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

ODYSSEY MARINE EXPLORATION, INC.
(CLAIMANT)

V.

UNITED MEXICAN STATES
(RESPONDENT)

(ICSID Case No. UNCT/21/1)

POST HEARING SUBMISSION AND ANSWERS TO THE TRIBUNAL'S QUESTIONS

FOR THE UNITED MEXICAN STATES:
Orlando Pérez Gárate
Director General de Consultoría Jurídica de Comercio Internacional
Secretaría de Economía

ASSISTED BY:

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

Pillsbury Winthrop Shaw Pittman LLP
Stephan E. Becker
Gary J. Shaw

Tereposky & DeRose
Alejandro Barragán
Ximena Iturriaga

12 September 2022

TABLE OF CONTENT

INDEX OF LEGAL AUTHORITIES

RL-0147-ING	Eleni Frantziou, *The Margin of Appreciation Doctrine in European Human Rights Law*, UCL POLICY BRIEFING (October 2014).
RL-0148-ING	Margin of Appreciation, OPEN SOCIETY JUSTICE INITIATIVE (April 2012).
RL-0149-ING	RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018.
RL-0150-ING	Phillip Morris c. Uruguay, Caso CIADI No. ARB/10/7, Laudo, Julio 8, 2016.

I. INTRODUCTION

1. In this Post-Hearing Submission, Respondent focuses on providing its conclusions regarding the case presented by Claimant and how the oral evidence provided during the hearing by the fact witnesses, legal experts and damages experts confirms that Claimant's case lacks merit. The Respondent confirms all the arguments raised in its Memorials and written communications and will not repeat them in this submission, which demonstrates that the issues that were addressed at the Hearing reinforce the main points of Mexico's defense. In this regard, nothing in this Post-Hearing Submission should be construed as a waiver of the arguments previously made by the Respondent.

2. At this stage of the proceedings, the Tribunal will be able to confirm that Claimant is attempting to treat this arbitration as if it were an appeal or an alternative legal recourse to review *de novo* technical findings that only fall within the jurisdiction of the Mexican environmental agency, in this case the DGIRA. Indeed, Claimant asks that the Tribunal make determinations about the interpretation and enforcement of domestic environmental laws — pending before Mexican courts— as well as on purely scientific aspects that have already been exhaustively analyzed by the technical authority in charge of such function, *i.e.*, DGIRA. In fact, the Claimant submitted in this arbitration scientific documentation and expert reports that were not part of the MIA file evaluated by the DGIRA.[1] In doing so, Claimant seeks to have the Tribunal acting as if it were the Mexican government's environmental agency, evaluating documentation that DGIRA did not have at its disposal when making its findings. In particular, Claimant seeks to have the Tribunal rule on such matters as:

- That the Don Diego Project does not involve mining activity, despite the fact that ExO stated in the EIA itself that the mining legislation was applicable and that they have a mining concession as a precondition for the development of their project;
- That the 2018 Resolution, by which the DGIRA denied the authorization of the MIA, did not express an impact on whales, despite the express references contained in the resolution itself;

[1] Counter-Memorial, ¶¶ 3 and 424 and Rejoinder, ¶¶ 15, 40, 55, 377, 487, 579, 581.

- The reliability of expert reports on technical-scientific matters that were not part of the EIA file that was evaluated by DGIRA;
- The interpretation and application of Article 35 III (b) of the LGEEPA, particularly an artificial distinction between an individual of a species and "the whole" species, which contradicts precedents in accordance with the 2018 Resolution;
- The alleged lack of impact of the Diego Project on various endangered species of marine mammals and turtles, particularly the *Caretta caretta* species.

3. The Tribunal should not subrogate itself to the functions of the DGIRA, nor should it engage in a *de novo* analysis of the evidence analyzed in the EIA assessment proceeding and the evidence additionally submitted in this arbitration to rule on the viability of the Don Diego Project. The investor-State arbitration mechanism was not designed to replace environmental authorities in their determinations, nor national courts in their reasoning and application of national law. Indeed, this limitation is all the more evident in light of the identical facts that are being litigated in parallel domestic legal proceedings, as the final outcome of those pending proceedings may have direct repercussions on the measures at issue in this arbitration, as well as on the alleged damages claimed by Claimant.

4. Other key issues that are addressed in this submission are the following:

- The credibility of [redacted], has been undermined in light of their appearances, which evidenced serious contradictions with their own written testimony, as well as with the evidence in the case file;
- Mr. Pacchiano's oral and written testimonies confirm that he did not give any instructions to deny the authorization of the MIA; on the contrary, they show that his actions were limited to complying with the law, respecting the technical-scientific decision of the DGIRA, the area in charge of evaluating and resolving the meaning of the MIA;
- The content of the various meetings referred to by Claimant, including the one in which Mr. Pacchiano allegedly felt insulted and ordered the denial of the MIA, as well as those in which it is alleged that Mexican authorities and reputable foreign scientists endorsed the Project, are questionable, since Claimant's oral statements that none of the witnesses attesting to them were present;
- Claimant's failure to call for cross-examination a number of Respondent's witnesses, *inter alia*, Dr. Seminoff, who had allegedly ratified the Project and stated that it was environmentally feasible, which was flatly denied by his written statement.

5. The evidence in the record shows that the decision of the environmental authority is duly justified, since it acted within the framework of the powers conferred by law in the exercise of its attributions and in clear compliance with the law. Particularly with regard to compliance with Mexican environmental legislation, which provides for the denial of an environmental impact authorization when there is an impact on threatened or endangered species, as occurred in this case with respect to various species of turtles and marine mammals that would be affected by the Don Diego Project.

6. But even if this Tribunal were to find that Mexico breached its international obligations, Claimant's damages claim is speculative and grossly exaggerated. As has been stated from the outset, Claimant values its project as if it were an ongoing business with assured future profitability. The reality is that it was a pre-operational project whose technical and financial viability had not yet been demonstrated. Using a DCF model under these conditions is highly speculative and would be unprecedented in investor-State cases where the expropriation of a pre-operational mining project is claimed that does not have a feasibility study and has not yet declared Mineral Reserves. The alternative valuation prepared by Agrifos lacks support and is equally defective and speculative. Therefore, it also cannot serve as a basis for the determination of damages, if any. All of this will be explained in more detail in the damages section of this submission.

7. The Tribunal's questions will be addressed separately in Exhibit A to this Post-Hearing Submission.

II. FACTS

A. The hearing confirmed that the facts on which Odyssey bases its claim are questionable because they rely on the statement of hearsay witnesses.

8. Claimant has referred to the content of various meetings in which it allegedly addressed issues that support its position in these proceedings.[2] However, Claimant's own witnesses expressly stated during the hearing that none of them participated in such meetings.

[2] Counter-Memorial, ¶¶ 313-319 and 494 and footnote 606. Witness Statement of Mr. Claudio Lozano ¶¶ 41, 74, 75 ("I did not participate in this meeting, but I later spoke with Mr. Ancira […] and that I should wait in the hallway […] Once we were in a car back to the office, Mr. Ancira said to me: "we did it, we are now in a good position.").

Moreover, they also stated orally that their written statements were based on the mere testimony of third parties, whom Claimant chose not to present to testify, *i.e.*, Mr. Ancira and Mr. Fernández de Cevallos.[3]

9. On the other hand, and as discussed below, Mr. Pacchiano clarified the scope of such meeting at the hearing. In fact, there is evidence that coincides with Mr. Pacchiano's statements and that refutes what Claimant's witnesses stated in their witness statements.

1. Mr. Gordon is not aware of the facts reported in his testimony.

10. Claimant has been insistent in alleging that the denial of the MIA was politically motivated. In fact, in its Memorial it pointed out that in an alleged meeting Mr. Pacchiano stated that the "approval of the Project [had turned] into a political "issue"".[4] However, Claimant highlights the fact that Mr. Gordon, who provided written statement of such meeting, was not present at the meeting, as he himself acknowledged during his hearing:

> Q. Okay.
>
> At Paragraph 69 of your Statement, your First Statement, you discuss a June 11, June 11, 2015, meeting that Mr. De Narváez and Mr. Ed Ancira had with SEMARNAT. You didn't attend that meeting, did you?
>
> A. No, I did not.[5]

11. It is also notable that Claimant has not submitted a witness statement from ExO representatives who did attend the meetings that Mr. Gordon reports in his witness statements, making him only a hearsay witness:

> Q. Do you know with whom they met at SEMARNAT?
>
> A. In this meeting in particular, I don't know off the top of my head who was in attendance for SEMARNAT.
>
> Q. Okay. And Mr. De Narváez hasn't presented a witness statement in this Arbitration, has he?
>
> A. No, he has not.[6]

---

3 Rejoinder, ¶¶ 280-281 and 393.

4 Memorial, ¶ 130.

5 Transcript, Day 1-Eng, p. 180, lines 6-11.

6 Transcript, Day 1-Eng, p. 180, lines 12-18.

12. The Tribunal should recall that Claimant emphasized in its Memorial that it "ran (sic), in November 2015, Odyssey also met with one of the world's leading turtle experts, Dr. Seminoff [...] and his National Oceanic and Atmospheric Administration (NOAA) colleague, Dr. Squires", who allegedly opined that "the Project and turtles could co-exist in the Gulf of Ulloa and that the Project was environmentally sound and socially responsible".[7] However, to support these alleged facts, Claimant relies on the testimony of Mr. Gordon, who was also not present at the meeting:

> Q. […]
>
> At paragraphs 76 and 77 of your First Statement that I'm displaying here, you discuss a meeting that was held with the U.S. National Oceanographic and Atmospheric Administration about the Project, and what Mr. De Narváez told you afterwards but you did not attend that meeting, did you?
>
> A. That's correct. We were represented at that meeting by Mr. De Narváez and by Dr. Newell, our two experts for that meeting.[8]

13. Regardless of the fact that Mr. Lozano did attend the aforementioned meeting, Dr. Seminoff has made it clear that "Odyssey has mischaracterized the sentiments I shared about the project during the November 18, 2015 meeting".[9] In this regard, it is indicative that Claimant decided not to call Dr. Seminoff to the hearing, especially considering that Dr. Seminoff openly contradicted what Mr. Lozano stated, stating that he expressed unfounded and confusing assumptions about the referred meeting.[10] In fact, Dr. Seminoff, "(the same […] whose studies SEMARNAT relied on when denying the MIA)"[11], flatly stated that "I did not and would not suggest that the Don Diego Project could move forward with no impact to the local loggerhead population",[12] contrary to what was stated by Claimant's witnesses.

14. In any event, it is clear that Mr. Gordon's testimony carries no weight since it is based on the optimistic assessments of his employees who have a direct interest in the matter, and not on facts known to him, which was evidenced in his oral appearance:

---

7 Counter-Memorial, ¶ 139.

8 Transcript Day 1-Eng, p. 182, lines 3-11.

9 WS Jeffrey Seminoff ¶ 9.

10 WS Jeffrey Seminoff ¶¶ 12-13.

11 Counter-Memorial, ¶ 139.

12 WS Jeffrey Seminoff ¶ 17.

> Q. Okay. Here in Paragraph 78 of your First Statement, you say that, here, down here: "By the end of February 2016, I understood that we had successfully addressed whatever issues had been raised."
>
> So, it seems when you say you understood it implies that someone else told you, who was that?
>
> A. That's correct, it would be various I was getting regular communications from various members of my management team, Daniel De Narváez, Dr. Claudio Lozano, who is a witness in this case, sometimes Richard Newell and sometimes from executives at AHMSA. It depended on who were in the particular meetings.[13]

15. Mr. Gordon has also asserted that Mr. Pacchiano allegedly (i) "requested that they withdraw the MIA [...] after that, the MIA would be expedited and he would approve it";[14] (ii) "took offense [at a comment by Mr. Ancira] and ended [a] meeting"[15]; and (iii) "said that he was not in the political position to approve the Project [...], but that he would [...]". However, all references are based on alleged meetings that he never attended. Moreover, the ExO representatives who did attend these alleged meetings did not submit any witness statements, i.e., the Claimant decided *motu proprio* not to offer them as witnesses, despite the significant weight it attempts to attribute to such meetings to support its claims.

> Q. ….
>
> At Paragraph 79, you describe a meeting with Secretary Pacchiano that was supposedly held in March of 2016. You didn't attend that meeting either, did you?
>
> A. No, that's correct, I did not.
>
> Q. Okay. Here at paragraph 83, you discuss another meeting with Secretary Pacchiano. You said it was attended by Mr. Ancira, and Mr. de Cevallos Ramos. So, Mr. de Cevallos did not prepare a witness statement for this Arbitration, did he?
>
> A. I'm sorry, can you repeat that last part of your question?
>
> Q. Yeah, you're describing here a meeting that you said was attended by Sr. Ancira and Sr. de Cevallos Ramos?
>
> A. Correct.
>
> Q. And you say Dr. Lozano waited outside. I'm just clarifying that Mr. de Cevallos Ramos did not prepare a witness statement for this Arbitration; correct?
>
> A. That's correct.

---

13 Transcript, Day 1-Eng, pp. 182-183, lines 12-22, 1-2.

14 Second WS, Mark Gordon, ¶ 70.

15 First WS, Mark Gordon, ¶ 79.

> Q. Okay. And Mr. Ancira did not prepare a witness statement for this Arbitration, did he?
>
> A. He did not.[16]

16. Claimant has also alleged that [redacted] supposedly had "a serious and sustained interest" in [redacted] becoming "a taker of phosphate rock for the Don Diego Project".[17] However, in support of that assertion, Claimant again relies on the statements of Mr. Gordon,[18] who claims to have participated in a meeting [redacted] However, [redacted] clarified that this meeting never took place:

> [redacted].[19]

17. Notwithstanding the foregoing, Mr. Gordon uses more than 35 paragraphs of his second witness statement[20] to refer to what he was informed by third parties regarding the alleged interaction between ExO [redacted] in relation to the Project and the alleged "great opportunity to partner".[21] However, it was clear from Mr. Gordon's testimony that his assertions regarding [redacted] alleged interest in the Don Diego Project are unsubstantiated because he has no written evidence of what transpired at the meetings and relies on his perceptions of what he was allegedly told by others:

> Q. Okay. Going to Paragraph 26 of your Second Statement, you say that AHMSA representative informed you that [redacted]
>
> […]
>
> A. […] Yeah, I think what he was sharing [redacted]

16 Transcript, Day 1-Eng, pp. 183- 184, lines 4-22 y 1-5.

17 Rejoinder, ¶ 484.

18 Second WS Mark Gordon, ¶¶ 4-39.

19 Transcript, Day 3-Eng, pp. 554-555, lines 18-22 and 1-2.

20 Second WS Mark Gordon, ¶¶ 4-39.

21 First WS Mark Gordon, ¶¶ 64.

Q. So, who were those AHMSA representatives that who informed you? [22]

A. That would have been Moises Koltheniuk.

[…]

Q. So, were any of [redacted] insights provided in writing?

A. I don't know.[23]

2. Mr. Lozano did not witness the events that took place in the meetings he refers to in his witness statement

18. Claimant has alleged throughout the proceeding that Mr. Pacchiano allegedly "would approve the Project if he withdrew it and resubmitted it with the letters of support",[24] however, such statement is based on the declaration of Mr. Lozano, who was not present at the meeting where this allegedly took place and acknowledged as much in his testimony:

> Q: What happened with the 2014 MIA submitted by 14 ExO?
>
> A: Well, come June 2015, there was a meeting of Mr. Ancira and Mr. Pacchiano, and Mr. Pacchiano suggested that the MIA be withdrawn and that it be resubmitted, the whole in-between process had to be redone and the MIA had to be accompanies by some support letter by local fishermen associations and 3 social actors from Baja California Sur.[25]
>
> […]
>
> Q. Thank you. Now let us look at Paragraphs 41 and 42 of your First Statement. You mentioned the meeting in--of June 2015 between Mr. Ancira and the then Sub-Secretary Pacchiano. You did not participate in 8 that meeting?
>
> A. I did not participate in that meeting, that's correct.
>
> Q. I understand that, at that meeting, Mr. Ancira received information indicating that ExO should withdraw the 2014 MIA; correct?
>
> A. Correct.
>
> Q. And he also indicated that once the MIA had 16 been withdrawn and once it had been resubmitted with 17 the support letter, SEMARNAT would go ahead with the 18 assessment, and it would approve the MIA?
>
> A. Well, that only after that MIA was known. 20 This is what Pacchiano told Mr. Ancira.
>
> Q. So, you never heard Mr. Pacchiano say that 22 there was a request to withdraw the 2015 MIA; correct?

---

22 Transcript, Day 1-Eng, pp. 187-188, lines 22, 1-4, 9-20.

23 Transcript, Day 1-Eng, p. 189, lines 6-8.

24 Rejoinder, ¶ 205.

25 Transcript Day 1-Eng, pp. 202-203, lines 19-22 and 1-3.

A. Correct.[26]

19. Like Mr. Gordon's assertions about the content of various meetings, Mr. Lozano's statements are based on facts that are not known to him, *i.e.*, assertions of what others allegedly told him regarding their perceptions of what occurred at the meetings he recounts. It is problematic that Claimant has chosen not to produce the persons who witnessed the meetings - particularly Messrs. Cevallos and Ancira - and instead seeks to substantiate its allegations with "hearsay" such as that produced by Mr. Lozano:

> Q. Was there any other meeting with Mr. Pacchiano during the appeal for review?
>
> A. Yes. There was a meeting in May 2016, and that meeting, well, I was there with Mr. Ancira and Mr. Fernandez de Cevallos, and I wouldn't go in. The assistant told me I had to wait outside, and Mr. Ancira and Mr. Cevallos went into the meeting. Once outside, Mr. Ancira said that an environmental event was going to be held in Mexico, the COP 13, and this was not the right context for the MIA to be approved for Don Diego. Then the event came and went, and the MIA was not approved. [27]
>
> Q. […] And just to confirm, you never Heard Mr. Pacchiano say that SEMARNAT wasn't willing to approve the Don Diego MIA; is that correct?
>
> A. Yes. [28]

20. Once again, as reflected below in Mr. Lozano's statement, Claimant attempts to base its arguments on what its witnesses may have heard ("*hearsay*") from Messrs. Elvira and Ancira—the lobbyists they hired—and whom Claimant chose not to present as witnesses, which is highly questionable:[29]

> Q. Let me briefly show you, because we're short on time, Paragraphs 26 and 27 your Second Statement. Here, you indicate that there was a subsequent meeting 21 on 31 January 2017.
>
> A. Yes.
>
> Q. Only present were Mr. Pacchiano; Mr. Elvira, former secretary of SEMARNAT; and Mr. Ancira, representing the Don Diego Project. Is that correct?
>
> A. Yes, correct.

---

26 Transcript Day 1-Eng, pp. 213-214, lines 4-22 and 1.

27 Transcript Day 1-Eng, pp. 204-205, lines 22 and 1-12.

28 Transcript Day 1-Eng, p. 231, lines 14-17

29 Rejoinder, 279-281.

> Q. Thank you. And you assert that Mr. Elvira informed you that Secretary Pacchiano mentioned that he wanted to avoid annulment legal site and preferred to resolve the issue with a review petition; is that correct?
>
> A. Yes, that's what Mr. Elvira told me. [30]

21. The fact that the Claimant intends to support its allegations based on witness statements of persons who testify about events that they did not witness, explains the contradictions and mistakes in their statements, as evidenced by the hearing of Mr. Lozano, who changed his statement about when an alleged meeting with ExO representatives took place:

> I also recall one more meeting that I did not describe in my prior witness statement. On 31 January 2017, after the COP13 conference, Secretary Pacchiano met with Messrs. Ancira and Elvira. Mr. Juan Elvira is a former Secretary of SEMARNAT who at the time worked for AHMSA in relation to environmental matters.
>
> […] At that meeting, Secretary Pacchiano said that he wanted to avoid a nullity appeal before the TFJA, and that he preferred to resolve ExO's MIA via the review petition, […][31]

22. As a result of his cross-examination and pursuant to Annex C-0170 that was shown to him, which stated that "on January 27, 2017" ExO had already initiated a nullity lawsuit against the 2016 DGIRA resolution, *i.e.*, prior to the January 31, 2017 meeting, Mr. Lozano changed his testimony stating that he did not remember the exact date of that meeting:

> Q. On screen, you can see C-170. This is the ruling of the Administrative Justice Federal Tribunal. A little bit lower down, it says here that 27 January 2017, ExO began nullity appeal against the resolution of 2016 by DGIRA. This means that, prior to the 31 January meeting in 2017, ExO had already filed a suit against DGIRA; is that correct?
>
> A. The notification I have is 31 January. The email is 31 January. I can't say exactly on what date that meeting took place.[32]

23. It becomes clear that Mr. Lozano's witness statements should be considered with great skepticism as they deal with facts that he did not witness and contain statements that contradict the evidence in the case, such as stating that there was a meeting on January 31, 2017 and later clarifying that he did not remember the exact date of that alleged meeting.

---

30 Transcript Day 1- Eng, pp. 231-232, lines 18-22 and 1-10.

31 Second WS of Mr. Claudio Lozano, ¶¶ 26-27.

32 Transcript Day 1- Eng, p. 231, lines 11-20.

B. [redacted] appearance confirmed that his witness statement is implausible

24. Despite the fact that the Claimant has insisted on stating that Mr. Pacchiano "ordered SEMARNAT officials to "find" a reason to prevent the approval of the Project",[33] [redacted]

1. [redacted]

25. Although [redacted] tried to make the Tribunal believe in his witness statements [redacted], in his appearance before the Tribunal it was evident that [redacted]

[redacted][35]

26. It is clear from the above quote that, despite the fact that the Claimant has been insistent in stating that allegedly "Secretary Pacchiano ordered the staff to "'find a reason'" to deny the Project ",[36] [redacted] regarding the 2016 Resolution or the 2018 Resolution, [redacted]

---

33 Memorial ¶¶ 220 and 253.

34 *See* First WS [redacted], ¶ 8.

35 Transcript, Day 2-Eng, p. 298-299, lines 18-22 and 1-10.

36 Memorial, ¶ 253.

[redacted]

A. [redacted][37]

[…]

[redacted]

[redacted][38]

27. It is evident that [redacted] Mr. Pacchiano in relation to the 2016 and 2018 Resolutions, [redacted] Therefore, he cannot be considered as a fact witness [redacted]

2. [redacted]

28. Throughout his appearance, [redacted] Mr. Pacchiano to deny the MIA's authorization of the Don Diego Project. To the contrary, he has confirmed that his statement about [redacted]

[redacted][39]

[…]

[redacted][40]

37 Transcript Day 2-Eng, p. 287, lines 2-9.

38 Transcript Day 2-Eng, pp. 301, lines 2-11

39 Transcript Day 2-Eng, p. 299, lines 5-10.

40 Transcript Day 2-Eng, p. 301, lines 7-11.

[…]

[redacted][41]

29. In fact, it also showed that there is no evidence about the alleged meeting that, according to the Claimant, resulted in Mr. Pacchiano instructing [redacted] to "find any reason to reject the project".[42] This because Mr. Pacchiano was allegedly irritated by a comment by Mr. Ancira:[43]

[redacted].[44]

30. Although [redacted] was elusive in his response and did not respond properly to Arbitrator Alexandrov's questions, the President of the Tribunal insisted on knowing [redacted] position on this issue, clarifying that, despite the fact that in his first witness statement he stated that [redacted], In fact, [redacted] did not testify to that alleged fact that he intends to account for:

[redacted]

41 Transcript Day 2-Eng, p. 331, lines 1-6.

42 Memorial, ¶ 145.

43 Memorial, ¶ 145.

44 Transcript Day 2-Eng, p. 351-352, lines 20-22 and 1-6.

[redacted][45]

31. Despite the fact that [redacted][46] In fact, in his appearance he reiterated that position:

[redacted][47]

32. In contrast [redacted] testimony that the meeting with ExO took place in late March 2016, Mr. Lozano said that it took place on March 12, and then clarified that there was "written that the meeting took place on 12 March, but it could have happened a few days before or after 12 March".[48] In his appearance, Mr. Lozano reiterated that he did not have any documentary evidence on the issues addressed:

> Q. In your Second Statement, you indicate that this meeting could have taken place a few days earlier or a few days after 12 March 2016; is this correct?
>
> A. Correct.
>
> Q. Were presentations or talking points prepared, or was there any other kind of material for this meeting with Mr. Pacchiano?
>
> A. No, not specifically. I always had the same presentation, and depending on the interlocutor, I maybe changed some of the slides around. It was a generic PowerPoint presentation that I had for this kind of meeting.
>
> Q. Very well. To better understand, this input was not added to your Witness Statements; correct?
>
> A. No. My Witness Statements don't have this input, this PowerPoint.
>
> Q. Very well. Thank you.[49]

---

45 Transcript Day 2-Eng, pp. 353-354, lines 18-22 and 1-3

46 First WS [redacted], ¶ 20.

47 Transcript Day 7-Eng, p. 1626, lines 9-19.

48 Second WS Claudio Lozano, ¶ 25.

49 Transcript Day 1-Eng, pp. 230, lines 5-15

33. The lack of documentary evidence that proves this alleged meeting was held, as well as the content that was addressed in it, is relevant, since it would not be the first time that Mr. Lozano's statements have been affected by his emotion and personal interest about the project, as well as for his misperceptions of what happened in the meetings he witnessed—such as the meeting he had with Drs. Seminoff and Squires. Mr. Pacchiano himself noted the lack of evidence to show that the aforementioned meetings actually took place:

> A. There was a meeting in 2016 that they say that took place on a Saturday or Sunday, and I said that, on those days, I wouldn't be working. And then, there are other meetings. I don't know if it was in May, but I have no record of that meeting anywhere.
>
> Q. But you don't deny that those meetings took place, do you, sir?
>
> A. I have no record, no documented record of those meetings taking place, and the days that they have put forward was a weekend. I'm sure it couldn't have been a weekend because I never received a sponsor over a weekend.[50]

34. The Tribunal must consider that Mr. Lozano's statements have been seriously questionable and have been contradicted by the evidence in the case, significantly with Dr. Seminoff's statement. In addition, the Tribunal must also take into account that the Claimant also decided not to offer as witnesses Messrs. Ancira, Koltheniuk and Fernández de Cevallos, who allegedly participated in the meetings in which the relevant facts and events to its case allegedly took place. Therefore, the Tribunal will be able to verify that there is no evidence to confirm the allegations made by the Claimant on the alleged causes (a personal inconvenience) to deny the authorization of the MIA.

3. The appearance [redacted] confirmed that he received an overpayment for his participation as a witness, which affects his credibility.

35. [redacted] has stated that his participation as a witness in Odyssey is based on a contract that implies the payment of financial remuneration for the time he spends preparing his testimony:

> [redacted].[51]
>
> […]

---

50 Transcript Day 2-Eng, pp. 532-533, lines 11-22, 1-2.

51 Transcript Day 2-Eng, p. 275, lines 12-15.

[redacted][52]

36. Despite the relevance of this fact as it constitutes a factor that could influence its credibility, both the Claimant and [redacted] initially failed to reveal that particular situation:

[redacted][53]

37. The omissions of relevant information in [redacted] witness statements regarding his participation as a witness are multiple and include the omission of not having disclosed that he allegedly would not receive any payment for the first witness statement. In fact, that statement made by [redacted] during his appearance constitutes a clear contradiction with the assertion in his second witness statement in which he stated that: [redacted][54]

[redacted]

52 Transcript Day 2-Eng, pp. 281, lines 17-22

53 Transcript Day 2-Eng, p. 282-283, lines 20-22 and 1-7.

54 Second WS [redacted], ¶ 3.

[redacted][55]

38. Although [redacted] stated that he did not receive any payment for making his first witness statement, the information available on the invoices reflects an indirect payment for it. [56]

39. The fact that [redacted] had signed a contract to provide his services as a witness on November 2, 2020, that is, six months after he rendered his First Witness Statement[57], raised reasonable doubts for the Tribunal about his conduct. In this regard, [redacted] tried to justify his actions by explaining the following:

[redacted]

[redacted][58]

40. [redacted] incorrectly assumes that having signed the contract one year [redacted] "complies" with the provisions [redacted] however, that interpretation is erroneous. [redacted]

---

55 Transcript Day 2-Eng, p. 338-339, lines 8-22 y 1-5.

56 Interestingly, the hours [redacted] *See* examination [redacted], Transcript Day 7-Spa, p. 1839, lines 8-12 and 18-21.

57 Transcript Day 2-Spa, p. 378-379, lines 18-22 and 1-3.

58 Transcript Day 2-Eng, pp. 337-338, lines 10-22 y 1-2.

41. It is obvious that [redacted], seeking to evade the limitations [redacted], waited until the end of the one-year period to sign the contract and retroactively charged for the time he spent assisting the Claimant in preparing its Memorial.

42. In his appearance, [redacted].[59] Responding to questions from Mr. Sands and President Bulnes, [redacted]

> [redacted]
>
> […][60]
>
> [redacted].[61]

43. It is questionable that he stated that [redacted] have no justification that can be considered reasonable:

> [redacted]
>
> [redacted].[62]

---

59 Transcript Day 2-Esp, p. 397, lines 16-22.

60 Transcript Day 2-Eng, p. 341, lines 18-19.

61 Transcript Day 2-Eng, p. 343, lines 6-17.

62 Transcript Day 2-Eng, p. 346-347, lines 18-22 and 1-14.

44. It is questionable that, [redacted], he stated that these were dedicated to [redacted].[63] In this regard, [redacted].[64]

45. During his examination, [redacted] was questioned by the Arbitral Tribunal regarding the hours invested in his participation as a witness, as well as the payment (compensation) that he would receive for it in accordance with the terms of the contract entered into with the Claimant:

[redacted].[65]

46. As can be seen from the previous paragraph, at the time of his appearance, [redacted] he had reported since the beginning of his participation as a witness for the Claimant —November 2, 2020— (date of signature of his contract) [redacted][66] [redacted].[67]

---

63 Transcript Day 2-Eng, p. 347, lines 10-13.

64 *See* **R-0212** and **R-0213**. This is because they are confidential documents and cannot be downloaded, they can only be viewed in read mode from a Claimant's system. Respondent is therefore limited to the notes it took on these documents.

65 Transcript Day 2-Eng, pp. 343-344, lines 12-22 y 1-2.

66 Transcript Day 2-Eng, p. 347, line 11.

67 Transcript Day 2-Eng, p. 347, line 12

47. On the other hand, [redacted] was also questioned by the Tribunal [redacted]

[redacted][68]

48. [redacted][69]

49. Based on the foregoing, it is evident that [redacted] gave his testimony in favor of the Claimant for the exorbitant economic benefit that he was able to obtain with it. In addition, the inconsistencies and contradictions between what [redacted] declared in his appearance and the reality also reveal the limited credibility of his testimony.

4. [redacted]

50. At the hearing, [redacted]

[redacted].[70]

---

68 Transcript, Day 2-Eng, p. 348, lines 11-19.

69 The exchange rate on the last business day that [redacted]

70 Transcript Day 2-Eng, p. 290-291, lines 15-22 and 1-14.

51. [redacted]

[redacted][71]

52. In accordance with the foregoing, it is not by chance that the Claimant has asked [redacted] Nor is it an accident that, instead, Claimant has preferred to hire experts to support its position in order to try to make the Tribunal believe that Mr. Pacchiano is responsible for a legal act carried out [redacted]

> **5.** [redacted] **it would not be illegal to deny an environmental authorization, widely regulated by law, based on technical and scientific grounds with which the DGIRA evaluators do not agree.**

53. [redacted] of the 2016 and 2018 Resolutions:[72]

[redacted][73]

---

71 Transcript Day 2-Eng, p. 290, lines 10-17.

72 [redacted] […].. *See* Second WS [redacted] ¶ 21.

73 Transcript Day 2-Eng, p. 306, lines 9-14.

54. However, it is contradictory that [redacted] has likewise stated that he [redacted].[74]

[redacted].[75]

55. It is unlikely that [redacted] would argue that [redacted] to deny the authorization of a MIA for reasons that are not scientifically rigorous is not illegal. [redacted] seems to be trying to adopt both positions ("to have it both ways"), which is clearly incompatible. In fact, it is questionable that [redacted] despite the fact that he was convinced that he allegedly [redacted].[76] It is evident that one does not need to be an expert in administrative law to be able to discern that if an MIA complies with the law from a technical and scientific aspect —[redacted] Project—it must be authorized, since an instruction to the contrary would violate the regulations, *i.e.*, would be illegal. Therefore, [redacted] in this regard simply undermines the credibility of his testimony.

C. The examination of [redacted] confirmed that his witness statement lacks credibility

56. Although the Claimant's case is strongly based on the witness statements of [redacted] —who in exchange for financial compensation now [redacted]— the

---

74 Second WS [redacted], ¶ 21.

75 Transcript Day 2-Eng, p. 305-306, lines 16-22 and 1-8.

76 First WS [redacted] ¶ 9.

appearance of both before the Arbitral Tribunal highlighted the contradictions and little credibility of their statements. The case [redacted] is significant, since his statements were shown to be unreliable by entering into an irremediable contradiction with [redacted] transmitted Mr. Pacchiano's alleged order. In addition, he recognized that, [redacted] that is, he could have refused [redacted]

1. [redacted]

57. In the direct examination, the Claimant's representatives asked [redacted] he replied as follows:

[redacted]

[…]

[redacted][78]

58. The Tribunal may note that, according to [redacted]

[77] Transcript Day 2-Eng, p. 271, lines 10-18.

[78] Transcript Day 2-Eng, p. 272, lines 9-16

[redacted][79]

[redacted][80]

59. The contradiction between what [redacted] declared in their appearance before the Tribunal is evident. In fact, this contradiction was pointed out [redacted] by the Respondent's representative, but he tried to ignore it and, instead, evade it with irrelevant explanations:

[redacted][81]

60. The clear contradiction only shows that the statements of [redacted] have no credibility. In addition, the Respondent submitted the statement of Mr. Pacchiano

79 Transcript Day 7-Eng, pp. 1640, lines 2-5, 17-22

80 Transcript Day 7-Eng, pp. 1641-1642, lines 16-22 and 1

81 Transcript Day 7-Eng, p. 1642, lines 1-19

who denies that this ever happened, and there is nothing in the MIA record or in this arbitration to indicate otherwise.

2. [redacted]

61. It is absurd that [redacted] declared in his appearance before the Tribunal that basically his function [redacted] Indeed, the following excerpts demonstrate the position [redacted]

[redacted][82]

[redacted]

[redacted][83]

62. It is evident that [redacted] cannot seriously [redacted]. Despite this, [redacted] goes so far as to acknowledge that, [redacted]

[redacted]

82 Transcript Day 7-Eng, pp. 1664-1665, lines 22 and 3-6.

83 Transcript Day 7-Eng, pp. 1665, lines 9-20.

[redacted].[84]

63. Indeed, [redacted] actions indicate that he [redacted] What [redacted] and the Claimant deliberately fail to mention is that Mr. Pacchiano made clear in his two witness statements and during his appearance at the hearing,[85] that he never gave any instructions or gave any indication that the MIA of this project was resolved in any particular sense. The Claimant and its witnesses also fail to acknowledge that, in the challenges against the MIA initiated at national level before local courts, they have not submitted any evidence, nor do they explain why they never filed a complaint with any authority, at least regarding that alleged conduct of the head of a Ministry of State.

3. The absence of invoices [redacted] affects the credibility of his testimony and suggests that he will receive an overpayment.

64. [redacted], just like [redacted], entered into a contract with the Claimant to serve as a witness in this arbitration.[86] However, in contrast [redacted] has not submitted any invoices to the Claimant for its submission in these arbitration proceedings pursuant to the Tribunal's instructions contained in Procedural Order No. 5[87] and its Communication of September 27, 2021. Although [redacted] stated that he was evaluating presenting the invoices due to [redacted] he did not deny the possibility of doing so:

---

84 Transcript Day 7-Eng, pp. 1666-1667, lines 6-14 and 1-3

85 First WS Rafael Pacchiano, ¶ 33 and Second WS Rafael Pacchiano, ¶¶ 12 y 13. Transcript Day 2-Spa, pp. 505-506, lines 14-22 and 1-9.

86 *See Rejoinder Memorial, ¶¶ 94-95, C-0364 and C-0365.*

87 Procedural Order No. 5, Confidentiality Order and Undertaking, August 30, 2021, ¶ 8.

[redacted][88]

[redacted][89]

65. To the extent that there is a legal instrument in force that establishes Claimant's obligation to pay [redacted] for the hours he spent participating in this arbitration —C-0364— there is no doubt that this obligation persists. Given the current stage of the arbitration, [redacted] has ample ability, without the Respondent being able to exercise its right to challenge him, of receiving an overpaid for assisting Claimant in this arbitration. This goes beyond the role of any witness in an international investment arbitration against a State. Therefore, Mexico asks the Arbitral Tribunal to dismiss the statement [redacted] Finally, it is important to emphasize that Mr. Pacchiano, Respondent's witness, has directly denied each of the facts described in [redacted] testimony.

D. The appearance of Mr. Pacchiano disproves the Claimant's allegations and what was stated by its witnesses

66. Despite the serious accusations that the Claimant makes against Mr. Pacchiano, in his appearance he demonstrated that all of them are false and lack merit, which was consistent with his written statements. Indeed, among other points, Mr. Pacchiano confirmed that CONANP and other academic institutions expressed concerns regarding the Don Diego Project, which was consistent with the conclusions reached by the DGIRA itself and shows that he had no interference in the result achieved by the technical-scientific area specialized in resolving MIAs in accordance with Mexican regulations.

---

88 Transcript Day 7-Eng, p. 1647, lines 18-21, 12-22

89 Transcript Day 7-Eng, p. 1649, lines 1-6.

1. Mr. Pacchiano confirmed that the decision adopted by the DGIRA was consistent with the technical opinion of CONANP and the concerns [redacted]

67. Although [redacted] CONANP's concerns raised in their November 2015 opinion were addressed with the information provided by ExO,[90] in the Resolutions of 2016 and 2018 there is no mention in that sense by the DGIRA. To the contrary, the Resolution's own reasoning and conclusions are in line with the opinion of CONANP. In fact, those concerns were part of the information that [redacted], as confirmed in his examination:

> ARBITRATOR SANDS: Could you tell us who is issuing this document? Could you explain what CONANP is, so that we can understand it?
>
> MR. PACCHIANO ALAMÁN: CONANP is the National Commission for Natural Protected Areas. It is an organization that depends on SEMARNAT.
>
> ARBITRATOR SANDS (Interpreted from English): This document, [redacted] Correct?
>
> MR. PACCHIANO ALAMÁN: Correct.
>
> ARBITRATOR SANDS: So this document is one of the technical documents that was referenced.
>
> MR. PACCHIANO ALAMÁN: These are one of the opinions that the DGIRA requested from the different dependencies. And yes, I guess that's the answer to that.
>
> ARBITRATOR SANDS: Good. Let's go to page 31 of this document, that is, to the conclusions. Mr. Pacchiano, do you see the conclusions?
>
> MR. PACCHIANO ALAMÁN: Yes.
>
> ARBITRATOR SANDS: Here are seven different concerns regarding this project. You saw it, right?
>
> MR. PACCHIANO ALAMAN: Yes.[91]
>
> ARBITRATOR SANDS: For example, if we look at Paragraph 7, it concludes that "mitigation measures to avoid and prevent interaction between the Project infrastructure, dredging system vessels with the loggerhead sea turtle are not consistent with the morphology and biology of the species in question, failing to demonstrate that the measures had the technical backing to be effective and efficient in their aims." Do you see that?
>
> MR. PACCHIANO ALAMÁN: Um-hmm.

---

90 Second WS [redacted], ¶ 17 and Second WS [redacted], ¶ 23.

91 Transcript, Day 2-Eng, pp. 569-570, lines 12-22 and 1-15.

> ARBITRATOR SANDS: Is that the kind of conclusion you had in mind when you said before in answer to Mr. Alexandrov, that you understood opinions had been made, although you had not seen them, which raised concerns about the viability of the Project?
>
> THE WITNESS: That's right. [redacted][92]

68. When questioned about the decision-making of the DGIRA in light of the technical and scientific opinions received from different institutions, organizations, agencies and authorities, particularly CONANP, Mr. Pacchiano recognized the technical nature and relevance of the opinions from CONANP:

> ARBITRATOR SANDS: I understand that you have little experience. For the decision-making body to receive a document like this, right? The decision-making body would simply reject a report of this nature, in which conclusions are drawn that are so solid and so clear.
>
> MR. PACCHIANO ALAMÁN: Well, I understand that, in order to ignore a document as clearly as this one, I think the DGIRA would have to have many arguments to reject this document and make a decision that would approve the project. But the decision of the DGIRA was totally consistent with the technical opinions, like the one you are showing me.
>
> ARBITRATOR SANDS: In theory, could DGIRA just ignore this Report and reach its own conclusion that the Project was viable?
>
> THE WITNESS: I understand that the opinions requested by DGIRA aren't binding except for certain cases not applicable here.[93]

69. Regardless of whether the technical opinions have a binding nature, Mr. Pacchiano made an important point about the relevance of this type of document in the sense that the elements that were formulated in the CONANP case were consistent with the final decision adopted by the DGIRA, that is, from a technical-scientific perspective, the Resolutions of 2016 and 2018 were fully justified, for which it would have been questionable for the DGIRA to pronounce differently without there being a reasoning supported by evidence that contradicted the CONANP opinion:

> ARBITRATOR SANDS: So in your experience, with the work that you've done, in your capacity as Secretary or Deputy Secretary, what weight would a document like this have?
>
> MR. PACCHIANO ALAMÁN: I think it would be very difficult to authorize a project that has opinions that come in the sense like this, since I think that in a

---

92 Transcript, Day 2-Eng, pp. 502-503, lines 12-22 and 1-7.

93 Transcript, Day 2-Eng, pp. 504, lines 12-17

> trial I think it would be very easy that -- annul a DGIRA resolution by having ignored technical documents. as strong as this.[94]

70. Based on the foregoing, it is evident that the opinion of CONANP —which was part of the PEIA file— that had weight and relevance in the determination of the DGIRA in accordance with the 2016 and 2018 Resolutions. Therefore, [redacted] in relation to the technical opinion of CONANP or the [redacted] with the Commissioner del Mazo Maza, are irrelevant because these were not part of the documentation analyzed by the DGIRA to adopt its decision to deny the authorization of the MIA.

2. Mr. Pacchiano confirmed that the 2016 and 2018 Resolutions are consistent with the technical opinions of the various organizations and institutions that participated.

71. In his cross-examination, Mr. Pacchiano recalled the importance of the participatory process that involved the PEIA of the Don Diego Project,[95] in particular the technical opinions of the various people, organizations, authorities and academic institutions that expressed their concerns regarding the Don Diego Project. In this regard, Mr. Pacchiano specified the following:

> R: Yes, and it is important to highlight that part of the environmental evaluation procedure, the DGIRA is accompanied by different institutions to obtain more information and be able to make a better decision. It was not the case -- it was not an exception in the case of this project. Opinions were requested from various institutions and all, as far as I remember, that are even in the file of the Impact Manifestation, it was always that the project was not viable since it involved a great risk to the environment and to the species that inhabit that area zone.[96]

72. As can be deduced from the appearance of Mr. Pacchiano, the technical opinion of the various organizations and academic institutions was practically unanimous in the sense that the Project was not viable as it involved a significant risk to the environment and the species of the region, which was consistent with the technical-scientific evaluation carried out by the DGIRA. According to Mr. Pacchiano, these opinions coincided with the concerns [redacted]

---

94 Transcript, Day 2-Eng, p. 574, lines 9-20.

95 Counter-Memorial, ¶¶ 270-305 and Rejoinder, ¶¶ 363-364.

96 Transcript Day 2-Eng, pp. 506-507, lines 17-22 and 1-7.

> ARBITRATOR SANDS: What are the Technical Opinions you are referring to there, and how did you have knowledge of them?
>
> THE WITNESS: Well, at meetings from the moment that the Project came in, [redacted] in from the National Commission of Protected Areas, the Autonomous University of Baja California Sur, the Mineralogy Center of UNAM that said that the Project was not viable.[97]
>
> […]
>
> ARBITRATOR SANDS: And as far as you're aware, had [redacted]
>
> THE WITNESS: [redacted].[98]

73. Mr. Pacchiano's statements regarding the concerns of the different organizations and academic institutions about the infeasibility of the Project are consistent with the evidence in the file. Therefore, the theories of the Claimant and its witnesses about an alleged personal nuisance or political motivations they attribute to Mr. Pacchiano for denying the Project are untenable and without merit.

3. Mr. Pacchiano made it clear that he was respectful of due process and never interfered in the 2016 and 2018 Resolutions that denied the authorization of the MIA

74. In response to the specific question from the Claimant's representatives about the Ministry of SEMARNAT in the PEIA of the Don Diego Project, Mr. Pacchiano specified that he was always respectful of the work that corresponded to the DGIRA as the authority in charge to assess the MIAs technically and scientifically s, for which he had no involvement in these processes:

> P: Thank you. There is discussion in this Arbitration in connection with the rejection of the Don Diego Project and your involvement as Secretary. Could you please explain to the Tribunal whether you had any influence or impact in order with—in order to deal with this project?
>
> R: No. I had none, neither in connection with this Project, Under-Secretary, in any other project assessed by the DGIRA. My positions was always to have the DGIRA staff to discharge its functions fully, and to deal with the information provided to it by the Applicants. And also that would have been prohibited by law.[99]

---

97 Transcript Day 2-Eng, pp. 470-471, lines 19-22 and 1-6.

98 Transcript Day 2-Eng, p. 471, lines 14-17

99 Transcript Day 2-Eng, p. 444, lines 1-14.

75. Mr. Pacchiano not only confirmed that he had no participation in the PEIA in his capacity as Secretary, but also acknowledged that as part of his work he held meetings to listen to the concerns of the interlocutors and interested parties regarding the issues of the SEMARNAT. In particular, he clarified the scope of the meetings he had with ExO representatives regarding the Don Diego Project:

> P: In your Witness Statements, you mentioned a number of meetings with a number of interlocutors in the Don Diego Project. I'm not going to be able to deal with each one of these meetings because I don't have the time to do so, but could you please explain to the Tribunal what these meetings entailed in 2014, 2015, and then 2017?
>
> R: For the Applicants, it was important for the Secretariat to have prior knowledge of the matters before the MIA was submitted, so they held the first meeting with Mr. Guerra. I went to a meeting for me to get information on the Project, and also I was asked to receive people, for them to give me more information on the Project, more detailed information. And I also received all this information. That position was also to be someone who acted in accordance with the Law. And then, I, as Secretary, received the Applicants, but always insisted that any MIA has to include information that makes it clear that there is no impact to the environment and that the DGIRA was going to make decision as to whether the Project was going to be rejected or accepted.[100]

76. As can be deduced from Mr. Pacchiano's response, his position as Secretary of SEMARNAT in relation to the Don Diego Project consisted of supporting the technical-scientific conclusions reached by the DGIRA in its capacity as a specialized body. For this reason, he confirmed that he did not receive any alert or communication as to whether denying the authorization of the MIA of the Don Diego Project was incorrect, since his work never consisted of influencing the decisions of the DGIRA, nor of creating a personal opinion regarding the projects that were submitted for evaluation, much less asking the DGIRA to act against to the law:

> P: Did you received any warning, any opinion, any communication [redacted] that would indicate that the Denial of the MIA Decision of Don Diego would be an incorrect decision?
>
> R: No, never.[101]
>
> […]

[100] Transcript Day 2-Eng, pp. 445-446, lines 9-22 and 1-9.

[101] Transcript Day 2-Eng, p. 487, lines 12-17.

> P: And you believed that, as Secretary, you were ultimately responsible to ensure that SEMARNAT issued correct decisions; isn´t that the case, sir?
>
> R: Our work was to coordinate so that all the specialized units did their work. I never had any influence on their decisions.[102]
>
> […]
>
> P: Did you have an independent opinion in connection with the Don Diego Project?
>
> R: No, never. I always tried not to have any opinion in connection with any kind of project. I always tried not to have any opinion in connection with any kind of project. I always looked at the Technical Opinion provided to me by the different departments.[103]

77. Taking into account Mr. Pacchiano's answers, it is clear that the Claimant's and its witnesses' allegations[104] regarding an alleged "manifest disregard for the TFJA's directions" on the part of SEMARNAT by "fail[ing] to reconsider its determination in good faith and arbitrarily den[y] the MIA a second time"[105] are questionable. As noted throughout the proceedings, "the TFJA did not determine that the DGIRA issued a new resolution in a certain way", [106] that is, the TFJA granted full jurisdiction to the DGIRA to issue a new resolution in the sense that the DGIRA considered applicable" [107]; which is consistent with what was stated by Mr. Pacchiano in his appearance:

> P: And the Mexican court ruled that SEMARNAT and GIRA should re-evaluate the MIA; correct?
>
> R: The Tribunal's Decision said that DGIRA had to once again provide the grounds and reasons for the Decision.
>
> P: Well, the grounded and reasons provided in the Original Decision were insufficient, according to the Tribunal; correct?
>
> R: Without being a lawyer, I believe that the Tribunal's ruling was that SEMARNAT had to once again motivate or better explain tis reasons
>
> P: Okay. And you had no intention of changing SEMARNAT's position with respect to the Project; right, Mr. Pacchiano?

---

102 Transcript Day 2-Eng, p. 448, lines 2-7.

103 Transcript Day 2-Eng, p. 487, lines 5-10.

104 First Witness Statement ¶¶ 28-29. First Witness Statement [redacted], ¶ 12.

105 Counter-Memorial, ¶ 167.

106 Counter-Memorial, ¶ 362.

107 Counter-Memorial, ¶ 363.

> R: That is a decision that was up to the DGIRA to adopt. They had to be the ones to draft a new resolution.[108]

78. Despite the accusations of the Claimant and its witnesses, Mr. Pacchiano adamantly denied —as with the 2018— that he had any interference in the determination of the 2018 Resolution, stating that this task did not correspond to him, which is consistent with the provisions of the applicable regulations, including the RISE.[109]

4. Mr. Pacchiano confirmed that it is false that there were political or other motivations to deny the authorization of the MIA of the Don Diego Project.

79. Although the Claimant has asserted that the MIA's clearance denials were allegedly based on "the political ambitions or personal whims of Secretary Pacchiano […]"[110] because he allegedly "believed that he could benefit politically by denying the Project instead of approving it",[111] said assertions are false. Indeed, Mr. Pacchiano reiterated in his appearance that he had no interest or political motivation in relation to the result of Don Diego's PEIA:

> PRESIDENTE BULNES: And also being Director of the SEMARNAT. And I understand that the President of the Republic appointed you as the political representative for the Province of Baja California Sur?
>
> SEÑOR PACCHIANO ALAMÁN: Of the State of Baja California Sur and Nayarit.
>
> PRESIDENTE BULNES: Perfect. Aside from this political designation, did you have any other links with the area, like, let's say, political or …?
>
> SEÑOR PACCHIANO ALAMÁN: No, none.
>
> PRESIDENTE BULNES: None. O it was a Federal designation for all of Mexico, and this political designation, as presidential delegate for the State which coincided while you were the Director of the SEMARNAT; correct?
>
> SEÑOR PACCHIANO ALAMÁN: Yes that is correct. And I was born in Morelos, and I was working in the State of Mexico, but I didn't have any link or any intention of having any political involvement with the State of Baja California Sur.[112]

---

108 Transcript Day 2-Eng, pp.479-480. lines 17-22 and 1-11.

109 *See Internal Regulations of SEMARNAT, Articles 18 and 28 sections II and IV*. **R-0053**. First WS Rafael Pacchiano, ¶¶ 8, 31-36.

110 Counter-Memorial, ¶ 200.

111 Counter-Memorial, ¶ 219.

112 Transcript Day 2-Eng, pp. 513-514, lines 18-22, 1-15.

80. Mr. Pacchiano emphasized that his work as Secretary was never influenced by the perception of the media and social networks:

> R: Yes. There were a number of times where decisions were made that were very hard to make, but they were the best decisions for the environment and the population, so I never let social media criticisms or media comments influence decisions made by SEMARNAT.[113]

81. Mr. Pacchiano gave as an example a controversial decision by the DGIRA in which it authorized a project:

> R: The Los Cardones Project shows that, during our administration, we always went along with that science said, not with public opinion, and that's why in Mexico there was a project that we believed was going to bring about this type of resistance. We would back the DGIRA's decision, which was authorizing entity.[114]

82. Indeed, the evidence confirms that the 2016 and 2018 Resolutions were due to the result of a technical-scientific evaluation which determined the impact on various species of turtles and marine mammals, therefore, it is false that the negatives contained in the 2016 and 2018 Resolutions have been based on political motivations or of any other nature.

E. At the hearing it was shown that the Resolutions that denied the MIA to ExO were reasonable due to the impact of the Project on the *Caretta caretta* turtle and other endangered species

83. At the hearing it was confirmed that the Don Diego Project would affect, *inter alia*, *Caretta caretta* turtle species. In addition, it was also revealed that, despite the fact that the Claimant and [redacted] that the impact of the project on the whales "did not form any part of the 2016 and 2018 Denials",[115] it was part of the 2016 and 2018 Denials, this was in fact part of DGIRA's reasoning, as discussed in the following subsections.

1. [redacted] that the Don Diego Project affected the turtles

84. The Tribunal must recall that the Claimant has been insistent in asserting that the Don Diego Project would in no way affect the *Caretta caretta* turtle species. According to the

---

113 Transcript Day 2-Eng, p.458, lines 12-18.

114 Transcript Day 2-Eng, p. 522, lines 11-17.

115 Reply, ¶ 85.

Claimant, "the Project's alleged potential impact on Caretta caretta turtles merely served as a pretext",[116] "the "scientific" reasons SEMARNAT articulated as to why the Project would affect turtles are manifestly wrong"[117] and that allegedly "this was a predetermined denial which did not rely on scientific arguments [since] ExO's evidence […] show[ed] that the Project would not affect Caretta caretta turtles[…]*".*[118]

85. Despite Claimant's position, in his cross-examination, [redacted] the Don Diego Project did generate an adverse impact on *Caretta caretta* species:

[redacted].[119]

86. Contrary to Claimant's positions, [redacted] Don Diego Project had an adverse impact. [redacted] statement that the Project would have an adverse impact on the *Caretta caretta* turtle coincides with what Dr. Seminoff states in his Witness Statement.[120] Therefore, and to the extent that it is recognized that Don Diego Project generates an adverse impact on the *Caretta caretta* species of turtles, it is irrefutable that the conclusions and reasoning of the 2016 and 2018 Resolutions are reasonable.

2. [redacted] on the existence of an affectation to the species of *Caretta caretta* turtle

87. Although [redacted] the Don Diego Project generated an adverse impact on the species of *Caretta caretta* turtle, [redacted] the effect was not on the "entire" species and "population", words that

116 Reply, ¶ 225.

117 Reply, ¶ 228.

118 Reply, ¶ 211.

119 Transcript Day 2-Eng, pp.333-334, lines, 16-22 and 1-5.

120 WS Jeffrey Seminoff, ¶ 17.

LGEEPA does not provide[121] and with which the Claimant has attempted to justify — erroneously— the viability of its Project:

[redacted][122]

88. To affirm that the application of Article 35 III (b) of the LGEEPA is limited to effects on an entire species would render the provision null and void, [123] since it could not be applied to migratory species that inhabit different places throughout the world, such as the *Caretta caretta* turtle. This inconsistency came to light in the appearance [redacted]

> P: Do you agree that the Caretta caretta turtle does not only live in Mexico
>
> R: It travels from Japan and it goes down the Pacific Coast. And part of its life is spent in the Ulloa Gulf in Mexico.
>
> P: So, you agree with me that the Caretta caretta turtle is not an endemic species; correct?
>
> R: It's not endemic species. It's a species that is distributed throughout the Pacific Ocean that comes from Japan and it goes down in different stages of its life cycle, and part of that life cycle is spent in Ulloa Gulf. [124]

---

121 Article 34(III)(b) of the LGEEPA, **C-0014.** *See also Second Expert Report* Solcargo-Rábago, ¶¶ 84, 150 and 151.

122 Transcript Day 7-Eng, pp. 1655-1657. Lines 19-22 and 1-7

123 First Expert Report Solcargo-Rábago, ¶ 190.

124 Transcript Day 7-Eng, p.1671, lines 4-15.

[…]

P: So, my question would be: in the case of a turtle that is not endemic because it travels around the world from Japan, [redacted][125]

[redacted]

[redacted][126]

89. From the above quote it is evident that [redacted] avoided answering the question raised by Respondent's representative in relation to the interpretation of Article 35(III) (b) of the LGEEPA, particularly, it is inconsistent that it must affect "all" a threatened or endangered species before an environmental impact authorization can be denied. In any case, said provision is very clear and its application by the DGIRA in other cases[127] has been consistent with the 2016 and 2018 Resolutions issued regarding the Don Diego Project.

3. [redacted] that the Don Diego Project affected the whales and that the 2018 Resolution was based on said affectation, [redacted]

90. Although the Claimant alleges that the impact on the whales "did not form any part of the 2016 and 2018 Denials",[128] [redacted] the 2018 Resolution was based on the impact on the whales:

---

125 Transcript Day 7-Eng, pp.1672-1673, lines 20-22 and 1-8.

126 Transcript Day 7 Eng, pp. 1673-1674, lines 16-22 and 1-9.

127 *See* Second Expert Report Solcargo-Rábago, ¶¶ 99 and 100 and SOLCARGO-0042.

128 Reply, ¶ 85.

> SEÑOR PACHECO ROMÁN: […] The denial of the 2018 Resolution was based not only on the potential impact on turtles but also on whales; right?
>
> R: Yes. That's correct. This was listed in a regulation that includes a list of species that are endangered or about to become extinct.[129]

91. In fact, in his appearance, [redacted] the Don Diego Project, in addition to affecting the turtles, did have an impact on the whales:

> [redacted] Well, everything that CONANP was saying had to do with its concerns related to sea mammals and sea turtles, and this – this means that they submitted a number of studies that clarified the information and the concerns that CONANP had, [redacted]

92. It is incontrovertible that the 2019 Resolution denied the authorization of the MIA because the Don Diego Project affects various species of turtles, as well as the impact on whales. Despite the fact that [redacted][131] was reluctant to recognize this aspect:

> [redacted][132]

93. Despite the initial reluctance [redacted] after having shown him various extracts from the 2018 Resolution which makes reference to the effects and impact on the whales, he ended up recognizing that fact:

> P: Okay. Now I would like to take you to Exhibit C-0009, which was the 2018 Resolution precisely. It's page 516, and there you can see in the highlighted area, it says "considering that the chelonian species that we pointed out before, as those

---

129 Transcript Day 2-Eng., p. 314, lines 5-12.

130 Transcript Day 2-Eng, pp. 312-313, lines 7-22 and 1.

131 Transcript Day 2- Eng, p. 334, lines 3-7.

132 Transcript Day 7-Eng, p. 1656, lines 8-18.

> large marine mammals, the authorization should be denied". Do you agree that the large marine mammals species indicated in Whereas Clause 17 refers to whales?
>
> [redacted]
>
> P: Okay. I'm going to refer you to the last paragraph of Page 295 of that Resolution of 2018, and there you can say that it states that there are other species that are under the protection of the SEMARNAT 2010 in the Ulloa Gulf that use the area with activities of foraging, transit and migration of large mammals such as whales. Do you agree that in accordance with this Resolution, the authorization is denied because it Guerra to deny the Don Diego Project?
>
> [redacted][133]

94. As can be seen from the above quotes, when [redacted] This behavior [redacted] undermines the credibility of his testimony, which must be considered by the Tribunal when evaluating the evidence in the case.

F. At the hearing it was confirmed that the Don Diego Project involves a mining activity through the dredging of phosphate sands

95. Although the Claimant has tried to make the Tribunal believe that the Don Diego Project does not involve a mining activity, the evidence is compelling and disproves the Claimant's false premise that the dredging to be carried out is not associated with seabed mining. Although [redacted] Claimant's witness— has been reluctant to acknowledge the mining nature of the Project, the evidence and the statement of Mr. Lozano —another Claimant's witness— contradict his position. In fact, to the extent that the Claimant has mining concessions, its MIA refers to the mining law as the regulations applicable to the project and in this ExO itself has recognized that the extraction of phosphate involves a mining activity, it must be considered that it does not exist any other project in Mexico that can be compared.

---

133 Transcript Day 7-Eng, pp. 1656-1658, lines 19-22, 1-22 and 1-3.

1. Mr. Lozano acknowledged that the Don Diego Project is a marine mining project

96. In the MIA submitted by ExO, particularly in Chapter II entitled "Project Description", the company expressly acknowledged —in section II.1.2 Site Selection— that its activity involved underwater mining:

> The selection of the site considered the inherent benefits of underwater mining comparatively with respect to land mining, as established hereunder: […][134]

97. This statement coincides precisely with what was stated by Mr. Lozano, the Environmental and Project Manager of Odyssey who was in charge of "assist with the Project's development and in the preparation of the Environmental Impact Assessment":[135]

> P: Thank you. Just to understand, based on your CV; you had never worked before in sea-mining project for extracting seabed phosphates, in the past?
>
> R: No. I had not participated in marine mining before. I had experience in dredging, but no in underwater mining.
>
> P: So, to understand your experience, in Mexico, you had only experience with the Don Diego Project; correct?
>
> R: Yes, that is correct.[136]

98. As can be seen from the above quote, Mr. Lozano, in his capacity as an expert scientist in the issues addressed by the MIA, without any modesty recognized that the Don Diego Project involved under water mining. Furthermore, Mr. Lozano also did not attempt to clarify by adopting the superfluous distinction between dredging and underwater mining that the Claimant and [redacted] make in order to argue that the Don Diego Project does not involve a mining activity. This express acknowledgment by Mr. Lozano is very important, as it weakens the Claimant's position and even undermines the credibility of [redacted], as discussed below.

2. [redacted] with the appearance of Mr. Lozano and with what was expressed by ExO in his

134 **C-0002**, p. 10.

135 First WS Claudio Lozano, ¶ 2.

136 Transcript Day 1-Eng, p. 207, lines 1-11.

MIA regarding the mining nature of the Don Diego Project.

99. Although Mr. Lozano confirmed that the Don Diego Project involved marine mining, [redacted] was reluctant to acknowledge that incontrovertible fact based on the evidence in the file and ExO´s own representations in the MIA:

> SEÑOR PACHECO ROMÁN: [redacted] do you agree with me that the Don Diego Project is a mining project? Is this correct?
>
> [redacted] The Don Diego Project is a marine Dredging Project to extract material from the seabed with suction dredge.
>
> P: Just to be clear about this: Your position today, before this Tribunal, is that Don Diego Project is not mining project? Is that your position?
>
> R: The Don Diego Project is a marine dredging product[project] to extract phosphates from black sands.
>
> P: I would like you to listen to me. My question is very simple. It's a "yes" or "no" question. The Don Diego Project, is it a mining project? "Yes" or "no"."
>
> [redacted] The Don Diego Project is not a mining project.[137]

100. [redacted] answer contrasts with what was expressed by ExO in Chapter III of the MIA, which is called "Links to applicable legal planning instruments and legal orders",[138] specifically the part in which the company by itself identified the Mining Law as an instrument applicable to the MIA and links them:

> The Federal Law of the Sea establishes, in its article 19, that the exploitation and use of underwater minerals (in the case of the phosphate sand project) in the Mexican marine areas, is governed by the Mining Law and its respective regulations. Therefore, it is now up to link the project with this normative body (See following Table)[139]
>
> […]
>
> The provisions of this numeral are complied with, the project consists of mining exploitation, by means of dredging, in the seabed and the subsoil of the exclusive economic zone, for which reason it can only be carried out with the authorization, permit or concession of the authorities that are in charge of the seabed and subsoil, and in the case at hand, the Federation is the corresponding authority, which has already granted the mining concession to the promoter.[140]

---

137 Transcript Day 7-Eng, p. 1652, lines 2-19.

138 **C-0002**, p. 119.

139 **C-0002**, p. 145.

140 **C-0002**, p. 147.

101. Despite this evident recognition by ExO of the mining Project considering the applicable regulations, [redacted] tried to reject this situation by weakly alleging that it was a situation supposedly unrelated to the Project itself and that it was more related to the mining concessions of the Project:

> P: But you agree that the Don Diego Project entails extracting phosphate? Correct?
>
> R: Yes. It entails extracting phosphate mineral with the marine dredging of black sands.
>
> P: Do you agree that ExO identified as an applicable instrument to the MAI, the Mining Law? Is this correct?
>
> R: Well, this is based on a concession given the Government of Mexico to exploit the phosphate.[141]

102. It is questionable that despite the fact that the Project involved the exploitation and extraction of a mineral —phosphate— [redacted] denying the mining nature of the Project, despite the fact that the 2018 Resolution [redacted] made express reference to this fact:

> That due to the description, characteristics and location of the activities that make up the project, it falls under federal jurisdiction in terms of environmental impact assessment, as they are works and activities for the exploitation of minerals and substances reserved for the Federation, as provided article 28 section III of the **LGEEPA** and article 5, section L), section 1, of its **REITA.**[142]

103. As evidenced in [redacted] answers, it is implausible to affirm that the Don Diego Project does not have a mining nature derived from the law that is linked to the Project (Mining Law), Mr. Lozano's open statement in his appearance, the express recognition of ExO in its MIA, as well as what is established in the 2018 Resolution itself.

3. [redacted] lack of credibility was evidenced by his reluctance to recognize that the Don Diego Project involves marine mining

104. Given the existence of compelling evidence confirming the mining nature of the Don Diego Project, the Arbitral Tribunal expressed doubts on [redacted] statement on the contrary:

---

141 Transcript Day 7, Eng, pp. 1652-1653, lines 4-16.

142 **C-0008**, p. 39.

> CO-ARBITRATOR SANDS: Of course, with great happiness. I think I got the sense from your Witness Statements, both Witness Statements, which I've read very carefully and your comments this afternoon—sorry, your morning, my afternoon, that you´re hesitant to characterize this project as a mining project. Could I ask, is that accurate and if so why?
>
> [redacted] At the end the day, the main activity of this project is a marine dredging. The materials are going to be extracted from the seafloor, and there is a mineral that was the subject of a mining concession there, that's true, but the processes used to obtain the phosphate are primary separation processes. This does not mean the use of additives or chemicals that could be used to separate materials out. The only thing that is being done is to dredge the bottom of the sea and to get that material—the material through a suction tube, take that sand, separate the material out, and then bring the sand back to the sand floor using the ecotube, which is mentioned in the MIA. And this is a process that is done very, very slowly. Its one known theory, and the effect would be about one square kilometer per year. This is the horizontal movement that the dredger does to dredge the seafloor, so there are no chemicals to separate the material out. There are no other mechanisms to obtain the phosphate from the black.[143]

105. Despite the legitimate doubts of the Arbitral Tribunal, it is clear that the answers [redacted] did not manage to dispel them, given the reluctance he showed in his appearance:

> CO-ARBITRATOR SANDS: So, is your definition of "mining" dependent upon the use of chemicals to remove a mineral resource from the seabed?
>
> [redacted] No, no, no. Simply for a mining activity to exist, a separation process needs to exist, and then you can obtain the materials. But in the mining process, you have a vein, you have tailings. We have no tailings here. We have residual sand that is then deposited back into the seabed.
>
> CO-ARBITRATOR SANDS: Are you familiar with the regulations in the Law of the Sea for Deep-sea mining?
>
> [redacted] I have heard about that specifically because of some projects that had been developed.
>
> CO-ARBITRATOR SANDS: And are you aware that those Projects essentially involved the removal of manganese nodules from the seabed, there's no use of chemicals, it's a collecting activity? It's rather similar to the activity that's being described now, I mean, that is characterized as a mining activity. Is that not rather similar to what is being done here?
>
> R: I think that would depend on the legal definition of mining that you have in the UK vis-à-vis the definition of what we have in Mexico as to what mining activities that are in Mexico.[144]

106. It is evident that [redacted] avoided to answer the Tribunal's questions and preferred to hide behind his concept of what a mining activity or project is, which is also not consistent

---

143 Transcript, Day 7-Eng, pp. 1692-1694-, lines 15-22, 1-22 and 1.

144 Transcript Revision, Day 7-Eng, pp. 1694- 1695, lines 2-22 and 1-4.

with Mexican law, which precisely confirms the Respondent's position in the sense that the Don Diego Project involves a mining activity, so thus as mentioned above, ExO stated that in the MIA. In any event, [redacted] oral statement contrasts even with his own witness statement, as the Tribunal noted:

[redacted][145]

107. The above quote confirms that [redacted] answers undermine his credibility and only shows that the veracity of his statement is seriously questionable.

4. [redacted] that it does not exist any project similar to Don Diego's in Mexico that involves the extraction of minerals

108. According to the Claimant and one of its experts, there are six projects that are in "similar circumstances" to the Don Diego Project,[146] however, the Claimant fails to recognize the relevance that none of them involves a mining activity that implies the extraction of a mineral from the seabed.[147] In fact, the Claimant intends to focus its comparative analysis based on the use of dredging *per se*, arguing that the Don Diego Project was associated "with a so-called mining project",[148] thus making it believe that its Project has no effect on the Gulf of Ulloa "local and regional sea ecosystem of great importance for food, shelter, and reproduction purposes with respect to vulnerable sea species".[149] In this regard, and as one of the members of the Tribunal noted, a marine mining project like the one that the Claimant intended to develop has never been carried out in Mexico:

---

145 Transcript, Day 7-Eng, p. 1695, lines 5-17.

146 Reply, ¶¶ 268-279.

147 Reply, ¶¶ 268-279.

148 Reply, ¶ 94.

149 2018 DGIRA Resolution p. 507. **C-0009.**

[redacted][150]

109. [redacted] answer shows that he sought to avoid answering what was asked by the arbitrator, however, at the end he had to admit that in Mexico all mining projects are carried out in terrestrial ecosystems and not in marine ecosystems such as the one involves Don Diego Project. In light of [redacted] ambiguous response, the Tribunal had to be more specific and ask for the name of a project in Mexico that could be similar to the one that the Claimant intended to develop:

[redacted][151]

110. Again, [redacted] response was elusive when referring to projects that was not related to the question that was raised to him, however, at the end of his response he had to admit that in Mexico there was no other project to extract phosphate like the one presented by the Claimant, *i.e.*, it was a *sui generis*, project, unique in its kind:

[redacted]

150 Transcript Day 7-Eng, pp. 1695-1696, lines 18-22, 1-10.

151 Transcript Day 7-Eng, pp. 1696-1697, lines 11-22, 1-9.

[redacted][152]

111. Although [redacted] the Don Diego Project with other projects that involve dredging, it is clear that, as is clear from the Tribunal's question, the Don Diego Project is unique and has no comparison with any other project because it is the only one: (i) with permanent dredging activity;[153] (ii) that is not in the vicinity of the coastline and/or previously established navigation channels;[154] (iii) that it intends to dredge in depths greater than 20 meters;[155] (iv) that it intends to return the dredged and treated material to the site from which it was extracted;[156] (v) whose dredging product is for commercial purposes;[157] (vi) whose dredging activity requires more than one vessel working simultaneously.[158]

III. APPLICABLE LAW

112. During the hearing on the merits, the Claimant failed to address the legal aspects of its claim, saying that "[they received supplementary information]".[159] Instead, it simply noted that:

> […] Claimant is not asking the Tribunal to sit as an appellate court. This is a theme that goes through the Counter-Memorial and the Rejoinder. We are not asking the Tribunal to weigh the environmental evidence on the MIA. It's not about the weight, it's about the abuse of the MIA process.[160]

113. The above argument is contradictory, since, on the one hand, it is stated that the Tribunal is not being asked to serve as an appellate court, however, on the other hand, the Tribunal is required to analyze the merits of the MIA, just as a Mexican court would do and, in fact, that court is already doing. Therefore, the aforementioned quotation evidences that

---

152 Transcript Day 7-Eng, pp. 1697, lines 10-22.

153 Expert Report Verónica Morales ¶ 92 and Rejoinder ¶ 439.

154 Expert Report Verónica Morales ¶ 92 and Rejoinder ¶ 439.

155 Expert Report Verónica Morales ¶ 92 and Rejoinder ¶ 439.

156 Expert Report Verónica Morales ¶ 92 and Rejoinder ¶ 439.

157 Expert Report Verónica Morales ¶ 92 and Rejoinder ¶ 439.

158 Expert Verónica Morales ¶ 92 y and Rejoinder ¶ 439.

159 Transcript, Day 1-Eng, p. 50, line 19.

160 Transcript Day 1-Eng, p. 67-68, lines 20-22 and 1-3.

the Claimant is improperly asking the Tribunal to carry out a *de novo* analysis of the MIA under the appearance of an evaluation of an alleged "abuse of the MIA process".[161] This task does is not appropriate for the Tribunal.

114. As discussed in the Counter-Memorial and in the Rejoinder, [162] the application of the Minimum Standard of Treatment "do not give the Tribunal an open mandate to question or to second-guess decisions by Governments, nor to interfere in exclusive matters of internal law or in the way that Governments must resolve technical matters and administrative matters".[163]

115. Given the Claimant's failure to address the law applicable to its claim during the hearing, the Respondent will briefly address some relevant aspects of the standards, which demonstrate that the Claimant has failed to establish any violation of the substantive provisions of the NAFTA as they have been interpreted by other tribunals and the Parties to the Treaty themselves.

A. The Claimant failed to demonstrate the violation of the Minimum Level of Treatment standard under NAFTA

116. The information in the record confirms that "the legal applicable standard under Article 1105 of NAFTA to analyze the Claims made by Odyssey, [is] a very high standard".[164] Indeed, in accordance with customary international law, in order to demonstrate a violation of the standard of the Minimum Standard of Treatment it is required to prove that "there was a conduct that was arbitrary, notoriously unfair, or that it involves a lack of due process.".[165] According to the Claimant "the MIA was denied" because of "[c]oncerns about political fallout[…] coals of the press [and] personal conflict."[166] However, it is insufficient to prove that the Minimum Standard of Treatment was not met through (i) the indiscriminate

---

161 Transcript Day 1-Eng, p. 68, lines 1-3.

162 Counter-Memorial, ¶¶ 518-523. Rejoinder, ¶¶ 350-361.

163 Transcript, Day 1-Sp, pp. 142-143, lines 18-22 and 1-3. The NAFTA Parties agree that Article 1105 does not mandate the courts to "second-guess" a government's policies and decision-making. Canada Article 1128 Submission, ¶¶ 17-18. US Article 1128 Submission, ¶ 41.

164 Transcript, Day 1-Eng, p. 126, lines 6-8.

165 Transcript, Day 1-Eng, p. 125, lines 12-14.

166 Transcript, Day 1-Eng, p. 68, lines6-8.

citation of non-NAFTA arbitration awards "in which the fair-and-equitable-treatment standard is interpreted in a broader manner, in a more indulgent manner"[167] —as if it was an autonomous standard; (ii) the abusive use of adjectives to qualify the authorities' conduct; and (iii) mere assertions without any documentary support based on evidence. In this regard, and as was recently clarified in a dissenting opinion in *Eco Oro v. Colombia*, the standard that must be applied to the concrete case is the one that is provided in the treaty itself—in this case the NAFTA— and the fact that there are a number of provisions of FET in other treaties is not enough to affect the content of customary international law and cannot be used to equate the MST to the FET standard:

> […] The standard to be applied by the Tribunal is not the Fair and Equitable Treatment ('FET') standard, one that is to be found and applied in other investment protection agreements. The parties to the FTA have reinforced the distinction between the two different standards by the authoritative interpretation of Article 805 and MST adopted in 2017 by the Joint Commission established under the FTA; this confirms that the investor has "the burden to prove a rule of customary international law invoked under Article 805"
>
> As acknowledged by both the ICJ and the ILC, the fact that the FET provision can be found in a number of treaties is not enough to affect the content of customary international law. Indeed, the widespread inclusion of FET provisions supports the opposite conclusion, as states which include such provisions in their treaties may be understood as expressing a desire to depart from the standard in customary international law. As with all rules of customary international law, the crucial issue is whether there is sufficient evidence of state practice and *opinio juris* to support the conclusion of the existence of a rule of customary law. As noted below, the majority has made no effort to address that evidentiary requirement, ignoring the explicit requirement of the FTA drafters that the Claimant must prove the content of the rule of customary international law invoked under Article 805.
>
> In the past, certain tribunals have accidentally or deliberately sought to equate or meld the MST and FET standards. The two standards may share a common aim of imposing restrictions on the manner and extent to which a state is required to treat a foreign investor in its territory, but they do so to in different ways. A breach of the customary MST standard would invariably give rise to a breach of the FET standards, but the reverse is generally not the case. This is because the MST standard sets a much higher bar.[168]

---

167 Transcript, Day 1-Eng, p. 128, lines 4-6.

168 *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case. No. ARB/16/41, Partial dissent opinion Prof. Philippe Sands, 9 September 2021, ¶¶ 5-7. **RL-0145**.

117. In this regard, "[o]bviously, the Claimant has been unable to show that Mexico has failed to reach this threshold"[169] provided by the NAFTA and, consequently, that Respondent has breached Article 1105 of NAFTA.

118. Without prejudice to all the arguments made in the Counter-Memorial and Rejoinder in relation to the NAFTA Article 1105[170] standard, it is enough to note that, for the purposes of this Submission and as stated at the hearing:

> The fact that Odyssey disagrees with the meaning of the Resolution, denying the MIA of Don Diego, is insufficient to give rise to arbitrary conduct susceptible of violation of Article 1105 of NAFTA, specifically when there was a transparent administrative procedure that was in line with due process and that the Claimant is still using the judicial remedies it has at its disposal at the Mexican courts, and they are still pending--those cases are still pending.[171]

119. Therefore, the evidence of the record demonstrates that Claimant has failed to demonstrate that Mexico has breached the Minimum Standard of Treatment standard under NAFTA Article 1105.

B. The hearing confirmed that the Claimant waved its claim to Full Protection and Security

120. Regardless of the fact that the Claimant erroneously considers that the FPS standard "extends beyond the political and economic domestic powers",[172] in the Reply it omitted to address entirely — except for one petition point — its FPS claim. Therefore, and to the extent that at the hearing Claimant also failed to clarify this aspect, the Tribunal must find that Odyssey has abandoned or waived its FPS claim under the NAFTA.

C. Claimant failed to prove the existence of an expropriation

121. Throughout the proceeding, Mexico has presented compelling arguments demonstrating that Claimant "has failed to explain, or to identify, what it is exactly that it

---

169 Transcript, Day 1-Eng, p. 127, lines 15-17.

170 Counter-Memorial, ¶¶ 437-527. Rejoinder, ¶¶ 337-406.

171 Transcript, Day 1-Esp, p. 129, lines 6-15.

172 Claimant Memorial, ¶ 296. Respondent has emphasized that Article 1105 is clear that the PSP standard is limited to physical protection and, therefore, is not applicable to the facts claimed by Claimant. *See* Counter-Memorial, ¶¶ 528-44 y Rejoinder, ¶¶ 407-408. *See* U.S. Article 1128 Submission, ¶¶ 49-50. Canada Article 1128 Submission, ¶¶ 22-24.

was deprived of "[173], considering that it "never had a right to exploit the mining concession deposits that were granted to it.",[174] since that right was "based on obtaining an Environmental Authorization issued by DGIRA […] and a series of permits that would have been required".[175] Despite this situation, the Claimant preferred to miss the opportunity to clarify these aspects during the hearing, under the pretext that "it´s been briefed" "about Merits".[176] However, in its Memorial and Reply, Claimant merely argues that intangible property rights can be subject to expropriation, which was never in dispute.

122. To the extent in which Claimant has not even been able "to identify what it is exactly that it was deprived of",[177] it is clear that its expropriation claim must fail. Therefore, the Tribunal must dismiss Claimant's claim under NAFTA Article 1110.

D. Claimant failed to demonstrate that Mexico granted more favorable treatment to another project in like circumstances

123. Mexico considers that the Claimant has failed to demonstrate a breach of the national treatment obligation by failing to make a *prima facie* case as to the comparability of the projects, *i.e.*, it has failed to establish that the Six Projects it chose are in "like circumstances".[178] Claimant's analysis starts from the incorrect premise that dredging

---

173 Transcript, Day 1-Eng, p. 131, lines 1-3.

174 Transcript, Day 1-Eng, p. 131, lines 3-5.

175 Transcript, Day 1-Esp, p. 131, lines 5-8. Canada confirmed that "[a] potential property right or one that is conditional, in that it may or may not materialize depending on a future event, is not vested and is not capable of being expropriated". Canada Article 1128 Submission ¶ 27.

176 Transcript, Day 1-Eng, p. 67, line 17.

177 Transcript, Day 1-Eng, p. 131, lines 1-3. In this regard, the United States and Canada confirmed that the first step in any expropriation analysis is the determination of the existence of an investment capable of expropriation, which involves the identification of the specific investment alleged to have been expropriated. See U.S. Article 1128 Submission ¶ Canada Article 1128 Submission ¶ 26. ("The first step in assessing whether there has been a breach of Article 1110 is to identify the specific investment alleged to have been expropriated. Any expropriation analysis must begin with determining whether there is a valid property right capable of being expropriated").

178 As noted by Canada in its submission under Article 1128, "Article 1102 is concerned with the question of whether treatment was accorded "in like circumstances", not whether it was accorded to "like investors". Determining the existence of "like circumstances" is not merely a matter of determining whether investors operate in the same business or economic sector or pursue the same activity. Rather, it requires a detailed consideration of the particular facts of each case and an examination of the totality of the circumstances in which treatment was accorded in order to determine whether those circumstances are "like". *See* Canada Article 1128 Submission ¶ 9. The United States has corroborated the above, that "identifying appropriate comparators for purposes of

activity *per se* makes any project comparable, failing to recognize the relevance that this activity is carried out to extract a mineral for commercial purposes, which implies a larger scale of dredging not only in surface area but also in time (50 years) --factors that undoubtedly affect comparability--, as discussed below.

1. At the hearing it was confirmed that none of the six projects referred to by the Claimant are in like circumstances to the Don Diego Project.

124. The following subsections will only address some specific aspects that were evidenced at the hearing and that confirm the fact that none of the Six Projects identified by the Claimant are in similar circumstances to the Don Diego Project.

a. None of the allegedly comparable projects involve mining activities

125. As discussed above, Mr. Lozano confirmed in his appearance that the Don Diego Project involved underwater mining activity,[179] ExO itself recognized this in its MIA[180], and the 2018 Resolution —[redacted] also states this in its analysis.[181] Despite this, one of the Claimant's experts [redacted]—[182] was reluctant to acknowledge the mining nature of the Project and, instead, focused his comparability analysis on the dredging activity itself, without considering the type of dredging, depth, duration, time, as well as the dredged area. Thus, Mr. Pliego's appearance evidenced the limited nature of his analysis to establish a real comparability involving "like circumstances":

---

the "like circumstances" analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics. When determining whether a claimant was in "like circumstances" with comparators, it or its investment should be compared to a domestic investor or investment that is alike in all relevant respects but for nationality of ownership. Moreover, whether treatment is accorded in "like circumstances" under Article 1102 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives". U.S. Article 1128 Submission ¶ 57.

179 Transcript, Day 1-Spa, p. 235-236, lines 15-22 and 1-5.

180 **C-0002**, pp. 145 and 147.

181 **C-0008**, p. 39.

182 Transcript, Day 7-Spa, p. 1842- 1844, lines 6-22, 1-22 and 1-20.

> P: Thank you very much. Do you agree that in Mexico there is no marine mining project which has been authorized? Correct?
>
> R: I'm analyzing a dredging project.
>
> P: Okay. So you ignore whether there are any marine mining projects which have been authorized?
>
> R: My work was to analyze the Dredging Project which is comparable with these other dredging projects that I pointed out, and the dredging has been carried out for many, many years in the country. That's the main topic, the dredging activity.[183]

126. The failure to recognized that the Don Diego Project involves mining activity, despite the evidence confirming it, only detracts from the expert's credibility and demonstrates that his analysis was superficially limited to one aspect --dragging-- which by itself is not enough to affirm comparability with Six Projects identified by Claimant.

b. The area and length of dredging to extract phosphate ore from the Don Diego Project is not comparable to any of the other Six Projects.

127. Respondent's experts have made it clear that the Don Diego Project is not comparable to the Six Projects identified by Claimant and its expert because:

(i) "the Don Diego Project is part of the mining sector; and under the Projects which are presented for comparison […] they're for transportation or communications or port structures, the dredging for maintenance […] building out the Port […] and broadening the Port […]";[184]

(ii) the type of dredging for the Don Diego Project is capital dredging, which, unlike maintenance dredging, "dredging the seafloor which has never been dredged before", so "the impact or the characteristics of the dredging are very different";[185] and

(iii) the environmental impacts cannot be limited to a type of "impact on the water column or the impact on the trophic chains or species", but must also consider the impact caused by "its magnitude, its extension, its importance and where

183 Transcript, Day 4-Eng p. 870-871, lines 21-22 and 1-1.

184 Transcript, Day 3-Eng, p. 722, lines 6-13.

185 Transcript, Day 3-Eng, pp. 724, lines 6-7 ND 10-11.

> the area is, the timeline, reversibility, its synergy and accumulation with other impacts that surround it".[186]

128. Notwithstanding the relevance of all the elements described above, it is indisputable that the magnitude of the projects as regards the dredging area is of utmost relevance since the environmental impacts cannot be comparable when the surfaces involved are completely different. Despite this, in his cross-examination, Claimant's expert attempted to weakly minimize this relevant fact:

> P: Okay. I don't believe that you answered my question. I'm going to ask it again. The surface of 20,594.88 hectares over 50 years of the life of the Project, do you agree in that that's the area that's going to be dredged, the total area, and that's what ExO stated?
>
> R: Yes. And when the dredged area is complete, they will recover 92 percent of that area, and that's important to take into account in an environmental impact evaluation.[187]
>
> […]
>
> P: So, you're maintaining before this Tribunal that the dredging surface for the Veracruz Port, in this case, 451 hectares; and that of Matamoros Port, which is 85.45 hectares. Those surfaces are comparable, the total surface which is going to be dredged in Don Diego of 20,594.88 hectares? Is it comparable to that surface?
>
> R: I'm not comparing the surfaces. I'm making an impact valuation for the environment, not the surface, not the size, not who was sponsoring it. I'm talking about environmental impact of dredging on those sites. [188]

129. As can be seen from the above quotation, the answer of Claimant's expert fails to recognized the undisputed fact that the environmental impacts of dredging will be greater when it is developed over a much larger area, for a longer period of time and in an area such as the Gulf of Ulloa, considered "a critical habitat" due to the "maximum concentration of the species in its juvenile and sub adult stage, because it uses it as a feeding area for long periods".[189] Despite the above, the Claimant's expert went so far as to state that the environmental impact of dredging in a surface of one meter is comparable to that which would occur in a surface of 80 meters —in the case of the Don Diego Project—:

---

186 Transcript, Day 3-Eng, p. 725-726, lines 17-22 and 1-2.

187 Transcript, Day 4-Eng, pp. 865-866, lines 22 and 1-10.

188 Transcript, Day 4-Eng, pp. 868-869, lines 18-22 and 1-8.

189 Expert Report Verónica Morales ¶¶ 89 and 92. Also *see* the Rejoinder, ¶ 439.

> P: Therefore, if I understand correctly, you believe that a dredging depth of 1 meter is comparable, which corresponds to the Mantenimiento Centro Nucleoeléctrica Laguna Verde with a depth of 80 meters? Is that correct? Do you consider that those depths are comparable?
>
> R: That's correct. In view of the General Law for Environmental Protection and Balance the definition of costal ecosystem and in view of the environmental impact that each of these projects has. Correct.[190]

130. The answer of Claimant's expert only detracts from the credibility of his testimony and highlights the limited nature of his comparative analysis between the Projects he identified as allegedly comparable.

2. Mr. Pliego's analysis was limited to identifying minor aspects that supposedly make the Don Diego Project comparable, ignoring important elements that make it clearly distinguishable that this is the only mining project in the country.

131. Clearly, the Don Diego Project involves a mining activity, as recognized by ExO in its MIA[191] and, thus, reflected in the 2018 Resolution.[192] In fact, Claimant's own witness, Mr. Lozano, the scientist in charge of coordinating the Project, had no objection to confirming that it involved marine mining.[193] Based on this evidence, it was questionable that Mr. Pliego, Claimant's expert, categorically rejected that characterization:

> …You have focused in your comparators and in your exercise on this activity of this project as a dredging activity; is that correct?
>
> MR. PLIEGO MORENO: That is correct.
>
> ARBITRATOR SANDS: And I think at a certain moment you said that you did that because you were invited to do so by the Claimant. Is that correct?
>
> MR. PLIEGO MORENO: The Project analysis led me to define it as a dredging project. There was no invitation by the Claimant to do it that way. The Claimant only asked me to assess the environmental impact statement of the Project.[194]

132. Clearly, Mr. Pliego's response is unconvincing and shows that basing his comparative analysis on the dredging activity itself is limited. Indeed, that approach fails to recognize that the activity is developed for the purpose of extracting a mineral that has an economic value,

---

190 Transcript, Day 4-Eng, p. 874, lines 2-12.

191 **C-0002**, pp. 145 and 147.

192 **C-0008**, p. 39.

193 Transcript, Day 1-Spa, p. 235-236, lines 15-22 and 1-5.

194 Transcript, Day 4-Eng, p. 883, lines 20-22 and 1-9.

i.e., a commercial purpose is pursued and, therefore, a larger scale must be carried out to achieve a significant profit, which is not the case with any of the other Six Projects:

> ARBITRATOR SANDS: Are you aware that the activity that is at the heart of the Project will remove phosphate rock from the seabed?
>
> MR. PLIEGO MORENO: Yes. Sediments of the seafloor and the separation will be done on the transformation or processing barge.
>
> ARBITRATOR SANDS: Well, it's not only a sediment. I mean, which can mean many different things, but it's a sediment which contains--I mean a sediment has no value. The value of the exercise is the phosphate rock that is being removed, is it not?
>
> MR. PLIEGO MORENO: That is correct.
>
> ARBITRATOR SANDS: So, is phosphate rock a mineral, in your opinion?
>
> MR. PLIEGO MORENO: Yes.[195]

133. It is obvious that the extraction of a mineral for commercial purposes implies a mining activity. Despite this obviousness, Mr. Pliego refused to categorize the Don Diego Project as mining and, instead, asserted that such aspect is secondary to his comparative analysis and that he rather focuses on the impact of dredging. However, it is indisputable that the dredging activity cannot be separated from the purpose for which it is carried out, as this has an influence on the magnitude, duration, time and area of the dredging, which undoubtedly also affects the environmental impact being assessed. Therefore, and as demonstrated by his appearance, the explanation he provided on the adoption of such approach is implausible:

> ARBITRATOR SANDS: So, I'm curious why you have not characterized, then, the removal of the minerals from the seabed as a mining activity rather than a dredging activity or at least both. I can understand why aspects of the Project which make use of dredging have caused you to focus on the word "dredging," but is it not the case that the removal of a mineral resource from the seabed constitutes a mining activity?
>
> MR. PLIEGO MORENO: True. That is why when I conducted my analysis, I indicated that I am assessing the activity and the impact of the activity. Now, the characterization would be secondary in my analysis. What I am assessing is how the dredging is done, how the sediments are removed, and the impact that that has--how all that it is taken up to the surface, what impact that has, and that is the essential matter to me. That is an assessment that I have conducted when I compared different projects that carry out the same activity, regardless of the purpose, which is the mining of the ore later on.[196]

---

195 Transcript, Day 4-Eng, pp. 884-885, lines 10-22 and 1.

196 Transcript, Day 4-Eng, pp. 885-886, lines 3-22 and 1.

134. Even though Mr. Pliego was reluctant to recognize the relevance of characterizing the Don Diego Project as mining, he accepted that there is no other project in Mexico with the characteristics of Claimant's Project, *i.e.*, concerning seabed mining:

> ARBITRATOR SANDS: Okay. So – this is quite important for me at least--your expert testimony is that, for all practical purposes, in this case, it makes no difference whether you characterize the activity as "mining," on the one hand, or "dredging," on the other. Is that your testimony?
>
> MR. PLIEGO MORENO: That is correct. From my environmental impact assessment analysis, that classification is secondary, given the activity that I am assessing. That is correct.
>
> ARBITRATOR SANDS: Right. And does that remain your position? I think you said earlier, you were not aware of any other project in Mexico in relation to seabed mining of this kind.
>
> MR. PLIEGO MORENO: That is correct. I don´t know of any similar project.[197]

135. Regardless of the fact that the Six Projects identified by the Claimant and its expert are not in "similar circumstances" to the Don Diego Project, none of those Six Projects received more favorable treatment, since all of them —as well as the Don Diego Project—, were subject to the same level of scrutiny by the authorities.[198] The above, without considering the fact that the novelty of the Project also implied recognizing that "in no case can the lack of scientific certainty be argued as a justification for postponing the adoption of effective measures for the integral conservation of wildlife and its habitat"[199]. In this regard, the Tribunal itself recognized this situation when questioning the Claimant's expert on this aspect:

> … ARBITRATOR SANDS: It is, indeed, correct. The regulations have focused on areas beyond 200 miles, but I have been very much informed in the negotiations by practice within 200 miles as countries try to agree on standards because this is such a new activity. Are you aware that these have taken a very long time to breathe because it's such a new activity? There has been so little of it going on. I assume you're aware of that.
>
> MR. PLIEGO MORENO: Yes, of course. As a mining activity, that is true; it's new, and that's why I go back to the characterization of this Project, where basically, although the purpose is to extract a mineral, nonetheless it's dredging, and the dredging is being carried out in the 200 meters that the Mexican Government defines as a coast area, and it is in abidance with the national

197 Transcript, Day 4-Eng, p. 888, line 22. p. 889, lines 1-15.

198 Counter-Memorial, ¶¶ 606-611 and Rejoinder, ¶¶ 449-452.

199 *See* **C-0009**, p. 329-331.

> legislation and standards. I'm very familiar with it. And I know that that kind of mining at lower depths when they use chemicals or when they're carried out in areas that could have greater biodiversity and greater impact--and it could have different implications. …[200]

136. Noting the novelty of the Don Diego Project —and the fact that other countries have been skeptical and cautious when authorizing marine dredging projects similar to the Don Diego Project—[201], it was not discriminated against. On the contrary, the DGIRA, the technical-scientific authority specialized in the evaluation of the Project, conducted itself in a transparent, rational manner and in accordance with legitimate environmental objectives and policies, as provided for in the regulations themselves.[202] Therefore, Claimant has failed to establish a violation of NAFTA Article 1102.

IV. DAMAGES

A. Introduction

137. The following closing submissions on damages are without prejudice to the legal arguments in the previous sections. Nothing in this section should be construed as an admission of liability by Respondent or as a waiver of defenses on the merits of this dispute.

138. Claimant alleges damages in excess of two billion US dollars plus post-award interest.[203] This amount is made up of 4 components: [redacted] (4) USD $1,037.9 million in pre-award interest .[205]

200 Transcript, Day 4 Eng, p. 892-893, lines 2- 22 and 1-2.

201 *See* Rejoinder, ¶¶ 289-295.

202 *See* Counter-Memorial, ¶¶ 612-613.

203 The Respondent claims a total of USD $2,676,300,000.00, however, this amount corresponds to pre-tax or gross damages. Counter-Memorial, ¶¶ 332 and 585.

[redacted]

205 Rejoinder, ¶¶ 715-721; Counter-Memorial, ¶¶ 708-711.

139. The first component of the claimed damages is highly speculative as it values the Project as if its future profitability were assured. During the hearing it was demonstrated among other things that, at the valuation date, the Project was in the early stages of development; it had no financing, feasibility studies or mineral reserves; Boskalis, its main service provider, had not been contracted, nor had any investment been made in infrastructure –-*e.g.*, modified dredges or the FPSP Platform-–; the basic engineering had not been completed,[206] nor had the necessary tests been carried out to demonstrate that the product could be successfully commercialized –-*e.g.*, acidulation of the phosphate rock. All of this, which would be a problem for a conventional mining project, is exacerbated by the *sui generis* nature of the Project. It is reiterated that, to date, it has not been possible to successfully implement an offshore phosphate mining and beneficiation operation anywhere in the world.

140. None of these facts have been refuted by Claimant, and this is significant because no reasonably informed hypothetical buyer would have ignored them. A valuation by the DCF method or any other income approach methodology under these conditions would not only go against best practice under internationally recognized valuation guidelines (CIMVAL and VALMIN), but also against the principle of reasonable certainty and the practice adopted by international tribunals in similar cases. Indeed, as explained in Mexico's Rejoinder and opening statements, international tribunals have consistently rejected the income approach to determine damages in cases involving pre-operational stage mining projects in the absence of contemporaneous evidence of future profitability, such as the existence of Mineral Reserves or a Feasibility Study (FS) or Prefeasibility Study (PFS).[207] The overwhelming majority of these tribunals have determined damages based on a cost approach.[208]

141. During the hearing it was also demonstrated that Claimant instructed its damages experts to consider in their valuation the expert reports submitted by Claimant in these

---

206 Transcript, Day 6-Eng, pp. 1456-1457, lines 18-22 and 1-20.

207 Rejoinder, see sections: IV. DAMAGES "C. Burden and standard of proof"; "F. Investor-State cases involving mining projects"; and "G. The Claimant's determination of damages continues to be Speculative - 1. The CIMVAL and VALMIN standards and guidelines". Transcript, Day 1-Spa, p. 157-160, 167, 175-177.

208 Rejoinder, ¶ 515.

proceedings. The problem with this is that the determination of the fair market value of an investment (FMV) is an *ex ante* exercise and therefore cannot be based on information that was not available at the valuation date.[209] Claimant has attempted to circumvent this problem by arguing that the expert reports relied upon by its damages experts are based on information that was available at the time. However, it does not appear to notice that the analysis and conclusions contained in the reports in question constitutes new information that was not available to a hypothetical buyer and seller on the valuation date. To suggest, as Claimant does, that a hypothetical buyer reasonably informed of the facts would have reached the same conclusions as its experts in a due diligence process is deeply speculative and unreasonable. Especially when there is an alternative report, such as the one of WGM, which disputes many of the conclusions of Claimant's experts.

142. The third problem with Claimant's estimates of the FMV of the Project is that they are inconsistent with the measure of compensation that Claimant itself identified as applicable under the full remediation standard –i.e., the FMV of the Project immediately prior to the first denial of the manifestación de impacto ambiental (MIA).[210] As it was demonstrated during the hearing, both Compass Lexecon and Agrifos assume, for purposes of their valuation, that the MIA had been granted.[211] Respondent has explained on several occasions, without receiving any response from Claimant, that this assumption is neither necessary nor appropriate.[212] This is so because the applicable compensation measure eliminates the effects of the alleged expropriation by requiring that the VJM be measured immediately prior to the expropriation. By adopting the assumption of the approval of the MIA, Claimant's experts calculate something other than the fair market value of the Project immediately prior to the expropriation and significantly overstate the damages in this case.[213]

143. A fourth problem with the Compass Lexecon and Agrifos valuations is that they include inferred resources in their valuation. As has been explained throughout this

---

209 Transcript, Day 6-Eng, pp. 1364-1365 and 1438. First Compass Lexecon report, ¶ 6; Agrifos Report, ¶ 6.

210 Claimant Memorial, ¶¶ 373 y 376.

211 Transcript, Day 6-Eng, pp. 1364-1365 y 1438.

212 Counter-Memorial, ¶¶ 628-638; Rejoinder, ¶¶ 490-506, 498, 699.

213 Rejoinder, ¶¶ 497-504.

proceeding, inferred resources have the lowest degree of geological certainty, and the CIMVAL guidelines explicitly state that they should not be considered for valuation purposes.[214] [redacted][215] The Rejoinder in fact identifies one case (Gold Reserve) where the tribunal explicitly concluded that the inferred resources were "too speculative to be included in the present valuation."[216]

144. Agrifos' valuation is not a viable alternative to Compass Lexecon's, because in addition to incorporating the assumption of MIA approval and introducing inferred resources into its analysis, it has fundamental problems that make it difficult to consider in this case. First, Mr. Cotton admitted during the hearing that he did not submit any documentary support for his report. He also admitted (reluctantly) that his valuation is based on a total of two transactions for which there is no public information. He further admitted that he made adjustments to these two transactions that had the effect of increasing the price per ton of phosphate between 56% and 69%, and that he offered no documentary, empirical or theoretical support for these adjustments. Agrifos' valuation cannot be taken seriously under these conditions, and even less so considering that it was submitted after the conclusion of the document production phase, which prevented Respondent from requesting basic information on Agrifos' valuation.

145. Regarding the second and third components of this estimate (*i.e.*, strategic value and lost opportunity), there is not much more to add to what has already been stated in

---

214 **C-0196**, p. 24: "*G4.2 For the Income Approach methods, it is generally acceptable to use all Proven Mineral Reserves and Probable Mineral Reserves, and to use Measured Mineral Resources and Indicated Mineral Resources in the circumstances described below.*" (Note that Measured and Indicated Resources are included but not "Inferred")

215 **C-0084**, p. 72, section 17.6.

216 Rejoinder, ¶ 529. The original English text reads as follows: "*Given that, as described by Respondent, these resources have the 'lowest level of geological confidence' and that the Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties ("CIMVal") Guidelines, to which Claimant refers, acknowledges the 'higher risk or uncertainty' associated with these resources and cautions that they should only be used with great care, the Tribunal finds the additional resources to be too speculative to include in the present valuation.*"

Respondent's submissions. Both categories of damages rely solely on rudimentary and unsupported calculations prepared by Mr. Longley, who not only is neither a damages expert nor has the necessary credentials to provide a damages valuation, but lacks the necessary independence to do so, as he is an employee of Claimant.[217] If Claimant was interested in pursuing these two categories of damages, it should have presented independent expert evidence of their amount.

146. Finally, the calculation of pre- and post-award interest at a rate of 13.95% is completely unfounded and unprecedented in investor-State arbitration. It is noted that this rate is based on the investor's WACC and using it for purposes of determining pre-award interest would have the effect of completely negating Compass Lexecon's discounting of future cash flows. As explained by Dr. Flores (Respondent's damages expert) in his reports and during the hearing, setting the WACC as the pre-award interest rate would compensate Claimant for risks it never took -- *i.e.*, operating the Project. To Respondent's knowledge, no international tribunal has determined interest on the basis of the investor's WACC for precisely this reason.[218]

B. The nature of the claim

147. Claimant remains unclear as to whether the claim is brought on its own behalf under NAFTA Article 1116 or on behalf of ExO under Article 1117. As explained in Respondent's written submissions, this is not a minor issue, as it has implications not only on the type of damages that may be claimed, but on the entity to be compensated in the event of a favorable outcome.[219]

148. In this case Claimant alleges indirect expropriation of its investment[220] and it is normally the owner of the investment who brings a claim of this nature. For this reason, the Tribunal is requested to determine, as alleged in the Rejoinder, that the claim was brought by

---

217 *Id*. Rejoinder, ¶ 722; Counter Memorial, ¶ 332. See also, Witness Statement of Mr. Langley, ¶¶ 33 and 47.

218 Rejoinder, ¶¶ 722-725.

219 Rejoinder, ¶¶ 454, first bullet and 458-462.

220 It also alleges violations of Articles 1105 and 1102, but claims that the damages would be the same. This implies that Claimant considers that such violations had effects tantamount to an expropriation.

Claimant on its own account under Article 1116 and, therefore, that the damages associated with the alleged expropriation are limited to the value of Claimant's shareholding in ExO.[221]

149. In the event that this Tribunal determines that the claim was brought under Article 1117, Respondent requests that the award indicate that the amount should be paid to ExO, as provided for in Article 1135(2)(b).

C. The applicable compensation measure

150. The Parties to this dispute agree that the measure of compensation applicable in this case is the FMV of the investment determined immediately before the expropriation.

151. As noted in paragraphs 491 and 493 of the Rejoinder, Claimant argued in its Memorial that "the appropriate measure of damages, in accordance with the Chorzów Factory standard, is the fair market value of the Don Diego Project prior to the first denial of the MIA by the Secretaría de Medio Ambiente y Recursos Naturales (SEMARNAT)".[222] Claimant alleged that "Compass Lexecon has calculated the compensation payable for Mexico's breaches based on the Project's fair market value at a date immediately before SEMARNAT denied the MIA [...]".[223] Claimant has not modified its position since then.

152. Mexico, for its own part, has argued that NAFTA Article 1110(2) defines the measure of compensation applicable in expropriation cases as "the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier".[224] It also states that such measure is consistent with the standard of full reparation according to the formulation used by the International Court of Justice in the *Chorzów Factory* case in the circumstances of this case. It also noted

---

221 Rejoinder, ¶ 462.

222 Rejoinder, ¶ 491 quoting Claimant Memorial, ¶¶ 373 y 376 (Respondent's translation). The original text in English is as follows: "*the appropriate measure of damages, pursuant to the Chorzów Factory standard, is the fair market value of the Don Diego Project prior to SEMARNAT's first denial of the MIA, regardless of whether the Tribunal finds a breach of only one or of all three of the aforementioned articles*." (Emphasis added).

223 Claimant Memorial, ¶ 380. (Emphasis added).

224 Counter-Memorial, ¶¶ 628-633; Rejoinder, 492-496.

that the measure of compensation specified in Article 1110(2) was essentially the same as the one proposed by the Claimant.[225] The Claimant did not dispute any of these points.

153. The determination of the FMV of the Project immediately prior to the alleged expropriation is not and should not be confused with a counterfactual analysis. The objective is not to determine the FMV that the Project could have achieved in a counterfactual scenario where the EIA would have been approved, but the FMV it had immediately prior to the denial of the EIA.[226] It is neither necessary nor appropriate to make assumptions regarding the expropriation measure since, by design, the compensation measure eliminates its effects by providing that the VJM should be measured immediately prior to expropriation.[227] This was explained in Claimant's submissions and Claimant never controverted the argument.

154. Notwithstanding the foregoing, it is clear that Claimant confuses and/or seeks to confuse the Tribunal as to the manner in which damages are to be determined. On several occasions during opening arguments, Claimant's counsel referred to a counterfactual value/scenario without (apparently) noticing that the measure of compensation they themselves proposed to the Tribunal does not require it:

- Referring to Agrifos' valuation methodology, Claimant's counsel argued: "This method attempts to assess--it addresses the but-for scenario by selecting comparator projects that are fully permitted or if not permitted have no known major regulatory hurdles."[228]
- In discussing Quadrant's market approach, Claimant's counsel argued that it was problematic because: "the market didn't know whether or not the MIA would have been approved, so this method actually cannot tell us the but-for value of the Don Diego Project directly…"[229]
- In advocating the virtues of the discounted cash flow (DCF) method, Claimant noted: "And I would also note that this source of uncertainty does not arise at all with the DCF Method because there, the but-for requirement is addressed by having the model assume that the Project received the MIA."[230]

---

225 Counter-Memorial¶ 631.

226 Claimant Memorial, ¶ 374-375.

227 Rejoinder Memorial, ¶¶ 494-495. This is precisely what Article 1110(2) provides.

228 Transcript, Day 1-Eng, p.70, lines 12-15. [Emphasis added].

229 Transcript, Day 1-Eng, p. 71, lines 4-7. [Emphasis added].

230 Transcript, Day 1-Eng, pp. 71-72, lines 22 and 1-4. [Emphasis added].

- In the context of the adjustments made in the valuation of damages, they pointed out: "*That is not correct because the adjustments that must be made in order to translate the market's valuation of Odyssey in the actual scenario into a but-for valuation of ExO and of the Don Diego Project, introduce more uncertainty than there is in the DCF Approach, where each of the valuation drivers can be scrutinized in detail*."[231]

155. In effect, Claimant, consciously or unconsciously, departed from what it originally characterized as *"the appropriate measure of damages under the Chorzów Factory standard"* by directing its experts to assume, for purposes of their analysis, that the MIA had been approved. During cross-examination both Compass Lexecon and Agrifos -- i.e., Claimant' s damages experts -- confirmed that they adopted this assumption on instructions from Claimant's counsel:[232]

> [Examination of Mr. Cotton:]
>
> Q. Okay the last bullet in the Paragraph 69 [of your Report] indicates that you assumed that the MIA would have been granted; right?
>
> A. That is correct.
>
> Q. Okay. And just to remind--I think we already established that, but this was an instruction that you were instructed to make; correct?
>
> A. It's an instruction--it's an assumption.[233]
>
> Q. So, if the Tribunal were to determine that the value of the Don Diego Project should be determined prior to 7 April 2016, as you point out in Paragraph 2 of your Report, it would follow that the result would be significantly lower; correct?
>
> A. I would say the following: It's a—I understand exactly your question, sir, and it's very clear. I would say the following: In our experience, achieving a permitting milestone does lead to a significant, you know, increase in value.[234]
>
> [Examination of Mr. Spiller:]
>
> Q. […] You should be seeing Paragraph 6 of your First Report, and there you state that you were instructed to compute damages based on the Fair Market Value of the Don Diego Project had it been permitted as of the date of valuation. Do you see that?
>
> A. (Prof. Spiller) Yes.
>
> Q. Do you agree that this assumption, that the Project would be permitted as of the date of valuation, removes all the permitting risks from your analysis?

---

231 Transcript, Day 1-Eng, p. 72, lines 9-16. [Emphasis added].

232 Transcript, Day 6-Eng, pp. 1365- 1366 and 1438, lines 12-22, 1-3 y 6- 18.

233 Transcript, Day 6-Eng, p. 1365, lines 12-19.

234 Transcript, Day 6-Eng, p. 1366, lines 11-20.

> A. (Prof. Spiller) Yes. It removes the main permitting risk.
>
> Q. Okay. Do you agree--and you agree, of course that, removing that risk has a material effect over the value of the Project; correct?
>
> A. (Prof. Spiller) It may. Although to infer exactly what--to say material is something I cannot say, as I am not qualified to assess the merits or not of the MIA.[235]

156. The experts' answers not only reveal the use of the assumption, but the effect it has on the result. Mr. Cotton (Agrifos) accepted that the permit leads to a significant increase in value. Dr. Spiller (Compass Lexecon) acknowledged that the assumption removed risk from the project, which necessarily leads to an increase in value. In fact, Compass Lexecon acknowledged, both on direct and cross-examination, that the approval of the MIA resulted in an increase of approximately 50% in the value of the investment, which it referred to as the "*permit bump*":

> [Direct examination: presentation of Dr. López Zadicoff]
>
> So, what is the value of this project in the market? Well, if permitted, it is 100 million, then I apply a probability of two to three, so the value is $66 million. Okay. Let's assume that a moment later the permit is granted, so what's the value of the asset? Well, we already know, already permitted is $100 million, so 100 compared to 66 is a 50 percent permit bump which is what we apply here.[236]
>
> [Examination of Dr. Spiller]
>
> Q. Okay. In your reconciliation, you attribute 50 percent to that permit bump; correct?
>
> A. (Prof. Spiller) Yeah, that's right. That's for an average project.[237]

157. It is also important to remember that the determination of the FMV of an investment is an *ex ante* analysis, which implies that information that was not available at the valuation date cannot be used. This would include the numerous expert reports that Claimant has submitted in this proceeding because, even assuming they were based on information available at the relevant date, the experts' analysis and conclusions constitute new information that would not have been available to the parties to the hypothetical transaction

---

235 Transcript, Day 6-Eng, pp. 1438-1439, lines 6-22 y 1-3.

236 Transcript, Day 6-Eng, p. 1428, lines 8-15.

237 Transcript, Day 6-Eng, p. 1439 lines 4-7. See also Compass Lexecon First Report, ¶ 121.b.

that is used to derive the FMV. This was pointed out in a timely manner in the Counter-Memorial, Rejoinder and opening statements.[238]

158. Dr. Spiller (of Compass Lexecon) openly acknowledged that his valuation is based on the conclusions of Claimant's experts. In fact, he stated that he was the one who requested the opinions because he wanted to obtain an independent assessment of the views of the company's management:

> Q. Okay. And then you also state there [¶ 7 of his first report] that counsel instructed you to rely, in addition to the Business Plan and the contemporaneous geological marketing and technical data, on the reports prepared by the Claimant's technical and marketing experts. Can you confirm that?
>
> A. (Prof. Spiller) Yeah, that's what I just said.
>
> Q. Okay. And just to clarify, did you request these opinions?
>
> A. (Prof. Spiller) We requested that the Claimant retain experts in all these geological issues so that we can get independent assessment of the management views.[239]

159. The introduction of the assumption about the approval of the MIA and the use of *ex post* information in an *ex ante* analysis implies that what Compass Lexecon and Agrifos calculated is different from the FMV of the investment determined immediately before the expropriation.[240] Rather, it is the value that Claimant expected its investment to achieve but for the denial of the MIA, which is inconsistent with the applicable measure of compensation and inappropriate for determining damages in the event that the Tribunal determines that Mexico is liable for the violations alleged against it.

160. It is reiterated that a reasonably informed hypothetical buyer would not have adopted the assumption about the approval of the EIA to set the price it would be willing to pay for the Project immediately prior to the alleged expropriation. What would have been reasonable would have been for him to take into account the risks existing at that time, which includes the risk that the MIA would be denied.[241]

---

238 Rejoinder, ¶ 488; Counter-Memorial, ¶ 424; Transcript, Day 1-Spa, pp. 161-162, lines 18-22 and 1-5.

239 Transcript, Day 6-Eng, p. 1438, lines 8-21 .

240 Rejoinder, ¶¶ 495, 503-504, 506.

241 Rejoinder, ¶ 501.

161. A reasonably informed hypothetical buyer would also not have taken into account the various expert reports that Claimant has submitted in this arbitration as evidence of the technical and economic feasibility of the Project simply because they were not available in April 2016. All that was available at that time were the contemporaneous documents that Respondent discussed in its Rejoinder[242], which contain numerous warnings about the preliminary nature of the information and the need to carry out several additional studies that were never carried out for reasons that have nothing to do with the EIS.

162. To go no further, [redacted][243] As noted above, there is no evidence that these analyses were even contracted for prior to April 2016.[244]

163. In sum, Respondent's position is that the FMV of the investment should be determined immediately prior to expropriation, as it is an objective value that Claimant itself has identified as *"the appropriate measure of damages under the Chorzów Factory standard"*. The value arrived at by Claimant's damages experts is speculative and inconsistent with the applicable standard, as it involves making assumptions about the approval of the MIA and using new opinions and information on such important issues as the technical and economic feasibility of the Project that would not have been available at the valuation date.

164. Should the Tribunal determine that the measure of damages discussed above is not appropriate under the full reparation standard, Respondent submits that it would be appropriate to determine damages based on the sunk costs of the Project. The cost approach is compatible with the full reparation standard as demonstrated by the numerous decisions

---

242 Rejoinder ¶¶ 588-589; *id*, ¶¶ 592-612 (Boskalis proposal and related documents); *id*, ¶¶ 613-617 (report NI 43-101); *id*, ¶¶ 618-626 [redacted]

243 **C-0084**, p. 77 (section 20.7).

244 Rejoinder, ¶ 617.

issued by recognized international tribunals that have opted for such method in the case of pre-operational mining projects.[245]

D. The principle of reasonable certainty precludes the use of a DCF in the circumstances of this case

165. As explained in Respondent's submissions, the principle of reasonable certainty requires dismissal of excessively speculative claims for damages, even if State responsibility is proven. Respondent has provided several examples in which international tribunals have explained and/or applied such principle, including *Amoco v. Iran*, *Gemplus v. Mexico, BG Group v. Argentina*, *Asian Agricultural Products v. Sri Lanka and* S.D. *Myers v. Canada*.[246] Claimant has not contested either the existence or the applicability of this principle.

166. Claimant's valuation of damages contravenes the principle of reasonable certainty for several reasons that were explained in detail in Respondent's submissions and during the hearing. Most notably the choice of income approach methodologies (DCF and ROV) given the absence of the necessary conditions to apply them.

167. The principle of reasonable certainty requires contemporaneous evidence of the future profitability of the investment, since only then would a hypothetical buyer and seller be willing to price the transaction on the basis of future flows from the investment. Normally, the future profitability of an investment is demonstrated by a proven track record of profitable transactions, and numerous international courts have identified the existence of such a track record as a requirement for using a DCF.[247] In this case, there is no such history because the Project was at least two years away from starting operations.

168. While it is true that some international tribunals have used DCFs in the absence of a history of profitable operations, this does not mean that the principle of reasonable certainty has been ignored. In the context of pre-operational mining projects, Respondent has demonstrated that international tribunals require the existence of Mineral Reserves and/or

---

245 *See* Rejoinder, chart of ¶ 514.

246 Transcript, Day 1- Spa, pp. 167 and 168, lines 8-22 and 1-7; RD-001, slides 63 and 64; Counter-Memorial, ¶ 644.

247 Counter-Memorial, ¶ 645. *See* also Rejoinder, section "IV. DAMAGES – F. Investor-state cases involving mining projects".

contemporaneous technical and economic feasibility studies (FS or PFS).[248] In fact, as noted in the Rejoinder, there is not a single case in which a tribunal has used a DCF to value a pre-operational stage mining project in the absence of Reserves and/or Feasibility Studies. Claimant has not refuted this point.[249]

169. Claimant is aware of the enormous problem posed by the absence of contemporaneous evidence of the Project's future profitability to justify the use of a DCF. It has therefore sought to justify its valuation approach under the CIMVAL and VALMIN guidelines. Unfortunately for it, these guidelines also do not support its position as explained below.

E. The CIMVAL and VALMIN guidelines do not allow a discounted cash flow valuation in the circumstances of this case

170. The existence of at least a Prefeasibility Study is not only a requirement under international practice in investment arbitration for the use of a DCF, it is also a requirement under the CIMVAL and VALMIN guidelines. As can be seen from the table below, the guidelines do not allow the income approach for Exploration Properties; they only allow it for Development Properties and Production Properties (last two columns) and only "in some cases" for Mineral Resource Properties. Hence the importance of determining the stage of the Project:

TABLE 1. Valuation Approaches for Different Types of Mineral Properties

Valuation Approach	Exploration Properties	Mineral Resource Properties	Development Properties	Production Properties
Income	No	In some cases	Yes	Yes
Market	Yes	Yes	Yes	Yes
Cost	Yes	In some cases	No	No

171. The available evidence points preponderantly to the fact that the Project was at the exploration stage. The Tribunal need not rely on WGM's opinion to reach this conclusion; it would suffice for it to consider the contemporaneous statements of Claimant and its experts.

---

248 Rejoinder, ¶ 514. *See* section "IV. DAMAGES - F. Investor-state cases involving mining projects".

249 *Id.*

[redacted][250] In its 2015 annual report to the U.S. Securities and Exchange Commission (SEC) the Claimant itself noted: *"we [Odyssey] have invested in marine mineral companies that to date are still in the exploration phase and have not begun to earn revenue from operations."*[251]

172. But even if doubts persist as to the stage of the Project, it would suffice to examine the text of the CIMVAL and VALMIN guidelines to eliminate them. As explained in paragraph 569 of the Rejoinder, CIMVAL defines Property under Development as "*a Mineral Property that is being prepared for mineral production and for which economic viability has been demonstrated by a Feasibility Study or Prefeasibility Study*". VALMIN defines "Projects in Development" as: "*[t]enure holdings for which a decision has been made to proceed with construction or production or both, but which are not yet commissioned or operating at design levels. Economic viability of Development Projects will be proven by at least a Pre-Feasibility Study*."

173. Despite the fact that the Project did not have a Prefeasibility Study at the valuation date, Claimant has misleadingly argued that the Project was a Development Property. For example, in the Memorial it stated: "based on these expert opinions, Professor Spiller and Mr. López Zadicoff concluded that Phase I of the Project is properly classified as a Development Property/Project, and therefore that it should be valued using an income approach."[252]

174. During opening statements, Claimant's counsel went even further, stating that the Project was in the "Development Stage" under CIMVAL and VALMIN's guidelines because it was a Mineral Property whose economic viability had been demonstrated by means of a Prefeasibility Study:

> The evidence also is clear that Don Diego was a development-stage project. Both CIMVAl and VALMIN acknowledged that a project is at the development stage

250 Rejoinder, ¶ 582; Counter-Memorial, ¶¶ 678-679; **C-0084**, p. 13.

251 Rejoinder, ¶ 582.

252 Memorial, ¶ 388.

> if it's a Mineral Property for which economic viability has been established by a Pre-Feasibility Study, which we have here.[253] [Emphasis added]

175. In direct contrast to the above, Dr. Spiller (of Compass Lexecon) acknowledged that there was no document in the file that met the definition of *"Pre-feasibility Study"* according to CIMVAL:

> Q. […] Now, can you point to any document on file that fits that description [i.e., CIMVAL's definition of Pre-Feasibility Study]?
>
> A. (Prof. Spiller) No. The Company has not declared Mineral Reserves yet.
>
> Q. And it does not have--it didn't have a Pre-Feasibility Study; right?
>
> A. (Prof. Spiller) Not that--not a formal Pre-Feasibility Study done, yet--meaning written yet, no--at least at Date of Valuation, at least.[254] [Emphasis added]

176. Dr. Flores (of Quadrant Economics) confirmed that there was no Prefeasibility Study and clarified that this was not his opinion, as suggested by Claimant's counsel:

> Q. […] So, you cite the CIMVAL definition in Paragraph 46, and then in subsequent paragraphs you develop a point that this definition is relevant to whether or not the DCF Method can be used because, in your view, Don Diego did not have a Pre-Feasibility Study; right?
>
> A. No. It's not in my view. I mean, it's a factual point that Don Diego did not have a Feasibility Study or a Pre-Feasibility Study. That's not a matter of opinion. It's a matter of fact.[255] [Emphasis added]

177. Despite their knowledge that there was no Prefeasibility Study in this case, Claimant's counsel pointed out in their opening statements that both CIMVAL and VALMIN explicitly acknowledge that the revenue approach is appropriate for projects that have not begun production.[256] This is inaccurate at best and misleading at worst.

178. Respondent explained in the Rejoinder that the CIMVAL guidelines only recommend the income approach for Development Properties (which the Project was not) and only "in some cases" for Mineral Resource Properties.[257] While the Claimant acknowledged the above, it misleadingly suggested that the guidelines "don't tell us exactly what this means",

---

253 Transcript, Day 1-Eng, p. 75, lines 2-7.

254 Transcript, Day 6-Eng, p. 1450, lines 3-11.

255 Transcript, Day 6-Eng, pp. 1520-1521, lines 22 and 1-9.

256 Transcript, Day 1-Eng, p. 74, lines 12-16.

257 Rejoinder, ¶ 566

and concluded that the revenue approach is appropriate when all that is needed is to integrate all the data into a single report:

> Now, it is true that CIMVAL and VALMIN say that the Income Approach can be used for pre-development projects in some cases and they don't tell us exactly what that means. But I would submit that when the only thing that was even arguably lacking to be at the development stage was pulling all of the data together into a single report that is clearly the type of case where the Income Approach is appropriate.[258]

179. The above completely ignores that the CIMVAL defines, in sections G4.4 and G4.5, the conditions that must be met for the use of "Mineral Resources" in a DCF, namely: (i) when there are Reserves and these are extracted before the Mineral Resources and/or; (ii) when there is an opinion from a Qualified Person that the extraction of the Mineral Resources is likely to be economically viable.[259] In this case, there were no Reserves, nor the opinion of a Qualified Person in the required sense at the valuation date. Given the above, it is clear that the Project is not one of those cases where the CIMVAL guidelines allow the use of the income approach.

180. Faced with the impossibility of proving that the conditions that international tribunals and guidelines require for the use of income methodologies existed, Claimant has been forced to argue that the information available at the valuation date was at a "pre-feasibility level."[260] With this, Claimant seeks to equate the existence of a formal Prefeasibility Study with the existence of the information that would have been necessary to prepare it. This false equivalence cannot and should not be accepted by this Tribunal.

181. A Prefeasibility Study is a "comprehensive study" that includes "a financial analysis based on reasonable assumptions about technical, engineering, operational and economic factors and the evaluation of other relevant factors that are sufficient for a Qualified Person, acting reasonably, to determine whether all or part of the Mineral Resources can be classified as Mineral Reserves".[261] In this regard, it should only be noted that, as of the valuation date,

---

258 Transcript, Day 1-Eng, p. 79, lines 2-10.

259 Rejoinder, ¶¶ 571 and 573. CIMVAL Standards and Guidelines 2003, p. 24. **C-0196**.

260 *See*, for example, Transcript, Day 1-Eng, pp. 75-76, 80, lines 2-22, 10-20 and 9-15; Rejoinder, ¶¶ 13, 375, 380-381, 385.

261 **C-0196**, p. 10.

there was no such study and/or a Qualified Person's opinion determining that part or all of the Mineral Resources identified by Dr. Lamb could be classified as Mineral Reserves.

182. Dr. Selby's opinion was submitted to address this deficiency, however, even putting aside for the moment the fact that this is information not available at the valuation date, it is clear that he himself does not dare to state the existence of Reserves at the valuation date. At most he goes so far as to state that "it is reasonable to assume that there will be a high conversion rate [90% to 95%] of Indicated Resources to Probable Reserves, subject to permitting, effective processing and subsequent commercialisation".[262] This last condition is relevant because there is also no contemporaneous evidence to show that, as of the valuation date, ExO would have been able to obtain the remaining permits, or that there would be effective processing, or that the product it intended to produce could have been marketed.

183. Finally, Respondent briefly refers to a document (CLEX-37) that was cited in Compass Lexecon's direct examination and was also the subject of a line of questioning that Claimant put to Dr. Flores. This document shows the results of a survey prepared by the Canadian Institute of Mining (CIM) that Claimant and Compass Lexecon used to imply that the revenue approach is the most widely used approach in practice for Mineral Resource Properties.[263] Claimant does not seem to notice that the document is a survey prepared in 2005, i.e. 11 years before the valuation date, was applied to a total of 22 individuals and that CIMVAL states that the income approach is admissible in "some cases". As Dr. Flores explained in response to the Respondent's question:

> A. According to the survey respondents, yes, but, as I said in my presentation, you have to take into account was the Market Approach available or recommended or not. It's fact-specific to each valuation that you're conducting.[264]

---

262 First report from Dr. Selby, ¶ 84. Respondent's translation, original in English: "*it is reasonable to assume that there will be a very high conversion rate from Indicated Resource to Probable Reserves, subject to permitting, effective processing and downstream commercialisation*."

263 Transcript, Day 6-Eng, pp. 1410, 1515, lines 1-7 and 18-21.

264 Transcript, Day 6-Eng, p. 1517, lines 4-8.

F. The technical and economic feasibility of the Project had not been demonstrated as of the valuation date.

184. It is undisputed that no one anywhere in the world has implemented an operation similar to the one Claimant sought to implement in Mexico. In fact, as Dr. Flores pointed out in his direct examination, two companies dedicated to the production and commercialization of phosphate had mining concessions adjacent to Claimant's, which they explored and subsequently abandoned.[265] It was, therefore, a production and business model that had not been successfully tested.

185. Claimant attempts to brush aside the implications of the foregoing by arguing that the method of extraction -- i.e., dredging -- has been around for a long time; that Boskalis is a reputable company in that area; and that the beneficiation techniques to achieve a marketable product were also well known and widely used onshore. However, it is an uncontroversial fact that the beneficiation processes intended to be used have never been used on board a Floating Production and Storage Plant (FPSP) Processing Platform and, therefore, it is unknown whether they would have been able to operate with the efficiency required for the Project to be economically viable. It should be recalled that, for successful commercialization, phosphate rock must have certain technical specifications including: a minimum phosphate content, a maximum moisture level and absence of undesirable elements.

186. To avoid unnecessary repetition, Respondent will not refer here to the analysis of the contemporaneous evidence included in its pleadings, but requests the Tribunal to take it into account for its decision.[266] In sum, Respondent reiterates that the contemporaneous documents demonstrate that the Project was in early stages of development and the technical or economic viability of the Project had not been demonstrated at the valuation date. Respondent will confine itself in this section to discussing the evidence provided by Mr. Bryson during the hearing.

---

265 Transcript, Day 6-Eng, p. 1479, lines 1-10.

266 Counter-Memorial, ¶¶ 655-658, 678-680 and Rejoinder section "IV. Damages – G.3 The contemporary evidence does not demonstrate the economic and technical feasibility of the Project."

187. In connection with the beneficiation process aboard the FPSP, Mr. Bryson stated in his witness statements that Boskalis had contacted its machinery suppliers -- specifically Weir Minerals and B&D Process[267]– to verify the tolerances of the machines, and to make sure that they could operate on the high seas. However, during his cross-examination he acknowledged that:

- Boskalis' proposal does not mention such suppliers anywhere;[268]
- he did not cite or present any documents to corroborate his testimony (e.g., communications with Boskalis on this point);[269]
- his testimony was based on what the suppliers allegedly told Boskalis and Boskalis allegedly communicated to him eight years ago (i.e., double "hearsay");[270]
- no Boskalis representative filed a statement in these proceedings;[271]

188. Therefore, Mr. Bryson's statement to the effect that [redacted][272] rests exclusively on his own statement.

189. The drying process was also addressed during Mr. Bryson's cross-examination. [redacted] Mr. Bryson testified about the tests conducted to show that [redacted] was possible, however, during his cross-examination, he acknowledged that the tests conducted in Germany [redacted][273], [redacted]

267 First WS of Mr. Bryson, ¶ 99. Mr. Bryson also notes that Boskalis consulted with DRA Global, SGS Bateman and Metso.

268 Transcript, Day 2-Eng, p. 380, lines 1-10.

269 Transcript, Day 2-Eng, p. 380, lines 4-6.

270 Transcript, Day 2-Eng, pp. 380-381, lines 21-22 and 17-21.

271 Transcript, Day 2-Eng, pp. 381-382, lines 22 and 1-2.

272 First WS of Mr. Bryson, ¶ 100; Transcript, Day 2-Eng, p. 382, lines 8-22.

273 First WS of Mr. Bryson, ¶ 109. Transcript, Day 2-Eng, pp. 394-399, lines 10-20 and 1.

[redacted][274]. This implies more storage capacity at the FPSP, which restricts production capacity.[275]

[redacted][276].

190. During Mr. Bryson's cross-examination, the tests performed by Boskalis to determine the phosphate content were also discussed. Claimant has relied on these tests to argue that Boskalis somehow validated its results.[277] Mr. Bryson states in his witness statement that Boskalis was given a representative sample of the phosphate sands, but during his cross-examination he acknowledged that he was not involved in the preparation and delivery of the sample. He also acknowledged that Boskalis' proposal indicates that it did not receive samples taken at various depths and notes that further testing was required, which would not have been necessary if the sample originally provided to Boskalis was representative as Mr. Bryson asserted in his statement.[278]

191. Mr. Bryson also acknowledged that what he stated in his witness statement about the interest shown by some *bulk carriers* was unsupported.[279] He admitted that he did not submit any documents, that he did not provide copies of the communications he had with those carriers and that none of them, in particular Oldendorff, provided a witness statement in this

274 Transcript, Day 2-Eng, pp. 397-399, lines 1-3 and 12-21.

275 Transcript, Day 2-Eng, p. 399 lines 14-22.

276 Transcript, Day 2-Eng, p. 399, lines 7-22.

277 Memorial, ¶ 69.

278 Transcript, Day 2-Eng, pp. 373-376, 422.

279 Transcript, Day 2-Eng, p. 404, lines 3-12. First WS of Mr. Bryson, ¶ 124.

case.[280] As with the alleged consultations with suppliers of separation machinery, the allegations about the interest shown by the transporters rest exclusively on Mr. Bryson's statement.

192. Mr. Bryson was also questioned about the exclusivity agreement between Boskalis and OMO and the feasibility studies that would be conducted once the agreement was signed. On the agreement with Boskalis he testified that he was not a party to those discussions[281], however, he acknowledged that Odyssey/ExO only had access to "*high-level price quotations"* and basic engineering, and that a hypothetical buyer interested in acquiring the Project at the valuation date would only have access to that information.[282] This is relevant because it is highly unlikely that a hypothetical buyer would have been willing to pay more than two billion dollars for a project based on preliminary budgets and without basic engineering of the Project.

193. When asked about the study -- i.e., the "sub-study" mentioned in the exclusivity agreement – to demonstrate the viability of the business, Mr. Bryson asserted that the study had been conducted, but it was not introduced into evidence in these proceedings. Even assuming the study exists -- which is highly doubtful -- it is clear that if it was not available to Odyssey and ExO it would also not have been available to a hypothetical buyer on the valuation date to inform the purchase decision.

194. Finally, Mr. Bryson acknowledged that the Project underwent many changes since the initial proposal. Regarding the use of dredges, he acknowledged that the option presented to SEMARNAT for evaluation in the MIA was different from the one taken into account [redacted][284] This means that even if SEMARNAT had

280 Transcript, Day 2-Eng, p. 404, lines 13-15.

281 Transcript, Day 2-Eng, p. 406, lines 5-8.

282 Transcript, Day 2-Eng, pp. 406-408.

283 Transcript, Day 2-Eng, p. 414, lines 16-21.

284 Transcript, Day 2-Eng, pp. 414-415.

approved the project presented to it, Odyssey/Exo would have had to request SEMARNAT's approval for the changes described [redacted]

G. Claimant's valuations introduce an unacceptable level of speculation by including Inferred Resources in its analysis

195. As stated above, one of the main problems with Claimant's damage estimate is that it includes Inferred Resources that have the lowest degree of geological certainty and cannot be used in economic analysis without first being reclassified as Measured or Indicated Resources. The CIMVAL guidelines are very clear on the type of resources that can be used in valuations using the income approach:

> G4.2 For the Income Approach methods, it is generally acceptable to use all Proven Mineral Reserves and Probable Mineral Reserves, and to use Measured Mineral Resources and Indicated Mineral Resources in the circumstances described below.[285]

196. Respondent has already referred to some of the "circumstances" referred to in this citation to consider Mineral Resources (rules G4.4 and G4.5). During cross-examination of WGM, Claimant took Respondent's expert to rule G4.8 confirming that only Measured and Indicated Resources can be included in analysis and only if the provisions of rules G4.3 to G4.7 are met:

> Q. I just wanted the record to be clear, sir, that it's not only if there are Reserves, this is also an and/or if Measured and Indicated Resources are used as specified in G4.3 to G4.7?
>
> A. (Mr. Hinzer) Correct.[286]

197. As noted above, rules G4.3 and G4.4 provide that Mineral Resources may be used in a valuation provided that: (i) Reserves exist and are mined before the Mineral Resources (rule G4.4) and (ii) that, in the opinion of a Qualified Person, there is a high probability that the Mineral Resources are economically viable. It is reiterated that none of these conditions were met at the valuation date.

198. It is again observed that the volume of Inferred Resources in this case is very significant. In its reports, Compass Lexecon considers 166.4 million mt of Inferred

---

285 **C-0196**, p. 24.

286 Transcript, Day 5-Eng, p. 1200, lines 16-20.

Resources, representing [redacted][287] Agrifos, for its part, not only considers Inferred Resources, but also takes into consideration the northern part of the concession that was not part of Dr. Lamb's NI 43-101 report.[288] This means that there is not even a Qualified Person's opinion attesting to the existence and volume of these resources.

H. Agrifos' alternative valuation is highly speculative, lacks support and, therefore, cannot be considered by this Tribunal

199. During Mr. Cotton's cross-examination, it was established that Agrifos' valuation is an opaque, unsubstantiated and idiosyncratic exercise. Respondent had already stated in the Rejoinder[289] the four main problems with the Agrifos report: (i) it is not supported by evidence; (ii) it is based on two private transactions for which no public information is available; (iii) it applies certain qualitative premiums to the alleged comparable transactions that have no support in the literature or in practice, and are based solely on Agrifos' allegedly extensive experience; and (iv) it includes Inferred Resources in the analysis. Respondent will address these issues in the same order.

200. First, Mr. Cotton openly admitted that he did not include a single document as an annex to his report and that he did not identify a single source of the information he used for his valuation:

> Q. And can you confirm that you did not attach or submit documents as exhibits to your Report?
>
> A. That's correct. […][290]
>
> Q. Okay. However, you did not identify a single document related to the comparable transactions you used in your analysis; correct?
>
> A. That's right.[291]

201. This is quite unusual for a valuation based on comparable transactions because the methodology consists of identifying suitable comparables and making appropriate adjustments to compensate for observed differences. In order to validate the comparability of the proposed set of transactions, complete information is required on each transaction,

---

287 Second report of Quadrant Economics, ¶ 94.

288 Second report of Quadrant Economics, ¶ 263.

289 Rejoinder, ¶¶ 696-707.

290 Transcript, Day 5-Ing, p. 1325, lines 16-18.

291 Transcript, Day 5-Ing, p. 1333, lines 5-8.

including the terms and conditions, as well as the underlying assets. Agrifos simply did not provide the necessary information to support and/or evaluate its analysis. For this reason alone, Agrifos' report cannot be considered a reliable exercise.

202. Second, Mr. Cotton attempted to mislead the Tribunal during his cross-examination by claiming that his analysis was based on 9 comparable transactions when, in fact, it was based on only two private transactions: Hinda and Boabab. In the first part of his cross-examination, Mr. Cotton was asked to confirm whether the Hinda transaction was one of the two transactions used to determine the value of Don Diego. Mr. Cotton responded:

> A. No. I used nine transactions or companies to determine the value. I focused or called out Hinda and Baobab as the most comparable, but I think it would be a mistake to say that those were the only two that we used.[292]

203. The next morning, Mr. Cotton's calculation was analyzed step by step in order to arrive at the range of values he proposed for the Don Diego Project and he reluctantly admitted that those values were derived from only two transactions:

> Q. Okay. But just to confirm, the average that you used to derive the [redacted] were--was taken from the average of Baobab and Hinda only; correct?
>
> A. Yes. I think--I think we've established mathematically that that's where it comes from.[293]

204. The Tribunal can easily confirm that the range of values proposed by Agrifos for the Don Diego Project - i.e. [redacted] - is based solely on the Hinda and Baobab transactions by looking at the table at the bottom of page 35 of Agrifos' report and the description of that calculation in the following paragraph. Both are reproduced below for the convenience of the Tribunal:

---

292 Transcript, Day 5-Eng, p. 1336, lines 6-10.

293 Transcript, Day 6-Eng, pp. 1355– 1356, lines 20-22 and 1-3.

[redacted][294]

205. [redacted]

206. [redacted]

207. It is also important to note that the information on these transactions is not publicly available. The amount of the Hilda transaction, for example, was communicated to Agrifos by one of the parties of the transaction, as indicated in the last row, second column of the table in Appendix C of his report, however, the terms and conditions of the transaction remain a mystery. During his direct examination, Dr. Flores explained that it is important to know

294 Agrifos Report, pp. 35-36.

the terms and conditions of a given transaction, as these often have an impact on the agreed value:

> My main problem with Hinda is that I do not know the terms and conditions of the supposed transaction. We only know it from what they told us. That they heard from a friend who works somewhere that was a participant in the transaction. I'm not saying that anyone is lying by any means, but the problem is that if you hear someone telling you, "Look, I sold my company for $10 million," you cannot just go down and write down $10 million. I need to see the terms. It's not the same if I sell my company to you for $10 million and you write me a check, or you give me the cash today, then if you say, okay, I will pay you $1 million in cash and the other $9 million are based on contingencies that may or may not happen over the next five years. You still may say to your friend, yes, I sold it for $10 million, but it's not the same economic value in both transactions. That's why I think the Hinda transaction, which is one of the only two that is used in the numerical calculations to arrive at the valuation conclusion of Agrifos, I think that cannot be used as a measure of value.[295]

208. Mr. Cotton also confirmed during his cross-examination that none of the companies listed in Appendix C is a public company.[296] It follows that the details of these transactions cannot be verified through public disclosures such as reports filed with the SEC. Contrary to what Claimant's counsel and Mr. Cotton suggested during the second direct examination[297], the details of the transactions cannot be obtained through a simple Google search. In any event, it is not the Respondent's task to gather the evidence necessary to verify the Claimant's estimate. Each party has the burden of proof and the Claimant, as far as Mr. Cotton's report is concerned, has not discharged this burden.

209. Third, Agrifos applies a [redacted] control premium to the two transactions used to derive the range of values, and not content with that, adds an additional [redacted] to arrive at the high and low values reported in the table on page 35 of his report (reproduced above). During his cross-examination, Mr. Cotton admitted that he did not cite any documents to support the addition of the control premium, and confirmed that it was based on his experience, although he also failed to identify a transaction in which the [redacted] premium was applied:

> Q. You did not identify any transaction that you know of where this [redacted] Premium was applied and accepted by the Parties to that transaction; correct?

---

295 Transcript, Day 6-Eng, pp. 1503-1504, lines 22 and 1-21.

296 Transcript, Day 5-Eng, pp. 1334- 1335, lines 21- 22 and 1.

297 Transcript, Day 6-Eng, p. 1386, lines 7-19.

A. No, we did not identify any specific transaction.

Q. And you also did not provide any theoretical or evidentiary support for the addition of a Controlled [control] Premium of this magnitude; correct?

A. No. I referred simply to our experience.[298]

210. He also admitted that the additional premiums – i.e. [redacted] – were qualitative in nature, had no underlying support and were also based solely on his experience:

Q. How did you determine the proper range for the premiums, the [redacted] and not some other percentages?

A. Yes, it's of necessity because it's qualitative rather than quantitative, in the sense that there are no metrics that are easy to do math on to compare the Don Diego to other projects for these qualitative aspects. It was necessarily an estimation based on our experience, and I believe in my presentation yesterday I talked a little bit why we thought it was reasonable, and if anything, perhaps conservative. That said, of course it's an estimate based on our experience, and I think we've been very—very clear about that.

Q. So, there was no theoretical or evidentiary support for these premiums, for the magnitude of these premiums; correct?

A. Not for a mathematical derivation of them. […][299]

211. To put this in perspective, the "low value" is the result of applying a [redacted] over the average of the Hinda and Baobab transactions, while the "high value" is the result of applying a [redacted] over the original value of the transactions.[300] "Qualitative" adjustments of this magnitude based solely on an expert´s unproven experience are highly speculative. No reasonably informed hypothetical buyer would accept a valuation of this nature.

212. If this were not enough, during Mr. Cotton's cross-examination it was further demonstrated that the comparable transactions he claimed to have used for his valuation involved projects are substantially different from the Don Diego Project. For example, Mr.

---

298 Transcript, Day 6-Eng, pp. 1355-1356, lines 16-22 and 1-3.

299 Transcript, Day 6-Eng, pp. 1363-1364, lines 5-22 and 1.

300 The combined premium of [redacted] for the low value is obtained by multiplying the control premium [redacted] by the qualitative premium of [redacted] The combined premium of [redacted] for the high value is obtained by multiplying the control premium [redacted] by the qualitative premium also of [redacted] Mr. Cotton confirmed at the Hearing that the premiums were applied one on top of the other, Transcript, Day 6-Eng, p.1358 (4-8)

Cotton confirmed that none of the nine comparables he claims to have used involved offshore extraction activities.[301] [redacted].[304] Notwithstanding these obvious differences, Mr. Cotton did not make any adjustments to his comparables.

213. Another point to highlight from Mr. Cotton's valuation is that he acknowledged that NI 43-101 reports, such as Dr. Lamb's, do not allow the use of Inferred Resources. However, without any justification beyond "his expertise" and without any documentary support, he decided to include Inferred Resources as part of his valuation. By using Inferred Resources, Agrifos artificially increases the volume of resources by [redacted][305] and, therefore, the value of the Don Diego Project:

> Q. Okay. Your valuation analysis does consider a significant proportion of Inferred Resources; correct?
>
> A. For both Don Diego and all the other projects, that's correct. I mean, I would simply say that the fact that NI 43-101 reports are not allowed to use Inferred Resources, is not a barrier to transaction counter-parties actually using them. And in my experience, they do use them all the time, so I appreciate the rigidity of the reporting guidelines, you know, prevents Mr. Lamb from commenting on their economic value or WGM or people trying to produce reports like this, but that's not how the practice actually takes place in the marketplace.[306]

214. Likewise, Agrifos completely ignores what was stated in NI 43-101 regarding the stage of development of the Don Diego Project. Without further justification, Mr. Cotton stated during the Hearing that it was in a "post exploration – pre-development" stage contrary to Dr. Lamb's and Mr. Bryson's statements:

> Q. So, the Project was in Exploration Stage, according to Dr. Lamb, and there were detailed plans to continue exploration to further prove out the resource, according to Mr. Bryson.

---

301 Transcript, Day 6-Eng, pp. 1370 – 1371, lines 13-22 and 1.

302 Transcript, Day 6-Eng, p. 1371, lines 2-5.

303 Transcript, Day 6-Eng, p. 1371, lines 6-9.

304 Transcript, Day 6-Eng, pp. 1373– 1375.

305 Rejoinder Memorial, ¶ 705.

306 Transcript, Day 6-Eng, p. 1378, lines 6-19.

> A. Yes.
>
> Q. And yet you conclude, without citing anything, that the Project was in post-exploration and pre-development; is that correct?
>
> A. Well, as I've just explained, in our Report where we say that, I believe we clarified that exploration would be ongoing, that the bulk of exploration needed to adequately define the resource for purposes of knowing, in broad terms, with enough detail and enough accuracy, but not to the last decimal place, that that work had been done, and I stand by that statement. […] So, when we talk about exploration projects in the real world, we're talking about people who had just obtained a concession, maybe have a couple of drillholes, and have a lot more work to do in terms of drilling and exploration analysis even to know, vaguely speaking, what kind of resource they have. Don Diego is well past that.[307]

215. In addition to all these defects, Mr. Cotton started from a premise, as explained above, that is inadmissible in this case. Indeed, Mr. Cotton confirmed that for his valuation he assumed that the MIA would have been granted and recognized that obtaining permits leads to a significant increase in value:[308]

> Q. So, do you agree that, prior to 7 April 2016, a hypothetical buyer would have no information or documents regarding the Denial of Odyssey's Environmental Permit?
>
> A. Strictly speaking, if it was prior to 4 April 7th, then they would not have that information, no.
>
> Q. Okay. But you made that assumption under instructions; correct? That the MIA would be approved?
>
> A. Correct.[309]

216. As a final comment, Respondent would like to state that Mr. Cotton recognized that he has no academic background in valuation or experience as a valuation expert.[310] Furthermore, Agrifos' alleged extensive experience in the phosphate market is not a proven fact. During his direct examination, Mr. Cotton stated that Agrifos had participated in 40 financing and M&A transactions totaling USD $6 billion. [311] However, Appendix A (Agrifos Partners) of his report is sparse on details and certainly does not identify any specific examples of any of these alleged transactions.[312] No evidence has been submitted to support

---

307 Transcript, Day 6-Eng, pp. 1381-1383.

308 Transcript, Day 6-Eng, p. 1366 lines 11-20.

309 Transcript, Day 5-Eng, pp. 1323-1324, lines 21-22 and 1-9.

310 Transcript, Day 5-Eng, p. 1322, lines 7-8.

311 **CD-0004**, p. 2 (p. 3 of the pdf).

312 Agrifos Report, Appendix A, pp. 38-39 (43-44 of the pdf).

Agrifos' alleged involvement in transactions of "over 100 million tons of phosphate rock"[313] or of Mr. Cotton's direct involvement in "buying and selling about 10 millions tons of phosphate fertilizer".[314] More importantly, none of this is mentioned in Appendix A describing Agrifos Partners' credentials and experience.

I. Conclusions on the different valuations presented in this proceeding

217. In conclusion, Compass Lexecon's valuation is not appropriate for determining damages in this case because it ignores the preliminary nature of the contemporaneous evidence – i.e., the Boskalis proposal, Dr. Lamb's NI 43-101 report and the [redacted] – and the multiple observations and warnings contained therein.[315] For example, Compass Lexecon adopts Dr. Lamb's report (sometimes identified as the MRA Report or NI 43-101) as a reasonable estimate of the resource volume, but does not take into consideration observations contained in the same report about the impossibility of considering inferred resources or the status of the project.

218. Compass Lexecon relies on [redacted] as if it were an objective, accurate and independent valuation of the value of the concession, without stating that it was prepared by Odyssey and is unreliable. Indeed, during his cross-examination, Dr. Spiller recognized, for example, that his valuation for Phase I [redacted].[316] Under these conditions, no reasonably informed hypothetical buyer would have placed the slightest reliance on the [redacted] parameters and results.

219. To give a better idea of the precariousness of the information available at the valuation date, [redacted]

313 **CD-0004**, p. 2 (p. 3 of the pdf).

314 **CD-0004**, p. 2 (p. 3 of the pdf).

315 *See*, Rejoinder Memorial section "IV. DAMAGES –G.3 The contemporary evidence does not demonstrate the economic and technical feasibility of the Project".

316 Transcript, Day 6-Eng, pp. 1451-1452 lines 21-22 and 1-6.

[redacted][317] On May 19, 2015, Jacobs Engineering conducted an acidulation test but warned, "This test was not conducted according to Jacob's standard testing procedure, but rather as a very small scale experiment." [318]

220. Compass Lexecon's valuation is also inappropriate because it assumes that the MIA would have been granted, thereby contravening the measure of damages; it follows a valuation approach that is not acceptable under the principle of reasonable certainty, nor under the valuation guidelines developed by CIMVAL and VALMIN; it includes Inferred Resources and, it is based on expert reports that were not available at the valuation date and were prepared for purposes of this proceeding.

221. Agrifo's alternative valuation is unsubstantiated; it is based on two private transactions for which no information or evidence was provided; it applies significant adjustments for which there is no theoretical, empirical or documentary evidence; it includes Inferred Resources in the analysis (even more than Compass Lexecon[319]) and, like Compass Lexecon, it proceeds under the assumption that the MIA had been approved. All of this translates into a valuation that is not only overly speculative, but unverifiable.

222. Dr. Flores, for his part, offers two valuation alternatives. The first is a valuation based on Odyssey's market capitalization that places the value of Odyssey's equity interest in ExO for USD $43.2 million[320]. Claimant has criticized this valuation because it uses a "secondary method" under the CIMVAL guidelines, however, it is necessary to take into account what the expert stated during his direct examination:

> Now, why do we not see the Market Capitalization Method used more often in international arbitration? For two reasons. There's many mining projects that are owned or operated by companies that are not publicly traded so then you don't have a Market Capitalization because you don't have a share price.
>
> There is also other mining projects that are owned by companies who own hundreds of mining projects around the world. For example, Glencore, I had been in arbitrations involving the company Glencore. Glencore is a mining company

317 **C-0134,** p. 14.

318 **C-0469**, p. 2 (5 of pdf).

319 Quadrant Economics Second Report, ¶ 263.

320 Quadrant Economics First Report, ¶¶ 50-64; Quadrant Economics Second Report, ¶¶ 121-123; Quadrant Economics Presentation at the Hearing, p. 18.

> that has over 150 mining projects. So, what happens to one of those mining projects will not be seen in the overall Market Capitalization of the company.
>
> So, based on this, I believe that the Market Capitalization is the appropriate method in this case.
>
> Now, Claimants made a point in their Opening on Monday that, look, the mining guidelines call it this is a secondary matter, but it's secondary for the very same reason I explained to you, that in most instances you cannot use it because it's either the mine is not publicly traded or it's publicly traded alongside 150 other mining projects. But when you have the right circumstances, as we do in this case, the Market Capitalization is appropriate.
>
> Next. The advantages of this method is, as I said, that it reflects the contemporaneous views of many market participants, but it doesn't require relying on Expert Reports prepared six-seven years after the fact.
>
> And also that it's an all-encompassing value. It includes the value of Phase I, Phase II, the alleged Strategic Value and the alleged Lost Opportunity. Whatever value those heads of damages had as of Valuation Date, that value was already captured in Odyssey's Market Capitalization.[321]

223. Dr. Flores' analysis is based on Odyssey's stock performance prior to the alleged expropriation, but is verified by subsequent movements related to the status of the MIA before SEMARNAT. Indeed, as he explained in his direct examination, when the denial of the MIA was announced, Odyssey's equity value plummeted to USD $37.1 million and when the successful challenge to the denial of the MIA was announced, the value recovered USD $37.7 million. This, according to Dr. Flores, provides certainty about his proposed approach:[322]

[321] Transcript, Day 6-Eng, pp. 1487-1488.

[322] Transcript, Day 6-Eng, p. 1490-1493; Quadrant Economics presentation during the Hearing, pp. 19-20.

[redacted]

224. At Respondent's request, Dr Flores calculated the value of sunk costs to provide an additional alternative to the Tribunal. This method is consistent with the full reparation standard, as can be seen from the numerous cases in which international tribunals have used it to determine damages in cases of expropriation of pre-operational mining projects. It is also consistent with the measure of damages contained in Article 1110 which explicitly recognizes the cost method as an alternative for determining the amount of compensation in expropriation cases. It should be noted, however, that Dr. Flores included a number of adjustments to exclude intercompany transactions and financing costs that have no place in a sunk cost analysis. The total he arrives at is [redacted][323]

J. Interest cannot be calculated on the basis of the WACC because it would compensate Claimant for risks it never assumed.

225. Claimant's proposed calculation of pre-and post-award interest at a rate of 13.95% is without merit and is unprecedented in investor–State arbitration. As noted in the introduction, the rate is based on the investor's WACC and using it for purposes of determining pre-award interest would have the effect of completely nullifying Compass Lexecon's discounting to future cash flows and, furthermore, would compensate the Claimant for risks it never assumed – i.e., operating the Project as explained by Dr. Flores:

> Interest represents, by now based on the methods proposed by Compass Lexecon, more than half of the total claim. More than half. That's a very big number of interest. [...] Compass Lexecon proposes using the WACC. The WACC is not an

[323] Transcript, Day 6-Eng, p. 1500-1501, lines 21-22 and 1-10; Quadrant Economics presentation during the Hearing, pp. 26-27.

> appropriate Interest Rate. Because the WACC, what it reflects is business risks, the risks and uncertainties that go with operating a mining project, or trying to make a mining project be in operation. But if you say there is responsibility, there is damages, and damages are X--X dollars, that number becomes fixed as of April 2016. That number doesn't get affected by whether phosphate prices go up or down or by whether there is a hurricane in Mexico or whether there are any other business risks. So you cannot use a WACC to remunerate risks to which the amount of compensation has not been subject.[324]

226. To Respondent's knowledge, no international tribunal has determined interest on the basis of the investor's WACC for precisely this reason.[325] Respondent considers that interest should be calculated on the basis of the one-years U.S. Treasury bond rate.[326]

K. Conclusions

227. In case the Tribunal determines that Mexico breached its obligations under NAFTA Chapter 11, Respondent considers that the amount of compensation should be calculated based on Claimant's sunk costs according to Dr. Flores' calculation, i.e. [redacted]

228. The Tribunal will recall that Odyssey argues that the sunk costs of the Project amounted to [redacted] as of December 31, 2020. [327] In his expert reports and during his presentation at the hearing, Dr. Flores asserted that such calculation has several deficiencies, among others: (i) it is based on the company's unaudited financial statements; (ii) [redacted] of the total, excluding financial costs, relates to intercompany charges; (iii) there is no support for the [redacted] in financial costs that represent more than half of the total[328]; and (iv) include costs of consultants and experts in this arbitration that are not part of the sunk costs of the Project. [329]

---

324 Transcript, Day 6-Eng, pp. 1505-1506, lines 5-22 and 1-8.

325 Rejoinder Memorial, ¶¶ 722-725.

326 Presentation of Dr. Flores, slide 35. Quadrant Second Report, ¶¶ 177-181. Quadrant noted in its second report the following: *"I have never seen any evidence of anyone, in the mining industry or in other sector of the economy, agreeing to defer receipt of an amount of money in exchange for interest payments calculated according to a WACC. On the other hand, trillions of dollars are invested with interest rates equal to the yield of the U.S. Treasury bills. This is why the yield of the U.S. Treasury bills is the quintessential commercial rate of interest for investments in U.S. dollars that are not subject to business risks*."

327 Rejoinder Memorial, ¶ 689.

328 Rejoinder Memorial, ¶ 689. Transcript, Day 6-Eng, pp. 1499-1500, lines 16-22 and 1-6.

329 Transcript, Day 6-Eng, pp. 1500-1501, lines 21-22 and 1-4.

229. Regarding financing costs, Dr. Flores explained that these costs are not normally taken into account in a sunk cost analysis because they do not refer to a necessary cost to carry out the Project but to a decision on the Company to know on how to finance it:

> Claimants have proposed--apprehended a head number of about [redacted] I analyzed that with my team carefully. And what we conclude, is that the number is actually much lower.
>
> First and foremost, because it includes about [redacted] in financing costs, but that's not how much money you have spent on the Project. That's how you finance the Project. Say there is two identical companies and they both want to do a Feasibility Study, and the Feasibility Study cost [redacted]. One company pays it out of pocket. The other one gets a loan from the bank, and it will accrue interest over time of, lets say, $1 million. The cost of the Feasibility Study, it's still [redacted] for both companies. So, the financing decisions should not be entered into a sunk cost calculation.[330]

230. In Quadrant's consideration, the intercompany payments also artificially increase the amount of sunk costs and should be excluded because they do not represent actual disbursements and Claimant did not present any analysis demonstrating that these payments were necessary and reasonable to move forward with the Project. [331] During the Hearing, Dr. Flores noted the following:

> The other point that we have also, is that there was a lot of inter-company management fees. You can see, for example, an invoice by a provider, by saying, Mr. Lamb, he prepares the Technical Report. He sent an invoice to Odyssey in Miami, and then, what we can see in the documents provided, is that that invoice from Miami is invoice in turn to us—related company in Panama, and then, in turn to a related company in Mexico. And every time they do this reinvoicing of Dr.--of Mr. Lamb's invoice, they add another [redacted] I believe this is just reflecting inter-company transactions, not cash flows especially.[332]

231. In Dr. Flores' opinion, the amount of costs incurred by Odyssey in the Don Diego Project is [redacted] which is very far from the more than $2 billion dollars alleged by the Claimant in this arbitration: [333]

> So, if we look at how much had been spent through the Valuation Date, the answer was [redacted]. So, you can make that comparison that was being proposed

---

330 Transcript, Day 6-Eng, pp. 1499-1500, lines 11-22 and 1-6.

331 Rejoinder Memorial, ¶ 690.

332 Transcript, Day 6-Eng, p. 1500, lines 7- 18.

333 Quadrant Second Report, ¶¶ 155-175.

> yesterday. An investment of [redacted]; would it be worth the $2 million [billion] that are being asked today? I leave it up to you.[334]

V. CONCLUSION

232. In view of the foregoing, Respondent request this Tribunal to dismiss Claimant's claim in its entirety, with a corresponding award of costs in favor of the Respondent.

Respectfully submitted,

El Director General de Consultoría Jurídica de Comercio Internacional

Orlando Pérez Gárate

[334] Transcript, Day 6-Eng, p. 1501, lines 5-10. The Claimant claims damages of 2.3 billion dollars.

ANNEX: ANSWERS TO THE TRIBUNAL'S QUESTIONS

1. To what extent, if any, would the basis and extent of Odyssey's claim be affected if SEMARNAT's 12 October 2018 Denial was to be annulled by the TFJA?

1. The answer to this question relates precisely to the concern that Mexico has expressed from the outset of the Arbitration proceedings, *i.e.,* Claimant's claim is premature. [335] Indeed, as Respondent has repeatedly stated, the outcome of the pending proceedings before the TFJA will affect the underlying factual basis of this arbitration.

a. Claimant's claim will be affected in its entirety if the TFJA nullifies DGIRA's 2018 Resolution

2. If the 2018 Resolution were to be annulled by the TFJA, the merits and scope of Claimant's claim would be greatly and significantly be affected in this arbitration proceeding. Indeed, if the tribunal were to annul the 2018 Resolution, such annulment could entail diverse legal consequences with legal scopes of equal importance for this arbitration proceeding, namely, the order that: (1) the DGIRA founds and motivates, with freedom of jurisdiction,[336] those aspects that the TFJA has considered deficient, *i.e.,* a similar situation with respect to what happened with the 2016 Resolution,[337] or (2) the DGRIRA issues a new resolution expressly stating the terms in which it shall do so, including ordering the DGIRA to grant the MIA conditionally, as requested by ExO.[338]

3. Even though in both of the aforementioned scenarios the nullity could be interpreted as the Claimant's prevailing on its claims before domestic courts, none of them would constitute a fact with which the Claimant could prove a breach of the NAFTA, since it has not exhausted the judicial remedies available to it.

(1) Nullity of the 2018 Resolution in order for the DGIRA to issue another resolution duly grounded and motivated

---

335 Counter-Memorial, ¶¶ 4, 383 and 384, Rejoinder Memorial, ¶¶ 4, 22-27.

336 Rejoinder , ¶¶ 36-38.

337 Rejoinder, ¶¶ 36-38.

338 **C-0186**, p. 197.

4. According to this first scenario (the TFJA orders the DGIRA to issue another resolution duly grounded and motivated), the TFJA's ruling could imply that, as with what happened with respect to the 2016 Resolution,[339] it expresses those particular aspects that are considered as illegal by the TFJA. Illegality would mean that, in accordance with Mexican law, the authority "did not sufficiently motivate its determination, in breach of the requirements of substantiation and motivation".[340] In view of this situation the TFJA would order the DGIRA to "adequately ground and motivate its determination, […], with full freedom in the use of its powers and attributions [on] aspects"[341] addressed and specified in the nullity judgment itself.

5. This could include an order to remedy, *inter alia*, the lack of "sufficient [or due] motivation in relation to" any specific point, [342] inaccuracies regarding "the reasons it took into consideration, as well as the scientific and/or environmental data on which it based [any] determination",[343] the omission of "the complete evaluation of the information provided by [ExO]" [344] and the absence of "the elements [and] the scientific reasoning on the basis of which it concluded that its specific act is exactly in accordance with the provisions of the legal precepts that it invoked as the basis for its actions" [345]

6. It is evident that the nullity of the TFJA in this regard would also affect Claimant's claim to a significant extent because, although the TFJA's ruling could be interpreted as recognizing an illegal act of the DGIRA, [346] such interpretation would be insufficient to equate aspects of mere illegality under Mexican law with a violation of the international NAFTA standards invoked by Claimant, including the NAFTA Minimum Standard of Treatment.[347] Indeed, and as addressed in Response to Question *2 infra*, the TFJA's

339 *See* **C-0170**.

340 **C-0170**, p. 184.

341 **C-0170**, p. 212.

342 **C-0170**, p. 176.

343 **C-0170**, p. 178.

344 **C-0170**, p. 176.

345 **C-0170**, p. 152.

346 Notice of Intent, January 4, 2019, ¶¶ 6 and 98; and Notice of Arbitration, April 5, 2019, 6, 86 and 112.

347 Rejoinder, ¶¶ 350-351.

annulment of the 2018 Resolution cannot serve as a basis for demonstrating a NAFTA violation, as the legal standard under the Treaty is different from the standards under Mexican law. That is, a potential annulment, in and of itself and without any further would not resolve the arbitration in Claimant's favor. [348]

7. In addition, the TFJA's ruling would also imply the recognition that the DGIRA —as the competent technical-scientific authority— has another opportunity to correct any errors it may have made, since it is the only agency technically qualified to analyze the MIA. In other words, the TFJA itself would give due deference to the DGIRA and avoid conducting a *de novo* review that would involve substituting itself in the powers that are proper and exclusive to SEMARNAT. [349]

8. . In this way, Claimant's claim would be affected by the eventual nullity judgment of the TFJA, since the Tribunal could not —and should not— rule on aspects that would be pending of resolution by the DGIRA and that form precisely the basis of the same factual allegations made in Claimant's claim. [350] Otherwise, the Tribunal would be engaging in resolving technical, scientific and legal issues that are pending of resolution, subrogating a function that corresponds solely to the DGIRA.

(2) Nullity of the 2018 Resolution ordering DGIRA to issue a resolution authorizing the MIA conditionally.

9. Under this second scenario (the TFJA orders the DGIRA to conditionally authorize the MIA), it is clear that the Claimant's claim would also be affected by the nullity of the TFJA, since the main basis of its claim —the denial of the authorization of the MIA—, could cease to exist. [351] This does not mean that the nullity constitutes a legal basis proving a breach of NAFTA. [352] On the contrary, the arbitration proceeding would be left without subject

---

348 *See Sicula S.p.A. (ELSI)* (United States v. Italy), ICJ Rep. 1989, Judgment, July 20, 1989, p. 124. **CL-0028**.

349 **C-0170**, pp. 186-187.

350 Rejoinder, ¶¶ 23-27 and Table 1.

351 Rejoinder, ¶ 397.

352 Although SEMARNAT could challenge the annulment ruling issued by the TFJA, through the appeal for review before a Collegiate Circuit Court, in practice it is unusual that in matters of this nature the appeal for review promoted by the authority is admissible. *See* Solcargo-Rábago Second Report, ¶¶ 105-106.

matter since the claimed measure underlying this arbitration would cease to be the subject of litigation.

10. In this regard, the Tribunal could not, and should not, rule on Claimant's claim, much less grant any compensation arising from the measure claimed. Otherwise, the Claimant would be in a position to obtain a double economic compensation since, on the one hand, it would have the possibility to develop its project obtaining the profits and economic benefits it claims in the arbitration and, on the other hand, it would obtain an economic reparation for the damages allegedly caused by the denial of the authorization of the MIA of its mining project.

b. If the TFJA uphold the DGIRA's 2018 Resolution, Claimant's claim in this arbitration would be completely affected

11. Even though the Tribunal's question is about the potential nullity of the 2018 Resolution (the first and second scenarios), the Tribunal must consider that there is also the possibility that the TFJA uphold DGIRA's determination, *i.e.,* that it will conclude that the 2018 Resolution is duly justified. Under this scenario, Claimant's claim would be similarly affected since the Tribunal's decision would constitute an additional factual issue that would make it clear that Claimant's claim in this arbitration lacks merit. Indeed, the judgment of the TFJA could serve as a fact that demonstrates that the decision of the DGIRA, a specialized technical authority in the matter, is duly grounded and motivated, *i.e.,* reasonable.

12. In this regard, and given that Claimant claims practically the same technical and scientific aspects in this arbitration proceeding —except for the alleged command orders— [353] the claim would be left without merit since the Tribunal would not be entitled to conduct a *de novo* review, *i.e.,* to substitute its own judgment or opinion for the technical-scientific assessment made by the DGIRA.

13. Therefore, and given that Claimant has not raised in this arbitration any claim of denial of justice by the Mexican administrative or judicial courts, [354] particularly with respect

[353] Rejoinder, ¶ 27.

[354] The Claimant presents allegations that it was allegedly denied due process and is the victim of an arbitrary decision, which basically constitutes a claim of denial of justice by the DGIRA in its

to the actions of the TFJA, the authority before which the challenge to the 2018 Resolution is being carried out, it is clear that its claim would be completely affected in such way that it would left without substance. [355] This aspect is addressed in greater detail in the Response to Question 2 *infra*.

> **2. By reference to the law applicable to this dispute, what is the legal standard to be applied in determining whether a violation of the BIT has occurred in circumstances in which (a) the Claimant has brought proceedings before courts of Mexico to challenge the refusal of SEMARNAT to grant the requested authorisation, which proceedings are still pending, and (b) there is no claim or finding that the courts of Mexico have failed to meet the requirements of international law imposed upon them by the BIT?**

14. Once again, the answer to this question relates to the premature nature of Claimant's claim. Claimant is legally precluded from proving a breach of the various NAFTA provisions it invokes in this arbitration because: (a) there are parallel proceedings involving precisely the same facts as those complained of here; and (b) no claim has been made regarding the actions of the Mexican courts.

15. As the Tribunal's question suggests, the applicable legal standard for determining a breach of the NAFTA will be seriously affected by the existence of the two factual issues aforementioned, as described in the following sections.

> **a. The applicable legal standard for determining a breach of the NAFTA is affected by the existence of pending domestic legal proceedings that involve the same facts and allegations as the arbitration.**

16. For clarity's sake, Mexico does not dispute the fact that, under NAFTA Article 1121, an investor may initiate or continue any proceeding before an administrative or judicial tribunal as long as it does not involve the payment of damages. However, this case presents the particularity that the proceedings that Claimant is pursuing in parallel involve exactly the

---

capacity as adjudicator of MIA requests. However, the Claimant has not exhausted the remedies available under the Mexican legal system and as required by the denial of justice legal review standard. Therefore, its claim must be dismissed. *See* Rejoinder, ¶¶ 394-406.

[355] Even under this assumption, ExO could again challenge the ruling of the TFJA through the judicial route of the direct amparo proceeding, a procedure that would be heard by a Collegiate Circuit Court. *See* Solcargo-Rábago Second Report, ¶ 104.

same allegations and claims that are made in this arbitration. In fact, the only difference between the two proceedings lies in the fact that the domestic proceedings address issues of mere legality —lack of foundation and/or motivation— whereas, in the international arbitration, the Claimant seeks to equate those aspects of alleged illegality with violations of international standards.

17. Claimant's approach is legally untenable since "the fact that an act of a public authority may have been illegal under domestic law does not necessarily mean that such act is illegal under international law, as a breach of a treaty or otherwise". [356] This is because the legal requirements for proving a violation of the NAFTA provisions demand a much higher threshold than that which could be derived from a violation of domestic law.

18. Another relevant element that affects Claimant's claim —and which relates to paragraph (b) of the Tribunal's question— is the fact that Claimant has also failed to make any allegations against the Mexican judicial system in general, which implies that the domestic legal procedures available to it are feasible and there are viable avenues to pursue, and cannot be considered futile.

b. The compliance with the legal standard applicable to each one of the Claimant's claims will be equally affected due to the absence of arguments or assertions against the TFJA's actions

19. The Claimant has referred to alleged violations of the Minimum Standard of Treatment, Full Protection and Security, Indirect Expropriation and National Treatment, which implies the assessment of diverse legal standards according to each claim. However, as shown *infra*, the Tribunal will be able to see that all the Claimant's claims involve arguments regarding an alleged lack of due process and arbitrariness by DGIRA as the agency in charge of assessing the MIA of the Don Diego Mining Project. Therefore, the absence of claims against the TFJA in accordance to the proceedings carried out by ExO before national courts demonstrate that the Claimant's claims do not comply in any manner with the legal standards to which it refers.

---

356 *Sicula S.p.A. (ELSI)* (United States v. Italy), ICJ Rep. 1989, Judgment, July 20, 1989, p. 74. **CL-0028**. [Own Translation].

(1) The existence of pending local proceedings and the absence of claims against the TFJA, do not allow to demonstrate a violation of the MST

20. The Tribunal's question refers to the legal standard applicable to this dispute in order to determine a violation to the Bilateral Investment Treaty (BIT), however, it is important to explain that the applicable treaty is the NAFTA and the minimum standard of treatment therein contained. Actually, Mexico has pointed out to the Tribunal that the Claimant has indiscriminately cited several arbitral awards that address the Fair and Equitable Treatment standard applicable to different BIT, which are not applicable since the analysis of such standard is not equivalent to the standard specifically developed in the NAFTA.[357]

21. According to the NAFTA, the Minimum Standard of Treatment is a standard that "includes a more limited range of obligations than FET […] open to arbitral interpretation, and one with a relatively higher threshold for breach".[358] Even when the Claimant has accepted that the Minimum Standard of Treatment is reflected in the *Waste Management II* decision,[359] the interpretation and application to the facts that it makes regarding such standard is incorrect. In that regard, it is relevant what the tribunal in *Cargill c. México* pointed out to determine whether governmental conduct is incompatible with the Minimum Standard of Treatment:

> To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.[360]

---

357 Rejoinder Memorial, ¶¶ 338-344.

358 Christophe Bondy, *Fair and Equitable Treatment – Ten Years On*, in Evolution and Adaptation: The Future of International Arbitration (Kluwer 2019), p. 214. **RL-0103**.

359 Memorial, 228. *Waste Management Inc. v The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004, ¶ 98. **CL-0121**.

360 *Cargill, Incorporated v The United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009, ¶ 285. (emphasis added). **CL-0027**.

22. The Claimant alleges a violation of NAFTA article 1105, basically arguing that: 1) "the MIA Denial was [allegedly] arbitrary and the product of a process conducted in the absence of good faith and without due process";[361] 2) "the MIA denial was [allegedly] arbitrary and that, acting on marching orders from the top, it never intended to give claimant due process";[362] 3) "SEMARNAT's written decisions demonstrate that the MIA denial was arbitrary ";[363] and 4) that it was "denied the MIA […] based on […] Secretary Pacchiano's political motivations and personal conflict".[364] To support its claim, the Claimant relies on [redacted][365] whose lack of credibility was demonstrated in the hearing, as well as on the statement of an employee that was not present at the meetings that he talks about.[366] In addition, the Claimant also refers to its own interpretations regarding alleged statements made by the SEMARNAT[367] as well as in its opinion regarding the alleged lack of solidity of the assessment carried out by the DGIRA.[368]

23. As the Respondent pointed out in its Rejoinder, the Claimant's allegations with respect to the article 1105 claim essentially rely on an alleged denial of due process and an arbitrary treatment by the DGIRA, the agency in charge of assessing the MIA. However, since the Claimant is entitled to legal remedies of an administrative or judicial nature, which in fact is exercising parallel to this arbitration, and there is no claim regarding the TFJA's actions, nor questions regarding the judicial system in Mexico, it has not come close to meeting the standard required to demonstrate a violation of the Minimum Standard of Treatment.

24. As has been explained in the Rejoinder, the Claimant has, in fact, submitted a claim of denial of justice by the SEMARNAT as the agency that decides (adjudicator) the requests

361 Memorial, ¶¶ 249-254.
362 Memorial, ¶¶ 255-257.
363 Memorial, ¶¶ 258-286.
364 Reply, ¶ 206.
365 Memorial, ¶¶ 249-253.
366 Memorial, ¶ 254.
367 Memorial, ¶¶ 255-257.
368 Memorial, ¶¶ 258-286.

of environmental authorizations.[369] Since the Claimant has not exhausted all the legal resources available in Mexico, it cannot demonstrate a violation of the Fair and Equitable Treatment. A claim of denial of justice in accordance to international law "rests upon a specific predicate, namely, the systemic failure of the State's justice system".[370] If the Mexican judicial system has not been totally tested, that is, the legal proceedings established under the Mexican law have not been resolved through the issuance of a final and unappealable decision, then a claim for Fair and Equitable Treatment cannot be established.

25. In *Corona Materials, LLC v. Dominican Republic*, the Ministry of Environment of Dominican Republic denied the claimant the approval of a concession arguing that the Project was not environmentally feasible. When dismissing the claim for denial of justice in the context of fair and equitable treatment, the tribunal stated:

> […] the Tribunal does not believe that an administrative act, in and of itself, particularly as the level of a first instance decisionmaker, can constitute a denial of justice under customary international law, when further remedies or avenues of appeal are potentially available under municipal law.[371]

26. The same principle and reasoning applies to this case.

(2) The pending domestic proceedings and the absence of any claim against the TFJA's actions, restricts the Claimant's capacity to demonstrate a violation of the FPS standard

27. Notwithstanding that the Claimant seems to have waived its claim regarding the Full Protection and Security obligation, since it failed to address it in its Reply,[372] its position

---

369 Rejoinder, ¶ 394 *et seq.*

370 *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)14/3, Award, May 31, 2016, ¶ 254 (emphasis in original) **RL-0132**; *see also Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, June 14, 2013, ¶ 282 ("For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself.") **RL-0036**; *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award, April 30, 2004, ¶¶ 97 ("[W]hat matters is the system of justice and not any individual decision in the course of proceedings. The system must be tried and have failed…) (emphasis in original) **RL-0133**.

371 *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)14/3, Award, May 31, 2016, ¶ 248. **RL-0132.**

372 Rejoinder, ¶ 408.

about the applicable legal standard was also incorrect. Indeed, the Claimant sought to broaden the scope of the legal standard of Full Protection and Security applicable to NAFTA's article 1105, arguing that this "covers legal protection",[373] which allegedly "obliges the host State "to possess and make available an adequate *legal system*, featuring such protections as appropriate remedial mechanisms, due process, and a right to compensation for expropriation".[374]

28. The Respondent already explained in detail that the scope of the legal standard of Full Protection and Security under NAFTA is limited to physical protection, not legal ones.[375] However, assuming that the legal standard described by the Claimant was accepted by the Tribunal —*quod non*—, it would be evident that the Claimant is far from succeeding in proving a violation to the Fair and Equitable Treatment standard. Indeed, the facts in this case show that Mexico has a suitable legal system and it has proper remedy mechanisms, so that the Claimant itself is using such legal protection that Mexico has made available to it, litigating in parallel similar facts before Mexican administrative courts.[376] Additionally, the Claimant cannot argue a lack of due process since it has not set out any claim regarding improper actions of the TFJA and it has additional legal remedies through judiciary proceedings that guarantee an effective legal protection.

(3) The existence of pending domestic proceedings restricts the Claimant's capacity to demonstrate a violation of the indirect expropriation standard

29. The application of the indirect expropriation legal standard under NAFTA's article 1110 requires as an element *sine qua non* the existence of a right subject to be expropriated, which the Claimant has failed to identify.[377] Notwithstanding this serious defect in its claim, the Claimant has not demonstrated either that the denial of the MIA's authorization has actually been expropriatory, against the legitimate nature with which that decision was made,

---

373 Memorial, 297.

374 Memorial, 296.

375 Counter-Memorial, ¶¶ 528-44 and Rejoinder, ¶¶ 407-408.

376 Rejoinder, ¶¶ 18-27.

377 Counter-Memorial, ¶¶ 546-557.

i.e., within the framework of the surveillance powers of the State.[378] Furthermore, the Claimant has far less succeeded in demonstrating that the MIA's denial resulted in substantial deprivation.[379]

30. The Claimant has argued that the legal standard in article 1110(1) forbids that a party expropriates either directly or indirectly an investor's investment, unless it is: "(a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraph 2 through 6."[380] Particularly, the Claimant argues that "the expropriation lacked any public purpose",[381] "did not respect due process of law [because]the expropriation takes place; and that the decision be taken by an unbiased official and after the passage of a reasonable period of time".[382]

31. Regardless of the defects in the Claimant's claim, and assuming that the Tribunal considers that the Claimant has a right susceptible of being expropriated —*quod non*—, it is clear that it has not yet been canceled —expropriated—. Indeed, the existence of pending legal proceedings before Mexican courts, as well as the absence of claims or findings that the TFJA has acted in contravention of NAFTA's legal standard of indirect expropriation, constitute elements that undermine any possibility for the Claimant to demonstrate that it meets the legal standard required by international law. Especially when the Claimant argues an alleged lack of due legal process and a disregard for the principle of legality without there being any finding or claim against the functioning of the Mexican judicial system and its effectiveness as a feasibly available legal remedy.

(4) The existence of pending domestic proceedings restricts the Claimants capacity to demonstrate a violation of the national treatment standard

---

378 Counter-Memorial, ¶¶ 558-561.

379 Counter-Memorial, ¶¶ 562-564.

380 Reply, ¶ 235.

381 Reply, ¶ 237.

382 Reply, ¶ 238.

32. The Claimant seems to agree with the legal standard stated in NAFTA's article 1102,[383] *i.e.,* the existence of: (i) a treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of the relevant investments; (ii) to be "in like circumstances" to the investor or the foreign investments and those of an investor or an investment of the respondent State ("the comparator"); and (iii) a treatment less favorable than that accorded to the comparator.[384]

33. In general terms, it could be argued that the existence of pending local proceedings before national courts is not directly related to the legal standard to determine a violation to National Treatment. However, in this particular case, this fact is relevant to the specific claim of the Claimant, since it is related to several factual aspects that it argues in the arbitration. Indeed, the facts and arguments underlying the Claimant's claim of National Treatment are based in the incorrect analysis of the "in like circumstances" requirement, which involves the same aspects that are pending to be resolved in the Mexican courts. Indeed, the Claimant, through ExO, has set out claims regarding discrimination before the TFJA, arguing that there are other projects that are "in similar situations of law",[385] submitting an analysis of "the projects that include extensive dredging and have been authorized by SEMARNAT, including the scale of their impacts, the technology they use and their proximity to protected or endangered species similar to that of the ExO Project, as well as those of projects located in areas with special categories, from a Biological perspective".[386]

34. The similarity in the facts and arguments underlying the discrimination claim that are pending before the TFJA and this Arbitral Tribunal is such that three of the projects that it identifies "in like circumstances" to Don Diego Project are the same in both venues. Even though the Claimant could argue that the legal standards stated in each of the venues are different, it is undeniable that an analysis on discrimination necessarily involves a

---

383 Memorial, ¶ 315.

384 Counter-Memorial, ¶ 574. *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, Jan. 15, 2008, ¶ 117. **CL-0041**. *See* also *William Ralph Clayton ¶ 607.* **CL-0122**.

385 **C-0186**, p. 149.

386 **C-0186**, p. 154.

comparative evaluation made by both tribunals. This will imply that the TFJA make findings and interpretations of domestic law that will certainly be of relevance to this arbitral Tribunal.

35. In addition, since the Claimant has not presented any claim against the actions of the TFJA, nor is there any finding that the TFJA or any Mexican court has failed to comply with any legal standard of international law, the Claimant is not in a position to meet the applicable legal standard in order to demonstrate the violation of the NAFTA National Treatment obligation.

3. What, if any, is the application and effect of the 'margin of appreciation' doctrine (Phillip Morris v Uruguay) in the present case?

36. As the Tribunal knows, the "margin of appreciation" doctrine was formulated by the European Court of Human Rights (ECHR) in its evaluation of the States' compliance with the European Convention on Human Rights. In accordance with this doctrine, the ECHR analyzes the compliance of the States up to a certain minimum threshold, beyond which the Court will respect the decisions of each State.[387]

37. Although the "margin of appreciation" is not directly incorporated into the NAFTA, the Respondent considers that, under customary international law, there is an inherent right that States have to regulate and supervise sensitive matters that affect their population, for example, economic policy, public health and the environment. Evidently, this regulatory power is essential for the achievement of the State's objectives.[388] The normative nature of deference has been recognized by various international courts. For example, in the case of *SD Myers v. Canada* the court emphasized that "[t]hat determination (of whether the investor has been unfairly or arbitrarily treated) must be made in the light of the high measure of

---

387 Eleni Frantziou, *The Margin of Appreciation Doctrine in European Human Rights Law*, UCL POLICY BRIEFING (October 2014) p. 1 ("This policy briefing discusses one of the most prominent legal constructs in European human rights law: the margin of appreciation doctrine of the European Court of Human Rights, which is used to allow states room for maneuver in the manner in which they apply some of the provisions of the European Convention on Human Rights.") **RL-0147**; *see also* Margin *of Appreciation*, OPEN SOCIETY JUSTICE INITIATIVE (April 2012) p.1 **RL-0148**.

388 *See RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, ¶ 244. **RL-0149**.

deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders".[389] Therefore, there can be no doubt that States enjoy a margin of appreciation in public international law.[390]

38. In the *Phillip Morris* case, when analyzing the compatibility of the challenged measures with the FET standard, the tribunal took into account "all relevant circumstances, including the margin of appreciation enjoyed by national regulatory agencies when dealing with public policy determinations".[391] Analyzing the claimant's claim under the FET standard, the tribunal referred to the margin of appreciation doctrine as part of its reasoning when examining each individual measure.[392]

39. Thus, although the margin of appreciation is analogous in nature, it should not be confused with the obligation itself under analysis, in this case, the FET standard under the NAFTA. In this regard, the proceeding of the tribunal in the *Phillip Morris* case is exemplary since it applied the relevant FET standard to that case, specifically, if the measures adopted by the respondent State were arbitrary, manifestly unfair, discriminatory or disproportionate in light of the facts and circumstances of the case.[393] In particular, the tribunal recognized that the legal analysis of the FET standard and the application of the margin of appreciation

---

389 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, Nov. 13, 2000, ¶ 263. **CL-0103**.

390 *See RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, ¶ 242. **RL-0149**.

391 *Phillip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award, Jul. 8, 2016, ¶ 389. **RL-0150**.

392 *Phillip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award, Jul. 8, 2016, ¶ 397. **RL-0150**.

393 *Phillip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award, Jul. 8, 2016, ¶¶ 410, 420 **RL-0150**; *see also Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004, ¶ 98 ("[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to Claimants if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes Claimants to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety."). **CL-0121**.

under NAFTA is carried out concretely, that is, with reference to the specific facts of the case.[394]

40. Therefore, NAFTA tribunals must consider all relevant circumstances when assessing a violation of a treaty, including the fact that state agencies must make scientific or public policy determinations that should not be questioned (second-guessed).[395] When a violation of the FET standard is alleged, the question is not whether the State deserves abstract deference—or a "margin of appreciation" in general—but rather, "is whether or not there was a manifest lack of reasons for the [decision]",[396] *i.e.*, whether the actions of the State were arbitrary, manifestly unfair or discriminatory at the time they were adopted.[397]

41. The *Phillip Morris* tribunal made this same assessment as can be seen in its introductory reference to the margin of appreciation doctrine.[398] In fact, it evaluated whether two Uruguayan tobacco regulations complied with the FET standard at the time of their adoption.[399] The tribunal concluded that both regulations were reasonable, adopted in good faith and were not arbitrary, grossly inequitable, unfair, discriminatory or disproportionate.[400] The Tribunal in the present case should make a similar assessment.[401]

4. To what extent, if any, is the Tribunal in this case (i) required to form a view of the environmental impacts of

---

394 *Phillip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award, Jul. 8, 2016, ¶¶ 400-401. **RL-0150** (citing *Chemtura Corp. v. Government of Canada*, UNCITRAL, Award, Aug. 2, 2010, ¶ 123. **CL-0033)**.

395 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, Nov. 13, 2000, ¶ 261. **CL-0103**.

396 *Phillip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award, Jul. 8, 2016, ¶ 399. **RL-0150**.

397 Considering the margin of appreciation that Mexico enjoys when regulating environmental matters, the Tribunal should not substitute its own opinions regarding the suitability of the measure in question, nor with respect of the characterization of the situation that motivated it, that is, the Tribunal should refrain itself from making findings regarding the existence of other possible or more appropriated measures to face the situation, as explained in the Answers to Questions 4 and 6. *See RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, ¶ 468. **RL-0149**.

398 *Phillip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award, Jul. 8, 2016, ¶ 388. **RL-0150.**

399 *Phillip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award, Jul. 8, 2016, ¶ 409. **RL-0150**.

400 *Phillip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award, Jul. 8, 2016, ¶ 410 and 420. **RL-0150**.

401 *See* Counter-Memorial, ¶¶ 518-523; Rejoinder Memorial, ¶ 418.

the proposed project, and (ii) if necessary, substitute its view for that adopted by the Mexican authorities, in particular SEMARNAT?

42. In relation to part (i) of the question, Mexico has been emphatic in pointing out throughout the procedure that the Tribunal does not have the function of carrying out a *de novo* review of the MIA request, much less of the 2018 Resolution.[402] In other words, the Tribunal must avoid assuming the responsibility that only falls to the DGIRA as a technical and scientific agency specialized in the issues that were the object of evaluation as part of the PEIA.[403] However, the Respondent acknowledges that, to a certain extent, the Tribunal must form an opinion on the environmental impacts of the project. In this sense, the degree or scope of the opinion that the Tribunal must form is limited only to the point necessary to determine that the decision of the DGIRA was reasonable and issued in accordance with the legal standards provided for in the NAFTA obligations, considering the facts that have been duly proven.[404]

43. As regards part (ii) of the question, it is indisputable that the Tribunal should not substitute its own opinion or conclusions for those adopted by the DGIRA.[405] This implies a total deference to the determination of the competent environmental authority in evaluating the technical and scientific aspects that were submitted to it in the PEIA,[406] however, this does not mean that the Tribunal should accept without further inquiry the DGIRA's conclusions. On the contrary, when carrying out its analysis, the Tribunal can assess whether

---

402 *See* Counter-Memorial, ¶¶ 2, 5 and 469 and Rejoinder Memorial, ¶¶ 9, 14, 52-56, 147 and 210.

403 *See* Rejoinder, ¶ 210.

404 *See* Rejoinder, ¶ 14.

405 Actually, not even the TFJA itself rejected to surrogate in the DGIRA's functions: "[…] The court does not have the technical capacity to analyze said proposals, and if they are analyzed by this Court, it would be substituting the powers that are proper and exclusive to the Ministry of the Environment and Natural Resources (SEMARNAT). **C-0170**, p. 187.

406 "NAFTA tribunals and tribunal members issuing separate opinions have referred on several occasions to the desirability of deference, policy space, regulatory autonomy and the expertise of primary decision-makers, and have stated that their rule was not to second-guess the policy decisions of governments. NAFTA tribunals have rarely adopted an excessively strict approach to the standard of review in relation to regulatory or administrative acts of states". *Ver* Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge 2015), p. 180 n.26. **RL-0119.**

the explanations of the DGIRA to reach its final resolution were reasonable and adequate in light of the evidence that the DGIRA itself had at its disposal in the framework of the PEIA. Indeed, when carrying out this work, the Tribunal must consider only those elements that were presented and evaluated at the time by the DGIRA, without the authority being held responsible for not taking into consideration those elements that did not exist because they were submitted only in the framework of this arbitration.[407]

44. Therefore, the Tribunal must review whether the DGIRA's reasoning and explanation are appropriate and congruent to objectively justify its determination. In carrying out this analysis of the adequacy and consistency of the conclusions reached by the DGIRA, the Tribunal should not reject the conclusions of the competent authority simply because the Tribunal itself would have reached a different result if it had made the determination itself. Furthermore, the Tribunal should also not reject the explanations given by the DGIRA for the simple reason that other plausible alternative explanations have been offered. In fact, the mere existence of other plausible alternatives does not imply that the DGIRA explanation is implausible or improbable.

45. Therefore, the legal examination that the Tribunal must carry out is based on determining not only the reasonableness of the 2018 Resolution of the DGIRA, but it must also evaluate whether it violates the applicable legal standard of the *Waste Management II* case,[408] as pointed out in the Answer to Question 2 *supra*, as well as in the Counter-Memorial[409] and Rejoinder Memorial.[410]

5. What is the legal significance of the TFJA Ruling of 21 March 2018, if any, for determining whether a violation of the BIT has occurred? What is the legal significance of SEMARNAT's compliance, or non-compliance, with that Ruling?

46. Regarding the first question, the judgment of March 21, 2018 of the TFJA does not have any legal relevance, nor legal meaning for purposes of determining that there has been

---

407 *See* Rejoinder, ¶¶ 55-56 and Table 3.

408 Memorial, 228. *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award, April 30, 2004, ¶ 98. **CL-0121**.

409 Counter-Memorial, ¶ 449.

410 Rejoinder, ¶ 337.

a violation of NAFTA. On the contrary, it confirms that the Claimant's claim is premature, since the aspects analyzed by the TFJA dealt with issues of mere legality that only involved the lack of due motivation and substantiation.

47. Thus, the TFJA ordered the issuance of "issues a new resolution, […], in which it [DGIRA] adequately furnishes the legal basis and grounds of its determination, based on the most reliable scientific data available, with full freedom in the use of its powers and attributions, the aspects already discussed and specified in this ruling".[411] In addition, the final conclusion of the DGIRA —the denial of the MIA authorization— was not questioned by the TFJA, which recognized that it did not have the technical capacity to analyze the possibility of granting the MIA authorization, respecting the powers of the Ministry of the Environment and Natural Resources (SEMARNAT) to resolve what corresponds by law.[412]

48. Therefore, the only legal meaning of the judgment of March 21, 2018, if any were to be drawn, is that it serves as evidence to confirm that there can be no violation of any of the obligations invoked by the Claimant, since simple non-compliance with domestic law does not mean a violation of international law.[413] The foregoing, considering that all the Claimant's claims involve an alleged arbitrariness and lack of due process on the part of the DGIRA derived from the denial of the MIA's authorization.

49. In relation to the second question of the Tribunal, the Respondent considers that the DGIRA complied with what was ordered by the TFJA in its judgment of March 21, 2018.[414] In fact, the Tribunal must recall that, although the Claimant challenged compliance with the DGIRA again before Mexican courts, alleging that the 2018 Resolution constituted an act of rebellion because it was a mere repetition,[415] the TFJA rejected said challenge.

---

411 **C-0170**, pp. 211-212.

412 *See* **C-0170**, pp. 211-212.

413 *Sicula S.p.A. (ELSI)* (United States v. Italy), ICJ Rep. 1989, Judgment, July 20, 1989, p. 74. **CL-0028**. Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford 2017), ¶ 7.198. **RL-0021.** Opinion of Professor Donald McRae, Mar. 17, 2015, Dissent ¶¶ 36-38. **RL-0110**.

414 Rejoinder, ¶¶ 375-378.

415 Notice of Intent, Jan. 4, 2019, ¶¶ 7 and 102-105, Notice of Arbitration, Apr. 5, 2019, ¶¶ 7 and 115-118 and Memorial, ¶ 20.

50. Indeed, the TFJA determined that "the resolution dated October 12, 2018 is in compliance with the resolution issued by this Jurisdictional Plenary, it does not reiterate in identical terms the grounds and reasons for the various annulled resolution dated April 7,2016".[416] Furthermore, in its reasoning, the TFJA noted that "both resolutions (the one annulled and the one issued in compliance) constitute different acts, that although they coincide in what was resolved in the sense that they determine to DENY the authorization of the MIA requested by the plaintiff […]".[417]

51. Thus, the legal relevance of SEMARNAT's compliance with what was ordered by the TFJA in the judgment of March 21, 2018 is that said determination of compliance would constitute an additional element that would demonstrate that the Claimant's claim is premature and, over all, lacks merits.[418]

52. Even if there were a legal determination of non-compliance by the DGIRA with what was ordered by the TFJA, it would be insufficient to meet the legal standards invoked by the Claimant, which involve allegations of arbitrariness and lack of due process. The foregoing, because it would not be a final sentence, that is, it would be subject to additional judicial procedures. In addition, there is no claim or determination against the TFJA's actions, or the Mexican judicial system in general, as discussed in the Response to Question 1 *supra*. These aspects show that the Claimant has brought before this Tribunal a premature claim that cannot constitute a violation of any of the NAFTA obligations. Therefore, the legal meaning of a hypothetical determination of non-compliance by the DGIRA with what was ordered in the judgment of March 21, 2018 would lie in being part of an additional factual element that would confirm the premature nature of the Claimant's claim.

6. What is the legal significance, if any, of the motivation behind SEMARNAT'S refusal to grant the requested authorization for determining whether a violation of the BIT has occurred?

53. To the extent that the Tribunal determines that the conclusions and findings made by DGIRA in the 2018 Resolution are technically and scientifically reasonable, as explained in

416 **R-0140**, p. 114.

417 **R-0140**, pp. 114.

418 Rejoinder, ¶ 396.

the Response to Question 4, any alleged motivation behind the denial of the MIA's authorization lacks legal relevance to determine whether there was a violation of NAFTA. Indeed, it is insubstantial if the Claimant alleges that there were alleged political motivations[419] —*quod non*—, or that any other type of motivation was even asserted, including an environmental motivation.

54. The *quid* of the matter is to verify that the Environmental Impact Assessment Procedure has been carried out in accordance with due process and that the DGIRA's conclusions can be considered reasonable —as happened in this case—. Otherwise, it would lead to the absurdity that a decision of a purely technical and scientific nature that addresses a legitimate environmental concern, *i.e.*, the impact on various species of mammals and turtles in danger of extinction, mainly the *Caretta caretta* species, would be seen as undermined by the alleged existence of a reason underlying that determination.[420] Such a course of action would be untenable. In this sense, the order of analysis that the Tribunal adopts on this matter will be relevant. Therefore, the Respondent considers that the Tribunal should first examine the reasonableness of the 2018 Resolution in the terms set forth in the Answer to Question 3, and only in the extreme case that it determines, without a doubt, that it is unreasonable, could investigate the possible motivations that explain that result.

55. The Tribunal must remember that the environmental impact assessment involves a procedure of a technical and scientific nature through which the DGIRA determines the admissibility of a request to carry out works and activities that may cause ecological imbalance.[421] In this regard, the Mexican environmental law itself recognizes that "[t]he resolution of the Secretary will refer only to the environmental aspects of the projects and activities under consideration".[422]

---

419 Reply, ¶¶ 190, 194, 198, 204-210, 237, 238, 250-256.

420 The Mexican environmental law itself recognizes that "[t]he resolution of the Secretary will refer only to the environmental aspects of the projects and activities under consideration". LGEEPA Art. 28. **C-0014**.

421 Counter-Memorial, ¶¶ 153-170.

422 *See* LGEEPA Art. 28. **C-0014**.

56. Therefore, any alleged "political" or other kind of motivation behind the denial of authorization of the MIA have no legal relevance to determine a violation of NAFTA.[423] On the contrary, the fact that the result of the 2018 Resolution coincided with the concern expressed by various environmental groups during the public consultation process,[424] as well as with the opinions expressed by various international organizations,[425] NGO,[426] governmental authorities,[427] universities and scientific centers,[428] constitutes an essential circumstance that serves to confirm that the conclusions of the DGIRA are reasonable.

[423] Counter Memorial, ¶¶ 494-506 and Rejoinder, ¶¶ 2, 6, 12, 14, 20, 79, 118, 119, 143, 146, 198, 240, 244, 279, 301, 304, 381-388, 396.

[424] Counter-Memorial, ¶¶ 267-269 and 299-301.

[425] Counter-Memorial, ¶¶ 267-269 and 302-305.

[426] Counter-Memorial, ¶¶ 267-269 and 279-284.

[427] Counter-Memorial, ¶¶ 267-269, 273-278 and 291-298.

[428] Counter-Memorial, ¶¶ 267-269 and 285-290.