC Article 31 now encapsulates this full reparation obligation as follows:

Article 31

Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Proofs:

a. **CL-12-ENG**, Article 31 (International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)).

336. ILC Article 35 goes on to establish that, when it comes to making full reparation for an internationally wrongful act, a State's primary obligation is to provide restitution. Where restitution is impractical—as it is here given the government's *rescate* of the Concession—, ILC Article 36(1) sets forth that:

> 1. The 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.

Proofs:

a. **CL-12-ENG**, Articles 35-36 (International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)).

337. Thus, a monetary award to Claimant should put it in a position that it would have occupied had Mexico's internationally wrongful acts never occurred. As the tribunal in *Vivendi v. Argentina II* reasoned:

> Based on these principles [of international law], and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action.

Proofs:

a. **CL-77-ENG**, ¶8.2.7 (*Compañia de Aguas del Aconquija S.A and Vivendi universal S.A. v. Argentina*, ICSID Case. No. ARB/97/3, Award, dated 20 August 2007);
b. **CL-78-ENG**, p. 47 (*Factory at Chorzów (Germany v. Poland)*, Merits, PCIJ (Ser. A) No. 28, dated 13 September 1928).

338. Full compensation for harm caused by an international wrong is normally assessed on the basis of the resulting diminution in "fair market value" of the affected asset. Even if the expropriation is deemed lawful and the Treaty standard on compensation were to apply, there would be no substantive difference here. The Treaty provides that compensation for an expropriation shall be "equivalent to the fair market value of the expropriated investment."

Proofs:

a. **CL-81-ENG**, p. 225 (J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2005)) ("Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the 'fair market value' of the property lost.");
b. **CL-5-ENG**, Chapter 11, Article 1110 (NAFTA) ("2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place …").

339. Tribunals tend to use the "fair market value" standard to calculate damages payable for breaches of expropriation and breaches of other standards of treatment established in bilateral investment treaties.

Proofs:

a. **CL-82-ENG**, ¶¶496–99 (*CME Czech Republic B.V. (The Netherlands) v. Czech Republic* (UNCITRAL), Final Award, dated 14 March 2003);
b. **CL-83-ENG**, ¶124 (*Bernardus Henricus Funnekotter and others v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, dated 22 April 2009);
c. **CL-80-ENG**, ¶410 (*CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, dated 12 May 2005) (hereafter "CMS");
d. **CL-84-ENG**, ¶424 (*Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, dated 14 July 2006);
e. **CL-85-ENG**, ¶¶359–363 (*Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3,Award, dated 22 May 2007);
f. **CL-86-ENG**, ¶¶403–406 (*Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, dated 28 September 2007);
g. **CL-87-ENG**, ¶¶ 703–705 (*El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, dated 31 October 2011).

340. Fair market value has been defined as follows:

> [T]he price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat. [The expert] appropriately assumed that the willing buyer was a reasonable businessman.

Proofs:

a. **CL-88-ENG**, ¶277 (*Starrett Housing Corporation, Starrett Systems, Inc, and others v. The Iran et al.*, Iran-US Claims Tribunal Case No. 24, Final Award, dated 14 August 1987);
b. *See also* **CL-80-ENG**, ¶ 402 (*CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award dated 12 May 2005).

341. Here, Mexico directly expropriated CFCM's Concession through the *rescate*, and indirectly expropriated Mr. Willars' interest in CFCM. Mexico has failed to pay any compensation as a result of these expropriations. Further, Mexico's actions constitute breach of Article 1105 (Minimum Standard of Treatment) and 1102 (National Treatment) of NAFTA. The harm suffered by Claimant as a result of these improper actions is the total loss of value in his investment. CFCM is a company organized and incorporated in 1999 with the sole purpose of operating the

Concession. The Concession became valueless once Mexico issued the *rescate* declaration without paying compensation, and, thus, Claimant's investment in CFCM became equally valueless. Therefore, a computation of damages for each of these bases of Claimant's claim requires determining the fair market value of Claimant's investment but-for the Government's unlawful conduct. The damages that Claimant has suffered for all of Mexico's breaches is equal to the entire fair market value of his investment.

Proofs:

a. *See supra*, Section V.A (Mexico Failed to Compensate CFCM Following its Expropriation of Claimant's Investments in Breach of NAFTA Article 1110);
b. *See supra*, Section V.B (Mexico Denied Claimant Fair and Equitable Treatment in Breach of NAFTA Article 1105) and V.C (Mexico Failed to Provide Claimant's Investments Full Protection and Security in Breach of NAFTA Article 1105);
c. *See supra*, Section V.C (Mexico Failed to Provide Claimant's Investments Full Protection and Security in Breach of NAFTA Article 1105);
d. **CER-1-ENG**, Section V (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

342. In order to compute the fair market value of Claimant's investment but-for Mexico's unlawful conduct (*i.e.*, but-for the failure to pay compensation after the *rescate* declaration and the various events described above that followed), the fair market value must be computed just prior to the unlawful conduct that crystallized into a breach of the Treaty (which, in this case, became a continued breach for the lack of compensation after the *rescate*). Claimant has instructed Messrs. De Marco and Medvedeff (Compass Lexecon) to compute the damages that Claimant suffered using 25 July 2016 as the date of valuation ("**Valuation Date**"), reflecting the circumstances prevailing just prior to Mexico's *rescate* of the Concession, which triggered a payment obligation that to date has been left unpaid, in breach of the Treaty.

Proofs:

a. **CL-78-ENG**, p. 47 (*Factory at Chorzów (Germany v. Poland)*, Merits, PCIJ (Ser. A) No. 28, dated 13 September 1928);
b. **CL-90-ENG**, ¶¶77–78 (*Compañia del Desarrollo de Santa Elena S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, dated 17 February 2000);
c. **CL-26-ENG**, ¶¶855, 891 (*Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, dated 4 April 2016).

343. For these reasons, Claimant is entitled to compensation based on the full reparation standard, which ought to be calculated by reference to the fair market value of CFCM and Claimant's investment before the *rescate* of the Concession.

Proofs:

a. *See supra*.

C. AN INCOME-BASED VALUATION IS THE APPROPRIATE METHOD FOR VALUING CLAIMANT'S DAMAGES

344. The discounted cash flow ("**DCF**") method of valuation, which estimates future cash flows and discounts them to a present value, is the appropriate method for deriving the fair market value of Claimant's rights under the Concession.

Proofs:

a. *See infra*.

345. For many years, international investment arbitration tribunals have relied on the DCF method to compute the damages owed to investors for breaches of investment protection treaties by States, including in cases involving expropriation, breach of the FET standard, and breach of the national treatment standard. Indeed, the tribunal in *Rusoro v. Venezuela* acknowledged the broad acceptance of the DCF method for valuing damages arising from investment treaty breaches:

> Valuations based on the DCF method have become usual in investment arbitrations, whenever the fair market value of an enterprise must be established. The Tribunal agrees that, where the circumstances for its use are appropriate, forward looking DCF has advantages over other, more backwards looking valuation methods.

Proofs:

a. **CL-73-ENG**, ¶758 (*Rusoro Mining Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, dated 22 August 2016));
b. *See also* **CL-26-ENG**, ¶¶877, 879 (*Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, dated 4 April 2016);
c. *See also* **CL-91-ENG**, ¶830 (*Gold Reserve v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, dated 22 September 2014).
d. *See also* **CL-80-ENG**, ¶¶411–17 (*CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, dated 12 May 2005);
e. *See also* **CL-85-ENG**, ¶385 (*Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award, dated 22 May 2007);
f. *See also* **CL-55-ENG**, ¶¶275–76 (*National Grid p.l.c. v. Argentina* (UNCITRAL), Award, dated 3 November 2008).
g. *See also* **CL-44-ENG**, ¶¶444–48 (*Cargill, Inc. v. Mexico*, ICSID Case No ARB(AF)/05/2, Award, dated 18 September 2009).

346. The DCF method, a "but-for" method for calculating damages, is an appropriate method to put the investor in the position it would have been had it not been for the State's unlawful

conduct, in accordance with the "full reparation" standard. Consequently, investment tribunals have found that the DCF method is consistent with the *Chórzow Factory* principle.

Proofs:

a. **CL-92-ENG**, ¶275 (*CEF Energia BV v. Italian Republic*, SCC Case No. 2015/158, Award, dated 16 January 2019) ("The Tribunal prefers the methodology of Mr Edwards, namely, his adoption of DCF. Quite apart from the fact that the DCF method is well-established and accepted by investment arbitration tribunals over many years for the purposes of calculation of compensation, the approach of GRIF would be inconsistent with the even longer-established Chorzow Factory principle. The latter requires an assessment of the position as if the act, found to be a breach of the international obligation in question, had not occurred. GRIF's approach would, taken to its logical conclusion, would result in ascertaining whether the investor was nonetheless making a 'fair' profit notwithstanding the measure found to be in breach, and, therefore, such "fair" be sufficient compensation. That is not the established principle found in Chorzow Factory.").

347. The DCF method is used almost uniformly by investment tribunals valuing business interests that have historical cash flows from which to estimate future ones.

Proofs:

a. **CL-93-ENG**, ¶¶788-790 (*Triodos SICAV II v. Kingdom of Spain*, SCC Case No. 2017/194, Final Award, dated 24 October 2022);
b. **CL-94-ENG**, ¶¶197-202 (*Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, dated 13 March 2015);
c. **CL-95-ENG**, ¶14.26 (*Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. Kingdom of Thailand (formerly Walter Bau AG (in liquidation) v. Kingdom of Thailand)*, UNCITRAL, Award, dated 1 July 2009).

348. Historical cash flows are not, however, a prerequisite to using the DCF method to compute damages. Tribunals have alternatively looked at the probability of securing future incomes. In fact, investment tribunals have relied on the approach in cases involving pre-operational or pre-profitable business interests where there was nevertheless sufficiently reliable information on which to base an estimate of future cash flows. The tribunal in *Rusoro v. Venezuela* acknowledged that the DCF method could be an appropriate valuation method even without a track record of financial performance and set out the relevant criteria for determining when the methodology might be appropriate:

> DCF works properly if all, or at least a significant part, of the following criteria are met:

- The enterprise has an established historical record of financial performance;
- There are reliable projections of its future cash flow, ideally in the form of a detailed business plan adopted in *tempore insuspecto*, prepared by the company's officers and verified by an impartial expert;
- The price at which the enterprise will be able to sell its products or services can be determined with reasonable certainty;
- The business plan can be financed with self-generated cash, or, if additional cash is required, there must be no uncertainty regarding the availability of financing;
- It is possible to calculate a meaningful WACC, including a reasonable country risk premium, which fairly represents the political risk in the host country;
- The enterprise is active in a sector with low regulatory pressure, or, if the regulatory pressure is high, its scope and effects must be predictable: it should be possible to establish the impact of regulation on future cash flows with a minimum of certainty.

Proofs:

a. **CL-73-ENG**, ¶759 (*Rusoro Mining Ltd. v. Venezuela,* ICSID Case No. ARB(AF)/12/5, Award, dated 22 August 2016).

349. Several investment tribunals have considered the above criteria to decide whether to apply the DCF model.

Proofs:

a. **CL-96-ENG**, ¶931 (*PJSC DTEK Krymenergo v. Russian Federation,* PCA Case No. 2018-41, Award, dated 1 November 2023);
b. **CL-97-ENG**, ¶338 (*(1) Mr Idris Yamantürk (2) Mr Tevfik Yamantürk (3) Mr Müsfik Hamdi Yamantürk (4) Güriş İnşaat ve Mühendislik Anonim Şirketi (Güris Construction and Engineering Inc) v. Syrian Arab Republic*, ICC Case No. 21845/ZF/AYZ, Final award, dated 31 August 2020);
c. **CL-98-ENG**, ¶434 (*Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, Final Award, dated 23 December 2019);
d. **CL-99-ENG**, ¶478 (*Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and a Partial Decision on Quantum, dated 19 February 2019).

350. Here, all the criteria set by the tribunal in *Rusoro v. Venezuela* are met. Specifically: (**a**) CFCM has an established historical record of financial performance; (**b**) the 2012 Business Plan provides reliable projections of CFCM's future cash flow; (**c**) the price of CFCM's freight transportation services can be determined; (**d**) the financing of CFCM's operation of the Concession was certain; (**e**) Compass Lexecon was able to calculate a meaningful WACC; and (**f**) there was little uncertainty on the potential impacts of regulation in the railway sector.

Proofs:

a. *See infra*, Sections VII.C.1 – VII-C-6.

1) CFCM had an established historical record of financial performance

351. As previously established, CFCM successfully operated the Concession from 1999 to 2005. During this period, the operation of the Concession was very lucrative. [REDACTED].

Proofs:

a. *See supra*, Section III.C (CFCM Successfully Operated the Concession from 1999 to 2005);
b. **C-62-SPA** (CFCM's 2000-2001 Financial Statements) (demonstrating that the operation of the Concession was profitable and that CFCM complied with its investments commitments);
c. **C-63-SPA** (CFCM's 2001-2002 Financial Statements) (demonstrating that the operation of the Concession was profitable and that CFCM complied with its investments commitments);
d. **C-64-SPA** (CFCM's 2002-2003 Financial Statements) (demonstrating that the operation of the Concession was profitable and that CFCM complied with its investments commitments);
e. **C-65-SPA** (CFCM's 2003-2004 Financial Statements) (demonstrating that the operation of the Concession was profitable and that CFCM complied with its investments commitments).

352. Further, between 2000 and 2004, the Chiapas-Mayab Concession increased traffic [REDACTED].

Proofs:

a. **CER-1-ENG**, ¶56 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

353. The above historical record of profitable financial performance justifies the use of the DCF method. Even if the Tribunal were to consider otherwise, however, where pre-operational or pre-profit businesses are sufficiently advanced in their development such that it is possible to estimate with sufficient reliability the inputs for a DCF valuation, investment tribunals have used the method to compute damages. This has been most evident in disputes where the investment at issue was to commence operations or, as was the case here, was about to *resume* operations. For instance, in *Crystallex v. Venezuela*, the tribunal was faced with the valuation of a gold mining project that "did not have a proven track record of profitability, because [Crystallex] never started

operating the mine." The tribunal found that Crystallex "if it had been allowed to operate, … would have engaged in a profitmaking activity and that such activity would have been profitable." The tribunal considered that "the development stage of the project" was such that its "costs and future profits [could] be estimated with greater certainty." The tribunal thus concluded that "predicting future income from ascertained reserves to be extracted by the use of traditional mining techniques … can be done with a significant degree of certainty, even without a record of past production."

Proofs:

a. **CL-26-ENG**, ¶877-879 (*Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, dated 4 April 2016).

354. In concluding that the DCF method was appropriate, the tribunal made the following observations:

> In short, the Claimant has established the fact of future profitability, as it had completed the exploration phase, the size of the deposits had been established, the value can be determined based on market prices, and the costs are well known in the industry and can be estimated with a sufficient degree of certainty.
> The Tribunal considers that in this case only forward-looking methodologies aimed at calculating lost profits are appropriate in order to determine the fair market value of Crystallex's investment. By contrast, a backward-looking methodology such as the cost approach, while susceptible of being utilized in certain instances where there is no record of profitability and other methodologies would lead to excessively speculative and uncertain results, cannot be resorted to in this case. The cost approach method would not reflect the fair market value of the investment, as by definition it only assesses what has been expended into the project rather than what the market value of the investment is at the relevant time.

Proofs:

a. **CL-26-ENG**, ¶880-882 (*Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, dated 4 April 2016).

355. The tribunal in *Gold Reserve v. Venezuela* considered the value of an adjacent mining project to the one at issue in *Crystallex*. That project also "was never a functioning mine and therefore did not have a history of cashflow." Notwithstanding, the tribunal also accepted the use of the DCF method to compute damages, concluding that "a DCF method can be reliable used in the instant case because of the commodity nature of the product and detailed mining cashflow analysis previously performed." In other words, the tribunal in *Gold Reserve* was comforted by the fact that the commodity was known to have an existing market and the project's stage of development was such that detailed, contemporaneous cash flow analysis had been prepared in the

ordinary course of business. The analysis of whether the DCF method is the appropriate method for valuing a business interest is, of course, as noted above, fact specific.

Proofs:

a. **CL-91-ENG**, ¶830 (*Gold Reserve v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, dated 22 September 2014).

356. The dispute of *Tethyan Copper v. Pakistan* also considered adverse government measures affecting a project that had not yet become operational but was well advanced in its development. In considering the applicability of the DCF method for valuing the project, the tribunal observed "that the question whether a DCF method (or a similar income-based valuation methodology) can be applied to value a project that has not yet become operational depends strongly on the circumstances of the individual case." The tribunal described the inquiry as follows:

> The first key question is whether, based on the evidence before it, the Tribunal is convinced that in the absence of Respondent's breaches, the project would have become operational and would also have become profitable. The second key question is whether the Tribunal is convinced that it can, with reasonable confidence, determine the amount of these profits based on the inputs provided by the Parties' experts for this calculation.

Proofs:

a. **CL-110-ENG**, ¶330 (*Tethyan Copper Co. Pty Ltd. v. Pakistan*, ICSID Case No. ARB/12/1, Award, dated 12 July 2019)).

357. In *Tethyan*, the fact that the "[c]laimant would have been able to obtain the necessary funds and would also have brought the necessary experience to successfully execute the project" was persuasive to the tribunal. The tribunal also found salient that "several years of intensive work on the ground" occurred in the years prior to the government's measures. Consequently, in light of the project's stage of development, the tribunal concluded that "it is appropriate to assume that [c]laimant's investment would have been profitable and to determine these future profits by using a DCF method."

Proofs:

a. **CL-110-ENG**, ¶331-332; 335 (*Tethyan Copper Co. Pty Ltd. v. Pakistan*, ICSID Case No. ARB/12/1, Award, dated 12 July 2019)).

358. The use of an income approach to value projects that are not yet in the profit generation stage is not limited to projects involving natural resources. In *Hydro v. Albania*, Albania expropriated the claimant's digital broadcast business, which the claimant had only operated for a short period of time before the expropriation. The tribunal observed that "[a]lthough not yet making a profit, [the business] had prospects to do so, and a reasonable likelihood of so

doing." On the issue of damages, the respondent argued that "the DCF method [was] inappropriate" to compute damages because the project "did not operate for sufficient time to generate adequate and reliable data." The tribunal, however, considered it appropriate to use the DCF method reasoning that to cast aside the income-based approach in favor of an alternative method (such as the sunk costs approach) because of the business's early stage: (i) would not adequately compensate the claimant in accordance with the applicable standard of compensation, and (ii) would reward the State for expropriating a promising business shortly after its founding and creating uncertainty affecting a DCF valuation:

> The Tribunal considers that awarding the Claimants their wasted costs would merely return them to the position they would have been in if the investments in Albania had never been made, rather than returning them to the position they would have been in had Albania not committed its illegal acts, which is what is called for by the Chorzów standard of full reparation. A similar conclusion was made by the tribunal in Crystallex, namely that it "would not reflect the fair market value of the investment, as by definition it only assesses what has been expended into the project rather than what the market value of the investment is at the relevant time".
>
> The Tribunal sees some limitations in the application of the DCF method to value Agonset, namely that the 2012 Business Plan is not particularly detailed and both businesses have only been operating for a short period of time. Mr. MacGregor, a chartered accountant, says there is insufficient evidence to undertake a valuation using the DCF Method. However, the Tribunal has a mandate, having found breach of the BIT, to arrive at a valuation on such evidence as it has. The tribunal in Kardassopoulos drew a similar conclusion stating that "The Tribunal's duty is to make the best estimate that it can of the amount of the loss, on the basis of the available evidence. That must be done even if there is no absolute documentary proof of the precise amount lost". Further, discarding the DCF method for lack of sufficient evidence in this case would, in effect, reward a State for expropriating promising businesses shortly after their founding.
>
> On balance, the Tribunal considers that the DCF method is an appropriate method to value Agonset. While valuation is not an exact science, the DCF method is a widely-accepted valuation method that can address the uncertainties that arise in this case.

Proofs:

a. **CL-101-ENG**, ¶¶ 286, 697, 791, 847-849, 851 (*Hydro S.r.l. et al. v. Albania*, ICSID Case ARB/15/28, Award, dated 24 April 2019));

b. *See also* **CL-45-ENG**, ¶811 (*Rumeli Telekom v. Kazakhstan*, ICSID Case. No. Arb/05/16, Award, dated 29 July 2008)) (awarding damages utilizing a DCF analysis even though "the enterprise had not been in existence for long enough to have

generated the data required for the calculation of future income" and observing that "[s]ince the value of that asset was directly linked to its potential to produce future income, there is no realistic alternative to using the DCF method to ascribe a value to it.").

359. Determining the reliability of the DCF method for valuing pre-operating projects is a fact-specific inquiry into the project's stage of development and into whether the inputs for the DCF reflect "a reasonable basis for the Tribunal to determine the amount of loss." To determine whether there is sufficient information to allow the estimation of future revenues and costs in order to perform a DCF analysis, tribunals have considered how close the project was to generating revenues, including whether a feasibility study had been conducted, whether there was any evidence that revenues would outweigh costs, and whether the source of revenues had already been identified.

Proofs:

a. **CL-101-ENG**, ¶845 (*Hydro S.r.l. et al. v. Albania*, ICSID Case ARB/15/28, Award, dated 24 April 2019)) ("In light of the above, the Tribunal considers that the Claimants must prove the existence of the fact of damage with sufficient certainty and then provide a reasonable basis for the Tribunal to determine the amount of loss. The Tribunal considers this a fair outcome considering that any difficulty that the Claimants may face in proving the amount of loss will have flowed from the Respondent's wrongdoing.");

b. *See also* **CL-26-ENG**, ¶886 (*Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, dated 4 April 2016) ("A tribunal will thus select the appropriate method basing its decision on the circumstances of each individual case…");

c. *See also* **CL-100-ENG**, ¶310 (*Tethyan Copper Co. Pty Ltd. v. Pakistan*, ICSID Case No. ARB/12/1, Award, dated 12 July 2019) ("The Tribunal agrees with the Parties that the analysis which valuation method is appropriate to value a project can only be made on a case-by-case basis, taking into account all relevant circumstances of the case and the evidence that the Parties have brought before this Tribunal");

d. **CL-102-ENG**, ¶823 (*South American Silver Ltd. v. Bolivia*, PCA Case No. 2013-15, Award, dated 22 November 2018) ("In sum, the Tribunal finds that, at the time of Reversion, (i) the Project was not at an advanced stage since it only had the PEA 2011 and had not conducted a prefeasibility or feasibility study; (ii) it did not have mineral reserves, but merely resources, most of them inferred; and (iii) there was no certainty that the metals could be economically extracted through the Metallurgical Process. The Tribunal considers that the Project's state of progress cast serious doubt as to its economic viability and, based on the reasons elaborated below, they preclude acceptance of the valuation presented by the Claimant.").

360. Thus, in this case, the DCF method is appropriate. CFCM has a successful historical record of profitable financial performance between 1999 and 2005. In any event, the conditions of the Concession as of the Valuation Date of 25 July 2016 and all the relevant facts strongly support the use of the DCF method as the appropriate way to value Claimant's investment, even more so than in the above cases, as detailed in the following subsections.

Proofs:

a. *See supra*, Section III.C (CFCM Successfully Operated the Concession from 1999 to 2005);
b. **C-62-SPA** (CFCM's 2000-2001 Financial Statements) (demonstrating that the operation of the Concession was profitable and that CFCM complied with its investments commitments);
c. **C-63-SPA** (CFCM's 2001-2002 Financial Statements) (demonstrating that the operation of the Concession was profitable and that CFCM complied with its investments commitments);
d. **C-64-SPA** (CFCM's 2002-2003 Financial Statements) (demonstrating that the operation of the Concession was profitable and that CFCM complied with its investments commitments);
e. **C-65-SPA** (CFCM's 2003-2004 Financial Statements) (demonstrating that the operation of the Concession was profitable and that CFCM complied with its investments commitments);
f. *See infra*, Sections VII.C.2 – VI.C.6.

2) The 2012 Business Plan is a detailed plan adopted in a non-suspect time, which provides reliable projections of CFCM's future cash flow

361. As discussed, CFCM and the SCT held several meetings in furtherance of agreeing on a comprehensive business plan that would ensure the Concession's financial prosperity in the future. As a result of these negotiations, the parties agreed on the 2012 Business Plan. On 17 July 2012, the DGTFM approved the 2012 Business Plan and the Amendment.

Proofs:

a. *See supra*, Section III.G (The SCT Committed to Return the Concession to CFCM);
b. **CWS-2-SPA**, ¶ 47 (Witness Statement-[redacted] Claim Memorial) ("En la Concesión Enmendada, la SCT también reconoció expresamente que, el 17 de julio de 2012, la Dirección General de Transporte Ferroviario y Multimodal de la SCT había aprobado las modificaciones a la Concesión sobre la base de los compromisos de inversión incluidos en el Plan de Negocios de 2012");
c. **C-11-SPA** (Amended Concession dated 22 October 2012) (evidencing that the Concession Agreement was amended based on the commitments established in the 2012 Business Plan);
d. **C-119-SPA** (New business plan agreed by the SCT and CFCM

dated 2012) (evidencing that the SCT and CFCM agreed on a detailed business plan for the Concession, which was the basis for the Concession's Amendment).

362. As required by *Rusoro*, the 2012 Business Plan was adopted in a "*tempore insuspecto*," as it was created and approved in July 2012—four years before the *rescate* declaration was issued by the SCT. At the time, there was no indication or warning that the SCT would later decide to expropriate the Concession.

Proofs:

a. **C-119-SPA** (New business plan agreed by the SCT and CFCM dated 2012) (evidencing that CFCM and the SCT agreed to a business plan for the Concession in a non-suspect time);

b. **CWS-2-SPA**, ¶38 (Witness Statement-[redacted] [redacted] Claim Memorial) ("Desde mi perspectiva, el Plan de Negocios de 2012 fue aprobado por la SCT porque se sustentó de manera sólida sobre la base de años de trabajo y con el apoyo de un equipo de especialistas con mucha experiencia en los diferentes aspectos del negocio ferroviario. La SCT se percató de que no existía una mejor alternativa para operar exitosamente las Vías. El FIT fue incapaz de dar una buena operación a la Concesión, y los clientes usuarios de las Vías nos comentaron que se incumplían los plazos de entrega de las mercancías, y había un índice alto de siniestralidad en el servicio. De esa forma, el Plan de Negocios de 2012 era un instrumento para reflotar el servicio ferroviario de carga en la zona como plataforma esencial del desarrollo económico del sureste de México, después de los daños producidos por el huracán Stan en 2005 y los insuficientes esfuerzos realizados desde entonces por el Gobierno de México para superar la situación");

c. **CWS-3-SPA**, ¶51 (Witness Statement-[redacted] [redacted] Claim Memorial) ("Finalmente, después de varias rondas de negociación y diversas revisiones al plan de negocios preparado por CFCM, en 2012, CFCM y la SCT llegaron a un acuerdo sobre la versión final del plan de negocios y de los nuevos términos de la Concesión").

363. Importantly, the 2012 Business Plan was not unilaterally created by CFCM, but rather a product of the collaborative effort of many parties in at least two respects. First, the 2012 Business Plan built on top of several findings from the [redacted] Report, a global logistics and transport consultancy that has provided comprehensive services since 1988. Second, the 2012 Business Plan was negotiated and prepared with the SCT, and the SCT ultimately approved the Business Plan and served as the basis for the Amendment, reflecting the SCT's agreement with the financial projections described therein.

Proofs:

a. **C-119-SPA** (New business plan agreed by the SCT and CFCM dated 2012) (evidencing that the 2012 Business Plan was negotiated, prepared and approved by CFCM and the SCT);

b. *See* **C-204-ENG** (██ website, available at ██ ██
██
(evidencing that ██ is a global logistics and transport consultancy that has provided comprehensive services since 1988);

c. **C-102-SPA** (Business Plan prepared by ██ for CFCM, dated June 2010) (evidencing that the 2012 Business Plan was built on the findings by ██

d. **CWS-2-SPA**, ¶35 (Witness Statement-██ ██Claim Memorial) ("Para esta mesa de trabajo, CFCM me designó como interlocutor único, mientras que la SCT designó al señor ██ El Sr. ██ y yo tuvimos diversas reuniones de trabajo principalmente durante los meses de enero y febrero de 2012, en las que intercambiamos opiniones respecto de diferentes aspectos de la propuesta de plan de negocios. Recuerdo que se revisaron los planes de inversión, las proyecciones de carga con base en el estudio elaborado por ██ el esquema tarifario y el resto de las variables operativas");

e. **C-11-SPA** (Amended Concession dated 22 October 2012) (reflecting that the Concession Agreement was amended based on the 2012 Business Plan).

3) The price of CFCM's freight transportation services and other sources of revenue can be determined with reasonable certainty

364. The price of the freight transportation services to be provided by CFCM after resuming the operation of the Concession can be determined with reasonable certainty. The 2012 Business Plan—approved by the SCT—contains forecasted tariffs for CFCM that are reasonable.

Proofs:

a. **CER-1-ENG**, ¶78 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial);

b. **C-119-SPA** (New business plan agreed by the SCT and CFCM dated 2012) (reflecting CFCM's forecasted tariffs).

365. Messrs. De Marco and Medvedeff explain that revenues projected in the 2012 Business Plan were mostly associated with freight transportation (87%) but also included revenues from terminal services, car hire, and car repair, among others. Traffic projections were based on a demand study conducted by ██ while freight rates were projected based on assigning a rate to each destination-origin route with capturable traffic determined according to the type of product to be transported and the historical tariffs applied in the Concession.

Proofs:

a. **CER-1-ENG**, ¶78 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial);

b. **C-119-SPA** (New business plan agreed by the SCT and CFCM dated 2012) (showing that the revenues projected in the 2012 Business Plan were mostly associated with freight transportation, terminal services, car hire, and car repair, among

others).

366. Messrs. De Marco and Medvedeff conclude that CFCM and SCT agreed on their expectations regarding the Concession's cash flows and that it would be reasonable to assume that, had Mexico complied with its obligations and returned the operation of the Concession to CFCM, CFCM would have operated the Concession based upon the 2012 Business Plan, including the agreed expectations of revenue.

Proofs:

a. **CER-1-ENG**, ¶¶120 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial);
b. **C-119-SPA** (New business plan agreed by the SCT and CFCM dated 2012) (reflecting CFCM's and the SCT's expectations regarding the Concession's cash flows).

4) The availability of financing for CFCM's operation of the Concession was certain

367. There was no uncertainty regarding the availability of financing. The 2012 Business Plan reflected CFCM's commitment to invest more than USD $200 million in the Concession and the SCT's commitment to return the Chiapas Line in optimal operating conditions. Additionally, the 2012 Business Plan factored in the SCT's commitment to return the Concession without labor debt and to indemnify CFCM for any losses arising from environmental damage caused during FIT's operation of the Concession.

Proofs:

a. *See supra*, Section III.G (The SCT Committed to Return the Concession to CFCM);
b. **CER-1-ENG**, ¶¶77 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial);
c. **CWS-2-SPA**, ¶37.b (Witness Statement-[redacted] Claim Memorial) ("CFCM se comprometió a implementar un nuevo plan de inversiones por un valor aproximado de USD $201 millones una vez se le devolviera la operación de la Concesión. A nivel de inversiones en vía, el programa incluía inversiones importantes en la Vía Mayab para que se pudieran operar carros a una velocidad de 30 kilómetros por hora a lo largo del periodo de Concesión, tal y como determinó [redacted] en su estudio. El plan de inversiones incluía también, entre otros, inversiones en tecnología de transporte para mejorar la calidad del servicio y terminales para dar soluciones logísticas integrales a un mayor número de clientes");
d. **C-119-SPA** (New business plan agreed by the SCT and CFCM dated 2012) (reflecting the sources of financing of the Concession);
e. **C-121-SPA** (Letter from CFCM to the SCT dated 4 June 2012) (showing that CFCM requested amendment of the Concession Agreement, along with the formal approval of the 2012

Business Plan, the termination of the Modality, and the restitution of CFCM's assets in FIT's custody);

f. **C-11-SPA** (Amended Concession dated 22 October 2012) (evidencing the SCT's commitment to return the Concession without labor debt and to indemnify CFCM for any losses arising from environmental damage).

368. Further, through the 2012 Convenio, the SCT and CFCM sought to ensure the operative and financial future of rail freight services in the region of the Concession in the long term.

Proofs:

a. **C-122-SPA** ("Convenio" executed between CFCM and the SCT dated 23 October 2012) (reflecting the SCT's and CFCM's agreement to ensure the financial and operative viability of the Concession);

b. **CWS-2-SPA**, ¶50 (Witness Statement-[redacted] Claim Memorial) ("…el 23 de octubre de 2012, CFCM y la SCT celebraron un convenio para procurar la viabilidad operativa y financiera del transporte ferroviario en el sureste del país, en donde la SCT se comprometió a finalizar ciertas obras en proceso, incluyendo el libramiento ferroviario de Tapachula (en la Vía Chiapas) e incorporarlo a la Concesión, así como concluir el acceso a las instalaciones de Pemex en Tapachula (en la Vía Chiapas), el acceso a puerto Chiapas y la entrada de Guatemala (el "Convenio")").

369. Finally, the SCT proposed to invest additional funds into the Concession. In a draft agreement to the 2014 Convenio dated December 2013, the SCT proposed to invest additional funds into the Concession totaling MXN 4.1 billion. Moreover, in Mexico's 2014 Infrastructure Plan, the SCT reiterated and expanded its commitments to invest MXN 6.58 billion into the Concession.

Proofs:

a. *See supra*, Section III.I (The SCT Agreed to Make Additional Investments to the Concession);

b. **CWS-2-SPA**, ¶61 (Witness Statement-[redacted] Claim Memorial) ("Inicialmente, la SCT propuso comprometer recursos federales por MXN$4,100 millones durante los primeros cinco años. … Adicionalmente, durante las discusiones sobre el monto a ser invertido por la SCT, ésta decidió solicitar la opinión del FIT sobre los requerimientos de inversión. El FIT, después de realizar su análisis, concluyó que la inversión que era requerida era de MXN$6,058,370,175.00");

c. **C-137-SPA**, p. 4 (Draft "convenio" prepared by the SCT dated 2 December 2013) (indicating that the SCT committed to comply with Resolution 811, and provide further funds to restore the condition of the Chiapas-Mayab Railway);

d. **C-15-SPA**, p. 17 (Mexico's 2014-2018 National Infrastructure Program dated 19 April 2014) (showing Mexico confirmed it

would invest MXN $6.058 billion in the Concession).

370. Thus, there was no uncertainty regarding the availability of financing. The 2012 Business Plan details the financing method for the operation of the Concession, and there were firm commitments by the SCT to invest significant sums into the Concession.

Proofs:

a. *See supra*.

5) Compass Lexecon was able to calculate a meaningful WACC

371. In its report, Messrs. De Marco and Medvedeff (Compass Lexecon) were able to calculate a meaningful post-tax shield real WACC, representing a reasonable country risk premium of 7.04% as of 25 July 2016.

Proofs:

a. **CER-1-ENG**, ¶138 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

372. Messrs. De Marco and Medvedeff (Compass Lexecon) explain that the 2012 Business Plan reported a discount rate of ███, which is consistent with a WACC exclusive of the effect of the tax shield and expressed in real terms. To compute CFCM's fair market value as of the Valuation Date, Messrs. De Marco and Medvedeff adjusted the pre-tax shield real WACC established in the 2012 Business Plan, to calculate a post-tax shield real WACC as of 25 July 2016. For this purpose, Compass Lexecon: (**a**) computed its own estimate of CFCM's pre- and post-tax shield real WACC rates as of June 2012 (*i.e.*, the date of approval of the 2012 Business Plan) and July 2016 (the date of the *rescate*); (**b**) noted that the pre-tax shield WACC for June 2012 agreed in the 2012 Business Plan represents 0.87 times Compass Lexecon's estimate of pre-tax shield real WACC for June 2012 (*i.e.*, 9.19%); and (**c**) applied such 0.87 factor to its estimate of CFCM's post-tax shield as of 25 July 2016 (*i.e.*, 8.09%). Using this methodology, Messrs. De Marco and Medvedeff (Compass Lexecon) were able to calculate the post-tax shield real WACC at 7.04% as of 25 July 2016.

Proofs:

a. **CER-1-ENG**, ¶¶134-138 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

6) There was little uncertainty on the potential impacts of regulation in the railway sector

373. Finally, there was little to no uncertainty on the potential adverse impacts of regulation, as the scope and effects of any potential regulations were highly predictable and with little potential adverse effect on the Concession. The Amendment expressly recognizes that CFCM had complied with the terms of the Concession, as demonstrated by the systematic inspections performed by the SCT. This includes compliance with any regulatory requirements during several years of operation. In addition, the 2012 Business Plan granted CFCM a one-year grace period to comply with applicable laws and regulations.

Proofs:

a. *See supra*, Section III.I (The SCT Agreed to Make Additional Investments to the Concession);
b. **C-119-SPA**, p. 14 (New business plan agreed by the SCT and CFCM dated 2012) (evidencing the agreed one-year period to comply with applicable laws and regulations);
c. **C-11-SPA**, p. 4 (Amended Concession dated 22 October 2012) (indicating that CFCM complied with all the terms of the Concession Agreement).

374. Accordingly, the use of a DCF method is fully justified in the present case and is the only method to achieve full reparation. The conditions of the Concession as of the Valuation Date and all the relevant facts strongly support the use of the DCF method as the appropriate way to value Claimant's investment, even more so than in the precedents discussed above. To summarize the relevant factors supporting the use of the DCF method:

- CFCM has a historical record of successful financial performance, as it successfully operated the Concession between 1999 and 2005.
- CFCM developed with the SCT the 2012 Business Plan, which adopted in a "*tempore insuspecto*" and expressly approved by the SCT.
- CFCM had all the necessary regulatory approvals to operate the Concession.
- CFCM was operationally ready. In the years leading up to the return of the operation of the Concession, CFCM had taken all the necessary steps to be ready to operate the Concession.
- The inputs for a DCF valuation based on information available as of the Valuation Date are all cognizable and reliable. The various inputs underlying Messrs. De Marco and Medvedeff's valuation are discussed in further detail below.

Proofs:

a. *See supra*.

375. The facts here support the computation of damages by reference to an income-based approach even more so than in the other arbitrations discussed in *supra* Sections VII.C and VII.C.1. CFCM was prepared from a regulatory, contractual, operational readiness, and financing standpoint to profitably operate the Concession. As of the Valuation Date, CFCM also had in place everything required to reliably estimate future revenues and costs with a detailed business plan that was approved by the SCT.

Proofs:

a. **CER-1-ENG**, ¶¶117-121 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial)

376. CFCM was unable to proceed with profitable operations due to the Mexican government's interference in issuing the *rescate* declaration (without paying compensation). Under these circumstances, in order to give effect to the compensation standard applicable here and wipe out all the consequences of Mexico's unlawful conduct, Claimant's damages must be computed by reference to the present value of the profits that it lost computed on an income-based approach. Anything less will not adequately compensate Claimant for the fair market value of its investment as of the Valuation Date.

Proofs:

a. **CER-1-ENG**, ¶¶103-108 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial);
b. **C-16-SPA** (Rescate Declaration dated 13 July 2016, served on CFCM on 26 July 2016);
c. *See supra*.

D. Compass Lexecon has Provided a Reliable DCF Valuation of the Damages

377. Compass Lexecon has valued the damages suffered by Claimant and CFCM by assessing their investment by reference to the DCF method described above.[10] As explained by Compass Lexecon, an income approach estimates the value of an asset based on the cash flows it will generate, the time during which these cash flows are going to be generated, and the level of risk associated with generating cash flows. The most widespread method of applying the income approach is the DCF method, which determines value on a particular date on the basis of the net cash flows that the asset is expected to generate over time and then brings them to a present value by computing an appropriate discount rate.

Proofs:

a. **CER-1-ENG**, ¶¶99-108 (Expert Report-Messrs. De Marco and

[10] *See supra*, Section VII.B (An Income-Based Valuation is the Appropriate Method for Valuing Claimant's Damages).

Medvedeff (Compass Lexecon)-Claim Memorial).

378. In estimating future cash flows, Messrs. De Marco and Medvedeff used as their starting point the 2012 Business Plan. As the experts explain, CFCM and the SCT worked collaboratively to develop the agreed-upon 2012 Business Plan and recognized that the purpose of the Concession's Amendment was to implement the 2012 Business Plan. In particular, in the 2012 Business Plan, CFCM and the SCT agreed on: (**a**) their expectations regarding the Concession's cash flows and (**b**) the appropriate rate to discount those cash flows. Therefore, Compass Lexecon concluded that it would be reasonable to assume that, had Mexico complied with its obligations and returned the operation of the Concession to CFCM, CFCM would have operated the Concession based on the 2012 Business Plan.

Proofs:

a. **CER-1-ENG**, ¶¶114-121 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

379. Compass Lexecon's reliance on the 2012 Business Plan as a starting point for its DCF valuation is particularly appropriate because it is highly persuasive evidence according to other tribunals faced with resolving disputes analogous to the instant action. Indeed, international tribunals have frequently relied on pre-expropriation ordinary-course-of-business planning documents for valuation purposes because they reflect the best evidence of the business expectations and projections at a non-suspect time, prior to the dispute arising. For instance, the *ADC v. Hungary* tribunal emphasized the importance of relying on pre-expropriation ordinary course of business planning documents for the "best evidence … of expectations" for the business "at the time of expropriation."

Proofs:

a. **CL-76-ENG**, ¶507 (*ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, de 2 de octubre de 2006);
b. **CL-117-ENG**, ¶771 (*Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A., PDVSA Cerro Negro, S.A.*, ICC Case No. 15416/JRF/CA, Award, dated 23 December 2011) ("…the Tribunal again considers that the FY 2007 budget is the most accurate reflection of the Parties' intent and expectation for the Project's production, as well as costs. Indeed, the Parties agreed to this budget before the dispute arose. The budget also accurately indicates the anticipated SCO production and costs absent Discriminatory Measures. Finally, there is ample evidence in the record that it is not only feasible, but also probable that the Project, had it continued, could have met the budget - not only for 2008, but also for the years thereafter").

380. Likewise, the tribunal in *Rusoro v. Venezuela* recognized the importance of "reliable projections of its future cash flow, ideally in the form of a detailed business plan adopted in *tempore insuspecto*" to prepare a DCF valuation.

Proofs:

a. **CL-73-ENG**, ¶759 (*Rusoro Mining Ltd. v. Venezuela,* ICSID Case No. ARB(AF)/12/5, Award, dated 22 August 2016).

381. For the same reason, Compass Lexecon emphasizes in its report the reliability of the 2012 Business Plan:

> 116. As explained in Section III.2 above, CFCM and the SCT worked collaboratively and agreed upon a new business plan for the Concession (i.e., the 2012 Business Plan), and furthermore recognized that the purpose of the 2012 Concession Amendment was to implement this new business plan.
> 117. In particular, in the 2012 Business Plan, CFCM and the SCT agreed upon:
> a. The expected cash flows resulting from the operation of the Concession…
> …
> b. The appropriate rate to discount those cash flows. …
> …
> 118. Based on the "2012 Business Plan", we estimate that CFCM and the SCT expected that the Concession would be worth USD 74.2 million as of June 2012, on pre-tax basis.
> …
> 119. We understand that CFCM and SCT did not modify the 2012 Business Plan before the date of the 2016 *Rescate* Declaration.
> 120. Consequently, we consider it reasonable to assume that, had Mexico complied with its commitments under the 2012 Concession Amendment, and returned the secured assets and the concessioned railroads to CFCM in good physical and operating condition (i.e., as stated by the SCT in its Oficio 811) by July 25, 2016, CFCM would have operated the Concession based on the commitments agreed upon in the 2012 Concession Amendment, including the 2012 Business Plan.
> 121. In sum, we base our assessment of the "fair market value" of CFCM in the but-for scenario on the 2012 Business Plan agreed upon between CFCM and SCT.

Proofs:

a. **CER-1-ENG**, ¶¶116-121 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

382. Compass Lexecon did not, however, simply adopt the 2012 Business Plan's model. Compass Lexecon evaluated the inputs to the 2012 Business Plan, considered the information that would have been available relating to the inputs as of the Valuation Date, and made adjustments and updates as it considered appropriate in deriving its own valuation:

> 122. To acknowledge that the valuation of CFCM ought to be performed as of the date immediately before the 2016 Recovery Declaration (i.e., July 25,

2016), we implement a series of adjustments to update the 2012 Business Plan valuation to the July 25, 2016, valuation date. In sum:
a. Step #1: We reduced the life of the Concession by approximately 4 years, as CFCM would have resumed operations on July 25, 2016, instead of June 30, 2012 (n.b., as expected in the 2012 Business Plan). Note that, for the purposes of this assessment, we assume that the end of the Concession remains unchanged on August 31, 2049.
b. Step #2: We updated the cash flow projections, to recognize that the Mexican rail freight traffic and the macroeconomic conditions have changed between 2012 and 2016.
c. Step #3: We updated the discount rate to July 25, 2016, taking into account the evolution of the financial markets' data between 2012 and 2016.

Proofs:

a. **CER-1-ENG**, ¶122 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

383. The key elements of Compass Lexecon's DCF analysis to update the figures of the 2012 Business Plan are described below and comprise of: (a) in a first scenario, Compass Lexecon reduced the life of the Concession by approximately 4 years, considering CFCM would have resumed operations on 25 July 2016 and assuming the Concession term would not have been extended; (b) in a second scenario, Compass Lexecon assumed that the Concession would have been extended for 1243 days due to the SCT's delay in returning the operation of the Concession to CFCM; (c) updated the cash flow projections to reflect the changes in market conditions between 2012 and 2016; and (d) updated the discount rate to 25 July 2016 to reflect the changes in market conditions between 2012 and 2016. Messrs. De Marco and Medvedeff's (Compass Lexecon) report describes each input in its DCF analysis in greater detail.

Proofs:

a. **CER-1-ENG**, ¶¶122-141 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial);
b. *See infra*, Sections VII.D.1-VII.D.4.

1) Update of the starting date and term of the Concession (scenario 1)

384. The first step in Compass Lexecon's update of the 2012 Business Plan was to assume that the execution of the 2012 Business Plan would have started on 25 July 2016, as opposed to June 2012, as originally assumed in the 2012 Business Plan. Consequently, Compass Lexecon applied two adjustments to the 2012 Business Plan: (**a**) assumed that the original cash flows projected in the 2012 Business Plan would have been delayed 4 years; and (**b**) assumed that the end of the Concession would remain fixed on August 31, 2049, and consequently that the life of the Concession would have been reduced by 4 years, from approximately 38 years to approximately 34 years.

Proofs:

a. **CER-1-ENG**, ¶¶125-126 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

2) Update of the starting date and term of the Concession (scenario 2)

385. In a second, alternative scenario, Compass Lexecon equally assumed that the execution of the 2012 Business Plan would have started on 25 July 2016, as opposed to June 2012, and assumed that the original cash flows projected in the 2012 Business Plan would have been delayed 4 years. In this second scenario, however, Compass Lexecon assumed that the term of the Concession would be extended by 1243 days (approximately 3.4 years) to reflect the SCT's delay in returning the operation to CFCM from February 2013 to July 2016.

Proofs:

a. **CER-1-ENG**, ¶¶142-145 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

386. According to the Amendment, the term of the Concession Agreement was extended twenty years from the original thirty years, for a total of fifty years (until 2049). Further, CFCM's exclusive right to operate the Chiapas-Mayab Railway was extended twelve years from the original eighteen years, for a total of thirty years (until 2029). The SCT would return the operation of the Concession to CFCM by 28 February 2013.

Proofs:

a. **C-11-SPA**, pp. 4-5 (Amended Concession dated 22 October 2012) (indicating that the Amendment extended the term of the Concession Agreement);
b. **C-12-SPA**, p. 99 (Official Letter 4.3.811/2012 dated 22 November 2022) (showing that the SCT agreed to return the operation of the Concession by 28 February 2013).

387. The SCT delayed the return of the operation of the Concession to CFCM. Assuming that the SCT would have returned the operation on 25 July 2016 (*i.e.*, one day before the *rescate* declaration), this would have resulted in a delay of three years and five months. As a direct consequence of the delay, CFCM would have had the ability to request an extension of the term of the Concession at least for a time equivalent to such delay, subject to the fulfillment of certain basic conditions established by law. As such, but for Mexico's measures, CFCM could have generated cash flows in connection with the Concession for a total of approximately 53.4 years.

Proofs:

a. **CL-14-SPA**, Article 11 (Mexico's Railway Service Regulation) (showing that concessions may be extended for a term not exceeding 50 years).

388. Investment tribunals tasked with computing damages payable to claimants who have been deprived of the value of their investments associated with state-granted concessions or licenses have recognized that a fair market value assessment requires ascribing value to extension periods available to the investors. In *CME v. Czech Republic*, for example, the tribunal ruled that it "cannot accept" an argument that the license at issue would not have been renewed and "the possibility of a nonrenewal of the license" without a justifiable basis "must be disregarded as a matter of fact," and could very well have amounted to "another severe breach of the Treaty and must be put aside when determining the value of [the investment]."

Proofs:

a. **CL-82-ENG**, ¶605 (*CME Czech Republic B.V. (The Netherlands) v. Czech Republic* (UNCITRAL), Final Award, dated 14 March 2003).

389. Similarly, in *LETCO v. Liberia*, the tribunal computed lost profits for a total concession period of 35 years, 20 of which related to an "initial period" and 15 years of which related to "a second period" available to the investor if it had, among other things, complied with the terms of the concession. The tribunal granted cash flows for the second period on the following reasoning: "Given LETCO's past compliance with the terms of the Concession Agreement, the Tribunal believes that the Concession Agreement would in fact have been renewed had LETCO so desired."

Proofs:

a. **CL-104-ENG**, ¶¶105-106 (*Liberian Eastern Timber Corporation v. Liberia,* ICISD Case No. ARB/83/2, Award, dated 31 March 1986).

390. In the Amendment, the SCT acknowledged CFCM's compliance with the terms of the Concession, as demonstrated by the systematic inspections performed by the SCT. Moreover, the Rescate Notice did not assert or allege any breach by CFCM of the Concession Agreement, but rather justified the *rescate* for reasons of public utility, public interest and national security. The evidence reflects that CFCM complied with all of its obligations under the Concession Agreement.

Proofs:

a. **C-11-SPA**, p. 4 (Amended Concession dated 22 October 2012) (indicating that CFCM complied with all the terms of the Concession Agreement);
b. **C-161-SPA** (Rescate Notice issued by the SCT dated 4 May 2016) (indicating that the Rescate Notice was issued for reasons of public interest, public utility, and national security);
c. **CWS-2-SPA**, ¶46 (Witness Statement-[redacted] [redacted] Claim Memorial) ("Considero importante resaltar que la SCT reconoce expresamente en la Concesión Enmendada que CFCM había cumplido con todas sus obligaciones bajo la

Concesión hasta esa fecha. La Concesión Enmendada afirma que CFCM 'ha cumplido con las condiciones previstas en la concesión que le fue otorgada; de acuerdo con las verificaciones sistemáticas practicadas.'").

391. Given CFCM's good standing under the Concession, it is reasonable to assume that CFCM would have been granted the extension for a period at least equal to the SCT's delay in returning the operation of the Concession to CFCM (1243 days or approximately 3.4 years). A buyer in the market would have ascribed value to this subsequent extension period. As cash flows that are estimated to occur later in time resolve to a lower present value as compared to cash flows that are estimated to occur earlier in time, the DCF calculation automatically risk-adjusts the later-in-time cash flows. In other words, the DCF calculation automatically factors in higher risks associated with cash flows after the initial 50-year term, and ascribes a value to them consistent with that risk level.

Proofs:

a. **CER-1-ENG**, ¶¶142-148 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial);
b. *See supra*.

3) Update of the cash flow projections to reflect the changes in the market conditions

392. Because the first year of the 2012 Business Plan would occur in 2016, Compass Lexecon's DCF analysis incorporates two macroeconomic assumptions: traffic (*i.e.*, growth in rail freight traffic) and inflation (*i.e.*, change in the general level of prices).

Proofs:

a. **CER-1-ENG**, ¶127 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

393. Railway traffic needed to be updated because it is an input that affects CFCM's revenue and variable costs. To update the traffic input, Compass Lexecon based its analysis on annual statistics reports published by the SCT, which reported that the rail freight traffic in Mexico increased by 7% between 2012 and 2016. To properly adjust for such an increase, Compass Lexecon assumed two different scenarios in the 2012 Business Plan: one assuming that the Concession would not have been extended, and another assuming an extension of 1243 days.

Proofs:

a. **CER-1-ENG**, ¶¶127-133, 145-146 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

394. In the first scenario, Compass Lexecon: (**a**) increased the projections for 2012 by 7% to obtain the updated traffic for year 2016; (**b**) applied the consecutive growth rates assumed in the 2012 Business Plan to the updated traffic for year 2016, until 2029 (when CFCM's exclusivity

period would come to an end according to the Amendment); and (**c**) from then onwards, applied the same growth rates specified in the 2012 Business Plan (assuming the Concession's term would come to an end according to the Amendment). In the second scenario, to account for the extension of the Concession, Compass Lexecon: (**a**) relied on the cash flow projections of the 2012 Business Plan for the years 2045 to 2049; and (**b**) updated the 2045-2049 cash flow projections to recognize that the Mexican rail freight traffic and the macroeconomic conditions have changed between 2012 and 2016.

Proofs:

a. **CER-1-ENG**, ¶¶127-133, 145-146 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

395. Separately, inflation needed to be updated because it affects CFCM's revenues and expenditures. For the inflation input update, Compass Lexecon based its analysis on the information published by the US Bureau of Labor Statistics, which reported an inflation increase of 4.86% between 2012 and 2016. To incorporate such inflation into the 2012 Business Plan, Compass Lexecon increased the following variables by 4.86%: (**a**) revenues, by adjusting the rail freight rates charged to customers; (**b**) operating expenses, by adjusting both the fixed operating costs and the variable cost ratios; (**c**) capital expenditures; and (**d**) working capital, by adjusting both revenues and operating expenses.

Proofs:

a. **CER-1-ENG**, ¶¶131-133 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

4) Update of the discount rate

396. As explained above,[11] Compass Lexecon was able to calculate a meaningful WACC. Messrs. De Marco and Medvedeff: (**a**) computed their own estimate of CFCM's pre- and post-tax shield real WACC rates as of June 2012 and July 2016; (**b**) noted that the pre-tax shield real WACC for June 2012 agreed in the 2012 Business Plan (*i.e.*, 8%), represented 0.87 times their own estimate of the pre-tax shield real WACC for June 2012 (*i.e.*, 9.19%); and (**c**) applied such 0.87 factor to their estimate of CFCM's post-tax shield as of 25 July 2016 (i.e., 8.09%). Using this methodology, Compass Lexecon estimated a post-tax shield real WACC of 7.04% as of 25 July 2016. Messrs. De Marco and Medvedeff's (Compass Lexecon) report describes its discount rate in greater detail.

Proofs:

a. **CER-1-ENG**, ¶¶134-138 (Expert Report-Messrs. De Marco

[11] *See supra*, Section VII.D.5 (Compass Lexecon was able to calculate a meaningful WACC).

and Medvedeff (Compass Lexecon)-Claim Memorial).

397. In summary, Messrs. De Marco and Medvedeff's (Compass Lexecon) DCF calculations yield a fair market value of: (**a**) ██████████ (reflecting a first scenario of a 50 year Concession period); or (**b**) ██████████ (reflecting the second scenario of a 53.4 year Concession period). Both of these calculations are before the addition of pre-award interest.

Proofs:

a. **CER-1-ENG**, ¶¶141, 148, 213 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

E. Alternatively, Compass Lexecon has Provided a Reliable Cost-Based Valuation of the Damages

398. Alternatively, in the event the Tribunal considers that the DCF method is not appropriate (it should not), Compass Lexecon also valued Claimant's damages under a cost-based approach, specifically using the replacement cost method. This is the same methodological framework followed by INDAABIN in its 2018 Valuation Report concerning the compensation owed to CFCM as a consequence of the *rescate* declaration.

Proofs:

a. **CER-1-ENG**, ¶¶149-173 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).
b. **C-177-SPA** (INDAABIN Report dated 16 October 2018) (showing that INDAABIN used a cost-based approach in its 2018 Valuation report).

399. The replacement cost method is often considered a deficient method of valuating a business because it assumes that it is possible to reconstruct the value of the entire investment simply by replacing its physical assets. As some investment tribunals have opined, the replacement value approach looks at what the investor has put in, not what the investor expected to derive from the investment. Thus, a cost-based valuation will not achieve full reparation nor reflect the fair market value of a claimant's investment. For these reasons, the replacement cost method is rarely used as the primary method of valuing a business on a going-concern basis. For the purposes of valuing a business, asset-based methods—such as the replacement cost method—generally produce a less reliable result than income-based methods—such as the DCF method—or market-based methods and are only used when these other methods are considered inappropriate.

Proofs:

a. **CL-105-ENG**, ¶¶160-161 (*Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, dated 9 September 2009) ("The 'replacement value' approach to valuation looks to what the investor has put in, not what the investor could expect to derive

from the investment - at what the investment cost rather than at what it was worth. But there is no necessary relationship between cost and value… In the context of expropriation, replacement cost is therefore less helpful than a valuation based upon expected profits.");

b. **CL-106-ENG**, ¶593 (*OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, dated 29 July 2014) ("Third, as both Parties have noted, a valuation based on a refinery's deferred replacement cost 'is typically not used by buyers and sellers of refineries.' The deferred replacement cost of the technical installation says little about the value of Ukrtatnafta in the specific economic context of the Ukrainian refining market, with its significant geographic and geopolitical challenges and equally significant business opportunities.");

c. **CL-103-ENG**, p. 316 (Herfried Wöss et al., *Damages in International Arbitration Under Complex Long-Term Contracts*, OUP, 2014) ("…the book value…[is] often based on rules that do not necessarily reflect economic reality, but [is] instead used for practical and comparative purposes, such as inventory and depreciation rules. For these reasons, book value is not always well-suited for determining the value of an on-going business").

400. In this case, however, Claimant has instructed Compass Lexecon to provide a valuation under a cost-based approach, because it is undisputed by Mexico that Claimant (and CFCM) are entitled, at least, to recover its costs. As discussed, on 28 January 2021, the Sixth Circuit Court issued the 2021 Decision where it declared that CFCM was entitled to compensation for the investments made in the Concession.

Proofs:

a. *See supra*, Section III.N (CFCM Challenged the Rescate Proceeding before Mexico's Courts);

b. **C-18**, p. 141 (Decision of the Sixth Circuit Court dated 28 January 2021) (recognizing that CFCM was entitled to compensations for the investments made in the Concession).

401. Based on Claimant's instruction, Messrs. De Marco and Medvedeff's (Compass Lexecon) have valued Claimant's (and CFCM's) damages under a cost-based approach, in as of 25 July 2016, before the addition of pre-award interest.

Proofs:

a. **CER-1-ENG**, ¶173 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

402. To determine the value of CFCM's historical investments as of 25 July 2016, Messrs. De Marco and Medvedeff's (Compass Lexecon) implemented a five-step methodology. The first step in Compass Lexecon's valuation was to compute the nominal gross amounts invested by CFCM in the assets used for the operation and exploitation of the Concession, between: (i) 17 August 1999 (when CFCM made cash payments to obtain the Concession rights, acquire movable

assets, and constitute a trust to guarantee the execution of urgent rehabilitation works) and (ii) 10 August 2007 (when the SCT imposed the *"Modalidad"*). Compass Lexecon computed CFCM's nominal annual gross investments for each type of asset at [redacted].

Proofs:

a. **CER-1-ENG**, ¶¶156-162 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

403. The next step in Compass Lexecon's analysis was to express CFCM's nominal gross investments (computed in the first step) as of 10 August 2007 based on the evolution of the US Consumer Price Index ("**US CPI**"). To that end, Compass Lexecon multiplied the nominal gross investment amount for each year by the ratio between the US CPI on the date of each investment and the US CPI as of 10 August 2007. Compass Lexecon thus computed that CFCM's gross investments as of 10 August 2007 represented [redacted].

Proofs:

a. **CER-1-ENG**, ¶¶163-165 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

404. Compass Lexecon then computed the depreciation and amortization for each of CFCM's investments (as updated under the second step of the analysis), based on the useful life of each of CFCM's assets and the time elapsed between the date of each investment and 10 August 2007. To compute the annual depreciation and amortization, Compass Lexecon: (**a**) relied on the useful lives reported in CFCM's audited financial statements for each type of asset; (**b**) used straight-line depreciation, which was the approach followed by CFCM according to its audited financial statements; and (**c**) assumed that depreciation and amortization would only accrue until 10 August 2007, since investments occurring after the date of the "*Modalidad*" are beyond CFCM's responsibility. As a result, Compass Lexecon calculated that the depreciation and amortization of CFCM's annual investments by 10 August 2007 represent a total of [redacted].

Proofs:

a. **CER-1-ENG**, ¶¶166-168 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial);
b. **C-12-SPA** (Official Letter 4.3.811/2012 dated 22 November 2012) (showing that CFCM would not be responsible for the use of the sequestered assets from 10 August 2007).

405. Following that, Compass Lexecon computed the net amount invested by CFCM as of 10 August 2007 as the difference between CFCM's gross investment as of 10 August 2007 and the corresponding depreciation and amortization of those investments as of 10 August 2007. Compass Lexecon calculated CFCM's net investment at [redacted].

Proofs:

a. **CER-1-ENG**, ¶¶169-170 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

406. Finally, Compass Lexecon updated the net investment amount as of 10 August 2007 to 25 July 2016 (*i.e.*, the day before the *rescate* declaration was notified to CFCM), based on the evolution of the US CPI. Applying this inflation factor, CFCM calculated that CFCM's net investment represented [redacted] as of 25 July 2016.

Proofs:

a. **CER-1-ENG**, ¶¶171-173 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

407. Thus, considering that it is undisputed that Claimant (and CFCM) are entitled, at least, to recover their costs, Claimant is entitled, at minimum, to compensation totaling [redacted], before applying any pre-award interest.

Proofs:

a. **CER-1-ENG**, ¶¶149-173 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).
b. *See supra*.

F. A Fully Compensatory Award Must Grant Claimant Compound Interest at a Rate Commensurate to its Opportunity Cost

408. An award of interest is an integral component of the full reparation principle under international law, because, in addition to losing its property and other rights, an investor loses the opportunity to invest funds using the money to which that investor was rightfully entitled. A State's duty to make full reparation arises immediately after its unlawful act causes harm; to the extent that payment is delayed, the claimant loses the opportunity to use the funds for productive ends. That loss must be compensated in order to restore the claimant to the position that it would have occupied had the State not acted wrongfully.

Proofs:

a. **CL-77-ENG**, ¶8.3.20 (*Compañia de Aguas del Aconquija S.A and Vivendi universal S.A. v. Argentina*, ICSID Case. No. ARB/97/3, Award, dated 20 August 2007) (to give effect to "the *Chorzów* principle … it is necessary for any award of damages in this case to bear interest"), ¶ 9.2.1 ("the liability to pay interest is now an accepted legal principle");
b. **CL-107-ENG**, ¶¶396–401 (*Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, dated 6 February 2007) (applying the principle of "full reparation for the injury suffered" to the interest rate, the starting date of interest, and the decision to award compound interest).

409. As such, an award of interest is not separate from full reparation under the *Chorzów Factory* standard; it is a component of, and gives effect to, full reparation. The requirement of full reparation must inform all aspects of an award, including the determination of the appropriate rate of interest and whether such interest should be simple or compounded. In the words of the ILC Articles: "[i]nterest on any principal sum due … shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result."

Proofs:

a. **CL-108-ENG**, ¶114 (*Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, dated 27 June 1990) ("[T]he case-law elaborated by international arbitral tribunals strongly suggests that in assessing the liability due for losses incurred the interest becomes an integral part of the compensation itself, and should run consequently from the date when the State's international responsibility became engaged.");

b. **CL-109-ENG**, ¶174 (*Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of* Egypt, ICSID Case No. ARB/99/6, Award, dated 12 April 2002) ("Regarding such claims for expropriation, international jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation due after the award and that compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law in such expropriation cases.");

c. **CL-81-ENG**, pp. 235–39 (J. Crawford, The International Law Commission's Articles of State Responsibility: Introduction, Text and Commentaries (2005));

d. **CL-110-ENG**, p. 35 (J. Gotanda, A Study of Interest (2007) Working Paper Series 83) ("It is a settled principle that a respondent is liable for all damages that have accrued naturally as a result of the failure to perform its obligations. Liability includes the obligation to pay the claimant interest for its lost opportunity cost, which may be in the form of interest.");

e. **CL-12-ENG**, Article 38(1) (International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)) ("Interest on any principal sum payable under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.").

410. Under Article 1110(4) of NAFTA, Mexico agreed that compensation for a lawful expropriation "shall include interest at a commercially reasonable rate … from the date of expropriation until the date of actual payment." However, the "commercially reasonable rate" of interest is applicable only to damages owing for a lawful expropriation. The Treaty does not provide guidance on the rate of interest payable on damages owing for an unlawful expropriation or for a breach of the FET, FPS, or National Treatment standards. Thus, interest payable on damages flowing from such Treaty breaches must be calculated in a manner giving effect to the principle of full reparation and is not limited by the Treaty standard for lawful expropriations.

Proofs:

a. **CL-5-ENG**, Chapter 11, Article 1110(4) (NAFTA).

411. The loss to the Claimant for which an adequate award of interest must compensate is the opportunity cost of having been deprived of the funds in question. The focus on the investor's opportunity cost has been endorsed by a number of investment arbitration tribunals. The tribunal in *Vivendi v. Argentina* confirmed the rationale underlying this approach:

> The object of an award of interest is to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive.

Proofs:

a. **CL-77-ENG**, ¶¶9.2.3 (*Compañia de Aguas del Aconquija S.A and Vivendi universal S.A. v. Argentina*, ICSID Case. No. ARB/97/3, Award, dated 20 August 2007).

412. The full reparation standard might warrant a higher rate of pre-award interest compared to the Treaty standard of a "commercially reasonable rate." Messrs. De Marco and Medvedeff's (Compass Lexecon), however, compute interest in accordance with the latter "commercial reasonable rate" standard. In light of Mexico's unlawful conduct and failure to pay Claimant compensation commensurate with its losses as of the Valuation Date, Mexico has effectively availed itself of a loan from Claimant (*i.e.*, a "forced loan"). Under these circumstances, Messrs. De Marco and Medvedeff's (Compass Lexecon) consider that an appropriate rate is a rate consistent with CFCM's weighted average cost of capital (WACC) updated to 5 December 2024. Thus, the experts applied a pre-award interest rate of 9.18%, which results from adding the long-term expected inflation rate of 2.0% to CFCM's post-tax shield real WACC of 7.04% as of 25 July 2016.

Proofs:

a. **CER-1-ENG**, ¶¶212-213 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

413. Tribunals have repeatedly affirmed that compound interest best gives effect to the customary international law rule of full reparation. There is no longer any genuine debate that compound interest is the only way to compensate Claimant for the time value of its money. On this issue, the tribunal in *Gemplus v. Mexico* noted that the awarding of compound interest is enshrined in investment arbitration:

> [T]here is now a form of 'jurisprudence constante' where the presumption has shifted from the position a decade or so ago with the result it would now

be more appropriate to order compound interest, unless shown to be inappropriate in favour of simple interest, rather than vice-versa.

Proofs:

a. **CL-111-ENG**, ¶16–26 (*Gemplus, S.A. et al. v. Mexico*, ICSID Case Nos. ARB(AF)/04/3 and ARB (AF)/04/4, Award, dated 16 June 2010);

b. **CL-23-ENG**, ¶¶834, 843-845 (*Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. Ecuador*, ICSID Case No. ARB/06/11, Award, dated 5 October 2012) ("[M]ost recent awards provide for compound interest. This practice accords with the Chorzów principle as an award of compound interest will usually reflect the damages suffered."), ¶ 840 ("In summary, it may be seen that compound interest is the norm in recent expropriation cases under ICSID.");

c. **CL-113-ENG**, ¶¶324–325 (*Marion Unglaube and Reinhard Unglaube v. Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, dated 16 May 2012) ("For this purpose, we believe that the appropriate financial instrument is the 5-year Treasury Bill of the United States. The interest on those instruments is … capitalized every six months. The Tribunal has therefore applied to the base figure interest (para. 318) at the 5-year U.S. Treasury Bill rate, compounded semi-annually to the date of the award");

d. **CL-114-ENG**, ¶¶226, 228 (*Quasar de Valores SICAV SA et al. v. Russia*, SCC Case No. 24/2007, Award, dated 20 July 2012) ("The Tribunal accepts that as a matter of realism this includes the compounding of interest…");

e. **CL-115-ENG**, ¶¶307–316 (*Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9, Award, dated 5 September 2008) ("…Under international law, the Tribunal concludes that it may order compound interest if it is necessary to ensure full reparation…");

f. **CL-116-ENG**, ¶¶382–384 (*Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Award, dated 21 June 2011) ("The Arbitral Tribunal notes that … compound interest is in the present case to be preferred in order to eliminate the consequences of the conduct");

g. **CL-87-ENG**, ¶746 (*El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, dated 31 October 2011) ("Compound interest is generally recognised by arbitral tribunals in the field of investment protection, including all awards in the Argentine cases. The Tribunal shares the view expressed by these awards that compound interest reflects economic reality and will therefore better ensure full reparation of the Claimant's damage").

414. Compound interest "reflects economic reality in modern times," where "the time value of money in free market economies is measured in compound interest." In *Ioannis Kardassopoulos v. Georgia*, the tribunal was required to award interest under Article 13(1) of the Energy Charter Treaty, which required interest to be awarded at a "commercial rate." The tribunal decided to order that interest be compounded semi-annually.

Proofs:

a. **CL-67-ENG**, ¶¶658, 667–68 (*Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, dated 3 March 2010).

415. Based on the above, Claimant claims pre-award interest on the principal sum claimed of ████████. The interest accrued from the Valuation Date until 5 December 2024 (as a proxy for the date of the Award) on that basis amounts to ████████, for a total value of ████████.[12]

Proofs:

a. **CER-1-ENG**, ¶213 (Expert Report-Messrs. De Marco and Medvedeff (Compass Lexecon)-Claim Memorial).

416. Furthermore, to the extent that Mexico may not immediately satisfy an eventual damages award issued by the Tribunal, Claimant is entitled to compound interest accruing on such an Award from the date of the award until payment is made in full. The threat of post-award interest removes any incentive on the part of the Respondent to further delay the compensation to which Claimant is entitled.

Proofs:

a. **CL-80-ENG**, ¶¶470-471 (*CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, dated 12 May 2005) (awarding separate post-award interest to be compounded);
b. **CL-28-ENG**, ¶131 (*Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, dated 30 August 2000) (applying monthly compounding frequency arguably to expedite Mexico's payment);
c. **CL-112-ENG**, pp. 73–74 (*Occidental Exploration and Production Co. v. Ecuador*, LCIA Case No. UN3467, Final Award, dated 1 July 2004) (increasing simple interest rate from 2.75 percent (pre-award) to 4 percent (post-award));
d. **CL-89-ENG**, p. 389 (S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008) (hypothesizing that such "changes can be explained by the desire of some tribunals to ensure prompt compliance with the award by adding a punitive interest and thereby turning the post-award interest from a purely compensatory instrument into a sanction.").

417. For the above reasons, Claimant is entitled to be compensated by Mexico for the damages that it suffered as a result of Mexico's breaches of NAFTA and international law. The

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[12] Compass Lexecon also computed fair market values assuming that the Concession would not be extended past 2049, which yields ████████, and under the cost-based approach, which yields ████████.

award of compensation must wipe out all of the consequences of Mexico's unlawful conduct. Claimant is entitled to compensation based on the full reparation standard, based on a DCF method, and granting Claimant an award with compound interest.

Proofs:

a. *See supra*.

VIII.

RESPONDENT SHOULD BEAR THE COSTS AND FEES FOR THE ARBITRATION ON AN INDEMNITY BASIS

418. The Tribunal has broad discretion to award costs and fees, including the costs of the tribunal and the fees of attorneys, experts, and legal assistants. Article 61(2) of the ICSID Convention provides:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

Proofs:

a. **CL-6-ENG**, Article 61(2) (ICSID Convention).

419. Claimant seeks an Award of costs covering all the costs and fees incurred in connection with the arbitration on an indemnity basis. The only reason that Claimant has to incur such costs and fees is as a result of Mexico's unlawful conduct and Mexico's failure to pay compensation for the damages that Claimant suffered as a result of Mexico's unlawful conduct. Claimant will provide its full costs submission at the conclusion of this arbitration, or as otherwise directed by the Tribunal.

IX.

CONCLUSION

420. For the reasons set forth in this Memorial, the Tribunal must conclude that Mexico's conduct is unlawful under NAFTA and international law. Specifically, Mexico has violated Articles 1110 (Expropriation and Compensation), 1105 (Minimum Standard of Treatment) and 1102 (National Treatment) of NAFTA by failing to provide any compensation after expropriating a multimillion-dollar Concession, while compensating its own national investors in comparable situations.

421. Mexico declared the *rescate* without paying compensation. Consequently, the Tribunal must conclude that Claimant is entitled to compensation based on the full reparation standard, calculated by reference to the value of CFCM and Claimant's investment before the *rescate* of the Concession, *i.e.*, on 25 July 2016. But for Mexico's wrongful conduct, Claimant's investment would be worth [REDACTED], rising to [REDACTED] after accounting for full compensation, including pre-award interest.

X.

REQUEST FOR RELIEF

Claimant submits the following requests to the Tribunal.

Requests:

(i) A declaration that the dispute is within the jurisdiction and competence of the Arbitral Tribunal;

(ii) A declaration that Mexico breached the Treaty and international law. Specifically that:

a. Mexico breached Article 1110 of NAFTA by failing to pay full, prompt, adequate, and effective compensation after expropriating Mr. Willars' investment in contravention of the Treaty and international law;

b. Mexico breached Article 1105 of NAFTA and violated its obligation under the Treaty to treat Mr. Willars' investment fairly and equitably;

c. Mexico breached Article 1105 of NAFTA and violated its obligation under the Treaty to grant Mr. Willars' investment full protection and security; and

d. Mexico breached Article 1102 of NAFTA and violated its obligation under the Treaty to not treat Mr. Willars, or his investment, less favorably than its own nationals or their investments.

(iii) An order directing Mexico to compensate Claimant for his losses resulting from Mexico's breaches of the Treaty and international law, with such compensation to be paid without delay, be effectively realizable and be freely transferable, and bear (pre- and post-award) interest at a compound rate sufficient to fully compensate Claimant for the loss of the use of this capital as from the date of Mexico's breaches of the Treaty;

(iv) An order directing Mexico to pay pre-award and post-award interest to Claimant at the applicable rate until the date of Mexico's full and effective payment;

(v) A declaration that the award of damages and interest be calculated on a pre-tax basis;

(vi) An order directing Mexico to pay all of Claimant's costs relating to the present arbitration proceedings, including the fees and expenses of the Tribunal, the fees and expenses of ICSID, the fees and expenses relating to Claimant's legal representation, and the fees and expenses of any expert appointed by Claimant or the Tribunal, plus interest; and

(vii) An order granting any further relief to Mr. Willars that the Tribunal deems just and appropriate under the circumstances.

Claimant also reserves its right to alter, amend, and/or supplement its claims as necessary and in accordance with the applicable rules during the course of this arbitral proceeding.

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