

*NOTICE OF ARBITRATION UNDER THE ARBITRATION RULES OF THE UNITED NATIONS
COMMISSION ON INTERNATIONAL TRADE LAW AND THE NORTH AMERICAN FREE TRADE
AGREEMENT*

BETWEEN

ODYSSEY MARINE EXPLORATION, INC. ON ITS OWN BEHALF AND ON BEHALF OF
EXPLORACIONES OCEÁNICAS S. de R.L. de C.V.

Claimant

-and-

UNITED MEXICAN STATES

Respondent

NOTICE OF ARBITRATION

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1. Pursuant to Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 (the **UNCITRAL Rules**) and Articles 1116(1), 1117(1) and 1120(1)(c) of the North American Free Trade Agreement (**NAFTA**) Odyssey Marine Exploration, Inc. (**Odyssey** or the **Claimant**) on its own behalf and on behalf of the Mexican enterprise it controls, Exploraciones Oceánicas, S. de R. L. de C.V. (**ExO**) hereby demands and commences arbitration against the United Mexican States (**Mexico** or the **Respondent**) concerning the claims stated herein.

1. INTRODUCTION

2. Using its world leading underwater exploration and scientific expertise, Odyssey identified one of the most significant phosphate sand deposits in the world and obtained the concession rights to mine it for fifty years. Located on Mexico's continental shelf, the **Oceánica deposit** or **Oceánica**) comprises an independently appraised 588 million tonnes of phosphorite ore, and a potential resource of up to 1 billion tonnes of ore, making it one of the largest such identified resources in the Americas, if not the world.
3. Odyssey and ExO have invested over [REDACTED] and more than six years preparing for the environmentally sound development of this resource. As Odyssey has demonstrated based upon years of on-site investigation and world-class scientific and technical analysis, ExO can extract the **Oceánica** deposit in a manner that will have no material adverse impact on flora and fauna.
4. **Oceánica** is capable of substantially supplying the fertilizer needs of North America for the next 100 years or more. [REDACTED]
[REDACTED] Not only would the Claimant and ExO earn significant returns from the development of the deposit, but Mexico would also reap major financial and strategic rewards. Within Mexico, the **Oceánica** project has the potential to generate hundreds of collection and fertilizer processing jobs. In addition, it would help secure Mexico's food self-sufficiency by providing a ready supply of locally generated phosphate-based fertilizer. It would transform Mexico from an importer to a net exporter of this strategic commodity, and indirectly generate thousands of Mexican agricultural and food processing jobs. Moreover, **Oceánica** would generate millions of dollars in annual royalties to Mexico, as well as millions of dollars in tax revenues over the project lifetime through direct and indirect economic development.
5. Unfortunately, despite the significant benefits the project will bring the country, the Mexican Government has prevented **Oceánica** from moving forward, in breach of its own laws and the obligations owed to Odyssey and to ExO under **NAFTA**. Under the control of a senior official with broader political ambitions (namely, then-Secretary Rafael Pacchiano Alamán) (**Secretary Pacchiano**), the Mexican *Secretaría de Medio Ambiente y Recursos Naturales* (Ministry of the Environment and of Natural Resources, or **SEMARNAT**) has ignored objective evidence, invented grounds for opposition that have no scientific basis, failed to carry out a review consistent with its legislative mandate and procedural rules, and actively sought to discredit Odyssey and to disparage the **Oceánica** project.
6. The highest administrative tribunal of Mexico has confirmed the illegal and arbitrary nature of **SEMARNAT's** actions. On 21 March 2018 the Mexican Federal Administrative Tribunal (the **Tribunal**) annulled **SEMARNAT's** initial decision of 7 April 2016 to deny project approval, finding that the agency's actions were arbitrary, unfounded and beyond its statutory powers.

The Tribunal remanded the issue to SEMARNAT and ordered it to provide the scientific and factual support justifying its decision. SEMARNAT blatantly disregarded the Tribunal's order and on 12 October 2018 simply reinstated its original refusal, again failing to consider the actual location, conditions and characteristics of the project location and the extensive environmental safeguards built into the project design.

7. SEMARNAT's contempt of the law and continued arbitrary and discriminatory conduct have destroyed the value of the Claimant's investment in Mexico. But for SEMARNAT and Secretary Pacchiano's measures, which are attributable to Mexico under international law, the Océánica project would already be operational and generating substantial benefits both to the Claimant and to Mexico and its citizens. Instead, Odyssey and ExO have been forced to turn to international law for compensation.
8. The Claimant sought formal consultations under Article 1118 of NAFTA, which were duly conducted without resolving the dispute. The Claimant now is filing this Notice of Arbitration to seek recovery in full of all losses and damages incurred both by it and by ExO, through a NAFTA Chapter Eleven arbitration.

2. THE PARTIES

2.1 The Claimant

9. Odyssey is a US (Nevada) corporation, publicly traded on NASDAQ (OMEX). Its principal place of business is at 5215 W Laurel Street, Tampa, Florida, USA 33607.
10. Odyssey, through intermediary holding companies, owns a majority interest in and controls ExO. Odyssey submits this Notice of Arbitration on behalf of ExO as well as on its own behalf. ExO is a Mexican company constituted in March 2012 as the vehicle for Odyssey's investment in Mexico. ExO notably holds the mining concessions for the Océánica deposit. ExO's principal place of business is Emerson No. 150, Suite 503, Colonia Polanco, Delegación Miguel Hidalgo, Mexico, D.F.
11. Pursuant to Article 4 of the UNCITRAL Rules, the Claimant hereby notifies the Respondent of the appointment of the following persons as its counsel with full powers of representation in connection with this Notice of Arbitration and the ensuing arbitration proceedings:

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12. For purposes of these proceedings, the Claimant's address of record shall be deemed to be those of its designated representatives and shall be used for delivery of notices and documents.

2.2 The Respondent

13. The United Mexican States is a sovereign State and is a contracting Party to the NAFTA.
14. Pursuant to Article 1137(2) of the NAFTA, delivery of notices and documents to Mexico shall be made to the following address:

Gobierno Federal de los Estados Unidos Mexicanos
Dirección General de Inversión Extranjera
Avenida Insurgentes Sur 1940
Piso 8 Colonia Florida
Álvaro Obregón
Ciudad de México
México, Código Postal 01030

15. The Claimant further serves a copy of the present Notice of Arbitration on the following representative of Mexico:

Subsecretaría de Comercio Exterior
Dirección General de Consultaría Jurídica de Comercio Internacional
Torre Ejecutiva
Pachuca número 189, piso 19
Colonia Condesa
Demarcación Territorial Cuauhtémoc
C.P. 06140
Ciudad de México

Attention: Orlando Pérez Gárate
Telephone: +55 57 29 91 34

3. ARBITRATION AGREEMENT

16. The Claimant invokes Section B of Chapter Eleven of the NAFTA, and specifically Articles 1116, 1117, 1120 and 1122 of the NAFTA as the basis and authority for this Notice of Arbitration.
17. Article 1122(1) of the NAFTA confirms that each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in the Agreement.
18. Article 1116(1) of the NAFTA confirms that an investor of a Party may submit to arbitration under Section B of Chapter Eleven a claim that another Party has breached an obligation under (*inter alia*) Section A (which sets out the principal substantive obligations owing to investors), and that the investor has incurred loss or damage by reason of, or arising out of, that breach.
19. Article 1117(1) of NAFTA further provides that an investor of a Party may submit a claim to arbitration on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly.
20. Odyssey and ExO fulfill the requirements under Articles 1116(1) and 1117(1). Odyssey qualifies as an investor of a Party under Article 1116(1) as an enterprise organised under the laws of Nevada in the United States which has made an investment in Mexico.

21. Odyssey has invested in Mexico both through its ownership interest in the locally incorporated enterprise ExO, and through its ongoing financial and technical contributions to ensure the success of the Oceánica project. Since 2010 Odyssey has financed the research leading to the identification of the Oceánica concession area, as well as the application for the concession and annual concession payments; sponsored the subsequent multi-year prospecting to identify the zones most suited for development and to collect environmental impact assessment data; and performed the technical and scientific analysis required to support the sustainable development plans and environmental impact assessments needed for the Oceánica project to go forward. [REDACTED]
[REDACTED]
22. ExO qualifies as an enterprise of another Party controlled by Odyssey, on whose behalf Odyssey may submit a claim under Article 1117(1) of NAFTA. ExO is a Mexican enterprise of which Odyssey indirectly holds a majority of the issued shares.
23. Article 1118 of the NAFTA requires that the disputing parties “should first attempt to settle a claim through consultation or negotiation”, prior to proceeding to submit a claim to arbitration. This requirement has been met. Prior to the filing of this Request, the disputing parties met in face-to-face consultations in Mexico City in a good faith attempt to seek amicable resolution of the dispute.
24. Article 1119 provides that the disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted (the **NOI**), which shall specify (a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise; (b) the provisions of the NAFTA alleged to have been breached and any other relevant provisions (c) the issues and factual basis for the claim; and (d) the relief sought and the approximate amount of damages claimed. The Claimant duly delivered a NOI to the Respondent on 4 January 2019.
25. Article 1120(1) further stipulates that a disputing investor may submit a claim to arbitration “provided that six months have elapsed since the events giving rise to a claim”. More than six months have elapsed since SEMARNAT’s initial denial of project approval (officially dated 7 April 2016 but actually notified to ExO’s local Mexican counsel on 8 April 2016).
26. Finally, Article 1121 provides that a disputing investor may submit a claim under Articles 1116 and 1117 where the investor and the locally incorporated enterprise the investor owns or controls consent to arbitration and waiver of claims in the form contemplated by Article 1121. Confirmation of Odyssey and of ExO’s consent and waiver of claim is attached as **Annex A**.
27. Mexico’s consent to arbitration and the Claimant’s filing of this Request for Arbitration thus form the agreement to arbitrate between the Parties to the dispute.

4. CONTRACT OUT OF OR IN RELATION TO WHICH THE DISPUTE ARISES

28. The dispute arises out of Mexico’s failure to respect its obligations under Section A of Chapter Eleven of the NAFTA in respect of the Claimant’s investment in Mexico, which breaches entitle the Claimant to damages pursuant to NAFTA Article 1135(1).

5. NATURE OF THE CLAIM

5.1 Odyssey is a global leader in underwater marine exploration and development

29. Founded in 1994, Odyssey is a global leader in deep-ocean survey, scientific investigation, exploration and the development of seabed resources. The company relies on its leading team of professionals, scientists and technicians who use the most up-to-date methods and technology to discover, study and develop deep-ocean seabed assets in an environmentally responsible manner. Odyssey is committed to responsible science-based development and to sharing the benefits of its work with local communities and host economies. Working in partnership with both private clients and with States, Odyssey's discovery, validation and development of subsea mineral deposits provides access to critical resources around the world.
30. Odyssey has deployed its expertise in sites around the world, including in mineral exploration, geophysical, geotechnical environmental and scientific research in the waters of Mexico, New Zealand, Fiji, Papua New Guinea, Tonga, Solomon Islands and Vanuatu. Over the past 20 years Odyssey has mapped more than 28,000 m³ of seabed and spent more than 16,000 hours diving at deep-ocean sites, using advanced robotic technology applying the highest scientific standards.
31. Odyssey applies principles of environmental stewardship and sustainability in all of its work. All of Odyssey's operations are managed and executed to exceed global standards for environmental practices and processes and are aligned with International Seabed Authority (ISA) standards. The company has a history of collaboration with international organizations such as the New Zealand Institute of Water and Atmospheric Research (NIWA) to supplement the Institute's database. It maintains relationships with research groups around the world, supplying scientific data and biological samples for academic research.
32. Odyssey sought to bring its special expertise and best practices to the development of the Océánica project, as set out below.

5.2 Odyssey first identified a likely phosphate deposit area in Mexico

33. Starting in 2010, Odyssey undertook initial scientific research, analysis and project design to explore the development potential of phosphate deposits off the coast of Mexico.
34. Mexico presented a range of attractions for phosphate resource development, including favorable coastal, geological and oceanographic conditions, as well as proximity to the enormous Mexican, US and Canadian agricultural markets, with their significant need for phosphate-based fertilizers.
35. Based upon its research, Odyssey determined that such deposits were likely to be present under the Pacific Ocean seabed on Mexico's continental shelf.
36. By 2012, Odyssey had identified an area likely to contain a deposit in the Pacific Ocean, offshore from the coast of Baja California Sur.

5.3 Odyssey then incorporated ExO and obtained a concession in the deposit area (the Océánica concession)

37. Odyssey's local Mexican associates caused ExO to be incorporated in 2012 and Odyssey then directed the newly incorporated entity to apply for a mining concession.
38. Through ExO, Odyssey prepared and in 2012 filed its seabed mining concession request to the Dirección General de Minas (**DGM**), the responsible agency within the Secretaría de Economía of Mexico.
39. On 28 June 2012 DGM granted ExO a 50-year mining concession extending over 2,680 km² of seabed on the Mexican continental shelf, encompassing the main area of the Oceánica deposit.
40. On 29 April 2014, DGM granted ExO two further mining concessions to the northwest and to the south of Oceánica, increasing the total mining concession area to 3,029 km².

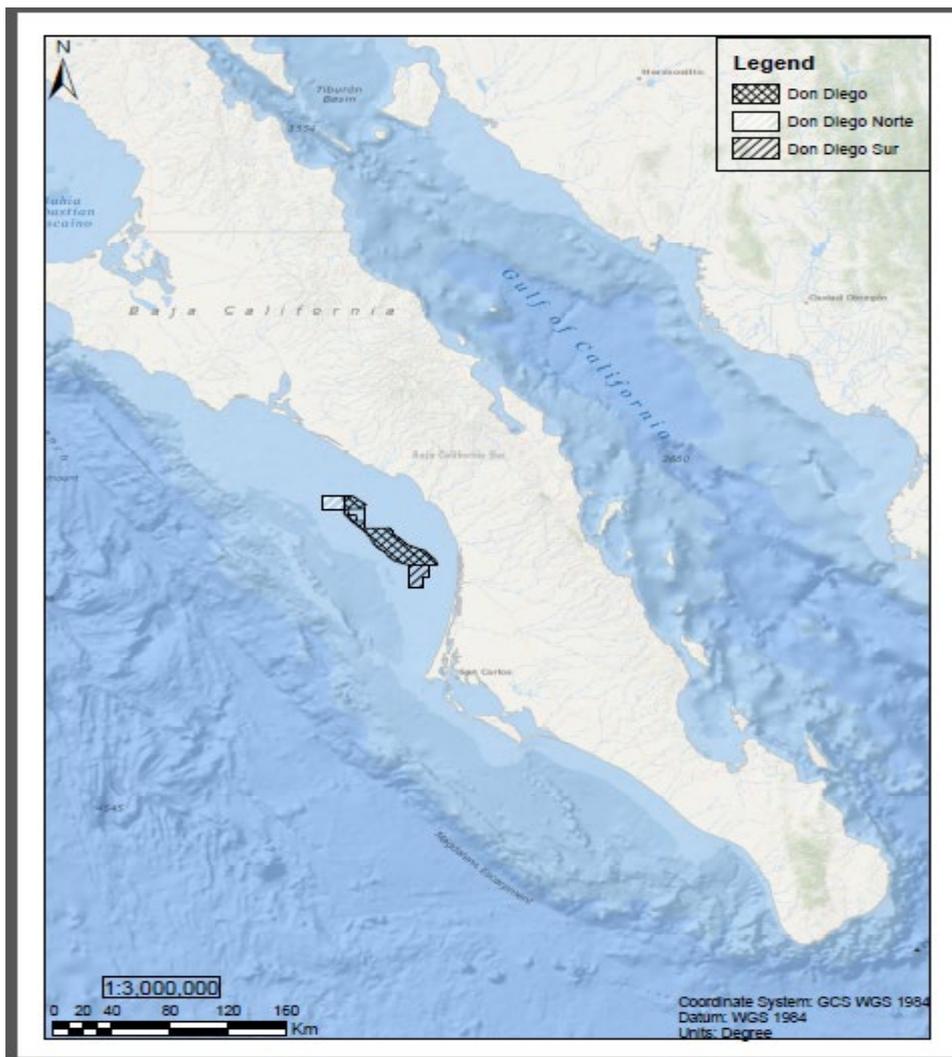


Figure 1: Oceánica Mining Concession Areas Including North and South Extensions

- 5.4 **Odyssey went on to spend nearly two years prospecting the Oceánica concession and collecting relevant data**
41. Using its chartered 100 metre research vessel the *Dorado Discovery*, Odyssey in the latter part of 2012 and throughout 2013 carried out an extensive prospecting and sampling campaign in

the Oceánica mining concession area. Its purpose was to more precisely identify and characterize the concession and to collect the raw data required to prepare an environmentally-appropriate development plan and impact assessment.

42. In mid-2012, Odyssey approached SEMARNAT seeking the approvals required to conduct these prospecting activities.¹ In September 2012, SEMARNAT confirmed that Odyssey's planned prospecting operations could proceed.
43. Over the next year and a half, Odyssey sponsored five separate 30- to 40- day cruises on the Dorado Discovery, staffed with a 40-member crew (comprised of engineers, seamen, other ship staff, and up to 20 technical personnel) and equipped with a wide range of survey, oceanographic and geological equipment. Each cruise cost Odyssey more than ██████.
44. Dorado Discovery extracted multiple core samples from across the seabed floor in the Oceánica concession area, from which Odyssey's team derived thousands of mineral samples. The team also collected hundreds of water samples, biological samples and other environmental data in the concession area generally, in the targeted work areas, and in the larger regional environmental system in which the Oceánica concession resides. All of this information was fed into Odyssey's detailed mapping, resource assessment, project planning and environmental due diligence exercise.
45. In all of this work, Odyssey followed international standards and complied with Mexican environmental law.
46. These nearly two years of work ultimately led Odyssey to identify an area within the Oceánica concession that combined highest concentration of phosphates with geological positioning favorable to development, and where naturally low biodiversity (reflecting biologically restrictive deep-sea conditions) would minimize any potential environmental impacts.

5.5 Odyssey's work confirmed that the Oceánica concession holds one of the world's richest phosphate deposits

47. Oceánica is a deposit of black phosphate-rich sands located in the Pacific Ocean seabed on Mexico's continental shelf, approximately 40 km from the coast in the Gulf of Ulloa, in Baja California Sur, in the embayment between Punta Abreus in the north and Puerto San Carlos in the south. Oceánica lies in Mexico's Exclusive Economic Zone (EEZ), at an average depth of 80 metres.
48. Based on current resource assessments, it is estimated that the Oceánica deposit contains approximately 588.3 million tonnes of phosphate ore, with average in-situ amount of phosphorus pentoxide (P₂O₅) in the range of 18.1%, an average overburden of merely 1.14 meters and an average ore thickness of 2.80 metres.
49. This ranks the Oceánica deposit amongst the largest and highest in-situ grade phosphate deposits in the world, and the only such marine resource found in Mexico. Developed in

¹ This was consistent with SEMARNAT's authority under the *Ley General Del Equilibrio Ecológico y La Protección al Ambiente (LGEEPA)* and the *Reglamento De La Ley General Del Equilibrio Ecológico Y la Protección Al Ambiente En Materia De Evaluation Del Impacto Ambiental*.

accordance with Odyssey's plans, Océánica is large enough to meet most of the fertilizer needs of North America for the next 100 years.

5.6 Development of the Océánica phosphate deposit would bring huge benefits to Mexico

50. Phosphate is one of the key components of multi-nutrient finished fertilizers, which in turn are an essential element of modern agricultural production. Close to three quarters of the total amount of available phosphorous exploitable worldwide is used in fertilizers.
51. Phosphates are natural compounds that contain phosphorous and other elements. Phosphorous is present in every living organism, including in the skeletal structures of vertebrates and in the shells of certain invertebrates. Phosphate is a non-renewable resource that cannot be manufactured. There is no synthetic substitute to replace it.
52. Mexican land-based phosphate supplies cannot meet the country's fertilizer needs. Mexico consumes an estimated 2.4 million tonnes of phosphate rock each year. To satisfy the nation's annual consumption, Mexico currently imports about 1 million tonnes of phosphate, principally from Morocco, Ukraine and Peru. Given the high cost of these imports, estimates indicate that roughly 74% of Mexico's crops are under-fertilized. Statistics generated by Mexico's National Institute of Statistics and Geology (INEGI) in 2013 pointed to an increasing need to import phosphate into Mexico, leaving the country exposed to foreign supply limitations, and negatively impacting Mexico's agricultural production and food security.
53. Recognizing the importance of Mexican food self-sufficiency, recently inaugurated President Andrés Manuel López Obrador vowed in December 2018 to meet Mexico's fertilizer needs entirely from domestic sources. Yet without domestic access to the required inputs – most notably phosphate – Mexico will continue to be dependent on foreign fertilizer. To achieve the President's stated goal, non-terrestrial sources like Océánica must be developed.
54. What is more, development of the Océánica deposit would transform Mexico into a phosphate-exporting nation, generating significant economic and social benefits. It would not only create jobs associated with phosphate extraction and fertilizer production, but also access to more affordable and more readily available fertilizer which would contribute to substantial agricultural development, indirectly generating thousands of jobs and potentially millions of dollars in economic benefits. This would in turn substantially strengthen Mexico's food security.

5.7 Odyssey generated a state-of-the-art development plan and environmental impact assessment, confirming it could develop Océánica without adverse environmental effect

55. From the start, Odyssey was sensitive to the environmental needs of the project. It had factored into its plans the development of careful environmental impact assessments and environmentally appropriate development strategies. Having obtained the mining concession and identified the area to be developed, ExO and Odyssey next spent two years working on an environmentally sustainable development plan and environmental impact assessment (MIA-R), to be submitted for approval by SEMARNAT in accordance with Mexican law.
56. Odyssey's extensive environmental surveys and planning resulted in both a sound understanding of the general and more specific ecosystem in the area to be developed, and a strong technical program for developing the site in an environmentally sensitive and responsible

manner. Odyssey's scientific team included experts in marine dredging, plume modelling, sound propagation, ecotoxicology, phosphate science and engineering, among others.

57. The result of this work was a project development plan that follows international best practices, the most innovative and efficient mitigation measures and a complete program of adaptive management and monitoring, as set out below.

(a) **Proposed dredging techniques ensure minimal environmental disturbance**

58. Most simply described, the Oceánica Project is a dredging project. Currently-employed dredging techniques are the product of over a hundred years of modern dredging experience. More specifically, Odyssey and ExO based their Oceánica development plans on the widely-studied and proven Trailer Suction Hopper Dredger (TSHD) seabed dredging process. TSHD dredging techniques are and have been widely used throughout the world, including in Mexican waters, and comply with international environmental, social and fisheries impact regulations.
59. To execute this work ExO called upon Boskalis, a Dutch company with over 100 years of experience recognized globally for its dredging expertise, and its subsidiary dredging company in Mexico, Dragamex. Over the past several decades Boskalis and Dragamex have executed at least 219 dredging projects in Mexican waters. The Oceánica project's proposed dredging technology had been approved by the Mexican government for use in virtually all of these projects.
60. The seabed in the Oceánica project area is composed of fine sediment, with little or no structure or relief. The TSHD ship deploys a suction draghead over the seafloor at a slow walking pace, slowly suctioning phosphate-laden sediment up to a ship. The main ship or a companion ship are equipped with hydrocyclone and filtration devices which extract the phosphate-laden sands as material is raised. The remaining clean material (comprised principally of non-phosphate-laden sand, broken shells and other natural materials) is then piped back down to the seabed floor, where it is placed within previously-dredged furrows in an irregular fashion. The latter technique is proven to facilitate biomass regeneration and indeed to promote the most biodiverse floral and faunal populations. ExO also planned to reserve tracks of untouched seabed within the area being exploited as "set-aside" furrows between areas of dredging. Again, this has been demonstrated to accelerate biomass regeneration.
61. The Oceánica deposit lies at an average depth of 80 metres below the sea's surface. The low water temperatures and diminished light at these depths naturally limit the presence of any living organisms on the seabed and in adjacent waters. There is little vegetation, and only a limited population of small worms and crustaceans. These organisms are characterized by their rapid regeneration capacity. Tiny worms present in the silty seabed floor have relatively short life-cycles and following physical disturbance rapidly recolonize and recover. Small crustaceans also present on the seabed are highly mobile and actively migrate back into areas as soon as operations such as dredging have ceased. Scientific studies show that the recolonization of worm and crustacean populations in analogous circumstances occurs within months after dredging activity ceases.
62. Compared with conventional terrestrial mining, seabed dredging has reduced infrastructure requirements, does not require the relocation of communities, has no impact on potable water

supplies, requires little or no removal of overlying material, has an overall lower carbon footprint, a better occupational health and safety record, and leaves minimal impact on the topography.

(b) The development plan incorporates extensive precautionary mitigation measures

63. ExO incorporated a range of precautionary mitigation measures in its dredging plans, which were all designed to minimize the dispersal of sediment during dredging or upon the return of sediment to the seabed. This was to be accomplished by dredging through vacuum technology and subsequent return of inert, unaltered and naturally occurring sand and shell fragments directly back to the seabed, well below the sea stratum containing most phytoplankton and other organisms. ExO also proposed a “green valve” mechanism (also called an “eco-tube”), which encourages sediment to sink by limiting air input into extracted materials.
64. As part of the environmental impact assessment, Odyssey retained one of the world’s leading oceanographic consultancies to undertake a series of complex project models. These scientists confirmed that with ExO’s proposed mitigation measures, the area of seabed affected by the operations would be confined to a zone of 200 metres or less from the point of discharge and confined strictly within the boundaries of previously dredged strips.

(c) The dredging process is chemical-free and non-toxic

65. ExO’s planned TSHD dredging process is chemical-free and operates exclusively through mechanical extraction. With Odyssey’s assistance, ExO also tested the toxicity levels of the phosphate sediments to verify that the dredging and return of sediment would not expose living organisms to any toxic substances. These tests confirmed there was no evidence of toxicity when test subjects were exposed to materials extracted from the project site.

(d) Work is to take place each year in only a tiny portion of the overall concession

66. To further mitigate impacts and allow for regeneration, ExO planned that the dredging operations would only occur over a tiny portion of the overall concession area in any given year. The annual area affected by dredging would be a strip approximately 3.5 km long and about 200 to 300 metres wide. This amounts to approximately 1 km² in total each year, out of a total concession area of 3,029 km².

(e) The proposed Océánica development location avoids impact on major fauna

67. The project was also designed to avoid impacts on marine animals, notably macrobiota such as the loggerhead turtle and whales.
68. The seabed at Océánica is not a suitable turtle habitat. The loggerhead turtle is mainly confined to surface waters of less than 20 metres depth. In contrast, the Océánica project takes place at depths of 80 metres where the water is cold, in the range of 14-16 degrees Celsius. It is therefore much deeper and in much colder water than the waters where the loggerhead turtles live. Indeed, these turtles are susceptible to deadly “cold stunning” if exposed to temperatures below 16 degrees Celsius. Furthermore, the seabed habitat at the Océánica site does not support food resources suitable for loggerhead turtles. The relatively sparse community of small invertebrates (mainly worms and small crustaceans) present at Océánica depths are unsuitable as a food resource for turtles. Loggerheads feed on large prey items in the surface waters,

including fish bycatch discards and the pelagic red crab, which forms dense swarms in surface waters during periods of upwelling. Oceánica is also located at depths well below these crabs' typical biosphere. In short the benthic (seabed) biosphere and pelagic (surface water column) biosphere are "decoupled". The project is specifically designed to avoid any impacts on potential turtle food resources in the water column and pelagic food web.

69. The project also does not interfere with or impact upon whales. Whale migration routes are in still deeper waters located to the west of the development site, as well as shoreward in shallower waters east of the development site. Given the location of the project and its very limited annual footprint of 1 km², there is no possibility of impacts on conservation-significant resources on the coastline (which is 40 km to the east of the Oceánica deposit) or on the coastal lagoons of San Ignacio and Bahía Magdalena (which are almost 100 km from the site). Furthermore, ExO confirmed through acoustic modeling that operations would generate no harmful frequencies or volumes in areas of whale migration.

(f) The project development plan includes still further precautionary measures

70. The risk to turtles from dredging at the Oceánica site is extremely low given that turtles do not live in or frequent the 80 metre project depths. Regardless, ExO's plan also incorporated the use of well-proven turtle exclusion devices (notably tickler chains) and deflection equipment regularly used at other shallower sites, as an additional precautionary measure. These devices have the effect of gently moving turtles or encouraging turtles to move away from a dredging site as a dredger slowly advances. Even in shallower waters where turtle densities are high, such techniques have been proven to minimize or prevent turtle losses by "entrainment".
71. ExO also committed to recording the unlikely event of any turtles being entrained during dredging operations and to considering any resulting additional mitigation measures, despite the very low probability that any turtles would be entrained in the first place.

(g) The project will have no impact on fisheries

72. The Oceánica project as designed also safeguards local fisheries. The area targeted for development is in a low-fish zone 40 km from the coast, only sporadically frequented by either commercial or smaller local fisheries. Given the naturally low numbers of fish in the sector and low catch numbers, fisherman have historically avoided the water column directly above the Oceánica deposit – they refer to the area as "Los Lodos" or "the silts".
73. Regardless, as a precaution ExO development plans avoid a significant portion of the concession in the area to the east of Oceánica, entirely eliminating overlap between the project area and the legal concessions of regional fisheries in these shallower waters.
74. Further, ExO agreed that fishing ships would be allowed to fish in all areas of the Oceánica concession, with the exception of a 500 metres berth around extraction vessels while they are in operation.
75. Moreover, while any impact on fisheries was designed to be minimal or non-existent, ExO's proposal nonetheless included a mechanism to compensate fisheries for any losses linked to the dredging operation, in the unlikely event this should occur.

(h) The project will have no impact on tourism

76. Finally, Odyssey and ExO designed the project to avoid any impact on tourism. Since the project operations are planned 40 km from the coast and will return unused sand and shells directly to the ocean floor, they would be invisible from the shoreline and have no impacts on coastline amenities.

77. Océánica also does not require adjacent shore-based facilities which might otherwise affect the Baja California Sur area leisure and tourism industry.

(i) **Environmental data will carefully be monitored going forward**

78. In addition to its environmental mitigation and restorative measures, ExO further proposed to conduct extensive ongoing environmental monitoring, including the use of independent on-board observers, to identify, quantify and report any signs of project impacts so that they could be addressed going forward.

79. ExO also undertook to engage in public environmental education and a “corporate good neighbor” policy to assist in developing programs to promote local communities and fisheries development, even though the dredging operation will not affect them.

5.8 Based upon years of effort Odyssey and ExO presented their project development and environmental protection plan to SEMARNAT

80. On 2 September 2014, after nearly three years of effort, Odyssey and ExO filed the MIA-R with SEMARNAT, which set out their plans for development, environmental impact assessment and environmental mitigation protection strategies, all as described above.

81. The MIA-R was a 4600-page document comprised of eight chapters, with 15 annexes and hundreds of technical and scientific references. The MIA-R was based on contributions from experts and consulting institutions in the fields of geology, oceanography, marine biology, marine ecosystems management, and environmental science specifically as it relates to dredging. It included a non-technical summary drawing on the MIA-R’s main conclusions.

82. Odyssey and ExO acted in good faith and in the expectation that SEMARNAT would evaluate their proposal on its merits, based upon scientific analysis and following the established administrative process.

83. Unfortunately, they experienced the exact opposite.

84. SEMARNAT has statutory responsibility under Mexican law to review and provide environmental approvals for mineral development projects in Mexican territory. SEMARNAT exercises that authority under the general direction of its principal Secretary, and with the support of various sub-entities that address specific aspects of the approvals process, including project evaluation, coordination with other agencies, legal review, and guardianship of specific environmental mandates.

85. SEMARNAT’s review process – at least, the way the regulatory oversight is supposed to take place – is set out in official Guidelines. The process set out in the Guidelines is intended to support a systematic, evidence and science-based evaluation of the specific project to be considered, in its particular environment, including thorough initial project definition, breakdown of the project into separate phases, description of the relevant environment, consideration of

the most significant environmental issues, specific impact assessments, consideration of alternatives and of mitigation measures, evaluation of residual environmental impacts, and the development of effective, specifically focused monitoring mechanisms.

86. In reality, SEMARNAT in its ultimate decision refusing approval of the project clearly ignored their own legal and regulatory mandate and requirements, according to the unanimous findings of Mexico's Federal Administrative Tribunal.
87. Both ExO and Odyssey were keen to ensure that the Mexican Government, interested parties, SEMARNAT, environmental NGOs, local communities and the public all would appreciate the anticipated benefits of the project, the extent of their environmental due diligence and mitigation measures, and the limited environmental impact of the project. ExO consistently responded to any issues SEMARNAT raised with accurate and relevant scientific data and technical information and analysis and took part in two full rounds of public hearings on the project.
88. The result of all of this work bore fruit, at least at the technical level. At final meetings in early 2016, SEMARNAT officials confirmed that all of their technical queries had been satisfied.
89. Unfortunately, SEMARNAT's then-Secretary Pacchiano intervened unjustly to terminate the project in a biased and arbitrary manner, as set out below.

5.9 Secretary Pacchiano asked ExO to suspend the environmental approval process on spurious political grounds

90. Rafael Pacchiano Alamán was appointed Secretary of SEMARNAT by Mexican President Enrique Peña Nieto on 27 August 2015. Prior to this appointment, he had since December 2012 been Under Secretary for Environmental Enforcement at SEMARNAT, and before that between 2009 and 2012 was federal deputy in Mexico's 61st Congress, representing the Ecologist Green Party of Mexico (Partido Verde Ecologista de México).
91. As titular head of SEMARNAT since August 2015, Secretary Pacchiano had ultimate responsibility for the decisions taken by the agency.
92. In his previous role as Under Secretary at SEMARNAT, he had raised only one substantive concern regarding the Oceánica project which related to its potential impact on whale migrations. ExO had addressed that concern in good faith, demonstrating that the proposed project location avoided by a considerable distance any known whale migration paths. Additionally, project design limits both risk of whale collisions by slow vessel speeds and risk of acoustic impacts as demonstrated through acoustic modelling. ExO further committed to substantial precautionary mitigation measures, undertaking to suspend dredging activities for a month during the peak whale migration season. Having received these explanations in a face-to-face meeting with ExO representatives in 2015, Secretary Pacchiano declared himself satisfied that his concern had properly been addressed.
93. But in March 2016, as the deadline for issuance of SEMARNAT's approval approached, Secretary Pacchiano performed a *volte-face*. He convened another meeting with ExO representatives and advised ExO that in light of other recent environmental controversies (none of which had anything to do with the Oceánica project) his political position was precarious. He said that he was unwilling to be seen as approving a project such as Oceánica, despite its merits. He therefore directed ExO to withdraw its MIA-R application and to resubmit it at some

later (undetermined) date, threatening that if ExO did not withdraw the application voluntarily, he would find some reason to deny it.

94. ExO and Odyssey had expected that the Oceánica project would be evaluated on its scientific merits. They dedicated six years of good faith efforts to achieve that result. What they instead encountered was a process arbitrarily dictated to facilitate the career ends of a high State official.
95. ExO and Odyssey were convinced of the merits of their application and that there were no legitimate grounds for refusal. They decided to maintain their request and not to withdraw the MIA-R.
96. ExO's decision to maintain its application left SEMARNAT scrambling for a reason to deny the project.

5.10 When ExO and Odyssey maintained their request, SEMARNAT was left with no other option but to invent a basis to refuse approval

97. On 7 April 2016, shortly after ExO's last meeting with Secretary Pacchiano, SEMARNAT made good on the Secretary's threat and issued a decision refusing environmental permission for the Oceánica project. ExO's local Mexican counsel did not receive the decision until the following day. The SEMARNAT resolution as drafted reflected its political rather than technical motivations. It was not grounded in any objective facts or analysis. SEMARNAT's report notably ignored the specific geographic and environmental features of the Oceánica site. It also disregarded the evidence and scientific analysis ExO had provided over the past two years.
98. Instead, SEMARNAT refusal cited the project's alleged impact on loggerhead turtle habitat and their food source, red crabs.
99. SEMARNAT's turtle and red crab rationale made no technical sense and had no basis in scientific fact. During the project evaluation phase, SEMARNAT had sought more information about the potential impact of the project on loggerhead turtle populations and on their food supply, in particular asking about any potential impact on red crabs. In response, ExO provided SEMARNAT with definitive answers to these queries. As it noted, loggerhead turtle populations cannot survive at the depths of the Oceánica project and do not depend for their sustenance on biological materials available at that depth. ExO further demonstrated that the project would have no influence on red crabs. The project was designed to avoid any impacts on the pelagic (ocean-going) food web, including red crabs and the pelagic species that feed on them.
100. In its refusal, SEMARNAT willfully misinterpreted all available scientific information concerning the distribution of loggerhead turtles in the Gulf of Ulloa. Notably, the agency ignored the fact that loggerhead turtles live at depths far shallower than the planned project activity area. SEMARNAT's misinterpretations, in turn, led it to make scientifically baseless assertions about presumed impacts on seabed food resources for loggerhead turtles. Among other things, SEMARNAT failed to consider Odyssey's sophisticated proposed process of dredging and return of seabed materials, minimizing water disturbance and functioning in only a tightly restricted area of the seabed floor. SEMARNAT failed to cite a single study suggesting that ExO's analysis or conclusions in this regard were incorrect.

101. SEMARNAT's refusal amounted to a grave violation of its own stated procedures. In rejecting ExO's proposal, contrary to the dictates of its own Guidelines, SEMARNAT ignored and failed to address any of ExO's technical proposals, working methods, mitigation measures, restoration protocols, monitoring, sampling and communications programs.
102. Instead, SEMARNAT relied on and misinterpreted general popular media sources and papers discussing the environmental importance of the Gulf of Ulloa more broadly. None of the sources it cited addressed the specific environment of the Oceánica project at 80 metre depths. Nor did they comment in any way on the likely environmental impact of the project as conceived by Odyssey, ExO and their multidisciplinary panel of experts.
103. In short, SEMARNAT's decision was quickly cobbled together to create a veneer of legitimacy for a pre-determined conclusion.
104. Once public, SEMARNAT's refusal of 7 April 2016 had the effect of sinking Odyssey's share prices by 59% from US\$8.37 to US\$3.45 per share, or a loss of market capitalization of approximately US\$37M.

5.11 During the same time period SEMARNAT granted approvals to many more environmentally sensitive projects owned or controlled by Mexican nationals

105. SEMARNAT's refusal of the Oceánica project was all the more arbitrary and discriminatory because SEMARNAT has approved (and continues to approve) multiple substantial dredging projects in Mexico's waters, in far more ecologically sensitive areas. The scale of these approved projects is enormous and the technology and process are either similar to, or even less effective than, the technology that Odyssey and ExO propose to employ at Oceánica. The singular difference is that these projects all are owned or controlled by Mexican nationals. To name but a few:
 - On 15 November 2013, SEMARNAT approved 38,000,000 m³ of seabed dredging, at the request of Administración Portuaria Integral de Veracruz. SEMARNAT approved the project notwithstanding that it lies within a natural protected area designated as a National Park, including areas of high environmental relevance (designated by SEMARNAT's *Comisión Nacional para el Conocimiento y Uso de la Biodiversidad (CONABIO)*), and despite the fact that the part of the project nearest to the shore is included in an internationally-designated protected wetland. Unlike the silty deep-water seabed of Oceánica, with its low biodiversity, the seabed for the Veracruz project is comprised of a coral reef and a well-known habitat for loggerhead and other turtles, bottlenose dolphins, and a range of other species.
 - On 16 March 2016 SEMARNAT at the request of Power Plant Laguna Verde also authorized MIA-R for the removal of 7,600,000 m³ of seabed through dredging. Power Plant Laguna Verde is owned and operated by [Comisión Federal de Electricidad \(CFE\)](#), the national electric company owned by the Mexican government. Again, this approval came despite the fact that the project is located in internationally protected wetland designated by CONABIO to be of environmental relevance. The area for this SEMARNAT approved dredging project includes habitats for species that are endangered and at risk of extinction, including the sea parrot turtle and the hawksbill turtle.

- In addition, on 7 September 2018 SEMARNAT authorized over 1,400,000 m³ of seabed dredging at the request of Gas y Petroquímica de Occidente S.A de C.V. Here again, the approval came despite the project covering several areas that SEMARNAT itself designated as of high environmental relevance. The project area and neighboring areas include the habitat and presence of several varieties of sea turtles, bottlenose dolphins and sea lions.
106. All of these projects, whose environmental impact statements were evaluated and approved by SEMARNAT, are owned and controlled by Mexican nationals or Mexican State agencies.
- 5.12 ExO asked SEMARNAT to reconsider its refusal but the agency simply ignored the request**
107. On 29 April 2016 ExO petitioned SEMARNAT to reconsider its initial refusal of 7 April, in accordance with Mexican law.
108. In support of its application, in June 2016 ExO filed a complete supplementary technical report setting out in detail the flaws and scientific and factual inaccuracies in the SEMARNAT decision, the ways in which SEMARNAT failed to consider evidence, and the lack of scientific justification or relevance of the issues the agency had raised.
109. Seven months passed with no answer. Despite its statutory responsibility to provide a response within 120 days, SEMARNAT simply ignored ExO's application for reconsideration.
- 5.13 ExO appealed to the Federal Tribunal of Administrative Justice, which annulled SEMARNAT's decision as contrary to Mexican law and sent it back for a new decision**
110. On 27 January 2017 ExO sought judicial review of SEMARNAT's decision and of its failure to respond to the request for revision, before Mexico's Federal Tribunal of Administrative Justice (the **Tribunal**).
111. Through 2017, the case went through an extensive briefing phase before the Tribunal.
112. On 21 March 2018 the Tribunal issued a ruling (notable as the first unanimous ruling of this Tribunal in two decades) nullifying the original decision of SEMARNAT and ordering it to issue a new resolution within four months. A bench of eleven judges found that SEMARNAT had failed to comply with Mexican law because its decision lacked sufficient scientific justification, ignored key evidence relating to the depth and lack of environmental impacts of the operation and failed to take account of the mitigation factors put forward by ExO.
113. The Tribunal directed SEMARNAT to confirm which scientific grounds and reasoning justified its original decision, including specifically addressing ExO's evidence that the dredging activity in question, given its depth, would not affect the habitat of either loggerhead turtles, or their source of food. Failing that, SEMARNAT was to issue project approval.
- 5.14 Secretary Pacchiano publicly defied the Federal Tribunal's order to review the project based on science**
114. The outcome of SEMARNAT's court-ordered new review process was prejudged and was a foregone conclusion. Rather than considering in good faith the actual location and

circumstances of the project and relevant scientific data, as the court had ordered, Secretary Pacchiano simply directed his officials to draft another refusal. At a public event on 9 September 2018, while the Tribunal-ordered response from SEMARNAT was still pending, Secretary Pacchiano was asked about his position concerning the Oceánica project. His answer was unequivocal - he stated publicly that “a new resolution is being drafted in the same sense as the original one, this is to deny it”.

5.15 SEMARNAT proceeded to issue a second denial in contempt of the Federal Tribunal’s instructions

115. Secretary Pacchiano’s threatened arbitrary and illegal behavior was confirmed when SEMARNAT on 12 October 2018 issued its second refusal of the Oceánica project.

116. The agency already had stalled in providing any decision at all. Despite the clear directions and order from a full bench of the Tribunal, by late September – six months after the Tribunal issued its ruling annulling the first decision – SEMARNAT still had failed to issue a new decision. Accordingly, on 4 October 2018 ExO filed a second request to the Tribunal, this time asking that the Tribunal find SEMARNAT out of time, in contempt of the Tribunal’s original order and ordering the agency to issue the requested approval.

117. SEMARNAT issued its new refusal of 12 October 2018, seemingly in an attempt to cut off the reviewing power of the Tribunal. In any event, the outcome was dictated in advance. In plain contempt of the Tribunal’s March 2018 order, and consistent with Secretary Pacchiano’s public prejudgment of the outcome, SEMARNAT again failed to evaluate ExO’s technical proposal, scientific data and mitigation measures, or habitat restoration plans.

118. Instead, SEMARNAT put forward a mishmash of pretexts pulled from studies that had been developed in different contexts and that bore no relation to the actual conditions present in the project. SEMARNAT again failed to explain how its alleged concern about loggerhead turtles had any scientific merit given the depth of the Oceánica project, its minimal annual coverage, highly limited pelagic disturbance and range of precautionary measures.

5.16 SEMARNAT deliberately publicized its refusal and made false statements that disparaged the project

119. SEMARNAT also deliberately sought to attract the maximum public attention to its new refusal, a departure from the agency’s typical discretion in denying such permits. This clearly was deliberate and intended to score a political “win” for Secretary Pacchiano by setting him up (falsely) as a supposed environmental crusader.

120. Typically, when SEMARNAT issues a denial, its decision is communicated solely to the applicant. However, in the present case SEMARNAT issued a press release dated 18 October 2018 announcing its decision to deny permission, thereby ensuring the denial received as much publicity as possible.

121. The press release SEMARNAT issued contained several materially untrue and damaging statements about the Oceánica project and its alleged environmental impacts. It also falsely suggested the decision was supported by agencies that had had no involvement whatsoever in the decision, presumably in an effort to bolster the legitimacy of the decision.

122. In all of these circumstances, ExO and Odyssey have lost any confidence in the good faith treatment of their Oceánica project by Mexico and have been forced to seek recourse under international law.

6. VIOLATIONS OF NAFTA CHAPTER ELEVEN

123. Mexico, through the actions of its agencies and legal representatives, including Secretary Pacchiano, has breached its obligations to Odyssey and to ExO under Section A of Chapter Eleven of NAFTA, including but not limited to Article 1102 (National Treatment), Article 1105(1) (Minimum Standard of Treatment) and Article 1110 (Expropriation and Compensation) in connection with Odyssey's investment in the Oceánica project, resulting in substantial damages.

6.1 Violation of NAFTA Article 1102

124. Mexico has violated NAFTA Articles 1102. This article provides that Mexico must accord U.S. investors and their investments treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
125. In violation of these provisions, Mexico has provided more favorable treatment to its own investors than to Odyssey by regularly granting environmental approvals to Mexican companies and Mexican State agencies for major dredging projects off the coast of Mexico, while refusing such permission to the Oceánica project. There is no regulatory justification for this disparate treatment. As demonstrated in ExO's submissions to SEMARNAT prior to the decision, the Oceánica site presents significantly less environmental sensitivity than do the sites of multiple other approved offshore dredging projects. Moreover, at Oceánica Odyssey proposes to employ improved versions of the same technology employed by such other projects, as well as additional state-of-the-art precautionary measures.

6.2 Violation of NAFTA Article 1105(1) (Minimum Standard of Treatment)

126. The Mexican Government's measure amounts to a violation of NAFTA Article 1105(1) (Minimum Standard of Treatment).
127. Article 1105(1) provides that each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
128. The actions of the SEMARNAT agency and of Secretary Pacchiano violate the international customary minimum standard of treatment of investors in that they are manifestly arbitrary and reflect fundamental breaches of due process in administrative decision-making.
129. In particular, SEMARNAT and Secretary Pacchiano ignored objective evidence and invented grounds for opposition that have no scientific basis. They also actively sought to discredit Odyssey and to disparage the Oceánica project to the public based upon false or misleading information.
130. SEMARNAT and Secretary Pacchiano also violated fundamental principles of due process by plainly ignoring the statutory and regulatory framework for their administrative decision-making.

Odyssey and ExO were in effect facing a rigged process, with decisions ordained against them in advance, due process ignored and avenues for domestic recourse frustrated by the Government and its agents.

6.3 Violation of NAFTA Article 1110 (Expropriation and Compensation)

131. The measures taken by the Mexican Government also amount to a violation of NAFTA Article 1110 (Expropriation and Compensation). That article provides *inter alia* that no Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment, except (a) for a public purpose, (b) on a non-discriminatory basis, (c) in accordance of due process of law and Article 1105(1) and (d) on payment of compensation in accordance with paragraphs 2 through 6 of Article 1110.
132. By arbitrarily refusing to allow the Océánica project to move forward and instead, actively frustrating it, Mexico has rendered worthless the Odyssey and ExO's investment in the Océánica project. This substantial taking is a measure tantamount to expropriation under Article 1110.
133. Moreover, the measure failed to meet any of the conditions for legal expropriation under Article 1110. The measure was not for a public purpose: a State cannot cloak an arbitrary measure under the mantle of its regulatory powers, as to do so would amount to an *abus de droit* at public international law. Mexico's measures were also discriminatory, in that they arbitrarily distinguished between Odyssey and other investors in like circumstances in Mexico. Mexico also failed to respect due process of law and Article 1105(1), through SEMARNAT and Secretary Pacchiano's manifestly arbitrary decision-making and contempt for due process. Finally, Odyssey and ExO have received no compensation to date for these losses.

7. AMOUNTS INVOLVED AND REQUESTED RELIEF

134. In light of the grave breaches of the NAFTA by the Respondent in the present case, the Claimant through the present proceedings intends to seek an order:
- Awarding damages to ExO pursuant to Article 1117 and to Odyssey pursuant to Article 1116 for breaches of Articles 1102, 1105(1) and 1110 of NAFTA in an amount to be fully quantified, but anticipated to be in the order of US\$3,540,000,000;
 - Granting pre- and post-Award compound interest on the amount of damages awarded;
 - Compensating the Claimant for all costs of the arbitration, as well as for its costs of legal representation and other related costs; and
 - Granting such other relief as the Arbitral Tribunal may deem just.

8. NUMBER AND APPOINTMENT OF ARBITRATORS

135. Having regard to Article 1123 of the NAFTA, the tribunal shall consist of three arbitrators, one appointed by each Party, and the President of the Tribunal appointed by agreement of the Parties or, failing such agreement, by the Secretary General of the International Centre for the Settlement of Investment Disputes. The Claimant will shortly notify the Respondent of the appointment of its arbitrator.

Dated: 5 April 2019

London, UK

Respectfully submitted on behalf of the
Claimant



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Annex A

WAIVER AND CONSENT

Pursuant to Articles 1121(1) and 1121(2) of the North American Free Trade Agreement (the **NAFTA**), Odyssey Marine Exploration, Inc. (**Odyssey**) and Exploraciones Oceánicas, S. De R.L., de C.V. (**ExO**) each consent to arbitration in accordance with the procedures set out in the NAFTA and waive their rights to initiate or continue before any administrative tribunal or court under the law of any Party to the NAFTA, or other dispute settlement procedures, any proceedings with respect to the measures of Mexico alleged in the Notice of Arbitration to be a breach referred to in Articles 1116 or 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the laws of Mexico.

Odyssey Marine Exploration, Inc.

BY: 

NAME: Mark D. Gordon

TITLE: President and Chief Executive Officer

DATE: March 29, 2019

Exploraciones Oceánicas S. de R.L. de C.V.

BY: 

NAME: Mark D. Gordon

TITLE: Vice President

DATE: March 29, 2019