IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/23/24

BETWEEN:

SILVER BULL RESOURCES, INC. **Claimant**

-and-

THE UNITED MEXICAN STATES **Respondent**

CLAIMANT'S REPLY

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25 APRIL 2025

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1. INTRODUCTION

1. Silver Bull Resources, Inc. ("**SVB**" or the "**Claimant**"), on its own behalf and on behalf of Minera Metalín S.A. de D.V. ("**Minera Metalín**"), submits this Reply Memorial ("**Reply**")[1] in support of its claims against the United Mexican States ("**Mexico**" or the "**Respondent**") under the Agreement between the United States of America, Mexico and Canada (the "**USMCA**"), and the North American Free Trade Agreement (the "**NAFTA**"), in accordance with the procedural calendar established by the Tribunal.[2]

2. The Tribunal in these proceedings has one factual question before it, from which all other issues proceed: Why did Mexico fail to intervene and restore the Claimant to its investment in the three years following installation of the Continuing Blockade in 2019 whereas it had done so immediately following imposition of the Initial Blockade in 2016?

3. Unhelpfully, Mexico's Counter-Memorial does not even attempt to answer that question.

4. Instead, the Counter-Memorial wheels out the same tired motifs advanced by other Latin American States in investment treaty mining disputes, none of which is apposite in the circumstances of this case:

- Mexico attempts to deflect responsibility for its inaction by characterizing the Continuing Blockade as a community dispute. In doing so, it overlooks the critical fact that the blockaders were not representative of the broader community but rather members of a private local mining cooperative, Mineros Norteños, whose corporate membership comprises just 144 individuals. By contrast, the Sierra Mojada district, immediately surrounding the Project is home to *thousands* of residents. According to the 2020 census, the municipality of Sierra Mojada has a population of 6,744 people, distributed across three primary communities: Hércules, home to many of Silver Bull's employees, has a population of 4,573 residents; La Esmeralda, the town closest to the Project site, has 948 residents; and the town of Sierra Mojada is home to 462 residents.[3] Clearly, Mineros Norteños does not speak for the wider community. In fact, the government-backed Continuing Blockade by Mineros Norteños has economically marginalized these thousands of residents, depriving them of the significant economic

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1 Abbreviations and terms used in the Claimant's Memorial will have the same meaning in this Reply.

2 Revised Procedural Timetable (Replaces Annex B of the Procedural Order No.1) approved by the Tribunal on 28 October 2024; ICSID letter to the Parties, 22 April 2024.

3 2020 Census data for Sierra Mojada, **C-0361**.

opportunities the Sierra Mojada Project would have provided. But, even if this were some form of "community dispute," *quod non*, that still does not explain why Mexico felt it necessary to intervene in a so-called community dispute in 2016 but not in 2019. The election of the AMLO administration and its vocal anti-foreign mining stance provides a ready-made answer.

- In a further effort to deflect blame from its inaction, Mexico asserts that the Continuing Blockade was nothing more than a "peaceful demonstration" despite clear evidence to the contrary. Contemporaneous audio recordings and reports from Mexico's own law enforcement agencies included in the criminal file – which Mexico has withheld from disclosure in bad faith and which SVB has gone to great lengths to obtain independently – show that there was nothing "peaceful" about the Continuing Blockade and the threat of violence that underlay Mineros Norteños's demands. As those reports demonstrate, within weeks of the imposition of the Continuing Blockade, Mexico knew and had evidence of Mineros Norteños's unlawful seizure and occupation of the Project site, its wrongful confinement and effective kidnapping of SVB personnel at the camp, and the identity of those responsible. Yet, Mexico still took no action.

- What is more, Mexico's lone factual witness in these proceedings, Mr. Lorenzo Fraire Hernandez, a leader of Mineros Norteños, has a documented history of physical violence and is hardly the poster child for "peaceful demonstrations" – facts that will be explored extensively with him should Mexico make him available for cross-examination. But the Tribunal must not lose sight of the overall point – this potential for violence, teamed with the clear unlawfulness of the Continuing Blockade is precisely why Mexico *did act* in 2016 and makes Mexico's failure to explain its refusal to do so in 2019 so unhelpful to the Tribunal.

- It also belies Mexico's *post hoc* justification that it was powerless to intervene. Mexico can and has used appropriate force and other measures to end similar mining blockades in Mexico, but has failed to take *any* reasonable action (let alone forceful action) in this case. Remarkably, Mexico has not proffered a single witness from its law enforcement or prosecutorial agencies to testify as to why Mexico took no action with respect to the Continuing Blockade. Nor has Mexico produced any contemporaneous documents from those agencies. Indeed, to date, Mexico has produced a total of *four* documents relating to the factual circumstances of this case in response to SVB's document requests. Rather than explain why it took no action,

Mexico's defence is therefore to conceal the contemporaneous record and shift the blame onto the Claimant.

- Mexico next attempts to condone the unlawful behaviour of Mineros Norteños by contending that the Claimant's Mexican subsidiary, Minera Metalín, had breached contractual obligations owed to Mineros Norteños (the "**Contractual Defense**"). In so doing, Mexico shamefully mischaracterizes the rulings of its own courts, which found repeatedly that Mineros Norteños's claims were inadmissible. No serious lawyer, or even layman familiar with mining royalty agreements, could read the two agreements in place between Mineros Norteños and Minera Metalín and conclude that the obligation to use "best efforts" to bring a mine into production in four years was, legally, an *absolute* obligation to do so. That much is obvious as a matter of contractual construction under any legal tradition as well as a matter of practicality – a mining company cannot be obliged to build a mine where its exploration efforts have yet to determine if that mine would be economic. In the introduction to its Counter-Memorial, Mexico acknowledges that the obligation in those agreements was one only of "best efforts" before, several paragraphs later, breathtakingly recasting that obligation as absolute and later saying that this "contractual promise" had been "validated by national judges." This contention is as inconsistent as it is untrue.

- In any event, Mexico's Contractual Defense is a paradigmatic red herring – it points to no Mexican or international law that excuses a State's obligation to, respectively, remove trespassers and restore foreign investors to their investments because one of the parties involved feels aggrieved by the actions of the other party. And, again, if Mexico seriously considered that the contractual dispute between two mining companies excused its obligation to protect the Claimant's foreign investment, it would explain why it fulfilled that obligation in 2016, but not in 2019.

- Mexico also chooses to ignore one of the most troubling aspects of this case, namely, that its own Federal Deputy, Francisco Javier Borrego Adame, incited, encouraged, and supported the Continuing Blockade. As evidence obtained by SVB shows, Deputy Borrego was intimately involved with orchestrating the Continuing Blockade and, predictably, he did so for two reasons: to advance the anti-foreign mining agenda which his and AMLO's MORENA party advocated, and seemingly to line his own pockets. Mexico's response to these serious allegations is a single bald denial in its Counter-Memorial. It has neither presented Deputy Borrego as a witness nor produced

a single document from his office, despite being ordered by the Tribunal to do so. In a sense, this silence *is* Mexico's answer to the central question asked above.

- But Mexico's recalcitrant approach to document production is not limited to documents from the office of Deputy Borrego. Despite being ordered to produce documents in response to 21 of the Claimant's document requests, Mexico has produced just *four* responsive documents with respect to the entire universe of factual issues in dispute in this case, two of which are already on the record. Mexico also sought to hide behind provisions of its own domestic law to withhold production of the criminal file in relation to the Continuing Blockade, despite the fact that Minera Metalín – on whose behalf SVB brings claims in this arbitration – was a party to the criminal proceedings and therefore had the legal right to access the file, and that its own representatives in this arbitration had themselves requested access to the file.

- The Tribunal directed in its letter of 22 April 2025 that it was open to the Claimant to make submissions regarding Mexico's document production "[i]f it subsequently appears that the Respondent's production of documents has been . . . incomplete or deficient."[4] Mexico's bad faith conduct with respect to its document production obligations prove beyond doubt that this is the case. The Claimant accordingly seeks adverse inferences as set out further in the sections that follow.

- In its hapless effort to ape defense strategies of other Latin American States in mining disputes, Mexico next says that the Claimant lost its investment because of a "business decision" – that decision being the failure to accede to the erratic and illegal demands of Mineros Norteños. In so doing, Mexico again disregards that its own courts had rejected those demands. But no matter – Mexico claims that if the Claimant had just paid whatever sum Mineros Norteños demanded from week to week, it would still have its Project. Imagine, for a moment, a sovereign State applying such logic in the context of mafia protection rackets – "you lost your business because you failed to pay the racketeer, not because we failed to protect you." This is sorry stuff. In any event, neither the capital markets nor South32 would have given SVB the nearly seven million dollars required to pay off another mining company which had already lost its lawsuit and had already been paid over US$ 3 million under two existing agreements.

[4] Letter from the Tribunal to the Parties, 22 April 2025.

- Relatedly, Mexico states that the Claimant considered it "fair and proper to explore the properties indefinitely" and appears to believe that it is somehow unseemly for a junior mining company to focus on exploration and development before involving a major mining company in the construction of a mine. This insinuation suffers from the same ignorance of the natural resources sector that underlies Mexico's interpretation of the 1997 and 2000 Agreements. More importantly, it is bereft of factual substance. First of all, nearly all mining prospecting is conducted by junior exploration companies that, upon identifying, delineating, defining and developing a resource, often agree to sell to or jointly develop projects with major mining companies. While the AMLO administration which failed to restore the Claimant to the Project often vilified exploration companies as nothing more than speculators seeking to "land bank," the truth is that exploration companies have nothing to gain from such practices. The Claimant's efforts here are a case in point.

- After several years of depressed silver and zinc prices and an inability to attract investment, promising mineralization discoveries and a rebound in commodity prices led to its partnership with South32 in 2018. Far from seeking to explore "indefinitely," SVB had brought in the major international backing necessary to turn Sierra Mojada into Mexico's "next great silver story" and was in the process of delineating the massive sulphide zone when Mexico failed to protect those delineation efforts from Mineros Norteños's unlawful conduct.

- Here it is worth pausing to reflect on another disgraceful insinuation Mexico makes against the Claimant – that it "simply abandoned the Project." The corollary of this abandonment defense is that the Claimant should have somehow stayed at the Project following imposition of the Continuing Blockade or even physically *fought* for its reinstatement. This Tribunal will be aware of how efforts by mining companies to forcibly regain access to their mines from these sorts of blockades have often played out – in violence, injury, and sometimes death. The Claimant did not *abandon* its Project – it relied on the State, with its rightful monopoly on force, to reinstate them to the Project using the appropriate means at its disposal – just as it had done in 2016. That the Claimant did so where other mining companies – like the one in *Copper Mesa* – did not should be commended as equally as Mexico's failure to perform its basic sovereign function of restoring law and order should be censured.

- Perhaps conscious that it is unbecoming of a sovereign State to endorse the vigilantism of a Mexican mining company, Mexico next conjures up the theory that the "real

cause" of the loss of the Claimant's investment was a lawsuit, the Valdez litigation. But that case raises more questions about Mexican regional judicial practice than it does provide answers to the Tribunal regarding the issue of causation. As developed below, the case was shockingly resurrected years after its dismissal by an appellate court and is now pursued by a married couple who have been deceased for years – their son continuing the litigation without having bothered to demonstrate that he is authorized to do so. The Valdez family is in the process obtaining some *non-final* attachments over the Claimant's concessions that had already been lost as a consequence of Mexico's breaches of the NAFTA.

- In any event, Mexico's reliance on the Valdez litigation is an "Ave Maria" as indicated by its document requests, where it sought documents that would have shown that the Claimant's option agreement partner, South32, *actually* terminated that agreement because of the impact of the Valdez litigation. But the disclosure process has shown only that South32 terminated the Option Agreement because Mexico had failed to lift the Continuing Blockade. In fact, there is no evidence that South32 had any concern over the Valdez litigation. This reveals the Valdez theory for what it is – a transparent attempt to distract from the only issue that matters in this case, Mexico's inaction in relation to the Continuing Blockade.

- Finally, and predictably, Mexico blames the entire investor-state dispute framework for the genesis of this dispute. Like other States that now so often seek to tap into the backlash against investment treaty arbitration, Mexico contends that SVB's claims "cast[] doubt on the proper functioning of the investor-State dispute settlement system by pitting the interest of the system . . . against the general interest of the community in which an investment is established." Again, such a complaint about "the system" may be relevant in other disputes, but not this one. As Dr. Weiler sets out in historical detail in his monograph,[5] the duty of States to protect the investments of foreigners from the acts of third parties dates to Venetian merchant society and is not some modern abomination of the treaties that Mexico continues to ratify freely. For Mexico to invoke some investor-treaty parade of horribles to avoid liability for its own fundamental refusal to uphold law and order is just another Ave Maria.

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[5] THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW: EQUALITY, DISCRIMINATION, AND MINIMUM STANDARDS OF TREATMENT IN HISTORICAL CONTEXT (Martinus Nijhoff: The Hague, 2013), **CL-0168**.

5. In sum, Mexico acted in 2016 and chose not to in 2019 onwards. In its Counter-Memorial, it has offered no explanation for that choice. Where this is the case, this Tribunal should make Mexico responsible for that choice.

6. The ability of the Tribunal to do so is unhindered by Mexico's jurisdictional objections. Those objections suffer from the same failure to square up against the Claimant's actual case and insistence on attacking strawmen as its liability defense. Contrary to Mexio's contentions, this is not a case where the relevant expropriation occurred after the NAFTA termination—rather, Mexico breached its obligations under the NAFTA beginning in 2019, when it first failed to lift the Continuing Blockade, *before* the NAFTA terminated. Those breaches *continued*, and the harm resulting from the breaches was not known to the Claimant until South32 terminated the Option Agreement in August 2022.

7. Mexico contends that this harm was obvious in the nine months that transpired between the imposition of the Continuing Blockade and the termination of the NAFTA on 28 June 2020. That position is convenient for Mexico's jurisdictional argument, but belied by the facts, and, indeed, Mexico's own contradictory argument that the Project retains value to this day. That the harm caused by Mexico's failure to uphold law and order had not manifested itself until August 2022 is obvious from the near constant efforts SVB made to restore itself to the Project from 2019 until that date, notwithstanding the idleness of the Mexican authorities. Had SVB been able to regain access to the Project and South32 not terminated the Option Agreement, it would not have brought these claims. But when its three years of efforts had gotten it nowhere and South32 walked away, the harm caused by Mexico's failures crystallized and it diligently proceeded to arbitration. The evidence bears these facts out and, consequently, Mexico's jurisdictional challenges must fail.

8. Lastly, Mexico's attack on the quantum of the Claimant's damages is without substance. Mexico claims that it has submitted "an alternative computation" of the Claimant's damages by Dr. Tiago Duarte Silva, but one would be hard pressed to find such a computation in his report. Inexplicably constrained in his analysis to taking pot shots at the analysis proffered by the Claimant's expert BRG, rather than advancing an alternative figure, Mexico has left this Tribunal with just one valuation to choose from – the Claimant's. In carrying out its duties as an independent expert, however, BRG has taken onboard some of Dr Duarte Silva's criticisms and, accordingly, revised its damages figure slightly downward to US$ 315.3 million plus pre-award interest.

9. The Claimant's Reply is supported by the following witness statements:

- *Timothy Barry*: CEO of the Claimant and President of Minera Metalín.[6]
- *Brian D. Edgar*: Chairman of the Board of Directors of the Claimant.[7]
- *Juan Manuel López Ramírez*: Country Manager at the Sierra Mojada Project.[8]
- *Matthew Melnyk*: Vice President of Exploration at SVB between April 2019 and April 2021.[9]
- *Christopher Richards*: CFO of the Claimant.[10]

10. In addition, the Claimant's Reply is supported by the second expert report of Mr. Santiago Dellepiane of Berkeley Research Group ("**BRG**").[11]

11. Finally, this Reply is accompanied by factual exhibits **C-0001** to **C-0497** and by legal authorities **CL-0001** to **CL-0213**, listed in the attached Indices of Factual Exhibits and Legal Authorities.

2. FACTUAL BACKGROUND

2.1 Request for Adverse Inferences

12. In its Procedural Order No. 3, the Tribunal granted 21 of the Claimant's 29 document production requests.[12] However, the Respondent has failed to produce any documents in response to the vast majority of those requests.[13] What is more, with respect to a number of requests, that failure was the product of bad faith, as set out below.

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6 Second Witness Statement of Tim Barry, 25 April 2025 ("**Barry WS2**").

7 Second Witness Statement of Brian D. Edgar, 23 April 2025 ("**Edgar WS2**").

8 Second Witness Statement of Juan Manuel López Ramírez, 25 April 2025 ("**López Ramírez WS2**").

9 Second Witness Statement of Matthew Melnyk, 23 April 2025 ("**Melnyk WS2**").

10 First Witness Statement of Christopher Richards, 23 April 2025 ("**Richards WS**").

11 Second Expert Report of BRG dated 25 April 2025 ("**BRG ER2**").

12 Procedural Order No. 3, Annex A.

13 Mexico has only provided documents in response to the Claimant's requests No. 1, 17, 27, and 28. Request 28 relates exclusively to the *travaux preparatoires* to the USMCA.

13. In accordance with paragraph 15.9 of Procedural Order No. 1, "if a party fails to produce documents ordered by the Tribunal, the Tribunal may deem, in light of all circumstances including the reasons advanced by a party to explain its inability to produce any given document, that the document is adverse to the interests of that party."[14] Furthermore, paragraph 15.9 provides that the Tribunal shall be guided by Article 9 of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, which provides, in its relevant part:

> If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.[15]

14. Accordingly, the Tribunal has the power and the authority to draw adverse inferences from the Respondent's failure to produce. The Tribunal here can draw guidance from the approach taken by the tribunal in *OPIC Karimum Corporation v. Venezuela*.[16] In that case, the tribunal drew adverse inferences against the respondent where it found that "the explanations offered by counsel for the Respondent as to Venezuela's failure to follow up the production of [requested documents] are *less than fully convincing.*"[17] The Claimant requests respectfully that the Tribunal adopt a similar approach here and infer that the documents Mexico has failed to produce – without providing "fully convincing" explanations – would be adverse to its case.

15. The Claimant articulates the adverse inferences that it requests the Tribunal to draw in the course of its Reply.[18] In particular, the Claimant requests the Tribunal to draw the following adverse inferences, including that:

- Documents prepared by the Municipal Syndic, Ms. María Esmeralda Aguilar Olguín, Public Prosecutors Sergio López Reyna and Anayanci Serrano, and the two police officers that accompanied them on 4 September 2016, do not support Mexico's

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[14] Procedural Order No.1, para. 15.9.

[15] 2020 IBA Rules on the Taking of Evidence in International Arbitration, Article 9.6.

[16] *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Award, 28 May 2013, **CL-0207**.

[17] *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Award, 28 May 2013, para. 145, **CL-0207** (emphasis added).

[18] *See infra*, at Sections 2.5, 2.7, 2.8.

allegation that the Initial Blockade was peaceful and that Mineros Norteños ended that Blockade voluntarily;

- Documents from Deputy Borrego and his office would demonstrate that he encouraged, supported, and coordinated the Continuing Blockade with Mineros Norteños;

- Documents prepared by or on behalf of the Coahuila Citizen Attention Service, the Public Prosecutor in Química del Rey, and Fuerza Coahuila concerning Mr. López Ramírez's 3 September 2019 warnings of an imminent blockade, would show that those authorities had ample warning, the opportunity to act, and sufficient time to prevent the Continuing Blockade – but refused to do so;

- Documents regarding Economía's, DGM's, and SEGOB's assessment of the other mining blockades identified by the Claimant in its Memorial and Request No. 19 would show that the Mexican authorities (i) had the ability to intervene to resolve blockades and apply appropriate criminal sanctions to those orchestrating them, and (ii) accorded SVB and its Sierra Mojada Project less favorable treatment than they accorded to those investors and investments.[19]

- Documents prepared by the Coahuila Public Prosecutor's Office, the Sierra Mojada Police, the Coahuila State Police, the Fuerza Coahuila (a special state police force), and the Citizen Attention Service for the State of Coahuila, would show that the decision not to take action with respect to the Continuing Blockade was the result of orders or instructions from Mexico's political organs, including Deputy Borrego, not to intervene in that Blockade.

16. Furthermore, even if the Tribunal determines, with respect to a particular document, that an adverse inference is not warranted in the circumstances, it should nevertheless refrain from drawing any positive inference in the Respondent's favor. As the tribunal in *Apotex v. United States* remarked, "while the Respondent is not to be blamed for these missing evidential pieces in its jigsaw defence, the fact remains that its jigsaw is materially incomplete with a likely mass

[19] Namely, Fresnillo's La Herradura mine, Pan American Silver's La Colorada mine, Equinox Gold's Los Filos mine, Americas Gold and Silver Corporation's San Rafael mine, Newmont Corporation's Peñasquito mine, and Torex Gold Resources' Limón-Guajes mine. *See* Memorial, para. 2.193; *infra* Section 2.8.

of documentation and numerous factual witnesses unavailable to be heard by the Tribunal in this arbitration, as to which the Respondent must accept the legal consequence."[20]

17. The Tribunal should also consider the bad faith with which Mexico has conducted itself during the document production phase of this case. Notably, in response to 21 document requests, Mexico has *produced only four responsive documents* with respect to the factual issues in dispute in this case, two of which are already on the record.[21] It is simply not credible that a good faith, reasonable search for documents across multiple agencies over a recent time period in response to 21 requests would turn up just two new documents. This is especially so given the record evidence reflecting that multiple government actors were present at the Continuing Blockade,[22] had been contacted for assistance during the Continuing Blockade,[23] and were (ostensibly) involved in discussing regarding the Continuing Blockade,[24] as laid out in the Claimant's document production requests, which the Tribunal granted.[25]

18. Moreover, as elaborated herein, Mexico has withheld production of the criminal file in relation to the Continuing Blockade, despite it falling squarely within the scope of Request No. 13, as well as documents in that criminal file responsive to other requests, including Request Nos. 1-12 and 16. This is bad faith. When SVB requested access to the criminal file in these proceedings, Mexico attempted initially to rely on provisions of its own domestic law to resist production, arguing that such documents are confidential.[26] It did so despite the fact that SVB's subsidiary, Minera Metalín, was a party to that investigation and therefore had a right to access the file. Mexico also claimed with respect to certain documents in the file that they were not relevant or material to the dispute and/or that it did not know where they might be found.[27] While that submission was plainly disingenuous on its face, the record demonstrates that it was also made bad faith: specifically, as the criminal file confirms, Mexico's own representative in this arbitration had *previously requested a copy of the very criminal file from the Public*

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20 *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1 ("***Apotex v United States***"), Award, 25 August 2014, para. 8.72, **CL-0152**.

21 The vast majority of the documents Mexico has disclosed are in response to Request No. 28, which called for the travaux préparatoires in relation to the CPTPP. Documents 27.1 and 27.2 are merely higher resolution copies of Exhibit R-62.

22 *See, e.g.*, Claimant's Document Production Request Nos. 2, 5, Procedural Order No. 3, Annex A, pp. 33, 47.

23 *See, e.g.*, Claimant's Document Production Request Nos. 5, 6, 7, Procedural Order No. 3, Annex A, pp. 47, 53, 59.

24 *See, e.g.*, Claimant's Document Production Request Nos. 1, 12, 17, 18, Procedural Order No. 3, Annex A, pp. 27, 79, 95, 98.

25 Procedural Order No. 3, Annex A, pp. 27, 33, 47, 53, 59, 79, 95, 98.

26 Procedural Order No. 3, Annex A at pages 11-2, General Objection 4, and response to requests 13 and 14, at pages 82-87.

27 Procedural Order No. 3, Annex A at pages 70-74.

Prosecutor's Office in May 2023, expressly for purposes of Mexico's defense.[28] He also expressly asked the Public Prosecutor's Office to appoint a representative from that Office to assist Mexico in its defense.[29]

19. Then Mexico sought to conceal the criminal file even after the Tribunal ordered Mexico to produce it. Even though the Tribunal had rightly rejected Mexico's spurious attempts to rely on its own domestic laws, noting that "[t]he Respondent cannot simply rely on its own domestic laws to resist requests to search and produce,"[30] Mexico simply repeated those very same arguments in a bogus "Privilege log" dated 10 March 2025 which failed to identify the documents withheld or the precise basis for its assertion of legal privilege.[31]

20. On 4 April 2025, faced with Mexico's deficient document production, the Claimant had no choice but to inform the Tribunal of Mexico's failure to comply with its document production obligations.[32] The Claimant raised its serious doubts about the adequacy of Mexico's searches and, more generally, the lack of seriousness with which Mexico approached the document production phase.[33] The deficiencies in Mexico's document production included (but were not limited to) a failure to conduct searches at the correct agency, include the relevant custodians, or search the most relevant repositories.[34] The Claimant also challenged Mexico's spurious claims of privilege, including its bogus "Privilege log" dated 10 March 2025, and its continued reliance on domestic law in a clear attempt to evade its document production obligations. The Claimant specifically reserved its right to seek adverse inferences arising out of Mexico's failure to comply with its document production obligations in the event that Mexico's document production remained incomplete and deficient.[35]

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28 Letter from the Ministry of Economy to the Coahuila Attorney General Requesting Criminal File for Arbitration Preparation, 4 May 2023, **C-0439**.

29 Letter from the Ministry of Economy to the Coahuila Attorney General Requesting Criminal File for Arbitration Preparation, 4 May 2023, **C-0439**.

30 Procedural Order No. 3, Annex A at page 82.

31 Procedural Order No. 3, Annex A at pages 82.

32 Letter from BSF to the Tribunal, dated 4 April 2025.

33 Letter from BSF to the Tribunal, dated 4 April 2025, para. 5.

34 Letter from BSF to the Tribunal, dated 4 April 2025, para. 5.

35 Letter from BSF to the Tribunal, dated 4 April 2025, para. 23.

21. Mexico responded to the Claimant's letter on 14 April 2025.[36] Unsurprisingly, in a continuation of its *modus operandi* to evade document production obligations in cases brought against it,[37] Mexico asserted without support that it had conducted searches in good faith and it did not have access to the criminal file in response to Claimant's Request No. 13.[38] As demonstrated below, Mexico's assertion was false, and justifies an order for adverse inferences.

22. On 22 April 2025, the Tribunal refused to grant the Claimant's requests, but directed the Respondent to use best endeavors to produce a revised privileged log within 14 days of the Tribunal's order.[39] As of the date of filing of this Reply, Mexico had not produced a revised privilege log. Given Mexico's failure to produce the evidence at the heart of this case, the Claimant was forced to go to significant lengths and expense to obtain a copy of the criminal file from the Public Prosecutor's Office in San Pedro, Coahuila State. As explained below, it is now clear why Mexico has undertaken to withhold the contents of that file in violation of the Tribunal's orders – the documents it contains contradict flatly Mexico's case and demonstrate the inadequacy of its actions with respect to the Continuing Blockade. As noted, it also lays bare Mexico's lack of candor with this Tribunal.

23. Indeed, at least with respect to Request No. 13, Mexico has scoffed at this Tribunal's order. It verifiably lied in telling the Claimant and the Tribunal that the criminal file was difficult to locate or irrelevant. Not only has Mexico's legal team apparently been in possession of the criminal file since the earliest days of these proceedings, but as the description of that file below makes clear, the Tribunal's order granting Request No. 13 was fully justified. Where a party lies to a tribunal and withholds documents, its explanations go beyond "less than convincing" and simply represent bad faith. Where that is the case, this Tribunal should order adverse inferences.

2.2 The Claimant's Investment in the Sierra Mojada Project

24. As explained in the Memorial, the Claimant's investment in the Sierra Mojada Project began in the 1990s when Metalline, the Claimant's corporate predecessor, first identified the Sierra Mojada silver-zinc deposit in Coahuila, Mexico.[40] The Project had all the features of a

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36 Letter from Economía to the Tribunal, dated 14 April 2025.

37 *See* Letter from BSF to the Tribunal, dated 4 April 2025, Section 3.

38 Letter from Economía to the Tribunal, dated 14 April 2025, Section B.

39 Letter from ICSID to the Parties, dated 22 April 2025, para. 2.

40 Memorial, paras. 2.1, 2.9.

successful mining operation and the potential to be "Mexico's next big silver story."[41] Mexico, at the time of the Claimant's investment and for more than 20 years thereafter, was friendly to foreign investment;[42] the region had a rich tradition of successful mining operations and a number of undeveloped deposits, among them Sierra Mojada;[43] and the deposit had access to the critical infrastructure and skilled labor necessary to effectuate the Project.[44]

25. Seeking to unlock that potential, the Claimant invested considerable time and millions of dollars, amidst difficult market conditions and other obstacles, to develop the Project – only to be met by a hostile political administration that refused to disperse a years-long, illegal blockade of the Project site.[45]

26. The Claimant's investment began with the establishment of Minera Metalín – the Claimant's wholly owned Mexican subsidiary incorporated for the purpose of carrying out exploration activities in Mexico.[46] Specifically, in 1996, to explore and develop the Sierra Mojada deposit, Metalline established Minera Metalín.[47] After the reverse merger between Metalline and Dome Ventures Corporation in 2010, the resulting merged entity – later renamed Silver Bull Resources Inc. – acquired control of Minera Metalín.[48] SVB owns 100% of Minera Metalín's shares – directly and indirectly through SVB's wholly owned subsidiary, Metalline, Inc. – and Minera Metalín owns the concessions and other assets comprising the Sierra Mojada Project.[49]

27. To advance the Sierra Mojada Project, Minera Metalín acquired 19 mining concessions in the Sierra Mojada area,[50] as well as a 20th, which it acquired but never received legal title, as

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41 Memorial, para. 2.31; Edgar WS1, para. 5.24.

42 Memorial, paras. 2.17, 2.103-2.104, 2.105-2.110.

43 Memorial, paras. 2.9, 2.13-2.16, 2.27.

44 Memorial, paras. 2.28-2.30.

45 Memorial, para. 2.111.

46 Memorial, para. 2.1.

47 Memorial, para. 2.9.

48 Memorial, para. 2.6.

49 Memorial, para. 2.7.

50 Exploitation Concession Title No. 160461 in relation to the Fortuna plot from 21 August 1974 to 20 August 2024, **C-0002**; Unificación Concession Title No. 169343 in relation to the Unificación Mineros Norteños plot from 11 November 1981 to 10 November 2031, **C-0003**; Exploitation Concession Title No. 195811 in relation to the Olympia plot from 22 September 1992 to 21 September 2042, **C-0004**; Exploitation Concession Title No. 212169 in relation to the Esmeralda plot from 22 September 2000 to 21 September 2050, **C-0010**; Exploitation Concession Title No. 220569 in relation to the La Blanca plot from 28 August 2003 to 27 August 2053, **C-0011**; Exploration Concession Title No. 223093 in relation to the Los Ramones plot from 15 October 2004

explained below.[51] Those 20 concessions originally totaled 9,530.4 hectares.[52] To further advance the Project, Minera Metalín also acquired the surface rights to nine lots – five from Mineros Norteños in 2006 and four in 2013 through a court-ordered transfer – as well as the buildings on those lots.[53] As of 28 June 2023– the date on which the Claimant filed its Request for Arbitration – Minera Metalín remained the concession holder for all 19 concessions, and all 19 concessions had valid legal title, *i.e.*, they were in full force and effect.[54] Indeed, for 18 of the 19 concessions, Minera Metalín remains the actual concession holder, and the titles remain valid, to this day.[55] And, as explained below in Section 2.11, the fact that questionable judicial proceedings recently resulted in the attachment of Minera Metalín's concessions in no

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to 14 October 2054, **C-0012**; Exploitation Concession Title No. 224873 in relation to the Volcan Dolores plot from 16 June 2005 to 15 June 2055, **C-0013**; Division Concession Title Nos. 235371, 235372, 235373, 235374, and 235375 in relation to the Sierra Mojada, Sierra Mojada Fracción I, Sierra Mojada Fracción II, Sierra Mojada Fracción III, and Sierra Mojada Fracción IV plots respectively, each from 30 November 1993 to 29 November 2043, **C-0020**; Exploitation Concession Title No. 236714 in relation to the Vulcano plot from 25 August 2010 to 24 August 2060, **C-0016**; Unificación Concession Title No. 238679 in relation to the Esmeralda I Fracción I plot from 31 March 2000 to 30 March 2050, **C-0008**; Unificación Concession Title No. 238680 in relation to the Esmeralda I Fracción II plot from 31 March 2000 to 30 March 2050, **C-0007**; Exploration Concession Title No. 239512 in relation to the Alote Fracción VI plot from 15 December 2011 to 14 December 2061, **C-0021**; Reducción Concession Title No. 245216 in relation to the Cola Sola plot from 23 August 2011 to 22 August 2061, **C-0019**; Reducción Concession Title No. 245217 in relation to the Dormidos plot from 10 April 2007 to 9 April 2057, **C-0014**; Concession Title No. 245216 in relation to the Cola Sola plot from 15 November 2016 to 22 August 2061, **C-0019**; Concession Title No. 245217 in relation to the Dormidos plot from 15 November 2016 to 9 April 2057, **C-0014**.

51 *See* Acquisition Agreement of *Veta Rica o La Inglesa*, 8 May 2014, **C-0388**; Exploitation Concession Title No. 236837 in relation to the *Veta Rica o La Inglesa* plot from 3 November 1928 to 6 September 2060, **C-0001**.

52 Technical Report on the Resources of the Silver-Zinc Sierra Mojada Project Coahuila, Mexico, 30 October 2018, p. 32, **C-0103**.

53 Purchase Agreement between Minera Metalín and Sociedad Cooperativa Mineros Norteños Covering Lots Nos. 1, 3, 4, 6, and 7, 28 March 2006, **C-0173**; Cadastral Certificate and Valuation for Lot No. 6, 24 February 2003, **C-0172**; Final Judgment Granting Ownership of Parcel No. 1 (Application No. 680-64-09.2189) by Adverse Possession to Minera Metalín, San Pedro Court, Exp. 450/2013, 27 September 2013, **C-0178**; Cadastral Value of Parcel No. 1 (Application No. 680-64-09.2189), 8 August 2014, **C-0179**; Memorial, paras. 2.9, 2.16, 2.20; JDS Energy & Mining Inc, Preliminary Economic Assessment NI 43-101 technical report, 30 September 2013, pp. 4-7. 4-8, 6-2, **C-0088**; SK1300 Summary Technical Report on the Resources of the Silver-zinc Sierra Mojada Project Coahuila, Mexico, 24 January 2023, pp. 13, 32-41, **C-0051**.

54 The Mining Public Registry operated by Economía's *Dirección General de Minas* ("**DGM**") provides public, unofficial certificates showing the ownership of any mining concession in Mexico and the relevant history of any acts affecting the concession's title. *See Dirección General de Minas, Tarjeta de Registro Público de Minería*, last accessed 24 April 2025, (available at https://tarjetarpm.economia.gob.mx/tarjeta.mineria/), **C-0436**. Searches for all nineteen concessions reveal that, as noted above, Minera Metalín remains the actual concession holder for all 19 concessions and that title remains valid (*título vigente*) for all 19 concessions. *See* **C-0445** to **C-0463**; *see also* Counter-Memorial, para. 50 (enumerating the nineteen concessions in a table and recognizing that Minera Metalín is the current concession holder for all nineteen concessions); *supra* footnote 11.

55 The *Fortuna* concession expired by its contractual terms on 20 August 2024. *See Dirección General de Minas, Tarjeta: Fortuna*, 8 April 2025, **C-0340**. The *Fortuna* concession comprises only about 14 hectares, an insignificant size relative to the volume of the Claimant's total concessions. *See id.*

way affects Minera Metalín's ownership of or ability to operate those concessions – only its ability to sell or transfer them.[56]

28. In its Counter-Memorial, Mexico asserts that "the Claimant did not submit the purchase contracts for the other concessions acquired from third parties, nor did it provide information on the terms under which they were acquired," and that "the Claimant has also omitted to explain whether the concessions are free of encumbrances or any legal limitations that would allow Metalín to dispose of its right to them, such as judicial liens."[57] But, as Mexico knows, and as noted above, documents reflecting the ownership of and any encumbrances on Minera Metalín's concessions is publicly available in Mexico's own Mining Public Registry.[58] Not only did Mexico itself create that Registry, but it used that Registry to identify Minera Metalín as the concession holder for all 19 of the above-described concessions.[59] The ownership of the concessions is therefore not in dispute. Notwithstanding that fact, SVB has submitted all of the relevant extracts from the Registry on the record, which demonstrate that it is the lawful owner of the 19 concessions.[60] That Registry also reflects any encumbrances on Minera Metalín's concessions, and as noted, Section 2.11, *infra*, explains that the liens only recently imposed on Minera Metalín's concessions through the below-described Valdez litigation do not affect the Claimant's ownership or control over the concessions.

29. Mexico further contends that "[o]f the 20 concessions that Claimant claims to hold, Minera Metalín held only 19 concessions."[61] While the Claimant did not state in its Memorial that it held 20 concessions, the BRG Expert Report and the Claimant's S-K1300 Summary Technical

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56 Of course, the Claimant remains unable to operate the concessions given their expropriation and the illegal Continuing Blockade that remains in place to this day; however, but for the illegal Continuing Blockade and Mexico's refusal to take reasonable action to lift it, the Claimant would be able to operate the concessions. *See infra* Section 2.10.

57 Counter-Memorial, para. 52. The Claimant has undertaken a reasonable search for documents responsive to Mexico's Request No. 9, as ordered by the Tribunal, which encompasses, *inter alia*, "[p]urchase contracts or agreements of a similar nature by which the Claimant acquired the rights to the mining concessions it claims to own." *See* Procedural Order No. 3, Annex B, p. 37. The Claimant has already exhibited the 2000 Agreement as **C-0009**, by which it acquired the *Unificación* and *Vulcano* concessions from Mineros Norteños, as well as the *Veta Rica o La Inglesa* concession-acquisition agreement as **C-0386** and will produce additional responsive documents if and when located.

58 *See Dirección General de Minas, Tarjeta de Registro Público de Minería*, last accessed 24 April 2025 (available at https://tarjetarpm.economia.gob.mx/tarjeta.mineria/), **C-0436**.

59 Counter-Memorial, para. 50 (identifying each concession owned by Minera Metalín by name and number).

60 *Dirección General de Minas, Tarjetas* for the Claimant's 19 concessions, **C-0445** to **C-0463**; *see also supra* fn. 11.

61 Counter-Memorial, para. 50.

Report describe the Project as comprising 20 concessions.[62] This discrepancy stems from the *Veta Rica o La Inglesa* concession: Minera Metalín acquired that concession in 2014 but was unable to register the mineral title under its own name.[63] That is because the original concession holder died, and his heir, the transferor – Mrs. Silvia Yolanda García Landeros – could not herself obtain title until completing probate proceedings.[64] Mrs. García Landeros never supplied formal documentation to the Claimant sufficient to complete the title transfer. In any event, this concession represents an insignificant area of land (less than 11 hectares) relative to the remaining 19 concessions (several thousand, as explained further below).[65]

30. In addition, Mexico asserts in its Counter-Memorial that "[t]he Claimant stated that it has mining concessions . . . covering a reported area of 9,530.4 hectares, however, only a total of 6,485.3269 hectares were found in official records."[66] That discrepancy is explained as follows. As noted above, when Minera Metalín originally acquired the 19 concessions – as well as a 20th, for which the title transfer was never finalized – those 20 concessions totalled 9,530.40 hectares.[67] Subtracting the *Veta Rica o La Inglesa* concession, to which, as noted above, Minera Metalín never obtained title transfer, that total becomes 9,519.41 hectares.[68] Then, in 2016, Minera Metalín reduced the size of its *Cola Sola* and *Dormidos* concessions, reducing the total concession area from 9,519.41 hectares to 6,485.32 hectares[69] – *i.e.*, the total area of the

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62 BRG ER1, para. 2; S-K1300 Summary Technical Report on the Resources of the Silver-zinc Sierra Mojada Project Coahuila, Mexico, 24 January 2023, p. 32, **C-0051**.

63 *See* Acquisition Agreement of *Veta Rica o La Inglesa*, 8 May 2014, **C-0388**; *see also* Exploitation Concession Title No. 236837 in relation to the Veta Rica o La Inglesa plot from 3 November 1928 to 6 September 2060, **C-0001**; *Dirección General de Minas, Tarjeta: Veta Rica o La Inglesa*, 8 April 2025, **C-0341**.

64 *See* Acquisition Agreement of *Veta Rica o La Inglesa*, 8 May 2014, **C-0388**.

65 Exploitation Concession Title No. 236837 in relation to the Veta Rica o La Inglesa plot from 3 November 1928 to 6 September 2060, **C-0001** (showing the coordinates of the *Veta Rica o La Inglesa* concession); *Dirección General de Minas, Tarjeta: Veta Rica o La Inglesa*, 8 April 2025, **C-0341**; Counter-Memorial, para. 72; Exploitation Concession Title No. 236837 in relation to the Veta Rica o La Inglesa plot from 3 November 1928 to 6 September 2060, **C-0001**.

66 Counter-Memorial, para. 72; Exploitation Concession Title No. 236837 in relation to the Veta Rica o La Inglesa plot from 3 November 1928 to 6 September 2060, **C-0001**.

67 *See, e.g.*, Technical Report on the Resources of the Silver-Zinc Sierra Mojada Project Coahuila, Mexico, 30 October 2018, p. 32, **C-0103**.

68 Exploitation Concession Title No. 236837 in relation to the Veta Rica o La Inglesa plot from 3 November 1928 to 6 September 2060, **C-0001**.

69 *Dirección General de Minas*, New Title to *Cola Sola* Concession, 15 November 2016, p. 2, **C-0399**; *Reduccion Concession Title No. 245217 in relation to the Dormidos plot*, p. 1, **C-0014** (showing reduction in hectares); *Dirección General de Minas*, New Title to *Dormidos* Concession, 15 November 2016, p. 1, **C-0400** (showing new title issued 15 November 2016); *Dirección General de Minas, Tarjeta: Dormidos*, 8 April 2025, **C-0448** (showing new, reduced concession area of 405 hectares).

Claimant's 19 concessions from November 2016 through 28 June 2023.[70] Mexico was of course fully aware of this, as its own authorities approved such reductions.

31. Contrary to Mexico's contentions, Minera Metalín thus retained full ownership and control over its 19 concessions through 28 June 2023 – the date on which the Claimant filed its Request for Arbitration in this case, as elaborated in Section 2.11, *infra*. And not only did Minera Metalín validly hold these concessions throughout the relevant time period, it also validly performed its obligations under its agreements with Mineros Norteños, as explained below.

2.3 Minera Metalín Complied with Its Obligations under the 1997 and 2000 Agreements

32. As set forth in the Claimant's Memorial and above, between 1998 and 2000, Metalline, through Minera Metalín, acquired mining concessions in the Sierra Mojada area – both from smaller mineral exploration companies as well as local mining cooperatives – including two concessions from Mineros Norteños.[71] Pursuant to a concession agreement entered into between Mineros Norteños and Minera Metalín dated 30 August 2000, Minera Metalín agreed to pay Mineros Norteños a flat fee of US$ 3,600,000 for the two concessions, as well as a royalty in respect of production up to a maximum of US$ 6,875,000 when the Sierra Mojada Project went into production (the "**2000 Agreement**").[72]

33. In its Counter-Memorial, Mexico attempts to justify Mineros Norteños's unlawful blockades of the Sierra Mojada Project – and thereby Mexico's own continuing failure to act – by suggesting that those blockades were legitimate in nature and peaceful in intent. According to Mexico, Minera Metalín "ha[d] an obligation to commence mining work in order to pay royalties to Mineros Norteños as of August 30, 2001" and "[v]arious courts and tribunals at all levels of the Mexican justice system have confirmed this interpretation."[73] As elaborated below, those contentions are misleading, wrong, and directly contradicted by the record.

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70 *See, e.g.*, Minera Metalín Tax Calculations, First Semester 2023, **C-0432** (reflecting 20 concessions totaling 6,496.31 hectares and, if you subtract *Veta Rica of La Inglesa*, as described above, 19 concessions totaling 6,485.32 hectares).

71 Memorial, para. 2.18; Maps and appraisals in relation to Minera Metalín's titles to the surface rights totalling 126.95 hectares in the Project Area, 8 August 2014, **C-0067**.

72 Memorial, para. 2.19; Agreement between Mineros Norteños and Minera Metalín, 30 August 2000, pp. 2-3, **C-0009**.

73 Counter-Memorial, para. 147.

2.3.1 Mexico Mischaracterizes Both the Nature of Mineros Norteños and Its Rights Under The 1997 And 2000 Agreements

34. As Mexico itself acknowledges, Mineros Norteños is a Mexican for-profit cooperative mining association in Sierra Mojada, incorporated in 1948 for purposes of exploiting local mines.[74] Mineros Norteños is not the community, nor does it represent the community's interests.[75] Mexico nevertheless repeatedly conflates Mineros Norteños with the Sierra Mojada community in its Counter-Memorial.[76] That conflation is incorrect. Although its members reside in the Sierra Mojada region, Mineros Norteños is not coterminous with, and does not represent, the community. Indeed, under Mexican law, any surplus that a cooperative generates from its transactions does not go to the community but to members of the cooperative.[77]

35. The difference in views between the two groups is also stark. Unlike Mineros Norteños – which has blockaded, threatened, stolen, vandalized, and even kidnapped to prevent progress at the Sierra Mojada Project for its own extortionate ends[78] – the community wanted the Project to proceed.[79] As Mr. Barry explains in his first witness statement, by meeting regularly with local stakeholders to discuss the Project's advancement, SVB was able to "cultivate[] community support for the Project."[80] That support is no surprise. The Project provided gainful employment to local community members,[81] and if the Project had proceeded to production, as SVB intended, it would have added further, substantial economic stimulus and employment to the surrounding local communities.[82] Moreover, in the recent elections for Sierra Mojada Municipal President, the opposition party defeated the candidate aligned with Mineros Norteños and AMLO's anti-mining political party: the National Regeneration Movement ("**MORENA**").[83] Simply put, Mineros Norteños is not the community; rather, it is a rogue

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74 Counter-Memorial, para. 46.

75 Counter-Memorial, paras. 46-47.

76 *See, e.g.*, Counter-Memorial, paras. 2, 93 (wrongly casting the Continuing Blockade as a natural result of Minera Metalín's alleged failure to fulfil commitments to the local community).

77 *Ley General de Sociedades Cooperativas* (as amended 19 January 2018), **C-0470**.

78 *See, e.g.*, Memorial, paras. 2.111 *et seq.*, 2.155, 2.168-2.170, 4.15.

79 *See* Memorial, paras. 2.58-2.59; Barry WS1, para. 4.28.

80 Barry WS1, para. 4.28.

81 Minera Metalín: Employee Information Excel Chart, 1998-2019, **C-0415**.

82 *See* Barry WS1, para. 4.27.

83 *See Saber Votar: Boleta de Evaluación*, last accessed 23 April 2025 (available at https://app.sabervotar.mx/candidato/elias-portillo-vasquez/presidentes-municipales-alcaldes/coahuila-de-zaragoza) **C-0416**; Plan de Desarrollo Municipal, Sierra Mojada, Coahuila, Administración 2022-2024, **C-0443** (the non-MORENA candidate prevailed in the recent elections).

group of agitators that has hijacked the Sierra Mojada Project at the expense of both the Claimant and the Sierra Mojada community.

36. Mexico further observes in its Counter-Memorial that the contractual relationship between Mineros Norteños and Minera Metalín began in 1997, when Minera Metalín's predecessor, Star Morning S.A. de C.V., entered into an option agreement with Mineros Norteños (the "**1997 Agreement**").[84] That is true, but as Mexico also acknowledges, the 2000 Agreement between Mineros Norteños and Minera Metalín "reproduces key terms of the 1997 Contract," "formaliz[ed] the transfer of concession rights" optioned in the 1997 Agreement, and is the Agreement that Mineros Norteños invoked when it ultimately sued Minera Metalín.[85]

37. As set forth below, Minera Metalín complied with its contractual obligations under both the 1997 and 2000 Agreements.

2.3.1.1 The 1997 Agreement

38. In 1997, Minera Metalín's corporate predecessor, Star Morning, S.A. de C.V., entered into an Agreement with Mineros Norteños that granted Star Morning an exclusive right to explore the "*Unificación Mineros Norteños*" and "*Vulcano*" concessions in Sierra Mojada for a three-year period, as well as an option to acquire the concessions and the associated surface rights, water rights, and wells during that same three-year period.[86] In exchange for that right and option, Star Morning agreed to make staged payments to Mineros Norteños over the three-year period, totalling US$ 3.6 million, as an advance against future royalties on minerals produced in the concession areas.[87] The 1997 Agreement also granted Mineros Norteños a 2% net smelter return royalty based on net revenue received, contingent upon Star Morning actually exploiting the concessions and selling minerals extracted, up to a maximum of US$ 10.745 million.[88]

39. As the 1997 Agreement states, Star Morning was neither obligated to acquire the concessions nor to exploit the concessions: rather, Star Morning's only duty was to "*mak[e] its best efforts*" to bring the lots into production within four years of executing the Agreement.[89] Mexico's

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84 Counter-Memorial, para. 77.

85 Counter-Memorial, paras. 85, 86.

86 1997 Agreement, Clause One, **R-0002**.

87 1997 Contract, Clauses One, Three, Four, **R-0002**.

88 1997 Agreement, Clause Five, **R-0002**.

89 1997 Agreement, Clause Five, **R-0002** (emphasis added).

assertion that Star Morning "committed to reach the productive phase within four years" of executing the Agreement is simply wrong on its face.[90]

40. Despite the plain text of the 1997 Agreement, Mexico asserts that this best-efforts provision "created a reasonable expectation that Minera Metalín would develop the concessions in the medium term."[91] That assertion has no basis in law or fact. As for the law, the allegedly "reasonable expectation that Minera Metalín would develop the concessions in the medium term" is belied by the plain text of the 1997 Agreement, which, as noted above, bound Star Morning only to "mak[e] its best efforts" to bring the lots into production within four years.

41. And as for the facts, the Government of Mexico is not authorized to speak as to Mineros Norteños's contemporaneous expectations. And, even if it were, Mexico is flatly wrong that any such expectation here was "reasonable." As Mr. Barry explains in his second witness statement, "it would be entirely unreasonable for a company to make an absolute commitment to reach production within four years before even taking possession of the mining concessions or conducting any exploration."[92] This is because, as Mr. Barry explains, "in the context of a mining project, four years is a relatively short period of time" due to the "comprehensive exploration, resource definition, feasibility studies, metallurgical studies, environmental and water permitting, and the construction of mining infrastructure" necessary to advance a Project to production.[93] This is in addition to the unpredictable nature of market conditions and the commercial risk that would attend such an unqualified commitment.[94] These factors illustrate the unreasonableness of Mineros Norteños's alleged expectation that the Project would be a producing mine within four years.

42. For all of these reasons, the 1997 Agreement is clear: Star Morning agreed only to undertake "best efforts" to advance the Project to production within four years. Mexico is attempting to rewrite a third-party contract to opportunistically advance its defense in this arbitration.

2.3.1.2 The 2000 Agreement

43. On 30 August 2000, Minera Metalín (Star Morning's corporate successor) and Mineros Norteños entered into the 2000 Agreement, whereby Minera Metalín acquired the *Unificación*

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90 *See, e.g.*, Counter-Memorial, para. 17.

91 Counter-Memorial, para. 82.

92 Barry WS2, para. 9.

93 Barry WS2, para. 9.

94 Barry WS2, para. 10.

Mineros Norteños and *Vulcano* concessions in exchange for US$ 3.6 million in advance payments against the US$ 10.475 million royalty contemplated by the 1997 Agreement.[95] Minera Metalín duly made these advance payments to Mineros Norteños.[96] Because these payments represented an advance against the US$ 10.475 million capped royalty, the 2000 Agreement provided that the remaining royalty payments following production would be capped at US$ 6.875 million.[97] The 2000 Agreement did not require Minera Metalín to use "best efforts" to commence production within any specified time period (or at all).

44. Notably, Mexico completely elides in its Counter-Memorial the fact that Minera Metalín paid Mineros Norteños the US$ 3.6 million sum contemplated under the Agreements.[98] Mexico does not (because it cannot) dispute this fact but rather avoids mentioning it. As for the remaining amounts provided under the Agreements, as explained above, those sums were expressly contingent upon the Project going into production and represented a capped royalty on amounts actually produced.[99] Simply put, the Agreements make clear that Mineros Norteños was not automatically entitled to receive the remaining sum set out under the Agreements, nor did it have any entitlement to these conditional sums before actual production began.

2.3.2 The Mexican Courts Rejected Mineros Norteños's Claims Against Minera Metalín for Breach of the 2000 Agreement

45. As SVB explained in its Memorial, on 20 May 2014, to obtain the remaining capped royalty of US$ 6.875 million from Minera Metalín prematurely, Mineros Norteños brought a lawsuit in the First Civil Court in the Judicial District of Morelos in the State of Chihuahua, asserting that Minera Metalín had breached the 2000 Agreement.[100] Mineros Norteños also sought the payment of wages by Minera Metalín to all members of Mineros Norteños, regardless of whether they were hired by, or worked for, Minera Metalín.[101] Mineros Norteños's lawsuit, as

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95 Agreement between Mineros Norteños and Minera Metalín, 30 August 2000, pp. 2-3, **C-0009**.

96 Barry WS2, para. 11.

97 Agreement between Mineros Norteños and Minera Metalín, 30 August 2000, Clause Seven, **C-0009**; Barry WS2, para. 11.

98 Barry WS2, paras. 11, 49.

99 1997 Agreement, Clause Five, **R-0002**; Agreement between Mineros Norteños and Minera Metalín, 30 August 2000, Clause Seven, **C-0009**.

100 Memorial, para. 2.60.

101 Memorial, para. 2.60; Decision of the Eighth District Court accepting jurisdiction, 23 January 2015, p. 2, **C-0025**.

SVB demonstrated, was baseless and ultimately rejected by the Mexican courts in its entirety.[102]

46. Now, in its Counter-Memorial, Mexico attempts to recast that domestic litigation to justify the illegal actions of Mineros Norteños and Mexico's own failure to uphold law and order and protect SVB's investments at Sierra Mojada.[103] Specifically, Mexico contends that although the Mexican courts "found in favor of Minera Metalín," SVB "fails to mention that such courts also determined that Metalín (i) had the obligation to pay royalties to Mineros Norteños and to start mining operations within a period of four years from the date of execution of the 1997 Contract, which implied starting to pay royalties to MN within the same period, and (ii) had failed to comply with such obligation."[104] As such, Mexico suggests, Mineros Norteños's illegal blockades were "legitimate."[105]

47. Like much of Mexico's defense, that narrative is both factually and legally incorrect and unsupported by the content of the judgments themselves. More fundamentally, it ignores the salient, indisputable fact here: that the Mexican courts repeatedly dismissed Mineros Norteños's claim for premature payment of royalties. Moreover, even if the Mexican courts had endorsed Mineros Norteños's reading of the Agreements – which they did not – that still would not justify Mineros Norteños's illegal self-help measures or Mexico's refusal to act. Before turning to the specifics of the domestic court decisions, it is important to recall the limited relevance of this litigation to the current arbitration – and to place it in proper context.

48. Mexico now seeks to justify Mineros Norteños's unlawful blockades and its own failure to act and enforce the law by reviving a commercial dispute that was long ago resolved against Mineros Norteños in court.[106] But the legal foundation for Mineros Norteños's lawsuit was always weak – and untimely. As SVB explained in its Memorial and above, the 2000 Agreement made royalty payments contingent on actual production and sale of minerals, and imposed no fixed timeline to bring the mine into production.[107] In legal terms, the royalty obligation was subject to a *suspensive condition* – namely, the occurrence of production –

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102 Memorial, para. 2.69.

103 Counter-Memorial, paras. 146-148.

104 Counter-Memorial, para. 18.

105 Counter-Memorial, para. 34.

106 Direct Amparo Ruling 375/2020 of the Third Collegiate Court in Civil and Labor Matters of the Seventeenth Circuit, 11 March 2021, **C-0040**.

107 Memorial, para. 2.19; Agreement between Mineros Norteños and Minera Metalín, 30 August 2000, Clause Seven, **C-0009**.

which had not yet occurred.[108] SVB also demonstrated that Mineros Norteños's interpretation contradicted the broader context and structure of the royalty clause, which linked payment explicitly to the generation of revenue from mineral sales.[109] Attempting to impose obligations divorced from that commercial reality – and divorced from the conditional language of the Agreement – was not only unfounded but unworkable. Yet Mineros Norteños nevertheless sued to demand premature royalties – years before the Project had even reached commercial viability – and sought wage payments for all cooperative members, regardless of whether they had ever been hired.[110] These claims ignored both the plain language and commercial logic of the Agreements.[111] The lawsuit was little more than a pressure tactic to extract value from an investment not yet in production.

49. The Mexican courts ultimately refused to endorse that strategy and dismissed the claims either on statute of limitations grounds or without reaching the merits, and contrary to what Mexico claims here, not a single court held that royalties were owed.[112] Even if they had, that would not excuse Mexico's failure to prevent or lift the Continuing Blockade. Indeed, the fact that no legal obligation to pay royalties yet existed is underscored by the fact that Mineros Norteños decided to take the law into its own hands – not once, but twice – through unlawful blockades.

50. It bears repeating that this case is not about a contractual disagreement over mining royalties – this case centers on what Mexico *did* in response to the second illegal blockade, which was and continues to be *nothing*. Mexico asserts that "[i]t is firmly established that international tribunals cannot act as appellate bodies with respect to decisions issued by competent local authorities."[113] SVB fully agrees. This Tribunal is not being asked to review or overturn any ruling by the Mexican courts. And the Tribunal should not be distracted by Mexico's attempts to bog this case down in the minutiae of domestic litigation – the fact is that Mexico had an obligation to protect SVB's investment and failed to meet that obligation. That is the matter

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108 Memorial, paras. 2.63-2.65.

109 Memorial, paras. 2.63-2.65.

110 Memorial, para. 2.60.

111 1997 Agreement, Clause Five, **R-0002**; Agreement between Mineros Norteños and Minera Metalín, 30 August 2000, Clause Seven, **C-0009**.

112 Specifically, *see* Judgment of the Mercantile Judgment 2/2015, 4 October 2017, **R-0027**; Direct Amparo Ruling 375/2020 of the Third Collegiate Court in Civil and Labor Matters of the Seventeenth Circuit, 11 March 2021, **C-0040**.

113 Counter-Memorial, para. 120.

for the Tribunal to decide, not whether decades-old contracts contained binding production obligations and justified Mineros Norteños's illegal self-help measures – which they did not.

2.3.2.1 Contrary to Mexico's contentions, the Eighth District Court did not affirm that Minera Metalín owed any royalties

51. Mexico's civil court system operates under a hierarchical structure. The District Courts are the courts of first instance, which hear commercial and civil disputes first.[114] Their decisions can be appealed to the Unitary Circuit Courts.[115] These appellate courts review District Court rulings on both factual and legal grounds, but do not create binding precedents. Their decisions can, in turn, be challenged through constitutional review mechanisms.[116] They also can be appealed in limited circumstances to the Mexican Supreme Court.[117]

52. When constitutional issues are raised, they are resolved through *amparo* proceedings, which can be initiated directly before the Supreme Court or the Collegiate Circuit Courts.[118] These Courts evaluate whether the District Court's rulings violated constitutional rights, without re-examining the full merits of the original claim.[119] In exceptional cases involving constitutional relevance, the Supreme Court may intervene directly in the matter.[120]

53. In this case, as SVB explained in its Memorial, the Mexican courts either rejected Mineros Norteños's claims as time-barred as a threshold matter or declined to find any enforceable obligation.[121] In so doing, the Mexican courts did not assess Mineros Norteños's claims for royalties on the merits, nor did they assess whether Minera Metalín even had a legal obligation

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114 Judgment of the Mercantile Judgment 2/2015, 4 October 2017, **R-0027**.

115 Judgment in amparo proceeding 4/2016, 16 May 2016, **R-0025**.

116 Political Constitution of the United Mexican States (as amended on 17 January 2025), 5 February 1917, Articles 103, 107, **C-0444**; Amparo Law, Regulating Articles 103 and 107 of the Constitution of the United Mexican States (as amended on 13 March 2025), 2 April 2013, Articles 107, 170, **C-0385**.

117 Political Constitution of the United Mexican States (as amended on 17 January 2025), 5 February 1917, Article 107, **C-0444**.

118 *See, e.g.*, Recurso de Revisión 145/2016 ruling, 21 April 2017, pp. 9-10, 30, 43-47, **R-0026**; Direct Amparo Ruling 375/2020 of the Third Collegiate Court in Civil and Labor Matters of the Seventeenth Circuit, 11 March 2021, **C-0040**.

119 Amparo Law, Regulating Articles 103 and 107 of the Constitution of the United Mexican States (as amended on 13 March 2025), 2 April 2013, Article 76, **C-0385**.

120 Political Constitution of the United Mexican States (as amended on 17 January 2025), 5 February 1917, Article 107, **C-0444**; Amparo Law, Regulating Articles 103 and 107 of the Constitution of the United Mexican States (as amended on 13 March 2025), 2 April 2013, Article 40, **C-0385**.

121 Memorial, paras. 2.69, 2.71.

under the 1997 or 2000 Agreement to pay royalties.[122] Rather, the Mexican courts examined the 1997 and 2000 Agreements for the sole purpose of assessing Minera Metalín's statute of limitations defense.[123] Finding that the "obligation claimed" by Mineros Norteños regarding production began to run on 31 August 2001, the Mexican courts ruled that Mineros Norteños's claim was time-barred under the Mexican Commercial Code.[124]

54. In its Counter-Memorial, Mexico first relies selectively on the Eighth District Court's decision of 2 April 2015 to suggest that Minera Metalín's obligation to pay royalties was triggered – and confirmed – by a four-year deadline to begin production under the 1997 Agreement.[125] That is not supported by the record.

55. As its decision reflects, the Eighth District Court did not validate Mineros Norteños's theory of breach – namely, that royalties were due and owing. Instead, the Court simply dismissed Minera Metalín's preliminary defenses to Mineros Norteños's claim for unpaid royalties, including both (i) that the claim was time-barred, and (ii) that the royalty clause was subject to a suspensive condition and therefore unenforceable.[126] The Court held only that the case could proceed to the merits.[127] It made no finding that a breach had occurred or that royalties were due. In any event, and notably, this decision was later corrected by the appellate court[128] and ultimately reversed by the Eighth District Court on 4 October 2017, a fact which Mexico fails to acknowledge in its Counter-Memorial.[129]

56. Accordingly, the 2 April 2015 decision of the Eighth District Court did not establish any binding contractual interpretation or affirm any royalty obligation owed by Minera Metalín; rather, it merely rejected Minera Metalín's preliminary defenses and allowed the case to proceed to the merits. It was also reversed on appeal and remand.

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122 Memorial, paras. 2.69, 2.71.

123 Memorial, paras. 2.69, 2.71.

124 Memorial, paras. 2.69, 2.71.

125 Counter-Memorial, paras. 115-116; Judgment of the Motion for Failure to Comply with a Term or Condition, 2 April 2015, **R-0023**.

126 Judgment of the Motion for Failure to Comply with a Term or Condition, 2 April 2015, pp. 16-17, **R-0023**.

127 Judgment of the Motion for Failure to Comply with a Term or Condition, 2 April 2015, p. 8, **R-0023**.

128 Appeal Judgment 7/2015, 7 March 2016, **R-0024**.

129 Judgment of the Mercantile Judgment 2/2015, 4 October 2017, **R-0027**.

2.3.2.2 The Second Unitary Court affirmed the Eighth District Court's decision, but did not affirm the existence of any royalty obligation

57. On 7 March 2016, the Second Unitary Court affirmed the Eighth District Court's decision rejecting Minera Metalín's affirmative defense that the royalty obligation was subject to a suspensive condition.[130] Mexico misrepresents this decision, suggesting that it amounted to a judicial endorsement of Mineros Norteños's legal position that royalties were due and owing, as well as a binding determination that the royalty obligation was unconditional.[131] This is, again, a distortion of the record.

58. In its decision, the Second Unitary Court explicitly recognized that Minera Metalín had made its royalty obligation subject to certain milestones – *i.e.*, production and sale of minerals – and analyzed these milestones under the legal framework applicable to suspensive conditions.[132] It ultimately found that Minera Metalín had not proven the existence of a suspensive condition.[133]

59. However, despite this flawed conclusion, the Court made no finding that royalties were owed.[134] The Court merely affirmed the rejection of Minera Metalín's preliminary defense that the royalty clause was subject to a suspensive condition. It did not analyze whether any royalties were in fact owed. Nor did it examine the statute of limitations defense in detail.

2.3.2.3 The First Unitary Tribunal likewise focused only on burden of proof and did not confirm any royalty obligation

60. On 23 August 2016, the First Unitary Tribunal likewise upheld the Eighth District Court's decision that Minera Metalín had not sufficiently proven the legal existence of a suspensive condition.[135] Mexico uses this decision to suggest that the Mexican courts consistently rejected Minera Metalín's interpretation of the royalty clause,[136] and affirmed that Minera Metalín was

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130 Appeal Judgment 7/2015, 7 March 2016, **R-0024**. A suspensive condition is a legal concept that refers to a future and uncertain event upon which the effectiveness or enforceability of a legal act depends; until the condition is fulfilled, the rights and obligations established by the act remain suspended and produce no legal effect. *See* Federal Civil Code, as amended 20 January 2010, Art. 1938, **C-0362**.

131 Counter-Memorial, paras. 118-120.

132 Appeal Judgment 7/2015, 7 March 2016, p. 33, **R-0024**.

133 Appeal Judgment 7/2015, 7 March 2016, pp. 34-36, **R-0024**.

134 Appeal Judgment 7/2015, 7 March 2016, pp. 33-37, **R-0024**.

135 Judgment in amparo proceeding 4/2016, 23 August 2016, **R-0025**.

136 Counter-Memorial, paras. 121-124.

under a binding and unconditional obligation to pay royalties.[137] This again misrepresents the scope and reasoning of the Court's decision.

61. As its decision reflects, the First Unitary Court did not affirm any legal obligation that Minera Metalín commence production, let alone endorse a four-year deadline.[138] Crucially, the Court did not find that any royalties were due, nor it accept that royalties were automatically due, as Mexico incorrectly suggests.[139] Instead, the decision turned on Minera Metalín's failure to meet its evidentiary burden as the party raising the suspensive condition as an affirmative defense. That is an important distinction, and one that Mexico curiously fails to grasp.

2.3.2.4 The Third Collegiate Court dismissed Minera Metalín's **amparo** *on procedural grounds without examining the merits*

62. On 21 April 2017, the Third Collegiate Court ruled on Minera Metalín's *amparo*, which had challenged the First Unitary Tribunal's decision of 23 August 2016.[140] In that judgment, the Third Collegiate Court revoked the earlier decision under appeal[141] and dismissed the *amparo* on the sole ground that the challenged act – namely, the ruling of the First Unitary Tribunal – was not an "act of impossible reparation" under Article 107 of the Mexican *Amparo* Law.[142] This meant that the Collegiate Court could not – and did not – examine the merits of the *amparo* at all. Mexico nonetheless invokes this decision to suggest that the Mexican judiciary at all levels sided against Minera Metalín and confirmed the existence of a binding obligation to produce and to pay royalties.[143] That is demonstrably wrong.

63. The Third Collegiate Court never considered – nor had any reason to consider – whether such an obligation existed. It made no findings as to the contractual framework, the alleged four-year production timeline, or even the conditions that applied to any royalty payment. The Court addressed only whether Minera Metalín's *amparo* was admissible.[144] The ruling turned on

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137 Counter-Memorial, paras. 121-124.

138 Judgment in amparo proceeding 4/2016, 16 May 2016, pp. 26-27, 49-51, **R-0025**.

139 Judgment in amparo proceeding 4/2016, 16 May 2016, pp. 26-27, 49-51, **R-0025**.

140 Recurso de Revisión 145/2016 ruling, 21 April 2017, pp. 4-5, **R-0026**.

141 Recurso de Revisión 145/2016 ruling, 21 April 2017, pp. 10, 45, **R-0026**.

142 Recurso de Revisión 145/2016 ruling, 21 April 2017, pp. 9-10, 30, 43-47, **R-0026**.

143 Counter-Memorial, para. 127.

144 Recurso de Revisión 145/2016 ruling, 21 April 2017, p. 30, **R-0026**.

form, not substance, and provides no support for Mexico's argument that the courts endorsed Mineros Norteños's interpretation of the 2000 Agreement.

2.3.2.5 The Eighth District Court dismissed Mineros Norteños's claim on statute of limitations grounds without affirming any royalty obligation

64. On 4 October 2017, the Eighth District Court, on remand, dismissed Mineros Norteños's claim against Minera Metalín in its entirety, finding that it was time-barred.[145] Mexico now seeks to recast that decision as tacit confirmation that Minera Metalín had an enforceable obligation to pay royalties.[146] However, beyond reciting vague platitudes about the legal effect of upholding an affirmative defense and offering general commentary on how limitation periods operate under Mexican law,[147] Mexico does not – because it cannot – identify any finding in this decision that supports the conclusion that Minera Metalín had an enforceable royalty obligation under the 2000 Agreement.

65. The Court's analysis focused *exclusively* on the ten-year statute of limitations applicable to commercial claims, and the Court made this explicit throughout.[148] It evaluated the 2000 Agreement only for the limited purpose of determining when any alleged obligation would have arisen – and therefore when the clock began to run on the statute of limitations. While the Court reviewed the contractual language in the Agreement, it did so only to determine whether the deadline to bring a claim had passed.[149]

66. The Court explicitly stated that because of the statute of limitations defense raised by Minera Metalín, it was unnecessary to examine any other defenses. In its words:

> In principle, I will deal with the claimed exceptions, because if one of them is well-founded, it would have an impact on the treatment of the action.[150]

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145 Judgment of the Mercantile Judgment 2/2015, 4 October 2017, **R-0027**.

146 Counter-Memorial, para. 133.

147 Counter-Memorial, para. 132.

148 Judgment of the Mercantile Judgment 2/2015, 4 October 2017, paras. 13, 51-53, **R-0027**.

149 Judgment of the Mercantile Judgment 2/2015, 4 October 2017, para. 22, **R-0027**.

150 Judgment of the Mercantile Judgment 2/2015, 4 October 2017, para. 13 (Spanish original: "*En principio, me ocuparé de las excepciones opuestas, pues si una de ellas resulta fundada, repercutiría en el tratamiento de la acción*."), **R-0027**.

> Now, given that the exception of prescription [statute of limitations] raised has been upheld, it is unnecessary to undertake an analysis of the other exceptions opposed by the defendant.[151]

67. As a result, the Court never proceeded to assess the content of the obligations under the 1997 and 2000 Agreements, whether any obligation to pay royalties had been triggered, or whether Minera Metalín had breached any obligation. The Court's discussion of the contractual terms was purely to determine when a potential cause of action might have arisen – not to determine whether that action had any merit.[152] This is reinforced by the Court's own description of the effect of the statute of limitations: "The effect of negative prescription [statute of limitations] is the extinction of the action, of the creditor's power to demand payment from the debtor."[153] As a consequence, the Court "absolve[d] Minera Metalín, Variable-Capital Corporation, from the payment of the benefits demanded."[154]

68. The Court observed that, under Mexican law, a ruling upholding a statute of limitations defense is considered a final disposition "on the merits,"[155] because it ends the case definitively.

2.3.2.6 The Second Unitary Court affirmed that Mineros Norteños's claim was time-barred, without confirming any breach

69. On 31 July 2019, shortly before Mineros Norteños imposed the Continuing Blockade, the Second Unitary Court affirmed the Eighth District Court's decision that Mineros Norteños's claim was time-barred.[156] Mexico refers to this decision in its Counter-Memorial as if the Court confirmed a breach of contract by Minera Metalín; the Court made no such finding.[157]

70. Specifically, the Second Unitary Court did not confirm that Minera Metalín was bound by any four-year obligation to produce, nor did it find that any royalties were due and owing; rather,

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151 Judgment of the Mercantile Judgment 2/2015, 4 October 2017, para. 51 (Spanish original: "*Ahora bien, dado que resultó procedente la excepción de prescripción, resulta innecesario el análisis de las demás excepciones opuestas por la parte demandada*."), **R-0027**.

152 Judgment of the Mercantile Judgment 2/2015, 4 October 2017, para. 22, **R-0027**.

153 Judgment of the Mercantile Judgment 2/2015, 4 October 2017, para. 20 (Spanish original: "*El efecto de la prescripción negativa, es la extinción de la acción, de la facultad del acreedor para exigir del deudor el pago*."), **R-0027**.

154 Judgment of the Mercantile Judgment 2/2015, 4 October 2017, para. 53 (Spanish original: "*En consecuencia, absuelvo a Minera Metalín, Sociedad Anónima de Capital Variable, del pago de las prestaciones demandadas*."), **R-0027**.

155 Judgment of the Mercantile Judgment 2/2015, 4 October 2017, para. 64, **R-0027**.

156 Appeal Judgment 12/2017, 31 July 2019, **R-0029**.

157 Counter-Memorial, paras. 135-140.

its decision was focused entirely on the statute of limitations.[158] The Court's brief contractual interpretation served one purpose only: to determine when the limitation period began to run.[159]

71. The Court confirmed the Eighth District Court's decision – namely, that Mineros Norteños had waited too long to assert its claim.[160] In fact, the Court emphasized that Mineros Norteños had failed even to explain why the District Court's ruling on the limitations period was incorrect.[161]

2.3.2.7 The Second Unitary Court reaffirmed that Mineros Norteños's claim was time-barred and did not find any breach by Minera Metalín

72. On 10 March 2020, while Mineros Norteños maintained its Continuing Blockade on the Project, the Second Unitary Court reaffirmed that Mineros Norteños's claim was time-barred and declined to assess whether Minera Metalín had breached any contractual obligation.[162]

73. In its Counter-Memorial, Mexico asserts that this decision "confirmed the decision of the Commercial Judgment 2/2015"[163] – *i.e.*, the Eighth District Court's 4 October 2017 decision dismissing Mineros Norteños's claim as time-barred[164] – and that the Court allegedly "determined that Minera Metalín had the obligation to start the exploitation works of the mining lots as of August 30, 2001."[165] These assertions too are incorrect and misleading.

74. As a threshold matter, SVB notes that although Mexico relies on the Second Unitary Court decision, it failed to submit it with its Counter-Memorial. SVB has independently located and reviewed the full judgment. Far from supporting Mexico's arguments, that decision reaffirms that Mineros Norteños's claim was procedurally defective and legally extinguished. It further confirms that the 2019 Continuing Blockade was not a lawful assertion of rights, but rather an illegal attempt by Mineros Norteños to obtain by force what had been unable to obtain by law.

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158 Appeal Judgment 12/2017, 31 July 2019, pp. 28-37, **R-0029**.

159 Appeal Judgment 12/2017, 31 July 2019, pp. 28-37, **R-0029**.

160 Appeal Judgment 12/2017, 31 July 2019, p. 40, **R-0029**.

161 Appeal Judgment 12/2017, 31 July 2019, p. 36, **R-0029**.

162 Ruling No. 2 of the Second Unitary Court, 10 March 2020, **C-0417**.

163 Counter-Memorial, para. 143.

164 Judgment of the Mercantile Judgment 2/2015, 4 October 2017, **R-0027**.

165 Counter-Memorial, para. 143.

75. Specifically, the Court's 10 March 2020 decision did not assess the content of Minera Metalín's obligations on the merits; it was a procedural decision reaffirming that Mineros Norteños's lawsuit was barred by the statute of limitations.[166] As the Court explicitly states:

> [N]othing would be decided about the start and end dates of the period that the defendant had to fulfill the obligation in question, as this was an issue to be debated in the process and resolved in the final judgment, whereas the statute of limitations defense is indeed of a peremptory nature.
>
> Therefore, it can be concluded that, even though the appealed decision was upheld, this unitary court merely confirmed its outcome . . . and omitted study of the exception of failure to comply within the applicable term, given that it is tied to the statute of limitations.[167]

76. The Court's reference to "30 August 2001" as the date the claimed obligation would have arisen was not a finding on the merits; it was legal assumption used to determine whether Mineros Norteños's lawsuit was timely. As the Court found, assuming that the obligation arose in 2001, the claim – filed in 2015 – was untimely. That decision, like those before it, affirmed that Mineros Norteños's legal remedies had expired as a matter of Mexican law.

2.3.2.8 The Third Collegiate Court confirmed the conditional nature of the royalty obligation and upheld the dismissal of the claim

77. On 11 March 2021, the Third Collegiate Court for Civil and Labor Matters of the Seventeenth Circuit rejected Mineros Norteños's *amparo* challenging the dismissal of its lawsuit on constitutional grounds.[168] Mexico relies on this decision to suggest incorrectly – through broad generalizations rather than specific analysis – that the Mexican courts consistently affirmed the

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166 Ruling No. 2 of the Second Unitary Court, 10 March 2020, p. 70, **C-0417**.

167 Ruling No. 2 of the Second Unitary Court, 10 March 2020, pp. 36-37 (Spanish original: "*[N]ada se resolvería sobre la fecha de inicio y conclusión del plazo que la enjuiciada tenía para el cumplimento de la obligación de que se trata, al resultar un tema que se debatiría en el proceso y se resolvería en sentencia definitiva, en tanto que efectivamente la excepción de prescripción de trato es de naturaleza perentoria. Por lo que es dable concluir que aun y cuando se confirmó la resolución apelada, este tribunal unitario únicamente confirmo el sentido de la misma. . . y se omitió el estudio de la excepción de falta de cumplimiento del plazo a que está sujeta la acción, al estar ligada con la prescripción*."), **C-0417**.

168 Direct Amparo Ruling 375/2020 of the Third Collegiate Court in Civil and Labor Matters of the Seventeenth Circuit, 11 March 2021, **C-0040**.

existence of a four-year production obligation and found Minera Metalín in breach of that obligation.[169] But, again, that is a deliberate misreading of the Court's decision.

78. The Court's decision was not a finding on the merits. Rather, it was a constitutional review focused narrowly on whether the Eighth District Court's interpretation of the 2000 Agreement and application of the statute of limitations was constitutionally valid.[170] The Court emphasized that it was not tasked with deciding whether Minera Metalín had breached the 2000 Agreement, but only whether the District Court's reasoning was constitutionally sound.[171]

79. In so doing, the Collegiate Court reaffirmed two critical points. First, it expressly confirmed that the obligation to bring the mine into production under the 2000 Agreement was conditional – specifically, that it was subject to Minera Metalín first acquiring the mining rights.[172] Second, it stated that the "four-year" clause could not be interpreted in isolation but had to be read in the full context of the Agreement.[173] The Court stressed the importance of interpreting that clause as part of a broader semantic and legal unit:

> A semantic unit which prevented the part of that clause where it referred to the four years from being interpreted in isolation and literally, because when the condition was observed as an integral part of the paragraph, it did not allow the conclusion that the start of that period began to run from the conclusion of that first contract.[174]

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169 Counter-Memorial, paras. 144-146.

170 Direct Amparo Ruling 375/2020 of the Third Collegiate Court in Civil and Labor Matters of the Seventeenth Circuit, 11 March 2021, pp. 8-9 (Spanish original: "*[L]a constitucionalidad o inconstitucionalidad del acto reclamado, atendiendo a las consideraciones en que se apoyó la autoridad responsable para la emisión de la resolución que se impugna. . .*"), **C-0040**.

171 Direct Amparo Ruling 375/2020 of the Third Collegiate Court in Civil and Labor Matters of the Seventeenth Circuit, 11 March 2021, pp. 8-9 ("[T]he constitutionality or unconstitutionality of the act claimed, based on the considerations on which the responsible authority relied for the issuance of the resolution being challenged." Spanish original: "*[L]a constitucionalidad o inconstitucionalidad del acto reclamado, atendiendo a las consideraciones en que se apoyó la autoridad responsable para la emisión de la resolución que se impugna. . .*"), **C-0040**.

172 Direct Amparo Ruling 375/2020 of the Third Collegiate Court in Civil and Labor Matters of the Seventeenth Circuit, 11 March 2021, p. 80, **C-0040**.

173 Direct Amparo Ruling 375/2020 of the Third Collegiate Court in Civil and Labor Matters of the Seventeenth Circuit, 11 March 2021, p. 81, **C-0040**.

174 Direct Amparo Ruling 375/2020 of the Third Collegiate Court in Civil and Labor Matters of the Seventeenth Circuit, 11 March 2021, p. 81 (Spanish original: "*[U]na unidad semántica, que impedía que la parte de dicha cláusula donde se refería a los cuatro años fuera interpretada de manera aislada y literalmente, porque al observarse la condición como parte integrante del párrafo, no permitía concluir que el inicio de dicho plazo empezara a correr a partir de la celebración de ese primer contrato.*"), **C-0040**.

80. The Collegiate Court thus agreed that the obligation was not absolute or automatic but rather was conditional. It also found nothing unconstitutional in the District Court's finding:

> [T]he concepts of violation are unfounded, because contrary to what he pointed out, the interpretation that the magistrate made with respect to the date on which the four-year term for the defendant to put the mining lots into production began to run (where the criterion of the judge of first instance was confirmed), is correct, according to the analysis of the contracts. . . .[175]

81. Moreover, the Collegiate Court expressly recognized that royalty payments would be triggered only if production occurred, reaffirming their conditional nature:

> [F]or the payment of these royalties to be updated, the mining lots that are the subject of the exploration contract and subsequently the concession transfer contract would effectively have to be in production.[176]

82. In short, the Collegiate Court's 11 March 2021 decision confirms that the Mexican courts did *not* impose a four-year production obligation on Minera Metalín or find Minera Metalín in breach of that obligation, as Mexico incorrectly asserts. Instead, the Collegiate Court upheld the dismissal of Mineros Norteños's claim on constitutional and procedural grounds and endorsed an interpretation of the Agreements that aligned with the Claimant's own – that any royalty or production obligation was conditional.

83. In light of the full set of judgments, Mexico's argument that the Mexican courts found that "[t]here was an obligation for Metalín to commence mining works and pay the royalties owed to Mineros Norteños within four years from the signing of the 1997 Contract" is both disingenuous and wrong.[177] As set forth above, not a single Mexican court ever held on the

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175 Direct Amparo Ruling 375/2020 of the Third Collegiate Court in Civil and Labor Matters of the Seventeenth Circuit, 11 March 2021, p. 81 (Spanish original: "*[R]esultan infundados los conceptos de violación, porque adverso a lo que señaló, la interpretación que el magistrado efectuó respecto de la fecha en que empezaba a correr el término de cuatro años para que la demandada pusiera en producción los lotes mineros (donde se confirmó el criterio del juez de primera instancia), resulta correcta, de acuerdo con el análisis de los contratos. . .*"), **C-0040**.

176 Direct Amparo Ruling 375/2020 of the Third Collegiate Court in Civil and Labor Matters of the Seventeenth Circuit, 11 March 2021, p. 94 (Spanish original: "*[P]ara que el pago de dichas regalías se actualizara, efectivamente tendrían que estar en producción los lotes mineros materia del contrato de exploración y posteriormente de cesión de la concesión.*"), **C-0040**.

177 Counter-Memorial, para. 146.

merits that Minera Metalín had such an obligation or that it had breached such an obligation. Rather, the Mexican courts repeatedly affirmed that Mineros Norteños's claim was time-barred under Mexican law and therefore not admissible, without addressing the merits of that claim. But even if the Mexican courts had ruled otherwise, that still would not permit Mexico to turn a blind eye to the violent and unlawful seizure of an investor's property.

84. Despite Mineros Norteños's baseless lawsuit – and a parade of other obstacles like the Initial Blockade, a hostile political administration, and unfavorable market conditions throughout the 2010s – SVB forged ahead, making consistent, active progress to advance the Project, as elaborated below.

2.4 SVB Made Substantial Investments in Exploration That Led to the Significant Development of the Sierra Mojada Project

85. Mexico asserts in its Counter-Memorial that Minera Metalín allegedly made "no significant progress" to bring the Sierra Mojada Project into production,[178] and did not have "any serious intention" to advance the Project through to production.[179] For instance, Mexico asserts that the Claimant never intended to develop the Sierra Mojada Project because SVB is an exploration, not exploitation, company.[180] The extensive record of evidence before this Tribunal contradicts each of these assertions.

86. *First*, Mexico is wrong to assert that the Claimant's expertise in exploration somehow meant that it was not willing or able to bring the Sierra Mojada Project to exploitation.[181] That assertion betrays Mexico's basic misunderstanding of the mining industry. As Mr. Edgar explains in his second witness statement, "[e]ven if a company specializes in exploration, it can advance a project to production by either pivoting to mine development (which happens frequently in the industry) or, more likely, by partnering with a major mining company that has a proven track record of advancing projects to exploitation."[182] That is exactly what SVB did. In 2018, SVB secured a partnership with South32 – a mining major with an extensive track

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178 Counter-Memorial, paras. 17, 87.

179 Counter-Memorial, para. 89.

180 *See, e.g.*, Counter-Memorial, paras. 4, 90, 540.

181 *See, e.g.*, Counter-Memorial, paras. 4, 90, 540.

182 Edgar WS2, para. 24.

record of moving projects from exploration through production.[183] That strategic partnership paved the way for the Sierra Mojada Project to advance to the production phase.[184]

87. Moreover, as explained below and in the Memorial and witness statements of Mr. Barry, SVB made significant investments to advance the Sierra Mojada Project toward production.[185] Indeed, South32 – the eighth largest mining company in the world – would not have invested in the Project in 2018 had "no significant progress" been made since SVB's 2010 acquisition of the rights to the Project, or if there was any indication that Minera Metalín lacked a "serious intention" to advance the Project, as Mexico now suggests. It is also worth emphasizing that South32 specifically requested SVB to continue managing the work program following its investment.[186] Had South32 lacked confidence in Silver Bull's capabilities, it would not have entrusted the team with this responsibility. As Mr. Edgar explains in his second witness statement, the investment of a mining major is a "huge endorsement" and reflected the promise of the Sierra Mojada Project and the capability of the SVB technical team.[187] That promise would not have been evident had it not been for the Claimant's exploration and development efforts. The paragraphs below summarize briefly the many steps the Claimant took to advance the Sierra Mojada Project, which Mexico notably does not contest in its Counter-Memorial:

- Between 1997 and 2010, Star Morning, and later Minera Metalín, undertook extensive underground sampling, mapping, and drilling to advance the high-grade zinc zone toward a mineable resource.[188] This work spanned 98,745 meters of underground drilling from existing adits and historical mine tunnels and 46,273 meters of surface drilling.[189] By the time of SVB's acquisition of the Project in 2010, Minera Metalín had invested more than US$ 20 million into advancing the Project.[190]

- Following the reverse merger with Dome in 2010, SVB built upon and expanded these considerable exploration efforts. Namely, SVB devised an improved strategy for

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183 Edgar WS2, para. 24.

184 Edgar WS2, para. 25.

185 Memorial, paras. 2.34-2.51; Barry WS1, paras. 4.4-4.25; Barry WS2, para. 13.

186 Option Agreement between Silver Bull, Minera Metalín, S.A. de C.V., Contratistas de Sierra Mojada S.A. de C.V., and South32 International Investments Holdings Ltd, 1 June 2018, pp. 45-46, **C-0031**.

187 Edgar WS2, para. 26.

188 Barry WS2, para. 14.

189 Barry WS2, para. 14; Barry WS1, para. 4.7.

190 Barry WS2, para. 14; Barry WS1, para. 4.8.

exploration,[191] reinterpreting the Project's geological model, remapping the site, resurveying mineral titles and surface rights, and retraining staff to implement the most current geological methods.[192]

- In April 2011, SVB commissioned a NI-43 101 report, including a resource estimate, from Geosim Services Inc. and Nilsson Mine Services Ltd., which analyzed the at-surface silver oxide mineralization, called the "Shallow Silver Zone" on the Project deposits.[193] Using conservative estimates that did not account for the zinc oxide mineralization, the report yielded a promising resource estimate and, among other conclusions, recommended additional drilling, testing, and studies to further define the Shallow Silver Zone.[194]

- Between 2011 and 2017, SVB conducted extensive drilling campaigns, including in the Shallow Silver Zone.[195] That exploratory drilling helped define a substantial silver oxide resource and supplied the foundation for several additional technical reports. For instance, as explained in the Memorial, a November 2011 technical report prepared by SRK Consulting (Canada) Inc. updated the earlier resource estimate with encouraging figures and reflected that the investments made in exploration were "sufficiently well understood to support resource estimation."[196] Likewise, in 2012 SVB commissioned a second study from that firm, which reported even higher figures.[197]

- Additionally, as explained by Mr. Barry, SVB conducted various additional studies critical to advance the Project toward production, including metallurgical testing, water and power assessments, and comprehensive commodity market analyses.[198]

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191 Memorial, paras. 2.34, 2.36.

192 Barry WS1, paras. 4.11-4.13.

193 Memorial, para. 2.37; Geosim Services Inc. and Nilsson Mine Services Limited, Technical Report on the "Shallow Silver Zone" Silver Zinc Deposit, 18 April 2011, **C-0077**; SRK Consulting, Technical Report on the Sierra Mojada Silver Project, Coahuila State, Mexico, 25 November 2011, **C-0080**.

194 Memorial, paras. 2.37-2.39.

195 Barry WS2, para. 14.

196 Memorial, para. 2.41; SRK Consulting, Technical Report on the Sierra Mojada Silver Project, Coahuila State, Mexico, 5 July 2012, p. 8, **C-0081**.

197 Memorial, para. 2.42; SRK Consulting, Technical Report on the Sierra Mojada Silver Project, Coahuila State, Mexico, 5 July 2012, p. vii, **C-0081**.

198 Barry WS1, para. 4.16.

Among these studies was a hydrological assessment conducted in 2012 aimed at ensuring the area had sufficient natural hydrological resources to sustain the Project's potential expansion.[199] Furthermore, SVB strategically acquired additional mineral rights to broaden the scope of the company's exploration activities and acquired surface title to 856 hectares of land over the deposit to allow for mining activities and the building of the necessary infrastructure.[200]

- In 2013, SVB commissioned a further technical report, from JDS Energy & Mining Inc., which reflected substantially greater indicated resources for the Project and paved the way for the completion of a Preliminary Economic Assessment ("**PEA**").[201] That PEA, also completed by JDS in 2013, revealed further positive economics and, in turn, recommended advancement to a pre-feasibility study.[202] As a result of these studies, in October 2013, SVB acquired additional surface rights to four areas totalling 755 hectares, for further expansion of the Project.[203]

- In 2015, thanks to SVB's extensive drilling and exploration efforts, the Company discovered a highly prospective sulphide mineralisation area (referred to as the "**Sulphide Zone**"). After completing an extensive underground mapping and sampling program throughout 2016, SVB commenced drilling in this zone in 2017.[204]

- Between 2016 and 2017, SVB undertook a significant fundraising effort to further establish the extent of the Sulphide Zone. Specifically, SVB raised approximately US$ 4 million via private placements, due in large part to the favorable results from SVB's many technical studies described above.[205] While securing this financing, SVB continued to advance its exploration program.[206]

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199 Memorial, para. 2.43; Hidrolab Consultants, Evaluation Report of General Hydrological Characteristics of the Area, 20 November 2012, p. 21, **C-0084**.

200 Barry WS1, paras. 4.22-4.23.

201 JDS Energy & Mining Inc, Technical Report on the Resources of the Silver-Zinc Sierra Mojada Project, Coahuila State, Mexico, 18 March 2013, **C-0085**.

202 JDS Energy & Mining Inc, Preliminary Economic Assessment NI 43-101 technical report, 30 September 2013, p. 255, **C-0088**.

203 Sierra Mojada surface rights acquired by SVB, 12-16 October 2013, **C-0089**.

204 Barry WS1, paras. 4.29-4.33.

205 Memorial, para. 2.49.

206 Memorial, para. 2.49.

- In 2018, SVB took a significant step towards the realization of the Project by securing a key strategic partner in South32. Specifically, SVB entered into an Option Agreement with South32, a major mining company and a spinoff of the world's largest mining company: BHP Billiton. Per the Option Agreement, South32 agreed to fund further exploration activities totalling US$ 10 million and obtained an option to acquire a 70% interest in the Project for an additional US$ 90 million.[207] As noted above and explained in the second witness statements of Messrs. Barry and Edgar, given South32's extensive experience as a mining investor, South32 would not have committed such substantial funding without clear evidence the Project had the potential to become a producing mine.[208]

- After securing the Option Agreement, SVB undertook further exploratory work, including commencing an 8,000-metre drilling program through a contract with Major Drilling De Mexico S.A. de C.V ("**Major Drilling**").[209] As Mr. Barry explains, this further exploration led to an important new discovery at one of the Project's prospects, namely the Palomas Negros Prospect, which SVB announced in June 2019, shortly before the Continuing Blockade began.[210] That drilling program produced samples with substantial silver, lead, and zinc mineralization close to surface.[211] At the same time, the South32 partnership also enabled drilling on the silver oxide resource.[212]

88. As explained above and in Mr. Barry's second witness statement, Minera Metalín consistently and actively advanced the Project toward production by conducting extensive exploration, commissioning key technical studies to assess the mineable resources, and advancing permitting efforts.[213] That progress enabled Minera Metalín to secure South32 as its key strategic partner, funder, and likely miner.[214] As noted above, Mexico does not contest that

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207 Option Agreement between Silver Bull, Minera Metalín, S.A. de C.V., Contratistas de Sierra Mojada S.A. de C.V., and South32 International Investments Holdings Ltd, 1 June 2018, **C-0031**.

208 Barry WS2, para. 14; Edgar WS2, para. 18.

209 Barry WS2, para. 14; Barry WS1, para. 6.1.

210 Barry WS2, para. 14; Barry WS1, para. 6.3.

211 S-K1300 Summary Technical Report on the Resources of the Silver-zinc Sierra Mojada Project Coahuila, Mexico 24 January 2023, p. 82, **C-0051**.

212 Barry WS2, para. 15.

213 Barry WS2, para. 15.

214 Barry WS2, para. 15.

SVB took the above-described steps to advance the Sierra Mojada Project. That is because it cannot – there is simply no evidence that the Claimant was sitting on its hands.

89. Despite this significant progress toward production, prolonged, unfavorable market conditions made production before 2019 impracticable. As Mr. Barry explains in his second witness statement, the sustained decline in silver prices and, to a lesser extent, zinc prices, posed a serious obstacle to further development.[215] Silver fell from a high of US$ 48.58/oz in January 2011 to approximately US$ 14.50/oz by June 2018, representing a 70% decline in value.[216] And zinc, the Project's other key commodity, also saw a substantial decline, falling from over US$ 2,470/t in February 2011 to below US$ 1,460/t in January 2016 – a 41% decrease.[217] Silver and zinc were the key minerals that SVB targeted in the Sierra Mojada Project, so their sustained depressed prices directly affected investment prospects, the Project's economic outlook and, in turn, SVB's ability to continue progressing development.[218] Nonetheless, SVB continued to advance the Project in spite of these market forces and made enough progress to secure a funding agreement with South32 in June 2018.[219]

90. Moreover, despite the positions taken by Mexico in its Counter-Memorial, at no point during SVB's development of the Sierra Mojada Project did any Mexican authority ever complain that the Project had not yet proceeded to production. Indeed, nobody other than Mineros Norteños ever complained about the Project's progress. This makes sense – international investors and Mexican authorities alike recognized that mining projects can only be advanced when commodity prices allow for the investment needed for exploration efforts. Mexico's position in the Counter-Memorial is simply fabricated for purposes of these proceedings.

91. And, as for Mineros Norteños, SVB made sure to keep the group apprised of the Project's developments as well as the obstacles to development posed by the sustained unfavorable market conditions.[220] Mr. Barry regularly provided updates to Mineros Norteños through presentations, typically delivered twice a year.[221] The below screenshots come from one such

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215 Barry WS2, para. 15.

216 15 year silver price in USD/oz, silverprice.org, **C-0349**.

217 Zinc prices 2011-2016, last accessed 22 April 2025 (available at https://www.westmetall.com/en/markdaten.php?action=table&field=LME_Zn_cash#y2011), **C-0201**.

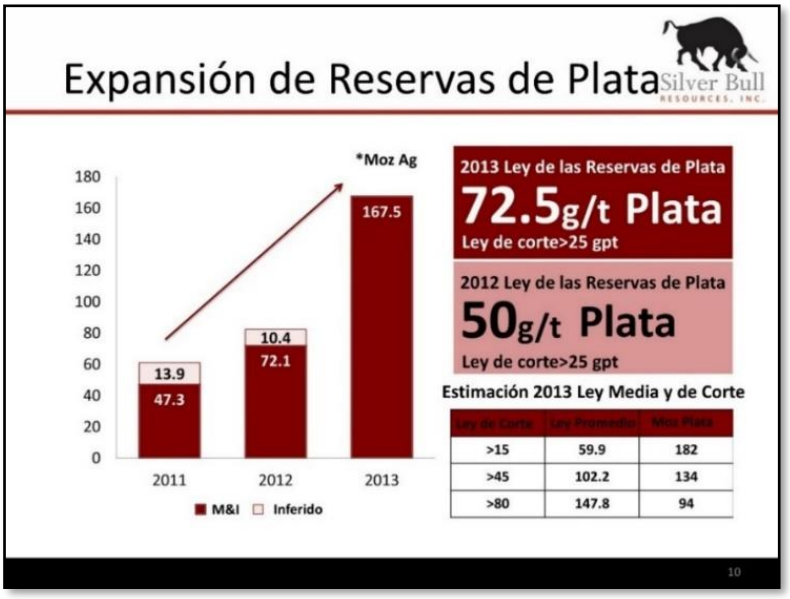
218 Barry WS2, para. 15.

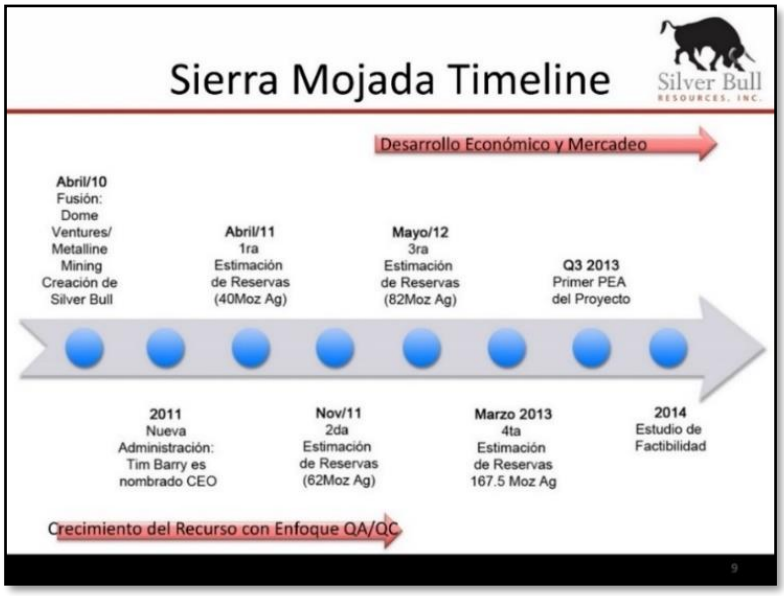
219 Barry WS2, para. 15.

220 Barry WS2, para. 15.

221 *See, e.g.*, Silver Bull Presentation to Mineros Norteños, June 2013, **C-0177**.

presentation in June 2013 and summarize SVB's efforts to expand the resource and produce an economic study on the silver oxide mineralization.[222] SVB translated these presentations to Spanish so that Mineros Norteños could fully understand the information being conveyed.[223]





Extract from Silver Bull presentation to Mineros Norteños, June 2013

222 Barry WS2, para. 16.

223 Barry WS2, para. 16.

92. As Mr. Barry explains in his second witness statement, SVB was confident that, given its active progress in advancing the Project, it was on a linear path towards production.[224] By 2019, market conditions had begun to improve, and the Company was well positioned to advance towards production, particularly with the support of South32.[225] As noted above, SVB had already completed extensive exploration work, which led to several promising discoveries, including the Sulphide Zone.[226] SVB's primary investor, South32, was highly enthusiastic about the Project, and in particular the Sulphide Zone. Thus, SVB believed that but for the illegal Continuing Blockade imposed in 2019, South32 would have exercised its option to acquire a 70% interest under the terms of the Option Agreement.[227] South32's acquisition of a 70% interest and corresponding funding would have, in turn, permitted SVB, as operator, to develop and implement a mine plan and proceed to the feasibility stage.[228]

93. Ironically, the very thing that Mineros Norteños claimed to want – royalties from production at the Sierra Mojada Project – could not occur so long as the group continued its illegal Continuing Blockade. That Blockade, coupled with Mexico's failure to intervene for nearly three years, prevented any further development of the Project and ultimately led to South32's exit, which crystallized the Claimant's damages and loss of its entire investment in the Project.

2.5 The 2016 Initial Blockade Was Not a Peaceful Protest

94. SVB demonstrated in its Memorial that the February 2016 Blockade (the "**Initial Blockade**") was a deliberate and coordinated act of physical coercion imposed on Minera Metalín by approximately 50 members of Mineros Norteños led by, among others, Mr. Fraire Hernández.[229] On the morning of 4 February 2016, Mr. Fraire Hernández and his group entered Minera Metalín's property without authorization, locked the camp's gates with chains and padlocks, and unlawfully confined Minera Metalín personnel inside against their will.[230] Mineros Norteños's clear goal was to hold SVB's and Minera Metalín's employees hostage

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224 Barry WS2, para. 17.

225 Barry WS2, para. 17.

226 Barry WS2, para. 17.

227 Barry WS2, para. 17.

228 Barry WS2, para. 17.

229 Memorial, paras. 2.77, 2.81.

230 Memorial, paras. 2.77, 2.80, 2.82

inside, effectively serving as collateral for Minera Metalín's purported debt to Mineros Norteños under the 2000 Agreement.[231]

95. As SVB demonstrated further, the Initial Blockade did not end voluntarily. It ended after two public prosecutors and police officers arrived at the Project site and warned Mineros Norteños about the consequences of their actions.[232] SVB presented in its Memorial witness testimony and documentary evidence confirming the timing and nature of Mineros Norteños's illegal actions and the swift intervention of the Mexican authorities to stop them.[233]

96. In its Counter-Memorial, Mexico asserts – without any documentary support – that the Initial Blockade was not a blockade at all, but a "peaceful," "social," and "legitimate demonstration."[234] According to Mexico, the "sole purpose" of that purported demonstration "was to seek an amicable solution to a legitimate conflict arising from Metalín's repeated breach of contract, which has been duly accredited by several Mexican courts."[235] It further asserts that the Initial Blockade allegedly took place without "hostage taking" and without trespass.[236]

97. Mr. Fraire Hernández echoes this false version of events, asserting that the Initial Blockade was "peaceful and free of aggression or violence of any kind,"[237] and that it ended when the group of Mineros Norteños members "voluntarily decided to withdraw" later that same day.[238] That withdrawal, Mexico says, was premised on Mineros Norteños's alleged "expectation that they would be able to communicate with Minera Metalín's management and reach a solution to their claims."[239] Specifically, according to Mexico, "the Municipal Syndic, Mrs. Esmeralda Olguín Aguilar . . . indicated that actions would be taken by high officials to seek a convenient

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231 Memorial, para. 2.80.

232 Memorial, para. 2.84.

233 López Ramírez WS1; Barry WS1.

234 Counter-Memorial, paras. 1, 34, 152, 175, 181, 449.

235 Counter-Memorial, para. 149.

236 Counter-Memorial, para. 149.

237 Fraire Hernández WS, para. 15.

238 Fraire Hernández WS, para. 18.

239 Counter-Memorial, para. 155.

solution for both parties in the conflict," to which Mineros Norteños allegedly "responded once again in good faith and with the best attitude towards dialogue, lifting the demonstration."[240]

98. Mexico's narrative is misleading and demonstrably wrong.

99. As set forth below, Mexico's arguments regarding the nature and purpose of the Initial Blockade – as well as the uncorroborated testimony of its sole fact witness, Mr. Fraire Hernández – are directly contradicted by the contemporaneous evidence, including photos, security footage, and audio recordings. As that evidence makes plain, the Initial Blockade was not a "peaceful demonstration;" it was the first extortionate attempt by Mineros Norteños to obtain by force what it ultimately failed to obtain lawfully from the Mexican courts.

100. SVB further notes that in response to its document requests for documents regarding the Initial Blockade,[241] Mexico has produced *not a single document*. It is not credible that no such documents exist, given the intervention of its authorities in the Initial Blockade. In such circumstances adverse inferences are warranted that those documents do not support and are indeed inconsistent with Mexico's arguments in this case, including that Mineros Norteños lifted its Initial Blockade voluntarily.[242]

2.5.1 Mineros Norteños Entered Minera Metalín's Private Property Illegally and Held Minera Metalín's Personnel Hostage

101. The Initial Blockade, as SVB explained in its Memorial, involved the deliberate trespass and unlawful occupation of Minera Metalín's private property by approximately 50 members of Mineros Norteños.[243] After entering Minera Metalín's private property without authorization, Mineros Norteños gathered immediately outside the Project's camp, where Minera Metalín's dormitories, geology offices, and dining building were located.[244] Mineros Norteños demanded to speak with Mr. Barry, and later added chains and padlocks to the front and back gates to the

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240 Counter-Memorial, para. 154.

241 Claimant's Document Production Requests, 13 January 2025, Request Nos. 13, 20, 21, 22, 23, 24.

242 *See* Section 2.1 *supra.*

243 Memorial, paras. 2.77, 2.80, 2.84, 2.86.

244 Memorial, para. 2.77.

camp, holding Messrs. López Ramírez, Enrique Hernández, and Carlos Luna hostage inside as collateral for Minera Metalín's purported debt to Mineros Norteños.[245]

102. In its Counter-Memorial, Mexico contends that, contrary to SVB's assertions, there was no trespass or "improper entry" on Minera Metalín's private property.[246] According to Mexico, Mineros Norteños remained outside the "fenced," on so-called "free access" land.[247] Relying solely on Mr. Fraire Hernández's uncorroborated testimony, Mexico further alleges that "it was the workers of Minera Metalín themselves who put the chains and padlocks,"[248] and that Mineros Norteños were merely exercising their constitutional right to free expression and made no threats of any kind.[249] Mr. Fraire Hernández even suggests that Minera Metalín could have continued its operations.[250] The Initial Blockade, Mexico argues, was thus not "a blockade or hostage taking."[251] These assertions are false.

103. *First*, contrary to Mexico's contentions, Mineros Norteños *did* illegally enter and trespass on Minera Metalín's private property during the Initial Blockade. As Mr. Barry explains, Minera Metalín owns "nine parcels of land covering 901 hectares, including the camp, the surrounding access road, and the area extending beyond the checkpoint that Mineros Norteños crossed on their way to the mine camp to set up the Continuing Blockade."[252] This is not public land, but rather private property that Minera Metalín acquired for Project development. The relevant lots and parcels are reflected in the map below.[253]

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245 Memorial, para. 2.80.

246 Counter-Memorial, para. 159.

247 Counter Memorial, para. 185.

248 Counter-Memorial, para. 158.

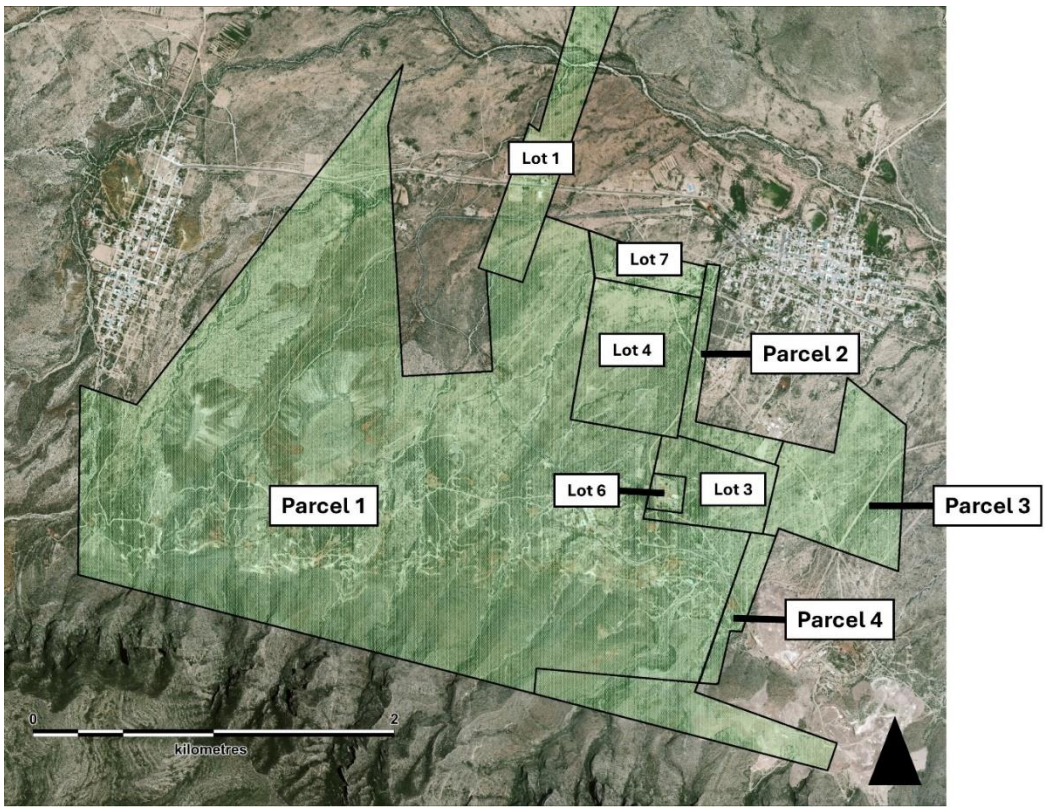
249 Counter-Memorial, paras. 151, 153, 157, 158, 199.

250 Fraire Hernández WS, paras. 19, 23.

251 Counter-Memorial, para. 155.

252 Barry WS2, para. 36.

253 Barry WS2, paras. 36-37.



Land owned by Minera Metalín. The green-shaded area covers the referred 901 hectares.

104. As Mr. López Ramírez notes, Minera Metalín's surface property begins at a permanent checkpoint located approximately 100 meters before the camp's main gate.[254] Once Mineros Norteños crossed that checkpoint, they were illegally trespassing on Minera Metalín's land.[255]

105. Specifically, the Project's camp lies within Lot No. 6, one of the five lots that Minera Metalín acquired directly from Mineros Norteños in 2006.[256] Minera Metalín's ownership of Lot No. 6 is confirmed by a formal acquisition deed and cadastral records.[257] As set forth further below, it is also confirmed by an independent expert report performed in 2021 as part of Mexico's criminal investigation,[258] which records that the camp – including the main gate and the

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254 López Ramírez WS2, paras. 16-17.

255 Barry WS2, para. 36; López Ramírez WS2, paras. 16-17.

256 Purchase Agreement between Minera Metalín and Sociedad Cooperativa Mineros Norteños Covering Lots Nos. 1, 3, 4, 6, and 7, 28 March 2006, **C-0173**; Cadastral Certificate and Valuation for Lot No. 6, 24 February 2003, **C-0172**.

257 Purchase Agreement between Minera Metalín and Sociedad Cooperativa Mineros Norteños Covering Lots Nos. 1, 3, 4, 6, and 7, 28 March 2006, **C-0173**; Cadastral Certificate and Valuation for Lot No. 6, 24 February 2003, **C-0172**.

258 Purchase Agreement between Minera Metalín and Sociedad Cooperativa Mineros Norteños Covering Lots Nos. 1, 3, 4, 6, and 7, 28 March 2006, **C-0173**; Cadastral Certificate and Valuation for Lot No. 6, 24 February 2003, **C-0172**; Expert Opinion on Topography (Property Identification) and Valuation of the Property by Architect Manuel Antonio Castillo Vázquez, 26 February 2021, **C-0357**.

surrounding perimeter where the Initial Blockade was staged and the Continuing Blockade remains to this day – lies entirely within Lot No. 6 and matches the GPS coordinates and legal description reflected in Minera Metalín's property deed.[259] In short, contrary to Mexico's contentions, Mexico's own State-appointed expert has confirmed that the land where Mineros Norteños staged both Blockades is Minera Metalín's lawfully-owned property.

Photograph of Mineros Norteños gathered at the second checkpoint.

106. Likewise, the second checkpoint is situated between Lot No. 6 and Parcel No. 1, the latter being one of the four surface parcels of land that Minera Metalín acquired in 2013 through a court-ordered transfer.[260] Minera Metalín's ownership of Parcel No. 1 is confirmed by the Court's final judgment on Application No. 680-64-09.2189 dated 27 September 2013 and cadastral records.[261]

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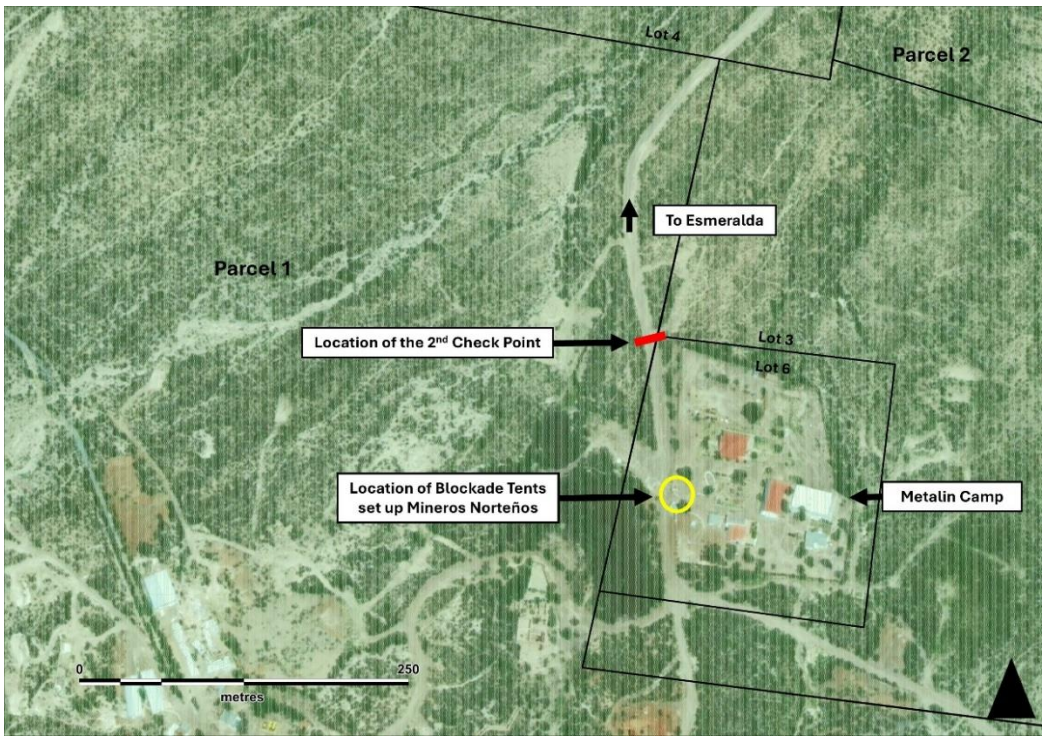
259 Expert Opinion on Topography (Property Identification) and Valuation of the Property by Architect Manuel Antonio Castillo Vázquez, 26 February 2021, pp. 7-9, **C-0357**.

260 Final Judgment Granting Ownership of Parcel No. 1 (Application No. 680-64-09.2189) by Adverse Possession to Minera Metalín, San Pedro Court, Exp. 450/2013, 27 September 2013, **C-0178**; Cadastral Value of Parcel No. 1 (Application No. 680-64-09.2189), 8 August 2014, **C-0179**.

261 Final Judgment Granting Ownership of Parcel No. 1 (Application No. 680-64-09.2189) by Adverse Possession to Minera Metalín, San Pedro Court, Exp. 450/2013, 27 September 2013, **C-0178**; Cadastral Value of Parcel No. 1 (Application No. 680-64-09.2189), 8 August 2014, **C-0179**.



Close-up of the location of the second checkpoint and the camp. The surface land shaded in green is owned by Minera Metalín.

107. Mexico's claim that Mineros Norteños committed no trespass because they stayed outside the "fenced" area, is equally incorrect.[262] As Mr. López Ramírez explains, while the cyclone fencing encloses the camp itself, all of the surface land beyond the second checkpoint – including the access road and surrounding terrain – belongs to Minera Metalín.[263] That land is titled, private, and clearly defined by formal legal boundaries.[264] The absence of cyclone fencing does not make it public or "free access" land, as Mexico and Mr. Fraire Hernández erroneously suggest.[265] Blocking access to the camp was illegal trespass; so was occupying the road and land between the second checkpoint and the camp's main gate.

108. As security footage from 4 February 2016 shows, after Mineros Norteños crossed the second checkpoint and advanced along Minera Metalín's internal road toward the camp,[266] they

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262 *See, e.g.*, Counter Memorial, para. 185.

263 López Ramírez WS2, para. 17.

264 Final Judgment Granting Ownership of Parcel No. 1 (Application No. 680-64-09.2189) by Adverse Possession to Minera Metalín, San Pedro Court, Exp. 450/2013, 27 September 2013, **C-0178**; Cadastral Value of Parcel No. 1 (Application No. 680-64-09.2189), 8 August 2014, **C-0179**.

265 Counter Memorial, paras. 185-186; Fraire Hernández WS, para. 29.

266 López Ramírez WS2, para. 9.

surrounded the camp's main gate and began actively blocking access and egress.[267] Mineros Norteños, Mr. López Ramírez notes, knew exactly where they were. They had owned Lot No. 6 before selling it to Minera Metalín and had worked not only on that lot, but also on most of the land.[268] Their trespass on Minera Metalín's private property was not accidental, but deliberate and unlawful.

Security footage from 4 February 2016 at approximately 10:20 a.m., showing members of Mineros Norteños gathered at the main gate.[269]

109. *Second*, audio recordings and security footage show clearly that, at approximately 4:30 p.m., two leaders of Mineros Norteños put chains and locks on the front gates to the camp, while other members put chains and locks on the emergency exit at the rear of the camp.[270] Security footage at 4:34 p.m. then shows Mineros Norteños members fastening padlocks on the main gate, as reflected below. As an audio recording made by Mr. López Ramírez that day reflects, one Mineros Norteños member says: "We're going to close up and check that other door [the rear emergency exit], we know that there's another door there, we have to check it too, let's put a lock on it."[271]

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267 Security Camera Footage Showing Mineros Norteños Approaching Main Gate and Interacting with Mr. Juan Manuel López Ramírez, 4 February 2016, **C-0468**.

268 López Ramírez WS2, para. 16.

269 Mr. Juan Manuel López Second WS, para. 7-9, 16-17; Security Camera Footage Showing Mineros Norteños Approaching Main Gate and Interacting with Mr. Juan Manuel López Ramírez, 4 February 2016, **C-0468**.

270 Security Camera Footage Showing Mineros Norteños Placing Padlocks on Main Gate, 4 February 2016, **C-0195**.

271 Audio Recording Capturing Mr. Lorenzo Fraire's Threat During the 2016 Blockade, 4 February 2016, **C-0193**; Transcript of Audio Recording Capturing Mr. Lorenzo Fraire's Threat During the 2016 Blockade, 4 February 2016 (Spanish original: "*Vamos a cerrar y checar aquella otra puerta, sabemos que de antemano allá esta otra puerta, hay que checarla también, vamos a poner candado allá*."), **C-0194**.

Surveillance footage from 4 February 2016 at 16:34, showing members of Mineros Norteños placing padlocks.[272]

110. Mr. López Ramírez also took still photos of the chains and padlocks that Mineros Norteños placed on the outside of both gates, as shown below. This picture makes clear that the lock was on the *outside* of the fence, rather than inside.

Chains and padlocks placed on the camp's main gate by Mineros Norteños on 4 February 2016.

[272] Security Camera Footage Showing Mineros Norteños Placing Padlocks on Main Gate, 4 February 2016, **C-0195**.

Chains and padlocks placed on the camp's emergency gate by Mineros Norteños on 4 February 2016.

111. Mexico's assertion that it was Mr. López Ramírez, and not Mineros Norteños, who "locked the doors" is thus incorrect.[273] As Mr. López Ramírez explains further, the main gate to the camp was routinely locked overnight from the inside as a standard security measure.[274] On the evening of 3 February 2016, this standard protocol was followed. When Mr. López Ramírez returned to the camp early the next morning, he instructed his team to keep the gate locked as a precaution.[275] Later that day, as shown above, Mineros Norteños added their own chains and padlocks to the gates from the outside.[276] The purpose of these external locks was plainly to prevent Mr. López Ramírez and the two other Minera Metalín employees inside the camp from leaving. Indeed, this is confirmed by the audio recordings from that day.

112. Mr. Fraire Hernández himself says on one of the audio recordings: "*We're going to be here 24 hours a day making sure no one comes in or out*."[277] On another recording, Mr. Fraire Hernández emphasizes that the employees were not free to leave the camp: "*We are going to*

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273 Counter-Memorial, para. 31.

274 López Ramírez WS2, para. 6.

275 López Ramírez WS2, para. 6.

276 López Ramírez WS2, paras. 9-12.

277 Audio Recording of Arrival and Conversation with Municipal Syndic Ms. María Esmeralda Aguilar Holguín During the 2016 Blockade, 4 February 2016, **C-0189**; Transcript of Audio Recording of Arrival and Conversation with Municipal Syndic Ms. María Esmeralda Aguilar Holguín During the 2016 Blockade, 4 February 2016 (Spanish original: "***José Merced**: Y te vamos a dar chance de salir nomas, no sé. . . **Lorenzo**: A medio día para hables. **José Merced**: Hasta mediodía para que hables tu con tus jefes. **Lorenzo**: Ya nosotros vamos a estar aquí las 24 horas cuidando que nadie entre ni salga*."), **C-0190**.

close no matter what; until Tim [Barry] comes, we are not going to open here."[278] Mr. Fraire Hernández's own contemporaneous statements thus leave no doubt that the Initial Blockade was an illegal blockade and a "hostage taking" and flatly contradict Mexico's baseless characterization of the events.

113. Mr. Fraire Hernández's assertion that Company operations could have continued during the Initial Blockade is likewise untrue.[279] The camp functions solely as a logistical base and, once the gates were locked and the employees trapped inside, all operations were paralyzed.[280] As Mr. López Ramírez explains, "[b]y locking us into the camp, we could not undertake any works that fell outside."[281]

114. *Third*, the Initial Blockade was not peaceful, nor was it legitimate or motivated by social concerns, as Mexico erroneously contends, as is abundantly clear from the evidence described above.[282] Mineros Norteños's members were confrontational from the outset. They demanded to meet Mr. Barry, despite knowing that he was not on site or even in Mexico.[283] In a recording captured by Mr. López Ramírez, Mr. Fraire Hernández makes Mineros Norteños's intentions explicit: "*Look, we have come to take the mines. . . So, we want to extract the minerals and, once they have vacated the mines, we will take the responsibility for everything*."[284] Thus, not only was Mineros Norteños obstructing Minera Metalín's operations, it also aimed to displace the rightful operator and take over the site by force.

115. Corroborating the above, security footage shows Mineros Norteños stationed at the gate, asserting control.[285] The footage captures the stark imbalance: Mineros Norteños on the

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278 Audio Recording Capturing Mr. Lorenzo Fraire's Threat During the 2016 Blockade, 4 February 2016, **C-0193**; Transcript of Audio Recording Capturing Mr. Lorenzo Fraire's Threat During the 2016 Blockade, 4 February 2016 (Spanish original: "*Vamos a cerrar pase lo que pase, hasta que no venga Tim no vamos a abrir aquí*."), **C-0194**.

279 Fraire Hernández WS, para. 23.

280 López Ramírez WS2, para. 13.

281 López Ramírez WS2, para. 13.

282 López Ramírez WS2, para. 5.

283 López Ramírez WS2, para. 9.

284 Audio Recording of Arrival and Conversation with Municipal Syndic Ms. María Esmeralda Aguilar Holguín During the 2016 Blockade, 4 February 2016, **C-0189**; Transcript of Audio Recording of Arrival and Conversation with Municipal Syndic Ms. María Esmeralda Aguilar Holguín During the 2016 Blockade, 4 February 2016 (Spanish original: "*Mire, nosotros venimos a, pues a tomar las minas. . . entonces nosotros queremos este sacar mineral y, que desalojen las minas, nosotros nos vamos a hacer responsables de todo*."), **C-0190**.

285 López Ramírez WS2, para. 9; Security Camera Footage Showing Mineros Norteños Approaching Main Gate and Interacting with Mr. Juan Manuel López Ramírez, 4 February 2016, **C-0468**.

outside, controlling the exit, while Minera Metalín personnel, including Mr. López Ramírez, stand on the other side of the fence, unable to leave.[286] As Mr. López Ramírez notes, "[a]nyone familiar with mining operations in Latin America would recognize the danger and seriousness that this scenario presented."[287]

116. In contrast to Mineros Norteños's hostile posture, Mr. López Ramírez attempted to de-escalate the situation. He approached the group respectfully from behind the gate, urged dialogue, and relayed that SVB's management was open to discussion.[288] In another audio recording he made, he can be heard saying: "[W]e are here to listen to you, I will notify the bosses, and we are open to discussion."[289] Mineros Norteños refused. As Mr. López Ramírez explains, "[t]hey grew increasingly agitated, however, and made clear that they would not let us leave the camp."[290]

117. In his first witness statement, Mr. López Ramírez described a face-to-face exchange with Mr. Fraire Hernández at the main gate, where Mr. Fraire Hernández declared: "If there is any tragedy, you will be responsible. If they have to die here, they will die here."[291] Mr. Fraire Hernández denies this statement, suggesting that his words were merely metaphorical – a reference to hunger strikes and peaceful protest.[292] Mexico adopts the same strategy, asserting that Mr. Fraire Hernández only "referred to the fact that Mineros Norteños would do anything to defend their rights,"[293] and that Mr. López Ramírez allegedly "misinterpreted it as a threat by modifying what Mr. Fraire Hernández actually said."[294] But the context, content, and tone of Mr. Fraire Hernández's actual words – captured on tape – speak for themselves.

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286 López Ramírez WS2, para. 9; Security Camera Footage Showing Mineros Norteños Approaching Main Gate and Interacting with Mr. Juan Manuel López Ramírez, 4 February 2016, **C-0468**.

287 López Ramírez WS2, para. 10.

288 López Ramírez WS2, para. 9.

289 Audio Recording of Arrival and Conversation with Municipal Syndic Ms. María Esmeralda Aguilar Holguín During the 2016 Blockade, 4 February 2016, **C-0189**; Transcript of Audio Recording of Arrival and Conversation with Municipal Syndic Ms. María Esmeralda Aguilar Holguín During the 2016 Blockade, 4 February 2016 (Spanish original: "*[E]stamos para escucharlos, yo notifico esto a los jefes, y estamos abiertos a platicar*."), **C-0190**.

290 López Ramírez WS2, para. 9.

291 López Ramírez WS1, para. 6.21; Audio Recording Capturing Mr. Lorenzo Fraire's Threat During the 2016 Blockade, 4 February 2016, **C-0193**; Transcript of Audio Recording Capturing Mr. Lorenzo Fraire's Threat During the 2016 Blockade, 4 February 2016 (Spanish original: "*Si hay una tragedia, tú vas a ser el responsable. . . si nos toca morir aquí, nos vamos a morir aquí*."), **C-0194**.

292 Fraire Hernández WS, para. 19.

293 Counter-Memorial, para. 157.

294 Counter-Memorial, para. 157.

118. The audio recording reflects Mr. Fraire Hernández's exact words: "If there is any tragedy, you will be responsible. If they have to die here, they will die here."[295] He then added: "I am speaking the truth and using kind words, but if you do not understand. . . it is going to be your responsibility."[296] Mr. Fraire Hernández's words are clear and impossible to dispute. They are a plain, unambiguous threat made in the context of a physical takeover with personnel confined inside the camp. As Mr. López Ramírez recalls, "I interpreted this as a threat. It was a warning that harm might befall our employees, and that I – and the Company – would be responsible."[297]

119. Mr. Fraire Hernández's threats carried weight because they were issued from a position of leverage: Mineros Norteños had seized the Project site, outnumbered the camp's inhabitants, and locked the camp from the outside. Mineros Norteños's actions and words confirm that this was no peaceful social demonstration.

2.5.2 Local Authorities Validated the Takeover

120. In its Counter-Memorial, Mexico asserts that the local authorities played a constructive and facilitative role during the Initial Blockade, emphasizing that the municipal syndic, María Esmeralda Aguilar Holguín, allegedly said that high officials would seek "a convenient solution for both parties in the conflict."[298] But these assertions are at odds with the record. From the moment the municipal syndic arrived on site, she did not act to uphold the law; to the contrary, she validated the attempted illegal takeover in tone, conduct, and message.

121. Ms. Aguilar Holguín arrived at the Project site in the afternoon of 4 February 2016, shortly after Mineros Norteños had locked the main gate.[299] In a recording captured by Mr. López Ramírez that afternoon, Mr. Fraire Hernández openly told Ms. Aguilar Holguín in the plain terms quoted above: "*Look, we have come to take the mines. . . So, we want to extract the*

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[295] López Ramírez WS1, para. 6.21; Audio Recording Capturing Mr. Lorenzo Fraire's Threat During the 2016 Blockade, 4 February 2016, **C-0193**; Transcript of Audio Recording Capturing Mr. Lorenzo Fraire's Threat During the 2016 Blockade, 4 February 2016 (Spanish original: "*Si hay una tragedia, tú vas a ser el responsable. . . si nos toca morir aquí, nos vamos a morir aquí*."), **C-0194**.

[296] Audio Recording Capturing Mr. Lorenzo Fraire's Threat During the 2016 Blockade, 4 February 2016 (Spanish original: "*Te estoy hablando con la verdad y buenas palabras, pero si no entiendes. . . ya va a ser tu responsabilidad*."), **C-0193**; Transcript of Audio Recording Capturing Mr. Lorenzo Fraire's Threat During the 2016 Blockade, 4 February 2016 (Spanish original: "*Te estoy hablando con la verdad y buenas palabras, pero si no entiendes. . . ya va a ser tu responsabilidad*."), **C-0194**.

[297] López Ramírez WS2, para. 22.

[298] Counter-Memorial, para. 154.

[299] López Ramírez WS2, para. 14.

minerals and, once they have vacated the mines, we will take responsibility for everything."[300] This was a clear statement of an intent to seize private property by force. But instead of intervening or warning Mineros Norteños about their unlawful actions, she normalized them:

> I am just here as a municipal authority to bear witness, well, they told me that they were going to take possession of the mine, so as it is not our responsibility, the only thing I can do is to bear witness, draw a report and give a copy to both parties . . . I would give a copy to both parties, I will just tell you what happened now, at what time they took possession, how many people were present, that they say they are going to be here day and night, that they are not going to let anyone in or out, until they have an answer from Engineer Tim.[301]

122. This was not a mediation, as Mexico contends erroneously.[302] Ms. Aguilar Holguín did not question Mineros Norteños's decision to "take possession" of the mine, challenge the legality of their brazen actions, or notify law enforcement. Instead, she acted purely as a notetaker, treating the illegal seizure of the Project as an administrative event to be documented rather than as a criminal act to be stopped.[303]

123. As Mr. López Ramírez underscores, the syndic's actions, in acknowledging Mineros Norteños's actions without any sanction, gave Mineros Norteños the appearance of official backing and emboldened their unlawful conduct.[304] From that moment forward, their posture hardened. Ms. Aguilar Holguín's passive endorsement sent a signal that the municipal

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300 Audio Recording of Arrival and Conversation with Municipal Syndic Ms. María Esmeralda Aguilar Holguín During the 2016 Blockade, 4 February 2016, **C-0189**; Transcript of Audio Recording of Arrival and Conversation with Municipal Syndic Ms. María Esmeralda Aguilar Holguín During the 2016 Blockade, 4 February 2016 (Spanish original: "*Mire, nosotros venimos a, pues a tomar las minas. . . entonces nosotros queremos este sacar mineral y, que desalojen las minas, nosotros nos vamos a hacer responsables de todo*."), **C-0190**.

301 Audio Recording of Arrival and Conversation with Municipal Syndic Ms. María Esmeralda Aguilar Holguín During the 2016 Blockade, 4 February 2016, **C-0189**; Transcript of Audio Recording of Arrival and Conversation with Municipal Syndic Ms. María Esmeralda Aguilar Holguín During the 2016 Blockade, 4 February 2016 (Spanish original: "*Yo solo solamente vengo como autoridad municipal para dar fe, este, ellos me comentaban que iban a ser, a tomar posesión de la mina, entonces como es algo que a nosotros no nos compete, lo único que yo puedo venir es a dar fe, levantar un acta y darles copia a ambas partes. . . yo les daría copia a las dos partes, nada más les digo del acontecimiento de ahorita, a que horas tomaron posesión, cuantas personas están presentes, lo que ellos manifiestan que van a estar día y noche, que no van a dejar entrar o salir a nadie, hasta que tengan una respuesta por parte del Ingeniero Tim*."), **C-0190**

302 Counter-Memorial, para. 154; Fraire Hernández WS, para. 17.

303 López Ramírez WS2, paras. 14-15.

304 López Ramírez WS2, paras. 14-15.

government was on their side, or at the very least, would not intervene.[305] That evening, Mineros Norteños began setting up camp and preparing to spend the night at the Sierra Mojada Project site – a clear sign they saw no risk of removal or consequence.[306]

124. Notably, Ms. Aguilar Holguín's statements also confirm that the authorities had received prior notice of the Initial Blockade and made no attempt to prevent it. As Mr. López Ramírez reiterates in his second statement, the Company had delivered a formal letter to the Mayor of Sierra Mojada on 3 February 2016 warning of the planned takeover and requesting protection.[307] On the day of the Blockade, Mr. López Ramírez also personally called local officials – including Citizen Assistance, the Municipal Police, and the Public Prosecutor's Office – to report the events and ask for help.[308] Yet no immediate action was taken.

125. As explained below, it was not until 10:00 p.m. that two Public Prosecutors and several police officers from Monclova arrived at the Project site to lift the Initial Blockade.

2.5.3 Prosecutorial authorities and police intervened to remove Mineros Norteños who did not withdraw voluntarily from the Initial Blockade

126. Mexico contends in its Counter-Memorial that Mineros Norteños "voluntarily and peacefully withdrew" from the Project site on 4 February 2016, after Ms. Olguín Aguilar "indicated that actions would be taken by high officials to seek a convenient solution for both parties in the conflict."[309] Mr. Fraire Hernández repeats this false narrative, asserting that the group decided to leave of their own accord after learning that the Government would mediate a resolution and Mr. Barry would personally travel to Sierra Mojada.[310] But neither proposition is true. As the record shows, Mineros Norteños withdrew at the demands of the authorities, not choice.

127. Specifically, two Public Prosecutors and several police officers from Monclova arrived at the Project site around 10:00 p.m. and approached the main gate.[311] As Mr. López Ramírez

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305 López Ramírez WS2, paras. 14-15.

306 Memorial, para. 2.83; López Ramírez WS, para. 6.23.

307 Letter from Minera Metalín to the President of the Municipality of Sierra Mojada, 3 February 2016, **C-0070**; López Ramírez WS2, para. 6.

308 López Ramírez WS2, para. 11; Phone Records of Juan Manuel López for February 2016, **C-0188**.

309 Counter-Memorial, para. 154.

310 Fraire Hernández WS, paras. 17-18.

311 López Ramírez WS2, para. 26.

testifies, their arrival changed the dynamic.[312] The Public Prosecutors questioned Mineros Norteños and warned them that their actions were "not right."[313] Confronted by legal authority, the blockaders' defiance gave way to submission. When asked whether they had locked the camp gates, Mr. Fraire Hernández admitted on the spot that they had.[314] When ordered to remove the padlocks, a Mineros Norteños member complied without hesitation: "Yes, I will take it away now."[315]

128. Thus, Mexico's contention that Mineros Norteños lifted the Initial Blockade voluntarily and in response to a supposed promise of mediation by Ms. Olguín Aguilar and a supposed promise by Minera Metalín that Mr. Barry would come to Sierra Mojada is entirely without merit.[316] As Mr. López Ramírez, who witnessed the events, confirms, "[t]he lifting of the Blockade was not a voluntary change of heart. . . it was a reaction to law enforcement."[317] As set forth above, there was no mediation by Ms. Olguín Aguilar. Nor did Mr. López Ramírez promise that Mr. Barry would come. As he explains, he only said that he would relay Mineros Norteños's request, stating: "I will tell him that,"[318] and made clear he was not authorized to make any such commitment.[319] The Blockade ended only when law enforcement arrived and made clear that Mineros Norteños's actions were illegal.

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312 López Ramírez WS2, para. 27.

313 Audio Recording Capturing the Arrival of Public Officials and the Removal of Chains and Padlocks During the 2016 Blockade, 4 February 2016, **C-0191**; Transcript of Audio Recording Capturing the Arrival of Public Officials and the Removal of Chains and Padlocks During the 2016 Blockade, 4 February 2016 (Spanish original: "*Eso no está bien, si ellos tiene que salir tienen que salir*."), **C-0192**.

314 Audio Recording Capturing the Arrival of Public Officials and the Removal of Chains and Padlocks During the 2016 Blockade, 4 February 2016, **C-0191**; Transcript of Audio Recording Capturing the Arrival of Public Officials and the Removal of Chains and Padlocks During the 2016 Blockade, 4 February 2016, **C-0192**.

315 Audio Recording Capturing the Arrival of Public Officials and the Removal of Chains and Padlocks During the 2016 Blockade, 4 February 2016, **C-0191**; Transcript of Audio Recording Capturing the Arrival of Public Officials and the Removal of Chains and Padlocks During the 2016 Blockade, 4 February 2016 (Spanish original: "*Si, ahorita te lo quito.*"), **C-0192**.

316 Counter-Memorial, para. 154; Fraire Hernández WS, paras. 17-18.

317 López Ramírez WS2, para. 27.

318 Audio Recording Capturing Mr. Lorenzo Fraire's Threat During the 2016 Blockade, 4 February 2016, **C-0193**; Transcript of Audio Recording Capturing Mr. Lorenzo Fraire's Threat During the 2016 Blockade, 4 February 2016 (Spanish original: "*Yo le comento eso*."), **C-0194**.

319 López Ramírez WS2, para. 18.

2.5.4 The Company Chose Not to Press Charges Immediately to Avoid Escalating Tensions

129. In its Counter-Memorial, Mexico faults Minera Metalín for not filing criminal charges against Mineros Norteños immediately after the Initial Blockade, suggesting that the Company failed to treat the event with sufficient seriousness, thus undermining the veracity of the Claimant's account.[320] But this criticism disregards both the actions taken by Minera Metalín and the careful considerations that shaped them.

130. On 5 February 2016, the very next day after the Initial Blockade, Mr. López Ramírez gave a formal Statement of Facts ("*Constancia de Hechos*") before the Public Prosecutor in Laguna del Rey.[321] This was not an informal or self-serving account, as Mexico would have this Tribunal believe.[322] It was an official, sworn declaration made under penalty of perjury, and intended to place the events of the prior day on the legal record.[323] Mr. López Ramírez recounted the threats made by Mr. Fraire Hernández, the unlawful takeover of the camp, and the role of the municipal authorities in lifting the Initial Blockade.[324] He also named the individuals involved and described how the camp gates were sealed with chains and padlocks.[325] The submission served as formal notice to the State of a serious criminal incident, with the expectation that the authorities would take appropriate action. The authorities had full knowledge of the incident and a basis to act.

131. At the time, however, the Company did not want to escalate tensions, but wanted to find an amicable resolution with Mineros Norteños that would avoid further disturbance at the Project in the interests of both parties. Minera Metalín's lawyer warned that filing a criminal complaint could trigger renewed unrest and derail any chance of reaching a negotiated solution with Mineros Norteños.[326]

132. In consideration of that advice and its desire to push forward with the Project and, hopefully, repair relations with Mineros Norteños, Minera Metalín chose not to file a criminal complaint.

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320 Counter-Memorial, paras. 163-164.

321 Sworn Statement of Facts by Mr. Juan Manuel López Ramírez, 5 February 2016, **C-0027**.

322 Counter-Memorial, para. 166.

323 Sworn Statement of Facts by Mr. Juan Manuel López Ramírez, 5 February 2016, **C-0027**.

324 Sworn Statement of Facts by Mr. Juan Manuel López Ramírez, 5 February 2016, **C-0027**.

325 Sworn Statement of Facts by Mr. Juan Manuel López Ramírez, 5 February 2016**, C-0027**.

326 López Ramírez WS2, para. 30.

That decision in no way means that Minera Metalín did not take the event seriously. Rather, it meant that Minera Metalín wanted to get on with the business of exploring the Project, rather than spend its time prosecuting a criminal complaint.

133. Minera Metalín acted prudently and in good faith in doing so, prioritizing employee safety, operational continuity, and the prospect of a peaceful resolution. As set forth below, notwithstanding the Company's good faith efforts to reach a mutually agreeable resolution, Mineros Norteños and its lawyers made achieving that resolution impossible.

2.6 SVB Made Good Faith Attempts to Negotiate with Mineros Norteños Following the Initial Blockade Despite Its Extortionate Demands

134. As set out in the Memorial, following the Initial Blockade, SVB engaged in sustained, good faith efforts to negotiate with Mineros Norteños.[327] SVB submitted written proposals, participated in multiple in-person meetings, and explored mechanisms for compromise. At every turn, however, Mineros Norteños rejected those overtures and escalated their demands.[328]

135. In its Counter-Memorial, Mexico portrays the Claimant as uncooperative, rather than Mineros Norteños.[329] Mexico accuses SVB of antagonizing Mineros Norteños, walking away from the negotiations, and refusing to make serious offers, blocking the path to amicable resolution.[330] That portrayal is inaccurate and unsupported by the record.

136. As Messrs. Barry and López Ramírez explain, for more than three years following the Initial Blockade, SVB worked in good faith to reach a mutually acceptable agreement with Mineros Norteños to resolve their unwarranted demands for payment.[331] It held regular meetings with Mineros Norteños, evaluated their proposals, and responded with reasonable counter-proposals.[332] Mr. López Ramírez acted as SVB's liaison throughout – relaying communications, facilitating dialogue, and seeking to de-escalate tensions with Mineros Norteños.[333] As he testifies, the main obstacle was not SVB's conduct, but rather the nature

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327 Memorial, para. 4.14.

328 Memorial, para. 4.14.

329 Counter-Memorial, paras. 547, 549-551.

330 Counter-Memorial, paras. 547, 549-551.

331 López Ramírez WS2, paras. 90-98; Barry WS2, Section 3.

332 López Ramírez WS2, paras. 90-98; Barry WS2, Section 3.

333 López Ramírez WS2, para. 86.

and content of Mineros Norteños's erratic and inconsistent proposals.[334] Those proposals not only sought to rewrite the terms of the 1997 and 2000 Agreements retroactively, but were inflated, incoherent, and presented as non-negotiable ultimatums.

137. As the negotiations progressed, moreover, a clear rift emerged within Mineros Norteños. While some members conveyed privately to Mr. López Ramírez a willingness to compromise, their formal proposals reflected increasingly extreme positions driven seemingly by their lawyers.[335] This appeared to be because the more Mineros Norteños demanded, the more their lawyers stood to gain on contingency. Furthermore, on multiple occasions, Mineros Norteños submitted a proposal that appeared relatively measured and conciliatory – only to follow it days later with a harsher, more ambitious version, presumably guided by their legal representatives.[336]

138. The first formal proposal that Mineros Norteños submitted was on 9 March 2016 – just weeks after the Initial Blockade – and demanded US$ 1 million upfront, another US$ 5.875 million upon any eventual sale of the Sierra Mojada Project, plus US$ 50,000 in legal fees, preferential hiring rights for Mineros Norteños members, and interest retroactive to the year 2000.[337] They gave SVB 15 days to agree, or face legal or protest action.[338] As Mr. Barry explains, Mineros Norteños's proposal was inconsistent with the terms of the 1997 and 2000 Agreements and in any event was unreasonable:

> Given we were still in the exploration stage, we simply did not have that kind of cash available and therefore could not accept the proposal. In addition, as noted above, Mineros Norteños had already received substantial upfront payments when Minera Metalín purchased the concessions (US$ 3.6 million), and the 2000 Agreement explicitly provided that the royalty would only be payable once the Project reached production. There was therefore no basis for any further payments at this stage.[339]

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334 López Ramírez WS2, para. 86.

335 López Ramírez WS2, para. 88.

336 *See, e.g.*, Proposal from Mineros Norteños to Minera Metalín, 8 June 2017, **C-0204**; Proposal from Mineros Norteños to Minera Metalín, 15 June 2017, **C-0205**.

337 Email from Juan Manuel López Ramírez to Tim Barry et al. Forwarding Proposal from Mineros Norteños to Minera Metalín, 17 March 2016, **C-0395**; Proposal from Mineros Norteños to Minera Metalín, 9 March 2016, **JMLR-013**.

338 Proposal from Mineros Norteños to Minera Metalín, 9 March 2016, **JMLR-013**.

339 Barry WS1, para. 24.

139. Nevertheless, SVB responded constructively. On 9 April 2016, SVB offered to increase Mineros Norteños's maximum royalty entitlement once the mine reached the production stage to up to US$ 8 million, in exchange for Mineros Norteños's support and withdrawal of its legal claims against Minera Metalín, which were still pending before the Mexican courts.[340]

140. In May 2016, rumors spread that SVB might offer a 500-peso monthly allowance per member to Mineros Norteños.[341] Mr. Barry saw it as a potential starting point for further discussion, but when Mr. López Ramírez raised the idea, Mineros Norteños responded by demanding 2,000 to 4,000 pesos per member – four to eight times the rumored amount.[342]

141. As Mr. López Ramírez notes, Mineros Norteños "expected the Company to keep entertaining their demands but offered nothing realistic in return and even kept their lawsuit active the entire time."[343] On 16 May 2017, one member of Mineros Norteños even asked if they could begin extracting ore from the waste dumps.[344] SVB declined, explaining that extraction would only be possible if and when the dispute was resolved and legal certainty restored.[345]

142. Mineros Norteños occasionally conveyed, in private, their dissatisfaction with the legal strategy their lawyers pursued. For instance, on 30 May 2017, Mineros Norteños members told Mr. López Ramírez they were tired of waiting for the case to be resolved and "wanted to work."[346] They floated additional offers – US$ 1.5 million upon any sale in addition to the increased US$ 8 million royalty cap that SVB had offered – but nothing resembling those figures was submitted in writing until September 2018.[347]

143. Another proposal arrived on 8 June 2017: US$ 2 million upon any sale or association, as well as US$ 30,000 in legal fees to be paid in three annual installments, the increased US$ 8 million royalty that SVB had proposed, and the right to work in certain areas outside SVB's

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340 Email from Juan Manuel López Ramírez to Miguel Enríquez Forwarding Proposal from Minera Metalín to Mineros Norteños, 9 April 2016, **C-0197**; Proposal from Minera Metalín to Mineros Norteños, 9 April 2016, **C-0198**.

341 Email from Juan Manuel López Ramírez to Tim Barry et al., 17 May 2016, **C-0199**.

342 Email Correspondence Between Juan Manuel López Ramírez and Tim Barry, 20-27 May 2016, **C-0200**.

343 López Ramírez WS2, para. 92.

344 Email Correspondence Between Juan Manuel López Ramírez and Tim Barry, 16 May 2017, **C-0202**.

345 Email Correspondence Between Juan Manuel López Ramírez and Tim Barry, 16 May 2017, **C-0202**.

346 Email from Juan Manuel López Ramírez to Tim Barry et al. Relaying Informal Proposal from Mineros Norteños to Minera Metalín, 30 May 2017, **C-0360**.

347 Email from Juan Manuel López Ramírez to Tim Barry et al. Relaying Informal Proposal from Mineros Norteños to Minera Metalín, 30 May 2017, **C-0360**.

concessions.[348] Notably, the lawyers did not appear to have drafted the proposal, and its informality signaled that it may have reflected the cooperative's own thinking.[349]

144. However, just seven days later on 15 June 2017, a second, conflicting proposal arrived – this time clearly lawyer-driven – demanding US$ 2 million upfront, a total of US$ 9.2 million that included over US$ 2 million dollars in retroactive interest, legal fees, hiring guarantees, and a rigid 2-year payment deadline – *regardless of whether the Project reached production*.[350] While the earlier proposal had already strayed from the basic structure of a royalty by tying payment to a future sale, this second demand went even further – it made clear that Mineros Norteños was no longer pursuing a realistic or good faith compromise.

145. That shift was not coincidental. Two days earlier, on 13 June 2017, Mr. López Ramírez had received a call from a Mineros Norteños member expressing frustration with the direction the negotiations were taking as a result of their lawyers' interference. In a contemporaneous email to Mr. Barry, Mr. López Ramírez reported: "[T]he lawyers and the guy who has the legal power [the legal representative] are thinking in more money and more conditions. . . I feel they are having problems with [their] lawyers and they want to take a decision alone."[351]

146. Mineros Norteños also quickly distanced themselves from the 15 June 2017 proposal. In an email to Mr. Barry that same day, Mr. López Ramírez relayed their sentiment: "They said that this is the proposal from the lawyers and they feel that some points are impossible."[352] Mr. López Ramírez also relayed that they suggested Mr. Barry review both proposals to see if either was acceptable.[353]

147. As Mr. Barry explains, however:

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348 Email from Juan Manuel López Ramírez to Tim Barry et al. Forwarding Proposal from Mineros Norteños to Minera Metalín, 9 June 2017, **C-0203**; Proposal from Mineros Norteños to Minera Metalín, 8 June 2017, **C-0204**.

349 Proposal from Mineros Norteños to Minera Metalín, 8 June 2017, **C-0204**.

350 Email from Juan Manuel López Ramírez to Tim Barry Forwarding Proposal from Mineros Norteños to Minera Metalín, 15 June 2017, **C-0206**; Proposal from Mineros Norteños to Minera Metalín, 15 June 2017, **C-0205**.

351 Email from Juan Manuel López Ramírez to Tim Barry Regarding Mineros Norteños's Lawyers Involvement in Negotiations, 13 June 2017, **C-0404**.

352 Email from Juan Manuel López Ramírez to Tim Barry Forwarding Proposal from Mineros Norteños to Minera Metalín, 15 June 2017, **C-0206**.

353 Email from Juan Manuel López Ramírez to Tim Barry Forwarding Proposal from Mineros Norteños to Minera Metalín, 15 June 2017, **C-0206**.

> [N]either of these proposals was realistic or acceptable. The proposals abandoned entirely the royalty structure that had been agreed under the 1997 and 2000 Agreements as each demanded significant payments that were not contingent on the mine being put into production. The 15 June 2017 proposal even demanded payment in excess of the increased royalty we had offered over a wholly unrealistic timeframe and regardless of whether the company could be sold.[354]

148. This pattern persisted. On 24 September 2018, Mineros Norteños submitted yet another proposal: US$ 1.5 million upon any sale or partnership, US$ 30,000 in legal fees, the increased US$ 8 million royalty that SVB had previously offered, and open access to work in areas outside SVB's concessions.[355] But that position too was short-lived.

149. On 12 March 2019, ten Mineros Norteños members met with Mr. López Ramírez and asked if the Company could "give them something," citing rumors that Minera Metalín "[would] start working soon and [they] ha[d] money"[356] – most likely referring to the fact that the Project was at a decisive point and well positioned to move to production.[357] Mr. López Ramírez, however, explained that there were no discretionary funds – all available funds were allocated to drilling efforts and reminded them that resumed activity would generate local employment opportunities.[358] Mineros Norteños said they would submit a new proposal.[359]

150. That proposal was delivered three days later, on 15 March 2019, and demanded US$ 1 million upfront, US$ 50,000 in legal fees, and US$ 1 million annually going forward.[360] It was neither serious nor grounded. As Mr. López Ramírez explains, "[t]he terms were so exaggerated and one-sided that they left little room for a constructive response,"[361] let alone for a resolution.

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354 Barry WS2, para. 32.

355 Email from Juan Manuel López Ramírez to Tim Barry Forwarding Proposal from Mineros Norteños to Minera Metalín, 24 September 2018, **C-0209**; Proposal from Mineros Norteños to Minera Metalín, 24 September 2018, **C-0210**.

356 Email from Juan Manuel López Ramírez to Tim Barry, 12 March 2019, **C-0211**.

357 *See* Section 2.3 *supra.*

358 Email from Juan Manuel López Ramírez to Tim Barry, 12 March 2019, **C-0211**.

359 Email from Juan Manuel López Ramírez to Tim Barry, 12 March 2019, **C-0211**.

360 Proposal from Mineros Norteños to Minera Metalín, 15 March 2019, **C-0213**.

361 López Ramírez WS2, para. 98.

151. The overall tenor of Mineros Norteños's negotiations during this period is aptly summarized by Mr. Barry, who testifies that:

> In my view, these "proposals" illustrate the lack of good faith in Mineros Norteños's discussions with us. They were willing not only to blockade the mining camp, but also to ratchet up their demands even while their lawsuit against us was ongoing. In addition, they see-sawed between proposals so frequently that it was difficult to know whether the various proposals were even genuine, or if they would later be superseded by a subsequent, more onerous offer, all whilst having already invaded our property.[362]

152. As explained below, the situation worsened with the involvement of Francisco Javier Borrego Adame, a Federal Deputy for the ruling *Movimiento de Regeneración Nacional* ("**MORENA**") Party. He directed Mineros Norteños to dismiss their lawyers and appoint new counsel of his choosing. From that point onward, the negotiations were no longer about resolving a dispute, they became a tool for Deputy Borrego's own political and personal gain.

2.7 The Continuing Blockade Was Not Peaceful and the Mexican Authorities Did Nothing to Prevent or End It

153. In the Memorial, Claimant demonstrated that, following the election of AMLO in December 2018 and the adoption of MORENA's anti-mining and anti-foreign investment agenda, Deputy Borrego held a meeting with Mineros Norteños in early September 2019 to encourage and incite the mining cooperative to blockade the Project once again.[363] Eager to obtain by force what it had been unable to obtain lawfully through the Mexican courts, and emboldened by Deputy Borrego's promise of support, Mineros Norteños proceeded to impose a second blockade on the Project beginning on 8 September 2019, reasserting its baseless demand for premature royalty payments (the "**Continuing Blockade**").[364] True to Deputy Borrego's word, unlike in 2016, the Mexican authorities in 2019 failed to take any genuine action to disperse the blockade, protect SVB's investments, personnel or property, or sanction those responsible.[365] As a result of Mexico's refusal to end the Continuing Blockade despite SVB's

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362 Barry WS2, para. 34.

363 Memorial, para. 2.111-2.117.

364 Memorial, para. 2.116.

365 Memorial, para. 2.150.

and Minera Metalín's repeated pleas for assistance, Mineros Norteños continues to blockade, occupy, use, and exploit the Project site to this day with total impunity.[366]

154. In its Counter-Memorial, Mexico attempts to insulate itself from liability by again reframing the Continuing Blockade as a peaceful and legitimate protest intended to initiate dialogue with Minera Metalín.[367] It falsely asserts that no crimes were committed and that the Mexican authorities lacked a legal basis to intervene.[368] Mexico also accuses SVB and Minera Metalín of failing to request legal action promptly[369] and implies that those inside the camp remained there voluntarily.[370] As for Deputy Borrego, Mexico attempts to minimize his role entirely – mentioning him only once, in passing, and dismissing Mr. López Ramírez's testimony with a bald denial. Similarly, Mr. Fraire Hernández now tries to distance Mineros Norteños from Deputy Borrego, asserting that "Mineros Norteños colleagues no longer maintain contact with Mr. Borrego."[371]

155. As set forth below, Mexico's assertions regarding the Continuing Blockade are demonstrably wrong and contradicted by the contemporaneous documentary record.

2.7.1 Deputy Borrego Incited and Enabled the Continuing Blockade

156. Mexico does not present a witness statement from Deputy Borrego. Nor does Mexico present a witness statement from any other Government official involved in the Continuing Blockade. Instead, Mexico ignores the role of Deputy Borrego, stating in a single sentence – without evidence or explanation – that the Claimant's claims about him are simply "inaccurate or erroneous."[372] Likewise, in his witness statement, Mr. Fraire Hernández attempts to distance Mineros Norteños from Deputy Borrego, asserting that the group no longer maintains any contact with him.[373] But these denials cannot be squared with the evidence, including admissions by Mr. Fraire Hernández himself, as well as publicly available photographs showing him standing beside Deputy Borrego at a political campaign event as recently as May

366 Memorial, para. 2.200, 3.28; López Ramírez WS1, para. 15.6.

367 Counter-Memorial, paras. 194-196, 199, 450-451, 456, 458.

368 Counter-Memorial, paras. 194-196, 199, 450-451, 456, 458.

369 Counter-Memorial, paras. 178, 182, 452.

370 Fraire Hernández WS, para. 39.

371 Fraire Hernández, para. 45.

372 Counter-Memorial, para. 190.

373 Fraire Hernández, para. 45.

2024.[374] Moreover, despite the Tribunal's express order requiring Mexico to produce "any Minutes of, or other Document recording, any meeting held on or about 3 September 2019 between Deputy Borrego and Mineros Norteños," Mexico has produced *nothing* – not a single record, email, or even note, even though it is clear that multiple discussions and meetings took place.[375] That silence speaks volumes.

157. Mr. López Ramírez affirmed in his first witness statement that, on 3 September 2019, just days before the Continuing Blockade, Deputy Borrego met with Mineros Norteños members, including Mr. Fraire Hernández and Mr. Miguel Enríquez, in Sierra Mojada to discuss plans for escalating pressure on the Company by staging a second blockade.[376] At that meeting, Mineros Norteños expressed doubts about this plan, recalling that their prior blockade in 2016 had not achieved their goals and that prosecutors had warned their actions were illegal.[377] But Deputy Borrego dismissed those concerns, assuring them that he would protect them and urging them to proceed.[378] Deputy Borrego promised legal backing, media attention, and the political momentum they needed to move forward.[379]

158. Deputy Borrego's direct role in inciting the Continuing Blockade is confirmed by a 5 January 2024 audio recording of a meeting between Mr. Fraire Hernández and Mr. López Ramírez.[380] As that audio recording reflects, Mr. Fraire Hernández states unequivocally that Deputy Borrego "*encouraged us to take the mine. We told him everything*."[381] He also confessed that Deputy Borrego expected a payout in return for helping them to resolve the conflict: "[H]e just

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374 Deputy Borrego Facebook Post, 18 May 2024 (available at: https://www.facebook.com/share/p/JN9v1HoMc26H9UTB/?mibextid=oFDknk), **C-0332**.

375 Procedural Order No. 3, 11 March 2025, Tribunal's Decision to Request No. 2, pp. 33-38.

376 Memorial, para. 2.113; López Ramírez WS1, paras. 8.2, 8.6.

377 Memorial, paras. 2.114-2.115; López Ramírez WS1, para. 8.6.

378 Memorial, para. 2.115; López Ramírez WS1, para. 8.6.

379 Memorial, para. 2.114; López Ramírez WS1, para. 8.5.

380 Audio Recording of Conversation between Juan Manuel López Ramírez and Lorenzo Fraire (Mineros Norteños) Regarding Deputy Borrego's Involvement and Monetary Demands, 5 January 2024, **C-0335**; Transcript of Audio Recording of Conversation between Juan Manuel López Ramírez and Lorenzo Fraire (Mineros Norteños) Regarding Deputy Borrego's Involvement and Monetary Demands, 5 January 2024, **C-0336**.

381 Audio Recording of Conversation between Juan Manuel López Ramírez and Lorenzo Fraire (Mineros Norteños) Regarding Deputy Borrego's Involvement and Monetary Demands, 5 January 2024, **C-0335**; Transcript of Audio Recording of Conversation between Juan Manuel López Ramírez and Lorenzo Fraire (Mineros Norteños) Regarding Deputy Borrego's Involvement and Monetary Demands, 5 January 2024 (Spanish original: "*Nos incitó a tomar las minas, todo le platicamos.*"), **C-0336**.

said that he wanted "*una feria*" [*i.e.*, money] but secretly because otherwise they would realize it there in the government."[382]

159. The next day, on 6 January 2024, Mineros Norteños member Alfredo Rosales confirmed to Mr. López Ramírez that Deputy Borrego's strategy had always involved using the cooperative to extract payment from Minera Metalín.[383] Mr. Rosales explained that, according to Borrego, the Blockade was key to forcing the Company's hand. According to Mr. Rosales, Deputy Borrego told them: "If they [Mineros Norteños] don't stop here, they [Minera Metalín] continue working and don't get paid [Mineros Norteños]. But if they [Mineros Norteños] do stop here, be sure that they [Mineros Norteños] are going to pressure them [Minera Metalín] and get paid."[384] When asked what Deputy Borrego wanted in return, Mr. Rosales answered bluntly: "He wanted cash. He wanted I don't know how much!"[385]

160. At a 5 January 2025 meeting with Mr. López Ramírez, Mineros Norteños member José Ángel García Sifuentes likewise confirmed Deputy Borrego's role in orchestrating the Continuing Blockade: "They [Mineros Norteños] only listened to the other lousy old man. . . He [Deputy Borrego] was the one who told them to block it. . . If they [Mineros Norteños] hadn't done that,

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382 Audio Recording of Conversation between Juan Manuel López Ramírez and Lorenzo Fraire (Mineros Norteños) Regarding Deputy Borrego's Involvement and Monetary Demands, 5 January 2024, **C-0335**; Transcript of Audio Recording of Conversation between Juan Manuel López Ramírez and Lorenzo Fraire (Mineros Norteños) Regarding Deputy Borrego's Involvement and Monetary Demands, 5 January 2024 (Spanish original: "*[N]omás decía que él quería una feria [dinero] pero acá a la sorda [a escondidas] porque pues se iban a dar cuenta allá en gobernación.*"), **C-0336**.

383 Audio Recording of Conversation between Juan Manuel López Ramírez and Alfredo Rosales (Mineros Norteños) Regarding Internal Dissent Within Mineros Norteños and Borrego's Involvement, 6 January 2025, **C-0337**; Transcript of Audio Recording of Conversation between Juan Manuel López Ramírez and Alfredo Rosales (Mineros Norteños) Regarding Internal Dissent Within Mineros Norteños and Borrego's Involvement, 6 January 2025, **C-0338**.

384 Audio Recording of Conversation between Juan Manuel López Ramírez and Alfredo Rosales (Mineros Norteños) Regarding Internal Dissent Within Mineros Norteños and Borrego's Involvement, 6 January 2025, **C-0337**; Transcript of Audio Recording of Conversation between Juan Manuel López Ramírez and Alfredo Rosales (Mineros Norteños) Regarding Internal Dissent Within Mineros Norteños and Borrego's Involvement, 6 January 2025 (Spanish original: "*Si no paran allá, ellos siguen trabajando y no les pagan. Pero si paran allá, hagan de cuenta que los van a presionar y les pagan.*"), **C-0338**.

385 Audio Recording of Conversation between Juan Manuel López Ramírez and Alfredo Rosales (Mineros Norteños) Regarding Internal Dissent Within Mineros Norteños and Borrego's Involvement, 6 January 2025, **C-0337**; Transcript of Audio Recording of Conversation between Juan Manuel López Ramírez and Alfredo Rosales (Mineros Norteños) Regarding Internal Dissent Within Mineros Norteños and Borrego's Involvement, 6 January 2025 (Spanish original: "*Él quería billetes. ¡Él quería no sé cuánto!*"), **C-0338**.

maybe they [Minera Metalín] would have opened it [the mine] by now or they [Mineros Norteños] would still be working on it."[386]

161. In addition to monetary gain, Deputy Borrego also used the Continuing Blockade for political reasons. As a member of MORENA – the ruling party under President López Obrador – Deputy Borrego aligned himself with the party's nationalist rhetoric against foreign mining interests and used the conflict between Mineros Norteños and Minera Metalín to consolidate his political standing in the region.[387] As the Claimant explained in its Memorial, Deputy Borrego had recently been re-elected to serve another term representing Coahuila District 2 and publicly cast himself as a defender of the community of Sierra Mojada,[388] when in reality he was only advancing the narrow interests of Mineros Norteños and himself.

162. Within hours of the start of the Continuing Blockade, Deputy Borrego arrived at the Project site and gave a public speech outside the camp's main gate.[389] Flanked by journalists, he accused the Company of exploiting the people of Sierra Mojada and looting Mexican resources.[390] Rather than defuse tensions, he inflamed them – legitimizing the illegal takeover and aligning himself publicly with the blockaders.

163. Deputy Borrego also inserted himself into Mineros Norteños's legal strategy, pressuring them to fire their lawyers and grant power of attorney to a lawyer of his choosing.[391] To persuade Mineros Norteños to agree, he accused Mineros Norteños's lawyers of inflating their fees and falsely claimed to be in "very advanced" negotiations with "the Canadians" – likely referencing Canadian consular or diplomatic officials based in Mexico – and thus suggesting that only through his political influence could the group achieve results.[392] His aim was not legal assistance but to steer the conflict toward his personal enrichment and political advantage.

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386 Audio Recording of Conversation between Juan Manuel López Ramírez and José Ángel García Sifuentes (Mineros Norteños) Regarding Borrego's Involvement and Theft of Minera Metalín Property, 5 January 2025, **C-0334**; Transcript of Audio Recording of Conversation between Juan Manuel López Ramírez and José Ángel García Sifuentes (Mineros Norteños) Regarding Borrego's Involvement and Theft of Minera Metalín Property, 5 January 2025 (Spanish original: "*Nada más le hicieron caso al otro pinche viejo. . . Ese fue el que les dijo que bloquearan allí. . . Si no hubieran hecho eso, a lo mejor ya hubieran abierto o todavía estaban chambeando*."), **C-0335**.

387 Memorial, paras. 2.109-2.113.

388 Memorial, paras. 2.109-2.110.

389 Memorial, paras. 2.127-2.128.

390 Memorial, paras. 2.127-2.128.

391 Email from Juan Manuel López Ramírez to Tim Barry, 31 December 2019 ("Mr[.] Borrego said to them that his lawyer needs the legal power to continue with the negotiations and they need to fire them lawyer (MN lawyer)."), **C-0114**.

392 Email from Juan Manuel López Ramírez to Tim Barry, 31 December 2019, **C-0114**.

He even met with the Canadian Ambassador and representatives of the Canadian Embassy in 2019, presenting himself as the cooperative's spokesperson.[393] Some members of Mineros Norteños naively believed Deputy Borrego's lawyers would somehow resolve everything in court.[394]

164. Furthermore, as shown in the photograph below, Deputy Borrego backed Mineros Norteños materially during the Continuing Blockade, providing food and supplies.[395]

Supplies delivered to Mineros Norteños during the Continuing Blockade by Deputy Borrego, October 2019. The woman in yellow was known to be his usual liaison with the group.

165. Moreover, despite Mr. Fraire Hernández's assertion that there is no longer any relationship between Mineros Norteños and Deputy Borrego, the record tells a different story. As Deputy Borrego's official Facebook page reveals, Mr. Fraire Hernández participated in a political event with Deputy Borrego on 18 May 2024, promoting Deputy Borrego's re-election campaign in Sierra Mojada.[396] The Facebook post shows Mr. Fraire Hernández standing beside

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393 Email Correspondence Between Tim Barry and Genevieve Dompierre (Canadian Embassy), 6-9 January 2020, **C-0252**.

394 Email from Juan Manuel López Ramírez to Tim Barry, 19 May 2020, **C-0255**.

395 López Ramírez WS2, para. 59; Email Correspondence Between Juan Manuel López Ramírez, Tim Barry et al., 3-13 September 2019, **C-0220**. Specifically, *see* email from Juan Manuel López Ramírez to Tim Barry, 13 September 2019.

396 Deputy Borrego Facebook Post, 18 May 2024 (available at: https://www.facebook.com/share/p/JN9v1HoMc26H9UTB/?mibextid=oFDknk), **C-0332**; López Ramírez WS2, para. 58.

Deputy Borrego in clear support.[397] That public endorsement confirms the close relationship between them – and further undermines the suggestion that the Continuing Blockade was free from political interference. It also flatly contradicts Mr. Fraire Hernández's statement that "Mineros Norteños colleagues no longer maintain contact with Mr. Borrego."[398]

Photograph during Deputy Borrego's campaign event in Sierra Mojada. Mr. Fraire is pictured in a white shirt, standing beside Deputy Borrego (right, wearing the burgundy vest), 18 May 2024.

166. As noted, despite the Tribunal's express order, Mexico has failed to produce a single document from Deputy Borrego or his office in response to the Claimant's document requests. This includes not only meeting minutes or notes but also any communications or records confirming that such meetings occurred, even though the evidence referred to above shows that such meetings took place.[399] As set forth above in Section 2.1, the Claimant respectfully requests that the Tribunal draw adverse inferences and consider that, had these documents been produced, they would confirm that Deputy Borrego met with Mineros Norteños in early September 2019 to support, coordinate, and incite the Continuing Blockade.[400] Against this

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397 Deputy Borrego Facebook Post, 18 May 2024 (available at: https://www.facebook.com/share/p/JN9v1HoMc26H9UTB/?mibextid=oFDknk), **C-0332**; López Ramírez WS2, para. 58.

398 Fraire Hernández WS, para. 45.

399 Audio Recording of Conversation between Juan Manuel López Ramírez and Lorenzo Fraire (Mineros Norteños) Regarding Deputy Borrego's Involvement and Monetary Demands, 5 January 2024, **C-0335**.

400 *See* Section 2.1 *supra.*

background, Mexico's blanket denial of political involvement – unsupported by any contemporaneous document, witness statement, or explanation – must be rejected.

2.7.2 SVB and Minera Metalín Sought Intervention to Prevent the Continuing Blockade, but Mexico Refused to Act

167. In its Counter-Memorial, Mexico dismisses the possibility of pre-emptive intervention, asserting that the Claimant "did not file a complaint with the Coahuila Prosecutor's Office until four days after the events,"[401] "did not advance any steps before the competent Mexican authorities to address its situation,"[402] and that, in any event "there was no crime or situation of extreme urgency that merited the intervention of the municipal police."[403] These statements are not only unsupported but directly contradicted by Mr. López Ramírez's contemporaneous reports and testimony.

168. As Mr. López Ramírez reiterates in his second witness statement, throughout the first week of September 2019, rumors began circulating in Sierra Mojada that Mineros Norteños would shut down the Project site once again, unless their baseless royalty demands were met.[404] Mr. López Ramírez received these warnings from community members and immediately raised the alarm – both internally and with the authorities – requesting intervention and preemptive action.[405]

169. Mr. López Ramírez had lived through the Initial Blockade and knew how quickly the situation could escalate. That prior experience taught him that waiting until tensions boiled over – or until law enforcement decided to act – was not an option. In 2016, the authorities had only arrived at the site around 10:00 p.m.[406] This time, Mr. López Ramírez understood that proactive, early intervention was critical. That is why he mobilized efforts days in advance.

170. Mr. López Ramírez did not report the threat in general terms. He placed multiple specific calls to the Public Prosecutor's Office in Laguna del Rey and the State Citizen Assistance lines – all of which are detailed in Mr. López Ramírez's second witness statement and corroborated by his September 2019 phone bill.[407] In every call, Mr. López Ramírez described the nature of the

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401 Counter-Memorial, para. 452.

402 Counter-Memorial, para. 452.

403 Counter-Memorial, para. 194.

404 López Ramírez WS2, para. 31.

405 López Ramírez WS1, para. 8.2-8.5, 8.8-8.10; López Ramírez WS2, paras. 31-36.

406 López Ramírez WS2, paras. 26, 29.

407 López Ramírez WS2, para. 33; Phone Records of Juan Manuel López for September 2019, **C-0218**.

threat and the location of Minera Metalín's property, stressing that blockading the access to the camp – just as Mineros Norteños had done in 2016 – would constitute illegal trespassing and require immediate State intervention.

171. On 5 September 2019, Mr. López Ramírez met with the local Public Prosecutor in person and described the plan Mineros Norteños was preparing.[408] The Public Prosecutor acknowledged the seriousness of the threat and agreed to warn Mineros Norteños directly that their planned actions were illegal.[409] The next day, on 6 September 2019, the Public Prosecutor followed up with Mr. López Ramírez, reporting that Mineros Norteños had dismissed his warning and insisted they had legal cover and political protection from Deputy Borrego.[410] Unable to dissuade them, the Public Prosecutor took no further action.[411]

172. The next day, 7 September 2019, Mr. López Ramírez contacted Mr. Andrés Hernández Márquez, an officer with Fuerza Coahuila and a distant relative of his wife, hoping that he could ensure a stronger police presence that Sunday.[412] Mr. Hernández Márquez reassured him that "the police would handle it."[413]

173. When the Continuing Blockade began on 8 September 2019, law enforcement officers were already on site – a clear sign that the State had had time to prepare.[414] And yet, as reflected in the photograph below, rather than enforce the law, the police stood by and watched as Mineros Norteños crossed into Company property and seized control of the camp, with multiple employees held hostage inside. They did not intervene or warn Mineros Norteños. As Mr. López Ramírez testifies, they simply let it happen.[415]

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408 Memorial, para. 2.119.

409 Memorial, para. 2.119.

410 Memorial, para. 2.120.

411 Memorial, para. 2.120.

412 López Ramírez WS2, para. 35; Memorial, paras. 2.118-2.121.

413 López Ramírez WS2, para. 35.

414 López Ramírez WS2, paras. 41-42.

415 López Ramírez WS2, para. 42.

Members of Mineros Norteños crossing onto Minera Metalin's private property, 8 September 2019.

174. In short, Mexico had both the opportunity and the legal obligation to act. As detailed in Section 2.8 below, it failed to prevent the Continuing Blockade and failed to respond to it.[416] It also failed to enforce its own laws once the Continuing Blockade was underway.[417]

175. Furthermore, during the document production stage, Claimant specifically requested all documents prepared by or on behalf of the Coahuila Citizen Attention Service, the Public Prosecutor in Laguna del Rey, and Fuerza Coahuila concerning Mr. López Ramírez's 3 September 2019 warnings of an imminent blockade.[418] The Tribunal granted that request in part, ordering Mexico to produce all responsive documents for the period between 3 September and 31 December 2019.[419] Yet despite this clear directive – and the *prima facie* relevance of those materials – Mexico produced *nothing*. Its silence in response to both the initial request and the Tribunal's explicit order underscores not only a pattern of evasion but a disregard for this Tribunal's authority.[420] Against this backdrop, and as set forth in Section 2.1, the Claimant respectfully requests adverse inferences, namely that had the requested documents been

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416 *See* Section 2.7 below; National Code of Criminal Procedure, Article 146, **R-0037**.

417 *See* Section 2.7 below.

418 Claimant's Document Production Requests, 13 January 2025, at Request No. 5.

419 Procedural Order No. 3, 11 March 2025, at Tribunal's Decision to Request No. 5, pp. 47-53.

420 Procedural Order No. 3, 11 March 2025, at Tribunal's Decision to Request No. 5, pp. 47-53.

produced, they would show that the authorities had ample warning, the opportunity to act, and sufficient time to prevent the Continuing Blockade – but failed to do so.[421]

2.7.3 The Continuing Blockade was a Hostile Takeover

176. Mexico argues that the Continuing Blockade was a "peaceful" and "social" demonstration, comprising nothing more than a "small encampment" by Mineros Norteños members intended to open a line of communication with Mr. Barry.[422] To excuse its failure to act, Mexico contends that Mineros Norteños remained outside the fence;[423] that the camp was never sealed off;[424] that workers were free to come and go;[425] that operations continued as normal;[426] and that those inside were adequately supplied.[427] Mexico also attempts to discredit Mr. López Ramírez, portraying him as someone who abandoned the site.[428] None of these contentions withstands scrutiny.

177. As set forth below, the evidence – including eyewitness accounts, security video footage, and Mr. López Ramírez's detailed statements – tells a very different story.

2.7.3.1 The Continuing Blockade followed Mineros Norteños's defeat in court, not a breakdown in dialogue

178. Mexico asserts that Mineros Norteños resorted to "protest" only after decades of delay and broken promises by SVB and after realizing that "there was no intention on the part of the Claimant's representatives to dialogue."[429] According to Mexico, the protest was legitimate, non-violent, and not a matter for law enforcement intervention.[430] These assertions are false.

179. As explained above, by September 2019, Mineros Norteños had exhausted its legal avenues before the Mexican commercial courts. Their lawsuit against Minera Metalín was dismissed

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421 *See* Section 2.1 *supra*.

422 Counter-Memorial, paras. 19, 31, 149, 177, 181, 182, 194, 196, 199, 449, 450, 456, 458.

423 Counter-Memorial, paras. 185, 196.

424 Counter-Memorial, para. 185.

425 Counter-Memorial, paras. 184, 188.

426 Fraire Hernández WS, para. 35.

427 Counter-Memorial, para. 188.

428 Counter-Memorial, para. 178.

429 Counter-Memorial, para. 183.

430 Counter-Memorial, paras. 177, 199.

on 4 October 2017 on statute of limitations grounds.[431] That dismissal was upheld on appeal on 31 July 2019.[432] Just weeks after this appellate decision,[433] Mineros Norteños, encouraged and emboldened by Deputy Borrego, imposed a second illegal blockade on the Project to obtain by force what the Mexican courts had denied them by law.

180. As Mr. Brian Edgar wrote on 6 September 2019, two days before the Continuing Blockade began, Mineros Norteños "must be reminded that their grievance with SVB is before the courts in Mexico and there is no need for them to take any action at all."[434] On 8 September 2019, Mineros Norteños nevertheless stormed the Sierra Mojada Project again.

181. As set forth below, contrary to Mexico's contentions, this was not a social protest, nor was it peaceful.[435] The Blockade was a direct response to having lost in court and was aimed at extracting royalty payments from Minera Metalín through extortion and force.[436]

2.7.3.2 Mineros Norteños crossed into Minera Metalín's property and law enforcement let it happen

182. Mexico's assertion that the Continuing Blockade was not unlawful, because it took place only on "public roads"[437] or "outside the fence"[438] is false. As explained above and as Mr. López Ramírez makes clear, Minera Metalín's property begins at the second checkpoint, well before the main gate and cyclone fencing that surrounds the camp.[439]

183. On 8 September 2019, Mineros Norteños began their march up to the second checkpoint, close to the camp, and stayed there for a while.[440] According to emails sent by Mr. López Ramírez that morning, the group gathered at the second checkpoint numbered at least 120 individuals.[441]

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431 Memorial, para. 2.69; Judgment of the Mercantile Judgment 2/2015, 4 October 2017, **R-0027**.

432 Memorial, para. 2.69; Appeal Judgment 12/2017, 31 July 2019, **R-0029**.

433 Appeal Judgment 12/2017, 31 July 2019, **R-0029**.

434 Email Correspondence Between Juan Manuel López Ramírez, Tim Barry, Brian Edgar et al., 3-6 September 2019, **C-0219**. Specifically, *see* email from Brian Edgar to Juan Manuel López Ramírez, 6 September 2019.

435 Counter-Memorial, paras. 31, 34, 149, 177, 181-182, 194-196, 199, 449-451, 456, 458.

436 Counter-Memorial, para. 199.

437 Counter-Memorial, paras. 183, 199, 450.

438 Counter-Memorial, paras. 185, 196.

439 López Ramírez WS2, para. 16.

440 López Ramírez WS2, paras. 41-42.

441 Email Correspondence Between Juan Manuel López Ramírez and Tim Barry, 8 September 2019, **C-0222**.

Police then informed Mr. López Ramírez that Mineros Norteños wished to speak with him – a request that, in hindsight, was a calculated ploy, as explained below.[442]

183.1 Within 30 minutes, Mineros Norteños advanced further, crossing the second checkpoint and proceeding directly to the camp's main gate.[443] Mineros Norteños brushed past Mr. López Ramíre and took control of the entrance to the camp.[444] Police officers stood by and did nothing.[445] They witnessed Mineros Norteños illegally trespass onto private property, reject all efforts at dialogue (including theirs), and physically obstruct the main entrance to the camp – yet they made no effort to intervene, de-escalate, or enforce the law.

2.7.3.3 Mineros Norteños rejected dialogue and used deception to lock Mr. López Ramírez out of the camp

184. Mexico asserts that Mr. López Ramírez "went to his home and deliberately avoided talking to Mineros Norteños" on 8 September 2019.[446] However, it was Mineros Norteños that made no attempt at dialogue. They refused to speak to Mr. López Ramírez even after requesting his presence outside the camp through the police. As he recounts in his second statement:

> When I reached the checkpoint – located approximately 100 meters from the camp's main gate – I tried to resolve the situation, but Mineros Norteños refused to speak with me, saying they would only talk to Mr. Barry. Some were visibly irritated by the presence of local police and shouted that the mayor had promised to support them, insisting the officers had no business being there.[447]

185. Mr. Barry was not even in the country at the time – and given the size and volatility of the crowd, it would have been reckless for him to travel to the site. However, as Mr. Barry himself explains in his second statement, ever since he became involved in the Project in 2010, he had met regularly with Mineros Norteños to discuss the Project and address their concerns.[448] He was therefore no stranger to the group. In fact, they had Mr. Barry's direct contact information

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442 López Ramírez WS2, paras. 41-42.

443 López Ramírez WS2, para. 42.

444 López Ramírez WS2, para. 42.

445 López Ramírez WS2, para. 42.

446 Counter-Memorial, para. 177.

447 López Ramírez WS2, para. 42.

448 Barry WS2, para. 22.

and had even emailed him before. If they had genuinely wanted to speak with him, they could have done so at any time. Instead, they refused to speak with Mr. López Ramírez, who was present, acting in good faith, and attempting to engage.[449]

186. Mr. López Ramírez stayed at the second checkpoint for nearly 30 minutes, actively trying to reason with the group. But Mineros Norteños ignored him entirely.[450] Despite his efforts, Mr. López Ramírez could do nothing to stop the takeover by himself.[451] He watched as Mineros Norteños bypassed the police – who did nothing to intervene – and advanced to the camp's main gate.[452] Within minutes, he was locked out, cut off from the site entirely.[453]

187. Contrary to Mexico's contentions, once locked out, Mr. López Ramírez did not disengage; rather, he responded as any responsible site leader would – he immediately shifted focus to managing the crisis from the outside.[454] He coordinated efforts, relayed updates, and pressed the authorities to act.[455] In Mr. López Ramírez's own words: "I left the Project site so that I could begin calling for help. It was not easy to make that decision. . . But I could not re-enter the camp safely, so I undertook to provide support from the outside."[456] His conduct was not only diligent and responsible – it was precisely the kind of leadership the moment demanded.

2.7.3.4 Mineros Norteños controlled – and continues to control – the camp's perimeter

188. Mexico asserts that the camp remained accessible and that its perimeter was never actually closed.[457] That assertion is false.

189. Once Mineros Norteños surrounded the camp, they controlled all access points. Having already staged the Initial Blockade in 2016, Mineros Norteños knew exactly where the access points were, how many gates existed, and what was required to shut down the site.[458] This time, they

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449 López Ramírez WS2, para. 42.

450 López Ramírez WS2, para. 42.

451 López Ramírez WS2, para. 42.

452 López Ramírez WS2, para. 42.

453 López Ramírez WS2, para. 42.

454 López Ramírez WS2, paras. 44-46.

455 López Ramírez WS2, para. 46.

456 López Ramírez WS2, para. 46.

457 Counter-Memorial, para. 185.

458 *See* Section 2.4 *supra.*

came better prepared. As Mr. López Ramírez describes in his second witness statement, they "pitched tents, set up cooking stations, and brought supplies to the camp's main gate,"[459] making themselves fully at home while holding the camp under siege. Their intent was not to protest and leave, but to occupy and hold. That objective has not changed.

Photo of Mineros Norteños at the main gate of the camp during the Continuing Blockade, 2019.

[459] López Ramírez WS2, para. 48.

Photo of a Mineros Norteños meeting during the Continuing Blockade, October 2019.

Photo of a Mineros Norteños meeting during the Continuing Blockade, 2019.

190. As Mr. López Ramírez confirms, the Continuing Blockade remains in place to this day.[460] Even amid the COVID-19 pandemic, Mineros Norteños maintained control of the Project site. In an email sent by Mr. López Ramírez on 10 July 2020 – more than ten months after the Blockade began – he wrote: "MN still there like rocks."[461]

191. Furthermore, the Continuing Blockade was not only better coordinated than the Initial Blockade, but the turnout was significantly larger. While the Initial Blockade involved an estimated 50-60 people,[462] the Continuing Blockade drew more than 120 individuals, according both to contemporaneous reports by Mr. López Ramírez and to reports prepared by Mexico's own officials and saved in the criminal file.[463] Backed by political protection and strength in numbers, Mineros Norteños moved swiftly and decisively.

192. Mr. López Ramírez, who was forced outside the camp, and Mr. Melnyk, who was trapped inside, confirm that the perimeter was sealed – physically and through intimidation.[464] Mineros Norteños posted guards at key entry and exit points, monitored movements inside the camp, and created an atmosphere of sustained pressure.[465] No one inside could leave.[466]

193. Throughout the multi-year negotiations that followed, SVB repeatedly requested access to the Project site to assess conditions and inspect the damage. Mineros Norteños staunchly refused.[467] In fact, the first and only time SVB was allowed to re-enter the Project site was in October 2021 – more than two years after the Continuing Blockade began.[468] The brief visit was tightly controlled and limited to a joint technical inspection.

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460 López Ramírez WS2, para. 48.

461 Email from Juan Manuel López to Tim Barry, 10 July 2020, **C-0418**.

462 López Ramírez WS2, para. 7.

463 Email Correspondence Between Juan Manuel López Ramírez and Tim Barry, 8 September 2019, **C-0222**; *See*, *e.g.*, Homologated Police Report (Notice of Allegedly Criminal Acts), 19 September 2019, **C-0409**; Report of Registration and Inspection of the Scene, 18 September 2019, **C-0408**; Field Criminalistics Report by Licenciado Fulgencio Tovar Escobedo Regarding the Sierra Mojada Site, 15 February 2021, **C-0356**; Information Note Issued by the Public Prosecutor's Office, 16 June 2021, **C-0426**; Homologated Police Report (Notice of Potentially Criminal Acts), 10 January 2023, **C-0464**; Notification of Temporary Archiving of Investigation File, 23 September 2024, **C-0441**.

464 López Ramírez WS2, paras. 42-43; Melnyk WS2, para. 16.

465 Melnyk WS2, para. 16.

466 López Ramírez WS2, para. 42.

467 Letter from Mineros Norteños to Minera Metalín, 6 August 2021, **C-0279**.

468 Letter from Mineros Norteños to Minera Metalín Granting Limited Site Access, 20 October 2021, **C-0296**; Site Inspection Report Prepared by Juan Manuel López Ramírez, 23 October 2021, **C-0298**.

194. Furthermore, as confirmed by the criminal file – obtained only after Mexico refused to produce it in this arbitration – Mineros Norteños even blocked an expert appointed by the Public Prosecutor's Office from entering the site to conduct a formal inspection in February 2021.[469] As his expert report documents, the expert was forced to flee the area, unable to carry out his mandate due to Mineros Norteños's obstruction, after he was confronted by "45 men."[470]

2.7.3.5 Mineros Norteños confined employees inside the camp and denied them exit – and the authorities did nothing to protect them

195. Mexico contends that the Continuing Blockade did not restrict anyone's freedom of movement, arguing that the employees inside the camp "were in the company's offices of their own free will"[471] and "left on their own foot and without any risk to their lives."[472] But that narrative is contradicted by the firsthand accounts of those who lived through the events.

196. Employees trapped inside the camp were not free to leave through the front door – or any other exit, for that matter. A video recorded during the Continuing Blockade by one of Minera Metalín's employees shows workers standing at the gate, requesting to be let out, and being denied exit. One Mineros Norteños member is caught on camera saying:

> You are going to stay here until someone comes, the representative from here, to talk to them because if not…we will not resolve anything. So, you tell them [Minera Metalín] yourselves. Here they [Minera Metalín] have you locked up, come and get them out.[473]

197. The blame-shifting is remarkable. While Mineros Norteños physically controlled the gate, they claimed it was the Company holding its workers hostage – effectively shifting the blame for a situation they had created.[474] And all of this occurred with the full knowledge – and passive

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469 Field Criminalistics Report by Licenciado Fulgencio Tovar Escobedo Regarding the Sierra Mojada Site, 15 February 2021, **C-356**.

470 Field Criminalistics Report by Licenciado Fulgencio Tovar Escobedo Regarding the Sierra Mojada Site, 15 February 2021, p. 3, **C-356**.

471 Counter-Memorial, para. 196.

472 Counter-Memorial, para. 180.

473 Video Footage from Inside the Camp Showing Mineros Norteños Preventing Workers from Leaving, 12 September 2019, **C-0223**. Transcript of Video Footage from Inside the Camp Showing Mineros Norteños Preventing Workers from Leaving, 12 September 2019 (Spanish original: "*Se van a quedar hasta que venga alguien, el representante de aquí, para hablar con ellos, porque si no... no arreglamos nada. Así que ustedes mismos díganles: aquí los tienen encerrados, vengan a sacarlos*."), **C-0223**.

474 Melnyk WS2, para. 8.

complicity – of the authorities, who never intervened or offered protection. As Mr. Melnyk – one of the confined geologists – recounts "Mineros Norteños scoffed at our desire to leave and set up guards to patrol the perimeter of the site with flashlights, presumably to ensure that we could not escape."[475]

198. Mexico also contends that the Continuing Blockade did not create hardship for those trapped inside the camp. According to Mexico, food and supplies allegedly continued to flow into the camp, and those trapped inside were able to continue with their daily routines.[476] That is false.

199. As Mr. Melnyk testifies, even supply trucks carrying critical goods were turned away by Mineros Norteños at the gate.[477] The individuals inside the camp were left to ration what they had on hand – an insufficient and unsustainable situation. No food deliveries were permitted, no medicine was allowed through, and no outside assistance ever reached them. As Mr. Melnyk notes: "[w]e feared we would run out of essential items, and we also feared that if Mineros Norteños would not permit even essential items to cross the threshold to the camp, we stood little chance of safely passing."[478] The seriousness of the situation is further underscored by Mr. López Ramírez's account, who recalls that "one of the employees, Baltazar Gastélum, was running out of his diabetes medication and feared for his health."[479]

200. By contrast, Mineros Norteños received plentiful supplies, delivered regularly to support their illegal occupation. As noted above, Deputy Borrego provided food and other logistical support to sustain the blockaders.[480] Thus, while the employees inside the camp were left without food and medicine, those outside were supplied and supported by a sitting Congressman. In any event, what matters is that these individuals were confined against their will inside the camp and denied freedom of movement. That is what made the situation unlawful – and that is what Mexico continues to ignore.

201. Among those confined was Rubén Navidad, a university student completing an internship,[481] who surely did not expect to find himself in such a dangerous situation. For him and others,

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475 Melnyk WS2, para. 16.

476 Counter-Memorial, para. 188.

477 Melnyk WS2, para. 12.

478 Melnyk WS2, para. 12.

479 López Ramírez WS2, para. 51.

480 Memorial, para. 2.141.

481 López Ramírez WS2, para. 44.

the experience was not only professionally disruptive – it was emotionally overwhelming. There was no safe way out. Escape required stealth, coordination, and real personal risk.

202. As SVB explained in its Memorial, some employees were so desperate to get out that they fled under cover of night to avoid confrontation with Mineros Norteños.[482] As shown in the photograph below, Mineros Norteños maintained a visible presence 24 hours a day.

Nighttime encampment set up by Mineros Norteños at the camp's main gate, with lights, chairs, and personnel visibly present – demonstrating 24-hour surveillance and organized occupation, 2019.

203. Mr. Matthew Melnyk's account captures the reality faced by all six employees who remained inside the camp:

> We were on our own. Recognizing this, we were forced to flee secretively out of the back entrance to the Project site under the cover of night, duck and crawl along in the darkness until we were out of sight, and escape in a non-descript getaway vehicle.[483]

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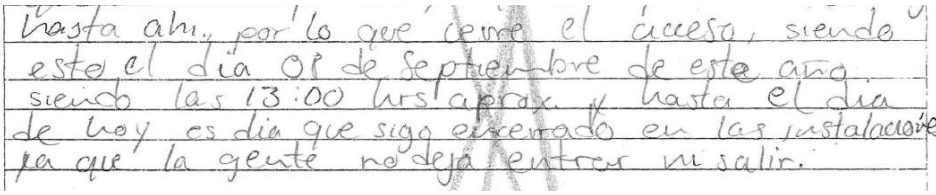
482 Melnyk WS2, para. 16.

483 Melnyk WS2, para. 21.

204. The most harrowing example, however, is Mr. Carlos Luna, who remained inside the camp for 12 days.[484] In a statement dated 18 September 2019, Mr. Luna – who was still inside the camp – confirmed in his own words: "[From] 8 September of this year, at approximately 1:00 p.m., and up until today [18 September 2019], I remain confined inside the premises because the people are not allowing anyone to enter or leave."[485]


hasta ahi, por lo que cerro el acceso, siendo
este el dia 08 de Septiembre de este año
siendo las 13:00 hrs aprox y hasta el dia
de hoy es dia que sigo encerrado en las instalaciones
ya que la gente no deja entrar ni salir.

Excerpt from Mr. Luna's statement in Spanish, 18 September 2019.[486]

205. Eventually, with no safe exit available, he climbed over the camp's fence – risking injury, retaliation by Mineros Norteños, or worse.[487] Mexico cynically describes his departure as a voluntary and safe exit.[488] That claim is indefensible. His written statement and the circumstances of his departure make clear that his decision to scale the fence was not a choice, but an act of desperation.

2.7.3.6 Mineros Norteños brought Minera Metalín's operations to a standstill

206. Mexico contends that the Continuing Blockade had no real operational consequences because Minera Metalín employees could "carry out their daily activities" inside the camp.[489] That is a fundamental misrepresentation of how a mining project functions – and a minimization of the actual conditions experienced by the team held inside the camp.

207. Mining work does not happen exclusively inside administrative offices. It takes place in the field – on the ground, in exploration zones, with teams, tools, vehicles, and mobility. Once the camp was surrounded and sealed, none of that was possible. As Mr. López Ramírez makes clear in his second witness statement, "[b]y locking us in the camp, we could not undertake

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484 López Ramírez WS2, para. 53.

485 Sworn Statement by Mr. Carlos Daniel Luna Cisneros, 18 September 2019, **C-0228**.

486 Sworn Statement by Mr. Carlos Daniel Luna Cisneros, 18 September 2019, **C-0228**.

487 López Ramírez WS2, para. 53.

488 Counter-Memorial, para. 180 ("[I]t is a fact that Minera Metalín's employees left on their own feet and without any risk to their lives.").

489 Fraire Hernández WS, para. 35.

any works that fell outside of the camp."[490] Geologists could no longer move through the site. Equipment could not be deployed. Materials could not be transported. Technical staff could not access their areas of responsibility. That was not SVB's choice; it was the direct consequence of a physical occupation that made continued operations impossible.

208. The six employees inside the camp did not remain because they were working – they remained because they were trapped. As Mr. Melnyk explains, it was not a normal working environment:

> [A]ll I could do workwise was write up lab results into reports, but we could not produce any new information from the field. More fundamentally, *it is insulting to justify false imprisonment by suggesting that the imprisoned individuals can still get work done while they are locked in*.[491]

209. The fact that some employees remained physically present did not make the site operational. These individuals were confined and under surveillance. With the support of Deputy Borrego and the inaction of law enforcement, Mineros Norteños brought the Project to a standstill – a paralysis that remains to this day.

2.7.4 Mineros Norteños's Continuing Blockade was Not Only a Seizure, but was Accompanied by Theft

210. Mexico dismisses the idea that the Continuing Blockade involved any theft or vandalism. In its Counter-Memorial, it asserts there is no credible evidence of wrongdoing, denies that any Company property was taken, and offers a blanket assertion that there was not "any indication of theft or similar acts" and "no report of the alleged crimes."[492] That narrative is flatly contradicted by the evidentiary record, including the recorded admissions of Mineros Norteños members themselves.

211. The Continuing Blockade was not merely a physical occupation of the Project site, but was accompanied by theft, vandalism, and illicit resale of Company property.[493] As Mr. López Ramírez explains in his second witness statement, "[w]e documented cut fences, missing gear, and stolen materials. Some of these belonged to outside contractors and had clear resale

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490 López Ramírez WS2, para. 13.

491 Melnyk WS2, para. 14 (emphasis added)

492 Counter-Memorial, paras. 182, 196, 452.

493 Memorial, paras. 2.168-2.170, 2.189.

value."[494] These were not isolated incidents. The stolen goods were later seen in Sierra Mojada. As Mr. López Ramírez explains, "[w]e later learned that Mineros Norteños tried to sell some of these items to locals from Sierra Mojada, including people I know personally."[495]

212. 17,000 liters of diesel were also stolen and resold in town.[496] Several local residents reported seeing Mr. Fraire Hernández himself trying to sell the diesel.[497] That claim is corroborated by a recorded admission in January 2025 by Mineros Norteños member José Ángel García Sifuentes, who confirmed that "everyone knew" Mr. Fraire Hernández was peddling Company diesel around town, although most declined to buy from him.[498]

213. The theft did not stop with Minera Metalín's property. Tools and equipment belonging to the Company's drilling contractor, Major Drilling, also disappeared.[499] As noted, during negotiations, SVB repeatedly requested access to inspect the site.[500] Mineros Norteños refused, because they knew what an inspection would reveal.[501] When access was finally granted in October 2021, Mr. López conducted an on-site review and documented the extent of the damage and loss.[502] His report, dated 23 October 2021, confirmed that batteries, tires, heavy-duty lights, and electrical components had been stolen.[503] While the damage was less catastrophic than feared, it was still serious.

214. This was not random looting by outsiders. It occurred inside a site that Mineros Norteños had seized and controlled. Mexico's blanket denial only underscores the weakness of its position. It has never explained how Company diesel and equipment left the site, why these items turned up in town, or why even Mineros Norteños members themselves admitted what had happened.

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494 López Ramírez WS2, para. 54.

495 López Ramírez WS2, para. 54.

496 López Ramírez WS2, para. 55.

497 López Ramírez WS2, para. 55.

498 López Ramírez WS2, para. 55.

499 López Ramírez WS2, para. 54.

500 López Ramírez WS2, para. 111, 114; Letter from Minera Metalín to Mineros Norteños, 4 August 2021, **C-0278**.

501 López Ramírez WS2, paras. 112-113, 116; Email from Juan Manuel López Ramírez to Tim Barry Forwarding Letter from Mineros Norteños to Minera Metalín, 6 August 2021, **C-0279**; Letter from Mineros Norteños to Minera Metalín, 6 August 2021, **C-0280**; Email from Juan Manuel López Ramírez to Tim Barry Forwarding Letter from Mineros Norteños to Minera Metalín, 15 September 2021, **C-0288**.

502 López Ramírez WS2, para. 116-117; Letter from Mineros Norteños to Minera Metalín Granting Limited Site Access, 20 October 2021, **C-0296**.

503 López Ramírez WS2, paras. 116-117; Site Inspection Report Prepared by Juan Manuel López Ramírez, 23 October 2021, **C-0298**.

2.8 To This Day, Mexico Has Taken No Reasonable Action to End the Continuing Blockade or to Prosecute Those Responsible

215. As SVB set out in its Memorial, the Continuing Blockade, which began in September 2019, remains in place to this day, nearly six years later.[504] Mineros Norteños and its members maintain vigilance over the front gate to the camp 24 hours a day, 7 days a week, 365 days a year.[505] They have built a small shelter out of wood and corrugated metal around the front gate to the camp site, where two guards sleep each night.[506] Mineros Norteños also continues to steal items from the camp, including thousands of liters of diesel, household items from camp buildings, and car and truck tires and stereo systems.[507] SVB further demonstrated that, despite SVB's repeated pleas to the Mexican authorities, to date, no law enforcement officials have ordered Mineros Norteños to cease its unlawful conduct, to leave Minera Metalín's private property, or to stop interfering with the Project.[508] Nor has anyone been prosecuted, despite Minera Metalín's criminal complaint.[509]

216. Mexico submits in its Counter-Memorial that *the Claimant* – not Mexico – is responsible for Mexico's failure to act, including because the Claimant allegedly "failed to take the necessary legal actions to formally request the intervention of the competent authorities."[510] Mexico nevertheless asserts that the Claimant's "approaches to multiple federal, state and municipal authorities were dealt with within the framework of the powers of each authority and the authorities acted in accordance with the facts found."[511] Those authorities, Mexico says, "cannot intervene or act with the use of public force, as the Claimant seems to suggest, in circumstances that do not warrant the use of force against peaceful demonstrators and on facts that do not establish violations or crimes."[512] Simply put, Mineros Norteños's actions, Mexico contends, were lawful and its authorities, therefore, were powerless to intervene.

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504 Memorial, paras. 2.111, 2.200, 4.17, 4.38.

505 Memorial, para. 2.189; López Ramírez WS1, para. 15.2.

506 Memorial, para. 2.189; López Ramírez WS1, para. 15.2.

507 Memorial, para. 2.189; López Ramírez WS1, paras. 15.6, 12.2.

508 Memorial, para. 2.190.

509 Memorial, para. 3.42-3.43.

510 Counter-Memorial, para. 452.

511 Counter-Memorial, para. 451.

512 Counter-Memorial, para. 451.

217. This is pure argument. Mexico presents *no* witness testimony from any of its authorities – at the local, state, or federal level – in support of these assertions. Nor does Mexico proffer any contemporaneous evidence demonstrating how its authorities responded to the Continuing Blockade, what their real time assessments were, what actions they recommended be taken in response, and why they ultimately failed to take any action at all. Instead, Mexico attempts to testify on their behalf, with reference only to its domestic laws.[513] Mexico asserts, for example – without support – that "[t]he Coahuila District Attorney's Office confirmed that there was no deprivation of liberty of any worker (*i.e.*, kidnapping or hostages), and investigated everything related to the alleged dispossession of Minera Metalín's property,"[514] and that "[t]he Sierra Mojada municipal police officers who went to the site did not witness any illegal act or crime, so there was no need to intervene with force."[515] Such *ipse dixit* statements are not factual evidence, nor are they testimony. They should therefore be given no weight by this Tribunal.

218. As noted in Section 2.1 above, Mexico likewise has produced *nothing* in response to the Claimant's multiple requests calling for the production of documents from its authorities regarding their response to the Continuing Blockade,[516] including the criminal file that Mexico has withheld in bad faith.[517] The Claimant has now independently, and at significant expense, obtained a copy of that file.[518] As set forth below, the documents comprising that file show that Mexico's representatives in this arbitration themselves requested a copy in 2023, and there is no indication that it was not provided to them.[519] Ultimately, it is obvious why Mexico has shielded that criminal file from production: it directly contradicts its case. This is bad faith.

219. It is worth pausing here to reflect on Mexico's actions in this case: rather than present testimony from its own officials with personal knowledge of the events at issue and produce evidence showing what those officials did and why, Mexico has chosen instead to stonewall and produce

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513 *See, e.g.*, Counter-Memorial, paras. 203-212, 217-224, 459.

514 Counter-Memorial, para. 193.

515 Counter-Memorial, para. 199.

516 Claimant's Letter to the Tribunal in Response to Mexico's Document Production, 27 March 2025; Claimant's Letter to the Tribunal in Response to Mexico's Document Production, 4 April 2025.

517 Procedural Order No. 3, 11 March 2025, at Tribunal's Decision to Requests Nos. 10-11, pp. 70-78.

518 Minera Metalín's Request for Certified Copies of Criminal Investigation File 650/2019 (Stamped by Coahuila Public Prosecutor's Office), 31 March 2025, **C-0467**.

519 Mexico's Objections to the Claimant's Redfern Schedule, 25 February 2025, at Requests Nos. 10-11, pp. 81, 89; Mexicos's Letter to the Tribunal in Response to Claimant's Allegations Regarding Document Production, 14 April 2025.

nothing in the hope that the Claimant will be unable to make its case. As set forth below, that hope is misplaced: the record evidence shows that, from the outset of the Continuing Blockade, the Mexican authorities, including its prosecutorial authorities, had direct evidence of Mineros Norteños's unlawful conduct but *chose* not to act. Of course, it bears repeating that this choice differs markedly from the one those authorities made in 2016. It also contrasts with Mexico's swift, effective intervention in other blockades of similar mining projects in Mexico.

2.8.1 Mexico has Withheld the Criminal File and Misrepresented its Contents

220. As SVB explained in its Memorial, on 12 September 2019, four days after the Continuing Blockade began, Minera Metalín filed a formal criminal complaint against Mineros Norteños for dispossession and deprivation of liberty with the Public Prosecutor's Office in San Pedro de las Colonias.[520] As Mr. López Ramírez testifies, he and Minera Metalín's lawyer, Mr. Rodrigo Hernández, prepared and submitted the complaint in hardcopy as fast as the situation allowed.[521] That complaint led to the opening of a criminal investigation, but no charges were ever brought against any member of Mineros Norteños for their ongoing unlawful actions.[522]

221. In its Counter-Memorial, Mexico seeks to blame the Claimant for this failure. Specifically, Mexico asserts that "the Public Prosecutor's Office acted correctly and in accordance with its attributions in the face of Metalín's complaint," but that *Minera Metalín* allegedly failed "to provide it with the information it required to continue fulfilling its functions," leading to the discontinuance of the criminal investigation.[523] Mexico further asserts that Minera Metalín was allegedly late in reporting the Continuing Blockade,[524] and that "the investigation carried out by the Public Prosecutor's Office did not prove that Mineros Norteños had committed any criminal conduct,"[525] while withholding the actual documents comprising that investigation.

222. These positions are absurd, contradictory and, as shown below, made in bad faith. In the first instance, the Public Prosecutor's office has investigative capabilities and is therefore not dependent upon Minera Metalín to provide it with information. Mexico, moreover, cannot on

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520 Criminal Complaint Filed by Minera Metalín with the San Pedro de las Colonias Public Prosecutor's Office, 12 September 2019, **C-0255**.

521 López Ramírez WS2, para. 64.

522 López Ramírez WS2, para. 80.

523 Counter-Memorial, para. 224.

524 Counter-Memorial, para. 213.

525 Counter-Memorial, para. 224.

the one hand complain that the Public Prosecutor was not provided with timely, relevant information and then contend on the other hand that it came to the right conclusions. In any event, Mexico has completely misrepresented the contents of that criminal investigation, as set out below.

223. To recall, during the document production phase, SVB requested the full criminal file documenting the investigation into the Continuing Blockade – an investigation that Mexico itself described in its Counter-Memorial without somehow disclosing.[526] In response to SVB's Requests Nos. 13 and 14, which specifically sought that file, Mexico objected, asserting that it "does not have access to the investigation file due to confidentiality issues"[527] and claiming protection under Article 218 of the National Code of Criminal Procedure (the "**CNPP**") and allegedly protected by legal privilege.[528] Simultaneously, in response to Requests Nos. 10 and 11 – which sought related records from the Coahuila Prosecutor's Office and local law enforcement – Mexico claimed those were "neither relevant nor material to the resolution of the dispute," professed not to know "the office within the Coahuila Attorney General's Office where such documents might be found" and asserted that, "in the event, albeit not conceded, that such information exists, it would be classified as confidential."[529]

224. Although the Tribunal ordered production of the criminal file in Procedural Order No. 3, Mexico failed to comply.[530] In its 22 April 2025 letter, the Tribunal reiterated the importance of transparency and directed Mexico to use its best efforts to provide a detailed privilege log for each document in the criminal file – acknowledging the relevance of the withheld materials and reserving the right to draw conclusions at the hearing should it appear that Mexico's production was incomplete or deficient.[531]

225. SVB has now independently obtained a copy of the criminal file from the Coahuila Attorney General's Office.[532] That file not only directly contradicts Mexico's arguments in this case but it demonstrates Mexico's lack of candor with this Tribunal. In particular, the criminal file

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526 Counter-Memorial, paras. 217-224.

527 Mexico's Objections to the Claimant's Redfern Schedule, 25 February 2025, Objection to Request No. 14, p. 103.

528 Mexico's Objections to the Claimant's Redfern Schedule, 25 February 2025, General Objection No. 4, pp. 7-8.

529 Mexico's Objections to the Claimant's Redfern Schedule, 25 February 2025, Objection to Requests Nos. 10-11, pp. 81, 89.

530 Procedural Order No. 3, 11 March 2025, Tribunal's Decision to Requests Nos. 10-11, pp. 70-78.

531 Tribunal Correspondence Transmitting Decision on Claimant's Application on Document Production, 22 April 2025.

532 Minera Metalín's Request for Certified Copies of Criminal Investigation File 650/2019 (Stamped by Coahuila Public Prosecutor's Office), 31 March 2025, **C-0467**.

includes the abovementioned letter dated 4 May 2023, signed by Mr. Alan Bonifiglio – lead counsel for Mexico in this arbitration – formally requesting the criminal file from the Coahuila Attorney General's Office. The circumstances of this letter merit attention:

- *First*, the request was submitted by Mexico's own legal team, *i.e.*, the very counsel now claiming that the file was both inaccessible and protected by legal privilege.[533]

- *Second*, the letter explicitly states that the file was being requested "with the aim of being able *to prepare an adequate defense for Mexico in this arbitration*," confirming that Mexico was fully aware of its relevance to the proceedings.[534]

- *Third*, Mr. Bonifiglio asked that the file be sent *electronically* using platforms such as Dropbox, WeTransfer or Google Drive – methods that are plainly unsuitable for safeguarding privileged information and flatly inconsistent with Mexico's claim in this case that the file was too sensitive to disclose.[535]

- *Fourth*, Mr. Bonifiglio requested that the Coahuila Attorney General "designate a contact point within your team who will be *in constant communication with the Mexican defense team*," thereby dispelling any pretense of confidentiality and revealing a direct, active, and coordinated line of communication between Mexico's lead counsel and the Public Prosecutor's Office from the very start of this arbitration.[536]

226. Mexico's claim that the file could not be produced due to privilege or confidentiality is unsustainable and was plainly made in bad faith.[537] Indeed, it had already requested access to the file itself nearly two years earlier.

227. Nevertheless, it is evident why Mexico would seek to withhold the criminal file: it confirms that there has been no genuine action in response to Minera Metalín's criminal complaint and,

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533 Letter from the Ministry of Economy to the Coahuila Attorney General Requesting Criminal File for Arbitration Preparation, 4 May 2023, **C-0439**; Communication from the Public Prosecutor's Office of Coahuila, 18 December 2024, **R-0041**.

534 Letter from the Ministry of Economy to the Coahuila Attorney General Requesting Criminal File for Arbitration Preparation, 4 May 2023, **C-0439**; Communication from the Public Prosecutor's Office of Coahuila, 18 December 2024, p. 1, **R-0041**.

535 Letter from the Ministry of Economy to the Coahuila Attorney General Requesting Criminal File for Arbitration Preparation, 4 May 2023, **C-0439**; Communication from the Public Prosecutor's Office of Coahuila, 18 December 2024, p. 2, **R-0041**.

536 Letter from the Ministry of Economy to the Coahuila Attorney General Requesting Criminal File for Arbitration Preparation, 4 May 2023, **C-0439**; Communication from the Public Prosecutor's Office of Coahuila, 18 December 2024, p. 2, **R-0041**.

537 Mexico's Objections to the Claimant's Redfern Schedule, 25 February 2025, General Objection No. 4, pp. 7-8.

more importantly, that Mineros Norteños's actions violated the law. As set forth below, Mexico's failure to take action in response to Mineros Norteños's crimes not only breached its obligation under Mexican law to guarantee victims timely, diligent, and professional prosecutorial support,[538] but also its obligations under the NAFTA.

2.8.1.1 Under Mexican law, the State was required to act in the face of a reported crime, but failed to do so

228. The Mexican Constitution and the CNPP govern the conduct of law enforcement and prosecutorial authorities in the investigation and prosecution of crimes.[539] These legal instruments impose binding obligations to act diligently, promptly, and transparently when confronted with reports of unlawful conduct, particularly where victims' rights are at stake.[540] The obligations set out in the Constitution and the CNPP are mandatory in nature and are designed to ensure that victims receive protection and that crimes are not left unaddressed.[541]

229. Specifically, Article 21 of the Constitution and Articles 131 and 211 of the CNPP require the Public Prosecutor to register any formal complaint and promptly open an investigation.[542] That investigation must be carried out with diligence. Specifically, Article 4 of the CNPP requires investigations to be prompt, impartial, efficient, and respectful of victims' rights.[543] Once a complaint is submitted and the investigation is opened, the Public Prosecutor must begin gathering evidence, interviewing witnesses, and assessing whether a crime occurred.[544]

230. In parallel, Article 109 of the CNPP outlines a broad and enforceable set of rights for victims of crimes.[545] These include the right to be informed of case progress, to access justice without delay, to propose investigative steps, to challenge prosecutorial omissions, and to receive

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538 Political Constitution of the United Mexican States, Article 21, **R-10**; National Code of Criminal Procedure, Article 109, **R-0037**.

539 National Code of Criminal Procedure, **R-0037**; Political Constitution of the United Mexican States, Article 21, **R-0010**.

540 National Code of Criminal Procedure, **R-0037**; Political Constitution of the United Mexican States, Article 21, **R-0010**.

541 Political Constitution of the United Mexican States, Article 20(c), **C-0444**; National Code of Criminal Procedure, Articles 2, 109, **R-0037**.

542 National Code of Criminal Procedure, Article 131, **R-0037**.

543 National Code of Criminal Procedure, Article 4, **R-0037**.

544 National Code of Criminal Procedure, Articles 131-132, 211, **R-0037**.

545 National Code of Criminal Procedure, Article 109, **R-0037**.

timely legal and psychological assistance.[546] Mexico's failure to investigate the Continuing Blockade and its failure to keep Minera Metalín informed breached each of these guarantees.

231. The CNPP also places responsibilities on the police. Article 146 empowers law enforcement to intervene without a court order where a crime is being committed in *flagrante delicto*.[547]

2.8.1.2 Mexico's criminal investigation was delayed, incomplete, and ultimately abandoned without justification

232. The first official record in the criminal file is an order issued by the Public Prosecutor's Office in San Pedro de las Colonias dated 13 September 2019 – one day after Minera Metalín filed its criminal complaint[548] – initiating a criminal investigation into the crimes of dispossession and deprivation of liberty, naming Mineros Norteños as the target.[549] That order, signed by Ms. Cecilia Gómez Sandoval, directed the State's criminal investigative agency to take a series of urgent steps, including a site inspection, witness interviews, and identification of possible suspects.[550] It further required that a formal investigative report be submitted within five days.[551]

233. As Mr. López Ramírez explains in his second witness statement, the Company made every effort to ensure a proper investigation.[552] After days of calling the Public Prosecutor's Office, on 17 September 2019, he finally reached the local Delegate.[553] He was told that a Prosecutor and the police would visit the Project site the following day.[554] On 18 September 2019, a Prosecutor arrived at Sierra Mojada, but, as Mr. López Ramírez recalls, that "visit was marked by confusion and signs of political interference."[555]

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546 National Code of Criminal Procedure, Article 109, **R-0037**.

547 National Code of Criminal Procedure, Article 146, **R-0037**.

548 Criminal Complaint Filed by Minera Metalín with the San Pedro de las Colonias Public Prosecutor's Office, 12 September 2019, **C-0225**.

549 Order from Public Prosecutor's Office to Initiate Criminal Investigation, 13 September 2019, **C-0407**.

550 Order from Public Prosecutor's Office to Initiate Criminal Investigation, 13 September 2019, **C-0407**.

551 Order from Public Prosecutor's Office to Initiate Criminal Investigation, 13 September 2019, **C-0407**.

552 López Ramírez WS2, Section 5.

553 The Delegate of the Public Prosecutor's Office is a senior official responsible for overseeing prosecutors in a particular region or district. They coordinate investigations, supervise subordinate prosecutors, and ensure that legal proceedings are carried out in accordance with the law.

554 Follow-up Email from Juan Manuel López Ramírez to Tim Barry et al., 17 September 2019, **C-0227**.

555 Email from Juan Manuel López Ramírez to Tim Barry et al., 18 September 2019, **C-0232**; López Ramírez WS2, para. 67.

234. Specifically, on 18 September 2019, the Prosecutor informed Mr. López Ramírez that she had initially been diverted to another village by her supervisor, for unexplained reasons.[556] The Prosecutor later messaged Mr. López Ramírez, offering to meet him at his home.[557] She admitted she did not fully understand the situation and was not assigned to the case, but agreed to collect information and submit it to the lead Prosecutor.[558] She confirmed that Mineros Norteños had obstructed her from entering the Project site and noted this as an aggravating factor.[559] That evening, Mr. López Ramírez compiled a full evidentiary package – including photos and videos – and transmitted it to her electronically.[560] It remains unclear whether that information was ever reviewed or acted upon, as it was not entered into the criminal file.

235. That same day, Mr. Manuel López received a call from the *Síndico Jurídica* (Municipal Legal Advisor), who asked him whether Minera Metalín had requested the Public Prosecutor's presence at the site.[561] When he responded affirmatively, the *Síndico* replied – without hesitation – that the Mayor supported Mineros Norteños, and that the municipality would only provide logistical support to the Public Prosecutor (such as transportation, food, or fuel) if the request came from Mineros Norteños, not from the Company.[562]

236. Separately, as the criminal file confirms, on 18 September 2019, Messrs. López Ramírez, Roberto Guevara Carrillo, Óscar Ariel Olague Corral, and Carlos Daniel Luna – the last one from inside the camp – each gave formal witness statements to agent Martín Isaías Olvera, a member of the Police Criminal Investigation Agency.[563] Their testimonies described the events surrounding the Continuing Blockade and confirmed that members of Mineros Norteños had

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556 Email from Juan Manuel López Ramírez to Tim Barry et al., 18 September 2019, **C-0232**; López Ramírez WS2, para. 68.

557 Email from Juan Manuel López Ramírez to Tim Barry et al., 18 September 2019, **C-0232**; López Ramírez WS2, para. 69.

558 Email from Juan Manuel López Ramírez to Tim Barry et al., 18 September 2019, **C-0232**; López Ramírez WS2, para. 69.

559 Email from Juan Manuel López Ramírez to Tim Barry et al., 18 September 2019, **C-0232**; López Ramírez WS2, para. 69.

560 Email from Juan Manuel López Ramírez to Tim Barry et al., 18 September 2019, **C-0232**; López Ramírez WS2 para. 70.

561 López Ramírez WS2, para. 68.

562 López Ramírez WS2, para. 68.

563 Sworn Statement by Mr. Juan Manuel López Ramírez, 18 September 2019, **C-0229**; Sworn Statement by Roberto Guevara Carrillo, 18 September 2019, **C-0231**; Sworn Statement by Mr. Óscar Ariel Olague Corral, 18 September 2019, **C-0230**; Sworn Statement by Mr. Carlos Daniel Luna Cisneros, 18 September 2019, **C-0228**.

unlawfully taken control of the Project site.[564] Mr. López Ramírez's criminal file testimony states:

> They started shouting . . . saying that they would come in with or without authorization, and that's what they did. All the people got in and crossed the boundaries, like the barriers, and stood outside the camp shouting: 'We're not going to let anyone in or out of the camp, we're not going to let them work.' And the [police] commander told me there was nothing to be done.[565]

237. Mr. Olague Corral likewise recalled that "[a] group of 100 to 150 people wanted to enter the premises, so after talking with them, they did not understand and passed through the turnstile at the entrance to the camp, leaving behind some people who work there."[566] Mr. Luna, who remained inside the camp against his will for ten days by then, confirmed that "[from] 8 September of this year, at approximately 1:00 p.m., and up until today [18 September 2019], I remain[ed] confined inside the premises because the people are not allowing anyone to enter or leave."[567]

238. On 19 September 2019, 11 days after the Continuing Blockade began, two Police Agents from the Criminal Investigation Agency – Martín Isaías Olvera and Hugo Sánchez Reza – filed a formal investigative report documenting the facts reported by Minera Metalín.[568] SVB notes that this police report is responsive to its Request No. 10;[569] although it is in Mexico's

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564 Sworn Statement by Mr. Juan Manuel López Ramírez, 18 September 2019, **C-0229**; Sworn Statement by Roberto Guevara Carrillo, 18 September 2019, **C-0231**; Sworn Statement by Mr. Óscar Ariel Olague Corral, 18 September 2019, **C-0230**; Sworn Statement by Mr. Carlos Daniel Luna Cisneros, 18 September 2019, **C-0228**.

565 Sworn Statement by Mr. Juan Manuel López Ramírez, 18 September 2019, p. 3 (Spanish original: "*Empezaron a gritar... diciendo que pasarían con y sin autorización, y así lo hicieron. Toda la gente se metió y pasó los límites, como los estrobos, y se colocaron en el exterior del campamento gritando: 'No vamos a dejar entrar ni salir a nadie del campamento, no los vamos a dejar trabajar'. Y el comandante me dijo que no hay nada que hacer*."), **C-0229**.

566 Sworn Statement by Mr. Óscar Ariel Olague Corral, 18 September 2019, pp. 1-2 (Spanish original: "*Un grupo de 100 a 150 personas querían tomar la entrada de las instalaciones, por lo que, después de dialogar, no entendieron y pasaron el estrobo de la entrada hasta la entrada del campamento, por lo que quedaron unas personas que laboran ahí*."), **C-0230**.

567 Sworn Statement by Mr. Carlos Daniel Luna Cisneros, 18 September 2019, p. 2 (Spanish original: "*Siendo este el día 08 de septiembre de este ano, siendo las 13:00 hrs aprox. y hasta el día de hoy es día que sigo encerrado en las instalaciones ya que la gente no me deja entrar ni salir*."), **C-0228**.

568 Homologated Police Report (Notice of Allegedly Criminal Acts), 19 September 2019, **C-0409**.

569 Claimant's Document Production Requests, 13 January 2025, at Request No. 10, pp. 29-32.

possession, along with the remainder of the criminal file, Mexico has withheld it in violation of the Tribunal's PO 3.[570] Its contents reveal why.

239. The agents confirmed that members of Mineros Norteños had seized the Project site on 8 September 2019.[571] They further recorded that five or six Minera Metalín workers had been prevented from leaving the camp.[572] They also conducted interviews with eyewitnesses and visited locations to identify the alleged perpetrators.[573] As they noted:

> We interviewed Mr. Roberto Guevara Carrillo. . . who has been working for Metalín for eight months and lives in that ejido. He is aware of who is responsible for the movement on September 8 of this year, mentioning the following individuals: *Lorenzo Fraire Hernández, Óscar Carillo Ramírez, Andrés García Nájera, and José Merce Aguilar Alfaro*.[574]

240. Following a site inspection, agent Hugo Sánchez Reza also filed formal minutes, confirming that Mr. Carlos Luna had been held inside the camp since 8 September 2019.[575] He attached a sketched map, with the coordinates of the camp.[576]

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570 Procedural Order No. 3, 11 March 2025, at Tribunal's Decision to Requests Nos. 10-11, pp. 70-78.

571 Homologated Police Report (Notice of Allegedly Criminal Acts), 19 September 2019, **C-0409**.

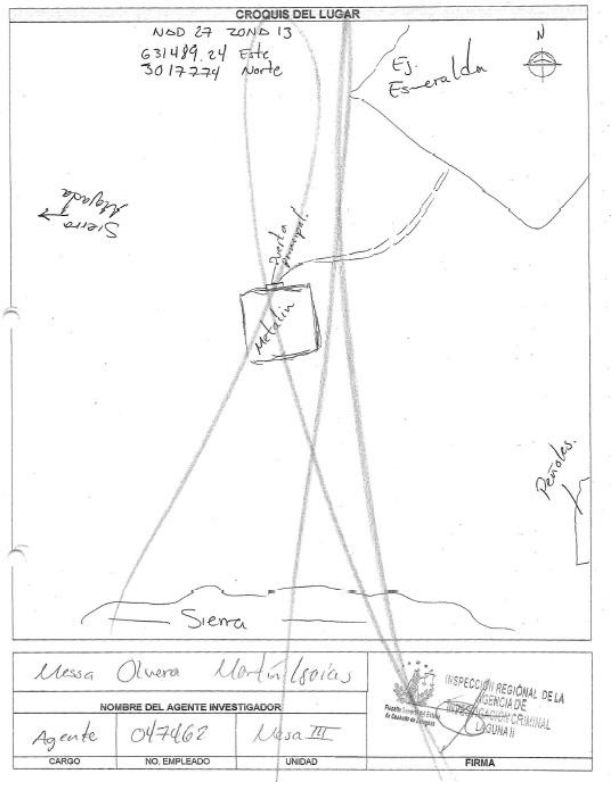
572 Homologated Police Report (Notice of Potentially Criminal Acts), 19 September 2019, **C-0409**.

573 Homologated Police Report (Notice of Potentially Criminal Acts), 19 September 2019, **C-0409**.

574 Homologated Police Report (Notice of Potentially Criminal Acts), 19 September 2019, **C-0409**.

575 Report of Registration and Inspection of the Scene, 18 September 2019, **C-0408**.

576 Report of Registration and Inspection of the Scene, 18 September 2019, **C-0408**.



Sketch map attached to the site inspection report

241. As these contemporaneous documents confirm, less than two weeks after the Continuing Blockade began, the Mexican authorities had direct confirmation of the unlawful nature of the Blockade, the hostage-taking, and the identity of the perpetrators, but still failed to act.[577]

242. On 20 September 2019, following the investigative report of 19 September 2019, the Public Prosecutor's Office issued formal summonses to the four leaders of Mineros Norteños – Messrs. Andrés García, Lorenzo Fraire, Óscar Carrillo, and José Merce – ordering them to appear before the Public Prosecutor on 27 September 2019 to provide testimony in their capacity as accused persons ("*imputados*").[578] The summonses made clear that their appearance was mandatory and warned that failure to appear without justification could result in arrest or

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577 Homologated Police Report (Notice of Potentially Criminal Acts), 19 September 2019 (Spanish original: "*Nos entrevistamos con el C. Roberto Guevara Carrillo. . . que es trabajador de Metalín desde hace 8 meses y que radica en dicho ejido, el cual tiene conocimiento de quiénes son los encargados de este movimiento del día 08 de septiembre del presente año, de los cuales menciona a los C.C. Lorenzo Fraire Hernández, Óscar Carillo Ramírez, Andrés García Nájera, y José Merce Aguilar Alfaro*."), **C-0409**.

578 Summons Issued to Lorenzo Fraire Hernández to Appear as an Accused Party, 20 September 2019, **C-0236**; Summons Issued to Óscar Carrillo Ramírez to Appear as an Accused Party, 20 September 2019, **C-0237**; Summons Issued to José Merce Aguilar Alfaro to Appear as an Accused Party, 20 September 2019, **C-0235**; Summons Issued to Andrés García Nájera to Appear as an Accused Party, 20 September 2019, **C-0234**.

contempt proceedings.[579] Yet none of the four accused appeared to testify.[580] These summonses confirm that, less than two weeks after the Continuing Blockade began, the Public Prosecutor's Office had identified the principal individuals responsible.[581]

243. On 24 September and 9 October 2019 Minera Metalín submitted supplemental criminal complaints to the Prosecutor's Office to amplify its initial filing and introduce additional allegations as the situation on the ground evolved.[582]

244. In his second witness statement, Mr. López Ramírez recalls that, on 9 October 2019, he personally went with Messrs. Carlos Luna and Víctor Chavarría to the Public Prosecutor's Office to give formal statements.[583] This was Mr. Luna's second statement, the first having been made while he was still trapped inside the camp.[584] Mr. Chavarría, the water truck driver who was also confined during the takeover, provided a first-hand account of the events. Yet both his statement and Mr. Luna's second statement are missing from the criminal file. These omissions cast doubt on the reliability and integrity of the official record.[585]

245. On 15 October 2019, all four accused leaders of Mineros Norteños belatedly appeared before the Public Prosecutor's Office. They were informed of the charges under investigation, advised of their rights, and given the opportunity to testify.[586] Each refused.[587] After all four accused

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579 Summons Issued to Lorenzo Fraire Hernández to Appear as an Accused Party, 20 September 2019, **C-0236**; Summons Issued to Óscar Carrillo Ramírez to Appear as an Accused Party, 20 September 2019, **C-0237**; Summons Issued to José Merce Aguilar Alfaro to Appear as an Accused Party, 20 September 2019, **C-0235**; Summons Issued to Andrés García Nájera to Appear as an Accused Party, 20 September 2019, **C-0234**.

580 López Ramírez WS2, para. 74.

581 López Ramírez WS2, para. 74.

582 Supplemental Filing to Criminal Complaint Filed by Minera Metalín with the San Pedro de las Colonias Public Prosecutor's Office, 24 September 2019, **C-0239**; Supplemental Filing to Criminal Complaint Filed by Minera Metalín with the San Pedro de las Colonias Public Prosecutor's Office, 9 October 2019, **C-0247**.

583 Screenshot of WhatsApp Conversation Between Juan Manuel López Ramírez and Juan Cedillo (Víctor Chavarría's Boss) Regarding Testimony of Carlos Luna and Víctor Chavarría Before the Public Prosecutor, 8 October 2019 (Forwarded 19 April 2025), **C-0246**; López Ramírez WS2, para. 75.

584 Sworn Statement by Mr. Carlos Daniel Luna Cisneros, 18 September 2019, **C-0228**.

585 López Ramírez WS2, para. 75.

586 Appointment of Defense Counsel and Interview with the Accused Lorenzo Fraire Hernández, 15 October 2019, **C-0412**; Appointment of Defense Counsel and Interview with the Accused Óscar Carrillo Ramírez, 15 October 2019, **C-0414**; Appointment of Defense Counsel and Interview with the Accused José Merce Aguilar Alfaro, 15 October 2019, **C-0413**; Appointment of Defense Counsel and Interview with the Accused Andrés García Nájera, 15 October 2019, **C-0411**.

587 Appointment of Defense Counsel and Interview with the Accused Lorenzo Fraire Hernández, 15 October 2019, **C-0412**; Appointment of Defense Counsel and Interview with the Accused Óscar Carrillo Ramírez, 15 October 2019, **C-0414**; Appointment

leaders refused to testify, no further action was taken until several months later, when the Public Prosecutor's Office asked Minera Metalín to provide the GPS coordinates of the Project site; Minera Metalín submitted these GPS coordinates on 17 August 2020.[588] Notably, this request also does not appear in the criminal file.

246. On 29 July 2020, Minera Metalín filed a second formal criminal complaint.[589] That complaint, submitted to the Public Prosecutor's Office in San Pedro de las Colonias, reiterated the Company's request for investigation and prosecution of those responsible for the ongoing illegal occupation.[590] It included photographs of damage to Minera Metalín's property, GPS coordinates, and references to earlier filings.[591]

247. On 6 October 2020, Minera Metalín submitted additional photographs showing Mineros Norteños members still occupying the site.[592] It explicitly requested that the evidence be added to the case file.[593]

248. On 26 October 2020, Minera Metalín submitted to the Public Prosecutor's Office a writ enclosing a copy of the ruling issued by the Second Unitary Tribunal of the Seventeenth Circuit in Chihuahua, confirming the rejection of Mineros Norteños's claims under the 2000 Agreement.[594] That same day, Minera Metalín submitted its notarized public property deed, again asking that it be added to the case file.[595]

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of Defense Counsel and Interview with the Accused José Merce Aguilar Alfaro, 15 October 2019, **C-0413**; Appointment of Defense Counsel and Interview with the Accused Andrés García Nájera, 15 October 2019, **C-0411**.

588 Written Submission by Minera Metalín Submitting GPS Coordinates of the Site, 17 August 2020, **C-0355**.

589 Second Criminal Complaint Filed by Minera Metalín with the San Pedro de las Colonias Public Prosecutor's Office, 29 July 2020, **C-0354**.

590 Second Criminal Complaint Filed by Minera Metalín with the San Pedro de las Colonias Public Prosecutor's Office, 29 July 2020, **C-0354**.

591 Second Criminal Complaint Filed by Minera Metalín with the San Pedro de las Colonias Public Prosecutor's Office, 29 July 2020, **C-0354**.

592 Written Submission by Minera Metalín Requesting Inclusion of Photographic Evidence in Criminal File, 17 August 2020, **C-0419**.

593 Written Submission by Minera Metalín Requesting Inclusion of Photographic Evidence in Criminal File, 17 August 2020, **C-0419**.

594 Written Submission by Minera Metalín Requesting Inclusion of Judicial Resolution in Criminal File, 26 October 2020, **C-0420**.

595 Written Submission by Minera Metalín Submitting Certified Property Deed and Requesting Inclusion in Criminal File, 26 October 2020, **C-0421**.

249. On 28 October 2020, the Public Prosecutor's Office ordered Architect Manuel Antonio Castillo Vázquez, a forensic topographer, to conduct an inspection and valuation of the site, including to verify boundaries, take photographs, and prepare a planimetric map.[596] Although the Public Prosecutor's Office gave the expert just 24 hours to complete his report,[597] he delivered the report nearly *four months later*, on 26 February 2021.[598] Crucially, that expert report established that Mineros Norteños's encampment, obstruction, and takeover at the main gate to the camp occurred squarely on Minera Metalín's private property.

250. As the report reflects, the expert conducted his inspection specifically on Lot No. 6 of the "*Hacienda de Fundición de la Esmeralda*" – which is Minera Metalín's legally titled land.[599] Using GPS coordinates, the expert traced the boundaries of the lot, identified six structures on site, and mapped the perimeter using the coordinates contained in Minera Metalín's registered property deed.[600] The report states unequivocally that all surveyed points fall within the boundaries of Lot No. 6, and that the expert reached this conclusion by physically inspecting the site and comparing his findings with the deed.[601] That conclusion refutes squarely Mexico's unsupported assertion that "the Coahuila Prosecutor's Office was able to confirm that the Mineros Norteños camp was off site."[602] To the contrary, the independent expert report requested and obtained by the Coahuila Prosecutor's Office confirmed that Mineros Norteños's encampment was *on site*.

251. On 15 February 2021, nearly a year and a half after Minera Metalínfiled its criminal complaint, the Public Prosecutor's Office ordered a forensic report – a *Dictamen de Criminalística de Campo* – assigning Licenciado Fulgencio Tovar Escobedo, a criminologist, to conduct an on-

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596 Order by the Public Prosecutor's Office Appointing Architect Manuel Antonio Castillo Vázquez as Expert for Site Inspection and Valuation, 28 October 2020, **C-0422**.

597 Order by the Public Prosecutor's Office Appointing Architect Manuel Antonio Castillo Vázquez as Expert for Site Inspection and Valuation, 28 October 2020, **C-0422**.

598 Expert Opinion on Topography (Property Identification) and Valuation of the Property by Architect Manuel Antonio Castillo Vázquez, 26 February 2021, **C-0357**.

599 Expert Opinion on Topography (Property Identification) and Valuation of the Property by Architect Manuel Antonio Castillo Vázquez, 26 February 2021, p. 3, **C-0357**.

600 Expert Opinion on Topography (Property Identification) and Valuation of the Property by Architect Manuel Antonio Castillo Vázquez, 26 February 2021, pp. 3-9, **C-0357**.

601 Expert Opinion on Topography (Property Identification) and Valuation of the Property by Architect Manuel Antonio Castillo Vázquez, 26 February 2021, p. 11, **C-0357**.

602 Counter-Memorial, para. 193.

site forensic investigation.[603] The stated goal of that report was to apply forensic methods to document physical evidence, evaluate damages, and help reconstruct the alleged events.[604] When Mr. Tovar Escobedo arrived at the Project site, he encountered approximately 45 men physically blocking access to Minera Metalín's private property.[605] As he notes in this report, *he was refused entry by those men and forced to withdraw without collecting any evidence*.[606] The only output of his visit was a planimetric sketch and GPS coordinates taken from outside the perimeter of the site.[607] As he reported: the individuals present "restricted free access to the site" and "to avoid confrontation with those people, no photographs were taken and [he] did not enter the premises."[608] His findings confirmed that, as of February 2021, Mineros Norteños still retained full physical control of the Project site and were present at the site in numbers to prevent access. So much for Mexico's suggestion that Mineros Norteños's demonstration was "peaceful" or that the Public Prosecutor's Office did not have any evidence of a crime.

252. One month later, on 16 June 2021, the Public Prosecutor's Office issued an internal Information Note ("*Tarjeta Informativa*") again affirming that the takeover began on 8 September 2019, that Minera Metalín employees were unlawfully detained, and that Mineros Norteños still controlled the site two years later.[609] Despite this Information Note, the Public Prosecutor's Office still took no action against Mineros Norteños.

253. As Mr. López Ramírez recalls in his second witness statement, on 28 June 2021, Minera Metalín's lawyer Mr. Rodrigo Hernández informed SVB that the Public Prosecutor considered the file ready for submission to court, with an initial hearing expected that same week.[610] At that hearing, the judge was to determine whether there was sufficient evidence to proceed with

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603 Field Criminalistics Report by Licenciado Fulgencio Tovar Escobedo Regarding the Sierra Mojada Site, 15 February 2021, pp. 1-2, **C-0356**.

604 Field Criminalistics Report by Licenciado Fulgencio Tovar Escobedo Regarding the Sierra Mojada Site, 15 February 2021, pp. 1-2, **C-0356**.

605 Field Criminalistics Report by Licenciado Fulgencio Tovar Escobedo Regarding the Sierra Mojada Site, 15 February 2021, pp. 2-3, **C-0356**.

606 Field Criminalistics Report by Licenciado Fulgencio Tovar Escobedo Regarding the Sierra Mojada Site, 15 February 2021, p. 3, **C-0356**.

607 Field Criminalistics Report by Licenciado Fulgencio Tovar Escobedo Regarding the Sierra Mojada Site, 15 February 2021, p. 3, **C-0356**.

608 Field Criminalistics Report by Licenciado Fulgencio Tovar Escobedo Regarding the Sierra Mojada Site, 15 February 2021, p. 3, **C-0356**.

609 Information Note Issued by the Public Prosecutor's Office, 16 June 2021, **C-0426**.

610 Email from Rodrigo Hernández to Tim Barry, 28 June 2021, **C-0274**; López Ramírez WS2, para. 79.

criminal charges against the leaders of Mineros Norteños. Under standard procedure, this ruling should have prompted the District Attorney to either file charges or issue a decision not to proceed within days. But nothing happened. Despite repeated follow-ups, the Public Prosecutor failed to move the case forward. On 1 September 2021, SVB learned that the Public Prosecutor would not proceed with charges.[611] No written resolution was provided, no official decision was issued, and the entire episode is conspicuously absent from the criminal file.

254. Remarkably, the criminal file shows that no further investigative steps were taken until 10 January 2023, when three police agents from the Criminal Investigation Agency – Martín Isaías Mesa Olvera, Juan Carlos Torres Ortiz, and Estrella Leticia Luna Fierro – returned to the site and issued a new Homologated Police Report ("*Informe Policial Homologado*").[612] This report is directly responsive to SVB's Request No. 10, but Mexico has also withheld it.[613]

255. The timing of this Homologated Police Report is suspect. Although it was prepared on 10 January 2023, it purports to document events that occurred years earlier on 8 September 2019, the first day the Continuing Blockade began.[614]

ACTA DE AVISO DE HECHOS PROBABLEMENTE DELICTIVOS
(INFORME POLICIAL HOMOLOGADO)

3723

N.U.C.		AA- 5897	
EVENTO		INFORME	
FECHA	08/09/2019	FECHA	10/01/2023
HORA	13:00 HRS	HORA	16:00 HRS

TIPO DE EVENTO	AVANCE DE INVESTIGACIÓN.			
LUGAR DEL EVENTO	EJIDO LA ESMERALDA, SIERRA MOJADA COAHUILA (MINA METALIN)			
AGENTE QUE LEVANTA EL ACTA	Apellido Paterno	Apellido Materno	Nombre (s)	
	MESSA	OLVERA	MARTIN ISAIAS	
	TORRES	ORTIZ	JUAN CARLOS	
	LUNA	FIERRO	ESTRELLA LETICIA	
PERSONAS DETENIDAS	NO [X] SI [ ]	FLAGRANCIA [ ]	CASO URGENTE [ ]	USO DE FUERZA FISICA SI [ ] NO [X]
VEHICULOS INVOLUCRADOS	NO [ ] SI [ ]	ROBADO [ ]	DAÑADO [ ]	ASEGURADO [ ] RECUPERADO [ ] ABANDONADO [ ]

Heading of the report, showing the 10 January 2023 date in the upper right corner and referring to events that took place on 8 September 2019.

611 Email from Rodrigo Hernández to Tim Barry, 1 September 2021, **C-0286**.

612 Homologated Police Report (Notice of Potentially Criminal Acts), 10 January 2023, **C-0464**.

613 Claimant's Document Production Requests, 13 January 2025, at Request No. 10, pp. 29-32.

614 Homologated Police Report (Notice of Potentially Criminal Acts), 10 January 2023, at p. 1, **C-0464**.

256. The report confirms what had long been obvious – that the Continuing Blockade was still in place at the camp's entrance as of 10 January 2023.[615] The report describes a makeshift encampment set up by members of Mineros Norteños, who brazenly told the officers that they had seized the property on 8 September 2019.[616] Specifically, the officers interviewed two local women,[617] who openly admitted to being part of Mineros Norteños and to having physically blockaded the Project site since 8 September 2019, claiming they would remain there until Minera Metalín paid what they claimed was owed to Mineros Norteños.[618] The officers further noted that Minera Metalín personnel were being denied access.[619] In their own words:

> We identify ourselves as agents of the Criminal Investigation Agency and, upon explaining the reason for our presence, this person told us. . . that she is a member of Mineros Norteños and that since 8 September 2019, they have been blocking the mine, stopping workers and operations until an agreement is reached regarding the money owed to the Mineros Norteños members. . .
>
> Continuing with our investigation at the same location, we interviewed a male individual to whom we identified as agents of the Criminal Investigation Agency. . . When we informed him of the events under investigation, he stated that he is a member of the Sociedad Cooperativa Mineros Norteños and that on 8 September 2019, they closed the mine with blockades to stop work, claiming that the Metalín company has not paid for the mine, which belongs to the Sociedad Mineros Norteños, and that they are therefore still occupying it and denying workers entry.[620]

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615 Homologated Police Report (Notice of Potentially Criminal Acts), 10 January 2023, at p. 1, **C-0464**.

616 Homologated Police Report (Notice of Potentially Criminal Acts), 10 January 2023, at p. 1, **C-0464**.

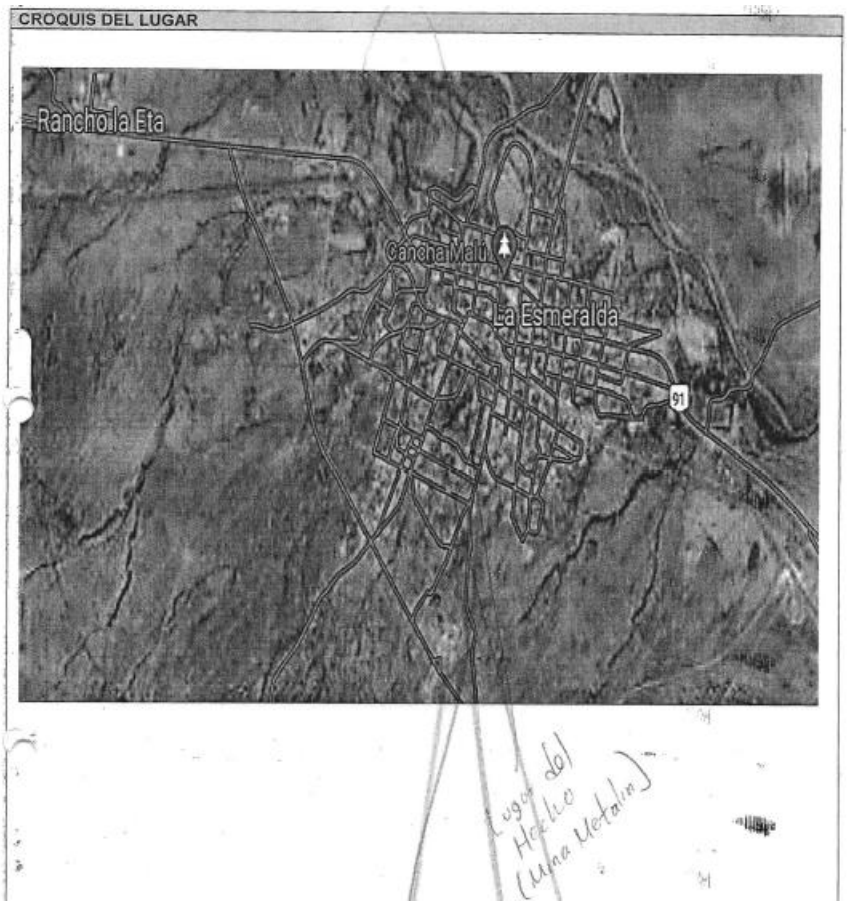
617 Homologated Police Report (Notice of Potentially Criminal Acts), 10 January 2023, at pp. 2-3, 6-7, **C-0464**.

618 Homologated Police Report (Notice of Potentially Criminal Acts), 10 January 2023, at p. 1, **C-0464**.

619 Homologated Police Report (Notice of Potentially Criminal Acts), 10 January 2023, at p. 1, **C-0464**.

620 Homologated Police Report (Notice of Potentially Criminal Acts), 10 January 2023, at p. 1 (Spanish original: "*Nos identificamos como agentes de la Agencia de Investigación Criminal y al manifestarle el motivo de nuestra presencia, esta persona nos dice. . . que ella es socia de Mineros Norteños y que desde el 08 de septiembre del año 2019 hicieron un bloqueo en la mina, parando a los trabajadores y labores hasta que lleguen a un acuerdo del dinero que se les debe a los socios Mineros Norteños. . . Continuando con las investigaciones en el mismo lugar, nos entrevistamos con una persona del sexo masculino con la cual nos identificamos como agentes de la Agencia de Investigación Criminal. . . al cual, al manifestarle sobre los hechos que se investigan,*

257. The report is accompanied by a Record of Registration and Inspection of the Scene of the Incident ("*Acta de Registro e Inspección del Lugar del Hecho*"), also prepared by Agent Martín Isaías Mesa Olvera. It describes the site generically as "an open area with a dirt road leading to the Metalín mine, where zinc is extracted,"[621] and attaches a satellite photo with a scribbled arrow pointing to the "Metalín site."[622]



Satellite photo attached to the "Acta de Registro e Inspección del Lugar del Hecho."[623]

258. Notwithstanding this additional evidence of Mineros Norteños's continued wrongdoing, the Public Prosecutor's Office still took no action.

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este nos manifiesta que es socio de la Sociedad Cooperativa Mineros Norteños y que desde el día 08 de septiembre del año 2019 cerraron con bloqueos para parar las labores en la mina, ya que manifiestan la empresa Metalín no ha liquidado la compra de dicha mina, la cual es de la Sociedad Mineros Norteños, por lo que hasta el momento aún la tienen tomada, negando la entrada a trabajadores [.]"), **C-0464**.

621 Homologated Police Report (Notice of Potentially Criminal Acts), 10 January 2023, p. 4, **C-0464**.

622 Homologated Police Report (Notice of Potentially Criminal Acts), 10 January 2023, p. 5, **C-0464**.

623 Homologated Police Report (Notice of Potentially Criminal Acts), 10 January 2023, p. 5, **C-0464**.

259. Instead, on 26 June 2023 – mere weeks after the 30 May 2023 consultation meeting held between representatives of SVB and Mexico regarding SVB's claims in this arbitration – the Public Prosecutor's Office issued a request for additional information from Minera Metalín.[624] That request asked for the contact details for five of the six detained Minera Metalín employees – *four years after they were detained*.[625] What is more, as noted above, Messrs. Carlos Luna and Víctor Chavarría had already provided formal statements in 2019 regarding the Continuing Blockade, including their unlawful detention by Mineros Norteños.[626] It is therefore unclear what further information the Public Prosecutor's Office was seeking nearly four years later from these employees, and in the case of Mr. Carlos Luna, for the third time.

260. Mexico argues that Minera Metalín failed to respond to this request for additional information and that, as a result, the Public Prosecutor's Office closed the criminal file and ended its investigation.[627] As Mr. López Ramírez confirms, Minera Metalín, however, never received this request.[628] That fact is supported by the criminal file itself, which shows no record of its delivery, no acknowledgment of its receipt, no proof that the request was ever served, and, critically, no addressee.[629] Indeed, there is no formal notice of service at all.[630] As Mr. López Ramírez notes, if Minera Metalín had received this request, it would have responded immediately.[631] The Company had every reason to cooperate in the investigation – as detailed above, it initiated the process by filing a criminal complaint, provided extensive documentation, and followed up to move the investigation forward.

261. Even more troubling is the fact that the resolution that ultimately closed the criminal case, dated 23 September 2024, does not mention this request *at all* – let alone cite any alleged failure to respond as the reason for closing the investigation.[632] Yet Mexico now points to this alleged request – for which there is no proof of service – as the purported reason why that

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624 Request for Additional Information Regarding Minera Metalín Employees, 26 June 2023, **C-0353**.

625 Request for Additional Information Regarding Minera Metalín Employees, 26 June 2023, **C-0353**.

626 Screenshot of WhatsApp Conversation Between Juan Manuel López Ramírez and Juan Cedillo (Víctor Chavarría's Boss) Regarding Testimony of Carlos Luna and Víctor Chavarría Before the Public Prosecutor, 8 October 2019 (Forwarded 19 April 2025), **C-0246**; López Ramírez WS2, paras. 75, 82.

627 Counter-Memorial, paras. 193, 453.

628 López Ramírez WS2, para. 81.

629 Request for Additional Information Regarding Minera Metalín Employees, 26 June 2023, **C-0353**.

630 Request for Additional Information Regarding Minera Metalín Employees, 26 June 2023, **C-0353**.

631 López Ramírez WS2, para. 82.

632 Notification of Temporary Archiving of Investigation File, 23 September 2024, **C-0441**.

investigation was closed.[633] This *post hoc* justification, entirely absent from the actual decision itself, again calls into question the legitimacy of Mexico's actions in this case.[634]

262. As reflected in the criminal file, the resolution archiving the criminal case acknowledges that approximately 120 individuals physically blockaded the Project site, but asserts that there was an insufficient basis to identify or prosecute those responsible.[635] That conclusion is flatly contradicted by the criminal file, including the formal summonses of the four leaders of Mineros Norteños – Messrs. Andrés García, Lorenzo Fraire, Óscar Carrillo, and José Merce – issued by Public Prosecutor's Office[636] and their subsequent refusal to testify,[637] as well as the expert reports requested by the Public Prosecutor's Office.[638] As noted, the resolution archiving the criminal case does *not* refer to the 26 June 2023 request for information, nor does it state "that the investigation carried out by the Public Prosecutor's Office did not *prove* that Mineros Norteños had committed any criminal conduct," as Mexico also incorrectly suggests.[639]

263. The circumstances surrounding the closure and alleged notification are also cause for concern. The final entry in the file is not a formal acknowledgment of service – it is a screenshot of a WhatsApp conversation.[640] That a four-year criminal investigation concluded not with a judicial hearing or official closure notice, but with an informal message sent via WhatsApp, casts serious doubt on the procedural rigor of the investigation and highlights the limited engagement by the Public Prosecutor's Office in advancing the case.

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633 Counter-Memorial, para. 453.

634 Notification of Temporary Archiving of Investigation File, 23 September 2024, **C-0441**.

635 Resolution Ordering Temporary Archive of Criminal File, 23 September 2024, **C-0442**.

636 Summons Issued to Lorenzo Fraire Hernández to Appear as an Accused Party, 20 September 2019, **C-0236**; Summons Issued to Óscar Carrillo Ramírez to Appear as an Accused Party, 20 September 2019, **C-0237**; Summons Issued to José Merce Aguilar Alfaro to Appear as an Accused Party, 20 September 2019, **C-0235**; Summons Issued to Andrés García Nájera to Appear as an Accused Party, 20 September 2019, **C-0234**.

637 Appointment of Defense Counsel and Interview with the Accused Lorenzo Fraire Hernández, 15 October 2019, **C-0412**; Appointment of Defense Counsel and Interview with the Accused Óscar Carrillo Ramírez, 15 October 2019, **C-0414**; Appointment of Defense Counsel and Interview with the Accused José Merce Aguilar Alfaro, 15 October 2019, **C-0413**; Appointment of Defense Counsel and Interview with the Accused Andrés García Nájera, 15 October 2019, **C-0411**.

638 Expert Opinion on Topography (Property Identification) and Valuation of the Property by Architect Manuel Antonio Castillo Vázquez, 26 February 2021, **C-0357**; Field Criminalistics Report by Licenciado Fulgencio Tovar Escobedo Regarding the Sierra Mojada Site, 15 February 2021, **C-0356**.

639 Counter-Memorial, para. 224 (emphasis added).

640 WhatsApp Notification of Temporary Archive, undated, **C-0358**.

264. In sum, Mexico's failure to take any reasonable action within its power to protect the Project site and Minera Metalín's employees in the face of criminal conduct – as well as its efforts in this case to conceal the evidence of its wrongdoing – are outrageous. Mexico's acts and omissions jeopardized the safety and well-being of multiple Minera Metalín employees, forced the complete cessation of operations at the Project, and as reiterated below, ultimately destroyed the value of SVB's investments in the Project in their entirety. Mexico's apparent desire to cover up its failures here speaks volumes.

2.8.2 Mexico Could and Should Have Intervened to End the Continuing Blockade and Release Minera Metalín's Employees from Captivity

265. As set forth in the Memorial and demonstrated above, as part of the Continuing Blockade, Mineros Norteños and its members committed trespass, false imprisonment, kidnapping, and theft at the Project site, which Mexican authorities knew about, witnessed, and documented, but did nothing to stop.[641]

266. In its Counter-Memorial, Mexico seeks to excuse its failure to act by claiming that it simply had no ability or obligation to intervene in the Continuing Blockade. Mexico asserts that there was "no deprivation of liberty of any worker (i.e., kidnapping or hostages),"[642] no "crime or situation of extreme urgency,"[643] and that even "if there had been some type of disturbance, the use of public force was not justifiable."[644] Mexico further contends that its authorities "did not witness any illegal act or crime"[645] and that law enforcement intervention would therefore have been inappropriate. These blanket assertions are entirely unsupported by the record, as set forth above, and fundamentally at odds with Mexico's demonstrated ability to address and resolve similar blockades when it chose to do so, including the Initial Blockade.

267. As the record demonstrates, Mexico not only has a long history of resolving mining blockades without the use of force, but, in any event, Mexico has used force to dispel and disperse analogous mining blockades. Indeed, Mexico swiftly intervened to resolve the Initial Blockade

641 Memorial, paras. 2,125, 4.15.

642 Counter-Memorial, para. 193.

643 Counter-Memorial, para. 194.

644 Counter-Memorial, para. 196.

645 Counter-Memorial, para. 199.

in 2016, without any resort to force.[646] Beyond that obvious comparison, Mexico has intervened to resolve the following blockades against other mining projects:

- In May 2013, protesters from a local *ejido* blockaded the El Ratón iron mine in Jalisco State, operated by Gan-Bo, a Chinese company.[647] In response, Mexico sent dozens of armed police officers to disperse the blockade and forcibly evict the *ejidatarios.*[648] The police then implemented a police cordon around the mine to protect it from further blockades and protests.[649] This swift and effective action belies Mexico's repeated assertions in its Counter-Memorial that it was powerless to act due to Mexican laws regarding the use of force.[650]

- In November 2017, the "Los Mineros" union orchestrated an illegal blockade of Torex Gold Resources's Limón-Guajes mine, located in the State of Guerrero.[651] Mexico's Federal Labor Board stepped in to conduct a mediation process, and Mexico's Federal Gendarmerie established a presence on site.[652] This intervention by Mexico through multiple agencies permitted Torex to restart operations within six weeks of the commencement of the blockade.[653]

- In September 2019, a group of truck drivers, landowners, and residents orchestrated an illegal blockade of Newmont Goldcorp's Peñasquito mine, located in the State of Zacatecas.[654] After four weeks, Newmont announced the lifting of the blockade and noted that "it was working closely with the federal and state governments towards a sustainable, long-term solution."[655] Mexico's willingness to intervene to peacefully

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646 Memorial, paras. 2.72-2.87.

647 La Jornada, *Police cordon will continue at Jalisco mine*, 10 May 2013 (available at: https://www.jornada.com.mx/2013/05/10/estados/036n1est), **C-0465**.

648 La Jornada, *Police cordon will continue at Jalisco mine*, 10 May 2013 (available at: https://www.jornada.com.mx/2013/05/10/estados/036n1est), **C-0465**.

649 La Jornada, *Police cordon will continue at Jalisco mine*, 10 May 2013 (available at: https://www.jornada.com.mx/2013/05/10/estados/036n1est), **C-0465**.

650 Counter-Memorial, paras. 195-199, 451-452, 457-458, 551.

651 Valentina Ruiz Leotaud, Torex restarts operations in Mexico despite blockade, Mining.com, 17 January 2018, **C-0170**.

652 Valentina Ruiz Leotaud, Torex restarts operations in Mexico despite blockade, Mining.com, 17 January 2018, **C-0170**.

653 Valentina Ruiz Leotaud, Torex restarts operations in Mexico despite blockade, Mining.com, 17 January 2018, **C-0170**.

654 Cecilia Jamasmie, Peñasquito blockade lifted, operations still suspended, Mining.com, 9 October 2019, **C-0169**.

655 Cecilia Jamasmie, Peñasquito blockade lifted, operations still suspended, Mining.com, 9 October 2019, **C-0169**.

resolve that illegal blockade illustrates that it has the ability to dispel illegal blockades of mining Projects when it chooses.

- In June 2021, workers and local community members orchestrated a blockade at the Los Filos mine, operated by Equinox Gold, a Canadian company, in Guerrero State.[656] Less than two months after the blockade began, Equinox announced that the blockade had been lifted and that mining operations had resumed, thanks in part to continuous intervention by government authorities.[657]

- In September 2021, workers blockaded the San Rafael silver mine in Sinaloa State, operated by Americas Gold and Silver Corporation, a US company.[658] Intensive efforts by SEGOB, Economía, and the Ministry of Labor enabled the company to broker a settlement with its employees and labor unions, and thus to lift the blockade.[659]

- In May 2023, disaffected employees commenced a blockade of the La Herradura open-pit gold mine in Sonora State, operated by Fresnillo, a UK company.[660] The Mexican Criminal Investigation Agency intervened to remove protesters after just 14 days, thereby expeditiously putting an end to the blockade and restoring the investor's access to its project.[661] Notably, this was the very same agency that conducted the initial investigations in relation to the Continuing Blockade in September 2019, but in the present case they failed to take any action.

- Finally, in October 2023, an armed group attacked on a public highway the vehicles of Pan American Silver, a Canadian mining company, disrupting its operations at the

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656 *See* Mexico Business News, *Blockade Lifted At Equinox Gold's Los Filos Mine*, 2 August 2021, (available at: mexicobusiness.news/mining/news/blockade-lifted-equinox-golds-los-filos-mine), **C-0122**.

657 *See* Mexico Business News, *Blockade Lifted At Equinox Gold's Los Filos Mine*, 2 August 2021, (available at: mexicobusiness.news/mining/news/blockade-lifted-equinox-golds-los-filos-mine), **C-0122**.

658 *See* Mexico Business News, *San Rafael Mine is No Longer Blocked*, 15 September 2021, (available at: mexicobusiness.news/mining/news/san-rafael-mine-no-longer-blocked?tag=blockade), **C-0123**.

659 *See* Mexico Business News, *San Rafael Mine is No Longer Blocked*, 15 September 2021, (available at: mexicobusiness.news/mining/news/san-rafael-mine-no-longer-blocked?tag=blockade), **C-0123**.

660 *See* Mexico Business News, *Authorities Lift Blockade at Herradura*, 17 May 2023, (available at: mexicobusiness.news/mining/news/authorities-lift-blockade-herradura), **C-0134**.

661 *See* Mexico Business News, *Authorities Lift Blockade at Herradura*, 17 May 2023, (available at: mexicobusiness.news/mining/news/authorities-lift-blockade-herradura), **C-0134**.

"La Colorada" silver mine in the State of Zacatecas.[662] Pan American reported "rapid response and efforts of the Zacatecas state government and federal authorities in Mexico to improve security in the vicinity of the mine, providing an environment that allow[ed] for mine operations to resume" immediately thereafter.[663] Indeed, the Mexican authorities quickly "t[ook] steps to facilitate the safe transit to and from the mine site for all the employees, contractors and people from the nearby communities" and maintained a direct line of communication with Pan American to ensure that operations could resume expeditiously.[664]

268. Each of these examples shows that Mexico can and does intervene swiftly to resolve mining blockades, whether through force or, as is most often the case, peacefully. Mexico's assertion that it was powerless to intervene to resolve the Continuing Blockade is simply not credible.

2.9 Following the Commencement of the Continuing Blockade, SVB Continued to Seek an Amicable Resolution with Mineros Norteños in Good Faith, but Their Demands Became Increasingly Unreasonable

269. After the imposition of the Continuing Blockade, Mineros Norteños's demands graduated again from excessive and unreasonable to outright extortion. In its Counter-Memorial, Mexico asserts that the Claimant unreasonably refused those extortionate demands and takes the remarkable position that the Claimant should have simply acceded to them.[665] As explained below, that argument is absurd, and for the Tribunal to countenance it would equate to acquiescence in illegal self-help.

270. Specifically, Mexico wrongly asserts that "[t]he Claimant decided not to consider the requests of the Mineros Norteños seriously" or to "make serious offers to negotiate a solution to the social problems."[666] Likewise, Mexico accuses the Claimant baselessly of "evad[ing] a negotiation with the Mineros Norteños,"[667] whose members, according to Mexico, "continue

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662 *See* LatinUS, *Zacatecas government promises protection to Canadian miner that suspended operations after organised crime robberies*, 7 October 2023, (available at: latinus.us/2023/10/07/gobierno-de-zacatecas-promete-proteccion-a-minera-canadienseque- suspendio-operaciones-tras-robos-del-crimen-organizado/#lngrnual3ziq3cwvd2k), **C-0136**.

663 Mining.com, *Pan American Silver plans La Colorada mine restart after robbery*, 11 October 2023, (available at: https://www.mining.com/pan-american-silver-plans-la-colorada-mine-restart-after-robbery/), **C-0466**.

664 Mining.com, *Pan American Silver plans La Colorada mine restart after robbery*, 11 October 2023, (available at: https://www.mining.com/pan-american-silver-plans-la-colorada-mine-restart-after-robbery/), **C-0466**.

665 Counter-Memorial, paras. 6, 33, 92, 402, 508, 510, 551.

666 Counter-Memorial, para. 6.

667 Counter-Memorial, para. 33.

to wait for the company to come to the negotiating table to reach an agreement."[668] But Mexico goes a step further, arguing that it is the Claimant's refusal to yield to extortion that caused the Claimant's damages.[669] Namely, Mexico claims that any loss that the Claimant suffered stems from its own alleged "refusal to negotiate an agreement with Mineros Norteños to reach a compromise that would allow the cooperative to obtain the royalties they had been promised 22 years ago and thereby open the door for the Project to continue."[670]

271. It is worth pausing to emphasize the dangerous absurdity of Mexico's position. Mexico is saying that foreign investors who received no help from the Government should simply accede to extortion by companies willing to resort to violence. That is an extraordinary and dangerous argument. And in positing it, Mexico implicitly admits that it has given up on maintaining law and order. What is more, it risks setting a dangerous precedent for foreign investors operating in Mexico. Finally, even if such a position were legally or morally defensible, which it is not, it certainly is not appropriate in a context where the allegedly aggrieved party, Mineros Norteños, took to falsely imprisoning laborers, geologists, and work-experience students when it did not get its way in the courts. For the avoidance of doubt, the Claimant felt, and still feels, that it had no obligation to accede to extortionate demands.[671]

272. Nonetheless, contrary to Mexico's assertions, the Claimant *did* engage in serious negotiations with Mineros Norteños concerning their baseless demands for payment, even after those demands turned criminal. Indeed, the Claimant continued to negotiate in good faith even after the Mexican courts dismissed Mineros Norteños's lawsuit for the claimed royalties.[672] A complete account of the Claimant's efforts is found in the second witness statement of Mr. López Ramírez,[673] and they are also addressed in the second witness statement of Mr. Barry,[674] but the below paragraphs summarize key points from the Claimant's years-long efforts to negotiate an end to the Continuing Blockade.

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668 Counter-Memorial, para. 92.

669 Counter-Memorial, para. 402; *see also* Counter-Memorial, paras. 508, 510, 551.

670 Counter-Memorial, para. 402.

671 *See, e.g.*, Edgar WS2, para. 6.

672 *See* Section 2.3 *supra*.

673 López Ramírez WS2, paras. 85-134.

674 Barry WS2, paras. 20-60.

273. When Mineros Norteños began the Continuing Blockade in September 2019, the Claimant remained willing to meet with Mineros Norteños.[675] That willingness to meet was subject to two reasonable conditions, which the Claimant conveyed to Mineros Norteños: that Major Drilling be permitted to recover its equipment and that SVB be permitted to collect its core samples.[676] Though these conditions were reasonable, Mineros Norteños repeatedly rejected them, thus delaying further negotiations for months.[677]

274. Amidst this deadlock, the Claimant turned to diplomatic channels for support, requesting a meeting with the Canadian Embassy and officials from the DGM.[678] On 13 December 2019, the Claimant met with representatives from the DGM to discuss an end to the Continuing Blockade.[679] Shortly thereafter, on 21 December 2019, one of the representatives from the DGM, Mr. Suárez Mejía, promised Mr. Barry that he would "get in touch with [Mr. Barry's] team in Mexico to outline a work plan" and "set up a communications channel with the municipal- and state-level authorities in Coahuila, as well as with other local stakeholders, to get a better understanding of the situation."[680] To the Claimant's knowledge, the DGM never took any steps to make good on that promise. Without governmental assistance, the Claimant had to fend for itself, so it returned to negotiations with Mineros Norteños.

275. Although Mineros Norteños never met the two very reasonable conditions set out by the Claimant,[681] in a show of good faith, the Claimant agreed to meet anyway. When those meetings finally occurred – amidst further delays from the COVID-19 pandemic – Mineros Norteños's demands were just as unreasonable as they had been for the prior seven years.[682] On 11 August 2020, Mineros Norteños demanded US$ 2 million in advance payments plus

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675 Email Correspondence Between Juan Manuel López Ramírez and Tim Barry, 24 September 2019, **C-0241**; Email from Juan Manuel López Ramírez to Tim Barry, 11 November 2019, **C-0248**.

676 Email Correspondence Between Juan Manuel López Ramírez and Tim Barry, 24 September 2019, **C-0241**; Email from Juan Manuel López Ramírez to Tim Barry, 11 November 2019, **C-0248**.

677 López Ramírez WS2, paras. 101-104; Email from Juan Manuel López Ramírez to Tim Barry Forwarding Letter from Mineros Norteños to Minera Metalín, 20 November 2019, **C-0250**.

678 López Ramírez WS2, para. 105; Email from Tim Barry to Genevieve Dompierre (Canadian Embassy), 9 December 2019, **C-0252**.

679 Barry WS1, para. 7.7.

680 Emails between Tim Barry and Antonio Leonardo Suárez Mejía of the Mexican Ministry of Economy, 15 December 2019 to 8 January 2020, **C-0037**.

681 López Ramírez WS2, para. 108.

682 López Ramírez WS2, paras. 107-108; *see also supra* Section 2.6 (setting out Mineros Norteños's demands prior to the Continuing Blockade).

US$ 50,000 in legal fees.[683] Likewise, even after the Mexican courts had definitively resolved Mineros Norteños's suit in the Claimant's favor in March 2021, nothing changed for the blockaders: in June 2021, they staunchly recited their demand for upfront payments – precisely what Mineros Norteños had unsuccessfully sought in the court action.[684]

276. Despite the blockaders' intransigence, the Claimant persisted in its efforts to negotiate a good-faith resolution to the Continuing Blockade. On 4 August 2021, the Company sent a letter reaffirming its willingness to negotiate subject to one week of uninterrupted access to the Project site.[685] Two days later, Mineros Norteños rejected that reasonable proposal, refusing to allow even a one-week inspection, and hurling a series of baseless, incendiary attacks at the Claimant, among them a threat to have the Company's CEO, Tim Barry, expelled from Mexico.[686] Specifically, Mineros Norteños admonished: "I would also like to remind you that your presence here in our country is ILLEGAL (you are NOT welcome), by virtue of the fact that we have sent a request for your expulsion from our country."[687] Mineros Norteños also accused Mr. Barry of the "violation of human rights" and "the use of CORRUPTION to achieve your own interests, to the detriment of Mexican society and our country."[688]These were not the words of a serious negotiator.

277. As noted above, months later, in October 2021, Mineros Norteños finally granted limited access to the Project site for inspection.[689] That inspection, predictably, revealed damage to the site – missing equipment, stolen diesel and batteries, and vandalism[690] – but it also reopened the door to negotiations.

278. Mineros Norteños never budged from its unreasonable demand for upfront cash payments, despite the fact that the Claimant made clear at all times that this demand was impossible to accommodate.[691] As Mr. Barry explains:

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683 Email from Juan Manuel López Ramírez to Tim Barry Forwarding Proposal from Mineros Norteños to Minera Metalín, 12 August 2020, **C-0259**; Proposal from Mineros Norteños to Minera Metalín, 11 August 2020, **C-0258**.

684 Email from Tim Barry to Mirek Wozga and Roy Andrew (South32), 27 June 2021, **C-0273**.

685 Letter from Minera Metalín to Mineros Norteños, 4 August 2021, **C-0278**.

686 Letter from Mineros Norteños to Minera Metalín, 6 August 2021, **C-0280**.

687 Letter from Mineros Norteños to Minera Metalín, 6 August 2021, **C-0280**.

688 Letter from Mineros Norteños to Minera Metalín, 6 August 2021, **C-0280**.

689 Letter from Mineros Norteños to Minera Metalín Granting Limited Site Access, 20 October 2021, **C-0296**.

690 López Ramírez WS2, para. 117.

691 López Ramírez WS2, para. 90.

> Not only were we an exploration stage company with limited cash on hand, but in any event we could not divert funds provided by South32 or other investors that were designated for exploration work to pay Mineros Norteños's extortionate demands. It also would not have been possible to raise funds from investors to pay Mineros Norteños's demands given that the Mexican courts had rejected their claims for royalty payments.[692]

279. Notwithstanding this, the Claimant got creative in proposing reasonable alternatives to upfront payments. In November 2021, after several meetings with Mineros Norteños, the Claimant proposed a sum of US$ 1.5 million in Silver Bull's shares to be provided over four years, credited against the royalty set out in the 2000 Agreement.[693] Mineros Norteños refused to compromise. In a response letter dated 30 November 2021, the blockaders demanded 100% of the so-called "debt" allegedly owed them – half immediately, and the rest within four months.[694] It also refused any compensation in shares, claiming that they were worthless.[695] Mr. Barry rightly described this letter as "the worst offer they have come back to us with."[696]

280. Likewise, in March 2022, after months of exchanges with Mineros Norteños, the Claimant proposed a US$ 3 million payment in Company stock, and US$ 6.875 million in capped royalties.[697] Mineros Norteños did not respond formally.[698] Instead, in May 2022, Mineros Norteños demanded full, upfront payment of the US$ 6.875 million royalty to lift the Continuous Blockade.[699] That proposal was, of course, unreasonable, and the Claimant could not agree to it.

281. Despite the Claimant's tireless efforts to address Mineros Norteños's extortionate demands, ultimately those demands, the ensuing blockade, and Mexico's abject failure to intervene

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692 Barry WS2, para. 41.

693 López Ramírez WS2, para. 119.

694 López Ramírez WS2, para. 120; Proposal from Mineros Norteños to Minera Metalín, 30 November 2021, **C-0302**.

695 López Ramírez WS2, para. 120; Proposal from Mineros Norteños to Minera Metalín, 30 November 2021, **C-0302**.

696 Email Correspondence Between Darren Klinck, Tim Barry, and Juan Manuel López Ramírez, 1 December 2021, **C-0303**. Specifically, *see* email from Tim Barry to Darren Klinck, and Juan Manuel López Ramírez, 1 December 2021.

697 Email from Federico G. Velásquez to Darren Klinck, Tim Barry et al. Reporting on Meeting with Mineros Norteños in Mexico City, 5 March 2022, **C-0314**.

698 López Ramírez WS2, para. 125.

699 Proposal from Mineros Norteños to Minera Metalín, 17 May 2022, **C-0317**.

resulted in South32's withdrawal from the Project on 31 August 2022. Consequently, the Claimant lost its entire investment.

282. Nevertheless, the Claimant continued its negotiation efforts, purely in hopes of mitigating those losses.[700] On 16 September 2022, Silver Bull communicated its willingness to meet with the blockaders.[701] Months later, Mineros Norteños responded, and the Claimant again reiterated its willingness to negotiate.[702] Mineros Norteños never agreed to arrange that meeting, however.[703]

283. Amidst these years-long, intractable negotiations between Mineros Norteños and the Claimant, Mexico was nowhere to be seen – that is, not until years later, when the Claimant had already lost its entire investment and brought this arbitration against Mexico.

284. Namely, in January 2024 – nearly five years after the Continuing Blockade began and 18 months after the expropriation of the Claimant's investment – Mexico's Secretary of Government ("**SEGOB**") contacted the Claimant, ostensibly offering to mediate the dispute with Mineros Norteños.[704] In that email, SEGOB referred to a communication from Mineros Norteños dated 9 October 2023 requesting government intervention to help resolve Mineros Norteños's dispute with the Claimant.[705] In response, Mr. López Ramírez stated as follows: "I would appreciate not contacting me any further on this issue, Economía is now in a process trying to defend a case and if Economía wishes to discuss a settlement with us, they must contact us directly."[706] Based on that response, Mexico asserts that "it was the Claimant itself who expressly requested not to get involved."[707]

285. But Mexico is wrong for two reasons. *First*, the Claimant could not agree to SEGOB's supposed offer to intervene because it came far too late. By that time, the Claimant had already lost its investment. The Mexican Government had stood by idly for almost five years as the Continuing Blockade prevented any progress at the Project. Only in January 2024 – nearly 18 months after SVB suffered the total loss of its investment – did the Government allegedly try

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700 López Ramírez WS2, para. 132.

701 Letter from Silver Bull to Mineros Norteños, 16 September 2022, **C-0327**.

702 Letter from Silver Bull to Mineros Norteños, 30 November 2022, **C-0329**.

703 *See* López Ramírez WS2, paras. 132-135.

704 Email from SEGOB to the Claimant, **R-0036**.

705 Email from SEGOB to the Claimant, p. 2, **R-0036**.

706 Email from SEGOB to the Claimant, **R-0036**.

707 Counter-Memorial, para. 200.

to intervene. And *second*, as Mr. López Ramírez observed in his response email to SEGOB, this arbitration had already begun: if any negotiations were to occur between the Claimant and the Mexican Government, they would need to go through Economía – the agency with carriage of the dispute – and not SEGOB. The 2024 email from SEGOB was, therefore, not a legitimate attempt to resolve the dispute, and Mexico wrongly relies on it to assert that "it was the Claimant itself who expressly requested not to get involved."[708]

286. To summarize, Mineros Norteños approached negotiations with the Claimant with complete intransigence. Most fundamentally, it demanded upfront payments (plus a host of other payments such as future royalties and legal fees) at every phase of the negotiations and refused to consider any alternative payment structure, despite the Claimant's reasonable proposed alternatives.[709] As explained above, the Claimant simply did not have the cash to accommodate Mineros Norteños's demands for upfront payment, and what cash it did have was earmarked for exploration – not for paying off another company that had already lost a lawsuit for the amounts sought.

287. But Mineros Norteños did not just make unreasonable demands; its conduct throughout the negotiations was equally unreasonable. As noted above, Mineros Norteños repeatedly rejected the Claimant's requests to temporarily inspect the property[710] (evidently because they feared repercussions for stolen property[711]), threatened to start selling material from the site if the Claimant refused to meet,[712] and twice threatened to have the Claimant's CEO expelled from the country.[713] Mineros Norteños was also erratic in its approach to negotiations, further complicating the negotiations process. At one point, albeit prior to the Continuing Blockade, Mineros Norteños submitted two substantially diverging proposals within an 8-day period.[714] Negotiating with the group was like trying to hit a rapidly moving target, all while navigating constant threats against the Claimant, its property, and its personnel.

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708 Counter-Memorial, para. 200.

709 *See, e.g.*, Email from Juan Manuel López Ramírez to Tim Barry Forwarding Proposal from Mineros Norteños to Minera Metalín, 12 August 2020, **C-0259**; Proposal from Mineros Norteños to Minera Metalín, 11 August 2020, **C-0258**.

710 López Ramírez WS2, para. 112; Letter from Mineros Norteños to Minera Metalín, 6 August 2021, **C-0280**.

711 López Ramírez WS2, para. 113; Email from Juan Manuel López Ramírez to Tim Barry Forwarding Letter from Mineros Norteños to Minera Metalín, 15 September 2021, **C-0288**.

712 Letter from Mineros Norteños to Minera Metalín, 14 September 2021, **C-0287**.

713 López Ramírez WS2, paras. 110, 112; Email from Tim Barry to Mirek Wozga and Roy Andrew (South32), 27 June 2021, **C-0273**; Letter from Mineros Norteños to Minera Metalín, 6 August 2021, **C-0280**.

714 López Ramírez WS2, paras. 94-95.

288. Consequently, Mexico is wrong to assert that "[t]he Claimant decided not to consider the requests of the Mineros Norteños seriously," did not "make serious offers to negotiate a solution to the social problems,"[715] or tried to "evade a negotiation with the Mineros Norteños."[716] As noted above, and explained more completely in the second witness statements of Mr. López Ramírez and Mr. Barry, the Claimant continually engaged with Mineros Norteños in good faith, advanced realistic proposals, and tried to reach a compromise.[717]

2.10 Mexico's Refusal to Remove the Continuing Blockade Led to the Destruction of the Project's Value

289. In its Memorial, the Claimant demonstrated that Mexico's refusal to remove the Continuing Blockade resulted directly in the loss of the Claimant's investment.[718] Specifically, from October 2019 until August 2022, in the hope that the Mexican authorities would act to end the Continuing Blockade, South32 and SVB suspended their obligations under the Option Agreement through a *force majeure* notice.[719] In August 2022, however, after nearly three years of inaction by Mexico, it was evident that the Continuing Blockade would remain and South32 therefore terminated the Option Agreement.[720] This marked the moment at which Sierra Mojada Project lost all value, as the Claimant had lost its critical financing and development partner necessary to progress the Project.[721] And, in such circumstances, no reasonable investor would be interested in investing in the Project to progress it, given the Continuing Blockade and the lack of any prospect of Government intervention to lift it.[722]

290. In its Counter-Memorial, Mexico fails to engage with the above facts or to provide rebuttal evidence.[723] Instead, Mexico argues that there is no evidence of "a clear relationship between the conflict with Mineros Norteños and South32's decision to terminate the Option Agreement."[724] Mexico also seeks to cast doubt on the testimony of SVB's witnesses that, in

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715 Counter-Memorial, para. 6.

716 Counter-Memorial, para. 33.

717 López Ramírez WS2, para. 85.

718 Memorial, paras. 2.202-2.211.

719 Memorial, paras. 2.203-2.205.

720 Termination Agreement between SVB Resources, Inc., Minera Metalín, S.A. de C.V. and South 32 International Investment Holding Pty Ltd., 31 August 2022, **C-0048**.

721 Barry WS1, para. 8.7; *see also* Memorial, para. 2.211.

722 Barry WS1, para. 8.7; *see also* Memorial, para. 2.211.

723 Counter-Memorial, paras. 171-173 and Section II.L.3.

724 Counter-Memorial, para. 172.

the circumstances, no reasonable investor would have been interested in investing in the Project as of 31 August 2022, following South32's exit.[725]

291. As mentioned in the introduction to this Reply, these allegations amount to a "Hail Mary" or "Ave María." Mexico's document production requests made clear its hope that perhaps there was some other reason than the Continuing Blockade that South32 exited the Project.[726] But these requests proved to be based on wishful thinking. After conducting a reasonable search, the Claimant confirmed that no such documents exist, and Mexico's hope was not realized.

2.10.1 There Was a Clear relationship Between the Continuing Blockade and South32's Termination of the Option Agreement

292. The Claimant demonstrated in its Memorial that there was a clear and direct link between Mexico's acts and omissions with respect to the Continuing Blockade and South32's decision to exit the Project.[727] Specifically, the Claimant explained that despite its best efforts to resolve the conflict with Mineros Norteños, the Mexican authorities failed to take any reasonable action to lift the Blockade and restore the Project to Minera Metalín, thereby leaving South32 and the Claimant with no alternative but to terminate the Option Agreement.[728]

293. As a result of the Continuing Blockade, on 11 October 2019, SVB informed South32 of a *force majeure* event under the Option Agreement.[729] In its letter to South32, SVB expressed the following reasons justifying the *force majeure* event: (i) Mineros Norteños's unlawful imprisonment of four of its employees; (ii) Mineros Norteños's illegal blockade of the Claimant's property and unlawful interruption of their business; (iii) Mineros Norteños's illegal blockage of Major Drilling – the Claimant's drilling contractor – and (iv) Mineros Norteños's refusal to meet with SVB to resolve the conflict.[730] SVB also informed South32 that it had "alerted the appropriate authorities including the State Prosecutor, local and state police, the Coahuila state government and the Mexican mining department," "filed criminal charges against the leaders of MN with the State Prosecutor of Coahuila," and "informed the

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725 Counter-Memorial, para. 396.

726 Procedural Order No. 3, Annex B, Requests 1 and 2.

727 Memorial, paras. 2.202-2.204.

728 Memorial, para. 2.202*; see also* Barry WS1, para. 8.1.

729 Memorial, para. 2.204; *see also* Barry WS1, para. 8.2.

730 Letter from SVB to South32, 11 October 2019, p. 2, **C-0035**; *see also* Barry WS1, para. 8.2.

Canadian Embassy and Mexican Chamber of mines of the situation and asked for their support."[731]

294. Further, in its Memorial, the Claimant explained that during the *force majeure* period – between October 2019 and August 2022 – SVB sought in good faith to maintain its critical partnership with South32, in the hope of resolving the Mineros Norteños conflict and resuming Project development.[732] To do so, SVB agreed to cover all expenses during the *force majeure* period with the intention that South32 would remain as a partner after SVB and Minera Metalín regained access to the Project site.[733] Despite these efforts, after nearly three years, South32's position had become untenable; given the total inaction of the Mexican Government and the inability to access the Project site and progress the works, the parties terminated the Option Agreement on 31 August 2022.[734]

295. Mexico fails to grapple with the above evidence in its Counter-Memorial. The only piece of evidence that Mexico cites in support of its argument that there is no "clear relationship" between the Continuing Blockade and South32's termination of the Option Agreement is the absence of any reference to the dispute with Mineros Norteños in the Termination Agreement itself.[735] That argument is neither here nor there. Through the Termination Agreement, SVB and South32 memorialized the termination of the Option Agreement.[736] The primary purpose of the Termination Agreement was therefore to address the manner in which the parties would release each other from their obligations under the Option Agreement, and to record the US$ 518,000 payment that South32 would make to Minera Metalín upon termination to cover certain expenses.[737] There was no reason to include any reference to the underlying facts and circumstances that had led to the termination.

296. As noted above, during the document production phase, Mexico pursued a risky strategy to address the factual weakness of its claim that the Valdez litigation was the reason for South32's

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731 Letter from SVB to South32, 11 October 2019, p. 2, **C-0035**; *see also* Barry WS1, para. 8.2.

732 Memorial, para. 2.205; *see also* Barry WS1, para. 8.4.

733 Memorial, para. 2.206; *see also* Barry WS1, para. 8.5.

734 Memorial, para. 2.206; *see also* Barry WS1, para. 8.5.

735 Counter-Memorial, para. 172.

736 Termination Agreement between SVB Resources, Inc., Minera Metalín, S.A. de C.V. and South 32 International Investment Holding Pty Ltd., 31 August 2022, **C-0048**.

737 Barry WS2, para. 63; *see also* Richards WS1, para. 47; Termination Agreement between SVB Resources, Inc., Minera Metalín, S.A. de C.V. and South 32 International Investment Holding Pty Ltd., 31 August 2022, clauses 3 and 4, **C-0048**.

exit. Mexico requested communications exchanged between the Claimant and South32 regarding South32's decision to exit the Project and the Valdez litigation.[738] That strategy yielded no results simply because Mexico's case is not grounded on facts but on speculation. After conducting a reasonable search, the Claimant produced correspondence between South32 and SVB but, unsurprisingly, the name Valdez was never mentioned in it.

297. More fundamentally, Mexico's argument ignores the weight of contemporaneous evidence demonstrating that (i) South32's main concern during the *force majeure* period was whether and when the Continuing Blockade would be lifted; and (ii) South32's position ultimately became untenable as a result of the Mexican authorities' failure to take action to resolve that Blockade. For example, the correspondence below reflects that South32's main concern during the *force majeure* period was the lifting of the Continuing Blockade:

- On 11 December 2020, Matthew Melnyk sent an email to Mirek Wozga – Vice President for Exploration at South32 – detailing the November 2020 summary of expenses incurred by SVB and informing South32 that "[t]he situation at the camp with regard to the Mineros Norteños is unchanged as there has been no change in the status of the court case," referencing the Mineros Norteños spurious lawsuit explained above.[739] Mr. Wozga thanked Mr. Melnyk for the update.[740]

- On 18 March 2021, Mr. Barry informed Mr. Wozga that Minera Metalín had won the court case against Mineros Norteños.[741] Mr. Barry recognized that although this result was positive, "this still does not get us onto the ground" to resume the Project's activities.[742] For this reason, Mr. Barry informed Mr. Wozga that Minera Metalín was reaching out to Mr. Rafael Jabalera, the Director of Mining Development at DGM, for assistance in resolving the Continuing Blockade. Mr. Barry conveyed his understanding that Mr. Jabalera was "very aware of our situation and appears to be motivated to resolve our issue."[743] Mr. Wozga responded to Mr. Barry's email

738 Procedural Order No. 3, Annex B, Requests 1 and 2.

739 Email from Matt Melnyk from SVB to Mirek Wozga from South 32, 11 December 2020, **C-0423**.

740 Email from Matt Melnyk from SVB to Mirek Wozga from South 32, 11 December 2020, **C-0423**.

741 Email from Tim Barry from SVB to Mirek Wozga from South 32, 18 March 2021, **C-0265**.

742 Email from Tim Barry from SVB to Mirek Wozga from South 32, 18 March 2021, **C-0265**.

743 Email from Tim Barry from SVB to Mirek Wozga from South 32, 18 March 2021, **C-0265**.

commenting "[t]hat's good news, particularly being a unanimous vote by the judges. Hopefully, the blockade will soon end quietly."[744]

- On 31 March 2021, Mr. Barry followed up with Mr. Wozga, attaching the Mexican court ruling in favor of Minera Metalín and explaining that the next steps included approaching "Mr Rafael Jabalera with this ruling [] to find out what the Governments response is and how they can assist us in ending the blockade."[745] On 30 April 2021, Mr. Wozga responded Mr. Barry's email inquiring about the latest news at Sierra Mojada, referring to the blockade situation.[746]

- On 22 May 2021, Tim Barry sent Mr. Wozga an email informing him about the local and state elections that were soon to take place on 6 June 2021, commenting that "we believe there will be more will and motivation by the Authorities to end blockade." He pledged to keep South32 "apprised of the results and of the situation on the ground at Sierra Mojada following this election."[747] Mr. Wozga responded "[f]ingers crossed for a quick resolution post-election."[748]

298. Despite South32's optimism about the end of the Continuing Blockade reflected in the above correspondence, after nearly three years of Mexico's inaction, South32's position ultimately became untenable.[749] From July to August 2022, the Claimant and South32 negotiated the conditions for South32's exit, which was prompted by the Mexican authorities' failure to put an end to the Blockade as reflected in the below correspondence:

- On 5 July 2022, Mr. Wozga from South32 called Mr. Barry and explained to him that "projects get old if they're not moving forward, and S32 would like to move on."[750] In other words, the three years during which the Continuing Blockade had been in place with no action from the Mexican authorities to resolve it had prolonged the

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744 Email from Mirek Wozga from South 32 to Tim Barry from SVB, 18 March 2021, **C-0265**.

745 Email from Tim Barry from SVB to Mirek Wozga from South 32, 31 March 2021, **C-0266**.

746 Email from Mirek Wozga from South 32 to Tim Barry from SVB, 30 April 2021, **C-0269**.

747 Email from Tim Barry to Andrew Roy and Mirek Wozga of South 32, 22 May 2021, **C-0271**.

748 Email from Mirek Wozga from South 32 to Tim Barry, 22 May 2021, **C-0424**.

749 Memorial, para. 2.208; *see also* Barry WS1, para. 8.6.

750 Email from Tim Barry to Andrew Roy from South32, 5 July 2022, **C-0126**.

situation beyond what was reasonable, prompting South32's decision to exit the Project.

- Between mid-July and early August 2022, SVB and Minera Metalín had discussions regarding who would bear the remaining costs in relation to the Project, such as annual tenement payments, salaries, rehabilitation, and environmental reporting costs.[751]

- On 16 August 2022, after the parties agreed on the main terms supporting the Termination Agreement, Mr. Wozga sent an email to Mr. Brian Edgar expressing his gratitude "to the entire Silver Bull team in Vancouver . . . for safely executing the drilling programs prior to the blockage and for the professionalism shown towards to blockage protesters and the broader community."[752]

299. On 31 August 2022, SVB and South32 entered into the Termination Agreement, pursuant to which the parties agreed to terminate the Option Agreement, subject to South32 providing a payment of US$ 518,000 to cover the residual costs of the Project, as noted above.[753]

300. Furthermore, Messrs. Barry, Edgar, and Richards each testify that South32's exit was prompted by the Continuing Blockade and Mexico's failure over three years to act to end it, and not the Valdez litigation.[754] Mr. Barry – the lead negotiator with South32 on this issue – states that "[w]e never discussed the Valdez litigation in the context of South32's decision to terminate," and "the only reason South32 wished to terminate the Option Agreement was that the Continuing Blockade had completely halted operations for nearly three years and, due to the inaction of the Mexican authorities, it was unclear if or when it would be lifted."[755] Similarly, Mr. Edgar confirms that "at no point did South32 represent that the cause of their exit was the Valdez litigation."[756] Lastly, Mr. Richards testifies to the fact that "South32 said expressly that

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751 Emails between T. Barry, A. Roy, D. Klinck, W. Mirek, B. Edgar and C. Richards between 5 July 2022 to 15 August 2022, **C- 0126**.

752 Email from Mirek Wozga from South32 to Tim Barry, Darren Klinck, Brian Edgar and Christopher Richards, 16 August 2022, **C-0428**.

753 Termination Agreement between SVB Resources, Inc., Minera Metalín, S.A. de C.V. and South 32 International Investment Holding Pty Ltd., 31 August 2022, Clause 3.1, **C-0048**.

754 Barry WS2, para. 76. Edgar WS2, para. 34. Richards WS1, para. 45.

755 Barry WS2, para. 76.

756 Edgar WS2, para. 34.

its decision to leave the Sierra Mojada Project and terminate the Option Agreement was based on the prolonged and lasting effect that the Continuing Blockade had had on the Project."[757]

301. The evidence demonstrating that South32 decided to exit the Project due to the Continuing Blockade and Mexico's failure to lift it is irrefutable. However, as explained below, Mexico has failed to engage with the Claimant's evidence and has devised an alternative theory that is unsupported by the facts or the evidence in this case.

302. Specifically, Mexico suggests that the "real" reason South32 decided to terminate the Option Agreement and exit the Project was the attachments obtained by the Valdez family over certain concessions in relation to the Project. This is a red herring. While the substance of the Valdez litigation is discussed in more detail in Section 2.11 below, there is not a shred of evidence that there was any link between the Valdez litigation and South32's decision to exit the Project. Indeed, at the time South32 exited the Project in August 2022, the Valdez family had obtained no attachments over the concessions; as explained below, those questionable judicial attachments happened on 2 June 2023, shortly after the Valdezes moved to extend the seizure to encompass the concessions.[758] More importantly, as the Claimant's document production makes clear, there is no evidence whatsoever that South32 had any concerns over the Valdez litigation at all, let alone that it decided to tear up an Option Agreement worth tens of millions of dollars because of it.

303. The Respondent's entire theory to the contrary is based on just one document – namely, an anonymous complaint allegedly filed by Mr. Valdez on 20 June 2022 with South32's EthicsPortal, notifying South32 that "Silver Bull Resources (Minera Metalínin Mexico) . . . has done the impossible for not pay [sic]" the "lawsuit I won for 7 millions USD [sic]."[759]

304. However, there is no evidence that the above complaint had any bearing on South32's decision to terminate. In fact, South32's response to the complaint, which the Claimant notably fails to cite, demonstrates the opposite. Such response reads:

> Thank you for raising your concern via South32's EthicsPoint platform. Based on the limited information that you provide, your concern appears to relate to a commercial dispute between you and

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757 Richards WS1, para. 45.

758 Writ of attachment of mining concessions, pp. 1-3, **R-0060**; *see also infra* Section 2.11.

759 Counter-Memorial, para. 256; *see also* Report from Antonio Valdez to South32, 20 June 2022. **R-0062**.

> Silver Bull Resources). We encourage you to continue engaging directly with Minera Metalínin relation to this matter.[760]

305. South32 therefore did not express any concern regarding the Valdez litigation or indicate that it affected their relationship with SVB. Rather, it considered the dispute between the Valdez family and SVB to be a matter between those parties.[761] Moreover, South32 did not even request any further information from the complainant.[762] South32's lack of concern in relation to the Valdez litigation is also confirmed by Mr. Barry in his second statement.[763] As Mr. Barry explains, South32 never raised the issue of the Valdez litigation with him in their discussions of the *force majeure* situation or the termination of the Option Agreement.[764] Nor did South32 forward to him the Valdez family's complaint, even though South32 typically forwarded him messages received through their online portal that related to the Project.[765]

2.10.2 South32's Termination of the Option Agreement Crystallized the Loss of the Claimant's Investment

306. As explained in the Memorial and above, Mexico's inaction resulted in South32's decision to terminate the Option Agreement, thus marking the end of the Project.[766] South32's exit meant the end of the critical funding lifeline that had sustained the Project's advancement.[767] As SVB explained, South32's funding was critical to formulate and implement a mine plan focusing on drilling out the Sulphide Zone discovered in 2015.[768] Moreover, the involvement of a major mining company like South32 signaled to the market that the Project remained viable, despite Mexico's ongoing failure to protect the Claimant's investment and end the Blockade.[769] Once South32 exited the Project, both the funding and the market's faith in the Project disappeared, confirming the Claimant's complete loss of its investment.[770] Ultimately, as Mr. Barry

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

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

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

763 Barry WS2, para. 77.

764 Barry WS2, para. 76.

765 Barry WS2, para. 77; *see also* Email from Mirek Wozga to Tim Barry, 7 May 2021, **C-0270**.

766 Memorial, paras. 2.210 - 2.211.

767 Memorial, para. 2.209.

768 Barry WS1, paras. 4.51-4.52; *see also* SVB News Release, '*Silver Bull Identifies New Massive Sulphide Mineralization Grading 690g/t Silver, 1% Copper, 4.8% Lead and 15.25% Zinc at the Sierra Mojada Project, Coahuila, Mexico'*, 17 June 2015, **C-0091**.

769 Barry WS2, para. 66; *see also* Edgar WS2, para. 21.

770 Barry WS2, para. 66.

explained in his first witness statement, no willing buyer would invest in a project that had been blockaded for nearly three years without any action from the Government.[771]

307. Again, Mexico does not engage with the above evidence in its Counter-Memorial. Instead, Mexico seeks to cast doubt on Mr. Barry's testimony, dismissing it as "subjective."[772] But as Mr. Barry reiterates in his second witness statement, his conclusion that no investor would be interested in the Project while the Continuing Blockade remained was based on discussions he had had with investors and shareholders in SVB, who all confirmed the same.[773] For instance, Mr. Barry discussed this issue with the famed Rick Rule from Exploration Capital Partners – a company managed by Sprott Group, the global mining investment manager – who told him that:

> After South32's withdrawal, Sierra Mojada had become effectively unfinanceable, even if the blockade were resolved. This was because it had acquired a negative reputation due to Mexico's prolonged failure to intervene in the Continuing Blockade, which had led a major mining company to exit the Project.[774]

308. Mr. Barry's conclusion also aligns with basic commercial common sense. Plainly, no mining investor would be interested in investing in or purchasing a project that is blockaded with no Government action in sight. As Mr. Barry notes in his second statement:

> Based on my 25 years of experience in mining and mineral exploration, I can confidently say that no investor would have been interested in investing in the Sierra Mojada Project following South32's exit on 31 August 2022 given that there was no sign that the authorities would ever take action to resolve the Continuing Blockade.[775]

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771 Memorial, paras. 2.209 - 2.211.

772 Counter-Memorial, para. 396.

773 Barry WS1, para. 8.7; Barry WS2, para. 66.

774 Barry WS2, para. 66.

775 Barry WS1, para. 8.7; Barry WS2, para. 68.

309. A contemporaneous assessment of the impact that South32's exit had with respect to the Project is reflected in an investor's post on an investment forum dated 2 September 2022, the day after SVB announced the termination of the Option Agreement as shown below:[776]

> From: LoneClone 9/2/2022 4:18:55 PM
> of 5627
>
> We finally get confirmation that thanks to the blockade, Sieera Mojada is essentially worthless and that SVB has become merely a shell.
>
> **Silver Bull Announces Termination of Option Agreement With South32 at Sierra Mojada**
>
> https://www.siliconinvestor.com/readmsg.aspx?msgid=33985368

310. As Mr. Barry explains, the above commentary is emblematic of the reaction of investors and shareholders to South32's exit and demonstrates that Mexico's inaction over nearly three years had consummated in the destruction of the entire value of the Project.[777]

311. Finally, this investor's opinion aligns with BRG's view of a "rational investor" faced with the fact of South32's exit from the Project. According to BRG, from an economic perspective, "South32's withdrawal from the Project on 31 August 2022 is indicative and representative of the view of a rational investor: that they cannot commit capital to a Project that is inaccessible and with property rights that are not expected to be enforced."[778]

2.11 The Valdez Litigation is Irrelevant to this Case

312. In its Counter-Memorial, Mexico spends 12 pages setting out the procedural history of a domestic litigation that is irrelevant to this case. Namely, Mexico describes a lawsuit filed in the Mexican courts by Mr. Antonio Valdez Perez ("**Mr. Valdez**") on behalf of his father, Mr. Jaime Valdez Farías, and mother, Ms. Maria Asunción Perez (the "**Valdezes**" or the "**Valdez**

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776 Comment on siliconinvstor.com message board, 2 September 2022, **C-0324**; *see also* Barry WS2, para. 67.

777 Barry WS2, para. 66.

778 BRG ER2, para. 27.

family")[779] – who were other concession holders in Sierra Mojada – for damages allegedly related to Minera Metalín's termination of a 2010 option contract with the Valdez family.[780]

313. Mexico's purpose for this sideshow is threefold: (1) to assert that SVB's and Minera Metalín's alleged failure to pay Mineros Norteños royalties (which, for the avoidance of doubt, Minera Metalín did not yet owe) fits a broader pattern of conduct;[781] (2) to suggest that because the Valdezes obtained a judgment against Minera Metalín that resulted in the attachment of Minera Metalín's assets, the Claimant lost ownership or control of the assets necessary to advance the Sierra Mojada Project;[782] and (3) to argue that the real reason for South32's withdrawal from its Option Agreement with SVB was the Valdez litigation and not the Continuing Blockade.[783]

314. As set out below, none of these arguments withstands scrutiny, and Mexico has raised them purely to distract from the main issue in this arbitration – its inaction in relation to the Continuing Blockade. Notwithstanding the irrelevance of the Valdez litigation to this case, the Claimant will briefly address below the key facts and the reasons why Mexico's submissions in relation to them fail.

2.11.1 Through Highly Questionable and Irregular Proceedings, the Valdez Family Obtained a US$ 5.9 Million Judgment Against Minera Metalín

315. On 21 April 2010, Minera Metalín entered into an option agreement with Mr. Jaime Valdez Farías and his wife, Ms. Maria Asunción Perez, with respect to three mining concessions they held in Sierra Mojada, namely the *La Perla*, *La India*, and *La India Dos* concessions (the "**Valdez Contract**").[784] The Valdez Contract granted Minera Metalín the right to use the concessions for exploration and exploitation, including to build on and use for storage or waste,

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779 As explained further below, Mr. Valdez brought this lawsuit on behalf of his parents, after receiving power of attorney to represent them in the case. His parents then passed away, and he continued to litigate the case without moving to designate his parents' heirs or estate executors as the new plaintiffs, despite having a legal requirement to do so. For ease of reference, the Claimant periodically refers to the plaintiffs in this litigation as "the Valdezes," but the Claimant does not concede the legitimacy of Mr. Valdez litigating on behalf of deceased individuals without duly designating their heirs, successors, or executors as the proper plaintiffs.

780 Counter-Memorial, paras. 225-255.

781 Counter-Memorial, paras. 225-226.

782 Counter-Memorial, paras. 227, 267.

783 Counter-Memorial, para. 227.

784 Contract of promise of assignment of onerous rights between the Valdezes and Minera Metalín, **R-0042**.

as well as the option to purchase those concessions.[785] In exchange, Minera Metalín agreed to make staged payments as long as it wished to use the concessions and retain the option.[786]

316. As an initial matter, and as Mr. Barry explains in his second witness statement, these three concessions were not essential for the Sierra Mojada Project but were, speaking colloquially, "nice to have."[787] They were not located in the key mineralization areas of the Project, but rather were potential locations for infrastructure.[788]

317. Under the Valdez Contract, if Minera Metalín decided not to purchase the concessions, it could terminate the Contract at any time during its term by giving notice to the Cedent, *i.e.*, Mr. Valdez Farías and Ms. Asunción Perez.[789] The Contract designated the Cedent's address in clause thirteen.[790] As Mexico acknowledges in its Counter-Memorial, Minera Metalín duly made payments in 2010, 2011, and 2012 pursuant to the Contract.[791] Then, in 2013, Minera Metalín elected not to purchase the concessions and instead to exercise its right to terminate the Contract.[792] Accordingly, on 3 June 2013, Minera Metalín issued a written termination notice pursuant to clause nine of the Valdez Contract, 30 days in advance of vacating the relevant lots.[793] To effectuate service of the termination notice, Minera Metalín notarized the document and designated a notary public, who exercises public official functions, to deliver the notice to the Cedent's address, as required under the Valdez Contract.[794]

318. Despite this valid termination, on 15 February 2016, nearly three years later – and just days after the Initial Blockade – the Valdezes sued Minera Metalín in the First Instance Court in the Judicial District of Torreón, Coahuila, for US$ 5.9 million.[795] This sum represented the total

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785 Contract of promise of assignment of onerous rights between the Valdezes and Minera Metalín, pp. 1-3, **R-0042**.

786 Contract of promise of assignment of onerous rights between the Valdezes and Minera Metalín, pp. 2-4, **R-0042**.

787 Barry WS2, para. 71.

788 Barry WS2, para. 71.

789 Contract of promise of assignment of onerous rights between the Valdezes and Minera Metalín, p. 4, **R-0042**.

790 Contract of promise of assignment of onerous rights between the Valdezes and Minera Metalín, p. 5, **R-0042**.

791 Counter-Memorial, para. 231.

792 Barry WS2, para. 72.

793 Termination Notice (*Notificación Notarial sobre Terminación de Contrato de Promesa de La Perla La India y La India Dos*), 3 June 2013, **C-0023**.

794 Termination Notice (*Notificación Notarial sobre Terminación de Contrato de Promesa de La Perla La India y La India Dos*), 3 June 2013, **C-0023**; Judgment in Civil Suit 103/2016, 17 March 2017, p. 12, **R-0046**; Contract of promise of assignment of onerous rights between the Valdezes and Minera Metalín, pp. 4-5, **R-0042**.

795 *See* Judgment in Civil Suit 103/2016, 17 March 2017, p. 1, **R-0046**.

amount that would have been payable had Minera Metalín decided to purchase the concessions.[796] Minera Metalín contested the lawsuit, and the Valdezes, after initially appearing,[797] stopped participating in the proceedings.[798] In March 2017, the Court dismissed the lawsuit, holding that Minera Metalín had validly terminated the Valdez Contract and did not owe the remaining amounts under the Contract.[799] The Court also ordered the Valdezes to pay Minera Metalín's costs arising from defending the claims and ordered the parties to be personally notified of the judgment.[800] That order was clarified to correct certain minor inaccuracies on 29 March 2017.[801] The Valdezes failed to submit an appeal of the judgment within the required timeframe of 15 days;[802] consequently, on 30 May 2017, the Court declared that the judgment had become final and enforceable.[803]

319. Following the March 2017 judgment and its order on costs, on 25 January 2018, Minera Metalín sought to recover legal costs through an interlocutory application to the First Instance Court.[804] On 8 April 2019, in the same Court, the Valdezes brought nullity proceedings, arguing that service of the March 2017 judgment and accompanying order was not effected personally, rendering the service null and void.[805]

320. On 17 June 2019, in a bizarre turn of events, the First Instance Court delivered judgment in favor of the Valdezes on their nullity claim, agreeing that the Court's official service of the

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796 *See* Barry WS2, para. 73; Contract of promise of assignment of onerous rights between the Valdezes and Minera Metalín, Clause 2(G), **R-0042**.

797 *See, e.g.*, Valdez Written Statement of Evidence Offering, 16 June 2016, **C-0476**.

798 Barry WS2, para. 73; First Instance District Court in Civil Matters, Torreón, Hearing Record, 15 February 2017, and Order, 28 February 2017, **C-0447** (noting that the Valdezes did not attend the evidentiary hearing and did not file findings of allegations).

799 Judgment in Civil Suit 103/2016, 17 March 2017, p. 12, **R-0046**.

800 Judgment in Civil Suit 103/2016, 17 March 2017, pp. 13-14, **R-0046**.

801 First Instance District Court in Civil Matters, Torreón, Order, 29 March 2017, **C-0478** (clarifying certain aspects of the judgment dated 17 March 2017).

802 *See* Code of Civil Procedure of the State of Coahuila de Zaragoza, Art. 868, **C-0475**.

803 First Instance District Court in Civil Matters, Torreón, Order, 30 May 2017, **C-0479** (declaring March 2017 judgment final and enforceable).

804 Interlocutory Judgment of the First Judge of First Instance for Civil Matters of the Judicial District of Torreón on costs, 25 January 2018, **C-0030**.

805 Valdez Motion to Nullify Judgment Service, 8 April 2019, **C-0482**.

judgment was defective.[806] This spurious annulment decision ordered service anew, permitting the Valdezes to obtain extemporaneous leave to appeal the March 2017 judgment.[807]

321. Consequently, on 17 June 2020, almost three years after the First Instance Court dismissed their claims, Mr. Valdez[808] was, absurdly, permitted to appeal the March 2017 judgment.[809] Just as absurdly, the Appellate Court ultimately ruled that Minera Metalín had failed to properly serve the notice of termination on the Valdezes.[810] The Court ruled that Minera Metalín should have served the notice of termination on the Valdezes' legal representative and that service on the security guard at their residence, a third party, was insufficient.[811] Further, the Court questionably found that, despite the fact that Minera Metalín had vacated the three concessions following its termination of the Valdez Contract, the company continued with "exploitation" of the mining estate without paying at the expiration of periods as contractually stipulated.[812] This was, of course, untrue – at no point did Minera Metalín commence exploitation activities on the concessions or anywhere else in Mexico, for that matter. On this basis, the Court wrongly awarded US$ 5.9 million to the Valdezes.[813]

322. The Mexican courts' allowance of Mr. Valdez's appeal – and the ensuing appellate decision – raise serious concerns. As Mr. Barry observes, the courts permitted the appeal more than three years after the original March 2017 judgment dismissing a lawsuit that the Valdezes had seemingly abandoned.[814] Moreover, as noted above, the notice of termination had been timely delivered by a notary public in accordance with the terms of the Valdez Contract.[815]

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806 Interlocutory Judgment of the First Judge of First Instance for Civil Matters of the Judicial District of Torreón on nullity, 17 June 2019, pp. 3, 7, **C-0032**.

807 Interlocutory Judgment of the First Judge of First Instance for Civil Matters of the Judicial District of Torreón on nullity, 17 June 2019, pp. 3, 7, **C-0032**.

808 As noted above and explained below, by this point Mr. Valdez had questionably continued to litigate the case on behalf of his deceased parents.

809 Notice of Appeal 87/2020, 17 June 2020, **R-0043**.

810 Barry WS2, para. 74; Appeal Judgment 87/2020, 1 October 2020, pp. 31-34, **C-0029**.

811 Appeal Judgment 87/2020, 1 October 2020, pp. 31-34, **C-0029**.

812 Appeal Judgment 87/2020, 1 October 2020, pp. 31-34, **C-0029**.

813 Appeal Judgment 87/2020, 1 October 2020, pp. 31-34, **C-0029**.

814 Barry WS2, para. 74.

815 Barry WS2, para. 74; Termination Notice, 3 June 2013, **C-0023**; Contract of promise of assignment of onerous rights between the Valdezes and Minera Metalín, p. 5, **R-0042**; Judgment in Civil Suit 103/2016, p. 12, **R-0046**.

323. On 9 November 2020, Minera Metalín sought to protect its due process rights through *amparo* proceedings before the First Collegiate Tribunal in Civil and Labor Matters of the Eighth Circuit.[816] On 10 June 2021, the Eighth Circuit Court unreasonably dismissed the application for protection, stating that the violations claimed were unfounded or inoperative.[817]

324. In a word, both the timing and the nature of the Valdez judgments are suspect. But these are not the only suspicious aspects of the Valdez proceedings. As noted above, the propriety of the action itself is dubious. That is because it is unclear at best that Mr. Valdez has the authority to litigate this case on behalf of his deceased parents.

325. As noted, Mr. Valdez filed this lawsuit on behalf of his parents – Mr. Jaime Valdez and Ms. Maria Asunción Perez – after receiving power of attorney to represent them in this case.[818] Ms. Maria Asunción Perez passed away in March 2017,[819] and Mr. Jaime Valdez Farías passed away in June 2019.[820] Nonetheless, Mr. Valdez continued to litigate his parents' nullity claim without apprising the Court that the plaintiffs had passed away.[821] This is despite a legal obligation to (i) notify the Court of the same and (ii) move to replace the plaintiffs with their heirs or executors.[822]

326. Indeed, it was not until September 2019 that Mr. Valdez informed the First Instance Court of these circumstances, and he has never identified his parents' heirs or executors, as required to replace the now-deceased plaintiffs.[823] The Court nonetheless permitted Mr. Valdez to continue the lawsuit on an emergency basis to defend the interests of his parents' estate temporarily.[824]

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816 Judgment of the First Collegiate Court for Civil and Labor matters of the Eighth Circuit, 10 June 2021, p. 1, **C-0042**.

817 Judgment of the First Collegiate Court for Civil and Labor matters of the Eighth Circuit, 10 June 2021, pp. 31, 46-47, **C-0042**.

818 Valdez Complaint Against Minera Metalín, 2 February 2016, p. 3, **C-0497** (representing that Mr. Jaime Valdez and María Asunción Pérez delivered power of attorney to Mr. Valdez).

819 First Instance District Court in Civil Matters, San Pedro, Hearing Minutes, 23 January 2019, **C-0481**; *see also* Writ with Death Certificate of Mrs. María Asunción Pérez, 10 June 2019, **C-0483**.

820 Valdez Submission, 26 September 2019, **C-0484** (apprising the Court that Mrs. Asunción Pérez had died in March 2017 and that Mr. Jaime Valdez Farías had died in June 2019).

821 *See, e.g.*, Valdez Motion to Nullify Judgment Service, 8 April 2019, **C-0482**.

822 *See* Code of Civil Procedure of the State of Coahuila de Zaragoza, Arts. 101, 307, **C-0475**; *see also* Civil Code of the State of Coahuila de Zaragoza, Arts. 1110, 1148, 1175, 1181, 3047, 3054, **C-0471**.

823 *See, e.g.*, Valdez Submission, September 26, 2019, **C-0484** (apprising the Court of his parents' passing but failing to identify heirs or executors; to the Claimant's knowledge, he has still not done so).

824 First Instance District Court in Civil Matters, Torreón, Order, 15 February 2022, **C-0486** (permitting Mr. Valdez to continue the proceedings against Minera Metalín).

However, this did not relieve Mr. Valdez of the obligation to replace the now-deceased plaintiffs with their heirs and executors, an act that he has still not completed today.

327. Mr. Valdez has every incentive to elide this defect in legal personality: he is, apparently, attempting to personally collect the liquidated assets by requesting a direct award of the concessions[825] and, separately, by requesting payment to his personal bank account.[826] This is despite the fact that, again, Mr. Valdez is not a plaintiff but rather merely has power of attorney over his deceased parents.

328. Further illustrating the suspicious circumstances of the Valdez litigation is the fact that Mexico in its Counter-Memorial submitted an anonymous report allegedly filed by Mr. Valdez on 20 June 2022 with South32's confidential ethics hotline.[827] In that anonymous report, Mr. Valdez – if it is actually him – alleged that South32's business partner, Minera Metalín, had failed to pay Mr. Valdez the money purportedly owed to him and stated "INVARIABLY YOUR COMPANY IT WILL BE SEEN STAINED FOR THE UNETHICAL ACT OF HIS PARTNER."[828] Mexico's submission of this document in this arbitration suggests that Mr. Valdez and Mexico are collaborating in this arbitration; otherwise, it is inexplicable how Mexico obtained a document filed confidentially by a third party with another third party. Mexico also submitted a copy of a message from Tim Barry to Antonio Valdez regarding the Valdez litigation.[829] Again, the only way Mexico could have obtained this document is from the Valdezes. Notably, during the document production phase of this case, Mexico objected to the production of any further documents it obtained from Mr. Valdez, asserting that "Respondent does not have possession, control or custody of documents prepared or received by Mr. Antonio Valdez, who is a third party unrelated to this proceeding."[830] In the circumstances, Mexico's assertions are not credible.

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825 Valdez Motion for Direct Award of Concessions, 18 December 2024, **C-0493**.

826 Valdez Request for Payment Directly to Personal Bank Account, 1 February 2022, **C-0485**

827 Report allegedly from Mr. Valdez to South32, 20 June 2022, **R-0062**.

828 Report allegedly from Mr. Valdez to South32, 20 June 2022, **R-0062**.

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

830 Procedural Order No. 3, Annex A, Claimant's Request No. 27, p. 135.

2.11.2 While Mr. Valdez Is Now Seeking to Enforce the Irregular Judgment Against Minera Metalín, those Proceedings Are Still Ongoing

329. Having obtained the above-described judgment against Minera Metalín – through highly questionable and irregular circumstances – Mr. Valdez moved to enforce the US$ 5.9 million judgment on 3 March 2022.[831] The ensuing enforcement proceedings resulted in the judicial attachment of Minera Metalín's bank accounts and certain property on 7 July 2022,[832] as well as its 19 concessions on 2 June 2023.[833] Notably, the judicial attachment of the 19 concessions took place after South32 withdrew from the Option Agreement on 31 August 2022 and after the Claimant initiated this arbitration on 28 June 2023.[834] As explained below, judicial attachment under Mexican law does not divest or curtail a party's ownership or control over the relevant asset but instead merely limits the asset's potential disposition. Based on the judicial attachments that Mr. Valdez obtained in 2022 and 2023, Mexico nevertheless erroneously asserts in its Counter-Memorial that the Claimant did not have ownership or control of its investment as of 31 August 2022 – the date on which the Claimant's losses and damage crystallized.[835]

330. This assertion is wrong on multiple grounds.

331. As a preliminary matter, the Claimant had already lost its investments in the Project by the time Mr. Valdez obtained judicial attachment of Minera Metalín's 19 concessions. Indeed, the Continuing Blockade, and the ensuing inability to access the Project for nearly three years, is what caused the Claimant not to contest the attachment proceedings and South32's withdrawal from the Option Agreement. But Mexico is also wrong for three additional reasons.

332. *First*, as noted, under Mexican law, judicial attachment limits the sale of property but does not affect its ownership or control. Minera Metalín still owned all of the attached assets – including its 19 concessions[836] – as of 31 August 2022 and as of 28 June 2023, when the Claimant filed

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831 Valdez Request for Initiation of Execution of Final Judgment 184/2020, 3 March 2022, **R-0050**.

832 First Instance District Court of Civil Matters, Torreón, Order of Attachment, 5 July 2022, pp. 1-3, **R-0054**.

833 First Instance District Court of Civil Matters, Torreón, Order of Attachment, 2 June 2023, pp. 1-3, **R-0060**.

834 Request for Arbitration, 28 June 2023.

835 Counter-Memorial, para. 271.

836 *See* Section 2.2 *supra*. Note, however, that although the Claimant remains the concession holder of the *Fortuna* concession, that concession expired by its contractual terms on 20 August 2024. *See Dirección General de Minas*, *Tarjeta: Fortuna*, 8 April 2025, **C-0340**.

its Request for Arbitration in this case.[837] But for the illegal Blockade, SVB would have been able to continue its exploration work and progress the mine toward production. *Second*, for Minera Metalín to lose its ownership and control over the attached assets, Mr. Valdez would need to exhaust a lengthy judicial process, which he has not yet completed even as of today – much less by August 2022. And *third*, even if Mr. Valdez had exhausted the long judicial process necessary to force a sale of Minera Metalín's attached assets, to divest Minera Metalín of its *concession* rights, he would need to successfully petition the Ministry of Economy (*Economía*) to revoke those concessions and authorize their transfer. He has not done so.

333. As elaborated below, as of 31 August 2022, Minera Metalín was thus nowhere near losing ownership or control over its Sierra Mojada Project assets. Indeed, the timing of the Valdez enforcement proceedings underscores the implausibility of Mexico's assertion that the Valdez litigation caused South32's exit, as explained in Section 2.10, *supra*.

2.11.2.1 Under Mexican law, attachment affects the disposition of property – not its ownership or control

334. Because Mr. Valdez's enforcement proceedings are in Coahuila civil court, they are governed by the Code of Civil Procedure for the State of Coahuila de Zaragoza. Article 938 of that Code establishes that the purpose of an attachment is to secure the result of a pending proceeding or to satisfy a judgment.[838] The Mexican Supreme Court has explained that an attachment does not affect the underlying ownership of the property but simply limits the owner's ability to sell or transfer that property without paying the judgment creditor.[839] Specifically, as the Mexican Supreme Court reasoned, an attachment is a lien on a privately owned asset or group of assets, and its purpose is to secure, as a precautionary measure, the eventual enforcement of a condemnation claim in court or to directly satisfy an enforceable claim.[840] The nature of the attachment is thus a "precautionary measure" that limits the disposition of the attached assets, but does not alter the owner's fundamental right to possess and use those assets.[841] As noted

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837 Request for Arbitration, 28 June 2023.

838 Code of Civil Procedure of the State of Coahuila de Zaragoza, Art. 938, **C-0475**.

839 *See Amparo Directo en revisión* 2705/2015 ruled by the First Chamber of the Supreme Court of Justice of the Nation, para. 59, **C-0474**; *Amparo en revisión* 155/2024 ruled by the First Chamber of the Supreme Court of Justice of the Nation, para. 45, **C-0472**.

840 *Amparo en revisión* 414/2021 ruled by the First Chamber of the Supreme Court of Justice of the Nation, para. 27, **C-0473**.

841 Code of Civil Procedure of the State of Coahuila de Zaragoza, Art. 938, **C-0475**; *Amparo en revisión* 414/2021 ruled by the First Chamber of the Supreme Court of Justice of the Nation, para. 30, **C-0473**; *Amparo en revisión* 155/2024 ruled by the First Chamber of the Supreme Court of Justice of the Nation, para. 45, **C-0472**.

above and explained below, the attachments that Mr. Valdez obtained over Minera Metalín's property in no way divested Minera Metalín of its ownership or control of those assets.

2.11.2.2 For Minera Metalín to lose ownership and control of the concessions, Mr. Valdez would need to exhaust a lengthy judicial process, which was nowhere near complete in August 2022

335. For the enforcement proceedings to strip Minera Metalín of its ownership and control of the attached assets, Mr. Valdez would need to successfully exhaust a lengthy judicial process, which he was nowhere near completing as of August 2022. This process is set out in the Coahuila Code of Civil Procedure, in particular Articles 963 to 998.

336. In relevant part, after obtaining an attachment, the judgment creditor can move for a forced sale of the attached assets via auction.[842] The first of potentially multiple auctions would need to be ordered within ten days of the attachment.[843] Before that, the parties would need to conduct an appraisal of the attached assets to ascertain their value.[844] That appraisal, in turn, would require the parties or the judge propose an expert appraiser.[845] Once the expert appraiser is approved,[846] the appraiser would need to accept the position and render an expert opinion as to the appraisal,[847] which the defendant would have the opportunity to contest.[848] Then, the judge would need to decide whether to approve the appraiser.[849] Once the asset has been appraised, it would be put to public auction, including as many as three auctions depending on whether bidders appear.[850] Within three days of the final auction, the judge would need to approve the auction (and any such decision may be reviewed on appeal with suspensive effect)[851] and order any measures necessary to effectuate the sale.[852] Once this sale is complete, and the enforcement proceedings are final, the judgment debtor would have the opportunity to

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842 Code of Civil Procedure of the State of Coahuila de Zaragoza, Arts. 963, 978-981, **C-0475**.

843 Code of Civil Procedure of the State of Coahuila de Zaragoza, Arts. 964, 978-981, **C-0475**.

844 Code of Civil Procedure of the State of Coahuila de Zaragoza, Arts. 965-971, **C-0475**.

845 Code of Civil Procedure of the State of Coahuila de Zaragoza, Art. 966, **C-0475**.

846 Code of Civil Procedure of the State of Coahuila de Zaragoza, Art. 966, **C-0475**.

847 Code of Civil Procedure of the State of Coahuila de Zaragoza, Art. 467, **C-0475**.

848 Code of Civil Procedure of the State of Coahuila de Zaragoza, Art. 971, **C-0475**.

849 Code of Civil Procedure of the State of Coahuila de Zaragoza, Art. 971, **C-0475**.

850 Code of Civil Procedure of the State of Coahuila de Zaragoza, Arts. 977-981, **C-0475**.

851 Code of Civil Procedure of the State of Coahuila de Zaragoza, Art. 983, **C-0475**.

852 Code of Civil Procedure of the State of Coahuila de Zaragoza, Arts. 984 and 987, **C-0475**.

challenge the enforcement proceeding via an *amparo*.[853] These auctions would continue until the judgment amount were satisfied, which in this case amounted to US$ 5.9 million.[854]

337. Here, Mr. Valdez moved to execute the above-described judgment on 3 March 2022.[855] The chronology of the relevant steps in that proceeding is as follows. As is clear from this chronology, there were many steps remaining before the concessions could be auctioned and the proceeds transferred to Mr. Valdez.

- On 19 May 2022, Minera Metalín proposed as attachable property the land corresponding to its *Dormidos* concession.[856]

- On 30 May 2022, Mr. Valdez moved to attach several assets, including various BBVA bank accounts, real estate, and 14 mining concessions owned by Minera Metalín.[857]

- On 7 July 2022, the Court granted Mr. Valdez's request to attach Minera Metalín's bank accounts and real estate (lots 1, 3, 4, 6, and 7 and related facilities[858]) but refused to attach Minera Metalín's *Dormidos* concession.[859] In particular, the Court held that Coahuila Code of Civil Procedure Article 941 lists all assets subject to judicial attachment and observed that mining concessions are not among them.[860] That is because, the Court held, the purpose of attachment is to limit a property owner's disposition of an asset, and mining concessions cannot be disposed of in the same way as other assets like money; as noted below, an administrative agency must authorize

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853 Amparo Law, Regulating Articles 103 and 107 of the Constitution of the United Mexican States (last amended on 13 March 2025), Art. 107, **C-0385**.

854 Code of Civil Procedure of the State of Coahuila de Zaragoza, Arts. 957, 958, 995, **C-0475**.

855 Valdez Request for Initiation of Execution of Final Judgment 184/2020, 3 March 2022, **R-0050**.

856 First Instance District Court in Civil Matters, San Pedro, Minutes, Attachment Hearing, 19 May 2022, **C-0487**.

857 Valdez Request for Attachment, 30 May 2022, pp. 1-3, **R-0053**.

858 Valdez Request for Attachment, 30 May 2022, pp. 1-3, **R-0053**; First Instance District Court of Civil Matters, Torreón, Order of Attachment, July 5, 2022, pp. 1-3, **R-0054**.

859 First Instance District Court of Civil Matters, Torreón, Order of Attachment, 5 July 2022, pp. 1-3, **R-0054**.

860 First Instance District Court of Civil Matters, Torreón, Order of Attachment, 5 July 2022, p. 1, **R-0054**.

the transfer of concession rights.[861] The Court likewise declined to attach the remaining concessions that Mr. Valdez had moved to attach.[862]

- On 30 August 2022, Mexico alleges, BBVA – the banking institution managing Minera Metalín's attached bank accounts – informed that one such account had been canceled on 15 July 2022.[863] Mexico asserts based on this fact that "it was possible that Minera Metalín sought to hide assets in order to comply with the seizure."[864] However, as explained in the statement of Mr. Richards – the Claimant's CFO – Mr. Richards became aware of the court order attaching the bank account on 20 October 2022 by an email from his Mexican counsel.[865] Moreover, Mr. Richards received confirmation that the bank account in question had been been inactive since approximately September 2021 and therefore was closed by the bank in July 2022 without Minera Metalín's intervention.[866] As Mr. Richards explained, Minera Metalín used this bank account to pay expenses for its operations from certain South32 funds, which Minera Metalín stopped receiving in September 2021.[867] Mexico's assertion that Minera Metalín attempted to conceal assets is therefore false.

- On 12 April 2023, Mr. Valdez filed an appraisal estimating that the commercial value of the attached assets was less than the judgment amount.[868]

- On 3 May 2023, Mr. Valdez then moved to extend the attachment to encompass all 19 concessions held by Minera Metalín.[869] On 2 June 2023, the Court granted the attachment, even though nearly one year earlier it had expressly denied the attachment

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861 *See* First Instance District Court of Civil Matters, Torreón, Order, p. 1, **R-0054**. In this decision, the court erroneously stated that it is the Secretary of Energy that is responsible for deciding the transfer of concession titles. As explained below, that authority resides with Economía.

862 First Instance District Court of Civil Matters, Torreón, Order of Attachment, 5 July 2022, pp. 1-3, **R-0054**.

863 Counter-Memorial, para. 250.

864 Counter-Memorial, para. 250.

865 Richards WS, para. 50; Email from Rodrigo Hernández to Darren Klinck, 20 October 2022, **C-0328**.

866 Richards WS, para. 50; Email from Rodrigo Hernández to Darren Klinck, 20 October 2022, **C-0328**.

867 Richards WS, para. 50.

868 Valdez Real Estate Appraisal, 12 April 2023, pp. 2, 4, **R-0058**.

869 Valdez Motion to Extend the Lien, 3 May 2023, **R-0059**.

of such concessions under applicable law.[870] The Court gave no explanation for its divergence from its own prior July 2022 decision.[871]

- Mr. Valdez registered the attachment with the Mining Public Registry more than one year later, on 21 August 2024.[872]

- On 21 October 2024, Mr. Valdez filed a motion to compel Minera Metalín to provide exploration and exploitation studies for the attached concessions, but also requested that, if Minera Metalín failed to provide the studies, the Court warn Minera Metalín that it would directly award the concessions to Mr. Valdez to satisfy the outstanding judgment.[873] On 14 January 2025, the Court rejected that request, finding that the direct award of the concessions could not be granted because Article 972 of the Code of Civil Procedure establishes that direct payment or award to a creditor is appropriate only with respect to certain assets enumerated by law, of which mineral concessions are not one.[874]

- Separately, following an appraisal process, the Court ordered an auction of the five attached real estate lots to be held on 5 December 2023.[875] That auction resulted in the award of the five lots to Mr. Valdez himself for 15 million pesos.[876] However, to this day Mr. Valdez has not obtained title deed to these lots because, to the best of the Claimant's knowledge, proceedings to effectuate title-transfer remain ongoing.[877]

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870 First Instance District Court of Civil Matters, Torreón, Order of Attachment, 2 June 2023, pp. 1-3, **R-0060**.

871 First Instance District Court of Civil Matters, Torreón, Order of Attachment, 2 June 2023, pp. 1-3, **R-0060**.

872 Valdez Registration of the Concessions Attachment with the Mining Public Registry, 21 August 2024, p. 2, **R-0061**.

873 Valdez Motion for Direct Award of Concessions, 21 October 2024, **C-0491**.

874 First Instance District Court in Civil Matters, Torreón, Order dated 14 January 2025, **C-0494** (denying the direct award of the 19 attached concessions to Mr. Valdez).

875 Valdez Appraisal of the Five Attached Lots, 18 October 2023, **C-0488**; First Instance District Court in Civil Matters, Torreón, Order dated 26 October 2023, **C-492** (ordering the auction of the attached five lots).

876 First Instance District Court in Civil Matters, Torreón, Auction Hearing Minutes, 5 December 2023, **C-0496**.

877 *See* Valdez Submission, 18 December 2024, **C-0493** (designating Notary Public number 89 of the Notarial District of Torreón, Coahuila, to formalize the award of the five lots attached); First Instance District Court in Civil Matters, Torreón, Order, January 14, 2025, **C-0494** (approving the designation made by Mr. Valdez).

- On 13 March 2025, after denying Mr. Valdez's initial motion to appoint an expert appraiser to appraise Minera Metalín's 19 concessions, the judge on reconsideration approved an expert.[878]

338. As explained above, several steps stand between appraisal and the forced sale of an attached asset. Minera Metalín accordingly still holds legal title to its 19 concessions, as confirmed by Mexico's own Mining Public Registry.[879] Needless to say, as of 31 August 2022, Minera Metalín was nowhere near losing its ownership or control over the attached assets.

2.11.2.3 Even if the Valdezes forced a sale of Minera Metalín's concessions, Economía would still need to revoke the concessions and authorize the transfer

339. Furthermore, even if the Valdezes *had* exhausted the lengthy judicial process necessary to force a sale of Minera Metalín's attached assets before 31 August 2022, this still would not be enough to strip Minera Metalín of its *mining concession* rights. That is because, under Mexican law, mining concessions are governed by the Mexican Mining Law, and any transfer of a concession requires the evaluation and approval by Economía of the new concession-holder's suitability to hold the concession.[880]

340. Indeed, as explained above, the First Instance Court recognized this fact. As noted, on 21 October 2024, Mr. Valdez filed a motion that, *inter alia*, requested the Court to warn Minera Metalín that failure to provide certain studies would result in a direct award of the concessions to Mr. Valdez to satisfy the outstanding judgment.[881] On 14 January 2025, the Court rejected that request because there was no basis for the Court to do so under Article 972 of the Code of Civil Procedure.[882] Simply put, a court cannot directly award mining concessions from a judgment debtor to a judgment creditor as part of judgment-enforcement proceedings.

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878 First Instance District Court in Civil Matters, Torreón, Order, 13 March 2025, **C-0495** (approving expert appraiser).

879 *Supra* Section 2.3.

880 2005 Mining Law Amendment, published in the *Diario Oficial* on 28 April 2005 ("**Mining Law**"), Arts. 10, 23, 42, Section V, **C-0371**.

881 Valdez Motion for Direct Award of Concessions, 21 October 2024, **C-0491**.

882 First Instance District Court in Civil Matters, Torreón, Order, 14 January 2025, **C-0494** (denying the direct award of the 19 attached concessions to Mr. Valdez).

341. Rather, the transfer of mining concessions is governed by the Mexican Mining Law and Regulations.[883] Under this regime, for a concession holder to lose its rights to a mining concession, Economía would need to revoke the concession and authorize the transfer of rights to a third party.[884] Such action would, in turn, require Economía to conduct its own assessment of the legal, technical, administrative, and economic capacity of the transferee to operate the concession.[885] Only then, if Economía were to revoke all 19 of Minera Metalín's concessions and authorize a transfer of the concession rights, could Mr. Valdez move for assignment.[886] In that case, Minera Metalín would still have further recourse: namely, the *amparo* process.[887] The transfer cannot be completed until any *amparo* proceedings are exhausted.[888]

342. In view of the above, even if Mr. Valdez had completed the lengthy judicial process to force a sale of Minera Metalín's attached concessions, he would still need to petition an executive agency to authorize the transfer of Minera Metalín's concessions, a process that he has not even commenced, much less successfully completed. Moreover, SVB would still have the right to pursue an *amparo* proceeding to challenge the forced sale and transfer. And because, as explained above, attachment does not affect the ownership of the concessions but rather simply limits their disposition, but for the Continuing Blockade, the Claimant could still have (i) advanced the Project using the attached assets, or (ii) sold the Project and paid the judgment debt. The Claimant would also have pursued its rights to challenge the attachments in the ongoing proceedings or before an appellate court.

343. In sum, the Valdez litigation has no bearing on this case. It is a third-party dispute that persists only because of highly questionable and irregular circumstances. The attachments that Mr. Valdez obtained against Minera Metalín's assets neither deprived Minera Metalín of its ownership or control over those assets, nor caused South32 to exit from the Option Agreement. As the record evidence shows and as elaborated further below, Minera Metalín maintained ownership and legal title to all of its assets relevant to the Sierra Mojada Project as of 31 August

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883 *See* Mining Law, Arts. 23, 42, Section V, **C-0371**; 2012 Mining Regulations, published in the *Diario Oficial* on 12 October 2012, last amended in December 2014 ("**2012 Mining Regulations**"), Art. 80, **C-0383**.

884 Mining Law, Arts. 23, 42, Section V, **C-0371**.

885 Mining Law, Art. 10, **C-0371**.

886 Mining Law, Arts. 23, 42, Section V, **C-0371**.

887 *See* Political Constitution of the United Mexican States (last amended 17 January 2025) ("**Mexican Constitution**"), Art. 107, **C-0444**; Amparo Law, Arts. 1,107, **C-0385**.

888 Mexican Constitution, Art. 107, Section X, **C-0444**; Amparo Law, Regulating Articles 103 and 107 of the Constitution of the United Mexican States (as amended on 13 March 2025), Arts. 147, 150, 151, **C-0385**.

2022 (the date on which the Claimant's damages and loss crystallized) and as of 28 June 2023 (the date on which the Claimant commenced this arbitration). Of course, counsel for Mexico comprises lawyers from Economía, who would be well aware of this legal reality.

2.12 Minera Metalín Complied with All Applicable Mexican Laws and Regulations

344. As demonstrated in the Memorial and above, beginning in 1996, Metalline – SVB's corporate predecessor – and then SVB, through Minera Metalín, acquired multiple mining concessions in the Sierra Mojada mining district for the exploration of silver and zinc.[889] As explained in detail in Section 2.2, Minera Metalín maintains valid legal title to 18 concessions, despite Mexico's destruction of their value.[890]

345. In its Counter-Memorial, Mexico provides a flawed overview of the Mexican Mining Law and its Regulations as a backdrop to assert two baseless allegations, namely: (i) that the Project was "unfeasible or inoperative" because the Claimant had failed to obtain "the entire universe of permits and licenses inherent to such a project,"[891] and (ii) that "the Project, today would not comply with the essential regulatory requirements for its development and operation in Mexico," providing Economía a purported basis to cancel the mining concessions.[892]

346. Both of these allegations are not only baseless, but irrelevant. As set out below, the Project was an exploration property that had the relevant permits in place for that activity. The Claimant's causation argument in this case centers on Mexico's failure to take any reasonable action to lift the Continuing Blockade, and it cannot be argued seriously that permitting was an intervening cause of its loss. Further, the Claimant is not claiming for damages on a Discounted Cash Flow ("**DCF**") basis where it would be necessary to show that it would have obtained all necessary permits, but for the State's breaches – though there is no compelling evidence to suggest that it would not have done so. Rather, the Claimant is claiming for damages equal to the value of the Project as the Claimant had developed it up to the Valuation Date, *i.e.*, 31 August 2022.[893]

347. In other words, Mexico's speculation concerning the permitting prospects of the Project does not impact any issue before this Tribunal. This is simply another area in which Mexico appears to have cribbed its defense from other, inapposite mining cases. Perhaps more importantly, and

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889 Memorial, paras. 2.2, 2.9.

890 *See* Section 2.2 *supra.*

891 Counter-Memorial, para. 69.

892 Counter-Memorial, paras. 74-75.

893 *See* Section 5 *infra*.

as demonstrated in the Memorial, given Mexico's own arguments concerning the residual value of the Project and the historic mining in, on, and around the Project, it is clear that the only obstacle to permitting was the resource nationalist agenda of the AMLO regime.[894]

348. In support of its allegations, Mexico explains that, in May 2023, the Mexican legislature enacted a new Mining Law ("**2023 Mining Law**"),[895] which fundamentally changed the legal and regulatory framework for mining activities in Mexico. The 2023 Mining Law introduced additional conditions and restrictions on mining operations in Mexico, including mandatory collaboration agreements with the Mexican Geological Service for exploration activities, the requirement to submit pre-operational reports to the Mexican authorities, and a reduction of the concession duration to a renewable 30-year term, among other changes.[896] Mexico alleges that Minera Metalín "only complied with one of the 19 administrative acts indispensable for the development" of the Project set forth in the 2023 Mining Law.[897] In support of that assertion, Mexico relies on the legal expert report submitted by Mr. Carlos Federico del Razo Ochoa from the law firm ECIJA.[898]

349. As demonstrated below, Mexico's defenses are conceptually misguided and factually wrong.

350. As an initial factual matter, Minera Metalín still holds the mining concessions at the heart of this matter, even though their value has been destroyed by Mexico's inaction.[899] At no point has Mexico notified Minera Metalín that those concessions are allegedly not in compliance with the 2023 Mining Law. Crucially, Mexico has not disputed the fact that Minera Metalín legally obtained the mining concessions necessary to carry out the Sierra Mojada Project.[900] It therefore lies ill in Mexico's mouth to make such arguments here.

351. As stated, it bears repeating that Mexico's "cookie-cutter" defenses, aimed at claiming a mining project's lack of viability to undermine the use of a DCF approach for measuring damages, are neither tailored to this case nor grounded in reliable evidence. Mexico's allegations hopelessly attempt to picture a but-for world in which the Project would not be

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894 Memorial, paras. 2.103-2.110.

895 Mining Law, published in the Official Diary on 8 May 2023, **R-0012**.

896 Counter-Memorial, paras. 58-69.

897 Counter-Memorial, para. 73.

898 Del Razo Ochoa ER, para. 4.

899 *See* Section 2.2 *supra.*

900 Counter-Memorial, para 50, table 1.

viable, without any factual basis to support it. Notably, as demonstrated in the Memorial and set forth above, the Claimant's position in this arbitration is *not* that the Project had progressed to exploitation, but that exploration activities had advanced significantly, confirming the Project's future profitability.[901] Accordingly, the permits necessary for exploitation activities, which Mexico references in its Counter-Memorial, would have been obtained in the normal course, if Mexico had not breached its obligations under the NAFTA.[902]

352. Furthermore, the Claimant's damages assessment – supported by BRG's Expert Reports – is not based on a DCF methodology, but a market approach, which infers value not on verifiable profits but on comparable transactions.[903] Simply put, Mexico's allegations do not undermine the Claimant's claim for damages.

353. Mexico's arguments regarding the 2023 Mining Law are also conceptually misguided. The 2023 Mining Law was published in the Official Diary on 8 May 2023 and entered into force 90 days after its publication, *i.e.*, on 6 August 2023.[904] As demonstrated in the Memorial and below, Mexico's continuous breaches of the NAFTA crystallized in losses and damages on 31 August 2022.[905] Thus, the 2023 Mining Law was published nine months *after* the Claimant's injury crystallized and took effect almost one year after.[906] The 2023 Mining Law thus has no bearing or application to the facts or measurement of damages in this case.

354. To disprove the Respondent's incorrect presentation of Mexican law to these proceedings, the Claimant explains below the applicable legal and regulatory framework for mining exploration activities, as relevant to the Project before Mexico's breaches.

2.12.1 Minera Metalín Acquired Concessions to Conduct Exploration Activities in Accordance with Mexican Law

355. In its Counter-Memorial, Mexico argues that the 2023 Mining Law imposed additional obligations on Minera Metalín, with which it needed to comply to guarantee the Project's feasibility.[907] Mexico argues that the 2023 Mining Law would be applicable to this arbitration

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901 Memorial, Section 5; Reply, Sections 2.4, 5.

902 Del Razo Ochoa ER, para. 116; Barry WS2, para. 18.

903 Memorial, paras. 5.10-5.16; BRG ER1, paras. 52-53.

904 2023 Mining Law, Art. 1 of the transitional provisions, **R-0012**.

905 Memorial, Section 4.

906 *See* Section 2.10 *supra*.

907 Counter-Memorial, para. 65 and fn. 40.

considering "the evolving nature of the obligations applicable to the concessions."[908] As explained below, however, the 2023 Mining Law has no bearing on this arbitration whatsoever.

356. The 1992 Mexican Mining Law as amended in 2005 (the "**Mining Law**"), its 2012 Regulations (the "**Mining Regulations**"), and Article 27 of the Mexican Constitution regulate the exploration, exploitation, and processing of minerals in Mexico.[909] These laws and regulations constitute the relevant framework in this arbitration and not, as Mexico submits, the 2023 Mining Law.[910] The application of the Mining Law is the responsibility of the Federal Executive Branch through the Secretary of Economy ("**Economía**").[911] The Directorate General of Mines ("**DGM**"), an agency under Economía, is responsible for the administration of the mining industry in Mexico, including the granting of mining concessions.[912] The DGM also maintains the Public Mining Registry, in which all mining concessions are registered.[913]

357. Mexico asserts that, prior to the enactment of the 2023 Mining Law, mining operations required two distinct concessions: one for exploration activities and another for exploitation activities.[914] That is incorrect. Under the 1992 Mining Law,[915] all minerals found within the territory of Mexico are owned by the Mexican State, and private parties may exploit these minerals through mining concessions granted by the DGM.[916] Under Article 15 of the 1992 Mining Law, exploration concessions had a non-renewable term of six years, counted from the date of registration of the concession titles in the Public Mining Registry, while exploitation concessions had a renewable term of 50 years.[917] On 28 April 2005, however, the 1992 Mining

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908 Counter-Memorial, para. 65 and fn. 40.

909 1992 Mining Law, published in the *Diario Oficial* on 26 June 1992 ("**1992 Mining Law**"), **C-0366**; 2005 Mining Law Amendment, published in the *Diario Oficial* on 28 April 2005, **C-0371**; 2012 Mining Regulations, published in the *Diario Oficial* on 12 October 2012, last amended in December 2014, **C-0383**; Political Constitution of the United Mexican States (last amended 17 January 2025) ("**Mexican Constitution**"), Art. 27, paras. 4 ,6, and 10, Section I, **C-0444**.

910 Counter-Memorial, fn. 40.

911 ` Mining Law, Arts. 1 and 7, **C-0371**.

912 *Reglamento Interior de la Secretaría de Economía*, published in the *Diario Oficial* on 22 November 2012, Art. 27, **C-0384** (in 2012, DGM was renamed *Dirección General de Regulación Minera*).

913 Mining Law, Art. 46, **C-0371**.

914 Counter-Memorial, para. 60.

915 The 1992 Mining Law was published in the *Diario Oficial* on 26 June 1992. Pursuant to Transitory Art. 1, the law entered into force 90 days after its publication, *i.e.*, on 24 September 1992; 1992 Mining Law, **C-0366**.

916 Mexican Constitution, Art. 27, paras. 4 and 6, **C-0444**; Mining Law, Arts. 7.VI, 10, **C-0371**; *Reglamento Interior de la Secretaría de Economía*, published in the *Diario Oficial* on 22 November 2002 (as amended on 17 August 2009), Art. 33, Section VI, **C-0370**.

917 1992 Mining Law, Art. 15, **C-0366**.

Law was amended to merge the exploration and exploitation regimes into one single regime, under which all mining concessions had a renewable term of 50 years.[918] Prior to the enactment of the 2023 Mining Law, mining concessionaires thus had the right to conduct both exploration *and* exploitation activities under the same concession title for renewable terms of 50 years.[919]

358. To obtain a mining concession under the Mining Law, an interested party must submit an application to Economía which complies with the requirements set forth in the Mining Regulations in force as of the date of the application.[920] Generally speaking – given that the original concessions Minera Metalín acquired were granted at different points in time – a mining concession application must contain the requisite information and supporting documentation, including proof that the applicant complies with the Mexican nationality requirement,[921] identification of the main minerals to which the envisaged exploration and exploitation activities relate, and information in relation to the concession area.[922]

359. Economía evaluates the application and grants the concession if it meets the requirements set forth in the Mining Law and Regulations.[923] The Public Mining Registry will then register the approved mining concession and publish it in the Book of Mining Concessions.[924] Upon registration of a mining concession, the concessionaire acquires all of the rights set forth in Article 19 of the Mining Law, including the right to carry out exploration and exploitation works within the concessioned area; to use water for exploration activities; to transfer or option

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[918] The 2005 Mining Law Amendment was enacted on 22 February 2005 and published in the *Diario Oficial* on 28 April 2005, **C- 0371**. This amendment came into effect on 1 January 2006 with respect to certain articles relating to mining concessions. Under Article 15 of the 2005 Mining Law Amendment, "[m]ining concessions will have a term of fifty years, counted from the date of their registration in the Public Mining Registry and will be extended for the same term," provided that an extension is requested five years before expiration of the term and the concession is in good standing under the Law. *See id*.

[919] Alberto Vasquez, *Spotlight: the Legal Framework and Licensing Regime for Mining in Mexico*, Lexology, 9 October 2019, **C-0410**. *Compare* Mining Law, Art. 15, **C-0371** *with* 1992 Mining Law, Art. 15., **C-0366** (showing that after the 2005 amendment to the Mining Law, concessions allow exploitation and exploration activities under the same title).

[920] *See e.g.*, 1999 Mining Regulations, published in the *Diario Oficial* on 15 February 1999, Art. 16, **C-0368**; 2012 Mining Regulations, Art. 16, **C-0383**.

[921] Under Arts. 10 and 11 of the Mining Law and Art. 4 of the 2012 Mining Regulations the applicant must be a Mexican corporation, *ejido*, agrarian community, or indigenous community. *See* Mining Law, Arts. 10, 11, **C-0371**; 2012 Mining Regulations, Art. 4, **C-0383**.

[922] 2012 Mining Regulations, Art. 16, **C-0383**. A mining concession application must be accompanied with an expert report expert report establishing the coordinates of the departure point of the mining concession and memorializing the topographical information in relation to the concession (*see* 2012 Mining Regulations, Arts. 16-17, **C-0383**).

[923] 2012 Mining Regulations, Art. 23, **C-0383**.

[924] Mining Law, Art. 47, **C-0371**.

the rights under the concession to qualified persons; to relinquish the rights under the concessions; and to reduce, divide, or apportion the lots that comprise the concession area.[925]

360. In exchange, the concessionaire must fulfill various obligations to maintain the concession in good standing as set out in Article 27 of the Mining Law, including the obligation to carry out and verify exploration activities sufficient to fulfill the investment requirements defined in Articles 59 and 60 of the Mining Regulations;[926] to pay the mining concession fees established under the Mining Law and the *Ley Federal de Derechos* in a timely manner;[927] and to comply with security and environmental requirements.[928]

361. Mexico contends that mining concessions for exploitation activities are granted for a 30-year duration.[929] While this might be true for mining concessions granted *after* the 2023 Mining Law took effect, that is not the case for previously granted mining concessions – such as those acquired by Minera Metalín. Specifically, under Article 6 of the transition provisions of the 2023 Mining Law, concession titles granted before that reform maintain the duration of the original concession.[930] In other words, mining concessions granted before the 2023 Mining Law entered into force are still valid for 50 years.[931] As shown below, Minera Metalín's concessions were validly obtained, and they are still valid and in good standing, despite Mexico's destruction of their value. Notably, as explained above, Mexico does not dispute the fact that the concessions were validly obtained; nor does it argue that they have expired.[932]

362. Instead, in its Counter-Memorial, Mexico lists various obligations stemming from Article 27 of the 2023 Mining Law that it claims Minera Metalín was required to meet. Notably, however, Mexico fails to take the step of affirmatively arguing that Minera Metalín did not comply with those obligations.[933] Mexico does not state its case clearly and, more importantly, as indicated

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925 Mining Law, Art. 19, **C-0371**.

926 2012 Mining Regulations, Arts. 59-60, (providing a per hectare investment requirement in Mexican Pesos that the concessionaire must meet), **C-0383**.

927 *Ley Federal de Derechos*, Arts. 262 and 264, (establishing a fee per hectare that the concessionaire must pay the Mexican Government every six months), **C-0364**.

928 Mining Law, Art. 27, **C-0371**.

929 Counter-Memorial, para. 62.

930 2023 Mining Law, Transition Provisions, Art. 6, **R-0012**.

931 2023 Mining Law, Transition Provisions, Art. 6, **R-0012**.

932 Counter-Memorial, para 50 (and the table included below). The discussion related to the *Veta Rica* or *La Inglesa* concession is addressed above in Section 2.2.

933 Counter-Memorial, para. 65.

above, Article 27 of the 2023 Mining Law was not applicable before May 2023 and thus is irrelevant to this case.[934] For instance, Mr. Del Razo Ochoa's Expert Report supporting Mexico's Counter-Memorial explains that Article 27 of the 2023 Mining Law mandates that concessionaires must notify Economía about the execution of pre-operative activities within 90 days after registering the concession in the Public Mining Registry.[935] This, however, was not a duty established under Article 27 of the Mining Law, which governs this arbitration.[936] As demonstrated in the Memorial and above, Minera Metalín acquired and maintains valid legal title to 18 mining concessions duly obtained in compliance with the applicable Mining Law and its Regulations, despite Mexico's breaches rendering those concessions valueless.[937]

363. These mining concessions granted Minera Metalín the right to conduct exploration activities without the need to require from Economía additional authorizations.[938] Upon acquiring the concessions, Minera Metalín was entitled to conduct mining exploration activities within the concession areas comprising the Sierra Mojada Project.[939]

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934 Counter-Memorial, para. 65. Del Razo Ochoa ER, para. 40-54. *Compare* Mining Law, Art. 27, **C-0371** *with* 2023 Mining Law, Art. 27, **R-0012** (the Mining Law does establish the duties listed in points (ii) (as it pertains to the duty to giving 90-day notice before starting operations), (iii), (x) (only applicable to concessions granted in tender processes), and (xv) to (xxiv)).

935 Del Razo Ochoa ER, para. 45.

936 2023 Mining Law, Art. 27, Fraction I, **R-0012**. *Compare with* Mining Law, Art. 27, Fraction I, **C-0371**.

937 *See* Section 2.2 *supra*; *see also* Exploitation Concession Title No. 160461 in relation to the Fortuna plot from 21 August 1974 to 20 August 2024, **C-002**; Unificación Concession Title No. 169343 in relation to the Unificación Mineros Norteños plot from 11 November 1981 to 10 November 2031, **C-0003**; Exploitation Concession Title No. 195811 in relation to the Olympia plot from 22 September 1992 to 21 September 2042, **C-0004**; Exploitation Concession Title No. 212169 in relation to the Esmeralda plot from 22 September 2000 to 21 September 2050, **C-0010**; Exploitation Concession Title No. 220569 in relation to the La Blanca plot from 28 August 2003 to 27 August 2053, **C-0011**; Exploration Concession Title No. 223093 in relation to the Los Ramones plot from 15 October 2004 to 14 October 2054, **C-0012**; Exploitation Concession Title No. 224873 in relation to the Volcan Dolores plot from 16 June 2005 to 15 June 2055, **C-0013**; Division Concession Title Nos. 235371, 235372, 235373, 235374, and 235375 in relation to the Sierra Mojada, Sierra Mojada Fracción I, Sierra Mojada Fracción II, Sierra Mojada Fracción III, and Sierra Mojada Fracción IV plots respectively, each from 30 November 1993 to 29 November 2043, **C-0020**; Exploitation Concession Title No. 236714 in relation to the Vulcano plot from 25 August 2010 to 24 August 2060, **C-0016**; Unificación Concession Title No. 238679 in relation to the Esmeralda I Fracción I plot from 31 March 2000 to 30 March 2050, **C-0008**; Unificación Concession Title No. 238680 in relation to the Esmeralda I Fracción II plot from 31 March 2000 to 30 March 2050, **C-0007**; Exploration Concession Title No. 239512 in relation to the Alote Fracción VI plot from 15 December 2011 to 14 December 2061, **C-0021**; Reducción Concession Title No. 245216 in relation to the Cola Sola plot from 23 August 2011 to 22 August 2061, **C-0019**; Reducción Concession Title No. 245217 in relation to the Dormidos plot from 10 April 2007 to 9 April 2057, **C-0014**; Concession Title No. 245216 in relation to the Cola Sola plot from 15 November 2016 to 22 August 2061, **C-0399**; Concession Title No. 245217 in relation to the Dormidos plot from 15 November 2016 to 9 April 2057, **C-0401**.

938 Mining Law, Art. 27, Fraction I, **C-0371**.

939 Mining Law, Art. 27, Fraction I, **C-0371**.

364. In its Counter-Memorial, Mexico also sets out a list of federal and local regulations before concluding that these regulations "go far beyond the concessions" and that because Minera Metalín did not obtain the "entire universe of permits and licenses inherent to such a project" this renders it "unfeasible or inoperative." Mexico's argument could not be more vague. As explained further below, this alleged "entire universe of permits" is an inflated list of regulations irrelevant to the Project's exploration efforts.

2.12.2 Minera Metalín Complied with Mexican Mining Regulations

365. In its Counter-Memorial, Mexico contends that SVB violated certain mining regulations through its alleged failure (i) to pay the mining concessions fees in connection with five mining concessions, namely El Retorno, El Retorno Fracción I, Esmeralda I (211158), Agua Mojada and Mojada 2,[940] and (ii) to invest and carry out works within the concessioned area.[941]

366. Mexico's allegations are hopelessly vague and affect the Claimant's right to present a tailored defense.[942] They lack specificity as to the time period during which the Claimant allegedly failed to pay the legal fees in connection with the five referenced concessions or to invest and carry out works in the concessioned area.[943] In any event, both assertions are factually incorrect.

367. As a threshold matter, it is worth underscoring that Mexico has the burden of proving the facts relied on to support its allegation that Minera Metalín failed to comply with Mexican laws or regulations.[944] This burden cannot be discharged through overbroad and speculative statements supported solely by references to Mexican laws and regulations with explanation of how they apply to the facts, which is the road that Mexico and its legal expert have taken.[945]

368. Crucially, Mexico has failed to produce contemporaneous documents or administrative acts sanctioning Minera Metalín for the alleged infractions of the Mining Law and the Mining

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940 Counter-Memorial, para. 70.This argument is also made in the Counter-Memorial, para. 51, fn. 29.

941 Counter-Memorial, para. 72, first bullet point; Del Razo Ochoa ER, para. 45.

942 Counter-Memorial, paras. 73, 75.

943 It bears noting that in paragraph 70 of its Counter-Memorial, the Respondent lists five concessions in respect of which Minera Metalín allegedly failed to pay its concession fees but in the paragraph immediately after it then asserts that the lack of payment affects six concessions.

944 ICSID Convention, Regulations and Rules 2022, *ICSID Arbitration Rules*, 1 July 2022, Art. 36(2), **CL-0002**.

945 Mr. Del Razo Ochoa submitted 16 exhibits in support of his expert report, 15 of which are copies of Mexican laws and regulations. *See* **CFRO-0001** to **CFRO-0016**.

Regulations during the relevant time period for this arbitration, confirming that these allegations are baseless and simply manufactured for purposes of this arbitration.

369. Moreover, Mexico relies on Mr. Del Razo Ochoa's Expert Report to support its allegations of Minera Metalín's non-compliance but seemingly without having provided him any *contemporaneous* documentation for purposes of his analysis. Instead, Mr. Del Razo Ochoa bases his analysis almost exclusively on what, according to him, are the relevant regulations and just one factual – but non-contemporaneous – document. Namely, Mr. Del Razo Ochoa relies on a letter from the *Secretaría de Medio Ambiente y Recursos Naturales* ("**SEMARNAT**") – the federal agency responsible for applying the federal environmental laws as explained below – dated 30 October 2024 to claim that the Project is unviable.[946] In this letter, SEMARNAT confirms that Minera Metalín obtained on 11 September 2008 the conditional approval of its *Manifestación de Impacto Ambiental* ("**MIA**") – an environmental impact assessment explained further below – to carry out an underground mining pilot project.[947] This piece of evidence has clearly been obtained for purposes of these proceedings and is not contemporaneous. More importantly, the letter is completely unrelated to any alleged mining regulatory infraction and does not support Mr. Del Razo Ochoa's conclusions.

370. The Expert Report's rickety factual basis is apparent on its face. Mr. Del Razo Ochoa explains in his Expert Report that his opinions were based on a "detailed analysis" of the Memorial, the regulatory framework applicable to the Project, "certain documents" issued by the Mexican authorities, and "certain official communications" sent by diverse levels of the Mexican Administration.[948] However, his Expert Report contains no specific reference to the evidence submitted in this arbitration thus far or any analysis of the facts set forth by the Claimant in its Memorial. Accordingly, to correct the record, the Claimant sets forth below the reasons why these allegations are factually wrong.

371. On 29 January 2016, Minera Metalín filed with Economía separate requests to relinquish its rights to the El Retorno, El Retorno Fracción I, Agua Mojada and Mojada 2 mining concessions.[949] When a concessionaire relinquishes its rights under the concession, Articles 27

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946 Del Razo Ochoa ER, para. 106.

947 Official Letter No. SRA/DGIRA/DG/03978-24 from SEMARNAT to Economía dated 30 October 2024, **CFRO-0016**.

948 Del Razo Ochoa ER, para. 2.

949 Application to relinquish the rights under the Agua Mojada mining concession filed by Minera Metalín with DGM, 29 January 2016, **C-0387**; Application to relinquish the rights under the El Retorno Fracción I mining concession filed by Minera Metalín with DGM, 29 January 2016, **C-0388**; Application to relinquish the rights under the Mojada 2 mining concession filed by Minera

of the Mining Law and 71 of the Mining Regulations require the concessionaire to submit a geological report describing the exploration works in the concessioned areas.[950] On the same day Minera Metalín relinquished its rights, it submitted the required geological report to Economía.[951]

372. As noted, Mexico states that Minera Metalín failed to pay the legally required fees for the referenced mining concessions.[952] It is worth pausing here to point out that Mexico appears to be contending that Minera Metalín breached a payment obligation in respect of concessions that it relinquished some three years before Mexico's measures. It is not understood how such an alleged infraction would be of any relevance to this Tribunal's analysis. Obviously, following Minera Metalín's relinquishment of its mining rights in January 2016, the company was under no obligation to make payments with respect to these concessions, confirming that the Respondent's accusation of non-compliance is baseless.

373. In any event, Minera Metalín has timely paid twice every year its fees to the Mexican Government to maintain in good standing the concessions it did not relinquish.[953] Notably, Minera Metalín made those payments even during the periods when the Project was illegally blockaded, reflecting its trust that the Mexican authorities would aid the Claimant to resume exploration activities.[954]

374. It bears noting that the Esmeralda I (211158) plot was incorporated in the current Esmeralda I concession title reissued by DGM on 11 October 2011 with a duration until 30 March 2050.[955] The evidence in the record reflects that, contrary to Mexico's baseless assertion, Minera

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Metalín with DGM, 29 January 2016, **C-0390**; Application to relinquish the rights under the El Retorno mining concession filed by Minera Metalín with DGM, 29 January 2016, **C-0389**.

950 Mining Law, Art. 27, Fraction IX, **C-0371**; 2012 Mining Regulations, Art. 71, **C-0383**.

951 Geological report accompanying the application to relinquish the rights under the Agua Mojada mining concession filed by Minera Metalín with DGM, 29 January 2016, **C-0394**; Geological report accompanying the application to relinquish the rights under the El Retorno Fracción I mining concession filed by Minera Metalín with DGM, 29 January 2016, **C-0392**; Geological report accompanying the application to relinquish the rights under the Mojada 2 mining concession filed by Minera Metalín with DGM, 29 January 2016, **C-0391**; Geological report accompanying the application to relinquish the rights under the El Retorno mining concession filed by Minera Metalín with DGM, 29 January 2016, **C-0393**.

952 Counter-Memorial, para. 70.

953 Composite of spreadsheets summarizing Minera Metalín payments of mining right duties between 2016 and 2023, **C-0440**.

954 Composite of spreadsheets summarizing Minera Metalín payments of mining right duties between 2016 and 2023, **C-0440**; *see also* Barry WS2, para. 62.

955 Reissued Exploitation Concession Title No. 238678 in relation to the Esmeralda I plot, 11 October 2011, p. 2, **C-0381**.

Metalín has timely paid the concession fees in connection with the Esmeralda I mining concession title.[956]

375. With respect to Mexico's second allegation that Minera Metalín failed to invest and carry out works within the concessioned area, Article 27 of the Mining Law mandates concessionaires to carry out works and activities within the concessioned areas.[957] Article 29 further specifies that these works must enhance the geological knowledge of the lot or its mineral reserves through activities such as constructing pits, drilling, creating topographical maps, and conducting physical and chemical analyses.[958] These activities must meet a minimum investment threshold outlined in Article 59 of the Mining Regulations.[959] To ensure compliance, Article 28 of the Mining Law requires concessionaires to submit an annual report to the DGM each May, detailing the works performed during the previous year, with Article 63 of the Mining Regulations setting out the specific requirements for these reports.[960]

376. The record evidence refutes Mexico's argument that Minera Metalín failed to invest or carry works within the concessioned areas. Minera Metalín complied with its duty to carry out works, as reflected in the annual reports submitted to DGM. In contrast, Mexico has failed to produce any affirmative and contemporaneous evidence showing that DGM ever complained about the timeliness or content of these reports, let alone the amounts expended by Minera Metalín during the relevant year.

377. In any event, the record evidence shows that Minera Metalín met this requirement. For instance, on 25 May 2016, Minera Metalín submitted its annual report verifying the execution of works in the Sierra Mojada concession area for the year 2015.[961] Minera Metalín showed that it had conducted chemical analysis of samples, metallurgical tests and experiments, acquisition, and lease and maintenance of work vehicles totaling MXN 153,636.[962] Notably, in

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956 Composite of spreadsheets summarizing Minera Metalín payments of mining right duties between 2016 and 2023, **C-0440**.

957 Mining Law, Art. 27, Fraction I, **C-0371**.

958 Mining Law, Art. 29, **C-0371**.

959 2012 Mining Regulations, Art. 59, **C-0383**.

960 Mining Law, Art. 28, **C-0371**. 2012 Mining Regulations, Art. 63, **C-0383**.

961 Report to verify performance of exploration works filed by Minera Metalín to DGM, 25 May 2016, p. 2, **C-0396**. It bears noting that, as indicated by Mexico in its Counter-Memorial, on 15 January 2016, Minera Metalín grouped most of its concessions under the leading title of "Sierra Mojada," allowing it to present one consolidated report to verify the compliance of the works in within the concession. *See* Counter-Memorial, para. 67; Oficio No. SE/181/00093/2016, 15 January 2016 **R-0013**; *see also Manual de Organización,* DGM, July 2021, p. 47, **C-0427**.

962 Report to verify performance of exploration works filed by Minera Metalín to DGM, 25 May 2016, p. 2, **C-0396**.

the financial assessment section of the report, Minera Metalín calculated a carryover credit from previous reports exceeding MXN 236 million.[963] This confirmed that during the previous years, Minera Metalín had not only complied with its duty to perform works but had exceeded the investment thresholds established under the Mining Regulations.

378. Similarly, on 23 May 2017, Minera Metalín submitted its annual report verifying the execution of works in the Sierra Mojada concession area for the year 2016. Minera Metalín demonstrated that it had drilled 173 holes in the Sierra Mojada concession, expending MXN 7.14 million to do this.[964] The carryover credit for activities conducted in previous years was MXN 245 million, again demonstrating that, contrary to Mexico's assertions, Minera Metalín had invested significantly in the advancement of the Sierra Mojada Project.[965]

379. Also, on 7 May 2019, Minera Metalín filed its annual report verifying the execution of works in the Sierra Mojada concession area for the year 2018. Minera Metalín showed that it carried out significant works such as topographical and geological activities, acquired and leased laboratory equipment destined to metallurgical research and mining and transportation machinery, expending MXN 19.1 million to complete these activities.[966] The carryover credit for activities conducted in previous years was MXN 267 million, again demonstrating that, contrary to Mexico's assertions, Minera Metalín continued to conduct significant works in the Sierra Mojada Project.[967]

380. Unfortunately, as demonstrated in the Memorial and as explained above, once the Continuing Blockade was instituted in September 2019, no further exploration works could be carried out and all operations within Sierra Mojada were halted.[968] Naturally, the blockade prevented Minera Metalín from continuing exploration works and investing in the Sierra Mojada region. For this reason, it is hardly a surprise that Mr. Del Razo Ochoa was unable to verify that Minera Metalín reported "no production whatsoever" during the period between 2019 and 2023.[969]

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963 Report to verify performance of exploration works filed by Minera Metalín to DGM, 25 May 2016, p. 3, **C-0396**.

964 Report to verify performance of exploration works filed by Minera Metalín to DGM, 23 May 2017, pp. 3-10, **C-0403**.

965 Report to verify performance of exploration works filed by Minera Metalín to DGM, 23 May 2017, pp. 3-10, **C-0403**.

966 Report to verify performance of exploration works filed by Minera Metalín to DGM, 7 May 2019, p. 3, **C-0406**.

967 Report to verify performance of exploration works filed by Minera Metalín to DGM, 7 May 2019, p. 5, **C-0406**.

968 Memorial, para. 2.150; *supra* Section 2.4.

969 Del Razo Ochoa ER, para. 99. *See e.g.*, Report to verify performance of exploration works filed by Minera Metalín to DGM, 10 June 2021, p. 3, **C-0425** (explaining that the Continuing Blockade impeded Minera Metalín to conduct works in the Sierra Mojada Project).

What this disingenuous statement confirms, rather than Minera Metalín's non-compliance, is the expert's lack of significant review of the documents reflecting the factual background of this arbitration.

2.12.3 Minera Metalín Obtained the Required Environmental Authorizations to Carry out Exploration Activities

381. In its Counter-Memorial, Mexico argues that the Claimant failed to obtain the necessary environmental authorizations required to develop the Sierra Mojada Project, making it unviable and inoperable.[970] As explained below, Mexico's argument is misguided.

382. Specifically, Mexico contends that Minera Metalín had to obtain approval of its environmental impact assessment or MIA to maintain and operate a viable mining project.[971] Mexico acknowledges that, in 2008, SEMARNAT conditionally approved Minera Metalín's MIA for the Sierra Mojada Project.[972] That same year, Minera Metalín requested that SEMARNAT suspend the MIA evaluation and subsequently withdrew it.[973] Mexico argues that this suspension and withdrawal indicate that no works or activities were carried out in connection with the Project.[974] Mexico further argues that since the 2008 MIA was withdrawn, Minera Metalín has not filed a new MIA application, "implying that the Sierra Mojada project did not actually have an [Environmental Impact Authorization] in place, a fundamental requirement for its development" and therefore "[t]his reinforces the conclusion that the project is unviable and inoperable."[975] Mr. Del Razo Ochoa's Expert Report supports this confused proposition, explaining that the lack of an approved MIA renders the Project unviable.[976]

383. Before responding to Mexico's flawed argument, the Claimant offers a brief overview of the environmental regulations governing mining activities to illustrate that the MIA is not the only environmental authorization applicable to mining exploration and that Minera Metalín obtained the appropriate authorization.

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970 Counter-Memorial, para. 72, second bullet point.

971 Counter-Memorial, para. 72.

972 Counter-Memorial, para. 72, second bullet point.

973 Counter-Memorial, para. 72, second bullet point.

974 Counter-Memorial, para. 72, second bullet point.

975 Counter-Memorial, para. 72.

976 Del Razo Ochoa ER, para. 65.

384. Under Mexican law, mining exploration activities must comply with the environmental provisions set forth in the *Ley General del Equilibrio Ecológico y la Protección al Ambiente* ("**LGEEPA**")[977] and its Regulations ("**R-LGEEPA**"). SEMARNAT is the agency responsible for applying environmental laws.[978] In addition, SEMARNAT is empowered to issue "official norms," or *normas oficiales mexicanas* ("**NOMs**"), which prescribe certain technical requirements and specifications applicable to mining exploration and other activities deemed to have environmental impacts.[979]

385. NOM-120 is the official norm that applies to mining exploration activities.[980] It requires that, where exploration activities will have an environmental impact on an area greater than 25% of the total surface area of the concession,[981] the concessionaire must file with SEMARNAT a MIA for its approval before commencing exploration activities.[982]

386. The MIA is a technical environmental document in which the project owner details the potential environmental impacts of the proposed works and activities, as well as the measures to prevent, mitigate, and compensate for any negative effects on the environment.[983] The MIA serves primarily to identify environmental risks and prevention measures to mitigate environmental impacts.[984] It bears noting that an approved MIA is required to carry out mining *exploitation* works.[985]

387. In contrast, for exploration activities that do not exceed the 25% threshold under NOM-120, the concessionaire must file an *informe preventivo* ("**IP**").[986] An IP is an environmental document describing the intended activities and proposing prevention and mitigation measures

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977 LGEEPA, Art. 28, Fraction III, **C-0365**; R-LGEEPA, Art. 5, Section L), Sub-Section I, **C-0369**.

978 LGEEPA, Arts. 6-8, **C-0365**.

979 LGEEPA, Art. 36, **C-0365**.

980 During the relevant period Minera Metalín carried out its exploration activities, two versions of NOM-120 were relevant: (i) NOM-120-SEMARNAT-1997 published in the Mexican Official Diary on 19 November 1998, **C-367**, and (ii) NOM-120-SEMARNAT-2011, in force as of May 2012, **C-0382**.

981 NOM-120-SEMARNAT-1997 published in the Mexican Official Diary on 19 November 1998, Section 4.3, **C-0367**; NOM-120-SEMARNAT-2011, Section 4.3, **C-0382**.

982 LGEEPA, Art. 28, **C-0365**.

983 LGEEPA, Art. 28, Fraction III, **C-0365**; R-LGEEPA, Art. 5, Section L, Sub-Section I, **C-0369**.

984 LGEEPA, Art. 28, Fraction III, **C-0365**; R-LGEEPA, Art. 5, Section L, Sub-Section I, **C-0369**.

985 LGEEPA, Art. 28, Fraction III, **C-0365**; R-LGEEPA, Art. 5, Section L, Sub-Section I, **C-0369**.

986 LGEEPA, Art. 31, **C-0365**; NOM-120-SEMARNAT-1997, 19 November 1998, **C-0367**.

to offset any environmental impacts.[987] Before 2012, filing and obtaining an IP was optional.[988] If no IP was filed, however, NOM-120 required the concessionaire to notify SEMARNAT five days before starting the exploration activities.[989] In 2012, the R-LGEEPA was amended to make the approval of an IP mandatory for all activities that fell below the relevant threshold for a MIA.[990]

388. As explained above, Mexico argues that in 2008, Minera Metalín obtained approval for – but later withdrew – its MIA to carry out a mining project, after which it failed to obtain the necessary environmental authorizations required to develop the Sierra Mojada Project, making it unviable and inoperable.[991] As explained below, Mexico's argument is plainly wrong.

389. There is no disagreement between the Parties that on 20 June 2008, Minera Metalín filed a MIA application with SEMARNAT for its project to construct a portal and a ramp to test an underground mining installation in the Sierra Mojada Municipality.[992] On 11 September 2008, SEMARNAT conditionally approved Minera Metalín's proposed MIA.[993] On 12 September 2008, however, Minera Metalín requested that SEMARNAT suspend the MIA assessment and ultimately withdrew the MIA to concentrate its exploration activities within other targets in the concessioned area.[994]

390. Contrary to Mexico's assertion that the lack of an approved MIA rendered the Project inoperable, Minera Metalín was able to carry out its exploration activities – which fell below the levels of environmental impact established in the regulation – through either the filing of a notice of commencement under NOM-120 before 2012 or the filing and approval of an IP by

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987 R-LGEEPA, Art. 3, Fraction XI, **C-0369**; NOM-120-SEMARNAT-1997, 19 November 1998, **C-0367**.

988 Prior to the entry into force of NOM-120-SEMARNAT-2011 in 2012, NOM-120-SEMARNAT-1997 did not require the submission and approval of a preventive report to carry out mining exploration activities. *See*, NOM-120-SEMARNAT-1997, 19 November 1998, Section 4.1.2, **C-0367**.

989 NOM-120-SEMARNAT-1997, 19 November 1998, Section 4.1.2 and Annex 1, **C-0367**.

990 LGEEPA, Art. 7, providing that "...before beginning the work or activity in question, *it may* submit a preventive report to the Secretariat for the purposes indicated in this article." (*emphasis added*), **C-0365**.

991 Counter-Memorial, para. 72, second bullet point.

992 Minera Metalín, *Manifestación de Impacto Ambiental Modalidad Particular, proyecto: portal y rampa para prueba de minado subterráneo en Sierra Mojada, Coahuila*, 20 June 2008, p. 2, **C-0373**.

993 Official Letter SGPA DGIRA DG.2947.08 from DGIRA approving Minera Metalín's MIA, 11 September 2008, p. 15, **C-0374**.

994 Letter from Minera Metalín to SEMARNAT, 12 September 2008, **C-0375**.

SEMARNAT after 2012.[995] Minera Metalín conducted its exploration activities in compliance with this regulatory framework.

391. For instance, between 2006 and 2011, Minera Metalín notified SEMARNAT about its exploration activities through a notice of commencement, in accordance with the provisions of NOM-120 then in force.[996] SEMARNAT did not object to Minera Metalín's exploration activities, which encompassed the completion of drilling programs within the concessioned area including La Perla, Unificación Mineros Norteños, Dulces Nombres, and Dolomita.[997]

392. After the revision of NOM-120 in 2012, which as stated required filing IP applications with SEMARNAT, Minera Metalín continued its exploration activities in full compliance with the updated regulation. The company submitted the necessary IP applications, all of which were approved by SEMARNAT. For instance, on 10 October 2016, SEMARNAT granted Minera Metalín the necessary IP to complete the "Sierra Mojada" drilling exploration program for a period of eight years within the concessioned areas.[998] Notably, SEMARNAT indicated that, based on the low-disturbance effects of the drilling activities, Minera Metalín was not required to file a MIA to carry out its drilling program.[999]

393. On 22 March 2019, less than six months before the imposition of the Continuing Blockade, SEMARNAT approved an additional IP authorizing drilling activities for Minera Metalín's "Sierra Mojada 2" drilling program.[1000] Once again, SEMARNAT authorized the drilling program for a period of eight years and the authority confirmed that no MIA was required to complete the drilling program.[1001] Unfortunately, exploration activities were halted as a result of the Continuing Blockade.[1002]

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995 *See* LGEEPA, Art. 31, **C-0365**; NOM-120-SEMARNAT-1997, 19 November 1998, **C-0367**.

996 NOM-120-SEMARNAT-1997, 19 November 1998, **C-0367**.

997 Notice of commencement of activities filed by Minera Metalín to SEMARNAT, April 2006, **C-0372**.

998 Official letter SGPA/1833/COAH/2016 approving Minera Metalín's Sierra Mojada drilling program, 10 October 2016, p. 8, **C- 0397**.

999 Official letter SGPA/1833/COAH/2016 approving Minera Metalín's Sierra Mojada drilling program, p. 8, 10 October 2016, **C- 0397**; *see also* Compliance report filed by Minera Metalín with SEMARNAT, 30 April 2017, **C-0402**.

1000 Official letter SGPA/473/COAH/2019 approving Minera Metalín's Sierra Mojada 2 drilling program, 22 March 2019, p. 18, **C- 0405**.

1001 Official letter SGPA/473/COAH/2019 approving Minera Metalín's Sierra Mojada 2 drilling program, 22 March 2019, p. 18, **C-0405**.

1002 Official letter SGPRA/019/COAH/2023 presumably dated 2023 acknowledging Minera Metalín's 2022 annual report, p. 1, **C- 0435** (acknowledging that since 2019 mining exploration activities have been halted due to the Continuing Blockade).

394. In sum, while a MIA is necessary to perform mining exploitation activities, it was not required to complete Minera Metalín's drilling programs. Minera Metalín conducted its exploration activities in compliance with environmental regulations and was steadily progressing toward exploitation before the installation of the Continuing Blockade. At no point did any Mexican authority complain that Minera Metalín did not have the appropriate authorizations. As Mr. Barry notes in his second statement, before Minera Metalín initiated its exploitation activities, it would have applied for and obtained the necessary MIA.[1003]

2.12.4 Mexico's Application of the Regulatory Framework to the Project is Flawed

395. Mexico argues in its Counter-Memorial that "the Claimant only complied with one of the 19 administrative acts indispensable for the development" of the Project.[1004] As shown below, Mexico's argument is both beside the point, as well as patently incorrect.

396. In support of Mexico's assertion, Mr. Del Razo Ochoa's Expert Report makes a lengthy presentation of the allegedly applicable Mexican regulations on emissions control,[1005] national waters,[1006] dangerous residues management,[1007] explosives,[1008] and construction[1009] that the Project purportedly had to comply with to be considered viable.[1010]

397. Notably, Mexico's legal expert does not apply these regulations to the Sierra Mojada Project in light of its current stage of development, *i.e.*, exploration. Put differently, the supposedly 19 administrative acts Mexico invokes as necessary to deem the Project operable are completely disconnected from the facts of this arbitration. As briefly explained below, these regulations are applicable to a mining project during its exploitation activities and *not* to the Sierra Mojada Project's exploration works.

- Regulations on emissions: According to Mr. Del Razo Ochoa, mining projects in general require federal and local licenses relating to emissions of pollutants to

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1003 Barry WS2, para. 18.

1004 Counter-Memorial, para. 73.

1005 Del Razo Ochoa ER, paras. 66-71.

1006 Del Razo Ochoa ER, paras. 72-75.

1007 Del Razo Ochoa ER, paras. 76-82.

1008 Del Razo Ochoa ER, paras. 83-85.

1009 Del Razo Ochoa ER, paras. 86-90.

1010 Del Razo Ochoa ER, para. 116.

operate.[1011] However, these licenses are generally granted *after* SEMARNAT approves a MIA and the project is about to initiate production.[1012] Indeed, SEMARNAT issues the federal authorization, *i.e.*, the *Licencia Ambiental Única* ("Unified Environmental License") under Article 111 BIS of the LGEEPA to regulate the emission of pollutants into the environment by industrial projects, including those involving mineral benefit and exploitation.[1013] Exploration works generally – as was the case with the Project – do not require obtaining this license.[1014]

- With respect to local authorizations, Mr. Del Razo Ochoa references the *Licencia de Funcionamiento* ("Functioning License") issued by the Coahuila State Secretary of Environment, which similarly regulates the emission of pollutants by fix sources of emissions, *i.e.* industrial complexes or commercial installations.[1015] Minera Metalín did not emit pollutants from its exploration activities through fix sources and thus was not required to obtain the *Licencia de Funcionamiento*.[1016]

- Regulations on the use of national waters: Both the Respondent and Mr. Del Razo Ochoa explain that in May 2023, the *Ley de Aguas Nacionales* ("National Waters Law") was amended to require water concession holders issued by *Comisión Nacional de Agua* ("**CONAGUA**") – the federal agency under SEMARNAT that applies the water regulations – to register their concessions specifying the "mining industrial use" of the implicated waters within 90 days after the entry into force of the amendment.[1017] According to Mexico, without water concessions, the Project cannot operate.[1018] However, again, Minera Metalín was not required to obtain water concessions from CONAGUA to conduct its exploration activities given that, as explained above,

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1011 Del Razo Ochoa ER, para. 66.

1012 Economía, *Portafolio de Proyectos Mineros Mexicanos*, September 2022, p. 15, **C-0429**.

1013 LGEEPA, Arts. 6, Fraction IV (defining fix sources or emissions) and 111 BIS, **C-0365**.

1014 Economía, *Portafolio de Proyectos Mineros Mexicanos*, September 2022, p. 15, **C-0429**.

1015 Del Razo Ochoa ER, para. 66. *See Reglamento de la Ley del Equilibrio Ecológico y Protección al Ambiente del Estado de Coahuila de Zaragoza en Materia de Prevención y Control de la Contaminación a la Atmósfera*, Art. 4, Fraction XXIV, **CFRO-0008** (defining the *Licencia de Funcionamiento* as "[a]uthorization for the operation or functioning of equipment, machinery, or activities of fixed sources that generate or may generate odors, gases, solid or liquid particles into the atmosphere;").

1016 *See* NOM-120-SEMARNAT-2011, in force as of May 2012, Section 4.1.13, **C-0382**; *see also* Official Letter No. SGPA/473/COAH/2019 from SEMARNAT approving Minera Metalín's Sierra Mojada 2 drilling program, 22 March 2019, p. 9, **C-0405**.

1017 Counter-Memorial, para. 72, third bullet point; Del Razo Ochoa ER, para. 73.

1018 Counter-Memorial, para. 72, third bullet point.

Article 19 of the Mining Law grants the concessionaire the right to use underground working water (*aguas de laboreo*).[1019] Moreover, as explained above, the May 2023 reform to the National Waters Law took effect nine months *after* the Claimant's loss crystallized, imposing the regulatory requirement to register the water concessions for mining industrial use is irrelevant for the instant matter. Finally, there is no evidence to suggest that Minera Metalín would have been unable to obtain water concessions given the historic mining operations in the area.

- In a desperate attempt to support its allegation that the Project was inoperable, Mr. Del Razo Ochoa's Expert Report cites a letter from the *Gerencia del Registro Público de Derechos del Agua* ("Directorate of the Public Registry of Water Rights") dated 19 November 2024 allegedly confirming that Minera Metalín lacked registered water concessions.[1020] Even though Minera Metalín did not require water concessions to perform exploration activities, Mexico and its expert failed to submit this letter with its Counter-Memorial and the Expert Report, making it impossible for the Claimant to address its contents. Notably, again, it appears that Mr. Del Razo Ochoa's Expert Report is relying upon documents prepared solely for the purpose of this arbitration and not on contemporaneous factual evidence.

- As stated above, Minera Metalín did not require from CONAGUA water *concessions* to conduct mining exploration works as it had the right under Article 19 of the Mining Law to use water for this purpose. Without prejudice of this right, Minera Metalín was required under Article 32 of the National Waters Law to register with CONAGUA the intended works to capture and use underground water.[1021] For this reason, on 21 June 2010 Minera Metalín registered with CONAGUA – through its subsidiary Contratistas de Sierra Mojada S.A. de C.V. ("**Contratistas**")[1022] – five requests to use underground water from a local aquifer as permitted under Article 18 of the Law of National Waters.[1023] In the resolutions ordering the registration of the intended works,

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1019 Mining Law, Art. 19, Fraction V, **C-0371**; s*ee also, Agua y Minería*, Santamarina Steta, 5 July 2023, p. 3 (point 4), **C-0398**.

1020 Del Razo Ochoa ER, paras. 107, 110.

1021 *See e.g.,* Official Letter No. BOO.E.21.1.1708/2010 from CONAGUA to Contratistas, 21 June 2010, p. 2, **C-0377**; Law of National Waters, Art. 32, **CFRO-0009**.

1022 Contratistas was merged into Minera Metalín on 26 August 2021. *See* Richards WS, para. 20.

1023 Law of National Waters, Art. 18, **CFRO-0009**; Official Letter No. BOO.E.21.1.1708/2010 from CONAGUA to Contratistas, 21 June 2010, **C-0377**; Official Letter No. BOO.E.21.1.1709/2010 from CONAGUA to Contratistas, 21 June 2010, **C-0378**; Official Letter No. BOO.E.21.1.1711/2010 from CONAGUA to Contratistas, 21 June 2010, **C-0380**; Official Letter No.

CONAGUA expressly confirmed that Contratistas did not require a water concession to capture and use the water necessary to carry out its exploration activities and industrial purposes.[1024] Notably, Mexico has failed to produce any contemporaneous evidence demonstrating that Minera Metalín was not complying with the applicable regulatory framework on the use of water.

- Regulations on hazardous residues management: Mr. Del Razo Ochoa contends that a standard mining project would be expected to generate hazardous residues and the Project lacked permits to manage them, making the Project unviable.[1025] However, Minera Metalín did not generate hazardous residues from its exploration activities as defined under the *Ley General para la Prevención y Gestión Integral de los Residuos* ("General Law for the Prevention and Comprehensive Management of Waste").[1026] Relatedly, Minera Metalín correctly managed the waste it generated through its exploration activities, as reflected in Minera Metalín's IP approved by SEMARNAT on 22 March 2019. The company adopted robust measures to carefully handle waste material, such as (i) constructing a warehouse to store fuels and oils used by machinery,[1027] and (ii) disposing of the mineral waste material in containers kept on the Project Site.[1028] Moreover, at no point did Mexican authorities ever complain about Minera Metalín's handling of waste materials.

- Regulations on the use of explosives: Mr. Del Razo Ochoa contends that mining projects generally utilize explosives to remove soil and materials and thus require compliance with the *Ley Federal de Armas de Fuego y Explosivos* ("Federal Law on Fire Weapons and Explosives").[1029] However, Mr. Del Razo Ochoa does not set out

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BOO.E.21.1.1707/2010 from CONAGUA to Contratistas, 21 June 2010, **C-0376**; Official Letter No. BOO.E.21.1.1710/2010 from CONAGUA to Contratistas, 21 June 2010, **C-0379**.

1024 Official Letter No. BOO.E.21.1.1708/2010 from CONAGUA to Contratistas, 21 June 2010, p. 2, **C-0377**.

1025 Del Razo Ochoa ER, paras. 78, 116.

1026 *Ley General para la Prevención y Gestión Integral de los Residuos*, Art. 5, Fraction XXXII, **CFRO-0010** (defining dangerous residues as ("[w]aste that possesses any of the following characteristics: corrosivity, reactivity, explosiveness, toxicity, flammability, or that contains infectious agents that render it hazardous, as well as containers, packaging, and soil that have been contaminated when transferred to another site, in accordance with the provisions of this Law.").

1027 Official Letter No. SGPA/473/COAH/2019 from SEMARNAT dated 22 March 2019 approving Minera Metalín's Sierra Mojada 2 drilling program, p. 9, **C-0405**.

1028 Official Letter No. SGPA/473/COAH/2019 from SEMARNAT dated 22 March 2019 approving Minera Metalín's Sierra Mojada 2 drilling program, p. 11, **C-0405**.

1029 Del Razo Ochoa ER, para. 83.

any factual basis to assert that the referenced law would be applicable to the Project. As made clear in Mr. Barry's second statement, Minera Metalín did not use explosives for its exploration activities, but rather, explored through drilling.[1030] Minera Metalín only used explosives once to construct a drilling road at the base of a mountain, obtaining the required permit to perform that task.[1031]

- Regulations on construction: Mr. Del Razo Ochoa explains that the Project required an approved urban impact assessment and a construction license in accordance with the Coahuila State *Ley de Asentamientos Humanos, Ordenamiento Territorial y Desarrollo Urbano* ("Law on Human Settlements, Land Use Planning, and Urban Development").[1032] Again, Minera Metalín did not require either the impact assessment or the construction license to carry out exploration activities. These provisions would only become relevant during the Project's exploitation phase, which would have been reached had the Continuining Blockade not halted the entire operation.

- The environmental restoration, closure and post-closure report: Mr. Del Razo Ochoa's Expert Report contends that Minera Metalín required from SEMARNAT an approved restoration, closure, and post-closure report during the Project's initial phase.[1033] Through this report, a mining concessionaire outlines the restoration and rehabilitation measures through the entire cycle of the mining project.[1034] However, this new obligation established under Article 107 BIS of the LGEEPA was introduced in May 2023, namely, nine months after the Claimant's loss crystallized.[1035] Hence, this reporting requirement is not applicable to the factual background of this arbitration.[1036]

398. Based on the foregoing, Mexico's unviability and non-compliance defenses are yet another red herring aimed at obscuring the Respondent's liability for failing to assist the Claimant in restoring law and order and in regaining access to the Project from the blockaders. The long

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1030 Barry WS2, fn. 10.

1031 Defense Secretary, Official Letter No. SM/0200, 1 January 2013, **C-0469**.

1032 Del Razo Ochoa ER, paras. 88-89; *see also, Ley de Asentamientos Humanos, Ordenamiento Territorial y Desarrollo Urbano del Estado de Coahuila de Zaragoza,* Arts. 129, 280, **CFRO-0014**.

1033 Del Razo Ochoa ER, para. 46.

1034 Del Razo Ochoa ER, para. 46.

1035 *See* LGEEPA, Art. 107 BIS, **C-0365**; Del Razo Ochoa ER, paras. 46, 54.

1036 *See* LGEEPA, Art. 107 BIS, **C-0365**; Del Razo Ochoa ER, paras. 46, 54.

regulatory detour presented in this Section was necessary only because the Respondent has gone to great lengths to distract the Tribunal from the crucial issues presented in this arbitration. After setting the record straight and disproving Mexico's baseless factual allegations, in the next sections the Claimant reiterates what has been demonstrated all along in the Memorial: the Tribunal has jurisdiction and Mexico is liable for the breach of its international obligations under the NAFTA.

3. THE TRIBUNAL HAS JURISDICTION OVER SVB'S CLAIMS

399. SVB established in its Memorial that the Tribunal has jurisdiction over the present dispute, as it has satisfied all of the jurisdictional requirements under the USMCA, the NAFTA, and the ICSID Convention.[1037] Specifically, the Tribunal has jurisdiction *ratione personae*, because SVB is a covered investor under the USMCA, the NAFTA, and the ICSID Convention;[1038] the Tribunal has jurisdiction *ratione materiae*, because SVB's claims arise out of legacy investments under USMCA Annex 14-C and it made covered investments within the meaning of NAFTA Article 1139 and ICSID Convention Article 25(1);[1039] the Tribunal has jurisdiction *ratione temporis*, because SVB has met all of the temporal requirements under the USMCA and the NAFTA;[1040] and the Tribunal has jurisdiction *ratione voluntatis*, because both SVB and Mexico consented to the submission of the present dispute to ICSID arbitration.[1041]

400. In its Counter-Memorial, Mexico raises three unfounded objections to jurisdiction:

- *First*, Mexico contends that the Tribunal does not have jurisdiction *ratione temporis* in relation to SVB's claims for breach of NAFTA Article 1105 (Minimum Standard of Treatment), because SVB's claims are allegedly time-barred.[1042]

- *Second*, Mexico contends that the Tribunal does not have jurisdiction *ratione voluntatis* or *ratione temporis* in relation to SVB's claim for breach of NAFTA Article 1110 (Expropriation and Compensation), because SVB's claim allegedly cannot be

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1037 Memorial, Section 3.

1038 Memorial, Section 3(A).

1039 Memorial, Section 3(B).

1040 Memorial, Section 3(C).

1041 Memorial, Section 3(D).

1042 Counter-Memorial, Section 3(A)(1).

submitted to arbitration under USMCA Annex 14-C, as the expropriation purportedly took place when Mexico was no longer subject to the obligations in the NAFTA.[1043]

- *Third*, Mexico contends that the Tribunal does not have jurisdiction *ratione materiae* or *personae* over "certain assets."[1044]

401. Notably, Mexico does not raise any jurisdictional objections in respect of SVB's claims under NAFTA Articles 1102 and 1103 (National Treatment and Most-Favored Nation Treatment).

402. As elaborated below, none of these objections has any merit:

- *First*, the Tribunal has jurisdiction *ratione temporis* in respect of SVB's claims under NAFTA Article 1105. As set forth in the Memorial and below, those claims, which arise out of Mexico's continuing breach of its obligations to accord fair and equitable treatment and full protection and security to SVB's protected investments, are timely.[1045] Specifically, Mexico's breaches of NAFTA Article 1105 are continuing in nature, have not ceased, and therefore operate to renew the limitation period. In any event, SVB's claims under NAFTA Article 1105 are timely because no more than three years have elapsed since SVB, or Minera Metalín, first acquired knowledge of the loss and damage caused by Mexico's continuing breaches and the filing of SVB's Request for Arbitration on 28 June 2023.[1046]

- *Second*, the Tribunal has jurisdiction *ratione voluntatis* and *ratione temporis* under USMCA Annex 14-C in respect of SVB's claim under NAFTA Article 1110(1), which arises out of Mexico's unlawful indirect expropriation of SVB's protected investments. As set forth in the Memorial and below, Mexico's unlawful conduct in this case is continuing in nature and commenced prior to the termination of the NAFTA.[1047] The Tribunal therefore has jurisdiction *ratione voluntatis* and *ratione temporis* over SVB's claims, including its claim under NAFTA Article 1110(1). In any event, Mexico consented to arbitration with respect to legacy investment claims

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1043 Counter-Memorial, Section 3(A)(1).

1044 Counter-Memorial, Section 3(A)(3).

1045 Memorial, Section 3(C)(ii).

1046 Memorial, para. 3.27.

1047 Memorial, para. 3.25.

arising out of alleged breaches of Section A of Chapter 11 of the NAFTA at any time until the end of the three-year transition period on 30 June 2023.[1048]

- *Third*, the Tribunal has jurisdiction *ratione materiae* over SVB's claims. SVB's legal rights and assets in the Sierra Mojada Project are qualifying investments over which it maintains ownership.[1049]

3.1 The Tribunal Has Jurisdiction *Ratione Temporis* Over SVB's Claim for Mexico's Continuing Breaches of Its Obligations under NAFTA Article 1105

403. NAFTA Articles 1116(2) and 1117(2) establish that an investor may not make a claim if more than three years have elapsed from the date on which the investor, or its enterprise, acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor, or its enterprise, has incurred loss or damage.[1050]

404. As these provisions make clear, and as NAFTA Chapter 11 tribunals have consistently affirmed, the limitation period starts to run only when the investor, or its enterprise, has acquired *both* knowledge of the alleged breach *and* knowledge that it has incurred loss or damage as a result.[1051] Where knowledge of these two events is not simultaneous, the limitation period runs from the later of these events.[1052]

1048 Memorial, para. 3.22.

1049 Memorial, Section 3(B).

1050 NAFTA, Articles 1116(2),1117(2), **CL-0004**.

1051 *See, e.g., Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada, 24 February 2000, para. 11, **CL-0191**, (observing that, "[b]efore time can begin to run in terms of NAFTA Article 1116(2) in respect of a claim by an Investor, *two matters must have come to its actual, or properly imputed, knowledge, knowledge of the breach and knowledge that it has incurred loss or damage thereby*") (emphasis added); *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Award, 25 October 2022, para. 405, **RL-0025**, (observing that "[t]he limitation period however starts running only after knowledge of the alleged breach and loss is first acquired"); *Energia y Renovacion Holding, S.A. v Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, 31 March 2025, para. 240, **CL-0176**, (observing that, "for the statute of limitations to begin to run, *there must be both knowledge of the violation (real or putative) and actual knowledge of the damages suffered*") (emphasis added).

1052 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award, 8 June 2009, para. 347, **CL-0088** (observing that "Article 1117(2) does not provide for a simple, fixed three-year period before the date the claim is brought, but rather refers to three years '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.' *As one commentary opines, '[t]he three-year limitation period presumably runs from the later of these events [knowledge of breach and of damage] to occur in the event that the knowledge of both events is not simultaneous*'") (emphasis added); *see also Energia y Renovacion Holding S.A. v Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, 31 March 2025, para. 240, **CL-0176** ("In light of this structure, *when there is no simultaneity*

405. As SVB demonstrated in its Memorial, its claims under the NAFTA, including NAFTA Article 1105, are timely because no more than three years have elapsed since SVB, or Minera Metalín, acquired knowledge of the loss and damage caused by Mexico's continuing breaches on 31 August 2022 and the filing of SVB's Request for Arbitration on 28 June 2023.[1053]

406. In its Counter-Memorial, Mexico argues that the Tribunal does not have jurisdiction *ratione temporis* with respect to SVB's NAFTA Article 1105 claims, because SVB has allegedly failed to comply with the limitation period set out in NAFTA Articles 1116(2) and 1117(2).[1054] Notably, Mexico does *not* raise this objection with respect to any of SVB's other claims under the NAFTA, including NAFTA Articles 1102 and 1103.[1055]

407. Specifically, while Mexico agrees with SVB that the cut-off date, or *dies a quo*, for purposes of NAFTA Articles 1116(2) and 1117(2) is 28 June 2020, *i.e.*, three years before SVB filed its Request for Arbitration (the "**Cut-Off Date**"),[1056] Mexico contends that SVB knew or should have known of Mexico's breaches of NAFTA Article 1105 before the Cut-Off Date,[1057] and that SVB likewise had knowledge of the loss or damage arising from those breaches before the Cut-Off Date, rendering SVB's NAFTA Article 1105 claims untimely.[1058]

408. As set forth below, Mexico's objections are legally misguided and factually incorrect.

3.1.1 SVB's Claims Arise out of Mexico's Continuing Breaches which Operate to Renew the Limitation Period

409. In its Counter-Memorial, Mexico contends that "[s]everal NAFTA tribunals have determined that the temporal restriction established by [NAFTA Articles 1116(2) and 1117(2)] is clear and rigid."[1059] Mexico further contends that it is "reasonable to assume" and/or "likely" that SVB knew or should have known of Mexico's alleged breach during the more than nine months that elapsed between the commencement of the Continuing Blockade in September 2019 and the

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between the violation and the damage, it can be assumed that the limitation period only begins to run when the damage is known, since the occurrence of the violation logically precedes the existence of the damage.") (emphasis added).

1053 Memorial, para. 3.24, 3.27.

1054 Counter-Memorial, Section 3(A)(1).

1055 *See* Counter-Memorial Section 3(A)-(C).

1056 Memorial, paras. 3.24, 3.27.

1057 Counter-Memorial, paras. 287, 292.

1058 Counter-Memorial, para. 288.

1059 Counter-Memorial, para. 281.

Cut-Off Date under the NAFTA, *i.e.*, 28 June 2020.[1060] Thus, Mexico contends, SVB's claims under NAFTA Article 1105 are untimely.[1061] Mexico's contentions are unfounded.

410. While there is no dispute between the Parties that the limitation period imposed by the NAFTA is clear and unambiguous, Mexico fails to acknowledge that the breaches at issue in this case under NAFTA Article 1105 are continuing in nature. Specifically, as set forth in the Memorial and above, Mexico's breaches of NAFTA Article 1105 span from the imposition of the Continuing Blockade in September 2019 until the present, and arise out of Mexico's continued failure to take any reasonable action in its power to end it,[1062] notwithstanding Minera Metalín's and SVB's repeated requests for intervention from the Mexican authorities and Minera Metalín's diligent pursuit of its criminal complaint.[1063]

411. As principles of international law confirm, where, as here, the State's breach is continuing in nature, the limitation period does not start to run until the relevant unlawful activity ceases.[1064] This is because the State is considered to repeat the relevant act or omission day after day, and thus the claimant becomes aware of the breach day after day, thereby renewing the limitation period until the relevant act or omission stops.[1065]

412. As Article 14 of the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts (the "**ILC Articles**") makes clear, where the State's breach of an international obligation is continuing in nature, that breach extends over the entire period in which the State's wrongful act or omission persists:

1060 Counter-Memorial, para. 287.

1061 Counter-Memorial, para. 273.

1062 Memorial, para. 3.25, 3.28.

1063 *See supra* Section 2.8*;* Memorial, para. 3.25, 3.28.

1064 *See, e.g.*, ILC Articles on State Responsibility, Art. 14, **CL-0081**; 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, footnote 437, **CL-0010** (noting that, in the case of a 'continuing' wrongful act . . . this *dies* [*a quo*] can be established only after the end of the time of commission of the wrongful act itself"); Joost Pauwelyn, The Concept of a "Continuing Violation" of an International Obligation: Selected Problems, The British Year Book of International Law, Oxford at the Clarendon Press, 1996, p. 432, **CL-0191** (observing that "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").

1065 *See, e.g., Energía y Renovación Holding S.A. v. Republic of Guatemala,* ICSID Case No. ARB/21/56, Award, 31 March 2025, para. 246, **CL-0176** (noting that where the alleged breach is continuing in nature, "[t]he calculation of the limitation period would remain suspended until the violation ceased, since *the continuous nature of the illegal act leads to the conclusion that the knowledge of the violation and the damages suffered are renewed day by day*") (emphasis added).

> **Article 14. Extension in time of the breach of an international obligation**
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> 1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
>
> 2. *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.*
>
> *3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation*.[1066]

413. As reflected in an earlier ILC Report, in the circumstances of a continuing wrongful act or omission, the limitation period does not begin to run until that continuing wrongful act or omission ceases: "in the case of a 'continuing' wrongful act . . . this *dies [a quo]* can be established only after the end of the time of commission of the wrongful act itself."[1067]

414. Several international tribunals have affirmed and applied this principle, including the European Court of Human Rights (the "**ECHR**"), the Inter-American Commission on Human Rights (the "**IACHR**"), and investment treaty tribunals.[1068] In the case of *De Becker v. Belgium*, for example, the ECHR considered the limitation period under the European Convention on Human Rights in relation to a conviction resulting in life imprisonment, which had deprived

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[1066] ILC Articles on State Responsibility, Art. 14(2) and (3), **CL-0081**; *see also Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.92, **CL-0193** (finding that "an omission that extends over a period of time and which, to the reasonable understanding of the relevant party, did not seem definitive should be considered as a continuous act under international law").

[1067] 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, footnote 437, **CL-0010**; also cited in Joost Pauwelyn, The Concept of a "Continuing Violation" of an International Obligation: Selected Problems, The British Year Book of International Law, Oxford at the Clarendon Press, 1996, p. 432, **CL-0191**.

[1068] *See M.R. De Becker v. Belgium*, Application No. 214/56, Decision of 9 June 1958, Yearbook of the European Convention on Human Rights, 2 (1958-59), **CL-0194**; *Neville Lewis v. Jamaica*, Inter-American Commission on Human Rights, Case 11.825, Report No. 97/98, 17 December 1998, **CL-0195**; *Peter Blaine v. Jamaica*, Inter-American Commission on Human Rights, Case 11.827, Report No. 96/98, 17 December 1998, **CL-0196**.

the applicant of the right to exercise his profession as a journalist.[1069] The applicant claimed a violation of his right to freedom of expression.[1070] Belgium raised a time-bar defense, namely, that the applicant had not applied to the ECHR within six months of his final conviction.[1071] The ECHR, however, found that the applicant was in "a continuing situation"[1072] and that the limitation period therefore could only begin to run once the "state of affairs" had ceased to exist:

> When the Commission receives an application concerning . . . a permanent state of affairs . . . the problem of the six months [limitation] period specified in Article 26 can only arise after this state of affairs has ceased to exist; whereas in the circumstances, it is exactly as though the alleged violation was being repeated daily thus preventing the running of the six months period.[1073]

415. The ECHR recently reaffirmed this principle in *Zorica Jovanović v. Serbia*,[1074] finding that "if there is a situation of an ongoing breach, the time-limit in effect starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end."[1075]

416. Decisions of the IACHR are to similar effect. In *Neville Lewis v. Jamaica* and *Peter Blaine v. Jamaica*, for example, the applicants alleged that their conditions in prison violated the Inter-American Convention on Human Rights.[1076] The IACHR found in both cases that because the

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1069 *M.R. De Becker v. Belgium*, Application No. 214/56, Decision of 9 June 1958, Yearbook of the European Convention on Human Rights, 2 (1958-59), p. 222, **CL-0194**.

1070 *M.R. De Becker v. Belgium*, Application No. 214/56, Decision of 9 June 1958, Yearbook of the European Convention on Human Rights, 2 (1958-59), p. 222, **CL-0194**.

1071 *M.R. De Becker v. Belgium*, Application No. 214/56, Decision of 9 June 1958, Yearbook of the European Convention on Human Rights, 2 (1958-59), p. 228, **CL-0194**.

1072 *M.R. De Becker v. Belgium*, Application No. 214/56, Decision of 9 June 1958, Yearbook of the European Convention on Human Rights, 2 (1958-59) p. 234, **CL-0194**.

1073 *M.R. De Becker v. Belgium*, Application No. 214/56, Decision of 9 June 1958, Yearbook of the European Convention on Human Rights, 2 (1958-59), p. 244, **CL-0194**.

1074 *Zorica Jovanović v. Serbia*, Case No. 21794/08, Judgment 26 March 2013, European Court of Human Rights, **CL-0197**.

1075 *Zorica Jovanović v. Serbia*, Case No. 21794/08, Judgment 26 March 2013, European Court of Human Rights, p. 55, **CL-0197**.

1076 *Neville Lewis v. Jamaica*, Inter-American Commission on Human Rights, Case 11.825, Report No. 97/98, 17 December 1998, **CL-0195**; *Peter Blaine v. Jamaica*, Inter-American Commission on Human Rights, Case 11.827, Report No. 96/98, 17 December 1998, **CL-0196**.

respective claims concerned a "set of norms and consequences" which continued to apply, the claims could not be time-barred. In *Neville Lewis*, the IACHR held that:

> The six-months rule does not apply where the allegations concern a continuing situation – where the rights of the victim are allegedly affected on an ongoing basis. As the foregoing claims concern sets of norms and consequences, respectively, which continue to apply and unfold, their admissibility is not barred by the six-months rule.[1077]

417. The IACHR's holding in *Peter Blaine* was the same.[1078]

418. Investment treaty tribunals have followed this same approach. In *UPS v. Canada*, for example, the claimant's claim arose out of certain anti-competitive and discriminatory practices by Canada, which were continuing in nature and commenced more than three years before the claimant submitted its claim to arbitration under the NAFTA.[1079] Canada raised an objection that the claim was time-barred under NAFTA Article 1116(2).[1080] The tribunal rejected that objection on the basis that Canada's conduct was of a continuing nature. The tribunal noted that:

> *[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. The use of the term 'first acquired' [in NAFTA Article 1116(2)] is not to the contrary, as that logically would mean that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period,

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1077 *Neville Lewis v. Jamaica*, Inter-American Commission on Human Rights, Case 11.825, Report No. 97/98, 17 December 1998, para. 52, **CL-0195**.

1078 *Peter Blaine v. Jamaica*, Inter-American Commission on Human Rights, Case 11.827, Report No. 96/98, 17 December 17, 1998, para. 52, **CL-0196**.

1079 *United Parcel Service of America v. Government of Canada,* Award on the Merits, 24 May 2007, paras. 22-24, **CL-0198**; *see also id*., para. 27 (noting that "[w]ith respect to NAFTA, UPS cites *Feldman v. Mexico*, ICSID Case No ARB/(AF)/99/l, Interim Decision on Preliminary Jurisdictional Issues (December 6, 2000), as authority for the proposition that 'state action beginning more than three years before the claim but continuing after that date' is not barred under Article 1116" and that Canada has not disagreed).

1080 *United Parcel Service of America v. Government of Canada*, Award on the Merits, 24 May 2007, para. 20, **CL-0198**.

> even if the investor later acquires further information confirming the conduct or allowing more precise computation of loss.[1081]

419. The tribunal in *Energía y Renovación v. Guatemala* recently reached the same conclusion.[1082] In that case, the claimant alleged a continuing violation of Guatemala's fair and equitable treatment and full protection and security obligations, due to its failure to take reasonable action to address and end attacks, threats, and blockades of the claimant's hydroelectric project in Guatemala.[1083] Guatemala argued, like Mexico here, that the investor's claims were time-barred under the Central America-Panama FTA, which contains the same limitation period as the NAFTA.[1084] A majority of the tribunal rejected Guatemala's objection, finding that the claims were timely.[1085] Citing ILC Article 14(2), the majority concluded that:

> *The calculation of the limitation period would remain suspended until the violation ceased, since the continuous nature of the illegal act leads to the conclusion that the knowledge of the violation and the damages suffered are renewed day by day*. In the specific case, the continued violation is concretized in the failure to fully exercise the State's police power in the region of the investment, a situation of lack of control that continues to this day and that was expressly recognized by the Guatemalan witnesses. In any case, *it must be* clear that *the violation of the Treaty is not consummated with the*

1081 *United Parcel Service of America v. Government of Canada*, Award on the Merits, 24 May 2007, para. 28, **CL-0198** (emphasis added). The Claimant notes that while the NAFTA tribunal in *Mobil v. Canada* raised questions about the tribunal's decision in *UPS*, it found that it was "unnecessary to decide whether the continuing breach theory is correct or not as a matter of law." *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, para. 173, **CL-0199**. Since that decision, the tribunal in *Energia y Renovacion v. Guatemala* affirmed and followed the approach adopted by the *UPS* tribunal in circumstances analogous to the present case, as described herein. *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, 31 March 2025, para. 244, **CL-0176**.

1082 *Energía y Renovación Holding S.A. v. Republic of Guatemala,* ICSID Case No. ARB/21/56, Award, 31 March 2025, **CL-0176**.

1083 *Energía y Renovación Holding S.A. v. Republic of Guatemala,* ICSID Case No. ARB/21/56, Award, 31 March 2025, paras. 233, 253, **CL-0176** (emphasis added).

1084 Central America-Panama Free Trade Agreement, Article 10.17.2: "An investor may not make a claim if more than three (3) years from the date on which the first knew or should have had knowledge of the alleged breach and knowledge that has suffered losses or damages."

1085 *Energía y Renovación Holding S.A. v. Republic of Guatemala,* ICSID Case No. ARB/21/56, Award, 31 March 2025, paras. 252, **CL-0176**.

> *first alleged attack in May 2014 but with the inaction of the State, which is subsequent, as well as prolonged in time*.[1086]

420. Notably, in so holding, the *Energía y Renovación v. Guatemala* tribunal relied on the concept of a continuing breach under ILC Article 14(2) to find that Guatemala's ongoing failure "to adequately exercise its police power" in the area where the claimant's investment was located amounted to a continuing breach:

> [T]he continued illegality extends over time throughout the period in which the state persists in violating its obligations. Specifically, *the continuity of the alleged illegality committed by Guatemala does not derive from the effects over time of isolated acts carried out by the armed groups opposed to the Bill, but rather the violation of a continuous nature is manifested in the alleged inability of the State to adequately exercise its police power in that part of the country*.[1087]

421. This same concept animated the tribunal's decision in *Tecmed v. Mexico*. In that case, the tribunal considered the limitation period under the Mexico-Spain BIT to assess whether the claimant's claim relating to an alleged composite act met the temporal requirement in the BIT.[1088] The tribunal concluded that time would not begin to run under the limitation period until the "*consummation of the conduct encompassing and giving an overarching sense to such acts*," *i.e.*, until the point at which the State's misconduct was consummated:

> If the acts under review are deemed by the Arbitral Tribunal to be a part of more general, and not merely isolated conduct, the Arbitral Tribunal reserves the power to consider that the time when it will assess whether such acts have caused losses or damage for the purposes of Title II(4) of the Appendix to the Agreement, or whether they were deemed by the Claimant to be a breach of the Agreement

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1086 *Energia y Renovacion Holding S.A. v. Republic of Guatemala,* ICSID Case No. ARB/21/56, Award, 31 March 2025, para. 246, **CL-0176** (emphasis added).

1087 *Energía y Renovación Holding S.A. v. Republic of Guatemala,* ICSID Case No. ARB/21/56, Award, 31 March 2025, para. 244, **CL-0176** (emphasis added).

1088 Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States, 18 December 1996, Title II, 5: "*The investor may not make any claim pursuant to this Agreement, if more than three years have elapsed since the date when the investor became aware of or should have become aware of the alleged violation, as well as of any losses or damages suffered*."

> or damaging within the three-year term provided for in Title II(5), *will not be earlier than the point of consummation of the conduct encompassing and giving an overarching sense to such acts*.[1089]

422. In the present case, there can be no dispute that Mexico's acts and omissions in breach of NAFTA Article 1105 are continuing in nature. Like in *Energía y Renovación v. Guatemala*, those continuing acts include Mexico's refusal to exercise the State's police power at Sierra Mojada to restore SVB to its investment and to end the Continuing Blockade at any point from 8 September 2019 until the present.[1090] As a result of Mexico's continued failure to act, SVB's Project remains under the unlawful control of Mineros Norteños, which is using and exploiting the Project for its own financial gain.[1091] And although Mexico's police and prosecutorial authorities documented criminal conduct at the Project site and identified the perpetrators by name, Mexico has taken no action to sanction Mineros Norteños or to disperse their permanent encampment.[1092] In the circumstances of this case, Mexico's breach of NAFTA Article 1105 was not consummated with the imposition of the Continuing Blockade in September 2019, "but with the inaction of the State, which is subsequent, as well as prolonged in time."[1093] SVB's Minera Metalín's knowledge of Mexico's breaches are therefore "renewed day by day," meaning that SVB's claims under NAFTA Article 1105 are not and cannot be time-barred.

423. Mexico, like Guatemala in *Energía y Renovación*, seeks to rely on the words "first acquired" in NAFTA Articles 1116(2) and 1117(2) to suggest that it is "reasonable to assume" and/or "likely" that SVB first knew or should have known of the alleged breach of NAFTA Article 1105 during the more than nine months that elapsed between the commencement of the Continuing Blockade and the Cut-Off Date.[1094] Mexico's argument, however, would require the Tribunal to "ignore the particular nature of the violation alleged in this case," specifically its continuing character.[1095]

1089 *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, para. 74, **CL-0200** (emphasis added).

1090 *See supra* Section 2.8; Memorial, paras. 2.190, 4.49.

1091 Memorial, para. 3.28.

1092 *See supra* Section 2.7 and Memorial, para. 4.38.

1093 *Energía y Renovación Holding S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, 31 March 2025, para. 246, **CL-0176**.

1094 Counter-Memorial, paras. 273, 287, 288.

1095 *Energía y Renovación Holding S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, 31 March 2025, para. 247-248, **CL-0176**.

424. In sum, the continuing nature of Mexico's unlawful conduct renewed the limitation period under NAFTA Articles 1116(2) and 1117(2) and, consequently, SVB's claims under NAFTA Article 1105 are not time-barred. For this reason alone, Mexico's first objection must be rejected. In any event, as set forth below, SVB did not obtain knowledge of the relevant loss or damage arising from Mexico's continuing breaches of NAFTA Article 1105 until *after* the Cut-Off Date, which provides a separate basis to dismiss Mexico's objection.

3.1.2 SVB's Loss and Damage Crystallized During the Limitation Period

425. As SVB has demonstrated, SVB's claims are timely because no more than three years have elapsed since SVB, or Minera Metalín, acquired knowledge of the loss and damage caused by Mexico's continuing breaches and the filing of SVB's RFA on 28 June 2023.[1096]

426. Specifically, SVB acquired knowledge of the loss and damage incurred as a result of Mexico's continuing breaches on 31 August 2022, when South32 terminated the Option Agreement due to Mexico's refusal to take any action to end the Continuing Blockade for nearly three years.[1097] As Mr. Barry explains, from that moment forward, the Project was unviable: SVB had lost its critical financing and development partner for the Project and – in view of the Continuing Blockade and Mexico's continued refusal to act – no reasonable investor would have invested in the Project, as confirmed by Mr. Barry's discussions with prominent shareholders and investors and by communications of those investors to the market.[1098]

427. As the record reflects, the parties terminated the Option Agreement on 31 August 2022, less than three years before SVB filed its Request for Arbitration in this arbitration on 28 June 2023.[1099] Irrespective of when SVB first acquired knowledge of Mexico's continuing breaches, the date of its knowledge of the loss and damage incurred falls well within the limitation period.

428. Mexico acknowledges in its Counter-Memorial the existence of both elements,[1100] but argues, without support, that for the Tribunal to have jurisdiction *ratione temporis* over the Claimant's NAFTA Article 1105 claims, "[b]oth knowledge of the breach and the damage would have to

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1096 Memorial, para. 3.24 and 3.27.

1097 *See supra* Section 2.10; Memorial, paras. 2.208 and 4.16; Termination Agreement between SVB Resources, Inc., Minera Metalín, S.A. de C.V. and South 32 International Investment Holding Pty Ltd., 31 August 2022, **C-0048**.

1098 Barry WS2, para. 66; *supra* Section 2.10.

1099 Termination Agreement between SVB Resources, Inc., Minera Metalín, S.A. de C.V. and South 32 International Investment Holding Pty Ltd., 31 August 2022, **C-0048**.

1100 Counter-Memorial, para. 285

arise *after* the Cut-Off Date for the claim to be within the three-year statute of limitations period."[1101] Mexico further asserts that it is "reasonable to assume" that SVB knew or should have known of the existence of damage during the more than nine months that elapsed between the commencement of the Continuing Blockade in September 2019 and the Cut-Off Date,[1102] and that it is "likely" that SVB had such knowledge prior to the Cut-Off Date.[1103] Mexico's arguments are again misguided and wrong.

429. *First*, as explained above, a claim will be time-barred under the NAFTA only if the investor has knowledge of both events (*i.e.*, breach *and* loss or damage incurred) before the cut-off date.[1104] Logically, the date on which the second limb of the test is satisfied, *viz.*, knowledge of the loss or damage incurred, cannot arise any earlier than the date on which the investor acquired knowledge of the breach.[1105] Thus, where, as here, the investor obtained knowledge of the second event after the Cut-Off Date, its claim will not be time-barred.

430. The tribunal's decision in *Energía y Renovación v. Guatemala* is again instructive. In that case, as the tribunal explained, the limitation period required the tribunal to "distinguish three relevant time frames for analyzing the limitation period . . . , namely, the time at which the investor became aware of the alleged violation, the time at which the investor should have known of the alleged violation and the time at which the investor became aware of the damage suffered."[1106] As the tribunal noted:

> There is no doubt that the first two moments are not cumulative, but alternative. In other words, we must assess the factual moment at which the investor became aware of the alleged violation or, alternatively, the putative time at which the investor is supposed to have known about the violation.

1101 Counter-Memorial, para. 312.

1102 Counter-Memorial, para. 287.

1103 Counter-Memorial, para. 288.

1104 *Energía y Renovación Holding S.A. v Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, 31 March 2025, paras. 247-248, **CL-0176**; *Pope & Talbot Inc. v. The Government of Canada*, Award on the Harmac Motion, 24 February 2000, para. 11, **CL-0191**.

1105 *Energía y Renovación Holding S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, 31 March 2025, para. 240, **CL-0176**.

1106 *Energía y Renovación Holding S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award, 31 March 2025, para. 237, **CL-0176**.

> As for the knowledge of the damage, it is the factual moment (and not the putative one) in which the investor has become aware of the damage suffered. In addition, the articles make use of the conjunctive locution 'as well as' (equivalent to 'and also' or 'in addition to'). Thus, the articles under analysis suggest that *knowledge of the harm suffered is a cumulative condition in relation to knowledge of the violation*.
>
> In other words, *for the statute of limitations to begin to run, there must be both knowledge of the violation (real or putative) and actual knowledge of the damages suffered*. In light of this structure, *when there is no simultaneity between the violation and the damage, it can be assumed that the limitation period only begins to run when the damage is known, since the occurrence of the violation logically precedes the existence of the damage*.[1107]

431. Moreover, while Mexico asserts that "[b]oth knowledge of the breach and the damage would have to arise *after* the *dies a quo* for the claim to be within the three-year statute of limitations period," it cites no authority for that proposition.[1108] Nor is there anything in the text of NAFTA Articles 1116(2) and 1117(2) that suggests that both events must occur after the Cut-Off Date, as Mexico contends.[1109] To the contrary, as noted above, NAFTA tribunals have consistently found that where, as here, knowledge of breach and damage is not simultaneous, the limitation period starts to run only after knowledge of the loss is acquired.[1110] As the tribunal in *Glamis Gold v. United States* observed:

> Article 1117(2) does not provide for a simple, fixed three-year period before the date the claim is brought, but rather refers to three

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1107 *Energia y Renovacion v Guatemala*, ICSID Case No. ARB/21/56, Award, 31 March 2025, para. 240, **CL-0176** (emphasis added).

1108 Counter-Memorial, para. 312.

1109 Counter-Memorial, para. 312.

1110 *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Award, 25 October 2022, para. 405, **CL-0201** (observing that "[t]he limitation period however starts running only after knowledge of the alleged breach and loss is first acquired"); *see also Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award, 8 June 2009, para. 347, **CL-0088** (observing that "Article 1117(2) does not provide for a simple, fixed three-year period before the date the claim is brought, but rather refers to three years '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.' *As one commentary opines, '[t]he three-year limitation period presumably runs from the later of these events [knowledge of breach and of damage] to occur in the event that the knowledge of both events is not simultaneous*'") (emphasis added).

> years '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.' As one commentary opines, *'[t]he three-year limitation period presumably runs from the later of these events [knowledge of breach and of damage] to occur in the event that the knowledge of both events is not simultaneous.'*[1111]

432. In any event, as demonstrated above, Mexico's breaches of NAFTA Article 1105 in this case are continuing and persist; those continuing breaches thus renew the limitation period.[1112]

433. *Finally*, Mexico's attempts to show that SVB acquired knowledge of loss and damage, both actual and constructive, before the Cut-Off Date fail.[1113] Mexico first argues that the notice of *force majeure* sent by SVB to South 32 on 11 October 2019 constitutes "evidence that the Claimant was aware that the Second Blockade interfered with its investment and prevented it from complying with the obligations vis-à-vis South 32."[1114] That argument is misguided, as it ignores the fundamental purpose of a *force majeure* notice, which is to *suspend* the parties' obligations under a contract during an event which prevents them from carrying it out.[1115] When the *force majeure* event ends, the parties may resume their obligations and continue to perform the contract according to its terms. The issuance of a *force majeure* notice therefore in no way implies that the parties have suffered any loss or damage, or that the contract is at an irreversible end. Indeed, as Mr. Barry confirms in his second witness statement:

> [W]hen we notified South32 of a force majeure situation (namely, the Continuing Blockade) under the Option Agreement, we did not consider that we had suffered any loss at that point, or that the Project was in any way irretrievable. Indeed, as we communicated to South32 in our force majeure notice, we remained hopeful that the

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1111 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award, 8 June 2009, para. 347, **CL-0088** (emphasis added).

1112 *Energía y Renovación v. Guatemala*, ICSID Case No. ARB/21/56, Award, 31 March 2025, para. 246, **CL-0176**.

1113 Counter-Memorial, paras. 316-322.

1114 Counter-Memorial. para. 289.

1115 Option Agreement between Silver Bull Resources Inc., Minera Metalín, S.A. de C.V., Contratistas de Sierra Mojada, S.A. de C.V. and South 32 International Investment Holdings Pty Ltd, 01 June 2018, **C-0031**.

> Mexican authorities would act to disband the Blockade, as they had done in relation to the First Blockade in 2016.[1116]

434. In an attempt to bolster its misguided argument, Mexico notes that, in the *force majeure* notice, SVB confirmed that: "Mineros Norteños illegally blocked access to our property and interrupted our lawful business;" "Mineros Norteños has illegally blocked Major Drilling, our drilling contractor from access to its equipment that is worth hundreds of thousands of dollars;" and "Mineros Norteños have refused all attempts by us to meet in Torreon to try and resolve this."[1117] But none of these three statements shows that SVB had knowledge of loss or damage. Indeed, these statements merely indicate that SVB's operations were "interrupt[ed]" and it hoped and expected the situation to be "resolve[d]."[1118] SVB also indicated the measures undertaken with a view to achieving a "speedy solution," including that SVB had "reached out [to] MN both directly and indirectly in an attempt to meet and start a dialogue to resolve the situation."[1119] It is clear that SVB hoped and expected that the situation would be resolved and that Mexico would take reasonable action to lift the Blockade, as it had done in 2016. Put differently, as of 11 October 2019 – when it sent the *force majeure* notice – SVB had no basis yet to conclude that Mexico would refuse to take reasonable actions within its power to end the Continuing Blockade or that the damage caused to its investment by that refusal would be irreversible.

435. Mexico next argues, in the abstract, that SVB knew or should have known of damage before the Cut-Off Date because a "prudent investor" would have "sought to estimate the possible financial and operational impacts of the Second Blockade on its investment."[1120] That argument too is unavailing. SVB's actions constituted those of a "prudent investor:" SVB immediately reported the Continuing Blockade to the relevant Mexico authorities with the expectation that they would take reasonable action to end that Blockade and restore SVB to its investment, as the Mexican authorities had done in 2016, thereby averting any loss or damage. Mexico, however, failed to do so.

1116 Barry WS2, para. 64.

1117 Counter-Memorial, para. 289.

1118 Letter from SVB to South32, 11 October 2019, p. 2, **C-0035**.

1119 Letter from SVB to South32, 11 October 2019, **C-0035**.

1120 Counter-Memorial, para. 287.

436. Mexico further seeks to rely on the theft and sale of diesel from the mine camp,[1121] the extortion of MXN 30,000 (~US$ 1,500) from a third party who owned tanker trucks parked at the property, and the sale of minerals from the mine's waste dump as evidence that SVB knew or should have known of damage before the Cut-Off Date.[1122] Mexico's position is untenable.

437. As a preliminary matter, SVB became aware of these thefts only *after* the Cut-Off Date, precisely because Mineros Norteños refused to give SVB access to its own Project site for an inspection.[1123] In a desperate attempt to lend credence to its flawed argument, in its Document Request Number 5, Mexico sought production of copies of insurance claims made by SVB or for theft or damage against their goods or property in Sierra Mojada between September 8, 2019 (date of the Second Blockade) and August 31, 2022 (date of South32's exit).[1124] The Tribunal granted that request, and SVB accordingly conducted a reasonable, good faith search but found no responsive documents.

438. In any event, SVB's claims under NAFTA Article 1105 do not arise out of these thefts by Mineros Norteños and its members; rather, the Claimant's claims under NAFTA Article 1105 arise out of Mexico's continued and repeated refusal to take reasonable action in its power to protect the Claimant's investment and to lift the Continuing Blockade, as it did in 2016.[1125] This continued and repeated refusal to act is what led directly to the Claimant's loss of its Project in its entirety, which loss crystallized on 31 August 2022 with the termination of the Option Agreement – not with Mineros Norteños's thefts. SVB raised these thefts in its Memorial simply as further evidence of Mineros Norteños's control over the Project site and continued ability to commit crimes at that site with total impunity.

439. For all of the reasons set forth above, Mexico's *ratione temporis* objection with respect to the Claimant's claims under NAFTA Article 1105 is without merit and should be dismissed.

1121 *See supra* Section 2.7.4.

1122 Memorial, paras. 2.168, 2.169, 2.189, 2.197.

1123 Memorial, para. 2.179.

1124 Procedural Order No. 3, Annex B, pp. 21-22.

1125 Memorial, Section 2(G).

3.2 The Tribunal has Jurisdiction *Ratione Voluntatis* and *Ratione Temporis* under USMCA Annex 14-C in Respect of SVB's Claim for Expropriation under Article 1110 NAFTA

440. As SVB has demonstrated, Mexico unlawfully expropriated SVB's protected investments in the Sierra Mojada Project through a series of continuing acts and omissions, the effect of which was the taking of the Project in breach of NAFTA Article 1110(1) on 31 August 2022.[1126]

441. In its Counter-Memorial, Mexico contends that the Tribunal allegedly lacks jurisdiction *ratione voluntatis* and *ratione temporis* under Annex 14-C of the USMCA with respect to SVB's indirect expropriation claim under NAFTA Article 1110(1). Specifically, Mexico argues that (i) the consent extended through Annex 14-C of the USMCA does not cover claims arising from post-termination NAFTA measures;[1127] and (ii) the expropriation of SVB's investment occurred after the termination of the NAFTA and, therefore, the NAFTA Chapter 11 investment protections were no longer binding on Mexico when the breach occurred.[1128] As elaborated below, Mexico's jurisdictional objections are unfounded and wrong.

442. In support of its jurisdictional objections, Mexico relies almost exclusively on the decision of the tribunal majority in *TC Energy Corporation and TransCanada Pipelines Limited v. United States*,[1129] in which the majority held that it did not have jurisdiction over the claimant's legacy NAFTA claim.[1130] As explained below, however, *TC Energy* is inapposite, and it therefore does not support Mexico's jurisdictional objections in this case.

443. Mexico's jurisdictional objections are misplaced for two main reasons. *First*, Annex 14-C of the USMCA extends the application of the substantive investment protections contained in Section A of NAFTA Chapter 11 beyond 30 June 2020 until the end of the transition period on 30 June 2023. *Second*, even if Annex 14-C of the USMCA did not extend the substantive investment protections contained in Section A of NAFTA Chapter 11, which it did, Mexico's misconduct constitutes a continuing breach that commenced *before* the termination of NAFTA on 30 June 2023. The Claimant's claim for breach of NAFTA Article 1110(1) – which arises

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1126 Memorial, Section 4(A).

1127 Counter-Memorial, para. 324.

1128 Counter-Memorial, para. 324.

1129 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024 [redacted], **RL-0042**.

1130 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024 [redacted], para. 219, **RL-0042**.

out of that continuing wrongful conduct – therefore is timely and falls within the scope of consent to arbitration under Annex 14-C of the USMCA.

3.2.1 Annex 14-C Extends the Application of the Substantive Investment Protections Contained in Section A of NAFTA Chapter 11 until the End of the Transition Period

444. As SVB explained in its Memorial, Article 3 of USMCA Annex 14-C provides that Mexico's consent to arbitration in respect of "legacy investments" expires three years after termination of the NAFTA.[1131] As SVB also explained, its investments in the Sierra Mojada Project qualify as "legacy investments" within the meaning of USMCA Annex 14-C.[1132]

445. The USMCA entered into force on 1 July 2020, and the NAFTA was terminated on 30 June 2020.[1133] Therefore, the opportunity to commence arbitration under NAFTA Chapter 11 remained available in respect of "legacy investments" for three years thereafter, *i.e.*, until 30 June 2023.[1134] SVB filed its Request for Arbitration on 28 June 2023, *i.e.*, within three years after termination of the NAFTA.[1135] SVB's submission of its claims to arbitration – including its claim under NAFTA Article 1110(1) – is thus timely under the USMCA.[1136]

446. In its Counter-Memorial, Mexico does not dispute that SVB's investments qualify as "legacy investments" within the meaning of USMCA Annex 14-C.[1137] Instead, Mexico contends that it allegedly did not consent to arbitrate SVB's claim under NAFTA Article 1110(1), because its consent under USMCA Annex 14-C does not cover claims arising from measures that post-date the NAFTA termination.[1138] USMCA Annex 14-C, however, contains no such temporal restriction. On the contrary, a good faith reading of paragraph 1 of Annex 14-C and its accompanying footnote 20 shows that the USMCA Parties extended their consent to legacy

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1131 Memorial, para. 3.22.

1132 Memorial, Section 3(B)(i).

1133 Memorial, para. 3.23; Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada, 30 November 2018, **CL-0041**.

1134 Memorial, para. 3.23.

1135 Memorial, para. 3.24.

1136 Memorial, para. 3.24.

1137 Counter-Memorial, Sections 3(A)(1)-(3).

1138 Counter-Memorial, paras. 324 and 335.

NAFTA claims, including claims based on breaches within the three-year consent period under Annex 14-C.

447. Annex 14-C reads as follows, in relevant part:

> 1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:
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> (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
>
> (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
>
> (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.
>
> 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;
>
> (b) Article II of the New York Convention for an 'agreement in writing'; and
>
> (c) Article I of the Inter-American Convention for an 'agreement'.
>
> 3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.[1139]

448. Based on a good faith interpretation of the ordinary meaning of those provisions in light of their object and purpose, in accordance with Article 31 of the Vienna Convention on the Law

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[1139] USMCA, Annex 14-C, paras. 1-3, **CL-0044**.

of Treaties,[1140] the USMCA Parties consented to submit legacy NAFTA claims brought within the three-year consent period under paragraph 3 of Annex 14-C.[1141] Such consent is subject to four conditions, all of which have been met in the present case:

- *First*, the claim must be brought "with respect to a legacy investment."[1142] As noted above, Mexico does not dispute that SVB's investments qualify as "legacy investments" under USMCA Annex 14-C.[1143]

- *Second*, the claim must be brought in respect of an alleged breach of obligations set out in Section A of Chapter 11 (Investment) of the NAFTA.[1144] There is no dispute that SVB's indirect expropriation claim arises out of Mexico's breach of NAFTA Article 1110(1).[1145]

- *Third*, the claim must be submitted to arbitration "in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994" and USMCA Annex 14-C.[1146] There is likewise no dispute that SVB's claims were submitted to arbitration in accordance with Section B of NAFTA Chapter 11 and USMCA Annex 14-C.[1147]

- *Fourth*, the claim must be brought within three years of the termination of the NAFTA.[1148] SVB filed its Request for Arbitration on 28 June 2023, within three years of the NAFTA's termination on 30 June 2020.[1149]

449. Notably, USMCA Annex 14-C does not contain any express exclusion of legacy NAFTA claims arising out of measures taken during the three-year consent period.

450. Mexico, relying upon the majority decision in *TC Energy*, seeks to make an artificial distinction between breaches arising before the termination date of the NAFTA and breaches arising

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1140 United Nations, Vienna Convention on the Law of Treaties, Article 31, **CL-0155**.

1141 Memorial, para. 3.22 *et seq.*

1142 USMCA, Annex 14-C, para. 1, **CL-0044**.

1143 Memorial, para. 3.11 et seq.

1144 USMCA, Annex 14-C, para. 1, **CL-0044**.

1145 Memorial, Section 4.

1146 USMCA, Annex 14-C, para. 1, **CL-0044**.

1147 Memorial, Section 3.

1148 USMCA, Annex 14-C, para. 3, **CL-0044**.

1149 Request for Arbitration, 28 June 2023.

during the three-year consent period.[1150] However, as Mr. Henri C. Alvarez explained in his dissenting opinion in that case, there is no temporal requirement that the alleged breach of the NAFTA must have occurred prior to the NAFTA's termination.[1151] Rather, as he remarks:

> [T]he natural meaning of Annex 14-C is that the Parties agreed to arbitrate claims alleging breaches of obligations under NAFTA Chapter 11, Section A for a period of three years after the termination of NAFTA. Therefore, unless the text otherwise expressly provides, for the purposes of Annex 14-C, Chapter 11, Section A must remain in force. Again, *Annex 14-C 1 does not limit its application to alleged breaches that occurred prior to the termination of NAFTA. Rather, it provides consent to arbitrate claims alleging a breach of an obligation of Section A of Chapter 11 with respect to legacy investments, without distinguishing between breaches that occurred before or after the termination of NAFTA.*[1152]

451. In other words, Mexico's position requires the Tribunal to import a temporal limitation into USMCA Annex 14-C that is not in its text.[1153] As Mr. Alvarez further observes, the USMCA Parties *could* have incorporated such a temporal limitation, but did not do so:

> There is no requirement that the relevant measure or alleged breach of an obligation have occurred before the termination of NAFTA. Had this been the intention of the Parties, it would have been simple to so provide expressly.[1154]

452. Footnote 20, which applies to paragraph 1 of Annex 14-C, confirms this position. It provides:

> For greater certainty, the relevant provisions in Chapter 2 (General Definitions), *Chapter 11 (Section A) (Investment)*, Chapter 14

1150 Counter-Memorial, para. 338-341.

1151 *TC Energy Corporation and TransCanada Pipelines Limited*, ICSID Case No. ARB/21/63, 12 July 2024, Dissenting Opinion of Arbitrator Henri C. Alvarez K.C., para 5. **CL-0202**.

1152 *TC Energy Corporation and TransCanada Pipelines Limited*, ICSID Case No. ARB/21/63, 12 July 2024, Dissenting Opinion of Arbitrator Henri C. Alvarez K.C., para 9. **CL-0202** (emphasis added).

1153 *TC Energy Corporation and TransCanada Pipelines Limited*, ICSID Case No. ARB/21/63, 12 July 2024, Dissenting Opinion of Arbitrator Henri C. Alvarez K.C., para 9, **CL-0202**.

1154 *TC Energy Corporation and TransCanada Pipelines Limited*, ICSID Case No. ARB/21/63, Dissenting Opinion of Arbitrator Henri C. Alvarez K.C., 12 July 2024, para. 6, **CL-0202**.

> (Financial Services), Chapter 15 (Competition Policy, Monopolies and State Enterprises), Chapter 17 (Intellectual Property), Chapter 21 (Exceptions), and Annexes I-VII (Reservations and Exceptions to Investment, Cross-Border Trade in Services and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim.[1155]

453. As Professor Christoph Schreuer testified in *TC Energy*, through footnote 20, "[t]he drafters of [the] USMCA confirmed that Annex 14-C chooses NAFTA's substantive obligations as the applicable law to Annex 14-C claims."[1156] Professor Schreuer further testified that "[t]hey introduced that footnote with the words '[f]or greater certainty', thereby indicating that the choice was already contained in paragraph 1 of Annex 14-C."[1157] He further explained that:

> [b]y virtue of Annex 14-C paragraph 1, Article 1131 of NAFTA, and footnote 20, NAFTA's substantive protections continue to apply to legacy investments during the transition period, provided the claim is brought before July 1, 2023. To this extent, NAFTA continues to apply even after its termination because the parties have so agreed in Annex 14-C.[1158]

454. As set forth above, SVB filed its Request for Arbitration on 28 June 2023, *i.e.*, within three years after termination of the NAFTA.[1159] SVB's submission of its claim under NAFTA Article 1110(1) is therefore timely under USMCA Annex 14-C.

3.2.2 USMCA Annex 14-C Provides Consent for Claims of Continuing Breach

455. As SVB has explained, its claims in this case – including its indirect expropriation claim under Article 1110(1) of the NAFTA – arise out of Mexico's continuing unlawful acts and omissions

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1155 USMCA, Annex 14-C, footnote 20, **CL-0044**.

1156 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024 [redacted], para. 110, **RL-0042**

1157 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024 [redacted], para. 110, **RL-0042**

1158 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024 [redacted], para. 110, **RL-0042**. The governing law clause found in NAFTA Article 1131 provides for tribunals to decide the issues in dispute in accordance with the NAFTA and applicable rules of international law.

1159 Memorial, para. 3.24.

in relation to the Continuing Blockade. Those continuing unlawful acts and omissions commenced on 8 September 2019 and continue to this day. These facts bear no resemblance to the facts in *TC Energy*, where the claimant's claims arose exclusively out of conduct that occurred *after* the termination of the NAFTA on 30 June 2020.[1160]

456. Specifically, in *TC Energy*, the claimant's claims arose out of the Biden administration's 20 January 2021 decision to revoke its permit in relation to the Keystone pipeline project for the transportation of crude oil between the United States and Canada.[1161] Because that decision took place on 20 January 2021, the alleged breach at issue indisputably occurred *after* the NAFTA termination date.[1162] As a result of the tribunal majority's determination that the USMCA Parties' consent to arbitration with respect to legacy NAFTA investments under USMCA Annex 14-C did not apply to measures after the NAFTA termination date, the tribunal majority determined that it lacked jurisdiction over the claim.[1163]

457. Unlike in *TC Energy*, the conduct that forms the basis of SVB's indirect expropriation claim here is continuing in nature and commenced *before* the NAFTA termination date. As set out in SVB's Memorial and below, a number of investment treaty tribunals have found that continuing wrongful acts and omissions may give rise to an indirect expropriation.[1164] For example:

- In *Wena Hotels v. Egypt*, a state-owned entity seized the investor's hotels by force. The seizure continued for a period of nearly one year and, during that time, neither the police nor the Ministry of Tourism took action to prevent or reverse the seizure and restore the hotels to the investor's control.[1165] In addition, Egypt never imposed substantial sanctions on the perpetrators.[1166] The tribunal had "no difficulty finding

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1160 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024 [redacted], para. 219, **RL-0042**.

1161 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024 [redacted], para. 126, **RL-0042**.

1162 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024 [redacted], para. 129, **RL-0042**.

1163 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024 [redacted], para. 219, **RL-0042**.

1164 Memorial, Section 4(A).

1165 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 84, **CL-0049**.

1166 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 84, **CL-0049**.

that the actions . . . constitute such an expropriation,"[1167] and that "whether or not it authorized or participated in the actual seizures of the hotels, Egypt deprived Wena of its "fundamental rights of ownership" by allowing EHC forcibly to seize the hotels, to possess them illegally for nearly a year, and to return the hotels stripped of much of their furniture and fixtures."[1168]

- In *Olin Holdings Ltd v. Libya*, the tribunal found that the dispossession of the investor's factory, which in turn forced the investor to vacate the premises and left the investor unable to realize the benefits of its investment for over four years constituted an indirect expropriation.[1169]

- In *Mohamed Abdel Raouf Bahgat v. Egypt (I)*, the tribunal considered that a freezing order imposed upon company assets for a period of six years[1170] had a "significant and lasting negative effect" on the investor's investment and therefore constituted an indirect expropriation.[1171]

458. These cases can be distinguished from cases of so-called "creeping" expropriation, which is "[a] form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates a situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property."[1172] In the present case, like in the above cases, the State's wrongful conduct are continuing acts and omissions that result in an indirect expropriation due to their "significant and lasting negative effect" on the investment.[1173]

459. Notably, in footnote 21 to USMCA Annex 14-C, the USMCA Parties addressed the issue of a continuing breach. Specifically, footnote 21 addresses the situation in which an investor would be eligible to submit *both* a claim to arbitration under USMCA Annex 14-C *and* a claim to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).[1174] Footnote 21 provides as follows:

1167 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 99, **CL-0049**.

1168 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 99, **CL-0049**.

1169 *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Final Award, 25 May 2018, para. 166, **CL-0173**.

1170 *Mohamed Abdel Raouf Bahgat v. Egypt (I)*, PCA Case No. 2012-07, Final Award, 23 December 2019, para. 6, **CL-0172**.

1171 *Mohamed Abdel Raouf Bahgat v. Egypt (I)*, PCA Case No. 2012-07, Final Award, 23 December 2019, para. 232, **CL-0172**.

1172 *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 20.22, **CL-0203**.

1173 *Mohamed Abdel Raouf Bahgat v. Egypt (I)*, PCA Case No. 2012-07, Final Award, 23 December 2019, para. 232, **CL-0172**.

1174 USMCA, Annex 14-C, footnote 21, **CL-0044**.

> Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

460. That footnote, as the United States has made clear, is meant to address continuing breaches.[1175] As the United States has noted, in a case of continuing breach, an investor could be eligible to submit a claim under USMCA Annex 14-C and USMCA Annex 14-E; however, footnote 21 makes clear that, where the investor is eligible to bring a claim under USMCA Annex 14-E, it cannot bring that claim under USMCA Annex 14-C:

> Footnote 21 addresses a specific class of potential claimants, namely those who may have a claim under both Annex 14-C and Annex 14-E. *These might include, for example, claimants alleging a continuing breach where the breach began before the termination of the NAFTA and continued after its termination. In the absence of footnote 21, such claimants could submit both a legacy investment claim under Annex 14-C, relying on the substantive obligations of the NAFTA because portions of the continuing breach predated its termination, and an Annex 14-E claim, relying on the USMCA with respect to portions of the continuing breach that postdate its entry into force.* This situation would cause confusion about which set of obligations and which arbitral regime would apply to the same alleged breach. Footnote 21 operates to restrict such claimants to relying on Annex 14-E, and the USMCA's substantive obligations, for these claims.[1176]

461. Importantly, the carve-out in footnote 21 applies *only* where the investor is eligible to submit a claim under USMCA Annex 14-C *and* USMCA Annex 14-E. Put simply, if an investor is

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1175 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America (II)*, ICSID Case No. ARB/21/63, Respondent's Reply to Claimants' Observations on Respondent's Request for Bifurcation, 2 March 2023, para. 31, **CL-0214**.

1176 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America (II)*, ICSID Case No. ARB/21/63, Respondent's Reply to Claimants' Observations on Respondent's Request for Bifurcation, 2 March 2023, para. 31, **CL-0214** (emphasis added).

eligible to bring a claim under Annex 14-E – which relates to claims pertaining to Government contracts – the investor cannot bring a claim under Annex 14-C.

462. There can be no dispute here that SVB is *not* eligible to submit claims under USMCA Annex 14-E; it does not have a Government contract covered by Annex 14-E.[1177] In such circumstances, SVB remains eligible to submit claims to arbitration under Annex 14-C arising out of Mexico's continuing breaches that commenced *before* the NAFTA termination date.

463. Moreover, the fact that SVB's indirect expropriation claim crystallized on 31 August 2022 does not divest the Tribunal of jurisdiction *ratione voluntatis* or *ratione temporis*.

464. The decision of the International Court of Justice ("**ICJ**") in *Nicaragua v. Colombia* is instructive.[1178] In that case, the ICJ considered the scope of its jurisdiction *ratione temporis* in the context of a claim under a treaty that subsequently expired.[1179] Nicaragua brought claims under Article XI of the Pact of Bogota arising out of certain "incidents" that had occurred both before and after the date on which the Pact of Bogota ceased to be in force for Colombia.[1180] The ICJ found that it had jurisdiction over Nicaragua's claims relating to incidents that had occurred after the date of termination, finding that:

> [T]he claims and submissions made by Nicaragua in relation to incidents that allegedly occurred after 27 November 2013 arose directly out of the question which is the subject-matter of the Application, that those alleged incidents are connected to the alleged incidents that have already been found to fall within the Court's jurisdiction, and that consideration of those alleged incidents does not transform the nature of the dispute between the Parties in the

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1177 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),* International Court of Justice, Summary 2022/3, 21 April 2022, **CL-0205**.

1178 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),* International Court of Justice, Summary 2022/3, 21 April 2022, Section II, **CL-0205**.

1179 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),* International Court of Justice, Summary 2022/3, 21 April 2022, Section II, **CL-0205**.

1180 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),* International Court of Justice, Summary 2022/3, 21 April 2022, Section II, **CL-0205**.

> present case. The Court therefore has jurisdiction *ratione temporis* over Nicaragua's claims relating to those alleged incidents.[1181]

465. A similar conclusion is warranted here. As in *Nicaragua v. Colombia*, Mexico's measures in this case that occurred after the NAFTA termination date are simply a continuation of the same measures that existed before the NAFTA termination date, namely, Mexico's continued refusal to act to end the Continuing Blockade imposed on the Project. Mexico's misconduct before and after the NAFTA termination date is also inextricably linked; indeed, it is not distinct. The Tribunal should therefore exercise its jurisdiction over the entirety of Mexico's continuing acts and omissions, which crystallized in loss and damage on 31 August 2022.

466. Based on the foregoing, the Tribunal has jurisdiction *ratione voluntatis* and *ratione temporis* over SVB's expropriation claim under NAFTA 1110(1).

3.3 The Tribunal has Jurisdiction *Ratione Materiae*

467. In its Counter-Memorial, Mexico raises a series of baseless objections to the Tribunal's jurisdiction *ratione materiae*. *First*, Mexico contends that SVB allegedly does not have ownership and/or control of certain assets as required under NAFTA Article 1139.[1182] *Second*, Mexico asserts that SVB allegedly has not demonstrated that the Option Agreement with South32 constitutes an "investment" under NAFTA Article 1139 and ICSID Convention Article 25(1).[1183] Again, Mexico's objections are misguided and without merit.

468. As demonstrated below, (i) SVB maintained legal title and ownership over the Sierra Mojada Project assets throughout the relevant time period, including on the date SVB commenced this arbitration (**Section 3.3.1**); and (ii) the Option Agreement qualifies as a protected investment under both NAFTA Article 1139 and ICSID Convention Article 25(1) (**Section 3.3.2**).

3.3.1 SVB's Project Assets Constitute Qualifying Investments Over which it Maintains Legal Title and Ownership

469. As SVB demonstrated in its Memorial, it made the following qualifying investments within the meaning of NAFTA Article 1139 and ICSID Convention Article 25(1):

1181 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),* International Court of Justice, Summary 2022/3, 21 April 2022, Section II, **CL-0205**.

1182 Counter-Memorial, paras. 345-350.

1183 Counter-Memorial, paras. 351-367.

- SVB's direct and indirect shareholding in Minera Metalín;
- SVB's indirect ownership of Minera Metalín's assets and Minera Metalín's direct ownership of those assets, including (without limitation) 19 registered mining concessions and surface rights in relation to various land plots at Sierra Mojada;
- funds that SVB provided to Minera Metalín to finance exploration works, including (without limitation) drilling, assaying, and metallurgical tests;
- SVB's and Minera Metalín's interests arising from commercial arrangements entered into with third parties subject to production operations, including, *inter alia*, the Option Agreement; and
- Minera Metalín's equipment and infrastructure, including, *inter alia*, movable and immovable as well as tangible and intangible property.[1184]

470. In its Counter-Memorial, Mexico does not dispute that such investments qualify for protection under NAFTA Article 1139 or ICSID Convention Article 25(1). Instead, Mexico argues – based solely on the spurious Valdez litigation and Mr. Valdez's incomplete enforcement proceedings – that "SVB did not have – nor does it have – ownership of certain assets that it considers investments under NAFTA, nor did it have – nor does it have – control over them, including the concessions that were part of the Sierra Mojada Project."[1185] Specifically, according to Mexico, as of the date of SVB's Request for Arbitration, *i.e.*, 28 June 2023, SVB did not have control of "20 registered mining concessions" and did not have ownership of "surface rights in relation to various land plots at Sierra Mojada" or "equipment and infrastructure."[1186] Thus, Mexico says, SVB "cannot claim to have an investment under NAFTA."[1187] Mexico's assertions are wrong both as a matter of law and fact.

471. Mr. Valdez's judicial attachments over certain of Minera Metalín's assets do not provide any basis for the conclusion that SVB did not have ownership or control over its concessions, surface rights, or equipment and infrastructure as of the date of its Request for Arbitration, *i.e.*,

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1184 Memorial, para. 3.13.

1185 Counter-Memorial, para. 348.

1186 Counter-Memorial, para. 349.

1187 Counter-Memorial, para. 349.

on 28 June 2023.[1188] Nor do they provide any basis for the conclusion that SVB did not have ownership or control over such investments when they were deprived of all value as a result of Mexico's continuing breaches, *i.e.*, on 31 August 2022.

472. As set forth in Section 2.11 above, under Mexican law, a judicial attachment of property is a provisional remedy or "precautionary measure" whereby a debtor's property is held to secure and protect the interests of creditors.[1189] While a judicial attachment imposes certain limits on the alienation or sale of that property, it does *not* affect legal title or ownership.[1190] Rather, it is the execution of the attached property through a court-ordered transfer or sale that results in the extinguishment of legal title and ownership.[1191]

473. As explained above, while Mr. Valdez was able to resurrect his parents' baseless claims on the eve of the Continuing Blockade – and to obtain a questionable judgement of US$ 5.9 million against Minera Metalín during the Continuing Blockade – as of 28 June 2023, there was no Court-ordered execution against any of those assets.[1192] And, indeed, there still has not been any court-ordered transfer or sale of Minera Metalín's 19 concessions even today.[1193] Rather, as of 28 June 2023, Mr. Valdez had succeeded only in attaching certain of Minera Metalín's assets.[1194] Those precautionary measures, which are provisional in nature, did not operate to extinguish Minera Metalín's legal rights and interests. This is confirmed by Mexico's own

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1188 *See, e.g.*, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, para. 31 **CL-0208**: ("[I]t is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to *the date on which such proceedings are deemed to have been instituted*") (emphasis added).

1189 Code of Civil Procedure of the State of Coahuila de Zaragoza, Art. 938, **C-0475**; *Amparo en revisión* 414/2021 ruled by the First Chamber of the Supreme Court of Justice of the Nation, para. 30, **C-0473**; *Amparo en revisión* 155/2024 ruled by the First Chamber of the Supreme Court of Justice of the Nation, para. 45, **C-0472**.

1190 *See Amparo Directo en revisión* 2705/2015 ruled by the First Chamber of the Supreme Court of Justice of the Nation, para. 59, **C-0474**; *Amparo en revisión* 155/2024 ruled by the First Chamber of the Supreme Court of Justice of the Nation, para. 45, **C-0472**.

1191 Code of Civil Procedure of the State of Coahuila de Zaragoza, Art. 938 *et seq.*, **C-0475**; *Amparo en revisión* 414/2021 ruled by the First Chamber of the Supreme Court of Justice of the Nation, para. 27, **C-0473**.

1192 Interlocutory Judgment of the First Judge of First Instance for Civil Matters of the Judicial District of Torreón on nullity, 17 June 2019, pp. 3, 7, **C-0032**; Appeal Judgment 87/2020, 1 October 2020, pp. 31-34, **C-0029**.

1193 *See* First Instance District Court in Civil Matters, Torreón, Order, 13 March 2025, **C-0495** (approving expert appraiser).

1194 First Instance District Court of Civil Matters, Torreón, Order of Attachment, 5 July 2022, pp. 1-3, **R-0054**; First Instance District Court of Civil Matters, Torreón, Order of Attachment, 2 June 2023, pp. 1-3, **R-0060**.

Public Mining Registry, which shows that Minera Metalín to this day holds legal title to its 19 concessions.[1195]

474. SVB further notes that while the Court has conducted appraisals and sales of some of Minera Metalín's attached assets since 28 June 2023,[1196] the Court has not conducted an appraisal of Minera Metalín's 19 concessions.[1197] As such, it is not established that the sale of all of those concessions is even necessary to satisfy Mr. Valdez's judgment, which, as noted above, amounts to a mere US$ 5.9 million.[1198]

475. As of 28 June 2023, SVB and Minera Metalín thus had direct and indirect ownership of all of the Sierra Mojada Project assets, which – as Mexico does not dispute – qualify as protected investments under the NAFTA.

3.3.2 The Option Agreement is a Protected Investment under NAFTA Article 1139 and ICSID Convention Article 25

476. Mexico's second objection to the Tribunal's jurisdiction *ratione materiae* is that the Option Agreement is not a qualifying investment.[1199] Again, this objection is baseless.

477. The crux of Mexico's argument is that the Option Agreement does not meet the definition of an "investment" under NAFTA Article 1139(h)(ii), which provides as follows:

> (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
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> . . .
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> (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.[1200]

1195 *See supra* Section 2.2.

1196 *See* Valdez Appraisal of the Five Attached Lots, 18 October 2023, **C-0488**; First Instance District Court in Civil Matters, Torreón, Order dated 26 October 2023, **C-0492** (ordering the auction of the attached five lots).

1197 *See* First Instance District Court in Civil Matters, Torreón, Order, 13 March 2025, **C-0495** (approving expert appraiser).

1198 Appeal Judgment 87/2020, 1 October 2020, pp. 31-34, **C-0029**; *see also* Code of Civil Procedure of the State of Coahuila de Zaragoza, Arts. 957, 958, 995, **C-0475**.

1199 Counter-Memorial, para. 353 *et seq.*

1200 NAFTA, Article 1139, **CL-0004**; Counter Memorial, para. 353.

478. According to Mexico, South32's obligation to provide capital to Minera Metalín under the Option Agreement for the advancement of the Project is not a contract where remuneration depends substantially on the production, revenues or profits of an enterprise.[1201]

479. This submission is spurious. As is plain from the wording of NAFTA Article 1139(h), the definition covers "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory."[1202] Sub-paragraphs (i) and (ii) then provide examples of the types of interest that could fall within the definition.[1203] Such examples are not exhaustive, as is clear from the fact that they are introduced by the words: "such as." This interpretation was confirmed by the tribunal in *Lone Pine Resources v. Canada*,[1204] which noted that subsections 1139(h)(i) and (ii) are simply "illustrative examples of types of contracts relevant for NAFTA Article 1139(h)."[1205]

480. As confirmed by the *Lone Pine Resources v Canada* tribunal, an investment under NAFTA Article 1139(h) contains four requirements:

> To qualify as a protected investment under NAFTA Article 1139(h), the alleged investment must be (i) an interest; (ii) arising out of the commitment of capital or other resources in the territory of a NAFTA party; (iii) which capital, must have been committed towards economic activity in the territory of a NAFTA party; and (iv) must be pursuant to a contractual arrangement.[1206]

481. Applying these criteria to the present case, SVB has an interest (*i.e.*, its rights under the Option Agreement) which arises out of its commitment of capital and resources towards economic activity in Mexico (*i.e.*, its investments in the Sierra Mojada Project), which is pursuant to a contractual arrangement (*i.e.*, the Option Agreement with South32). The Option Agreement therefore satisfies the definition of an investment under NAFTA Article 1139(h).

1201 Counter-Memorial, para. 355.

1202 NAFTA, Article 1139 (h), **CL-0004**.

1203 NAFTA, Article 1139 (h), **CL-0004**.

1204 *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2 ("***Lone Pine v. Canada***"), Final award, 21 November 2022, **RL-0032**.

1205 *Lone Pine v. Canada*, Final award, 21 November 2022, para. 347, **RL-0032.**

1206 *Lone Pine v. Canada*, Final award, 21 November 2022, para. 347, **RL-0032**.

482. Notably, the tribunal in *Merrill & Ring Forestry LP v. Canada* adopted an even less demanding test for an investment under NAFTA Article 1139(h) finding that it is satisfied if the investor can demonstrate the existence of "an actual and demonstrable entitlement . . . to a certain benefit under an existing contract or other legal instrument."[1207] As explained in the Memorial, the Option Agreement formed an essential part of SVB's investments in the Project by providing SVB with a critical funding and development partner;[1208] the Option Agreement thus constitutes an actual and demonstrable entitlement to a benefit for purposes of Article 1139(h).

483. In addition, in *Finley Resources Inc. v United Mexican States*, the tribunal considered whether a bond constituted an "investment" or a "guarantee/contingent liability."[1209] While the tribunal acknowledged that, in isolation, the bond in question would arguably not qualify as an investment in Mexico, and that it was a "contingent liability" and not an "asset," the tribunal found the bond to be:

> *so closely related to the investment* made by the Claimants . . . it entails such a *massive potential "commitment of resources*" by the Claimants if the bond is called . . . and its calling . . . may affect so dramatically the return obtained by the Claimants from their overall investment in Mexico that the Dorama bond may be seen *as part and parcel of the 'interest' arising from the commitment of "other resources" by the Claimant in Mexico*."[1210]

484. Similarly here, the Option Agreement is "part and parcel" of SVB's investment in the Sierra Mojada Project, as it is inextricably linked with SVB's operation and advancement of that Project. It was through the Option Agreement that SVB carried out exploration work and continued the process of progressing the Project to the production stage from 2018 onwards. The envisaged joint venture with South32 under the Option Agreement would also have formed the basis of the future operation of the Project.

1207 *Merrill & Ring Forestry LP v. Government of Canada*, NAFTA/UNCITRAL ("***Merrill & Ring v Canada***"), Award, 31 March 2010, para. 142, **CL-0029**.

1208 Memorial, para. 2.209.

1209 *Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v United Mexican States,* ICSID Case No. ARB/21/25 ("***Finley Resources v. Mexico***"), 4 November 2024, Decision on Jurisdiction and Liability, para. 252, **CL-0209**.

1210 *Finley Resources v. Mexico*, 4 November 2024, Decision on Jurisdiction and Liability, para. 256, **CL-0209** (emphasis added).

485. In any event, Mexico's argument that the Option Agreement is not a "contract where remuneration depends substantially on the production, revenues or profits of an enterprise"[1211] and therefore does not meet the description in Article 1139(h)(ii) is flawed. South32's future returns on its investment in the Project if it decided to exercise its option were undoubtedly dependent on the future "production, revenues or profits" of SVB. Thus, the Option Agreement with South32 falls squarely within the scope of NAFTA Article 1139(h).

486. Finally, Mexico makes a bare assertion that the Option Agreement falls within an exclusion under NAFTA Article 1139(i) which excludes "claims to money . . . that do not involve the kinds of interests set out in subparagraphs (a) through (h)" of NAFTA."[1212] Again, however, this argument has no basis. The Option Agreement is not a claim to money, nor is it divorced from SVB's investments in the Sierra Mojada Project, as Mexico incorrectly suggests.

487. Moreover, even if the Tribunal considered that the Option Agreement falls short of constituting an investment for the purposes of NAFTA Article 1139, the Option Agreement is "part and parcel" of SVB's wider investment and "interests" in Mexico.[1213] Accordingly, Mexico's argument that the Option Agreement is not a qualifying investment must be rejected.

3.3.2.1 SVB made protected investments covered by ICSID Convention Article 25

488. Mexico disingenuously asserts that SVB has merely stated that its claim is brought pursuant to Article 25 of the ICSID Convention, but has not proven that it meets the requirements of that article.[1214] However, in its Memorial, SVB explained that, whilst the ICSID Convention does not contain a definition of "investment," international tribunals have considered objective criteria, in particular the *Salini* criteria,[1215] to analyze the existence of an investment for the purposes of ICSID Convention Article 25(1).[1216] SVB detailed the elements of the *Salini criteria* and explained how its investment satisfied them.[1217] Similarly to the position stated in

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1211 Counter-Memorial, para. 355.

1212 Counter-Memorial, para. 356.

1213 *Finley Resources v. Mexico*, 4 November 2024, Decision on Jurisdiction and Liability, para. 257, **CL-0209**.

1214 Counter-Memorial, para. 360.

1215 Memorial, para. 3.16.

1216 Memorial, para. 3.16.

1217 Memorial, paras. 3.17-3.21.

its Memorial, SVB maintains that its interest in the Option Agreement constitutes an investment for the purposes of ICSID Convention Article 25(1).

489. As an initial matter, it is artificial to try to extricate the Option Agreement from the context of SVB's investment as a whole for the purposes of ICSID Convention Article 25(1). It is well accepted that tribunals take a holistic approach to the interpretation of an investment under ICSID Convention Article 25(1), such that it does not make logical sense to try to parse the different elements of an investment and analyze whether each individual element qualifies as an investment individually. By way of example:

(a) In *Holiday Inns v Morocco*,[1218] the tribunal considered whether the investor's development and construction of hotels in Morocco constituted an investment. The tribunal found that:

> It is well known, and it is being particularly shown in the present case, that investment is accomplished by a number of juridical acts of all sorts. *It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others*. It is particularly important to ascertain which is the act which is the basis of the investment and which entails as measures of execution the other acts which have been concluded in order to carry it out.[1219]

(b) Similarly, in *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*,[1220] the tribunal considered claims arising out of interrelated contracts relating to the reconstruction and operation of a sail training ship. The tribunal found that:

> *The Tribunal can step back to consider their claimed investments as component parts of a larger, integrated investment undertaking*. It is not necessary to parse each component part of the overall transaction and examine whether each, standing alone, would satisfy

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1218 Pierre Lalive, *The First 'World Bank' Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, British Yearbook of International Law, Volume 51, Issue 1, 1980, pp. 123-162, **CL-0213**.

1219 Pierre Lalive, *The First 'World Bank' Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, British Yearbook of International Law, Volume 51, Issue 1, 1980, p. 159, **CL-0213** (emphasis added).

1220 *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8 ("***Inmaris v. Ukraine***"), Decision on Jurisdiction, 8 March 2010, **CL-0210**.

> the definitional requirements of the BIT and the ICSID Convention. For the purposes of this Tribunal's jurisdiction, it is sufficient that the transaction as a whole meets those requirements.[1221]

(c) Finally, in *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*,[1222] the tribunal considered whether a series of project agreements for the construction and operation of a new airport terminal constituted an investment for the purposes of ICSID Convention Article 25(1). The tribunal found as follows:

> *[T]he Tribunal is entitled to, and does, look at the totality of the transaction as encompassed by the Project Agreements*. …. This claim is posited on the basis that Hungary took action which had the effect of depriving the Claimants of their investment and that no compensation was offered or paid in respect thereof. The Tribunal fails to see how it can be contended that this dispute does not arise directly out of an investment. It plainly does. The fact that this case involved a complex series of carefully drafted agreements does not detract from the fact that the Claimants invested US$16.765 million into the Hungarian Airport Project.[1223]

490. SVB has already demonstrated that its investments, as a whole, incorporate the four *Salini* factors, namely: (i) contribution of capital or resources (ii) duration (iii) an assumption of risk and (iv) a contribution to the host state's development.[1224] Seeing as the Option Agreement is a key component of the Sierra Mojada Project, the satisfaction of the *Salini test* criteria must be viewed through the prism of the Project as a whole and not the Option Agreement in isolation.[1225] Nevertheless, the Option Agreement is a covered investment under ICSID Convention Article 25 in its own right, and Mexico's arguments to the contrary lack merit.

1221 *Inmaris v. Ukraine*, Decision on Jurisdiction, 8 March 2010, para. 92, **CL-0210** (emphasis added).

1222 *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16 ("***ADC v. Hungary***"), Award, 2 October 2006, **CL-0061**.

1223 *ADC v. Hungary*, Award, 2 October 2006, para. 331, **CL-0061** (emphasis added).

1224 Memorial, paras. 3.16-3.21.

1225 *See, e.g.*, Pierre Lalive, *The First 'World Bank' Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, British Yearbook of International Law, Volume 51, Issue 1, 1980, p. 159, **CL-0213** (emphasis added); *Inmaris v. Ukraine*, Decision on Jurisdiction, 8 March 2010, para. 92, **CL-0210**; *ADC v. Hungary*, Award, 2 October 2006, para. 331, **CL-0061**.

491. *First*, in terms of the contribution of capital or resources, ICSID tribunals have broadly interpreted this factor to encompass both pecuniary and non-pecuniary contributions including "materials, works or services."[1226] SVB committed capital through its investments in and development of the Sierra Mojada Project, the subject of the Option Agreement with South32.

492. *Second*, the Option Agreement satisfies the duration criterion, which has been held to be satisfied by an investment that is in place from a number of months to many years.[1227] South32 agreed to contribute funding for the exploration at the Sierra Mojada Project over a period of four years in exchange for an option to purchase 70% of all of the issued and outstanding shares of Minera Metalín. Moreover, SVB's development of the Project spanned over two decades.

493. *Third*, it is incorrect for Mexico to contend that the Option Agreement does not involve the assumption of risk. Firstly, risk is an inherent part of the grant of any option and, more generally, tribunals have recognized that risk is an inherent element of any long-term investment.[1228] As demonstrated by the facts of the present case, SVB bore the risk of a failure of the Sierra Mojada Project – indeed, that risk materialized in this case as, due to Mexico's misconduct, South32 terminated the Option Agreement and SVB lost its entire investment. There is no risk more significant to SVB than the loss of its entire Project.

494. *Fourth and finally*, not only is it disingenuous for Mexico to suggest that the Option Agreement did not involve a contribution by SVB to the economic development of the host State, but Mexico also grossly overstates the importance of a territorial nexus between the Option Agreement and Mexico. Tribunals have considered that "it is not necessary to parse the territorial nexus of each and every component of the Claimants' investment; it is the investment as a whole that has that nexus." [1229] As already described in its Memorial,[1230] SVB deployed the capital amounts paid by South32 to develop the Sierra Mojada Project which, in turn, contributed to local employment and tax revenues in Mexico. SVB therefore undeniably made

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1226 Memorial, para. 3.18 and *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction (unofficial translation), para. 73(i), **CL-0060**.

1227 Memorial, para. 3.19 and *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2 ("***Deutsche Bank v. Sri Lanka***"), Award, 31 October 2012, para. 303, **CL-0069**.

1228 Memorial, para. 3.20; *see also Salini Costruttori S.p.A. and Italstrade S.p.A.* v. *Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 56, **CL-0051**; *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 136, **CL-0058**.

1229 *Inmaris v. Ukraine,* Decision on Jurisdiction, 8 March 2010, para. 125, **CL-0210**.

1230 Memorial, para. 3.21.

a qualifying contribution to Mexico's economic and social development through the funds generated by the Option Agreement.

495. The Option Agreement therefore satisfies the criteria for an investment under ICSID Convention Article 25(1). Accordingly, Mexico's objection to the Tribunal's jurisdiction *ratione materiae* with regard to the Option Agreement must be rejected

4. MERITS

4.1 Mexico Unlawfully Expropriated the Claimant's Protected Investments in the Sierra Mojada Project

496. In its Memorial, SVB demonstrated that (i) Mexico's acts and omissions amounted to an indirect expropriation of SVB's protected investments in the Sierra Mojada Project, and (ii) Mexico's indirect expropriation was unlawful under NAFTA Article 1110(1), as it was not done for a public purpose, in accordance with due process of law, in a non-discriminatory manner, or accompanied by payment of prompt, adequate, and effective compensation.[1231]

497. Specifically, as SVB showed, despite SVB's repeated requests to the Mexican authorities, Mexico made no attempt to intervene in or bring an end to the Continuing Blockade or to allow SVB and Minera Metalín to regain access to the Project site.[1232] Nor has Mexico taken any action to sanction Mineros Norteños or its members for their continued unlawful occupation of the Project site.[1233] By encouraging and permitting Mineros Norteños to blockade, occupy, possess, and exploit the Sierra Mojada Project site with impunity since September 2019 – through the direct instigation and support of Deputy Borrego and the total inaction of its authorities – Mexico has deprived SVB in whole of its fundamental rights of ownership and of the use, enjoyment, and economic benefit of its protected investments in the Project.[1234]

498. In its Counter-Memorial, Mexico does not dispute the content or legal standard for an indirect expropriation under NAFTA Article 1110(1) as set out by SVB.[1235] Indeed, Mexico concurs with SVB that "[a]n indirect expropriation involves the total (or almost total) loss of the value

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1231 Memorial, paras. 4.2-4.25.

1232 Memorial, para. 4.15.

1233 Memorial, para. 4.15.

1234 Memorial, paras. 4.16-4.17.

1235 Counter-Memorial, paras. 377-381.

of the investment,"[1236] and that an indirect expropriation may occur even in the absence of a formal transfer of title.[1237] There is also no dispute between the Parties that "the key factor in determining the existence of an indirect expropriation is the effect on the investment of the measure or measures alleged to be in breach of the treaty that are attributable to the State."[1238]

499. Mexico further agrees with SVB that the Tribunal should follow a three-step test to determine whether an indirect expropriation has occurred, namely: (i) whether there is an investment capable of being expropriated; (ii) whether that investment has in fact been expropriated; and (iii) whether the conditions set forth in Article 1110(1)(a)-(d) have been satisfied.[1239]

500. Notably, while Mexico agrees with this test, it ignores entirely the third step, *i.e.*, whether the conditions set forth in Article 1110(1)(a)-(d) have been satisfied, dismissing it as "irrelevant."[1240] By neglecting to establish that Mexico's expropriation in this case complied with Article 1110(1)(a)-(d), Mexico effectively concedes that, if the Tribunal finds that an expropriation has occurred, it must be deemed unlawful.[1241]

501. Mexico likewise does not dispute that SVB made investments capable of being expropriated; instead, Mexico contends that SVB allegedly has not "identified precisely which investment it considers to have been expropriated."[1242] Mexico further asserts that SVB has failed to show that its investments lost substantially all of their value "as a result of the omission it attributes to the Respondent in connection with the Second Blockade."[1243] Finally, Mexico argues that "the interference" caused by the Continuing Blockade is purportedly "neither permanent (since it is possible to reach an agreement with Mineros Norteños) nor of such magnitude as to have caused a complete deprivation of the economic use and enjoyment of the investment."[1244]

502. Mexico's contentions are misleading and wrong.

1236 Counter-Memorial, paras. 378.

1237 Counter-Memorial, para. 381; Memorial, para. 4.5.

1238 Counter-Memorial, para. 382.

1239 Counter-Memorial, para. 387; Memorial, para. 4.6.

1240 Counter-Memorial, para. 389.

1241 Counter-Memorial, para. 389; Memorial, paras. 4.19-4.25.

1242 Counter-Memorial, para. 388.

1243 Counter-Memorial, para. 389.

1244 Counter-Memorial, para. 403.

503. *First*, contrary to Mexico's contentions, SVB clearly explained in its Memorial that Mexico's wrongful acts and omissions amount to an unlawful indirect expropriation of its protected investments in Minera Metalín and, through Minera Metalín, the Sierra Mojada Project.[1245] As SVB demonstrated, it held protected investments in the Sierra Mojada Project, specifically, all of the shares in Minera Metalín – as the project company – and, indirectly, in Minera Metalín's assets, including 19 registered mining concessions; surface rights to land plots at Sierra Mojada; equipment and infrastructure; the results of exploration works; and interests arising from commercial arrangements, including the Option Agreement.[1246]

504. In addition, the Claimant's quantum expert, BRG, set out a detailed overview of SVB's investments in the Sierra Mojada Project in its expert report,[1247] including the specific amounts SVB invested to acquire and develop the Project.[1248] There can therefore be no dispute that SVB has adequately identified the investments that Mexico indirectly expropriated.

505. *Second*, the deprivation of SVB's economic use and enjoyment of its protected investments in the Sierra Mojada Project is "permanent" and total, and not merely "ephemeral" or temporary, as Mexico erroneously contends.[1249] As SVB has demonstrated, Mexico encouraged and then permitted Mineros Norteños to blockade, occupy, possess, and exploit the Project site with impunity for its own financial benefit.[1250] In so doing, Mexico has denied SVB access to its own Project site, brought all exploration to a halt, and prevented SVB from bringing the Project into production with its partner South32.[1251] Despite repeated appeals from SVB and Minera Metalín for Government intervention and action, Mexico has taken no action and the Project site remains under the control of Mineros Norteños, with ongoing unauthorized exploitation.[1252] Mineros Norteños has even asserted that it owns the Project and wishes to sell it.[1253]

1245 Memorial, para. 4.16.

1246 Memorial, para. 3.13.

1247 BRG ER1, s. III.

1248 BRG ER1, paras. 35-39.

1249 Counter-Memorial, paras. 383, 403.

1250 Memorial, para. 4.14.

1251 Memorial, para. 4.16.

1252 Memorial, para. 4.15.

1253 López Ramírez WS1, para. 5.4; Second Letter from Minera Norteños to Minera Metalín, 6 August 2021, **C-0281**; Barry WS2, para. 68.

506. As the tribunal in *Wena Hotels v. Egypt* made clear, an expropriation "exists not only when a state takes over private property," but also where, as here, "the state withdraw[s] the protection of its courts [from] the owner expropriated, and tacitly allow[s] a *de facto* possessor to remain in possession of the thing seized."[1254] As a result of Mexico's continued inaction, Mexico has neutralized the benefit of SVB's investments in the Sierra Mojada Project by failing to allow SVB and Minera Metalín to regain access to the Project site and preventing SVB from bringing the Project into production with its partner South32.[1255] SVB's interest in the Sierra Mojada Project, which SVB cannot access or develop, has thus been rendered worthless. As explained in the Claimant's Memorial and above, SVB's losses and damage crystallized on 31 August 2022, when South32 – SVB's critical financing and development partner – exited the Project due to the unlawful Continuing Blockade, Mexico's continued refusal to act, and the inability to progress the exploration works for nearly three years, marking the end of the Project.[1256]

507. As Mr. Barry explained in his first witness statement, following the exit of South32, no reasonable investor would have invested in the Project, thus confirming that it had lost all value as of 31 August 2022.[1257] While Mexico seeks to dismiss Mr. Barry's evidence as "subjective," as explained in Mr. Barry's second witness statement and Section 2.10 above, his testimony is based on several conversations with shareholders and investors following South32's exit from the Project.[1258] Those investors and shareholders all confirmed Mr. Barry's and South 32's conclusion that, given the Continuing Blockade and Mexico's lack of action to resolve it, there would be no appetite for investors to invest in the Project.[1259] Thus, due to Mexico's continued inaction, SVB had lost its major financing and development partner, its Project remained blockaded with no end in sight, and its investments had lost all their value.

1254 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 ("***Wena Hotels v. Egypt***"), Award, 8 December 2000, para. 97, **CL-0049**; *see also Amco Asia Corporation, et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1 ("***Amco v. Indonesia***"), Award, 20 November 1984, para. 158, **CL-0047**.

1255 *See, e.g.*, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, para. 1328, **CL-0170** (finding that, "[b]y denying [the] Mining Lease Application . . . the Licensing Authority rendered it impossible for Claimant to make use of the information and data it had collected and thereby also rendered Claimant's interest in both [companies] useless" and that, "[w]ithout a mining lease, neither of them could any longer fulfil their exclusive purpose, after the exploration had been completed; thus, following the denial of Application, the value of [the investment] was effectively neutralized"); *see also* Section 2.10 *supra*.

1256 *See* Section 2.10 *supra*; Memorial, para. 3.28.

1257 Barry WS1, paras. 8.6-8.7.

1258 Barry WS2, para. 66.

1259 Barry WS2, para. 5.

508. It is, moreover, no answer for Mexico to argue SVB could and should have resolved the Continuing Blockade itself by acquiescing to Mineros Norteños's extortionate demands.[1260] Mexico's "blame the victim" defense is untenable and fundamentally flawed. SVB was under *no* obligation to accede to Mineros Norteños's extortionate demands for royalty payments to which it had no legal entitlement.[1261] As explained in SVB's Memorial and above, multiple levels of Mexico's own judiciary adjudicated and rejected Mineros Norteños's claims for premature royalty payments.[1262] In defiance of these judicial rulings, Mineros Norteños resorted to illegal self-help measures, taking the law into its own hands to obtain by force what it had been unable to obtain by law.[1263] Rather than curbing that unlawful conduct, Mexico not only tolerated it – it actively encouraged it.[1264] Mexico had an obligation to uphold and enforce the rule of law at Sierra Mojada.[1265] Even today, it continues to fail to do so. In such circumstances, there can be no dispute that Mexico has permanently deprived SVB of its investments in the Sierra Mojada Project and prevented SVB from "exploiting the economic potential of the property."[1266]

509. Furthermore, even if the Tribunal were to accept that the Continuing Blockade – which remains in place even today – were temporary in nature, which it is not, tribunals have recognized that

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1260 Counter-Memorial, paras. 400-402.

1261 *See* Section 2.6 *supra*.

1262 *See* Section 2.3 *supra*; Memorial, para. 2.69.

1263 *See* Section 2.5 *supra*; Memorial, para. 2.111.

1264 *See* Section 2.7 *supra*; Memorial, para. 2.111.

1265 *See, e.g.*, Report of the Secretary General of the United Nations, *The rule of law and transitional justice in conflict and post-conflict societies*, 23 August 2004, para. 6, **CL-0171** (stating that the rule of law "refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards" and that "[i]t requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency").

1266 *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, para. 76, **CL-0007**; *see also Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2 ("***Tecmed v Mexico***"), Award, 29 May 2003, para. 115, **CL-0055** (observing that "[i]t must first be determined if . . . due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder and the extent of the loss" and that "[t]his determination is important because it is one of the main elements to distinguish, from the point of view of an international tribunal, between a regulatory measure . . . and a de facto expropriation that deprives those assets and rights of any real substance").

"in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary."[1267]

510. As SVB explained in its Memorial,[1268] in *Wena Hotels*, Egypt argued that the seizure of the claimant's hotels at issue in that case was merely an "ephemeral" deprivation and, therefore, did not constitute an expropriation, because the claimant regained possession of the hotels after one year.[1269] The tribunal disagreed, finding that "allowing an entity (over which Egypt could exert effective control) to seize and illegally possess the hotels for nearly a year is more than an ephemeral interference 'in the use of that property or with the enjoyment of its benefits.'"[1270] On this basis, the tribunal held that Egypt had expropriated the claimant's investments.[1271]

511. The tribunal's decision in *Bahgat v. Egypt I* is to similar effect.[1272] In that case, Egypt froze, for a period of six years, the assets of companies that the claimant had founded to develop iron ore resources in Egypt on the basis of a 30-year mining concession.[1273] Despite the temporary nature of the freezing order, the tribunal held that it had the effect of "*de facto* [bringing] an end to all commercial activities" of the claimant's companies.[1274] The tribunal rejected Egypt's argument that the impugned freezing order was "neither permanent nor irreversible," finding that "no possibility exists to undo the negative impact that the lost 6 years had on Claimant's investment."[1275] The tribunal further noted that it was "unlikely that in the remaining period [of the concession] the mining project could be brought to economic viability with an adequate return on the investment."[1276] As a result, the tribunal concluded that Egypt had indirectly expropriated Mr. Bahgat's investments.[1277]

1267 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL ("***S.D. Myers v Canada***"), Partial Award, 13 November 2000, para. 283, **CL-0085**.

1268 Memorial, paras. 410-413.

1269 *Wena Hotels v. Egypt*, Award, 8 December 2000, para. 99, **CL-0049**.

1270 *Wena Hotels v. Egypt*, Award, 8 December 2000, para. 99, **CL-0049**.

1271 *Wena Hotels v. Egypt*, Award, 8 December 2000, para. 101, **CL-0049**.

1272 *Mohamed Abdel Raouf Bahgat v. Egypt (I)*, PCA Case No. 2012-07 ("***Bahgat v. Egypt I***"), Final Award, 23 December 2019, **CL-0172**.

1273 *Bahgat v. Egypt I*, Final Award, 23 December 2019, para. 6 **CL-0172**.

1274 *Bahgat v. Egypt I*, Final Award, 23 December 2019, para. 227, **CL-0172**.

1275 *Bahgat v. Egypt I*, Final Award, 23 December 2019, paras. 227, 228, **CL-0172**.

1276 *Bahgat v. Egypt I*, Final Award, 23 December 2019, para. 228, **CL-0172**.

1277 *Bahgat v. Egypt I*, Final Award, 23 December 2019, para. 232, **CL-0172**.

512. In *Olin Holdings v. Libya*, the tribunal similarly affirmed that "State measures, even if temporary, can have an effect equivalent to expropriation *if their length and impact on the investment are sufficiently important*."[1278] In that case, Libya had issued an expropriation order in 2006, seizing a parcel of land along the Tripoli Airport Road, including the claimant's dairy factory.[1279] Although the order was revoked in 2011,[1280] the claimant was unable to operate its business for over four years, leading to financial losses and loss of market position.[1281] Even though the expropriation was "temporary," the tribunal concluded that "the four years and a half of uncertainty"[1282] and economic harm suffered by the claimant[1283] were sufficient to find that Libya's measures amounted to an expropriation of the claimant's investment.[1284]

513. In the present case, like in *Wena Hotels*, *Bahgat*, and *Olin Holdings*, Mexico dispossessed the Claimant of its investment and the effect of Mexico's inaction was permanent, as the Claimant was unable to access or operate its investment for the three years following the commencement of the Continuing Blockade, rendering the Project unviable and causing the Claimant's partner South32 to exit the Project. Unlike in the above cases, SVB's deprivation of its investment did not merely last for a period of months or years. Mineros Norteños remains in possession of the Project site to this day and the Mexican authorities have taken no steps to restore the Claimant's investments, despite having a clear legal duty to do so. Mexico has therefore permanently and totally deprived the Claimant of its investment, in breach of NAFTA Article 1110(1).

1278 *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP ("***Olin Holdings v. Libya***"), Final Award, 25 May 2018, para. 165 (emphasis added), **CL-0173**; *see also Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award, 14 February 2012, para. 577, **CL-0174** (observing that the terms of the France-Poland BIT "do not require that dispossession be permanent in the sense of continuing *ad infinitum*, although deprivation must possess a character which is more than transitory"); *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Award, 22 December 2003, para. 68, **CL-0175** (observing that "[w]hile this disappearance [of the expropriated property or right] need not be permanent, a temporary measure must have substantial consequences equivalent to a definitive loss") (French original: "*S'il n'est pas nécessaire que cette disparition soit permanente, une mesure temporaire doit alors avoir des conséquences substantielles équivalentes à une perte définitive*").

1279 *Olin Holdings v. Libya*, Final Award, 25 May 2018, para. 93, **CL-0173**.

1280 *Olin Holdings v. Libya*, Final Award, 25 May 2018, para. 115, **CL-0173**.

1281 *Olin Holdings v. Libya*, Final Award, 25 May 2018, para. 166, **CL-0173**.

1282 *Olin Holdings v. Libya*, Final Award, 25 May 2018, para. 166, **CL-0173**.

1283 *Olin Holdings v. Libya*, Final Award, 25 May 2018, para. 166, **CL-0173**.

1284 *Olin Holdings v. Libya*, Final Award, 25 May 2018, paras. 167, 181, **CL-0173**.

4.2 Mexico Failed to Accord the Claimant's Investments the Minimum Standard of Treatment under NAFTA Article 1105

514. SVB demonstrated in its Memorial that Mexico has breached the minimum standard of treatment set out in NAFTA Article 1105 by failing to provide full protection and security ("**FPS**")[1285] and fair and equitable treatment ("**FET**")[1286] to its protected investments.

515. As SVB showed, the Mexican authorities failed to take reasonable actions within their power to protect SVB's investments from the Continuing Blockade, despite their multiple requests for assistance; to restore SVB's and Minera Metalín's access to the Project site; or to sanction Mineros Norteños and its members for their ongoing, unlawful conduct.[1287] As a result of Mexico's inaction, SVB has had no access to its Project for years, during which time Mineros Norteños has taken possession of the mine and profited from the sale of tailings at the site.[1288]

516. What is more, Mexico's own Federal Deputy, Mr. Borrego,[1289] incited, encouraged, and supported the Continuing Blockade for his own political and personal gain.[1290] And while Mexico acted swiftly to resolve similar blockades at other mining projects in Mexico, it unjustifiably refused to take such action in relation to the Sierra Mojada Project. Through these actions and omissions, Mexico has violated its obligations to accord SVB's investments FPS and FET.[1291]

517. In its Counter-Memorial, Mexico agrees with SVB that the FPS and FET standards under NAFTA Article 1105 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.[1292] However,

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1285 Memorial, paras. 4.26-4.39.

1286 Memorial, paras. 4.40-4.54.

1287 *See* Section 2.7 and Section 2.8 *supra*; Memorial, para. 4.38.

1288 *See* Section 2.7 *supra*; Memorial, para. 4.15.

1289 Memorial, para. 2.109.

1290 *See* Section 2.7 *supra*; Memorial, paras. 2.115-2.117, 2.120, 2.127-2.131, 4.17(a). Deputy Borrego's actions are attributable to Mexico: *see* ILC Articles, Art. 4, **CL-0081** ("1. 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").

1291 Memorial, para. 4.39.

1292 Counter-Memorial, para. 406; Memorial, para. 4.28.

Mexico disputes the content and scope of those legal standards and then misapplies them, incorrectly concluding that Mexico has complied with its Treaty obligations.[1293]

518. As elaborated below, Mexico's arguments misstate the relevant legal standards and then either distort or ignore the evidence of its wrongdoing. Mexico's continued failure to exercise any care, much less reasonable care, to protect SVB's investments from the Continuing Blockade has breached Mexico's obligation to provide FPS and FET.

4.2.1 Mexico Failed to Accord SVB's Protected Investments FPS

519. It is well established that the FPS standard requires the State to act with due diligence or vigilance, and to exercise reasonable care and to take reasonable actions within its power to prevent harm or injury to the investment.[1294] As SVB explained in its Memorial, this entails both (i) a positive obligation to prevent third parties from physically harming to the investment, and (ii) a negative obligation to refrain from causing harm through acts attributable to the State.[1295]

520. Strikingly, although this case is a textbook example of a FPS breach, Mexico, in its 171-page Counter-Memorial, devotes just two paragraphs to FPS.[1296] Mexico notably agrees with SVB that "the full protection and security standard imposes an obligation of due diligence or vigilance and requires the State to exercise reasonable care and take reasonable actions within its power to prevent harm or injury to the investment."[1297] Mexico also does not dispute that the FPS standard imposes both positive and negative obligations on the host State.[1298]

521. Mexico nevertheless takes issue with SVB's formulation of the positive obligation on the host State, arguing that requiring Mexico to "prevent the Second Blockade and avoid Claimant's losses . . . would not be consistent with a 'due diligence' obligation," because "it would suggest

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1293 Counter-Memorial, para. 448-459.

1294 Memorial, para. 430.

1295 Memorial, para. 4.32; *Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 21537/ZF/AYZ ("***Cengiz v. Libya***"), Award, 7 November 2018, paras. 403-404, **CL-0077**.

1296 Counter-Memorial, paras 417-418.

1297 Counter-Memorial, para. 418.

1298 Counter-Memorial, paras 417-418.

an obligation of strict liability, which is inconsistent with the standard set forth in Article 1105 and available precedent."[1299] Mexico misunderstands the Claimant's position.

522. SVB's position is not that the FPS standard imposes an obligation of strict liability on the host State; rather, SVB's position is that the FPS standard imposes an obligation of due diligence or vigilance.[1300] That standard requires, in turn, that the host State exercise "reasonable care" in the circumstances or take "reasonable actions" within its own power to prevent harm or injury to the investment. As the tribunal in *Cengiz v. Libya* observed with respect to the FPS standard:

> [T]he question which the Tribunal must address is whether the Libyan government exercised *reasonable care* to protect Cengiz's investment in the Southern Region, taking into consideration the State's means and resources and the general political and security situation in Libya?[1301]

523. In *Cengiz*, the tribunal found that Libya had breached the FPS standard by failing to deploy security forces to protect the claimant's assets during a period of significant instability, allowing private groups to raid the investor's project repeatedly, loot its equipment, and destroy its facilities.[1302] Similarly here, Mexico failed to deploy its police and prosecutorial authorities to prevent, disperse, or remove the Continuing Blockade – which continues with impunity even today – causing the total destruction of SVB's protected investments in the Project.[1303]

524. A number of other investment treaty tribunals have reached similar conclusions with respect to FPS.[1304] In *Parkerings v. Lithuania*, for example, the tribunal recognized that a breach of the FPS standard may arise where a State fails to prevent damage to an investor's investment by a

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1299 Counter-Memorial, para. 418.

1300 Memorial, para. 4.30.

1301 *Cengiz v. Libya*, Award, 7 November 2018, para. 437, **CL-0077** (emphasis added).

1302 *Cengiz v. Libya*, Award, 7 November 2018, paras. 438, 442, **CL-0077**.

1303 *See* Section 2.7 and Section 2.8 *supra.*

1304 Memorial, paras. 4.34-4.37; *Wena Hotels v. Egypt*, Award, 8 December 2000, paras. 84-95, **CL-0049**; *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, para. 597, **CL-0073**; *MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro*, ICSID Case No. ARB(AF)/12/8 ("***MNSS v. Montenegro***"), Award, 4 May 2016, Award, paras. 351, 356**, CL-0076**; *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic* of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, paras. 288-289, **CL-0040**.

third party, restore the *status quo* that existed prior to the damage, or punish the perpetrator.[1305] Likewise, in *AAPL v. Sri Lanka*, the tribunal found that the respondent, by failing to protect the investor's shrimp farm from a military counter-insurgency operation, "violated its due diligence obligation which requires undertaking all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destructions."[1306]

525. In *AMT v. Zaire* the tribunal similarly held that "Zaire must show that it has taken *all measure of precaution* to protect the investments of AMT on its territory."[1307] In that case, during periods of political instability and civil unrest, Zairean military forces looted and destroyed the investor's properties.[1308] The tribunal observed that Zaire had breached the FPS obligation "*by taking no measure whatever* that would serve to ensure protection and security of the investment in question."[1309] The same is true of Mexico's conduct in the present case—it refused to take any action, even in the face of blatant criminal activity by Mineros Norteños.

526. The tribunal's recent decision in *Energía y Renovación v. Guatemala* is to similar effect. In that case, the tribunal found that Guatemala had failed to protect the claimant's investments in hydroelectric powerplants from protests and violence by local opponents, and therefore breached FPS under the minimum standard of treatment in the DR-CAFTA.[1310] Notably, Guatemala argued that it had duly coordinated with the National Civil Police and the investor's Guatemalan subsidiaries, increased police presence (including special forces), deployed officers preventively, and taken action to disperse or contain the protests, as allegedly required under the FPS standard.[1311] The tribunal disagreed, finding that:

> In this case, although the State has not remained totally inert in the face of the systematic and continuous violation of the physical integrity of the Project and its collaborators, *its actions have lacked*

1305 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8 ("***Parkerings v. Lithuania***"), Award, 11 September 2007, para. 355, **CL-0062**; *see also* Memorial, para. 4.31.

1306 *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, **CL-0094**, para. 85

1307 *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1 ("***AMT v Zaire***"), Award, 21 February 1997, para. 6.05, **CL-0005**; *see also* Memorial, para. 4.33.

1308 *AMT v Zaire*, Award, 21 February 1997, para. 3.04, **CL-0005**.

1309 *AMT v Zaire*, Award, 21 February 1997, para. 6.08, **CL-0005**.

1310 *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56 ("***Energía y Renovación v. Guatemala***"), Award, 31 March 2025, para. 78, **CL-0176**.

1311 *Energía y Renovación v. Guatemala*, Award, 31 March 2025, para. 289, **CL-0176**.

> *practical consequences.* There is evidence in the file that police measures were taken, legal action was taken, as well as the existence of an attempt at a political settlement in the form of the Peace Agreement. However, *none of these measures had any concrete effects. That is, none of these measures proved to be sufficient or adequate to address the security concerns related to the Project.*[1312]

527. Thus, although Guatemala – unlike Mexico in this case – took certain actions to protect the claimant's investments, including dispersing the protest prosecuting those involved, the tribunal concluded that those actions were not adequate and had no practical effect, and therefore did not comply with Guatemala's FPS obligation under the DR-CAFTA.[1313]

528. Similarly, in *Wena Hotels*, the tribunal held that Egypt had breached its obligation to accord Wena's investment FPS, finding that (i) Egypt was aware of the Egyptian Hotel Company's intention to seize the claimant's hotels and took no action to prevent this seizure; (ii) once the seizures occurred, both the police and the Ministry of Tourism took no immediate action to restore the hotels promptly to Wena's control; and (iii) neither the Egyptian Hotel Company nor its senior officials was sanctioned seriously for their actions in forcibly expelling Wena and illegally possessing the hotels for approximately a year.[1314]

529. In the present case, like in *Wena*, the Mexican authorities (i) were aware of the Continuing Blockade, even before it was installed, and took no action to prevent it; (ii) once the Continuing Blockade began, took no immediate (or subsequent) action to contain or disperse it or to restore the Project site promptly to SVB's and Minera Metalín's control; and (iii) have taken no action to sanction Mineros Norteños or its members for their illegal actions.[1315] Instead, as set forth above, Minera Metalín's criminal complaint languished for years with no meaningful action before the Prosecutor's Office discontinued the criminal case on spurious grounds.[1316]

530. In an attempt to muddy the waters, Mexico argues that the tribunals' findings in *Wena Hotels* and *Suez v. Argentina* are "not directly applicable" here, because the treaties in those cases did not define FPS by reference to the minimum standard of treatment under customary

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1312 *Energía y Renovación v. Guatemala*, Award, 31 March 2025, para. 331, **CL-0176** (emphasis added).

1313 *Energía y Renovación v. Guatemala*, Award, 31 March 2025, para. 331, **CL-0176**.

1314 *Wena Hotels v. Egypt*, Award, 8 December 2000**,** paras. 84-95, **CL-0049**.

1315 *See* Section 2.8 *supra.*

1316 *See* Section 2.8 *supra.*

international law.[1317] That argument is misplaced. Not only are the findings of the *Wena Hotels* and *Suez* tribunals consistent with the tribunal's recent decision in *Energía y Renovación* – which applied FPS by reference to the minimum standard of treatment – but as multiple tribunals have confirmed, there is no practical difference between the FPS standard under the minimum standard and an autonomous FPS standard.[1318] As the tribunal in *Noble Ventures v. Romania* observed, "it seems doubtful whether [the FPS standard in the BIT] can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens."[1319]

531. Furthermore, Mexico cannot rely on its own law to justify its refusal to act in the face of the patently illegal conduct of Mineros Norteños. As set forth above, and as confirmed by the criminal file, the Mexican authorities had direct confirmation of the fact that Mineros Norteños was unlawfully blockading and occupying Minera Metalín's land, and had taken its employees hostage; it also had confirmed the identity of the perpetrators.[1320] As noted, in such circumstances, the Mexican Constitution and the CNPP imposed mandatory requirements on the authorities to act diligently, promptly, and transparently – particularly where victims' rights are at stake – but they inexplicably failed to do so here.[1321]

532. Instead of promptly investigating and prosecuting such unlawful conduct as it was legally required to do, Mexico avoided taking meaningful action, even when Mineros Norteños obstructed its investigation by refusing to allow the authorities to access the site. As explained in Section 2.11 above, the criminal file reveals a consistent pattern – the authorities would visit the mine site, document illegal activity and admissions of wrongdoing by Mineros Norteños, but then fail to take any further action. As a result, Mexico effectively acquiesced in Mineros Norteños's continued and unabated criminal activity. Such inaction falls plainly short of the requirement to exercise due diligence and take reasonable actions within the State's power to

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1317 Counter-Memorial, para. 422.

1318 *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11 ("***Noble Ventures v Romania***"), Award, 12 October 2005, para. 164, **CL-0177**; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 522, **CL-0032** (observing that "the full protection and security standard is no more than the traditional obligation to protect aliens under international customary law").

1319 *Noble Ventures v. Romania*, Award, 12 October 2005, para. 164, **CL-0177**.

1320 *See* Section 2.8 *supra.*

1321 *See* Section 2.8 *supra.*

prevent harm to the Claimant's investment – here, the authorities had the power and a clear basis to take action, but they simply refused to do so.[1322]

533. Nor do Mexico's domestic laws on the use of force justify its inaction in this case.[1323] As a threshold matter, Mexico did not need to use force to resolve the Continuing Blockade, as demonstrated by the Initial Blockade.[1324] In any event, Mexico had ample justification to use reasonable force in this case, given Mineros Norteños's flagrant criminal activity. As set forth above, Mexico has a history of intervening, in some cases through the use of force, to resolve blockades against other mining projects. There is no explanation for its refusal to take any action – through force or other means – to intervene in the Continuing Blockade and restore the Claimant's access to its Project.

534. The decision in *MNSS v. Montenegro* is instructive here. In that case, workers invaded and occupied the claimant's steelworks on two occasions, but on both occasions Montenegro took no action to dislodge the protesters, despite having been forewarned of the second occupation.[1325] The tribunal found that the FPS standard "requires the Government to have a more pro-active attitude to ensure the protection of persons and property in the circumstances of [the investor in that case], particularly when it had been forewarned."[1326] Thus, the failure of Montenegro's police to take any action breached FPS.[1327] Likewise here, Mexico's police and prosecutorial authorities took no action to intervene in the Continuing Blockade or to restore SVB's investment, thereby breaching its FPS obligation.

535. Moreover, as SVB has shown, not only were the Mexican authorities fully aware of the Continuing Blockade, but Mexico's own Federal Deputy incited and encouraged it.[1328] Although Mexico has failed to produce any documents in response to SVB's requests regarding Deputy Borrego and his role in inciting, encouraging, and supporting the Continuing Blockade, the contemporaneous record affirms that role.[1329] As Mr. Fraire's own audio statements make plain, Deputy Borrego's motives for inciting the Blockade are clear: to gain political capital

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1322 *See* Section 2.11 *supra*; Barry WS2, para. 62.

1323 Counter-Memorial, paras. 196-199.

1324 *See* Section 2.5 *supra.*

1325 *MNSS v. Montenegro*, Award, 4 May 2016, paras. 352-353, **CL-0076**.

1326 *MNSS v. Montenegro*, Award, 4 May 2016, CL-0076, para. 356, **CL-0076**.

1327 *MNSS v. Montenegro*, Award, 4 May 2016, CL-0076, para. 356, **CL-0076**.

1328 *See* Section 2.7 *supra*; Memorial, para. 2.111.

1329 *See* Section 2.7 *supra.*

for the MORENA Party and for his re-election campaign by supporting a local mining cooperative in its dispute with a foreign investor, while at the same time lining his pockets with a percentage of any proceeds obtained by Mineros Norteños from its extortionate actions.[1330] These facts speak for themselves – Mexico, through Deputy Borrego's unlawful actions, has plainly breached its obligation to refrain from doing harm to SVB's protected investments.

536. In sum, Mexico took no steps to enforce the law, to bring an end to Mineros Norteños's unlawful conduct, or to restore the Project site to the rightful control of SVB and Mineros Metalín. Rather, after years of delay and inactivity – despite the ongoing nature of the Continuing Blockade – Mexico has permanently shelved its criminal investigation on the purported basis that Minera Metalín failed to respond to an alleged request in June 2023, even though the actual resolution archiving the investigation refers to no such request.[1331] And as set forth above, Minera Metalín never received that belated request, nor is there any proof of delivery.[1332] The net result of Mexico's complete failure to act is that the Claimant has lost the entirety of its protected investments in the Project, while Mineros Norteños continues to control and to use the Project as its own, by, among other things, mining the waste dumps and seeking to sell the Project to interested buyers.[1333]

537. Remarkably, despite the clear evidence of Mexico's breach of its FPS obligation, Mexico offers no response to the Claimant's arguments applying the FPS standard to the facts.[1334] Nor does Mexico provide any rebuttal testimony or evidence from Deputy Borrego. SVB's arguments regarding Mexico's breach of its FPS obligation therefore stand unrebutted and are reinforced by the further evidence that has come to light since SVB filed its Memorial.[1335] Moreover, as demonstrated above, the Claimant is entitled to an adverse inference that documents from Deputy Borrego and his office would demonstrate that he encouraged, supported, and coordinated the Continuing Blockade with Mineros Norteños.[1336] In view of the above, and

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1330 *See* Section 2.7 *supra.*

1331 *See* Section 2.8 *supra.*

1332 *See* Section 2.8 *supra.*

1333 *See* Section 2.10 *supra*; López Ramírez WS1, para. 6.5.

1334 Mexico's only submissions regarding FPS address the narrow legal issues referred to above, which relate to the scope and content of the FPS obligation, rather than its application to the facts of this case.

1335 *See* Section 2.7 and Section 2.8 *supra.*

1336 *See* Sections 2.1 and 2.7 *supra*.

Mexico's failure to put forward an affirmative defense, there can be no dispute that Mexico has breached its FPS obligation under Article 1105 of the NAFTA.

4.2.2 Mexico Failed to Accord SVB's Protected Investments FET

538. SVB established in its Memorial that Mexico's acts and omissions also breached the FET obligation under NAFTA Article 1105. Specifically, SVB demonstrated that Mexico's acts and omissions were unjust, arbitrary, unreasonable, and in violation of due process, and thus failed to provide the minimum standard of treatment of both FPS and FET to SVB's protected investments.[1337] In particular, as SVB showed, Mexico has refused to take action to address in a just or reasonable way (i) the Continuing Blockade and illegal occupation at the Project site; (ii) the wrongful confinement and effective kidnapping of SVB's personnel at the camp; and (iii) the substantial damage to SVB's facilities and illegal exploitation by Mineros Norteños.[1338]

539. Mexico has also frustrated SVB's legitimate expectations that Mexico would uphold and enforce its own laws, act to lift the Continuing Blockade, and return control of the Project site to SVB and Minera Metalín, such that SVB's personnel would be able to access and work safely at the Project without interference, confinement, or occupation.[1339] SVB further expected that its representatives, personnel, facilities, and equipment would be safe from physical harm and damage by third parties, or at a minimum that Mexico would take corrective action to address that harm and damage, and sanction those responsible.[1340] Mexico still has failed to do so nearly five and a half years after Mineros Norteños first took control of the Project.[1341]

540. Additionally, Mexico has treated SVB and its protected investments in a discriminatory fashion.[1342] As detailed in the Memorial and further elaborated below, Mexico not only incited and encouraged the Continuing Blockade at Sierra Mojada, it also stood by passively as unlawful events unfolded. This is in stark contrast to the proactive measures it took to address similar blockades affecting other mining projects in the country.[1343]

1337 Memorial, paras. 4.39, 4.54.

1338 Memorial, paras. 4.48-4.49.

1339 Memorial, paras. 4.50-4.51.

1340 Memorial, para. 4.52.

1341 *See* Section 2.8 *supra*.

1342 Memorial, para. 4.53.

1343 Memorial, paras. 4.52-4.53.

541. While Mexico devotes the bulk of the merits section of its Counter-Memorial to the Claimant's FET claim, as elaborated below, those arguments misstate and misapply the relevant standard.

4.2.2.1 Mexico misstates the relevant legal standard for FET under NAFTA Article 1105

542. In its Counter-Memorial, Mexico makes a series of flawed arguments regarding the content of the FET standard under NAFTA Article 1105.[1344] While Mexico's arguments are confusingly structured, Mexico's main contentions appear to be as follows:

- SVB has failed to demonstrate the evolution of the minimum standard of treatment under customary international law;[1345]
- FET under the minimum standard of treatment imposes a "high" threshold for finding a breach with respect to administrative actions;[1346]
- SVB confuses the obligation to provide FET under Article 1105 with the anti-discrimination protections embodied in NAFTA Articles 1102 and 1103;[1347] and
- FET under the minimum standard of treatment does not encompass the protection of legitimate expectations.[1348] Relatedly, SVB argues that legitimate expectation claims may only be founded on "specific commitments" from the host State.[1349]

543. Mexico's arguments are incorrect and inconsistent with numerous NAFTA decisions.

544. *First*, as SVB established in its Memorial, the minimum standard of treatment under customary international law can and has evolved; it is not limited to outrageous conduct as described in

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1344 Counter-Memorial, paras. 432-434, 424, 408-416, 443-447, 425-427, 437-442, 407.

1345 Counter-Memorial, para. 432-434, 424, 408-416.

1346 Counter-Memorial, paras. 412-413.

1347 Counter-Memorial, paras. 437-442, 407.

1348 Counter-Memoria, paras. 443-447, 425-427.

1349 Counter-Memorial, paras 445, 447.

the *Neer* case.[1350] While Mexico appears to accept that fact "in general terms,"[1351] it nonetheless argues that the nearly 100-year old articulation of the standard in the *Neer* case should serve as a "common benchmark."[1352] In so doing, Mexico ignores the decisions of several NAFTA tribunals rejecting the relevance of the *Neer* standard in modern times.[1353]

545. Moreover, while Mexico advocates using *Neer* as a benchmark, it simultaneously endorses the more contemporary formulation of the minimum standard of treatment adopted by the *Waste Management II* tribunal, which SVB cited in its Memorial.[1354] That formulation, which Mexico itself describes as "the most widely used," provides as follows:[1355]

> the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is *arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial*

1350 Memorial, para. 4.42; *see also Mesa Power Group LLP v. Canada*, PCA Case No. 2012-17, UNCITRAL (NAFTA) ("***Mesa Power v. Canada***"), Award, 24 March 2016, para. 500, **CL-0037** (noting that NAFTA tribunals have accepted "that the minimum standard of treatment is an evolutionary notion, which offers greater protection than that contemplated in the *Neer* decision"); *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1 (NAFTA) ("***ADF v. United States***"), Award, 9 January 2003, para. 179, **CL-0178** (observing that "what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered" and that "both customary international law and the minimum standard of treatment of clients it incorporates, are constantly in a process of development").

1351 Counter-Memorial, para. 432.

1352 Counter-Memorial, para. 408.

1353 *IC Power Ltd and Kenon Holdings Ltd v. Republic of Peru*, ICSID Case No. ARB/19/19 ("***IC Power v. Peru***"), para. 289, **CL-0179** (observing that "the MST has evolved since *Neer*, when it only prohibited "outrageous" behavior, and now forbids a wider range of conducts"); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 ("***Mondev v. United States***"), Award, 11 October 2002, para. 116, **CL-0054** (observing that "Secondly, *Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be […] To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious"); *Merrill & Ring v. Canada*, Award, 31 March 2010, para. 193, **CL-0029** (observing that "there appears to be a shared view that customary international law has not been frozen in time and that it continues to evolve in accordance with the realities of the international community. No legal system could endure in stagnation"); *ADF v. United States*, Award, 9 January 2003, para. 179, **CL-0178** (observing that "customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the Neer case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development").

1354 Counter-Memorial, paras. 409-410; Memorial, para. 4.43.

1355 Counter-Memorial, paras. 409-410.

> *proceedings or a complete lack of transparency and candour in an administrative process*. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[1356]

546. Thus, notwithstanding Mexico's arguments regarding the *Neer* case, both Parties agree with the *Waste Management II* tribunal's observations regarding the legal standard under Article 1105.[1357] Accordingly, Mexico's argument that SVB has allegedly failed to prove that the minimum standard has evolved beyond *Neer* is irrelevant.[1358] It also cannot be seriously contested. As the tribunal *IC Power v. Peru* observed, "the MST has evolved since *Neer*, when it only prohibited 'outrageous' behavior, and now forbids a wider range of conducts."[1359]

547. In addition, there is a growing recognition among investment treaty tribunals – particularly in the post-*Waste Management II* era – that the FET standard under customary international law is not materially different from an "autonomous" FET standard found in many BITs.[1360] For instance, the tribunal in *Deutsche Bank v. Sri Lanka* concluded that the content of the autonomous FET obligation in the Germany-Sri Lanka BIT was "not materially different from" the minimum standard of treatment under customary international law.[1361] Similarly, in *Rusoro Mining v. Venezuela*, the tribunal found no meaningful difference between the protections offered under the two standards.[1362] The tribunal in *Rumeli v. Kazakhstan* came to the same

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1356 Counter-Memorial, para. 409; *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3 ("***Waste Management v. Mexico II***"), Award, 30 April 2004, para. 9, **CL-0056** (emphasis added).

1357 Memorial, para. 4.42.

1358 Counter-Memorial, para. 4.32.

1359 *IC Power Ltd and Kenon Holdings Ltd v. Republic of Peru*, ICSID Case No. ARB/19/19 ("***IC Power v. Peru***"), Award, 3 October 2023, para. 289, **CL-0179**; *Waste Management v. Mexico II*, Award, 30 April 2004, para. 93, **CL-0056** ("observing that "[b]oth the *Mondev* and *ADF* tribunals rejected any suggestion that the standard of treatment of a foreign investment set by NAFTA is confined to the kind of outrageous treatment referred to in the *Neer* case"); *Merrill & Ring v. Canada*, Award, 31 March 2010, para. 213, **CL-0029** ("observing that "today's minimum standard is broader than that defined in the *Neer* case and its progeny"); *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44 ("***Lopez-Goyne v. Nicaragua***"), Award, 1 March 2023, para 411 (observing that "[i]t is now broadly accepted that, in light of the evolutionary character of the concept of the international minimum standard of treatment, the high threshold test formulated almost a century ago in Neer and upheld by a number of subsequent awards, including some recent ones, is no longer the applicable standard").

1360 *See*, e.g., *Deutsche Bank v. Sri Lanka*, Award, 31 October 2012, para. 419, **CL-0069**; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5 ("***Rusoro v. Venezuela***"), Award, 22 August 2016, para. 520, **CL-0039**; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 ("***Rumeli v. Kazakhstan***"), Award, 29 July 2008, para. 611, **CL-0025**.

1361 *Deutsche Bank v. Sri Lanka*, Award, 31 October 2012, para. 419, **CL-0069**.

1362 *Rusoro v. Venezuela*, Award, 22 August 2016, para. 520, **CL-0039**.

conclusion.[1363] The *Rumeli* tribunal further observed that both standards share a set of core principles, including: (i) a requirement for the State to maintain transparency in its actions; (ii) an obligation to act in good faith; (iii) a prohibition on conduct that is arbitrary, grossly unfair, unjust, erratic, discriminatory, or procedurally deficient; and (iv) a duty to uphold due process and procedural fairness.[1364]

548. *Second*, Mexico overstates the threshold required for an FET breach under NAFTA Article 1105 and the level of deference that should be accorded to the State and its regulatory actions.[1365] In particular, Mexico cites to the tribunal's observation in *Mesa Power v. Canada* that "imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard."[1366] However, this reference is inapposite. This case does not concern Mexico's "mistakes" in the exercise of its administrative functions, but rather an outright refusal to exercise those functions altogether.

549. In any event, although States retain discretion in regulating their affairs, when they conclude investment treaties, such as the NAFTA, States agree to exercise its regulatory powers in accordance with the standards set forth in those treaties.[1367] As the tribunal in *Parkerings v. Lithuania* aptly remarked, "[i]t is each State's undeniable right and privilege to exercise its sovereign legislative power,"[1368] but that it is prohibited for a State "to act unfairly, unreasonably or inequitably in the exercise of its legislative power."[1369] Several tribunals have held similarly.[1370]

550. Furthermore, while bad faith may amplify the severity of a breach, it is well established that bad faith is not a necessary element for finding an FET breach under the minimum standard of

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1363 *Rumeli v. Kazakhstan*, Award, 29 July 2008, para. 611, **CL-0025**.

1364 *Rumeli v. Kazakhstan*, Award, 29 July 2008, para. 583, **CL-0025**.

1365 Counter-Memorial, paras. 412-413.

1366 Counter-Memorial, para. 413; *Mesa Power v. Canada*, Award, March 24, 2016, para. 505, **CL-0037**.

1367 *See, e.g.*, *ADC v. Hungary*, Award, 2 October 2006, para. 423, **CL-0061** (noting that, when a State enters into an investment treaty, the State "becomes bound by it and the investment-protections it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate").

1368 *Parkerings v. Lithuania*, Award, 11 September 2007, para. 332, **CL-0062**.

1369 *Parkerings v. Lithuania*, Award, 11 September 2007, para. 332, **CL-0062**.

1370 *Tecmed v. Mexico*, Award, 29 May 2003, para. 154, **CL-0055**; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006, para. 127, **CL-0180**; *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, para. 611, **CL-0053**.

treatment.[1371] Indeed, the tribunal in *Mondev v. United States* made clear that "a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."[1372] Likewise, in *Loewen v. United States*, the tribunal observed that "[n]either State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment."[1373]

551. *Third*, Mexico's argument that SVB confuses NAFTA Article 1105 with the anti-discrimination protections under Articles 1102 and 1103 lacks any basis.[1374] It is uncontroversial that the minimum standard of treatment encompasses an obligation not to discriminate against investors. Indeed, the articulation of the standard in *Waste Management II*,[1375] which Mexico endorses, refers specifically to discriminatory conduct: "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 […] *discriminatory* [.]"[1376] Similarly, the tribunal in *Glamis Gold* observed that NAFTA Article 1105 protects investors from "evident discrimination,"[1377] while the tribunal in *TECO v. Guatemala* confirmed that "the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is […] *discriminatory* [.]"[1378]

552. In support of its contrary argument, Mexico cites the 2001 FTC Interpretative Note on NAFTA Chapter 11,[1379] which states that a violation of another provision of NAFTA does not automatically establish a violation of Article 1105(1). But this is irrelevant. SVB has not sought to establish a breach of NAFTA Article 1105(1) solely by reference to alleged violations of

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1371 *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 116, **CL-0055;** *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 ("***Loewen v. United States***"), Award, 26 June 2023, para. 132, **CL-0055**; *Waste Management v. Mexico II*, Award, 30 April 2004, para. 97, **CL-0056**.

1372 *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 116, **CL-0055**.

1373 *Loewen v. United States*, Award, 26 June 2023, para. 132, **CL-0055**.

1374 Counter-Memorial, paras. 437-442, 407.

1375 Memorial, footnote 528.

1376 *Waste Management v. Mexico II*, Award, 30 April 2004, para. 98, **CL-0056**.

1377 *Glamis Gold Ltd. v. United States of America*, Award, 8 June 2009, para. 627, **CL-0088**.

1378 *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, para. 454, **CL-0071** (emphasis added).

1379 Counter-Memorial, paras. 407, 438.

other provisions of the NAFTA. Rather, as SVB has explained, the facts of this case give rise to separate breaches of NAFTA Articles 1102, 1103, and 1105.[1380]

553. *Fourth and finally*, Mexico's assertion that the minimum standard of treatment under customary international law does not encompass legitimate expectations is incorrect and contradicted by a number of NAFTA tribunals.[1381] Indeed, Mexico itself expressly concedes that "several international tribunals . . . have interpreted the MST standard of Article 1105 as including such protection."[1382] To recall, such cases include, among others:

- *Grand River v. United States*, in which the tribunal expressly acknowledged that reasonable or legitimate expectations are "protected by NAFTA."[1383]

- *Mobil v. Canada*, in which the tribunal observed that in determining whether there was a breach of NAFTA Article 1105, "it will be a relevant factor if the treatment is made against the background of (i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and (ii) were, by reference to an objective standard, reasonably relied on by the investor, and (iii) were subsequently repudiated by the NAFTA host State."[1384]

- *Tecmed v. Mexico*, in which the tribunal held that "in light of the good faith principle established by international law, [FET under customary 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."[1385]

1380 Memorial, paras. 4.53, 4.66.

1381 Counter-Memorial, paras. 443-447, 425-427.

1382 Counter-Memorial, para. 444.

1383 Counter-Memorial, para. 444; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL ("***Grand River v United States***"), Award, 12 January 2011, para. 141, **CL-0102**.

1384 Counter-Memorial, para. 444; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Quantum, 22 May 2012, para. 152, **CL-0181**.

1385 *Tecmed v. Mexico*, Award, 29 May 2003, para. 154, **CL-0055**.

554. Indeed, even the *Waste Management II* tribunal, whose analysis of the minimum standard of treatment Mexico endorses, held that legitimate expectations are relevant to assessing a claim for breach of the minimum standard of treatment.[1386]

555. The fact that legitimate expectations form part of customary international law was also confirmed recently by the tribunal in *IC Power v. Peru*.[1387] In that case, the tribunal observed that "the obligation to protect an investor's legitimate expectations stems from the principle of good faith, which is certainly one of the 'customary international law principles that protect the economic rights and interests of aliens.'"[1388] Accordingly, the tribunal concluded that, as part of their broader obligation under customary international law to act in good faith, States must also protect the legitimate expectations of investors.[1389]

556. The sole award that Mexico cites in support of its contention that legitimate expectations do not form part of the minimum standard of treatment, *Red Eagle v. Colombia*,[1390] does not assist its case. While the *Red Eagle* tribunal was not persuaded that legitimate expectations formed part of customary international law, it nonetheless acknowledged that "a State's failure to fulfil a promise made to an investor may amount to a breach of the customary MST if it can be shown that the State's actions fall foul of the usual standard outlined above."[1391] The tribunal further accepted that "the MST may be breached where the claimant demonstrates the existence of 'at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment.'"[1392]

557. Mexico's related argument that a claimant must identify a specific commitment as forming the basis for its legitimate expectation also lacks any basis.[1393] As recently observed by the tribunal

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1386 Counter-Memorial, para. 409; *Waste Management v. Mexico II*, Award, 30 April 2004, para. 98, **CL-0056** (observing that "in applying [the MST 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").

1387 *IC Power v. Peru*, Award, 3 October 2023, para. 306, **CL-0179**.

1388 *IC Power v. Peru*, Award, 3 October 2023, para. 306, **CL-0179**.

1389 *IC Power v. Peru*, Award, 3 October 2023, para. 306, **CL-0179**; *see also Lopez-Goyne v. Nicaragua*, Award, 1 March 2023, para. 428, **CL-0182** (observing that "the standard of protection of investments enshrined in Article 10.5 of the Treaty by reference to the customary international law minimum standard of treatment of investments: […] (iii) protects the investor's legitimate expectations that are reasonable and objective in light of the circumstances and the State's conduct").

1390 Counter-Memorial, para. 427.

1391 *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12 ("***Red Eagle v. Colombia***"), Award, February 28, 2024, para. 293, **RL-0082**.

1392 *Red Eagle v. Colombia*, Award, February 28, 2024, para. 294, **RL-0082**.

1393 Counter-Memorial, para. 444.

in *Odyssey v. Mexico*, "the signing by a State of treaties providing for the protection of foreign investments and the existence of a domestic regulatory framework governing a technical and objective assessment of the environmental effects of any relevant project, even when they are not promises specifically addressed to a particular investor, constitute elements that can reasonably be expected to give rise to the emergence of objective and legitimate expectations on the part of the investor."[1394] Thus, legitimate expectations may arise from the commitments and protective measures set out in the host State's legislation.[1395] In the present case, Mexico's failure to uphold its own laws in the face of ongoing illegal action satisfies this test.

4.2.2.2 Mexico breached FET under NAFTA Article 1105

558. Mexico's application of the FET standard to the facts is equally flawed. In order to justify its inaction with respect to the Continuing Blockade, Mexico argues that (i) the Blockade was a "peaceful demonstration that did not trespass on the Claimant's territory;"[1396] and (ii) the Claimant's requests for assistance from the Mexican authorities were "dealt with within the framework of the powers of each authority . . . in accordance with the facts found."[1397] Mexico then shifts gears to blaming the Claimant itself for the loss of its investment, arguing that the Claimant did not "take the necessary actions to formally request intervention by the competent authorities,"[1398] breached alleged "commitments" to Mineros Norteños and "various concessionaires in Sierra Mojada,"[1399] and ultimately "abandoned its project."[1400] Finally, Mexico complains that the Claimant has not founded its legitimate expectations claim on any "specific commitment" from Mexico.[1401] All of these arguments are unfounded.

559. *First*, Mexico's characterization of the Continuing Blockade as a "peaceful demonstration that did not trespass on the Claimant's private property" grossly misconstrues the facts.[1402] As the Claimant has demonstrated, Mineros Norteños (i) imprisoned the Claimant's employees against their will, forcing them to escape in the dead of night for fear of their personal safety;

1394 *Odyssey Marine Exploration, Inc. v. United Mexican States*, ICSID Case No. UNCT/20/1 ("***Odyssey v. Mexico***"), Award, 17 September 2024, para. 318, **CL-0183**.

1395 *Odyssey v. Mexico*, Award, 17 September 2024, para. 318, **CL-0183**.

1396 Counter-Memorial, para. 450.

1397 Counter-Memorial, para. 451.

1398 Counter-Memorial, para. 455.

1399 Counter-Memorial, para. 455.

1400 Counter-Memorial, para. 454.

1401 Counter-Memorial, para. 445.

1402 Counter-Memorial, para. 450.

(ii) physically prevented the company and its employees from accessing the Project site up to the present day; (iii) broke into the Project camp and stole the Claimant's equipment, fuel, and minerals; (iv) continues to deny third-party contractors access to retrieve their equipment and personal belongings; (v) attempted to extort the Claimant by demanding royalty payments that the Mexican courts had denied; (vi) threatened to have the Claimant's CEO expelled from the country; and (vii) blocked the Mexican authorities from accessing the Project site to carry out investigative actions.[1403] These were not the actions of peaceful demonstrators, they were the actions of a criminal group who had decided to take the law into their own hands following the dismissal of their claims by the Mexican courts.

560. Mineros Norteños also plainly trespassed on the Claimant's property. As explained above and in the second witness statement of Mr. López Ramírez, Minera Metalín's property line begins well before the entrance to the Project camp.[1404] To reach the Project camp Mineros Norteños marched through the Claimant's checkpoint on the Project's main access road and crossed over its boundary rope in full view of law enforcement.[1405] Contrary to Mexico's assertions, Mineros Norteños's encampment, which remains in place to this day, is located well within the Claimant's property.[1406]

561. *Second*, Mexico's argument that its authorities "dealt with [the Claimant's requests for assistance] within the framework of the powers of each authority . . . in accordance with the facts found"[1407] is flatly contradicted by the evidence. Mexico manifestly failed to meet its obligations both under Mexican law and international law to take steps to prevent, address, and sanction Mineros Norteños's unlawful actions. Despite the clear evidence of illegal conduct and Claimant's repeated requests for assistance at multiple levels of the Mexican State, Mexico took no meaningful action to address the Continuing Blockade.[1408] The sparse and limited actions Mexico took – such as conducting inspections and requesting GPS co-ordinates – were formalistic and did nothing to end Mineros Norteños's criminal activity.[1409] In fact, Mexico's passivity emboldened Mineros Norteños to make increasingly exorbitant demands of the

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1403 *See* Section 2.7 and 2.8 *supra*.

1404 *See* Section 2.5 *supra*; López Ramírez WS2, para. 78.

1405 *See* López Ramírez WS1, para. 8.18 and image embedded therein.

1406 *See* Section 2.8 *supra*; López Ramírez WS2, para. 78.

1407 Counter-Memorial, para. 451.

1408 *See* Section 2.7 *supra.*

1409 *See* Section 2.8 *supra.*

Claimant.[1410] Ultimately, having taken no action for half a decade, Mexico permanently shelved the criminal file, thus ensuring that justice and the rule of law will never be restored, and Mineros Norteños may continue to act as the *de facto* possessor of the mine in perpetuity.[1411]

562. While Mexico places significant emphasis on the limits on the use of force under Mexican law, this argument is entirely misconceived.[1412] It is trite law that a State cannot rely on its own domestic law to evade international responsibility.[1413] In any event, the Claimant's case is not that Mexico failed to use force to disperse the Continuing Blockade; rather, it is that Mexico failed to take *any* reasonable or effective action to end or sanction Mineros Norteños's illegal conduct. The fact that Mexico moved swiftly to intervene in other mining projects in Mexico belies its argument that it was powerless to act in this case.[1414] Indeed, as noted above, the Mexican authorities took prompt and effective action to address the Initial Blockade in 2016.[1415] It is inexplicable that they have failed to do the same at any point since September 2019.[1416]

563. Mexico also fails to address the evidence that Deputy Borrego instigated, encouraged, and supported the Continuing Blockade for political and personal gain.[1417] In fact, Mexico only mentions Deputy Borrego once in its entire Counter-Memorial, merely asserting, without citing to evidence, that the Claimant's allegations regarding meetings between Mineros Norteños and Deputy Borrego are "inaccurate or erroneous."[1418] Mexico's one-sentence response is plainly inadequate to rebut the weight of evidence demonstrating his involvement in the facts of this case. Mexico also failed to produce any documentation from Deputy Borrego's office regarding his involvement with the Continuing Blockade, implausibly asserting that such

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1410 Barry WS2, para.47.

1411 *See* Section 2.8 *supra.*

1412 Counter-Memorial, paras. 456-457.

1413 ILC Articles, Art. 32, **CL-0081** ("The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part").

1414 *See* Section 2.7 *supra.*

1415 *See* Section 2.5 *supra.*

1416 Memorial, para. 2.139.

1417 *See* Section 2.7 *supra.*

1418 Counter-Memorial, para. 190.

documents do not exist. As noted above, Mexico's failure to produce documents in relation to this issue calls for adverse inferences.[1419]

564. In any event, with or without that evidence, Deputy Borrego's actions in encouraging violent acts and extortion against a foreign investor for corrupt motives constitute an archetypal breach of the FET standard. For example, in *Odyssey v. Mexico*, the tribunal found that the Mexican environmental ministry denied the claimant an environmental permit for reasons that were wholly unrelated to the relevant legal framework, but rather that furthered the personal political motivations of its secretary.[1420] The tribunal held that this "arbitrary and idiosyncratic conduct" constituted a violation of the minimum standard of FET under the NAFTA.[1421] The tribunal should reach the same conclusion here. Deputy Borrego's actions did not pursue any legitimate purpose; they were purely for personal and political gain.

565. As the Claimant has explained, Deputy Borrego's actions – and the Mexican authorities' inaction – came against the backdrop of AMLO's nationalist anti-mining agenda.[1422] While Mexico seeks to dismiss these political factors as "unfounded" and irrelevant,[1423] there can be little doubt that Deputy Borrego's actions in encouraging unlawful action against an international mining company was emboldened by the hostile stance of the Federal Government and Borrego's own party, MORENA, towards foreign investment in the mining sector.[1424] It is also no coincidence that, given that anti-mining sentiment, the Public Prosecutor took no action to address unlawful actions towards a foreign mining investor,[1425] as doing so would have been inconsistent with the clear directives of the AMLO administration.

566. *Third*, Mexico's argument that the Claimant "failed to take the necessary legal actions to formally request the intervention of the competent authorities"[1426] similarly distorts the facts. As demonstrated in the Memorial and Section 2.8 above, and as reflected in the criminal file,

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1419 *See* Section 2.1 *supra*.

1420 *Odyssey v. Mexico*, Final Award, 17 September 2024, para. 442, **CL-0183**.

1421 *Odyssey v. Mexico*, Final Award, 17 September 2024, para. 441, **CL-0183**.

1422 Memorial, paras. 2.103-2.110.

1423 Counter-Memorial, paras. 369-376.

1424 *See* Section 2.7 *supra*.

1425 *See* Section 2.7 *supra*.

1426 Counter-Memorial, para. 452.

the Claimant promptly and repeatedly informed the competent Mexican authorities of Mineros Norteños's unlawful actions, but the authorities refused to intervene.[1427]

567. While Mexico belatedly relies on an email from SEGOB to the Claimant in March 2024 to argue that the Claimant "did not accept the support of the entities that could be involved in this type of matters,"[1428] such email dates from more than four and a half years after the start of the Continuing Blockade and even post-dates the commencement of the arbitration itself. In any event, SEGOB's email offered no concrete assistance with resolving the Blockade. Instead, it made a vague proposal for "dialogue between representatives of this Ministry and representatives of Minera Metalín."[1429] This proposal underscores the inadequacy of Mexico's response to the Continuing Blockade. Rather than enforcing its own law or sanctioning illegal behaviour, Mexico's only suggestion was "dialogue" with the perpetrators, years after the Claimant's investment had been destroyed.

568. Mexico also relies heavily on Minera Metalín's alleged failure to respond to a request for information from the Public Prosecutor in June 2023, arguing that this prevented the Public Prosecutor from continuing its investigation.[1430] As the Claimant has explained, Minera Metalín never received this request and there is no evidence in the criminal file that it was ever delivered.[1431] In any event, that request post-dates the commencement of the Continuing Blockade by nearly four years and so cannot justify the Mexican authorities' refusal to act from the inception of the Continuing Blockade and in the several years that followed. Nor is there any evidence that the Claimant's alleged lack of response was the reason for the Public Prosecutor's decision to archive the criminal file, as explained above.[1432]

569. *Fourth*, the Claimant did not "abandon[]" its Project.[1433] As the Claimant has demonstrated, Mexico's refusal to intervene in the Continuing Blockade prevented the Claimant from

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1427 *See* Section 2.8 *supra*; Memorial, para. 2.190.

1428 Counter-Memorial, para. 452; Juan Manuel López email exchange with SEGOB, **R-0036**.

1429 Juan Manuel López email exchange with SEGOB, **R-0036**.

1430 Communication from the Public Prosecutor's Office of Coahuila 18 December 2024, **R-0041**; Counter-Memorial, para. 453.

1431 *See* Section 2.8 *supra*; López Ramírez WS2, para. 80.

1432 *See* Section 2.8 *supra.*

1433 Counter-Memorial, para. 454.

accessing or developing the Sierra Mojada Project for more than three years.[1434] Ultimately, this forced South32 to exit the Option Agreement, thus marking the end of the Project.[1435]

570. Mexico suggests that the Claimant showed a "lack of interest in resolving the dispute with Mineros Norteños,"[1436] but again this is a baseless attempt to distract from the main issue in this case—*viz.*, Mexico's lack of action in relation to the Continuing Blockade. In any event, as demonstrated above and in the second witness statements of Messrs Barry and López Ramírez, the Claimant made extensive good faith efforts to resolve the dispute, but Mineros Norteños responded with increasingly extortionate demands that had no basis in the agreements between the parties.[1437] As noted above, Mexico's suggestion that the Claimant should have simply given in to Mineros Norteños's baseless and extortionate demands is untenable.[1438]

571. While Mexico argues that the Claimant "breached its commitments" with Mineros Norteños,[1439] there is no basis for this statement; as set forth above, the Claimant had no liability for advance royalties to Mineros Norteños and no Mexican court ever found otherwise.[1440] Mexico also refers to the Claimant's alleged commitments to "various concessionaires in Sierra Mojada," without identifying which concessionaires it refers to or what the Claimant's supposed commitments were.[1441] Without further specificity, it is impossible for the Claimant to respond to this submission. However, to the extent that Mexico is referring to the Claimant's alleged obligations towards the Valdez family, such allegation has no foundation for the reasons discussed in Section 2.11 above. As demonstrated, the Valdez litigation is irrelevant to the present dispute and did not affect the Claimant's Project.[1442]

572. *Fifth*, Mexico has not even attempted to rebut the substance of the Claimant's arguments regarding Mexico's discrimination against it in breach of FET. As noted above, Mexico's suggestion that the Claimant has conflated the legal standard for discrimination under FET

1434 *See* Section 2.10 *supra*.

1435 *See* Section 2.10 *supra*.

1436 Counter-Memorial, para. 455.

1437 *See* Section 2.9 *supra*; Barry WS2, paras. 24, 35; López Ramírez WS2, paras. 108-109.

1438 *See* Section 4.1 *supra*; López Ramírez WS2, para. 49.

1439 Counter-Memorial, para. 455.

1440 *See* Section 2.3 *supra*.

1441 Counter-Memorial, para. 455.

1442 *See* Section 2.11 *supra*.

with the national treatment and most-favored nation obligations under the NAFTA is incorrect. The Claimant further elaborates on Mexico's discriminatory conduct in Section 4.3 below.

573. *Sixth and finally*, Mexico's submission that the Claimant has failed to base its legitimate expectation claim on a "specific commitment" from Mexico is wrong as a matter of law and fact. As noted above, it is not necessary to identify a specific commitment in order to establish a legitimate expectation claim; legitimate expectations can be derived from commitments and safeguards contained in the host State's legislation. In this case, the Claimant legitimately expected that Mexico would uphold its own law and take steps to enforce it in the event that the Claimant's investment was affected by flagrant criminal conduct. It also expected that, having obtained the right to carry out mining activity under its concessions, it would be able to do so free from interference from third parties. Mexico frustrated these basic expectations by failing to take action to end the Continuing Blockade and allowing Mineros Norteños to take *de facto* possession of the Project.

574. For all of the above reasons, Mexico's arguments in its Counter-Memorial should be rejected and the Tribunal should uphold SVB's claim for breach of the minimum standard of FET under NAFTA Article 1105.

4.3 Mexico Failed to Accord the Claimant's Investments National Treatment and Most-Favored Nation Treatment

575. SVB demonstrated in its Memorial that Mexico has breached its obligations to accord national treatment under NAFTA Article 1102 and most-favored nation treatment ("**MFN**") under NAFTA Article 1103.[1443]

576. As SVB explained, in assessing claims under NAFTA Articles 1102 and 1103, tribunals routinely apply a three-step test: (i) whether the State has afforded "treatment" to the investor or investment "with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition" of the relevant investments;[1444] (ii) whether the investor or investments is "in like circumstances" compared to a local or foreign investor

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1443 Memorial, paras. 4.55-4.69.

1444 *Merrill & Ring v. Canada*, Award, 31 March 2010, para. 79, **CL-0029**; *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1 ("***Corn Products v. Mexico***"), Decision on Responsibility, 15 January 2008, para. 117, **CL-0063**; *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1 ("***UPS v. Canada***"), Award on the Merits, 11 June 2007, para. 83, **CL-0021**.

or investment, *i.e.*, the comparator;[1445] and (iii) whether the treatment was less favorable than that accorded to the comparator.[1446] Once a *prima facie* case has been established, the burden then shifts to the respondent to demonstrate that the differential treatment was objectively justified.[1447]

577. As SVB has shown, each of the above elements is met in this case.[1448] Mexico's acts and omissions in relation to the Continuing Blockade constitute "treatment" for purposes of NAFTA Articles 1102 and 1103, as its inaction prevented the Claimant from accessing its Project, carrying out exploration work, and progressing the Project to production.[1449] Moreover, Mexico afforded less favorable treatment than it did in like circumstances to:

(a) Mineros Norteños, a Mexican mining cooperative, by permitting Mineros Norteños to blockade, occupy, possess, and exploit the Sierra Mojada Project site unlawfully;[1450] and

(b) Foreign mining companies – namely, Fresnillo (United Kingdom), Americas Gold and Silver Corporation (United States), Equinox Gold (Canada), Pan American Silver (Canada), Torex Gold Resources (Canada), Newmont Goldcorp (United States) and Gan-Bo (China) – by taking action to end blockades imposed on their mining operations, while permitting the Continuing Blockade at Sierra Mojada to continue unabated and without sanction.[1451]

578. Mexico furthermore has not and cannot reasonably advance any rational policy justification in support of its inaction in this case.[1452]

1445 *Corn Products v. Mexico*, Decision on Responsibility, 15 January 2008, para. 117, **CL-0063**; *UPS v. Canada*, Award on the Merits, 11 June 2007, para. 83, **CL-0021**.

1446 *Corn Products v. Mexico*, Decision on Responsibility, 15 January 2008, para. 117, **CL-0063**; *UPS v. Canada*, Award on the Merits, 11 June 2007, para. 83, **CL-0021**.

1447 *William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04 ("***Bilcon v. Canada***"), Award on Jurisdiction and Liability, 17 March 2015, para. 723, **CL-0072**; *Mercer International, Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, para. 7.16, **CL-0086**.

1448 Memorial, paras. 4.60-4.66.

1449 Memorial, para. 4.60.

1450 *See* Section 2.7 *supra*; Memorial, para. 4.69.

1451 *See* Section 2.8 *supra*; Memorial, para. 4.69.

1452 Memorial, para. 4.69.

579. In its Counter-Memorial, Mexico asserts that "[t]he four projects selected by the Claimant and their respective blockades cannot be used as comparators because none of these projects received more favorable treatment in circumstances similar to that accorded to the Sierra Mojada Project."[1453] Mexico further contends that "the burden of proof with respect to the three elements for proving a violation of Articles 1102 and 1103 rests on the claimant and never shifts to the respondent."[1454] Finally, Mexico contends that of the blockades identified by SVB occurred between 2021 and 2023, after the USMCA replaced the NAFTA, and are therefore irrelevant.[1455] As elaborated below, each of Mexico's assertions is unavailing and without merit.

4.3.1 The Claimant Identified the Relevant "Treatment"

580. As SVB explained in its Memorial, "treatment" for purposes of NAFTA Articles 1102 and 1103 includes both acts and omissions, and is a broad term encompassing "almost any conceivable measure that can be with respect to the beginning, development, management and end of an investor's business activity."[1456] SVB showed that Mexico's acts and omissions in relation to the Continuing Blockade constitute "treatment" for purposes of NAFTA Articles 1102 and 1103.[1457] Specifically, Mexico's acts and omissions – directly encouraging and supporting the Blockade, as well as refusing to take any steps to prevent, address, or sanction Mineros Norteños's unlawful actions – prevented SVB from accessing the Project site, carrying out exploration works, or progressing the Project to production.[1458] These measures impacted the "development and management" of the Claimant's investment – indeed, they entirely destroyed that investment. They therefore constituted "treatment" for purposes of NAFTA Articles 1102 and 1103.

581. In its Counter-Memorial, Mexico does not dispute that its actions and omissions constituted "treatment" for purposes of Article 1103 (Most-Favored Nation Treatment). Mexico asserts, however, that SVB failed to identify the relevant treatment on which it bases its national treatment claim.[1459] This is simply incorrect. SVB relies on the same treatment, namely the acts

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1453 Counter-Memorial, para. 474.

1454 Counter-Memorial, para. 468.

1455 Counter-Memorial, paras. 500.

1456 Memorial, para. 4.59; *Merrill & Ring v. Canada*, Award, 31 March 2010, para. 79, **CL-0029**.

1457 Memorial, para. 4.60.

1458 Memorial, para. 4.60.

1459 Counter-Memorial, para. 490.

and omissions referred to above, for its national treatment claim as it does for its MFN claim.[1460] The first limb of the test for breach of national treatment is therefore met.

4.3.2 Mexico Afforded Less Favorable Treatment to the Claimant and its Sierra Mojada Project

4.3.2.1 The relevant legal standard

582. As SVB explained in its Memorial, the criterion of "like circumstances" does not require that the investor or investment and its comparator be in *identical* circumstances.[1461] SVB further established that, in analysing "like circumstances," tribunals typically consider (i) whether the entities operate under the same legal regime; (ii) whether the entities operate in the same business or economic sector; and (iii) whether the entities provide the same or competing products or services.[1462]

583. In its Counter-Memorial, Mexico does not dispute that the relevant legal standard requires "like circumstances."[1463] However, it argues that the "phrase 'like circumstances' applies to "treatment accorded to the investor/investment 'with respect to the establishment, acquisition, expansion, management, conduct, operation, sale or other disposition of investments,' and not to the investor/investment *per se*."[1464] This is a distinction without a difference.

584. NAFTA tribunals routinely consider the respective characteristics of the investor and/or its investment and the relevant comparator to which more favorable treatment has been afforded.[1465] These characteristics include the elements the Claimant identified in its Memorial

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1460 Memorial, para. 4.60.

1461 Memorial, para. 4.61.

1462 Memorial, para. 4.62; *Grand River v. United States*, Award, 12 January 2011, paras. 165-167, **CL-0102**; *Merrill & Ring v. Canada*, Award, 31 March 2010, para. 89, **CL-0029**; *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, para. 692, **CL-0072**; *S.D. Myers v. Canada*, Partial Award, 13 November 2000, para. 250, **CL-0085**; *UPS v. Canada*, Award on the Merits, paras. 101-104, **CL-0021**; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL ("***Pope & Talbot v. Canada***"), Award on the Merits of Phase 2, 10 April 2001, paras. 76, 88, 118, **CL-0050**; *Corn Products v. Mexico*, Decision on Responsibility, 15 January 2008, para. 117, **CL-0063**; *Cargill, Incorporated v. United Mexican State*s, ICSID Case No. ARB(AF)/05/2, ("***Cargill v. Mexico***"), Award, 18 September 2009, para. 205, **CL-0083**.

1463 Counter-Memorial, para. 491.

1464 Counter-Memorial, para. 461.

1465 *Grand River v United States*, Award, 12 January 2011, paras. 165-167, **CL-0102**; *Merrill & Ring v. Canada*, Award, 31 March 2010, para. 89, **CL-0029**; *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, para. 692, **CL-0072**; *S.D. Myers v Canada*, Partial Award (Merits), 13 November 2000, para. 250, **CL-0085**; *UPS v. Canada*, Award on the Merits, 11 June 2011, paras. 101-104, **CL-0021**; *Pope & Talbot v. Government of Canada*, Award on the Merits of Phase 2, 10 April 2001, paras. 76,

and above, namely, the relevant legal regime, business or economic sector, and products and services.[1466] As the tribunal noted in *Grand River v. United States*, "the identity of the legal regime(s) applicable to a claimant and its purported comparators [is] a compelling factor in assessing whether like is indeed being compared to like for purposes of Articles 1102 and 1103."[1467] Thus, for example, the *Methanex* tribunal (citing *Pope & Talbot*) emphasized the importance of assuring that purported comparators face similar regulatory requirements.[1468] As set forth below, SVB and its Sierra Mojada Project did face similar regulatory requirements to the comparators the Claimant has identified.

585. Further, Mexico's assertion that it is "incorrect to state that "[t]he concept of 'like circumstances' is flexible and does not require the comparator investors or investments to be in identical circumstances"[1469] is without basis. Indeed, Mexico contradicts itself by expressly admitting that "the standard does not require identical circumstances."[1470]

586. The tribunal's decision in *Corn Products v. Mexico* is illustrative. In that case, Mexico imposed a 20% tax on soft drinks and other beverages sweetened with high fructose corn syrup ("**HFCS**"), which adversely affected the claimant, a United States-based HFCS producer.[1471] The claimant argued that the measure was discriminatory because domestic sugar producers, whose product directly competed with HFCS, were not subject to a comparable tax.[1472] Mexico argued that the claimant and the domestic sugar producers were not in "like circumstances," because, among other reasons, "Mexican sugar was to a significant extent denied access to the United States market during the relevant period, whereas there was no barrier to trade in HFCS across the U.S.-Mexican border."[1473] The tribunal disagreed, emphasizing that "Article 1102 requires that the investors (or investments) which are being compared are *in like, not identical,*

88, 118, **CL-0050**; *Corn Products v Mexico*, Decision on Responsibility, 15 January 2008, para. 117, **CL-0063**; *Cargill v. Mexico*, Award, 18 September 2009, para. 205, **CL-0083**.

1466 Memorial, para. 4.62.

1467 *Grand River v. United States*, Award, 12 January 2011, para. 167, **CL-0102**.

1468 *Methanex Corporation v. United States of America*, UNCITRAL, Award, 3 August 2005, Part IV, Chapter B, paras. 18-19, **CL-0169**.

1469 Counter-Memorial, para. 467.

1470 Counter-Memorial, para. 467.

1471 *Corn Products v. Mexico*, Decision on Responsibility, 15 January 2008, para. 40, **CL-0063**.

1472 *Corn Products v. Mexico*, Decision on Responsibility, 15 January 2008, para. 101, **CL-0063**.

1473 *Corn Products v. Mexico*, Decision on Responsibility, 15 January 2008, para. 125, **CL-0063**.

circumstances."[1474] The tribunal concluded that the claimant and the Mexican sugar producers were in like circumstances *inter alia* because they operated in the same business sector,[1475] and that Mexico had violated its national treatment obligation under NAFTA Article 1102.[1476] The same analysis applies here: while there are differences between SVB, its Project, and the comparators, they were all in the same business sector – namely, the Mexican mining sector.

587. Finally, the Tribunal must determine whether Mexico treated the Claimant or its investments less favorably than the relevant comparator(s), *viz.*, the local or foreign investors or investments.[1477] In determining whether the treatment of the claimant or its investments was "less favorable" than the treatment of the comparator, tribunals have assessed the adverse effects of measures imposed on foreign investors or investments and their comparators.[1478] Such treatment must have produced a practical, adverse effect on the claimant,[1479] but the claimant need not have suffered some "disproportionate disadvantage" as a result.[1480]

588. Notably, Mexico does not contest any of the above elements of the relevant standard. Instead, it limits its analysis of the standard to the "like circumstances" requirement discussed above.[1481]

4.3.2.2 The relevant legal test for discrimination is met in this case

589. Even assuming, as Mexico asserts, that "like circumstances" applies only to the "*treatment* accorded to the investor/investment,"[1482] SVB has identified several instances in which Mexico

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1474 *Corn Products v. Mexico*, Decision on Responsibility, 15 January 2008, para. 129, **CL-0063** (emphasis added)

1475 *Corn Products v. Mexico*, Decision on Responsibility, 15 January 2008, paras. 120, 125, **CL-0063**.

1476 *Corn Products v. Mexico*, Decision on Responsibility, 15 January 2008, para. 143, **CL-0063**.

1477 *UPS v. Canada*, Award on the Merits, 11 June 2011, para. 83(c), **CL-0021**; *Cargill v. Mexico*, Award, 18 September 2009, para. 193, **CL-0083**; *Corn Products v. Mexico*, Decision on Responsibility, 15 January 2008, para. 117, **CL-0063**; *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, paras. 717-718, **CL-0072**.

1478 *S.D. Myers v. Canada*, Partial Award, 30 November 2000, para. 254, **CL-0085**; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5 ("***Archer Daniels v. Mexico***"), Award, 21 November 2007, para. 209, **CL-0086**.

1479 *S.D. Myers v. Canada*, Partial Award, 30 November 2000, para. 254, **CL-0085**; *Archer Daniels v. Mexico*, Award, 21 November 2007, para. 252-254, **CL-0086**.

1480 *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 71-27, 118, **CL-0050**.

1481 Counter-Memorial, paras. 461-472.

1482 Counter-Memorial, para. 461.

afforded different and more favorable treatment to domestic and foreign investors and investments in "like circumstances."[1483]

590. In its Counter-Memorial, Mexico repurposes its flawed jurisdictional arguments by asserting that where, as here, it has treated comparators more favorably than the Claimant and its investments after the NAFTA was terminated on 30 June 2020, that treatment cannot form the basis of a claim for breach of NAFTA Article 1103.[1484] Mexico's submission is misguided, for several reasons.

591. *First*, the relevant treatment that forms the basis of a claim for breach of national or MFN treatment is the treatment of the investor or investment itself – *i.e.*, in this case, Mexico's acts and omissions with respect to the Continuing Blockade – not the treatment of the comparator. The relevant treatment, as the Claimant has shown, began in September 2019 and continues to this day.[1485] The fact that some of Mexico's more favorable treatment of comparators occurred *after* the date of termination of the NAFTA does not preclude the Tribunal from assessing whether Mexico's treatment of the Claimant and its investments was less favorable and therefore in breach of NAFTA Articles 1102 and 1103.[1486]

592. *Second*, as explained above, the investment protections under the NAFTA continued to apply to legacy investments until 30 June 2023 pursuant to Article 14-C of the USMCA.[1487] All of the relevant treatment regarding the Claimant, its investments, and the relevant comparators occurred before that date. Accordingly, they plainly can form the basis of a breach of NAFTA Articles 1102 and 1103.

593. In any event, Mexico not only afforded more favorable treatment *after* the NAFTA terminated, it also afforded more favorable treatment *before* the NAFTA terminated. Specifically, as discussed above, Mexico afforded more favorable treatment to:

1483 *See* Section 2.8 *supra*; Memorial, paras. 2.193, 4.63.

1484 Counter-Memorial, para. 500.

1485 *See* Section 2.7 *supra*.

1486 *See* Section 3.1 *supra*; Memorial, paras. 3.22-3.31.

1487 *See* Section 3.1 *supra*.

(a) Mineros Norteños from 2019 to the present, by allowing them to blockade the Project, hold the Claimant's personnel hostage, steal and damage the Claimant's property, and ultimately take *de facto* possession of the Project;[1488]

(b) Various foreign investors, by swiftly intervening to resolve blockades or other illegal activity affecting their mining operations, as set out in Section 2.8 above.

594. All of these comparators were in "like circumstances" to the Claimant and its investments. Specifically, they all (i) operate in the mining sector in Mexico; (ii) are subject to the same legal regime, namely the Mexican Mining Law and Regulations; and (iii) provide comparable products and services, *i.e.*, valuable minerals.[1489] These are precisely the factors that the tribunal in *Apotex v. United States* deemed "*appropriate* in the identification of comparators which are in 'like circumstances'"[1490] Like the Claimant, they were also adversely affected by blockades or other unlawful activity that disrupted their mining operations. It is therefore incorrect to argue, as Mexico does, that SVB has only addressed the "like circumstances" requirement "simply on the basis of the economic sector."[1491]

595. Plainly, all of the comparators set out in Section 2.8 above were treated more favorably than the Claimant and its Project. While in those cases Mexico took swift, effective action to resolve the blockades and address the unlawful activity, here it refused to do the same.[1492]

596. Presumably recognizing that it would be futile to argue otherwise, Mexico does not contest that it afforded less favorable treatment to the Claimant and its Project than it did to the comparators identified in its Memorial. Instead, Mexico argues that the "like circumstances" criterion is not satisfied with regard to such comparators.[1493] Mexico's argument, however, focuses on irrelevant points of distinction and misstates the facts.

597. With respect to Mineros Norteños, Mexico argues that it was not in "like circumstances" with the Claimant because Mineros Norteños was not blockaded by a third party.[1494] This submission misses the point. Mineros Norteños was in precisely the same circumstances as the

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1488 *See* Section 2.7 *supra.*

1489 Memorial, para. 4.63.

1490 *Apotex v United States*, Award, 25 August 2014, para. 8.15, **CL-0152**.

1491 Counter-Memorial, para. 472.

1492 *See* Section 2.8 *supra.*

1493 Counter-Memorial, para. 501.

1494 Counter-Memorial, para. 492.

Claimant, as the Claimant and Mineros Norteños were both mining companies party to a dispute regarding their rights in the same Project. Mexico treated Mineros Norteños more favorably than the Claimant by allowing it to blockade and take the Claimant's mine with impunity, while refusing to take any action to restore the Claimant's rights to its investments.[1495] In other words, Mexico took the Mexican company's side over the foreign investor that was the subject of that company's aggression.

598. Moreover, as noted above, Mineros Norteños was a local mining cooperative that operated in the same sector, was subject to the same legal and regulatory regime, and sold the same commodities as the Claimant (*i.e.*, valuable minerals).[1496] The test of "like circumstances" referred to above is therefore satisfied.

599. With respect to the foreign investors and investments identified by the Claimant in its Memorial, Mexico seeks to distinguish them on four bases, namely: (i) SVB's Project had not reached the production phase; (ii) SVB allegedly lacked certain permits needed for exploitation; (iii) SVB did not have an employment relationship with Mineros Norteños; and (iv) SVB's senior personnel were not involved in negotiations with Mineros Norteños.[1497] These attempts to distinguish the Claimant and its investments are, frankly, baffling.

600. None of these purported distinctions has any relevance. As noted above, the "like circumstances" test does not require "identical circumstances." In any event, as the Claimant has demonstrated, all of the relevant projects were in the same economic sector, were subject to the same legal and regulatory regime, and were in the business of producing the same commodities. None of the factors relied on by Mexico have any bearing on those fundamental similarities. Indeed, whether mining projects are at the exploration or exploitation phase, they are subject to the same legal and regulatory framework – namely the Mining Law and its Regulations. In fact, at the time of the relevant treatment, both activities were authorized under the same legal instrument, namely a mining concession.[1498]

601. The last two of Mexico's assertions are also simply incorrect. As noted above, many of the Project's employees were Mineros Norteños members.[1499] SVB's personnel were also

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1495 *See* Section 2.7 *supra.*

1496 *See* Section 2.3 *supra.*

1497 Counter-Memorial, para. 475.

1498 2005 Mining Law Amendment, published in the *Diario Oficial* on 28 April 2005, **C-0174**.

1499 *See* Section 2.3 *supra*; Minera Metalín: Employee Information Excel Chart, 1998-2019, **C-0415**.

indisputably involved in the negotiations with Mineros Norteños – as Mr. Barry, the Claimant's CEO, explains in his second witness statement, he was closely involved in the negotiations with Mineros Norteños, along with SVB's President, Darren Klinck.[1500]

602. Nor did any of the alleged distinctions Mexico identifies form the basis of Mexico's differential treatment. They therefore lack any relevance to the analysis of "like circumstances." As observed by the tribunal in *Cargill v. Mexico*, "the fact that a difference in circumstances exists in the abstract is not enough; the difference has to be relevant in the context of the particular measure being imposed."[1501] In that case, Mexico tried to distinguish the claimant's business from the proposed domestic comparators based on "economic circumstances," with claimant's business being economically healthy and Mexico's domestic producers being in "dire economic straits."[1502] The tribunal observed that "there is no link here between the alleged difference – a difference in economic circumstances – and the rationale and objective of the measure in question"[1503] and found that differences in economic circumstances were not relevant when assessing whether the claimant and domestic comparators were in "like circumstances."[1504]

603. The *Corn Products* tribunal reached a similar conclusion when dismissing Mexico's attempt to distinguish the claimant's business from those of its comparators on the basis that it did not have access to US markets. The tribunal noted that "whether CPI had access to markets in the United States was entirely irrelevant to the decision to impose the HFCS tax."[1505] Similarly here, there is no evidence that Mexico refused to take action with respect to the Continuing Blockade simply because Sierra Mojada was an exploration-stage Project, lacked certain permits, or because of the employment relationships with Mineros Norteños. Indeed, as the Claimant has shown, Mexico *did* take action in 2016 to lift the Initial Blockade at Sierra Mojada.[1506]

1500 Barry WS2, paras. 55-59.

1501 *Cargill v. Mexico*, Award, 18 September 2009, para. 203, **CL-0083**.

1502 *Cargill v. Mexico*, Award, 18 September 2009, para. 203, **CL-0083**.

1503 *Cargill v. Mexico*, Award, 18 September 2009, para. 209, **CL-0083**.

1504 *Cargill v. Mexico*, Award, 18 September 2009, para. 210, **CL-0083**.

1505 *Corn Products v Mexico*, Decision on Responsibility, 15 January 2008, para. 129, **CL-0063**; *see also Archer Daniels v. Mexico*, ICSID Case No. ARB (AF)/04/5, Award 21 November 2007, para. 198, **CL-0086** (finding that "[a]s to the Mexican argument that they are not in like circumstances because of the situation sugar producers faced concerning access to the U.S. market, this is not a relevant factor in determining whether two companies are in like circumstances").

1506 *See* Section 2.5 *supra.*

604. Finally, Mexico attempts to distinguish its treatment of Pan American and its La Colorada mine on the basis that there was no blockade at La Colorada.[1507] Again, this is irrelevant. Both the La Colorada mine and the Sierra Mojada mine were adversely affected by illegal, violent activity. The only relevant difference is that in the instant case, the Mexican authorities took no action to resolve Mineros Norteños's unlawful conduct, whereas at La Colorada, they did.[1508]

605. For all of the above reasons, the Claimant has plainly fulfilled the three requirements for a showing of discrimination under NAFTA Articles 1102 and 1103.

4.3.3 Mexico has Failed to Demonstrate that its Less Favorable Treatment of SVB and its Investments was Justified

606. As SVB explained in its Memorial, once a *prima facie* case of discrimination has been demonstrated, the *evidentiary burden* shifts to the respondent State to show that the measures were objectively justified.[1509] Indeed, as the tribunal rightly noted in its decisions on the Claimant's document requests, "[i]t is for the Respondent to explain why (if it be so) it intervened in other cases, but not in this one."[1510] To meet its burden, Mexico would need to show that its measures bore a reasonable relationship to rational government policies.[1511] Mexico has made no such showing in this case.

607. It is well established that, as the *Bilcon* tribunal observed, "once a *prima facie* case is made out under [NAFTA Article 1102], the onus is on the host state to show that a measure is still sustainable within the terms of Article 1102."[1512]

608. The tribunal's decision in *Feldman v. Mexico* in instructive. In that case, a U.S. investor engaged in the export of tobacco products from Mexico argued that Mexico had discriminated against it by denying it access to tax rebates that were granted to Mexican-owned companies

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1507 Counter-Memorial, para. 488.

1508 Memorial, para. 4.52.

1509 Memorial, para. 4.58.

1510 Procedural Order No.3, Annex A, ruling on Request 19, pp. 103-104.

1511 Memorial, paras. 4.67-4.68.

1512 *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, para. 723, **CL-0072**.

engaged in similar export activities.[1513] On the question of the burden of proof, the tribunal majority cited with approval the dicta of the WTO Appellate Body that:

> … it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence. *If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.*[1514]

609. In assessing the evidence before it, the *Feldman* tribunal noted that, "if the Respondent had had available to it evidence showing that the Poblano Group companies had not been treated in a more favorable fashion than CEMSA with regard to receiving [tax] rebates, it has never been explained why it was not introduced."[1515] The tribunal concluded that an inference of discrimination was warranted based on Mexico's failure to present rebuttal evidence, noting that the differential treatment was "obvious."[1516] The tribunal therefore held that Mexico had breached its national treatment obligation under NAFTA Article 1102.[1517]

610. The same conclusion applies here. Just like in *Feldman*, Mexico has not even attempted to justify its less favorable treatment of the Claimant and its investments. Instead, Mexico relies upon the tribunal's decision in *UPS v. Canada* to argue that "the burden of proof with respect to the three elements for proving a violation of Articles 1102 and 1103 rests on the claimant and never shifts to the respondent."[1518] However, Mexico ignores the fact that the *UPS* tribunal's observation pertains to the *legal* burden of proof, rather than the *evidentiary* burden of proof. As the *Apotex v. United States* tribunal noted in rejecting the respondent's attempt to rely upon precisely the same excerpt from *UPS*:[1519]

1513 *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 ("***Feldman v Mexico***"), Award, 16 December 2002, paras. 155-156, **CL-0105**.

1514 *Feldman v Mexico*, Award, 16 December 2002, para. 177, **CL-0105** (emphasis in original).

1515 *Feldman v Mexico*, Award, 16 December 2002, para. 178, **CL-0105**.

1516 *Feldman v Mexico*, Award, 16 December 2002, para. 178, **CL-0105**.

1517 *Feldman v Mexico*, Award, 16 December 2002, para. 188, **CL-0105**.

1518 Counter-Memorial, para. 468.

1519 *Apotex v United States*, Award, 25 August 2014, para. 8.6, **CL-0152**.

> [A] distinction exists between the *legal burden of proof* (which never shifts) and the *evidential burden of proof* (which can shift from one party to another, depending upon the state of the evidence).[1520]

611. The *Apotex* tribunal found that the claimants had sufficiently discharged their *evidentiary* burden, thereby shifting the *evidentiary* burden to the respondent to rebut their case.[1521] In other words, while the claimants retained the "legal burden of proof, which defines which party has to prove what in order for its case to prevail", the evidential burden of proving "the relevant fact[s] on which it relies in support of its case or defence," *i.e.*, the objective basis for the differential conduct, had shifted to the respondent.[1522]

612. Contrary to Mexico's contentions, shifting the *evidentiary* burden of proof to the respondent would not constitute an "unreasonable burden."[1523] As the *Bilcon* tribunal observed, "[i]t is the host state that is in a position to identify and substantiate the case, in terms of its own laws, policies and circumstances, that an apparently discriminatory measure is in fact compliant with the 'national treatment' norm set out in Article 1102."[1524]

613. In the present case, while the *legal* burden of proof remains with SVB, the *evidentiary* burden has shifted to Mexico, because SVB has established, at the very least, a *prima facie* case of discrimination. For its part, Mexico has failed to produce *any* evidence relating to SVB's claims or in response to SVB's document requests to justify why it treated the Claimant and its investments less favorably than other investors and investments in like circumstances. Nor could it justify such differential treatment – as demonstrated above, there is no reasonable explanation for its refusal to take any meaningful or genuine action to address the Continuing Blockade or sanction Mineros Norteños's unlawful conduct.[1525] Mexico's defense to the Claimant's claims for breach of NAFTA Articles 1102 and 1103 must therefore fail.

1520 *Apotex v United States*, Award, 25 August 2014, para. 8.8, **CL-0152** (emphasis added).

1521 *Apotex v United States*, Award, 25 August 2014, para. 8.10, **CL-0152**.

1522 *Apotex v United States*, Award, 25 August 2014, para. 8.7, **CL-0152**.

1523 Counter-Memorial, para. 469.

1524 *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, para. 723, **CL-0072**.

1525 *See* Section 2.7 *supra*.

5. SVB IS ENTITLED TO COMPENSATION IN AN AMOUNT NEEDED TO WIPE OUT ALL THE CONSEQUENCES OF MEXICO'S BREACHES OF THE NAFTA

614. As the Claimant demonstrated in its Memorial, the Respondent's breaches of the NAFTA give rise to an obligation to make full reparation for the Claimant's loss.[1526] Consistent with the principle of full reparation, the Respondent is obligated to pay the Claimant the fair market value ("**FMV**") of its investment in the Sierra Mojada Project, which lost all value as a direct result of the Respondent's breaches of the NAFTA.[1527] FMV is the appropriate measure of the Claimant's compensation because it puts the Claimant in the position that, in all probability, it would have been in absent the Respondent's breaches.[1528] The Claimant's damages claim is supported by the expert testimony of BRG, whose Second Report containing their updated calculations accompanies this Reply.[1529]

615. In its Counter-Memorial, the Respondent argues that the Claimant's claim for compensation is improperly specified and that its damages are not reasonably certain.[1530] The Respondent further contends that the Claimant's loss resulted from either its "reluctance to negotiate a solution to the conflict with Mineros Norteños," or its "failure to comply with the obligation Metalín assumed to the Valdez."[1531] Relatedly, the Respondent argues that the Claimant is contributorily negligent because it failed to negotiate a settlement with Mineros Norteños to end the Blockade and materially contributed to its harm by "failing to seek to mitigate its losses through the sale of the concessions and other assets of the Project."[1532] Finally, relying on Dr. Duarte-Silva's Expert Report, the Respondent criticizes BRG's valuation methodology – though, as shown below, the Respondent does not offer an alternative valuation for the Tribunal to rely upon.

616. As demonstrated below, the Respondent's arguments are without merit and the Tribunal should therefore uphold the Claimant's damages claim in full.

1526 Memorial, paras. 5.1-5.10.

1527 Memorial, paras. 5.1-5.10.

1528 Memorial, paras. 5.1-5.10.

1529 Expert Report of Mr. Santiago Dellepiane of Berkeley Research Group dated 24 April 2025 ("**BRG ER2**").

1530 Counter-Memorial, paras. 506-508.

1531 Counter-Memorial, paras. 508-509.

1532 Counter-Memorial, para. 510.

5.1 The Respondent Must Compensate SVB based on the Project's Fair Market Value in Accordance with the Principle of Full Reparation

617. As the Claimant explained in its Memorial, the NAFTA does not contain express language regarding the applicable standard of compensation for the Respondent's Treaty breaches in this case.[1533] Accordingly, the Tribunal should apply principles of customary international law to assess the relevant standard of compensation.[1534] Customary international law in turn provides that a State has an obligation to make "full reparation" for the injuries caused by its internationally wrongful acts.[1535] The Claimant submits that full reparation in this case can only be attained by applying FMV, as this measure "ensures that the consequences of the breach are wiped out and that the situation which would, in all probability, have existed if the wrongful acts had not been committed is re-established."[1536]

618. The Respondent agrees that the principle of full reparation set forth in *Chorzów Factory* reflects the applicable standard of compensation in this case.[1537] But the Respondent complains that the Claimant did not specify a distinct damages estimate for breaches that do not amount to expropriation.[1538]

619. As explained in the Memorial, in the circumstances of this case, the measure of damages that must be applied to make the Claimant whole is the same irrespective of whether the Tribunal finds that Mexico breached its obligation regarding indirect expropriation under Article 1110(1) of the NAFTA, or its obligations under Articles 1102, 1103, or 1105 of the NAFTA.[1539] The Respondent's breaches, individually or cumulatively, caused the loss of the Claimant's investment because Mexico failed to protect SVB and Minera Metalín from the Continuing Blockade, causing the loss of SVB's entire investment. Put simply, whether the Tribunal finds that the Respondent unlawfully expropriated the Claimant's investment – which, as set out above and in the Memorial, it did – or finds that it failed, for instance, to accord FPS, the

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1533 Memorial, paras. 5.3-5.4.

1534 Memorial, paras. 5.3-5.7.

1535 *See* International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, Art. 31, **CL-0081**, ("[t]he responsible State is under an obligation to make a full reparation for the injury caused by the internationally wrongful act.").

1536 Memorial, paras. 5.3-5.7; *Crystallex International Corporation v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/11/2 ("***Crystallex v. Venezuela***"), Award, 4 April 2016, para. 850, **CL-0075**.

1537 Counter-Memorial, paras. 526, 528.

1538 Counter-Memorial, paras. 514-521.

1539 Memorial, para. 5.3.

practical result is the same: the Claimant lost its investment because of the Respondent's breach. The appropriate measure of damages in all cases is therefore the FMV of the Project.

620. Investment treaty tribunals have consistently held that a State's breach of FET, FPS, national treatment, or MFN obligations can result in the total loss of an investment's value – and in such cases, they have used FMV as the measure of damages regardless of which Treaty obligation the State breached. For instance, in *Gemplus v. Mexico* the tribunal found that Mexico failed to accord the investor FET and indirectly expropriated the investor's investment by revoking a concession granted by Mexico to operate a national vehicle registry.[1540] In determining the measure of damages, the tribunal accepted that it was appropriate to apply the same measure of damages for FET as for unlawful expropriation, and it did not distinguish between the compensation to be provided for each breach.[1541]

621. Similarly, in *CMS v. Argentina*, the tribunal found that Argentina failed to accord the claimant FET as a result of the governmental suspension and ultimate termination of the claimant's right to calculate the tariff for gas transportation activities in US dollars.[1542] In determining the measure of damages, the tribunal was persuaded that "the cumulative nature of the breaches discussed here is best dealt with by resorting to the standard of fair market value."[1543] The tribunal recognized that, "[w]hile this standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses."[1544]

1540 *Gemplus, S.A., SLP, S.A., and Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 ("***Gemplus v Mexico***"), Award, 16 June 2010, para. 18.3, **CL-0100**.

1541 *Gemplus v Mexico*, Award, 16 June 2010, para. 12.52, **CL-0100**; s*ee also Rumeli v. Kazakhstan*, Award, 29 July 2008, para. 792, **CL-0025**, ("[i]n assessing compensation for internationally wrongful acts other than expropriation, the Tribunal considers that it should apply the principle of the Factory at Chorzow case.").

1542 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8 ("***CMS v Argentina***"), Award, 12 May 2005, operative part, p. 139, **CL-0017**.

1543 *CMS v Argentina*, Award, 12 May 2005, para. 410, **CL-0017**.

1544 *CMS v Argentina*, Award, 12 May 2005, para. 410, **CL-0017**; s*ee also Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, paras 403-404, **CL-0187**, ("[t]he Treaty does not specify the damages to which the investor is entitled in case of breach of the Treaty standards different from expropriation . . . several awards of arbitral tribunals dealing with similar treaty clauses have considered that compensation is the appropriate standard of reparation in respect of breaches other than expropriation, particularly if such breaches cause significant disruption to the investment made. . . . The Tribunal is of the view that fair market value would be the most appropriate standard to apply in this case to establish the value of the losses, if any, suffered by the Claimant as a result of the Treaty breaches which occurred, by comparing the fair market value of the companies concerned with and without the measures adopted by Argentina in January 2002."); *see also Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No.

622. More recently, in *Odyssey v. Mexico*, the tribunal – by majority – found that Mexico breached NAFTA Article 1105, because the Mexican federal environmental ministry arbitrarily denied a necessary environmental permit to conduct mining exploitation activities.[1545] In determining the appropriate measure of damages, the tribunal noted that "the FMV standard has been used by investment tribunals when called upon to calculate damages," and that this was the case "both in the context of expropriations and for other violations of international obligations, either in the context of NAFTA disputes or non-NAFTA disputes."[1546] Accordingly, it found that "the assessment of the damages due to Respondent's violation of the FET standard established in NAFTA Article 1105(1) should be based on the FMV of the investment, to the extent such value is ascertainable."[1547]

623. Likewise, in *Gold Reserve v. Venezuela*, the tribunal found that Venezuela failed to accord the claimant FET by nullifying certain construction permits and cancelling the claimant's mining concessions related to a gold-copper-molybdenum mine.[1548] The tribunal considered that "the serious nature of the breach in the present circumstances and the fact that the breach has resulted in the total deprivation of mining rights" meant that "under the principles of full reparation and wiping-out the consequences of the breach, a fair market value methodology is also appropriate in the present circumstances."[1549]

624. Similarly, the facts and circumstances of this case confirm that Mexico's duty to make the Claimant whole under the standard of full reparation can only be achieved by adopting FMV as the measure of damages. As demonstrated in the Memorial and set forth herein, the Respondent's refusal to take action to lift the Continuing Blockade caused South32 to terminate the Option Agreement, marking the end of the Project and the loss of its value.[1550] The

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ARB/06/11, Award, 5 October 2011, para. 707, **CL-0035**, ("Having found earlier in this Award that the Claimants' investment in Ecuador has not been accorded fair and equitable treatment by the Respondent and has been expropriated by the issuance of the *Caducidad* Decree, the Tribunal will now determine, as mandated by Article III of the Treaty, the fair market value of this investment.").

1545 *Odyssey v. Mexico*, Award, 17 September 2024, para. 333, **CL-0183**.

1546 *Odyssey v. Mexico*, Award, 17 September 2024, para. 558, **CL-0183**.

1547 *Odyssey v. Mexico*, Award, 17 September 2024, para. 559, **CL-0183**.

1548 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela (I)*, ICSID Case No. ARB(AF)/09/1 ("***Gold Reserve v. Venezuela I***"), Award, 22 September 2014, para. 863, **CL-0188**.

1549 *Gold Reserve v. Venezuela I*, Award, 22 September 2014, paras. 678, 680, 681, **CL-0188**.

1550 *See* Section 2.10 *supra*; Barry WS2, para. 19.

Claimant's loss was total, and the harm would only be wiped out if the Respondent pays the Claimant compensation reflecting the FMV of its investment.

5.2 The Measure of SVB's Damages Should Follow a Market Approach Methodology

625. In its Memorial, the Claimant explained that the FMV of its investment should be determined using a market approach, measuring the difference between the investment's FMV considering the State's wrongful conduct (the "actual" scenario) and its value in the absence of such conduct (the counterfactual "but-for" scenario).[1551] In its First Report, BRG opined that a market methodology as recommended under the CIMVAL Code for Valuation of Mineral Properties ("**CIMVAL Code**") would be appropriate to assess the Project's FMV.[1552] Under the market approach, BRG assessed the Project's value "based on the value of similar mining properties per oz of mineral resource they control," and cross-checked the result of this valuation with the valuation under the public guideline companies method and SVB's past transactions.[1553] As set forth further below, BRG confirms in its Second Report that its initial approach was correct.[1554]

626. In its Counter-Memorial, the Respondent relies on Dr. Duarte-Silva's Expert Report to support its contention that "the methodologies comprised in the market approach used by BRG are not immune to excessive speculation and manipulation."[1555] But, again, Mexico fails to take an affirmative position regarding why it considers that a market methodology is not suitable for assessing the Project's value.

627. The Respondent's insinuation that the market approach methodology utilized by BRG to calculate the Claimant's damages is speculative and prone to manipulation is misguided.[1556] BRG's market approach is consistent with the CIMVAL Code's recommendations for assessing a mineral project's value based on the actual stage of the Sierra Mojada Project's development.[1557] In particular, BRG explained in its First Report that before the imposition of

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1551 Memorial, para. 5.10.

1552 BRG ER1, para. 54; s*ee also* The CIMVAL Code for the Valuation of Mineral Properties, 29 November 2019, p. 3, **SD-0014**.

1553 BRG ER1, para. 54.

1554 BRG ER2, para. 203.

1555 Counter-Memorial, para. 562.

1556 Counter-Memorial, para. 562.

1557 BRG ER1, para. 52.

the Continuing Blockade, SVB compiled various technical reports, including a preliminary economic assessment under the Canadian regulation NI 43-101 in 2015, which was updated in 2018.[1558] In the 2018 updated report, the consultants Archer Cathro & Associates Ltd. – a Canadian company specialized in the management of mineral exploration project – quantified approximately 542,000 silver equivalent ounces of mineral resources.[1559] For this reason, BRG concluded that the Project had progressed significantly enough to be considered a mineral resources property under the definition of the CIMVAL Code.[1560]

628. Moreover, as set forth in Section 2.4 above, SVB made significant investments to advance the Sierra Mojada Project toward production.[1561] The Claimant invested extensively in the Project between 1996 and 2022,[1562] leading to promising new discoveries such as the Sulphide Zone and the Palomas Negros Prospect,[1563] and acquired funding sources to continue exploration through the Option Agreement with South32.[1564]

629. Based on the progression of the Project and its definition as a mineral resources property, BRG opined – following the CIMVAL Code's recommendations – that "the market approach [is] a suitable method for this case, in particular using information from comparable transactions."[1565] Because "SVB commissioned numerous technical reports quantifying the Project's mineral resources," BRG was able "to assess the Project's value based on the value of similar mining properties per oz of mineral resource they control."[1566]

630. The Respondent has not engaged with this evidence and has not provided rebuttal evidence to demonstrate that the Project's information relied upon by BRG is incorrect. Such failure confirms the Claimant's case in chief – that the market approach is appropriate in this case.

1558 BRG ER1, para. 51.

1559 BRG ER1, para. 51.

1560 Defined as "a Mineral Property that contains a Mineral Resource as defined in the CIM Definition Standards, as defined in National Reporting Standards, or other estimates of quantity and grade of mineralization that are reconciled the with the CIM Definition Standards.", p. 38, **SD-0014**.

1561 BRG ER1, paras. 32-33; s*ee also* Barry WS2, para. 14.

1562 BRG ER1, para. 35.

1563 Barry WS2, para. 14.

1564 Barry WS2, para. 14.

1565 BRG ER1, para. 54.

1566 BRG ER1, para. 54.

631. BRG's reliance on the market approach methodology to assess the Project's value is also consistent with decisions in previous investment cases involving early-stage projects such as this one. For instance, in *Crystallex v. Venezuela*, the tribunal found that the State expropriated the investment of a Canadian company in an early-stage gold mining project by failing to issue an environmental permit.[1567] In determining the methodology to measure the claimant's damages the tribunal held as follows:

> [T]he market multiples method . . . is a valuation method that estimates the value of an asset or company by examining the market valuation of companies holding properties of similar characteristics. It derives a measure of value for the asset subject to valuation by inference from the value of peer companies. *The Tribunal considers that such method is widely used as a valuation method of businesses, and can thus be safely resorted to, provided it is correctly applied and, especially, if appropriate comparables are used*. Also the CIMVAL Guidelines confirm that market-based methodologies, such as this one, *are appropriate for the valuation of a development stage mineral property such as Las Cristinas*.[1568]

632. Other tribunals have confirmed that the investor's damages can be measured by reference to market comparators, even when projects are at an early stage. For instance, in *Windstream Energy v. Canada*, the tribunal found that Canada's FET breach with respect to the claimant's investment in an early-stage wind energy project should be compensated under a market approach.[1569] The tribunal held that "the Project can be best valued, and the damage to it quantified, on the basis of the comparable transactions methodology . . . the evidence relating to comparable transactions is the best evidence before it, and the Tribunal finds it reasonable to rely on this evidence."[1570]

633. In this case, as demonstrated in the Memorial and below, the market comparators utilized by BRG in its Expert Reports are appropriate to measure the Project's FMV.[1571] The comparators

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1567 *Crystallex v. Venezuela*, Award, 4 April 2016, para. 961, **CL-0075**.

1568 *Crystallex v. Venezuela*, Award, 4 April 2016, para. 901, **CL-0075** (emphasis added).

1569 *Windstream Energy LLC v. The Government of Canada (I)*, PCA Case No. 2013-22 ("***Windstream Energy v. Canada***"), Award, 27 September 2016, para. 515, **CL-0090**.

1570 *Windstream Energy v. Canada*, Award, 27 September 2016, para. 476, **CL-0090**.

1571 Memorial, para. 5.15; BRG ER1, para. 80.

BRG utilized have similar characteristics to the Sierra Mojada Project including their level of development, the volume of silver and zinc resources, amongst other parameters.[1572] Notably, as explained below, Mexico's quantum expert does not take issue with the criteria BRG uses to assess comparability but only the resulting sample of comparators.[1573] BRG carefully analyzed Dr. Duarte-Silva's criticisms of the market comparators utilized by BRG to assess the Project's value, and largely confirmed its conclusions.[1574] Accordingly, the appropriateness of the comparators support adopting a market methodology.[1575]

634. Thus, contrary to the Respondent's assertions, BRG's use of a market methodology to assess and confirm the Project's value is not speculative or legally uncertain but grounded on previous decisions from investment tribunals in cases involving projects at the same stage of development. It is also based on an assessment of observable data from the Claimant's significant investments in exploring and developing the Sierra Mojada Project.

5.3 The Sunk Costs Approach is Not an Appropriate Measure of the Fair Market Value of the Claimant's Investment

635. The Respondent argues that because the full reparation standard does not specify the measure of damages, the question of "whether [full reparation] can be achieved by determining the FMV of the investment or some other method, such as sunk costs, depends on the facts and circumstances of each case."[1576] Notably, however, the Respondent does not take a position as to what method of valuation should be preferred in this case. In any event, as demonstrated below, a sunk costs approach would not be appropriate in this case.

636. The relevant jurisprudence shows that a sunk costs approach is only appropriate where there is insufficient information to conclude that the Project would ultimately become profitable and/or there is a lack of appropriate comparators in the market.[1577] Neither of those obstacles is present here.

1572 Memorial, para. 5.15; BRG ER1, para. 80.

1573 BRG ER2, para. 30.

1574 BRG ER2, paras. 31-39.

1575 Memorial, para. 5.15; BRG ER1, paras. 78-91.

1576 Counter-Memorial, para. 526.

1577 *Crystallex v. Venezuela*, Award, 4 April 2016, para. 882, **CL-0075**, ("[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

637. The Project was poised to have its value enhanced by further exploration under the South32 partnership and, ultimately, lead to the production phase.[1578] Accordingly, measuring the Claimant's loss under a sunk costs approach would undervalue the Claimant's investment. As Mr. Barry confirms in his second witness statement that but for the Respondent's breaches, the Claimant would have advanced the Project into production its production stage because:

> By 2019, market conditions [for the international prices of zinc and silver] had begun to improve, and we were well positioned to accelerate our efforts toward development. As noted earlier, we had already completed extensive exploration work, which led to several promising discoveries, including the Sulphide Zone. Our primary investor, South32, was highly enthusiastic about the Project, and I firmly believe it would have exercised its option to acquire a 70% interest under the terms of the Option Agreement. *Had that occurred, we would have partnered with them to develop and implement a mine plan*. Our objective at the time was to reach the feasibility study stage using the USD 90 million South32 had committed to invest upon exercising their option, a process we anticipated would take approximately three to four years.
>
> […]
>
> Unfortunately, the Continuing Blockade disrupted our progress, resulting in South32 eventually exiting the project after waiting almost three years for the Mexican authorities to uphold their own law and remove the illegal blockade from our project and allow us back to work. […] As a result, we were unable to advance the Project beyond the exploration phase and South32 terminated the Option Agreement, marking the end of the Project.[1579]

638. Applying a sunk costs approach in this case would be conceptually inappropriate, as it does not align with the standard of full reparation. As BRG aptly notes, a sunk cost approach to

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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.").

1578 Barry WS2, paras. 17, 19.

1579 Barry WS2, paras. 17, 19 (emphasis added).

measures damages "aims to reflect reparation by placing the investor in the position it would have been in but-for making the *investment*."[1580] A sunk costs approach would therefore compensate the Claimant for the historical costs in connection with the Project and would restore the situation had the Claimant not invested in Mexico.[1581] This does not accord with the customary international law standard of full reparation, which "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[1582] This entails assessing the economic situation that, in all probability, would have occurred but-for the Respondent breaches, including the investment's forward-looking potential to create value.

639. A sunk costs approach would also not be commensurate with the Project's FMV, which, as discussed, is the appropriate measure of damages in this case. As the tribunal in *Crystallex* held in adopting a market methodology, "[t]he 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."[1583]

640. For all of these reasons, the Tribunal should not apply a sunk costs approach, but instead adopt a market approach as set out in BRG's Expert Reports.

5.4 The Respondent's Arguments Related to a Lack of Causation are Meritless

641. As SVB demonstrated in its Memorial and as set out above, its losses and damages crystallized on 31 August 2022, when South32 terminated the Option Agreement, marking the end of the Project.[1584] South32's exit from the Project was caused by Mexico's refusal to take action within its power to lift the Continuing Blockade, which had prevented access to the Project site and halted exploration works for nearly three years.[1585] If Mexico had instead enforced law and order and restored the Project to the Claimant, the loss of the Claimant's investment would not have occurred, demonstrating that Mexico's breaches are the proximate cause of the harm.[1586]

1580 BRG ER1, para. 102 (emphasis added).

1581 BRG ER1, para. 102. For an indicative list of the activities undertaken by the Claimant to measure the mineral resources in the Sierra Mojada Project *see* BRG ER1, para. 32.

1582 *Case Concerning the Factory at Chorzów*, PCIJ, Claim for Indemnity – Merits, Judgment No 13, 13 September 1928, p. 47, **C-0096**.

1583 *Crystallex v. Venezuela*, Award, 4 April 2016, para. 882, **CL-0075**.

1584 *See* Memorial, Section 2.G; *supra* Section 2.10.

1585 *See* Memorial, Section 2.G.

1586 *See* Memorial, Section 2.G; *supra* Section 2.10.

Moreover, the Claimant would have continued its exploration activities leveraging the funds provided by South32 under the Option Agreement and the Project would have advanced to production.[1587] Unfortunately, and contrary to the Respondent's assertions, this did not happen as a direct result of the Respondent's breaches of the NAFTA.[1588]

642. In its Counter-Memorial, the Respondent attempts to categorize SVB's damages as (i) those resulting from physical damage to the Claimant's facilities, and (ii) those arising from interference with the Claimant's Project amounting to indirect expropriation.[1589]

643. With respect to the first set of damages, the Respondent contends that the Claimant has not established their quantum.[1590] Regarding the second category of damages, the Respondent advances the following flawed causation arguments: (i) that the Claimant has failed to demonstrate that the Project was viable;[1591] (ii) that the real cause of the Claimant's loss was its own failure to comply with alleged commitments to Mineros Norteños,[1592] and (iii) that there is no evidence linking the exit of South32 with the Continuing Blockade, which the Respondent speculatively links to the outcome of the Valdez litigation.[1593]

644. The Respondent's arguments are fundamentally flawed. *First*, the Respondent's categorization of SVB's damages into two distinct categories of damages is incorrect. The Claimant's case is *not* that the isolated instances of criminal damage and theft of its property by Mineros Norteños are the source of its damage in this case. Indeed, the Claimant has advanced no claim for such damage. Instead, as demonstrated above, the Respondent's unreasonable inaction caused the Claimant to lose its entire investment, and such loss crystallized on 31 August 2022.[1594] As the Claimant has explained, had Mexico acted to intervene in the Continuing Blockade and restore the Claimant's investment to it, as it was legally required to do and as it did in 2016 with the Initial Blockade, the Claimant would not have lost its entire investment.

1587 *See* Section 2.4 *supra*; Barry WS2, para. 15.

1588 *See* Section 2.4 *supra*; Barry WS2, para. 15.

1589 Counter-Memorial, para. 532.

1590 Counter-Memorial, para. 534.

1591 Counter-Memorial, paras. 535-542.

1592 Counter-Memorial, paras. 544-545.

1593 Counter-Memorial, paras. 535, 552.

1594 *See* Section 2.10 *supra*; Barry WS2, para. 19.

645. *Second*, the Claimant demonstrated that the Respondent's failure to lift the Continuing Blockade prevented SVB from bringing the Project into production with its partner South32, as it denied SVB access to its own Project site and brought all exploration to a halt.[1595] After nearly three years of the Blockade, the Respondent's unreasonable inaction resulted in South32 exiting the Project, marking its end and the crystallization of the Claimant's loss.[1596] Such harm is directly attributable to the Respondent's breaches – the but-for test to establish causation is clearly met.[1597]

646. Indeed, as Mr. Barry explains, from the moment South32 terminated the Option Agreement, the Project was unviable: SVB had lost its critical financing and development partner for the Project and – in view of the Continuing Blockade and Mexico's continued refusal to act – no reasonable investor would have invested in the Project, as confirmed by Mr. Barry's discussions with prominent shareholders and investors and by communications of those investors to the market.[1598]

647. BRG confirms that following South32's exit of the Project, a "rational investor" faced with this fact would not have committed any funding, effectively confirming the Claimant's loss. According to BRG, from an economic perspective "South32's withdrawal from the Project on 31 August 2022 is indicative and representative of the view of a rational investor: that they cannot commit capital to a Project that is inaccessible and with property rights that are not expected to be enforced."[1599]

648. *Third*, contrary to the Respondent's assertions, the Project was not only viable but was ideally positioned for economic success.[1600] As demonstrated in the Memorial and set forth above and in the witness statements of Messrs. Barry and Edgar:

1595 *See* Section 2.8 *supra*.

1596 *See* Section 2.10 *supra*.

1597 The central question is whether Mexico's breaches caused the Claimant's loss, which is an application of a principle aptly explained by the tribunal in the *Biwater v. Gauff* case ("The key issue in this case is the factual link between the wrongful acts and the damage in question, as opposed to any issue as to remoteness or indirect loss.") *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 786, **CL-0024**.

1598 *See* Section 2.10 *supra*; Barry WS2, para. 66.

1599 BRG ER2, para. 27.

1600 *See* Section 2.4 *supra*.

- The Sierra Mojada region had significant mineral potential as it is located within a well-known mineral belt with a robust history of silver, zinc, lead, and copper mining.[1601]

- Between 1997 and 2010, Minera Metalín completed extensive underground sampling, mapping, and drilling, investing more than US$ 20 million into advancing the Project by 2010.[1602]

- The Claimant confirmed significant measured and indicated resources in the Sierra Mojada Project,[1603] based on targeted drillings within the property which resulted in the discovery of the Sulphide Zone in 2015, a significant area of mineralization that would have formed the backbone of the future mine plan for the Project had the Continuing Blockade been lifted.[1604]

- Between 2011 and 2017, Minera Metalín conducted further extensive drilling programs, completing 85,751 meters of surface drilling and 11,784 meters of underground drilling between defining a four kilometers silver oxide resource.[1605]

- The Claimant compiled robust studies to derisk the Project and progress it towards the pre-feasibility stage, which it would have reached had it not been for the Continuous Blockade.[1606] These studies included for instance the compilation of a preliminary economic assessment under NI 43-101 conducted by JDS Mining & Energy Inc, which estimated the "total resources total resources of 328,401 silver equivalent oz and estimated the value of the Project between US$ 250.7 million and US$ 677.1 million in its base case scenario under the discounted cash flow ("**DCF**") approach."[1607] This study was updated in 2015, and later in 2018. In the 2018, the updated study conducted by Archer Cathro & Associates Ltd. estimated "a total of 541,766 oz of silver equivalent

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1601 *See* Section 2.2 *supra*; Memorial, para 2.27; Edgar WS1, para. 5.6.

1602 Barry WS1, para. 4.8.

1603 BRG ER1, para. 33.

1604 Barry WS2, para. 84.

1605 Barry WS2, para. 14.

1606 Barry WS1, para. 4.31. Edgar WS2, para. 17.

1607 BRG ER1, para. 32(f).

resources and identified additional exploration activities and target areas going forward."[1608]

- In 2018, the Claimant attracted significant investment from South32, a major mining company that was formed through a spin-off from BHP Billiton, who provided fresh funding to continue exploration work and advance the Project towards production.[1609]

- The Claimant's exploration work – including an 8,000 meter-drilling program through the contractor Major Drilling – led to the identification of promising new prospects like Palomas Negros, discovered in 2019, which were a clear sign of the Project's upside and viability.[1610]

649. The Respondent does not engage with these facts and baldly asserts that "the Project would have marginal value if any," mainly because it had not progressed to pre-feasibility or feasibility studies.[1611] This is, with respect, lazy sophistry. The entire reason the eighth largest mining company in the world, South32, invested in the Project was because of its potential value and a collective intention to progress its development to pre-feasibility level. Indeed, the evidence shows the Claimant would have advanced to Project to the feasibility stage had it not been for the start of the Continuing Blockade.[1612]

650. The Respondent also does not address any of the studies or activities referred to above in its Counter-Memorial. Instead, the Respondent's whole theory that the Project had little marginal value lies in the lack of a pre-feasibility study – which would have been prepared shortly but-for Mexico's breaches; the Respondent simply fails to proffer a single technical argument or rebuttal evidence to support its proposition that the Project lacked technical viability.

651. Relatedly, the Respondent's legal expert, Mr. Del Razo Ochoa, opines that the Project was "inviable" because it lacked environmental and other mining regulatory permits to initiate operations.[1613] As explained in detail above, Mr. Del Razo Ochoa's Expert Report lacks any factual basis for its conclusions and is conceptually misguided because the permits supposedly

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1608 BRG ER1, para. 32(i).

1609 Edgar WS2, para. 25.

1610 Barry WS2, para. 14.

1611 Counter-Memorial, para. 539.

1612 Barry, WS2, para. 14.

1613 Del Razo Ochoa ER, para. 112.

required to make the Project viable became applicable upon the entry into force of the 2023 Mining Law, almost nine months after the Claimant's loss crystallized.[1614] Moreover, Mr. Del Razo Ochoa's opinions on permitting have no bearing on whether Mexico's inaction was the proximate cause of the Claimant's loss, particularly in circumstances where the Claimant's damages case does not depend on establishing future cash flows with certainty, but rather on the comparable transactions method.

652. Mr. Del Razo Ochoa's assumption of non-viability is in any event misplaced. The Respondent has adduced no evidence to suggest that, had it not breached the NAFTA, the Claimant would have failed to obtain each one of the necessary regulatory permits. While permitting is always a risk, there is no suggestion the Project posed specific permitting risks, and the Respondent has failed to adduce evidence to show the contrary.[1615]

653. In determining whether a Mexican authority would have granted the Claimant and Minera Metalín the necessary permits to begin exploitation, the tribunal's reasoning in *Chevron v. Ecuador* – assessing the likelihood of Ecuadorian courts' ruling in favor of the claimant's subsidiary in certain domestic proceedings – is persuasive. There, the tribunal considered that it "must ask itself how a competent, fair, and impartial Ecuadorian court would have resolved TexPet's claims."[1616] Applying this principle here, the Claimant submits there is no reason why a fair and impartial Mexican authority would not have granted the required permits for Minera Metalín to initiate exploitation, provided that Minera Metalín complied with the applicable domestic laws and regulations.

654. Further, Mr. Del Razo Ochoa's claim that the Project is non-viable because the Respondent could cancel the concessions due to an alleged lack of evidence of work within the concessions for over two years and non-payment of concession rights[1617] is equally unpersuasive.[1618] As demonstrated above, it is simply not true that the Claimant – or Minera Metalín – failed to comply with their duties to report the works carried out within the concessions or pay the rights to hold the mining

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1614 *See* Section 2.12 *supra*; Del Razo Ochoa ER, para. 120.

1615 *See* Section 2.12 *supra*. Barry WS2, para. 18.

1616 *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, para. 375, **CL-0189**.

1617 These are limited to the concession rights related to El Retorno, El Retorno Fracción I, Esmeralda I (211158), Agua Mojada and Mojada 2. Counter-Memorial, para. 70. *See* Section 2.12 *supra*.

1618 *See* Section 2.12 *supra*. Counter-Memorial, para 72; Del Razo Ochoa ER, para. 101.

concessions as provided under the applicable Mining Law.[1619] Moreover, Mexico has failed to produce any evidence – let alone affirmative contemporaneous evidence – showing that the Mexican authorities took any steps to cancel Minera Metalín's concessions on the basis of the alleged violations cited by Mr. Del Razo Ochoa.

655. *Fourth*, as explained above in Section 2.9, the Respondent's attempts to shift the blame on to the Claimant for not to acceding to Mineros Norteños's efforts to extort the Claimant are entirely misguided. As shown above, the Claimant undertook good faith efforts to reach a deal with Mineros Norteños to lift the Continuing Blockade. However, the prolonged and ultimately permanent Blockade resulted from Mineros Norteños's unreasonable, erratic, and extreme demands, supported by the complacency of the Mexican authorities and Minister Borrego's patronage in maintaining the Blockade.[1620]

656. *Fifth*, as demonstrated in Sections 2.10 and 2.11 above, South32's exit resulted directly from Mexico's refusal to take reasonable action to end the Continuing Blockade. That exit had nothing to do with the Valdez litigation, which, as established above is entirely irrelevant to this arbitration.[1621]

657. In sum, Mexico's actions were indisputably the sole, proximate cause of the Claimant's losses, and Mexico's arguments to the contrary are unavailing.

5.5 The Respondent has Failed to Demonstrate that the Claimant Contributed to the Harm or Failed to take Reasonable Steps to Mitigate its Loss

658. The Respondent argues that the Claimant contributed to its injury and failed to mitigate its loss because of "its intransigence in the face of Mineros Norteños' proposals" and by "by failing to attempt to mitigate its losses by selling the investment to a third party."[1622] As demonstrated below, the Respondent's defenses are misplaced.

659. As an initial matter, the Respondent conflates the theories of contributory negligence and mitigation of damages. Even though both theories may limit a claimant's recovery in certain circumstances, they have different applications. As Professor Marboe explains, the difference between the theories "is that the former concerns the occurrence of damage in the first place,

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1619 *See* Section 2.12 *supra*.

1620 *See* Section 2.9 *supra*; Barry WS2, paras. 35.

1621 Barry WS2, para. 76; Edgar WS2, para. 34; Richards WS1, para. 45.

1622 Counter-Memorial, paras. 566-567, 571.

while the latter is related to the duty of the injured party to keep the damage as small as possible once it has incurred."[1623] In other words, the contributory negligence theory assesses whether the claimant's conduct had a bearing on the resulting injury and is thus a question arising *before or at the same time as* the occurrence of the loss. Separately, the issue of mitigation only arises *after* the injury.

660. Here, however, the Respondent confuses the application of these two separate theories by using the same factual basis for both defenses. For instance, it claims that the Claimant did not mitigate its damages by failing to pay Mineros Norteños royalties and, at the same time, it claims that this was the reason the Claimant suffered its injury. This is logically incoherent – even if the factual basis of the Respondent's argument were accepted, the same actions cannot be both the prior cause of a loss and a failure to reduce that same loss after it has occurred.

661. With respect to the contributory fault defense, this is yet another manifestation of the Respondent's flawed argument that the Claimant should have simply acceded to Mineros Norteños's extortionate demands. The Claimant has already explained why that argument lacks merit – there is simply no basis to argue that the Claimant should have agreed to unwarranted demands that contradicted the agreements between the parties, had already been rejected by Mexico's own courts, and were made under duress due to the unlawful Continuing Blockade that Mexico had failed to remove, prosecute, or sanction.[1624] In essence, Mexico's argument condones Mineros Norteños's illegal conduct, by contending that no matter what Mineros Norteños's demands were, what threats Mineros Norteños made, or what Mexico's own courts had decided, the Claimant should have met those demands come what may.[1625] This is not a serious argument.

662. In any event, the argument is wrong from a factual perspective. As Mr. Barry testifies, "despite the unlawful trespass of our property, threatened violence and unlawful imprisonment of our employees," the Claimant "still sought [to] find a reasonable middle ground to resolve the dispute in good faith."[1626] Despite having no obligation to make any royalty payments prior to entering production, the Claimant made a series of good faith offers to resolve the dispute, including offering substantial shareholdings in SVB and payments to Mineros Norteños on the sale of the Project. These efforts ultimately failed not because of any actions or omissions by the Claimant,

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1623 Irmgard Marboe, 'Chapter 3: Conclusions', in Calculation of Compensation and Damages in International Law (2nd ed. 2017), para. 3.241, **CL-0186**.

1624 *See* Section 2.9 *supra*.

1625 *See* Section 2.9 *supra*.

1626 Barry WS2, para 35.

but because Mineros Norteños continued to make unreasonable and extortionate demands, emboldened by the acquiescence of the Mexican authorities and the support of Mr. Borrego.[1627]

663. Mexico's contributory fault defense is also wrong on the law. While the Respondent relies on the tribunal's decision in *MTD* v. *Chile*, the findings in that case are inapplicable here. In *MTD*, the claimant bought a piece of land from a private party and claimed damages from Chile in the amount invested to advance a real estate project – including the actual price paid for the land – following Chile's breaches of the Chile-Malaysia BIT.[1628] However, the tribunal reduced damages on the basis of contributory fault, as it found that the claimant had exercised poor business judgement by paying the full upfront price for the land without obtaining prior assurances that Chile would issue a rezoning decision to allow the development of an urban project.[1629]

664. The factual circumstances here are entirely different. In *MTD*, the claimant made a business decision under the assumption that a government agency would issue a discretionary rezoning permit and therefore exposed itself to the risk that its assumption would prove incorrect. Here, the Claimant did not pay Mineros Norteños future royalties because it was not liable for them under the 1997 and 2000 Agreements, and then refused to meet extortionate demands for such payments. The difference between both cases is glaringly obvious.[1630]

665. Mexico's argument that the Claimant was contributorily negligent by failing to sell the Project is both illogical and factually wrong. It is illogical because, as noted above, Mexico asserts that the Claimant contributed to its loss by failing to sell the Project *after* the loss occurred.[1631] And it is factually wrong because, as Mr. Barry confirms in his testimony, no reasonable investor would be willing to buy the Project while the Continuing Blockade remained in place and the Mexican authorities continued to do nothing in response.[1632] Mr. Barry notes that after South32 terminated

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1627 Barry WS2, para 35.

1628 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 ("***MTD v Chile***"), Award, 25 May 2004, para. 253, **CL-0184**.

1629 *MTD v Chile*, Award, 25 May 2004, para. 177, **CL-0184**.

1630 *See* Section 2.9 *supra*. The Respondent also cites the final award in *Occidental Petroleum v. Ecuador* as support for its contributory negligence defense (*see* Counter-Memorial, fn. 510). However, in that case the tribunal reduced damages by 25% because the claimants failed to promptly inform Ecuador about an agreement to transfer rights to a third party without ministerial authorization, which was connected with the *caducidad* (cancellation) of the contract. This decision is far removed from the facts of this case as the Claimant did not act negligently or contributed to impede the Mexican authorities' actions to lift the Blockade.

1631 Counter-Memorial, para. 571.

1632 Barry WS2, para. 66.

the Option Agreement, he held discussions with several shareholders and investors – including well-known figures in the mining industry – who all confirmed that there would be no appetite from investors to invest in the Project unless and until the Continuing Blockade was lifted.[1633]

666. For the reasons explained above, an award of damages should not be reduced. The Claimant took a good faith approach to its negotiation with Mineros Norteños, which included numerous offers of advance royalties.[1634] It could not have been expected to simply pay those royalties or face an illegal blockade and the intransigence of the Mexican authorities. Plainly, the Claimant's actions fail the legal test for contributory fault, which requires a demonstration that "the action or omission must represent negligent and reproachable behaviour."[1635]

667. With respect to the Respondent's mitigation defense, it attempts to offload its *onus probandi* on to the Claimant by arguing that "[t]here is no evidence that SVB has made *any* effort to mitigate its damages."[1636] However, it is well-settled doctrine that a respondent has the burden of proving a failure to mitigate damages. As the *AIG v. Kazakhstan* tribunal observed:

> The onus of proof on the issue of mitigation is always on the person pleading it – if he fails to show that the Claimant or Plaintiff ought reasonably to have taken certain mitigating steps, then the normal measure of damages will apply.[1637]

668. Again, neither the facts nor the law support the Respondent's mitigation defense. The Respondent's arguments are unsupported by the authorities on which they rely.[1638] Mexico relies on the *Lion Mexico* case, in which the tribunal found that Mexico breached the NAFTA by improperly cancelling the claimant's interest under promissory notes tied to mortgages. The tribunal did not hold, however, that the claimant failed to mitigate damages.[1639] Instead, it only

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1633 Barry WS2, para. 66.

1634 *See* Section 2.9 *supra*.

1635 Irmgard Marboe, 'Chapter 3: Conclusions', in Calculation of Compensation and Damages in International Law (2nd ed. 2017), para. 3.243, **CL-0186**.

1636 Counter-Memorial, para. 567.

1637 *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, para. 10.6.4.(4), **CL-0185**.

1638 Counter-Memorial, paras. 563, 565, fns 506-507.

1639 *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2 ("***Lion v Mexico***"), Award, September 20, 2021, paras. 838-839, **RL-0076**.

restated that the claimant had a continued duty to mitigate its losses and noted that after the award, the claimant "must continue defending the claim for Legal Fees filed by the Debtor."[1640]

669. The facts and evidence on the record also belie the Respondent's mitigation defense. As demonstrated above, after the Claimant's loss crystallized, no reasonable investor would be willing to buy the Project while the Continuing Blockade remained in place and the Mexican authorities continued to refuse to take action.[1641] Moreover, the record shows that the Claimant could not have sold assets or otherwise mitigated its damages because Minera Metalín did not have and still does not have access to the Project.[1642]

5.6 The Respondent's Expert Fails to Rebut the Claimant's Damages Valuation

670. SVB's claim for damages is supported by BRG's expert testimony.[1643] In its First Report, BRG assessed the Sierra Mojada Project's FMV following the recommendations of the CIMVAL Code's guidelines for valuing mining properties.[1644] Based on the Project's stage of development – having quantified mineral resources but without a completed pre-feasibility study – the CIMVAL Code recommends following the market approach.[1645] As summarized below, in its First Report BRG measured the Project's FMV primarily utilizing two different market approach methodologies. BRG also undertook an alternative assessment under the cost approach.

671. With respect to the market approach, BRG's two analyses were as follows:

- Comparable transactions method: As its primary valuation method, BRG followed the comparable transactions methodology, which infers the Project's value based on the market prices for transactions involving similar mineral projects.[1646] BRG analyzed a sample comprised of 514 transactions involving companies in the silver and diversified ores industry – including zinc – within the three years prior to the Valuation Date, *i.e.*, from 31 August 2019 to 31 August 2022.[1647] BRG narrowed the sample by

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1640 *Lion v Mexico*, Award, September 20, 2021, para. 839, **RL-0076**.

1641 Barry WS2, para. 66.

1642 Barry WS2, para. 66.

1643 BRG ER2.

1644 BRG ER1, para. 9.

1645 BRG ER1, paras. 9-10.

1646 BRG ER1, para. 78.

1647 BRG ER1, para. 79. Memorial, para. 5.15.

applying certain criteria to ensure comparability between the Project and the comparators, which resulted in a filtered sample of nine transactions.[1648] BRG then adjusted the comparators' values to account for differences in the mineral resources through an enterprise value to resources ("**EV to Resources**") multiples.[1649] Based on this reduced sample, BRG concluded that the Project's FMV as of the Valuation Date is US$ 362.7 million.[1650]

- Public guideline companies method: BRG cross-checked the comparable transactions valuation by comparing it to a sample of publicly traded companies with similar characteristics, adjusting their values using a median EV to Resources multiple.[1651] As BRG explained in its First Report, this approach is not as reliable as the comparable transactions methodology because certain companies in the sample, like SVB, have small market capitalizations and do not trade their stock efficiently.[1652] Based on a sample of 41 publicly traded companies and applying a median EV to Resources multiple,[1653] BRG's First Report concluded that the Project's FMV as of the Valuation Date is US$ 528.3 million.[1654]

672. With respect to its alternative valuation based on a cost approach, BRG deployed a Multiple for Exploration Expenditure ("**MEE**") method, which is a cost approach under the CIMVAL Code.[1655] Through this methodology, BRG assessed the Project's FMV by calculating the Claimant's historical expenses incurred in developing the Project as of the Valuation Date (the "**Expenditure Base**") and applied a three-times prospectivity enhancement multiple ("**PEM**"), as recommended by the industry literature to reflect the contribution of the investments in

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1648 BRG ER1, para. 80. Memorial, para. 5.15.

1649 BRG ER1, para. 13. Memorial, para. 5.16.

1650 BRG ER1, para. 13. Memorial, para. 5.16.

1651 BRG ER1, para. 14.

1652 BRG ER1, paras. 12, 14.

1653 BRG notes that "the 41-company sample size is large enough to reduce the impact of instances where market capitalizations may deviate from underlying project value." BRG ER1, para. 91.

1654 BRG ER1, para. 91.

1655 BRG ER1, para. 15.

adding forward-looking value to the Project.[1656] Based on this approach, BRG's First Report calculated that the Project's FMV is US$ 488.5 million.[1657]

673. Finally, BRG calculated the Claimant's sunk costs in connection with the Project. This approach is not commensurate with the principle of full reparation as explained above, but BRG measured the Claimant's sunk costs to provide the Tribunal with a complete set of alternative valuations.[1658]

674. In its Counter-Memorial, the Respondent relies on Dr. Tiago Duarte-Silva's report to rebut BRG's assessment of quantum. According to the Respondent, Dr. Duarte-Silva was instructed to assess the reasonableness of BRG's damages assessment and provide an "alternative valuation of the damage in case it considered that BRG's estimate was inappropriate."[1659] However, as detailed below and further explained in BRG's Second Report, Dr. Duarte-Silva's analysis fails to effectively rebut BRG's conclusions. Notably, Dr. Duarte-Silva does not seriously challenge BRG's assessment of the Project's FMV based on the comparable transactions method, nor does he dispute the reasonableness checks that BRG employed using the guideline companies and MEE approaches.[1660] Dr. Duarte-Silva also does not object to the utilization of the Claimant's proposed Valuation Date as the starting point for the measurement of damages.

675. More critically, despite his supposed mandate from the Respondent, Duarte-Silva's Expert Report does not provide an alternative valuation to quantify the Claimant's damages. Instead, his report consists of scattered criticisms aimed at undermining BRG's thorough and well-supported report without offering a substantive alternative framework. Indeed, Dr. Duarte-Silva's report succeeds only in taking "pot shots" at BRG's report and does not provide an analysis upon which this Tribunal can rely in ruling on the matter of damages.

676. In its Second Report – for the reasons explained below – BRG confirms that its main conclusions and methods regarding the assessment of Project's FMV in its First Report remain correct.[1661] After addressing each of Dr. Duarte-Silva's objections in detail, BRG confirms that

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1656 BRG ER1, para. 15.

1657 BRG ER1, para. 100.

1658 BRG ER1, paras. 101-105.

1659 Counter-Memorial, para. 574.

1660 BRG ER2, para. 4.

1661 BRG ER2, para. 203.

the Project's FMV is appropriately measured under a comparable transactions methodology. Sensibly, however, BRG took into account certain of Dr. Duarte Silva's more reasonable criticisms and adjusted its valuation accordingly. As explained in further detail below, the adjusted Project's FMV as of the Valuation Date using the comparable transactions method is **US$ 315.3 million**.[1662] As demonstrated in the Memorial and as discussed above, the actual value of the Project as of the Valuation Date is zero because of Mexico's breaches, and therefore the referenced figure is also the quantum of damages claimed by SVB.[1663]

677. As a preliminary issue related to the valuation analysis, the Respondent argues that the Claimant's valuation method is poorly specified because it is not clear whether the Claimant brings the claims on its own behalf or on behalf of Minera Metalín, or whether the investment that is being valued is the Project or Minera Metalín.[1664]

678. This argument is entirely misconceived. SVB made clear from the very first paragraph of its Memorial that it was filing a claim under the NAFTA "on its own behalf and on behalf of Minera Metalín S.A. de D.V. ("**Minera Metalín**")."[1665] SVB owns directly or indirectly the totality of Minera Metalín's shares. Minera Metalín, in turn, holds the concession titles to develop the Sierra Mojada Project.[1666] As set forth in the Memorial, the Claimant's investments in Mexico include shares in Minera Metalín, ownership of assets and rights – including the mining concession titles – funds that SVB provided to Minera Metalín to finance exploration works, interest in commercial agreements, amongst others.[1667] These investments were made for the purpose of advancing the Sierra Mojada Project. Accordingly, BRG has valued the Sierra Mojada Project as a whole, rather than analyzing the value of its individual elements.[1668]

5.6.1 BRG's Market Approach Methodologies Reflect the FMV of the Project

679. In his report, Dr. Duarte-Silva sets forth three main objections to BRG's valuation under the two market methodologies relied upon by BRG, namely that (i) BRG should not have

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1662 BRG ER2, paras. 17, 204.

1663 *See* Memorial, para 5.11; *supra* Section 2.10; BRG ER2, para. 27.

1664 Counter-Memorial, paras. 517-518.

1665 Memorial, para. 1.1.

1666 Memorial, para. 2.7.

1667 Memorial, para. 3.13.

1668 BRG ER2, para. 20.

considered certain transactions and companies as suitable comparators because, for instance, the comparators include companies with more than one property that have not issued mineral resource declarations;[1669] (ii) the weighting system used by BRG to express mineral resources as "reserves" lacks adequate support;[1670] and (iii) BRG inappropriately applied a 33% control premium to the public companies and transactions.[1671]

680. As detailed below and further explained in BRG's updated expert report, Dr. Duarte-Silva's objections are misguided.

681. Regarding the sample selection for the comparable transactions approach, Dr. Duarte-Silva's claim that five comparable transactions should have been excluded is wrong.[1672] As BRG explains in its Second Report, three out of the five transactions that Dr. Duarte-Silva opines should be excluded from the sample – namely those involving Arizona Mining Inc., Altamin Ltd., and Pine Point Mining Ltd – had quantified mineral resources and thus Dr. Duarte-Silva's objection is baseless.[1673] Moreover, the two remaining companies that had early-stage exploration properties without quantified resource – namely, Murchison Minerals Ltd and Constantine Metal Resources Ltd – contributed very little overall value to the companies, and thus do not present a risk of inflated multiples.[1674] In any case, BRG explains that it would be incorrect to exclude transactions based on similar early-stage potential within the properties because the Sierra Mojada had a similar upside potential as reflected by the significant discoveries within the property including the Palomas Negros prospect.[1675]

682. Notably, Dr. Duarte-Silva is also wrong to suggest that Arizona Mining Inc.'s La Hermosa project should be excluded from the sample, as in doing so he disregards the strong similarities between that project and the Sierra Mojada Project.[1676] As BRG notes, both the La Hermosa

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1669 Duarte-Silva ER, paras. 56-60.

1670 Duarte-Silva ER, paras. 112-115.

1671 Duarte-Silva ER, paras. 107-111.

1672 BRG ER2, para. 39.

1673 BRG ER2, para. 39.

1674 BRG ER2, para. 39.

1675 BRG ER2, para. 39; *see also* Barry WS2, para 14.

1676 Duarte-Silva ER, paras. 58-59.

and Sierra Mojada projects lie within the same mineral belt, share deposit composition structure, and involve a similar degree of knowledge of mineralization.[1677]

683. Notwithstanding the above, out of an abundance of caution, BRG agreed with Dr. Duarte Silva that it was sensible to exclude two out of the nine transactions from the original sample – Karmin and Firefly – reducing the median multiple applied to the comparators transactions.[1678] As a result, BRG's FMV assessment of the Project under the comparators approach is reduced from US$ 362.7 million to US$ 315.3 million.[1679]

684. With respect to the public guideline companies approach, Dr. Duarte-Silva does not object to the filters BRG used to determine the sample of companies. Rather, his disagreement with BRG relates to the comparability of the 41 companies with the Project.[1680] However, as BRG demonstrates in its Second Report, Dr. Duarte-Silva's objections are incorrect because (i) for the same reasons noted above, companies carrying projects with quantified resources that contain early-stage areas should not be excluded;[1681] (ii) there is no support for Dr. Duarte-Silva's election to exclude companies with less than 20 million silver equivalent ounces;[1682] and (iii) Dr. Duarte-Silva overstates the impact of the country risk where the projects of certain companies are located.[1683]

685. Sensibly, again, BRG excluded three companies from the sample – Cerro de Pasco Resources, Yari Minerals Ltd. and Zacatecas Silver Corp. – after carefully reviewing Dr. Duarte-Silva criticisms, reducing the sample to 38 companies.[1684] As a result, BRG's FMV assessment of the Project under public guideline companies approach is reduced from US$ 528.3 million to US$ 426.8 million.[1685]

1677 BRG ER2, paras. 44-45.

1678 BRG ER2, para. 41.

1679 BRG ER2, para. 42. BRG further rejects the adjustment of the value of the target companies involved in the transaction using the MSCI Select Silver Mining Investable Index. According to BRG "the index is a poor proxy for the returns of exploration-stage mining companies because it is disproportionately driven by companies with producing mines." BRG ER2, para. 60.

1680 BRG ER2, para. 62.

1681 BRG ER2, paras. 63-64.

1682 BRG ER2, paras. 63-66.

1683 BRG ER2, paras. 71-73.

1684 BRG ER2, paras. 68-70.

1685 BRG ER2, paras. 69, 205. BRG further confirms that the utilization of a 30-day average market capitalization to calculate enterprise value and to calculate EV to Resources instead of the stock price at the Valuation Date – suggested by Duarte-Silva –

686. Dr. Duarte-Silva's claim that BRG used an improper weighting system to adjust mineral resource values based on the level of geological confidence in its market approach is incorrect.[1686] As BRG notes in its Second Report, to account for the greater value of measured and indicated resources than inferred resources – based on the higher geological confidence of the former – BRG calculated multiples based on weighted resources following the industry literature, the Australasian Code for Reporting of Exploration Results, Mineral Resources, and Ore Reserves ("**JORC**"), and the CIMVAL Code.[1687] Notably, despite criticizing BRG's weighting system, Duarte-Silva applied the same system to carry out his calculations.[1688]

687. Finally, Dr. Duarte-Silva's objection to BRG's application of a control premium in relation to the purchase of majority or controlling stakes in the companies considered in the market approach is misplaced.[1689] Contrary to Dr. Duarte-Silva's objection, when assessing the FMV of a majority stake in an asset it is standard practice to adjust transactions of minority stakes and public guideline companies using an acquisition premium; this is supported by the leading valuation treatises of authors such as Damodaran, Koller, Rudenno, and Webster.[1690] BRG used 32.9% as an acquisition premium, which is a typical premium reflected in the source data from Mergerstat Review – an annual compilation of statistics on mergers and acquisitions – for 2021, *i.e.*, the immediate year before the Valuation Date.[1691]

5.6.2 SVB's Market Capitalization and Past Transactions Do Not Reflect the Project's FMV

688. In its First Report, BRG assessed whether SVB's market capitalization and past transactions – the Option Agreement and the Private Placement,[1692] both completed in 2018 – are an appropriate reflection of the Project's FMV.[1693] BRG concluded that SVB's market capitalization was not indicative of the Project's FMV because (i) SVB's stock did not trade efficiently, and (ii) its value was affected by factors such as (a) the litigation with Mineros

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is an appropriate approach. *See* BRG ER2, para. 77 ("Dr. Duarte-Silva's application of stock prices on the Date of Valuation rather than an average disregards the volatility of stock prices and its inherent randomness.")

1686 BRG ER2, para. 82.

1687 BRG ER2, para. 82.

1688 BRG ER2, para. 84.

1689 BRG ER2, paras. 92-105.

1690 BRG ER2, paras. 95-108.

1691 BRG ER2, para. 96.

1692 *See* Memorial, para. 2.96.

1693 BRG ER1, paras. 70-77.

Norteños initiated in 2014; (b) the additional exploration work that SVB would have conducted but-for the Respondent's breaches in recent discovered prospects – such as within the Sulphide Zone; and (c) the increase in silver prices during the Continuing Blockade and until the Valuation Date.[1694]

689. With respect to SVB's past transactions, BRG also concluded that these were not indicative of the Project's FMV because they did not capture the upside resulting from having a major mining company like South32 as a partner in the Project and discovering and developing the Sulphide Zone.[1695]

690. In his report, Dr. Duarte-Silva objects to BRG's exclusion of SVB's market capitalization and past transactions to analyze the Project's FMV.[1696] According to Dr. Duarte-Silva, (i) SVB's market capitalization should not have been discarded as a source of the Project's FMV because there is no indication that SVB's stocks traded inefficiently, and the dispute with Mineros Norteños had limited effects with the Company's value considering their claim was for US$ 6.875 million; (ii) the discovery of the Sulphide Zone was "actually not valuable for the project,"[1697] and that "the sulfide mineralization that was actually worthless"[1698] and (iii) the increase in silver prices observed after SVB's transactions did not affect the Project's FMV.[1699]

691. As set forth below and as BRG explains in detail in its Second Report, Dr. Duarte-Silva's objections are misguided. With respect to SVB's stock trading efficiency, BRG analyzed eight factors proposed by the well-known economists, Professors Bhole, Surana and Torchio to assess market efficiency and confirmed that "Silver Bull would not be considered to trade in an efficient market and therefore its stock price prior to the Continuing Blockade cannot be considered to reflect the Project's FMV."[1700]

1694 BRG ER1, paras. 70-73.

1695 BRG ER1, paras. 74-77.

1696 Duarte-Silva ER, paras. 33-34, 90-106.

1697 Duarte-Silva ER, para. 93.

1698 Duarte-Silva ER, para. 94.

1699 Duarte-Silva ER, paras. 33-34, 90-106.

1700 BRG ER2, para. 111. BRG considers the SVB's stock inefficiency to be confirmed for the following reasons "I determined that as of the start of the Continuing Blockade, Silver Bull's stock was thinly traded, did not have any analyst coverage (this factor alone is a fundamental issue, as it is mostly analysts who provide an information bridge between companies' management and the investor public), it was illiquid, and had minimal levels of institutional ownership, with over 87% of the stock outstanding at the start of the Continuing Blockade held by retail (i.e., individual) investors." BRG ER2, para. 123.

692. Relatedly, BRG pointed out that Dr. Duarte-Silva is mistaken to assume that the litigation between Minera Metalín and Mineros Norteños did not affect SVB's market capitalization before the Continuing Blockade.[1701] *First*, contrary to Dr. Duarte-Silva's assertion, Mineros Norteños's claim was valued in excess of US$ 20 million – US$ 6.875 million for royalties and US$ 13.250 million for allegedly lost wages. It would thus have had a bearing on SVB's market capitalization. *Second*, by the time the Continuing Blockade began in September 2019, the Mexican courts had not finally ruled in favor of Minera Metalín – as there was still a writ filed by Mineros Norteños pending before the Second Unitary Court[1702] – and thus the uncertainty of the outcome likely affected SVB's market capitalization.[1703]

693. Dr. Duarte-Silva's opinion that the discovery of the Sulphide Zone did not contribute value to the Project is equally misplaced. Mr. Barry confirms in his witness testimony that the discovery of the Sulphide Zone in 2015 was a highly significant development in the history of the Project.[1704] After carrying out additional exploration and drilling works in 2016 and 2017, SVB identified and announced to the market various sizeable mineralization intercepts in the Sulphide Zone.[1705] These discoveries were the key focus of SVB's efforts to source investment in the company, and were ultimately a key factor in prompting South32's agreement to invest in the Project and fund extensive exploration works in the Sulphide Zone to investigate its full potential.[1706] Mr. Barry adduces that if the Continuing Blockade had not halted exploration works, "the mine plan for the Project would have centred around the Sulphide Zone" and therefore "the Sulphide Zone would have been a key contributor to the value of the Project as a whole."[1707]

694. BRG also confirmed, as a valuation matter, that the Sulphide Zone would have contributed significant value to the Project's FMV, which was not adequately captured by SVB's market capitalization as of the Valuation Date, rebutting Dr. Duarte-Silva's objection.[1708] Indeed, BRG

1701 BRG ER2, paras. 126-132. Duarte-Silva ER, para. 33.

1702 *See* Sections 2.3 and 2.7 *supra*.

1703 BRG ER2, paras. 126-132.

1704 Barry WS1, para. 4.29.

1705 Barry WS1, para. 4.31.

1706 Barry WS1, paras. 4.51 - 4.52

1707 Barry WS2, para. 84.

1708 BRG ER2, paras. 130-136.

explains that "the initial results of drilling in the sulfide mineralization were promising and were a core part of the interest in the Project by South32."[1709]

695. Finally, Dr. Duarte-Silva contends that the index of silver miners better reflects the impact on a company's value than the increase in silver prices between September 2019 and the Valuation Date.[1710] However, BRG explains that Dr. Duarte Silva's conclusion that an increase in silver prices would lead to a decrease in the Project's value does not make logical or rational sense:

> Dr. Duarte-Silva's implication that the decrease in the silver mining index suggests the increase in silver prices would have a negative impact on a mining company's value is illogical; [because] all else being equal, an increase in silver prices would increase the expected revenue for mining companies and consequently their value.[1711]

5.6.3 The MEE Approach is an Appropriate Means to Assess the Project's FMV under the Cost Approach

696. Dr. Duarte-Silva objects to BRG's utilization of the MEE methodology for three reasons: (i) according to Dr. Duarte-Silva, BRG improperly included in SVB's Expenditure Base all historical investments made as of the Valuation Date, without providing a breakdown of the expenditures, their connection with exploration activities, or whether the expenditures were audited;[1712] (ii) BRG incorrectly adjusted the Expenditure Base for inflation before applying the PEM, resulting in double counting;[1713] and (iii) the three-times PEM multiplier BRG applied to the Expenditure Base is "subjective and contradicted by the literature."[1714] As set forth below and explained in BRG's Second Report, Dr. Duarte-Silva's objections are baseless.

697. BRG's calculation of SVB's Expenditure Base relied on the Company's accounting records, which were used to compile SVB's audited financial statements published in the 10-K forms.[1715] Mr. Richards, the Claimant's CFO, explains in his Witness Statement the process by which SVB prepared its internal accounting records and how those records were later used as

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1709 BRG ER2, para. 138.

1710 Duarte Silva, para. 95.

1711 BRG ER2, para. 141.

1712 Duarte-Silva ER, para. 123.

1713 Duarte-Silva ER, para. 138.

1714 Duarte-Silva ER, para. 134.

1715 BRG ER2, paras. 147-150.

an input to compile the financial statements.[1716] Contrary to Dr. Duarte-Silva's assertion, the Company's financial statements were audited by Hein & Associates LLP up until 2016 and then by Smythe LLP.[1717] Mr. Richards also explains why Dr. Duarte-Silva finds discrepancies between 10-K forms and SVB's internal financial documents. As he explains, Dr. Duarte-Silva is not comparing "apples to apples" because SVB's "Form 10-K reflects the annual expenditures including both cash and non-cash expenses" while the SVB's internal accounting records provided to BRG for their damages valuation includes "actual cash sent by the Company to its Mexican subsidiaries and the cash spent by the Company to operate – *i.e.*, overhead costs – that substantially had only one project, namely, Sierra Mojada."[1718]

698. BRG also clarifies in its Second Report that, contrary to Dr. Duarte-Silva's claims, the historical expenses included in SVB's Expenditure Base were linked directly to advancing the Sierra Mojada Project. In this regard BRG has emphasized that overhead costs were essential to conducting exploration activities, making their inclusion in the Expenditure Base both appropriate and necessary.[1719] Moreover, Dr. Duarte-Silva's criticism that such costs were not "fruitful" and did not contribute to the value of the property and therefore should not be included in the Expenditure Base is misplaced.[1720]

699. *First*, Dr. Duarte-Silva is an economist, not an exploration geologist and therefore is not equipped to opine on what expenditure was "fruitful." As Mr. Barry, who is an exploration geologist, notes "[e]ven where exploration work did not identify mineralisation, it was still of value to the company as it demonstrated to us where we should focus future exploration works within the concession areas."[1721] BRG opines that Duarte Silva's theoretical distinction

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1716 Richards WS, para. 34.

1717 Richards WS, para. 34 ("As noted above, the Sierra Mojada Project's expenditures were compiled by the corporate accounting team I oversaw as part of the Company's intercompany reconciliations, which form an integral part of the Company's consolidation process. This reconciliation process supports the preparation of the consolidated financial statements that are audited on an annual basis, and reviewed on a quarterly basis. Since the fiscal year ending on 31 October 2016, Smythe LLP, of Vancouver, British Columbia, have been the Company's auditors. Smythe LLP has also conducted quarterly reviews since that time. Prior to the 2016 fiscal year, the annual consolidated financial statements were audited by Hein & Associates LLP, based in Denver, Colorado, United States.")

1718 Richards WS, paras. 32-33

1719 BRG ER2, para. 154. In any case, BRG subtracted from the expenditure base those overhead costs that were related to managing the Gabon and Kazakhstan projects. *See* BRG ER2, paras. 155-158.

1720 Duarte-Silva ER, para. 130.

1721 Barry WS2, para. 86. BRG aptly notes that "Dr. Duarte-Silva's theoretical distinction between value-adding and non-value-adding costs disregards the fact that all of the exploration activities provided additional information on the size, shape, and grade of the ore body contained within the Project which contributed to its overall stage of Development." BRG ER2, para. 161.

between "value-adding and non-value-adding costs disregards the fact that all of the exploration activities provided additional information on the size, shape, and grade of the ore body contained within the Project which contributed to its overall stage of development."[1722]

700. Further, Dr. Duarte-Silva's assertion that it is not clear whether capital inflows coming into Minera Metalín from SVB transfers were spent on the Sierra Mojada Project is incorrect as a factual matter. As Mr. Richards explains, "[a]ll of the capital inflows coming into Silver Bull's Mexican subsidiaries from transfers from Silver Bull – whether they originally came from South32's capital payments or reimbursements, or from Silver Bull itself – were deployed to carry out the exploration activities at the Sierra Mojada Project."[1723] Accordingly, BRG verified the accuracy of SVB's Expenditure Base calculation and updated the total to US$ 85 million.[1724]

701. *Second*, BRG explained in its First Report that SVB's Expenditure Base should be adjusted for inflation. This adjustment does not lead to double-counting expenses, as Dr. Duarte-Silva incorrectly suggests. Adjusting for inflation does not account for the property's increased value from prior exploration, which is addressed through the PEM multiplier. Instead, it standardizes costs as if they had all been incurred around the Valuation Date.[1725] Without adjusting for inflation, a property that completed exploration more recently would appear more valuable than an identical property that conducted its exploration over time, simply because earlier costs were lower – this would make no sense.[1726] SVB's updated Expenditure Base accounting for inflation is US$ 162 million.[1727]

702. *Third*, BRG confirms that, contrary to Dr. Duarte-Silva's assertions, a three-times PEM multiplier is correct based on the Project's stage of development, as supported by robust studies based on empirical evidence.[1728] Accordingly, the Project's FMV as of the Valuation Date under the MEE approach is updated to **US$ 485.9 million**.[1729]

1722 BRG ER2, para. 161.

1723 Richards WS, para. 29.

1724 BRG ER2, para. 206.

1725 BRG ER2, para. 168.

1726 BRG ER2, para. 168.

1727 BRG ER2, para. 159.

1728 BRG ER2, para. 172.

1729 BRG ER2, para. 206.

703. Finally, BRG has addressed each of Dr. Duarte-Silva's objections to BRG's sunk costs approach.[1730] While, as explained above, a sunk costs approach is not appropriate to measure the Claimant's damages in accordance with the principle of full reparation, the Claimant instructed BRG to calculate its damages under this approach to assist the Tribunal in having a full range of valuation alternatives. In its Expert Reports, BRG assessed SVB's sunk costs by reference to the opportunity cost of the investment, *i.e.*, "the returns that could have been generated through alternative investments."[1731] BRG assessed the opportunity cost by calculating SVB's cost of equity between 1996 and 2022, and alternatively by analyzing a stock market index.[1732]

704. In its Second Report, BRG made some adjustments to the sunk costs analysis, while largely confirming that its valuation under the opportunity cost analysis was appropriate.[1733] Based on these adjustments, BRG's figure for SVB's sunk costs is US$ 135.7 million as of the Valuation Date based on a market index, and US$ 197.6 million based on SVB's cost of equity.[1734] To reiterate, as demonstrated above, the sunk costs approach in this matter would not make the Claimant whole in accordance with the principle of full reparation. Accordingly, if anything, the sunk costs figure calculated by BRG should serve as a floor for the Claimant's damages.

5.7 SVB is Entitled to Pre-and-Post-Award Interest

705. In its Memorial, the Claimant demonstrated that it is entitled to pre-and post-award interest as a component of full reparation, as supported by Article 1135(2)(b) of the NAFTA and confirmed by consistent arbitration practice.[1735] The Claimant also showed that it is entitled to receive no less than the rate of interest that Mexico pays to willing lenders and accrue interest on a compound basis.[1736]

706. In its First Report, BRG explained that pre-and-post-award interest rate should be the same and should be calculated by reference to Mexico's borrowing cost.[1737] This rate is consistent with the idea that the Claimant became a forced lender of Mexico as a result of its breaches. Based

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1730 BRG ER2, paras. 176-192.

1731 BRG ER2, para. 177; s*ee also* BRG ER1, para. 102.

1732 BRG ER2, paras. 103-104.

1733 BRG ER2, para. 174.

1734 BRG ER2, paras. 176-192, 208.

1735 Memorial, paras. 5.17-5.19.

1736 Memorial, paras. 5.19-5.20

1737 BRG ER1, paras. 112, 114.

on the yields of Mexico's sovereign debt between 31 August 2022 and 17 June 2024 – the date of the Claimant's Memorial – BRG calculated the interest rate to oscillate between 6.7% and 6.9% per annum.[1738] Alternatively, BRG considered that SVB's cost of equity reflecting the risk profile of the investment would also be an appropriate interest rate.[1739]

707. In line with the above, in its Second Report, BRG provided three alternative interest rates to calculate pre-and-post-award interest, namely (i) Mexico's cost of borrowing in US dollars; (ii) Claimant's cost of equity, and (iii) the US Prime rate + 2%, which reflects a commercial rate. The application of interest rates to the measure of damages is shown below – which shall continue to accrue until the Respondent makes a payment in full of the award issued by the Tribunal.[1740]

708. Dr. Duarte-Silva raises two objections to BRG's interest calculations: (i) that the cost of equity is not an appropriate rate for pre- or post-award interest, because it incorrectly assumes that but-for Mexico's actions, the Claimant would have been able to continue operations and obtain a return equal to its cost of equity,[1741] and (ii) that, if the Respondent's liability to pay interest runs from the date of the award, then pre-award interest be based on the risk-free rate, *i.e.*, the US Treasury rate.[1742] Notably, neither the Respondent or Dr. Duarte-Silva contest the Claimant's right to receive post award interest at a rate based on Mexico's cost of borrowing.

709. As explained below and as BRG explains in its Second Report, Dr. Duarte Silva's objections are baseless.

710. With respect to the first objection, regarding the cost of equity, as BRG explains, Dr. Duarte-Silva's objection stems from mischaracterizing the concept of cost of equity. According to BRG, the cost of equity is a measure of the opportunity cost of an investment, which is nothing more than "a price – the opportunity cost of purchasing a $10 item is simply any other item that costs $10."[1743] In other words, according to BRG, the "[o]pportunity cost of funds isn't a

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1738 BRG ER1, para. 115.

1739 BRG ER1, fn. 129.

1740 BRG ER2, para. 202.

1741 Duarte-Silva ER, para. 150.

1742 Duarte-Silva ER, para. 153.

1743 BRG ER2, para. 200.

specific investment opportunity, but instead, the price of those funds, and the price of money is expressed by interest rates and rates of return (*e.g.*, the cost of equity)."[1744]

711. Dr. Duarte-Silva's second point – that Mexico should only be liable for pre-award interest at the risk-free rate if the Tribunal determines that its liability starts only on the date of the award – is equally unfounded. As noted by BRG in its Second Report, from an economic perspective, it makes no sense to calculate pre-award interest based on the passage of time between the Valuation Date and the date of the award at a risk-free rate. This is because, as BRG explains "The U.S. Treasury is not a rate at which the Claimant (or virtually any company) can obtain funds," not even Mexico.[1745]

712. BRG's calculation of pre-award interest as of the date of this Reply is shown below:[1746]

Table 8: Pre-award interest sensitivity analysis

Figures in USD million	Respondent's CoD	Claimant's CoE	US Prime +2%
FMV of the Sierra Mojada Project as of 31 August 2022	315.3	315.3	315.3
Pre-award interest	59.6	77.1	90.7
Damages to Claimant as of 25 April 2025	374.8	392.4	406.0

713. Finally, it bears noting that the Respondent does not object to the Claimant's request that the Tribunal issue its award net of Mexican taxes, declare that Mexico may not tax or attempt to tax the award, and order Mexico to indemnify SVB in respect of any adverse tax consequences that may result from double taxation liability as set forth in the Memorial.[1747] The Claimant accordingly maintains those requests in full.

1744 BRG ER2, para. 200.

1745 BRG ER2, para. 196. *See Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014, para. 961 ("*La compensación debida desde 2005 ha de llevar pareja un tipo de interés que remunere una deuda a largo plazo. Además el riesgo crediticio de los EE.UU. es de los más bajos del mercado, lo que implica la aplicación de tasas irrazonablemente bajas*."), **CL-0190**.

1746 BRG ER2, Table 8, para. 202.

1747 Memorial, paras. 5.22-5.24.

5.8 SVB's Updated Claim for Compensation

714. For the reasons set forth in the Memorial and in this Reply, as a direct result of Mexico's acts and omissions, SVB and Minera Metalín suffered damages in the amount of **US$ 315.3 million**, which amount should be awarded to SVB along with pre- and post-award compounded interest at a commercially appropriate rate, as shown below.

715. The total compensation the Respondent owes to SVB, including pre-award compounded interest is summarized below.[1748]

Table 9: Damages summary as of 25 April 2025 (USD millions)

FMV of the Sierra Mojada Project as of 31 August 2022	**315.3**
Pre-award interest	59.6
Damages to Claimant as of 25 April 2025	**374.8**

6. REQUEST FOR RELIEF

716. The Claimant respectfully requests the Tribunal to:

(a) **DECLARE** that Mexico has breached its obligation to accord full protection and security to the Claimant's investments under Article 1105 of the NAFTA;

(b) **DECLARE** that Mexico has breached its obligation to accord fair and equitable treatment to the Claimant's investments under Article 1105 of the NAFTA;

(c) **DECLARE** that Mexico has breached its obligation not to expropriate the Claimant's investments under Article 1110 of the NAFTA;

(d) **DECLARE** that Mexico has breached its obligation to accord national treatment to the Claimant and its investments under Article 1102 of the NAFTA;

(e) **DECLARE** that Mexico has breached its obligation to accord most-favored nation treatment to the Claimant and its investments under Article 1103 of the NAFTA;

[1748] BRG ER2, Table 9, para. 209.

(f) **ORDER** Mexico to pay compensation for the loss and damage sustained by the Claimant and Minera Metalín as a result of Mexico's breaches of its obligations under the NAFTA, in an amount of not less than **US$ 315.3 million**, or such other amount quantified during the course of this proceeding;

(g) **ORDER** Mexico to pay pre-award and post-award interest on a compound basis at a rate calculated by reference to Mexico's borrowing cost;

(h) **ORDER** Mexico to bear the costs of the arbitration and compensate the Claimant for all its costs and expenses incurred in relation to this proceeding, including the fees and expenses of their counsel, in-house counsel, witnesses and experts and reasonable funding costs, the fees and expenses of the Tribunal, and ICSID's other costs and fees;

(i) **DECLARE** that the award is net of all Mexican taxes;

(j) **ORDER** Mexico to indemnify SVB in respect of any adverse consequences that may result from the imposition of double taxation liability by the United States tax authorities; and

(k) **AWARD** such other and further relief as the Tribunal deems appropriate.

717. The Claimant reserves its rights further to amend, develop, and quantify its claims and requests for relief, assert additional claims and requests for relief, and to present further argument and evidence in the course of the arbitration, in accordance with the ICSID Convention and the ICSID Arbitration Rules.

Respectfully submitted,

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25 April 2025