ICSID Case No. ARB/19/1

Administered by the

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

LEGACY VULCAN, LLC

Claimant

v.

UNITED MEXICAN STATES

Respondent

CLAIMANT'S RESPONSE ON COUNTERCLAIM ADMISSIBILITY AND JURISDICTION

Counsel for the Claimant:

Miguel López Forastier
José E. Arvelo
Clovis Trevino
Santiago M. Zalazar
Amanda Tuninetti
Kate McNulty
Roy Goldsman
Gabriel Gates
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, D.C. 20001-4956
United States of America
+1-202-662-5185 (telephone)

Elsa Ortega López
Luis M. Jardón Piña
CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ, S.C.
Torre Virreyes
Pedregal 24, Piso 24
Colonia Molino del Rey
Ciudad de México, 11040
México
+52-55-4748-0600 (telephone)

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1. In accordance with the Tribunal's communication of 13 April 2023 and the revised Timetable for Ancillary Claim and Counterclaim of the same date, Claimant Legacy Vulcan, LLC ("Legacy Vulcan") submits this response to the Counterclaim Memorial (Admissibility and Jurisdiction) submitted by the United Mexican States ("Mexico" or "Respondent") on 12 May 2023. This brief is supported by new factual exhibits numbered C-0332 to C-0353 and new legal authorities numbered CL-0230 to CL-0253.

I. INTRODUCTION

2. Mexico's Counterclaim Memorial repeats many of the same unsupported and debunked allegations that Respondent has lodged in this ancillary-claim proceeding to distract from its wrongful conduct and utterly fails to establish jurisdiction over Respondent's frivolous counterclaim.

3. Mexico's reiterated allegations of legal violations and environmental harm by CALICA and Legacy Vulcan are contrived. They are a smokescreen that fails to conceal that Respondent's counterclaim is no more than the execution of one of President López Obrador's threats against Claimant and CALICA. Mexico's factual allegations remain largely unsupported and are contradicted by record evidence, as shown in Claimant's Reply on Ancillary Claim (mostly ignored in Respondents' Memorial) and below. Legacy Vulcan corrects the factual record in **Part II**, rebutting and exposing Mexico's factual misrepresentations and falsehoods.

4. In addition to lacking proper factual support, Mexico's counterclaim also fails to meet any of the cumulative conditions required for the Tribunal to exercise jurisdiction over it, as described in **Part III**.

5. *First*, Mexico's counterclaim falls outside the scope of the Parties' consent to arbitration, as described in **Part III.A**. Mexico tries to fabricate consent where none exists through a tortured reading of NAFTA Article 1137(3) — concerning "Receipts under Insurance or Guarantee Contracts" — that does not reflect the intent of the NAFTA Parties or that provision's plain meaning. Mexico also seeks to improperly "infer" the Parties' consent from Legacy Vulcan's pursuit of arbitration under the ICSID Convention, despite having acknowledged elsewhere that consent to arbitration must be "explicit" and cannot be so inferred. And, because Mexico alleges breaches and losses about which it has or should have known for well over three years before submitting its counterclaim, that counterclaim also falls outside the Parties' consent to arbitrate as time barred under NAFTA Articles 1116 and 1117. Mexico must establish a clear, unequivocal, and unambiguous consent to arbitrate its counterclaim, a burden Mexico has failed to discharge.

6. *Second*, the Tribunal lacks jurisdiction over Mexico's counterclaim because the nature of the counterclaim does not implicate any investor obligations under NAFTA Chapter 11, as explained in **Part III.B**. Mexico tries to rely on NAFTA Article 1114, despite having expressly disclaimed reliance on that provision before. In any event, the notion that this Article implies an obligation for investors to comply with Mexico's environmental laws lacks any basis in principles of treaty interpretation or investment treaty jurisprudence. Mexico's attempt to rely on other environmental treaties to ground its counterclaim is also inconsistent with NAFTA Articles 1116(1) and 1117(1), which clearly state that claims submitted to arbitration under Chapter 11 may be based on breaches of only Section A of that same chapter.

7. *Third*, the Tribunal lacks jurisdiction over Mexico's counterclaim because that claim is factually broader than Legacy Vulcan's primary claim and lacks a legal connection to that claim, as described in **Part III.C**. Mexico's counterclaim also undermines the procedural efficiency of this arbitration because it is entirely duplicative of parallel domestic proceedings Mexico initiated before submitting its counterclaim.

8. *Fourth*, and finally, Mexico's counterclaim fails on procedural grounds. As described in **Part IV**, Mexico had ample opportunity in the previous phase of this arbitration to lodge its counterclaim but failed to do so. It would be contrary to due process and fairness, as well as severely prejudicial to Legacy Vulcan, to entertain that counterclaim now. In addition, Mexico is barred under NAFTA Article 1121 from pursuing counterclaims seeking compensatory damages because it has chosen to pursue that very relief in domestic proceedings and has failed to waive or discontinue them.

9. For these reasons, as developed further below, Legacy Vulcan respectfully requests that the Tribunal dismiss Mexico's counterclaim and order Mexico to pay all costs and expenses associated with this baseless and wasteful litigation tactic.

II. MEXICO'S ALLEGATIONS OF ENVIRONMENTAL HARM ARE BASELESS AND PRETEXTUAL.

10. Mexico has failed to submit sufficient evidence to support its counterclaim, both on the merits and on jurisdiction. Nearly two-thirds of its brief is spent on largely unsupported allegations of wrongdoing and environmental damage by Claimant and CALICA that are contradicted and proven specious by record evidence. As explained below, (A) Mexico's counterclaim merely gives effect to one of President López Obrador's several threats against CALICA and Legacy Vulcan; (B) Mexico's allegations of environmental harm and legal violations

have no sound basis in fact and are pretextual; and (C) Mexico's conspiratorial allegations that Legacy Vulcan and CALICA engaged in fraud and bad faith are far-fetched and groundless.

A. MEXICO'S COUNTERCLAIM FLOWS FROM PRESIDENT LÓPEZ OBRADOR'S WHIM AND THREATS TOWARD LEGACY VULCAN AND CALICA.

11. Legacy Vulcan has detailed in its ancillary-claim briefs the numerous statements of President Andrés Manuel López Obrador accusing CALICA of legal violations and environmental destruction, despite acknowledging that its activities had been authorized.[1] Legacy Vulcan has also shown how the President used these attacks to deflect from environmental criticism of his own government over the neighboring Mayan Train project and to pressure Claimant into abandoning its quarrying-for-export project in Quintana Roo (the "Project") as well as this arbitration.[2] Respondent has largely ignored these statements,[3] and does so again in its Counterclaim Memorial, even though the President's own words reveal the real impetus for pursuing a counterclaim so clearly devoid of a jurisdictional basis.

12. Soon after publicly demanding that Legacy Vulcan "withdraw their [ICSID] claim, because it has no legal basis,"[4] President López Obrador threatened to bring an international claim accusing Legacy Vulcan of environmental misdeeds if it refused to discontinue its operations and this arbitration:

- In early February 2022, the President noted that, "*[i]f [Legacy Vulcan and CALICA] say no*" to the government's demand to transform quarrying operations into a tourism project, "*we are going*, if necessary, *to go to* the UN and other *international tribunals*, because it is destruction of our territory."[5]
- In March 2022, the President reiterated that he "told [Legacy Vulcan and CALICA]: *If they do not stop extracting material on their land*, which destroys the environment, I am going to make it known, I am going to make a video and *I am*

[1] Memorial (Ancillary Claim), ¶¶ 37-60, 79-88; *id*. Appendix A; Reply (Ancillary Claim), ¶¶ 16-24.

[2] *See* Memorial (Ancillary Claim), Part II.B; Reply (Ancillary Claim), Part II.B; *see also Opositores al Tren Maya envían segunda carta a la ONU*, Yucatán a la Mano (2 November 2021) (C-0350-SPA) (example of environmental-activist criticism of Mayan Train project).

[3] *See* Counter-Memorial (Ancillary Claim), Rejoinder (Ancillary Claim).

[4] Transcript of President's Morning Press Conference (31 January 2022) (C-0176-SPA.22) (emphasis added) (free translation, the original text reads: "[E]n es[t]a mina [...] buscando un acuerdo, pero que ya no se siga destruyendo y que retiren su demanda, porque no tiene fundamento legal.").

[5] Transcript of President's Morning Press Conference (3 February 2022) (C-0178-SPA.23) (emphasis added) (free translation, the original text reads: "si ellos dicen que no, que quieren seguir explotando [...] nosotros vamos, si es necesario, a acudir a la ONU y a otros tribunales internacionales, porque es destrucción de nuestro territorio."); Andrés Manuel López Obrador, Baja incidencia delictiva en Hidalgo, YouTube (uploaded 3 February 2022), https://www.youtube.com/watch?v=OyjJQJxJtrc (C-0246-SPA) (video online begins display at 02:13:13).

going to file a lawsuit in international organizations and I am going to accuse them of destroying the environment."[6]

- The President echoed these statements the following months, threatening to "*go to tribunals and file a formal claim before international bodies*" if Legacy Vulcan persisted on its international claims and rejected Respondent's ultimatum.[7]

13. President López Obrador's public statements give the lie to Respondent's assertion in its memorial that it became aware of the need to file a counterclaim only after Legacy Vulcan requested leave to file an ancillary claim on 8 May 2022.[8] The President had revealed months earlier that he had predetermined CALICA's alleged environmental violations and harms, and that his government would file an international claim if Legacy Vulcan did not give in to his demands. The so-called "*dictamen*" issued by SEMARNAT (the "Dictamen") — Respondent's main source of support for its counterclaim — was published months later, in August 2022.[9] According to Mexico's own account, work on the Dictamen began on 29 May 2022, *after* the President's public accusations and threats, as well as the shutdown of La Rosita.[10]

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[6] Transcript of President's Morning Press Conference (31 March 2022) (C-0183-SPA.7) (free translation, the original reads: "Pero les dije: Si no se termina de extraer material en sus predios, que destruyen el medio ambiente, lo voy a dar a conocer, voy a hacer un video y voy a presentar una demanda en organismos internacionales y les voy a acusar de que destruyen el medio ambiente.").

[7] Transcript of President's Morning Press Conference (20 April 2022) (C-0185-SPA.9) (free translation, the original reads: "Entonces, si se van a tribunales, porque además hay denuncias, pues vamos a tribunales y vamos a hacer la denuncia formal en organismos internacionales."); Andrés Manuel López Obrador, Seguridad y bienestar, fundamentales para instaurar la paz, YouTube (uploaded 20 April 2022), https://www.youtube.com/watch?v=RoONYTUVQ-I (C-0257-SPA) (video online begins display at 01:18:55); Transcript of President's Morning Press Conference (25 May 2022) (C-0196-SPA.16) ("El único acuerdo es que lo que ya han extraído, que se lo pueden llevar, pero ya no van a poder extraer más. *Y si no se llega a ningún acuerdo, a tribunales, quedamos en libertad, tribunales nacionales y extranjeros*, y nosotros vamos a presentar todos los elementos de prueba para demostrar que es una catástrofe ecológica que no podemos aceptar."); Andrés Manuel López Obrador, 2022, año de mayor inversión extranjera en la historia de México, YouTube (uploaded 25 May 2022), https://www.youtube.com/watch?v=L_Hn23QzV5U (C-0197-SPA) (video online begins display at 01:05:52).

[8] Memorial on Jurisdiction and Admissibility (Counterclaim), Part. II.E.4. ("La Demandada tuvo conocimiento de los incumplimientos de la Demandante y de su necesidad de reconvenir después de la Solicitud de la Demandante de su Reclamación Subordinada").

[9] *See id.*, ¶ 43 ("Mexican authorities had no knowledge of the environmental damage really generated by CALICA's activities [until] the issuance of the *Dictamen*") (free translation, the original reads: "las autoridades mexicanas no tenían conocimiento del daño ambiental realmente generado por las actividades de CALICA. Sin embargo, con la emisión del Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa CALICA (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo ("Dictamen"), la Demandada ha podido obtener mayor conocimiento sobre estos daños."); *see also id.*, ¶ 56 ("fue a partir de la formulación de este Dictamen en agosto de 2022 que pudo dimensionar el daño ambiental generado por las actividades de extracción de CALICA[.]").

[10] *See* SEMARNAT, *Desastre Ambiental Violatorio del Derecho Humano a un Medio Ambiente Sano* (18 August 2022) (C-0235-SPA.17) ("Dicho dictamen se realizó del 29 de mayo al 24 de junio [...] bajo la coordinación de la SEMARNAT.").

14. Respondent gave effect to the President's threat to file an international claim when, on 26 May 2022 — months before the Dictamen was completed — it expressed to this Tribunal its intention to submit a counterclaim if Legacy Vulcan's ancillary claim was admitted.[11] *That very week*, SEMARNAT launched its "extremely abnormal" quest to provide the *post-hoc* justification for the President's directive via the Dictamen — a document which SEMARNAT has yet to serve on CALICA.[12] As explained below, the Dictamen (which *followed* Respondent's decision to pursue a counterclaim in this arbitration, instead of *preceding* it) is so flawed and inaccurate as to confirm the pretextual and post-hoc nature of the exercise.

B. MEXICO'S ALLEGATIONS OF ENVIRONMENTAL HARM AND VIOLATIONS ARE PRETEXTUAL AND UNSUPPORTED.

15. Mexico tries to base its counterclaim on two general allegations of environmental harm: (1) that CALICA harmed the environment as a matter of law because it purportedly breached its environmental obligations and any such breach constitutes environmental damage *ipso facto*; and (2) that CALICA actually harmed the environment as supposedly demonstrated by the Dictamen.[13] Neither allegation withstands scrutiny. The first relies on a tortured reading of a Mexican statute as well as inexistent breaches to CALICA's environmental authorizations. The second relies on the Dictamen, which Legacy Vulcan has already debunked without refutation from Mexico.

1. Mexico's Claim of Environmental Harm as a Matter of Law Is Wrong and Belied by the Record.

16. Echoing arguments it has made since the previous stage of this arbitration,[14] Mexico first asserts that *any* breach of Mexican environmental law and *any* noncompliance with environmental authorizations, permits, or licenses constitutes environmental damage *per se*.[15] As Legacy Vulcan has explained before, Respondent's argument is based on a tortured reading of Mexico's Federal Law on Environmental Liability (the "LFRA," by its Spanish acronym) and leads to absurd results.[16]

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[11] Response to Claimant's Requests for Provisional Measures and for Leave to Submit an Ancillary Claim (filed on 26 May 2022), § IV.

[12] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶ 122; *see* SEMARNAT, *Desastre Ambiental Violatorio del Derecho Humano a un Medio Ambiente Sano* (18 August 2022) (C-0235-SPA.17) ("Dicho dictamen se realizó del 29 de mayo al 24 de junio [...] bajo la coordinación de la SEMARNAT.").

[13] *See* Memorial on Jurisdiction and Admissibility (Counterclaim), n.99.

[14] Rejoinder, ¶ 84; Respondent's Post-Hearing Reply, ¶¶ 95-100.

[15] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 88-91.

[16] Claimant's Post-Hearing Brief, ¶¶ 135-140; Claimant's Post-Hearing Reply, ¶¶ 62-66.

17. Article 2 of the LFRA defines "environmental harm" as:

> the *adverse and measurable* loss, change, deterioration, diminution, impairment, or modification of habitats, ecosystems, natural elements and resources, of their chemical, physical or biological conditions, of the interaction relationships among them, as well as of the environmental services they provide.[17]

In simple terms, environmental harm is defined as a specific impact on the environment (*e.g.*, loss, change, deterioration, etc., of habitats, etc.) that is both adverse and measurable.

18. But Article 6 of the LFRA contains a carve out from what would otherwise constitute "environmental harm." It provides that there is no such harm if either (i) the relevant impacts were expressly evaluated and authorized by SEMARNAT, or (ii) they "do not exceed the limits set out [...] in environmental laws or official Mexican environmental laws or official Mexican standards."[18] This provision also states that the carve out relating to SEMARNAT authorization does not apply if the relevant authorization was breached.[19]

19. Mexico ignores the definition of environmental harm, reading out its burden to prove an adverse and measurable loss. According to Mexico, the exception to the carve out means that whoever fails to abide by a SEMARNAT authorization automatically harms the environment.[20] That reading is untenable. Under that interpretation, not producing a report or

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[17] Federal Law on Environmental Liability, Article 2.III (7 June 2013) (R-0080-SPA.3) (emphasis added) (free translation, the original reads: "Daño al ambiente: Pérdida, cambio, deterioro, menoscabo, afectación o modificación adversos y mensurables de los hábitat, de los ecosistemas, de los elementos y recursos naturales, de sus condiciones químicas, físicas o biológicas, de las relaciones de interacción que se dan entre éstos, así como de los servicios ambientales que proporcionan. Para esta definición se estará a lo dispuesto por el artículo 6° de esta Ley[.]").

[18] *Id.*, Article 6 (free translation, the original reads: "No se considerará que existe daño al ambiente cuando los menoscabos, pérdidas, afectaciones, modificaciones o deterioros no sean adversos en virtud de: I. Haber sido expresamente manifestados por el responsable y explícitamente identificados, delimitados en su alcance, evaluados, mitigados y compensados mediante condicionantes, y autorizados por la Secretaría, previamente a la realización de la conducta que los origina, mediante la evaluación del impacto ambiental o su informe preventivo, la autorización de cambio de uso de suelo forestal o algún otro tipo de autorización análoga expedida por la Secretaría; o de que, II. No rebasen los límites previstos por las disposiciones que en su caso prevean las Leyes ambientales o las normas oficiales mexicanas."); *see also* Claimant's Post-Hearing Brief, ¶ 136; Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 100-106.

[19] Federal Law on Environmental Liability, Article 6 (7 June 2013) (R-0080-SPA.3) (free translation, the original reads: "La excepción prevista por la fracción I del presente artículo no operará, cuando se incumplan los términos o condiciones de la autorización expedida por la autoridad.").

[20] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 91 ("el simple incumplimiento de la legislación ambiental genera daño ambiental."); *see also id.*, ¶ 24 ("Estos incumplimientos [a las autorizaciones de impacto ambiental] no sólo se traducen en una violación a la legislación ambiental y el TLCAN, sino que, como consecuencia, han generado, *per se*, un daño ambiental[.]"); *id.*, ¶ 88 ("los incumplimientos de CALICA a la legislación han generado, *per se*, daño ambiental"); *id.*, n.99 ("el cambio en las condiciones de los recursos naturales que no fue evaluado y autorizado en términos específicos acredita *de facto* el daño ambiental.").

posting a speed-limit sign as required in an environmental authorization would constitute environmental harm *per se*.[21] Not updating SEMARNAT of the status of the Project would also constitute environment harm.[22] This is an overbroad presumption of harm that is found nowhere in the law itself, only made worse by Mr. Rábago's admission that it is essentially impossible to disprove.[23]

20. As Legacy Vulcan's environmental law expert and [redacted], confirms, a more natural reading of the statutory text requires that the authorities first prove that an individual's activities have adverse and measurable impacts on the environment, in line with the definition of environmental harm.[24] Only if this first hurdle is satisfied, do the carve out and its exception come into play. Failure to comply with every provision of an environmental authorization does not by itself constitute environmental harm, though it may lead to administrative sanction.[25]

21. Other provisions of the LFRA confirm this natural reading of the statute. For instance, LFRA Article 7 states that, "to provide certainty" regarding environmental harm, SEMARNAT must:

> issue official Mexican standards, with the purpose of establishing [...], the minimum amounts of deterioration, loss, change, deterioration, diminution, impairment, or modification and contamination, necessary to consider them as adverse and harmful.

[21] *See* Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 32-33 (alleging that not producing bimonthly reports constitutes "a direct breach of Mexican environmental law"); Tr. (Spanish), Day 3, 694:10-695:1 ([redacted] cross-examination, explaining that Mexico's incorrect interpretation would mean that not posting a required sign would constitute environmental harm) [English, 603:3-14].

[22] *See* Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 32-33; *see also* PROFEPA Inspection Resolution (16 August 2002) (C-0353-SPA.6) (imposing a small administrative fine for carrying out construction works not permitted by an environmental impact authorization but expressly finding that this infraction *did not* constitute environmental harm).

[23] Tr. (Spanish), Day 4, 1120:10-1121:5 ("[Professor Tawil]: Para entender, esto sería una suerte de presunción legal. La norma presume daño. ¿Correcto? ¿No? [...] Usted lo que está diciendo es que el daño [al ambiente] es consecuencia [de] que la norma dice que en ese caso hay daño. // [Rábago]: La norma dice que cualquier modificación mesurable al ambiente hecha sin autorización es un daño.// [Professor Tawil]: ¿Y se puede probar lo contrario? ¿Se puede probar que no hay daño o no admite prueba en contrario? No se puede probar lo contrario. // [Rábago]: Se puede -- es difícil probar lo contrario, es correcto.") [English, 955:22-956:16]; *see also* Claimant's Post-Hearing Brief, ¶ 138.

[24] Expert Report-[redacted]-Environmental-Claimant Ancillary Claim Memorial-Third Report-SPA, ¶¶ 91-97; Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 102-106.

[25] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 100-102, 105-106.

> To this end, it must be guaranteed that such amounts are significant[.][26]

22. Similarly, LFRA Article 35 states that, to prove, among other things, "environmental damage, as well as causality, the parties and the authorities may use photographs, satellite images, population studies and in general all kinds of elements provided by technology and science."[27] These provisions are in keeping with the fact that environmental damage, including causality, is a charge that the State has the burden of proving through technical means, in relation to objective parameters. Mexico's position that any breach of environmental obligations constitutes environmental harm *ipso facto* is at odds with these provisions and the principle of presumption of innocence enshrined in the Mexican Constitution.[28]

23. Mexico's attempt to ease its burden of showing actual environmental harm by CALICA through the LFRA thus fails because its reading of that statute is wrong. It also fails because CALICA did not breach its environmental obligations in any event, as established in Claimant's Ancillary Claim Reply and effectively ignored or unrebutted by Mexico in its briefs:

- In 1986, competent Mexican authorities at the federal and state levels evaluated the environmental impacts of the Project and expressly authorized it from an environmental perspective.[29] Mexico concedes this.[30]
- PROFEPA inspected the Project at least twice since then and found it fully compliant with its environmental obligations, without ever hinting that CALICA missed a forestry or other permit such as the Authorization for Soil-Use Change in Forested Terrains (*Autorización de Cambio de Uso de Suelo en Terrenos Forestales* or "CUSTF").[31]
- In 1993, for example, PROFEPA inspected La Rosita "*to verify and confirm [CALICA's] compliance with* the provisions contained in the [LGEEPA], the

[26] Federal Law on Environmental Liability, Article 7 (7 June 2013) (R-0080-SPA.5) (free translation, the original reads: "A efecto de otorgar certidumbre e inducir a los agentes económicos a asumir los costos de los daños ocasionados al ambiente, la Secretaría deberá emitir paulatinamente normas oficiales mexicanas, que tengan por objeto establecer caso por caso y atendiendo la Ley de la materia, las cantidades mínimas de deterioro, pérdida, cambio, menoscabo, afectación, modificación y contaminación, necesarias para considerarlos como adversos y dañosos. Para ello, se garantizará que dichas cantidades sean significativas y se consideren, entre otros criterios, el de la capacidad de regeneración de los elementos naturales.") (emphasis added).

[27] *Id.*, Article 35 (free translation, the original reads: "Para acreditar los hechos o circunstancias en relación al estado base, el daño ocasionado al ambiente, así como el nexo causal, las partes y las autoridades podrán utilizar fotografías, imágenes de satélite, estudios de poblaciones y en general toda clase de elementos aportados por la técnica y la ciencia.").

[28] Constitution of Mexico, Article 20.B.I. (C-0328-SPA.24).

[29] *See, e.g.*, Reply (Ancillary Claim), ¶¶ 39-41; Investment Agreement (6 August 1986) (C-0010-SPA.6, 14).

[30] *See, e.g.*, Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 31 ("la MPIA fue el documento evaluado por la Secretaría de Desarrollo Urbano y Ecología (SEDUE) para otorgar la factibilidad del proyecto de extracción en La Rosita desde el punto de vista de impacto ambiental").

[31] *E.g.*, Reply (Ancillary Claim), ¶¶ 41-48.

technical ecological standards and other *applicable legal provisions for the granting of permits, authorizations and concessions*."[32] PROFEPA concluded that CALICA was quarrying "in accordance with applicable laws,"[33] even though vegetation had been cleared without a CUSTF at the time.

- Mexico's attempt to downplay the 1993 inspection is unconvincing. It relies on the fact that the letterhead of the inspection report contains a reference to SEDESOL (the *Secretaría de Desarrollo Social*) to suggest that the inspection was not conducted by an authority with jurisdiction over forestry issues.[34] Mexico fails to mention that SEDESOL was one of the government entities in charge of applying the newly-enacted Forestry Law.[35] Mexico also ignores that the inspection report's letterhead refers to PROFEPA as well, that the report contains PROFEPA numbering, and that the body of that report expressly states that the inspection was conducted by PROFEPA.[36] PROFEPA indisputably had the authority to enforce forestry laws and regulations at the time.[37] Mexico's further assertion that the results of the inspection were "preliminary" is similarly unconvincing.[38] PROFEPA's conclusion that CALICA was "extracting in accordance with applicable laws"[39] was never rebutted or modified.
- In 2012, PROFEPA again inspected the Project to verify "physically and through documents whether [CALICA] [...] complied with its obligations regarding

[32] PROFEPA Inspection Report (17 March 1993) (C-0280-SPA.3-4, 11-12) (emphasis added) (free translation, the original reads: "[E]s con el fin de verificar y comprobar el cumplimiento de las disposiciones contenidas en la Ley General del Equilibrio Ecológico y la Protección al Ambiente, de las normas técnicas ecológicas y demás disposiciones jurídicas aplicables, al otorgamiento de permisos, autorizaciones y concesiones[.]").

[33] PROFEPA Inspection Resolution (29 March 1993) (C-0281-SPA.2) (emphasis added) (free translation, the original reads: "En atención a lo expuesto y del análisis de la documentación legal y aprovechamiento físico de la empresa, manifestamos de manera preliminar que [CALICA] realiza el aprovechamiento conforme a las normas aplicables.").

[34] Memorial on Jurisdiction and Admissibility (Counterclaim), n.129 (citing to Rejoinder (Ancillary Claim), ¶ 231).

[35] Ley Forestal publicada el 22 de diciembre de 1992 (JPMA-0025.3-4) (listing numerous duties of SEDESOL in applying this law, including: defining forestry zones, forming a consultive technical council, preparing a forestation and reforestation program, among others).

[36] PROFEPA Inspection Report (17 March 1993) (C-0280-SPA.3, 11) (stating that the document "Oficio de Comisión No. PFPA-DEVN-C10-117" was issued by PROFEPA, and that "el (los) suscrito(s) inspector(es) de la Subdelegación de Verificación Normativa el (los) C(cc) Lic. Manuel Mayorga Reyes, Ing. José A. Flores Calderón, y Jorge Reyes Flores en cumplimiento de la Orden de Inspección conferida por el C. Delegado Estatal de la Procuraduría Federal de Protección al Ambiente"); s*ee also* PROFEPA Inspection Resolution (29 March 1993) (C-0281-SPA.2) ("En relación a las acciones de Verificación Ambiental que esta Procuraduría Federal de Protección al Ambiente realiza [...]").

[37] Ley Forestal publicada el 22 de diciembre de 1992 (JPMA-0025.11) ("El personal autorizado de la Secretaría realizará visitas de inspección o auditorías técnicas [...], con el objeto de verificar el cumplimiento de lo dispuesto en esta ley, sin perjuicio de las facultades que correspondan a la Secretaría de Desarrollo Social a través de la Procuraduría Federal de Protección al Ambiente.").

[38] Memorial on Jurisdiction and Admissibility (Counterclaim), n.129 (citing to Rejoinder (Ancillary Claim), ¶ 229).

[39] PROFEPA Inspection Resolution (29 March 1993) (C-0281-SPA.2) (emphasis added) (free translation, the original reads: "En atención a lo expuesto y del análisis de la documentación legal y aprovechamiento físico de la empresa, manifestamos de manera preliminar que [CALICA] realiza el aprovechamiento conforme a las normas aplicables."); *see also* Reply (Ancillary Claim), ¶¶ 47, 59.

environmental impact." [40] PROFEPA considered the 1986 Investment Agreement — a fact Mexico no longer disputes[41] — and found it "clear that the company *does have* the prior resolution or authorization in matters of environmental impact to carry out the works or activities that are being performed[.]"[42] PROFEPA concluded that CALICA was conducting its quarrying activities in accordance with its legal obligations.[43] Notably, Mexico makes no additional attempts at downplaying the 2012 inspection, having seen its prior arguments utterly debunked.[44]

- CALICA's authorization to quarry La Rosita was not limited to 25 years, as Mexico insists in its Counterclaim Memorial.[45] As Legacy Vulcan explained in its Ancillary Claim Reply and Mexico failed to refute in its Rejoinder,[46] that supposed limitation is at odds with the text of the 1986 Investment Agreement as well as public admissions from President López Obrador and SEMARNAT.[47] CALICA was in fact authorized to quarry La Rosita for as long as economically feasible, subject to the time limits specified in the permits, licenses, authorizations, and concessions for

[40] PROFEPA Inspection Resolution (10 December 2012) (C-0043-SPA.2) (emphasis added) (free translation, the original reads: "con el objeto de verificar física y documentalmente que él o las responsables de la empresa citada [CALICA] [...] hayan dado cumplimiento con sus obligaciones ambientales en materia de impacto ambiental, en lo referente a sus autorizaciones, permisos o licencias, otorgadas por la [SEMARNAT]; y si cuenta con autorización en materia de impacto ambiental vigente.").

[41] *See* Rejoinder (Ancillary Claim), ¶ 222 ("en 2022, *a diferencia de la inspección de 2012*, CALICA no exhibió el Acuerdo de 1986" (emphasis added)); *cf.* Counter-Memorial (Ancillary Claim), ¶¶ 306, 309.

[42] PROFEPA Inspection Resolution (10 December 2012) (C-0043-SPA.6-7) (emphasis added) (free translation, the original reads: "[S]e tiene que [...] en fecha seis de agosto de mil novecientos ochenta y seis, se autorizó a la inspeccionada para que llevara a cabo la explotación de los predios 'Punta Inha' y 'La Rosita', sobre y bajo el nivel freático, por lo que, se desprende que *la empresa [CALICA], sí cuenta con el resolutivo o la autorización previa en materia de impacto ambiental* para llevar a cabo las obras o actividades que se realizan en el predio sujeto a inspección, de conformidad con [...] [la LGEEPA] y [...] [el] Reglamento de la [LGEEPA] en Materia de Evaluación del Impacto Ambiental.") (emphasis added).

[43] *Id.* at 56-57.

[44] *See* Reply (Ancillary Claim), ¶¶ 42-45, 80.

[45] *See* Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 114, 121, 124, 130.

[46] *See* Reply (Ancillary Claim), ¶¶ 75-81.

[47] Investment Agreement (6 August 1986) (C-0010-SPA.4, 11) ("El tiempo de explotación estará sujeto a las condiciones de mercado y a la factibilidad económica."); *id.* at 8, 16 ("La duración de este acuerdo dependerá de los plazos y tiempos establecidos en los permisos, licencias, autorizaciones y concesiones a que se refiere la cláusula Décima Primera."); *id.* at 57 ("Como resultado de las diferentes investigaciones geológicas que se han llevado a cabo en el sitio [...] se ha determinado el volumen aprovechable del banco, el cual se estima en 220 millones de toneladas, suficiente para una explotación continua de 40 años.")); Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 64-67; Transcript of President's Morning Press Conference (4 May 2022) (C-0187-SPA.7) ("Esta autorización no especificaba ni la vigencia ni el volumen de explotación del proyecto, fue como un cheque en blanco para extraer piedra caliza y llevarse un pedazo de nuestro país[.]"); Transcript of President's Morning Press Conference (3 February 2022) (C-0178-SPA.22) ("Y fíjense cómo era antes este asunto, cómo eran las cosas antes, no le pusieron ni siquiera un límite a la concesión, porque en otros casos, bueno, concesionaron el puerto de Veracruz, en el tiempo de Salinas, 100 años, un siglo, pero acá ni siquiera hay fecha. [...] [L]es digo que no tiene límite, ese lo entregaron antes del 2000."); SEMARNAT Press Release (6 May 2022) (C-0174-SPA.3) ("En 1986, la Secretaría de Comunicaciones y Transportes, la [SEDUE] y el Gobierno de Quintana Roo otorgaron a Calica la primera autorización para la explotación de roca caliza por debajo del manto freático en La Rosita, sin determinar un plazo de vigencia, ni volumen de explotación específico.").

the Project.[48] Respondent has failed to establish that those time limits had expired as of 2022.

- CALICA did not require a CUSTF to remove vegetation in its lots. The regulatory land use of CALICA's lots made them incompatible with forestry, meaning that they could not constitute "forested terrains" requiring such a permit.[49] This is why CALICA removed vegetation openly for almost 40 years without a CUSTF, with the full knowledge of SEMARNAT and PROFEPA.[50]
- PROFEPA-certified auditors have evaluated the Project repeatedly and found it to be environmentally compliant. PROFEPA itself monitored this process closely, requesting additional information when necessary.[51] As a result, CALICA was awarded six Clean Industry Certificates, which constitute a legal "acknowledge[ment] that at the time of issuance, the Company operates *in full compliance with environmental regulations*[.]"[52] While Mexico does not deny this, it now alleges that CALICA deceived its auditors,[53] but Mexico's desperate new accusation of fraud is a tall order and is also false, as explained in Part II.C below.

24. In sum, Mexico's claim of *ipso facto* environmental harm and its insistence that CALICA was a serial environmental offender do not withstand scrutiny and is belied by ample evidence in the record — including admissions from Mexico's instrumentalities — that CALICA at all relevant times "operate[d] *in full compliance with environmental regulations*[.]"[54]

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[48] Investment Agreement (6 August 1986) (C-0010-SPA.4, 11) ("El tiempo de explotación estará sujeto a las condiciones de mercado y a la factibilidad económica."); *id.* at 8, 16 ("La duración de este acuerdo dependerá de los plazos y tiempos establecidos en los permisos, licencias, autorizaciones y concesiones a que se refiere la cláusula Décima Primera.").

[49] *See, e.g.*, Reply (Ancillary Claim), ¶¶ 55-56.

[50] *See, e.g.*, *id.*, ¶¶ 61-62.

[51] *See* Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 34-38.

[52] LGEEPA Regulation on Environmental Audits, Article 23 (29 April 2010) (C-0210-SPA.10) (emphasis added) (free translation, the original reads: "A través del Certificado [de Industria Limpia], la Procuraduría o, en su caso, la Agencia, según corresponda, reconocen que al momento de su otorgamiento, la Empresa opera en pleno cumplimiento de la regulación ambiental y que su Desempeño Ambiental es conforme con los Términos de Referencia."); Clean Industry Certificate (23 June 2003) (C-0037-SPA); Clean Industry Certificate (16 December 2005) (C-0038-SPA); Clean Industry Certificate (31 July 2008) (C-0039-SPA); Clean Industry Certificate (28 February 2012) (C-0040-SPA); Clean Industry Certificate (2 June 2014) (C-0041-SPA); Clean Industry Certificate (27 July 2016) (C-0042-SPA).

[53] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 121, 124, 130.

[54] LGEEPA Regulation on Environmental Audits, Article 23 (29 April 2010) (C-0210-SPA.10) (emphasis added) (free translation, the original reads: "A través del Certificado, la Procuraduría o, en su caso, la Agencia, según corresponda, reconocen que al momento de su otorgamiento, la Empresa opera en pleno cumplimiento de la regulación ambiental y que su Desempeño Ambiental es conforme con los Términos de Referencia."); *see also* Clean Industry Certificate (23 June 2003) (C-0037-SPA); Clean Industry Certificate (16 December 2005) (C-0038-SPA); Clean Industry Certificate (31 July 2008) (C-0039-SPA); Clean Industry Certificate (28 February 2012) (C-0040-SPA); Clean Industry Certificate (2 June 2014) (C-0041-SPA); Clean Industry Certificate (27 July 2016) (C-0042-SPA).

2. Mexico's Claim that CALICA Actually Harmed the Environment Is Wrong and Pretextual.

25. As a backstop to its assertion of environmental damage as a matter of law, Mexico posits that "there is additional scientific evidence showing that CALICA's activities caused environmental damage in soil, water, biodiversity and air which is irreparable and has caused effects on the health of neighboring residents."[55] The only "scientific evidence" Mexico proffers, however, is the so-called Dictamen and the testimony of two of its authors.[56] Mexico's purported "evidence" does not hold water and instead confirms the pretextual nature of the Dictamen and the counterclaim it was designed to serve.

26. The context of the Dictamen's genesis and publication suggests that SEMARNAT developed it to lend a veneer of *post-hoc* technical support to the otherwise unsupported assertions of environmental harm by President López Obrador. It is no coincidence that SEMARNAT started working on that document the same week Respondent notified its intent to submit a counterclaim, which followed the President's months-long threats to file an international claim if Legacy Vulcan did not agree to Respondent's demands.[57] And it is not surprising that the Dictamen ended up outlining a laundry list of supposed environmental harms from CALICA's activities that marked a 180-degree departure from SEMARNAT's previous assessments of those very activities over decades.[58]

27. Another contextual fact suggesting that the Dictamen was a hit job from the start: SEMARNAT never notified CALICA of the Dictamen or gave it an opportunity to address its conclusions before publication on SEMARNAT's website.[59] As [redacted] has explained, this is

[55] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 94 (free translation, the original reads: "Con independencia de los incumplimientos y violaciones a la legislación mexicana en materia ambiental que han sido descritos en la Sección A supra, existe evidencia científica adicional para acreditar que las actividades de CALICA han ocasionado daño ambiental en suelo, agua, biodiversidad, y aire, mismo que es irreparable y ha provocado afectaciones en la salud de los habitantes de las zonas aledañas.") (citation omitted).

[56] SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA); Witness Statement of Mr. Adrian Pedrozo Acuña (RW-0016); Witness Statement of Ms. Gloria Fermina Tavera Alonso (RW-0015).

[57] Response to Claimant's Requests for Provisional Measures and for Leave to Submit an Ancillary Claim (filed on 26 May 2022), § IV; SEMARNAT, *Desastre Ambiental Violatorio del Derecho Humano a un Medio Ambiente Sano* (18 August 2022) (C-0235-SPA.17) ("Dicho dictamen se realizó del 29 de mayo al 24 de junio [...] bajo la coordinación de la SEMARNAT.").

[58] *See e.g.* SEMARNAT, *Desastre Ambiental Violatorio del Derecho Humano a un Medio Ambiente Sano* (18 August 2022) (C-0237-SPA.55-66) (arguing that CALICA contaminated water in the area); *but see* Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶ 85 (CALICA reporting its water quality testing results to SEMARNAT for over 20 years without complaint).

[59] SEMARNAT, *Desastre Ambiental Violatorio del Derecho Humano a un Medio Ambiente Sano* (18 August 2022) (C-0235-SPA).

highly irregular.[60] Mexico's attempt to brush the Dictamen off as "an ordinary act" fails.[61] It cites to four supposedly comparable environmental studies, but not one of these is an evaluation targeted at a specific company the way the Dictamen is:

- One of the documents cited is a diagnostic not of the environmental aspects of a project but simply of a public participation process.[62]

- Another is an industry-wide analysis of pig-farming in the entire state of Yucatán, encompassing over 500 farms in 53 municipalities.[63] This analysis took seven months (as opposed to the 26 days dedicated to CALICA's Dictamen)[64] and included consultation with associations representing the farmers.[65] In contrast, the Dictamen was performed covertly.

- Another identifies risks of mercury mining in the Sierra Gorda region of the State of Querétaro, encompassing multiple mining projects and industry actors.[66] This involved taking samples across at least three years *inside* the mines,[67] and consulting the miners and the local population.[68] In contrast, the Dictamen was done in record time — 26 days — and all the purported "samples" were taken *outside* of CALICA.

[60] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 122, 126.

[61] Second Witness Statement of Mr. Carlos Rábago Estela, ¶ 8 (RE-0011) (free translation, the original reads "La elaboración y publicación de este tipo de documentos son actos ordinarios dentro de las atribuciones de la SEMARNAT").

[62] *See* Programa de Acciones de Saneamiento (PAS) 2022 de la SEMARNAT en el marco del Programa Integral de Restauración Ecológica o Saneamiento de la Cuenca del Alto Atoyac (CRE-0006).

[63] *See* Dictamen Diagnóstico Ambiental De la Actividad Porcícola en Yucatán (CRE-0005.9) ("Este Dictamen Diagnóstico Ambiental tiene por objetivo analizar la dinámica de la actividad porcícola en el estado de Yucatán y conocer sus implicaciones ambientales en el territorio"); *id*. at 24 (listing municipalities).

[64] *Compare* Dictamen Diagnóstico Ambiental De la Actividad Porcícola en Yucatán (CRE-0005.18) ("siete meses de trabajo de investigación") *with* SEMARNAT, *Desastre Ambiental Violatorio del Derecho Humano a un Medio Ambiente Sano* (18 August 2022) (C-0235-SPA.17) ("Dicho dictamen se realizó del 29 de mayo al 24 de junio").

[65] Dictamen Diagnóstico Ambiental De la Actividad Porcícola en Yucatán (CRE-0005.18) (listing consultations from Asociación Local de Porcicultores and Grupo Porcícola Mexicano, among others).

[66] Identificación de los riesgos a la salud y al medio ambiente asociados a la minería primaria de mercurio en la Sierra Gorda de Querétaro (CRE-0007).

[67] *E.g.*, *id*. at 38 (referencing worm samples taken in 2017, 2018 and 2019 in both wet and dry seasons); *id*. at 39-40 (same with reference to rodents).

[68] *Id*. at 58 ("En cada sitio de estudio se llevó a cabo una plática informativa con la finalidad de presentar el proyecto a la población de interés y hacer una atenta invitación a participar en el mismo, para lo cual los implicados firmaron una carta de consentimiento informado"); *id*. at 44-58 (describing health evaluations on local population).

- Another is simply a book to "show, by way of illustration, the minimum required activities that must be performed on a municipal wastewater treatment system to function correctly[.]"[69]

28. As [redacted] testified, [redacted] such a coordinated deployment of resources, entirely removed from any administrative proceeding, focused on attacking a single company."[70]

29. The Dictamen is also extraordinary in that it targeted one company outside a formal administrative process. Mexican administrative law regulates the procedures environmental authorities must follow to investigate private persons, including procedural safeguards to protect them from state abuse.[71] By carrying out the Dictamen covertly and outside the confines of an administrative procedure, SEMARNAT deliberately flouted these procedural safeguards, denying CALICA the right to be heard or present evidence.[72] CALICA learned of the Dictamen through Mexico's statements about it in social media.[73] Mexico's response that "CALICA could have prepared and publicized its own Dictamen" is no serious response at all.[74]

30. The irregular circumstances surrounding the development of the Dictamen are not the only evidence that makes its conclusions suspect. The analysis underpinning the Dictamen's allegations of adverse environmental impacts purportedly caused by CALICA's activities is fundamentally flawed and skewed against CALICA, as shown by the report of Legacy Vulcan's independent environmental expert, Dr. Gino Bianchi Mosquera.[75] Mexico's Counterclaim Memorial makes *no* effort to address Dr. Bianchi's technical evaluation of the Dictamen, nor do the testimonies of two of the Dictamen's purported co-authors that Respondent cites and quotes in that memorial.[76] The *unrebutted* deficiencies of the Dictamen — examples of which are

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[69] Operación y mantenimiento básico de un humedal: el caso de San Francisco Uricho (CRE-0008.11) (free translation, the original reads "mostrar de manera enunciativa las actividades mínimas requeridas que se deben realizar a un sistema de tratamiento de aguas residuales municipales; esto, con el fin de mantener el funcionamiento correcto del sistema").

[70] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶ 122.

[71] *Id.*, ¶ 123.

[72] *Id.*, ¶¶ 123-126.

[73] Witness Statement-[redacted]-Claimant Ancillary Claim Reply-Fourth Statement-ENG, ¶ 12.

[74] Rejoinder (Ancillary Claim), ¶ 104.

[75] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, Part 5.

[76] *See* Witness Statement of Mr. Adrian Pedrozo Acuña (RW-0016); Witness Statement of Ms. Gloria Fermina Tavera Alonso (RW-0015).

summarized below — confirm what contextual facts already suggest: that the Dictamen was not the result of an objective technical exercise but rather a behind-the-scenes government effort to lend *ex-post* support to the President's predetermined conclusions about CALICA's operations.

a) The Dictamen's Water-Quality Analysis Is Flawed.

31. Pointing to the Dictamen, Mexico argues that CALICA caused "apparent contamination" of water in the region,[77] but this assertion is unsupported by serious scientific study or evidence.

32. As Dr. Bianchi explains in his unrebutted expert report, Mexican technical standard NMX-AA-14-1980 sets out how water samples are to be taken to check the presence of contaminants.[78] Though the Dictamen states it followed these standards,[79] it actually deviated from them significantly. Standard NMX-AA-14-1980 requires that samples be taken from the actual lagoon being analyzed.[80] SEMARNAT instead took samples from outside CALICA's lots, some as far as four kilometers away, with the predetermined objective of assessing purported contamination from CALICA's activities.[81] SEMARNAT did this even though there are bodies of water within CALICA from which periodic samples have been taken for study and regularly submitted to SEMARNAT over the years — samples SEMARNAT wholly ignored.[82] Respondent offers no justification or correction for this deviation from the standard.

33. Because "contaminated" is a relative term (like "tall," "long," or "heavy"), Mexican law also sets out specific parameters to determine whether a body of water can be considered "contaminated."[83] The government officials dispatched to prepare the Dictamen failed to test for these parameters. SEMARNAT instead collected water samples from 17 sources (all outside CALICA), and tested them for only two of the appropriate parameters (pH and temperature) plus

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[77] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 70 (free translation, the original reads: "La presencia de agua con aparente contaminación y olor en los cenotes de la región"); SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA.104) ("se puede afirmar de manera inequívoca que existen afectaciones a la calidad del agua que son directamente atribuibles a la actividad minera").

[78] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG,¶ 79.

[79] SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA.52).

[80] GSI-0015, p. 6.

[81] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶ 74.

[82] *Id.*, ¶¶ 78-80.

[83] Expert Report-[redacted]-Environmental-Claimant Ancillary Claim Memorial-Third Report-SPA, ¶ 81; Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶ 82.

11 others that were irrelevant to the applicable contamination standard.[84] The Dictamen provides no explanation as to how or why these extraneous 11 parameters were chosen.[85] For this reason, Dr. Bianchi determined that the laboratory results generated for the Dictamen's water quality evaluation are "woefully inadequate to assess water quality based on applicable Mexican standards."[86] He added that "these laboratory results cannot allow one to conclude whether water quality in the sampled bodies of water complies with the relevant Mexican standard."[87]

34. Further, SEMARNAT analyzed these results in a most unusual way, seemingly designed to reach its premeditated conclusion.[88] The Dictamen ostensibly stated that it would evaluate the water around CALICA using a well-known Water Quality Index ("WQI").[89] The WQI uses a formula with several variables to determine water quality, illustrated below. SEMARNAT deviated from this standard formula, however, and cherry-picked *only one* of these variables: the "K" coefficient.[90] It did so because the K coefficient is *subjective*, requiring the sampler to opine on what the water looks and smells like.[91] Normally, this subjectivity inherent in the K coefficient is offset by the presence of other objective variables, but by using only the K coefficient, SEMARNAT evaluated the quality of the water in an entirely subjective manner while presenting it as a serious evaluation.[92]

Figure 1: Water-Quality Index Formula (Conesa)[93]

$$WQI = \frac{K \sum C_i P_i}{\sum P_i}$$

35. To make matters worse, SEMARNAT altered the textbook definitions for the K coefficient to facilitate a finding of "contamination," as shown in the table below. As Dr. Bianchi

[84] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶ 81.

[85] *Id.*, ¶ 82.

[86] *Id.*, ¶ 84.

[87] *Id.*

[88] *Id.*, Part 5.2.2.

[89] SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA.53) (referring to Conesa 1993 as its basis of analysis).

[90] SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA.53-55).

[91] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶¶ 87-89.

[92] *Id.*

[93] *Id.*, ¶ 88.

explains, "[b]y making these changes to the original definition, the interpretation of K used in the Dictamen was biased toward a low K coefficient (*i.e.*, worse water quality). For example, ***any*** odor, not just a ***strong*** odor, would have resulted in a K value of 0.50" using the altered methodology used in the Dictamen.[94]

Figure 2: Changes to the Textbook of Definitions of K Coefficient in the Dictamen[95]

"K"	Textbook	Dictamen
1 (*high quality water*)	**Clear** water without apparent contamination	**Clean** water without apparent contamination
0.75	Lightly colored water, foams, **slight apparent unnatural turbidity**	Lightly colored water, slightly turbid, **without a natural appearance**
0.50	Waters with a contaminated appearance and **strong odor**	Waters with apparent contamination and **odor**
0.25 (*low quality water*)	Black waters presenting fermentation and odors	--

36. When the Dictamen's authors came across data that did not fit its preordained conclusions, they ignored that data. For instance, Mexico found test results purportedly showing that nitrites were ***higher upstream*** CALICA than ***downstream***.[96] This did not fit SEMARNAT's theory of CALICA causing water contamination downstream from its lots and was therefore discarded without explanation.[97] SEMARNAT also failed to give any consideration whatsoever to water-quality data CALICA had been reporting every month for over 20 years in the regular course of business (from ***inside*** its lots).[98] In contrast, Dr. Bianchi ***did*** analyze this historical data and found that, "if the K coefficient is properly used along with the remaining factors of the WQI

[94] *Id.*, ¶ 91 (emphasis in the original).

[95] *Id.*, ¶90 (modified); GSI-0021, p. 173 (textbook definitions); *cf.* SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA.53) (Dictamen definitions).

[96] SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA.62-63).

[97] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶¶ 93-94.

[98] *Id.*, ¶ 85.

equation (as taken from CALICA's historical data), the resulting WQI for the water sampled from CALICA is between 75 and 100 (*i.e.*, good to very good water quality)."[99]

37. Asserting that CALICA "has caused serious contamination"[100] on this basis — as Mexico does — is untenable. As Dr. Bianchi confirms, "[t]his is not a scientific conclusion[.]"[101]

b) The Dictamen's Soil-Quality Analysis Is Flawed.

38. Mexico argues, based on the Dictamen, that CALICA's activities have also contaminated the soil around the company's lots.[102] As Dr. Bianchi explains in his unrebutted expert report, this "is misleading and appears to force a conclusion that contamination exists even though metal concentrations are below Mexican standards for soil contamination."[103]

39. As with its water-quality "analysis," the Dictamen ignored usual soil-evaluation methods.[104] Under applicable testing guidelines, to evaluate the soil of an area the size of CALICA, SEMARNAT had to take 110 samples.[105] It took only four.[106] Each of these was from outside CALICA's lots; some as far as two kilometers away.[107]

40. Also like its water-quality "analysis," the Dictamen did not compare the soil test results against applicable Mexican standards for contamination.[108] The Dictamen simply asserted that certain metals were elevated, with no criteria for comparison.[109] Dr. Bianchi did compare the metal concentrations in the soil — as reported by the Dictamen — against the applicable Mexican

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[99] *Id.*, ¶ 102.

[100] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 76.

[101] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶ 87.

[102] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 78.

[103] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶ 71.

[104] *Id.*, Part 5.1.1.

[105] *Id.*, ¶ 44.

[106] SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA.78).

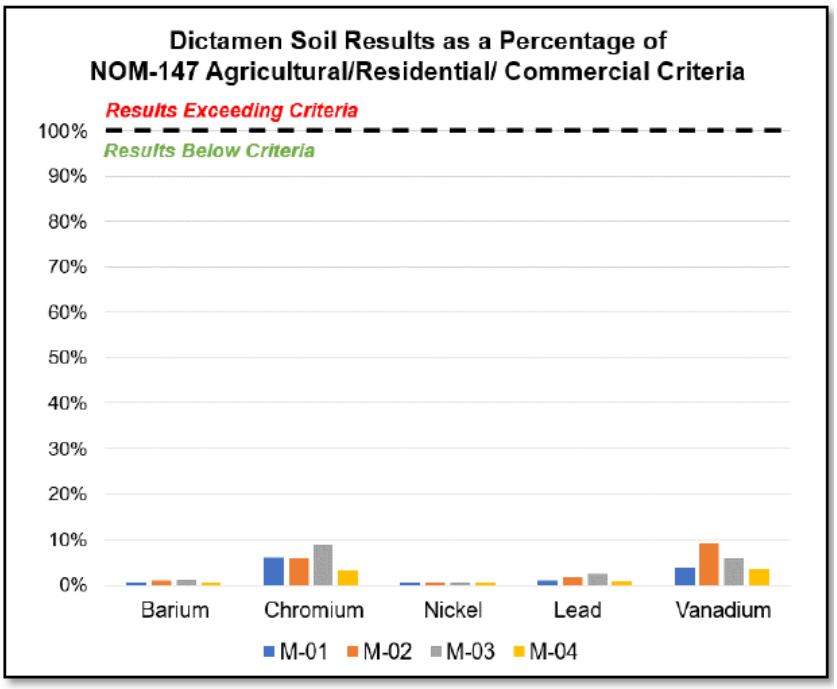
[107] SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA.78); *see also* Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶ 44.

[108] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶¶ 47-48.

[109] SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA.79-82); Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶ 46.

standards (NOM-147),[110] revealing that none of the metals sampled in the Dictamen reach even 10% of the concentrations required to constitute "contamination," as shown in the chart below.[111] Mexico has not contested this expert evidence and none of the witnesses that Mexico proffered as purported authors of the Dictamen defend the soil analysis of that document.

Figure 3: Soil Concentrations for Metals Regulated by NOM-147 in Samples Collected Outside CALICA[112]



41. The Dictamen again analyzed these soil measurements in a most unusual way, tailored to reach its intended conclusion of contamination.[113] To determine that the soil around CALICA was "contaminated," the Dictamen purported to use a contamination factor (C_F) analysis.[114] This method normally consists of comparing two variables:

a. C_o — the mean concentration of a metal resulting from at least five soil samples; and

[110] The applicability of this standard is not in dispute. SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA.83).

[111] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶¶ 49-51.

[112] *Id.*, Illustration 5.3.

[113] *Id.*, Part 5.1.2.

[114] *Id.*, ¶¶ 55-56.

b. C_n — the baseline reference (*i.e.*, "background") concentration of the metal in the area being studied.[115]

42. The higher the former as compared to the latter, the higher the contamination factor, as shown below.

Figure 4: Definition of Contamination Factor Analysis Used in Dictamen[116]

$$C_F = \frac{C_0}{C_n}$$

where:

C_0 = "…the mean contents of metals of **at least five** samples in the contaminated site…"

C_n = "…the **baseline concentration in reference environment** like Earth's crust in this study…."

(emphasis added)

43. SEMARNAT's Dictamen applied both factors incorrectly, artificially yielding a higher contamination factor.[117] As regards C_0, it used four soil samples instead of the minimum five.[118] As regards C_n, the Dictamen used the soil sample with the lowest metal concentrations as its background value.[119] As Dr. Bianchi explained in his unrebutted expert report, this approach skewed the result toward higher "contamination factors":

> The incorrect CF methodology used in the Dictamen may be illustrated using the analogy of a family attempting to determine whether they are 'tall' compared to other families in the neighborhood. Per the correct CF methodology, the family should first take the average height of five family members (this is the sample, C0) and then compare this average with the average height of other families in the neighborhood (this is the background, Cn). Instead, the Dictamen's methodology takes the height of four individual members of the family, uses the shortest of the four as the 'background' or baseline height of the average family in the neighborhood, and compares the remaining three family members' heights to that individual. Obviously, this will never provide the answer as to whether the family is taller or shorter than other families in the neighborhood – but it will give you a result (though

[115] *Id.*, ¶¶ 57-58.

[116] *Id.*, ¶ 57.

[117] *Id.*, ¶¶ 59-61; *see also id.*, ¶¶ 63-64 (illustrating the distortive effects of this method using Barium readings).

[118] *Id.*, ¶ 60; SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA.78).

[119] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶ 61; SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA.80).

> flawed) indicating that the family is in fact tall. The decision to take the shortest family member as background has the effect of classifying the rest of the family members as 'tall' regardless of how they may compare to the true average for the neighborhood.[120]

44. If this were not bad enough, SEMARNAT also ignored data that did not fit its predetermined conclusion of soil contamination. The Dictamen analyzed 27 metals in the soil but reported the results of only five metals regulated by NOM-147, leaving numerous results inexplicably unreported.[121] As Dr. Bianchi concludes, the Dictamen's assertion of soil contamination "is not the result of a serious or credible technical or scientific analysis[.]"[122]

45. The flaws in the Dictamen's water and soil analysis further show that SEMARNAT was on a mission to lend support to the predetermined conclusion of environmental harm that President López Obrador had staked out publicly months earlier, regardless of the facts or proper technical methodology.

c) The Dictamen's Biodiversity Analysis Is Flawed.

46. Mexico alleges that CALICA's activities have harmed the biodiversity of the region by altering the natural landscape as well as reducing its flora and fauna.[123] This allegation boils down to the wholesale opposition to quarrying at the very sites that Mexico authorized CALICA to quarry decades ago. The allegation also ignores remediation steps CALICA has taken (including in accordance with its environmental authorizations) to minimize the impacts of its activities on local biodiversity, which continues to thrive despite CALICA's operations.[124]

47. For instance, Mexico cites the Dictamen and the testimony of one of its co-authors (Ms. Tavera) to accuse CALICA of removing vegetation irreversibly.[125] But this is an indisputably unavoidable part of the quarrying activity assessed and authorized by Mexico decades ago.[126]

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[120] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶ 62.

[121] *Id.*, ¶¶ 52-53.

[122] *Id.*, ¶ 53.

[123] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 58.

[124] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, Parts 5.5-5.6.

[125] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 59.

[126] Witness Statement of Ms. Gloria Fermina Tavera Alonso, ¶ 53 ("los resultados descritos demuestran diversos impactos ambientales derivados de las actividades de extracción de roca caliza a cielo abierto que se deben al procedimiento que requiere para su desarrollo, lo cual implica primeramente la remoción de la vegetación forestal existente con la perdida de las selvas, lo que naturalmente implica la pérdida y desplace de hábitat para especies de fauna."); *id.*, ¶ 42 ("la explotación de materiales pétreos o mineros a cielo abierto siempre implica un daño ambiental directo sobre los ecosistemas y la pérdida de biodiversidad") (RW-0015).

CALICA anticipated as much in its 1986 environmental impact statement and several times since then.[127] SEMARNAT evaluated those impacts and expressly authorized them at the time.[128]

48. The clearing of vegetation is also not entirely irreversible, as the Dictamen suggests.[129] CALICA has implemented a reforestation program that has successfully restored native vegetation in portions of the quarried areas, at a rate exceeding the usual regulatory metrics fivefold.[130] To this end, CALICA has developed and maintained an award-winning tree nursery within its property.[131] The Dictamen overlooked these efforts, instead conducting a flora "analysis" without having entered the lots or interviewing CALICA's sustainability team.[132]

49. Tellingly, Ms. Tavera acknowledges that the flora *beyond* CALICA's lots — the only area her team purportedly visited — is in a fine state. She asserts that the "degree of conservation of the adjacent areas [...] maintains its important habitat," and that "in terms of biodiversity, we

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[127] *E.g.*, Investment Agreement (6 August 1986) (C-0010-SPA.20) ("El proceso se inicia con el desmonte de la franja de terreno que se va a excavar[.]"); *id.* at 403 ("El desmonte previsto para la preparación del sitio deberá ser en forma parcelaria[.]"); Corchalito/Adelita Federal Environmental Impact Authorization (30 November 2000) (C-0017-SPA.32) ("Para realizar el aprovechamiento del banco, se trabajaran las areas desmontadas[.]"); *id.* at 33 ("Las actividades que se llevaran a cabo para la operación del proyecto son las siguientes: [...] a) desmonte y limpieza del terreno[] b) [d]espalme[.]"); *id.* at 38-40 (further mentioning "*desmonte*" activities); Land Use License (2 October 2007) (C-0079-SPA).

[128] Investment Agreement (6 August 1986) (C-0010-SPA.14). SEMARNAT has also authorized other quarries more recently. *See, e.g.*, *¿Quién depreda el ambiente en Quintana Roo?*, El Sol de México (8 October 2022) (C-0347-SPA) (reporting on SEMARNAT's ordering the closure of CALICA's quarry, while awarding two new similar quarrying permits — "Banco de Aprovechamiento de Materiales Pétreos ABC Cancún" y "Aprovechamiento de Roca Caliza en el predio San Francisco"—in the same area); *A la sombra - Tatiana Clouituer*, El Sol de México, (7 October 2022) (C-0348-SPA) (noting that the issuance of two new permits is "surprising" when CALICA's operations were shut down, and adding "[t]ambién sorprende la coincidencia del inicio de los ataques contra Calica y los planes del gobierno, revelados a través de las filtraciones de esta semana, que muestran el interés que tiene el gobierno federal [...] de construir hasta cuatro hoteles eco turísticos alrededor de las estaciones del Tren Maya. ¿Casualidad? o han quedado al descubierto los verdaderos intereses que existen desde el inicio[.]"); *Pese al caso Calica, dan otras concesiones para explotación de piedra caliza*, Novedades Quintana Roo (5 October 2022) (C-0349-SPA).

[129] SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA.105); Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, Part 5.6.

[130] SAC-TUN, 2021 Sustainability Report (January 2023) ([redacted]-0016.11) ("We plant an average of 2,885 trees per hectare, which far above the 500 recommended by the National Forestry Commission (CONAFOR)."); *see also* Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶¶ 157-158; Witness Statement-[redacted]-Claimant Ancillary Claim Reply-Fourth Statement-ENG, ¶ 6.

[131] SAC-TUN, 2021 Sustainability Report (January 2023) ([redacted]-0016.15) (stating that the objective of this nursery is "the identification, collection, transplantation, and protection of at-risk plant species for use in reforestation and restoration, both on our land and to donate them to the communities of Quintana Roo to help beautify schools, parks, municipal gardens, and other public spaces").

[132] SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA.29) ("Para la elaboración de las cubiertas del uso del suelo y vegetación del polígono de interés, se utilizaron las imágenes de satélite[.]").

found that the adjacent areas present a great wealth."[133] Her supposed assessment of CALICA's flora is limited to the authorized quarrying activities inside CALICA's lots with no negative impact on vegetation outside them.

50. Mexico also alleges that CALICA has caused "severe effects" on animal populations,[134] relying solely on Ms. Tavera's testimony.[135] But neither she, nor the Dictamen she co-authored, present any ***actual data*** of impacts on fauna beyond the unsubstantiated allegation that animals have been "displaced" by the effects of quarrying (again, not based on any observations within CALICA's lots).[136] This again seems to be a criticism of quarrying itself, an activity SEMARNAT authorized in CALICA's lots decades ago. And neither Mexico nor Ms. Tavera considered that a diverse set of fauna continues to thrive in CALICA's lots, as demonstrated by a monitoring program run for over five years by the Universidad Autónoma de Querétaro.[137]

51. Ms. Tavera goes so far as to blame CALICA for road accidents involving jaguars.[138] The single news article Ms. Tavera cites, however, refers to an incident occurring on a highway between Cancún and Playa del Carmen, at a spot near tourism infrastructure and ***over 30 kilometers*** away from CALICA's lots (as shown by the map below).[139] Other reports relating to jaguars hit on roads place blame on growing tourism development in the region and even the Mayan Train project.[140] Ms. Tavera would rather point the finger at CALICA,[141] in remarkable

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[133] Witness Statement of Ms. Gloria Fermina Tavera Alonso, ¶¶ 31, 44 (RW-0015) (free translation, the original reads: "Aun cuando no se tuvo acceso a los predios de CALICA, sí fue posible definir el grado de conservación de las áreas colindantes (el cual aun con perturbaciones como incendios forestales de las décadas de los 60's y 80's) mantienen el hábitat importante que brindan las selvas tropicales de la Península de Yucatán (Selva Alta o Mediana Subperennifolia). […] En materia de biodiversidad, se encontró que las zonas aledañas presentan una riqueza elevada con un total de 883 especies, de los cuales 413 son plantas vasculares con 86 familias representadas, 363 vertebrados y 107 invertebrados"); *see also id.*, ¶ 60 ("el sitio presenta un elevado grado de conservación").

[134] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 59, 64.

[135] *Id.*, ¶¶ 59, 64, nn.58, 63.

[136] Witness Statement of Ms. Gloria Fermina Tavera Alonso, ¶ 60 (RW-0015).

[137] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶¶ 152-155.

[138] Witness Statement of Ms. Gloria Fermina Tavera Alonso, ¶¶ 65-66 (RW-0015).

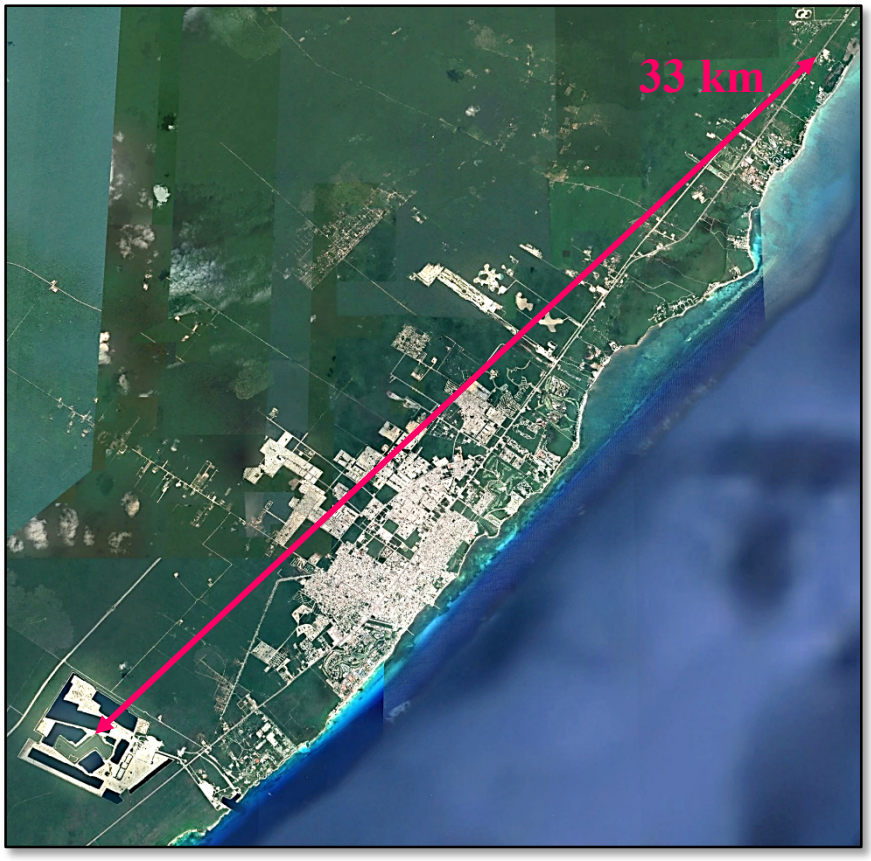
[139] Rivera Maya News. Jaguar killed on Playa del Carmen highway two days away from giving birth. (GFTA-016.2) (stating the jaguar "was run over on highway 307 between Playa del Secreto and Nickelodeon").

[140] El País, *El atropello de una hembra de jaguar embarazada alerta de los riesgos para esta especie en Quintana Roo* (6 February 2023) (C-0332-SPA); *Atropellan a jaguar en carretera Cancún- Playa del Carmen,* Aristegui Noticias (6 February 2023) (C-0333-SPA) ("A pesar de que grupos ambientalistas responsabilizan a las obras del Tren Maya, el Comité de Vigilancia Ambiental Participativa de la Asociación 'Mirada de Jaguar' señala que la presión inmobiliaria también desplaza a este especie felina.").

[141] Witness Statement of Ms. Gloria Fermina Tavera Alonso, ¶ 66 (RW-0015).

harmony with her ultimate boss's defamatory public narrative of CALICA as an environmental offender.

Figure 5: Distance from Jaguar Hit by Car to CALICA[142]



52. Similar to the soil and water "analyses" of the Dictamen, Mexico's biodiversity allegations are not based on proper studies of CALICA's lots, ignore that CALICA's quarrying activities were authorized long ago and subjected to mitigation efforts that the company has been undertaking for years, and disregard inconvenient evidence regarding flora and fauna within CALICA's properties. As with other aspects of the Dictamen, Mexico has simply tried to pile on biased assertions of environmental damage devoid of context and a proper scientific basis to support its President's predetermined narrative about Legacy Vulcan and CALICA.

[142] Map of Jaguar Accident (C-0334-ENG); *see also* Rivera Maya News. Jaguar killed on Playa del Carmen highway two days away from giving birth. (GFTA-016.2) (reporting location of accident).

d) The Dictamen's Accusation of Health Hazards Are Unsubstantiated.

53. Mexico also asserts that airborne dust resulting from CALICA's activities has caused health problems in neighboring populations.[143] This accusation is entirely unsupported and cannot be accepted as fact; indeed, the record disproves it.

54. Though Mexico cites to the Dictamen for this assertion,[144] that document offers zero evidence of any person suffering any health issues connected to CALICA — no doctor, no patient, no case, no hospital records; not even anecdotal evidence of any kind.[145] Neither does the class action complaint against CALICA that Respondent has touted[146] — a complaint that was based on the unreliable Dictamen[147] and has been dismissed in any event.[148]

55. While the Dictamen asserts the existence of harmful dust clouds without any evidence, it again fails to consider the actual data available on the matter. CALICA has had an independent university measure the presence of airborne particulates regularly since at least 2016.[149] Had SEMARNAT bothered to assess this data, it would have seen that CALICA has consistently met the historical limit for total suspended particulates.[150] This is not surprising, since CALICA regularly sprayed its quarries with water during operations to minimize the release of airborne dust particles.[151] In fact, as early as its 1993 inspection, PROFEPA officials observed this process and found it fully compliant:

> *The release of dust and solid particles into the atmosphere* [...] *is practically null* for three basic reasons: (1) the stone material [...] has sufficient humidity to prevent the release of solid particles, (2)

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[143] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 83-86.

[144] *Id.*, nn.90, 93.

[145] *See* SEMARNAT, *Dictamen de impactos ambientales derivados del proyecto de extracción industrial de roca caliza a cargo de la empresa Calica (hoy SAC-TUN) en los municipios de Solidaridad y Cozumel, Quintana Roo* (18 August 2022) (C-0237-SPA.104) (making generalized health-related assertions without support).

[146] *See* Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 84 (citing Class Action Complaint (Quetzal Tzab Gonzalez & Others) Against CALICA (25 October 2022) (C-0283-SPA)).

[147] SEMARNAT, *Sirve estudio técnico elaborado por Semarnat para demanda de acción colectiva de comunidades* (25 October 2022) (C-0285-SPA) (SEMARNAT press release reporting: "Comunidades de Quintana Roo se basaron en los resultados de dicho estudio [Dictamen] para exigir a la empresa Calica la restauración del daño ambiental que ha causado por 36 años, así como el cierre definitivo de sus operaciones").

[148] Judgment of Eighth District Court of Quintana Roo (11 May 2023) (C-0352-SPA.47). The dismissal is subject to appeal.

[149] *See, e.g.*, GSI-0011 and GSI-0012 (November 2021 dust monitoring reports for La Rosita and El Corchalito, respectively).

[150] Expert Report-Dr. Gino Bianchi Mosquera-Environmental-Claimant's Ancillary Claim Reply-ENG, ¶ 142.

[151] *See id.*, ¶ 143; Investment Agreement (6 August 1986) (C-0010-SPA.12-13, 22, 25, 26, 51).

> the conveyor belts reach the ship's holds perfectly, and (3) the personnel who carry out this operation are trained and careful. As far as can be observed, ***this operation does not produce any negative effects***. Another critical point could be the storage of crushed stone materials if they were dry, but since they are humid, they do not form the dust clouds that could cover the foliage of the surrounding vegetation, which was observed to be practically clean.[152]

56. Mexico's irresponsible and unsupported accusation of health impacts to "neighboring populations" also directly contradicts Mexico's recognition that "in the area there is no [...] agricultural activity, human settlement or any industrial activity[.]"[153] Indeed, none of the class action plaintiffs live within five kilometers of CALICA's quarrying lots, and most live in Playa del Carmen, about 10 kilometers away, as shown in the map below.[154]

[152] PROFEPA Inspection Report (17 March 1993) (C-0280-SPA.12-13) (emphasis added) (free translation, the original reads: "el desprendimiento de polvo y partículas sólidas a la atmósfera [...] es prácticamente nulo por tres causas básicamente; (1) el material pétreo [...] posee la humedad suficiente para evitar el desprendimiento partículas sólidas, (2) las bandas transportadoras llegan perfectamente hasta las bodegas del barco y (3) el personal que lleva a cabo esta operación está capacitado además de ser cuidadoso. Por lo que se observa es que esta operación no produce efectos negativos. Otro punto crítico, pudiera ser el almacén de materiales pétreos triturados si estos estuvieran secos, pero como están húmedos no se forman las tolvaneras que podrían cubrir en un momento dado el follaje de la vegetación circundante, que se observó que prácticamente estaba limpia.").

[153] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 81 (free translation, the original reads: "en la zona no hay registro de actividad agrícola, asentamientos humanos o alguna actividad industrial") (citation omitted).

[154] *See Indigenistas Nylon vs. Calica,* La Razón (27 June 2023) (C-0351-SPA) (highlighting the history of the Mexican government using false movements for political gain and the importance of the Punta Venado port for the Mayan Train Project).

57. In sum, the Dictamen piles on skewed, decontextualized, and unsubstantiated allegations of supposed harms flowing from CALICA's otherwise authorized and long-running quarrying activities. Its context and profound methodological flaws show that it was meant to lend some degree of scientific legitimacy to President López Obrador's bare accusations against CALICA from early 2022. The Dictamen has been discredited by an independent environmental expert whose opinions stand unrebutted. It cannot be taken seriously — nor can Respondent's allegations of environmental harm founded on the Dictamen.

C. MEXICO'S ALLEGATIONS OF DECEPTION AND BAD FAITH ARE BASELESS.

58. CALICA's record of environmental compliance and its multiple sustainability initiatives have been well documented in this arbitration.[156] Against this evidence, Mexico now puts forth the conspiracy theory that CALICA never intended to comply with its environmental

[155] Map Pinpointing Declared Addresses of Plaintiffs in Class Action (C-0335-ENG) (pink dots represent the declared domicile of each of the 35 class members); Class Action Complaint (Quetzal Tzab Gonzalez & Others) Against CALICA (25 October 2022) (C-0283-SPA); Submission in Class Action Clarifying Personal Details (2 January 2023) (C-0336-SPA).

[156] *See, e.g.*, Memorial (Ancillary Claim), § II.A.5; Reply (Ancillary Claim), ¶¶ 102-103.

obligations and simply "construct[ed] an *appearance* of compliance."[157] As Legacy Vulcan explained in its Ancillary Claim Reply, Mexico's fraud theory — never asserted in the first phase of this arbitration — strains credulity and is contradicted by record evidence.[158]

59. *First*, Mexico insists that Vulcan Material Company's ("VMC") filings before the Securities and Exchange Commission ("SEC") reveal a nefarious intent,[159] but they do nothing of the sort. In 2001, VMC reported to the SEC that its Playa del Carmen quarry had reserves amounting to 665 million tons and an estimated production time for those reserves of 98 years.[160] Respondent distorts this SEC disclosure and misunderstands the relevant U.S. securities laws by reiterating that the disclosure was misleading and at odds with Legacy Vulcan's representations to Mexican authorities.[161]

60. The purpose of VMC's disclosure was to inform investors about the company's reserves, in accordance with SEC industry guidelines and regulations. The applicable SEC industry guide defines "reserves" as "a mineral deposit which could be economically and legally extracted or produced at the time of the reserve determination."[162] The Standard Instructions for Filing Forms under the U.S. Securities Act states that "[t]he term mineral reserves *does not necessarily require that [...] the company has obtained all necessary permits*[.]"[163] Rather, it requires only that there be no identified "obstacles [...] to obtaining permits" and that "the chances of obtaining such approvals and contracts in a timely manner are highly likely."[164] As [redacted] explains, VMC reports its reserves assuming the economic and legal viability of extraction at the time will continue into the future.[165] This is

[157] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 106 (free translation, the original reads: "el Estado mexicano detectó el verdadero objetivo de la empresa: la construcción de una apariencia de legalidad.") (emphasis added).

[158] Reply (Ancillary Claim), Part II.E.

[159] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 110-115.

[160] Vulcan Materials Company, Form 10-K for the 2001 Fiscal Year (27 March 2002) (C-0046-ENG.7).

[161] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 113; *but see* Reply (Ancillary Claim), ¶¶ 105-106.

[162] Securities and Exchange Commission, Industry Guides, Guide 7: Description of Property by Issuers Engaged or to be Engaged in Significant Mining Operations (C-0310-ENG.2).

[163] 17 CFR § 229.1302(e)(3)(i) (C-0312-ENG.10) (emphasis added).

[164] *Id.*

[165] Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-First Statement-ENG, ¶¶ 28-29.

reasonable and necessary as permit renewals are the norm,[166] and it is in line with the practice of other companies in the industry.[167]

61. Mexico strives to prop up its argument by pointing to the fact that another company's 10-K included a disclaimer pointing out the risks of permits not being renewed.[168] Yet Mexico ignores similar explanations of "assumptions, risks and uncertainties" in VMC's 10-Ks, which include the company's "ability to secure and permit aggregates reserves[.]"[169]

62. Similarly, VMC's reporting of 98 "estimated years of life of aggregates reserves" is just that: an estimation of how long its total reserves would last based on average production rates at that time.[170] This is not a representation that CALICA planned on quarrying for that long without proper permitting but a standard calculation that VMC explained explicitly in its 10-K.[171] Far from indicating an intent to deceive, as Mexico speciously contends,[172] VMC's securities filings reflect the company's commitment to compliance with its disclosure requirements.

63. *Second*, Mexico is wrong to accuse CALICA of submitting itself to environmental audits, not as a means to comply with environmental law, but "to make it appear" that its activities were in compliance.[173] According to Mexico, CALICA deceived environmental auditors by telling them that it was in compliance with its environmental obligations, and PROFEPA "trusted these voluntary self-evaluations," allowing CALICA to "avoid" further PROFEPA scrutiny.[174] Mexico's

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[166] *Id.*

[167] *See, e.g.*, Martin Marietta Materials, Inc., Form 10-K for the 2021 Fiscal Year, (22 February 2022) ([redacted]-0008.6) ("The Company does not anticipate any significant difficulty in obtaining reserves used for production. The Company's aggregates reserves average approximately 78 years, based on current production levels.").

[168] Rejoinder (Ancillary Claim), ¶ 241.

[169] Vulcan Materials Company, Form 10-K for 2009 (R-0140-ENG.6); *see also id.* at 19 (cautioning that "our future success is dependent, in part, on our [...] to secure operating and environmental permits to operate"); *id.* at 19 ("Our operations are affected by numerous federal, state and local laws and regulations related to zoning, land use and environmental matters. [...] Our operations require numerous governmental approvals and permits [...]. Stricter laws and regulations, or more stringent interpretations of existing laws or regulations, may impose new liabilities on us [...] or impede our opening new or expanding existing plants or facilities.").

[170] Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-First Statement-ENG, ¶ 26.

[171] Vulcan Materials Company, Form 10-K for the 2001 Fiscal Year (27 March 2002) (C-0046-ENG.7) ("Estimated years of life of aggregates reserves are based on the average annual rate of production of the facility for the most recent three-year period[.]"); Witness Statement-[redacted]-Claimant's Ancillary Claim Reply-First Statement-ENG, ¶ 26.

[172] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 98.

[173] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 117 (free translation, the original reads: "Los informes de auditoría presentados por CALICA se han elaborado para aparentar la legalidad de las actividades de la empresa en el cumplimiento de la legislación ambiental[.]").

[174] *Id.*, ¶ 124 (free translation, the original reads: "México confió en sus autoevaluaciones voluntarias y en la información proporcionada en los documentos presentados mediante el auditor privado. De esa manera la empresa logró evadir la obligación de cumplimiento de las leyes en materia ambiental que está prevista

far-fetched narrative is at odds with its prior position portraying environmental audits as "mere[] general instruments to incentivize best practices for companies [...][.]"[175] Mexico cannot have it both ways: the audits either were an effective means of showing CALICA's environmental compliance (as Mexico seems to argue now to support its conspiracy theory of CALICA's fraud) or they were not (as Mexico argued before to downplay the import of those audits).

64. Either way, Mexico's argument that CALICA deceived its environmental auditors to avoid PROFEPA scrutiny fails. PROFEPA in fact did scrutinize CALICA's operations before 2017. Its issuance of Clean Industry Certificates after environmental audits was not a mere rubberstamp. As explained before[176] — and as stands unrebutted by Mexico —, PROFEPA plays a key role in the environmental audit process.[177] PROFEPA's own circular describing the audit program illustrates how PROFEPA is involved in each step of an audit, including its review of the PROFEPA-certified auditor's diagnostic report and certification of compliance.[178]

65. For instance, when CALICA was undergoing its first environmental audit in 2002, PROFEPA identified 29 indicators that CALICA needed to address before it would be issued a Clean Industry Certificate.[179] PROFEPA and CALICA agreed on a detailed six-month action plan to do so under the close supervision of both PROFEPA and its certified auditors.[180] After a careful "analysis of the documentation provided" and "visits to [CALICA's] site," PROFEPA confirmed CALICA's compliance and awarded CALICA its first Clean Industry Certificate.[181] [redacted]

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en el TLCAN."); *id.*, ¶ 121 ("Con sus declaraciones, sobre supuestamente no encontrarse en operaciones, CALICA evadió que se realizaran revisiones documentales y verificaciones"); *id.*, ¶ 130 (stating that through its declarations in environmental audits, "CALICA evadió las revisiones documentales y las inspecciones de las condicionantes del Acuerdo de 1986[.]").

[175] Counter-Memorial (Ancillary Claim), ¶ 314 (free translation, the original reads: "estos [Certificados de Industria Limpia] son solo instrumentos generales para incentivar a las empresas a buenas practicas, pero no constituye un cumplimiento y mucho menos sustituye las facultades de la autoridad ambiental, así como tampoco los exime de cumplir sus obligaciones ambientales o de ser inspeccionados.") (citation omitted).

[176] *See* Reply (Ancillary Claim), ¶ 51.

[177] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 34-38.

[178] National Environmental Audit Program Explanatory Circular (C-0209-SPA.8).

[179] Coordination Agreement Regarding Actions Resulting from Audit (13 November 2002) (C-0292-SPA). *See also* Action Plan Compliance Report (4 April 2003) (C-0293-SPA.9-17).

[180] Coordination Agreement Regarding Actions Resulting from Audit (13 November 2002) (C-0292-SPA.5-6); Action Plan Compliance Report (4 April 2003) (C-0293-SPA.2, 18). None of the 29 improvement points concerned CALICA's environmental impact authorization or the alleged requirement to obtain a CUSTF.

[181] PROFEPA Certification of Compliance with the Action Plan (19 May 2003) (C-0294-SPA.2) (free translation, the original reads: "como resultado del análisis de la documentación contenida en los informes [...] así como la resultado de las visitas efectuadas a sus instalaciones por personal de esta Dependencia [de PROFEPA] [...], se ha podido constatar la realización de las actividades convenidas."); Clean Industry Certificate (23 June 2003) (C-0037-SPA). By law, each of these Certificates "acknowledges that at the time of issuance, the Company operates *in full compliance with environmental regulations*[.]"

has testified that, when he was a PROFEPA official, he witnessed numerous instances of PROFEPA reviewing an auditor's diagnostic report and rejecting it, thereby refusing to issue the requested Clean Industry Certificate.[182] This is to be expected, considering that, when PROFEPA issues such a Certificate, it "acknowledges that at the time of issuance, the Company operates *in full compliance with environmental regulations*[.]"[183]

66. CALICA's supposed plan to defraud PROFEPA through audits also fails to account for the fact that the audits did not stop PROFEPA from independently inspecting CALICA's lots. For instance, PROFEPA inspected the Project in 2012 and found CALICA fully compliant with its obligations, without reference to the Clean Industry Certificate that had been issued recently.[184]

67. Nor is it true that CALICA hid information from its auditors, because — as Mexico contends — the environmental audits are "self-evaluations."[185] The audits are *self-imposed*, not *self-evaluated* by the audited company. Environmental audits are carried out by independent, PROFEPA-certified auditors.[186] In fact, the very Environmental Audit Report that Mexico cites expressly states — over a dozen times — that the auditors carried out field verifications on-site over several days in a number of locations.[187] Mexico's attempt to downplay the audits as "only

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LGEEPA Regulation on Environmental Audits, Article 23 (29 April 2010) (C-0210-SPA.10) (free translation, the original reads: "A través del Certificado, la Procuraduría [...] reconoce[...] que al momento de su otorgamiento, la Empresa opera en pleno cumplimiento de la regulación ambiental y que su Desempeño Ambiental es conforme con los Términos de Referencia.").

[182] Expert Report-[redacted]-Environmental-Claimant Ancillary Claim Memorial-Third Report-SPA, ¶ 24.

[183] LGEEPA Regulation on Environmental Audits, Article 23 (29 April 2010) (C-0210-SPA.10) (emphasis added) (free translation, the original reads: "A través del Certificado, la Procuraduría o, en su caso, la Agencia, según corresponda, reconocen que al momento de su otorgamiento, la Empresa opera en pleno cumplimiento de la regulación ambiental y que su Desempeño Ambiental es conforme con los Términos de Referencia.").

[184] PROFEPA Inspection Resolution (10 December 2012) (C-0043-SPA. 56-57).

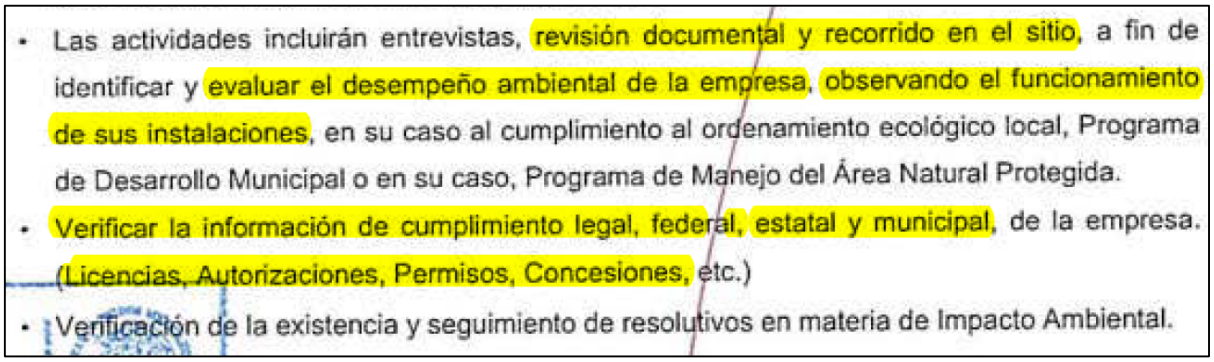
[185] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 124, 129, 131 (referring to Environmental Audits as "autoevaluaciones").

[186] *See* Counter-Memorial (Ancillary Claim), ¶ 317 (stating that the audits were "realizadas por personal externo y validado por la PROFEPA"); Third SOLCARGO Report, ¶ 7 (RE-008) (referring to "auditores autorizados por PROFEPA"); Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 34-38; LGEEPA Regulation on Environmental Audits, Article 23 (29 April 2010) (C-0210-SPA.7).

[187] *See e.g.*, Expediente PFPA/29.4/1S.3/00008-11 (R-234-ESP.18) (referring to "La *revisión documental y de campo* que se efectúo"), at 48-49 (stating that the field work for the 2011 Environmental Audit Report was carried out between October and November 2011, and listing the specific areas the auditors visited); *id.* at 19 ("los *trabajos de campo* a efectuarse en sus instalaciones físicas"); *id.* at 31 ("se describen las actividades que fueron llevadas a cabo durante *los trabajos de campo y gabinete* de la presente Auditoria Ambiental"); *id.* at 41 ("La evaluación de las actividades de campo y gabinete, se realizará dentro de las instalaciones de la empresa, así como en el medio natural y socioeconómico ubicado en el entorno del predio"); *id.* at 48, 50, 72, 154, 175, 177, 181, etc.

based on documentary review" is demonstrably false.[188] As the excerpt below shows, the Environmental Audits used "documentary review *and site visits*" to evaluate CALICA's environmental performance and "verif[ied] [its] compliance with federal, state and municipal [...] permits and authorizations."[189]

Figure 7: 2011 Environmental Audit Report[190]


- Las actividades incluirán entrevistas, revisión documental y recorrido en el sitio, a fin de identificar y evaluar el desempeño ambiental de la empresa, observando el funcionamiento de sus instalaciones, en su caso al cumplimiento al ordenamiento ecológico local, Programa de Desarrollo Municipal o en su caso, Programa de Manejo del Área Natural Protegida.
- Verificar la información de cumplimiento legal, federal, estatal y municipal, de la empresa. (Licencias, Autorizaciones, Permisos, Concesiones, etc.)
- Verificación de la existencia y seguimiento de resolutivos en materia de Impacto Ambiental.

68. The auditors' work was no mere rubberstamp. They reviewed CALICA's documents and visited the site to verify the information CALICA provided. It is ludicrous to suggest — as Mexico does[191] — that the subsidiary of a U.S. public company subject to the strictest standards of compliance[192] would try to pull a fast one on independent environmental auditors and PROFEPA for well over a decade to maintain a false appearance of compliance. The reality is that CALICA voluntarily submitted itself to PROFEPA's Environmental Audit Program because it was committed to good environmental practices and went above and beyond its regular environmental obligations.[193]

69. To bolster its far-fetched theory of a decades-long fraud scheme by CALICA, Mexico argues that CALICA misrepresented facts in connection with its environmental audits,[194] but it only cites to one of the multiple reports of PROFEPA-certified auditors (issued in November

[188] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 119 (free translation, the original reads: "Los alcances de la verificación en la auditoría ambiental [...] únicamente se basan en la revisión de documentos. CALICA aprovechó esta situación para manipular información[.]) (citation omitted).

[189] Expediente PFPA/29.4/1S.3/00008-11 (R-234-ESP.13) (emphasis added).

[190] *Id.* (emphasis added)

[191] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 124.

[192] Witness Statement-[redacted]-Claimant Ancillary Claim Reply-Fourth Statement-ENG, ¶¶ 3-4.

[193] Witness Statement-[redacted]-Claimant Ancillary Claim Reply-Fourth Statement-ENG, ¶ 5.

[194] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 116-134.

2011)[195] and that report — viewed in context — fails to support Mexico's argument. According to Mexico, in the 2011 audit, CALICA reported having reforested 8 hectares for every 25 hectares extracted.[196] This, Mexico posits, ***must*** be false because "a simple aerial view" of El Corchalito and La Rosita shows that one third of the extracted area has not been reforested.[197] Mexico is simply wrong. Under the 2011 Corchalito/Adelita State Environmental Impact Authorization:

> *[CALICA] shall sign a cooperation agreement* with the State Government [...] and the H. City Councils of Solidaridad and Cozumel, *to reforest public areas* to comply with the reforestation activities and surfaces established by this authority, which must be 32% percent of the authorized surface per year (of the 25 hectares allowed per year, *8 hectares must be reforested per year, in the following sites: public areas, slopes and areas susceptible to reforestation in the area of the project* [...][198]

70. CALICA complied with this obligation and reported its compliance to state environmental authorities, as required by the environmental impact authorization. [199] For instance, in its compliance reports for the 2011 period, CALICA showed it had reforested 6.98 hectares *inside* CALICA, and an additional 1.2 hectares *outside* CALICA on public areas, thereby reaching the requisite 8 hectares.[200] In subsequent years, and once CALICA signed an agreement

[195] *Id.*, nn.127, 136-137, 139-141.

[196] *Id.*, ¶ 132.

[197] *Id.*

[198] Second Amendment to the Corchalito/Adelita State Environmental Impact Authorization (19 May 2011) (C-0075-SPA.40) (emphasis added) (free translation, the original reads: "TRIGÉSIMA SEGUNDA.- La empresa CALIZAS INDUSTRIALES DEL CARMEN, S.A. de C.V. junto al Gobierno del Estado a tráves de la Secretaría de Ecología y Medio Ambiente y los H. Ayuntamientos de Solidaridad y Cozumel, signarán un convenio de Colaboración para reforestar áreas públicas para dar cumplimiento a las actividades y superficies de reforestación establecidas por esta autoridad, mismas que deberan de ser de un 32% porciento de la superficie autorizada por año (de las 25 has permitidas por año, se deberán reforestar 8 has por año, en los siguientes sitios: areas públicas, taludes y zonas suceptibles de reforestación en el área del proyecto, incluyendo el predio La Rosita y Punta Venado indistintamente); las áreas de explotación donde no se realice la extracción por debajo del manto freático deberán ser restauradas y reforestadas, siendo reportadas en los informes de cumplimiento de condicionantes ambientales.").

[199] Second Amendment to the Corchalito/Adelita State Environmental Impact Authorization (19 May 2011) (C-0075-SPA.39).

[200] Biannual Report to SEMA for the May 2011 to November 2011 Period (19 November 2011) (C-0337-SPA.23) ("la superficie reforestada dentro de la empresa es de .766 Has[.] [...] [E]n áreas publicas dentro del Municipio de Solidaridad la superficie reforestada es de 1.2 Has); Biannual Report to SEMA for the November 2011 to May 2012 Period (19 May 2012) (C-0338-SPA.22) ("Durante el período comprendido de este segundo informe se realizaron actividades de reforestación en taludes con un total de superficie de 6.21 Has, lo cual hace un total de 8.18 has, reforestadas durante el periodo comprendido del 19 de mayo de 2011 al 19 de mayo de 2012 equivalente al 32% de las 25 has autorizadas anualmente. (Ver anexo 20)"). *See also, e.g.*, Biannual Report to SEMA for the May 2011 to November 2011 Period - Annex 2 (19 November 2011) (C-0339-SPA) (providing evidence of reforestation); Biannual Report to SEMA for the May 2011 to November 2011 Period - Annex 19 (19 November 2011) (C-0340-SPA) (same); Biannual Report to SEMA for the November 2011 to May 2012 Period - Annex 4 (19 May 2012) (C-0341-SPA) (same); Biannual Report to SEMA for the November 2011 to May 2012 Period - Annex 20 (19 May 2012) (C-0342-SPA) (same).

with the Municipality of Solidaridad, it reforested the entire 8 hectares on public land *outside* its lots.[201] The alleged misrepresentation Mexico touts is not only an accurate statement; it is further evidence of CALICA complying with its environmental obligations.

71. Mexico's second purported example of CALICA's deception is similarly unavailing. Mexico cites a line in the 2011 audit report indicating that CALICA had ceased quarrying activities in La Rosita in 2003, even though those activities continued thereafter.[202] As shown by the prior and subsequent environmental audit reports, this is not an example of CALICA misleading its auditors. In the 2005 audit report, for example, the auditors stated that "*currently*, the main stone extraction activity is being carried out in La Rosita."[203] The 2016 audit report similarly contains no reference to the end of quarrying activities in La Rosita.[204]

72. Viewed in this context, the passing excerpt from the auditors' 2011 report that Mexico touts is simply a reference to the wind-down of quarrying in La Rosita since 2003 (due to the ramp-up of quarrying in El Corchalito).[205] Indeed, the auditor who authored the 2011 report visited La Rosita and flagged no issues even though quarrying was being conducted there.[206] And the notion that the 2011 audit report somehow dissuaded PROFEPA from enforcing environmental laws against CALICA is belied by the fact that, in November 2012, PROFEPA

[201] Biannual Report to SEMA for the November 2015 to May 2016 Period (19 May 2016) (C-0343-SPA.21) ("Se llevan a cabo actividades de reforestación en distintas áreas públicas del Municipio de Solidaridad mediante el convenio establecido con el Municipio de Solidaridad."); Biannual Report to SEMA for the November 2015 to May 2016 Period - Annex 11 (19 May 2016) (C-0344-SPA.4) (letter from Solidaridad Government attesting to CALICA reforesting 8 hectares in parks, public schools, dunes and other areas).

[202] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 119, 130 (citing Expediente PFPA/29.4/1S.3/00008-11 (R-234-ESP.61)).

[203] Environmental Audit Report (April 2005) (C-0345-SPA.49) (emphasis added) (free translation, the original reads: "Actualmente la actividad principal de aprovechamiento de material pétreo (calizas), se lleva a cabo dentro del predio La Rosita"); *see also id*. at 13 ("La empresa realizó el aprovechamiento de material pétreo en forma principal en el predio 'La Rosita', donde actualmente se realiza la mayor parte de la actividad de la empresa"); *id*. at 18 ("Actualmente se cuenta actualmente con tres predios, mismos que integran la reserva de material pétreo denominado yacimiento o cantera y del cual se extrae la roca caliza utilizando material explosivo y máquinas perforadoras.").

[204] *See* Environmental Audit Report (March 2016) (C-0208-SPA).

[205] *See* Expediente PFPA/29.4/1S.3/00008-11 (R-234-ESP.61) ("la actividad dentro del predio La Rosita, esta concluyo [sic] durante el año 2003"); *id*. at 67 ("la actividad de aprovechamiento de roca caliza dentro del predio denominado La Rosita, concluyó desde el año de 2003"); *see also* Witness Statement-[redacted]-Claimant's Memorial-ENG, ¶ 24 (noting that, starting in 2001, CALICA started quarrying El Corchalito and [redacted]).

[206] Expediente PFPA/29.4/1S.3/00008-11 (R-234-ESP.49) (including "Cantera [...] La Rosita" as one of the areas visited during the audit).

inspected La Rosita, observed quarrying operations there, and concluded that there was no violation of CALICA's environmental obligations.[207]

73. At bottom, Mexico's argument — that CALICA sought to ***avoid*** environmental scrutiny by voluntarily ***inviting*** an invasive and avoidable audit process[208] — is nonsensical and highlights that Respondent is grasping at straws to support its baseless counterclaim. Mexico's reiterated allegations of bad faith and fraud illustrate its inability to refute CALICA's record of environmental compliance. These conspiracy theories do not hold up to scrutiny and should be rejected.[209]

D. MEXICO HAS ALREADY SOUGHT AND OBTAINED COMPENSATION FOR SUPPOSED ENVIRONMENTAL DAMAGES.

74. Mexico's counterclaim for supposed environmental damages would be duplicative of damages Mexico has already sought and collected or is seeking on the same basis with respect to supposed environmental violations and harms from CALICA's quarrying operations.

75. As detailed in the previous stage of this arbitration,[210] PROFEPA launched an administrative proceeding after irregular inspections of El Corchalito in 2017, culminating with [redacted]

[207] PROFEPA Inspection Resolution (10 December 2012) (C-0043-SPA.3-4) ("se realizó un recorrido por el predio de las instalaciones de la citada empresa, donde se observó que *desarrollan obras y actividades de explotación, extracción, aprovechamiento*, molienda, selección, almacenamiento y comercialización de piedra caliza, en una superficie que incluye a los predios denominados La Rosita con 931.13 hectáreas y El Corchalito con 369.30 hectáreas; mientras que en el predio denominado La Adelita con una superficie de 882.13 hectáreas, aún no se empiezan las actividades de extracción y aprovechamiento de piedra caliza [...].") (emphasis added); *id*. at 47 ("no haberse detectado hechos u omisiones presuntamente constitutivos de infracción a la normatividad ambiental").

[208] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 121.

[209] Mexico also repeats its discredited allegations of purported contradictions between what Legacy Vulcan has said here and what CALICA has said to a local judge. *See* Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 140. As Legacy Vulcan explained in its Ancillary Claim Reply and Respondent has simply ignored, there is no contradiction. When President López Obrador announced on 2 May 2022 that he ordered the shutdown of CALICA's remaining operations, CALICA's counsel scrambled to seek preliminary relief in court and submitted CALICA's 2000 federal environmental authorization as support. This authorization governs La Adelita and El Corchalito, but *mentions* La Rosita, where the processing plant is located. *See* Corchalito/Adelita Federal Environmental Authorization (30 November 2000) (C-0017-SPA.23). Mexico warps this straightforward fact into the fiction that CALICA made a "totally false" representation to the court in bad faith, but simply repeating this outlandish allegation does not make it true. *See* Reply (Ancillary Claim), ¶ 108; Claimant's Reply to Respondent's Response to Its Request for Provisional Measures and For Leave to Submit an Ancillary Claim, ¶ 14, n.27.

[210] Memorial, Part II.H.3; Reply, Part II.C.

[211] Resolution (R-0005-SPA.228); Witness Statement-[redacted]-Claimant's Reply-Second Statement-ENG, ¶ 13.

[212] Memorial, Part II.H.3; Reply, Part II.C; Resolution (R-0005-SPA.225-228).

[redacted]

76. Mexico is following a similar approach in respect of La Rosita. In May 2022, at the President's instructions, PROFEPA shut down quarrying operations in that lot, alleging environmental violations and harms as a pretext.[217] PROFEPA's inspections of May 2022 that led to this shutdown would *normally* be followed soon thereafter by an *Acuerdo de Emplazamiento*. Through that instrument, PROFEPA is required to inform CALICA of any supposed violations and formally launches an administrative proceeding.[218] This is the process followed with regard to El Corchalito.[219] Respondent, however, has irregularly delayed the issuance of the *Acuerdo de Emplazamiento* for over a year without any explanation, and has refused to waive the pursuit of a domestic proceeding regarding La Rosita. To the contrary, Mexico insisted that the site visit protocol "*should not be understood as a waiver* by the Mexican State to make use of its powers to prosecute pending actions in accordance with the law."[220]

[213] CALICA Filing before PROFEPA Paying Ad Cautelam (19 November 2020) (C-0346-SPA).

[214] Resolution (R-0005-SPA.219).

[215] *Id*. at 219 (free translation, the original reads: "se ordena a CALICA presentar a esta Dirección [...] un Programa de Compensación Ambiental que consista en inversiones en acciones o medidas que generen una mejora ambiental equivalentes a los efectos adversos ocasionados por el daño, los cuales deberán hacerse en un ecosistema o región ecológica alternativa, vinculado ecológica y geográficamente al sitio dañado.").

[216] CALICA Filing before PROFEPA Paying Ad Cautelam (19 November 2020) (C-0346-SPA.5, 22-24).

[217] Memorial (Ancillary Claim), Part. II.B.3; Reply (Ancillary Claim), Part II.B.

[218] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 109-113.

[219] Shutdown Order (22 January 2018) (C-0117-SPA).

[220] Procedural Order No. 8, Site Visit Protocol, ¶ 9.1 (emphasis added).

III. THE TRIBUNAL LACKS JURISDICTION OVER MEXICO'S COUNTERCLAIM.

77. The Parties agree on the legal standard to determine the Tribunal's jurisdiction over Mexico's counterclaim:[221] the counterclaim (i) must fall within the scope of the Parties' consent to arbitrate; (ii) implicate investor obligations under the applicable investment treaty; and (iii) have a direct and close connection with Legacy Vulcan's primary claim.[222] Mexico's counterclaim fails to meet these cumulative conditions and must be dismissed.

A. MEXICO'S COUNTERCLAIM IS OUTSIDE THE SCOPE OF THE PARTIES' CONSENT TO ARBITRATE.

78. Mexico's counterclaim must fall within the scope of the Parties' consent in order to be heard by this Tribunal.[223] Mexico argues that the Parties' consent may be found in places where it does not exist: (1) in the ICSID Convention, as inferred from Legacy Vulcan's initiation of an arbitration under that treaty; (2) in NAFTA, through the word "counterclaim" in NAFTA Article 1137(3), dealing with "Receipts under Insurance or Guarantee Contracts"; and (3) in NAFTA Articles 1121 and 1122, which purportedly confirm that Mexico's counterclaim falls within the scope of Article 1137(3). Mexico is wrong on all counts, as detailed below, but even if all of Mexico's arguments regarding consent were to be accepted, Mexico's counterclaim would be time-barred under NAFTA Articles 1116 and 1117, as explained in Part III.A.4 below.

1. Consent to Arbitrate Must Be Clear in the Text of NAFTA Chapter 11.

79. The parties' consent to arbitrate must be unequivocal, clear, and unambiguous, and shall be determined by reference to the agreement to arbitrate as set forth in the investment treaty under which the dispute arises or other relevant instrument. Mexico comes nowhere close to meeting this standard.

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[221] Reply (Ancillary Claim), ¶ 257; Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 142-143.

[222] *Limited Liability Company AMTO v. Ukraine*, SCC, Final Award, ¶ 118 (26 March 2008) (Cremades Sanz-Pastor (P), Söderlund, Runeland) (RL-0166-ENG) ("The jurisdiction of an Arbitral Tribunal over a State party counterclaim under an investment treaty depends upon the terms of the dispute resolution provisions of the treaty, the nature of the counterclaim, and the relationship of the counterclaims with the claims in the arbitration."); *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Award, ¶¶ 939, 954 (17 December 2015) (Tercier (P), Stern, Lalonde) (RL-0208); *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Award, ¶ 659 (15 December 2014) (Cremades (P), Hwang, Nariman) (CL-0127-ENG).

[223] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 142-143.

a) The Consent of the Parties to Arbitrate Cannot Be "Inferred," as Respondent Wrongly Asserts Here.

80. The Parties agree that consent is an indispensable condition for the Tribunal to exercise jurisdiction over Mexico's counterclaim.[224] Mexico, however, proposes that consent may be "inferred" from Legacy Vulcan's initiation of this arbitration,[225] "without the need for the express consent of the investor to arbitrate such claims under the applicable treaty."[226] Mexico is wrong.

81. Consent by the Parties to arbitrate a particular claim cannot be "inferred" as Mexico suggests here; it rather must be clear, unequivocal, and unambiguous.[227] As the tribunal in *ICS Inspection v. Argentina* explained:

> [C]onsent to arbitration shall not be presumed [...] The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.[228]

82. Notably, Mexico has itself taken the position in other NAFTA arbitrations that "consent to arbitration must be explicit and unambiguous."[229] Mexico has further stated that, under NAFTA, "Article 1121, interpreted in good faith and in the light of the ordinary meaning of its terms in their context, *requires disputing investors to provide clear, explicit consent to*

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[224] Reply (Ancillary Claim), ¶ 258; Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 142-143.

[225] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 187 ("Ya que dicho consentimiento puede inferirse bien de su conducta de iniciar el arbitraje (perfeccionando la oferta a arbitrar)").

[226] *Id.* ("el Tribunal tiene jurisdicción para conocer de reconvenciones presentadas por el Estado, sin necesidad de constar con el consentimiento expreso del inversionista para arbitrar dichas reconvenciones en el tratado aplicable").

[227] *Limited Liability Company AMTO v. Ukraine,* SCC, Final Award, ¶ 46 (26 March 2008) (Cremades Sanz-Pastor (P), Söderlund, Runeland) (RL-0166) ("Consent to arbitrate, as the foundation of the jurisdiction of an arbitral tribunal, should be unequivocal."); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 198 (8 February 2005) (Salans (P), van den Berg, Veeder) (CL-0231-ENG) ("It is a well-established principle, both in domestic and international law, that [an agreement to arbitrate] should be clear and unambiguous."). *See also Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, I.C.J. Rep. 2008, Judgment, ¶ 62 (4 June 2008) (CL-0232-ENG) ("The consent allowing for the Court to assume jurisdiction must be certain [...] whatever the basis of consent, the attitude of the respondent State must "be capable of being regarded as 'an unequivocal indication' of the desire of that State to accept the Court's jurisdiction in a 'voluntary and indisputable' manner.").

[228] *ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic*, PCA Case No. 2010-09, Award on Jurisdiction, ¶ 280 (10 February 2012) (Dupuy (P), Torres Bernardez, Lalonde) (CL-0032-ENG).

[229] *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Mexico's Post-Hearing Brief, ¶ 2(ii) (17 August 2018) (C-0233-ENG).

arbitration and does not permit implied or constructive consent."[230] No such clear or explicit consent by either Mexico or Legacy Vulcan exists to arbitrate counterclaims in this case.

83. NAFTA tribunals have also refused to interpret NAFTA's text to allow claims that did not clearly fall within the scope of the parties' consent under the Treaty. Instead, the tribunal in *Fireman's Fund v. Mexico*, as well as the consolidated tribunal for *Canfor v. United States* and *Tembec v. United States*, explained that "the Tribunal does not believe that under contemporary international law a [claimant] is entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement."[231]

84. International investment law thus categorically requires that Mexico demonstrate that the Parties consented to arbitrate Mexico's counterclaim clearly, unequivocally, and unambiguously. Further, Mexico's practice requires that such consent be explicit. As explained below, Mexico has failed to so demonstrate.

b) The Scope of the Consent to Arbitrate Is Determined by the Arbitration Agreement in the Relevant Instrument.

85. Mexico argues that, because "NAFTA does not contain any provision that prohibits the filing of a counterclaim pursuant to the ICSID Convention and its arbitration rules," the Tribunal should find that "[t]he Parties to this dispute agreed to submit to the ICSID rules, and therefore consented to the Respondent's filing of a Counterclaim pursuant to Article 46 of the ICSID Convention and Rule 40(2) of the ICSID Arbitration Rules."[232] This circular argument betrays a fundamental misreading of the ICSID Convention and the ICSID Arbitration Rules.

86. Mexico cannot fabricate consent from the ICSID Convention and the ICSID Rules; none of those instruments constitutes expressions of consent to arbitrate Mexico's counterclaim, let alone in a clear, unequivocal, and unambiguous way. Indeed, Article 46 of the ICSID Convention provides that a tribunal may exercise jurisdiction over "any [...] counterclaims arising

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[230] *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Mexico's Post-Hearing Brief, ¶ 21 (17 August 2018) (C-0233-ENG) (emphasis added).

[231] *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Decision on the Preliminary Question, ¶ 64 (17 July 2003) (Van den Berg (P), Lowenfeld, Carrillo Gamboa) (CL-0234-ENG); *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Decision on Preliminary Question, ¶ 186 (6 June 2006) (Van den Berg (P), L.C. de Mestral, Robinson) (CL-0235-ENG).

[232] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 177-178 (free translation, the original reads: "[E]l TLCAN no contiene ninguna disposición que prohíba presentar una reconvención conforme al Convenio CIADI y sus reglas de arbitraje. [...] Las Partes de esta controversia acordaron someterse a las reglas del CIADI, por lo que otorgaron su consentimiento para que la Demandada pudiera presentar una Reconvención conforme al Artículo 46 del Convenio CIADI y la Regla 40 (2) de las Reglas de Arbitraje del CIADI.").

directly out of the subject-matter of the dispute *provided that they are within the scope of the consent of the parties* and are *otherwise* within the jurisdiction of the Centre."[233] ICSID Arbitration Rule 40(1) similarly requires that counterclaims fall within the scope of the consent of the Parties.[234] Neither the ICSID Convention nor the ICSID Rules serve as an indirect source of that consent, as Mexico suggests. This is confirmed by the *travaux préparatoires* of the ICSID Convention, which explain that Article 46 of the Convention was "in no way intended to extend the jurisdiction of the arbitral tribunal."[235]

87. As Legacy Vulcan explained in its Ancillary Claim Reply,[236] numerous arbitral tribunals have confirmed that the existence and scope of the parties' consent to arbitrate is dictated not by the ICSID Convention, but by the instrument of consent, usually the investment treaty under which the claim arises. As explained by the tribunal in *Metal Tech v. Uzbekistan*, a case on which Mexico relies:

> In treaty arbitration, consent is achieved by the respondent State making an offer to arbitrate when ratifying the investment treaty and the investor accepting that offer in principle when filing the request for arbitration. The scope of the State's offer is defined in the investment treaty, in particular in the dispute resolution clause of that treaty. When he initiates an arbitration under the treaty, the investor accepts the offer within the scope defined in the treaty.[237]

88. The tribunal in *Spyridon Roussalis v. Romani*a similarly concluded that "[t]he investor's consent to the BIT's arbitration clause can only exist in relation to counterclaims if such counterclaims come within the consent of the host State *as expressed in the BIT*."[238] On this basis, the *Roussalis* tribunal rejected the argument that a claimant consents to arbitration of counterclaims merely by submitting a claim to the ICSID Convention and Rules.[239] Instead, the

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[233] ICSID Convention, Art. 46 (C-0129-ENG) (emphasis added).

[234] *See* ICSID Arbitration Rule 40(1) ("Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.").

[235] Summary Record of Proceedings, Geneva Consultative Meeting of Legal Experts, February 17-22 1964 in History of the ICSID Convention, Vol. 2 (ICSID 1970) 367, 422 (CL-0236-ENG). *See also Metal Tech v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶ 412 (4 October 2013) (Kaufmann-Kohler (P), Townsend, von Wobeser) (RL-0171).

[236] Reply (Ancillary Claim), ¶ 260.

[237] *Metal Tech v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶ 409 (4 October 2013) (Kaufmann-Kohler (P), Townsend, von Wobeser) (RL-0171).

[238] *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, ¶ 866 (7 December 2011) (Hanotiau (P), Reisman, Giardina) (CL-0223-ENG) (emphasis added).

[239] *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, ¶ 775 (7 December 2011) (Hanotiau (P), Reisman, Giardina) (CL-0223-ENG).

tribunal concluded that the scope of the parties' consent to arbitrate must be determined on the basis of instruments other than the ICSID Convention itself.[240] Numerous tribunals have similarly held that "[n]otwithstanding Articles 25(1) and 46 of the ICSID Convention, the jurisdiction of an arbitral tribunal over a State party counterclaim under an investment treaty depends upon the terms of the dispute resolution provisions of the treaty."[241]

89. NAFTA Article 1122(2) also confirms that the requirement "for written consent of the parties" under the ICSID Convention is satisfied by the consent found in NAFTA Article 1122(1) (providing that "[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in [NAFTA]") and "the submission by a disputing investor of a claim to arbitration,"[242] not within the text of the ICSID Convention itself.

90. Accordingly, for the Tribunal to have jurisdiction over Mexico's counterclaim, the counterclaim must fall within the scope of the Parties' arbitration agreement under NAFTA or some other agreement between them. As explained in the following sections, because the Parties here have not agreed to arbitrate Mexico's counterclaim under NAFTA or any other agreement, Mexico's counterclaim should be dismissed. That Mexico has had to rely on an implicit consent theory based on the ICSID Convention and Rules, despite the relevant treaty text and the great weight of arbitral jurisprudence, only illustrates the baselessness of its counterclaim.

2. NAFTA Article 1137(3) Does Not Grant Jurisdiction to the Tribunal Over Mexico's Counterclaim.

91. Mexico also asks the Tribunal to "infer" the Parties' consent to the submission of counterclaims against disputing investors from NAFTA Article 1137(3), which provides as follows:

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[240] *Id.*, ¶ 866 ("Respondent considers that such consent included consent to arbitrate counterclaims. Whether it is so must be determined in the first place by reference to the dispute resolution clause contained in the BIT.").

[241] *Limited Liability Company AMTO v. Ukraine, SCC, Final Award*, ¶ 118 (26 March 2008) (Cremades Sanz-Pastor (P), Söderlund, Runeland) (RL-0166); *see also Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, ¶ 333 (15 April 2016) (Kaufmann-Kohler (P), Dupuy, Grigera Naón) (CL-0224-ENG); *Karkey Karadeniz Elektrik Uretim AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, ¶ 1012 (22 August 2017) (Derains (P), Grigera Naón, Edward) (CL-0225-ENG); *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, ¶ 526 (18 January 2019) (Derains (P), Tawil, Vinuesa) (CL-0226-ENG); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶ 160 (8 December 2008) (Nariman (P), Torres Bernárdez, Bernardini) (CL-0237-ENG).

[242] NAFTA, Art. 1122(2) (C-0009-ENG) ("The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties.").

> Receipts under Insurance or Guarantee Contracts
>
> In an arbitration under this Section, a Party shall not assert, as a defense, counterclaim, right of setoff or otherwise, that the disputing investor has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

92. According to Mexico, the exclusion of "counterclaims" related to insurance payments implies that all other counterclaims are subject to arbitration under the Treaty.[243] This argument distorts the plain meaning of Article 1137(3) and ignores the well-established requirement that consent to arbitrate must be clear and unambiguous and may not be inferred.[244]

93. The meaning of Article 1137(3) is straightforward. This provision simply reflects the incorporation into the Treaty of the "collateral source rule," whereby "any recovery by a victim from a third party is not applied to reduce the liability of the wrongdoer."[245] NAFTA Article 1137 thereby "permits an investor to continue to pursue a claim notwithstanding the receipt of compensation through insurance."[246] It was not intended to, nor does it authorize, NAFTA Parties to pursue counterclaims against claimant investors.[247]

94. Mexico next argues that, if the NAFTA Parties had wanted to establish an express prohibition against the filing of counterclaims under NAFTA Chapter 11, they would have done so.[248] Mexico has it backwards. To begin, the argument that the NAFTA Parties would have

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[243] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 151.

[244] *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, ¶ 154 (21 April 2015) (van Houtte (P), Paulsson/Veeder, Rubino-Sammartano) (CL-0228-ENG) ("[I]t is the letter of the BIT, interpreted under international law, that binds the Parties. Where there is no jurisdiction provided by the wording of the BIT in relation to a counterclaim, no jurisdiction can be inferred merely from the 'spirit' of the BIT.").

[245] Kenneth J. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 583, 659 (2009) (CL-0238-ENG).

[246] *Id.* at 583 (CL-0238-ENG). *See also* Lee M. Caplan & Jeremy K. Sharpe, *United States in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 835 (C. Brown, ed. 2003) (CL-0239-ENG) ("[A] respondent is barred from asserting as a defence, counterclaim, or right of set-off that the claimant has received or will receive indemnification or other compensation for alleged damages under an insurance or guarantee contract. This provision, rooted in prior US BIT practice and known as the 'collateral source rule' in US law, allows an investor to continue pursuing a claim despite having already been compensated through an insurance or guarantee contract.").

[247] Hege Elizabeth Kjos, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW 146 (Oxford University Press 2013) (CL-0240-ENG) ("It has been suggested that where the relevant instrument excludes a specified category of counterclaims, it may be presumed that other counterclaims are allowed, at least to the extent to which the connexity requirement is satisfied. Although such *e contrario* argumentation has some appeal and might constitute a factor for the tribunal to consider, it is doubtful whether it—in and of itself—could counterbalance a lack of any inclusion of investor obligations in the arbitration agreement.").

[248] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 155 ("Por ello no es procedente argumentar que el TLCAN contiene una prohibición amplia en contra de las reconvenciones de todo tipo

explicitly *excluded* counterclaims if that was their intention is contrary to the fundamental principle of consent under international law. Mexico's argument implies that international investment tribunals enjoy general jurisdiction to resolve disputes absent express limits to that jurisdiction. But, as explained above, jurisdiction will not vest absent clear and unambiguous consent to arbitrate. As the tribunal in *ICS Inspection v. Argentina* explained:

> This principle follows from the lack of a default forum for the presentation of claims under international law [...]. The absence of a forum before which to present valid substantive claims is thus a normal state of affairs in the international sphere. A finding of no jurisdiction should not therefore be treated as a defect in a treaty scheme that runs counter to its object and purpose in providing for substantive investment protection.[249]

95. Legacy Vulcan's interpretation of Article 1137(3) is consistent with the principle of *effet utile*, despite Mexico's assertion to the contrary.[250] Article 1137(3) can be given full effect without finding that counterclaims by NAFTA Parties are permitted under Chapter 11. Its effect is simply to allow investors of a Party who have suffered a loss as a consequence of a breach of the Treaty to obtain both recovery under the relevant insurance contract and NAFTA, consistent with the collateral source rule.

96. In reality, it is Mexico's proposed reading of Article 1137(3) that would be contrary to the principle of *effet utile* because it would render useless and redundant text that Canada and Mexico have included in subsequent treaties to affirmatively authorize State parties to bring counterclaims against investors. This text is found, for instance, in Article 9.19(2) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"), which entered into force for Mexico and Canada on 30 December 2018. This text was included in the CPTPP *in addition to* (not in lieu of) language that mimics NAFTA Article 1137(3):

> CPTPP Article 9.19(2): When the claimant submits a claim pursuant to paragraph 1(a)(i)(B), 1(a)(i)(C), 1(b)(i)(B) or 1(b)(i)(C), the respondent may make a counterclaim in connection with the

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significaría que el Artículo 1137 prohibiría a una 'Parte' aducir cualquier tipo de 'defensas' y 'derechos de compensación' dentro de un procedimiento inversionista-Estado iniciado conforme a la Sección B del TLCAN. Esto es absurdo. En donde las partes quisieron establecer una prohibición expresa, así lo hicieron.").

[249] *ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic*, PCA Case No. 2010-09, Award on Jurisdiction, ¶ 281 (10 February 2012) (Dupuy (P), Torres Bernardez, Lalonde) (CL-0032-ENG).

[250] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 156-157 ("En este sentido, tribunales internacionales han coincidido en que, '[u]no de los corolarios de la "regla general de interpretación" de la Convención de Viena es que la interpretación ha de dar sentido y ha de afectar a todos los términos del tratado. El intérprete no tiene libertad para adoptar una lectura que haga inútiles o redundantes cláusulas o párrafos enteros de un tratado' [...] Ignorar esta disposición acarrearía como obsoleta e ineficaz el Artículo 1137(3), pues se habría regulado una excepción sobre una acción no permitida.").

> factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant.
>
> CPTPP Article 9.23(8): A respondent may not assert as a defence, counterclaim, right of set-off or for any other reason, that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

97. If Mexico's argument that NAFTA Article 1137(3) permits the filing of State counterclaims were correct, CPTPP Article 9.19(2) would be unnecessary and superfluous, contrary to the *effet utile* principle.[251] That Mexico and Canada deemed it necessary to include new language in CPTPP to explicitly permit the filing of counterclaims demonstrates that Mexico's proposed interpretation of NAFTA Article 1137(3) is wrong and must be rejected.

98. In addition to misapplying customary principles of treaty interpretation, Mexico mischaracterizes and misapplies arbitral jurisprudence in an attempt to buttress its erroneous argument that no affirmative expression of consent is needed in NAFTA to allow its counterclaim.

99. For instance, Mexico references a decision by the Iran-U.S. Claims Tribunal indicating that "an explicit authorization of counterclaims would be unnecessary; on the contrary, express language would be necessary to exclude counterclaims."[252] Mexico distorts that tribunal's conclusion. Unlike NAFTA, the Algiers Accord establishing the Iran-U.S. Claims Tribunal explicitly provided for the filing of "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, *and any counterclaim which arises out of the same contract, transaction, or occurrence that constitutes the subject matter of that national's claim*."[253] Mexico itself has recognized that "[t]he jurisdiction of [the Iran-U.S. Claims Tribunal] was broader than that of a NAFTA Tribunal."[254] The Iran-U.S. Claims Tribunal also specifically noted that its jurisdiction over counterclaims was further reflected in the "*concordant, common and consistent practice* in filing counterclaims" under the Algiers Accord.[255] No such practice

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[251] *ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic*, PCA Case No. 2010-09, Award on Jurisdiction, ¶¶ 314-317 (10 February 2012) (Dupuy (P), Torres Bernardez, Lalonde) (CL-0032-ENG) (holding that BIT provisions must be interpreted in a manner that does not render moot provisions included in BITs subsequently concluded by the same State party).

[252] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 161.

[253] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran ("Algiers Accord Claims Settlement Declaration"), art. II(1), Iran-U.S. C.T.R. 9 (19 January 1981) (C-0241-ENG) (emphasis added).

[254] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Mexico's Article 1128 Submission, ¶ 9 (3 April 2000) (CL-0242-ENG).

[255] *The Islamic Republic v. United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), ¶ 43 (9 September 2004) (RL-0212) (emphasis added).

exists under NAFTA, as Mexico's counterclaim is the first of its kind under the Treaty. The case Mexico cites simply does *not* support the proposition Mexico espouses.

100. Mexico's reliance on *Aven v. Costa Rica* is similarly misplaced. In that case, the tribunal considered whether it had jurisdiction over a counterclaim filed by Costa Rica in a dispute arising under CAFTA-DR. One element of the tribunal's analysis considered whether the exclusion of certain counterclaims under Article 10.20(7) of CAFTA-DR, which resembles NAFTA Article 1137(3),[256] means *a contrario* that counterclaims not expressly excluded are within the tribunal's jurisdiction under the treaty.[257] Analyzing the procedural provisions of CAFTA-DR, the tribunal "[did] not find any reason of principle to declare inadmissible a counterclaim," though it ultimately dismissed the counterclaim on substantive and procedural grounds.[258] While Mexico asserts that "the reasoning of the tribunal in *Aven v. Costa Rica* applies *mutatis mutandis* to this case,"[259] Mexico ignores several important distinctions between the text of CAFTA-DR and NAFTA that render the *Aven* tribunal's reasoning inapposite here.

101. For instance, in concluding that counterclaims were notionally possible under CAFTA-DR, the tribunal in *Aven* remarked that several of the key procedural provisions in CAFTA-DR could conceivably be read neutrally to apply to State parties and investors alike, such that a State party could be a "claimant" under the treaty. Specifically, the *Aven* tribunal indicated that "[t]he language of Articles 10.15 and 10.16 of DR-CAFTA is in principle wide enough to encompass counterclaims and that Article 10.16 does not imply that it applies only to disputes in which it is an investor which initiates claims."[260] In contrast, the relevant NAFTA text is different in this respect from that of DR-CAFTA and is much more rigid. This is particularly true of NAFTA Articles 1137(3), 1116, and 1117, where reference is made specifically to NAFTA "Parties," and "investors," instead of the more neutral use of "claimant" and "respondent" found in CAFTA-DR. The table below shows these fundamental differences between NAFTA and CAFTA-DR with respect to the provisions analyzed in *Aven v. Costa Rica*.

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[256] Article 10.20(7) of CAFTA-DR provides: "A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract." CAFTA-DR, Art. 10.20(7) (C-0165-ENG).

[257] *David R. Aven et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, ¶ 728 (18 September 2018) (Siqueiros (P), Baker, Nikken) (CL-0222-ENG) (hereinafter "*Aven v. Costa Rica* (Final Award)").

[258] *Id.*, ¶¶ 742-743, 747.

[259] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 165.

[260] *Aven v. Costa Rica* (Final Award), ¶ 740 (CL-0222-ENG).

NAFTA Text	CAFTA-DR Text
Article 1118 (Settlement of a Claim through Consultation and Negotiation) The **disputing parties** should first attempt to settle a claim through consultation or negotiation.	*Article 10.15 (Consultation and Negotiation)* In the event of an investment dispute, the **claimant** and the **respondent** should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures such as conciliation and mediation.
*Article 1116 (**Claim by an Investor** of a Party on Its Own Behalf)* 1. An **investor** of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A or Article 1503(2) (State Enterprises), or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the **investor** has incurred loss or damage by reason of, or arising out of, that breach.	*Article 10.16 (**Submission of a Claim** to Arbitration)* 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the **claimant**, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A, (B) an investment authorization, or (C) an investment agreement; and (ii) that the **claimant** has incurred loss or damage by reason of, or arising out of, that breach; and
*Article 1117 (**Claim by an Investor** of a Party on Behalf of an Enterprise)* An **investor** of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under: (a) Section A or Article 1503(2) (State Enterprises), or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's	*Article 10.16 (**Submission of a Claim** to Arbitration)* 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (b) the **claimant**, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A,

NAFTA Text	CAFTA-DR Text
obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.	(B) an investment authorization, or (C) an investment agreement; and (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.
Article 1137 (General) 3. In an arbitration under this Section, **a Party** shall not assert, as a defense, counterclaim, right of setoff or otherwise, that the disputing investor has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.	*Article 10.20 (Conduct of the Arbitration)* 7. A **respondent** may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract

102. Given these differences and the *Aven* tribunal's reliance on the more neutral language in CAFTA-DR, that tribunal's conclusions do not apply here. This important distinction was identified by the tribunal in *Lopez Goyne Family Trust v. Nicaragua*, which also considered whether an *a contrario* reading of Article 10.20(7) of CAFTA-DR would allow respondent counterclaims not excluded by that provision.[261] In that case, the tribunal noted with respect to Article 10.20(7) of CAFTA-DR, that "this provision is modelled on Article 1137.3 of the NAFTA, *a treaty that bars counterclaims*."[262] The tribunal further explained that:

> [T]he Treaty [*i.e.*, CAFTA-DR] differs considerably from the NAFTA. Indeed, contrary to Article 10.16.1 of the [CAFTA-DR] Treaty, which as mentioned above, employs the neutral term "claimant" to identify the individual or entity bringing a claim, Articles 1116 and 1117 of the NAFTA – respectively headed "Claims by an Investor of a Party on its behalf" and "Claims by an Investor on behalf of an enterprise" – are strictly "unidirectional," in the sense that they only contemplate claims brought by an "investor." This major discrepancy prevents the Tribunal from accepting that

[261] *Lopez Goyne Family Trust v. Nicaragu*a, ICSID Case No. ARB/17/44, Award, ¶ 587 (1 March 2023) (Radicati di Brozolo (P), Martínez de Hoz, Stern) (CL-0243-ENG).

[262] *Id.*, ¶ 596 (emphasis added).

> the NAFTA provides guidance on whether the Treaty reflects the consent to counterclaims.[263]

103. In short, the conclusions of the *Aven* tribunal under CAFTA-DR are not relevant to the interpretation of NAFTA 1137(3). The clear text of NAFTA does not contain consent to arbitrate State counterclaims, and that consent cannot be implied from NAFTA Article 1137(3).

3. Other NAFTA Provisions Confirm that Mexico's Counterclaim Falls Outside the Scope of the Parties' Consent to Arbitrate.

104. Mexico also errs in arguing that NAFTA's other procedural provisions confirm that respondent States have the right to file counterclaims under NAFTA.[264] Mexico's argument fundamentally ignores the clear text in key provisions of NAFTA Chapter 11. Numerous arbitral tribunals have interpreted similar text as failing to confer jurisdiction over counterclaims brought by respondent States. The same conclusion should be reached here.

a) NAFTA's Text Confirms That Claims Under Section B of Chapter 11 May Only Be Filed by Investors.

105. Mexico asserts that the Parties' consent is governed by NAFTA Articles 1121 and 1122 and that, under those provisions as well as Legacy Vulcan's Notice of Intent to arbitrate, the Parties consented to arbitration "in accordance with the procedures set forth in this Treaty."[265] According to Mexico, because NAFTA Article 1137(3) is a "procedural provision," both Parties have impliedly consented to arbitrate respondent State counterclaims under NAFTA Chapter 11.[266] Mexico's argument is baseless.

106. To begin, Mexico's argument is premised on a mischaracterization of what Article 1137(3) does and says, as addressed in Part III.A.2 above. In addition, by incorporating the collateral source rule into NAFTA, Article 1137(3) is a substantive provision — not a "procedural" one. And even if Mexico's interpretation of Article 1137 as procedural were to be accepted, the other provisions in Section B of NAFTA Chapter 11 simply do not support Mexico's conclusion that the Parties consented to arbitrate counterclaims. To the contrary, a review of NAFTA Articles 1116, 1117, 1119 through 1122, 1125, and 1135 confirm that counterclaims fall outside the scope of the Parties' consent to arbitrate.

107. *First*, the text of Articles 1116 and 1117 is definitive: claims may only be submitted by investors of a NAFTA Party. NAFTA Articles 1116(1) and 1117(1) refer only to claims "*by an*

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[263] *Id.*

[264] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 169-170.

[265] *Id.*, ¶ 168.

[266] *Id.*, ¶¶ 169-172.

investor" (whether on its own behalf or on behalf of an enterprise) alleging that a NAFTA "Party has breached an obligation under" specified provisions of Chapter 11. The titles of Article 1116 ("Claim *by an Investor* of a Party on its Own Behalf") and Article 1117 ("Claim *by an Investo*r of a Party on Behalf of an Enterprise") reinforce this conclusion. As legal scholars have explained, this "unidirectional" language in Articles 1116 and 1117 confirms that "NAFTA does not envisage claims being initiated by host states."[267] Mexico itself has conceded as much elsewhere:

> Article 1116(1) and Article 1117(1) identify the class of claims that the NAFTA Parties consented to submit to Arbitration. The scope of the Parties' consent is limited to claims that (a) are brought by an investor of another NAFTA Party; (b) allege that the Party breached an obligation owed the investor or its investment under Section A of Chapter Eleven; and (c) aver that the investor "incurred loss or damage by reason of, or arising out of, that breach."[268]

108. *Second*, other NAFTA provisions further confirm that claims under Section B of NAFTA Chapter 11 may only be filed by investors. In particular:

- **Article 1119 (Notice of Intent to Submit a Claim to Arbitration)** provides that only a "disputing investor" can submit a notice of intent to submit a claim to arbitration.
- **Article 1120(1) (Submission of a Claim to Arbitration)** similarly provides that only a "disputing investor may submit the claim to arbitration."
- **Article 1121(1) and (2) (Conditions Precedent to Submission of a Claim to Arbitration**) provides that only a "disputing investor may submit a claim" under Articles 1116 and 1117.
- **Article 1122(2) (Consent to Arbitration)** distinguishes between the consent provided by "a Party" and that provided by "a disputing investor."
- **Article 1125 (Agreement to Appointment of Arbitrators)** provides that the "disputing investor referred to in Article 1116 [and Article 1117] may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID

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[267] Hege Elizabeth Kjos, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW 140 (Oxford University Press 2013) (CL-0240-ENG) ("NAFTA does not envisage claims being initiated by host states: an investor of a party (on behalf of an enterprise of another party that is a juridical person that the investor owns or controls directly or indirectly) may submit to arbitration a claim that another party has breached (a) specified provision(s) of the NAFTA."). *See also* Andrea K. Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17 LEWIS & CLARK LAW REVIEW (2013), 461, 468 (RL-0167-ENG) ("Because the referenced sections of NAFTA [Article 1116 and 1117] do not impose obligations on investors, that latter formulation makes the argument that a treaty confers jurisdiction on a tribunal to hear a counterclaim difficult."); Zachary Douglas, The International Law of Investment Claims 257 (2009) (CL-0244-ENG) (concluding that "it would be preferable to construe Chapter 11 of NAFTA as excluding the possibility of counterclaims," because the consent to arbitration under NAFTA "is expressed in narrow terms," and extending a NAFTA's tribunal's jurisdiction to allow counterclaims would be inequitable in that a host state counterclaim could be "based upon a contractual obligation . . . a tort, unjust enrichment, or a public law act, in circumstances where the investor's primary claims are limited to breaches of Chapter 11 obligations").

[268] *Alicia Grace and Others v. United Mexican States*, ICSID Case No. UNCT/18/4, Statement of Defense, ¶ 591 (1 June 2020) (C-0245-SPA) (quoting and adopting a U.S. statement in *Methanex*).

Additional Facility Rules, only on condition that the disputing investor agrees in writing to the appointment of each individual member of the Tribunal."

- **Article 1135(1) (Final Award)** authorizes a tribunal to grant relief (in the form of monetary damages and restitution of property) only in the case that the tribunal "makes a final award ***against*** a Party," and also provides that "[a] Tribunal may not order a Party to pay punitive damages."

109. The Treaty text therefore makes clear that entitlement to submit a claim under Section B of NAFTA Chapter 11 is reserved for "a disputing investor" (defined as "an investor that makes a claim under Section B"). That text also clarifies that relief in the form of monetary damages or restitution is appropriate only where a NAFTA Party is found to have breached the Treaty — and may only be imposed on a NAFTA Party, not a disputing investor. At the same time, the Treaty distinguishes between the role of the "disputing investor," on the one hand, and of the "disputing Party" (defined as "a Party against which a claim is made under Section B"), on the other. It is a "disputing Party" which receives the notice of intent to submit a claim to arbitration (Article 1119) and it is a "disputing Party" against which a breach of the Treaty is alleged (Article 1121 and Article 1125). As explained by the tribunal in *Amco v. Indonesia*, the use of distinct terms in arbitration agreements must be given meaning and interpreted in good faith:

> [T]his is again a general principle of law — any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged.[269]

110. Yet, in defiance of this clear and unambiguous Treaty text, Mexico asserts that "the alleged one-way language for submitting a claim to arbitration under Section B in accordance with the provisions of Article 1116 and 1117 does not preclude the possibility of the State filing a counterclaim against an investor."[270] This assertion disregards the definitions of "disputing investor" and a "disputing Party" as well as the distinction between the two under the Treaty. Mexico also ignores the explicit roles assigned to each as set forth in Articles 1116, 1117, 1119 through 1112, 1125, and 1135, all of which explicitly provide that claims under Section B of NAFTA Chapter 11 are to be filed by investors against the NAFTA Parties. Mexico's argument clashes head on with the Treaty text and should be rejected.

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[269] *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 14 (25 September 1983) (Goldman (P), Rubin, Foighel) (CL-0207-ENG).

[270] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 172 ("[E]l supuesto lenguaje unidireccional para someter una reclamación de arbitraje bajo la Sección B de acuerdo a lo previsto por los Artículos 1116 y 1117 no precluyen la posibilidad de que el Estado presente una contrademanda en contra de un inversionista contendiente.").

111. Mexico's assertion that Legacy Vulcan consented to arbitrate counterclaims by submitting its Notice of Intent fails for the same reason.[271] As Legacy Vulcan has explained, its consent to arbitrate was submitted "in accordance with Article 1121" of NAFTA.[272] As described above, NAFTA Article 1121 contemplates conditions under which "a disputing investor" may submit a claim, and cannot — as Mexico asserts — be interpreted as consent by Legacy Vulcan to arbitrate counterclaims that are not envisioned in the consent provisions of NAFTA Chapter 11.

112. In short, interpreting the Treaty text "in good faith in accordance with the ordinary meaning to be given to the terms"[273] leads to an inevitable conclusion: NAFTA Chapter 11 claims may only be filed by investors, and Mexico's counterclaim must be dismissed for lack of jurisdiction.

b) Jurisprudence Confirms that NAFTA Does Not Contemplate Respondent State Counterclaims.

113. As further confirmation that NAFTA only provides consent for *investor* claims, not State counterclaims, numerous arbitral tribunals have dismissed respondent counterclaims asserted under similarly worded investment treaties. Mexico tries to brush off the overwhelming jurisprudence against it by arguing that the decisions cited by Legacy Vulcan are irrelevant because none of them arose under NAFTA.[274] But the legal reasoning of tribunals issuing decisions under treaties with language similar to NAFTA is instructive, more so given that there is not a single decision by a NAFTA tribunal upholding jurisdiction over a respondent counterclaim. Although 79 disputes have been filed by investors under NAFTA Chapter 11 over close to thirty years, Mexico has been unable to identify a single NAFTA arbitration in which a respondent State has previously submitted a counterclaim.

114. The near unanimous international investment law jurisprudence holds that where, as here, treaties specify that investment arbitration claims are to be filed by "investors," there is no consent and thus no jurisdiction over State-party counterclaims. As the tribunal in *Iberdrola v. Republic of Guatemala (II)* put it:

> [T]he Tribunal comes to the conclusion that the Treaty wording showing that only the investor is entitled to file claims must prevail

[271] *Id.*, ¶ 171.

[272] Notice of Intent, § 5 (3 September 2018) ("Legacy Vulcan y Calica consienten por la presente en someter a un arbitraje CIADI, *de conformidad con el Artículo 1121 del TLCAN*") (C-0007-SPA) (emphasis added).

[273] Vienna Convention, Art. 31(1) (CL-0141).

[274] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 167.

> over any contrary meaning that the arbitration rules to which the Treaty refers may suggest.[275]

115. The tribunal in *Rusoro v. Venezuela* similarly declined jurisdiction over Venezuela's counterclaim under the Canada-Venezuela BIT,[276] where the relevant treaty language provided that "[a]n *investor* may submit a dispute [...] to arbitration."[277] Relying on this clear text, the tribunal held that "the Treaty does not afford host States a cause of action against an investor of the other Contracting Party, be it by way of claim or of counter-claim."[278] NAFTA's similar text points to the same conclusion here.

116. The tribunal in *Karkey Karadeniz Elektrik Uretim AS v. Pakistan* likewise concluded that "the text of the BIT is decisive in determining [the tribunal's] jurisdiction over the counterclaims."[279] In that case, the dispute-resolution provisions of the applicable treaty provided that it was up to the investor to choose where to submit the dispute for arbitration, and that "[d]isputes between one of the Parties and an investor of the other Party, in connection with the investment, shall be notified in writing, including a detailed information, *by the investor to the recipient Party of the investment*."[280] Relying on this text, the tribunal held that:

> References to the "investor" [...] in the dispute resolution clause of the BIT means that the BIT is intended to enable arbitration only at the initiative of the investor. The BIT imposes no obligation on investors, only on the Contracting State.[281]

117. Finally, as noted above, even in cases where the applicable treaty text references counterclaims, tribunals have concluded that they lack jurisdiction over those counterclaims. The tribunals in *Lopez Goyne Family Trust v. Nicaragua* and *Aven v. Costa Rica* concluded that CAFTA-DR did not confer jurisdiction over respondent counterclaims, despite the reference to

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[275] *See Iberdrola Energía, S.A. v. Republic of Guatemala (II)*, PCA Case No. 2017-41, Final Award, ¶ 391 (24 August 2020) (Kaufmann-Kohler (P), Thomas, Dupuy) (emphasis added) (CL-0197-ENG).

[276] *See Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (Fernández-Armesto (P), Simma, Vicuña) (RL-0003).

[277] *See* Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, Art. XIII:2 (1 July 1996) (emphasis added) (C-0331-ENG).

[278] *See Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, ¶ 628 (22 August 2016) (Fernández-Armesto (P), Simma, Vicuña) (RL-0003).

[279] *Karkey Karadeniz Elektrik Uretim AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, ¶ 1012 (22 August 2017) (Derains (P), Grigera Naón, Edward) (CL-0225-ENG).

[280] *Id.* (emphasis added).

[281] *Id.*, ¶ 1013.

counterclaims in Article 10.20(7) of that treaty.[282] The *Lopez Goyne* tribunal further observed that NAFTA is "a treaty that bars counterclaims."[283]

118. Consistent with the reasoning of these tribunals, the text of NAFTA Chapter 11 limiting the submission of claims to investors makes clear that the Parties did not consent to arbitrate counterclaims. Mexico cannot reasonably dismiss the overwhelming case law that so confirms.

4. Mexico's Claims Are Time Barred Under NAFTA Articles 1116(2) and 1117(2).

119. Mexico asserts that Articles 1116 and 1117 should be read to allow respondents to file claims in the same manner as investors, provided such a counterclaim is submitted "in accordance with the procedures set out in [the] Agreement."[284] If, as Mexico insists, its counterclaim is subject to and benefits from the procedural provisions under NAFTA Chapter 11,[285] then its counterclaim must be subject to the same procedural and jurisdictional requirements as an investor's claim under NAFTA Articles 1116 or 1117. Mexico cannot cherry-pick which procedural provisions apply to its counterclaim. While Legacy Vulcan categorically rejects Mexico's tortured reading of NAFTA to allow respondent counterclaims, if Mexico's position were to be accepted, its counterclaim would still be invalid under the time limitations set forth in Articles 1116(2) and 1117(2).

120. Because CALICA's purportedly illegal and harmful acts from quarrying in La Rosita and El Corchalito occurred more than three years before Mexico filed its counterclaim, and Mexico has known or should have known about those acts and any resulting loss since then,

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[282] *Lopez Goyne Family Trust v. Nicaragu*a, ICSID Case No. ARB/17/44, Award, ¶ 605 (1 March 2023) (Radicati di Brozolo (P), Martínez de Hoz, Stern) (CL-0243-ENG) ("the Treaty does not confer jurisdiction in respect of the Counterclaim"); *Aven v. Costa Rica* (Award), ¶ 743 (CL-0222-ENG).

[283] *Lopez Goyne Family Trust v. Nicaragu*a, ICSID Case No. ARB/17/44, Award, ¶ 596 (1 March 2023) (Radicati di Brozolo (P), Martínez de Hoz, Stern) (CL-0243-ENG).

[284] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 169-170; *see also id.*, ¶ 172 ("el supuesto lenguaje unidireccional para someter una reclamación de arbitraje bajo la Sección B de acuerdo a lo previsto por los Artículos 1116 y 1117 no precluyen la posibilidad de que el Estado presente una contrademanda en contra de un inversionista contendiente").

[285] Mexico asserts that for "claims submitted under Section B of Chapter XI of NAFTA," "the provisions of a procedural nature […] are precisely the procedures set out in this Agreement *to which the Party* [counterclaimant] and the disputing investor submit to present a claim under Articles 1116 and 1117." Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 169 ("En este sentido, el Artículo 1137 (Disposiciones generales) contiene disposiciones de carácter procedimental, e.g., para definir el 'momento en que la reclamación se considera sometida al procedimiento arbitral' aplicables a las reclamaciones presentadas al amparo de la Sección B del Capítulo XI del TLCAN. Estas disposiciones de carácter procedimental, incluyendo la prevista en el Artículo 1137(3), son precisamente los 'procedimientos establecidos en este Tratado' a los que la Parte y el inversionista contendiente se someten al presentar una reclamación al amparo de los Artículos 1116 y 1117.") (emphasis added).

that counterclaim is time barred under NAFTA Articles 1116 and 1117. Mexico's effort to circumvent this conclusion by feigning ignorance of CALICA's allegedly harmful conduct until SEMARNAT's *Dictamen* fails, as Legacy Vulcan explains below.

a) Mexico's Counterclaim Must Comply With NAFTA's Three-Year Time Limitation.

121. The Parties' agreement to arbitrate under NAFTA Chapter 11 is formed by the consent given by each Party to submission of a claim to arbitration "in accordance with the procedures set out in this Agreement."[286] Based on this premise, NAFTA tribunals have determined that a tribunal lacks jurisdiction over a claim that does not comply with the three-year time limitation set forth in Articles 1116(2) and 1117(2).[287] Mexico agrees that this is a jurisdictional requirement, not an admissibility one.[288]

122. The three-year time limitation set forth in Articles 1116 and 1117 bars claims under Section B of NAFTA Chapter 11 "if more than three years have elapsed from the date on which the [claimant] first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the [claimant] has incurred loss or damage."[289] At the earliest, Mexico filed its counterclaim when it formally sought leave from the Tribunal to do so on 19 December 2022.[290] Mexico's counterclaim would therefore be time-barred if Mexico first acquired, or should have first acquired, knowledge of the alleged breaches and of the resulting loss or damage underpinning its claim before 19 December 2019.

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[286] NAFTA, Arts. 1121(1)(a), 1122(1) (C-0009-ENG). Such conclusions are reinforced by the ICSID Convention and ICSID Arbitration Rule 40, which both similarly provide that a tribunal may entertain counterclaims brought before it "provided that they are within the limits of the consent of the parties." ICSID Convention, Article 46; ICSID Arbitration Rules, Rule 40 (2006).

[287] *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, ¶ 83 (30 January 2018) (Crawford (P), Cass, Lévesque) (CL-0246-ENG) ("The clear inference is that arbitration of a claim not submitted in accordance with those procedures is not consented to and that the tribunal lacks jurisdiction. Although the time limit specified in Articles 1116(2) and 1117(2) is not itself a procedure, compliance with it is required for the bringing of a claim, which is certainly a procedure. This is enough to justify the conclusion that compliance with the time limit goes to jurisdiction.").

[288] Counter-Memorial, ¶ 275 ("Como se explica a continuación, el requerimiento de someter reclamaciones a arbitraje dentro de tres años es una cuestión de jurisdicción, no de admisibilidad."). *See also Bayview Irrigation District and others v. United Mexican States,* ICSID Case No. ARB(AF)/05/1, Mexico's Memorial on the Jurisdiction of the Tribunal, ¶¶ 115-117 (19 April 2006) (Lowe (P), Gómez Palacio, Meese) (C-0247-ENG).

[289] NAFTA, Arts. 1116(2), 1117(2) (C-0009-ENG).

[290] *See* Counter-Memorial (Ancillary Claim), ¶ 494 ("La Demandada presenta su Solicitud de Reconvención (Counterclaim) en relación con los daños ambientales generados por la Demandante en el desarrollo de su inversión, de conformidad con las disposiciones del TLCAN y las Reglas de Arbitraje aplicables.")

123. In determining when a claimant first acquired or should have acquired knowledge of a breach and resulting damage or loss, either "actual" or "constructive" knowledge by a claimant is sufficient to begin the tolling of the limitations period.[291] Actual knowledge is generally a factual question as to whether the claimant was notified or was aware of the breach and resulting damage or loss.[292] When determining whether a claimant had constructive knowledge, tribunals have considered whether the claimant acted in a "reasonably prudent" manner, exercising reasonable care or diligence in connection with the relevant investment.[293] As the tribunal in *Grand River v. United State*s explained:

> "Constructive knowledge" of a fact is imputed to [a] person if by exercise of reasonable care or diligence, the person would have known of that fact. Closely associated is the concept of "constructive notice." This entails notice that is imputed to a person, either from knowing something that ought to have put the person to further inquiry, or from wilfully abstaining from inquiry in order to avoid actual knowledge.[294]

124. It is not necessary that the claimant knew the full extent of losses incurred for the three-year period to start to run. Rather, to trigger the three-year period under NAFTA Articles 1116 and 1117, it is sufficient that "[a] claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear."[295]

125. As the party asserting the counterclaim, Mexico bears the burden of showing that it first acquired, or should have first acquired, knowledge of the alleged breaches and of the resulting loss or damage underpinning its claim after 19 December 2019, and that the Tribunal has jurisdiction to hear its counterclaim. As the tribunal in *Resolute Forest v. Canada* explained:

> The language of NAFTA treats the 3-year time limit as one among a number of requirements that a claimant under Chapter Eleven has to meet to attract jurisdiction over a claim. The Tribunal agrees with later tribunals, and with the United States and Mexico in their

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[291] *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, ¶ 153 (30 January 2018) (Crawford (P), Cass, Lévesque) (CL-0243-ENG) ("The triggering event is the knowledge, actual or constructive, that an alleged breach has occurred and that loss or damage has been incurred as a result.").

[292] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America,* UNCITRAL, Decision on Objections to Jurisdiction, ¶ 66 (20 July 2006) (Nariman (P), Crook, Anaya) (CL-0249-ENG).

[293] *Id.* ("The Tribunal believes that it is appropriate to consider in this connection what a reasonably prudent investor should have done in connection with extensive investments and efforts such as those described to the Tribunal.").

[294] *Id.*, ¶ 59.

[295] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 87 (11 October 2002) (Stephen (P), Crawford, Schwebel) (CL-0011-ENG*). See also Grand River Enterprises Six Nations, Ltd., et al. v. United States of America,* UNCITRAL, Decision on Objections to Jurisdiction, ¶ 78 (20 July 2006) (Nariman (P), Crook, Anaya) (CL-0249-ENG).

> Article 1128 submissions, that the claimant has to establish its case on this and other points.[296]

126. As described in the following section, Mexico has failed to meet this burden.

b) Mexico's Counterclaim Is Time Barred.

127. Legacy Vulcan strongly denies the unfounded allegations that undergird Mexico's counterclaim. But even if Mexico's allegations of environmental violations and damage had any merit, they would be time barred under NAFTA Articles 1116(2) and 1117(2) because Mexico had actual or constructive knowledge before 19 December 2019 of the breaches and damage it alleges.

128. With respect to La Rosita, CALICA began operations in the late 1980s and continued quarrying there for over 35 years. During that time, Mexico has been aware of the activities it now claims were in breach of CALICA's environmental obligations and harmful[297] — in sharp contrast to what its instrumentalities concluded about activities in La Rosita before.

129. For example, PROFEPA conducted an inspection of La Rosita in 1993, "to verify and confirm [CALICA's] compliance with the provisions contained in the [LGEEPA], the technical ecological standards and other applicable legal provisions for the granting of permits, authorizations and concessions."[298] The PROFEPA inspectors visited La Rosita and observed the "extraction process that starts with the vegetative clearing,"[299] as well as the "minimal" dust and noise associated with operations there.[300] PROFEPA also reviewed the 1986 Investment Agreement and other environmental documentation.[301] To the extent CALICA was violating any environmental obligation as Mexico alleges, Mexico would or should have been aware of those violations no later than 1993. Because Mexico has asserted that any such breach

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[296] *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, ¶ 85 (30 January 2018) (Crawford (P), Cass, Lévesque) (CL-0243-ENG).

[297] *See, e.g.*, Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 33 (free translation, the original reads: "la Demandante ha incumplido, inter alia, con los siguientes términos del Acuerdo de 1986 y su MPIA, lo cual se traduce en violaciones directas a la legislación ambiental mexicana").

[298] PROFEPA Inspection Report (17 March 1993) (C-0280-SPA.3-4, 11-12) (free translation, the original reads: "[E]s con el fin de verificar y comprobar el cumplimiento de las disposiciones contenidas en la Ley General del Equilibrio Ecológico y la Protección al Ambiente, de las normas técnicas ecológicas y demás disposiciones jurídicas aplicables, al otorgamiento de permisos, autorizaciones y concesiones[.]"). To facilitate the legibility of this handwritten inspection report, a transcribed version has been provided and appended to the exhibit after the original document. Pincites are included to the original and transcribed text.

[299] *Id.* at 13 (free translation, the original reads: "se observó que el proceso de extracción inicia desde el desmonte que se realiza de manera controlada").

[300] *Id.* at 14 ("Observándose en todo momento que el mínimo desprendimiento de polvo [...] En este proceso el ruido que se produce es mínimo").

[301] *Id.* at 14 ("la empresa presenta Manifestación de Impacto Ambiental de 1986 [...] Se anexa copia de la licencia que autoriza la explotación de los materiales pétreos"); *id.* (last paragraph).

immediately triggered a finding of damage under Mexican law,[302] it also would or should have been aware of any loss associated with such a breach well before the three-year limitations period set forth by NAFTA.

130. To illustrate Mexico's early knowledge of CALICA's activities (and alleged breaches), Mexico complains that CALICA "clear[ed] forest vegetation for more than 30 years without the corresponding CUSTF authorization."[303] Yet Mexico has known of CALICA's plan to clear vegetation in this lot since 1986.[304] During the 1993 PROFEPA inspection of La Rosita, PROFEPA described CALICA's production process, including "the *clearing of the land*, which is carried out in a controlled manner, that is, as the extraction process progresses, *the plot is cleared*[.]"[305] CALICA further made mention of its vegetation-clearing activities in 1999, when requesting authorization to quarry El Corchalito.[306] This was no secret to Mexico.

131. Mexico now claims that it only recently became aware that CALICA lacked a CUSTF for La Rosita,[307] but this is unbelievable given the indisputable evidence showing that PROFEPA has known for decades that CALICA cleared vegetation there without a CUSTF.[308] Even assuming, for the sake of argument, that Mexico actually learned this fact recently, however, the record clearly shows that, had Mexico acted in a reasonably prudent manner, it should have become aware of CALICA's failure to obtain a CUSTF for La Rosita much earlier. It is undisputed that Mexico has been on notice that CALICA was clearing vegetation in La Rosita from the outset

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[302] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 88 ("los incumplimientos de CALICA a la legislación han generado, per se, daño ambiental conforme al estándar establecido en los Artículo 2 y 6 de la Ley Federal de Responsabilidad Ambiental").

[303] *Id.*, ¶ 33 (asserting as an alleged breached "Desmonte de vegetación forestal por más de 30 años sin la Autorización CUSTF correspondiente").

[304] Investment Agreement (6 August 1986) (C-0010-SPA.20) ("El proceso se inicia con el desmonte de la franja de terreno que se va a excavar[.]"); *id.* at 403 ("El desmonte previsto para la preparación del sitio deberá ser en forma parcelaria[.]").

[305] PROFEPA Inspection Report (17 March 1993) (C-0280-SPA.5, 13) (free translation, the original reads: "En esta área [La Rosita] se observó que el proceso de extracción inicia desde el desmonte que se realiza de manera controlada, es decir conforme se avanza en la extracción se desmonta la parcela guardando una distancia entre la vegetación y el banco de material pétreo[.]").

[306] CALICA's Environmental Impact Statement, Chapter II (23 October 2000) (C-0077-SPA.240).

[307]Counter-Memorial (Ancillary Claim), ¶ 220 ("el predio La Rosita nunca había sido inspeccionado para verificar el cumplimiento de CALICA en materia de impacto ambiental respecto de la extracción de piedra caliza y en materia forestal con relación a la remoción de vegetación"); *id.* ¶ 264 ("la visita de inspección de 2022 en materia forestal fue la primera que la autoridad realizó en La Rosita para verificar el cumplimiento de obligaciones en esa materia") (citation omitted); *id.*, ¶ 447.

[308] *See, e.g.*, Reply (Ancillary Claim), ¶ 61; PROFEPA Inspection Report (17 March 1993) (C-0280-SPA.5, 13); Investment Agreement (6 August 1986) (C-0010-SPA.20) ("El proceso se inicia con el desmonte de la franja de terreno que se va a excavar[.]"); *id.* at 403 ("El desmonte previsto para la preparación del sitio deberá ser en forma parcelaria[.]"); CALICA's Environmental Impact Statement, Chapter II (23 October 2000) (C-0077-SPA.41).

and has continued to confirm this activity for decades. If Mexico is right that a CUSTF was required all of this time (it was not), then Mexico had, at a minimum, constructive knowledge that CALICA was clearing vegetation in La Rosita without a CUSTF well over three years ago.

132. Having been on actual or constructive notice for decades of this and other alleged "breaches" Mexico attributes to the clearing of vegetation and quarrying in La Rosita, as well as the purported resulting "damage," Mexico's counterclaim regarding La Rosita is time barred.

133. The same is true regarding El Corchalito. Mexico has been aware of CALICA's quarrying there from the moment it commenced in the early 2000's.[309] Mexico has been aware of the clearing of vegetation there for decades.[310] Since commencing quarrying in El Corchalito in 2001, CALICA has submitted regular reports to PROFEPA *every four months* detailing the progress of its quarrying operations, including the clearing of vegetation.[311] This is undisputed.

134. PROFEPA also inspected El Corchalito in 2017, confirming the clearing of vegetation and quarrying activities there.[312] In January 2018, PROFEPA identified purported infractions by CALICA and ordered the shutdown of El Corchalito,[313] ultimately preserving the shutdown and demanding compensation from CALICA for purported environmental harms.[314] In the Shutdown Order issued in January 2018, PROFEPA asserted CALICA's infractions could constitute environmental damage, requiring reparation or compensation.[315] Thus, PROFEPA's own documents confirm that Mexico knew and certainly should have known of the breaches and damage it alleges occurred in El Corchalito no later than January 2018.[316] Mexico's counterclaim with respect to El Corchalito is therefore time barred.

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[309] *See, e.g.*, Corchalito/Adelita State Environmental Authorization (11 December 1996) (C-0018-SPA); Corchalito/Adelita Federal Environmental Authorization (30 November 2000) (C-0017-SPA); CALICA's Eleventh Quadrimester Report and Corresponding Acknowledgements of Receipt, (23 May 2005) (C-0113-SPA) (reporting on quarrying activities).

[310] *E.g.*, Corchalito/Adelita Federal Environmental Impact Authorization (30 November 2000) (C-0017-SPA.32-33); Corchalito/Adelita State Environmental Authorization (11 December 1996) (C-0018-SPA.9).

[311] *See, e.g.,* CALICA's Eleventh Quadrimester Report and Corresponding Acknowledgements of Receipt, (23 May 2005) (C-0113-SPA.19) (listing "desmonte" as an activity CALICA was carrying out); *id.* at 39 (reporting how CALICA ensures that no animals are harmed during the clearing, stripping, and extraction activities carried out).

[312] First PROFEPA Inspection Report (19 May 2017) (C-0115-SPA.39, 47); Second PROFEPA Inspection Report (27 November 2017) (C-0118-SPA.10) ("La ubicación georreferenciada del polígono que forma el espejo de agua, está contenida en los cuadros de coordenadas que forman parte de la presente acta de inspección, con base en ello se tiene que la superficie que ocupa el espejo de agua es de 1,421.520.02209 metros cuadrados [i.e., 142.152 hectares].").

[313] Shutdown Order (22 January 2018) (C-0117-SPA.300).

[314] Resolution (30 October 2020) (R-0005-ESP).

[315] Shutdown Order (22 January 2018) (C-0117-SPA.308).

[316] Mexico asserts that PROFEPA's Administrative Resolution with respect to El Corchalito "did not contemplate an assessment of the damage actually generated by CALICA." Memorial on Jurisdiction and

135. Finally, Mexico makes no specific claims of environmental damage with respect to La Adelita, nor can it, since CALICA has been unable to even clear vegetation from, let alone quarry, that property as a consequence of Mexico's repudiation of the 2014 Agreements.

136. So, even if Mexico's counterclaim was able to overcome the insurmountable jurisdictional hurdles discussed above, it would still be subject to dismissal as time barred under NAFTA Articles 1116(2) and 1117(2). And these are not the only deficiencies with Mexico's counterclaim, as discussed below. That Mexico had the audacity to pursue a counterclaim so clearly devoid of jurisdiction and merit only highlights its tactical nature and illegitimate origin: the materialization of President López Obrador's overt threats against Legacy Vulcan.

B. THE NATURE OF THE COUNTERCLAIM DOES NOT IMPLICATE ANY INVESTOR OBLIGATIONS UNDER NAFTA CHAPTER 11.

137. Even if the scope of the Parties' consent was broad enough to allow Mexico's counterclaim (it is not), the Tribunal would still lack jurisdiction over the counterclaim because the nature of the claim does not implicate any investor obligations under NAFTA Chapter 11.

138. As Legacy Vulcan explained in its Ancillary Claim Reply,[317] Mexico's attempts to concoct affirmative investor obligations under NAFTA Article 1114 fail for at least three reasons.[318] *First*, Article 1114 imposes no "obligation" on investors and cannot support a cause of action for the alleged environmental breaches that purportedly underpin Mexico's counterclaim. *Second*, having explicitly disclaimed reliance upon Article 1114 in this arbitration, Mexico cannot now seek to recant its prior waiver to prop up a baseless and tactical counterclaim against Legacy Vulcan. *Third*, having failed to establish the existence of investor obligations under NAFTA Chapter 11, Mexico cannot rely on other environmental treaties to ground its counterclaim under that Chapter.

Admissibility (Counterclaim), ¶ 43 (free translation). This is false because PROFEPA sought compensation from the damages allegedly caused by CALICA. *See* ¶ 75 above. It is also irrelevant. Knowledge of the extent or quantification of the loss or damage is not what triggers the three-year limitations period under Articles 1116 and 1117. It is sufficient that Mexico may have known that it suffered loss. The 2018 Shutdown Order demonstrates that Mexico had knowledge of the damage it alleges with respect to El Corchalito at that time. *See* Shutdown Order (22 January 2018) (C-0117-SPA.291-294); *see also* First PROFEPA Inspection Report (19 May 2017) (C-0115-SPA.39, 47); Second PROFEPA Inspection Report (27 November 2017) (C-0118-SPA.10).

[317] Reply (Ancillary Claim), ¶¶ 264-274.

[318] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 212.

1. NAFTA Article 1114 Does Not Impose Any Obligations Upon Investors.

139. Mexico claims that, since NAFTA Article 1114 deals with environmental issues, an investor's obligation to comply with Mexico's domestic environmental regulations may be "implied" from the language of that article.[319] This is fiction. The text of Article 1114 in no way creates an obligation for investors:

> Article 1114 (Environmental Measures)
>
> (1) Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
>
> (2) The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.[320]

140. Contrary to Mexico's claims, a good faith reading of NAFTA Article 1114 confirms that the text does not impose any "obligation" on investors. Article 1114(1) merely clarifies obligations imposed on NAFTA Contracting Parties elsewhere under Chapter 11 and confirms that the NAFTA Parties may enact and enforce environmental measures, provided such measures are "otherwise consistent with [NAFTA Chapter 11]."[321] As Legacy Vulcan has demonstrated, Mexico's thwarting of the Project has not been consistent with NAFTA Chapter 11.[322] Article 1114(2) similarly regulates the conduct of the NAFTA Parties by discouraging derogation or waiving of certain domestic measures and providing for State-to-State consultations between NAFTA Parties where such conduct may occur. Neither paragraph of Article 1114 makes any

[319] Counter-Memorial (Ancillary Claim), ¶ 512 ("El Artículo 1114 del TLCAN (Medidas Relativas al Medio Ambiente) regula cuestiones medioambientales de las que se pueden inferir obligaciones para el inversionista respecto a la legislación ambiental del Estado receptor (en este caso, México).").

[320] NAFTA, Article 1114 (C-0009-ENG).

[321] NAFTA, Article 1114(1) (C-0009-ENG).

[322] Memorial, ¶¶ 186-245; Reply, ¶¶ 127-200; Memorial (Ancillary Claim), ¶¶ 91-136; Reply (Ancillary Claim), ¶¶ 142-185.

mention of investor obligations or can reasonably be read to generate any treaty obligations to which investors are bound.[323]

141. Other NAFTA provisions — which provide context for Article 1114 — confirm this conclusion. NAFTA Article 1101 makes crystal clear that the scope of obligations set forth in NAFTA Chapter 11 apply only to "measures adopted or maintained ***by a Party***," not to investor conduct.[324] Mexico's assertion that investor obligations should be read into Article 1114 because "various NAFTA provisions confirm the importance placed by the NAFTA Parties [...] on regulatory compliance in environmental matters,"[325] is also incorrect. Article 102(2) requires NAFTA Parties to "interpret and apply the provisions of this Agreement in the light of its objectives set out in [Article 102] paragraph 1 and in accordance with applicable rules of international law."[326] The absence of any reference to investor compliance with environmental measures in NAFTA Article 102 (Objectives) underscores that Mexico's argument lacks any basis. In sum, nothing in the Treaty imposes substantive obligations upon Legacy Vulcan or CALICA or otherwise creates a cause of action for Mexico's counterclaim.

142. Investment jurisprudence confirms that — absent explicit language that is not present in NAFTA — investment treaties do not impose any affirmative obligations on investors, nor do they allow respondent States to bring counterclaims on the basis of alleged violations of domestic law. In *Lopez Goyne Family Trust v. Nicaragua*, the tribunal found that Article 10.11 — which mimics NAFTA Article 1114 — does not provide a cause of action under which counterclaims could be brought by a respondent under CAFTA-DR.[327] The *Lopez Goyne* tribunal explained that these "provisions do not themselves directly lay down environmental obligations

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[323] Mexico offers an equally uncompelling reading of NAFTA Article 1106(6), which — like Article 1114 — merely confirms that NAFTA Parties may take certain actions with respect to performance requirements, "[p]rovided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment." Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 216-217. Like Article 1114, however, nothing in Article 1106 can be read to impose any obligations upon investors, and Mexico's suggestion otherwise simply misrepresents the text of the Article, and NAFTA Chapter 11 more generally. *See Lopez Goyne Family Trust v. Nicaragu*a, ICSID Case No. ARB/17/44, Award, ¶ 601 (1 March 2023) (Radicati di Brozolo (P), Martínez de Hoz, Stern) (CL-0243-ENG).

[324] NAFTA, Art. 1101 (C-0009-ENG) (emphasis added). Similarly, NAFTA Article 201 defines "measure" to include "any law, regulation, procedure, requirement or practice," reflecting activity reserved for the State. NAFTA, Art. 201 (C-0009-ENG).

[325] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 215 ("diversas disposiciones del TLCAN confirman la importancia que las Partes le dieron a la protección al ambiente, y, evidentemente, al cumplimiento normativo en materia ambiental").

[326] NAFTA, Art. 102(2) (C-0009-ENG).

[327] *Lopez Goyne Family Trust v. Nicaragu*a, ICSID Case No. ARB/17/44, Award, ¶ 601 (1 March 2023) (Radicati di Brozolo (P), Martínez de Hoz, Stern) (CL-0243-ENG).

for investors" but rather "are mere 'safeguard clauses' [that] allow States to pursue and enforce their environmental policies."[328]

143. Similarly, in *Gavazzi v. Romania*, the respondent State sought to bring a counterclaim against the investor alleging violations of Romania law.[329] In concluding that it lacked jurisdiction over the counterclaim, the tribunal explained that "the BIT does not import Romanian law as substantive law to decide claims and counterclaims."[330] The tribunal further noted that "it is not unusual for parties to be in asymmetrical positions when a dispute relating to a BIT arises," and that "[b]y concluding the BIT, the Contracting Parties agreed to apply the BIT and international law to disputes for breaches of the BIT," and not national laws or regulations.[331] The same reasoning applies to Mexico's counterclaim in this case.

144. Even the tribunal decisions upon which Mexico relies support Legacy Vulcan's position. For instance, the tribunal in *Urbaser v. Argentina* held that "international law does not provide a cause of action for the [respondent's] Counterclaim,"[332] and accordingly dismissed the counterclaim. In doing so, that tribunal explicitly rejected the argument Mexico makes here. It held that Argentina could not fabricate a cause of action under the Spain-Argentina BIT for alleged violations of domestic law by relying on mere references to domestic measures in the text of the treaty:

> Claimants rightly note that Article 1(2) of the BIT, when requesting that an investment must be acquired or effected in accordance with the legislation of the country receiving the investment, relates to the

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[328] *Id.* The tribunal reached the same conclusion with regard to CAFTA-DR Article 10.9.3(c), which mimics NAFTA 1106(6). Accordingly, Mexico's arguments with respect to Article 1106(6) are equally unavailing.

[329] *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, ¶ 162 (21 April 2015) (van Houtte (P), Paulsson/Veeder, Rubino-Sammartano) (CL-0228-ENG).

[330] *Id.*, ¶ 156.

[331] *Id.*, ¶¶ 154, 156.

[332] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 1206 (8 December 2016) (Bucher (P), McLachlan, Martínez-Fraga) (RL-0174). *See also Amco Asia Corporation and Others v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Decision on Jurisdiction in Resubmitted Proceeding, ¶¶ 125-127 (10 May 1988) (Goldman (P), Foighel, Rubin) (CL-0253-ENG) ("[I]t is correct to distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State's jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host state. Legal disputes relating to the latter will fall under Article 25(1) of the Convention. Legal disputes concerning the former in principle fall to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention. The obligation not to engage in tax fraud is clearly a general obligation of law in Indonesia. It was not specially contracted for in the investment agreement and does not arise directly out of the investment. For these reasons the Tribunal finds the [Respondent's counterclaim] of tax fraud beyond its competence *ratione materiae*.").

> definition of investments for the purposes of determining the scope of application of the BIT. It does not in itself contain an investor's obligation to comply with the host State's legislation when pursuing its investment with the effect that the host State would have a right to trigger the application of the BIT and its arbitration clause in case of a violation of its domestic law.[333]

145. Mexico also persists on its gross misrepresentation of the *Aven v. Costa Rica* decision. Though Mexico accuses Legacy Vulcan of "decontextualizing" the tribunal's decision in that case, it is Mexico that mischaracterizes the tribunal's conclusions. In several instances, Mexico cites to language in the *Aven* award that merely summarizes the respondent's position in the case, and does not reflect the tribunal's analysis or conclusions. Mexico nevertheless presents these excerpts as if they form part of the tribunal's conclusions.[334] In addition, as Legacy Vulcan explained in its Ancillary Claim Reply,[335] Mexico selectively removes phrases from excerpts of the award to present them as conclusions, when the excerpts correspond to a hypothetical argument posed — and ultimately rejected — by the tribunal in its consideration of Article 10.10 of CAFTA-DR.[336]

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[333] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 1185 (8 December 2016) (Bucher (P), McLachlan, Martínez-Fraga) (RL-0174). The *Urbaser* tribunal essentially concluded that the defense of illegality is fundamentally distinct from an affirmative investor obligation under an investment treaty. *Id.* For this reason, Mexico's argument that investor obligations under Article 1114 derive from the principle of legality in investment matters is similarly without merit. *See* Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 232-235.

[334] The summary of Costa Rica's position with respect to the counterclaim appears in paragraphs 689 to 715 of the award, while the tribunal's analysis spans paragraphs 719 to 747. *See, e.g.,* Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 165, n.168 (citing *Aven v. Costa Rica* (Award), ¶ 694 (RL-0168)); Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 226, n.227 (citing *Aven v. Costa Rica* (Award), ¶ 699 (RL-0168)); Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 236, n.235 (citing *Aven v. Costa Rica* (Award), ¶ 701 (RL-0168)). *See also* Counter-Memorial (Ancillary Claim), ¶ 505, n.441 (citing *Aven v. Costa Rica* (Award), ¶ 694 (RL-0168)).

[335] Reply (Ancillary Claim), ¶268.

[336] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 226. Below is a complete reproduction of the relevant passages cited by Mexico, emphasizing the phrases Mexico removed from its Counterclaim Memorial:

> A logical effect of Article 10.11 *could be* that the "measures" adopted by the host State for the protection of the environment should be deemed to be compulsory for everybody under the jurisdiction of the State, particularly the foreign investors. Therefore, *following said interpretation* the investors have the obligation, not only under domestic law but also under Section A of Chapter 10 of DR-CAFTA to abide and comply the environmental domestic laws and regulations, including the measures adopted by the host State to protect human, animal, or plant life or health. No investor can ignore or breach such measures and its breach is a violation of both domestic and international law, so that the perpetrator cannot be exempt of liability for the damages caused. Thus, *if it could be interpreted that these provisions impose affirmative obligations on*

146. In reality, the *Aven* tribunal did not conclude — as Mexico claims — that "the counterclaim filed in *Aven v. Costa Rica* was not successful due to procedural issues and not due to the absence of obligations imposed on the investor."[337] While procedural shortcomings did play a role, a separate basis for the tribunal's dismissal of the counterclaim was the lack of any cause of action under the treaty on which the respondent's counterclaim could be based. This key holding directly contradicts Mexico's argument:

> [T]he Tribunal finds two issues that need to be addressed prior to examining the merits of the counterclaim. First, the Tribunal believes that the language of articles Article 10.9.3.c and 10.11 seeks to ensure that States retain a significant margin of appreciation in respect of environmental measures in their respective jurisdictions, but *they do not—in and of themselves—impose any affirmative obligation upon investors*. *Nor do they provide that any violation of state-enacted environmental regulations will amount to a breach of the Treaty which could be the basis of a counterclaim*.[338]

147. In sum, neither the text of the Treaty nor international jurisprudence supports the premise that NAFTA Article 1114 imposes treaty obligations on investors. To the contrary, each confirms Legacy Vulcan's position that Mexico lacks a cause of action under the Treaty for its counterclaim.

2. Mexico Has Expressly Waived Any Reliance on NAFTA Article 1114 in this Arbitration.

148. As Legacy Vulcan explained in its Ancillary Claim Reply, Mexico explicitly disclaimed reliance on Article 1114 in this arbitration, seemingly aware that this provision has no bearing on the real issues presented in this case. During the July 2021 hearing,

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> *investors*, it is not impossible either de facto or de jure, that a foreign investor could be found to breach an obligation under Section A, by the violation the environmental domestic laws and regulations.

Aven v. Costa Rica (Final Award), ¶¶ 734-735 (emphasis added) (CL-0222).

[337] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 227 ("El laudo habla por sí mismo, por más que la Demandante busque descontextualizar sus conclusiones. Cabe precisar que, la reconvención presentada en *Aven v. Costa Rica* no tuvo éxito por cuestiones procesales y no por la inexistencia de obligaciones a cargo del inversionista").

[338] *Aven v. Costa Rica* (Award), ¶ 742 (CL-0222-ENG) (emphasis added). *See also Lopez Goyne Family Trust v. Nicaragu*a, ICSID Case No. ARB/17/44, Award, ¶ 601 (1 March 2023) (Radicati di Brozolo (P), Martínez de Hoz, Stern) (CL-0243-ENG) (explaining that the *Aven* tribunal concluded that Articles 10.9.3(c) and 10.11 of CAFTA-DR "do not themselves directly lay down environmental obligations for investors").

President van den Berg specifically asked Mexico to confirm that "[t]here is no reliance whatsoever [by Mexico] […] in this case on that provision."[339] Mexico's response was categorical:

> MR. PÉREZ GÁRATE: We did not refer to this provision. We are very aware of this provision […] *It is not part of our defense. We didn't think it was necessary to use it as part of our defense*[.]
>
> PRESIDENT VAN DEN BERG: We thank you. It was simply the Tribunal wasn't sure that […] we have seen the provision, that you have also seen the provision, and that thereafter we mentioned the provision and the whole world says hey, why haven't you seen that provision. Okay. *We can now simply note we all have seen the provision, but there is no reliance on the provision. Can we leave it at that?*
>
> MR. PÉREZ GÁRATE: Yes, Mr. President.[340]

149. Mexico's attempt to retract this disclaimer serves only to further expose the *post-hoc* and tactical nature of Mexico's counterclaim.[341] While acknowledging that it waived any reliance on Article 1114 in the prior phase of this arbitration,[342] Respondent still contends that this waiver "does not preclude Mexico's right to file a claim under [Article 1114] in this new phase" of the arbitration.[343] Having waived reliance on Article 1114, Mexico cannot reverse its position now, especially when the alleged violations and harms arising from quarrying in Legacy Vulcan's lots were well known (or should have been known) to Mexico at the time of the waiver.

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[339] Tr. (English), Day 1, 239:12-241:4 (President van den Berg: "[…] there is one further aspect, Ms. Rayo or Mr. Pérez Gárate. You are undoubtedly familiar with the NAFTA Chapter Eleven. There is a provision in Article 1114 about environmental matters. There is no reliance whatsoever insofar as I can see it in this case on that provision[.]" // Mr. Pérez Gárate: "We did not refer to this provision. We are very aware of this provision, and, in particular, so that there is no flexibility around the environmental regulations just to attract investment. It is not part of our defense. We didn't think it was necessary to use it as part of our defense, but, clearly, it is a very relevant provision for Chapter 11, and it is something, a discussion, that continues to be reflected in the Agreement that we have with the U.S. and Canada." // President van den Berg: "We thank you. It was simply the Tribunal wasn't sure that […] we have seen the provision, that you have also seen the provision, and that thereafter we mentioned the provision and the whole world says hey, why haven't you seen that provision. Okay. We can now simply note we all have seen the provision, but there is no reliance on the provision. Can we leave it at that?" // Mr. Pérez Gárate: "Yes, Mr. President" // President van den Berg: "Mr. López Forastier? You also agree, Mr. López Forastier." // Mr. López Forastier: "That is my understanding, Mr. President. That issue has not been raised by Respondent." // President van den Berg: "Duly noted.").

[340] *Id.* at 240:2-20 (emphasis added).

[341] *See* Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 214.

[342] *Id.*

[343] *Id.* ("cuando México hubiera renunciado a utilizar este artículo en la fase anterior, esto no precluye el derecho de México a presentar una reclamación bajo este artículo en esta nueva fase").

150. Because Mexico tries to bring a counterclaim under a Treaty provision it expressly disclaimed in this arbitration, that counterclaim should be dismissed as waived.[344] Allowing Mexico to backpedal its waiver of Article 1114 at this late stage would cause undue prejudice to Legacy Vulcan. And, as Legacy Vulcan explains further in Part IV.A, Mexico indisputably had the opportunity to invoke Article 1114 to allege environmental violations and harm at the prior stage of this arbitration. Mexico expressly declined to do so and should at the very least be foreclosed from now recanting its express waiver.

3. Mexico Cannot Rely on Environmental Treaties to Give Life to an Otherwise Unavailable Counterclaim Under NAFTA Chapter 11.

151. As a further attempt to bolster its incorrect contention that NAFTA Article 1114 imposes affirmative treaty obligations on investors, Mexico argues that environmental treaties entirely separate from NAFTA are "clear in determining that the Claimant has obligations under NAFTA,"[345] because "under Article 104 of the NAFTA, the Parties gave greater weight to international obligations derived from certain international environmental treaties than to the investment obligations contained in the NAFTA itself."[346] Mexico specifically points to provisions contained in the Stockholm Declaration on the Human Environment of 1972 and the Rio Declaration on Environment and Development of 1992, two declarations referenced and "reaffirmed" in the North American Agreement on Environmental Cooperation ("NAAEC").[347] Mexico further argues that provisions in the Stockholm and Rio Declarations also constitute investor obligations that Legacy Vulcan has allegedly breached.[348] Mexico's arguments in this regard find no basis in the text of the Treaty and are wholly contradicted by both NAFTA jurisprudence and statements made by the NAFTA Parties.

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[344] Mexico's statement at the July 2021 hearing also acknowledged that Article 1114 contains inter-State obligations limited to establishing "that there is no flexibility around the environmental regulations just to attract investment," not investor's obligations. Tr. (English), Day 1, 240:2-6 (Mr. Pérez Gárate: "We are very aware of this provision, and, in particular, so *that there is no flexibility around the environmental regulations just to attract investment*. It is not part of our defense.") (emphasis added).

[345] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 220.

[346] *Id.*, ¶ 212 ("Adicionalmente, en virtud del Artículo 104 del TLCAN, las Partes le dieron mayor peso a las obligaciones internacionales derivadas de ciertos tratados internacionales en materia ambiental, que a las obligaciones en materia de inversión contenidas en el propio TLCAN.").

[347] *Id.*, ¶ 219.

[348] *Id.*, ¶ 220 (alleging Legacy Vulcan failed to comply with principles set forth in the Stockholm Declaration relating to planning and management, as well as preservation of habitats); *id.*, ¶ 221 (alleging Legacy Vulcan failed to comply with principles set forth in the Rio Declaration regarding environmental damage and cooperation with the State).

152. *First*, Mexico's position is in conflict with the scope of claims that may be submitted under Section B of NAFTA Chapter 11. Specifically, NAFTA Articles 1116(1) and 1117(1) provide that the only claims that may be submitted to arbitration under Section B are those which allege a breach of the obligations set forth in:

> (a) Section A [of NAFTA Chapter 11] or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A.[349]

153. The meaning of this text is clear: claims submitted under NAFTA Chapter 11 may not extend to alleged breaches of other NAFTA provisions or obligations arising under other international treaties that do not fall within the scope of Articles 1116(1) and 1117(1).

154. This straightforward reading of NAFTA Articles 1116 and 1117 has been confirmed by NAFTA tribunals, which have repeatedly rejected attempts to broaden the scope of claims to cover breaches of other treaties between the NAFTA Parties. For example, the tribunal in *Methanex* rejected the suggestion that it had any jurisdiction to decide alleged violations of the General Agreement on Tariffs and Trade ("GATT"),[350] even though all three NAFTA Parties were also GATT parties and NAFTA expressly referred to the GATT in various chapters.[351] In doing so, the *Methanex* tribunal held that "its jurisdiction is here limited by Articles 1116-1117 NAFTA to deciding claims that the [respondent] has breached an obligation under Section A of Chapter 11."[352] Following the same reasoning, the tribunal in *Bayview v. Mexico* declined to consider alleged breaches by Mexico under an extraneous treaty (the bilateral 1944 Water Treaty with the United States).[353] The same should be done here.

155. *Second*, Mexico is wrong in asserting that NAFTA Article 104 (Relation to Environmental and Conservation Agreements) imposes environmental obligations on investors

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[349] NAFTA, Arts. 1116(1); 1117(1) (C-0009-ENG).

[350] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, Part II, Chapter B, ¶ 5 (3 August 2005) (Veeder (P), Rowley, Reisman) (RL-020).

[351] *See, e.g.*, NAFTA Preamble; Arts. 101, 103, 201, 301(1), 2005 (C-0009-ENG).

[352] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, Part II, Chapter B, ¶ 5 (3 August 2005) (Veeder (P), Rowley, Reisman) (RL-020).

[353] *Bayview Irrigation District and others v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Final Award, ¶ 121 (19 June 1997) (Lowe (P), Meese, Gómez Palacio) (CL-0248-ENG) (holding that any breach of the 1944 treaty would be a matter to be taken up under that treaty by the parties to it).

that are susceptible of being enforced via NAFTA counterclaims by respondent states.[354] That article does no such thing.[355] NAFTA Article 104 provides in relevant part:

> In the event of any inconsistency between this Agreement and the specific trade obligations set out in [certain environmental agreements], such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.[356]

156. This text makes clear that the NAFTA Parties — not investors —have the "choice among equally effective and reasonably available means of complying with such [environmental] obligations."[357] It does not establish that investors assume any obligation the breach of which could give rise to a counterclaim. This is further confirmed by the explicit application of Article 104 only to "specific trade obligations," which are undertaken by and applied only among State parties.[358]

157. *Third*, all three NAFTA Parties — including Mexico — have expressed the view that NAFTA does not allow claimants to bring claims alleging breaches of other treaties. Mexico, for instance, argued in *Bayview v. Mexico* that NAFTA did not allow investor claims regarding breaches of a treaty pre-dating NAFTA to which Mexico and the United States were parties.[359] The United States made the same argument in *Methanex*.[360] In *Detroit International Bridge*

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[354] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 218 ("Adicionalmente, en virtud del Artículo 104 del TLCAN, las Partes le dieron mayor peso a las obligaciones internacionales derivadas de ciertos tratados internacionales en materia ambiental, que a las obligaciones en materia de inversión contenidas en el propio TLCAN.").

[355] Nor does Respondent's contention that NAFTA "places a high premium on environmental protection," *see* Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 223, imply (even if true) that NAFTA imposes environmental obligations on investors. The award in *Al Tamimi v. Oman* that Mexico cites interpreted text similar to NAFTA Article 1114 in the U.S.-Oman FTA, not as imposing obligations upon investors, but rather as merely confirming a State party's right "to adopt, maintain, or enforce measures to ensure that investment is 'undertaken in a manner sensitive to environmental concerns'" as long as those measures were consistent with the obligations assumed by the host State in the treaty. *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, ¶ 387 (3 November 2015) (Williams (P), Brower, Thomas) (RL-0228).

[356] NAFTA, Art. 104(1) (C-0009-ENG).

[357] *Id.*

[358] *Id.*

[359] *Bayview Irrigation District and others v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Mexico's Memorial on Jurisdiction of the Tribunal, ¶ 2(b) (19 April 2006) (C-0247-ENG).

[360] *Methanex Corporation v. United States of America*, UNCITRAL, Reply Memorial the United States of America on Jurisdiction, Admissibility and the Proposed Amendment, pp. 32-33 (12 April 2001) (CL-0250-ENG) ("Numerous treaties, many of which have either no mechanism for resolving disputes between States or highly specialized mechanisms, are in effect among the NAFTA Parties. *The limited consent to arbitration granted in Chapter Eleven cannot reasonably be extended to the international law obligations embodied in those treaties*.") (emphasis added).

Company v. Canada, Canada likewise asserted that, because "NAFTA Articles 1116 and 1117 state that an investor may only bring a claim on its own behalf or on behalf of an enterprise for a breach of Section A of Chapter 11 of the NAFTA," the tribunal lacked jurisdiction to adjudicate whether Canada had violated any obligations under the 1909 Boundary Waters Treaty, which the claimant argued applied between the United States and Canada.[361]

158. For these reasons, Mexico's reliance on principles set forth in both the Stockholm and Rio Declarations fails, as does Mexico's reference to the NAAEC. None of those extraneous treaties may serve as the basis for Mexico's counterclaim under NAFTA.

C. MEXICO'S COUNTERCLAIM LACKS A CLOSE CONNECTION TO LEGACY VULCAN'S CLAIM.

159. Finally, even if Mexico overcame the multiple jurisdictional deficiencies discussed above, it would still fail to meet a final jurisdictional requirement: that the "counterclaim must have a close connection with *the primary claim* to which it is a response."[362] A determination as to whether a sufficiently close connection exists depends "on the particular circumstances of individual cases, including not only their facts but also the relevant treaty and other texts."[363]

160. Mexico's counterclaim fails to meet this condition because it is factually broader than Legacy Vulcan's ancillary claim and it lacks a legal connection to Legacy Vulcan's claim. In addition, consideration of Mexico's counterclaim by this Tribunal would not promote procedural efficiency as Mexico contends, because the counterclaim is duplicative of parallel proceedings initiated by Mexico in domestic courts prior to bringing its counterclaim.

1. Mexico's Counterclaim Is Factually Broader Than Legacy Vulcan's Ancillary Claim.

161. As Legacy Vulcan explained in its Ancillary Claim Reply, the "primary claim" for purposes of assessing jurisdiction over Mexico's counterclaim must be Legacy Vulcan's ancillary claim, which relates to Mexico's wrongful shutdown of CALICA's remaining quarrying and export operations in La Rosita and Punta Venado.[364] Mexico's counterclaim is much broader, extending to alleged environmental breaches and harms perpetrated by Legacy Vulcan in connection with

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[361] *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Canada's Memorial on Jurisdiction and Admissibility, ¶ 288 (15 June 2013) (C-0251-ENG).

[362] *Saluka Investments B.V. v. Czech Republic*, PCA Case No. 2001-04, Decision on Jurisdiction Over the Czech Republic's Counterclaim, ¶ 61 (7 May 2004) (Watts (P), Behrens, Yves Fortier) (RL-0176) (emphasis added).

[363] *Id.*, ¶ 63.

[364] Reply (Ancillary Claim), ¶ 276.

El Corchalito and La Adelita.[365] This breadth is at odds with Mexico having reserved its right to file a counterclaim only in respect of "the subject of [Legacy Vulcan's] *new* claim."[366]

162. Mexico's mischaracterization of the scope of Legacy Vulcan's "primary claim" at this stage as concerning the whole Project seeks to raise new and baseless allegations regarding issues that were fully addressed before this Tribunal nearly two years ago. As described further in Part IV.A, Mexico's failure to assert its counterclaim at the appropriate time in the prior stage of this arbitration constitutes a waiver of those claims.

163. Furthermore, even if the scope of Legacy Vulcan's "primary claim" at this ancillary-claim stage were to be broadened as Mexico proposes, Mexico's counterclaim would still lack a sufficient factual connection to Legacy Vulcan's claims. Legacy Vulcan's claims in this arbitration relate to breaches by Mexico of its NAFTA obligations that occurred in 2015 and later.[367] In contrast, the events underpinning Mexico's counterclaim occurred as early as the 1980's — when CALICA began removing vegetation in La Rosita without a CUSTF[368] — and spanning roughly 30 years, a much broader timeframe than any of Legacy Vulcan's claims.[369] This clear discrepancy in the factual scope of the Parties' claims confirms that Mexico's counterclaim is factually broader than Legacy Vulcan's claim and therefore lacks the sufficiently close connection necessary to establish jurisdiction in this case.

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[365] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 35-43 (setting forth Mexico's allegations of breaches "applicable to El Corchalito and La Adelita").

[366] Mexico's Response to the Claimant's Request for Provisional Measures and Leave to File an Ancillary Claim, ¶ 130 (26 May 2022) ("México desea enfatizar que en caso de que el Tribunal autorice la presentación de la nueva reclamación que la Demandante pretende hacer pasar por subordinada, se reserva el derecho de presentar una solicitud de autorización para presentar una reconvención relacionada con el objeto de la nueva reclamación") (emphasis added). *See also* Dúplica a las Solicitudes de la Demandante de Autorizar un Nueva Reclamación y Otorgar Medidas Provisionales, ¶¶ 94-95 (7 June 2022).

[367] Taken together, Legacy Vulcan's claims stem from: (i) Mexico's failure to amend the POEL by 5 December 2015, as required by the 2014 Agreements, which Mexico subsequently repudiated; (ii) Mexico's disregard of the Mexican judiciary's determination — made final in January 2017 — that API Quintana Roo had no right collect the millions of dollars in port fees collected from CALICA for over a decade; (iii) Mexico's unlawful shutdown of CALICA's operations in El Corchalito in January 2018, and maintained by PROFEPA's Resolution of October 2020, and (iv) Mexico's continued harassment of Legacy Vulcan leading to the wrongful shutdown of CALICA's remaining quarrying and export operations in La Rosita and Punta Venado in 2022. *See* Reply, ¶ 91; Memorial (Ancillary Claim), ¶¶10-89.

[368] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 33 ("la Demandante ha incumplido, inter alia, con los siguientes términos del Acuerdo de 1986 [. . .] Desmonte de vegetación forestal por más de 30 años sin la Autorización CUSTF correspondiente[.]").

[369] As explained in Part III.A.4, Mexico's counterclaim is time barred under NAFTA Article 1116 and 1117 as a result of the fact the events underpinning Mexico's claim occurred so long ago, and that Mexico knew or should have known of the alleged breaches and resulting loss more than three years before it initiated its claim.

2. Mexico's Counterclaim Lacks a Legal Connection to Legacy Vulcan's Claim.

164. The Parties agree that, for Mexico's counterclaim to fall within the Tribunal's jurisdiction, it must have a sufficiently close legal connection to Legacy Vulcan's claim.[370] In considering this element, numerous tribunals have explained that the cause of action for the primary claim and the counterclaim must arise out of the same legal instrument, generally the applicable investment treaty. As the tribunal in *Oxus Gold v. Uzbekista*n explained:

> [I]n order for the Arbitral Tribunal to have jurisdiction over the counter-claims, it is necessary that there be a close connection between them and the primary claim from which they arose in the sense that the counter-claims must be sufficiently connected to the claims, *i.e.* arise out of the investment and *thereto relating obligations, and may not be matters merely covered by the general law of the Respondent*.[371]

165. The tribunal in *Saluka v. Czech Republic* similarly concluded that the cause of action giving rise to the respondent's counterclaim was found in domestic law rather than the applicable investment treaty.[372] On this basis, it held that the counterclaim was not closely connected to the claimants' claim and that there was no jurisdiction over the counterclaim. The *Saluka* tribunal's reasoning applies with equal force here:

> Respondent's counterclaim cannot be regarded as constituting [...] "an indivisible whole" with the primary claim asserted by the Claimant, or as invoking obligations which share with the primary claim "a common origin, identical sources, and an operational unity" or which were assumed for "the accomplishment of a single goal, [so as to be] interdependent." The legal basis on which the Respondent has itself relied for [...] its counterclaim is to be found in the application of Czech law, and involves rights and obligations which are applicable, as a matter of the general law of the Czech Republic, to persons subject to the Czech Republic's jurisdiction. Consequently, the disputes underlying [the] counterclaim in principle fall to be decided through the appropriate procedures of Czech law and not through the particular investment protection procedures of the Treaty.[373]

166. The tribunal in *Paushok v. Mongolia* also held that it lacked jurisdiction over counterclaims brought by Mongolia under the Russia-Mongolia BIT because the cause of action

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[370] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 238-239.

[371] *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Award, ¶ 954 (17 December 2015) (Tercier (P), Lalonde, Stern) (RL-0208) (emphasis added).

[372] *Saluka Investments B.V. v. Czech Republic*, PCA Case No. 2001-04, Decision on Jurisdiction over the Czech Republic's Counterclaim (7 May 2004) (Watts (P), Behrens; Yves Fortier) (RL-0176).

[373] *Id.*, ¶ 79.

of the counterclaim arose under "Mongolian public law and exclusively raise[s] issues of non-compliance with Mongolian public law, including the tax laws of Mongolia."[374] The tribunal therefore determined that the counterclaim could not be considered "an indivisible part" of the claimants' claims, "or as creating a reasonable nexus between the Claimants' claims and the Counterclaims justifying their joint consideration by an arbitral tribunal exclusively vested with jurisdiction under the BIT."[375] In reaching this conclusion, the tribunal remarked that accepting jurisdiction over the counterclaim would have the effect of improperly extending Mongolia's legislative jurisdiction (specifically, its national tax laws) extraterritorially without justification.[376]

167. Numerous other investment tribunals have reached the same result when a respondent State's counterclaim — like Mexico's here — arises from domestic law rather than the applicable investment treaty.[377] This Tribunal should follow this persuasive line of cases and dismiss Respondent's counterclaim for lacking a legal connection with Legacy Vulcan's claims.

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[374] *Sergei Paushok et al v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, ¶ 694 (28 April 2011) (Lalonde (P), Stern, Grigera Naón) (RL-0177).

[375] *Id.*

[376] *Id.*, ¶ 695 ("[T]hrough the Counterclaims the Respondent seeks to extend the extraterritorial application and enforcement of its public laws, and in particular its tax laws, to individuals or entities not subject to and not having accepted to submit to Mongolian public law or its courts. Thus, if the Arbitral Tribunal extended its jurisdiction to the Counterclaims, it would be acquiescing to a possible exorbitant extension of Mongolia's legislative jurisdiction without any legal basis under international law to do so, since the generally accepted principle is the non-extraterritorial enforceability of national public laws and, specifically, of national tax laws.").

[377] *See, e.g, Amco Asia Corporation and Others v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Decision on Jurisdiction in Resubmitted Proceeding, ¶¶ 125-127 (10 May 1988) (Goldman (P), Foighel, Rubin) (CL-0253-ENG) ("[I]t is correct to distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State's jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host state."); *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, ¶ 154 (21 April 2015) (van Houtte (P), Paulsson/Veeder, Rubino-Sammartano) (CL-0228-ENG) ("The majority further observes that the counterclaim submitted by the Respondent is an entirely independent claim based upon Romanian law and unrelated to the Claimants' claim based upon breaches of the BIT."); *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, ¶ 628 (22 August 2016) (Fernández-Armesto (P), Orrego Vicuña, Simma) (RL-0003) (determining that the tribunal lacked jurisdiction over Venezuela's counterclaims that the investor failed to adhere to a mine plan because "the Tribunal's power is limited to adjudicating disputes which arise from the BIT, and the obligations allegedly breached by Rusoro do not derive from and have no connection with the Treaty" and "the Tribunal must decide the dispute in accordance with the Treaty and the principles of international law, and the dispute underlying the counter-claim—that Rusoro breached the mine plan—and cannot be adjudicated by applying the Treaty or principles of international law"); *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, ¶¶ 529-530 (18 January 2019) (Derains (P), Tawil, Viñuesa) (CL-0226-ENG) ("Anglo American's claims that involve the examination of the problems of Venezuelan law cannot be equated with its Counter-claim. Anglo American's claims are based on alleged violations of the Treaty and it is only to rule on these alleged violations that the Tribunal must first examine issues of Venezuelan law. The Counter-claim is not based on a violation of the Treaty or on a violation of

168. As explained above, Mexico's attempt to ground its counterclaim on NAFTA's text fails because (i) the Parties have not consented to arbitrate respondent counterclaims under the Treaty; (ii) NAFTA imposes no affirmative obligations on investors; and (iii) the counterclaim lacks a close factual connection to Legacy Vulcan's primary claim. The sole and real cause of action underpinning Mexico's counterclaim is alleged violations of environmental requirements under Mexican law. Because Legacy Vulcan's claims are based on Mexico's alleged violations of NAFTA, Mexico's counterclaim lacks a sufficiently close legal connection to Legacy Vulcan's claim and should be dismissed.

3. Mexico's Counterclaim Does Not Promote Procedural Efficiency.

169. Mexico asserts that consideration of its counterclaim by this Tribunal will preserve order and procedural efficiency in this arbitration.[378] Mexico's appeal to procedural efficiency is unavailing for two reasons. *First*, interests of "procedural efficiency" cannot vest the Tribunal with jurisdiction where none exists.[379] As the tribunal in *Gavazzi v. Romania* remarked:

> [I]t is the letter of the BIT, interpreted under international law, that binds the Parties. Where there is no jurisdiction provided by the wording of the BIT in relation to a counterclaim, no jurisdiction can be inferred merely from the 'spirit' of the BIT.[380]

Since NAFTA supplies no jurisdiction over Mexico's counterclaim, the considerations of procedural efficiency the Respondent touts are irrelevant.

170. *Second*, Mexico's appeal to "order and procedural efficiency"[381] is disingenuous. While it is well-recognized that an objective of hearing related claims in an existing arbitration is to "obviate separate proceedings for incidental claims and to make it unnecessary for parties who have additional claims or counterclaims to start new procedures,"[382] such considerations simply

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international law, only on Venezuelan law. Accordingly, the Tribunal does not have jurisdiction to adjudicate the Counterclaim submitted by the Respondent.").

[378] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶¶ 207-210.

[379] *See Iberdrola Energía, S.A. v. Republic of Guatemala (II)*, PCA Case No. 2017-41, Final Award, ¶ 392 (24 August 2020) (Kaufmann-Kohler (P), Thomas, Dupuy) (emphasis added) (CL-0197-ENG) ("[W]hile the Tribunal appreciates that counterclaims are a useful procedural tool to promote the concentration of claims and thus enhance the efficiency of the dispute settlement system, it notes that its role is limited to applying the treaty on the basis of which it is seized in accordance with its terms. It cannot go beyond or else it would engage in policy choices which are the domain of the States.").

[380] *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, ¶ 154 (21 April 2015) (van Houtte (P), Paulsson/Veeder, Rubino-Sammartano) (CL-0228-ENG).

[381] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 207.

[382] Christoph H. Schreuer, The ICSID Convention: A Commentary, Arts. 46-47, p. 732 (Cambridge University Press 2009) (CL-0179-ENG). *See also Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, ¶ 760 (7 December 2011) (Hanotiau (P), Reisman, Giardina) (CL-0223-ENG) (noting

do not apply here. As described further in Part IV.B, Mexico's counterclaim is duplicative of domestic proceedings it has lodged and encouraged against CALICA for the same alleged violations of domestic environmental laws.[383] These proceedings predate the submission of Mexico's counterclaim to the Tribunal, and through them, Mexico has sought or can seek relief identical to that which it seeks through its counterclaim.[384]

171. In fact, CALICA has already paid compensatory damages under protest with respect to El Corchalito as a result of those domestic proceedings.[385] Mexico has also taken the initial steps to launch administrative proceedings of the same nature against CALICA regarding La Rosita and has reserved rights to continue prosecution of that claim against CALICA in the administrative proceeding.[386] Allowing Mexico's counterclaim to proceed will undermine the order and procedural efficiency of this arbitration by triggering the very "duplication and inefficiency" and increased "transaction costs" against which Mexico warns.[387]

172. Because Mexico chose to pursue its claims of environmental violations and harms in Mexican proceedings, procedural efficiency requires that the Tribunal dismiss Mexico's counterclaim here.

IV. MEXICO'S COUNTERCLAIM FAILS ON PROCEDURAL GROUNDS

173. Mexico's counterclaim also fails on procedural grounds. Mexico has waived any counterclaim by failing to submit a counterclaim with its Counter-Memorial of 23 November

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one potential benefit of allowing respondent counterclaims is that it "advances the goals of economy and efficiency in international dispute resolution because they will resolve disputes that need not be relitigated in [national] courts").

[383] Shutdown Order (22 January 2018) (C-0117-SPA.291-294, 297-301) (charging CALICA with supposed environmental violations in El Corchalito); Resolution (30 October 2020) (R-0005-ESP.163-164, 201-206, 224-228) (sanctioning CALICA for supposed environmental infractions in El Corchalito and La Adelita); PROFEPA Inspection Report on Environmental Impact (2-5 May 2022) (C-0171-SPA.68-72) (ordering the shutdown of La Rosita on the basis of supposed risks of environmental damage); PROFEPA Inspection Report on Forestry (2-5 May 2022) (C-0172-SPA.49-62) (same); Reply (Ancillary Claim), ¶ 32 (describing the local class action proceeding based on the Dictamen's assertions of environmental harm).

[384] Consequently, Mexico's claims with respect to La Rosita and El Corchalito are barred under Article 1121, as explained further in Part IV.B.

[385] CALICA Filing before PROFEPA Paying Ad Cautelam (19 November 2020) (C-0346-SPA); *see* ¶ 75 above.

[386] *See* ¶ 76 above; *see also, e.g.*, PROFEPA Inspection Order and Report on Environmental Impact (29 April 2022) (C-0171-SPA.72); Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 107-118.

[387] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 209 (citing *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, ¶ 866 (7 December 2011) (Hanotiau (P), Reisman, Giardina) (CL-0223-ENG)).

2020. Mexico is also barred under Article 1121 from pursuing any counterclaim seeking compensatory damages with respected to La Rosita and El Corchalito.

A. MEXICO WAIVED ANY COUNTERCLAIM BY DELAYING SUBMISSION OF ITS COUNTERCLAIM.

174. Under the ICSID Arbitration Rules, Mexico was required to present any "counter-claim no later than in [its] countermemorial."[388] Specifically, Rule 40(2) of the 2006 ICSID Arbitration Rules provides that:

> An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the countermemorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.[389]

175. At this stage of the arbitration, Mexico has filed two counter-memorials. The first — filed on 23 November 2020 — addressed Legacy Vulcan's original claims, while the second — filed on 12 May 2023 — addressed Legacy Vulcan's ancillary claim. As the Tribunal has explained, "Claimant's prior claims and requests for relief in this proceeding are directed at CALICA's La Adelita and El Corchalito lots, as well as port fees associated with the port at Punta Venado."[390] Thus, under the terms of ICSID Arbitration Rule 40(2), Mexico was required to file any counterclaims relating to those "prior claims" with its first Counter-Memorial on 23 November 2020. By failing to do so, Mexico waived its right to bring a counterclaim regarding alleged breaches of environmental laws related to El Corchalito and La Adelita.

176. Moreover, Mexico also had — or should have had — knowledge of the breaches and losses it alleges with respect to La Rosita well before the date it filed its first counter-memorial in November 2020.[391] Because it similarly declined to file a counterclaim regarding that lot with its first counter-memorial, Mexico has also waived its right to bring a counterclaim regarding alleged breaches of domestic environmental obligations in La Rosita.

177. A finding that Mexico has waived its counterclaim would be consistent with fundamental principles of due process and procedural economy, as confirmed by the approach taken by several investment arbitration tribunals. In *Bureau Veritas v. Paraguay*, for example, the tribunal held that new arguments raised for the first time in post-hearing briefs were

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[388] ICSID Arbitration Rules, Rule 40(2).

[389] *Id.*

[390] Procedural Order No. 7, ¶ 71.

[391] *See* ¶¶ 127-132 above.

inadmissible, reasoning that "it would not be consistent with principles of due process and procedural economy to introduce new arguments into the preliminary phase when both parties had already agreed to an orderly procedural schedule, and where the parties had had ample opportunities to present their arguments."[392] In *Euram v. Slovakia*, the tribunal rejected the respondent's submission of new jurisdictional objections, raised after its statement of defense, noting that, "[i]n deciding whether a plea is 'justifiably late,' the [t]ribunal must [...] have regard to whether there has been undue delay by the [r]espondent once it became aware of the facts and to whether there will be undue prejudice to the [c]laimant if the plea is admitted."[393]

178. Mexico had ample opportunity in the previous phase of this arbitration to submit counterclaims concerning alleged breaches of environmental laws regarding La Rosita, El Corchalito, and La Adelita.[394] It failed to do so, waiting until nearly 18 months after post-hearing briefing in the prior phase to submit its counterclaim. It would be contrary to due process and fairness, plus severely prejudicial to Legacy Vulcan, to entertain that counterclaim now.

B. MEXICO'S COUNTERCLAIM REGARDING EL CORCHALITO AND LA ROSITA IS BARRED UNDER NAFTA ARTICLE 1121.

179. Under NAFTA Article 1121, a claimant under Section B of NAFTA Chapter 11 must, with respect to any proceedings involving or seeking the payment of damages, "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure[s]" forming the basis of the alleged breach at issue in the claim.[395] Failure to comply with this condition will defeat the tribunal's jurisdiction over the claim. As the tribunal in *Waste Management I* explained:

> [T]his Arbitral Tribunal is compelled to hold that it lacks jurisdiction to judge the issue in dispute now brought before it, owing to breach by the Claimant of one of the requisites laid down by NAFTA Article 1121(2)(b) and deemed essential in order to proceed with submission of a claim to arbitration, namely, waiver of the right to initiate or continue before any tribunal or court,

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[392] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, ¶ 52 (29 May 2009) (Knieper (P), Sands, Fortier) (CL-0229-ENG).

[393] *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, Second Award on Jurisdiction, ¶ 118 (4 June 2014) (Greenwood (P), Stern, Petsche) (CL-0221-ENG).

[394] Legacy Vulcan notes that Mexico alleges breaches with respect to La Adelita, but makes no specific claims of environmental damage to that lot. Any such claims of environmental damage in La Adelita are absurd, CALICA has been unable to even clear vegetation from, let alone quarry, that property as a consequence of Mexico's repudiation of the 2014 Agreements. *See, e.g.,* Memorial, ¶¶ 85-86, 111-131.

[395] NAFTA, Arts. 1121(1)(b); 1121(2)(b) (C-0009-ENG). The waiver requirement does not apply to "proceedings for injunctive, declaratory or other extraordinary relief." *Id.*

> dispute settlement proceedings with respect to the measures taken by the Respondent that are allegedly in breach of the NAFTA[.][396]

180. Because Mexico contends that its counterclaim is subject to the same procedural and jurisdictional requirements as an investor claim submitted under NAFTA Articles 1116 or 1117,[397] this waiver requirement applies equally to Mexico's counterclaim. Compliance with this requirement entails submission by Mexico of a waiver declaring its intent to adhere to the conditions of Article 1121. It also entails discontinuing or refraining from pursuing any relevant domestic dispute settlement proceedings relating to the Legacy Vulcan measures Mexico alleges were in breach of NAFTA.[398]

181. Mexico has failed to comply with NAFTA Article 1121. As described in Part II.D above, Mexico has already forced Legacy Vulcan to pay compensatory damages for alleged environmental harm at El Corchalito through domestic legal proceedings. Specifically, at the conclusion of PROFEPA's administrative proceeding relating to El Corchalito, it required CALICA to [redacted]

[396] *Waste Management, Inc. v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Award, § IV (2 June 2000) (Cremades (P), Highet, Siqueiros) (CL-0252-ENG).

[397] Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 169 ("En este sentido, el Artículo 1137 (Disposiciones generales) contiene disposiciones de carácter procedimental, e.g., para definir el 'momento en que la reclamación se considera sometida al procedimiento arbitral' aplicables a las reclamaciones presentadas al amparo de la Sección B del Capítulo XI del TLCAN. Estas disposiciones de carácter procedimental, incluyendo la prevista en el Artículo 1137(3), son precisamente los 'procedimientos establecidos en este Tratado' *a los que la Parte y el inversionista* contendiente se someten al presentar una reclamación al amparo de los Artículos 1116 y 1117.") (emphasis added).

[398] *Waste Management, Inc. v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Award, ¶ 24 (2 June 2000) (Cremades (P), Highet, Siqueiros) (CL-0252-ENG) ("[T]he act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued [...] [I]t is clear that the waiver required under NAFTA Article 1121 calls for a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before other courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions. Moreover, such an abdication of rights ought to have been made effective as from the date of submission of the waiver[.]").

[399] Resolution (30 October 2020) (R-0005-SPA.228); Witness Statement-[redacted]-Claimant's Reply-Second Statement-ENG, ¶ 13.

[400] CALICA Filing before PROFEPA Paying Ad Cautelam (19 November 2020) (C-0346-SPA).

[401] Resolution (R-0005-SPA.219) (free translation, the original reads: "se ordena a CALICA presentar a esta Dirección [...] un Programa de Compensación Ambiental que consista en inversiones en acciones o medidas que generen una mejora ambiental equivalentes a los efectos adversos ocasionados por el daño, los cuales deberán hacerse en un ecosistema o región ecológica alternativa, vinculado ecológica y geográficamente al sitio dañado."); CALICA Filing before PROFEPA Paying Ad Cautelam (19 November 2020) (C-0346-SPA.5, 22-24) (quantifying the costs of the program).

[redacted] which is premised in part on CALICA's purported environmental violations and harms from quarrying that lot.[403] Mexico admits as much by describing Legacy Vulcan's alleged breaches in El Corchalito as mirroring the purported violations identified in PROFEPA's 2020 Resolution.[404]

182. Mexico has also taken the initial steps to launch administrative proceedings of the same nature against CALICA regarding La Rosita. PROFEPA shut down that lot in May 2022.[405] Although PROFEPA has unreasonably and inexplicably delayed issuing an *Acuerdo de Emplazamiento* to formally charge CALICA with infractions,[406] a domestic proceeding similar to that regarding El Corchalito will follow its eventual issuance and, given Mexico's conduct regarding CALICA in recent years, that proceeding will presumably result in a requirement for CALICA to pay compensation for the alleged environmental damage Mexico claims CALICA has caused.[407]

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[402] Sala Especializada en Materia Ambiental y de Regulación del Tribunal Federal de Justicia Administrativa, Juicio de Nulidad No.73/21-EAR-01-6, Escrito inicial, 8 de enero de 2021 (R-0076-ESP).

[403] *See e.g.* Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 1 (presenting the Counterclaim as based on "los daños e impactos ambientales generados por las omisiones e incumplimientos de CALICA en la operación de su 'Proyecto de explotación de piedra caliza" en el Estado de Quintana Roo.'"); *id.*, ¶¶ 51, 67 (referring specifically to the effects of vegetative clearing at El Corchalito).

[404] *Compare* Memorial on Jurisdiction and Admissibility (Counterclaim), ¶ 40 ("Derivado del procedimiento administrativo iniciado en 2017, el 30 de octubre de 2020, PROFEPA emitió una Resolución Administrativa, por medio de la cual detectó diversos incumplimientos de CALICA a su AIA Federal. Entre estos incumplimientos, destacan los siguientes: (i) la extracción acelerada en los primeros 17 años del Proyecto, ya que no respetó el límite anual de 7 hectáreas de extracción autorizadas por debajo del manto freático y había extraído 142.15 hectáreas al año 17 de su proyecto; (ii) la falta de extracción en los dos predios como lo determinaba la MIA; (iii) el exceso de explotación sobre más del área total de 140 ha autorizadas; (iv) la omisión de dar aviso a SEMARNAT de la modificación de los términos originales autorizados del Proyecto; e (v) incumplimientos a términos y condicionantes, entre los cuales se encuentran aspectos regulatorios.") *with* Resolution (30 October 2020) (R-0005-SPA.200-202) (finding CALICA liable for environmental damage for, among other purported violations, exceeding its permitted below-water extraction, quarrying only El Corchalito and not La Adelita, impacting the hydrodynamics of the aquifers, affecting the hydraulic balance of the lagoons, making the water unsuitable for human consumption or irrigation, exceeding the permissible rate of extraction).

[405] *See, e.g.*, PROFEPA Inspection Order and Report on Environmental Impact (29 April 2022) (C-0171-SPA.72); Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 107-118.

[406] Expert Report-[redacted]-Environmental Law-Claimant's Ancillary Claim Reply-Fourth Report-SPA, ¶¶ 110-113.

[407] PROFEPA conducted the inspection of La Rosita under the same legal authority used to inspect El Corchalito. *See* First PROFEPA Inspection Order (12 May 2017) (C-0114-SPA.2) (citing to the LFRA); Orden de inspección forestal No. OC00158RN2022 del 29 de abril de 2022, emitida por la Dirección General de Inspección y Vigilancia Forestal de la PROFEPA (R-0127-ESP.2) (same); Orden de inspección en materia de impacto ambiental No. PFPA/4.1/2C.27.5/024/2022 del 29 de abril de 2022, emitida por la

183. By pursuing domestic proceedings designed in part to impose compensatory damages on CALICA for the same alleged breaches of environmental obligations that undergird Respondent's counterclaim here, Mexico has failed to comply with the conditions precedent set forth in NAFTA Article 1121. This blatant disregard of NAFTA Article 1121 underscores that Mexico's counterclaim is nothing more than an attempt to get a second bite at the apple, while also giving effect to President López Obrador's threats and artificial credence to his politically-motivated attacks against CALICA. The Tribunal lacks jurisdiction over Mexico's counterclaim on this additional basis.

* * *

184. Mexico's effort to pursue a counterclaim in this arbitration is a frivolous and wasteful tactic, premised on unsubstantiated and pretextual allegations of environmental harm. Mexico's counterclaim merely seeks to give effect to President López Obrador's threats and politically-motivated attacks. This effort should be rejected, and Mexico's counterclaim should be dismissed.

V. REQUEST FOR RELIEF

185. For the foregoing reasons, Legacy Vulcan respectfully requests that the Tribunal render an Award in its favor:

a. Dismissing Mexico's counterclaim for lack of jurisdiction or because it otherwise is inadmissible;

b. Ordering Mexico to pay all costs and expenses incurred by Claimant in connection with Mexico's counterclaim, including the fees and expenses of the Tribunal and the cost of legal representation, plus interest thereon; and

c. Ordering such other or additional relief as may be appropriate under the applicable law or that may otherwise be just and proper.

Directora General de Impacto Ambiental y Zona Federal Marítimo Terrestre de la PROFEPA (R-0128-ESP.2) (same).

Respectfully submitted,

Miguel López Forastier
José E. Arvelo
Clovis Trevino
Santiago M. Zalazar
Amanda Tuninetti
Kate McNulty
Roy Goldsman
Gabriel Gates

COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, D.C. 20001-4956
United States of America
+1-202-662-5185 (telephone)

Elsa Ortega López
Luis M. Jardón Piña

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ, S.C.
Torre Virreyes
Pedregal 24, Piso 24
Colonia Molino del Rey
Ciudad de México, 11040
México
+52-55-4748-0600 (telephone)

Counsel for Claimant