INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Access Business Group LLC

v.

United Mexican States

ICSID Case No. ARB/23/15

CLAIMANT'S MEMORIAL ON THE MERITS [ENGLISH]

May 23, 2024

CONTENTS

The reformist President of Mexico, Mr. Lázaro Cárdenas, on August 23, 1939 issued a Presidential Resolution. On July 14, 2022, Mexico's Federal government purported to complete the execution of this Presidential Resolution – eighty-three (83) years and fifteen (15) Presidential Administrations later.

While the delay in execution raises more questions than the execution itself could ever aspire to explain, a second related and factual-historical proposition is equally intriguing. On March 14, 1994, the August 23, 1939 Presidential Resolution was fully satisfied and discharged. In fact, it was so fulfilled pursuant to administrative actions undertaken by high-ranking officials of Mexico's Federal government.

To add the appropriate historical perspective, the 1939 Presidential Resolution was "enforced" on July 14, 2022, eighty-three (83) years after its enactment and twenty-four (24) years after the Federal government of Mexico itself had already sought and obtained the Presidential Resolution's satisfaction and discharge.

The actual evidence demonstrates that the 1939 Presidential Resolution's discharge was enacted and/or evidenced by documents authored by high-ranking members of Mexico's Federal government. Therefore, the legal insufficiency of the 1939 Presidential Resolution for purposes of executing on it in July 2020 is pristine.

Even more, the 1939 Presidential Resolution was discharged twenty-four (24) years ago for the single purpose of providing Claimant with the assurance that it should invest in and help to develop the impoverished southern quadrant of the State of Jalisco because the 1939 Presidential Resolution would not constitute a legal basis for the taking of legal title to, or physical and material possession of, the 280 hectares of land known as *El Petacal.*

These formal written representations memorialized in official writings notwithstanding, on July 14, 2022 legal title to all 280 hectares of *El Petacal*, as well as physical and material possession to

120 hectares comprising 43% of the total property, was taken by the Mexican Federal government pursuant to the 1939 Presidential Resolution and conveyed to the communal landowners of the Township of San Isidro, in the Municipality of San Gabriel, in the State of Jalisco.

The property was not taken for a public purpose because executing on a stale eighty-three (83) year-old legally inoperative Presidential Resolution that was fully satisfied twenty-four (24) years earlier, simply does not constitute a legally cognizable public purpose.

The taking was, in fact, *contrary* to a public purpose because it threatens to reverse the micro- and macro- economic gains in (i) healthcare, (ii) employment, (iii) the construction of roads, (iv) the construction of bridges, (v) the bringing of electricity to the entire region of the State of Jalisco, (vi) the provision of potable water in the necessary amounts to an entire community, (vii) the provision of irrigation water to multiple communities, and (viii) the bringing of sewage waters and drainage systems to the community of San Isidro. The threat to these gains cannot be construed as being anything other than contrary to the public interest.

The taking was not accompanied by any type of due process. Instead of providing Claimant with a venue to challenge the prospective implementation of a government measure, Claimant merely was furnished (one week earlier) with notice of the date on which the property was to be surveyed and expropriated. This “notice,” or invitation to witness the technical surveying and taking, made clear that the expropriation would take place irrespective of Claimant’s attendance or punctuality in attending.

There are multiple farming operations throughout the State of Jalisco owned by Mexican nationals and jointly owned by Mexican national and non-nationals. Only Claimant had its farming operation taken.

Finally, the taking was without compensation.

This arbitration ensued.

I. THE PARTIES

A. The Claimant

1. The Claimant in this dispute, Access Business Group LLC, is a Michigan limited liability company created on November 14, 2000, which in this writing has been referred to as "ABG."[1] ABG has taken all necessary internal actions to authorize the initiation and prosecution of this arbitral proceeding against the United Mexican States.

B. The Respondent

2. The Respondent in this arbitration is the United Mexican States ("Mexico"), a sovereign State and a Party to the Treaty as well as a Contracting State under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention") at all times material to this claim, and at the initiation of this claim.

II. ANALYSIS OF RELEVANT FACTS

A. ABG Owner of Nutrilite S. de R.L. de C.V. and Related Entities

3. Detailed below is a factual narrative of the relationship between relevant entities. This statement is offered for purposes of clarity as to nomenclature, the ownership, and operation of the real property sustaining an organic farming processing and packaging operation referred to as "*El Petacal*." This property (*El Petacal*) is generally referenced in ¶¶ 19-23 of the *Request for Arbitration* filed in this proceeding and is detailed in

[1] Attached as **C-0001-ENG** are the Articles of Organization for use by domestic limited lability companies regarding ABG's formation, filed with the Michigan Department of Consumer and Industry Services, Bureau of Commercial Services, dated November 13, 2000, and signed by Michael A. Mohr, Vice President of Alticor, Inc., together with a corresponding Michigan Department of Consumer and Industry Services filing endorsement.

Composite Annex 5 to that submission.[2] It is also described the Witness Statement of Robert Hunter and the Witness Statement of Keith Eppers which are filed as **CWS-001** and **CWS-002** respectively to this Memorial.

4. On September 6, 1949, Ja-Ri Corporation was incorporated in the State of Michigan, U.S.A.[3] On November 27, 1963, Ja-Ri Corporation changed its name to "Amway Corporation" ("Amway").[4]

5. On October 23, 2000 Amway Corporation filed Restated Articles of Incorporation superseding the Articles of Incorporation as amended, and reflecting a name change to "Alticor Inc." ("Alticor").[5]

6. Alticor still conducts business as Amway.[6] The name "Amway" remains a trade name in the form of a "d/b/a," i.e., doing business as.[7]

7. Alticor is a Michigan privately-held corporation whose principal business purposes consist of the manufacture and distribution of nutrition, beauty, personal care, durable, and home care products that are exclusively sold in over 100 countries and territories

---

[2] Attached as **C-0002-ENG** to facilitate reference is Composite Annex 5 of the *Request for Arbitration* filed in this proceeding.

[3] Attached as **C-0003-ENG** to facilitate reference is Articles of Incorporation of Ja-Ri Corporation, dated September 6, 1949.

[4] Attached as **C-0004-ENG** to facilitate reference is the Certificate of Amendment to the Articles of Incorporation of Ja-Ri Corporation, dated November 27, 1963, together with a document from the Michigan Corporation and Securities Commission dated December 3, 1963, and reflecting that the Certificate of Amendment to the Articles of Incorporation of Ja-Ri Corporation were received on November 29, 1963, and formally filed on December 3, 1963.

[5] Attached as **C-0005-ENG** to facilitate reference are the Restated Articles of Incorporation of Amway Corporation reflecting a corporate name change to Alticor, Inc., which restated Articles of Incorporation were adopted on October 19, 2000.

[6] Attached as **CWS-003** to facilitate reference is the Witness Statement of Mr. John Patrick Parker ("**Parker Witness Statement**"). *See* Parker Witness Statement (**CWS-003**) at 11 ¶ 41.

[7] *Id.*

through Amway's Independent Business Owner distributors ("IBO-Distributors").[8] It is the world's largest direct selling company, and it posted USD 7.7 Bn in sales for calendar year 2023.[9]

8. Nutrilite Products Inc. ("NPI")[10] was a California corporation incorporated in 1947, whose principal business purpose was the manufacture and sale of vitamin and mineral supplements containing organically certified plant-based nutrients. On August 16, 1972, Amway held a Board Meeting and approved the negotiation of a Stock Purchase Agreement with NPI.[11]

9. In 1977, Amway purchased additional shares of NPI, bringing its total interest in the company to 88.31138%.[12]

10. On April 29, 1991, NPI held a Special Meeting of the Board of Directors and approved the formation of Nutrilite S. de R. L. de C.V. ("Nutrilite S.R.L."), a Mexican limited

---

8 *Id.*

9 *Id.*, attached as **Composite C-0006-ENG** Direct Selling News Staff Writer, "Amway Reports $7.7 Billion in 2023 Revenue," 24 March 2024, <https://www.directsellingnews.com/2024/03/06/amway-reports-7-7-billion-in-2023-revenue/>, accessed on May 21, 2024 (**C-0006-1-ENG**); Amway, "Amway Reports Sales of $7.7B for 2023," 5 March 2024, <https://www.amwayglobal.com/newsroom/amway-reports-sales-of-7-7b-for-2023/>, accessed on May 21, 2024 (**C-0006-2-ENG**)

10 Attached as **C-0007-ENG** to facilitate reference are the NPI Articles of Incorporation, dated October 17, 1947.

11 Attached as **Composite C-0008-ENG** to facilitate reference is the Amway Corporation-Board of Directors Meeting-Special Authorizing Purchase of NPI, dated August 21, 1972 (**C-0008-1-ENG**) and Stock Purchase Agreement-Amway Corporation and Various Sellers dated August 22, 1972 (**C-0008-2-ENG).**

12 Attached as **C-0009-ENG** to facilitate reference is Amway Corporation-Board of Directors Meeting-Approving the Purchase of Minority Shares, dated December 13, 1977.

liability company.[13] Within a month, on May 20, 1991, Nutrilite S.R.L. was formed.[14] As more fully set forth below, Nutrilite S.R.L. acquired *El Petacal*, and operationally managed the organic farm's farming, processing, and packaging activities.[15]

11. On August 31, 1995 Amway and NPI merged, with Amway remaining as the surviving merger company, and owner of NPI's shares of Nutrilite S.R.L.[16] On June 29, 2001 Alticor assigned its equity interest in Nutrilite S.R.L. to Claimant in this proceeding, ABG.[17]

12. Hence, the Nutrilite™ line of products containing ingredients from *El Petacal* are manufactured by ABG (the owner of Nutrilite S.R.L.), a subsidiary of Alticor, whose products are sold globally by Amway IBO-Distributors.[18]

III. NUTRILITE PRODUCTS INC. ENGAGES IN AN INTERNATIONAL SEARCH FOR POTENTIAL FARMLAND MEETING SPECIFIC AND NARROW REQUIREMENTS

A. Global Search for Additional Acreage

13. On September 18, 1989, Hurricane Hugo made landfall and severely damaged large parts of the island of Puerto Rico. The southeastern quadrant of the island, where NPI

---

[13] Attached as **C-0010-ENG** to facilitate reference is the NPI Board of Directors Meeting Minutes Approval of Formation of Mexican SRL (Nutrilite), dated April 29, 1991. *See also* Parker Witness Statement (**CWS-003**) at 12, ¶ 43.

[14] Attached as **C-0011-ENG** to facilitate reference are the Nutrilite S. de R. L. de C.V. Articles of Incorporation-Public Deed 15890, Notarized Copy and Translation, dated May 20, 1991. *See also* Parker Witness Statement (**CWS-003**) at 12, ¶ 43.

[15] *See infra* at Section III. B, *see also* Parker Witness Statement (**CWS-003**) at 12, ¶ 43.

[16] Attached as **C-0012-ENG** to facilitate reference is Certificate of Merger-Amway Corporation and Nutrilite Products Inc. filed in Michigan, dated August 31, 1995. *See also* Parker Witness Statement (**CWS-003**) at 12, ¶ 44.

[17] Attached as **C-0013-ENG** to facilitate reference is an Assignment Agreement – Alticor Inc. and Access Business Group LLC, dated June 29, 2001. *See also* Parker Witness Statement (**CWS-003**) at 12, ¶ 45.

[18] Parker Witness Statement (**CWS-003**) at 12, ¶ 46.

had planted 30,000 acerola producing trees throughout 440 acres, was hardest hit.[19] Only approximately 9,000 trees were spared, with an additional 10,000 identified as possibly susceptible to rehabilitation. [20]

14. This substantial loss translated into an estimated anticipated loss of approximately 13,000 kilos of valuable acerola concentrate, where fifteen (15) kg of cherries = 1 kg of concentrate. This deficit required immediate attention in order to mitigate market disruptions regarding acerola and vitamin C-rich NPI products.[21]

15. The consequences of the storm damage in Puerto Rico and additional risks that NPI's California organic farming operations faced from rising pollutants generated by residential, commercial, and industrial development that would render organic farming impossible on NPI's California farmland in keeping with NPI's standards at some time, led to an aggressive search for alternative acreage.[22]

16. In a Budget Commentary dated August 22, 1990,[23] NPI's Board of Directors in relevant part was advised:

> *Puerto Rico: Acerola orchard heavily damaged by Hurricane Hugo resulting in shortages of acerola-containing products. Repairs and replanting underway. In view of increasing worldwide interest and demand for acerola-containing products, we are now looking for additional acreage on the other side of Puerto Rico* ***as well as in other parts of the world.***
>
> (Emphasis supplied.)

---

[19] Attached as **CWS-001** to facilitate reference is the Witness Statement of Robert Paul Hunter ("**Hunter Witness Statement**") at 4, ¶ 18.

[20] *Id.* at ¶ 19.

[21] *Id.* at ¶ 20.

[22] *Id.* at ¶ 21.

[23] Attached as **C-0014-ENG** to facilitate reference is the NPI Board of Directors Budget Commentary, dated August 22, 1990.

17. Just shy of one week later, on August 28, 1990, the *Minutes of Special Meeting of Board of Directors of Nutrilite Products Inc.*[24] under the heading "*STATUS OF CURRENT FACILITIES AND PROPOSED EXPANSIONS*," observed:

> *Mr. Hunter reviewed the shortage of NPI's [Nutrilite Products Inc.] acerola supply and alternatives being explored. Mr. VanAndel suggested that the island of Dominicana may be an alternative growing area. He provided the name of the Prime Minister, Eugenia Charles.*[25]

18. Mr. Robert P. Hunter, Alticor's former Vice President, Global Engineering, Maintenance, EH & S Real Estate, Misc. Administrative Services and Supply Chain Center of Excellence ("Mr. Hunter") testifies as follows:

> *I was thus asked to participate in an effort to identify land anywhere in the United States and globally that would be fit to supplement NPI's organic farming needs – not just for acerola supply but also for the many other organically-grown crops produced for NPI's use. PHH Fantus Consulting was retained. A number of factors were identified suggesting that NPI's organic farming needs, among other things, required (i) an isolated venue capable of sustaining high air quality, (ii) specific climatic conditions that would support year-round farming, (iv) a sufficient area to create buffer zones to guard against cross-contamination, (v) a limited temperature fluctuation every twelve (12) hour interval, (vi) protection from mountain wind tunnels, (vii) access to quality water, (viii) nearby potential employment population, and (ix) nutrient-rich soil with a tempered pH (6.5 to 7.5), and (x) pollination. These factors also would have to coexist with reasonable market-driven economic expectations. Satisfying both sets of requirements proved to be challenging, and at times, seemingly practically futile.*[26]

19. The scope of the initial search for alternative acreage that would support NPI's seed-to-supplement organic farming was limited to the United States. Accordingly, PHH Fantus Consulting prepared a study that, among other considerations, required the farming operation to be within seven hundred (700) miles of the NPI Lakeview

---

[24] Attached as **C-0015-ENG** to facilitate reference are Minutes of Special Meeting of Board of Directors of Nutrilite Products Inc., dated August 28, 1990.

[25] *Id.* at p. 2.

[26] Hunter Witness Statement (**CWS-001**) at ¶ 24.

processing facilities. The search area, characteristics of operations, and plant purpose identified in the PHH Fantus Consulting Study is here reproduced:[27]

[The rest of this page is intentionally left blank.]

[27] Attached as **C-0016-ENG** to facilitate reference is the Project Specifications for New Farmland PHH Fantus Consulting, dated August 1990.

PROJECT SPECIFICATIONS

Plant Purpose

To organically grow and naturally process alfalfa and other vegetable crops for shipment to the Lake View facility for further processing.

Characteristics of Operations

Farm:

- Alfalfa, water cress, parsley, carrots, spinach. Must have potential for possible new crops (purslane, jojoba, etc.).

Processing Operation:

- 1 shift, 4 days per week.
- 40 hour work week.

Search Area

- Operation must be within 700 miles of the Lake View processing facilities.

Preferred Areas

Arizona:	South of Flagstaff
Colorado:	South of Salida
California:	South of Fresno
New Mexico	Entire State
Texas:	South of Lubbock, west of Pecos

PHH Fantus

20. The *PHH Fantus Consulting Project Specifications for New Farmland Analysis* (the "Analysis") contemplated a climate-growing season of ideally ten (10) months with December and January as standard non-productive months. In this same vein, the environmental profile was very specific and premised on the following eight (8) foundational factors:

(a) an elevation similar to Hemet, California, i.e., 100 feet above sea level, without excluding other elevations meeting critical growing criteria;

(b) day/night temperature fluctuation less than four (4) degrees Fahrenheit;

(c) wind speed less than twenty miles per hour, and foreclosing mountain wind tunnels;

(d) foreclosing *any* proximity to agricultural crop-dusting operations with herbicides and pesticides that would jeopardize organic farming. A minimum ten (10)-mile radius for proper buffering would have to be observed;

(e) areas conducive to the habitation of the Diptera insect order (flies);

(f) the property must be outside a four (4)-mile radius from any dairy or chicken production facilities, but requires manure for fertilizer that can be transported forty (40) to fifty (50) miles;

(g) the property must be sufficiently secluded so as to avoid completely smog areas;

(h) paramount to the necessary elements is high-grade soil characteristics;

(i) most notably, (a) neutral pH: 6.5 to 7.5, (b) the prospective property must be clear of any structures, rock formations, or other obstacles that may obstruct harvesting equipment, and (c) a medium sandy loam; and

(j) high quality water in sufficient quantities and accessibility to be able to support fulsome irrigation and processing.[28]

21. The Analysis as well included a community summary comparison based upon eight (8) critical factors that included both social and agricultural categories.[29] In this connection, Mr. Hunter testifies:

> *It soon became clear the search would have to be expanded to encompass a global effort. NPI's organic farming needs were then, and remain to date, subject to very exacting standards of excellence. Consequently, identifying farmland consonant with these standards, let alone also available and within reasonable fair market pricing was akin to searching for a needle in the proverbial haystack. A global search ensued.*[30]

22. At some time during the first quarter of 1991, NPI learned that *El Petacal*, and other arable land conforming to the Analysis, were available in the State of Jalisco, Mexico.[31] On August 31, 1991, the NPI Board of Directors' Annual Report to Shareholders announced:

> *Two hundred acres of land were purchased in Mexico during the year and development is proceeding rapidly…. The first acerola tree was officially planted by Rob Hunter in our fields in Mexico on September 18. This will be a showplace operation for Nutrilite in the very near future and* ***we are currently investigating the possibility of acquiring additional acreage for alfalfa, watercress, parsley, and other plant crops.***[32]
>
> (Emphasis supplied.)

---

28 Hunter Witness Statement (**CWS-001**) at ¶ 26 (i) – (x) and (**C-0016-ENG**) Project Specifications for New Farmland Analysis PHH Fantus Consulting.

29 (**C-0016-ENG**) at the *community comparison summary*.

30 Hunter Witness Statement (**CWS-001**) at ¶ 27.

31 *Id.*, ¶ 28.

32 Attached as **C-0017-ENG** to facilitate reference is Annual Report to Shareholders Fiscal Year Ended August 31, 1991.

23. The reference to "investigating the possibility of acquiring additional acreage for alfalfa, watercress, parsley, and other plant crops," refers to *El Petacal* .[33]

B. The Acquisition of the 280 Hectares Known as *El Petacal*

1. The Acquisition of 160 Hectares Constituting "*Puerta del Petacal Tres*" and "*Puerta del Petacal Cuatro*"

24. On April 13, 1992, Nutrilite S.R.L. purchased approximately 160 hectares constituting "*Puerta del Petacal Tres*" and "*Puerta del Petacal Cuatro*."[34]

25. As more fully described in this Memorial, the 160 hectares purchased in April 1992 sustains the processing and packaging of crops. In addition, the 160 hectares parcel supports all crop growth and harvesting operations.[35]

26. Mr. Hunter describes his first visit to *El Petacal* at the time that only "*Puerta del Petacal Tres*" and "*Puerta del Petacal Cuatro*" (the 160 hectares parcel) had been purchased, as follows:

> *On this first visit my impression was twofold. First, the land was beautiful. The property is on the foot of the Petacal mountain forming part of the Neovolcanica mountain range in the Municipality of San Gabriel. The vast plain in part surrounded by the imposing mountain range left no doubt in my mind why this scenic beauty inspired centuries of folklore and legends regarding the mountain's many purported mystical powers. The isolated nature of the property, its physical and natural beauty, and the interplay between the clouds, the mountains, and prairies gave rise to an optical illusion suggesting that somehow the green plains spawned clouds in the form of white smoke. Doubtless, this image inspired Mexican author Juan Rulfo to write the now classical and timeless work 'El Llano en Llamas,' which has been translated as 'The Plain in Flames.'*

---

[33] Hunter Witness Statement (**CWS-001**) at ¶ 33.

[34] Attached as **C-0018-SPA** to facilitate reference is a Sales Purchase Agreement Esc. 12,802 - "*Puerta El Petacal Tres*" and "*Puerta El Petacal Cuatro*."

[35] Attached as **CWS-002** to facilitate reference is the Witness Statement of Keith Michael Eppers ("**Eppers Witness Statement**") at ¶ 104, and Hunter Witness Statement (**CWS-001**) ¶ 36.

> *Equally arresting was a calm silence that seemed to envelop the entire plain and mountain range. The land was so isolated that no vestige of industrialized city sounds could be heard.*
>
> *My second impression was that there was an extraordinary amount of work that had to be undertaken to create a sophisticated organic farming operation that could support the multi-billion dollar sales of products by NPI, ABG, and their direct selling Amway affiliates.* ***The land was raw. There was no development of any kind, including basic infrastructure, let alone the roads and bridges that would render possible sustained commercial activity. There was no water or electricity.***[36]
>
> (Emphasis supplied.)

27. Mr. Hunter further testifies that while he "*was not engaged in the acquisition of the 160 hectares in April 1992, [he] did participate in the process leading to the purchase of the 120 hectares [Puerta El Petacal Uno and Puerta El Petacal Dos]. As of that time (May 1994) no significant work establishing the harvesting, processing, and shipping, and operations had commenced on the 160 hectares already owned. The development of El Petacal was staged and planned as a medium-to-long-term project.*"[37]

28. The record before the Arbitral Tribunal establishes that *after* the purchase of the 160 hectares (*Puertas Tres* and *Cuatro)*, but *before* the acquisition of the remaining 120 hectares (*Puertas Uno* and *Dos)*, Nutrilite S.R.L. learned that communal landowners known as "ejido" were asserting an ownership interest of some kind in the 280 hectares comprising *El Petacal*. Mr. Hunter testifies that "*[t]his looming uncertainty caused Nutrilite S.R.L. to adjust the rate of development until more could be ascertained regarding the allegation*."[38] The communal landowners of the Township of San Isidro, in the Municipality of San Gabriel where the 280 hectares comprising *El Petacal* are

---

36 Hunter Witness Statement (**CWS-001**) at ¶¶ 38-40.

37 *Id.* at 14, ¶ 49.

38 *Id.* at 57, ¶ 147.

located, asserted a claim on the 280 hectares purportedly arising from a Presidential Resolution dated August 23, 1939 ("1939 Presidential Resolution") that President Lázaro Cárdenas then issued.[39]

29. That stale claim that at the time (third quarter of 1993) was being asserted, fifty-four (54) years after the issuance of the 1939 President Presidential Resolution and *after* Nutrilite S.R.L. purchased the 160 hectares, but *before* acquisition of the remaining 120 hectares, caused NPI and Nutrilite S.R.L. to decrease for approximately four (4) months (i) any work on the 160 hectares, and (ii) the actual acquisition of the remaining 120 hectares.[40]

30. The Mexican Federal government and the government of the State of Jalisco, however, (i) signed multiple agreements[41] with Nutrilite S.R.L., (ii) provided a legal

---

[39] Attached as **C-0019-SPA** to facilitate reference is a copy of the August 23, 1939 Presidential Resolution published in the *Diario Oficial*, Organo del Gobierno Constitucional de los Estados Unidos Mexicanos, Sección Primera, under "*Resolución en el Expediente de Dotación de Ejidos al Poblado San Isidro, Estado de Jalisco*", p. 5.

[40] *Id.* at 57-58, ¶¶ 147-150.

[41] Attached as **C-0020-SPA** to facilitate reference is "*Acuerdo de Concertación*," dated September 15, 1993, executed by (i) Dip. Gerardo Avalos Lemus (Representante de la Unión Campesina Democrático y Apoderado Legal del Ejido San Isidro), (ii) Sr. Mario Rosales Laureano (Secretario del Comisariado Ejidal), (iii) José Araiza (Suplente del Comisariado Ejidal), (iv) Sr. Alejo Enciso Estada (Representante del Grupo de Campesinos de El Petacal), (v) Sergio Vargas Maciel (Secretario), (vi) José Roberto Vargas Maciel (Residente) of Exportag, S.A. de C.V. (Representatives of Nutrilite S.R.L. and NPI), and (vii) Sr. Raúl Peña Herz (Representative of the Agrarian Reform), (viii) Lic. Arturo Gil Elizondo (Coordinador del Comité Estatal de Concertación Agraria en el Estado por parte del gobierno del Estado). *Also* attached as **C-0021-SPA** is an Agreement, here referred to as the "*Guadalajara Agreement*" arising from a meeting had at the Industrial Club in Guadalajara, signed by Messrs. Lic. Alejandro Díaz Guzmán (Mexican Federal government Delegate of the Secretary of the Agrarian Reform), Lic. Arturo Gil Elizondo (Secretary of Rural Development-State of Jalisco), Gustavo Martínez Guitón (Secretary of Economic Promotion-State of Jalisco), Humberto Anaya Serrano (Rural Development-State of Jalisco), Rafael Hidalgo Reyes (Sub General Manager Electricity District-State of Jalisco), Adriana de Aguinaga (Legal Counsel for Nutrilite S.R.L. [Goodrich Riquelme y Asociados]), Enrique Romero Amaya (Counsel for Nutrilite S.R.L.), Roberto Vargas Maciel (Exportag, S.A. de C.V., Representative of Nutrilite S.R.L.), Abelardo Reyes Vargas (Exportag, S.A. de C.V., Representative of Nutrilite S.R.L.), Sergio Vargas Maciel (Exportag, S.A. de C.V., Representative of Nutrilite S.R.L.), and David T. Tuttle (NPI and Nutrilite S.R.L.), dated February 15, 1994, executed for purposes of having the Mexican federal government provide the communal landowners of San Isidro with approximately 280 hectares of property known as *Potrero Grande* or *Paso de Cedros*, in

opinion[42], (iii) issued an Administrative Order[43], (iv) issued a Judicial Judgment[44], and (v) authored multiple communications[45] assuring Nutrilite S.R.L. and NPI that they would be protected from any claim on the 280 hectares comprising *El Petacal* based upon the alleged execution of a right arising from the 1939 Presidential Resolution.

---

exchange for the communal landowners releasing any claim that they would have under the 1939 Presidential Resolution directed at *El Petacal*.

[42] Attached as **C-0022-SPA** to facilitate reference is a Legal Opinion from the Lic. Ignacio Ramos Espinoza (Director General) of the Secretary of the Agrarian Reform to Lic. Juan Reyes Flores, Coordinator of Department of Payment for Real Property and Indemnifications dated February 22, 1994.

[43] Attached as **C-0023-SPA** to facilitate reference is an Administrative Order (*Oficio*) dated November 19, 1993, authored by Lic. Alejandro Díaz Guzmán of Mexico's Federal Secretary of the Agrarian Reform to Lic. Raúl Pineda Pineda (*Oficial Mayor de la Secretaría de la Reforma Agraria*).

[44] Attached as **Composite C-0024-SPA** to facilitate reference are (i) Judicial Judgment titled: *Acta de Ejecucion de la Sentencia Definitiva Emitida Por El Tribunal Superior Agrario el 9 de diciembre de 1997, Dentro del Juicio Agrario Número 615/97, Relativo al Poblado "San Isidro," Municipio de San Gabriel, Jalisco* (**C-0024-1-SPA**) and (ii) Judgment titled: *Cumplimiento Ejecutoria, Magistrada: Lic. Cármen Laura López Almaraz, Secretaria: Lic. Alba Fernanda Vázquez Márquez,* dated March 12, 2014 (**C-0024-2-SPA**).

[45] Attached as **C-0025-SPA** to facilitate reference is correspondence from *Comisión Federal de Electricidad División Jalisco* dated July 23, 1993 directed to Robert T. Hunter and J. Roberto Vargas. *See also* attached as **C-0026-SPA** transmittal letter from Coordinator of Payments Concerning Real Property and Indemnifications, Lic. Juan Reyes Flores to the Director General of Legal Affairs of the Secretary of Agrarian Reform, Lic. Ignacio Ramos Espinoza having as reference "*ASUNTO: Se Remite Expediente Para su Opinión*," stamped "received" December 2, 1993 and **C-0027-SPA** correspondence from the Coordinator of Payments Concerning Real Property and Indemnifications, Lic. Juan Reyes Flores to the Director General of Legal Affairs of the Secretary of Agrarian Reform, Lic. Ignacio Ramos Espinoza, dated February 9, 1994.

The Spanish language original of the language cited in (**C-0027-SPA**), states: "*[d]icho acuerdo fue llevado a cabo con la finalidad de resolver el conflicto agrario en el Potrero Puerta El Petacal*."

Also attached as **C-0028-SPA** is correspondence, dated February 11, 1994 from Alfredo Galeana Ortega, Department of Payments Real Property to Lic. Juan Reyes Flores; **C-0029-SPA** correspondence from Lic. Juan Reyes Flores to the Lic. Arturo Sánchez Zavala, Coordinator of the Program for the Incorporation of Lands to the Ejido Regime, dated February 18, 1994; **C-0030-SPA** is correspondence from Alfredo Galeana Ortega, Department of Payments Real Property to Lic. Arturo Rafael Sánchez Zavala National Coordinator of Program of Incorporation of Lands to the Ejidal Regime dated February 22, 1994; and **C-0031-SPA** is correspondence [internal communication] from Lic. Raúl Pineda Pineda (*Oficial Mayor de le Secretaría de la Reforma Agraria*) of the Mexican Federal government's Secretary of the Agrarian Reform to C. P. Rafael Casellas Fitzmaurice, Director General of Administration, and the reference on this communication reads "*Se Solicita Autorizacion de Recursos Financieros del Prog. Esp. de Abatimiento del Rezago Agrario,"* dated February 23, 1994.

31. In fact, the Mexican Federal government, itself is a party to a Release, which is also executed by the communal landowners of San Isidro, pursuant to which the communal landowners of San Isidro (i) acknowledged that the 1939 Presidential Resolution had been satisfied, and, therefore, (ii) no claim arising from the 1939 Presidential Resolution against *El Petacal* would ever ensue.[46]

32. Mexico's Federal government Secretary of Agrarian Reform also caused a second Release to be issued in connection with the waiver of any and all claims that the communal landowners of San Isidro would have against *El Petacal* arising from the 1939 Presidential Resolution.[47]

33. Mr. Hunter's testimony on the Mexican Federal government's and the government of the State of Jalisco's commitment to have NPI and Nutrilite S.R.L. purchase the remaining 120 hectares and develop a world-class organic farming, processing, and packaging operation in the impoverished southern region of the State of Jalisco, by

---

[46] Attached as **C-0032-SPA** to facilitate reference is a Release dated March 14, 1994, stamped "*Registro Agrario Nacional Secretaría de Desarrollo Agrario Territorial y Urbano*" (SEDATU), which in part reads:

> ***CONVENIO*** *QUE CELEBRAN LA SECRETARIA DE LA REFORMA, REPRESENTADA POR LOS CC. LICENCIADOS RAUL PINEDA PINEDA, OFICIAL MAYOR-E. IGNACIO RAMOS ESPINOZA, DIRECTOR GENERAL DE ASUNTOS JURIDICOS, - LOS CC. REPRESENTANTES LEGALES DE LA ACCIÓN DE* ***DOTACION DE TIERRAS*** *TRAMITADA POR EL POBLADO DENOMINADO* ***'SAN ISIDRO'****, MUNICIPIO DE* ***VENUSTIANO CARRANZA HOY SAN GABRIEL****, ESTADO DE* ***JALISCO*** *Y LOS CC.* ***ESPERANZA NAVA GOMEZ Y JOSE NAVA PALACIOS****, PROPIEDAD Y USUFRUCTA – RIO, VITALICIO RESPECTIVAMENTE, DEL PREDIO DENOMINADO 'PASO DE CEDROS' O 'POTRERO GRANDE', UBICADO EN EL MUNICIPIO DE TOLIMÁN, ESTADO DE JALISCO, A QUIENES EN EL TEXTO DE ESTE CONVENIO SE LES DESIGNARA COMO* ***'LA SECRETARIA'****,* ***'EL POBLADO'*** *Y* ***'EL PROPIETARIO'*** *RESPECTIVAMENTE PARA SOLUCIONAR EL CONFLICTO SOCIAL EXISTENTE EN EL POBLADO SEÑALADO, EN CUANTO AL BIEN INMUEBLE QUE EN EL SE INDICA Y-AL TENOR DE LAS DECLARACIONES Y CLAUSULAS QUE A CONTINUACION SE DE DETALLAN.*

[47] Attached as **C-0033-SPA** to facilitate reference is a Release dated March 14, 1994 executed by Victor M. Cervera Pacheco, on behalf of the Secretary of the Agrarian Reform, Mr. C. Gerardo Avalos Lemus, on behalf of the "*Union Campensina Democratica*" and Mr. Adolfo Reyes González, *Presidente del Comisariado Ejidal del Poblado 'San Isidro', Venustiano Carranza hoy San Gabriel*, Jalisco.

ensuring that the communal landowners of San Isidro would agree (i) that the 1939 Presidential Resolution has been fully discharged, and (ii) to waive any claims to *El Petacal* arising from the 1939 Presidential Resolution, is helpful:

> *The Mexican Federal government and the government of the State of Jalisco concluded that it was in Mexico's national best interest to provide the communal landowners with the identical number of hectares of land of comparable quality in the region. The thinking was that by providing the communal landowners with comparable property as to quality (in the very region) and quantity (280 hectares), the communal landowners would acknowledge that the August 23, 1939 Presidential Resolution had been satisfied and release any claims to El Petacal. Federal and State Mexican government officials identified such comparable land in the vicinity. This land was known as Potrero Grande or Paso de Cedros. It is my understanding this property was owned by private landowners.*
>
> *Mexican Federal and State government officials wanted to protect foreign direct investment in Mexico while satisfying the claims that approximately forty-five (45) San Isidro communal landowners were asserting. Mexico's Federal government proceeded to acquire with federal funds Potrero Grande or Paso de Cedros from the private sector owners of the property and to transfer Potrero Grande or Paso de Cedros to the San Isidro communal property owners in exchange for a written agreement that this satisfied the August 23, 1939 Presidential Resolution and released any claim that they claimed to be able to assert arising from the August 23, 1939 Presidential Resolution.*
>
> *These facts were made known to me at the time [third quarter of 1993]. Since then, however, I have been provided with a number of documents that factually seem to corroborate this understanding.* [48]

34. Documents authored by and subscribed to by representatives of Mexico's Federal government and the government of the State of Jalisco establish as a matter of fact and law that the 1939 Presidential Resolution cannot be used as a basis for taking the 280 hectares comprising *El Petacal*.

---

48 Hunter Witness Statement (**CWS-001**) at ¶¶ 151-153.

IV. REPRESENTATIVES OF MEXICO'S FEDERAL GOVERNMENT AND OF THE GOVERNMENT OF THE STATE OF JALISCO INVITED NPI AND NUTRILITE S.R.L. TO PURCHASE THE REMAINING 120 HECTARES AND TO CREATE A WORLD-CLASS ORGANIC FARMING, PROCESSING, AND PACKAGING OPERATION IN ORDER TO BRING MICRO- AND MACRO- ECONOMIC DEVELOPMENT TO THE REGION IN THE SOUTH OF THE STATE OF JALISCO KNOWN AS *EL LLANO EN LLAMAS*

A. Representatives of Mexico's Federal Government and the Government of the State of Jalisco Assured NPI and Nutrilite S.R.L. That They Would Lawfully Cause the Communal Landowners of San Isidro to Waive Any Claim to *El Petacal* That May Have Arisen Under the 1939 Presidential Resolution

35. The Federal government of Mexico itself ensured and assured that the 1939 Presidential Resolution would be fully discharged by March 14, 1994. Therefore, NPI and Nutrilite S.R.L., according to the Mexican Federal government's own written representations, would be assured that the purchase of the 120 hectares parcel and the staged investment would not be in any way disrupted by claims to the property pursuant to the 1939 Presidential Resolution.

36. An objective review of the documents subscribed to and authored by representatives of Mexico's Federal government and of the State of Jalisco's government constitute compelling evidence beyond cavil. The Mexican government's own documents comprise the most compelling evidence in this case.

1. *Acuerdo de Concertación*

37. A document dated September 15, 1993 and titled: "*Acuerdo de Concertación*" ("*Coordination Agreement*") memorializes the initiative to acquire *Potrero Grande* or *Paso de Cedros* from private sector owners and to convey this property to the San Isidro communal landowners in exchange for waiver of any claims that the communal landowners had or could have under the 1939 Presidential Resolution with respect to entitlement to *El Petacal*.[49] The purpose of the *Coordination Agreement* is succinctly

[49] *See supra* note 41 (**C-0020-SPA**).

stated as "*to resolve in a coordinated fashion the Agrarian dispute concerning the lands known as Puerto de Petacal, Municipality of San Gabriel.*"[50]

38. It is significant for the Tribunal to note that the signatories to this Agreement were

(a) the communal landowners of San Isidro,

(b) the legal representatives of the San Isidro communal land owners,

(c) Exportag, S.A. de C.V. (NPI's and Nutrilite S.R.L.'s representative),

(d) representatives of the *Grupo de Campesinos El Petacal*,

(e) representatives of the Secretary of the Agrarian Reform (Mexican Federal government),

(f) the Coordinador del Comité Estatal de Concertación Agraria, and

(g) representatives of the Government of the State of Jalisco for Social Development.

39. The *Coordination Agreement* in the Spanish language original in relevant part provides:

> *1. La Empresa Exportag, S.A. de C.V. y el* ***gobierno federal y al gobierno del estado****, otorgan un predio de 140 HAS. Denominado 'Paso de Cedros' o 'Potrero Grande' ubicado en la zona.*
>
> *2. Los campesinos derechosos aceptan solicitar a la autoridad agraria para que haga nuevo proyecto de localización que contenga sólo 140 HAS. del predio 'Paso de Cedros' o 'Potrero Grande.'*
>
> ***3. La Empresa Exportag, S.A. de C.V. [representative of NPI and Nutrilite S.R.L.], se compromete a elaborar un plan maestro de desarrollo económico financiero en el predio ofreciéndoles productores. Éste contendrá los requerimientos necesarios para establecer una empresa productora de hortalizas y básicos.***

50 *Id.*

> ***4. El Gobierno del Estado [State of Jalisco] y la Empresa Exportag, S.A. de C.V. [representative of NPI and Nutrilite S.R.L.], se comprometen a desarrollar la infraestructura básica de caminos, que permita el tránsito vehicular de manera razonable.***
>
> *5. El Gobierno del Estado [State of Jalisco], considerará el proyecto como prioridad en sus programas para apoyar su desarrollo en la medida de sus posibilidades ….*
>
> *No habiendo más asunto que tratar, se cierra el* ***presente convenio*** *siendo las 12:00 HRS. del mismo día, mes y año, firmando de conformidad los que en ella intervinieron para su debido cumplimiento.*[51]
>
> (Emphasis supplied.)

40. The referenced language points to three foundational premises that are purely factual in nature and rooted in the ordinary and plain language of the cited text. First, the Federal government and the government of the State of Jalisco demonstrate support for Nutrilite and NPI, and agree to work together.

41. Second, NPI and Nutrilite S.R.L., through their representative (Empresa Exportag, S.A. de C.V.) agree to partner with the government of the State of Jalisco to provide basic infrastructure to the region. As will be demonstrated in this writing, again mostly pursuant to documents authored by representatives of Mexico's Federal government and the government of the State of Jalisco, Nutrilite S.R.L. and NPI did more than just provide roads. They provided (i) healthcare[52], (ii) bridges[53], (iii) roads,[54] (iv)

---

51 *Id.*

52 Hunter Witness Statement (**CWS-001**) at ¶ 144.

53 Hunter Witness Statement (**CWS-001**) at ¶ 142.

54 Hunter Witness Statement (**CWS-001**) at ¶ 142.

electricity[55], (v) potable water[56], (vi) irrigation water[57], (vii) sewage water[58], (viii) employment[59], and (ix) schooling[60].

42. Third, the communal landowners of San Isidro agreed to accept *Paso de Cedros* or *Potrero Grande* as part of the contemplated consideration tendered in exchange for relinquishment of any and all claims to ownership of *El Petacal* pursuant to the 1939 Presidential Resolution.

43. Significantly, the *Coordination Agreement* represents an initiative on the part of the Federal Secretary of Agrarian Reform Delegate to the State of Jalisco proposed to the *Oficial Mayor de La Secretaría de la Reforma Agraria en México, Distrito Federal,* so that the Federal government itself would open a file concerning the purchase of *Potrero Grande* or *Paso de Cedros*.[61] The Tribunal is invited to note that on page 2 of the November 19, 1993 Administrative Order here attached as (**C-0023-SPA)** to this Memorial, the Spanish language original reads:

> ***OPINION:*** *Vistos los antecedentes y consideraciones expuestas en los párrafos precedentes resulta procedente la instauración de la compra-venta respecto del predio 'Paso de Cedros' o 'Potrero Grande', con una superficie de … a fin de cumplimentar subsidiariamente la Resolución Presidencial referida [Presidential Resolution dated August 23, 1939] y con ello finiquitar el problema social existente ….*

55 Hunter Witness Statement (**CWS-001**) at ¶¶ 109-133.

56 Hunter Witness Statement (**CWS-001**) at ¶¶ 134-146.

57 Hunter Witness Statement (**CWS-001**) at ¶¶ 134-146.

58 Hunter Witness Statement (**CWS-001**) at ¶¶ 134-146.

59 Hunter Witness Statement (**CWS-001**) at ¶ 88 and 121-122.

60 Hunter Witness Statement (**CWS-001**) at ¶ 223.

61 *See supra* note 43 (**C-0023-SPA).**

44. The very last page of this *Administrative Order* reflects that it was sent to the Secretary of the Agrarian Reform, Mr. Víctor M. Cervera Pacheco.

45. The documents of record before this Tribunal reflect that the entire file, including the *Coordination Agreement*, was sent to the Director General of Legal Affairs of Secretary of the Agrarian Reform in Mexico, *Distrito Federal*.[62] This communication provides that the project was registered with the "*Coordinación de Pago de Predios e Indemnizaciones*". This was done so that the project could be reviewed from a legal perspective given the condition precedent to having an opinion issued on the specific question concerning the legal sufficiency of the acquisition and transfer of *Paso de Cedros* o *Potrero Grande* to the communal landowners of San Isidro in exchange for their relinquishment of any claim to ownership of *El Petacal* under the 1939 Presidential Resolution.

46. The documentation before this Arbitral Tribunal demonstrates that on February 9, 1994, Mr. Juan Reyes Flores, the *Coordinator of Payments Concerning Real Property and Indemnifications* provided the Director General of Legal Affairs of the Secretary of the Agrarian Reform with a cover letter transmitting the *Coordination Agreement* for his consideration in connection with issuance of the Legal Opinion referenced in the immediately preceding sentence. Significantly, that communication describes the *Coordination Agreement* as "*having been executed for the purpose of resolving the agrarian conflict in the Puerta del Petacal….*"[63]

---

62 *See supra* note 45 (**C-0026-SPA).**

63 *Id.* (**C-0027-SPA).**

The Spanish language original of the language cited states, "[d]icho *Acuerdo fue llevado a cabo con la finalidad de resolver el conflicto agrario en el Potrero Puerta El Petacal*."

47. Indeed, just two days later, on February 11, 1994, the Department of Payments Concerning Real Property and Indemnifications of the Secretary of the Agrarian Reform in Mexico issued a communication advising on the status of the approval process.[64] On that very same date, the owners of *Paso de Cedros* or *Potrero Grande* supplied the *Secretary of Agrarian Reform*, Víctor M. Cervera Pacheco, with the value of *Paso de Cedros* or *Potrero Grande*, and account information.[65]

48. Having gathered all the requisite information to complete the file in furtherance of *certification* and *approval* of the purchase by the Federal government of Mexico of *Potrero Grande* or *Paso de Cedros*, on February 18, 1994 the Coordinator of Payments Concerning Real Property and Indemnifications of the Secretary of the Agrarian Reform in Mexico, Federal District, transferred the file to the Coordinator of the Program for the Incorporation of Lands to the Ejido Regime. Correspondence dated February 18, 1994 from Lic. Juan Reyes Flores to the Lic. Arturo Sánchez Zavala (Coordinator of the Program for the Incorporation of Lands to the Ejido Regime) reflects that the administrative process just had to be verified and approved.[66]

49. The Director General of Legal Affairs of the Department of Payments for Real Property and Indemnifications of the Secretary of the Agrarian Reform then issued a *Legal Opinion* stating that the Technical Committee of Payments of Real Property and Indemnifications (*Comité Técnico de Pagos de Predios e Indemnizaciones*) is legally able to render possible the purchase of *Potrero Grande* or *Paso de Cedros* from Mr. José Nava Palacios and Mrs. Esperanza Nava Gómez. The purpose of this

---

64 *Id.* (**C-0028-SPA).**

65 Attached as **C-0034-SPA** to facilitate reference are owners of *Potrero Grande* and *Paso de Cedros* valuation and account information provided to the *Secretary of the Agrarian Reform*, Víctor M. Cervera Pacheco dated February 11, 1994.

66 *See supra* note 45 (**C-0029-SPA).**

communication was to ensure that the 1939 Presidential Resolution would be discharged and satisfied in every regard so that the communal landowners of San Isidro would relinquish any and all claims to ownership of or entitlement to *El Petacal*, including any claims premised on the referenced Presidential Resolution.[67]

50. The *Legal Opinion's* textual language is important.[68] The first citation that the Arbitral Tribunal respectfully is asked to consult is found under the heading, "*Consideraciones*," in relevant part in the Spanish language original reads:

> *I. – Que del informe del delegado agrario en el estado de Jalisco, se desprende que por Resolución Presidencial de fecha 23 de agosto de 1939, se concedió por concepto de dotación de ejido al poblado 'San Isidro' una superficie de 536-00-00 hectáreas. Mandato Presidencial que fue ejecutado en forma parcial en virtud de que solo se le entregó al poblado beneficiado una superficie de 256-00-00 hectáreas.* ***Es por ello, que la autoridad de referencia es de la opinión de que se adquieran vía compra las diversas fracciones que conforman el predio rústico denominado 'Paso de Cedros' o 'Potrero Grande', con superficie total de 335-34-46 hectáreas, para cumplimentar en todos sus términos el fallo Presidencial citado en beneficios del poblado 'San Isidro'****.*[69]
>
> (Emphasis supplied.)

51. The second statement contained in this writing appears under the heading, "*Opinión*":

> *Con base en los antecedentes y consideraciones mencionados, esta Dirección General emite opinión en el sentido de que previo cumplimiento a lo solicitado en los puntos II y III del presente dictamen,* ***no existe inconveniente para someter a la decisión de ese H. Comité Técnico de Pago de Predios e Indemnizaciones, la celebración de un convenio, por el cual, se adquiera la libre disposición de las fracciones que integran el predio rústico denominado 'Paso de Cedros' o 'Potrero Grande', con superficies de __-13-26, 37-00-00 y 258-21-20 hectáreas, respectivamente, propiedad de la C. Esperanza Nava Gómez: mientras que el usufructo vitalicio de la referida en tercer término, corresponde al C. José Nava Palacios para cumplimentar en todos sus términos la Resolución Presidencial de fecha 23 de agosto de***

---

67 *Id.* (**C-0022-SPA).**

68 *See supra* note 42 (**C-0022-SPA).**

69 *Id.*

1939, y con ello satisfacer las necesidades agrarias del poblado 'San Isidro'.[70]

(Emphasis supplied.)

52. On February 23, 1994, the *Comité Técnico de Pago de Predios e Indemnizaciones* approved issuance of payment for purposes of acquiring *Potrero Grande* or *Paso de Cedros* and applied for "extra urgent" authority to tender payments by appealing to the *Programa Especial de Abatimiento de Rezago Agrario* in order to bring closure to the claim on *El Petacal* on the part of the communal landowners of San Isidro.[71]

53. On March 14, 1994, the Secretary of the Agrarian Reform issued a receipt in the amount of N$668,055.35 for payment tendered to Mr. José Nava Palacios and Mrs. Esperanza Nava Gómez memorializing payment for the Mexican Federal government's purchase of *Potrero Grande* or *Paso de Cedros* as part of the project to convey this property to the communal landowners of San Isidro in exchange for their acknowledgement of satisfaction of the 1939 Presidential Resolution and complete relinquishment as to any claim to title to *El Petacal*, including one premised on the 1939 Presidential Resolution.[72]

54. The Tribunal will note that the Secretary of the Department of the Treasury and Public Credit (*Secretaría de Hacienda y Crédito Público de la Tesorería de la Federación*) issued a check, which also reflects authorization from the Bank of Mexico (Banco de México), to proceed with the Federal government's purchase. The Arbitral Tribunal

---

70 *Id.*

71 Attached as **C-0035-SPA** to facilitate reference is the "*Comité Técnico de Pago de Predios e Indemnizaciones*" approval of payment, dated February 23, 1994.

72 Attached as **Composite C-0036-SPA** to facilitate reference are Receipts and check copy from the Agrarian Reform, dated March 14, 1994.

also will note that the check has an attached receipt signed by Mrs. Esperanza Nava Gómez and Mr. José Nava Palacios.[73]

55. In what follows are references to documents establishing that Federal and State Mexican government representatives attested to the legal sufficiency of having provided to the communal landowners of San Isidro *Potrero Grande* or *Paso de Cedros* in full satisfaction of the 1939 Presidential Resolution, and in exchange for a release of all claims on behalf of the communal landowners of San Isidro to a property interest in *El Petacal*, including any such claim premised on the 1939 Presidential Resolution.

56. First, the Arbitral Tribunal is invited to consult a document titled: "*Showing of Conformity*" (*Manifiesta Conformidad*).[74] This document is presumably signed by the Secretary of the Communal Landowners' Commission for the Township of San Isidro at the time (*El Comisario Ejidal Secretario)* and by the President of the Communal Landowners' Commission, Mr. José Araiza Chávez. Dated March 26, 1994, this document purports to memorialize *conformity* and *satisfaction* regarding the *physical* and *legal* sufficiency of *Potrero Grande* or *Paso de Cedros* in connection with the project at issue.

57. The document is also twice stamped by the Federal Agrarian National Registry of the Secretary of Agrarian Development (*Registro Agrario Nacional Secretaría de Desarrollo Agrario*). Moreover, this instrument establishes that the communal

[73] Attached as **Composite C-0037-SPA** to facilitate reference are check copies totaling N$668,055.35 for payment tendered to Mr. José Nava Palacios and Mrs. Esperanza Nava Gómez, dated March 9, 1994.

[74] Attached as **C-0038-SPA** to facilitate reference is the document titled: *Asunto: Se Manifiesta Conformidad*, dated March 26, 1994.

landowners of San Isidro *received actual possession* of *Potrero Grande* or *Paso de Cedros*.[75]

58. Similarly on March 26, 1994, on behalf of the communal landowners of the San Isidro Township, Mr. José Ariaza Chávez and Ms. Guadalupe Reyes Martínez, as President and Secretary, respectively, of the Communal Landowners Commission for the Township of San Isidro (*El Comisario Ejidal Secretario*) acknowledged receipt of all documents concerning title to and possession of *Potrero Grande* or *Paso de Cedros* in satisfaction and discharge of the 1939 Presidential Resolution.

59. This document acknowledged receipt of six (6) documents that accordingly purport to transfer ownership of *Potrero Grande* or *Paso de Cedros* from the Federal government of Mexico to the communal landowners of the Township of San Isidro. The relevant language is cited below for the Arbitral Tribunal's convenience:[76]

> *… por medio de la presente manifestando haber recibido la documentación relativa al deslinde y amojonamiento de los terrenos del predio denominado 'Paso de Cedros', o 'Potrero Grande', con una superficie de las 280-00-00 Has. que por entrega precaria se nos ejecutó* ***para complementar nuestra Resolución Presidencial de dotación de fecha 23 de agosto de 1939****, la cual consiste en la siguiente:*
>
> *Copia del oficio de comisión.*
>
> *Copia del convenio de fecha 11 de marzo de 1994.*
>
> *Copia del convenio subsidiario de fecha 11 de marzo de 1994.*
>
> *Copia del acta de posesión y virtual de las 280-00-00 Has.*
>
> *Copia del acta de deslinde y amojonamiento de las 280-00-00 Has.*
>
> *Copia del plano del deslinde complementario.*
>
> (Emphasis supplied.)

---

[75] *Id.*

[76] Attached as **C-0039-SPA** to facilitate reference is the document titled: *ASUNTO: Acuse de Recibo*, March 26, 1994.

This instrument is also stamped by the *Registro Agrario Nacional Secretaría de Desarrollo Agrario*.

60. A third document signed on March 26, 1994, also by Mr. José Ariaza Chávez and Ms. Guadalupe Reyes Martínez, as President and Secretary, respectively, purports to attest to these individuals having been duly satisfied that the property known as *Potrero Grande* or *Paso de Cedros* was comprehensively surveyed, inspected, and tendered to the communal landowners of San Isidro on that same date.

61. This document as well states that the inspection, surveying, and taking possession of this property was in satisfaction of the "*[a]cción de dotación de tierras de fecha veintitrés de agosto de 1939, publicada en el diario oficial de La Federación el 18 de noviembre del mismo año*". The document also appears to be stamped by the Federal Agrarian National Registry of the Secretary of Agrarian Development (*Registro Agrario Nacional Secretaría de Desarrollo Agrario Territorial y Urbano*).[77]

62. The fourth document meriting consideration and respectfully brought to the Arbitral Tribunal's attention is a copy of what purports to be the official signed Minutes of the actual taking of possession of *Potrero Grande* or *Paso de Cedros* by the communal landowners of San Isidro.

63. Quite notably, the Arbitral Tribunal will observe this document is signed by the Governor of the State of Jalisco, and is dated March 17, 1994, two months before the purchase of the 120 hectares forming part of the 280 hectares of *El Petacal*. It also is signed by the Delegate to the State of Jalisco of the Federal Secretary of the Agrarian Reform, Mr. Alejandro Díaz Guzmán. Like the three documents referenced

[77] Attached as **C-0040-SPA** to facilitate reference is document indicating that *Potrero Grande* or *Paso de Cedros* was duly surveyed, inspected, and tendered to the communal landowners of San Isidro on that date, March 26, 1994.

immediately preceding this one, these Minutes are signed as well by the President, Secretary, and Treasurer, of the Commission of the Communal Landowners of the Township of San Isidro.

64. There are two additional signatories to this instrument; (1) Mr. Gerardo Avalos Lemus (Dirigente Estatal de la Central Campesina U.C.D.), and (2) the Secretario y Síndico del H. Ayuntamiento Constitucional de Tolimán, Jalisco.

65. This writing in part states:

> *… en su carácter de Delegado Agrario en el Estado y contando con la presencia del* ***C. Gobernador Constitucional en el Estado, Lic. Carlos Rivera Aceves y asimismo los CC José Raiza Chávez, J. Guadalupe Reyes Martínez y Alfredo Villa Jacobo, en su carácter de Presidente, Secretario y Tesorero respectivamente, del Comisariado Ejidal*** *en funciones en términos del 2º. Párrafo del artículo 39 de la Ley Agraria vigente, del poblado 'San Isidro', Municipio de San Gabriel (antes Venustiano Carranza), Jalisco, y el* ***C. Dip. Gerardo Avalos Lemus en su calidad de Representante Legal del núcleo agrario*** *en que se actúa y a su vez como Dirigente Estatal de la Central Campesina denominada Unión Campesina Democrática;* ***todos con la finalidad de dar el debido cumplimiento al Convenio de Finiquito Agrario celebrado ante la Oficialía Mayor de la Secretaria de la Reforma Agraria el día 14 del presente mes de marzo****, mediante el cual los CC Esperanza Nava Gómez y José Nava Palacios pusieron a disposición de esta Dependencia del Ejecutivo Federal, varias fracciones del predio rústico al inicio mencionado, para satisfacer las necesidades agrarias de los integrantes de la Dotación del Ejido del Poblado de 'San Isidro', del Municipio de San Gabriel, Jalisco,* ***por lo que acto seguido, el C. Lic. Alejandro Diaz Guzmán, procede con apoyo en las instrucciones que le girará el C. Víctor Cervera Pineda Pineda, Oficial Mayor de la misma, mediante Oficio No. P.I. 333/94 fechado el día 12 del mes en curso, a realizar la Entrega Precaria Virtual de un superficie total de 280-00-00 Has. de terrenos de temporal y agostadero del multicitado predio rústico denominado 'Paso de Cedros' o 'Potrero Grande', de lo que fuera propiedad de Esperanza Nava Gómez y José Nava Palacios; los CC Integrantes del Comisariado Ejidal del poblado citado en antecedentes, manifiestan que es de recibirse y se recibe a su entera satisfacción, la superficie de terreno descrita con anterioridad****, ya que con la misma quedan satisfechas las necesidades agrarias de la Dotación de Ejido que representan y se comprometen en este momento para que juntamente con los técnicos comisionados por la Delegación Agraria en el Estado, a realizar el deslinde de amojonamiento de la*

superficie de referencia, para que en su oportunidad se levante el acta respectiva.[78]

(Emphasis supplied.)

66. Mr. Hunter testifies as follows with respect to this instrument:

I believe this single-page document is helpful because it facilitates explaining to the Arbitral Tribunal how, during the second half of [calendar year] 1993 and the first quarter of [calendar year] 1994, representatives of Mexico's Federal and State governments were very proactive in communicating to Nutrilite S.R.L., and, therefore, to NPI, and the entire Amway family of companies, that El Petacal would be free from any cloud on title that could jeopardize the organic farming and processing operation that was planned at that time. In addition to illustrating and symbolizing this concerted effort on the part of Federal, State, and local governments, this document also is emblematic of the communal landowners of San Isidro's acknowledgement that the August 23, 1939 Presidential Resolution was discharged, thus extinguishing any claim to ownership of El Petacal that could have existed by dint of the August 23, 1939 Presidential Resolution.[79]

67. These minutes explicitly reference the "*Convenio de Finiquito Agrario,*" signed on March 14, 1994 pursuant to which the communal landowners of the San Isidro Township surrendered any claim that they otherwise could have regarding ownership of the real property constituting *El Petacal*. Two such agrarian releases actually were executed, as discussed below in greater detail.[80]

68. Fifth and finally, the Arbitral Tribunal respectfully is invited to consider a document titled: Acta Relativa al Deslinde y Amojonamiento de los Terrenos Que Se Entregan al Núcleo Agrario Denominado "San Isidro", Municipio de San Gabriel (antes Venustiano Carranza), Estado de Jalisco, en Cumplimiento al Convenio de Finiquito

---

78 Attached as **C-0041-SPA** to facilitate reference are Minutes of the actual taking of the session of *Potrero Grande* or *Paso de Cedros* by the communal landowners of San Isidro, dated March 17, 1994.

79 Hunter Witness Statement (**CWS-001**) ¶ 177.

80 *See supra* note 46 (**C-0032-SPA**) and note 47 (**C-0033-SPA**).

Celebrado el once de marzo de mil novecientos noventa y cuatro, por la Oficialía Mayor de la Secretaría de la Reforma Agraria ("Acta de Deslinde").[81]

69. This *Acta de Deslinde* was signed by the entire "*Comisariado Ejidal de San Isidro, Municipio de San Gabriel, Estado de Jalisco*." This document contains a legal description of *Potrero Grande* or *Paso de Cedros*. The legal description can be noted as constituting the greater part of this instrument.

70. The document also cites to a statement by the President of the *Comisariado Ejidal* (President of the Commission of the Communal Landowners of the Township of San Isidro) with respect to which he states in the Spanish language original:

> *… En nombre del poblado 'San Isidro', Municipio de San Gabriel, Jalisco, declaro que son de recibirse y se reciben a nuestra entera satisfacción las tierras descrita con anterioridad* ***ya que con las mismas queda cumplimentada en su totalidad nuestra Resolución Presidencial de fecha 23 de agosto de 1939, que concedí dotación de ejido al poblado que represento ….***
>
> (Emphasis supplied.)

71. This *Acta de Deslinde* furthermore contains a declaration by the Engineer who was commissioned to survey the property described in this instrument. The Engineer's declaration is cited for the Arbitral Tribunal's ease of reference:

> *…En cumplimiento al Convenio de Finiquito Agrario celebrado el once de marzo de Mil Novecientos Noventa y Cuatro, ante la Oficialía Mayor de la Secretaria de la Reforma Agraria y con apoyo a las instrucciones giradas por su Titular Víctor Cervera Pacheco, a través de Lic. Raúl Pineda Pineda, Oficial Mayor de la misma, mediante el oficio número P.I. 333/94 de fecha 14 de marzo del año en curso, doy posesión precaria de las tierras que se acaban de recorrer y describir y que están señaladas en el plano respectivo y cargo formalmente entrega de ellas a este poblado por conducto de su Comisariado Ejidal….*

72. These documents directly were drafted by Federal and State Mexican government officials. In a handful of instances Federal and State Mexican government officials

---

81 Attached as **C-0042-SPA** to facilitate reference is the *Acta de Deslinde*, dated March 11, 1994.

caused some of these documents to be written by designated professionals (civil law Notaries, and lawyers).

73. Collectively these documents emanating from the Federal government of Mexico and the government of the State of Jalisco paved the way for NPI's and Nutrilite S.R.L.'s acquisition of the additional 120 hectares constituting *Puertas Uno* and *Dos* of *El Petacal* in May 1994, and for the implementation of the staged investment and development plans (which had previously been put on hold) in 1996 through approximately 2008 and, indeed for all subsequent investments through the present day.[82]

74. The importance of the Mexican Federal government's initiative, with the support of the government of the State of Jalisco, in extinguishing any claim to *El Petacal* that could be brought pursuant to the 1939 Presidential Resolution was critical (i) to the acquisition of the remaining 120 hectares later in May 1994, and (ii) to the subsequent staged investment that mostly took place between 1996 and 2008. Mr. Hunter testifies on this point as follows:

> *The conveyance of Potrero Grande or Paso de Cedros to the communal landowners of San Isidro in satisfaction of the August 23, 1939 Presidential Resolution was viewed as a very significant event. In addition to having taken place publicly, the satisfaction of the August 23, 1939 Presidential Resolution pursuant to the conveyance of this property was highly publicized both regionally and nationally. Numerous newspaper articles covered the event and praised the State government of Jalisco and the Federal government for (i) honoring a land grant that had issued [August 23, 1939] at that time (1994) fifty-five (55) years earlier, and (ii) safeguarding foreign direct investment and the micro- and macro-economic development of the southern region (El Llano en Llamas) of the State of Jalisco.*[83]

---

82 Hunter Witness Statement (**CWS-001**) at ¶ 183.

83 *Id.* at 72, ¶ 184.

75. One of the newspaper articles to which Mr. Hunter refers, titled: "*El gobernador entregó tierras en San Gabriel*," captures the benefits of purportedly satisfying the 1939 Presidential Resolution, while rendering it possible for NPI and Nutrilite S.R.L. to invest in the Municipality of San Gabriel. Citing to then Governor of Jalisco, Carlos Rivera Aceves, the article in pertinent part reads:

> *'… Lo que hoy vemos con resultados positivos es producto de una lucha que se inició hace años, que se creía en algunos minutos perdida o difícil, pero que ha tenido fruto gracias a la concertación, a la participación de todos y al deseo de las partes en lograr un entendimiento.'*
>
> *'Ahora tenemos que ponernos a trabajar todos para que esas tierras produzcan. Hacemos el compromiso del Gobierno de Estado, de que en la medida de nuestras posibilidades, a través de la Secretaría de Desarrollo Rural, los apoyaremos para que sean productivas.'*
>
> *Expresó su certidumbre de que así se motivará a las empresas que aquí están trabajando para que realicen alguna concertación de esfuerzos y logren mejores frutos para la comunidad.*
>
> ***
>
> *El mandatario estatal subrayó su emoción porque un municipio enclavado en la zona desértica del Sur de Jalisco esté recibiendo este tipo de beneficios.*
>
> *Fue informado de que la decisión de establecer estas industrias de tanta importancia para este ejido tan aislado, se debe a que se reúne las condiciones climatológicas indispensables para los trabajos que se realizan.*
>
> *Es tanta la confianza de estas empresas en el árido Petacal, que se viene trabajando aquí desde hace dos años incluyendo el compromiso de los empresarios de otorgar el servicio de agua potable a la comunidad.*[84]

76. The testimony before this Tribunal establishes that NPI and Nutrilite S.R.L. were invited (i) to purchase the remaining 120 hectares comprising *El Petacal*, (ii) to invest in the southern region of the State of Jalisco known as *El Llano en Llamas*, and (iii) in keeping with the immediately referenced newspaper article, to provide basic

---

[84] Attached as **C-0043-SPA** to facilitate reference is a newspaper article from the newspaper, *"EL INFORMADOR DIARIO INDEPENDIENTE,"* "*El gobernador entregó tierras en San Gabriel*," dated March 18, 1994 No. 27,422 at 1, 3-C. *See also* Hunter Witness Statement (**CWS-001**) at n. 64.

infrastructure in the way of electricity, roads, bridges, and potable water, among other utilities and foundational infrastructure.[85]

V. NPI'S AND NUTRILITE S.R.L.'S RELIANCE ON THE INVITATION TO INVEST IN *EL PETACAL* AND IN THE REGION KNOWN AS *EL LLANO EN LLAMAS* TENDERED BY THE GOVERNMENTS OF MEXICO AND THE STATE OF JALISCO

A. The Conveyance of Potrero Grande or Paso de Cedros

77. The conveyance of *Potrero Grande* or *Paso de Cedros* to the communal landowners of San Isidro in exchange for waiver on the part of the communal landowners to challenge title to ownership of *El Petacal*, and to deem discharged any rights to property arising from the 1939 Presidential Resolution, caused NPI and Nutrilite S.R.L. to invest in *El* Petacal. And to work together with Federal Mexican government and

---

[85] See Hunter Witness Statement (**CWS-001**) at 73-85. Also, referenced here in order to facilitate the Arbitral Tribunal's consultation, are the principal infrastructure and related contracts that Nutrilite S.R.L., NPI, or ABG undertook as part of a voluntary commitment to develop not just the Municipality of San Gabriel, Township of San Isidro where *El Petacal* is located, but also the Municipalities of Tolimán, Tonaya, Tuxcacuesco, and Zapotitlán.

Attached as **C-0044-SPA** to facilitate reference is an Agreement dated February 13, 1994 between Nutrilite S.R.L., NPI, and representatives of the San Isidro communal landowners pursuant to which, among other things, NPI and Nutrilite S.R.L. commits to providing fifty-five (55) houses comprising the community of Tolimán with approximately 400 liters of water on a daily basis, and to provide the community with technical help in the construction and implementation of a sewage system; attached as **C-0087-1-ENG/SPA** to facilitate reference is an Agreement titled: "*Convenio de Coordinación y Colaboración y Sus Anexos,*" dated June 14, 1996, regarding the development of an electricity grid with a capacity of 5,000 KVA, which accordingly to the document in the Spanish original "… *lo cual generaría aproximadamente 1,000 empleos directos, más los indirectos que se deriven de los mismos, …*"; attached as **C-0046-SPA** to facilitate reference is an Agreement between the Municipality of Tolimán, along with the Municipality of the communities of *El Petacal* (*Delegado Municipal del Poblado de El Petacal*) pursuant to which Nutrilite S.R.L. would prepare and contribute to the installation of a sewage treatment plant, as well as provide necessary extraction equipment, dated June 3, 1999; attached as **C-0047-SPA** to facilitate reference is an Agreement/Stipulation dated January 6, 1995 between the residents of the El Petacal community, the Secretary of Rural Development of the State of Jalisco, and Nutrilite S.R.L. regarding the construction of bridges and roads.

See also Eppers Witness Statement (**CWS-002)** at 119-177, detailing the bringing of electricity, potable water, irrigation water, sewage water and corresponding treatment plan, roads, and bridges to the communities comprising *El Llano en Llamas*.

State of Jalisco government officials to develop the region known as *El Llano en Llamas.*[86]

78. On February 15, 1994, approximately five (5) months after the signing the *Coordination Agreement* (**C-0020-SPA**), and after many of the steps in the approval process for the purchase and transfer of *Potrero Grande* or *Paso de Cedros* that have been here detailed, a breakfast meeting was held at the Industrial Club of Guadalajara in which NPI, Nutrilite S.R.L. (represented by Exportag, S.A. de C.V.) and representatives of the Mexican Federal government and the government of the State of Jalisco were present. Mr. Hunter testifies to the following attendees:[87]

Alejandro Díaz Guzmán	Federal Delegate of the Secretary of the Agrarian Reform
Arturo Gil Elizondo	Secretary of Rural Development – State of Jalisco
Gustavo Martínez Guitón	Secretary of Economic Promotion – State of Jalisco
Humberto Anaya Serrano	Rural Development – State of Jalisco
Rafael Hidalgo Reyes	Sub General Manager Electricity District – State of Jalisco
Adriana de Aguinaga	Legal Counsel for Nutrilite S.R.L. (Goodrich Riquelme y Asociados)
Enrique Romero Amaya	Counsel for Nutrilite S.R.L.
Roberto Vargas Maciel	Exportag, S.A. de C.V.
Abelardo Reyes Vargas	Exportag, S.A. de C.V.
Sergio Vargas Maciel	Exportag, S.A. de C.V.
David T. Tuttle	Nutrilite.

79. Mr. Hunter testifies that at the breakfast meeting at the Industrial Club in Guadalajara, "*[i]t was explained that Potrero Grande or Paso de Cedros would be conveyed to the San Isidro communal landowners in satisfaction of the August 23, 1939 Presidential Resolution in exchange for an extinguishment of any claim that they have or would*

86 Hunter Witness Statement (**CWS-001**) at ¶¶ 183-184.

87 *Id.,* ¶ 190.

have to El Petacal , including any such claim arising from the August 23, 1939 Presidential Resolution."[88] He further testifies that "*[d]uring the meeting, Mr. Díaz-Guzmán Delegate of the Secretary of the Agrarian Reform of Mexico's Federal government approved the purchase of this property for N$2,000/hectare.*"[89]

80. The extent to which the Federal government of Mexico sought to reassure NPI and Nutrilite S.R.L. of the finality that the conveyance of *Potrero Grande* or *Paso de Cedros* to the San Isidro communal landowners would bring to any claim challenging ownership of *El Petacal*, including the 120 hectares yet to be acquired, compels citation of Mr. Hunter's testimony on this point in its entirety:

> *It also was discussed that any decree, judgment, or directive purporting to award El Petacal to the San Isidro communal landowners would not be enforced or executed upon while the conveyance of this property was pending. It was further agreed that Messrs. Díaz Guzmán and Gil Elizondo (Secretary of Rural Development for the State of Jalisco) would exercise best efforts to secure from the then Governor of the State of Jalisco and fervent supporter of the benefits that Nutrilite S.R.L. would bring to the region, Mr. Carlos Rivera Aceves, the purchase and subsequent conveyance of Potrero Grande or Paso de Cedros to the San Isidro communal landowners in full satisfaction of the August 23, 1939 Presidential Resolution and in exchange for waiver of any claim arising from such August 23, 1939 Presidential Resolution. It was agreed that the* ***Governor of Jalisco would write a letter in support of the Potrero Grande or Paso de Cedros transaction.*** *The Governor's letter would be hand-delivered to Mr. Víctor Cervera Pacheco, Secretary of the Agrarian Reform for the Federal government of Mexico.*
>
> *At the meeting Nutrilite S.R.L. reiterated its commitment to provide residents of the El Petacal community with potable and other waters. Furthermore, the attendees agreed to hold monthly follow-up meetings in order to maximize the likelihood of settling the communal landowners' claim as contemplated in the Coordination Agreement.*
>
> *On Thursday February 17, 1994, State of Jalisco Governor Rivera Aceves met with Mr. Terry Tuttle, Mr. Gil Elizondo, Mr. Romero Amaya, Mr. Díaz Guzmán, and Mr. Anaya Serrano.* ***At that time Governor Rivera Aceves made clear that he would implement every measure at his disposal to ensure that Nutrilite***

88 *Id.* at ¶ 191.

89 *Id.*

S.R.L.'s investment would be protected. Much more significantly, however, the Governor emphasized that at stake was the State of Jalisco's, and of greater consequence, the United Mexican States' ability to attract future investments from North America. This latter proposition was foremost on Governor Rivera Aceves' list of priorities.[90]

(Emphasis supplied.)

81. The representations of State and Federal Mexican government officials at the highest levels, which representations in part are memorialized in the documents already canvassed and forming part of this Memorial, "*caused Nutrilite S.R.L. to continue to invest in El Petacal at the time [first quarter of 1994] and after the finalization of the purchase and transfer of Potrero Grande or Paso de Cedros to the San Isidro communal landowners*."[91]

82. All of the attendees at the breakfast meeting at the Industrial Club in Guadalajara on the morning of February 15, 1994, signed an agreement (the "*Guadalajara Agreement*"). The signatories to that instrument, in part, pledged to undertake best efforts to make possible the purchase of *Potrero Grande* or *Paso de Cedros*, as well as the conveyance of this property to the communal landowners of San Isidro in satisfaction of the 1939 Presidential Resolution, and in exchange for any claims the communal landowners would have to *El Petacal*, including an action purportedly seeking execution of the 1939 Presidential Resolution.[92]

83. In addition to the very representations of State and Federal Mexican government officials at the highest levels, NPI and Nutrilite also relied on "*the Director General of Judicial Affairs of the Department for Payments Pertaining to Real Property and*

---

90 *Id.* At ¶ 192-194.

91 *Id.* at ¶ 196.

92 *See supra* note 41 (**C-0021-SPA**).

Indemnifications"[93] and the Judgment Decree issued by the Federal *Tribunal Unitario Agrario Distro 16*,[94] which representations subsequently were confirmed by the Federal Judicial Tribunal,[95] which caused Nutrilite S.R.L. to invest and to continue to implement its staged investment in *El Petacal*.[96]

84. The communal landowners of San Isidro simply could have elected to register the documents conveying *Potrero Grande* or *Paso de Cedros* in the public records. Such registration would provide notice to anyone concerned that the communal landowners of San Isidro owned title to *Potrero Grande* or *Paso de Cedros*.

85. Instead, the communal landowners of San Isidro opted for the more cumbersome, but perhaps in the eyes of public opinion normatively more valid, procedure to have a court issue a judgment recognizing, ratifying, and approving their ownership interest in the approximately 280 hectares comprising *Potrero Grande* or *Paso de Cedros*. Therefore, they filed papers with the *Federal Tribunal Unitario Superior Agrario* for issuance of the judgment here identified as (**RH-0001-SPA**).

86. The *Guadalajara Agreement* that resulted from the meeting at the Industrial Club in Guadalajara on the morning of Tuesday February 15, 1994 constitutes an emblematic example of the representations that representatives of Mexico's Federal and State governments communicated to NPI and Nutrilite S.R.L. The points agreed to in that document are self-explanatory and best appreciated by citation to the Spanish language original:

---

93 Attached as **C-0048-SPA** to facilitate reference is *Comité Técnico de Pago de Predios e Indemnizaciones* approval of payment dated February 23, 1994.

94 *See supra* (**Composite C-0024-SPA**).

95 *Id.*

96 Hunter Witness Statement (**CWS-001**) at ¶ 197.

1. *El Delegado Agrario, Lic. Alejandro Díaz Guzmán, se compromete a suspender cualquier intento de ejecución complementaria de la resolución presidencial dotatoria de tierras para el Ejido San Isidro, Municipio de Venustiano Carranza [now Municipalidad San Gabriel], Jalisco.*

   ***Lo anterior en virtud de la acción concertada por el Gobierno Estatal y Federal** para sustituir el predio 'Puerta del Petacal' por el predio 'Potrero Grande' o 'Paso de los Cedros', propiedad del Sr. José Nava Palacios y Esperanza Nava Gómez en la diligencia de ejecución, ya que el Ejido San Isidro y el propietario del predio 'Puerta del Petacal' así como los representantes de las instituciones que participan, **reconocen la inejecutabilidad de la resolución presidencial** en el predio 'Puerta del Petacal' una vez que se consolida la compra y sea debidamente ejecutada.*

2. *El mismo Delegado Agrario, Lic. Alejandro Díaz Guzmán, y el Lic. Arturo Gil Elizondo, **Secretario del Desarrollo Rural del Estado de Jalisco, se comprometen a unir esfuerzos y gestionar ante la Secretaría de la Reforma Agraria** la compra del predio mencionado 'Potrero Grande' o 'Paso de los Cedros' para que él a la mayor brevedad posible se ejecute en la resolución presidencial dotatoria que de manera complementaria beneficia al ejido San Isidro.*

   Asimismo, y siendo requisito indispensable para la integración del expediente de compra, la carta del C. Gobernador Constitucional del Estado, de apoyo al proyecto de la empresa Nutrilite, S. de R. L. de C.V., ambos funcionarios gestionarán la obtención de la misma ante el Ejecutivo del Estado y la remitirán al Oficial Mayor de la Secretaría de la Reforma Agraria.

3. ***El Ing. Gustavo Martínez Guitrón, Delegado de la Secretaría de Desarrollo y Fomento Industrial, declara su interés sobre el proyecto de inversión de Nutrilite Products, Inc. y de Nutrilite, S. de R. L. de C.V. en el estado, manifestando su apoyo para la solución concertada del conflicto agrario, que están gestionando los funcionarios que intervienen en este acto.***

4. *La Empresa Nutrilite, S. de R. L. de C.V. por conducto de sus representantes, se compromete a ejecutar los acuerdos contenidos en el acta **de fecha 13 de febrero de 1994 adoptados con la Comunidad del Petacal, respecto del suministro de agua para satisfacer sus necesidades y reforestación, que será apoyada por el Secretario de Desarrollo Rural.***

5. *Los presentes adquirieron el compromiso de participar en reuniones mensuales para evaluar y dar seguimiento a la solución concertada del conflicto agrario del predio 'Puerta del Petacal', proponiendo que la siguiente reunión tenga lugar en el predio mencionado, a efecto de constatar el desarrollo y progreso en la zona al que ha contribuido la*

empresa Nutrilite ***y demás instituciones que han apoyado su proyecto, las cuales se encuentran aquí presentes****.*[97]

(Emphasis supplied.)

87. This *Guadalajara Agreement*, much like the *Coordination Agreement*, will provide the Arbitral Tribunal, according to Mr. Hunter's testimony and just as important, the ordinary and plain textual language of the *Agreement*, with a sense of the support and representations that Mexican State and Federal government officials very affirmatively were communicating to Nutrilite S.R.L. and NPI. Mexican State and Federal representatives communicated to Nutrilite S.R.L. and NPI very tangible representations, such as the *Guadalajara Agreement* and the *Coordination Agreement*, regarding the stability, support, and protection that Nutrilite S.R.L.'s and NPI's investment would receive.[98] These representations assured Nutrilite S.R.L., NPI, and later ABG, that moving forward with the staged development of *El Petacal* would be a prudent and commercially sound course of conduct.[99]

1. The Governor of the State of Jalisco, Mr. Carlos Rivera Aceves, Writes Correspondence to Mexican Federal Government Supporting the Nutrilite S.R.L. Investment and Protecting Title to *El Petacal*

88. The Governor of the State of Jalisco, Mr. Carlos Rivera Aceves, in fact honored his promise to provide the Mexican Federal government (Mr. Víctor Cervera Pacheco, Secretary of Agrarian Reform) with a letter in support of the Mexican State and Federal

---

97 *See supra* (**C-0021-SPA**).

98 *See* Hunter Witness Statement (**CWS-001**) at ¶ 201.

99 *Id.*

government initiative to provide the communal landowners of San Isidro with "*Potrero Grande*" or "*Paso de Cedros*" in full satisfaction of the 1939 Presidential Resolution.[100]

89. Governor Rivera Aceves' letter in the Spanish language original merits sustained consideration:

> *Distinguido Sr. Secretario:*
>
> *Como es de su conocimiento, en esa Dependencia del Ejecutivo Federal a su cargo, se encuentra instaurado el expediente de compra del predio 'Paso de Cedros' o 'Potrero Grande', con una superficie de 334-00-00 hectáreas, propiedad de los Señores Esperanza y José Nava Flores,* ***a efecto de satisfacer vía subsidiaria, la acción agraria del Ejido 'San Isidro',*** *Municipio de San Gabriel, de esta Entidad Federativa, lo anterior considerando la imposibilidad material para la ejecución complementaria de la Resolución Presidencial dotatoria correspondiente, pero sobre todo con el fin de solucionar el conflicto socio-económico suscitado entre los campesinos de dicha comunidad agraria (U.S.D.) y* ***la Transnacional Nutrilite Amway, S. de R. L. de C.V., instalada en el predio 'Petacal', empresa ésta que en respuesta a la política de inversión en el campo, tiene proyectado un importante desarrollo agropecuario que obviamente redundaría en beneficio de la región, considerando la infraestructura y fuentes de trabajo que se generarían con su funcionamiento****.*
>
> *Por ello, Señor Secretario, a nombre del pueblo y del Gobierno del Estado de Jalisco, ruego su valiosa intervención al respecto a fin de que se agilice el procedimiento administrativo y en su caso, el Comité de Compras de Predios que Usted preside,* ***apruebe la adquisición del rústico de referencia, para beneficio de las familias campesinas de la zona rural en comento, así como el desarrollo Económico del Estado.***
>
> *Agradeciéndole sobremanera su invaluable apoyo al respecto, le reitero mi respeto y consideración más distinguida.*
>
> (Emphasis supplied.)

90. Emphasized in bold for the Arbitral Tribunal's ease of reference are notable factual features of the Governor's letter. *Prior* to the actual initiation of the investment in stages

[100] Attached as **C-0049-SPA** to facilitate reference is correspondence dated February 17, 1994 on letterhead "*Gobierno de Jalisco Poder Ejecutivo*" from Governor Carlos Rivera Aceves to C. Víctor M. Cervera Pacheco, *Secretary of the Agrarian Reform*.

(as early as February 1994, three (3) months before the 120 hectares – *Puertas Uno* and *Dos* of *El Petacal* were purchased) representatives of Mexico's Federal government and of the government of the State of Jalisco viewed the prospective investment as an undertaking that would contribute micro- and macro- economic gains to the region, and to the State of Jalisco. Here it is important to note that the Governor mentions, "*tiene proyectado un importante desarrollo agropecuario que obviamente redundaría en beneficio de la región, considerando la infraestructura y fuentes de trabajo que se generarían con su funcionamiento*."[101]

91. In addition to referencing a "regional" economic effect the Governor also noted that it is a future "projected" investment that "would redound" (*redundaría)* and "would generate" (*generarían*), using the conditional tense to refer to the future investment that is yet to take place.

92. Mr. Hunter testifies:

> *At that time, the last quarter of 1993 and first quarter of 1994, Nutrilite S.R.L. and NPI had the conviction that all levels of the Mexican government would cooperate in protecting the development and operation of an organic farming and processing center. For this reason, the staged investment ensued.*[102]

93. The Federal government of Mexico and the Government of Jalisco were so committed to the prospective investment that the Federal government *expedited* the processing of all internal procedures necessary to clear the purchase and conveyance of *Potrero Grande* or *Paso de Cedros* in order to discharge the 1939 Presidential Resolution, and thereby provide NPI and Nutrilite S.R.L. with assurance that title to *El Petacal* would not be clouded on the basis of the 1939 Presidential Resolution.

---

101 *Id.*

102 Hunter Witness Statement (**CWS-001**) at ¶ 205.

2. Expediting the Purchase and Conveyance of *Potrero Grande* or *Paso de Cedros*

94. The Governor's letter was provided to Mr. Raúl Pineda Pineda, Chief Clerk of the Agrarian Reform (Federal government), at 6:15 p.m. in Mexico City. The letter was then tendered to Secretary Cervera Pacheco.[103]

95. Mr. Hunter testifies that, "*Mr. Pineda Pineda in very clear terms stated that this project would be prioritized and processed with all due dispatch such that it 'could be resolved within the next two weeks'; meaning, by the end of the first week of March 1994.*"[104]

96. In an effort to ensure *Potrero Grande* or *Paso de Cedros* would be expeditiously (i) purchased, and (ii) conveyed to the San Isidro communal landowners, Mr. Pineda Pineda assigned the project to Mr. Arturo R. Sánchez Zavala, a staff attorney of the Agrarian Reform.[105]

3. Two Agrarian Releases (*Finiquitos Agrarios*) Are Executed With the Federal Government of Mexico Serving As a Signatory to One of the Releases

97. On March 14, 1994, the San Isidro communal landowners executed two (*Convenios*) agrarian releases stating that the 1939 Presidential Resolution had been satisfied and, therefore, they surrendered any claim that they had or could have arising from the referenced Presidential Resolution.[106] One of the agrarian releases (**C-0032-SPA**) was entered into between the Secretary of Agrarian Reform, the owners of *Potrero Grande* or *Paso de Cedros* Mr. José Nava and Mrs. Esperanza Nava Gómez, and the representatives of the communal landowners of San Isidro. That agrarian release

---

103 *Id.* at 82, ¶ 206.

104 *Id.* at 82, ¶ 207.

105 *See supra* note 45 (**C-0029-SPA).**

106 *See supra* note 46 (**C-0032-SPA**) and note 47 (**C-0033-SPA**).

referenced receipt on the part of Mr. José Nava and Mrs. Esperanza Nava Gómez of all the funds tendered to them in exchange for the conveyance of 280 hectares of property known as *Potrero Grande* or *Paso de Cedros*.

98. A second agrarian release (**C-0033-SPA**) was entered into between the Secretary of the Agrarian Reform and the communal landowners of San Isidro. In that instrument the communal landowners of San Isidro acknowledge that the Secretary of Agrarian Reform *appropriately* and *lawfully* made possible the conveyance of the 280 hectares known as *Potrero Grande* or *Paso de Cedros* in satisfaction of any claim that the communal landowners had or could have with respect to the execution of their rights pursuant to the 1939 Presidential Resolution. The agrarian release entered into between the Secretary of the Agrarian Reform and the communal landowners of San Isidro, in part reads:

> *Ley Federal de Reforma Agraria, tramitada por el poblado 'San Isidro', Municipio de Venustiano Carranza hoy San Gabriel Estado de Jalisco, entrega en forma directa al núcleo agrario la cantidad de N$ 668,052.35 (Seiscientos Sesenta y Ocho Mil Cincuenta y Dos Nuevos Pesos 35/100 M.N.) como apoyo económico subsidiario por parte del gobierno federal, para adquirir 280-00-00 hectáreas de temporal y agostadero cerril, que constituyen el predio denominado 'Paso de Cedros' o 'Potrero Grande', ubicado en el Municipio de Tolimán, Estado de Jalisco,* ***propiedad de la C. Esperanza Nava Gómez, y que de esa manera satisfagan sus necesidades agrarias y de por ejecutada en sus términos la Resolución Presidencial dotatoria, aceptando y ratificando el núcleo agrario conforme al Artículo 308 de la Ley Federal de Reforma Agraria, que la superficie en cita, la reciben en su entera satisfacción y en sustitución de las 280-00-00 hectáreas de la hacienda 'El Petacal', propiedad de María Rojas, que se les concedió mediante la Resolución Presidencial, de dotación de tierras del 23 de agosto de 1939, consintiendo expresa y libremente en el cambio de localización que posibilite la aprobación del expediente de ejecución y la formulación e inscripción del plan definitivo en el registro agrario nacional.***
>
> ***
>
> *Tercera.- El núcleo agrario acepta que con la cantidad mencionada queda satisfecho en sus necesidades agrarias* ***y para todos los efectos legales da por ejecutada en sus términos la Resolución Presidencial dotatoria de tierras***

concluyendo con el conflicto social suscitado, reconociendo expresamente que ha quedado resuelta alternativamente la obligación correspondiente, en virtud de la imposibilidad material y legal por parte del estado para su cumplimiento en los términos originales, desistiéndose a cualquier acción o derecho que pudieran tener o exigir respecto de las 280-00-00 hectáreas de la hacienda 'El Petacal' Propiedad de María Rojas.[107]

(Emphasis supplied.)

99. The language underscored in bold compels attention. The release explicitly provides that its execution attests to the acceptance on the part of the communal landowners of San Isidro the property known as *Potrero Grande* or *Paso de Cedros* as satisfying all of the communal landowners of San Isidro's entitlements pursuant to the 1939 Presidential Resolution, and as consonant with Article 308 of the *Ley Federal de Reforma Agraria*.

100. Moreover, the language stresses that *Potrero Grande* or *Paso de Cedros* is being received by the communal landowners as property substituting any claim that they could have pursuant to the 1939 Presidential Resolution to the "*Hacienda El Petacal, property of María Rojas that had been conveyed to them pursuant to the Presidential Resolution land grant dated August 23, 1939 ….*"[108]

101. Equally relevant and compelling to the cause before this Arbitral Tribunal is the second part of the language highlighted in bold. Quite remarkably, the Federal government of Mexico represents that the conveyance of *Potrero Grande* or *Paso de Cedros* is in lieu of execution on *El Petacal*, and it goes on to state, "*en virtud de la imposibilidad material y legal por parte del estado para su cumplimiento en los términos originales,*

107 *See id.,* note 47 (**C-0033-SPA**).

108 *Id.*

desistiéndose a cualquier acción o derecho que pudieran tener o exigir respecto de las 280-00-00 hectáreas de la hacienda 'El Petacal' Propiedad de María Rojas."[109]

102. This language explicitly acknowledges that it is "materially and legally impossible" for the State (Federal government of Mexico) to execute on the 280 hectares comprising *El Petacal*, in keeping with the ordinary and plain language of the original mandate embodied in the 1939 Presidential Resolution.[110]

103. As will be further explained in this Memorial, the material and legal impossibility that the Federal government of Mexico swore to and ratified in the form of the agrarian release dated March 14, 1994 (**C-0033-SPA**) with respect to executing on *El Petacal* pursuant to the 1939 Presidential Resolution, is now multiplied and compounded. This legal and material impossibility has been bolstered all the more by virtue of the writings here canvassed, and culminating with the two agrarian releases (**C-0032-SPA** and **C-0033-SPA**) discussed.

104. The second agrarian release (**C-0032-SPA**) entered into between the Secretary of Agrarian Reform, Mr. José Nava and Ms. Esperanza Nava Gómez, and the representatives of the communal landowners of San Isidro, in relevant part reads:

> *II. - Que con objeto de abatir el rezago agrario y resolver en términos del Artículo 309 de la Ley Federal de Reforma Agraria, el conflicto social suscitado con motive de la ejecución complementaria de la Resolución Presidencial de dotación de tierras que benefició al poblado denominado 'San Isidro', Municipio de Venustiano Carranza hoy San Gabriel, Estado de Jalisco,* ***'La Secretaría'*** *ha formulado convenio de finiquito con los representantes legales de este* ***núcleo agrario****, a través del cual se entrega a los capacitados del poblado citado, como apoyo económico subsidiario la cantidad total de:* ***N$ 668,052.35 (Seiscientos Sesenta y Ocho Mil Cincuenta y Dos Nuevos Pesos 35/100 M.N.)*** *que se destinarán a la adquisición de una superficie total de* ***334-02-61.76*** *hectáreas de temporal y agostadero cerril, que constituyen el predio denominado 'Paso de Cedros' y dos*

109 *Id.*

110 *Id.*

fracciones de 'Paso de Cedros', que conforman una sola unidad topográfica denominada 'Paso de Cedros' o 'Potrero Grande', ubicada en el Municipio de Tolimán, Estado de Jalisco, propiedad de la C. Esperanza Nava Gómez, y cuya entrega material será realizada y distribuida, bajo la responsabilidad de la delegación agraria en la entidad, de la siguiente manera: 280-00-00 hectáreas para el poblado 'San Isidro' y el resto o sea 54-02-61.76 para el poblado 'San Antonio', ambos del Municipio de Venustiano Carranza hoy San Gabriel, según Oficio Número 0771 de fecha 22 de febrero de 1994, inmueble que será incorporado al régimen ejidal del núcleo gestor, contando con las opiniones positivas de la delegación agraria vertida en oficios 5910 del 19 de noviembre de 1993 y 0771 del 22 de febrero de 1994 y la correspondiente de la dirección general de asuntos jurídicos, mediante Oficio Número 192708 de fecha 22 de febrero de 1994 y con la aprobación del técnico e fecha 23 de febrero de 1994.

El Poblado

Este núcleo agrario cuenta con Resolución Presidencial de dotación de tierras del 23 de agosto de 1939, publicada en el Diario Oficial de la Federación el 18 de noviembre del mismo año, concedió una superficie total de 536-00-00 hectáreas de la hacienda 'El Petacal', propiedad de María Rojas, para 44 capacitados, haciéndose ejecutado en forma parcial sobre la superficie de 536-00-00 hectáreas del primer predio referido, en virtud de que la superficie faltante se encontraba amparada por la resolución emitida en el juicio de garantías número 571/90, lo que motivó un déficit de unidades de dotación para explotación individual, comprobándose una imposibilidad legal para la ejecución en sus términos de la Resolución Presidencial de referencia. Posteriormente el 15 de septiembre de 1993, el gobierno del estado en prevención del conflicto social señalado, conjuntamente con la Secretaría de la Reforma Agraria, los representantes legales del núcleo gestor, la central campesina que los asesora y el propietario celebraron acuerdo de concertación para la adquisición de una superficie de 280-00-00 hectáreas, razón por la cual se considera pertinente agotar la vía alterna de adquisición de predios por la motivación expresada y fundándose en lo previsto por el Artículo 309 de la Ley Federal de Reforma Agraria.[111]

105. The two agrarian releases reviewed (**C-0032-SPA** and **C-0033-SPA**) in plain and ordinary language reflect that the communal landowners of San Isidro opined that the 1939 Presidential Resolution was fully satisfied. Of equal importance, they demonstrate that Mexico's Federal government, together with representatives of the State of Jalisco's government, arranged for the conveyance of *Potrero Grande* or *Paso*

111 **C-0032-SPA**, pp. 1-2.

de Cedros to the communal landowners with the goal of satisfying the communal landowners' claims pursuant to the 1939 Presidential Resolution so that NPI's and Nutrilite S.R.L.'s plans to develop a world-class organic farming operation would take place and galvanize the economic development of *El Llano en Llamas*.

106. Mr. Hunter testifies that "[t]he two agrarian releases suggested at the time that it was appropriate for NPI and Nutrilite S.R.L. to purchase Puertas Uno and Dos…[T]he 120 hectares comprising Puertas Uno and Dos were purchased on May 12, 1994."[112]

B. Overview of Evidence Canvassed: A Compulsory Conclusion

107. In Sections XIV and XV of this Memorial, the following nineteen (19) documents constituting evidence in this proceeding were referenced and, to different degrees, analyzed:

(a) Agrarian Release (*Convenio*: *Finiquito Agrario*) entered into between the *Secretary of Agrarian Reform*, represented by Lic. Raúl Pineda Pineda (*Oficial Mayor*), and Lic. Ignacio Ramos Espinoza (*Director General de Asuntos Jurídicos*), the proprietors of the property known as *Potrero Grande* or *Paso de Cedros*, Mrs. Esperanza Nava Gómez and C. José Nava Palacios, and C. Adolfo Reyes González (*Comisariado Ejidal del Poblado "San Isidro" Venustiano Carranza hoy San Gabriel, Jalisco, President*), on the part of the communal landowners of San Isidro, as well as the Secretary of the Communal Landowner Organization, C. Mario Rosales Laureano, and that organization's Treasurer, C. Daniel Lázaro Durán, dated March 14, 1994 (**C-0032-SPA**);

(b) Agrarian Release (*Convenio*: *Finiquito Agrario*) entered into between the *Secretary of the Agrarian Reform*, represented by C. Víctor M. Cervera

---

112 Hunter Witness Statement (**CWS-001**) at ¶ 213.

Pacheco, the organization titled, *Unión Campesina Democrática,* represented by C. Gerardo Avalos Lemus, and the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco,* C. Adolfo Reyes González (President) on the part of the communal landowners of San Isidro, dated March 14, 1994 (**C-0033-SPA**);

(c) The *Guadalajara Agreement*, dated February 15, 1994 executed by Alejandro Díaz Guzmán (*Federal Delegate of the Secretary of the Agrarian Reform*), Arturo Gil Elizondo (*Secretary of Rural Development-State of Jalisco*), Gustavo Martínez Guitón (*Secretary of Economic Promotion-State of Jalisco*), Humberto Anaya Serrano (*Rural Development-State of Jalisco*), Rafael Hidalgo Reyes (*Sub-General Manager Electricity District-State of Jalisco*), Adriana de Aguinaga (*Legal Counsel for Nutrilite S.R.L. [Goodrich Riquelme y Asociados]*), Enrique Romero Amaya (*Counsel for Nutrilite S.R.L.*), Roberto Vargas Maciel (*Exportag, S.A. de C.V. on behalf of NPI and Nutrilite S.R.L.*), Abelardo Reyes Vargas (*Exportag, S.A. de C.V. on behalf of NPI and Nutrilite S.R.L.*), Sergio Vargas Maciel (*Exportag, S.A. de C.V. on behalf of NPI and Nutrilite S.R.L.*), and Mr. David T. Tuttle (*NPI and Nutrilite S.R.L.*) (**C-0021-SPA**);

(d) The *Coordination Agreement* (*Acuerdo de Concertación*) dated September 25, 1993 executed by (i) Sr. Raúl Peña Herz (*Secretary of the Agrarian Reform*), (ii) Arturo Gil Elizondo (*Secretary of Rural Development*), (iii) Dip. Gerardo Avalos Lemus (Representative of the organization, *La Unión Campesina Democrático y Apoderado Legal del Ejido San Isidro,* and legal representative of the communal landowners of San Isidro), (iv) Sr. Mario Rosales Laureano (*Secretary of the "Comisariado Ejidal"*), (v) José Araiza (*Suplente del*

Comisariado Ejidal), (vi) Sr. Alejo Enciso Estrada (*Representante del Grupo de Campesinos de El Petacal*), (vii) Sergio Vargas Maciel (Exportag, S.A. de C.V. on behalf of Nutrilite S.R.L.), and (viii) José Roberto Vargas Maciel (Exportag, S.A. de C.V. on behalf of Nutrilite S.R.L.) (**C-0020-SPA**);

(e) Administrative Order (*Oficio*) dated November 19, 1993, from Lic. Alejandro Díaz Guzmán of Mexico's Federal Secretary of the Agrarian Reform to Lic. Raúl Pineda Pineda (*Oficial Mayor de la Secretaría de la Reforma Agraria*) (**C-0023-SPA**);

(f) Legal Opinion from Lic. Ignacio Ramos Espinoza (Director General) of the Secretary of the Agrarian Reform to Lic. Juan Reyes Flores, Coordinator of Department of Payment for Real Property and Indemnifications dated February 22, 1994 (**C-0022-SPA**);

(g) Letter from Governor of the State of Jalisco, Mr. Carlos Rivera Aceves to C. Víctor M. Cervera Pacheco, *Secretary of the Agrarian Reform*, dated February 17, 1994 (**C-0049-SPA**);

(h) Correspondence from the Coordinator of Payment Concerning Real Property and Indemnification, Lic. Juan Reyes Flores, to the Director General of Legal Affairs of the Secretary of Agrarian Reform, Lic. Ignacio Ramos Espinoza, dated February 9, 1994 (**C-0027-SPA**);

(i) Correspondence from the Coordinator of Payment Concerning Real Property and Indemnification, Lic. Juan Reyes Flores, to Lic. Arturo Sánchez Zavala, Coordinator of the Program for the Incorporation of Lands to the Ejido Regime, dated February 18, 1994 (**C-0029-SPA**);

(j) Correspondence from Lic. Alfredo Galeana Ortega, Unidad de Pago de Predios e Indemnizaciones to Lic. Arturo Rafael Sánchez Zavala, Coordinator of the Program for the Incorporation of Lands to the Ejido Regime, dated February 22, 1994 (**C-0030-SPA**);

(k) Correspondence dated February 23, 1994 from Lic. Raúl Pineda Pineda (*Oficial Mayor*) to C. P. Rafael Casellas Fitzmaurice, Director General of Administration, regarding solicitation for authorization of resources for payment (**C-0031-SPA**);

(l) Receipt of payment dated March 14, 1994 issued by the Secretary of the Agrarian Reform, and signed by Lic. Raúl Pineda Pineda (*Oficial Mayor*), C. Esperanza Nava Gómez (Proprietor), and C. José Nava Palacios (Proprietor) (**Composite C-0036-SPA**);

(m) Copy of check issued by the Secretary of the Treasury (Secretaría de Hacienda y Crédito Público, Tesorería de la Federación, signed by C. Esperanza Nava Gómez (Proprietor), and C. José Nava Palacios (Proprietor) issued by the Bank of Mexico, Check No. 01809286 and three times stamped by official stamp of the Secretary of Agrarian Reform (**Composite C-0036-SPA**);

(n) Document demonstrating conformity and satisfaction (*Asunto: Se* Manifiesta Conformidad signed by José Araiza Chávez, President of the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco* and J. Guadalupe Reyes Martínez, Secretary of the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco*, and Alfredo Villa Jacobo, Treasurer of the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco*, twice stamped by the *Registro Agrario*

*Nacional Secretaría de Desarrollo Agrario, Territorial y Urbano (“*SEDATU”*)*, dated March 26, 1994 (**C-0038-SPA**);

(o) Receipt (*ASUNTO: Acuse de Recibo*) signed by José Araiza Chávez, President of the *Comisariado Ejidal del Poblado “San Isidro,” Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco* and J. Guadalupe Reyes Martínez, Secretary of the *Comisariado Ejidal del Poblado “San Isidro,” Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco*, and Alfredo Villa Jacobo, Treasurer of the *Comisariado Ejidal del Poblado “San Isidro,” Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco*, dated March 26, 1994, twice stamped by the *Registro Agrario Nacional Secretaria de Desarrollo Agrario, Territorial y Urbano (SEDATU)*, acknowledging receipt of six documents:

(i) *Oficio de Comisión,*

(ii) *Convenio de fecha 11 de marzo de 1994,*

(iii) *Convenio Subsidiario de fecha 11 de marzo de 1994,*

(iv) *Acta de Posesión y Virtual de las 280-00-00 Has.,*

(v) *Acta de Deslinde y Amojonamiento de las 280-00-00 Has.*, and

(vi) *Plano del Deslinde Complementario.*

(**C-0039-SPA**);

(p) Document signed by José Araiza Chávez, President of the *Comisariado Ejidal del Poblado “San Isidro,” Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco* and J. Guadalupe Reyes Martínez, Secretary of the *Comisariado Ejidal del Poblado “San Isidro,” Venustiano Carranza hoy San*

Gabriel, Jalisco, President, Jalisco, and Alfredo Villa Jacobo, Treasurer of the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco*, pursuant to which the communal landowners acknowledge having been surveyed with respect to the property known as *Potrero Grande* or *Paso de Cedros* on March 16, 1994, twice stamped by the *Registro Agrario Nacional Secretaría de Desarrollo Agrario, Territorial y Urbano (SEDATU)*, dated March 26, 1994, (**C-0040-SPA**);

(q) Document titled "*Acta de Posesión y Deslinde de Polígono de las 280-00-00 Hectáreas Pendientes a Entregar de la Ejecución Complementaria de la Resolución Presidencial del 23 de agosto de 1939 Publicada en el Diario Oficial de la Federación el 18 de noviembre del Mismo Año, Por la Cual se Benefició el Ejido San Isidro, Municipio San Gabriel, Estado de Jalisco*" ("*Acta de Posesión y Deslinde*"), dated July 14,2022; (**C-0050-SPA**);

(r) Document titled "*Acta Relativa a la Posesión Precaria que se Realiza en Favor del Núcleo Agrario Denominado 'San Isidro', del Municipio de San Gabriel (antes Venustiano Carranza), Jalisco, en Cumplimiento al Convenio de Finiquito Celebrado, por la Oficialía Mayor de la Secretaría de la Reforma Agraria, el 14 de marzo de 1994*," signed by the Governor of the State of Jalisco, Lic. Carlos Rivera Aceves, and the Agrarian Delegate of the Communal Landowners (*El Delegado Agrario en el Ejido, Lic. Alejandro Díaz Guzmán*) (**C-0051-SPA**); and

(s) Document titled "*Acta Relativa al Deslinde y Amojonamiento de los Terrenos Que Se Entregan al Núcleo Agrario Denominado 'San Isidro', Municipio de San Gabriel (antes Venustiano Carranza), Estado de Jalisco, en Cumplimiento al Convenio de Finiquito Celebrado el once de marzo de mil novecientos noventa*

y cuatro, por la Oficialía Mayor de la Secretaría de la Reforma Agraria," and, in part, by the *Comisionado* of the Secretary of the Agrarian Reform and bearing four stamps of the *Registro Nacional de la Secretaría de Desarrollo Agrario, Territorial, y Urbano (SEDATU)* (**C-0042-SPA**).

108. Eighteen (18) of the nineteen (19) documents referenced above were all drafted and subscribed by high-ranking members of Mexico's Federal government. The single document of different origin and subscription is the letter that the then Governor of the State of Jalisco Mr. Carlos Rivera Aceves wrote to Mr. Víctor M. Cervera Pacheco, Secretary of the Agrarian Reform dated February 17, 1994 regarding endorsement of the conveyance of *Potrero Grande* o *Paso de Cedros* to the communal landowners of San Isidro in order to ensure that NPI's and Nutrilite S.R.L.'s investment in *El Petacal* would be protected from any claims purporting to arise on the part of the communal landowners of San Isidro from the alleged complementary execution of the 1939 Presidential Resolution (**C-0019-SPA**).

109. These nineteen (19) documents constituting evidence of record before this Arbitral Tribunal stand as admissions on the part of the Federal government of Mexico, and principally the *Secretaria de Desarrollo Agrario, Territorial, y Urbano (SEDATU)* in support of the proposition that the 1939 Presidential Resolution has been fully satisfied by virtue of the conveyance of *Potrero Grande* or *Paso de Cedros* to the communal landowners of San Isidro. In this identical vein, these nineteen (19) evidentiary instruments represent assurances to NPI and to Nutrilite S.R.L. that its existing and future investments in furtherance of the establishment of a world-class organic farming, processing, and packaging operation would be free from claims arising from the 1939 Presidential Resolution.

110. It remains conceptually and legally unclear how it could at all be possible for the very same government and corresponding governmental agency, SEDATU, to execute in July of 2022 the taking of *El Petacal* based upon the 1939 Presidential Resolution, notwithstanding the litany of governmental action taken between September 15, 1993 (the signing of the *Coordination Agreement*) and March 14, 1994 (the execution of the two agrarian releases). The latter documents, of course, stand for the proposition that the 1939 Presidential Resolution was fully satisfied by the date of the issuance of the releases, March 14, 1994.

111. These representations stem from the same agency of Mexico's Federal government that now asserts the converse of that proposition. The cause before this Tribunal arises from the Mexican government's taking of legal title to the 280 hectares comprising *El Petacal* based upon the 1939 Presidential Resolution and the physical possession of 120 of these 280 hectares.

112. In addition to the multiple reiterations of the statement that the 1939 Presidential Resolution has been duly satisfied and discharged, the Mexican government also has stated (as previously referenced) that the satisfaction of the 1939 Presidential Resolution pursuant to the conveyance of *Potrero Grande* or *Paso de Cedros* constitutes the only alternative for discharging that Resolution "*in light of the materially and legally impossible undertaking on the part of the State to satisfy the 1939 Presidential Resolution by challenging title to the 280 hectares of the El Petacal Hacienda [then] belonging to María Rojas.*"[113]

113. The Spanish language original reads "…*en virtud de la imposibilidad material y legal por parte del estado para su cumplimiento [1939 Presidential Resolution] en los*

[113] *See supra* ¶ 98 .

términos originales, desistiéndose a cualquier acción o derecho que pudieran tener o exigir respecto de las 280-00-00 hectáreas de la hacienda 'El Petacal' Propiedad de María Rojas."[114]

114. As discussed later in this submission, the referenced nineteen (19) documents, without more, compel a finding in favor of Claimant and adverse to Respondent arising from the illicit taking of legal title to *El Petacal* allegedly based upon the 1939 Presidential Resolution.[115]

VI. THE COMMENCEMENT OF A STAGED INVESTMENT

A. The Design and Planning Phase: Converting a Desert Into a World-Class Farming Operation

115. On May 12, 1994 Nutrilite S.R.L. purchased *Puerta el Petacal Uno* and *Dos,* which consisted of approximately 120 hectares.[116] These 120 hectares are used primarily as a buffer zone to keep insects and any other type of contaminant from the 160 hectares sustaining the harvesting, processing, and packaging operation.[117] They are also used for crop rotation.[118]

116. Mr. Hunter testifies that while he "was not engaged in the acquisition of the 160 hectares in April 1992, [he] did participate in the process leading to the purchase of the 120 hectares."[119] He adds that "[a]s of that time (May 1994), no significant work

---

114 *Id.*

115 *Infra* Section XIV .

116 Attached as **C-0052-SPA** to facilitate reference is the Sale Purchase Agreement *Esc. 34,365* "*Puerta El Petacal Uno*" and "*Puerta El Petacal Dos*."

117 Hunter Witness Statement (**CWS-001**) at ¶ 48, *see also* Eppers Witness Statement (**CWS-002**) at ¶¶ 92-104.

118 Eppers Witness Statement (**CWS-002**) at ¶¶ 92-96.

119 Hunter Witness Statement (**CWS-001**) at ¶ 49.

establishing the harvesting, processing, and shipping operations had commenced on the 160 hectares already owned. The development of *El Petacal* was staged and planned as a medium-to-long-term project."[120]

117. The design and planning phase involved clearing the land in the southern quadrant of the 160 hectares in order to prepare it for the planting of crops, i.e., alfalfa, spinach, broccoli, sage, chia, and cactus.

118. This task required the soil to be tilled back into the earth so that it could be organically enhanced. To accomplish this objective, calcium carbonate had to be brought to the site in trucks. This calcium carbonate was then used for composting which was added to the soil.[121] Nine (9) items required immediate attention: (i) water, (ii) irrigation, (iii) reservoirs, (iv) wells, (v) electricity, (vi) fuel for equipment, (vii) roads, (viii) crops, and (ix) equipment. Meeting these nine (9) foundational requirements constituted the second phase of soil preparation, mostly because of the foundational nature of water and electricity with respect to the organic farming, processing, and packaging operation.[122]

---

120 *Id.*

121 *Id.* at 12-13, ¶ 42.

122 Mr. Hunter testifies as to these nine (9) requirements comprising phase 2 as follows:

> ***1. Future Water***
>
> *43. The second phase of the soil preparation that was necessary and undertaken entailed green manure farming that cannot take place until adequate water supplies are secured. Although sufficient water reservoirs were present at 250-300 meters below the land surface, there was no electrical power necessary to operate the pumps to bring water to the surface.*
>
> *44. It was estimated that approximately 250 KVA would be required for each well, and a minimum of three wells were necessary to irrigate what ultimately would be slightly more than 280 hectares.*
>
> *45. To supplement El Petacal's well water, a 6-hectares reservoir would also need to be built in addition to the existing reservoir on the property known as 'La Becerrera.' The reservoir would collect rainwater running off the mountains. This reservoir would provide water, without the need for additional pump capacity, to a large section of land in the northern half of the property known*

as 'Llanetes.' We found two dams on the property and were told that both dated back to the time when Mexico was colonized by the Spaniards. The colonial dam on the 160 hectares collapsed when we tried to refurbish it. The second colonial dam was found on the 120 hectares. In light of our experience with the first dam, we left it as is.

46. It was clear to me that NPI would have to engage in discussions with various government agencies, including the Federal Power Commission, to obtain adequate electrical power for the development and operation of this site. In addition to being indispensable to the operation of wells and pumps, the electrical power project also would support other projects, such as algal farming for beta-carotene production at El Petacal.

*****

50. As of December 1994, the El Petacal farm and processing operations were at the design and coordination stage. Members of the Operations Team, Agricultural Technicians, and Facilities Representatives were yet to consolidate and to coordinate their efforts. The venture was far from being off the ground.

2. Irrigation

51. Consequently, in December 1994 Nutrilite was still working on four basic issues: (i) the location of the fields, (ii) timing of installation of the irrigation systems, (iii) the need to establish a general power source for the entire operation, and (iv) detailed development schedules and corresponding capital plans.

52. In this same vein, the production facility development needed to be addressed at a more conceptual scale. Fundamental premises had to be agreed upon as a condition precedent to commencing infrastructure work in a sensible critical path orderly progression. [*Citing to* **C-0082-ENG**, a document titled: Petacal Mexico Site Development: General Notes and Observations December 1994].

3. Reservoirs

53. By way of infrastructure as of December 1994, there were three reservoirs on the property. At that time, however, the sizes of the reservoirs and the water capacity of each was unknown to us.

4. Wells

54. As of December 1994, only one well had been drilled on the El Petacal site. As noted, we did discover high-grade water quality at approximately three hundred (300) meters below the surface. However, the well's small and low-capacity electric pump needed to be replaced with a large industrial diesel motor pump.

55. The status of the land as of December 1994 was such that the requisite irrigation was not at all possible. Considerable work was necessary.

56. I was charged with determining the purpose of infrastructure that had been built around this well site and to quantify its area for purposes of NPI's records. I also had to schedule and to conduct discussions regarding the timing for installation and location of the diesel tanks necessary to operate this well. Quite notably, a supply water line had been fed from the well site westerly/southwesterly to reservoir No. 1, located in the central southwestern border of the El Petacal site. All of these water resources had to be reconfigured, enhanced, and updated.

57. From a technical perspective, as of December 1994 irrigation did not exist on El Petacal. There was simply none. This factual proposition is important because it provides the Arbitral Tribunal with a very clear and precise understanding that as of this time (December 1994), farming at El Petacal simply was not possible and, therefore, not taking place. Likewise, because there was no farming, processing and packaging could not have taken place even if the appropriate buildings and machinery had been present, which they were not.

58. Based upon the initial design of the alfalfa/crop area, we proposed installing underground irrigation. We still had not determined the type of irrigation system that would be installed, i.e., wheel line irrigation, manual pipe irrigation, etc. A budget of approximately USD 2,000 per hectare for manual line irrigation was being considered.

59. The general thinking at the time, and it proved to be correct, was that irrigation had to be created and expanded to include the balance of the site on a field by field, and plateau by plateau basis, which was and turned out to be a considerable undertaking.

5. Electricity

60. During this timeframe (as of December 1994) the entire 200 hectares were barely serviced by electrical power.

61. We explored the possibility of wind power, and the extent to which wind-generated electricity would be more economical if exclusively serving agricultural purposes. Solar power and co-generation harnessed steam also were considered.

62. El Petacal had some areas that was neither arable nor best suited for farming. These sites could have been propitious for small solar power units, the aggregate of which could have met our agricultural harvesting operation needs. Wind and co-generation energy options similarly were explored in connection with the property's topography. With respect to these three renewable energies (solar, co-generation, and wind), we concluded that studies should be undertaken.

63. I bring the exploration of these three renewable energies to the Arbitral Tribunal's attention to demonstrate that, because providing the operation with comprehensive electrical power would take time, resources, the cooperation of local and State government, and considerable expertise, we considered renewable energy to try to find a short-to-medium term solution to the lack of electric power.

6. Fuel for Equipment

64. I would like to impress upon the Arbitral Tribunal that a necessary condition to developing an agricultural process is the ability also to provide the facilities with diesel and gasoline fuel on a sustainable and reliable basis. As of December 1994, we still did not have the capability to do this either. Storage tanks that are central to that effort still had not been installed for the well and farming equipment.

65. A budget was yet to be calculated, identified, and incorporated into the general development plan.

66. No action plans had been developed as of December of 1994 for the installation of fuel servicing equipment. [*Citing to* **C-0082-ENG** at 5]. *In the notes that I have attached to this witness statement it is reflected that one of the action items arising from my visit to El Petacal was 'to sit down with Roberto Vargas and discuss these particular items. Determine locations for all potential*

fuel tanks. Determine size required. Discuss the delivery of fuel to the site.' [*Citing to* **-0082-ENG** at 5].

67. In those same notes a related action item was for me 'to talk to Amway and get appropriate specification information and details for tank farms. Obtain information regarding the portable tanks that were discussed this past week.' [*Citing to* **C-0082-ENG** at 5].

68. Arriving at a development plan constituted a priority at that time.

7. Roads

69. While a very rough and rudimentary network of 'roads' had been developed throughout the site in 1994 and the first quarter of 1995, major roads and bridges still needed to be built. Small bridges and culverts in place at the time were used so that four-wheel drive traffic could circulate up to and past a major ravine called 'Arroyo La Colmena.' Plans were underway to build a major and permanent bridge crossing over this rugged ravine. In fact, it was not until September 30, 1995 that this bridge was completed. [*Citing to* **C-0083-ENG**, a document titled *Bridge L Colmena - Construction Contract* dated June 8, 1995].

70. The area around 'Arroyo La Colmena' eventually had to be developed from an infrastructure perspective in order to build a main paved road that would be able to connect with a series of existing roads to lead directly to the City of Manzanillo. During this timeframe only a partially paved road existed. This road ended, however, far short of the city.

71. We needed a principal site road with the capacity of accommodating traffic beyond that which the daily eventual Nutrilite S.R.L. operation would generate; such road would need to meet specifications to allow for the traffic of large trucks carrying farm equipment, bulldozers, and construction equipment necessary for development.

72. El Petacal and the surrounding area lacked a specific traffic circulation pattern. A circulation pattern is necessary in order to identify how to maximize the use of fields not just for development purposes, but also in the future on an ongoing basis. I was charged with the responsibility not only of developing specific traffic circulation patterns, but also a design that would minimize disruption to the operation by taking into consideration temporary and permanent prospective infrastructure plans.

73. Ultimately, I designed a site layout that considered all of these factors. The proposal was accepted and implemented.

8. Crops

74. At this time, of course, the site was under-developed and no consequential crops had been planted. Actually, even the actual crops that were to be harvested had not been yet conclusively identified. The December 1994 notes addressing El Petacal's site development clearly speak to this state of affairs. I reference this language for the Arbitral Tribunal's benefit because it captures quite comprehensively the crop status of El Petacal during the last quarter of 1994 and first quarter of 1995:

> *It is proposed that during this planning session, specific field assignments within the individual plateaus be developed and at least one field be identified for spring planting. Timing of planting will coincide with the installation of irrigation and other required infrastructure.* ***Determination should be made as to what crop is to be planted.*** *Defer this answer to Doyle Gibbs and/or AG Team members as to best crop for farming, soils,*

B. Multiple Phase Operational Development Strategy: Elements of a Staged Investment

119. The Nutrilite S.R.L. organic farming processing and packaging operation was being established pursuant to multiple phases commencing in January 1995 through approximately the fourth quarter of 2008.[123] The comprehensive nature of the

---

etc. should be determined if soil samples should be taken at various parts of the proposed site to classify and quantify the types of soils (in U.S. terms) for future development.

Numerous discussions have occurred in the past regarding different crops. I feel we should initially concentrate on the ability to concentrate on the production of alfalfa. All other crops should take a back seat to this goal. We should minimize or eliminate the 'experimental' crops we are 'garnering' and focus on the issues at hand. I think we should discuss the role of the Ag Tech Team in this arena and see if some level of coordinated effort could be laid over this endeavor so some value can come out of this. [*Citing to* **C-0082-ENG** at 7].

(Emphasis supplied.)

75. The equipment inventory was yet to begin.

9. Equipment

76. Developmentally a basic pre-planting requirement is an inventory list of the necessary equipment. This inventory list also constitutes an important element for budget consideration. At that time we did not have the inventory list, let alone the equipment. An additional phase then contemplated concerned the training of personnel for the use of this equipment. Steps were yet to be taken in that direction as well.

77. Decisions regarding permanent staffing and seasonal help were far from ripe. And equally nascent was clarification regarding rules and regulations governing the importation of farm and construction equipment.

78. The capitalization and accounting for this equipment had not yet been fully studied and concluded. By way of example, fundamental questions remained pending such as 'how is Nutrilite thinking of capitalizing this equipment'? 'Will we need a separate department that can track costs incident to different aspects of the operation such as product versus development, and cash crop farming'?

79. Put simply, as of December 1994 the very conceptual framework for the development of El Petacal can best be described as 'work in progress.' The initial acquisition of land was but a necessary condition precedent to the establishment of a site that ultimately would be what it is today; a world-class farming, processing, manufacturing, and packaging facility consisting of multiple production centers undertaking specialized tasks in furtherance of unique organic seed-to-supplement methodologies, all of which were to be unprecedented in the industry of nutritional supplements and vitamins.

Id. at 13-21, ¶¶ 43-46, 50-79.

123 Hunter Witness Statement (**CWS-001**) at ¶ 80.

transformation and development that had to be implemented did not provide for another agro-engineering and processing alternative.[124]

120. A flexible five- (5) year development plan was prepared.[125] The five-year development program in general terms can be summarized as follows:

Fiscal Year 1994

(a) The existing dam, including gate replacement and comprehensive mud removal was projected, and completed in March 1994;

(b) The deep water well was projected for completion as well as the installation of a pipe network in order to distribute water to the reservoir, as well as to the township. These tasks were completed by January 1, 1994;

(c) The land clearance and corresponding leveling was a very substantial undertaking. These tasks still were ongoing as of December 1994;

(d) Acerola trees were planted for testing purposes early in 1994, and additional planting and testing efforts were enhanced in June 1994;

(e) All throughout fiscal year 1994, Nutrilite worked with Federal, State, and local government agencies to provide electrical power to *El Petacal* for purposes of

---

124 *Id.*

125 See **Composite C-0084-ENG** comprising the following documents: (a) Nutrilite S. de R.L. de C.V. Development Plan: Rancho El Petacal (**C-0084-1-ENG**); (b) Farming-Rancho El Petacal – Development Plan (**C-0084-2-ENG**); (c) Five-Year Capital Requirements dated May 2, 1994 (**C-0084-3-ENG**); (d) Memorandum from Rob Hunter to Terry Tuttle Regarding Petacal Property Description dated December 1, 1994 (**C-0084-4-ENG**); (e) Note entitled "Farming" (**C-0084-5-ENG**); (f) Correspondence dated May 30, 1995 from Ernesto M. Sánchez Anguiano to Sr. Lic. Francisco Mayorga Secretario de Desarrollo Rural del Gobierno del Estado de Jalisco (**C-0084-6-ENG**); (g) Note of Field Visito of the El Petacal Property (**C-0084-7-ENG**); (h) Correspondence from Engineer Ricardo Luna Valencia to Terry Tuttle dated April 22, 1997 (**C-0084-8-ENG**); (i) Correspondence dated June 5, 1995 from Roberto Vargas to Terry Tuttle regarding electricity at El Petacal (**C-0084-9-ENG**).

supporting then ongoing efforts and future development not only of the farming operation but also of surrounding communities even beyond the Township of San Isidro. This work was not completed during the 1994 year;

(f) During the 1994 calendar year, engineering plans were developed and completed in June 1994 for infrastructure work that began for the construction of the bridge and road over the very rough ravine, '*Arroyo La Colmena*.' The plans were approved later that year, and actual work began in 1995;

(g) During the latter part of 1994 the testing of renewable energies, particularly wind, solar, and co-generation, was undertaken. These projects were not deemed to be feasible for *El Petacal*, and never were implemented;

(h) A plan to determine the feasibility of cash crop farming was drafted, but placed on hold;

(i) An ingress and egress road was constructed leading to the office area, completed on January 26, 1994;

(j) Construction of a composting area, and commencement of composting process completed on February 28, 1994;

(k) The north 30 hectares were cleared, completed in March 1994;

(l) A new well was drilled to replace an under-capacity unit. The drilling was completed in February 1994. Pumps were installed in May 1994;

(m) During 1994 the process for detection of weevil predators and parasites was commenced and remained pending;

(n) Also in process during all of 1994 was testing of natural *control agents* for weevils;

(o) Developing capacity data on watercress, pending throughout 1994;

(p) Similarly in process during 1994 was the study of watercress harvesting techniques and the development of more efficient harvesting methodologies;

(q) The area between the office and the river was graded for a Distributor Pavilion, completed in February 1994;

(r) Established boundaries of the *Petacal* site;

(s) Topographic surveys were planned to be completed regarding areas surrounding the first two bridge sites so that proper bridge and road engineering could be established. A minimum of omnidirectional meters was deemed sufficient at that time; and

(t) A second topographic survey was scheduled to be completed on the southwestern portion of the site surrounding the then already constructed storage building. This quadrant was to be surveyed because it would be the location of the then future building for the agricultural sector of the operation.[126]

Fiscal Year 1995

(a) Limited irrigation installation for test farming, and first phase green manure farming was scheduled;

(b) Infrastructure improvements and the construction of small bridges to cross multiple ravines;

(c) The plan to build reservoirs in strategic locations using existing terrain and structures was scheduled;

(d) Electric power development, including the construction of a substation;

---

126 Hunter Witness Statement (**CWS-001**) at ¶ 81.

(e) Site preparation for an algae farming facility was projected for 1995, subject to approval;

(f) Test ponds were scheduled in order to determine the feasibility of beta carotene production;

(g) Warehouse construction was completed;

(h) The Distributor Pavilion was built with a separate septic system;

(i) Gated the northern entrance consistent with local architecture;

(j) Performed preliminary feasibility study on installation of Instant Quick Freeze (IQF) equipment; and

(k) Negotiating with Sr. Lic. Francisco Mayorga, Secretary of the Rural Development of the Government of Jalisco, and Ing. Ernesto M. Sánchez Anguiano (General Manager) of the National Commission of Electricity regarding the location and electrical needs of pumping equipment at *El Petacal*.[127]

121. At that date (October 24, 1995), Nutrilite S.R.L. had been excluded from the rural electrification project for the State of Jalisco that was prepared by the Federal Electricity Commission, Department of Rural Electrification. Consequently, Nutrilite S.R.L. directly appealed to the Governor of the State of Jalisco, Alberto Cárdenas Jiménez. The communication merits citation in its entirety because it reflects the nature of the staged development plan that was being pursued:

> *Dear Governor Cárdenas,*
>
> *We have recently received a copy of the proposed Rural Electrification Project for the State of Jalisco, prepared by the Federal Electricity Commission, Department*

127 *Id.*, *see also* at 24-25.

of Rural Electrification. We are disappointed that our project at El Petacal was not included in the proposal for 1996.

The Nutrilite SRL, has made a considerable financial commitment to develop a farming and processing facility at El Petacal. This development cannot succeed without adequate electrical power. ***We are prepared to share some of the cost of bringing power to our facility. We feel that such a project will not only benefit Nutrilite SRL but will also benefit the people who live in the area, many of whom will be employed by the SRL when the farm is operational. Our capital allocation for this project is US$300,000.***

We respectfully request that El Petacal be included in the finalized electrification plan. I am prepared to meet with you and/or your representatives and the Federal Electricity Commission to structure a joint project for the electrification of El Petacal in 1996. [128]

(*Emphasis supplied.)*

122. Three observations regarding this letter are helpful. First, the letter facilitates understanding of the timeframe for planning and for actual establishment of the investment. As of 1995 *El Petacal* was not included in the Federal Electricity Commission's, Department of Rural Electrification's proposal for 1996.

123. Second, the highlighted language in the second paragraph explicitly references micro-economic contributions that are projected, including language on the many people in the area whom Nutrilite S.R.L. will employ, and a budget in the amount of USD 300,000 that Nutrilite S.R.L. was willing to contribute, and as discussed later in this Memorial, actually contributed.[129]

124. Third, this correspondence reflects the manner in which NPI and Nutrilite S.R.L. were prepared to work hand-in-glove with Federal and State government officials. Reference is made to "*a joint project for the electrification of El Petacal in 1996.*" The explicit mention of a "joint project" and to "1996" as the target year bespeak both the

---

[128] Attached as **C-0053-ENG** to facilitate reference is correspondence dated October 24, 1995 from Terry Tuttle to Governor Alberto Cárdenas Jiménez**.**

[129] *See infra* Section IX, 3.

state of development of the property as of 1995 (lacking electricity) and the interdependence between Nutrilite S.R.L. and the Federal Mexican government with respect to the development of the southern region of the State of Jalisco known as *El Llano en Llamas*.

Fiscal Year 1996

(a) Expansion of irrigation system for green manure farming to 150 hectares;

(b) Construction of a beta carotene farming facility (never ultimately constructed);

(c) The drilling of well number two (2) in the northwestern quadrant; and

(d) Construction and outfitting of laboratory for basic assay work.[130]

Fiscal Year 1997

(a) The development of a Master Plan for farming and dehydration facility, with a target implementation for the year 2000;

(b) Continuous quality improvement; and

(c) In the second quarter of 1997 nine construction budgets were received:

(i) Budget for substation well No. 1,

(ii) Budget for substation well No. 2,

(iii) Budget for substation dam Nutrilite II,

(iv) Budget for build bathroom well No. 1,

(v) Budget for build bathroom well No. 2,

(vi) Budget for build bathroom dam LA ESPAÑOLA 1,

130 Hunter Witness Statement (**CWS-001**) at ¶¶ 80-83).

(vii) Budget for build dining room well No. 1,

(viii) Budget for build dining room well No. 2, and

(ix) Budget for build dining room dam LA ESPAÑOLA 1.[131]

Fiscal Year 1998

(a) Commencement of site preparation for the dehydration facility; and

(b) Continuous quality improvement.[132]

125. The Tribunal will note that there are multiple staged plans for *El Petacal* 's development. Mr. Hunter testifies that "[*e]very site visit seemed to cause revisions to existing plans based primarily, but certainly not exclusively, on five (5) factors.*"[133] In this connection he testifies as follows:

> *First, the development and transformation of the El Petacal property required hiring local engineers and surveyors. For this reason, schedules had to be adjusted and revised to meet the availability of third parties. Moreover, retaining the ablest professionals in a new jurisdiction for Nutrilite was time-consuming.*[134]
>
> *Second, local contractors and subcontractors had to be retained. Their work, of course, was coordinated with that of other professionals and technical workers. We needed to make sure that in addition to harmonizing all efforts, tactical decisions would be undertaken to ensure that efficiencies were maximized in the planning and execution of all work performed. From a purely logistical perspective the planning of roads, crossings of ravines, the placement of warehouses and buildings, and the optimization of arable land all had to be coordinated. Otherwise,*

131 *Id.* at ¶ 82.

132 *Id* at ¶ 82.

133 *Id.* at ¶ 83.

134 *Id.* at ¶ 84 *citing to* **Composite C-0085-ENG/SPA**, consisting of (i) *Evaluación Geo hidrológica – El Petacal – 1995* (**C-0085-1-SPA**); and (ii) Correspondence dated June 5, 1995 from Mario Alberto Reyes de la Torre of Tacamo to David "Terry" Tuttle regarding the preliminary works for construction of the "*La Colmena*" bridge, (**C-0085-2-ENG**).

the operation would fail or operate with built-in inefficiencies that would translate into monetary losses.[135]

Third, local land consultants and architects were retained and incorporated into the team. Here as well, both the selection process and the integration and process management were critical, but also time-intensive. Nutrilite S.R.L. and local professionals and consultants working on El Petacal's development had to interface with State and Federal officials regarding (i) demarcation of metes and bounds and preparation of surveys, (ii) the construction of roads, (iii) the provision of water to the local population, (iv) the construction of sanitary and sewage infrastructure,… (v) the electrification of El Petacal in the form of a joint venture with the State of Jalisco's government and with the Mexican Federal government. Moreover, much of the developmental work required multi-lateral permitting and cooperation.[136]

Fourth, arable land soil preparation take time and are indispensable for the development of a world-class organic farming operation. Allowing for proper composting and soil treatment prior to actual planting is a necessary phase of developing organic farming soil conditions. This preparation also entails testing the soil for impurities and contaminants, as well as addressing these issues without the use of pesticides. The process is time-consuming, requiring process staging methodologies, and flexibility of timing depending on soil testing outcomes.

Fifth and finally, the development of the El Petacal site required hiring seasonal workers, as well as skilled labor and professionals. At peak season it is not rare for Nutrilite S.R.L. to employ more than three hundred (300) local workers. Establishing internal guidelines, training sessions, and implementing measures to ensure that local laws are observed was a required process that took one (1) year before all elements were operational.

For these reasons, among other considerations, the purchasing of the 160 hectares (Puertas Tres and Cuatro) of El Petacal in 1992 triggered approximately two years of planning, and, as more fully discussed in the following section of this

---

135 *Id.* at ¶ 85 citing to **Composite C-0086-ENG/SPA**, consisting of (i) Correspondence regarding proposed budgets dated March 24, 1997 from Engineer Ricardo Luna Valencia of Construcciones y Carreteras, S.A. de C.V. to David "Terry" Tuttle, (**C-0086-1-ENG**);and (ii) Correspondence and proposed budgets dated February 16, 1998 from Engineer Ricardo Luna Valencia of Construcciones y Carreteras, S.A. de C.V. to David "Terry" Tuttle, (**C-0086-2-SPA**)

136 *Id.* at ¶ 86 citing to **Composite C-0087-ENG/SPA**, consisting of (i) Coordination & Collaboration Agt – Jalisco Government, Fed. Electricity Commission & Nutrilite – June 14, 1996, (**C-0087-1-ENG/SPA**) and (ii) Federal Electrical Power Project at El Petacal dated 1996, (**C-0087-2-SPA**).

witness statement, approximately eight (8) years of work to establish and operationalize the investment to full functionality.[137]

126. After a site visit from August 30 through September 2, 1995 (three (3) years and four (4) months after the 160 hectares parcel was purchased, and one (1) year and three (3) months after the acquisition of the 120 hectares parcel), Nutrilite S.R.L. and NPI noted that (i) more emphasis had to be placed on then existing development efforts, and (ii) development efforts had to be significantly increased if *El Petacal* was "*to be ready in the next few years.*"[138]

127. That field visit gave rise to concerns related to rudimentary aspects of *El Petacal's* development that were yet to be completed, some not even commenced, regarding such basic items as (i) electrical services, (ii) field grading, (iii) field irrigation, (iv) bridge construction, (v) dams and reservoirs, (vi) wells, and (vii) building construction.[139]

128. A helpful example is borne out when considering that as of the fourth quarter of 1995, Nutrilite S.R.L. had just received the latest response from the government regarding a joint venture for the electrification of *El Petacal* and the township of San Isidro. At that time (fourth quarter 1995) Nutrilite S.R.L. still was assessing the proper sizing of a generator station on the property that would be able to meet overall electrical loads during the next five (5) to ten (10) years.[140]

129. Another telling example concerns bridge construction. Nutrilite S.R.L. had reviewed a proposal for bridge number two at that time (fourth quarter of 1995). A decision, however, on the matter was not possible because a determination first had to be made

---

137 *Id.* At ¶ 84-89.

138 Attached as **C-0084-7-ENG** to facilitate reference is *a* Field Visit Report concerning El Petacal, dated August 30 – September 2, 1995.

139 Hunter Witness Statement (**CWS-001**) at ¶ 90.

140 *Id.* at 29-30, ¶ 91.

on whether a dam would be constructed at that site. Meanwhile Nutrilite S.R.L. was trying to expedite approval of a proposal for bridge number one because the bridge that was actually in place had structural problems and posed a clear and present danger. [141]

130. During the August – September 1995 timeframe, the entire dams and reservoirs project had been dealt a measurable setback. This entire development project had to be reconfigured because Nutrilite S.R.L.'s engineering team correctly concluded that a reservoir could not be constructed in the northeast quadrant, which theoretically seemed ideal because of that location's high elevation. It was the highest point of elevation on the entire *El Petacal* site.[142]

131. Mr. Hunter testifies that *"[w]hat still remained to be accomplished is best summarized by the succinct conclusions of the field visit [August-September 1995] report*," which states:

> *A tremendous amount of work and project load is on tap for the coming year [1996] as we try to get this property transformed into a working farm. Additional involvement is required to push the electrical issue, and a concrete development plan for the irrigation and water services needs to be developed in the near term to allow proper engineering and long-term systems to be in place for the growth of the ranch. The other infrastructure issues such as roads, bridges, etc. are fairly well defined and can move along in the coming year [1996]. The reservoir issues need to be resolved in concert with the irrigation, and we are in a holding pattern until we get the aerial survey. The need to continue with a defined landscaping program is evident, as this will allow for the proper wind and erosion protection that will be a constant source of irritation in the years to come*.[143]

132. The planning and preparation phase of the staged development extended through calendar year 1998, as most improvements on the real property were constructed and

---

141 *Id.* at ¶¶ 92-93.

142 *Id.*, ¶ 94.

143 *See supra* note 138 (**C-0084-7-ENG**); *see also* Hunter Witness Statement (**CWS-001**) at ¶ 95.

established between 1998 and the year 2000. Indeed, Mr. Hunter testifies that "*not one single building was constructed prior to 1996.*"[144]

VII. THE ESTABLISHMENT OF THE INVESTMENT AND INCORPORATION OF FIXTURES AND IMPROVEMENTS TO THE *EL PETACAL* PROPERTY

133. Between 1992 and 1994 the engineering work on the property from a developmental perspective consisted of surveying, testing, and understanding what Nutrilite S.R.L. and NPI had by way of the actual property and collateral resources, i.e., *El Petacal* and non-*El Petacal* roads, ravines, water sources, and electricity. Mr. Hunter testifies that "*[i]t was this approximately two- (2) year testing and design phase that generated the development plans that have been referenced…throughout the course of [his] witness statement.*" He adds that "*[o]f course, building local, State, and Federal working relationships with the appropriate government representatives was also a substantial undertaking as part of the site design and development.*"[145]

134. The chronology of the investment's establishment reflects that the actual implementation of "equipment and construction of buildings, including the design, expansion, and development of arable land, commenced during the 1996 to 2008 timeframe."[146] Attached as referenced in the footnote below for the Tribunal's benefit are some pictures taken of the property in 1995.[147]

135. The Tribunal will note the lack of improvements on the property at that time. Also distinctive is the absence of developed and manicured arable land.

---

144 Hunter Witness Statement (**CWS-001**) at ¶ 104.

145 *Id.* at 31, ¶ 96.

146 *Id.,* ¶ 97.

147 Attached as **C-0055-ENG** to facilitate reference are pictures of *El Petacal* during 1995.

136. Reproduced for the Tribunal's ease of reference is a schematic representation of *El Petacal* with the nomenclature "Nutrilite areas". It is the first page of a multi-page document comprising **Composite C-0056-ENG** to this Memorial.[148]

137. The schematic encompasses the entire 280 hectares of the *El Petacal* farming and processing operation. The Tribunal will note that the legend on the schematic under the title "Nutrilite areas" identifies ten zones. The zones from top to bottom, however, do not follow an ordinal progression. Instead, they have been arranged into two groups. The first consisting of four zones. And the second group having five zones.

138. The first group comprises the 120 hectares that make up the parcels purchased in May 1994, which is primarily used as a buffer zone, and to some extent for purposes of rotating crops.[149] This group contains Zones 3, 6 (hillside), 8 and 10.

139. The second group contains Zones 1, 2, 4, 5, 6, (farming) and 7. Each designated zone area for both groups has a corresponding video. The videos and links to them for each zone is here identified as (**Composite C-0056-ENG**)[150] to facilitate the Tribunal's understanding of these principal areas of *El Petacal.*

---

148 Attached as **Composite C-0056**, to facilitate reference are (i) Nutrilite areas (**C-0056-1-ENG**) and (ii) video links of each Nutrilite area: Manufacturing Zone 1 (**C-0056-2**), Farming Zone 2 (**C-0056-3**), Farming Zone 3 (**C-0056-4**), Farming Zone 4 (**C-0056-5**), Farming Zone 5 (**C-0056-6**), Farming Zone 6 and 7 (**C-0056-7**), Farming Zone 8 (**C-0056-8**), Hillside Zone 6 (**C-0056-9**); Hillside Zone 10 (**C-0056-10**); *see also* Hunter Witness Statement (**CWS-001**) n. 26.

149 Eppers Witness Statement (**CWS-002**) at ¶¶ 92-104.

150 *See supra* note 147.

1. Buildings and Installations on *El Petacal*: Construction Dates

140. Currently, there are thirty-six (36) principal structures on *El Petacal*. They are identified in the chart that follows, and listed in chronological order:[151]

Building	**Construction Date mmm-yy**
Main Offices (**C-0057-1**)	Aug-96
Electric Generator (**C-0057-2**)	Aug-96
Information Technology Offices (**C-0057-3**)	Aug-96
Supplies Warehouse (**C-0057-4**)	Jan-97
General Workshops (**C-0057-5**)	Jan-97
Deep well 1 (**C-0057-6**)	Jun-98
Deep Well 2 (**C-0057-7**)	Jun-98
Electric Substation (**C-0057-8)**	Jun-98
Agricultural Base (**C-0057-9)**	1998
Chía Cleaning Process (**C-0057-10**)	1998
Dining room zone 4a (**C-0057-11**)	Sep-98
Dining room zone 1d (**C-0057-12**)	Sep-98
Seedlings greenhouse (**C-0057-13**)	Sep-98
Nutrilite Dam (**C-0057-14**)	Oct-00
Dry Dam 1 (**C-0057-15**)	Oct-00

[151] Attached as **Composite C-0057**, to facilitate reference a chart listing the buildings located on the Subject Property with hyperlinks to each photograph is set out below. Please *see also* Hunter Witness Statement (**CWS-001**) n. 27.

Dry Dam 2 (**C-0057-16**)	Oct-00
Deep Well 3 (**C-0057-17**)	Apr-00
Environmental Health & Safety Irrigation Offices (**C-0057-18**)	Oct-00
Work In progress Warehouse 1 (**C-0057-19**)	Dec-06
Dehydration Building (**C-0057-20**)	Dec-06
Community Center (**C-0057-21**)	Mar-08
Finished product Warehouse 2 (**C-0057-22**)	Mar-08
Self-Consumption Fuel Station (**C-0057-23**)	Oct-08
Rotary Dryer Building (**C-0057-24**)	Dec-08
Chelates Area Kelatos (**C-0057-25**)	Dec-11
Dining room zone 12 (**C-0057-26**)	Dec-11
Dining room zone 4b (**C-0057-27**)	Dec-11
Dining room zone 5 (**C-0057-28**)	Dec-11
Innovation & Science Building (**C-0057-29**)	Oct-13
Dorms (**C-0057-30**)	Oct-13
Heat Treatment Building (**C-0057-31**)	Nov-15
Heat Treatment Offices (**C-0057-32**)	Nov-15
Dining room (**C-0057-33**)	Jan-22
Sanitary Pilot Plant (**C-0057-34**)	Ago-22
Dining room zone 9 (**C-0057-35**)	Dec-22
Dining room zone 6 and 7 (**C-0057-36**)	Oct-23

141. As already referenced, the majority of the improvements on the real property were constructed between 1998 and the calendar year 2000. And, as Mr. Hunter has testified, "*not one single building was constructed prior to 1996.*"[152]

2. Machinery Installation Date and Corresponding Building

142. The chart that follows lists the dates on which major equipment and machinery were installed, and identifies the building housing the equipment.[153]

Building	**Part of the Building**	**List of Equipment in Building**	**Date they were installed mmm-yy**
Heat Treatment Building	**PRE-MILLING**	SCALE (**C-0058-1**)	Nov-15
		CYCLONE (**C-0058-2**)	Nov-15
		METAL DETECTOR (**C-0058-3**)	Nov-15
		FEED BIN (**C-0058-4**)	Nov-15
		BAUERMEISTER MILL (**C-0058-5**)	Nov-15
		SWECO - CIRCULAR SEPARATOR (**C-0058-6**)	Nov-15
		VAC-U-MAX (**C-0058-7**)	Nov-15
		ROTARY VALVE 4, 5 and 6 (**C-0058-8**)	Nov-15
		AIR CONDITIONERS (**C-0058-9**)	Nov-15
	CITRUS BLENDS	SCALE (**C-0058-10**)	Nov-15
		TOTE TUMBLER (**C-0058-11**)	Nov-15

152 *See* at Hunter Witness Statement (**CWS-001**) at ¶ 104.

153 Attached as **Composite C-0058**. To facilitate reference**,** a chart listing the equipment/machinery located in each building on the Subject Property with hyperlinks to each photograph is set out below. Please *see also* Hunter Witness Statement (**CWS-001**) n. 28.

		ROTARY VALVE 7 (**C-0058-12**)	Nov-15
		SWECO - CIRCULAR SEPARATOR (**C-0058-13**)	Nov-15
		HOPER 1 (**C-0058-14**)	Nov-15
		HOPER 2 (**C-0058-15**)	Nov-15
		HOIST (**C-0058-16**)	Nov-15
		AIR- CONDITIONING (**C-0058-17**)	Nov-15
	HT (BAG FILLING)	SCALE (**C-0058-18**)	Mar-21
		SEALING MACHINE (**C-0058-19**)	Aug-20
		HYDRAULIC SKATE (**C-0058-20**)	Nov-15
	SUPPLIES	McKENNA BOILER (**C-0058-21**)	Nov-15
		BOILER (**C-0058-22**)	Nov-15
		KAESER COMPRESSOR (**C-0058-23**)	Nov-15
	EXTERIOR SUPPLIES	CHILLER (**C-0058-24**)	Nov-15
		CHILLER WATER RESERVE TANK (**C-0058-25**)	Nov-15
		HVAC (heating, ventilation and air conditioning) (**C-0058-26**)	Nov-15
		FILTER BOX (**C-0058-27**)	Nov-15
		HANDLER AHU16-1 (**C-0058-28**)	Nov-15
		HANDLER AHU16-05 (**C-0058-29**)	Nov-15
	MACHINE ROOM	STEAM GENERATOR (**C-0058-30**)	Nov-15

		REVERSE OSMOSIS PURIFIER (**C-0058-31**)	Nov-15
		BELIMED STERILIZER (**C-0058-32**)	Nov-15
	MEZANINE	EPSA VACUUM PUMP (**C-0058-33**)	Nov-15
		DONALDSON DUST COLLECTOR (**C-0058-34**)	Nov-15
		FARR COLLECTOR (**C-0058-35**)	Nov-15
		STEAM HEAD (**C-0058-36**)	Nov-15
	POST MILLING	DUAL SCALE (**C-0058-37**)	Nov-15
		DELUMPER (**C-0058-38**)	Nov-15
		SPARK DETECTOR (**C-0058-39**)	Jul-19
		METAL DETECTOR (**C-0058-40**)	Nov-15
		MAGNETIC TRAP (**C-0058-41**)	Nov-15
		BAUERMESITER MILL (**C-0058-42**)	Nov-15
		HMI (Human-machine interface) (**C-0058-43**)	Nov-15
		SWECO - CIRCULAR SEPARATOR (**C-0058-44**)	Nov-15
		FILLING VALVE (**C-0058-45**)	Nov-15
		ROTARY VALVE 1 AND 2 (**C-0058-46**)	Nov-15
		EPSA PNEUMATIC TRANSPORT (**C-0058-47**)	Nov-15
		HOIST (**C-0058-48**)	Nov-15
Heat treatment Offices	**NA**	11 AIR CONDITIONERS (**C-0058-49**)	Nov-15

Dehydration Building	**RECEPTION OF RAW MATERIALS**	2 SCALES (**C-0058-50**)	Dec-06
		DRY WASHER (**C-0058-51**)	Jun-08
		2 CONVEYOR BELTS (**C-0058-52**)	Jun-08
		BOX WASHER (**C-0058-53**)	Dec-17
		2 ELECTRIC SKATES (**C-0058-54**)	May-23
	WASHING	DICER MACHINE (**C-0058-55**)	Dec-11
		2 CHOPPERS (**C-0058-56**)	Dec-12
		2 WASHING MACHINES (**C-0058-57**)	Dec-07
		9 CONVEYOR BELTS (**C-0058-58**)	Dec-12
		STEAMER (**C-0058-59**)	Dec-08
		STEAM EXTRACTION TURBINE (**C-0058-60**)	Dec-08
	DEHYDRATED	4 BIN DRYERS (**C-0058-61**)	Bin 1 & 2, Dec-06 Bin 3, Jun-08 Bin 4, Dec-09
		4 BURNERS (**C-0058-62**)	Burner 1 & 2, Dec-06 Burner 3, Jun-08 Burner 4, Dec-09
	SHIPMENT	SCALE (**C-0058-63**)	Dec-06
		FORK LIFT (**C-0058-64**)	Dec-14
	SCREENING	SCALE (**C-0058-65**)	Dec-06

		DISINTEGRATOR MILL (**C-0058-66**)	Dec-11
		TORPEDO (**C-0058-67**)	Dec-11
		VAC-U-MAX (**C-0058-68**)	Dec-11
		ROTARY VALVE (**C-0058-69**)	Dec-11
		SWECO - CIRCULAR SEPARATOR (**C-0058-70**)	Dec-11
		METAL DETECTOR (**C-0058-71**)	Dec-11
		SPARK DETECTOR (**C-0058-72**)	Jul-19
		SWING CRANE (picture not available)	Dec-11
	LPS (Large Particle Size)	SCALE (**C-0058-73**)	Jun-16
		MASSAGER (**C-0058-74**)	Jun-16
		AUGUER (**C-0058-75**)	Jun-16
		FITZMILL MILLS (**C-0058-76**)	Jun-16
		SWECO - CIRCULAR SEPARATOR (**C-0058-77**)	Jun-16
		METAL DETECTOR (**C-0058-78**)	Jun-16
		2 HOISTS (**C-0058-79**)	Jun-16
		HYDRAULIC SKATE (**C-0058-80**)	Jun-16
Rotary Dryer Building	**EXTERNAL ZONE**	BRUNER (**C-0058-81**)	Nov-04
		RAMP LIFT (**C-0058-82**)	Nov-04
		ADVANCE RAMP (**C-0058-83**)	Nov-04
		CRUSHER (**C-0058-83**)	Nov-04
		AUGUER (**C-0058-84**)	Nov-04

		DEHYDRATOR CYLINDER (**C-0058-85**)	Nov-04
		TURBINE (**C-0058-86**)	Nov-04
		ROTARY VALVE (**C-0058-87**)	Nov-04
		HAMMER MILL (**C-0058-88**)	Nov-04
		SPARK DETECTOR (**C-0058-89**)	Oct-19
		DONALDSON DUST COLLECTOR (**C-0058-90**)	Aug-12
	INTERNAL ZONE	VAC-U-MAX (**C-0058-91**)	Nov-04
		ROTARY VALVE (**C-0058-92**)	Nov-04
		2 SWECO - CIRCULAR SEPARATORS (**C-0058-93**)	Nov-04
		MAGNETS (**C-0058-94**)	Dec-11
		HOIST (**C-0058-95**)	Nov-19
		FEED BIN (**C-0058-96**)	Nov-04
		FORK LIFT (**C-0058-97**)	Apr-13
		2 SCALES (**C-0058-98**)	Nov-04
Work In Progress Warehouse 1	**NA**	GENIE ARTICULATED PLATFORM (**C-0058-99**)	Nov-15
		RACK SYSTEMS (**C-0058-100**)	Dec-09
Finished Product Warehouse 2	**NA**	FORK LIFT (**C-0058-101**)	Apr-13
		LEVELING RAMP (**C-0058-102**)	Nov-15

		RACK SYSTEMS (**C-0058-103**)	Nov-15
Self Consumption Fuel Station	**NA**	FUEL SELF- CONSUMPTION STATION (**C-0058-104**)	Oct-08
Fire Protection System	**PRODUCTION**	FIRE PROTECTION SYSTEM (**C-0058-105**)	Dec-09
Optical Fiber	**NA**	FIBER OPTIC LINE (pictures unavailable – underground)	Feb-22
Deep Well 1,2,3	**DEEP WELL 1**	FREQUENCY VARIATOR (**C-0058-106**)	Jun-98
		STARTER (**C-0058-107)**	Jun-98
		SUBMERSIBLE PUMP (**C-0058-108**)	Jun-98
	DEEP WELL 2	SUBSTATION: 2 ELECTRICAL TRANSFORMERS (**C-0058-109**)	Jun-98
		STARTER (**C-0058-110**)	Jun-98
		SUBMERSIBLE PUMP (**C-0058-111**)	Jun-98
	DEEP WELL 3	SUBSTATION: 1 ELECTRICAL TRANSFORMER (**C-0058-112**)	Apr-00
		STARTER (**C-0058-113**)	Apr-00
		SUBMERSIBLE PUMP (**C-0058-114**)	Apr-00
Private Medium Voltage Electrical Network	**FARM AREA**	ELECTRICAL NETWORK (**C-0058-115**)	Sep-98

Irrigation System	**FARM AREA**	UNDERGROUND HYDRAULIC NETWORK FOR DRIP IRRIGATION (**C-0058-116**) UNDERGROUND HYDRAULIC NETWORK FOR CENTRAL PIVOT IRRIGATION UNDERGROUND HYDRAULIC (**C-0058-117**) NETWORK FOR MICROSPRAY IRRIGATION (**C-0058-118**)	1998 - 2002
Electric Generator	**COMMUNITY CENTER AREA**	ELECTRIC GENERATOR (**C-0058-119**)	Aug-96
Electric Sub Station	**PRODUCTION AREA**	ELECTRIC SUBSTATION (**C-0058-120**)	Jun-98
Chia Cleaning Line	**CHIA CLEANING BUILDING**	CHIA CLEANING LINE (**C-0058-121**)	Feb-24

143. The Tribunal will note a plurality of the equipment, with the material exception of the electric generator and the electric substation (1996-1998), and deep wells 1, 2, & 3 (1998-2000), were installed in 2015. The referenced buildings and equipment reflect how the testing, planning, and design work that took place between 1992 and 1994 and part of 1995 was physically installed and rendered operational.[154] Attached as

154 Hunter Witness Statement (**CWS-001**) at ¶ 106.

Composite C-0056-ENG is a comprehensive schematic of the property as existing as of the time of the signing of the filing of this submission.[155]

144. NPI's and later ABG's development of *El Petacal* directly through Nutrilite S.R.L. over time can be comprehensively appreciated by tracking the evolution of the workforce at the organic farming, processing, and packaging operation. The micro- and macro-economic significance of the employment opportunities that Nutrilite S.R.L. created are discussed in Section IX, *infra*. Here, however, the Arbitral Tribunal respectfully is invited to note the incremental creation of jobs commencing in calendar year 1992 (because the 160 hectares comprising *Puertas Tres* and *Cuatro* were purchased in May of that year) through February 13, 2024.

145. Accordingly, set forth below for the Arbitral Tribunal's ease of reference is a chart with calendar years commencing 1992 and corresponding numbers of Nutrilite S.R.L. employees[156] working at *El Petacal*:

Year	Number of employees
1992	2
1993	2
1994	3
1995	3
1996	6
1997	9
1998	9

[155] *Id.*, ¶ 107. Mr. Hunter has testified that "*but for the chia cleaning line installed in 2024, the buildings and equipment identified in this witness statement and present in (**C-0057-ENG**) and (**C-0058-ENG**) to this witness statement, were part of the 280 hectares forming El Petacal as of July 1 and 7, 2022, the dates on which title to the 280 hectares was taken, and the 120 hectares (Puertas Uno and Dos de El Petacal) were physically occupied*." *Id.*, ¶ 108.

[156] Attached as **Composite C-0059/KE-0001-SPA** to facilitate reference are copies of documents kept in the ordinary course of business reflecting employment history that has been synthesized in the form of the chart that is the subject matter of this footnote.

This underlying documentation respectfully is provided to the Arbitral Tribunal as an evidentiary basis for the summary of this documentary evidence contained in the referenced chart.

1999	15
2000	15
2001	24
2002	31
2003	42
2004	114
2005	139
2006	367
2007	420
2008	457
2009	420
2010	412
2011	511
2012	605
2013	411
2014	547
2015	458
2016	545
2017	642
2018	654
2019	667
2020	653
2021	608
2022	467
2023	484
13-02-2024	370

146. The Tribunal will observe that through 1995 the *El Petacal* farm operation only had three (3) employees. A number that only grew to fifteen (15) employees as of calendar year 2000.

147. It was not until calendar year 2004 that *El Petacal* surpassed the 100-employee mark (114), and in 2008 that the 450-employee threshold was surpassed (457). At its height in 2019, the Tribunal will note that 667 people were employed.

148. Hence, in 1994, basic infrastructure work was undertaken in order to clear the land and render it possible for trucks and other service vehicles to have even rudimentary access to *El Petacal*.[157]

149. In late 1994 and early 1995 rough roads were developed throughout the site.[158] By the second quarter of 1995 (September 30) the bridge, *Puente La Colmena*, was

---

157 (1994)

(i) The existing dam, including gate replacement and comprehensive mud removal was completed;

(ii) Deep water well completed with the installation of a pipe network to distribute water to the reservoir and township;

(iii) Land clearance and leveling (still were ongoing in December 1994);

(iv) Acerola trees were planted for testing purposes;

(v) Nutrilite worked with State and Federal government agencies to provide electricity to *El Petacal* and to the Township of San Isidro;

(vi) Engineering plans were developed and completed for infrastructure work for the construction of the bridge and road over "*Arroyo La Colmena*";

(vii) Testing of renewable energies (i.e., wind, solar, and co-generation);

(viii) Ingress and egress road constructed leading to the central office area;

(ix) Construction of a composting area, and commencement of composting process;

(x) 30 hectares of the northern quadrant were cleared;

(xi) A new well was drilled to replace an under-capacity unit and pumps were installed;

(xii) Detection of weevil predators and parasites commenced and testing of natural control agents for weevils took place;

(xii) Developing capacity data on watercress, pending throughout 1994 and study of harvesting techniques;

(xiv) Area between the office and river was graded for a Distributor Pavilion;

(xv) Boundaries established for *El Petacal*, topographic survey completed on the area surrounding the first two bridge;

(xvi) Second topographic survey on the southwestern portion of the site was completed.

Hunter Witness Statement (**CWS-001**) at ¶¶ 81.

158 *Id.* at 18, ¶ 69.

completed.[159] By 1995 much of the basic irrigation and infrastructure also was completed.[160]

150. In 1996, additional infrastructure work and improvements on real property were built.[161] During 1997, supply warehouses and general workshops were constructed.[162] In

---

159 Eppers Witness Statement (**CWS-002**) at ¶¶ 173, 174, n. 50, n. 51.

160 During this timeframe (1995) the following six investment installment milestones were reached:

(i) Limited irrigation installation for test farming, and first phase green manure farming;

(ii) Infrastructure improvements and the construction of small bridges to cross multiple ravines (including *Arroyo La Colmena*);

(iii) Warehousing construction was completed;

(iv) Distributor Pavilion was built with a separate septic system;

(v) Preliminary feasibility study on installation of Instant Quick Freeze (IQF) was competed; and

(vi) Negotiation with Sr. Lic. Francisco Mayorga, Secretary of the Rural Development of the Government of Jalisco, and Ing. Ernesto M. Sánchez Anguiano (General Manager) of the National Commission of Electricity regarding electricity to *El Petacal*, was being undertaken.

Hunter Witness Statement (**CWS-001**) at ¶¶ 81-82.

161 (1996)

(i) Main offices, electric generator and Information Technology Office were constructed (Hunter Witness Statement (**CWS-001**) at ¶ 103, n. 27);

(ii) Equipment was installed in the Community Area Center – electric generator (*Id.* at ¶ 105, n. 28);

(iii) Bridges Nos. 1 & 2 were constructed (Eppers Witness Statement (**CWS-002**) at ¶ 171, n. 48, n. 49);

(iv) Expansion of irrigation system for green manure farming to 150 hectares (Hunter Witness Statement (**CWS-001**) at ¶¶ 80-83);

(v) Drilling of well number two (2) in northwestern quadrant; and (*Id.*)

(vi) Construction and outfitted laboratory for basic assay work was completed. (*Id.*)

162 Hunter Witness Statement (**CWS-001**) at ¶ 103, n. 27).

1998, work concerning potable and irrigation water was undertaken and prioritized.[163] In 1999, the construction of a three-phased tension electrical line was completed.[164]

151. On January 13, 2000, the first certificate certifying organic farming at *El Petacal* issued.[165] This fact represents a critical milestone in the functionality of *El Petacal* as an organic farming, processing, and packaging center. In calendar year 2000, water related infrastructure work continued.[166]

---

163 (1998)

(i) Deep Well 1, Deep Well 2, electric substation were constructed (Hunter Witness Statement (**CWS-001**) at ¶ 103, n. 27);

(ii) Equipment installed for Deep Well 1 – Frequency Variator, Starter and Submersible Pump were added; (*Id.* at 42, ¶ 105, n. 28);

(iii) Equipment installed for Deep Well 2 - Substation 2 – Electrical Transformer, Starter and Submersible Pump were installed (*Id.*);

(iv) Equipment installed for Electrical Substation – Production Area (*Id.* at 43, ¶ 105, n. 28);

(v) Dining Room Zone 4a, Dining Room Zone 1d, and Seedling Greenhouse were constructed (Hunter Witness Statement (**CWS-001**) at ¶ 103, n. 27);

(vi) Equipment installed for Private Medium Voltage Electrical Network in farm areas (*Id.* at ¶ 105, n. 28); and

(vii) Equipment installed for Irrigation System in Farm Area – Underground Hydraulic Network for Drip Irrigation, Underground Hydraulic Network for Central Pivot Irrigation, Underground Hydraulic Network for Micro Spray Irrigation (*Id.* at ¶ 105, n. 28). This latter installation effort lasted through calendar year 2002.

164 Eppers Witness Statement (**CWS-002**) at ¶147, n. 36.

165 *Id.* at 33, ¶ 106, n. 15.

166 (2000)

(i) Deep Well 3 was constructed (Hunter Witness Statement (**CWS-001**) at ¶ 103, n. 27);

(ii) Equipment was installed for Deep Well 3 (*Id.* at 42, ¶ 105, n. 28);

(iii) Substation 1 Electrical Transformer as installed (*Id.*);

(iv) Starter and Submersible Pumps were added to Deep Well 3 (*Id.*);

(v) Nutrilite Dam, Dry Dam 1 and Dry Dam were built (*Id.*, at 33, ¶ 103, n. 27); and

(vi) Environmental Health and Safety Irrigation Offices were constructed (*Id.*).

152. In 2004, a significant percentage of the processing equipment was installed.[167] It was not until December 2006 that the Dehydration Facility was completed.[168] As part of this effort multiple component parts to the Dehydration Facility were installed at that time.[169] By the end of 2008 through 2009, a number of improvements on real property were concluded and some processing component parts were installed.[170] Throughout

---

[167] Equipment was installed in the Rotary Dryer Building – (External Zone) Burner, Ramp Lift, Advance Ramp, Crusher, 2 Auger, Dehydrator Cylinder, Turbine, Rotary Valve, Hammer Mill, Spark Detector, Donaldson Dust Collector; (Internal Zone), Vac-U-Max, Rotary Vale, 2 Sweco-Circular Separators, Feed Bin, and 2 Scales, were installed (*Id.* at 40-41, ¶ 105, n. 28).

[168] Eppers Witness Statement (**CWS-002**) at ¶ 155.

[169] Dehydration Building installs:

(i) (Reception of Raw Materials) 2 Scales;

(ii) (Dehydrated) Bin Dryer 1 & 2, Burner 1 & 2;

(iii) (Shipment) Scale; and

(iv) (Screening) Scale.

(Hunter Witness Statement (**CWS-001**) at ¶ 105, n. 28); and

(v) There was still work in progress with respect to Warehouse 1 and the Dehydration Building was constructed that year as well. (*Id.* at 33, ¶ 103, n. 27).

[170] (2008 – 2009)

(i) Community Center and finished products warehouse 2 were constructed (*Id.* at 33, ¶ 103, n. 27);

(ii) Self-consumption fuel station was constructed (*Id.* at 34, ¶ 103, n. 27);

(iii) Equipment was installed for self-consumption fuel station (*Id.* at 42, ¶ 105, n. 28);

(iv) Rotary dryer building was constructed (*Id.* at 34, ¶ 103, n. 27);

(v) Additional equipment was installed in the Dehydration Building (Washing) Steamer, Extraction Turbine) (*Id.* at 38-9, ¶ 105, n. 28);

(vi) Equipment installed in Dehydration Building (Dehydrate) Bin Dryer 4 and Burner 4 (*Id.)*;

(vii) Equipment installed in Work-In Progress Warehouse 1 – Rack Systems (*Id.* at 41, ¶ 105, n. 28); and

(viii) Equipment installed for fire protection (*Id.* at 42, ¶ 105, n. 28).

calendar years 2011 and 2012 construction and installation of buildings and equipment still took place.[171]

153. By 2013, *El Petacal* was harvesting, processing, and packaging the raw materials that it produced.[172] In that same year, the Innovation and Science Building was built, and dorms were constructed.[173] Major component parts for these buildings also were installed at that time.[174]

154. Finally, the Heat Treatment Facilities and Offices were constructed and appropriately populated with component parts.[175]

---

171 (2011 – 2012)

(i) Chelates Area Keltos, Dining Room Zone 12, Dining Room Zone 4b, and Dining Room Zone 5 were constructed (*Id.* at 34, ¶ 103, n. 27);

(ii) Equipment installed in Dehydration Building (Washing) Dicer Machine (*Id.* at 38, ¶ 105, n. 28);

(iii) Equipment installed in Dehydration Building (Screening) Disintegrator Mill, Torpedo, Vac-U-Max, Rotary (*Id.* at 39, ¶ 105, n. 28);

(iv) Valve, Sweco-Circular Separator, Metal Detector, and Swing Crane (*Id.* at 39-40, ¶ 105, n. 28);

(v) Equipment installed in Rotary Dryer Building – (Internal Zone) 4 Magnets (*Id.* at 41, ¶ 105, n. 28);

(vi) In August 2012 installed in Rotary Dryer Building – (External Zone) Donaldson Dust Collector also installed(*Id.* at 40, ¶ 105, n. 28); and

(vii) Equipment installed in Dehydration Building – (Washing) 2 Choppers and 9 Conveyor Belts (*Id.* at 38, ¶ 105, n. 28).

172 Eppers Witness Statement (**CWS-002**) at ¶ 91.

173 *Id.*, at 32, ¶ 100; *see also* Hunter Witness Statement (**CWS-001**) at ¶ 103.

174 (2013)

(i) Equipment installed in Rotary Dryer Building – (Internal Zone), Forklift;

(ii) Equipment installed in Work-in-Progress Warehouse 1 – Forklift; and

(iii) Equipment installed in Finished Product Warehouse 2 – Forklift.

(Hunter Witness Statement (**CWS-001**) at 105).

175 Hunter Witness Statement (**CWS-001**) at ¶¶ 103, 105.

VIII. THE ORGANIC FARMING PROCESS AT *EL PETACAL*

155. The value of the *El Petacal* organic farming processing and packaging operation arises from the uniqueness of the land and its location,[176] and the organic farming that *El Petacal* sustains pursuant to a rigorous organic certification process.[177] The *El Petacal* organic farming process is central to the quality of Amway's nutritional supplements. It contributes to carving out a special marketplace for the Nutrilite™ line of products.

156. ABG and Amway do not target the elite athlete or the morbidly obese consumer markets for nutritional supplements and vitamins. The Nutrilite™ line of products primarily focuses on meeting the expectations and consumer needs of persons who are mindful of maximizing their health through the use of products made with organic ingredients. Organic farming and processing provides Nutrilite™ vitamins and nutritional supplements with peerless quality.[178]

157. Nutrilite S.R.L.'s organic certification issues from the Oregon Tilth Certified Organic (OTCO) which certifies a total of approximately 2,143 operations on 2,137,622

Equipment was installed in the Heat Treatment Building – (Pre-Milling) Scale, Cyclone, Metal Detector, Feed Bin, Bauermeister Mill, Sweco-Circular Separator, Vac-U-Max, Rotary Valve 4, 5, and 6, Air Conditioners; (Citrus Blends) Scale, Tote Tumbler, Rotary Valve 7, Sweco Circular Separator, Hoper 1, Hoper 2, Hoist, Air-Conditioning; (HT (Bag Filling) Hydraulic Skate, (Supplies) McKenna Boiler, Boiler, Kaeser Compressor; (Exterior Supplies) Chiller, Chiller Water Reserve Tank, HVAC (heating ventilation and air conditioning), Filter Box, Handler AHU16-1, Handler AHU16-105; (Machine Room) Steam Generator, Reverse Osmosis Purifier, Belimed Sterilizer; (Mezzanine) EPSA Vacuum Pump, Donaldson Dust Collector, Farr Collector, Steam Head, (Post Milling) Dual Scale, Delumper, Metal Detector, Magnetic Trap, Bauermeister Mill, HMI (Human-machine interface), Sweco – Circular Separator, Filling Valve, Rotary Valve 1 and 2, EPSA Pneumatic Transport, Hoist, Equipment installed in Heat Treatment Offices, 11 Air Conditioners; Equipment installed in Work-in-Progress Warehouse 1 - Genie Articulated Platform, Rack Systems; Equipment installed in Finished Product Warehouse 2 – Leveling Ramp, Rack Systems (*Id.*, at 35-38, ¶ 105).

176 Eppers Witness Statement (**CWS-002**) at ¶¶ 35-37.

177 *Id.* at 8, ¶ 39.

178 *Id.*

organically certified acres in the U.S. and Latin America.[179] Notably, the OTCO maintains accreditation and direct compliance with organic certification requirements of nine countries, including the United States Department of Agriculture-Agricultural Marketing Service-National Organic Program, and the United Mexican States' *Servicio Nacional de Sanidad, Inocuidad y Calidad Agroalimentaria* (SENASICA).[180] The OTCO's certification process, in adhering to USDA organic regulations, follows 7 C.F.R. Part. 205 National Organic Program, as well as the SENASICA Mexican counterpart requirements.

158. ABG's Organic System Plan ("OSP") constitutes the fulcrum of the organic certification process.[181] The OSP comprises approximately fourteen (14) maintenance and disclosure forms together with a survey map of *El Petacal*. The OSP is premised on a policy of transparency and disclosure requirements that seek to ensure that appropriate procedures are implemented and duly enforced in keeping with regulatory and legal organic certification requirements.

159. The principal disclosure requirements can be summarized for present purposes as follows:

(a) information regarding the entity seeking certification, including its certification history where applicable;

(b) a comprehensive and detailed listing of the arable land cultivation and harvesting activities undertaken on the farm premises;

---

179 European Organic Certifiers Council, "Oregon Tilth," various dates, <https://eocc.nu/members/oregon-tilth/>, accessed on May 22, 2024,**C-0060-ENG**; *see also* Eppers Witness Statement (**CWS-002**) at ¶ 40-43, n. 5.

180 *Id.*

181 Attached as **Composite C-0061-ENG/SPA** to facilitate reference is Nutrilite S.R.L.'s Organic System Plan.

(c) a disclosure of the historical use of the farmland at issue, including each individual parcel purportedly sustaining agricultural and harvesting activities;

(d) a descriptive narrative and disclosure of the acceptable organic fertilizers applied;

(e) a disclosure and comprehensive narrative pertaining to the management of plagues, diseases, and other pollutants causing harm to crops;

(f) a disclosure and narrative concerning the biodiversity of the subject farm;

(g) physical showing of the maintenance of logs memorializing crops cultivated and harvested in each parcel;

(h) disclosure of methodologies used for the (a) processing, (b) washing, (c) cutting, (d) classification, (e) drying, (f) refrigeration, (g) freezing, (h) packaging, and (i) transportation of organically farmed crops;

(i) if applicable, disclosure of all labeling applied to crops;

(j) where applicable, a descriptive narrative of water flow and irrigation used for the cultivation of organic crops;

(k) disclosure of methodologies used to avoid contamination in the handling of seeds, planting, and cuttings of organic crops;

(l) disclosure of acceptable levels of water used for cultivation of organic crops;

(m) disclosure of equipment used in the organic farming operation;

(n) a detailed description of measures employed to avoid contamination, including land used as buffer zones;

(o) a log documenting seed providers as well as vegetation (plant grass) providers (if any);

(p) a detailed account of the sequence of operations concerning the use of fertilizers and soil enrichment organic materials;

(q) all processes used with respect to the warehousing of crops;

(r) disclosure of heat treatment processes and equipment;

(s) disclosure of well water tests;

(t) disclosure of all micronutrients forming part of the farming operation;

(u) disclosure of annual cleaning program used to sanitize all physical components of the farming operation, including buildings, interior areas (pre-milling and post-milling), and equipment;

(v) preventive measures in place to avoid contamination of irrigation water;

(w) disclosure of the maintenance and use of rotary dryers, pre-heat treatment equipment, and dehydration equipment; and

(x) recordkeeping concerning every aspect of the pre-harvesting and post-harvesting cultivation of crops, including documentation demonstrating the vetting of seed providers, crop rotation, and supplies.[182]

160. While this listing of twenty-four (24) categories is not exhaustive, it provides the Arbitral Tribunal with a sense of the disclosure and recordkeeping requirements that are essential to an OSP.[183]

161. Inspectors inquire on a yearly basis as to the status of these essential OSP requirements. The applicants for organic certification status are charged with an

182 *Id.*

183 Eppers Witness Statement (**CWS-002**) at ¶ 43.

affirmative reporting requirement with respect to any item forming part of the OSP that has materially changed.[184]

162. ABG's Mr. Keith Eppers, Director of Global Agribusiness Operations, testifies to the authenticity and rigors of organic farming as follows:

> *I respectfully would like to point out to the Arbitral Tribunal that organic farming at Amway (and in general) is neither a fad nor a marketing ploy. To the contrary, it is a highly regulated, expensive, and time-consuming process that requires significant investment and professional rigor. Moreover, it is scientifically-driven to achieve maximum quality and benefits of organic ingredients and products.*
>
> *Organic farming and certification entails submitting to rigorous regulations and practices that ensure that the seed-to-supplement process will yield ingredients that are free from organic and inorganic contaminants. It entails more than just avoiding pesticides and wearing special clothing during harvesting and processing*.[185]

163. Nutrilite S.R.L. applies for organic farming certification on a yearly basis and does so in accordance with the national list of allowed substances (2023)[186] and regulations of the Law for Organic Products Regulations.[187] In order to meet the necessary organic farming requirements and to be able to obtain organic farming certification, the farming and operational activity at *El Petacal* must meet six (6) essential requirements. These requirements concern every single aspect forming part of the interaction between the

---

184 *Id.*

185 *Id.* ¶¶ 44-45.

186 *Id.* ¶ 46, citing to <https://www.gob.mx/cms/uploads/attachment/file/830046/National_List_of_Allowed_Substances_2023_LPO_M_XICO.pdf>, accessed on May 23, 2024, **C-0054-ENG**.

187 *Id.* ¶¶ 44, *citing to* <https://www.gob.mx/cms/uploads/attachment/file/194132/OrganicProductsRegulations_1_.pdf>, accessed on May 23, 2024, **C-0075-ENG**.

soil, crops, plants, the immediate environment, and the people working in the fields and in the farm's facilities.[188]

164. The comprehensive screening of contaminants, in large measure by adhering to Mexican and U.S. organic certification requirements, can best be shared with the Tribunal by briefly discussing these six most salient organic farming requirements.

165. The first such requirement addresses the substances that actually touch the soil or penetrate it. This predicate mostly concerns fertilizers, amendments, conditioners, and soil inoculants. The regulations specify description, composition requirements, and conditions of use with respect to any such substance that is to be applied to arable land.[189]

166. This requirement deals with five sub-categories of substances: (i) mineral origin, (ii) plant or animal origin, (iii) micronutrients, (iv) products that can be used during post-harvest handling, and (v) a general catch-all category under "Others."[190]

167. Although seemingly vague in nomenclature, the "Others" subcategory addresses critical considerations. By way of example, it regulates the use of amino acids. It does so by requiring them to be non-synthetic in origin. Moreover, in the case of non-synthetic amino acids produced by plants, animals, and micro-organisms, the amino acids cannot be physically extracted. The extraction or isolation process must take place through hydrolysis or other means that do not involve chemicals.[191]

---

188 *Id.* at 11-12, ¶ 46.

189 *Id.* at 12, ¶ 48.

190 *Id.,* ¶ 49.

191 *Id.,* ¶ 50.

168. The regulation provides for the use of non-synthetic amino acids as plant growth regulators. They also can be applied to the soil as chelating agents. These chelating agents are organic molecules that are used to isolate or to trap a number of metal ions that are toxic for plant nutrition and micro-organisms in the soil. These metal ions are subsequently slowly released and absorbed by plants, but only after they have lost the negative cationic characteristics that are harmful to soil and plants.[192]

169. Similarly, the "Others" category allows for the use of enzymes. Very much like amino acids, only enzymes derived from plants, animals, or micro-organisms may be used in organic farming.[193]

170. The second requirement of qualified strictures that must be met in order to comply with U.S. and Mexican laws concerns the types of "pesticides" – or expressed in more technical terms - agents for the ecological management of insects, fungi, viri, bacteria, diseases, and weeds. With respect to substance and methodology, six (6) subcategories of pesticides are identified in order to establish clear notice of expectations as to performance and with respect to substance and methodology, including the ever-present "Others" catch-all-clause: (i) plant or animal origin, (ii) oils of natural origin, (iii) mineral origin, (iv) micro-organisms used for biological pest control, (v) micro-organisms, and (vi) "Others".[194]

171. Common to all requirements (and the present one is no exception) is a proscription against use of synthetic chemicals and even chemicals more generally that are not

192 *Id.*, ¶ 51.

193 *Id.,* ¶ 52.

194 *Id.,* ¶ 53.

treated with other substances. In this regard, two examples of permissible pesticides are helpful: extracts of algae and aquatic plants and natural preparations of plants.[195]

172. At first glance, it would appear that no qualification would be necessary for the use of these extracts because purer organic substances, other than algae and aquatic plants, are difficult to imagine and most likely do not exist.[196] Yet, the required qualifications understandably focus on the extent to which such extracts cannot have been chemically treated. In addition, the extracts themselves may have been "purified" or "cleansed" pursuant to chemical, and not physical, methodologies such as dehydration, freezing, and crushing.[197]

173. Likewise, the use of natural plants preparations seemingly would not require further amendment for their use. The applicable terms of use or composition requirements, nonetheless, provide that where the natural preparations of plants originate from wild species, they must directly derive from sustainable production.[198]

174. The third major requirement constituting a fundamental tenet of organic farming concerns ingredients that can be used in the processing of organic products. This category is intended to address and to limit the kinds of ingredients of non-organic origin that are permissible for use in the process of organic products. Five subcategories are identified on this subject: (i) food additives (carriers included), (ii) flavoring agents, (iii) water and salts, (iv) preparations of micro-organisms and

---

195 *Id.,* ¶ 54.

196 *Id.,* ¶ 55.

197 *Id.* ¶ 55.

198 *Id.* at 14*,* ¶ 56.

enzymes, and (v) minerals (including trace elements), vitamins, amino acids, micro-nutrients, and essential fatty acids and other nitrogen compounds.[199]

175. The fourth requirement addresses actual processing aids that are permissible for the processing/preparation of ingredients of organic agricultural origin. For the Tribunal's ease of reference, and to provide the Tribunal with a sense of the corresponding qualifications, set forth below is a table addressing these particulars:[200]

[The rest of this page is intentionally left blank.]

199 *Id.,* ¶ 57.

200 Attached as **C-0054-ENG** to facilitate reference is a copy of the *Official Gazette* published by the *Secretary of Agriculture and Rural Development*, dated May 2, 2023; *see also* Eppers Witness Statement (**CWS-002**) n. 11.

TABLE 4. - Processing aids that can be used for the processing/preparation of products of organic agricultural origin.

Name	Specific conditions
Vegetable oils	Greasing agents, demoulder or antifoam.
Citric acid	It is allowed in the production of oil, yeast, in starch hydrolysis and as a pH acidifier.
Tannic acid	Clarifying.
Argon	----------
Water	----------
Bentonite	----------
Activated carbon	----------
Calcium carbonate	----------
Potassium carbonate	Grapes drying.
Sodium carbonate	Sugar production.
Hazelnut shell	----------
Casein	----------
Bee wax	Demoulder.
Carnauba wax	Demoulder. As a cover (in citrus fruits or vegetables). As a mitigating method for cold storage and conservation treatment. As a cover in fruits with high transpiration in postharvest.
Calcium chloride	Coagulating agent.
Magnesium Chloride (or "Nigari")	Coagulating agent.
Carbon dioxide	----------
Ethanol	Solvent.
Silica gel or colloidal silicon dioxide solution	----------
Gelatin	----------
Rice flour	----------
Calcium hydroxide	----------
Sodium hydroxide (lye or caustic soda)	Sugar production. Production of oil of vegetable origin (excluding olive oil). Vegetable protein extraction. pH regulator. It is prohibited for the peeling of fruits and vegetables.
Ichtiocola or fish tail	----------
Nitrogen	----------
Ovalbumin	----------
Perlite	----------
Calcium sulfate	Coagulating agent.
Talcum powder	----------
Diatomaceous earth	----------

176. Mr. Eppers testifies that this fifth requirement:

> *… must be observed in order to engage in organic farming, and to satisfy U.S. and Mexican law requirements, concerns two types of ingredients that are permissible for organic preparation or processing, or that may be used in small amounts: (i) ingredients of non-organic vegetable origin, and (ii) ingredients of non-organic animal origin. This includes the following three subcategories and subparts: (i) unprocessed vegetable products and products derived from them: (i.i) edible fruits and nuts, (i.ii) aromatic plants and edible spices, (i.iii) various (algae, including marine, allowed in the preparation of conventional food products), (ii) vegetable*

products: (ii.i) fats, and oils (these can be refined or not, but not chemically modified), (ii.ii) sugars, starch and other products of cereals and tubers (such as beet sugar, fructose, wax corn and rice starch not chemically modified), (ii.iii) various (pea protein [Pisum pp]); and products of animal origin.[201]

177. The sixth and final requirement addresses the level of control that all undertakings directly or indirectly related to an organic farming operation must have. This requirement places qualifications on the very supplies permissible for sanitization, disinfection, and cleaning in organic operations. The extent of restraints and requirements is best illustrated by producing to the Arbitral Tribunal the following table:[202]

TABLE 7.- Supplies allowed for sanitization, disinfection and cleaning in organic operations.

In buildings and facilities for animal production:	Terms of use
Vegetable oils	----------
Acetic acid	See Acids
Acids (acetic, formic, lactic and oxalic)	That it comes from natural sources and/or be produced by carbohydrate fermentation using non-GMO microorganisms.
Citric acids	----------
Peracetic acid / peroxyacetic acid	It is allowed in aqueous solution containing peracetic acid (CAS 79-21-0), for the disinfection of processing equipment and facilities, with a concentration that does not exceed 6% as indicated on the product label.
Phosphoric acid	For dairy equipment.
Nitric acid	For dairy equipment.
Water and steam	----------

201 *Id.* at 15-16, ¶ 59.

202 *See supra* note 199.

Ethyl alcohol	For use as an algaecide, disinfectant and sanitizer.
Isopropyl alcohol	----------
Lime	----------
Quicklime	----------
Sodium carbonate	----------
Natural plant essences	----------
Ozone gas	----------
Sodium hypochlorite (eg as liquid bleach)	The residual levels of chlorine in the water will not exceed the maximum limit of disinfectant residues in accordance with the Amendment to the Official Mexican Standard NOM-127-SSA1-1994, published in the Federal Official Gazette on November 22, 2000.
Soap	----------
Potash and soda soap	----------
Whitewash	----------
Hydrogen peroxide	----------
Caustic potash	----------
Cleaning and disinfection products for teats and milking facilities	----------
Caustic soda	
For cleaning and disinfection of irrigation equipment:	**Terms of use**
Vegetable oils	----------
Acetic acid	It can be used as an algaecide or disinfectant.
Peracetic acid / peroxyacetic acid	(CAS #-79-21-0) For use as an algaecide, disinfectants and sanitizer and in hydrogen peroxide formulations with a concentration not to exceed 6% as indicated on the product label.
Water and steam	----------
Ethyl or isopropyl alcohol	As an algaecide, disinfectant and sanitizer.
Ozone gas	----------
Soap	----------
Chlorinated Materials: Calcium Hypochlorite, Chlorine Dioxide, Sodium Hypochlorite	The residual levels of chlorine in the water will not exceed the maximum limit of disinfectant residues in accordance with the Amendment to the Official Mexican Standard NOM-127-SSA1-1994, published in the Federal Official Gazette on November 22, 2000.
Hydrogen peroxide	As an algaecide, disinfectant and sanitizer.
For processing plants, storage and transportation equipment:	**Terms of use**
Phosphoric acid	----------
Peracetic acid / peroxyacetic acid	(CAS #-79-21-0) For use as a sanitizer on food processing equipment and utensils and on food contact surfaces at a concentration of not less than 100 ppm and not more than 200 ppm.
Water and steam	----------
Chlorinated materials: Calcium hypochlorite, chlorine dioxide, sodium hypochlorite	The residual levels of chlorine in the water will not exceed the maximum limit of disinfectant residues in accordance with the Amendment to the Official Mexican Standard NOM-127-SSA1-1994, published in the Federal Official Gazette on November 22, 2000.
Ozone	----------
Hydrogen peroxide	As an algaecide, disinfectant and sanitizer, including cleaning of irrigation systems.

For sanitization, disinfection and cleaning of food contact surfaces and post-harvest handling.	Terms of use
Acetic acid	That it comes from natural sources, for use as a food grade cleaner, sanitizer and disinfectant.
Citric acid	----------
Peracetic acid / peroxyacetic acid	(CAS #-79-21-0) For use as a sanitizer on food contact surfaces and use in product wash and/or rinse water, in aqueous solution not to exceed 80 ppm in wash water.
Water and steam	----------
Ethyl alcohol	As a disinfectant and sanitizer, including cleaning of irrigation systems and food contact surfaces and is removed before organic production.
Isopropyl alcohol / Isopropanol	Food grade cleaner, sanitizer and disinfectant and is removed prior to organic production.
Detergents	Biodegradable in nature.
Natural plant essences	E.g. Citrus extracts.
Sodium hydroxide (lye or caustic soda)	Food grade cleaner, sanitizer and disinfectant and is removed prior to organic production.
Calcium hypochlorite	Free chlorine levels for washing water in contact with crops or food, and in the washing water of cleaning irrigation systems, applied to crops or fields, will not exceed the maximum limits according to the standards applicable to drinking water.
Sodium hypochlorite (eg as liquid bleach)	To be used in pre-harvest, the residual levels of chlorine in the water in direct contact with the crop or in the cleaning water of the irrigation systems applied to the soil must not exceed the maximum residual limit established in the Modification of the NOM-127-SSA1-1994, published in the Federal Official Gazette on November 22, 2000.
For water treatment	**Terms of use**
Citric acid	Citric acid is allowed in water treatment, use in product washing or rinsing water, the same concentration criteria apply as for peracetic acid indicated for that use, in an aqueous solution that does not exceed 80 ppm in the washing water.

178. Mr. Eppers testifies:

> *As the Arbitral Tribunal may glean, organic farming requires the implementation of dozens of internal procedures to ensure compliance and to safeguard against unintentional contamination or cross-contamination of organic operations. Every product purchased that is to be taken to the farming operation, whether to the fields or to any of the farm's buildings, must comply with the requirements discussed.*
>
> *Certainly, organic farming is expensive and time-consuming. From our research and development scientific staff, to the personnel who bring products to the farm, and the field employees, everybody must receive training and develop professional*

habits and methodologies that will ensure compliance with these exacting standards.[203]

***

Were the farming, processing, and packaging operations at El Petacal interrupted, ABG and Amway would not be able to replicate most of its nutritional supplement and vitamin product lines merely by sourcing the raw materials from third parties. If any percentage of an ingredient of any product-line were to be altered by substituting an inorganic counterpart or a white chia other than the patented Nutrilite Rehnborg White Chia, that product would be altered. It no longer would represent the highest and best possible exemplar of such product. Thus, the actual product that ABG produces, distributes, markets, and currently makes available to consumers globally who crave nutritional supplements made with the highest quality organic ingredients would disappear.[204]

179. The evidentiary record before this Arbitral Tribunal establishes that *El Petacal*'s organic farming operation is indispensable to the Nutrilite™ line of products. Likewise, this evidence establishes beyond quibble that the *El Petacal* organic farming enterprise is virtually irreplaceable when contextually considered with regard to the Nutrilite™ line of vitamin and mineral supplements.

180. Mr. Eppers explains:

The R&D Team at El Petacal engages in theoretical and applied bio-development focused on existing as well as new crops earmarked for farming in Mexico. Virtually every single aspect of the farming of existing and prospective crops is subjected to practical and theoretical analysis.

As to existing crops, the R&D team focuses on maximization and improvement of plant nutritional value. ABG is invested in setting higher goals for its nutritional supplements and vitamins. Studies on irrigation, fertilization, growing conditions, soil nutrients, and organic protection of plant growth and development at El Petacal are central to ABG's contribution to a global supply chain of Nutrilite™ nutritional supplements and vitamins.

The R&D team also engages in practical experimentation. There are approximately three (3) acres on the farm reserved for experimental farming and testing. This

203 Eppers Witness Statement (**CWS-002**) at ¶¶ 61-62.

204 *Id.* at 19, ¶ 65.

practical scientific dimension is critical because often theoretical models when actually removed from the blackboard and transferred to the field lead to discoveries of both positive and negative variables.[205]

A. Research and Development on *El Petacal*

181. Any assessment on Nutrilite S.R.L.'s organic farming operation must submit to sustained analysis the value of its Research & Development (R&D) undertaken at the premises. This R&D very much bolsters Nutrilite S.R.L.'s organic farming process, enhancing the value and uniqueness of the operation. The record before this Tribunal demonstrates that ABG has a complete research team on site. It is led by Alicia Castello Gutierrez who supervises a team of five (5) research scientists.[206]

182. Much of the R&D seeks to benefit from the very exceptional conditions that can be found in very few places on the planet beyond *El Petacal*. Thus, onsite testing at *El Petacal* is invaluable to the entire agricultural supply chain. Mr. Eppers adds that "*[w]hile aprioristic theoretical knowledge certainly is possible, in this field a practical test often is required.*"[207]

183. New crops and varieties of existing crops, such as the Rehnborg White Chia, always are being developed. Future formulas constantly are being explored, all within the framework of organic farming. The *El Petacal* R&D team works very closely with R&D teams in California, Washington State, and Michigan. This pooling of resources routinely generates intellectual property mostly in the form of new crop varieties.[208]

184. The R&D team in *El Petacal*, and generally in the Amway family of companies, in addition to prioritizing qualitative increments in the nutritional value of plants that will

---

205 *Id.* at 20, ¶ 67-69.

206 *Id.* at 19-20, ¶ 66.

207 *Id.* at 20, ¶ 70.

208 *Id.* at 20-21, ¶ 71.

form part of the Nutrilite™ supplements, also focuses on cost efficiencies and water conservation. Mr. Eppers testifies that "*[the Nutrilite S.R.L.] R&D team at El Petacal also is charged with exploring organic farming methodologies and processes that will contribute to maintaining and enhancing the wellbeing of the environment*."[209] He adds that *"[t]he El Petacal R&D team focuses its investigations on enhancing products that can be grown in Mexico and serve to improve different aspects of the human life cycle."*[210]

185. The R&D at *El Petacal* takes place on the 160 hectares parcel identified as *Puertas Tres* and *Cuatro*.[211]

B. The Seed-to-Supplement Process

186. Another feature of the *El Petacal* organic farming activity, that also contributes to the uniqueness of ABG's and Nutrilite S.R.L.'s singular contributions to the nutritional field concerned with products containing organic plant-based ingredients, concerns the seed-to-supplement methodology. This process, and the rigors with which it is applied and followed distinguish Nutrilite S.R.L.'s organic farming operation from most other farming undertakings concerned with nutritional supplements in the form of vitamins and minerals.[212]

187. We learn that *"[t]he first step in this process entails sourcing seeds from quality suppliers throughout the entire world. This sourcing process is undertaken with meticulous care."*[213]

---

209 *Id.* ¶ 72.

210 *Id.*, ¶ 73.

211 *Id.*, ¶ 75.

212 *Id.*, ¶ 76.

213 *Id.,* ¶ 76.

188. Nutrilite S.R.L. submits prospective suppliers to an exhaustive and comprehensive vetting process. The seeds must meet Nutrilite S.R.L.'s demanding requirements for excellence and suitability for purposes of organic farming. It is important to note, however, that with respect to some ingredients Nutrilite S.R.L. harvests its own seeds.[214]

189. The next step concerns planting the seeds. Mr. Eppers testifies that *"[o]bvious as this step may first appear, it requires planning and consideration of a number of factors. Different seeds must be planted during particular seasons. Ten core crops are grown at El Petacal: (i) alfalfa, (ii) spinach, (iii) broccoli, (iv) parsley, (v) sage, (vi) chia, (vii) cactus, (viii) rosemary, (ix) pomegranate, and (x) picao preto."*[215]

190. The crops are harvested on specific dates and then placed in different dryers. Alfalfa, for example, is processed using a tunnel dryer. All others go through bin dryers. The tunnel dryer reduces moisture in alfalfa to the required ten percent (10%), which is extremely dry.[216]

191. Products that go through the bin dryers also are reduced to approximately ten percent (10%) moisture. The tunnel dryer is in the exterior of the building and the alfalfa subsequently is fed into the building.[217]

192. Third, after passing through the dryers, the dried organic material is milled into particle size. Sometimes a specific ingredient first is heat-treated and then milled. The milled product can vary in size from particles all the way to powder. The larger milled products are sent to Quincy, Washington State, for alcohol concentration. The ingredients that

---

214 *Id.*, ¶ 77.

215 *Id.*, ¶ 79.

216 *Id.*, ¶ 80.

217 *Id.*, ¶ 81.

are heat-treated and powdered are sent directly to Amway's tableting operations which, historically have been at Buena Park, California for incorporation into finished products.[218]

193. Fourth, the ingredients are incorporated into a tablet. The larger particle sizes that are sent to Quincy are used for ethanol extraction concentration. Packaging also takes place at the Buena Park facility. Mr. Eppers, however, advises that "*shortly that task will be transferred to Ada, Michigan entirely. Currently, tableting and packaging take place in both the Buena Park and Ada, Michigan facilities.*"[219]

194. Once the finished product is in tablet form and packaged, it is sent to ABG's distribution warehouses. The product is subsequently distributed globally to ABG affiliates and, thereafter, by many thousands of Amway distributors around the world.[220]

195. Amway has two distribution facilities in the United States - one in Ada, Michigan and a second in Santa Fe Springs, California.[221]

196. Mr. Eppers testifies that *"[t]he ingredients from El Petacal also support our seed-to-supplement methodology in China. The products from El Petacal are central to ABG's and Amway's international supply chain.*"[222] Therefore, the evidence before this Tribunal establishes that without the ingredients from *El Petacal*, the entire Amway international supply chain would be comprised.

---

218 *Id.*, ¶ 82.

219 *Id.*, ¶ 83.

220 *Id.*, ¶ 84.

221 *Id.*, ¶ 85.

222 *Id.*, ¶ 86.

C. The *El Petacal* Organic Farming Operations and IP Protected Crops

197. The seed-to-supplement process undertaken in *El Petacal* is rendered all the more unique because of five (5) of the core crops harvested at the site, at least some of which are the subject of various patents: (i) white chia, (ii) rosemary, (iii) pomegranate, (iv) spinach, and (v) picao preto. Mr. Eppers testifies as follows with respect to the foundational nature of these plants:

> *These crops are not only used in many of the best-selling Nutrilite™ nutritional supplements and vitamins, but also in several of Amway's skincare products, including Artistry Ideal Radiance™ Illuminating Milky Emulsion, Artistry Ideal Radiance™ Illuminating Cream, and Artistry Signature Select™ Personalized Serum. A number of plants, methodologies, or finished products also depend on the farming of plants at El Petacal. The harvesting of these plants at El Petacal in part explains why this particular farming operation is so critical to the Nutrilite™ line of nutritional supplements and vitamins on a global basis.*[223]

198. Set forth below for the Arbitral Tribunal's reference is a chart identifying product, country, title, patent number, application number, status, expiration date, filing date, and issue date. This chart may be helpful in providing the Tribunal with a sense of the uniqueness and proprietary nature of the farming that takes place at *El Petacal* and that constitutes an integral part of the final products produced using *El Petacal* ingredients and placed into the global stream of commerce:

[The rest of this page is intentionally left blank.]

223 *Id.* at 23-24, ¶ 87.

- Chia
  - Patented Rehnborg Chia variety

Country	Title	Patent Number	Application Number	Status	Expiration Date	Filing Date	Issue Date
US - (United States)	CHIA VARIETY DESIGNATED REHNBORG	10357006	16/218798	Granted - (G)	12/13/2038	12/13/2018	7/23/2019
TW - (Taiwan (Province of China))	METHODS FOR PRODUCING PLANT PRODUCT, CHIA OIL OR MEAL, COSMETIC OR BEAUTY PRODUCT, OR FOOD PRODUCT		107145484	Filed - (F)		12/17/2018	
JP - (Japan)	CHIA VARIETY DESIGNATED REHNBORG		2020-551777	Filed - (F)		12/13/2018	
KR - (Korea, Republic of)	CHIA VARIETY DESIGNATED REHNBORG		10-2020-7020721	Filed - (F)		12/13/2018	

  - Process patent on extraction of white chia seed for topical applications

Country	Title	Patent Number	Application Number	Status	Expiration Date	Filing Date	Issue Date
US - (United States)	CHIA SEED EXTRACT AND RELATED METHOD OF MANUFACTURE	8409636	13/237541	Granted - (G)	10/13/2031	9/20/2011	4/2/2013
US - (United States)	CHIA SEED EXTRACT AND RELATED METHOD OF MANUFACTURE	8846117	13/750483	Granted - (G)	1/31/2032	1/25/2013	9/30/2014

  - Whitening benefit patent on the combination of white chia seed extract and
  - pomegranate extracts for topical applications

Country	Title	Patent Number	Application Number	Status	Expiration Date	Filing Date	Issue Date
US - (United States)	SKIN WHITENING COMPOSITION CONTAINING CHIA SEED EXTRACT	8685472	12/715156	Granted - (G)	9/16/2030	3/1/2010	4/1/2014
US - (United States)	SKIN WHITENING COMPOSITION CONTAINING CHIA SEED EXTRACT	8916212	14/172397	Granted - (G)	3/1/2030	2/4/2014	12/23/2014

  - White Chia Oil (NF7318 and NF7318A) both have secondary sources qualified.
    This is also an ingredient in Omega Liposome (9807).
  - White Chia Gel (RN2418) does not have a secondary source on spec,
    but we matched our ingredient to our supplier's existing source.
    Further development would be needed to quality that supplier's existing source.
  - White Chia Extract (NF7105B) does not have a secondary source qualified.
    A source has been identified but the testing has not been done to see if they are like-for-like.
  - White Chia Protein (NF7319) does have a secondary source qualified.
  - White Chia Fiber (NF7320) has been developed but not used in products yet.
    It does have a secondary source qualified.

- Rosemary
  - Patent on Quercetin Rosemary Turmeric Blend (QRT blend used in Double X)

Country	Title	Patent Number	Application Number	Status	Expiration Date	Filing Date	Issue Date
US - (United States)	ANTIOXIDANT DIETARY SUPPLEMENT AND RELATED METHOD	9517249	14/088765	Granted - (G)	5/13/2034	11/25/2013	12/13/2016
TW - (Taiwan (Province of China))	ANTIOXIDANT DIETARY SUPPLEMENT AND RELATED METHOD	I660680	102142795	Granted - (G)	11/24/2033	11/25/2013	6/1/2019
CN - (China P.R.)	ANTIOXIDANT DIETARY SUPPLEMENT AND RELATED METHOD	201380061555.0	201380061555.0	Granted - (G)	11/24/2033	11/25/2013	10/20/2017
JP - (Japan)	ANTIOXIDANT DIETARY SUPPLEMENT AND RELATED METHOD	6825809	2015-544164	Granted - (G)	11/25/2033	11/25/2013	1/18/2021
KR - (Korea, Republic of)	ANTIOXIDANT DIETARY SUPPLEMENT AND RELATED METHOD	10-2173501	10-2015-7013277	Granted - (G)	11/25/2033	11/25/2013	10/28/2020
HK - (Hong Kong)	ANTIOXIDANT DIETARY SUPPLEMENT AND RELATED METHOD	HK1208309	15109039.7	Granted - (G)	11/25/2033	9/16/2015	6/8/2018
US - (United States)	ANTIOXIDANT DIETARY SUPPLEMENT AND RELATED METHOD	10201583	15/342627	Granted - (G)	5/16/2034	11/3/2016	2/12/2019
TW - (Taiwan (Province of China))	ANTIOXIDANT DIETARY SUPPLEMENT AND RELATED METHOD	I671014	107138812	Granted - (G)	11/24/2033	11/1/2018	9/11/2019
JP - (Japan)	ANTIOXIDANT DIETARY SUPPLEMENT AND RELATED METHOD	6930957	2018-234453	Granted - (G)	11/25/2033	12/14/2018	8/16/2021

- Pomegranate
    - Whitening benefit patent on the combination of white chia seed extract and pomegranate extracts

Country	Title	Patent Number	Application Number	Status	Expiration Date	Filing Date	Issue Date
US - (United States)	SKIN WHITENING COMPOSITION CONTAINING CHIA SEED EXTRACT	8685472	12/715156	Granted - (G)	9/16/2030	3/1/2010	4/1/2014
US - (United States)	SKIN WHITENING COMPOSITION CONTAINING CHIA SEED EXTRACT	8916212	14/172397	Granted - (G)	3/1/2030	2/4/2014	12/23/2014

- Spinach
    - Patent on Spinach Leaf Extract (NF7321A) for prevention and repair of DNA damage for topical applications

Country	Title	Patent Number	Application Number	Status	Expiration Date	Filing Date	Issue Date
TH - (Thailand)	WATER SOLUBLE EXTRACT OF SPINACH FOR PREVENTION AND REPAIR OF DNA DAMAGE		0701005697	Filed - (F)		11/8/2007	
JP - (Japan)	WATER SOLUBLE EXTRACT OF SPINACH FOR PREVENTION AND REPAIR OF DNA DAMAGE	5134005	2009-540227	Granted - (G)	11/5/2027	11/5/2007	11/16/2012

- Picao Preto

Country	Title	Patent Number	Application Number	Status	Expiration Date	Filing Date	Issue Date
US - (United States)	ANTI-ALLERGY COMPOSITION AND RELATED METHOD	7384654	11/051905	Granted - (G)	12/8/2025	2/4/2005	6/10/2008
JP - (Japan)	ANTI-ALLERGY COMPOSITION AND RELATED METHOD	4571952	2006-551996	Granted - (G)	2/4/2025	2/4/2005	8/20/2010
KR - (Korea, Republic of)	ANTI-ALLERGY COMPOSITION AND RELATED METHOD	10-0832667	10-2006-7015691	Granted - (G)	2/4/2025	2/4/2005	5/20/2008
US - (United States)	ANTI-ALLERGY COMPOSITION AND RELATED METHOD	7384656	11/351963	Granted - (G)	8/19/2025	2/10/2006	6/10/2008

199. Mr. Eppers testifies that *"[a]ll of the ingredients necessary to monetize these patents are grown only at El Petacal. All ingredients grown at El Petacal, with the exception of watercress (also grown in Brazil) and alfalfa (also grown at Trout Lake), only are grown*

in El Petacal. Moreover, the alfalfa grown in El Petacal is earmarked for Nutrilite™ or Artistry™ products that are produced using only El Petacal alfalfa."[224]

200. Mr. Eppers adds:

> *There are about thirteen (13) crops or crop derivative products that must be produced using heat treatment.*[225]

201. Set forth below, by way of illustration, is the 2024 planning volume. For ease of reference, the crops or crop derivatives requiring heat treatment as a condition of shipment are highlighted in yellow. The quantities in the chart are in kilograms:

Item #	Item Description	Grand Total 2024
NF6623	PICAO PRETO HT	4,095
NF9086	OPUNTIA CACTUS FIBER	4,400
NF9735	PARSLEY DEHYDRATED HEAT	1,215
NF9742	SPINACH DEHYDRATE HEAT TREATED	2,925
NF9745	WATERCRESS DEHYDRATE, H.T	3,150
NF9814	ALFALFA CONCENTRATE	19,305
NF9823	PARSLEY, DEHYDRATE, PWD	2,430
NF9824	ORGANIC SPINACH DEHYDRATE	33,645
NF9859	BROCCOLI DEHYDRATE, MILLE	810
NF9883	CITRUS BIOFLAV DEHYDRATE MILL	44,726
NXP9083A	NUTRILITE ALFALFA CONC SP	87,920
NXP9814A	NAC DEHYDRATE	1,625

224 *Id.* at 24-28, ¶ 89.

225 *Id.* at 28-29, ¶¶ 89-90.

NXP9883A	CITRUS MIXTURE CONCENTRATE	25,662	
R7097Z	PARSLEY POWDER	3,960	
R7749	SAGE DRIED MILLED	1,000	
R8870	PARSLEY COARSE CUT	11,895	
R8999	ALF PWD MILLED NP ALF B	84,390	
R9364	SPINACH COARSE CUT	11,725	
R9457	ALFALFA COARSE CUT	4,825	
R9891	PUNICA GRANATUM FRUIT FROZEN	175	
R9980	WATERCRESS COARSE CUT	400	
RN1666	SPINACH DRIED FLAKE	90	
RN1794	CHIA SEED ACTIVE CONCEPT	500	
RN2448	CHIA SEED EXTRACT	30,000	
RN2884	ORGANIC ROSEMARY LEAF	23,249	
Grand Total		**404,117**	

202. Thus, while in 2013 *El Petacal* was harvesting, processing, and packaging product, its optimal efficiency was reached when the on-site heat treatment facility for which construction began in 2014 was completed.[226]

D. The 120 Hectares Parcel and Crop Rotation

203. As the Tribunal has been informed from the Witness Statement of Mr. Robert P. Hunter,[227] and the *Request for Arbitration*[228] filed in this case, *El Petacal* is comprised

226 *Id.* at 30, ¶ 91.

227 *See* Hunter Witness Statement (**CWS-001)** at **¶¶ 35, 48.**

228 *See Request for Arbitration* **¶¶** 20 and 21.

of four parcels of land. *Puertas Uno* and *Dos* (120 hectares), and *Puertas Tres* and *Cuatro* (160 hectares). The 120 hectares parcel that the communal landowners of San Isidro physically control pursuant to the expropriation action on the part of Mexico in July of 2022, represents an integral part of the farming and harvesting operation sustained on the 160 hectares because the 120 hectares are contiguous with the 160 parcel hectares, and in some places the parcels circumscribe each other. As Mr. Eppers testifies, "*[a] key feature of organic farming is crop rotation*."[229]

204. Organic farming needs an adequate land base that will be effective for rotating crops. Certain crops require specific levels of nutrients in the soil. The appropriate level of such nutrients is sustainable only if crops are rotated and land is allowed (i) to lay fallow, and/or (ii) to grow different varieties of plants. The rotation process helps rid soil of insects, negative organic matter like weeds, and soil diseases as pathogens can no longer survive in the soil as soon as diseased plant debris decomposes.[230]

205. When crops are rotated, the quantity of the pest population is reduced. What actually is occurring with crop rotation is that crops or plants are rotated to bring in non-host plants or crops that will prevent the accumulation or build-up of significant pathogen populations.[231]

206. The rotation process also increases nutrients available for crops and plants while reducing erosion and promoting soil fertility. Mr. Eppers testifies that *"[a] helpful example is found in the farming of parsley and watercress. Both of these plants require*

---

229 Eppers Witness Statement (**CWS-002**) at ¶ 92.

230 *Id.* ¶ 93.

231 *Id.*, ¶ 94.

nitrogen-rich soil. The necessary ratio of soil/nitrogen saturation only is possible if crops are rotated."[232]

207. A portion of the 120 hectares parcel helps with crop rotation, and the entirety also serves as a buffer that equally is foundational to organic farming in at least two ways, as explained by Mr. Eppers:

> *First, organic farming needs to have natural habitats surrounding it so that the natural pollinators from such habitats are present in the right population density. Second, a buffer with a natural habitat will protect crops from contamination arising from nearby conventional non-organic farms. In organic farming, pesticides are not used. Therefore, we need buffer land to protect against pesticides or, for example, synthetic nitrogen that could otherwise travel to cultivated lands*.
>
> *The legal **and** physical taking of the 120 hectares has left ABG's Nutrilite S.R.L. farming operation without the original buffer with respect to which the farmed arable parcels were designed*.
>
> *Indeed, what used to be a buffer, the 120 hectares, is now a source of contamination*.[233]
>
> (Emphasis in original.)

208. Not two years after taking physical possession and legal title, the communal landowners have abandoned most of the 120 hectares. However, parts of it are or were, for a short time, used for conventional farming that *does* rely on pesticides. In order to protect against the contamination of what was Nutrilite S.R.L.'s own buffer that insulated Nutrilite S.R.L. from conventional inorganic farming operations and undesirable pollination and insects, Nutrilite S.R.L. has had to sacrifice arable land within the 160 hectares to now serve as buffer. Mr. Eppers explains that *"[c]onsequently, arable land in the 160 hectares has diminished in favor of increasing buffer land from this critical parcel. Ultimately, this inversely proportional relationship*

---

232 *Id.*, ¶ 95.

233 *Id.*, ¶¶ 97-99.

will not be sustainable and crop production will suffer. Signs of this inevitability already are present."[234]

209. He further testifies:

> *Even a cursory inspection of the 120 hectares reveals that there are insect pests growing on this parcel that are prejudicial to the crops and plants being farmed on the 160 hectares. The communal landowners have, among other things, planted conventional corn pursuant to inorganic farming methodologies.*
>
> *Other parts of the 120 hectares are not being farmed or otherwise maintained. They have become a Petri dish for undesirable contaminants in the form of insects. These factors are having an adverse effect on the 160 hectares.*[235]

210. It would take approximately three (3) years to regain the organic status that the 120 hectares enjoyed prior to having been physically taken by the communal landowners in July 2022.[236]

211. Finally, in this connection Mr. Eppers testifies that "*it is accurate to state that the 120 hectares represent an integral part of the entire organic farming process that takes place in the 160 hectares and of Nutrilite S.R.L.'s farming operation as a whole.*"[237]

E. The Nutrilite™ Products Market

212. Nutrilite™ line of products does not target the athletic elites. These supplements do not purport to assist athletes in meeting or surpassing high performance athletic metrics under the stress of competition or training. The Nutrilite™ supplements containing organic ingredients from *El Petacal* are not designed to help the human body over-perform when submitted to athletically induced stress.[238]

---

234 *Id.*, ¶ 100.

235 *Id.*, ¶¶ 101-102.

236 *Id.*, ¶ 103.

237 *Id.*, ¶ 104.

238 Parker Witness Statement (**CWS-003**) at ¶ 75.

213. Mr. John Parker, Alticor Inc.'s Regional President & Chief Sales Officer explains that:

> *These supplements are not designed to induce muscle mass synthetically, create short-term maximal power/strength, or to increase performance of short-term high intensity exercises by using synthetic ingredients to stimulate cellular level production of adenosine triphosphate (commonly known as "ATT") in musculoskeletal tissue. In this same vein, the Nutrilite™ line of products do not contain synthetically confected ingredients designed to produce short bursts of energy to enhance athletic training or performance.*[239]

214. He adds that "[*t]he enhancement of athletic performance for training and competition purposes, as well as with respect to post-athletic stress replenishment, is a globally-identifiable market that does not place a premium on supplements containing organic ingredients.*"[240]

215. This "athletic" market mostly, and certainly not exclusively, focuses on the short-to-medium-term correlation between supplement intake as metabolic agents, and the likelihood of meeting or exceeding athletic metrics whether in competition or training. The Nutrilite™ line of products does not seek to incorporate such metabolic agents, or ingredients as amino acids, or high doses of nitrogenous organic acid.[241]

216. Mr. Parker likewise testifies that:

> *The Nutrilite™ line of products also does not target the massively or morbidly obese. This weight loss market is premised on using synthetic metabolic agents to help consumers, mostly with dietary problems. Much like the athletic elite market, the supplements that the morbidly obese consumers purchase are not* ***primarily*** *designed to support a healthy lifestyle and enhance overall wellbeing, but rather to curing the ills arising from an unhealthy lifestyle. Our Nutrilite™ supplements are different, and so too is our market*.[242]
>
> (Emphasis in original.)

---

239 *Id.*, ¶ 76.

240 *Id.*, ¶ 77.

241 *Id.*, ¶ 78.

242 *Id.*, ¶ 79.

217. The evidence before this Tribunal establishes that the Nutrilite™ vitamin and mineral supplements service those consumers who are interested in the benefits of organic nutrients.[243] These consumers not only belong to what has been identified as possibly the best-educated generation of whole foods consumers with access to technology that provides in-depth knowledge as to any subject or industry, but themselves are highly educated with respect to the kind of nutritional diet that supports a healthy lifestyle.[244] Mr. Parker shares that "*[t]he Nutrilite™ line of products do not purport to address and redress athletic performance or obesity challenges. They do not hold themselves out as being medicinally remedial in nature.*"[245]

218. He adds that "*our supplements help support people who value a balanced lifestyle that emphasizes nutrition, moderate exercise, good sleep, and correspondingly healthy habits. In fact, our supplements advocate for these elements of a lifestyle that obviously ABG and Amway do not and cannot sell. ABG and Amway advocate for more than just the products they sell.*"[246]

219. *El Petacal* is part and parcel of the Nutrilite™ product line. These products "*tell a history that begins with the farm, i.e., El Petacal, and finds fruition in a consumer who knows to a scientific certainty that she is consuming plant-based supplements that support a healthy diet and lifestyle and enhance overall well-being. This history is incapable of being reduced to a slogan, logo, a twenty-second soundbite, or a billboard*"[247]

---

243 *Id.*, ¶ 80.

244 *Id.*

245 *Id.*

246 *Id.*, ¶ 81.

247 *Id.*, ¶ 82.

220. Understanding the uniqueness and quality of these supplements requires having understanding of the careful organic cultivation, harvesting, processing, and packaging that render them exceptional in the first place. It is a story that cannot be told without *El Petacal* because, but for this unique farmland, the seed-to-supplement methodology that it sustains, and the organic farming that defines it, the Nutrilite™ products would not be possible. Mr. Parker testifies that "*[s]o central to the Nutrilite™ story is El Petacal, that the labels of Nutrilite™ products feature the mountains surrounding the farm as a portion of the recognizable branding that is Nutrilite™*." Quite significantly, he adds that "*[t]o the extent that markets are defined by particular products and specific consumers, so too would the organic vitamin and mineral supplements market either disappear, or significantly reconfigure itself to the detriment of educated consumers in the field, were El Petacal to be compromised*."[248]

221. The testimony before this Tribunal underscores the interdependence between (i) the Nutrilite™ vitamin and mineral supplements (ii) the organic ingredients farmed at *El Petacal*, (ii) the centrality of the seed-to-supplement methodology in tandem with the rigors of organic farming, and (iii) the very distinctive and educated market of consumers of organic plant-based products that these supplements service.

222. The centrality of *El Petacal* also stretches to the Amway IBO-Distributor direct selling methodology based upon thousands of distributors globally who share with prospective consumers committed to whole foods and organic ingredients, the story of *El Petacal* and the artisanal farming that generates the ingredients that go into Nutrilite™ supplements. The particulars comprising *El Petacal*'s uniqueness is central to the person-to-person narrative that ABG's and Amway's IBO-Distributors deliver to

248 *Id.*, ¶ 83.

end consumers by describing what these products are, how they are processed, packaged, and made available to discerning consumers.[249]

223. Put simply, the evidence before this Tribunal compellingly illustrates that the loss of *El Petacal* adversely touches and concerns every aspect of ABG's and Amway's global operation concerning the Nutrilite™ vitamin and mineral supplements.

IX. ***EL PETACAL* MICRO- AND MACRO- ECONOMIC CONTRIBUTIONS TO THE MUNICIPALITY OF SAN GABRIEL AND TO THE SURROUNDING COMMUNITIES – *EL LLANO EN LLAMAS***

224. ABG's investment in the development of *El Petacal* into a world-class organic farming and processing operation transformed much of the Municipality of San Gabriel and the surrounding communities. Over time, mostly as of approximately 1996 through 2008, ABG's investment gradually and consistently improved the quality of life of the people living in the area known as *El Llano en Llamas*, which includes the Municipalities of San Gabriel, Copala, Tolimán, Zapotitlán (beyond just the Township of San Isidro), Tonaya, and Tuxcacuesco.[250]

225. Micro- and macro- economic development was gradual and took time because of two fundamental reasons. First, poverty had ravaged these communities. Second, ABG's investment was staged over time.[251] As has been referenced, it was not until January 13, 2000 that the first organic farming certificate was actually issued with respect to *El Petacal*.[252]

---

249 *Id.*, ¶¶ 85-86.

250 Eppers Witness Statement (**CWS-002**) at ¶ 106.

251 *Id.*, ¶ 107.

252 Attached as **C-0063-ENG** to facilitate reference is an Organic Certification document from the Oregon Tilth Certified Organic organization; *see also* Eppers Witness Statement (**CWS-002**) n. 15.

1. Census and Health Conditions of the Population of *El Petacal*

226. The following narrative was authored in 2003 by Dr. Sandra E. Romo Mendoza, who was for a time employed by Nutrilite S.R.L.:

> *HOUSING CHARACTERISTICS*
>
> *Home ownership is fundamentally private, a majority, 97%. The walls are predominantly made of brick; the floors are made of cement and some floors are earthen. Most of the roofs are made of asbestos laminate, and few houses have vaulted roofs. It was found that nearly all of them had two bedrooms; few of them had three, a situation making it such that twenty-one families live in overcrowded conditions.*
>
> *In a study conducted by the company Nutrilite in 1999,* ***it was found that twenty-seven families did not have in-home drainage, and excretions were disposed of outside, a situation that created a significant source of gastrointestinal and respiratory infections. So, the company [Nutrilite S.R.L.] contributed to digging ditches so as to connect pipes to the main drainage system. The Municipality of Tolimán contributed pipes, the people of the town, labor. As a result, currently 47 families have drainage and only 11 do not: for 5 of these families the drainage runs into a stream, 3 families have a latrine or septic tank, and 3 families relieve themselves outside.***
>
> *The entire population has access to electricity and potable water [a Nutrilite S.R.L. contribution]. This does not cost them any money. Twenty-four (24) families have daily access; 23 families, more than 5 days per week, and only 11 families have access every three days because their homes are so far away.*
>
> *In Petacal, all of the housewives cook on a stove, and only 27 homes still use firewood to make their tortillas, a situation that improved after raising awareness of the fact that using firewood is harmful to [people's] health.* ***In the 1996 census, all of the households cooked with firewood, which led to respiratory problems.*** *Cleanliness in the community and in the homes has improved: 41 houses were clean, 10 were passable, and 7 were dirty. Currently purified bottled drinking water is [consumed] in all of the homes, which is an improvement because before [all community members] drank from the tap. Likewise, through talks and films, [community residents] have received training and education to improve their homes and, in so doing, improve their health. Today [2003] 39 families bathe daily, 18 every three days, and only 1 person bathes once a week. Brushing teeth is another habit that has been instilled through one – or two – week events [every] year during which a mobile dental health unit comes, if people so desire, they can receive dental attention, extractions, treatments, etc. Moreover, through the*

company [Nutrilite S.R.L.] and this support from the Department of Health, [El Petacal residents] are [provided with] free tooth brushes.[253]

(Emphasis supplied.)

227. Dr. Sandra E. Romo Mendoza's narrative documents bleak living conditions by modern industrialized urban metrics. It does, however, also chronicle meaningful living conditions, healthcare, and hygiene gains. Much of which, as the evidence before this Tribunal demonstrates, are directly attributable to ABG's and Nutrilite S.R.L.'s initiatives. She chronicles that as of 2003 *"women no longer [gave] birth with midwives, who were from the same town and who did not have any training whatsoever …."*[254]

228. She adds that "[c]urrently every pregnant woman has her prenatal check-ups in the Nutrilite S.R.L. health clinic and afterwards they decide to go to the hospital to deliver their babies or, if applicable, have Cesarean sections."[255]

229. She observes that "*there has been a decrease in infections [arising from] gastrointestinal disease, dermatosis, and parasitosis, and the children are up-to-date on their inoculations.*"[256] She notes *"[t]hese changes were achieved when drainage was installed, and open-air feces disposal was stopped*."[257]

230. In the context of nutrition, she observes that *"[n]utritional problems have improved little by little, with children recovering from slight malnutrition and stunted growth, by training*

---

253 Attached as **C-0064-ENG** to facilitate reference is a document titled: *Census and Health Diagnosis of the Population of Petacal, Jalisco Year: 2003* by Dr. Sandra E. Romo Mendoza, Physician, Nutrilite S de RL de CV**;** *see also* Eppers Witness Statement (**CWS-002**) n. 16.

254 *Supra, Census and Health Diagnosis of the Population of Petacal, Jalisco Year: 2003* at 14.

255 *Id.*

256 *Id.*

257 *Id.*

and educating the mothers on the use of the best quality foods for their children, by giving them vitamins that the company [Nutrilite S.R.L.] has sent them."[258]

231. In addition to having been suffering from acute poverty, the *El Petacal* community suffered from cultural inhibitions that translated into direct negative health consequences. A helpful example is the need for women to have yearly cervical-uterine cancer check-ups. The contemporaneously written documentation suggests that since 1998, yearly cervical-uterine cancer detection tests were offered.[259]

232. The population, however, was not immediately responsive. Dr. Sandra E. Romo Mendoza in this regard documents that "*little by little we have been able to break this taboo and, in 2002, there was an excellent response. Seven women were found to have problems, and we were able to send for a gynecologist to treat them*."[260] Overcoming these cultural/social inhibitions also allowed the Nutrilite Health Clinic to conduct check-ups for children every four months in order to assist those who were suffering from malnutrition. In part, through education, as of 2003 considerable success against malnutrition had been achieved. At that time, in 2003, there was only one child in pre-school and four in primary school suffering from malnutrition.[261]

233. Nourishment itself in the *El Petacal* community was lacking because it mostly was "*based on beans, tortillas and…fruits and vegetables.*"[262] It was only as of 2003 that

---

258 *Id.*

259 *Id.*

260 *Id.* at 8.

261 *Id.*

262 *Id.* at 9.

"*most*" residents now eat more chicken and beef, and Nutrilite S.R.L. was critical to this development.[263]

234. Similarly, it was not until 2003 that *El Petacal* residents were able to acquire "*water, gas, and other services that were not available before*."[264] This point is discussed in considerable detail at *infra* Section IX.3. It also is raised in connection with the public purpose requirement of a lawful expropriation under the public international law of investment protection.

235. Promoting hygiene and healthcare to the *El Petacal* community was important, and remains a primary concern, to ABG.[265] Another document contemporaneously authored with the occurrence of the facts described, was composed in the year 2000, titled: *Apoyos Médicos y de Salud, Reseña de Salud y Actividades Médicas de 1996 a 2000*. That report, among other things, documents how NPI (predecessor in name and operations to Alticor Inc. and ABG with Alticor Inc. being the indirect parent company of ABG) and Nutrilite S.R.L. promoted healthcare, sanitation, and hygiene pursuant to systematic and institutionalized educational programs.[266]

236. In pertinent part that report in the Spanish language original and the English language original (it is written in a hybrid of both languages) reads:

> *La promoción a la salud se ha realizado por medio de videos de trabajadores de Nutrilite:*
>
> - *Prevención de accidentes en el trabajo,*

263 Eppers Witness Statement (**CWS-002**) at ¶ 114.

264 *Id.*

265 *Id.*, ¶ 116.

266 Attached as **C-0065SPA/ENG** to facilitate reference is a document titled: *Apoyos Médicos y de Salud, Reseña de Salud y Actividades Médicas de 1996 a 2000* by Dr. Sandra Romo Mendoza, and with Appendices constituted by media reports documenting Nutrilite's and Amway's "*Milagro en el Llano*" (translation: "Miracle in the Plain").

- *Uso de equipo de protección,*
- *Cuidado de la columna vertebral,*
- *Primeros auxilios de los cuales se han realizado 2 cursos en 1997-1998,*
- *Trenching and shoring operations,*
- *Bloodborne pathogens for industry,*
- *Machine guarding responsibility,*
- *Personal protective equipment,*
- *Alcoholism in the workplace,*
- *Accident cause and prevention,*
- *Back care & safety,*
- *Safe lifting-back supports,*
- *Heat stress,*
- *Basic first aid,*
- *Accidents 'it can't happen to me,'*
- *Saneamiento ambiental,*
- *Nutrición y salud,*
- *Embarazo,*
- *Higiene personal y de hogar,*
- *Prevención de accidentes en el hogar,*
- *Prevención enfermedades diarreicas,*
- *Prevención enfermedades respiratorias,*
- *Planificación familiar,*
    - *Campaña de vacunación de perros y gatos contra la rabia,*
    - *Actualmente se tiene proyectado de Cruz Roja detenido en espera de cambio de pacientes municipales mientras tanto, el comité encargado, continua con las actividades para sacar fondos económicos para la compra del terreno, donde en un futuro se construirá la unidad.*
    - *Campañas de limpieza y recolección de basura una vez por semana en camión de la empresa Nutrilite.*

237. The education and access regarding healthcare, nutrition, and basic hygiene that was spawned by ABG's entry to the community through *El Petacal*, as well as the other

contributions of ABG and Nutrilite S.R.L., all contributed to a gradual but constant positive development of living standards for the impoverished populations comprising *El Petacal* and surrounding areas.[267]

2. The Macro- and Micro- Economic Significance of Employment Opportunities that Nutrilite S.R.L. Create

238. The chart setting forth the employment history at *El Petacal* commencing on calendar year 1992 through February 13, 2024, *supra* ¶ 145, was shared with the Tribunal in the context of the staged phases of the investment. It is here, however, again reproduced to facilitate reference. This time the chart is used to contextualize the micro- and macro- economic significance of the employment opportunities that NPI, ABG, and Nutrilite S.R.L. have created.

Year	Number of employees
1992	2
1993	2
1994	3
1995	3
1996	6
1997	9
1998	9
1999	15
2000	15
2001	24
2002	31
2003	42
2004	114
2005	139
2006	367
2007	420
2008	457
2009	420
2010	412

267 Eppers Witness Statement (**CWS-002**) at ¶ 119.

2011	511
2012	605
2013	411
2014	547
2015	458
2016	545
2017	642
2018	654
2019	667
2020	653
2021	608
2022	467
2023	484
13-02-2024	370

239. In the entire State of Jalisco the average private sector corporation hires 5.15 employees.[268] This number is negatively adjusted when particular municipalities are considered. The relevant municipality of San Gabriel where *El Petacal* is located reflects that private sector entities average three (3) employees for every single corporation. Therefore, retaining on a yearly basis anywhere between 450 to 667 people, virtually all of whom are local residents, represents a substantial contribution.[269]

240. The Arbitral Tribunal also may find it helpful to learn that while certainly a majority of *El Petacal's* employees are seasonal workers, ABG through Nutrilite S.R.L. also hires polytechnical personnel. Nutrilite S.R.L. trains prospective technical workers as agro-

[268] Attached as **C-0066-SPA** to facilitate reference is a *Plan General del Ayuntamiento de San Gabriel, Jalisco 2010 – 2012*, published by *Administración Municipal*; *see also* Eppers Witness Statement (**CWS-002**) note 29.

[269] *See supra* chart in ¶ 238.

mechanics in applied agro-engineering and as systems operators. These skills are transferrable beyond the *El Petacal* work venue.[270]

3. Nutrilite S.R.L. Brings Potable, Irrigation, and Sewage Waters to San Gabriel and to the Municipalities Comprising *El Llano en Llamas*

241. During the fourth quarter of 1993 and the first quarter of 1994, NPI and Nutrilite S.R.L. learned that the surrounding communities were suffering from acute water shortages. At that time, NPI decided that it would contribute to mitigating, if not altogether resolving, this critical issue affecting so many lives.[271] It decided to do so, both unilaterally and in unison with Federal and State of Jalisco government agencies.[272]

242. NPI through Nutrilite S.R.L., even though it was not legally or otherwise obligated to do so, pledged substantial and meaningful assistance. It honored those pledges.[273]

243. On February 13, 1994, Nutrilite S.R.L. entered into an Agreement with representatives of the fifty-five (55) households then comprising the *El Petacal* community. Shortly before entering into this Agreement, Nutrilite S.R.L. actually learned the exact extent of this water shortage. It became aware that each of the fifty-five (55) households in question merely had access on a daily basis to one hundred (100) liters of water only. Community representatives advised that the real needs of a household could not be

---

270 Eppers Witness Statement (**CWS-002**) at ¶ 125.

271 *Id.*, ¶ 126.

272 *See, e.g.,* Attached as **C-0047-SPA** to facilitate reference is the Agreement/Stipulation dated January 6, 1995 entered into between the residents of the community of El Petacal, the Secretary of Rural Development of the State of Jalisco, and Nutrilite S.R.L.; and **C-0046-SPA,** a two-page *Agreement* between the Municipality of Tolimán, the Municipality of the Township of El Petacal, and Nutrilite S.R.L. dated June 3, 1999; *see also* Eppers Witness Statement (**CWS-002**) notes 32 and 33.

273 *Id.*, ¶ 127.

met with any amount less than four hundred (400) liters of potable water a day. The community had been surviving on only 25% of the daily water needs.[274]

244. NPI through Nutrilite S.R.L. agreed to meet the actual daily water need. Nutrilite S.R.L. (i) constructed a well, (ii) installed the required machinery, (iii) installed and maintained the accessory equipment, and (iv) donated the land. The Spanish language original of this Agreement reads:

> *Se acepta la solicitud y se compromete por la compañía [Nutrilite S.R.L.] para que mientras la empresa tenga agua potable suficiente en el pozo de la empresa Nutrilite y el gobierno y la población no resuelva esta necesidad de otra manera, se les dote de este volumen de agua ['400 litros de agua potable por día por cada casa siendo estas cincuenta y cinco casas en total']. Solicitando la población el apoyo de la Secretaría de Desarrollo Rural del gobierno de Jalisco y de más instituciones competentes, para que se perfore un pozo profundo que será construido en terreno que donará la misma empresa Exportag [Nutrilite S.R.L.'s representative], comprometiéndose ésta a instalar el equipo de bombas y el de mantenimiento del mismo dotar a la población del mencionado volumen de agua, haciendo la empresa uso del agua excedente dando cumplimiento al convenio administrativo por la C.N.A. con fecha del 25 de noviembre de 1993*.[275]

245. Providing fifty-five (55) households with potable water represents a substantial micro-economic contribution. The consequence of having made this vital resource available to fifty-five (55) households also has a multiplier effect representing a macro-economic benefit to the entire State of Jalisco.

246. The provision of so essential a resource as potable water to fifty-five (55) households is consequential with respect to healthcare and the ability to generate income, among other factors. The secondary consequential effects of transforming a community of this size has statewide repercussions throughout Jalisco.

---

274 *Id.*, ¶ 128.

275 Attached as **C-0044-SPA** to facilitate reference is the Agreement dated February 13, 1994 entered into between the residents of the community of *El Petacal* and Nutrilite S.R.L.; *see also* Eppers Witness Statement (**CWS-002**) note 31.

247. On January 6, 1995 Nutrilite S.R.L. entered into a second Agreement/Stipulation with residents of the *El Petacal* community concerning an issue as fundamental as the potable water issue that was addressed in the February 13, 1994 Agreement. In this second Agreement/Stipulation, Nutrilite addressed basic sanitary concerns regarding sanitary and sewage treatment.[276]

248. The residents of *El Petacal* had petitioned the Secretary of Rural Development for the State of Jalisco (*La Secretaría de Desarrollo Rural del Estado de Jalisco*) for the grant of a small sewage treatment plant and one kilometer of PVC piping to avoid contaminating the Tizilín ravine. The Secretary of Rural Development for the State of Jalisco, without Nutrilite S.R.L.'s intervention, had been unable to provide the residents with this essential resource.[277]

249. On June 3, 1999 Nutrilite S.R.L. entered into an Agreement with the Municipality of Tolimán along with the Municipality of the Communities of *El Petacal* (*Delegado Municipal del Poblado de El Petacal*) pursuant to which Nutrilite S.R.L. contribute to the installation of a sewage treatment plant exclusively for the benefit of the *El Petacal* community. [278] Paragraph 3 of this Agreement in the Spanish language original reads:

> *El Señor Roberto Vargas Maciel Director de la Empresa Nutrilite se compromete a proporcionar el equipo necesario para las excavaciones donde se instalará la planta así como proporcionar el suministro de energía eléctrica para la operación de la misma.*

250. Mr. Eppers testifies that "*Nutrilite S.R.L. voluntarily entered into this Agreement and performed in accordance with its terms with the singular objective of contributing to the improvement of the health and welfare of the residents of the El Petacal*

---

276 *See supra* note 271.

277 Eppers Witness Statement (**CWS-002**) at ¶ 133.

278 *See supra* note 271.

community."[279] He further states that "[*i]n addition to assisting the residents to obtain the PVC piping and the water treatment plant for sewage, Nutrilite S.R.L. (i) constructed a road that provided the residents with access to other roads and bridges, (ii) granted an easement across Nutrilite's property, and (iii) supplied water for irrigation purposes along Mexico Avenue and for the principal gardens.*"[280]

251. The Agreement/Stipulation in the Spanish language original in relevant part reads:

> *La población y la empresa [Nutrilite S.R.L.] solicitan en esta misma acta a La Secretaría de Desarrollo Rural del Estado de Jalisco y de más autoridades competentes* ***una pequeña planta de tratamiento de aguas negras de la población, así como un kilómetro de tubería de PVC sanitaria con lo que se evitará la contaminación del arroyo Tizilín para no pasar por la[s] instalaciones de Nutrilite, en su parte final.***
>
> *Los que aquí firman lo reconocen y aceptan que los dos primeros puentes fueron construidos por la empresa* ***Nutrilite, así como el camino que se comprometen en este momento en forma inmediata a la apertura de dicha calle para contar con el tránsito por dicho camino y puentes.***
>
> *Se acuerda solicitar a las La Secretaría de Desarrollo Rural y de más autoridades correspondientes* ***la construcción del camino y los puentes hasta conectar la carretera pavimentada San Gabriel, Tolimán haciéndose entronque a la altura del lugar conocido como El Oasis****.*
>
> (Emphasis supplied.)

252. It is respectfully pointed out to the Tribunal that this text establishes that the *El Petacal* community turned to Nutrilite S.R.L. and appealed to Nutrilite S.R.L. to assist them in working with State agencies in efforts to gain access to some of their most basic and fundamental health and logistical needs.

---

279 Eppers Witness Statement (**CWS-002**) at ¶ 135.

280 *See supra* note 271.

253. This Agreement/Stipulation, together with contemporaneous media reports, demonstrate that the community viewed Nutrilite S.R.L. as its logical representative and interlocutor with the government of the State of Jalisco.

254. Mr. Eppers testifies:

> *Nutrilite S.R.L. met the El Petacal community's needs. Moreover, we met all of their requirements, and did so voluntarily as part of a more global ethical commitment to help develop the community. Bringing potable, irrigation, and sewage waters helps a community develop in every statistically essential category, including (i) general health and life expectancy, (ii) infant mortality, (iii) functional and operational health as a collective whole comprised of individual family units.*[281]

4. NPI and Nutrilite S.R.L. Bring Electricity to the Southern Region of the State of Jalisco

255. Along with making potable, irrigation, and sewage waters available to residents of *El Petacal* and creating employment for hundreds of its residents in tandem with polytechnical training, "*ABG and Nutrilite S.R.L. are particularly proud of having brought electricity to impoverished and formerly isolated rural communities in the southern region of the State of Jalisco*."[282]

256. Mr. Hunter testified that bringing electricity to *El Petacal* was a priority because electric power is necessary for basic development and operation of the farm, let alone the actual processing of agricultural products grown on the farm.[283] He also testified that *"[t]he task of bringing electricity to the farm was particularly complex because electrical energy is highly regulated at both the State and Federal levels in Mexico. Therefore,*

---

281 Eppers Witness Statement (**CWS-002**) at ¶ 140.

282 *Id.* at 45, ¶ 141.

283 Hunter Witness Statement (**CWS-001**) at ¶ 109.

navigating the two layers of bureaucracy often proved to be a time-consuming challenge."[284]

257. In light of the exigent need to be able to generate electricity in order to render the wells and pumps functional for its own operations, Nutrilite S.R.L. representatives met with members of Mexico's Federal Electricity Commission – Jalisco Division (Federal Commission Jalisco) to communicate Nutrilite S.R.L.'s needs and its commitment to partner with Federal and State authorities to bring electricity to *El Petacal* and surrounding areas.[285] At that meeting Nutrilite S.R.L. communicated its necessary operational consumption in kilo volt amps ("KVA") to the Federal Commission-Jalisco. Even though *Puertas Uno* and *Dos* (the 120 hectares parcel) were yet to be purchased, the information provided contemplated acquisition of this property.[286]

258. The sense of urgency to bringing electricity to *El Petacal* was duly emphasized as a basic developmental condition without which the highest and best use of the property could not be achieved. The officials with whom Nutrilite S.R.L. met committed to preparing a study of the electrical needs and corresponding costs associated with the construction of facilities for the generation, provision, and distribution of electricity at *El Petacal* and in the surrounding areas.[287]

259. On July 23, 1993, the proposed plan was communicated to Nutrilite S.R.L. In addition to detailing very precise plans for different electricity demand scenarios, the Federal Commission-Jalisco estimated that the work to be performed would take

---

284 *Id.*

285 Attached as **C-0025-ENG** to facilitate reference is correspondence from the *Comisión Federal de Electricidad División Jalisco* dated July 23, 1993 directed to Robert T. Hunter and J. Roberto Vargas; *see also* Hunter Witness Statement (**CWS-001**) n. 29.

286 Hunter Witness Statement (**CWS-001**) at ¶ 110.

287 *Id.*, ¶ 111.

approximately twelve (12) months. In an effort to render lines of communication between Nutrilite S.R.L. and the Federal Commission-Jalisco open and responsive, Rafael Hidalgo Reyes was designated as the contact person on the part of the Federal Commission-Jalisco.[288]

260. Beyond Nutrilite S.R.L.'s need to interface with both State and Federal electric commission officials, the two levels of government themselves had to coordinate their efforts. By May 1995, Federal energy authorities were asking Jalisco's Secretary for Rural Development to provide the Federal government with an area study of *El Petacal* with markings for the proposed electrical substation site. Also, the Federal government emphasized the need to know where wells would be located as well as pump motor capacity. This data was a predicate to the design and installation of the Juan Rulfo electricity distribution substation.[289]

261. Contemplating a partnership with both State and Federal government officials, Nutrilite S.R.L. worked side-by-side with Mr. Secretary Francisco Mayorga, Secretary of the Rural Development of the Government of Jalisco, to identify electrical needs for *El Petacal* and the surrounding areas. At the time, ABG's and Nutrilite S.R.L.'s estimate was that approximately 2,000 KVA would be necessary for the processing area and 1,000 KVA for the water pumps at *El Petacal*.[290]

262. By the third quarter of 1995, Mr. Hunter personally found that the need to expedite the process for bringing electricity to the farm was reaching an inflection point.

---

288 *Id.*, ¶ 112.

289 *Id.*, at 46, ¶ 113.

290 Attached as **C-0067-ENG** to facilitate reference is correspondence dated June 5, 1995 from Roberto Vargas to Terry Tuttle attaching correspondence dated May 30, 1995 from the General Manager of the Federal Electricity Commission Jalisco to Secretary Francisco Mayorga**;** *see also* Hunter Witness Statement (**CWS-001**) n. 31.

Consequently, at that time he urged the then *El Petacal* Facilities Manager, Mr. Roberto Vargas, to re-double his efforts with the appropriate government officials to begin the construction of the electric substation.[291]

263. Nutrilite S.R.L. was disappointed to learn that the Federal Electricity Commission's (Department of Rural Electrification) recent proposed rural electrification project did not include *El Petacal.* This somewhat inexplicable omission at the time was viewed as a setback as to timing, even though Nutrilite S.R.L. felt that whatever the reason for the omission might have been, the demand for electricity, together with the countless benefits that it would bring to the area, which Mr. Hunter testifies as being "*poor and underdeveloped beyond words*," ultimately would carry the day.[292]

264. Nutrilite S.R.L. directly appealed to Governor Cárdenas Jiménez, who was an enthusiastic proponent of Nutrilite S.R.L.'s development of *El* Petacal into a world-class organic farming and processing operation. The appeal did not fall on deaf ears. Indeed, by June 14, 1996, Nutrilite S.R.L. signed an agreement with the Federal Commission of Electricity, and the State of Jalisco's Electrical Commission counterpart, for the provision of electricity to the entire region in the south of the State of Jalisco commonly referred to as "*El Llano en Llamas,*" comprising the Municipalities of Tolimán, San Gabriel, Tuxcacuesco, Tonaya, and Zapotitlán.[293]

265. Mr. Hunter testifies that Nutrilite S.R.L. "*found great satisfaction in knowing the signing of this agreement would provide electricity to the communal land owners ('ejidos') residing in the communities of Copala, Tolimán, Venustiano (subsequently San*

---

291 Attached as **C-0068-ENG** to facilitate reference is Communication by fax from Mr Hunter to Roberto Vargas dated September 8, 1995, copies to T. Tuttle and R. T. Hunter*,* at ¶ 6; *see also* Hunter Witness Statement (**CWS-001**) n. 32.

292 Hunter Witness Statement (**CWS-001**) at ¶ 116.

293 *See supra* note 127 (**C-0087-1-ENG/SPA**); *see also supra* note 84 (**C-0043-SPA**).

Gabriel), Carranza, and San Isidro, among others, who themselves had asked for government help in bringing electricity to the region."[294] He adds that "*Nutrilite S.R.L. was pleased to learn that partially owing to its investment, an electrical grid of 5,000 KVA was made available to these communities.*"[295]

266. According to the contemporaneous evidence, the grid was expected to generate approximately 1,000 *direct jobs*, and a sizeable number of indirect employment opportunities deriving from the actual direct job opportunities.[296]

267. The text of the Federal and State electricity agreement actually detailed the benefits to these rural communities, and more generally the entire State of Jalisco. In this commentary, reference is made to economic development as a positive event that stabilizes internal (national) and even international migration patterns. The Federal and State electricity Agreement's literal language merits citation in pertinent part in the Spanish language original:

> *III. El pasado mes de marzo, el Titular del Ejecutivo del Estado por parte de vecinos de la región ubicada al sur del Estado [Jalisco], denominada El Llano en Llamas, la cual comprende los municipios de Tolimán, San Gabriel, Tuxcacuesco, Tonaya y Zapotitlán, y dentro de ellos se encuentran entre otros, los Ejidos de Copala, Tolimán, Venustiano Carranza y San Isidro, recibió comunicación mediante la cual le solicitaban apoyo para que se gestionara ante las autoridades responsables de la Comisión Federal de Electricidad para que se les proporcione una red eléctrica de 5,000 KVA, lo cual generaría aproximadamente 1,000 empleos directos, más los indirectos que se deriven de los mismos, puesto que desde hace tiempo tienen la inquietud de coadyuvar con el desarrollo del área aludida, sin embargo, tienen la Imitante de que el elemento básico tan importante como lo es el fluido eléctrico es insuficiente, y al subsanarse el problema, provocará atraer la inversión hacia dicha región, con los beneficios que ello importa, como lo es que las familias se arraiguen en su lugar de origen y evitar en lo posible la emigración a otras ciudades e inclusive a otro país.*

294 Hunter Witness Statement (**CWS-001**) at ¶ 120.

295 *Id.*

296 *See supra* note 84 (**C-0043-SPA**).

IV. Con el propósito de fomentar el desarrollo económico y social de la Entidad, se acordó canalizar recursos para apoyar las obras en materia de electrificación rural, es por ello que concurre a la celebración del presente Instrumento.[297]

268. Mr. Hunter testifies how:

Bringing electricity to rural communities is foundational to the improvement of quality of life at its most basic levels. Life expectancy, infant mortality, sanitation, and actual illumination with other than high-risk propane gas, all are rendered possible by the generation and distribution of electricity to rural villages, towns, and communities. Therefore, as a matter of both personal and corporate pride all members of Nutrilite S.R.L., NPI, and ABG viewed this achievement as one that transcended merely rendering an organic farming project operational. It was a milestone that actually would contribute to saving and prolonging human life. No greater achievement was possible from a humanitarian or institutional perspective.[298]

269. In order to advance this project -- rural electrification – Nutrilite committed funds and physical resources, and stipulated to the conveyance of a number of rights in favor of the Mexican Federal government and the government of the State of Jalisco, so that these authorities jointly would operate the generation and administration of electric power. The grant of these resources was duly memorialized in the Federal and State electricity agreement in Spanish:

DÉCIMA QUINTA. – 'NUTRILITE' *se obliga a ejecutar bajo su riesgo con* ***sus propios elementos, recursos, y personal****, todas las obras de distribución que se requieren conforme a los lineamientos y parámetros de 'LA COMISIÓN', para suministrar energía eléctrica partiendo de la Subestación Juan Rulfo, a los puntos de utilización (pozos profundos, planta industrializadora, y otros necesarios), en su caso* ***entregarlas gratuitamente*** *bajo inventario a 'LA COMISIÓN', para su operación y mantenimiento, por lo que 'LA COMISIÓN' en ningún caso será responsable ni de accidentes de trabajo, ni del cumplimiento de las obligaciones derivadas de los contratos de trabajo que celebre 'NUTRILITE' con sus trabajadores.*

---

297 *Id. citing to* the original Spanish language. Notably, a draft Agreement had been circulated two months earlier that was bi-lingual – English and Spanish languages.

298 Hunter Witness Statement (**CWS-001**) at ¶ 123.

> ***DÉCIMA SEXTA. – 'EL GOBIERNO DEL ESTADO' y 'NUTRILITE,'*** *manifiestan su conformidad para que las obras e instalaciones construidas tanto por 'NUTRILITE' como por 'LA COMISIÓN' pasen* ***a formar parte del patrimonio de*** *'LA COMISIÓN' por lo que podrá utilizarlas total o parcialmente en su carácter de suministradora del servicio público de energía eléctrica para satisfacer otras necesidades pero a condición de que dicha utilización no sea en perjuicio o menoscabo del eficiente suministro de energía eléctrica para 'NUTRILITE'.*
>
> ***DÉCIMA SÉPTIMA. – 'NUTRILITE'*** *podrá disponer al término de las obras, hasta de un total de 3,000 KVA para su consumo, requiriendo en forma adicional de la elaboración del contrato de suministro de energía eléctrica con 'LA COMISIÓN'. Asimismo, ambas partes se pondrán de acuerdo en determinar el punto adecuado de conexión, donde 'NUTRILITE' tomará la energía eléctrica para su distribución.*[299]
>
> (Emphasis supplied.)

270. In this very same vein, in the tenth ("**DÉCIMA**") paragraph of this agreement, Nutrilite "*agrees to allow the COMMISSION unrestricted access to its properties for purposes of operating and maintaining the electrical installations that are the subject matter of this Agreement.*"[300] The Spanish language original reads:

> ***DÉCIMA. – 'NUTRILITE'*** *se obliga a permitir a 'LA COMISIÓN' el libre acceso a los predios de su propiedad y dominio, exclusivamente para la operación y mantenimiento de las instalaciones eléctricas objeto de este instrumento.*

271. The electrification of *El Petacal* in 1996 provides the Tribunal with a good sense of the extent to which this investment was staged over time. It also draws the Tribunal's attention to notable micro- and macro- economic contributions that Claimant's investment yielded.

272. The Mexican Federal government invested over USD 350,000 to bring electricity to *El Petacal*. It did so, however, based upon two very specific commitments on Nutrilite S.R.L.'s part. First, Nutrilite had to invest, and in fact invested, USD 300,000 for the

---

299 *See supra* note 84 (**C-0043-SPA**).

300 *Id*.

distribution of electricity to *El Petacal.* Nutrilite S.R.L. also invested USD 50,000 in generation equipment.[301]

273. Second, Nutrilite S.R.L. committed to contributing to the economic development of the area through creation of jobs, infrastructure, and bringing potable water, irrigation water, sewage water, and electricity. To do so, however, it was necessary to construct dehydration capabilities and to finalize the already scheduled farming projects for the *El Petacal* site. ABG provided Nutrilite S.R.L. with authorization to proceed with the project to build the dehydration facility in September 2002. The facility was completed in December 2006.

274. The partnership between Nutrilite S.R.L., Mexico's Federal government, and the State of Jalisco is emblematic of the productive and all-around extremely positive relationship that Nutrilite S.R.L. enjoyed with both levels of government. The Governor of the State of Jalisco, Governor Alberto Cárdenas Jiménez was a very strong and enthusiastic supporter of the Nutrilite S.R.L. organic farming project. So too was Mexico's President Ernesto Zedillo.[302]

275. Both levels of government -- State and Federal – demonstrated their support for Nutrilite S.R.L. in many different ways and on multiple occasions. By way of example, Governor Cárdenas Jiménez and President Zedillo visited *El Petacal* in June 1999 in support of Nutrilite S.R.L.'s operations. The visit was covered by local and national media. President Zedillo heralded Nutrilite S.R.L.'s investment as a model of foreign direct investment that creates jobs and that has the effect of freeing government resources that can then be earmarked for assistance to those who need it the most.

301 Hunter Witness Statement (**CWS-001**) at ¶ 127-128.

302 *Id.*, ¶ 131.

Indeed, he underscored Nutrilite S.R.L.'s contribution to bringing electricity to the Municipalities of Zapotitlán, Tolimán, and San Gabriel.[303]

276. In an article published by *El Informador*[304] the following, in part, is reported in the Spanish language original in order to obviate any ambiguity arising from translations:

> *Durante su estancia en Ciudad Guzmán, el Jefe del Ejecutivo federal, resaltó que la participación* ***de la iniciativa privada, en la generación de la energía eléctrica que el país consume****, permitiría destinar mayores recursos públicos a otras necesidades de la población.*
>
> *'Si hay inversionistas privados, nacionales y extranjeros, que tienen mucho interés en invertir en la industria eléctrica deben hacerse los cambios legales para que puedan hacerlo.'*
>
> *Antes de su arribo a Ciudad Guzmán, Zedillo Ponce de León, acompañado del Gobernador [Estado de Jalisco] Alberto Cárdenas, inauguró una subestación de la Comisión Federal de Electricidad,* ***que fue instalada gracias a la participación de los gobiernos federal y estatal, así como de la empresa Nutrilite****.*
>
> *'Esto es un ejemplo de lo que puede aportar la inversión de los particulares en la industria eléctrica; por eso, el gobierno de la república ha propuesto al Congreso de la Unión que se abran más posibilidades de inversión privada en esa industria eléctrica que es fundamental para el país', acotó el primer mandatario de la nación.*
>
> ***
>
> ***Esta planta beneficia a más de 40 mil personas que habitan en 50 poblaciones rurales de los Municipios de Zapotitlán, Tolimán, y San Gabriel y facilitó la instalación de dos empresas que generaron más de 350 empleados directos****, que interactúan entre si produciendo vitaminas y complementos dietéticos a base de productos naturales agrícolas y cuyo destino final es principalmente el mercado asiático.*
>
> *La inversión en esta empresa visitada por Zedillo y Cárdenas, alcanzará los 60 millones de dólares en el año 2,000 y estará generando 800 empleados directos.* ***Los productos hortícolas que produce cuentan con un sistema de riego por goteo que significa un gasto de 4,000 mil dólares por hectárea pero que permite ahorra el 75% del agua que se gastaría con el sistema tradicional de riego****.*

303 Attached as **C-0069-SPA** to facilitate reference is an article from *El Informador* titled: *Insiste Zedillo en la conveniencia de abrir a la inversión privada el sector eléctrico,* dated June 9, 1999.

304 *Id*.

(Emphasis supplied.)

277. This article points to two meaningful propositions within the framework of this arbitration. First, it is clear that as of the bringing of electricity to *El Petacal* in 1996 in keeping with the different phases of the staged investment, both immediate micro-economic benefits and consequential macro-economic gains were generated by the investment. Explicit reference is made to the Municipalities not just of San Gabriel and the Township of San Isidro where *El Petacal* is located, but also to the Municipalities of Zapotitlán and Tolimán. The effect of this investment is such that it precipitated the visit of President Zedillo who seized the opportunity to endorse the privatization of the electricity sector in the nation; hence the rather explicit reference and invitation to the national legislature to enact laws that would make such investments by private sector actors, both national and international, possible.[305]

278. According to the article, the electric substation (plant) was estimated to provide services to "*more than 40,000 people inhabiting the 50 rural villages of the Municipalities of Zapotitlán, Tolimán, and San Gabriel….*"[306] As part of the micro- and macro- economic gains, the article touches on revenues that Nutrilite S.R.L. is to generate, as well as approximately 800 direct jobs.[307]

279. Second, the article further bears witness to the close partnership between Nutrilite S.R.L., the government of the State of Jalisco, and the Federal government of Mexico at the highest levels. This relationship spawned as a direct and explicit consequence

---

305 *Id.,* providing for the exact citation as follows: "'*Si hay inversionistas privados, nacionales y extranjeros, que tienen mucho interés en invertir en la industria eléctrica deben hacerse los cambios legales para que puedan hacerlo*.'"

306 *Id.*

307 *Id.*

of the March 14, 1994 satisfaction and complete discharge of the 1939 Presidential Resolution.

280. Five (5) years after the conveyance of *Potrero Grande* or *Paso de Cedros* to the San Isidro communal landowners, and nine (9) years before the investment was fully realized and optimally producing, the Governor of the State of Jalisco, and the President of the Federal government of Mexico encouraged Amway and Nutrilite to continue to invest in developing one of the poorest regions in the State of Jalisco, and in all of Mexico, *El Llano en Llamas.*

281. The contemporaneous documents (second quarter 1999) demonstrate that, but for the Nutrilite S.R.L. investment in *El Petacal*, the provision of electricity to rural Jalisco would not have ensued at that time. The same analysis applies to bringing potable, irrigation, and sewage waters to the region.[308] Nutrilite S.R.L. provided resources and know-how and served as an intermediator and facilitator between residents of *El Llano en Llamas* and the Federal Mexican government, and the government of the State of Jalisco. Documents *authored by these government representatives* demonstrate as much.

282. Dr. Sandra Romo Mendoza's Report [309] includes in its annexes media news publications that amply document the healthcare and economic gains arising from Nutrilite S.R.L.'s investment during the very limited 1999-2000 timeframe. It also reports on then President Zedillo's policies (i) for indirect investment, and (ii) the

308 Eppers Witness Statement (**CWS-002**) at ¶ 161.

309 *See supra* note 252 and 265.

privatization of critical infrastructure resources, such as the energy, infrastructure, and utilities sectors.[310]

283. By way of example, in an article titled, *Milagro En El Llano (En Lo Que Fuera Un Auténtico Páramo Rulfiano Una Subsidiaria Alimentaria De Amway Logró Desmentir A Los Que Aseguraban Que Lo Único Que Podía Cosecharse Ahí Era, Si Acaso, Polvo.)*[311] Nutrilite S.R.L.'s transformation of the *El Petacal* communities is described:

> ***Oasis en el desierto***
>
> *En medio del árido y desolado pasaje del Rulfiano Llano, el rancho El Petacal aparece un oasis en el desierto. Sin embargo, cuánto le ha costado a Nutrilite levantar en este 'duro cuero de vaca' un paraje pletórico de vida.*
>
> * * *
>
> ***Con el apoyo del gobierno del estado, que ha visto con mucha simpatía el proyecto, Nutrilite abrió caminos, levantó puentes e introdujo líneas eléctricas. De las entrañas del subsuelo extrajo agua, rehabilitó una presa bicentenaria que estaba totalmente seca y construyó un par de embalses nuevos.***
>
> * * *
>
> ***Bienestar***
>
> ***EXPANSIVO***
>
> ***El Petacal se había convertido en un pueblo casi fantasma****, abandonado por sus hombres que, ante la desesperanza de una tierra que no les daba ni para comer, emigraban 'pal Norte.'* ***Nutrilite vino a cambiar las cosas****.*
>
> *… la empresa [Nutrilite] ha aportado más de $1 millón de dólares para la construcción de* ***una clínica—con doctor de tiempo completo*** *--,* ***un kínder y una cancha de fútbol****, así como para dotar a la comunidad de* ***agua potable*** *y* ***del servicio de alumbrado público****. De igual modo,* ***comparte el agua*** *con los ganaderos del poblado, con quienes ha establecido un* ***convenio para proporcionarles alfalfa a cambio del estiércol que producen sus animales.***
>
> ***

310 *Id.*

311 *See supra* note 266 (**C-0065SPA/ENG**) *citing to Milagro En El Llano* (*En Lo Que Fuera Un Auténtico Páramo Rulfiano Una Subsidiaria Alimentaria De Amway Logró Desmentir A Los Que Aseguraban Que Lo Único Que Podía Cosecharse Ahí Era, Si Acaso, Polvo*).

> *La historia se repite;* ***alguien hace las veces de punta de lanza y otros avanzan por esa brecha. Nutrilite ha servido de detonador para que otros inversionistas se animen a instalarse en una zona que para muchos estaba desahuciada.***[312]
>
> (Emphasis supplied.)

284. This article references as contributions to the residents of *El Llano en Llamas* Nutrilite S.R.L.'s (i) construction of roads, (ii) construction of bridges, (iii) construction of electric lines and cable work, (iv) the reconstruction of a dam, (v) the successful drilling for water, (vi) the construction of a clinic attended to by a full-time physician, (vii) the construction of a kindergarten, (viii) the construction of a soccer field, (ix) the provision of potable water, (x) public lighting, (xi) an agreement pursuant to which water is shared with cattle ranchers, (xii) an agreement whereby Nutrilite S.R.L. provide cattle ranchers with alfalfa in exchange for composting materials. The evidence before this Tribunal, however, reflects that these contributions hardly are exhaustive.

285. The Arbitral Tribunal respectfully is encouraged to note the text stating (in the Spanish language original to avert possible mistranslation) "*con el apoyo del gobierno del estado [State of Jalisco] que ha visto con mucha simpatía el proyecto, Nutrilite abrió caminos, levantó Puentes e introdujo líneas eléctricas*."[313]

286. The article, as do virtually all newspaper accounts reporting on Nutrilite S.R.L.'s undertaking in *El Llano en Llamas*, repeatedly underscores Nutrilite S.R.L.'s role in working together with State and/or Federal government agencies, and the policy support that NPI and Nutrilite S.R.L. receive from the various levels of government.

---

312 *Id.*

313 *Id.*

287. In another article, this one titled, *Insiste Zedillo En La Conveniencia De Abrir A La IP El Sector Eléctrico*, Nutrilite S.R.L.'s rural electricity contributions are contextualized within a political framework seeking to privatize the electricity sector:

> *La subestación de la Comisión Federal de Electricidad que entró en operación el 26 de mayo del año anterior se ubica en el crucero Cuatro Caminos en el municipio de San Gabriel; denominada Juan Rulfo, tuvo un costo total de 19 millones 735 mil pesos aportados de la siguiente forma: CFE doce millones 521 mil pesos; gobierno de Jalisco, cuatro millones 714 mil pesos, y* ***Nutrilite dos y medio millones de pesos****;*
>
> ***Esta planta beneficia a más de 40 mil personas que habitan en 50 poblaciones rurales*** *de los Municipios de Zapotitlán, Tolimán, y San Gabriel y facilitó la instalación de dos empresas que generaron más de 350 empleos directos, que interactúan en si produciendo vitaminas y complementos dietéticos a base de productos naturales agrícolas y cuyo destino final es principalmente el mercado asiático.*
>
> *La inversión en esta empresa [Nutrilite S.R.L.], visitada por Zedillo y Cárdenas,* ***alcanzará los 60 millones de dólares en el año 2000 y estará generando 800 empleos directos****. Los productos hortícolas que producen cuenta con un sistema de riego por goteo que significa un gasto de cuatro mil dólares por hectárea pero que permite ahorrar el 75% del agua que se gastaría con el sistema tradicional de riego.*[314]
>
> (Emphasis supplied.)

288. In addition to attaching these newspaper accounts to her report, after summarizing the immediate and direct provision of healthcare services on the part of Nutrilite during this 1996-2000 timeframe, Dr. Sandra Romo Mendoza also draws a direct correlation between the sewage treatment plant, which also is dependent on the rural electricity project, and the corresponding health benefits to the community:

> *Otro proyecto ya realizado es la construcción de planta tratadora de aguas residuales, la cual se inaugurará en cuanto el Municipio de Tolimán se coordine con el Gobernador que quede electo.* ***Este proyecto mejora mucho las condiciones de salud del pueblo de El Petacal, ya que se evita la***

[314] Attached as **C-0069-SPA** to facilitate reference is an article from *El Informador* titled: *Insiste Zedillo en la conveniencia de abrir a la inversión privada el sector eléctrico,* dated June 9, 1999; *see also* Eppers Witness Statement (**CWS-002**) n. 40, n. 44.

***contaminación del suelo y aire disminuyendo este foco infeccioso tan importante que existía**. De la misma manera se contribuyó a presionar al Municipio de Tolimán y a la población de El Petacal, para que las personas que carecían de drenaje, lo pusieran y se llevó a cabo en 1999 y 2000 quedando solamente 8 casas sin conexión de drenaje.*

Por lo mencionado con anterioridad se concluye, que las condiciones de calidad de vida, y educación para la salud en la población de El Petacal, han mejorado y aún quedan muchas cosas por hacer ya que el cambio se ha dado poco a poco; y que actualmente se gestiona en la Secretaría de Saludo se construya una casa de salud para tener más apoyos de salud para esta región que tiene tan poco acceso a lugares cercanos de salud; y ningún vehículo público para su traslado a esas unidades.[315]

(Emphasis supplied.)

289. Mr. Eppers testifies that "*Nutrilite S.R.L.'s contributions actually exceeded (i) the provision of healthcare, (ii) bringing potable, irrigation, and sewage waters to multiple communities, and (iii) rendering possible the electrification of the Llano en Llamas.*"[316]

290. Mr. Hunter testifies:

*The constant and repeated support that Nutrilite S.R.L. received from the Mexican government at all levels **prior to the actual investment** and all throughout the establishment and operation of the El Petacal organic farming and processing center, led Nutrilite S.R.L., NPI, and ABG to expect to be treated in a commercially respectful and accommodating manner. To be sure, such always was the case as of April 1992 through June 2022.*[317]

(Emphasis supplied.)

---

315 *Id.*

316 Eppers Witness Statement (**CWS-002**) at ¶ 167.

317 Attached as **Composite C-0070-SPA** to facilitate reference are six (6) media reports concerning the electrification project in particular, and more generally the Nutrilite S.R.L. investment titled: (i) *Impulso a la electrificación rural en el Sur del Estado, "El Informador*," October 19, 1996, (**C-0070-1-SPA**), (ii) *Continúan las inversiones en obras de ampliación: CFE, "El Informador*," August 26, 1997, (**C-0070-2-SPA**), (iii) *Más de 25 millones de dólares, Inversión para lograr el despegue, "El Informador,"* June 17, 1999, (**C-0070-3-SPA**), (iv) *Empresas Agrícolas en Plena Expansión, "El Informador,"* August 8, 1999, (**C-0070-4-SPA**), (v) *Cerca de $26 millones destinarán a la electrificación rural, "El Informador*," September 1, 1996, (**C-0070-5-SPA**); and (vi) *$15 millones para obras de electrificación rural, "El Informador,"* June 7, 1996, (**C-0070-6-SPA**); *see also* Hunter Witness Statement (**CWS-001**) n. 39.

5. Infrastructure Contributions: Roads, Bridges, and the Construction of a Community

291. The Arbitral Tribunal will note that, according to newspaper reports here cited throughout the course of this Memorial and contained in the Witness Statements of Messrs. Hunter and Eppers, here cited and attached as (**CWS-001**) and (**CWS-002**),[318] prior to ABG's investment, *El Petacal* was desolate. The conventional wisdom was that in the *Llano en Llamas* region "*the only crop that can be grown is, perhaps, dust*."[319] The desolation was, in part, because the 280 hectares comprising *El Petacal* lacked roads.[320]

292. The entire 280 hectares and surrounding areas were isolated. Mr. Eppers testifies "[*t]here was no ingress or egress capable of sustaining access by four-wheel vehicles, let alone roads that would support consistent commercial activity*."[321]

293. ABG's Nutrilite S.R.L. investment gave rise to the building of three bridges over ravines that otherwise would have fragmented *El Petacal* and limited any potential access to major roadways, as well as posed constraints on the internal development of the 280 hectares.[322] Immediately below is a chart designating the bridges by Arabic numbers 1-3 only for illustrative purposes. The length and width of the bridges are contained in the chart that follows:[323]

---

318 *See also, supra* notes 265, 310, 313.

319 *Supra* note 266.

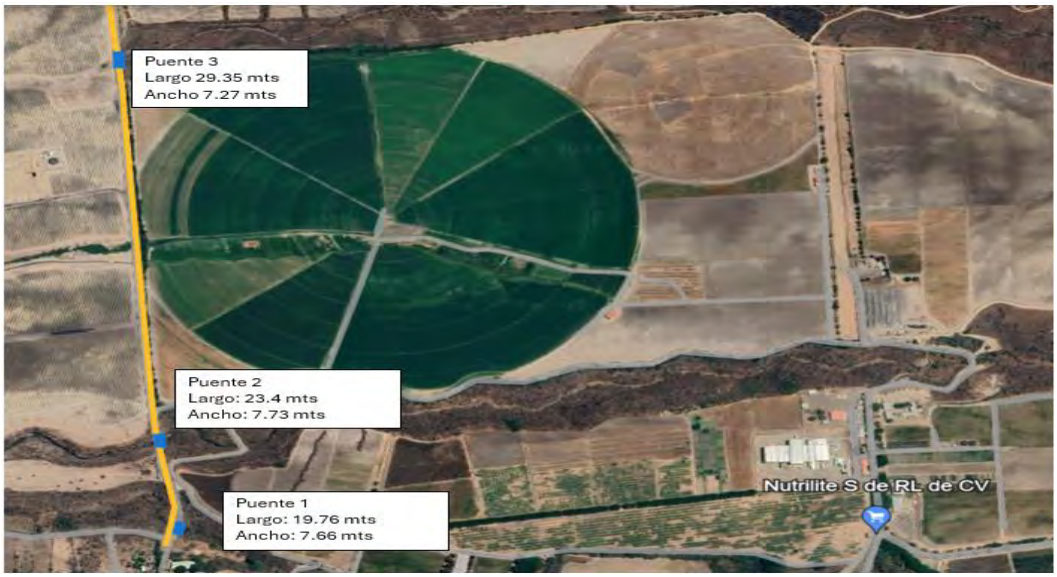
320 Eppers Witness Statement (**CWS-002**) at ¶ 169.

321 *Id.,* ¶ 170.

322 *Id.,* ¶ 170.

323 *Id.*

# Puente	Largo	Ancho
1	19.76 mts	7.66 mts
2	23.4 mts	7.73 mts
3	29.35 mts	7.27 mts



294. Nutrilite S.R.L. hired local engineers and contractors to build these bridges.[324] Bridges 1 and 2 were constructed during the fourth quarter of 1996. The attached construction contract, dated October 7, 1996, reflects that the total value of the construction project with respect to these two bridges was USD 231,732.53. The work was undertaken by *Construcciones y Carreteras, S.A. de C.V.*, under the supervision of Engineer Ricardo Luna Valencia.[325]

295. The critical path work programs for bridges 1 and 2 are here reproduced:[326]

---

324 *Id.* at 56, ¶ 171.

325 Attached as **C-0071-ENG** to facilitate reference is a copy of a document titled, *Construction Contract at Unit Prices and Fixed Time*, entered into between Nutrilite, S.R.L. de C.V., and *Construcciones y Carreteras, S.A. de C.V.*, dated October 7, 1996; *see also* Eppers Witness Statement (**CWS-002**) n. 48.

326 *Id.*

ANNEX 2

NUTRILITE S. DE R.L. DE C.V.	WORK PROGRAM	WORK: CONSTRUCTION THE BRIDGES 1 AND 2 SITE : RANCHO "EL PETACAL" MPIO.: TOLIMAN STATE : JALISCO

BRIDGE No. 1

SHEET 1 *OF* 3

ANNEX No. 2

CONCEPT	UNIT	VOL.	UNIT PRICE	AMOUNT (DLLS)	1thr. Month 30 days	2thr. Month 30 days	3thr Month 30 days	4thr Month 30 days
Excavation for structures, any depth, material class "B"	M3	780.00	6.01	4,688.51				
Afin the bottom of the excavation	M2	270.00	2.25	608.61				
Compacted refill with material from the excavation	M3	220.00	2.66	586.22				
Stone-work trirth class, any heigth, sticking-plaster with mortar cement- sand 1:5 Note: Cement supply by the contractee	M3	1,053.00	53.16	55,980.28				
Drainer back of the footing, filled by hand with stone	M3	25.00	21.17	529.34				
Re-fill the top of the crown of the stone wall with mortar cement-sand 1:5, 3/4" thick	ML	51.60	3.60	185.84				
Hydraulic concrete F'c=250 kg/cm2 on the crown of the stone wall, dry moulding	M3	17.00	161.39	2,743.69				
TOTAL THIS SHEET				65,322.49				

THE CONTRACTOR
NUTRILITE, S. DE R.L. DE C.V.

SR. DAVID T. TUTTLE

THE CONTRACTEE
CONSTRUCCIONES Y CARRETERAS, S.A. DE C.V.

ENGINEER RICARDO LUNA VALENCIA

ANNEX 2

NUTRILITE S. DE R.L. DE C.V.	WORK PROGRAM	WORK: CONSTRUCTION THE BRIDGES 1 AND 2 SITE : RANCHO "EL PETACAL" MPIO.: TOLIMAN STATE : JALISCO

BRIDGE No. 1

SHEET 2 OF 3
ANNEX No. 2

CONCEPT	UNIT	VOL.	UNIT PRICE	AMOUNT (DLLS)	1thr. Month 30 days	2thr. Month 30 days	3thr Month 30 days	4thr Month 30 days
Steel re-enforcement for hydraulic concrete with round iron elastic limit = 4000 kg/cm2	KG	5,720.00	0.82	4,666.62				
Concrete beams pre-strong, prestrenuous, AASHTO kind, 19.70 meters long for super-structure, include manufacturing, transport and installation	PZA	4.00	4,116.65	16,466.60				
Hydraulic concrete F'c=250 ks/cm2 on diaphragm	M3	4.00	153.55	614.21				
Stretcher with round iron 1 1/2"	KG	73.00	1.07	78.38				
Simple hydraulic concrete f'c= 250 kg/cm2 dry pured on the superstructure slab	M3	24.40	205.68	5,018.47				
PVC pipe drain 4" diam. on slab	PZA	14.00	2.05	28.65				
PVC pipe drain 4" diam. across the stone wall	ML	42.00	7.66	321.60				
Neoprene support shore hardness 8" x 12" x 1"	PZA	4.00	45.38	181.52				
TOTAL THIS SHEET				27,376.05				

THE CONTRACTOR
NUTRILITE, S. DE R.L. DE C.V.

SR. DAVID T. TUTTLE

THE CONTRACTEE
CONSTRUCCIONES Y CARRETERAS, S.A. DE C.V.

ENGINEER RICARDO LUNA VALENCIA

NUTRILITE S. DE R.L. DE C.V.	WORK PROGRAM	ANNEX 2 WORK: CONSTRUCTION THE BRIDGES 1 AND 2 SITE : RANCHO "EL PETACAL" MPIO.: TOLIMAN STATE : JALISCO

BRIDGE No. 1

SHEET 3 OF 3

ANNEX No. 2

CONCEPT	UNIT	VOL.	UNIT PRICE	AMOUNT (DLLS)	1thr. Month 30 days	2thr. Month 30 days	3thr Month 30 days	4thr Month 30 days
Neoprene support shore hard-ness 8" x 12" x 1.6"	PZA	4.00	53.25	212.99				
Supply and install the dilatation joint, JMCY-55	M	14.05	56.30	790.97				
Simple hydraulic concrete f'c= 250 kg/cm2 dry pured on the superstructure liner, size accor the project	ML	39.40	39.86	1,570.66				
Steel parapet for roadway according to the project	ML	36.00	38.48	1,385.33				
Supply and install the steel defence, IMMSA brand, include post, separator and terminnal	ML	15.24	25.50	388.61				
Laboratory for control the quality of the concrete by test concrete cylinders	LOTE	1.00	3,421.27	3,421.27				
TOTAL THIS SHEET				7,769.83				

THE CONTRACTOR
NUTRILITE, S. DE R.L. DE C.V.

SR. DAVID T. TUTTLE

THE CONTRACTEE
CONSTRUCCIONES Y CARRETERAS, S.A. DE C.V.

ENGINEER RICARDO LUNA VALENCIA

NUTRILITE S. DE R.L. DE C.V.	WORK PROGRAM	WORK: CONSTRUCTION THE BRIDGES 1 AND 2 SITE : RANCHO "EL PETACAL" MPIO.: TOLIMAN STATE : JALISCO

BRIDGE No. 2

SHEET 1 OF 3

ANNEX No. 2

CONCEPT	UNIT	VOL.	UNIT PRICE	AMOUNT (DLLS)	1thr. Month 30 days	2thr. Month 30 days	3thr Month 30 days	4thr Month 30 days
Excavation for structures, any depth, material class "B"	M3	790.00	6.01	4,748.62				
Afin the bottom of the excavation	M2	270.00	2.25	608.61				
Compacted refill with material from the excavation	M3	160.00	2.66	426.34				
Stone-work trirth class, any heigth, sticking-plaster with mortar cement- sand 1:5 Note: Cement supply by the contractee	M3	940.00	53.16	49,972.90				
Drainer back of the footing, filled by hand with stone	M3	47.00	21.17	995.17				
Re-fill the top of the crown of the stone wall with mortar cement-sand 1:5, 3/4" thick	ML	52.60	3.60	189.44				
Hydraulic concrete F'c=250 kg/cm2 on the crown of the stone wall, dry moulding	M3	17.20	161.39	2,775.97				
TOTAL THIS SHEET				59,717.05				

THE CONTRACTOR
NUTRILITE, S. DE R.L. DE C.V.

SR. DAVID T. TUTTLE

THE CONTRACTEE
CONSTRUCCIONES Y CARRETERAS, S.A. DE C.V.

ENGINEER RICARDO LUNA VALENCIA

NUTRILITE S. DE R.L. DE C.V.	WORK PROGRAM	WORK: CONSTRUCTION THE BRIDGES 1 AND 2 SITE : RANCHO "EL PETACAL" MPIO.: TOLIMAN STATE : JALISCO

BRIDGE No. 2

SHEET 2 OF 3

ANNEX No. 2

CONCEPT	UNIT	VOL.	UNIT PRICE	AMOUNT (DLLS)	1thr. Month 30 days	2thr. Month 30 days	3thr Month 30 days	4thr Month 30 days
Steel re-enforcement for hydraulic concrete with round iron elastic limit = 4000 kg/cm2	KG	6,344.00	0.82	5,175.70				
Concrete beams pre-strong, pre-strenuous, AASHTO kind, 19.70 meters long for super-structure, include manufacturing, transport and installation	PZA	4.00	4,892.42	19,569.69				
Hydraulic concrete F'c=250 ks/cm2 on diaphragm	M3	5.00	153.55	767.76				
Stretcher with round iron 1 1/2"	KG	104.00	1.07	111.67				
Simple hydraulic concrete f'c= 250 kg/cm2 dry pured on the superstructure slab	M3	33.00	205.68	6,787.28				
PVC pipe drain 4" diam. on slab	PZA	16.00	2.05	32.74				
PVC pipe drain 4" diam. across the stone wall	ML	44.00	7.66	336.91				
Neoprene support shore hardness 8" x 12" x 1"	PZA	4.00	45.38	181.52				
TOTAL THIS SHEET				32,963.27				

THE CONTRACTOR
NUTRILITE, S. DE R.L. DE C.V.

SR. DAVID T. TUTTLE

THE CONTRACTEE
CONSTRUCCIONES Y CARRETERAS, S.A. DE C.V.

ENGINEER RICARDO LUNA VALENCIA

NUTRILITE S. DE R.L. DE C.V.	WORK PROGRAM	WORK: CONSTRUCTION THE BRIDGES 1 AND 2 SITE : RANCHO "EL PETACAL" MPIO.: TOLIMAN STATE : JALISCO

BRIDGE No. 2

SHEET 3 OF 3

ANNEX No. 2

CONCEPT	UNIT	VOL.	UNIT PRICE	AMOUNT (DLLS)	1thr. Month 30 days	2thr. Month 30 days	3thr Month 30 days	4thr Month 30 days
Neoprene support shore hard-ness 8" x 12" x 1.6"	PZA	4.00	53.25	212.99				
Supply and install the dilatation joint, JMCY-55	M	14.86	56.30	837.70				
Simple hydraulic concrete f'c= 250 kg/cm2 dry pured on the superstructure liner, size accor the project	ML	46.80	39.86	1,865.66				
Steel parapet for roadway according to the project	ML	42.40	38.48	1,631.61				
Supply and install the steel defence, IMMSA brand, include post, separator and terminnal	ML	15.24	25.50	388.61				
Laboratory for control the quality of the concrete by test concrete cylinders	LOTE	1.00	3,421.27	3,421.27				
TOTAL THIS SHEET				8,357.84				

THE CONTRACTOR
NUTRILITE, S. DE R.L. DE C.V.

SR. DAVID T. TUTTLE

THE CONTRACTEE
CONSTRUCCIONES Y CARRETERAS, S.A. DE C.V.

ENGINEER RICARDO LUNA VALENCIA

296. Bridge number 3 was constructed by *Tacamo Construcciones S.A. de C.V.* under the auspices of C.P. Mario A. Reyes de la Torre and Engineer Miguel González Rivera. This project, construction of bridge number 3 a/k/a *Puente "La Colmena*,*"* [327] commenced during the third quarter of 1995. On September 30, 1995 Nutrilite S.R.L. and *Tacamo Construcciones S.A. de C.V.* executed a formal *tender* and corresponding *acceptance* of the construction project, and certified the bridge as completely and satisfactorily constructed.[328]

297. Set forth below is a reproduction of a critical path construction program pertaining to *Puente "La Colmena,"* i.e., bridge No. 3.

[The rest of this page is intentionally left blank.]

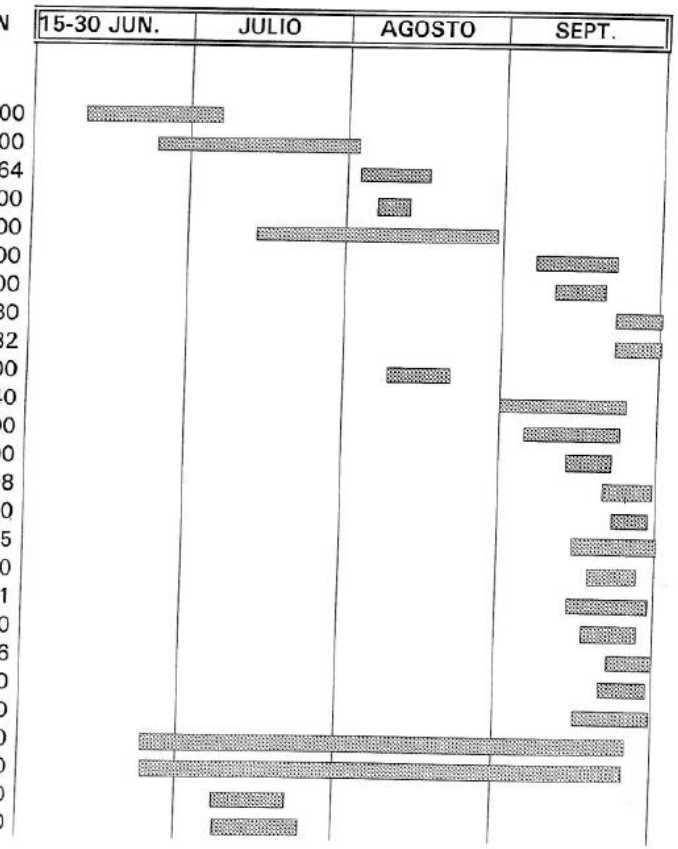
[327] Attached as **C-0072-SPA** to facilitate reference is a copy of a document titled, *Contrato de Obra a Precios Unitarios y Tiempo Determinado*, entered into between Nutrilite S.R.L. de C.V. and Tacamo Construcciones S.A. de C.V., dated May 19, 1995; *see also* Eppers Witness Statement (**CWS-002**) n. 50.

[328] Provided as **C-0073-SPA** for the Tribunal's ease of reference photographs taken by *Tacomo Construcciones of the La Colmena* bridge work chronicling the progress throughout the project; *see also* Eppers Witness Statement (**CWS-002**) n. 51.

OBRA .-PUENTE "LA COLMENA"
LUGAR.- EL PETACAL, MPIO DE TOLIMAN, JALISCO.
CONTENIDO.- PROGRAMA DE OBRA.
PERIODO EJECUCION.- DEL 15 DE JUNIO AL 30 DE SEPTIEMBRE DE 1995

ANEXO No. 2

No.	CONCEPTO	UNI	VOLUMEN
1-	EXCAV. P/ESTRUCTURAS MAT. "B"	M3	203.00
2-	CONCRETO CICLOPEO, ESTRIBOS	M3	736.00
3-	CONC 250 KG/CM2 CORONA, DIAF.	M3	24.64
4-	ACERO REFUERZO CORONA Y DIAF.	KG	2,320.00
5-	ESTRUCT. MET. TRIDIMENSIONAL	KG	10,130.00
6-	JUNTA DILATACION DE AC.ESTRUC.	KG	264.00
7-	AC. REF. EN JUNTA DE DILATACION	KG	340.00
8-	JUNTA DILATACION DE SIKAFLEX	DM3	52.80
9-	JUNTA DILAT. CARTON ASFALTADO	M2	1.32
10-	PLACA DE APOYO DE NEOPRENO	DM3	45.00
11-	CONCRETO 250 K/G/CM2 EN LOSA	M3	26.40
12-	AC. DE REFUERZO EN LOSA	KG	1,526.00
13-	DRENES DE PLASTICO 7.6 CM.	PZA	18.00
14-	CONC. DE 250 GUARN. PUENTE	M3	6.08
15-	AC. REFUERZ. GUARNICION PUENTE	KG	855.00
16-	CONC. EN GUARNICION DE ACCESO	M3	3.45
17-	ACERO DE REF. EN GUARN. ACCESO	KG	387.00
18-	POSTE CONC. EN ACCESOS	M3	1.51
19-	AC. DE REF. EN POSTE DE ACCESO	KG	533.00
20-	DEFENSA GALVANIZADA ACCESOS	ML	45.76
21-	LAVADEROS DE CONC. EN ACCESOS	M3	6.10
22-	BORDILLO DE CONC. EN AMPLIACION	ML	80.00
23-	EQUIPOS DE APOYO	LOT	1.00
24-	LABORATORI DE MECANICASUELOS	LOT	1.00
25-	TUBOS P/ DRENES DE 4" ESTRIBOS.	ML	43.00
26-	PIEDRA RESPALDOS DE ESTRIBOS	M3	100.00



298. From the work programs referenced (*supra* ¶¶ 295-297) above the Arbitral Tribunal will be able to glean the scope of this infrastructure investment. Mr. Eppers testifies that it reflects "*a long-term commitment to multiple communities beyond that of El Petacal in the Municipality of San Gabriel.*"[329] He adds that "*these infrastructure projects bespeak a long-term commitment to the State of Jalisco more generally. The two decades following the acquisition of the 280 hectares comprising El Petacal palpably demonstrate this commitment*."[330]

299. Nutrilite S.R.L. built a road connecting the *San Gabriel – Tolimán* highway with an important thoroughfare, "*Avenida México.*" This important roadway covers a distance of 7.7 kilometers, and is 7.66 meters wide.[331] Set forth below for the Arbitral Tribunal's ease of reference is a Google map image of *El Petacal* with the "*El Petacal Road*" designated in yellow.[332]

329 Eppers Witness Statement (**CWS-002**) at ¶ 175.

330 *Id.*

331 *Id.* at ¶ 176

332 *Id.*

300. Mr. Eppers explains that *"[t]his infrastructure made possible the development of the El Petacal organic farming operation. It also decreased the isolation of the El Petacal community and facilitated access for other foreign direct investors who invested in neighboring real estate that subsequently was converted into productive agricultural concerns."*[333]

301. The record before this Arbitral Tribunal is rife with testimonial, documentary, electronic visual images, and videos attesting to the investment at issue's micro- and macro-economic contributions, not only to the Municipality of San Gabriel and the Township of San Isidro where *El Petacal* is located, but also to the totality of communities comprising the region in the southern quadrant of the State of Jalisco known as *El Llano en Llamas*. Part of the evidence before this Tribunal are the third-party newspaper reports documenting these contributions. They are not cosmetic.

302. Indeed, the investment brought potable water, irrigation water, sewage waters, electricity, and healthcare, to reference only some of the more salient items, to a region characterized by poverty with respect to which its residents suffered from malnutrition and multiple preventable diseases.

303. Among the evidence canvassed, the Tribunal has been provided with multiple Agreements between Nutrilite S.R.L. and representatives of Mexico's Federal government, as well as the State of Jalisco. Also before this Tribunal are Agreements, all unilateral and voluntary in nature, between Nutrilite S.R.L. and the communal landowners of San Isidro and beyond providing for assistance ranging from unqualified easements to the provision of potable water, irrigation water, and the building of roads and bridges.

---

333 *Id.*, ¶ 177.

304. It remains unclear how wresting from ABG legal title to the 280 hectares comprising *El Petacal*, irrespective of considerations pertaining to (i) due process, (ii) compensation of any kind and in any amount, and (iii) discriminatory treatment, can constitute a taking for a *public purpose*.

X. THE JULY 2022 TAKING OF LEGAL TITLE OF THE 280 HECTARES COMPRISING THE PROPERTY KNOWN AS *EL PETACAL*

A. Notice of Taking Dated July 1, 2022 Regarding the 120 Hectares Known as *Puertas Uno* and *Dos* of *El Petacal*

305. The legal representative of Nutrilite S.R.L. was served with a Notice dated July 1, 2022 [334] provided by the *Secretaría de Desarrollo Agrario, Territorial y Urbano* (SEDATU) that purports to provide that government instrumentality with the right to execute a taking immediately on the 120 hectares of *El Petacal* known as *Puertas Uno* and *Dos*. This July 1, 2022 Notice ostensibly purports to do so based upon the 1939 Presidential Resolution that President Lázaro Cárdenas Jiménez issued at that time. This Notice of taking, or of execution pursuant to the 1939 Presidential Resolution, purports to be in furtherance of the rights of the San Isidro communal landowners under the very 1939 Presidential Resolution.

306. The July 1, 2022 Notice additionally purports that this taking of property also is normatively premised on Art. 302 of the *Ley Federal de Reforma Agraria*, which the Notice asserts to be applicable with respect to the third transitional Article of the *Ley Agraria* of January 6, 1992.[335]

---

334 Attached as **C-0081-SPA** to facilitate reference is Notice dated July 1, 2022.

335 The July 1, 2022 Notice cites to this statutory authority as follows:

… Con fundamento en el artículo 302 de la Ley Federal de la Reforma Agraria aplicable en términos del artículo tercero transitorio de la Ley Agraria del 6 de enero de 1992, menciona:

> *Art. 302… 'Cuando al darse una posesión derivada del mandamiento de un Ejecutivo local, haya dentro de los términos [terrenos] concedidos cosechas pendientes de levantar, se*

307. After citing to Art. 302 of the *Ley Federal de Reforma Agraria*, the Notice adds:

> *Derivado de lo anterior y toda vez que los días 30 de junio y 01 de julio de 2022, se realizaron los trabajaos técnicos de* ***ejecución complementaria****, en los cuales se observaron 121-00-00 hectáreas de terreno de monte, mismas que están delimitadas con lienzos y malla ciclónica, las cuales de acuerdo al artículo anteriormente descrito [Art. 302 Ley Federal de Reforma Agraria,]* ***deberán de ponerse en posesión inmediata a los beneficiados de la Resolución Presidencial de fecha de publicación 18 de noviembre de 1939, se lee concede un plazo de veinticuatro horas las cuales empezaran a surtir sus efectos a partir de las 9:00hrs del día cuatro de julio de 2022, a efecto de que se retiren los lienzos y malla ciclónica y esta dependencia del ejecutivo federal se encuentre en condiciones para poner en posesión a los beneficiados.***
>
> (Emphasis supplied.)

308. The July 1, 2022 Notice states that based upon the technical work undertaken on June 30 and July 1, 2022 in furtherance of "*ejecución complementaria*," it was observed that 121 hectares were not cultivated with crops, and instead appeared covered with canvases and nets. Therefore, so says the Notice, physical possession of these "121 hectares" pursuant to the 1939 Presidential Resolution would ensue within twenty-four (24) hours as of July 4, 2022 so that the canvases and nets on the property could be removed, and physical possession and control of the property taken at that time. It is worth noting that entry into the property, according to the ordinary textual language of

---

> *fijará a sus propietarios el plazo necesario para recogerlas, el cual se notificará expresamente y se publicará en las tablas de avisos de las oficinas municipales a que corresponda el núcleo de población beneficiado. Los plazos que se señalen a los cultivos anuales corresponderán en todo caso, a la época de las cosechas en la región [y] nunca alcanzarán el siguiente ciclo agrícola del cultivo de que se trate. Respecto a los terrenos de agostadero, se concederá un plazo máximo de treinta días para que los ejidatarios [communal landowners] entren en posesión plena, salvo que medien las circunstancias previstas en el Artículo 312 y* ***en cuanto a terrenos de monte en explotación la posesión será inmediata, pero se concederá el plazo necesario para extraer los productos forestales ya laborados [elaborados] que se encuentren dentro de la superficie concedida.***
>
> (Emphasis in original.)

the Notice, actually took place before (June 30 and July 1, 2022) the Notice actually was provided to Nutrilite S.R.L.'s legal representative.

309. The testimony before this Tribunal is that the communal landowners of San Isidro took control of *Puertas Uno* and *Dos* of *El Petacal* after the passage of twenty-four (24) hours as of 9:00 p.m., July 4, 2022.[336] This fact conflicts, as will be shown below, with a document here referenced as "*Acta de Posesión y Deslinde*" that literally and textually states that physical, material, and juridical title to the property was conveyed to the communal landowners of San Isidro on July 14, 2022. As to the 120 hectares (*Puertas Uno* and *Dos*) such obviously was not the case.[337]

310. Consequently, the July 1, 2022 Notice, despite the absence of literal textual language so stating, concerned the entire 280 hectares comprising *El Petacal*, but notes that only physical control at that time would be taken with respect to "*121-00-00 hectáreas de terreno de monte*," i.e., the 120 hectares comprising *Puertas Uno* and *Dos* of *El Petacal*.

311. The July 1, 2022 Notice in citing to Art. 302 and underscoring the alleged right to immediate possession of land that was *not* being cultivated, supports that at the time only the 120 hectares would be physically taken, as the remaining 160 hectares were sustaining crops yet to be harvested and picked. Under Art. 302 of the *Ley Federal de Reforma Agraria*, arable land where crops are being farmed would be susceptible to physical possession pursuant to complementary execution of an Executive Order only after time is provided for purposes of gathering the harvest. Article 302 of the *Ley*

336 Eppers Witness Statement (**CWS-002**) at ¶ 178; Hunter Witness Statement (**CWS-001**) at ¶ 215.

337 See **C-0050-SPA**, document titled "*Acta de Posesión y Deslinde*".

Federal de Reforma Agraria provides for "*un plazo máximo de treinta días para que los ejidatarios entren en posesión plena*".[338]

B. Notice of Taking Dated July 7, 2022 Regarding the 160 Hectares Known as *Puertas Tres* and *Cuatro* of *El Petacal*

312. A second Notice of taking as a complementary execution pursuant to a Presidential Order was also issued on July 7, 2022.[339] Unlike its July 1, 2022 predecessor Notice, which only generally stated that 280 hectares of the original 536 hectares referenced in the 1939 Presidential Resolution remain pending and therefore the Presidential Resolution had not been discharged, the July 7, 2022 Notice contained greater particularity as to the hectares in question. The letter referenced, "*Predio Denominado 'El Petacal' con una Superficie de 280-00-00 hectáreas presente*."

313. This communication referenced in its first paragraph that C. Miguel de Jesús Manzur Pérez had been commissioned "to cure omissions and deficiencies that were identified in the execution ordered and integrated from the respective matters, ordered during the Act DGOPR.DE. 4947. 2022 dated April 26, 2022 signed by the Titular de la Dirección General de Ordenamiento de la Propiedad Rural," with respect to the 1939 Presidential Resolution. It furthermore states that the 1939 Presidential Resolution was only partially and not fully discharged because 280 hectares remained pending.[340]

---

338 *Supra* note 334.

339 Attached as **C-0074-SPA** to facilitate reference is Notice dated July 7, 2022.

340 *Id*. The Spanish language original reads:

Para subsanar las omisiones y deficiencias que fueron detectadas en la ejecución ordena e integración del expediente respectivos, ordenados mediante oficio DGOPR.DE. 4947. 2022, del 26 de abril del 2022, suscrito por la Titular de la Dirección General de Ordenamiento de la Propiedad Rural, en referencia a la Resolución Presidencial de 23 de agosto de 1939, publicada en el Diario Oficial de la Federación el 18 de noviembre del mismo año, en la cual de beneficio al poblado San Isidro, municipio de San Gabriel, Jalisco, misma que se encuentra ejecutada parcialmente, quedando pendiente de entregar 280-00-00 hectáreas.

314. No greater particulars are provided in that paragraph. The following paragraph, formally much like the preceding paragraph, also is constituted by one sentence containing unpunctuated multiple subordinate clauses.

315. While it very generally references "*Arts. 307, 308, and others relative to and applicable forming part of the Ley Federal de la Reforma Agraria*," it is mostly limited to notice of a meeting scheduled for July 14, 2022 at the "*House of the communal landowners of San Isidro*" where particulars concerning the complementary execution of the 1939 Presidential Resolution would take place, including "technical undertakings," which likely reference surveying the property that as of that date, July 14, 2022, had not been physically taken. The Notice, however, is silent as to any further particulars. The Spanish language original compels citation of this second paragraph in its entirety:

> *En virtud a lo anterior y de conformidad a lo dispuesto por los artículos 307, 308 y demás relativos y aplicables de la Ley Federal de la Reforma Agraria pero aplicable al caso concreto atento a lo que dispone el artículo tercero transitorio de Ley Agraria vigente se les notifica que a las 10:00 diez horas del día 14 catorce de julio del 2022, en el local que ocupa la casa ejidal del poblado de San Isidro, del municipio de San Gabriel, estado de Jalisco, lugar en donde se llevará a cabo el inicio de la diligencia de los trabajos técnicos de la ejecución complementaria de la Resolución Presidencial anteriormente citada, lo que se les comunica a efecto de que se sirvan a concurrir personalmente o por medio de su representante debidamente acreditado al lugar de la diligencia de los trabajos en comento, en la inteligencia de que su ausencia o retraso no será motivo de la suspensión el acto de referencia.*[341]

316. Counsel for Nutrilite S.R.L., Lic. René Morales, attended the referenced July 14, 2022 meeting and was advised that the remaining 160 hectares pertaining to *El Petacal* also had been the subject matter of complementary execution of the 1939 Presidential Resolution. These 160 hectares, however, were not physically occupied pursuant to

341 *Supra* note 337.

Mexican agrarian law because a considerable part of that property was in the process of harvesting crops that were not yet ripe for picking and processing.[342]

317. Accordingly, Nutrilite S.R.L. was advised that the 160 hectares would be physically taken from Nutrilite S.R.L. after the passage of a six (6)-month timeframe purportedly prescribed under the relevant Mexican agrarian law.[343]

318. Mr. Eppers testifies that *"[t]hrough its Mexican legal counsel, Nutrilite S.R.L. sought to obtain a transcript of the 'proceedings' at the '**house**' of the communal landowners of San Isidro that took place July 14, 2022, referenced in the July 7, 2022 Notice to Nutrilite S.R.L. from SEDATU.*" He adds that "*[r]egrettably, notwithstanding multiple requests, the transcript was not forthcoming.*"[344]

C. The Communication of the Minutes Concerning Custody and Survey of the 280 Hectares Presumably Discharging the Strictures of the August 23, 1939 Presidential Resolution

319. In August 2023 (slightly over one (1) year after the meeting at the communal landowners' house), Mexican counsel for Nutrilite S.R.L. was provided with a document titled: *Acta de Posesión y Deslinde de Polígono de las 280-00-00 Hectáreas Pendientes a Entregar de la Ejecución Complementaria de la Resolución Presidencial del 23 de agosto de 1939 Publicada en el Diario Oficial de la Federación el 18 de noviembre del Mismo Año, Por la Cual se Benefició el Ejido San Isidro, Municipio San Gabriel, Estado de Jalisco* ("*Acta de Posesión y Deslinde"*).[345]

---

342 Eppers Witness Statement (**CWS-002**) at ¶ 180.

343 *Id.*, ¶ 181.

344 *Id.*, ¶ 182.

345 Attached as **C-0050-SPA** to facilitate reference is the *Acta de Posesión y Deslinde de Polígono de las 280-00-00 Hectáreas Pendientes a Entregar de la Ejecución Complementaria de la Resolución Presidencial del 23 de agosto de 1939 Publicada en el Diario Oficial de la Federación el 18 de noviembre*

320. The *Acta de Posesión y Deslinde,* in pertinent part states:

> *En este acto, el Mtro Jonathan Hernández Chávez, comisionado técnico de la oficina de representación en Jalisco del Registro Agrario Nacional, en coordinación con el Ing. Gabriel González Bautista comisionado de la Oficina de Representación en Jalisco de la Secretaría de Desarrollo Agrario Territorial y Urbano [SEDATU], hacen el conocimiento a los ejidatarios presentes que la presente acta de posesión y deslinde,* ***se hace la entrega jurídica de las 280-00-00.00 hectáreas con las previsiones legales en aquellos terrenos que se encuentran sembrados y en que en su momento se describirán ….***
>
> *En ese mismo orden de ideas no habiendo impedimento legal alguno que imposibilite* ***la entrega física, jurídica y material*** *e 120-00-00.00 hectáreas aproximadamente, en este momento* ***se hace la entrega*** *en los términos de mérito, así como* ***su posesión de manera inmediata, identificadas plenamente sin cultivo alguno.***
>
> *En razón de lo anteriormente expuesto y* ***una vez concluido el plazo para levantar las cosechas pendientes en las superficies en explotación, se hará la entrega física y/o material*** *al Comisariado Ejidal de San Isidro de las Tierras que fueron deslindadas en la presente acta; por lo que, 'En nombre del C. Presidente de los Estados Unidos Mexicanos y en cumplimiento a la Resolución Presidencial de fecha 23 veintitrés de agosto de 1939 mil novecientos treinta y nueve, que concedió dotación de tierras al poblado de San Isidro, Municipio de San Gabriel, Estado de Jalisco,* ***por una superficie de 280-00-00 hectáreas, deslindo las tierras que se acaban de recorrer y describir.'***[346]
>
> (Emphasis supplied.)

321. The *Acta de Posesión y Deslinde* states that (i) the 120 hectares comprising *Puertas Uno* and *Dos* have been "physically," "juridically," and "materially" taken and provided to the San Isidro communal landowners,[347] and that (ii) the 160 hectares pertaining to

---

del Mismo Año, Por la Cual se Benefició el Ejido San Isidro, Municipio San Gabriel, Estado de Jalisco, dated July 14, 2022, at 1-8; *see also* Eppers Witness Statement (**CWS-002**) n. 54.

346 *Id.*

347 *Id.* The Spanish language original reads:

> *En ese mismo orden de ideas no habiendo impedimento legal alguno que* ***imposibilite la entrega física, jurídica y material*** *e 120-00-00.00 hectáreas aproximadamente, en este momento* ***se hace la entrega*** *en los términos de mérito, así como* ***su posesión de manera inmediata****, identificadas plenamente sin cultivo alguno.*
>
> (Emphasis supplied.)

Puertas del Petacal Tres and *Cuatro* have been "juridically" transferred to the communal landowners of San Isidro.[348] This language further states that the physical and material tender or transfer of the 160 hectares shall take place at such time as the harvest season concludes.[349]

322. The *Acta de Posesión y Deslinde*, a document authored by the Mexican Federal government, specifically SEDATU, states in plain, ordinary, and pristine language that legal title to the 280 hectares comprising *El Petacal* has been taken from ABG and transferred to the communal landowners on July 14, 2022. As is discussed in Section XIV.C.3 of this Memorial, this taking of title did not take place in keeping with due process.

323. Moreover, title was taken in a discriminatory manner, without corresponding compensation to ABG, and contrary to any cognizable public purpose. Indeed, the taking of title is affirmatively contrary to public purpose and within this framework of public purpose, the taking is contrary to any reasonable hypothesis of fact, law, or logic.

324. The *Acta de Posesión y Deslinde* provides that a portion of the 280 hectares that was sustaining crops being harvested will be (i) *physically* and (ii) *materially* tendered to the communal landowners once the harvest season concludes and the crops are

---

348 *Id.* The Spanish language original in pertinent part states:

> *… en coordinación con el Ing. Gabriel González Bautista comisionado de la Oficina de Representación en Jalisco de la Secretaría de Desarrollo Agrario Territorial y Urbano [SEDATU], hacen el conocimiento a los ejidatarios presentes que la presente acta de posesión y deslinde,* ***se hace la entrega jurídica de las 280-00-00.00 hectáreas con las previsiones legales en aquellos terrenos que se encuentran sembrados y en que en su momento se describirán ….***
>
> (Emphasis supplied.)

349 *Id.*

picked. However, legal title to the 160 hectares also already has been transferred to the communal landowners of San Isidro.

325. As to the prospect of transferring of *physical* and *material* control of the 160 hectares to the communal landowners of San Isidro, the *Acta de Posesión y Deslinde* reads with clarity. In relevant part it states:

> *…se le informa a los ejidatarios presentes que, en cuanto a la posesión física y/o material del área sembrada o actualmente en cultivo; con fundamento en el artículo 302 de la Ley Federal de Reforma Agraria derogada pero aplicable al presente caso en concreto, de conformidad a lo estipulado por el numeral tercero transitorio de la Ley Agraria vigente, así como del ACUERDO por el que se emite el instructivo para realización de Trabajaos Técnicos y diligencias para la ejecución de Resoluciones Presidenciales de acciones agrarias e integración de expedientes en cumplimiento de ejecutorias del Poder Judicial de la Federación y/o Acuerdos de los tribunales agrarios publicado en el Diario Oficial de la Federación el 14 de julio de 2004 dos mil cuatro; y demás relativos, así como el marco normativo correspondiente* ***quedará en posesión material de la empresa [Nutrilite S.R.L.] hasta el término de la actual ciclo de producción agrícola en virtud, de no tener cosechas pendientes de levantar. En consecuencia y por estar presentes el Representante Legal de la persona moral Nutrilite Sociedad de Responsabilidad Limitada de Capital Variable, se notifica en términos de Ley y para los efectos legales a que haya lugar, es decir para que, en el plazo correspondiente levanten sus cosechas, lo que en un tiempo no mayor a seis meses, contados a partir de la presente diligencia, del predio que encierra esto en cuanto a una superficie plenamente identificada por los presentes, misma que se logró constatar que se encuentra en esto momentos sembrada de los productos que a continuación se mencionan: perejil, limón, garbanzo, alfalfa, romero, nopal y ebo.***
>
> (Emphasis supplied.)

326. The harvest season has since concluded. The 160 hectares have not been “physically” and “materially” taken because of an issuance of a legal decree temporarily proscribing

such actions.[350] ABG is not a party to that proceeding where only injunctive relief, and not compensatory damages, is sought.[351]

327. Agencies of the Mexican Federal government at present are respecting this form of temporary injunctive relief.[352] The brittleness of this *status quo* is plain.

328. ABG and Nutrilite S.R.L. are unaware of any comparable scenarios where either a foreign (not Mexican) or domestic (Mexican) investor has had its farming operation located in the State of Jalisco executed upon or otherwise taken for purposes of allegedly discharging any presidential resolution, let alone the 1939 Presidential Resolution.

329. There are a number of non-Mexican farming operations in Jalisco having, on information and belief, Mexican investors that have not been divested of their title to property for any reason, let alone discharging a presidential resolution issued in 1939.[353] By way of example, (i) Reiter Affiliates Companies LLC, (ii) NutraSweet (owned by the private equity firm J. W. Childs Associates), and (iii) Hortifruit S.A. (a company based in Chile) all have farming, processing, and packaging operations in the State of Jalisco in *El Llano en Llamas*.

---

350 Attached as **Composite C-0062-SPA** to facilitate reference is are legal decrees (i) EXPEDIENTE: 292/2023, AMP. INDIRECTO: 68/2023, POBLADO: SAN ISIDRO, MUNICIPIO: SAN GABRIEL, ESTADO: JALISCO dated September 9, 2023, (**C-0062-1-SPA**), and (ii) INCIDENTE DE SUSPENSION 1411/2022-1 (AUDENCIA INCIDENTAL) (AMPARO INDIRECTO 1411/2022), dated August 15, 2022 (**C-0062-2-SPA**).

351 The parties to that proceeding are Nutrilite S.R.L. (Plaintiff) and *Sub-Delegado de Desarrollo Urbano, Ordenación de Territorio y Vivienda de la SEDATU en el Estado de Jalisco, Secretario de Desarrollo Agrario Territorial y Urbano,* Dirección General de Ordenamiento *de la Propiedad Rural, Dependiente de la Secretaria de Desarrollo Agrario, Territorial y Urbano, Delegación Estatal en Jalisco del Registro Agrario Nacional, Núcleo Agrario Denominado San Isidro, Director de Catastro y Asistencia Técnica del Registro Agrario Nacional*, and the *Sub-Delegación Técnica Jurídica Estatal en Jalisco del Registro Agrario Nacional*.

352 Eppers Witness Statement (**CWS-002**) at ¶ 187.

353 Eppers Witness Statement (**CWS-002**) at ¶ 190.

330. Moreover, on information and belief, these companies also have Mexican investors. None of these farming operations, however, has suffered the same or similar fate of having complete legal ownership and partial physical possession transferred to local communal landowners, or to any other third party, including agencies, departments, or instrumentalities of the Mexican government, or of the government of the State of Jalisco.

331. There is a compelling factual basis from which it can be reasonably inferred that ABG's Nutrilite S.R.L. investment has been singled out and treated in a way that is different from the treatment and protection that the Mexican federal government has accorded to other similarly situated domestic and non-domestic farming operations in the State of Jalisco, or anywhere else within the geopolitical subdivision of the United Mexican States.

332. Neither domestic (Mexican citizens and companies) nor foreign (non-Mexican citizens and companies) with similar investments in the State of Jalisco have had their respective investments similarly treated and disrespected.

333. The evidence before this Arbitral Tribunal, most of which has been fashioned by instrumentalities, departments, agencies, and representatives of the Federal government of Mexico and of the government of the State of Jalisco themselves, compellingly establishes that ABG has improved every aspect of the quality of life of the *Llano en Llamas* residents, ranging from basic healthcare to electricity, and from potable water and sewage facilities, to roads and bridges, as well as schools and unprecedented levels of actual employment opportunities.

334. ABG also rebuilt a church, a school, and a community center. And voluntarily did so within the framework of the invitation, behest, and encouragement from representatives of Mexico's State and Federal governments to invest in *El Petacal* so

that this investment, in part, would yield the micro- and macro- economic gains that have been brought to this Tribunal's attention. The contemporaneous Mexican outlet news accounts point to ABG's Nutrilite S.R.L. investment as having transformed the communities of *El Llano en Llamas* for the better.

XI. THE JURISDICTIONAL BASES OF THE CLAIMANT'S CLAIMS

335. The jurisdictional bases of the Claimant's claims are here asserted, specifically on the issue of the applicable treaties, as directed by the Tribunal to be addressed by the Claimant in these submissions in paragraph 10 of Procedural Order No. 2 of January 19, 2024 ("PO2"). As explained below, the Claimant submits that the jurisdictional bases of this arbitration stem primarily from the Treaty Parties' consent to arbitration as provided in Annex 14-C USMCA and, in the alternative, from Mexico and the United States' consent to arbitration as provided in Annex 14-D USMCA.

336. The Claimant seeks compensation in an amount not less than USD 2,700,384,482 plus prejudgment interest from Mexico for its breaches of the treatment protection standards set out in Section A of Chapter 11 NAFTA and, in the alternative, the Claimant also seeks the same compensation from Mexico for its breaches of the guarantees as set out in Articles 14.4 and 14.8 USMCA. The substantive obligations applicable to this arbitration are therefore those in Section A of Chapter 11 NAFTA. Should the Tribunal find that it has no jurisdiction under Annex 14-C USMCA, or that it cannot apply the terms of Section A of Chapter 11 NAFTA in determining the Claimant's claims, the Claimant relies further and in the alternative upon Annex 14-D USMCA and the substantive obligations in Articles 14.4 and 14.8 USMCA with respect to its claims.

337. In Annex 14-C USMCA, the Treaty Parties, including Mexico and the United States, consent to arbitrate claims alleging breach of Section A of Chapter 11 NAFTA with

respect to "legacy investments." Specifically, paragraph 1 of Annex 14-C USMCA requires investors to submit such claims to arbitration in accordance with Section B of Chapter 11 NAFTA and unequivocally provides that Section A of Chapter 11 applies with respect to such claims. As detailed in Section XII.A below, the Claimant's claims alleging breach of treatment protection standards provided in Section A of Chapter 11 NAFTA in this arbitration concern its "legacy investments" in Mexico and the Claimant had met all relevant jurisdictional predicates set out in Annex 14-C USMCA, Section B of Chapter 11 NAFTA, and the ICSID Convention. By submitting its *Request for Arbitration* on April 13, 2023, the Claimant accepted Mexico's offer to arbitrate as contained in its consent set out in Annex 14-C USMCA. The Tribunal clearly has jurisdiction over the Claimant's claims under Annex 14-C USMCA.

338. The Claimant notes Mexico's current objection in this arbitration that Annex 14-C USMCA "*does not confer jurisdiction to decide a case over facts that took place after NAFTA's termination.*"[354] In other words, Mexico is slated to object to the Tribunal's jurisdiction by arguing, amongst other things, that the Treaty Parties' consent in Annex 14-C USMCA only extends to claims alleging breach of Section A of Chapter 11 NAFTA by conduct or measures taken while NAFTA was in force.

339. However, as detailed in Section XII.B below, such complaint ignores the clear terms of the Treaty Parties' consent in Annex 14-C and seeks to add to that unambiguous consent a temporal requirement that is neither consistent with the plain and ordinary terms of the USMCA, nor evidenced by the Treaty Parties' contemporaneous

354 *TC Energy Corporation v. USA*, ICSID Case No. ARB/21/63, Mexico's Submission Pursuant to Article 1128 of NAFTA of September 11, 2023, **CL-0004-ENG**.

The Claimant reserves its rights to supplement its submissions in this memorial with respect to Mexico's likely objection concerning the Claimant's Legacy Investment Claims and any other jurisdictional objections to be raised in Mexico's Counter-Memorial on the Merits or Memorial on Jurisdiction.

documents and statements. Engrafting this non-textual material term also is bereft of conceptual or doctrinal support. Furthermore, this complaint cannot be characterized as a jurisdiction objection, as the issue actually concerns the interpretation and effect of particular provisions of Annex 14-C; specifically, whether those provisions contain a choice of law provision for the terms of Section A of Chapter 11 NAFTA to apply in the Tribunal's determination of the Claimant's claims in this arbitration. Claimant respectfully submits that Annex 14-C USMCA, based on a plain and ordinary construction of its terms contains a choice of law provision (i) that is binding on the Tribunal, and (ii) that the Tribunal must respect and observe as a constituent part of the Treaty Parties' consent that also is part of the arbitration agreement between the Claimant and Mexico in this arbitration.

340. In the alternative, should the Tribunal find that it has no jurisdiction or that it cannot apply the terms of Section A of Chapter 11 NAFTA in determining the Claimant's claims, the Claimant relies upon Annex 14-D USMCA and Articles 14.4 and 14.8 USMCA. In Annex 14-D USMCA, Mexico and the United States consented to arbitrate claims alleging breach of Articles 14.4 (National Treatment), 14.5 (Most-Favored-Nation Treatment) or 14.8 (Expropriation and Compensation) of the USMCA. As detailed in Section XIII below, the Claimant has met all relevant requirements under Annex 14-D USMCA and the ICSID Convention with respect to this alternative jurisdictional basis for its claims. The Tribunal demonstrably has jurisdiction with respect to Claimant's claims under Annex 14-D USMCA.

XII. THE TRIBUNAL HAS JURISDICTION OVER CLAIMANT'S CLAIMS UNDER ANNEX 14-C USMCA

341. In this Section, Claimant submits that (i) it has met the jurisdictional requirements of Annex 14-C USMCA, Section B of Chapter 11 NAFTA and the ICSID Convention; and that (ii) its arbitration agreement with Mexico as contained in Annex 14-C USMCA

unambiguously provides for a binding choice of law for the terms of Section A of Chapter 11 NAFTA to apply.

342. In support of its positions to be detailed below, including that Annex 14-C USMCA contains a binding choice of law provision for Section A of Chapter 11 NAFTA to apply, Claimant, in part, relies on Professor Christoph Schreuer's Expert Opinion, and the Expert Report of Mr. Olin L. Wethington, accompanying this submission.[355]

A. The Claimant Has Met the Jurisdictional Requirements in Annex 14-C USMCA, Section B of Chapter 11 NAFTA and the ICSID Convention

343. As the primary jurisdictional basis upon which it relies, Claimant has met the jurisdictional requirements as set out in Annex 14-C USMCA, Section B of Chapter 11 NAFTA and the ICSID Convention. The Tribunal has jurisdiction over Claimant's claims under Annex 14-C USMCA.

1. Jurisdiction *Ratione Personae*: Claimant Is An "Investor"

344. On the Tribunal's jurisdiction *ratione personae*, Claimant is an "investor" for the purpose of Annex 14-C USMCA.

345. Paragraph 6(a) of Annex 14-C USMCA defines "legacy investment" as "an investment of an investor of another Party" and paragraph 6(b) adopts the definition of "investor" from Chapter 11 NAFTA.

346. Article 1139 NAFTA defines "investor of a Party" as, among other things, "a national or an enterprise of such Party, that seeks to make, is making or has made an investment." It further defines "enterprise of a Party" as "an enterprise constituted or

[355] Expert Opinion by Christoph Schreuer ("Schreuer Opinion"), **CER-001**; Expert Report by Olin L. Wethington ("Wethington Opinion"), **CER-002**.

organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there."

347. The Claimant is an enterprise organized in and under the laws of the State of Michigan, United States,[356] with its registered office at 7575 Fulton Street East, Ada, Michigan 49355-0001. As will be shown in the immediate subsection below, the Claimant invested in Mexico through owning shares in its Mexican subsidiary.[357] The Tribunal has jurisdiction *ratione personae* with respect to the Claimant's claims under Annex 14-C USMCA.

2. Jurisdiction *Ratione Materiae*: Claimant's Investment Is a "Legacy Investment"

348. On the Tribunal's jurisdiction *ratione materiae*, paragraph 1 of Annex 14-C USMCA provides that the Treaty Parties consent to the submission of claims to arbitration that are with respect to "legacy investments." The Claimant's investment that is the subject of this arbitration is its interest in *El Petacal* and in its business operations on *El Petacal* as held through its Mexican subsidiary Nutrilite S.R.L. It acquired its ownership of the shares in its Mexican subsidiary on June 29, 2001 and this constitutes a "legacy investment" for the purposes of Annex 14-C USMCA.[358]

349. Paragraph 6 of Annex 14-C USMCA defines "legacy investment" as follows:[359]

---

356 Certification of the Filing of the Claimant's Articles of Organization dated November 13, 2000, **C-0001-ENG**.

357 See *Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award dated April 30, 2004, paras. 83-85, **CL-0005-ENG**.

358 Claimant Access Business Group LLC is the successor-in-interest to Nutrilite Products Inc. with respect to NPI's ownership interest in Nutrilite S.R.L.

359 *See also, Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States, the United Mexican States, and Canada* dated November 30, 2018, **CL-0003-ENG**; Website of the Office of the United States Trade Representative, "United States-Mexico-Canada Agreement,<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-

(a) 'legacy investment' means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994 [July 1, 2020], and in existence on the date of entry into force of this Agreement [July 1, 2020];

(b)"investment"… have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994;

350. Article 1139 in Chapter 11 NAFTA defined "investment" to include, among others:

(a) an enterprise;…

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;…

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes;

351. From these provisions, there are three requirements for there to be a "legacy investment":

(a) there is an "investment" as defined in Chapter 11 NAFTA;

(b) that such investment be "established or acquired" between January 1, 1994 and July 1, 2020; and

(c) that such investment be "in existence on" July 1, 2020.

352. The Claimant's investment consists of the following:

agreement>, accessed on May 22, 2024, **C-0076-ENG**, confirming the date of when the USMCA entered into force and when NAFTA was terminated.

(a) its ownership in Nutrilite S.R.L., a Mexican company with operations in Mexico, as acquired on June 29, 2001;[360]

(b) Nutrilite S.R.L.'s acquisition of the 280 hectares *El Petacal* for its "seed-to-supplements" business operations on May 12, 1994, consisting of:

(i) the acquisition of 160 hectares known as estates "*Puertas Tres y Cuatro*" on April 13, 1992;[361] and

(ii) the acquisition of 120 hectares known as estates "*Puertas Uno y Dos*", which is contiguous to the 160-hectares portion, on May 12, 1994;[362]

(c) after the acquisition of the 280-*hectares El Petacal* on May 12, 1994, Nutrilite S.R.L.'s investment in, and establishment of the "seed-to-supplement" research, organic farming, processing, and packaging operations on the *El Petacal* from 1992 to 2008 which included:

(i) a planning stage from 1992 to 1996 to ascertain the then available potable water,[363] irrigation water,[364] irrigation,[365] electricity,[366] and road access [367] infrastructure and resources; the primary crop to be

---

360 Assignment agreement dated 29 June 2001, **C-0013-SPA**; Partners' meeting minutes of Nutrilite S.R.L., **C-0040**; *see also* Parker Witness Statement (**CWS-003**) at ¶¶ 42-46.

361 Hunter Witness Statement (**CWS-001**) at ¶¶ 32-35; *Sales Purchase Agreement Esc. 12,802* - "*Puerta El Petacal Tres*" and "*Puerta El Petacal Cuatro*," **C-0018-SPA**.

362 Hunter Witness Statement (**CWS-001**) at ¶¶ 46-48; "*Sales Purchase Agreement Esc. 34,365* "*Puerta El Petacal Uno*" and "*Puerta El Petacal Dos*," C-0052-SPA.

363 Hunter Witness Statement (**CWS-001**) at ¶¶ 43-50.

364 Hunter Witness Statement (**CWS-001**) at ¶¶ 51-59.

365 Hunter Witness Statement (**CWS-001**) at ¶¶ 51-59.

366 Hunter Witness Statement (**CWS-001**) at ¶¶ 60-63.

367 Hunter Witness Statement (**CWS-001**) at ¶¶ 69-73.

planted;[368] and the overall further investment and equipment necessary to establish Nutrilite S.R.L.'s "seed-to-supplement" organic farming operation on the *El Petacal*;[369]

(ii) further investment to construct the buildings and to acquire equipment from 1996,[370] which included:

(1) the construction of the principal structures on *El Petacal* with most of these structures completed in 2001, with further structures constructed from 2001 to October 2023;[371] and

(2) the installation of the necessary equipment on *El Petacal* with most of the equipment installed in 2008;[372]

(d) Nutrilite S.R.L.'s investment in community infrastructure necessary for the Claimant's operations on *El Petacal*, and to create and support the local economy and the families of its employees, which included:

(i) investment to bring electricity to *El Petacal* and the communities surrounding it;[373]

(ii) investment to bring portable and irrigation water and water treatment facilities to *El Petacal*, and the surrounding communities including

---

368 Hunter Witness Statement (**CWS-001**) at ¶¶ 74-75; December 1994 notes addressing *El Petacal's* site development, **C-0076-ENG.**

369 Hunter Witness Statement (**CWS-001**) at ¶¶ 64-68, 76-79 & 80-95.

370 Hunter Witness Statement (**CWS-001**) at ¶¶ 96-103. Eppers Witness Statement (**CWS-002**) at ¶¶ 42;126-167.

371 Hunter Witness Statement (**CWS-001**) at ¶¶ 103.

372 Hunter Witness Statement (**CWS-001**) at ¶¶ 105.

373 Hunter Witness Statement (**CWS-001**) at ¶¶ 109-133.

Tolimán, Zapotitlán, and Tuxcacuesco that comprise *El Llano en Llamas*; and[374]

(iii) investment to construct roads and bridges leading to the *El Petacal* and the communities surrounding it.[375]

353. With respect to the first requirement outlined in paragraph 351 above, all five aspects of the Claimant's investment fall within the definition of "investment" in Chapter 11 NAFTA.

(a) First, Claimant's ownership of the shares in Nutrilite S.R.L., a Mexican company, acquired on June 29, 2001 and as described in paragraph 352(a) above falls within the definition of "investment" in Article 1139 NAFTA, specifically under subparagraphs (a) and (e).

(b) Second, the Claimant's indirect ownership of the 280-*hectares* comprising *El Petacal* acquired in full on May 12, 1994 by Nutrilite S.R.L., as described in paragraph 352(b) above, falls within the definition of "investment" in Article 1139 NAFTA, namely under subparagraph (g).

(c) Lastly, Claimant's investment, through Nutrilite S.R.L., in establishing its "seed-to-supplement" organic farming, processing, and packaging operation on *El Petacal* (as described in paragraph 352(c) above), in establishing the necessary infrastructure in the region for its operations, and in creating and supporting and developing the local economy by creating micro- and macro-economic gains for the entire southern quadrant of the State of Jalisco, including the community and the families of its employees (as described in

374 Hunter Witness Statement (**CWS-001**) at ¶¶134-146.

375 Hunter Witness Statement (**CWS-001**) at ¶¶ 69, 80-81.

paragraph 352(d) above) falls within the definition of "investment" in Article 1139 NAFTA, namely under subsections (g) and (h).

354. With respect to the second requirement outlined in paragraph 351 above, it is beyond cavil that Claimant's investment only could be "established or acquired" after the date of the Claimant's incorporation in Michigan on November 14, 2000.[376] The Claimant acquired the shares in Nutrilite S.R.L. on June 29, 2001 which falls within the necessary time period between January 1, 1994 and July 1, 2020.

355. The Claimant notes Mexico's objection with respect to this second requirement as set out in its letter of April 21, 2023.[377] Specifically, Mexico complained that Nutrilite S.R.L.'s acquisition of the 160-hectares part of *El Petacal* on April 13, 1992 was too early to constitute a "legacy investment." Without prejudice to the Claimant's right to respond to jurisdictional objections relating to this initial complaint in full later in the arbitration, Mexico's objection simply cannot stand. The Claimant did not exist before November 14, 2000 and could only be considered to have made its investment in *El Petacal* by acquiring the shares in Nutrilite S.R.L. on June 29, 2001. The Claimant is ABG, not Nutrilite S.R.L..

356. In any case, even on the assumption that the Claimant is Nutrilite S.R.L. (which it is not), Mexico's attempt to carve out from Nutrilite S.R.L.'s overall investment and to focus only on Nutrilite S.R.L.'s initial acquisition of part of *El Petacal* in its objection simply does not reflect the indisputable acts concerning the reality of Nutrilite S.R.L.'s staged investment in completing the acquisition of *El Petacal* and in establishing its operations over time mostly between 1996 and 2008.

---

376 Certification of the Filing of the Claimant's Articles of Organisation dated November 14, 2000, **C-0001-ENG**.

377 Letter from Mexico to ICSID dated April 21, 2023 with no. DGCJCI.511.68.283.2023, **C-0077-ENG**.

357. The definition of "legacy investment" in paragraph 6 of Annex 14-C USMCA includes the investment of an investor that was either "established" or "acquired" from January 1, 1994 to July 1, 2020. Nutrilite S.R.L. clearly "established" its operations on *El Petacal* in that period, and, in any case, its acquisition of *El Petacal* did not complete until May 12, 1994.

358. *First*, Nutrilite S.R.L.'s establishment of its "seed-to-supplements" organic farming operations on *El Petacal*, including its acquisition of *El Petacal*, through Nutrilite S.R.L. must be viewed as a whole for purposes of considering the Tribunal's jurisdiction *ratione materiae*. The relevant date in considering whether Nutrilite S.R.L.'s investment in bringing into being its business operations on *El Petacal* is a "legacy investment" is 2008 when the constructions of necessary facilities and infrastructures were completed and its "seed-to-supplements" organic farming operations were mostly fully established.

359. On the facts, as Messrs. Hunter and Eppers attest, the acquisition of *El Petacal* was only the first step in the Claimant's establishment of its investment and "seed-to-supplements" organic farming operation on *El Petacal*. The land was raw with no development of any kind, including basic infrastructure.[378] After an initial survey of the land, plans were made to establish Nutrilite S.R.L.'s "seed-to-supplement" organic farming operations by engaging in a staged investment.[379] As outlined above in paragraph 352, Nutrilite S.R.L. made further significant investments in constructing the necessary facilities on *El Petacal* and infrastructures in the region to establish its operations. Without such further investments, Nutrilite S.R.L. would not have been

---

[378] Hunter Witness Statement (**CWS-001**) at ¶¶ 38, 90-99. Please also see the schematic representation of the *El Petacal*, **C-0056-1-ENG**; *see also* Eppers Witness Statement (**CWS-002**) at ¶¶ 105-177.

[379] Hunter Witness Statement (**CWS-001**) at ¶¶ 38 & 80-95.

able to commence its "seed-to-supplements" organic farming, processing, and packaging operations on *El Petacal*.

360. Second, the word "established" as used in paragraph 6 of Annex 14-C USMCA cannot be taken to mean only the acquisition or the coming into possession of individual land plots forming the contiguous 280 hectares comprising *El Petacal*. Pursuant to Article 31 of the Vienna Convention on the Law of Treaties ("VCLT"), the Tribunal is invited to interpret the words "established or acquired" in paragraph 6 "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"[380] As the tribunals in *Suez v. Argentina* observed, "*dispute resolution provisions are subject to interpretation like any other provisions of a treaty, neither more restrictive nor more liberal.*"[381]

361. In terms of the ordinary meanings of "established" and "acquired", according to the Shorter Oxford English Dictionary:

(a) The ordinary meanings of "establish" include (a) "secure or settle (property etc.) on or upon a person"; (b) "set up on a permanent or secure basis; bring into

---

380 Article 31(1) of the VCLT, **CL-0006-ENG**.

381 *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction dated May 16, 2006, ¶ 64, **CL-0091-ENG**; *Suez, Sociedad General de Aguas de Barcelona S.A. y Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19 (**CL-0081-ENG**) and *AWG Group Ltd. v. Argentine Republic*, UNCITRAL Case, Decision on Jurisdiction dated August 3, 2006, ¶ 66, **CL-00092-ENG**.

See also, *Mondev. International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award dated October 11, 2002, ¶ 43, **CL-0093-ENG** ("*In the Tribunal's view, there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end, the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31-33 of the [VCLT], which for this purpose can be taken to reflect the position under customary international law*."); *Austrian Airlines v. The Slovak Republic*, UNCITRAL Case, Award dated October 9, 2009, paras. 120-121, **CL-0007-ENG**; and *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent dated July 3, 2013, paras. 22-23, **CL-0008-ENG**.

being, found, (a government, institution, business, etc.)"; or (c) "make stable or firm."[382]

(b) The ordinary meanings of "acquire" include: (a) "gain or get as one's own, by one's own exertions or qualities" or (b) "come into possession of."[383]

362. As evident from its term, the general purpose of this temporal requirement in the definition of "legacy investment" is to limit the scope of the Treaty Parties' consent only to those claims concerning investments of investors made after the coming into force of the NAFTA. By using the phrase "established *or* acquired", the Treaty Parties intended for the words "established" and "acquired" each to mean a distinctive mode of an investor making an investment. As such, in order to impart specific meaning to the word "established," the Tribunal should interpret and apply an ordinary meaning of that word that does not overlap with the ordinary and plain meanings of the word "acquired." As a result, "established" must be taken to mean the actions of investors in bringing into being their business operations constituting their investment.

363. This conclusion is the same as the one drawn by the tribunal in the case of *Seo Jin Hae v. Korea*, which considered whether the claimant's, Ms. Seo's ownership of a residential property was a "covered investment", as defined under Article 1.4 of the Korea-US Free Trade Agreement ("KORUS FTA")**.** [384] Article 1.4 KORUS FTA defines

---

382 Shorter Oxford English Dictionary (2006 ed.), p. 865, **CL-0009-ENG**.

383 *Id.,* p. 20.

384 *Seo Jin Hae v. Korea*, HKIAC Case No. 18117, Redacted Final Award, September 27, 2019, **CL-0010-ENG**; & Article 1.4 of the Korea-US Free Trade Agreement (2019), **CL-0011-ENG**.

Please also see *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004, paras. 27-28, **CL-0012-ENG** ("28. Article 1(2)(b) of the Ukraine-Lithuania BIT defines the term 'investor,' with respect to Lithuania, as 'any *entity established* in the territory of the Republic of Lithuania in conformity with its laws and regulations.'… The meaning of 'establish' is to '[s]et up on a permanent or secure basis; bring into being, found (a… business).'"); *Flemingo DutyFree v. Poland*, UNCITRAL, Redacted Award, August 12, 2016, paras. 322-324, **CL-0013-ENG** ("*324… Article 1(1) of the [India-Poland*

"covered investment" as "*an investment… in its territory of an investor of the other Party that is in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter.*"[385]

364. In *Seo*, the tribunal was concerned with Ms. Seo's status as a non-national of the United States when the KORUS FTA came into force. Even though Ms. Seo already was in possession of her residential property when KORUS FTA came into force, the tribunal found that she could not rely on the first subparagraph of the definition of "*covered investment", as her ownership of the property when KORUS FTA came into force was not "an investment… of an investor of the other Party [the United States].*" As such, the *Seo* tribunal moved to consider the second subparagraph of that definition: whether Ms. Seo's ownership of her residential property could be said to have been "*established, acquired, or expanded thereafter.*"[386]

365. With respect to the analysis under the second subparagraph, Ms. Seo argued, among other things, that she had "established" her investment in the form of her residential property by having her US nationality registered in the Korean land registry. The *Seo* tribunal dismissed this argument and held:

> *The Tribunal has no doubt that the purpose of this requirement for a "covered investment" in Articles 11.5 and 11.6 of the KORUS FTA is to preclude requests for protection from investors of the other State (or of a third State) who are not entitled to protection because they did not have any major involvement with the*

BIT] includes as 'investments' assets that are 'acquired' (as well as 'established') in accordance with the laws of the host state. For the majority of the Tribunal, the definition of 'investment' is definitive, as on the plain meaning of these provisions read together, the inclusion of 'acquired' assets within the definition allows for investments that have already been made in Poland to fall within the scope of the Treaty as soon as they are acquired by an Indian investor.").

385 KORUS FTA, Article 1.4, **CL-0011-ENG.** (Emphasis supplied.)

386 *Seo v. Korea*, Redacted Final Award, September 27, 2019, paras. 140-145, **CL-0010-ENG**.

investment during the existence of the KORUS FTA – neither by holding the investment when the KORUS FTA came into force, nor by acquiring, establishing or expanding it thereafter.

This rationale suggests that an investor of the other State party can only claim to have "established" an investment if the involvement in the investment is of a similar magnitude as the holding or acquiring of the investment during the currency of the KORUS FTA. This is also supported by the plain fact that the definition of "covered investment" considers the establishing of the asset an equivalent alternative to the holding or acquiring of an investment, given that each of them allows the investor of the other State party to enjoy the protection of Articles 11.5 and 11.6 of the KORUS FTA.

In the Tribunal's view, therefore, ***the requirement to be "established" must be understood to refer mainly, if not solely, to acts that bring the relevant asset into existence (as opposed to an asset being "acquired", which the Tribunal interprets as referring to a transfer of an already existing asset). Typical examples would be the building of a factory or an invention that gives rise to intellectual property rights.***

(Emphasis supplied.)

366. Applying this definition of “established”, Nutrilite S.R.L.’s investment in setting up its “seed-to-supplements” operation clearly were not established, or brought into existence, when it acquired the 160 hectares *Puertas Tres* and *Cuatro* of the *El Petacal*. Instead, Claimant submits that Nutrilite S.R.L.’s investment only was established by 2008 when the basic facilities on *El Petacal* and infrastructure in the

region were completed and its "seed-to-supplements" organic farming, processing, and packaging operation was mostly fully functional.[387]

367. Secondly, even if the definition of "legacy investment" only includes those investments "acquired" in the period between January 1, 1994 and July 1, 2020, Nutrilite S.R.L.'s acquisition of *El Petacal* must be viewed and considered as a whole in this exercise. This conclusion is a logical one stemming from an application of Article 31 VCLT in interpreting the words "*investment… acquired between January 1, 1994 and [July 1, 2020].*"

368. As part of this further interpretative exercise, the Tribunal should consider that as set out in paragraph 361 above, the ordinary meanings of "acquire" include (a) "*gain or get as one's own, by one's own exertions or qualities*" or (b) "*come into possession of.*" Further, the definition of "investment" in Article 1139 NAFTA, as incorporated by paragraph 6 of Annex 14-C USMCA, includes *"(g) real estate or other property, tangible or intangible,* ***acquired in the expectation or used for the purpose of economic or other business purposes.***" (Emphasis supplied.) Lastly, as context, the word "acquired" is also used as part of the USMCA's definition of "covered

---

[387] By way of example, Mr. Hunter testifies that "*[t]he establishment of equipment and construction of buildings, including the design, expansion, and development of arable land* ***commenced*** *during the 1996 to 2008 timeframe.*" (Hunter Witness Statement (**CWS-001**) at ¶ 97.) Paragraph 103 of Mr. Hunter's Witness Statement reflects, in part, that the Dehydration Building was constructed in 2006, the Finished Product Warehouse 2 was constructed in March 2008, the Rotary Dryer Building was constructed in December 2008, the Heat Treatment Building and corresponding Heat Treatment Offices were constructed in November 2015. In this connection, he adds that "…*not one single building was constructed prior to 1996*." *Id.* at 34, ¶ 34. The Tribunal is invited to consult the four charts listing the exact date when major machinery component parts and corresponding buildings were built. *Id.* At 35-43, ¶ 105. Mr. Hunter further testifies:

> *The Tribunal will note a plurality of the equipment, with the exception of the electric generator and the electric substation (1996-1998) and deep wells 1, 2, & 3 (1998-2000), were installed in 2015.*
>
> *Id.* at 44, ¶ 106.

Finally he adds that "*[w]e received authorization to proceed with the project to build the dehydration facility in September 2002. The facility was completed in December 2006*." *Id.* at 51, ¶ 130.

investment" in Article 14.1,[388] in the same terms as the definition in the KORUS FTA analyzed by the *Seo* tribunal.

369. As paragraph 6 of Annex 14-C USMCA defines "legacy investment" to include "*an investment… acquired between January 1, 1994 and [July 1, 2020]*", Claimant submits that the word "acquired" must be interpreted in light of the applicable definition of "investment." Given that Article 1139 NAFTA defined "investment*"* as specifically those real estate or other property *"acquired in the expectation or used for the purpose of economic or other business purposes*", the inquiry as to when an "investment" in the form of real estate assets is "acquired" must have reference to Nutrilite S.R.L.'s expectation and intended use of the relevant assets with respect to its "seed-to-supplements" organic farming operations. This is further supported by the Treaty Parties' deliberate choice to frame "legacy investment" as those "established or acquired", implicitly giving support to the premise that an investment would first need to exist, i.e. established, prior to being acquired. As Mr. Hunter attests, Nutrilite S.R.L. intended to acquire the whole of *El Petacal* for its organic farming, processing, and packaging operations and the 120 hectares portion acquired on May 12, 1994 was a necessary buffer zone and crop-rotating field for those operations.[389] Therefore, Nutrilite S.R.L.'s acquisition of the 160 hectares could not be said to be an acquisition of *El Petacal* that was intended to be used as a whole, all 280 hectares, for the Claimant's organic farming operation.

---

388 Article 14.1 USMCA defines "covered investment" as "*with respect to a Party, an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter.*"

389 (Hunter Witness Statement (**CWS-001**) at ¶ 26(iv), 48; Eppers Witness Statement (**CWS-002**) at ¶ 92-104.

370. Further, the use of the word "acquired" should be interpreted consistently across the USMCA. As Article 14.1 USMCA defines "covered investment" using the words "established, acquired or expanded" in a similar manner as the KORUS FTA, the *Seo* tribunal's interpretation of "acquired" is instructive. The *Seo* tribunal interpreted "acquired" as "*referring to a transfer of an **already existing** asset.*"[390] This analysis lends further support to the implication as submitted above from the Treaty Parties' deliberate choice to define "legacy investment" as those *"investment… established or acquired.*"

371. It is self-evident that "*investment… established or acquired*" cannot simply be interpreted as requiring an analysis of when an investor took its first step in establishing and acquiring its investment. Instead, a holistic, case-by-case approach must be adopted.

372. On the facts, ABG did not acquire its shares in Nutrilite S.R.L., and therefore its investment in *El Petacal*, until June 29, 2001. In any case, even if Nutrilite S.R.L. were the claimant in this arbitration, *which it is not*, its activities in establishing its principal investment in *El Petacal* were only mostly completed by 2008. Both these dates fall within the time period provided in paragraph 6 of Annex 14-C USMCA, and Claimant continues to hold its shares in Nutrilite S.R.L. to this day. The Tribunal therefore has jurisdiction *ratione materiae* with respect to Claimant's claims under Annex 14-C USMCA.

390 *Seo v. Korea*, Redacted Final Award, September 27, 2019, paras. 153, **CL-0010-ENG.** (Emphasis supplied.).

3. Jurisdiction *Ratione Temporis* & Procedural Requirements: Claimant Submitted Its Claims in Time and in Satisfaction of All Procedural Provisions

373. On the Tribunal's jurisdiction *ratione temporis*, the Claimant unequivocally submitted its claims before the expiry of the Treaty Parties' consent in Annex 14-C USMCA and the expiry of the three-year limitation period provided for in Articles 1116(2) and 1117(2) NAFTA. It submitted its claims after the expiry of six months since the events giving rise to the Claimant's claims as required under Article 1120 NAFTA. Further, without prejudice to Claimant's position that such procedural requirements do not affect the Tribunal's jurisdiction nor the admissibility of the Claimant's claims, Claimant also has satisfied all procedural predicates set forth in Articles 1118, 1119 and 1121 NAFTA.

374. For the avoidance of doubt, this subsection does not address Mexico's current objection that Annex 14-C USMCA "*does not confer jurisdiction to decide a case over facts that took place after NAFTA's termination.*"[391] As will be addressed in Section XII.B below, any such objection does not go to the jurisdiction of the Tribunal but rather the Parties' choice of law with respect to the resolution of their dispute as contained in their arbitration agreement. Central to Mexico's objection is a choice of law question and not the issue of whether the substantive provisions of the treaty survive the treaty's termination. The contrary presentation of the issue by Mexico mischaracterizes the actual question to be analyzed.

---

391 *TC Energy Corporation v. USA*, ICSID Case No. ARB/21/63, Mexico's Submission Pursuant to Article 1128 of NAFTA of September 11, 2023, **CL-0004-ENG**.

The Claimant reserves its rights to supplement its submissions in this memorial with respect to Mexico's likely objection concerning the Claimant's Legacy Investment Claims and any other jurisdictional objections to be raised in Mexico's Counter-Memorial on the Merits or Memorial on Jurisdiction.

375. *First*, paragraph 3 of Annex 14-C USMCA provides that Treaty Parties' consent "*under paragraph 1 shall expire three years after the termination of NAFTA 1994*", which would be July 1, 2023. Claimant submitted its *Request for Arbitration* on April 13, 2023.

376. *Second*, Claimant's submission of its *Request for Arbitration* on April 13, 2023 was within the three-year limitation period provided for under Articles 1116(2) and 1117(2) NAFTA, which is applicable given the requirement of paragraph 1 of Annex 14-C USMCA for submission of claims to be in accordance with Section B of Chapter 11 NAFTA. Article 1116(2) NAFTA (which for the present purpose is substantially the same as Article 1117(2) NAFTA) provides that:

> *An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.*

377. As detailed in Sections I to X above, the Claimant's claims arose following Mexico's issuance of its initial notice of expropriation with respect to the 120-*hectares* portion of *El Petacal* through SEDATU on July 1, 2022. Counting three years from that date, the limitation period under Articles 1116(2) and 1117(2) NAFTA would expire on July 1, 2025. The Claimant submitted its Request for Arbitration on April 13, 2023.

378. Third, Claimant's submission of its Request for Arbitration on April 13, 2023 is also after six months from the events giving rise to its Legacy Investment Claims pursuant to Article 1120 NAFTA, which is also part of Section B of Chapter 11 and applicable in this arbitration based on paragraph 1 of Annex 14-C USMCA. Again, the substantive basis of Claimant's claim is the SEDATU's Notices of July 1 and July 7, 2022 and it had been more than six months since that date when the Claimant filed its *Request for Arbitration* with ICSID.

379. Lastly, without prejudice to its position that such procedural provisions do not need to be complied with for the purposes of the Tribunal's jurisdiction and the admissibility of the Claimant's claims (as detailed in Section XIII.E below), Claimant's submission of its Legacy Investment Claims also satisfies Articles 1118, 1119 and 1121 NAFTA:

(a) Article 1118 NAFTA provides that "*[t]he disputing parties should first attempt to settle a claim through consultation or negotiation.*" As stated in paragraph 9 of its *Request for Arbitration*, the Claimant attempted to resolve its claims through consultation and negotiation, including (without limitation) two in-person meetings with Mexico's officials on January 5 and February 14, 2023.

(b) Article 1119 NAFTA provides for a written notice of intent to submit a claim to arbitration to be delivered 90 days before the claim is submitted, with specific provisions as to the content of such notice. The Claimant has satisfied Article 1119 via its "Notice of Intent to Submit a Claim to Arbitration" as delivered to Mexico on October 11, 2022 (the "Notice of Intention").

(c) Articles 1121(1) NAFTA requires (a) the Claimant to have consented to arbitration; and (b) the Claimant and Nutrilite S.R.L. to provide a waiver with respect to its right to initiate or continue proceedings in other fora.

(i) With respect to (a), the Claimant expressly stated its consent to the arbitration in paragraph 7 of its *Request for Arbitration* and, in any case, pursuant to Article 1122(2) NAFTA, its submission of its *Request for Arbitration* constitutes its written consent to arbitrate.

(ii) With respect to (b), the Claimant provided the necessary waiver in paragraph 8(b) of its *Request for Arbitration*. Submitted along with this

Memorial as **C-0078-ENG** is Nutrilite S.R.L.'s waiver pursuant to Article 1121(1)(b) NAFTA.

380. The Claimant's submission of its Legacy Investment Claims on April 13, 2023 on its face satisfies all *ratione temporis* and any applicable procedural provisions in Annex 14-C USMCA and Section B of Chapter 11 NAFTA. The Tribunal has jurisdiction *ratione temporis* with respect to Claimant's claims under Annex 14-C USMCA.

4. Jurisdiction *Ratione Voluntatis*: There Is Written Consent of the Parties in Dispute to Submit the Claimant's Claims to This Arbitration

381. On the Tribunal's jurisdiction *ratione voluntatis*, for the purpose of Article 25(1) of the ICSID Convention, the written consent of the Parties in dispute to arbitrate is contained in Annex 14-C USMCA as accepted by the Claimant through its submission of its *Request for Arbitration*.

382. Article 25(1) of the ICSID Convention provides:

> *The Jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State… and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre*.

383. The requirements of Article 25(1) ICSID Convention have been met in full. There is a legal dispute in which Claimant alleges primarily that Mexico is in breach of its obligations as set out in Section A of Chapter 11 NAFTA. As shown in Section XII.A.2 above, that dispute is a dispute concerning the Claimant's investment in Mexico, which falls within the specific definition of "legacy investment" in Annex 14-C USMCA. Further, the current dispute is between Mexico (a Contracting State to the ICSID Convention) and Claimant, which is a company organized in the United States (also a

Contracting State).[392] Lastly, pursuant to paragraph 2 of Annex 14-C USMCA, the Claimant accepted Mexico's offer to arbitrate as contained in Annex 14-C USMCA by submitting its *Request for Arbitration* on April 13, 2023, which together constitute the disputing Parties' arbitration agreement in writing to submit to ICSID.

B. The Parties' Arbitration Agreement as Contained in Annex 14-C USMCA Plainly Provides for a Binding Choice of Law Provision for the Terms of Section A of NAFTA Chapter 11 to Apply

384. The disputing Parties' arbitration agreement as contained in Annex 14-C USMCA plainly and deliberately provides for a binding choice of law provision for the terms of Section A of NAFTA Chapter 11 to apply in this arbitration. The Claimant notes Mexico's current objection in this arbitration purportedly asserting that USMCA Annex 14-C "*does not confer jurisdiction to decide a case over facts that took place after NAFTA's termination*."[393] In other words, Mexico is positioned to object to the Tribunal's jurisdiction by arguing, among other things, that the Treaty Parties' consent in Annex 14-C extends only to claims alleging breach of Section A of NAFTA Chapter 11 by conduct or measures taken while NAFTA was in force, i.e. prior to the three (3) year transition period. Claimant also relies on the opinion of Prof Schreuer and the opinion of Mr. Olin L. Wethington in its submissions here.

---

[392] Website of ICSID, "About ICSID – Member States – United States of America," <https://icsid.worldbank.org/about/member-states/database-of-member-states>, accessed on May 22, 2024, **C-0079-ENG**; and Website of ICSID, "About ICSID – Member States – Mexico," <https://icsid.worldbank.org/about/member-states/database-of-member-states>. accessed on May 22, 2024, **C-0080-ENG**.

[393] *TC Energy Corporation v. USA*, ICSID Case No. ARB/21/63, Mexico's Submission Pursuant to Article 1128 of NAFTA of September 11, 2023, **CL-0004-ENG**.

The Claimant reserves its rights to supplement its submissions in this memorial with respect to Mexico's likely objection concerning the Claimant's Legacy Investment Claims and any other jurisdictional objections to be raised in Mexico's Counter-Memorial on the Merits or Memorial on Jurisdiction.

385. As Prof Schreuer opines, this preliminary objection from Mexico cannot be properly characterized as a jurisdictional objection, as the issue actually concerns the interpretation and effect of particular provisions of Annex 14-C, and specifically whether those provisions provide consent to the terms of Section A of NAFTA Chapter 11 as the choice of law governing the Tribunal's adjudication of the Claimant's claims in this arbitration.[394] As shown in the above subsections, the Claimant has satisfied the requirements to establish the Tribunal's jurisdiction under Annex 14-C, and Mexico carries the burden of proof on any objections it wishes to raise in this regard.[395] Claimant reserves its right to respond in full to any such objections from Mexico in this arbitration.

386. In any case, any objections to the Tribunal's jurisdiction on this basis would ignore the very pristine and unambiguous terms of the Treaty Parties' consent in Annex 14-C and

---

394 Schreuer Opinion, paras. 45-55, **CER-001**, referring to *Vattenfall v. Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, August 31, 2018, at paras. 118-119; *Hydro Energy v. Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, March 9, 2020, at ¶ 502; *Landesbank Baden-Württemberg v. Spain*, ICSID Case No. ARB/15/45, Decision on the Intra EU Jurisdictional Objection, February 25, 2019, at ¶ 161; *SGS v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, January 29, 2004, at ¶ 167; *Impregilo v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, at ¶ 309; and *Salini v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, November 29, 2004, at ¶ 176.

395 *See, e.g.*, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, December 10, 2014 ("*Fraport v. Philippines II*, Award"), at ¶ 299, **CL-0014-ENG** ("*Regarding burden of proof, in accordance with the well-established rule of onus probandi incumbit actori, the burden of proof rests upon the party that is asserting affirmatively a claim or defense. Thus, with respect to its objections to jurisdiction, Respondent bears the burden of proving the validity of such objections.*"); *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, at ¶ 318, **CL-0015-ENG** ("*The Tribunal considers that the burden of proof in respect of all jurisdictional objections and substantive defences lies with Egypt. The Tribunal concurs with the opinion of Professor Reisman, that it is a widely-accepted principle of law that the party advancing a claim or defence bears the burden of establishing that claim or defence.*") (citing expert opinion of Professor Michael Reisman); *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, February 21, 2014, at ¶ 66, **CL-0016-ENG** ("*[I]n terms of the present [ratione temporis] jurisdictional objection, the Respondent accepts the burden of proving that the 'legal dispute' arose before the critical date.*").

would instead seek to add to that patent consent a temporal requirement that is neither consistent with the actual written text of the USMCA, the context of the USMCA nor supported by supplementary evidence in the Treaty Parties' contemporaneous documents and statements. Put simply, there is no evidence providing conceptual or doctrinal support for Mexico's objection to jurisdiction on this ground.

387. In this subsection, Claimant will establish pursuant to the standard rules of treaty interpretation as contained in the VCLT that (i) the ordinary meaning of Annex 14-C; (ii) its context; (iii) its object and purpose; and (iv) the available contemporaneous documents and statements from the Treaty Parties and their representatives, all confirm that Annex 14-C is a binding choice of law provision requiring application of the terms of Section A of NAFTA Chapter 11 without any temporal restrictions and that measures within the transition period are actionable..

1. The Ordinary Meaning Of Annex 14-C USMCA Clearly Provides for a Binding Choice of Law Provision of Section A of Chapter 11 of NAFTA

388. Article 31(1) of the VCLT provides that *"[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*." As Prof Schreuer opines, the ordinary meaning of Annex 14-C provides for a binding choice of law provision (i.e., Section A of NAFTA Chapter 11) without any temporal restrictions as to measures allegedly in breach of Section A of Chapter 11 of NAFTA, except for the expiry of the transition period on July 1, 2023.[396] Pursuant to Article 42(1) ICSID Convention, the Tribunal must apply the Parties' agreed choice of law in their arbitration agreement. ICSID, Article 42(1) states that "[*t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties*." As Mr. Wethington opined,

396 Schreuer Opinion, ¶¶ 84-88, **CER-001**.

"[*i*]*n Annex 14-C the Parties clearly specified the applicable law: Section A of NAFTA Chapter 11. This choice of law is binding on the Parties during the transition period, even though NAFTA is terminated. Any argument that because NAFTA is terminated its obligations for choice of law purposes under Annex 14-C no longer exist runs contrary to generally accepted principles of customary international law, as well as Article 42(1) of the ICSID Convention on which this arbitration is based. Under Article 42(1), treaty parties are free to designate their choice of law for arbitration purposes. It is well-established under international law that parties to treaties are free to specify that applicable law in a replacement treaty may be obligations in a predecessor agreement or, for that matter, obligations in any other body of law that they may agree upon*."[397]

389. The relevant terms of Annex 14-C read as follows:

> *1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:*
>
> > *(a) Section A of Chapter 11 (Investment) of NAFTA 1994;*
> >
> > *(b) Article 1503(2) (State Enterprises) of NAFTA 1994;*
> >
> > *(c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligation under Section A of Chapter 11 (Investment) of NAFTA 1994.*[20 21]
> >
> > *…*
>
> *3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.*
>
> > *…*
>
> *6. For the purposes of this Annex:*
>
> > *(a) "legacy investment" means an investment of an investor of another Party in the territory of the Party established or acquired between January*

397 Wethington Opinion, ¶ 18, **CER-002**.

> *1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement;…*
>
> *[Footnote 20: For greater certainty, the relevant provisions in Chapter 2 (General Definitions), Chapter 11 (Section A) (Investment), Chapter 14 (Financial Services), Chapter 15 (Competition Policy, Monopolies and State Enterprises), Chapter 17 (Intellectual Property), Chapter 21 (Exceptions) and Annexes 1-VII (Reservations and Exceptions to Investment, Cross-Border Trade in Service and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim.]*
>
> *[Footnote 21: Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).]*

390. As Prof Schreuer opines, the parties' choice of law in their arbitration agreement may be direct or indirect,[398] and Annex 14-C USMCA contains both direct and indirect choice of Section A of Chapter 11 of NAFTA as the applicable law in this arbitration.

391. Paragraph 1 of Annex 14-C USMCA clearly sets out the Parties' choice of law--namely, Section A of NAFTA Chapter 11:

(a) Annex 14-C incorporates Section B of Chapter 11 of NAFTA, which provides at NAFTA Article 1131(1) that "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with [the NAFTA] and applicable

---

398 Schreuer Opinion, ¶ 70, **CER-001**; *MTD v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, para 112, **CL-0089-ENG**; *ADC v. Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, para 290, **CL-0018-ENG**; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Decision on Annulment, September 1, 2009, ¶¶ 146-147 **CL-0019-ENG**; *Alpha Projektholding v. Ukraine*, ICSID Case No. ARB/07/16, Award, November 8, 2010, ¶ 233 **CL-0020-ENG**; *Addiko v. Croatia*, ICSID Case No. ARB/17/37, Decision on Jurisdiction, June 12, 2020, ¶ 260, **CL-0021-ENG**; Rudolf Dolzer, Ursula Kriebaum, & Christoph Schreuer, *Principles of International Investment Law* (3d. ed. 2022) (excerpts), at pp. 417-18, **CL-0022-ENG**, ("*Many treaty provisions that offer investor-State arbitration, such as the [Energy Charter Treaty] and some BITs, also contain provisions on applicable law. By taking up the offer of arbitration, the investor also accepts the choice of law clause contained in the treaty's dispute settlement provision. […] In this way the treaty's provision on applicable law becomes part of the arbitration agreement between the host State and the foreign investor. In other words, the clause on applicable law in the treaty becomes a choice of law agreed by the parties to the arbitration.*").

rules of international law." This was a direct choice for the NAFTA to apply.[399] The Article 1131 (1) language, "*in accordance with this Agreement*", encompasses Section A of NAFTA Chapter 11 as choice of law in this arbitral proceeding[400]. Moreover, the NAFTA Statement of Administrative Action, Chapter 11, page 148, reinforces the application of NAFTA Articles 1131 and 1132: "Articles 1131 and 1132 address the substantive law to be applied in arbitral proceedings."[401]

(b) Further, paragraph 1 of Annex 14-C specifically refers to the submission of a legacy investment claim that alleges breach of an obligation under Section A of NAFTA Chapter 11. As Prof Schreuer opines, this definition of the Tribunal's jurisdiction constitutes an implicit choice of Section A of Chapter 11 of NAFTA as the applicable law.[402]

(c) Lastly, its footnote 20 further provides that "*Chapter 11 (section A) (Investment)… of NAFTA 1994 appl[ies] to such a claim.*" As both Prof Schreuer and Mr. Wethington[403] opine, this language confirms that the substantive protections for investments under NAFTA apply to a dispute concerning a legacy investment under Annex 14-C.[404] This choice for Section A of NAFTA Chapter 11 to apply is directly and expressly part of the Parties' arbitration agreement under Annex 14-C USMCA.

---

399 Schreuer Opinion, ¶¶ 72-74, **CER-001**; Wethington Opinion, ¶ 19, **CER-002**.

400 Wethington Opinion, ¶ 19, **CER-002**.

401 Wethington Opinion, ¶ 19, footnote 21, **CER-002**.

402 Schreuer Opinion, ¶ 71, **CER-001**.

403 Wethington Opinion, ¶ 21, **CER-002**.

404 Schreuer Opinion, ¶¶ 75-77, **CER-001**; Wethington Opinion, ¶ 21, **CER-002**.

392. This conclusion is further confirmed by the Treaty Parties' agreement in their Protocol Replacing the NAFTA with the USMCA dated November 30, 2018 (the "**USMCA Protocol**"), in which they agreed that "*[u]pon entry into force of this Protocol, the USMCA… shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA.*"[405] Paragraph 1 and footnote 20 of Annex 14-C are such very provisions that refer to the provisions of the NAFTA based on their plain and ordinary language.

393. There are only two temporal restrictions expressed in Annex 14-C of USMCA. First, paragraph 3 of Annex 14-C provides that the Treaty Parties' consent to arbitration expires at the end of the three-year transition period. Second, paragraph 6 of Annex 14-C defines "legacy investment" as those "*established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement*." Neither of these concerns the timing of the State conduct alleged to be in breach of Section A of NAFTA Chapter 11. Put simply, Mexico's complaint seeks to impose a temporal limitation against its clear consent and the Parties' arbitration agreement for Section A of NAFTA Chapter 11 to apply, when there are no express terms containing such limitation.[406]

394. Mexico's attempt to impose an implied temporal limitation against claims concerning State conduct after the termination of NAFTA and the entry into force of the USMCA runs counter (a) to the principle that a treaty is inherently prospective in application

---

405 Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada, at ¶ 1, **CL-0003-ENG.**

406 Please also see Schreuer Opinion, paras. 25-44, **CER-001**; & Wethington Opinion, paras. 12 & 16, **CER-002**.

unless otherwise provided for by the Parties,[407] and (b) the Treaty Parties' existing treaty practice of imposing explicit temporal limitations on the application of an ISDS mechanism analogous to USMCA Annex 14-C where they intended to put in place a temporal limitation.[408] If the Treaty Parties intended to impose a restriction with respect to the timing of the State conduct alleged to be in breach of Section A of NAFTA Chapter 11 , they would have done so in Annex 14-C in express terms. They have not.

395. In contrast to the principle that treaties inherently apply prospectively unless otherwise explicitly agreed to is the principle of non-retroactivity found in Article 28, VCLT: "*[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*." As such, in contrast to the general principle of non-retroactivity where treaties are not in force, the inverse of the non-retroactivity principle applies to treaties in force—meaning, treaties inherently look forward and apply prospectively to measures occurring after entry into force unless otherwise explicitly agreed to.[409] The default presumption under international law is that, absent an express agreement to the contrary, treaty provisions (such as Annex 14-C) would apply to events that occur after the entry into force of the USMCA.[410]

[407] See Wethington Opinion, ¶ 14, **CER-002**. Wethington notes that there is no explicit derogation from this principle in Annex 14-C nor elsewhere in the USMCA.

[408] See Wethington Opinion, ¶ 26, **CER-002**.

[409] See Wethington Opinion, ¶ 14, **CER-002**.

[410] The Claimant notes in this regard that Article 14.2(3) USMCA provides that Annex 14-C does bind a State Party "in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement," which again does not limit the operation of Annex 14-C in terms of the timing of the conduct alleged to be in breach of Section A of Chapter 11 NAFTA.

396. The negotiating history of USMCA Article 14.2(3) also supports the interpretation that the Treaty Parties intended Annex 14-C to apply to measures arising during the transition period.[411] The USMCA Parties on September 30, 2018, announced that they had reached agreement on the text of the USMCA. In the draft of the USMCA, released on September 30, 2018, Article 14.2(3), the non-retroactivity provision, provided that "*[f]or greater certainty, this Chapter shall not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement."*[412] This version of Article 14.2(3) made no reference to Annex 14-C and would have precluded from the scope of Annex 14-C any measures taken prior to entry into force of the USMCA. During the legal review of Article 14.2(3) the exception for Annex 14-C was added, thereby giving Annex 14-C both prospective and retroaction application. As Mr. Wethington concludes, under the September 30 version of Article 14.2(3), Annex 14-C could only have had application if it applied to measures taken on or after entry into force of USMCA. Any argument that Annex 14-C excludes measures arising during the transition period would make no sense given this negotiating history of Article 14.2(3) because such intention would mean that the negotiators of the September 30 version had agreed to a major provision of the USMCA (i.e. Annex 14-C) without any application whatsoever.[413] The final version of Article 14.2(3) included a caveat reading "*except as provided for in Annex 14-C (Legacy Investment Claims and Pending Claims)*." Obviously, the Treaty Parties and their legal advisors paid specific attention to Article 14.2(3) and the issue of retrospective and prospective effect of the provisions and mechanisms in Chapter 14

411 See Wethington Opinion, ¶ 15, **CER-002**.

412 Draft of USMCA released on September 30, 2018, **CL-0023-ENG**.

413 See Wethington Opinion, ¶ 15, **CER-002**.

USMCA, specifically Annex 14-C. In finalizing Article 14.2(3), they made a deliberate choice to apply Annex 14-C to those measures and breaches that took place both prior to the entry into force of the USMCA and during the transition period after USMCA was in force.

397. In any case, as Mr. Wethington observes, there are simply no express terms in the provisions of Annex 14-C limiting the application only retrospectively with respect to State conduct before the entry into force of the USMCA.[414]

398. Treaty practice supports the interpretation that USMCA Annex 14-C applies to measures arising during the transition period. The general approach taken by the Parties in the NAFTA negotiations in formulating provisions was to commit to broad rules and then, if warranted, to derogate from broad principles with respect to specified measures or circumstances. As Mr. Wethington notes, where Party negotiators wanted an exception from broadly stated obligations, they did so expressly.[415] As Mr. Wethington stated, this is in accord with the general approach taken by the Treaty Parties when they negotiated the NAFTA.[416] Mr. Wethington further states that *"[e]ven though USMCA is a significant revision of NAFTA, the general structure of the USMCA, still reflecting the general approach of the NAFTA, centers around the framing of broad principles from which derogations or exceptions are made.*"[417] If USMCA negotiators had intended to exclude claims arising from measures taken during the transition period, they knew how to do it as there was ample precedent on

414 Wethington Opinion, ¶¶ 14-15, **CER-002**.

415 See Wethington Opinion, ¶ 23, **CER-002**.

416 Wethington Opinion, ¶¶ 22-24, **CER-002**; See also, The Report of the Services Policy Advisory Committee on the North American Free Trade Agreement ("SPAC"), chaired by John S. Reed, Chairman, Citicorp, submitted to USTR Carl Hills on September 11, 1992, pages 2-3 as referred to in Wethington Opinion, ¶¶ 23, **CER-002**.

417 Wethington Opinion, ¶ 24, **CER-002**.

which to draw.[418] As for the Treaty Parties' past practices in similar treaties, the Claimant submits that such past practices are also relevant in the interpretation of Annex 14-C and the Tribunal should take them into account in interpreting Annex 14-C .[419] In the context of replacement trade agreements, there are examples of replacement trade agreements involving one of the USMCA Treaty Parties where an older agreement (analogous to NAFTA) was replaced by a new agreement (analogous to USMCA) and the parties designated a body of law in the predecessor agreement as surviving obligations under an investor-state dispute settlement mechanism on a transitional basis, and importantly for the matter now before the Tribunal, where the parties intended that the ISDS mechanism (analogous to Annex 14-C in USMCA) apply only to claims arising during the period the predecessor agreement was in force, they did so explicitly in the text of the agreement.[420] These past treaty practices include*:*

(a) Canada's Comprehensive Economic and Trade Agreement ("**CETA**"), which provides at Article 30.8(2) that *"a claim may be submitted under an agreement listed in Annex 30-A [a list of BITs that will be suspended when CETA enters into force] in accordance with the rules and procedures established in the agreement if (a) the treatment that is the object of the claim was accorded when the agreement was not suspended or terminated; and (b) no more than three*

418 *Id* at ¶ 25.

419 Gardiner, *Treaty Interpretation*, p. 400, **CL-0024-ENG** *("[C]ourts and tribunals often make comparisons between wording of a treaty in issue and that in other treaties without indicating any basis in the Vienna rules for this. If, however, the comparable treaty provisions were part of a line of treaties in some sense linked such as by subject matter, and even more so if reference was made to them in the preparatory work, they may be treated as part of the history and warrant consideration as part of the circumstances of conclusion.*").

420 Wethington Opinion, ¶ 26, **CER-002**.

years have elapsed since the date of suspension or termination of the agreement;[421]

(b) the Mexico-EU Agreement in Principle, which provides at Article 22(3) that:[422]

> *3… a claim may be submitted pursuant to an agreement listed in Annex Y (Agreements between the Member States of the European Union and Mexico), in accordance with the rules and procedures established in that agreement, provided that:*
>
> *(a) the claim arises from an alleged breach of that agreement that took place prior to the date of suspension of the agreement pursuant to paragraph 2 or, if the agreement ceases to have effect pursuant to paragraph 1 prior to the date of entry into force of this Agreement;*
>
> *(b) no more than three years have elapsed from the date of suspension of the agreement pursuant to paragraph 2 or, if the agreement ceases to have effect pursuant to paragraph 1, from the date of entry into force of this Agreement until the date of submission of the claim.*

(c) the Canada-Peru Free Trade Agreement, which provides at Article 845 that:[423]

> *1. The Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments done in Hanoi on 14 November 2006 (the "FIPA") shall be suspended from the date of entry into force of this Agreement and until such time as this Agreement is no longer in force.*
>
> *2. Notwithstanding paragraph 1, the FIPA shall remain operative for a period of fifteen years after the entry into force of this Agreement for the purpose of any breach of the obligations of the FIPA that occurred before the entry into force of this Agreement. During this period the right of an investor of a Party to submit a claim to arbitration concerning such a breach shall be governed by the relevant provisions of the FIPA.*

---

421 Comprehensive Economic and Trade Agreement between Canada and the European Union, signed October 30, 2016, provisionally entered into force September 21, 2017 ("CETA"), p. 172, **CL-0025-ENG**.

422 European Commission, "EU-Mexico agreement: The Agreement in Principle," Investment Chapter, April 21, 2018, p. 18, **CL-0026-ENG,** emphasis supplied.

423 Free Trade Agreement Between Canada and the Republic of Peru, signed May 29, 2008, entered into force August 1, 2009, p. 163, **CL-0027-ENG**. (Emphasis supplied.)

(d) the Canada-Panama Free Trade Agreement, which provides at Article 9.38 substantively the same provision as Article 845 of the Canada-Peru Free Trade Agreement as quoted above;[424]

(e) the Australia-Mexico side letters in connection with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership dated March 8, 2018 ("**CPTPP**"), which provides at paragraph 2 that the pre-existing investment treaty to be terminated *"shall continue to apply for a period of three years from the date of termination to any investment… which was made before the entry into force of the Agreement for both Australia and the United Mexican States [the CPTPP] with respect to any act or fact that took place or any situation that existed before the date of termination";*[425]

(f) the United States-Honduras side letters in connection with the Dominican Republic – Central America – United States Free Trade Agreement ("**CAFTA-DR**") (the "**United States-Honduras Side Letters**"), which concerns the termination of the pre-existing United States-Honduras BIT and provides at paragraph (b) that:[426]

---

[424] Article 9.38(2) of the Canada-Panama Free Trade Agreement states that "*[n]otwithstanding [the suspension of the Treaty between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments ("Canada-Panama FIPA")], the [Canada-Panama FIPA] remains operative for a period of 15 years after the entry into force of this Agreement for the purpose of any breach of the obligations of the [Canada-Panama FIPA] that occurred before the entry into force of this Agreement. During this period the right of an investor of a Party to submit a claim to arbitration concerning such a breach shall be governed by the relevant provisions of the [Canada-Panama FIPA].*" Free Trade Agreement Between Canada and the Republic of Panama, signed May 14, 2010, entered into force April 1, 2013, **CL-0028-ENG**, emphasis supplied.

[425] Side Letters between Australia and Mexico Regarding Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, March 8, 2018, **CL-0029-ENG**, emphasis supplied.

[426] Side Letters between United States and Honduras Regarding the U.S.-Honduras Bilateral Investment Treaty dated August 5, 2004, **CL-0030-ENG**, emphasis supplied.

> *"…for a period of ten years beginning on the date of entry into force of the Agreement [CAFTA-DR] as between the United States of America and Honduras, Articles IX and X of the Treaty [United States-Honduras BIT] shall not be suspended:*
> *(i) in the case of investments covered by the Treaty as such date; or*
> *(ii) in the case of disputes that arose prior to that date and that are otherwise eligible to be submitted for settlement under Article IX or X of the Treaty."*

(g) the United States-Morocco Free Trade Agreement, which provides at Article 1.2(4) the substantively the same provisions as paragraph (b) of the United States-Honduras Side Letters as quoted above but with respect to the termination of the then pre-existing United States-Morocco BIT.[427]

399. Further, Mexico's reliance on the fact that NAFTA terminated on July 1, 2020 does not sustain its argument. Article 70(1) VCLT provides that, upon a treaty's termination, the treaty parties may agree in a separate agreement to continue to perform certain obligations under that treaty. In this case, as Prof Schreuer opines, the Treaty Parties to the USMCA agreed in express terms that Section A of NAFTA Chapter 11 would apply in Annex 14-C.[428] The Treaty Parties further agreed and confirmed their agreement in Annex 14-C in the USMCA Protocol that the termination of NAFTA would be without prejudice to those provisions referred to in the USMCA. Clearly, the Treaty Parties agreed through Annex 14-C and the USMCA Protocol for Section A of NAFTA Chapter 11 to continue to apply for three years with respect to "legacy investments."

400. More importantly, following the submission of its *Request for Arbitration*, the Claimant accepted Mexico's consent to arbitrate in Annex 14-C and the disputing Parties therefore agreed expressly for Section A of NAFTA Chapter 11 to apply as part of their

---

427 United States-Morocco Free Trade Agreement signed on June 15, 2004, and entered into force on January 1, 2006, Article 1.2(4), **CL-0031-ENG**.

428 Schreuer Opinion, paras. 58-60, **CER-001**.

arbitration agreement.[429] Article 42(1) of the ICSID Convention obliges the Tribunal to "*decide a dispute in accordance with such rules of law as may be agreed by the parties.*"[430] As explained by ICSID, under Article 42(1), "*the parties are free to agree on rules of law defined as they choose… [and] may refer to a national law, international*

[429] Schreuer Opinion, paras. 61-62, **CER-001**; Christoph Schreuer, "Jurisdiction and Applicable Law in Investment Treaty Arbitration," *McGill Journal of Dispute Resolution*, Vol. 1:1 (2014), at pp. 11-12, **CL-0032-ENG** ("*Some treaties offering consent to arbitration contain their own rules on applicable law. A rule on applicable law in a treaty that offers consent to arbitration becomes part of the arbitration agreement. Acceptance by the investor of the offer of consent to jurisdiction in the treaty includes the acceptance of the clause on applicable law, leading to an agreed choice of law. Tribunals have confirmed that treaty clauses of this type were the basis for an agreement on choice of law between the host State and the investor.*") (citing *Goetz and Five Belgian Shareholders of AFFIMET v. Burundi*, ICSID Case No ARB/95/3, Award, February 10, 1999, 15 *ICSID Rev* 457, *ORIL IIC* 16, at ¶ 94, **CL-0033-ENG**; and *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, February 6, 2007, 44 *ILM* 138, at ¶ 76, **CL-0034-ENG** ("*By accepting the offer of Argentina to arbitrate disputes related to investments, Siemens agreed that this should be the law to be applied by the Tribunal. This constitutes an agreement for purposes of the law to be applied under Article 42(1) of the Convention.*")) (citing *Suez v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, July 30, 2010, paras. 59-63; *EDF v. Argentina*, ICSID Case No. ARB/03/23, Award, June 11, 2012, ¶ 181; *Gold Reserve v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sep. 22, 2014, ¶ 533; and *Rusoro Mining v. Bolivia*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016, ¶¶ 347-349.)

[430] See ICSID Convention 1965, **CL-0138-ENG**. *See also* Regional Consultative Meetings of Legal Experts on Settlement of Investment Disputes, "Chairman's Report on Issues Raised and Suggestions Made With Respect to the Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and National of Other States," July 9, 1964, in *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol. II-1 (1968), at p. 569 **CL-0035-ENG** ("*in keeping with the consensual character of the Convention and generally accepted in international arbitration, that the parties can control the rules by which an arbitral tribunal is to arrive at a decision of the dispute which they have submitted to it. If the parties have agreed on the law to be applied by the tribunal . . . the tribunal is bound by that agreement.*"); "Summary of the Proceedings of the Legal Committee, December 7, Morning," December 30, 1964, in *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol. II-2 (1968), at p. 803 **CL-0036-ENG** (Chairman Broches indicated that he "*would propose that the first part of the first sentence of paragraph (1) be replaced by the following sentence: 'The Tribunal shall decide disputes submitted to it in accordance with such rules of law as shall have been agreed upon between the parties'. That would indicate that in the normal case one would expect the parties to choose the applicable law and would reflect the normal practice in the field of foreign investment agreements.*"); Note by A. Broches, General Counsel, transmitted to the Executive Directors, "Settlement of Investment Disputes" August 28, 1961, in *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol. II-1 (1968), at ¶ 17 **CL-0037-ENG** ("*It is characteristic of arbitration that the parties are free in the choice of the law to be applied by arbitrators.*").

law, a combination of national and international law, or a law frozen in time or subject to certain modifications."[431] As further observed by the *ad hoc* committee in *MINE v. Guinea*, Article 42(1) "*grants the parties to the dispute unlimited freedom to agree on the rules of law applicable to the substance of their dispute and requires the tribunal to respect the parties' autonomy*."[432] Specifically, as Prof Schreuer observes, the

---

[431] ICSID website, ICSID-Model Clauses, Section V "Applicable Law," <https://icsidfiles.worldbank.org/icsid/icsid/staticfiles/model-clauses-en/13.htm> accessed on February 8, 2024, **CL-0038-ENG**. See also, U.N. Conference on Trade and Development, Dispute Settlement: International Centre for Settlement of Investment Disputes, 2.6 Applicable Law (2003), at p. 8, **CL-0039-ENG** ("*Article 42(1) first sentence refers to "rules of law" rather than systems of law. . . . The parties are . . . allowed to set aside certain aspects of a chosen system of law from its application to the relationship, or to declare applicable rules derived from a treaty not yet in force or another non-binding instrument.*") (emphasis supplied); U.N. Conference on Trade and Development, *Dispute Settlement: International Commercial Arbitration, 5.2 The Arbitration Agreement* (2005), at pp. 53-54, **CL-040** ("*Rules of law'. . . allows the application of rules derived from international conventions and uniform laws—even if they are not in force—, parts of different legal systems or provisions of laws that are no longer in force as well as restatements or compilations, such as the UNIDROIT Principles of International Commercial Contracts.*") (emphasis supplied).

[432] *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, ICSID Case. No. ARB/84/4, Decision on Annulment, December 14, 1989, at ¶ 5.03 **CL-0041-ENG** (as relied upon by Mexico in *Methanex Corporation v. United States of America*, UNCITRAL, Article 1128 Submission of the United Mexican States, February 11, 2002, at pp. 2-3, **CL-0042-ENG**). See also, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, June 5, 2007, at ¶ 45, **CL-0043-ENG** ("*The relevant provisions of the applicable law are constitutive elements of the Parties' agreement to arbitrate and constitute part of the definition of the tribunal's mandate.*"); Schreuer, *Commentary on the ICSID Convention* (2022) at p. 1268, **CL-0044-ENG** ("*Non-application of the law agreed by the parties [pursuant to Article 42 of the ICSID Convention] or of the law determined by the residual rule in Art. 42(1) goes against the parties' agreement to arbitrate and may constitute an excess of powers.*"); U.N. Conference on Trade and Development, *Dispute Settlement: International Centre for Settlement of Investment Disputes, 2.6 Applicable Law* (2003), at p. 33, **CL-0045-ENG** ("Ad hoc Committees have determined that the failure to apply the proper law may constitute an excess of powers and a ground for annulment. Therefore, a negligent application of Article 42 can lead to a decision of nullity."); Giudittta Cordero Moss, "Chapter 31: Tribunal's Powers Versus Party Autonomy," in Peter Muchlinski, Federico Ortino, & Christoph Schreuer, eds., *The Oxford Handbook of International Investment Law* (2008), at p. 1215, **CL-0046-ENG** ("*The treaty establishing arbitration may contain instructions in respect of the law to be applied by the tribunal to the merits of the dispute. Violation of these rules does not necessarily simply amount to an error in the merits of the award. Disregard of treaty rules on applicable law is a violation of the duties established by the treaty in respect of the conduct of the proceedings and, in particular, in respect of the legal standard against which the disputed facts shall be measured. Given the significance of the applicable law for the outcome of the dispute, such violation may be considered as a serious procedural irregularity or an excess of the power conferred on the tribunal. Both are grounds for invalidity and refusal of enforcement of the award . . . .*").

tribunal in *CSOB v. Slovakia* confirmed that parties can pursuant to Article 42(1) agree to the terms of a treaty as applicable law even if that treaty was not in force and had never come into force.[433]

401. This principle of party autonomy is also widely recognized in international arbitration and is expressed in many other arbitration rules, such as the UNCITRAL rules, the ICC rules and the SCC rules.[434] The Treaty Parties to the USMCA have all relied upon the principle of party autonomy in the context of NAFTA arbitrations in the past.[435]

Please also see Wethington Opinion, ¶ 20, **CER-002**.

433 Schreuer Opinion, paras. 66-68, **CER-001**; Wethington Opinion, ¶ 18, **CER-002**; *CSOB v. Slovakia*, ICSID Case No. ARB/97/4, Award dated December 29, 2004, ¶ 63, **CL-0047-ENG**. See also, Richard Gardiner, *Treaty Interpretation* (2015) (excerpts), pp. 47-51, **CL-0048-ENG** ("*A provision in the consolidation agreement between the claimant and the Slovak Republic referring to the agreement being governed by the BIT did satisfy the requirement for consent (even though the BIT was not in force) as it made the arbitration provision in the BIT part of the contract of the consolidation agreement.*").

434 UNCITRAL Arbitration Rules (2021), at Art. 35, **CL-0049-ENG** ("The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute"); ICC International Court of Arbitration Rules (2021), at Art. 21(1), **CL-0050-ENG** ("*The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute.*"); and SCC Arbitration Rules (2023), at Art. 27(1), **CL-0051-ENG** ("*The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties.*").

See also, "Chapter 1: Applicable Law Chosen by the Parties," in Emmanuel Gaillard & John Savage, eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), at Section 1421 (p. 785), **CL-0052-ENG** ("*Virtually all modern arbitration laws recognize that, in international situations, the parties are free to determine the law applicable to the merits of the dispute which the arbitrators are to resolve. This principle, traditionally referred to as the principle of party autonomy, is binding on the arbitrators.*"); David D. Caron & Lee M. Kaplan, *The UNCITRAL Arbitration Rules: A Commentary* (2013) (excerpts), at p. 116, **CL-0053-ENG** ("*The "rules of law" need not be in force. Indeed, it was exactly with the purpose of enabling a tribunal to apply, for example, a convention not yet in force that the Model Law employs the words "rules of law chosen by the parties" instead of simply referring to "law." As party autonomy is the overriding principle in the application of the UNCITRAL Rules, the parties' choice of a "law" not in force should be respected to the extent possible. Accordingly, a convention not in force, but which has been designated as applicable law, should be applied…*").

435 *Methanex Corporation v. United States of America*, UNCITRAL, Article 1128 Submission of the United Mexican States, February 11, 2002, at pp. 2-3, **CL-0042-ENG** (relying upon *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, ICSID Case. No. ARB/84/4, Decision on Annulment, December 14, 1989, at ¶ 5.03 **CL-0041-ENG**); *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Canada's Reply to the Tribunal's Letter Regarding the Interpretation of NAFTA Article 1105 by the NAFTA Commission, October 1, 2001, at p. 2, **CL-0054-ENG**; *Chemtura Corporation v. Government of*

402. The Tribunal remains bound to observe its mandate in this regard to apply the Parties' agreed choice of law. As Prof Schreuer opines, a failure by the Tribunal to exercise its jurisdiction under Annex 14-C USMCA, including a failure to observe the Parties' agreed choice of law being Section A of NAFTA Chapter 11, may lead to an annulment of an award in this arbitration under Article 52 of the ICSID Convention.[436]

403. Clearly, the ordinary meaning of the express terms of Annex 14-C provide for a binding choice of law provision for the terms of Section A of NAFTA Chapter 11 to apply with respect to the Claimant's claims without any temporal restrictions to the timing of the State conduct alleged to be in breach. There are no terms to the contrary in Annex 14-C USMCA. This binding choice of law for Section A of Chapter 11 NAFTA to apply is part of the Parties' arbitration agreement and the Tribunal must observe this part of their mandate and apply Section A of Chapter 11 NAFTA in this arbitration.

2. The Context of Annex 14-C USMCA Confirms the Claimant's Interpretation of Annex 14-C

404. The same conclusion can be drawn from a review of the context of Annex 14-C—which confirms that the Treaty Parties consented to Section A of NAFTA Chapter 11 as a binding choice of law provision for adjudicating claims arising during the transition period.

405. Article 31(2) and (3) of the VCLT list the factors and documents that need to be taken into account when considering the context of a treaty for interpretation. The following

Canada, UNCITRAL, Submission of the United States of America, July 31, 2009, at paras. 4, 6-7, **CL-0055-ENG**.

436 Schreuer Opinion, ¶¶ 90-94, **CER-001**, citing *Vivendi v. Argentina*, ICSID Case No. ARB/97/3 Decision on Annulment, 3 July 2002, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, June 5, 2007, *Lucchetti v. Peru (sub nomine: Industria Nacional de Alimentos)*, ICSID Case No. ARB/03/4, Decision on Annulment, and *Malaysian Historical Salvors v. Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009.

are relevant here (a) "the text of the treaty, including its preamble and annexes"; and (b) "any agreement relating to the treaty which was made between all parties in connection with the conclusion of the treaty", i.e. the USMCA Protocol. In addition, the Claimant also underscores that under VCLT, Article 32 allows recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion. Thus, the negotiation context of the USMCA should be taken into account by the Tribunal.

a. The Context As Informed By the Text Of the USMCA

406. Claimant submits that the context as informed by (a) footnote 21 of Annex 14-C; (b) the definition of "legacy investment" in paragraph 6 of Annex 14-C; and (c) Article 34.1 USMCA all reflect and confirm the Treaty Parties' intention to allow legacy investment claims arising out of actions taken after the termination of NAFTA. The context is further informed by the USMCA's preamble as part of the USMCA object and purpose as discussed in Section XII.B.3 below.

407. *Subsection (a)*: footnote 21 of Annex 14-C carves out of Annex 14-C claims that are eligible to be submitted under Annex 14-E of the USMCA. Footnote 21 of Annex 14-C provides:

> *Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).*

408. Annex 14-E USMCA only applies prospectively to breaches that arise after the entry into force of the USMCA. As such, for footnote 21 of Annex 14-C to have effect Annex

14-C and Annex 14-E must overlap--that is, Annex 14-C must apply to breaches of Section A of NAFTA Chapter 11 that arise after the entry into force of the USMCA.[437]

409. If the Treaty Parties understood Annex 14-C to apply only with respect to State conduct alleged to be in breach during the period NAFTA was in force, there would be no need for Mexico and the United States to agree further in footnote 21 of Annex 14-C to carve out claims that can be submitted under both Annex 14-C and Annex 14-E, as such claims could not exist. There can be no quibble that Mexico and the United States both understood their consent to arbitrate under Annex 14-C would apply to breaches of Section A of NAFTA Chapter 11 that arise after the termination of NAFTA and intentionally agreed in express terms in footnote 21 of Annex 14-C to carve out from their Annex 14-C consent claims that could also be made under Annex 14-E USMCA.

410. *Subsection (b)*: the definition of "legacy investment" in paragraph 6 of Annex 14-C also confirms the understanding of the Treaty Parties that their consent in Annex 14-C allows legacy investment claims arising out of actions taken during the transition period.

411. Paragraph 6(a) of Annex 14-C requires an investment to be "*in existence on the date of entry into force of [the USMCA]*" in order to constitute a "legacy investment." Therefore, the Treaty Parties' consent in Annex 14-C extends to measures arising on the first day of the transition period.

---

[437] VCLT Commentary in Yearbook of the International Law Commission, 1966, Vol II, p. 219, **CL-0056-ENG**, ("*When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.*"); and Gardiner, *Treaty Interpretation,* p. 168, **CL-0057-ENG** ("*an interpretation of a term should be preferred which gives it some meaning and role rather than one which does not.*"). Please also see Wethington Opinion, ¶ 17, **CER-002.**

412. The Treaty Parties agreed to this temporal requirement for "legacy investment" to be in existence when the USMCA came into force on July 1, 2020 because they intended for their consent in Annex 14-C to protect investments with respect to State conduct that were taken in breach of Section A of NAFTA Chapter 11 during the transition period. As Mr. Wethington opined, "*the temporal element within the definition of legacy investment…reflect[s] an intention to protect investments from measures taken both during the period of NAFTA and prospectively during the transitional period.*" Otherwise, if Treaty Parties intended only to protect investments from measures taken during the period NAFTA was in force, there would be no reason for the addition of the clause "*investments…in existence on the date of entry into force of this Agreement [USMCA].*" Mr. Wethington went on to state that "*…an exclusion of measures occurring during the transition period would have been a major restriction on continued protection during the transition period. The Parties, having shown sensitivity to temporal considerations, could hardly have intended an exclusion of such significance without making it explicit. Most certainly in the text, or at least in the negotiating history or congressional record of deliberations, there would be indication of a carve-out of measures arising during the transition period, but none appears to exist*."[438]

413. *Subsection (c)*: Article 34.1 USMCA is relevant in ascertaining the context of Annex 14-C in two aspects.

414. *First*, Article 34.1.1 contains the Treaty Parties' recognition of "*the importance of a smooth transition from NAFTA 1994 to this Agreement.*" Viewed in light of the fact that Canada has not consented to arbitrate claims under Annexes 14-D and 14-E USMCA, Article 34.1.1 lends further support to the conclusion that the Treaty Parties could not

438 Wethington Opinion, ¶ 16, **CER-002**.

have intended to end abruptly the protections afforded to investors in NAFTA Chapter 11 without express terms to that effect.

415. Second, Article 34.1.4 provides that "Chapter Nineteen of NAFTA 1994 shall continue to apply to binational panel reviews related to final determinations published by a Party before the entry into force of this Agreement."[439] This is another example of the Treaty Parties' practice to specify any temporal restrictions in their agreement for the continued application of particular provisions of NAFTA. As it is contained within the text of the USMCA, it is part of the context in interpreting Annex 14-C.

b. The Context As Informed By the USMCA Protocol

416. As submitted in paragraph 399 above, the Treaty Parties specifically agreed in the USMCA Protocol that the termination of NAFTA would be "*without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA.*" Paragraph 1 and footnote 20 of Annex 14-C USMCA are precisely those provisions. The Treaty Parties' agreement in the USMCA Protocol was clearly intended to give effect to the terms of the NAFTA that are referred to in the USMCA. The Claimant submits that the Treaty Parties' agreement in the USMCA Protocol must also be taken into account as context in the interpretation of Annex 14-C USMCA.

c. The context as informed by the negotiation of the USMCA

417. Mr. Wethington in his Opinion describes the primary contextual dynamics influencing the negotiation of the investor-state dispute settlement provisions of the USMCA.[440] In summary, the US Administration's skepticism as to the long-term benefits of investor-state dispute settlement mechanisms was tempered by the strong support within

439 (Emphasis supplied.)

440 See Wethington Opinion, ¶¶ 27-34, **CER-002**.

President Trump's political party for inclusion of a robust ISDS mechanism and by strong US industry support as well demanding ISDS protection for US current and future investments in Mexico. The latter stance was influenced by Mexico's then-presidential candidate, Mr. Andrés Manuel López Obrador, who had signaled intention to tighten Mexico's liberalization policies on investment in the energy sector, fueling concerns of American investors who had been investing in these sectors when NAFTA was in place.[441]

418. Over the course of 2018 the United States shifted from opposition to continuing ISDS towards maintaining some form of ISDS that retained NAFTA investment chapter obligations for a transitional period. This US position stemmed from a desire to respond to US Congressional demands which had linked Congressional approval to inclusion of ISDS in the new treaty and a recognition of "*expectations of US investors which had invested in Mexico during NAFTA and which anticipated, continued or even enlarged investments in the early years after USMCA.*"[442]

419. Against the dynamics described in paragraphs 396 to 398 above, negotiators of the USMCA could not, as Mr.Wethington describes[443], have been oblivious to whether claims arising from measures, either pre- or post-entry into force of the USMCA, were within the scope of Annex 14-C. In this context, any exclusion of claims arising during the transition period would have been a politically charged constraint on the application of Annex 14-C. The absence of any explicit exclusion of measures post-entry into force of the USMCA strongly supports the view that Parties understood that Annex 14-C

441 **CER-002**, ¶¶ 27-30.

442 **CER-002**, ¶¶ 31-33.

443 **CER-002**, ¶ 34.

applied to measures arising during the transition period and was the approach most responsive to political necessity.

3. The Object and Purpose of USMCA Also Confirms the Claimant's Interpretation of Annex 14-C

420. In addition to the ordinary meaning and the context of Annex 14-C, Article 31(1) VCLT also requires an interpretation of treaty terms to be done in light of the treaty's "object and purpose." The object and purpose of the USMCA as informed by its preamble confirms that the Treaty Parties sought a transitional investor-state dispute settlement mechanism in Annex 14-C which reflects the intention of the Parties to protect and expand trade and investment within a clear, transparent and predictable framework. The implied constraints under Mexico's interpretation of Annex 14-C (that is, the exclusion of measures arising during the transition period) are inconsistent with the explicit object and purpose of the USMCA as articulated in the Treaty's preamble.

421. The relevant parts of the USMCA preamble read as follows:

> *STRENGTHEN ANEW the longstanding friendship between them and their peoples, and the strong economic cooperation that has developed through trade and investment;*
>
> *FURTHER strengthen their close economic relationship;*
>
> *REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement to support mutually beneficial trade leading to freer, fairer markets, and to robust economic growth in the region;*
>
> *PRESERVE AND EXPAND regional trade and production by further incentivizing the production and sourcing of goods and materials in the region;*

…

ESTABLISH a clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment;

…

PROMOTE transparency, good governance and the rule of law, and eliminate bribery and corruption in trade and investment;

422. From the referenced excerpts, by replacing the NAFTA with the USMCA, the Treaty Parties intended to further strengthen their friendships, strong economic cooperation in trade and investment, and ultimately their close economic relationship. In doing so, the Treaty Parties aimed to preserve and expand trade and production by further incentivizing production and sourcing of goods and materials in their territories, to support further expansion of trade and investment by establishing a clear, transparent, and predictable legal and commercial framework, and to promote transparency, good governance, and the rule of law.

423. Mexico's interpretation of Annex 14-C, as set out in its current objection, would mean an abrupt end of the protections under Section A of NAFTA Chapter 11 explicitly consented to by the Treaty Parties. There is no public statement by the Treaty Parties that Annex 14-C would only apply with respect to State measures that pre-dated the termination of NAFTA. Such restriction is also not directly or indirectly expressed in Annex 14-C or anywhere else in USMCA.

424. An implied temporal restriction that was not previously publicized would not further strengthen the economic relationship between the Treaty Parties, nor would it

establish or promote a clear, transparent, and predictable legal and commercial frameworks for the further expansion of investment, and the rule of law.[444]

425. Conversely, the object and purpose of the USMCA is entirely consistent with Annex 14-C providing for Section A of NAFTA Chapter 11 to continue to apply to legacy investment claims with respect to State conduct after the termination of NAFTA. Having Section A of NAFTA Chapter 11 applicable with respect to "legacy investments" for the first three years of USMCA gives further clarity, transparency, and predictability to this transition for both Treaty Parties and also their investors.

4. The Supplementary Means of Interpretation Further Confirm That The Treaty Parties Intended for Their Consent in Annex 14-C to Continue the Application of Section A of NAFTA Chapter 11

426. The preceding three subsections establish that the Claimant's interpretation of Annex 14-C is the only available good faith interpretation in light of the ordinary meaning, context, object and purpose of the USMCA. Pursuant to Article 32 VCLT, the supplementary means of interpretation, i.e. the preparatory work of the USMCA and the circumstances of its conclusion, further confirm that the Treaty Parties intended for their consent in Annex 14-C to continue the application of Section A of NAFTA Chapter 11 for three years from the entry into force of the USMCA.[445] Specifically, statements by the USMCA Parties, government officials, and former USMCA negotiators show that Annex 14-C allows claims for damages arising from measures taken by States after the entry into force of the USMCA.

---

444 Please also see Wethington Opinion, ¶¶ 36-38, **CER-002.**

445 Gardiner, *Treaty Interpretation*, p. 354, **CL-0058-ENG** ("*[T]he preparatory work of the Vienna Convention effectively confirms the propriety of examining the preparatory work, without precondition, of any treaty whose interpretation is in issue and sets this in the context of 'the unity of the process of interpretation'. Recourse to preparatory work is always permissible under the Vienna rules to 'confirm' the meaning reached by the general rule in article 31.*") (emphasis supplied).

427. As Mr. Wethington has determined, there are no publicly available statements or documents that demonstrate the Treaty Parties intended to exclude from Annex 14-C claims arising from measures taken during the transition period.[446] Mr. Wethington has stated, "*[t]o my knowledge there is not a single public statement by a negotiator or official of any of the USMCA Treaty Parties contemporaneous with the negotiation or ratification of the USMCA that has taken the position that Annex 14-C provides consent only to arbitrate claims regarding measures taken prior to termination of NAFTA, but not regarding measures arising during the transition period under the USMCA.*"[447]

428. This subsection highlights particular statements. A list of statements by USMCA Parties, government officials, and former USMCA negotiators confirming the same position are in Annex of this Memorial.[448]

429. The government of Mexico's statement contemporaneous with the conclusion of USMCA confirms that Annex 14-C allows claims arising out of State conduct after the entry into force of the USMCA. In its September 9, 2019 *Reporte T-MEC No. 14, Capitulo de Inversión del T-MEC*, the Secretaria de Economia stated that:[449]

> *In the case of claims that may arise between the investors from Canada and the United States with the respective governments, the dispute settlement mechanism under NAFTA will continue to be applied provisionally. Three years after the entry into force of the T-MEC [USMCA] said mechanism shall cease to apply for Canada and the US, and in the event a dispute arises between investors and governments,*

---

446 Wethington Opinion, ¶ 37, **CER-002**.

447 *Id.*

448 Set forth at the end of this Memorial with Annex 2.

449 Government of Mexico, Secretary of the Economy, "Reporte T-MEC: Capitulo de Inversión del T-MEC [USMCA Report: USMCA Investment Chapter]," September 9, 2019, at p. 2 (unofficial translation), **OW-0016-ENG**.

the parties shall resort to domestic courts or some other mechanism of dispute resolution.

430. As Mr. Wethington opines, the reference to "*claims that may arise*" has a prospective meaning, referring to the Annex 14-C transition period within which claims may arise.[450]

431. The Claimant notes Mexico's submissions and statements in separate arbitrations of *Legacy Vulcan v. Mexico*[451] and *TC Energy v. USA*.[452] However, these statements are not contemporaneous to the negotiation or conclusion of the USMCA. Instead, from the publicly available record of the *Legacy Vulcan* arbitration, it appears that Mexico did not complain about the scope of Annex 14-C nor object to the continued application of Section A of NAFTA Chapter 11 in May/June 2022, when the parties were exchanging submissions on Legacy Vulcan's request for leave to raise its ancillary claims.[453] Mexico appeared to have only raised its objection on this aspect of USMCA Annex 14-C in its counter memorial on December 19, 2022.[454] This is shortly before the United States filed its request for bifurcation in *TC Energy* on January 11, 2023, in which it made the same objection.

432. The U.S. government's documents regarding the meaning of Annex 14-C refer to the "continued applicability of NAFTA *rules* and *procedures*" during the transition period.

---

450 Wethington Opinion, ¶ 46, **CER-002**.

451 *Legacy Vulcan v. Mexico*, ICSID Case No. ARB/19/1, Mexico's Counter Memorial, November 23, 2020, **CL-0059-ENG**.

452 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Mexico's Intervenor Submission, September 11, 2023, **CL-0134-ENG**.

453 *Legacy Vulcan v. Mexico*, ICSID Case No. ARB/19/1, Procedural Order No. 7, July 11, 2022, **CL-0060**.

454 *Legacy Vulcan v. Mexico*, ICSID Case No. ARB/19/1, Mexico's Ancillary Claim Counter Memorial, December 19, 2022, **CL-0061-ENG**.

For example, talking points written by a USTR official and reviewed by the US State Department in preparation for OECD investment committee meetings explain that "*investors that have established or acquired investments during the lifetime of the NAFTA can continue to bring ISDS claims under the NAFTA rules and procedures with respect to those 'legacy investments' for three years after the termination of the NAFTA.*"[455] The background document prepared for the OECD investment committee meetings repeats the same statement regarding the continued applicability of "*NAFTA rules* and *procedures with respect to . . . 'legacy investments.'*"[456] (Emphasis supplied.) These documents do not support Mexico's objection that paragraph 1 of Annex 14-C excludes claims in connection with measures after the termination of NAFTA or that Section A of NAFTA Chapter 11 is not the applicable law chosen by the Treaty Parties.

433. Statements from the government of Canada that are contemporaneous with the conclusion of USMCA clearly state that NAFTA protections for legacy investments will continue to be available through dispute settlement for the duration of the transition period. The Canadian government stated, for example, that "*NAFTA's existing ISDS mechanism will continue to apply for three years after termination of the Agreement*

---

455 Email Exchange between Michael Tracton and Lauren Mandell, "RE: OECD Week Item," October 19, 2018, at p. 1 of attachment "Talking Points on USMCA Investment Chapter for OECD Investment Committee Meetings" (emphasis supplied), **OW-0014-ENG**.

456 Wethington Opinion, ¶ 40, **CER-002**; Email Exchange between Michael Tracton and Lauren Mandell, "RE: OECD Week Item," October 19, 2018, at attachment "USMCA Investor-State Dispute Settlement Provisions: Background and Talking Points" , **OW-0014-ENG**. A November 6, 2019 report from the OECD titled "Freedom of Investment Roundtable 29: Summary of Discussion" reflects these points, stating that "[*t]he US noted that for three years following the termination of NAFTA, covered investors with existing investments could continue to bring ISDS claims under NAFTA (known as 'legacy claims').*" OECD, Directorate for Financial and Enterprise Affairs Investment Committee, "Freedom of Investment Roundtable 29: Summary of Discussion," Doc. No. DAF/INV/WD(2019)16/FINAL, November 6, 2019, at ¶ 22, **C-0088-ENG**.

Please also refer to *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Claimant's Counter Memorial on Preliminary Objections dated August 11, 2023, footnote 174, **CL-0076-ENG.**

for investments made prior to the entry into force of CUSMA."[457] Elsewhere, the Canadian government stated that:

> *The parties [to CUSMA] have also agreed to a transitional period of three years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry into force of CUSMA. . . . [T]he original NAFTA ISDS mechanism will remain available to investors with respect to their existing investments for a period of three years after entry-into-force of CUSMA."*[458]

434. Again, nothing in these statements from Canada indicates that Annex 14-C allows claims only in connection with measures that predated the entry into force of USMCA.

435. Further, Section 8 of the Canada-United States-Mexico Agreement Implementation Act, S.C. 2020, c. 1, which is Canada's domestic legislation implementing the USMCA, provides in relevant part:

> *Causes of action under Agreement*
>
> *(2) No person has any cause of action and no proceedings of any kind are to be taken, without the consent of the Attorney General of Canada, to enforce or determine any right or obligation that is claimed or arises solely under or by virtue of the Agreement.*
>
> *Exception*
>
> *(3) Subsection (2) does not apply with respect to causes of action arising out of, and proceedings taken under, Annex 14-C of the Agreement.*[459]

436. With the express reference to "*causes of action arising out of… Annex 14-C*", Canada was clearly of the view that the terms of Annex 14-C permits a new cause of action

---

[457] *See* Government of Canada, "Minister of International Trade - Briefing book," November 2019 <https://www.international.gc.ca/gac-amc/publications/transparency-transparence/briefing-documents-information/transition-trade-commerce/2019-11.aspx?lang=eng>, accessed on May 22, 2024), **C-0089-ENG**.

[458] Government of Canada, "Investment chapter summary," <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/investment-investissement.aspx?lang=eng>, accessed on May 22, 2024, **C-0090-ENG**.

[459] Canada–United States–Mexico Agreement Implementation Act, S.C. 2020, c. 1 (Can.), at Section 8, **CL-0063-ENG**.

"*that is claimed or arises solely under or by virtue of*" USMCA[460] The legislation clearly indicates that the terms of Annex 14-C are not solely procedural, given the specific distinction drawn between "causes of action" and "proceedings." The only way that Annex 14-C can provide a basis for a substantive cause of action is if Annex 14-C provides for the continued application of Section A of NAFTA Chapter 11 after July 1, 2020.

437. There are various statements from the former lead U.S. negotiator (Lauren Mandell) of the investment chapter of USMCA, which showed his understanding that Annex 14-C was intended to allow claims for damages arising from State conduct taken after the entry into force of the USMCA.[461] In particular, there is an article that Mr. Mandell co-authored with his colleagues at WilmerHale, which advised investors of their right to initiate arbitration under Annex 14-C to challenge measures taken by the Mexican government after July 1, 2020.[462] This article indicates that the co-authors understood that Annex 14-C allows claims for damages arising from State measures taken after the entry into force of the USMCA[463].

---

460 See also Government of Canada, "Canada-United States-Mexico Agreement – Canadian Statement on Implementation," <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/implementation-mise_en_oeuvre.aspx?lang=eng#61> accessed on May 22, 2024, **C-0091-ENG** ("*Subsection 8(2) of the CUSMA Implementation Act sets out the general prohibition against an individual or entity bringing a claim against Canada for a breach of CUSMA. Subsection 8(3) provides an exception for investment dispute settlement under Annex 14-C in the limited circumstances set out therein.*").

461 See Annex 1.

462 John F. Walsh, David J. Ross, Danielle Morris, and Lauren Mandell, "Three Tips for Investors in Mexico's Energy Sector Regarding Potential USMCA Claims," March 18, 2021, <https://www.wilmerhale.com/en/insights/client-alerts/20210318-three-tips-for-investors-in-mexicos-energy-sector-regarding-potential-usmca-claims>, accessed on May 22, 2024 (emphasis supplied), **C-0092-ENG.**

463 See Wethington Opinion, ¶ 41. **CER-002**.

438. Further, Mr. Mandell also confirmed that Annex 14-C applies to measures taken during the transition period in a presentation that he delivered at the ANADE "*Seminario Trinacional – México-Estados Unidos-Canadá [Trinational Seminar – Mexico-United States-Canada]*" conference in April 2023. He participated in a panel titled "Protección de inversions en el T-MEC [Protection of Investments in the USMCA]," where he was listed as the chief U.S. negotiator for the investment chapter of T-MEC (USMCA) and special counsel at WilmerHale.[464]

439. During his presentation, Mr. Mandell explained as follows:

> *July 1st of 2023 is a very important date here. Until July 1st of 2023 there were these things called legacy claims. . . .* ***Until July 1 of 2023, the NAFTA rules can still apply effectively, and so for example, U.S. investors can continue to bring ISDS claims using NAFTA rules until July 1st of 2023,*** *provided the investors issued a Notice of Intent to bring a claim 90 days in advance, essentially before March 31st of 2023.*
>
> *. . .*
>
> *Things change after July 1st of 2023. NAFTA claims are no longer available for . . . U.S. investors in Mexico or Mexican investors elsewhere. . . . Most . . . U.S. investors in Mexico essentially lose meaningful access to ISDS. . . . In order for a US investor after July 1 of 2023 to go to ISDS against Mexico, they have to first litigate in Mexican domestic court for up to two and a half years. . . . [Y]ou are then limited in the types of claims that you can bring. You can effectively bring two types of claims [national/most-favored nation treatment, or direct expropriation]. . . . If you have an issue and you think your investment has been indirectly expropriated after July 1st of 2023, most U.S. investors cannot go to ISDS there. And also for the minimum standard of treatment, which is also a very important standard, it is off limits after July 1st of 2023 for investors. So, those are two major impediments for most investors, which leads me to conclude a lack of sort of meaningful access to ISDS.*[465]
>
> (Emphasis supplied.)

---

[464] ANADE, "1° Seminario Trinacional – México-Estados Unidos-Canadá," <https://anade.org.mx/quienes-somos/1er-seminario-trinacional-mexico-estados-unidos-canada/>, accessed on May 22, 2024, **C-0093-ENG**.

[465] Please refer toTC Energy Corporation and TransCanada Pipelines Limited v. United States of America, ICSID Case No. ARB/21/63, Claimant's Counter Memorial on Preliminary Objections dated August 11, 2023, footnote 252, **CL-0076-ENG**.

440. Mr. Mandell's statements are clear. The full suite of investment protections under NAFTA Chapter 11 is available under Annex 14-C for legacy investment claims for the entire duration of the three-year period provided in paragraph 3 of Annex 14-C.

XIII. FURTHER AND IN THE ALTERNATIVE, THE TRIBUNAL HAS JURISDICTION OVER THE CLAIMANT'S CLAIMS UNDER ANNEX 14-D USMCA

441. Further and in the alternative, should the Tribunal find that it has no jurisdiction under Annex 14-C USMCA or that it cannot apply the terms of Section A of Chapter 11 NAFTA in determining the Claimant's claims, the Claimant relies upon Annex 14-D USMCA as an alternative jurisdiction basis to claim breaches of Articles 14.4 and 14.8 USMCA by Mexico. As detailed in this Section, the Claimant has satisfied all jurisdictional requirements provided in Annex 14-D USMCA and the ICSID Convention. On this alternative basis, the Tribunal also has jurisdiction over the Claimant's claims under Annex 14-D USMCA.

A. Jurisdiction *Ratione Personae*: Claimant Is a "Claimant" for Purposes of Annex 14-D USMCA

442. On the Tribunal's jurisdiction *ratione personae*, Claimant clearly is a "claimant" for the purposes of Mexico's consent to arbitrate under Annex 14-D USMCA.

443. Articles 14.D.3 to 14.D.5 USMCA contain Mexico's consent to arbitrate under Annex 14-D. Specifically, Article 14.D.3(a) provides that a "claimant" may submit claims to arbitration either on its own behalf or on behalf of an enterprise of the respondent.

444. Article 14.D.1 USMCA defines "claimant" as "an investor of an Annex Party [Mexico & United States] that is party to a qualifying investment dispute" and further defines "qualifying investment dispute" as "an investment dispute between an investor of an Annex Party and the other Annex Party."

445. Article 14.1 USMCA defines "an investor of a Party" as, among other things, "*an enterprise of a Party that attempts to make, is making, or has made an investment in the territory of another Party*" and further defines "enterprise of a Party" as "*an enterprise constituted or organized under the law of a Party, or a branch located in the territory of a Party carrying out business activities there.*"

446. Again, the Claimant is an enterprise organized in and under the laws of the State of Michigan, United States,[466] with its registered office at 7575 Fulton Street East, Ada, Michigan 49355-0001. Without question, through its ownership of the shares in Nutrilite S.R.L., Claimant invested in Mexico[467] and is therefore an "investor" of the United States. Further, Claimant is an "investor" of the United States that is party to an investment dispute with Mexico, alleging on this alternative basis that Mexico breached Articles 14.4 and 14.8 USMCA. The Tribunal has jurisdiction *ratione personae* with respect to the Claimant's claims under Annex 14-D USMCA.

B. Jurisdiction *Ratione Materiae:* Claimant's Investment Is a "Covered Investment" for the Purpose of Annex 14-D USMCA

447. On the Tribunal's jurisdiction *ratione materiae*, the Claimant's investment as outlined in paragraph 352 above is a "covered investment" for the purpose of Annex 14-D USMCA. Namely, it acquired its ownership of the shares in Nutrilite S.R.L. on June 29, 2001 and has continued to hold such shares since then, through the date of entry into force of the USMCA, and to the present.

448. Article 14.1 USMCA defines "covered investment" as "with respect to a Party, an investment in its territory of an investor of another Party in existence as of the date of

---

466 Certification of the Filing of the Claimant's Articles of Organisation dated November 14, 2000, **C-0001-ENG**.

467 See *Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award dated April 30, 2004, paras. 83-85, **CL-0005-ENG**.

entry into force of this Agreement or established, acquired, or expanded thereafter." It further defines "investment" as:

> *[E]very asset that an investor owns or controls, directly or indirectly that has the characteristics of an investment including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. An investment may include:*
>
> *(a) an enterprise;*
>
> *(b) shares, stock and other forms of equity participation in an enterprise;*
>
> *…*
>
> *(h) other tangible or intangible, movable or immovable property, and related property rights, such as lies, mortgages, pledges and leases.*

449. All five aspects of the Claimant's investment as listed in paragraph 352 above fall within the definition of "investment" in Chapter 11 NAFTA:

(a) First, clearly, the Claimant's ownership of the shares in Nutrilite S.R.L., acquired on June 29, 2001 and as described in paragraph 352(a) above falls within the definition of "investment" in Article 14.1 USMCA, namely under subparagraphs (a) and (b).

(b) Second, the Claimant's indirect ownership of the 280-hectares *El Petacal* acquired in full on May 12, 1994 by Nutrilite S.R.L., as described in paragraph 352(b) above, falls within the definition of "investment" in Article 14.1 USMCA, namely under subparagraph (h).

(c) Lastly, Claimant's investment, through Nutrilite S.R.L., in establishing its "seed-to-supplement" operations on *El Petacal* (as described in paragraph 352(c)

above), in establishing the necessary infrastructure in the region for its operations and in creating and supporting the local economy, community and the families of its employees (as described in paragraph 352(d) above) falls within the definition of "investment" in Article 1139 NAFTA, namely under subparagraph (h).

450. Further, as described in paragraphs 79 to 141 of Mr Hunter's witness statement,[468] the Claimant's investment in *El Petacal* clearly involved the commitment of capital and other resources, with an expectation of profit and an assumption of risk.

451. Lastly, Claimant acquired its shares in Nutrilite S.R.L. before the entry into force of the USMCA on July 1, 2020 and equally, Nutrilite S.R.L., as detailed in Section XII.A.2 above, established the investment on the *El Petacal* before that date. Claimant continued to hold its shares in Nutrilite S.R.L. through July 1, 2020, and continues to do so to the present. Pursuant to the first limb of the definition in Article 14.1 USMCA, its investment that is the subject of this arbitration is therefore a "covered investment" for the purposes of Annex 14-D. The Tribunal has jurisdiction *ratione materiae* with respect to the Claimant's claims under Annex 14-D USMCA.

C. Jurisdiction *ratione temporis*: Claimant submitted its claims in time and was not required to seek recourse to domestic remedies at first instance

452. Regarding the Tribunal's jurisdiction *ratione temporis*, the Claimant demonstrably submitted its claims before the expiry of the four-year limitation period provided for in Article 14.D.5(1)(c) USMCA. Further, given the historic context of the Claimant's dispute with Mexico, recourse to domestic remedies was obviously futile and the requirements in Article 14.D.5(1)(a) and (b) therefore do not apply.

---

[468] Hunter Witness Statement (CWS-001) at ¶ 80-146 and Eppers Witness Statement (CWS-002) at ¶¶ 39-177.

453. Article 14.D.5(1)(a) to (c) of the USMCA reads as follows:

> *No claim shall be submitted to arbitration under this Annex unless:*
>
> *(a) the claimant (for claim brought under Article 14.D.3.1(a) (Submission of a Claim to Arbitration)) and the claimant or the enterprise (for claims brought under Article 14.D.3.1(b)) first initiated a proceeding before a competent court or administrative tribunal of the respondent with respect to measures alleged to constitute a breach referred to in Article 14.D.3;*
>
> *(b) the claimant or the enterprise obtained a final decision from a court of last resort of the respondent or 30 months have elapsed from the date the proceeding in subparagraph (a) was initiated;*[25]
>
> *(c) no more than four years have elapsed from the date on which the claimant first acquire, or should have first acquired, knowledge of the breach alleged under Article 14.D.3.1…*
>
> *[Footnote 25: The provisions in subparagraphs (a) and (b) do not apply to the extent recourse to domestic remedies was obviously futile].*

454. As described in paragraph 8(c) to (e) of its *Request for Arbitration*, recourse to further litigation in Mexican courts after the issuance of the SEDATU Notices of July 1 and July 7, 2022 obviously was futile.[469] In this connection, Dr. José Ramón Cossío and Lic. Raúl Mejía Garza issued a Report explaining that there is no precedent under the domestic law of Mexico where the taking of property in the manner communicated to the legal representatives of Nutrilite S.R.L. in the Notices dated July 1 and July 7, 2022

[469] Please see Report of former Mexican Supreme Court Justice Dr. José Ramon Cossío Díaz and Lic. Raúl M. Mejía Garza, **CER-003**, opining on the futility of resorting to domestic remedies.

was successfully challenged.[470] The Claimant therefore submits that footnote 25 to Article 14.D.5(1)(a) and (b) is triggered and it was not required to seek recourse to domestic remedies before submitting its claims under Annex 14-D USMCA.

455. As for Article 14.D.5(1)(c), the substantive basis of Claimant's claims are the SEDATU Notices of July 1, and July 7, 2022. Counting four years from that date, the four-year limitation period would expire on July 1, 2026. Claimant's submission of its claim on April 13, 2023 is well before that date. The Tribunal therefore has jurisdiction *ratione temporis* with respect to the Claimant's claims under Annex 14-D USMCA.

D. Jurisdiction *Ratione Voluntatis*: There Is Written Consent of the Parties in Dispute to Submit the Claimant's Claims to This Arbitration Under Annex 14-D USMCA

456. In addition to Article 14.D.5(1)(a) to (c), Claimant's claims also satisfy the requirements of Article 14.D.5(1)(d) and (e) USMCA and the Parties in dispute have agreed in writing to the submission of the Claimant's claims to ICSID under Annex 14-D USMCA. The Claimant further submits that it has satisfied all procedural requirements necessary for the Tribunal to have jurisdiction under Annex 14-D.

457. Article 14.D.5(1)(d) requires Claimant to "*[consent] in writing to arbitration in accordance with the procedures set out in this Agreement.*" The procedures referred to in this provision are those in Article 14.D.4 USMCA which provides that:

> *1. Each Annex Party consents to the submission of a claim to arbitration under this Annex in accordance with this Agreement.*
>
> *The consent under paragraph 1 and the submission of a claim to arbitration under this Annex shall be deemed to satisfy the requirements of:*

470 *Id.*

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;…

458. Article 25(1) of the ICSID Convention is applicable and it provides that:

The Jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State… and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

459. The requirements of Article 14.D.5(2) USMCA and Article 25(1) ICSID Convention have been met in full. There is a legal dispute in which the Claimant alleges on this alternative basis that Mexico is in breach of its obligations as set out Articles 14.4 and 14.8 USMCA. As shown in Section XIII.B above, that dispute is a dispute concerning the Claimant's investment in Mexico. Further, the current dispute is between Mexico (a Contracting State to the ICSID Convention) and the Claimant, which is an enterprise incorporated in the United States (also a Contracting State).[471] Lastly, pursuant to Article 14.D.5(2) USMCA, the Claimant accepted Mexico's offer to arbitrate as contained in Annex 14-C USMCA by submitting its *Request for Arbitration* on April 13, 2023, which together constitutes the disputing Parties' consent in writing to submit to ICSID.

460. Further, Article 14.D.5(e) requires the Claimant to have provided its written waiver with its *Request for Arbitration*, which it did in paragraph 8(b) of its *Request for Arbitration*.

[471] Website of ICSID, "About ICSID – Member States – United States of America," accessed on May 22, 2024, **C-0079-ENG**; and Website of ICSID, "About ICSID – Member States – Mexico," accessed on May 22, 2024, **C-0080-ENG.**

461. For the reasons stated above, the Tribunal has jurisdiction *ratione voluntatis* with respect to the Claimant's claims under Annex 14-D USMCA.

E. Procedural Provisions: Compliance With Article 14.d.3(2) USMCA Does Not Affect the Tribunal's Jurisdiction Under Annex 14-D and, in Any Case, the Claimant Has Satisfied Article 14.d.3(2) USMCA

462. The Claimant notes Mexico's objection with respect to the Notice of Intention in its letter of April 21, 2023.[472] Specifically, Mexico objects that Claimant's alternative claims of breach of Articles 14.4 and 14.8 USMCA are outside the scope of its Notice of Intention and pointed to the provisions of Article 14.D.3(2) USMCA not being fulfilled. Without prejudice to Claimant's right to respond to objections relating to this complaint in full later in the arbitration, Claimant submits that any omissions to comply with Article 14.D.3(2) USMCA would not affect the Tribunal's jurisdiction under Annex 14-D USMCA and, in any case, Claimant has complied with the provisions under Article 14.D.3(2) USMCA. The Claimant's claims under the alternative jurisdictional basis of Annex 14-D USMCA are admissible in this arbitration.

463. First, Claimant respectfully submits that the provision for a notice of intention to be submitted in Article 14.D.3(2) USMCA, like similar provisions in other BITs, particularly Article 1119 NAFTA, does not go to the Tribunal's jurisdiction under Annex 14-D. As many NAFTA tribunals have found, "*strict adherence to the letter of [the procedures set out in Articles 1116-1122] is not necessarily a precondition to arbitrability, but must be analyzed within the context of the objective of [the treaty] in establishing investment dispute arbitration in the first place.*"[473] Specifically, as recently observed by the

---

472 Letter from Mexico to ICSID dated April 21, 2023 with no. DGCJCI.511.68.283.2023, p.2, **C-0077-ENG**.

473 *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Decision on Motion Regarding Superfee dated August 7, 2000, ¶ 26, **CL-0064-ENG**.

tribunal in *B-Mex v. Mexico* following a consideration of the terms of Articles 1119 and 1122 NAFTA in their context and in light of the NAFTA's object and purpose pursuant to Article 31 VCLT, "*Article 1119 does not condition the Respondent's consent to arbitration in Article 1122 and that the Additional Claimants' failure to issue a notice of intent therefore does not deprive the Tribunal of jurisdiction over them.*"[474]

464. Claimant submits that the above findings with respect to Articles 1119 and 1122 NAFTA are equally applicable to Articles 14.D.3(2) and 14.D.4 USMCA and should be adopted by the Tribunal. Specifically, the observations made by the *B-Mex* tribunal with respect to Articles 1119 and 1122 NAFTA are equally applicable to Articles 14.D.3(2) and 14.D.4 USMCA.[475] Article 14.D.3(2) is not listed as one of the conditions and limitations on consent in Article 14.D.5 USMCA, nor is Mexico's consent to arbitration in Article 14.D.4 conditional upon the satisfaction of Article 14.D.3(2). Regardless of the status of compliance with Article 14.D.3(2) USMCA, the Tribunal has jurisdiction to consider the Claimant's claims under the alternative jurisdictional basis in Annex 14-D USMCA.

465. Second, in any case, the Claimant has complied with Article 14.D.3(2) USMCA by notifying the substance of its claims and the factual context of the Parties' dispute to Mexico via its Notice of Intention. The Claimant's Notice of Intention obviously satisfies

---

See also, *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction dated June 24, 1998, ¶¶ 79-85, **CL-0065-ENG**; *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by Canada dated February 24, 2000, ¶¶ 8-16, **CL-0066-ENG**; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award dated January 9, 2003, ¶¶ 127-139, **CL-0067-ENG**; *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, 2 August 2010, ¶¶ 100-104, **CL-0068-ENG**; and *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award dated July 19, 2019, ¶¶ 76-120, **CL-0069-ENG**.

474 *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award dated July 19, 2019, ¶ 79, **CL-0069-ENG**.

475 *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award dated July 19, 2019, paras. 80 to 120, **CL-0069-ENG**.

the timing requirement under Article 14.D.3(2) as it was issued well over 90 days before the Claimant submitted its Request for Arbitration. In terms of its content, the Claimant's Notice of Intention outlines the substance of its claims and the factual context of the Parties' dispute with sufficient detail for the Parties to fulfil their obligations to seek to resolve their dispute through consultation and negotiation under Article 14.D.2 USMCA. In this context, any procedural defects to be alleged by Mexico concerning the Claimant's compliance with Article 14.D.3(2) USMCA would have been in any case sufficiently remedied by the Claimant through the submission of its *Request for Arbitration*. There could not be any prejudice occasioned on the Respondent from any purported defects of the Claimant's Notice of Intention.

466. The Tribunal has jurisdiction to consider the Claimant's claims under the alternative jurisdictional basis in Annex 14-D USMCA.

XIV. MEXICO'S BREACH OF ARTICLE 1110 (NAFTA) 1994 – EXPROPRIATION AND COMPENSATION

A. Mexico's Obligations With Respect to Takings of Investments and Property

467. NAFTA (1994) Article 1110 in pertinent part reads:

> *1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation'), except:*
>
> *(a) for a public purpose;*
>
> *(b) on a non-discriminatory basis;*
>
> *(c) in accordance with due process of law and Article 1105(1)*[476]*; and*

[476] Article 1105: Minimum Standard of Treatment, in relevant part states:

1. 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.

(d) on payment of compensation in accordance with paragraphs 2 through 6.[477]

468. The USMCA counterpart provisions contained in Arts. 14.8.1-14.8.4 are substantively indistinguishable as to the elements of expropriation and compensation.[478] Notably,

---

[477] Article 1110, paragraphs 2 through 6 provides:

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('date of expropriation'), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

6. On payment, compensation shall be freely transferable as provided in Article 1109.

[478] Articles 14.8.1-14.8.4 USMCA states:

> *1. No Party shall expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation), except:*
>
> *(a) for a public purpose;*
>
> *(b) in a non-discriminatory manner;*
>
> *(c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2, 3, and 4; and*
>
> *(d) in accordance with due process of law.*
>
> *2. Compensation shall:*
>
> *(a) be paid without delay;*
>
> *(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation);*
>
> *(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and*
>
> *(d) be fully realizable and freely transferable.*
>
> *3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest*

Annex 14-B(1) USMCA provides that "*[a]n action or a series of actions by a party cannot constitute an expropriation unless it interferes with an tangible or intangible property right or property interest in an investment*." Moreover, Annex 14-B(2) provides that "*Article 14.8.1 USMCA (Expropriation and Compensation) provides that "Article 14.8.1 addresses two situations. The first is direct expropriation in which an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure*." (Emphasis supplied.)

469. NAFTA (1994) in Art. 1131 (Governing Law) provides that "[a] tribunal established under this Section shall decide the issue in dispute in accordance with this Agreement and applicable rules of international law."[479]

470. Customary international law has long recognized the principle that "*the property of aliens cannot normally be taken, whether for public purposes or not, without adequate compensation.*"[480]

---

at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date; plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

[479] The USMCA counterpart also explicitly references "applicable rules on international law," as part of the substantive law to be applied to issues in dispute in accordance with the USMCA:

1. Subject to paragraph 2, when a claim is submitted under Article 14.D.3.1 (Submission of a Claim to Arbitration), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

[480] Geroge C. Christie, *What Constitutes a Taking of Property Under International Law?* British Y. B. Intl 307 (1962), **CL-0094-ENG**.

471. The United Nations Conference on Trade and Development noted that *"[u]nder customary international law and typical international agreements, three principal requirements need to be satisfied before a taking can be considered lawful: it should be for a public purpose; it should not be discriminatory; and compensation should be paid."* [481] The World Bank has affirmed this approach in the context of foreign investments in its Guidelines on the Treatment of Foreign Direct Investment (the "World Bank Guidelines"):

> *A State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation.*[482]

472. Under customary international law, the scope of protected investments, as in the NAFTA (1994),[483] is defined in very broad terms. The Iran-U.S. Claims Tribunal

---

481 UNCTAD International Investment Agreements: Key Issues 235 (2004), **CL-0095-ENG**.

482 World Guidelines on the Treatment of Foreign Direct Investment (1992), **CL-0096-ENG**. Although the World Bank Guidelines were initially conceived as a possible multi-lateral agreement on investment, they were instead adopted as guidelines by the World Bank's Development Committee for its member institutions.

483 Article 1139

Investment *means:*

(a) an enterprise;

(b) an equity security of an enterprise;

(c) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the debt security is at lease three years

(iii) but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or

repeatedly has expressed the customary view that property rights "*should encompass both tangible and intangible rights.*"[484]

(ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

(iii) but investment does not mean,

(i) claims to money that arise solely from

(i) commercial contracts for the sale of goods or service by national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit in connection with a commercial transaction, such as a trade financing, or other loan covered by subparagraph (d); or

(j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h).

(Emphasis supplied.)

[484] Michael G. Parisi, *Moving Towards Transparency? An Examination of Regulatory Takings in International Law*, 19 EMORY INT'L. REV. 386 (2005), **CL-0097-ENG**.

473. The definition of property at customary international law has thus been held to include "*any right which can be the object of a commercial transaction, i.e., freely sold and bought, and thus has a monetary value*."[485]

474. As this Tribunal well understands, two general categories of expropriation have been widely recognized in international law. Direct expropriations, which have become increasingly rare (but particularly relevant to the proceeding before this Arbitral Tribunal), "*occur when a State deliberately affects the legal title of property, effectively seizing it in an outright manner.*" [486] (Emphasis supplied.) The United Nations Conference on Trade and Development (UNCTAD) similarly has defined direct expropriation as the "*mandatory legal transfer of the title of the property or its outright physical seizure.*"[487] (Emphasis supplied.)

475. Indeed, by way of example, paragraph 2 of Annex 14-B of the USMCA addresses direct expropriation, stating that it can be carried out through "*formal transfer of title" or "outright seizure.*"

476. UNCTAD, in its Study on the Taking of Property, noted that *"[i]t is not the physical invasion of property that characterizes nationalizations or expropriations that has assumed importance, but the erosion of rights associated with ownership by State interferences.*"[488]

---

485 *See id., citing Amoco Intl 1 Fin. Corp. v. the Islamic Republic of Iran*, 15 Iran-US CL. Trib. Rep. 189 (1987), **CL-0132-ENG**.

486 *See Christie* (**CL-0094-ENG**) at 307. *OOO Manolium-Proceesing v. the Republic of Belarius*, PCA Case No. 2018-06, Final Award, June 22, 2021 at ¶ 421, **CL-0098-ENG** ("*such direct expropriations have, however, become less frequent, while the number of so-called 'indirect expropriations' has increased*").

487 UNCTAD, Expropriation: The sequel 67 (2011), **CL-0099-ENG.**

488 UNCTAD Series on Issues in International Investment Agreements, Taking of Property 20 (2000), **CL-0100-ENG**.

B. The United Mexican States Transferred Title to the 280 Hectares Comprising El Petacal and Conveyed Such Title to the Communal Landowners of San Isidro

477. The Tribunal in *Glamis Gold*[489] provides helpful language on direct expropriation in the context of NAFTA (1994) Art. 1110(1):

> *354. The inclusion in Article 1110 of the term 'expropriation' incorporates by reference the customary international law regarding that subject. Under custom, a State is responsible, and therefore must provide compensation, for an expropriation of property when it subjects the property of another State Party's investor to an action that is confiscatory or that 'unreasonably interferes with, or unduly delays, effective enjoyment' of the property. [citation omitted.] …*
>
> *355. A direct expropriation is readily apparent: there is an 'open, deliberate and acknowledged taking…of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State….'*[490]
>
> (Emphasis supplied.)

478. Arbitral tribunals have been of a single voice in finding that a transfer of title from the investor to the host-State or to a third party at the behest of the host-State constitutes a direct expropriation. This principle is both universal and unqualified.[491] The authority

---

489 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, (Award), June 8, 2009 (David D. Caron, Michael J. Young, and Kenneth D. Hubbard), ¶¶ 354-355, **CL-0101-ENG.**

490 *Citing to Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1*, (Award), August 30, 2000, ¶ 103, **CL-0102-ENG** (Benjamin Civiletti, José Luis Siqueiros, Elihu Lauterpacht) ("*thus, expropriation under NAFTA includes not only open, deliberate, and acknowledged taking of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of the property even if not necessarily to the obvious benefit of the host State*").

491 *See, e.g., S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, (First Partial Award) on the Merits, 8 ICSID Rep. 4, IC, November 13, 2000, **CL-0103-ENG** (defining expropriation as a "*'taking' by a governmental-type authority of a person's 'property' with a view to transferring ownership of that property to another person, usually the authority that exercised its de jure or de facto power to do the 'taking'*."); *TÉCNICAS MEDIOAMBIENTALES Tech Med S.A. v. the United Mexican States*, ICSID Case No. ARB(AF)/00/2, (Award), May 29, 2003, at ¶ 113, **CL-0104-ENG** (Horacio Grigera Naón, Prof. José Carlos Fernández Rosas, Carlos Bernal Verea) (in the context of a discussion on indirect expropriation, the tribunal distinguishes between direct expropriation and indirect expropriation acknowledging that "*formally an expropriation means a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to the effect, the term also covers a number of*

situations defined as de facto expropriations, where such actions or laws transfer assets to third parties different from the expropriating State or where such laws or actions deprive persons of their ownership over such assets, without allocating such assets to third parties or to the government.") *Enron Corporation Ponderosa Assets, LP v. Argentine Republic*, ICSID Case No. ARB/014/3, (Award), May 22, 2007, ¶ 243, **CL-0105-ENG** (in a case where the tribunal identified a colorable argument "*that economic benefits might have been transferred to an extent from industry to consumer or from industry to another industrial sector, but this does not amount to affecting a legal element of the property held, such as the title to property.*" The tribunal additionally observed that it "does not believe there can be a direct form of expropriation if at least some essential component of property rights has not been transferred to a different beneficiary…"); *Waguih Elie George Siag and Clorinda Vecchei v. the Arab Republic of Egypt*, ICSID Case No. ARB/05/15, (Award), June 1, 2009, at ¶ 427, **CL-0106-ENG** (David A.R. Williams, Q.C., Prof. Michael Pryles, Prof. Francisco Orrego Vicuña) (observing that "[d]irect expropriation occurs when the title of the owner is affected by the measure in question. In the present case, Egypt, commencing with Resolution No. 83, formally transferred ownership of the land in Taba from Siag Touristic (enhance the claimants) to the Government"); *El Paso Energy International Company v. the Argentine Republic*, ICISID Case No. ARB/03/15, (Award), October 31, 2011, at ¶ 265, **CL-0107-ENG** (Pro. Lucius Caflisch, Prof. Piero Bernardini, Prof. Brigitte Stern) (stating that "[i]n direct expropriation, there is a formal transfer of title of ownership from the foreign investor to the State engaged in the expropriation or to a national company of that State …"); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, (Award), December 7, 2011, at ¶ 327, **CL-0108-ENG** (Andrea Giardina, Michael Reisman, Bernard Hanotiau) (stating that "*[e]xpropriation can be direct, that is, resulting from a deliberate formal act of taking, or indirect. Indirect expropriation may occur when measures 'result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor'.*" [citations omitted.]); *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB 13/13, (Award), September 27, 2017, at ¶ 822, **CL-0109-ENG** (Dr. Laurent Lévy, Prof. Laurent Aynès, Dr. Jacques Salès) (noting nothing that "*[w]hile a direct expropriation involves the transfer of the title to the property or its outright physical seizure, usually to the benefit of the State itself or a State-mandated third party, an indirect expropriation is characterized by the total or near-total deprivation of an investment, but without the formal transfer of the title or outright seizure.*"); *Stabil LLC (Ukraine) v. the Russian Federation*, PCA Case No. 2015-35, (Final Award), April 12, 2019, at ¶ 229, **CL-0110-ENG** (Prof. Gabrielle Kaufmann-Kohler, Mr. Daniel M. Price, Prof. Brigitte Stern) (finding that a direct expropriation ensued when the Russia Federation seized claimants' petrol station and storage facility, as well as claimants' headquarters. The award notes that "*[t]his expropriation was subsequently formalized through the 3 September 2014 amendment to Nationalization Decree and the Sevastopol Order, the terms of which are clear and leave no doubt that the Republic of Crimea and the Sevastopol government expropriated the claimants' property.*"); *Ioannis Kardassopoulos and Ron Fuchs v. the Republic of Georgia*, ICSID Case No. ARB/05/18 and ARB/07/15, (Award), March 3, 2020, at ¶ 387, **CL-0111-ENG** (Mr. L. Yves Fortier, C. C., O.Q., Q.C., Prof. Francisco Orrego Vincuña, and Vaughan Lowe, Q.C.) (finding that "a classic case of direct expropriation" is present where the decree there at issue "*deprived [entity] of its rights in the early oil pipeline and [claimant's] interest therein.*"); *Lone Pine Resource, Inc. v. the Government of Canada*, UNCITRAL, (Final Award), November 21, 2022, at ¶ 496, **CL-0112-ENG** (Prof. Dr. Albert Jan van den Berg, David R. Haigh, Prof. Brigitte Stern) (after citing to the *Metalclad* Tribunal for the proposition that a direct expropriation constitutes "*'open, deliberate and acknowledge takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host-State …*'"); and *Michael Anthony Lee Chin v. the Dominican Republic*, ICSID Case No. UNCT/18/3, (Final Award), October 6, 2023, at ¶ 343, **CL-0113-ENG** (Prof. Diego P. Fernández-Arroyo, Mr. Christian Leathley, and Prof. Marcelo Cohen) (noting "*that if no formal transfer of property has taken place, there cannot be a direct expropriation.*").

addressing direct expropriation makes clear the formal transfer of title constitutes a demonstrable divestiture of the most fundamental property rights.

479. This divestiture of the most salient interest in property, i.e., title, is the most overt and material form of the taking of property giving rise to an expropriation. The authority cited as stands to reason, contrasts the formal and explicit taking of ownership interest by dint of a formal transfer of title, with physical operational interference in a scenario where title has not been legally and explicitly taken, which constitutes the basic elements of an indirect taking.[492]

480. The taking in this cause constitutes a paradigmatic direct expropriation. Formal legal title to the 280 hectares comprising *El Petacal* was (i) taken[493] by SEDATU[494], an instrumentality of Mexico's Federal government, and (ii) transferred to the communal landowners of San Isidro.

481. As previously referenced in Section X.A., *supra*, the July 1 and July 7, 2022 Notices of taking were public acts that SEDATU initiated ostensibly to provide to Nutrilite S.R.L. notice that complementary execution of the 1939 Presidential Resolution was then (July 5, 2022) being executed.[495] Moreover, this process was cloaked with the thin varnish of formal notice[496]

482. Indeed, the July 7, 2022 Notice suggested that its purpose was to cure a deficit concerning execution of the 1939 Presidential Resolution. In its very first paragraph,

---

492 *Id.*

493 See Section X(A) and X(B) above. Hunter Witness Statement (**CWS-001**) at ¶¶ 215-223; and Eppers Witness Statement (**CWS-002**) at ¶¶ 178-186; See July 1, 2022 Notice (**C-0081-SPA)** and July 7, 2022 Notice (**C-0074-SPA)**.

494 The full name of SEDATU is *Secretaría de Desarrollo Agrario, Territorial y Urbano*.

495 *Supra* ¶¶ 305-318.

496 *Id.*

the Notice states that C. Miguel de Jesús Manzur Pérez had been commissioned "*to cure omissions and deficiencies that were identified in the execution ordered and integrated from the respective matters, ordered during the Act DGOPR. De. 4947.2022 dated April 26, 2022 signed by the Titular de la Dirección General de Ordenamiento de la Propiedad Rural, concerning the August 23, 1939 Presidential Resolution.*"[497] In so doing, the July 7, 2022 further provided that the 1939 Presidential Resolution only was partially and not fully discharged because 280 hectares remained pending for execution.[498]

483. The *Acta de Posesión y Deslinde*[499] in no uncertain terms provides that on July 14, 2022 the entire 280 hectares comprising *El Petacal* was legally taken.[500] It in part states that legal transfer is made of the 280 hectares, further qualifying that this conveyance is not physical nor material because of provisions in Mexico's domestic agrarian law proscribing physical taking and material takings until such time as the harvest has ripened and crops are picked.[501]

---

497 **C-0074-SPA**.

498 *See supra* note 340 (Notice dated July 7, 2022, **C-0074-SPA**) *citing to* the Spanish language original, which is here set forth for the Tribunals convenience:

> *Para subsanar las omisiones y deficiencias que fueron detectadas en la ejecución ordena e integración del expediente respectivos, ordenados mediante oficio DGOPR.DE. 4947. 2022, del 26 de abril del 2022, suscrito por la Titular de la Dirección General de Ordenamiento de la Propiedad Rural, en referencia a la Resolución Presidencial de 23 de agosto de 1939, publicada en el Diario Oficial de la Federación el 18 de noviembre del mismo año, en la cual de beneficio al poblado San Isidro, municipio de San Gabriel, Jalisco, misma que se encuentra ejecutada parcialmente, quedando pendiente de entregar 280-00-00 hectáreas.*

499 *See supra* ¶ 324.

500 *Supra* ¶ 320.

501 The specific language cited is highlighted in bold. The document titled *Acta de Posesión y Deslinde* (**C-0050-SPA**) in relevant part states:

> *En este acto, el Mtro Jonathan Hernández Chávez, comisionado técnico de la oficina de representación en Jalisco del Registro Agrario Nacional, en coordinación con el Ing. Gabriel González Bautista comisionado de la Oficina de Representación en Jalisco de la*

484. The *Acta de Posesión y Deslinde* also is explicitly pristine in stating that the communal landowners accepted the tender; "*haciendo formal la entrega al Comisariado ejidal del ejido San Isidro, Municipio de San Gabriel, Jalisco**, quien recibe de conformidad***…." (Emphasis supplied.)

485. The *Acta de Posesión y Deslinde* further informs the communal landowners that physical and material possession of the entire 280 hectares will be forthcoming once the harvest is over in accordance with domestic agrarian law.[502]

486. It cannot be rationally disputed that, based on the *Acta de Posesión y Deslinde* (a document authored by SEDATU, Mexico's Federal government) legal title to the 160 hectares comprising *Puertas Tres* and *Cuatro* of *El Petacal* was transferred to the communal landowners of San Isidro, Municipality of San Gabriel, by SEDATU

> *Secretaría de Desarrollo Agrario Territorial y Urbano [SEDATU], hacen el conocimiento a los ejidatarios presentes que la presente acta de posesión y deslinde,* ***se hace la entrega jurídica de las 280-00-00.00 hectáreas con las previsiones legales en aquellos terrenos que se encuentran sembrados y en que en su momento se describirán*** *y que son las que se acaban de recorrer y señalar, con todos sus usos, accesiones, costumbres y servidumbres, tal y como lo señala la Resolución Presidencial de fecha 23 veintitrés de agosto de 1939 mil novecientos treinta y nueve, haciendo formal la entrega al Comisariado Ejidal del ejido San Isidro, Municipio de San Gabriel, Jalisco, quien recibe de conformidad;*
>
> (Emphasis supplied.)

502 *Id*. The Spanish language original in pertinent part states:

> *…de igual manera se le informa a los ejidatarios presentes que, en cuanto la posesión física y/o material del área sembrada [160 hectares comprising Puertas Tres and Cuatro] o actualmente en cultivo; con fundamento en el artículo 302 de la Ley Federal de Reforma Agraria derogada pero aplicable al presente caso en concreto, de conformidad a lo estipulado por el numeral tercero transitorio de la Ley Agraria vigente, así como del ACUERDO por el que se emite el instructivo para realización de Trabajaos Técnicos y diligencias para la ejecución de Resoluciones Presidenciales de acciones agrarias e integración de expedientes en cumplimiento de ejecutorias del Poder Judicial de la Federación y/o Acuerdos de los tribunales agrarios publicado en el Diario Oficial de la Federación el 14 de julio de 2004 dos mil cuatro; y demás relativos, …*

purportedly in furtherance of the 1939 Presidential Resolution.[503] Applicable statutory agrarian law on the subject thus proscribed the immediate physical and material conveyance of such property.[504]

487. As previously and fleetingly stated in Section X.C., it also cannot be reasonably challenged that while the entirety (100%) of the 280 hectares constituting *El Petacal* has been *legally transferred* to the communal landowners of San Isidro, the 120 hectares comprising *Puertas Uno* and *Dos* of *El Petacal*, approximately 43% of the entire surface area, has been *physically* and *materially* conveyed as well.[505]

488. In addition to the *Acta de Posesión y Deslinde*, the July 1, 2022 Notice[506] is sufficient evidence, without more, to warrant a finding that the 120 hectares constituting *Puertas Uno* and *Dos* of *El Petacal* were the subject matter of a direct expropriation.

489. The July 1, 2022 Notice observed that "121-00-00 hectares" were not harvesting crops, and instead appeared covered with canvases and nets.[507] Hence, according to this Notice, transfer of physical possession of these "121-00-00 hectares" pursuant to the 1939 Presidential Resolution ensued within twenty-four (24) hours as of July 4, 2022. Based upon this Notice, the 120 hectares comprising *Puertas Uno* and *Dos* of *El*

---

503 *Id.*

504 *Id.*

505 *Supra* note 347 (Document titled *Acta de Posesión y Deslinde* **C-0050-SPA**). To facilitate reference, the Spanish language original reads:

> *En ese mismo orden de ideas no habiendo impedimento legal alguno que* ***imposibilite la entrega física, jurídica y material*** *e 120-00-00.00 hectáreas aproximadamente, en este momento* ***se hace la entrega*** *en los términos de mérito, así como* ***su posesión de manera inmediata****, identificadas plenamente sin cultivo alguno.*
>
> (Emphasis supplied.)

506 *Supra* (**C-0081-SPA**).

507 *Supra,* ¶ 308.

Petacal were legally, physically, and materially taken from Nutrilite S.R.L. and ABG, and transferred to the communal landowners of San Isidro on July 5, 2022, nine (9) days earlier than as stated in the *Acta de Posesión y Deslinde*.[508]

C. The Direct Expropriation of *El Petacal* on July 14, 2022 Is Unlawful

490. A sovereign State has a right to take the tangible or intangible property of nationals and non-nationals. It can do so pursuant to any of its vested powers. Indeed, a State has an existential obligation to exercise its regulatory, administrative, legislative, judicial, and executive sovereignty. With considerable regularity the exercise of such sovereignty compels the taking of property.[509]

491. In doing so, however, for the taking to be lawful pursuant to conventional and customary public international law, the seizure (i) must have been for a public purpose, (ii) on a non-discriminatory basis, (iii) in accordance with due process of law, and (iv) accompanied by compensation, as previously noted above.[510]

1. The Taking of *El Petacal* Was Not For a Public Purpose Because It Was Based On a Discharged Presidential Resolution

492. A finding that the 280 hectares constituting *El Petacal* were the subject matter of a direct expropriation amply comports with cases holding as much based upon a formal transfer of title from the investor to the host-State, or to a third party at the behest of the host-State. The analysis in *JSC Tashkent Mechanical Plant JSCB ASAKA v.*

---

508 The seemingly innocuous nature of this nine (9) day difference actually bespeaks the lack of due process and arbitrariness that pervades this unlawful taking. It is an emblematic fact rather than an immaterial scrivener's error. The *Acta de Posesión y Deslinde* (**C-0050-SPA**) is dated July 14, 2022 and states that it was on that date title, physical, and material ownership and possession was (i) conveyed to, and (ii) received by the communal landowners of San Isidro.

509 UNCTAD Series on Issues of International Investment Agreements (ii), Expropriation, United Nations 2012, **CL-0114-ENG**.

510 *Id. See also supra* ¶¶ 467-468.

Kyrgyz Republic[511] is particularly illustrative because central to the Tribunal's reasoning is that the April 2016 taking of property in that case was based on a December 16, 1992 Supreme Counsel of the Republic of Kyrgyzstan (Resolution No. 1080). Significantly, that Resolution No. 1080 had not been enforced for approximately twenty-four (24) years since its issuance on December 16, 1993 until the referenced taking in April of 2016.[512]

493. The case concerns a dispute arising from the Agreement Between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic on the Mutual Promotion and Protection of Investments, dated December 24, 1996 (the "Uzbekistan/ Kyrgyz BIT"). Following the dissolution of the Soviet Union in 1991, the newly-independent Kyrgyz Republic entered into multi-lateral and bi-lateral agreements pursuant to which it expressly agreed to recognize and to protect the ownership rights and interests of Uzbek entities in four vacation Resorts on Lake Issyk-Kul located in the Kyrgyz Republic.[513] The claimants averred that following the dissolution of the Soviet Union in 1991 the rights of the Uzbek entities that had constructed, developed, and operated the four Resorts on Lake Issyk-Kul on land plots provided to them by then Kyrgyz SSR were "*specifically preserved through a series of multilateral and bilateral agreements concluded between the Kyrgyz Republic and the Republic of Uzbekistan.*"[514]

494. The respondent host-State asserted that upon dissolution of the Soviet Union and the transition of the country from being a Soviet satellite republic to an independent

511 *JSC Tashkent*, ICSID Case No. Arb(AF)/16/14, (Award) dated May 17, 2023 (Bernardo M. Cremades, Gary Born, Zachary Douglas KC), **CL-0115-ENG**.

512 *Id.*, ¶¶ 553-554.

513 *Id.*, ¶ 97.

514 *Id.*, ¶ 101.

sovereign State, a legislative rubric was enacted requiring owners of land granted during the Soviet era to perfect their ownership interests in such properties, in part, by re-registering and bringing their ownership rights over land in conformity with the newly-enacted legislation. The Kyrgyz Republic asserted that because the Uzbek claimants "*'had not undertaken any actions towards proper re-registration of its rights over the … land plot within the prescribed five-year period or at all*,' *and that*, '*in any event, the right of permanent use … had become invalid under the provision of the 1999 Land Code*' *and expired on 1 January 2000 at the latest.*"[515]

495. The Kyrgyz Republic further asserted that "*'any right that the claimant…had had over the facilities of the… Resort … expired simultaneously with its right of use of the relevant land plot,' and that the State register extract allegedly showed that, 'the land and buildings comprising the… Resort have always been in State property'.*"[516]

496. It is significant that the Uzbek claimants underscored to the Tribunal that claimants had "*operated and maintained [the] Resort … from the 1960s until Respondent's unlawful nationalization in April 2016*." Claimants also asserted that they "*upgraded and expanded the Resort with new guest accommodations, including more than thirty cottages, and developed new facilities and amenities.*"[517]

497. Finally, claimants alleged the Resort suffered considerable material losses as a direct and explicit consequence of political unrest during an approximately ten (10)-year period of time between 2000 and 2010. [518] Yet claimants added that

515 *Id.*, ¶ 163.

516 *Id.*

517 *Id.*, ¶ 192.

518 *Id.*, ¶ 193-195.

"[n]othwithstanding the challenges created by the Respondent [political unrest], … the Resort…was profitable from 2006 to 2009, as well as from 2013 to 2015."[519]

498. Claimants asserted that in the context of political tensions between the two Contracting States, Kyrgyz Republic and the Republic of Uzbekistan, over access to water in the Orto-Tokoi reservoir, the Kyrgyz Republic issued the 2016 Order directing the Kyrgyz Fund for the Management of State Property to take over the Resort and attendant recreational facilities. Claimants maintained these actions were taken "*without any justification, due process, evidence of the public interest, direct notice or compensation.*"[520]

499. Significantly, the host-State relied "upon Resolution No. 1080 dated 16 December 1992, which ordered the State Property Fund to '[t]ake … the Kyrgyz Republic ownership of…the Resorts and recreational facilities located within the territory of the Republic and used by the legal entities of other CIS countries'." [521] Claimants challenged the normative standing and basic legality of Resolution No. 1080 because it "was never implemented and lost legal force in accordance with its own terms."[522]

500. The Tribunal framed the question before it as having *"[a]t issue…whether following the dissolution of the Soviet Union, the Uzbek claimants preserved their rights in the Resorts through a series of multilateral and bilateral agreements between the Kyrgyz Republic and the Republic of Uzbekistan; namely, the 1992 Agreement, the 1994 protocol, and the 1995 protocol.*"[523] Assuming the Tribunal found such agreements to

519 *Id.*, ¶ 195.

520 *Id.*, ¶ 250.

521 *Id.*, ¶ 267.

522 *Id.* at 95.

523 *Id.*, ¶ 509.

be binding, then the singular issue remaining before it was the validity of the April 2016 Order depriving claimants of their ownership interests in the four properties at issue.

501. After engaging in sustained analysis of these agreements, the Tribunal observed that essential terms were present and that the agreements, specifically the 1992 Agreement was more than just a mere *pactum de contrahendo*. Rather "*it was a valid and binding international agreement that imposed, at least in Article 4, binding obligations.*" It further held that the Agreement's ordinary language simply did not state that it was "*an agreement to agree*."[524]

502. In this regard it reasoned that *"[t]he fact that further implementation might have been envisioned or would have been desirable does not affect the status of the 1992 Agreement itself; a treaty can have immediate, direct effects even if further steps are also intended (and taken).*" [525] It concluded that respondent's argument that reservations in the 1992 Agreement provide it with the right to seize the property simply was invalid under Art. 19(c) of the VCLT, providing that "[a] State may, when signing, ratifying, and accepting, proving, or acceding to a treaty, formulate a reservation list … the reservation is incompatible with the object and purpose of the treaty." Consequently, the Tribunal held that "following the dissolution of the Soviet Union, the Uzbek entities preserved their property rights in the Resorts through the 1992 Agreement."[526]

503. As to the legal sufficiency of the April 2016 Expropriation Order, the Tribunal held that the 2016 Order rested on Resolution No. 1080 of the Supreme Council of the Republic of Kyrgyzstan "*on transfer of ownership of the Kyrgyz Republic of facilities of resort*

524 *Id.*, ¶ 512.

525 *Id.*, ¶ 513.

526 *Id.*, ¶ 519.

and recreational sector used by the legal entities of other CIS States" dated December 16, 1992.[527] Resolution No. 1080 dated December 16, 1992, in part, states:

> *The Supreme Soviet of the Kyrgyz Republic hereby deliberates to:*
>
> *1. Take, within 10 January 1993, the Kyrgyz Republic, ownership of the resorts and recreational facilities located within the territory of the Republic and used by the legal entities of other CIS countries.*[528]

504. Critical to the analysis was that the Tribunal observed that "*Resolution No. 1080 remained unenforced for almost twenty-four years with regard to the Resorts. Since the express deadline for the execution of Resolution No. 1080 was set at 10 January 1993, the Tribunal considers that the Resolution ceased to operate and became unenforceable*."[529] It further added that "[d]ue to the doubtful validity of Resolution No. 1080 as a result of the exclusive period during which it was unenforced, the Tribunal finds that Resolution No. 1080 did not provide proper grounds for the 2016 Order."[530]

505. Here, in the case before this Tribunal, the July 1 and 7, 2022 Notices were based on the 1939 Presidential Resolution that President Lázaro Cárdenas issued. The government of Mexico through its instrumentality SEDATU for eighty-three (83) years did not seek to enforce this Presidential Resolution with respect to title to *El Petacal*. It sought to do so eighty-three (83) years after its official publication in the *Diario Oficial*[531] *(SECCION PRIMERA) Órgano del Gobierno Constitucional de Los Estados Unidos Mexicanos, Núm. 16*, on November 18, 1939, and fifteen (15) Administrations earlier.[532] Moreover, it did so in contravention of (i) two agreements to which the

---

527 *Id.*, ¶ 551.

528 *Id.*, ¶ 552.

529 *Id.*, ¶ 553.

530 *Id.*, ¶ 554.

531 *Supra* (**C-0019-SPA**).

532 Set forth below are the relevant Administrations:

Federal government of Mexico was a party;[533] (ii) two agrarian releases to which Mexico's Federal government was a party,[534] (iii) issuance of an Administrative Order

Lázaro Cárdenas (1934-40)	José López Portillo (1976–82)
Manuel Ávila Camacho (1940–46)	Miguel de la Madrid (1982–88)
Miguel Alemán (1946–52)	Carlos Salinas de Gortari (1988–94)
Adolfo Ruíz Cortines (1952–58)	Ernesto Zedillo (1994–2000)
Adolfo López Mateos (1958–64)	Vicente Fox (2000–06)
Gustavo Díaz Ordaz (1964–70)	Felipe Calderón (2006–12)
Luis Echeverría Álvarez (1970–76)	Enrique Peña Nieto (2012–18)
Andrés Manuel López Obrador (2018–)	

533 The *Guadalajara Agreement* dated February 15, 1994 executed by *Lic. Alejandro Díaz Guzmán* (*Federal Delegate of the Secretary of the Agrarian Reform*), Arturo Gil Elizondo (*Secretary of Rural Development-State of Jalisco*), Gustavo Martínez Guitón (*Secretary of Economic Promotion-State of Jalisco*), Humberto Anaya Serrano (*Rural Development-State of Jalisco*), Rafael Hidalgo Reyes (*Sub-General Manager Electricity District-State of Jalisco*), Adriana de Aguinaga (*Legal Counsel for Nutrilite S.R.L. [Goodrich Riquelme y Asociados]*), Enrique Romero Amaya (*Counsel for Nutrilite S.R.L.*), Roberto Vargas Maciel (*Exportag, S.A. de C.V. on behalf of NPI and Nutrilite S.R.L.*), Abelardo Reyes Vargas (*Exportag, S.A. de C.V. on behalf of NPI and Nutrilite S.R.L.*), Sergio Vargas Maciel (*Exportag, S.A. de C.V. on behalf of NPI and Nutrilite S.R.L.*), and Mr. David T. Tuttle (*NPI and Nutrilite S.R.L.*) (**C-0021-SPA**); and The *Coordination Agreement* (*Acuerdo de Concertación*), dated September 25, 1993 executed by (i) Sr. Raúl Peña Herz (*Secretary of the Agrarian Reform*), (ii) Arturo Gil Elizondo (*Secretary of Rural Development*), (iii) Dip. Gerardo Avalos Lemus (Representative of the organization, *La Unión Campesina Democrático y Apoderado Legal del Ejido San Isidro,* and legal representative of the communal landowners of San Isidro), (iv) Sr. Mario Rosales Laureano (*Secretary of the "Comisariado Ejidal"*), (v) José Araiza (*Suplente del Comisariado Ejidal*), (vi) Sr. Alejo Enciso Estrada (*Representante del Grupo de Campesinos de El Petacal*), (vii) Sergio Vargas Maciel (Exportag, S.A. de C.V. on behalf of Nutrilite S.R.L.), and (viii) José Roberto Vargas Maciel (Exportag, S.A. de C.V. on behalf of Nutrilite S.R.L.) (**C-0020-SPA**).

534 The first Agrarian Release (*Convenio*: *Finiquito Agrario*) entered into between the *Secretary of Agrarian Reform*, represented by Lic. Raúl Pineda Pineda (*Oficial Mayor*), and Lic. Ignacio Ramos Espinoza (*Director General de Asuntos Jurídicos*), the proprietors of the property known as *Potrero Grande* or *Paso de Cedros*, Mrs. Esperanza Nava Gómez and C. José Nava Palacios, and C. Adolfo Reyes González (*Comisariado Ejidal del Poblado "San Isidro" Venustiano Carranza hoy San Gabriel, Jalisco, President*), on the part of the communal landowners of San Isidro, as well as the Secretary of the Communal Landowner Ogranization, C. Mario Rosales Laureano, and that organization's Treasurer, C. Daniel Lázaro Durán, dated March 14, 1994 (**C-0032-SPA**);

The second Agrarian Release (Convenio: Finiquito Agrario) entered into between the Secretary of the Agrarian Reform, represented by C. Víctor M. Cervera Pacheco, the organization titled, *Unión Campesina Democrática*, represented by C. Gerardo Avalos Lemus, and the *Comisariado Ejidal de Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco*, C. Adolfo Reyes González (President) on the part of the communal landowners of San Isidro, dated March 14, 1994 (**C-0033-SPA**).

(*Oficio*) dated November 19, 1993 issued by the Office of the Secretary of the Agrarian Reform,[535] (iv) a Legal Opinion issued by the Director General of the Secretary of the Agrarian Reform,[536] (v) document demonstrating conformity and satisfaction (*Asunto: Se Manifiesta Conformidad*),[537], and (vi) document titled: *"Acta Relativa al Deslinde y Amojonamiento de los Terrenos Que Se Entregan al Núcleo Agrario Denominado 'San Isidro', Municipio de San Gabriel,"*[538] standing for the singular proposition that the 1939 Presidential Resolution has been fully satisfied and discharged.

506. Consequently, much like Resolution No. 1080 purporting the April 2016 Orders nationalizing the Resorts in *JSC Tashkent Mechanical Plant JSCB ASAKA v. the Kyrgyz Republic*, the July 2022 Notices rest on a 1939 Presidential Resolution that is inoperative by virtue of having been fully satisfied and discharged, among other considerations.

---

535 Administrative Order (*Oficio*) dated November 19, 1993, from Lic. Alejandro Díaz Guzmán of Mexico's Federal Secretary of the Agrarian Reform to Lic. Raúl Pineda Pineda (*Oficial Mayor de la Secretaría de la Reforma Agraria*) (**C-0023-SPA**).

536 Legal Opinion from the Lic. Ignacio Ramos Espinoza (Director General) of the Secretary of the Agrarian Reform to Lic. Juan Reyes Flores, Coordinator of Department of Payment for Real Property and Indemnifications dated February 22, 1994 (**C-0022-SPA**).

537 *See* document demonstrating conformity and satisfaction (*Asunto: Se Manifiesta Conformidad* signed by José Araiza Chávez, President of the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco* and J. Guadalupe Reyes Martínez, Secretary of the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco*, and Alfredo Villa Jacobo, Treasurer of the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco,* twice stamped by the *Registro Agrario Nacional Secretaría de Desarrollo Agrario, Territorial y Urbano (SEDATU)*, dated March 26, 1994 (C-0038-SPA).

538 *See* document titled "*Acta Relativa al Deslinde y Amojonamiento de los Terrenos Que Se Entregan al Núcleo Agrario Denominado 'San Isidro', Municipio de San Gabriel (antes Venustiano Carranza), Estado de Jalisco, en Cumplimiento al Convenio de Finiquito Celebrado el once de marzo de mil novecientos noventa y cuatro, por la Oficialía Mayor de la Secretaría de la Reforma Agraria,*" and, in part, by the *Comisionado* of the Secretary of the Agrarian Reform and bearing four stamps of the *Registro Nacional de la Secretaría de Desarrollo Agrario, Territorial, y Urbano (SEDATU)* (**C-0042-SPA**).

507. The taking of property based upon an inoperative Presidential Resolution cannot under any analysis comply with the public purpose requirement.

508. Therefore, the 1939 Presidential Resolution was fully discharged on March 14, 1994.[539] It necessarily follows that the July 1 and July 7, 2022 Notices were based on an inviable and inoperative Presidential Resolution. The practical consequence of the 1939 Presidential Resolution having been discharged means that whatever public purpose may have been served by such Resolution eighty-three (83) years and fifteen (15) Presidential Administrations after its initial issuance and publication in 1939, no longer can be present.

509. There is no explanation why between the discharge of the 1939 Presidential Resolution on March 14, 1994 and its purported implementation in July 2022, twenty-four (24) years later, execution regarding the allegedly pending hectares somehow ripened anew notwithstanding the complete discharge and satisfaction nearly a quarter of a century earlier.

510. In this very specific connection, Claimant has provided this Arbitral Tribunal with exactly eighteen (18) documents authored by high-ranking representatives of Mexico's Federal government establishing that *Potrero Grande* or *Paso de Cedros* was (i) conveyed, and (ii) duly accepted by the communal landowners of San Isidro.[540]

511. Eighteen (18) of the nineteen (19) documents referenced as compelling a finding that the 1939 Presidential Resolution was fully discharged and, therefore, is inoperative, and these documents were drafted and subscribed to by high-ranking members of Mexico's Federal government. The solitary document of different origin and

539 *See* (**C-0032-SPA**) and (**C-0033-SPA**).

540 *See supra* ¶¶ 107-114.

subscription is the letter that then Governor of the State of Jalisco, Mr. Carlos Rivera Aceves wrote to Mr. Víctor M. Cervera Pacheco, Secretary of the Agrarian Reform, dated February 17, 1994 regarding endorsement of the conveyance of *Potrero Grande* or *Paso de Cedros* to the communal landowners of San Isidro. The conveyance, of course, was undertaken in order to ensure that NPI's and Nutrilite's investment in *El Petacal* would be protected from any claims, such as those embodied in the July 1 and July 7, 2022 Notices, that somehow would challenge ABG's and Nutrilite S.R.L.'s ownership interest in *El Petacal*.[541]

512. A finding of public purpose, if any such legitimate public purpose even existed in 1939 when the 1939 Presidential Resolution was issued, would entail rewriting these nineteen (19) documents.[542] In addition, it also would entail concluding that the time these instruments were issued, they were of no force and effect.

513. Alternatively, the Tribunal would be invited to reason that if it is not in a position to determine that the documents had no legal effect at the time that they were authored, then a subsequent intervening event in time rendered them operative. The very scant textual language of the July 1 and July 7, 2022 Notices, however, does not reference any intervening interdiction. To the contrary, both Notices harken back to the 1939 Presidential Resolution.

514. The July 1, 2022 Notice is quite compelling in this regard:

> *En referencia a la Resolución Presidencial publicada en el Diario Oficial de la Federación el 18 de noviembre de 1939, mediante la cual se benefició al poblado de San Isidro, municipio de San Gabriel, estado de Jalisco,* ***con una***

541 *See* **C-0049-SPA**.

542 *See supra* ¶¶ 107-109.

superficie de 536 hectáreas de las cuales se encuentran pendientes de ejecutar 280 hectáreas.[543]

(Emphasis supplied.)

515. This Notice merely purports to satisfy a specific numerical requirement pertaining to the hectares to be conveyed to the communal landowners of San Isidro.

516. The Notice references Art. 302 of the *Ley Federal de Reforma Agraria*. It does so only, however, to state that raw land may be immediately, physically and materially seized while farmland sustaining a harvest cannot be taken until such time as the crops are picked.[544] The July 7, 2022 Notice sheds no greater light.

517. In addition to having been discharged, and the lack of any intervening event rendering the 1939 Presidential Resolution operative anew, a finding of public purpose would require the Tribunal to hold that the benefits sought to be bestowed in 1939, as a matter of *policy* and *fact* remained relevant with equal force in 2022.

---

543 *See* **C-0081**.

544 In pertinent part the July 1, 2022 Notice provides:

Por lo anterior [the August 23, 1939 Presidential Resolution] y con fundamento en el artículo 302 de la Ley Federal de Reforma Agraria aplicable en términos del artículo tercero transitorio de la Ley Agraria del 6 de enero de 1992, menciona:

> *Art. 302. 'Cuando al darse una posesión derivada del mandamiento de un Ejecutivo local, haya dentro de los términos [terrenos] concedidos cosechas pendientes de levantar, se fijará a sus propietarios el plazo necesario para recogerlas, el cual se notificará expresamente y se publicará en las tablas de avisos de las oficinas municipales a que corresponda el núcleo de población beneficiado. Los plazos que se señalen a los cultivos anuales corresponderán en todo caso, a la época de las cosechas en la región [y] nunca alcanzarán el siguiente ciclo agrícola del cultivo de que se trate. Respecto a los terrenos de agostadero, se concederá un plazo máximo de treinta días para que los ejidatarios [comunal landowners] entren en posesión plena, salvo que medien las circunstancias previstas en el Artículo 312 y* ***en cuanto a terrenos de monte en explotación la posesión será inmediata, pero se concederá el plazo necesario para extraer los productos forestales ya laborados [elaborados] que se encuentren dentro de la superficie concedida.'***

(Emphasis in original.)

518. Historical academic writings teach that President Lázaro Cárdenas was a fervent nationalist during a period of time when Mexico's citizenry opined that non-nationals were unduly benefitting from the country's natural resources.[545] He spawned nationwide expropriations of foreign investments, and endorsed a redistribution of agrarian lands for the benefit of communal landowners.

519. Here, a parallel can be drawn between the April 2016 Orders nationalizing the four Resorts presumably based upon the Soviet era Resolution No. 1080, the relevance of which (if it ever had any) was rendered obsolete by the passage of time, and the transposition of 1939 era expropriations and land reforms to the contemporary Mexican political policy of the 21st century. Even if the 1939 Presidential Resolution were legally operative and viable (which it is not) its public purpose was long-extinguished by the passage of eighty-three (83) years.

520. The July 2022 Notices of taking, in addition to not serving a legally cognizable public purpose, are actually contrary to the demonstrable interests of the residents of the southern quadrant of the State of Jalisco known as *El Llano en Llamas*. The evidence before this Tribunal, much of which again was authored by high-ranking members of Mexico's Federal government and the government of the State of Jalisco, compellingly demonstrate that the organic farming, processing, and packaging operation that *El Petacal* sustains has (i) created hundreds of direct jobs,[546] (ii) brought potable water to a community that had been surviving on only 1,000 liters of water (i.e., 25% of the

---

545 See **Composite C-107-SPA**, which includes: (a) Lazaro Cardenas en la memoria colectiva. Universidad Autónoma Metroplitana Unidad Xochimilco (**C-0107-1-SPA**), (b) El legado más fuerte de Lázaro Cárdenas Boletin Colegio Nacional (**C-0107-2-SPA**), (c) El discurso patriótico y el aparato propagandistico. cardenismo. Articulo UNAM (**C-107-3-SPA**), (d) Mexico El estado y la unidad nacional cardenista. Departamento de Historia (**C-107-4-SPA**), (e) El circulo de poder del presidente Cardenas. Colegio de Jalisco (**C-0107-5-SPA**), (f) The Political Legacy of Lazaro Cardenas. (**C-0107-6-SPA**).

546 Eppers Witness Statement (**CWS-002**) at ¶¶ 119-140.

actual daily water needs),[547] (iii)made available sewage waters,[548] (iv) brought irrigation water,[549] (v) provided electricity,[550] (vi) administered healthcare,[551] (vii) built

---

547 On this point Mr. Eppers testifies as follows:

On February 13, 1994, Nutrilite S.R.L. entered into an Agreement with representatives of the fifty-five (55) households then comprising the El Petacal community. Shortly before entering into this Agreement, Nutrilite S.R.L. actually learned the exact extent of this water shortage. It became aware that each of the fifty-five (55) households in question merely had access on a daily basis only to one hundred (100) liters of water. Community representatives advised that the real needs of a household could not be met with any amount less than four hundred (400) liters of potable water a day. The community had been surviving on only 25% of the daily water needs.

Id., at 41 ¶ 128.

548 *Id.* ¶ 129; *see also* Hunter Witness Statement (**CWS-001**) at ¶¶ 134-146.

549 *Id.*

550 Mr. Eppers testifies:

My testimony regarding the provision of electricity to El Llano en Llamas is based on a review of numerous documents, including those forming part of Robert Paul Hunter's Witness Statement. I also discussed with Mr. Hunter his direct knowledge of the effort to bring electricity to the El Petacal community and to the El Llano en Llamas area more generally.

On May 14, 1996 Nutrilite S.R.L. signed an agreement with the Federal Commission of Electricity and the State of Jalisco's Electrical Commission counterpart for the provision of electricity to the entire region in the south of the State of Jalisco commonly referred to as "El Llano en Llamas," comprising the Municipalities of Tolimán, San Gabriel, Tuxcacuesco, Tonaya, and Zapotitlán.

There is much satisfaction in knowing that the signing of this Agreement provided electricity to the communal landowners residing in the communities of Copala, Tolimán, San Gabriel, Carranza, and San Isidro, among others, who themselves had a long history of petitioning the Mexican federal government and the government of the State of Jalisco for help in bringing electricity to the region. NPI and Nutrilite S.R.L.made possible an electrical grid for 5,000 KVA that services these communities to this day.

An additional benefit was that, at the time the grid was first installed, the Mexican Federal government's expectation was that it would generate approximately 1,000 ***direct*** *jobs, and a sizeable number of indirect employment opportunities derivative of the actual direct jobs created.*

Eppers Witness Statement (**CWS-002**) at ¶¶ 142-145; *see also* Hunter Witness Statement (**CWS-001**) at ¶¶ 124-133.

551 Eppers Witness Statement (**CWS-002**) at ¶¶ 107-118; *see also* Mr. Eppers observes in the context of newspaper accounts chronicling Nutrilite S.R.L.'s healthcare contributions to *El Lano En Llamos*:

By way of example, in an article titled, *Milagro En El Llano* (*En Lo Que Fuera Un Auténtico Páramo Rulfiano Una Subsidiaria Alimentaria De Amway Logró Desmentir A Los Que Aseguraban Que Lo Único Que Podía Cosecharse Ahí Era, Si Acaso, Polvo*). Nutrilite S.R.L.'s transformation of the *El Petacal* communities is described:

roads and bridges,[552] and (viii) rendered possible the general construction of a community.[553] These gains would be undermined and frustrated on a prospective basis, and the communities comprising *El Llano en Llamas* would be divested of the *status quo* and any prospect for economic development.

521. Notwithstanding the lack of defined elements incident to the public purpose doctrine in the international law of investment protection, including its seemingly subjective self-

---

Oasis en el desierto

En medio del árido y desolado paisaje del Rulfiano Llano, el rancho El Petacal aparece un oasis en el desierto. Sin embargo, cuánto le ha costado a Nutrilite levantar en este 'duro cuero de vaca' un paraje pletórico de vida.

* * *

Con el apoyo del gobierno del estado, que ha visto con mucha simpatía el proyecto, Nutrilite abrió caminos, levantó puentes e introdujo líneas eléctricas. De las entrañas del subsuelo extrajo agua, rehabilitó una presa bicentenaria que estaba totalmente seca y construyó un par de embalses nuevos.

* * *

Bienestar

EXPANSIVO

El Petacal se había convertido en un pueblo casi fantasma*, abandonado por sus hombres que, ante la desesperanza de una tierra que no les daba ni para comer, emigraban 'pal Norte.'* ***Nutrilite vino a cambiar las cosas****.*

… la empresa [Nutrilite] ha aportado más de $1 millón de dólares para la construcción de ***una clínica—con doctor de tiempo completo*** *--,* ***un kínder y una cancha de fútbol****, así como para dotar a la comunidad de* ***agua potable*** *y* ***del servicio de alumbrado público****. De igual modo,* ***comparte el agua*** *con los ganaderos del poblado, con quienes ha establecido un convenio para proporcionarles alfalfa a cambio del estiércol que producen sus animales.*

* * *

La historia se repite; ***alguien hace las veces de punta de lanza y otros avanzan por esa brecha. Nutrilite ha servido de detonador para que otros inversionistas se animen a instalarse en una zona que para muchos estaba desahuciada.***

(Emphasis supplied.)

Id. at 52-53, ¶ 163.

552 *Id.* at 54-66, ¶¶ 168-177.

553 *Id.* and ¶¶ 163-167.

judging nature[554], there are objective premises suggestive of the doctrine's conceptual limits. The exercise of regulatory sovereignty in the context of "*protecting…the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like…,*" all are reasonable exercises of regulatory and legislative sovereignty without which governments would be unable to function.[555]

522. Even were this Tribunal to provide Mexico with "broad deference" in deciding what it considers most expedient and essential for purposes of meeting its sovereign obligation to act in furtherance of the public good, the taking of *El Petacal* for the stated reason of satisfying the 1939 Presidential Resolution must fail under the totality of facts surrounding the use of the subject property. Wresting *El Petacal* from ABG and conveying to the communal landowners only would serve to undermine any objective assessment of the consequences arising from such a conveyance when considering the micro- and macro- economic benefits that the organic farming operation on the property has contributed to the region.

---

554 *Libyan Am Oil Co. (LIAMCO) v. Libyan Arab Republic*, 20 I.L.M. 1, (Award) ,1977, **CL-0116-ENG** (observing that a State is "*free to judge for itself what it considers useful or necessary for the public good*").

555 Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1 (also known as *Marvin Feldman v. Mexico*), (Award) December 16, 2002 (Prof. Konstantinos Kerameus, Jorge Covarrubias Bravo, Prof. David Gantz) ¶ 103, **CL-0117-ENG** (noting "*that the ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unrealistic regulatory regimes, among others, have been considered to be expropriatory actions.* ***At the same time, governments must be free to act in the broader public interest*** *through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariffs levels, imposition of zoning restrictions and the like.* ***Reasonable governmental regulations of this type*** *cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this*" [citation omitted].

(Emphasis supplied.)

523. Tribunals in assessing whether a sovereign measure constitutes a reasonable exercise of sovereignty in furtherance of a public purpose or an unlawful expropriation giving rise to a compensable act have focused on the preposition "for"[556] as in "*of such an investment, except: (a) for a public purpose,*" (emphasis supplied) within the meaning of Art. 1110.1(a) of the NAFTA (1994), or USMCA Art. 14.8.1(a). The Tribunal's analysis in *Vestey Group Limited v. Bolivarian Republic of Venezuela*[557] on this narrow issue is helpful.

524. In that case respondent averred that the sovereign measure at issue resulting in the expropriation of claimant's cattle-farming operation in Venezuela was to serve the public purpose of "*ensur[ing] the availability and timely access to food by its citizens, as part of its national plan to ensure food self-sufficiency*."[558] Respondent further submitted that "*the widespread access to agricultural and livestock resources… make[s] up one of the main drivers of the Bolivarian Republic of Venezuela's food strategy to provide resources to its population.*"[559] The Tribunal observed that the access to agricultural and livestock resources as part of a food strategy to provide the general population with nutritional resources appeared "*perfectly legitimate and worthy of protection.*" It also observed that "*there [was] no suggestion in the record that it was not*."[560]

---

556 *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, **CL-0015-ENG**.

557 *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, (Award), April 15, 2016 (Prof. Gabrielle Kaufmann-Kohler, Prof. Horacio Grigera Naón, Prof. Pierre-Marie Dupuy), **CL-0118-ENG**.

558 *Id.* ¶ 295.

559 *Id.*

560 *Id.*

525. In what turned out to be the third prong of the analysis, the first consisting in providing latitude to a State to determine its own policy for the common good, and the second, finding that the policy on its face was legitimate and one worth protecting and enhancing, the Tribunal inquired whether the alleged expropriatory measure in fact was "for" a public purpose as prescribed by the treaty there at issue.[561] It did so having first expressed the qualification that "*the objective is not to review the effectiveness of the measures, the government's failure to advance a declared purpose may serve as evidence that the measure was not taken in furtherance of such purpose.*"[562] It added that "*the idea is to determine whether the measure had a reasonable nexus with the declared public purpose or in other words, was at least capable of furthering that purpose.*"[563]

526. After canvassing the record evidence, the Tribunal found that the claimant cattle enterprise actually "*share[d] the burden of meeting the alimentary needs of the population.*"[564] Hence, it determined that *"[i]t [was] difficult to see how the purpose of wider access to food would be better served by expropriating such private enterprise. Nothing in the record suggested that [claimant's] output increased after the expropriation or that the population gained wider or cheaper access to the beef produced by [claimant]. To the contrary, there [was] unrebutted statements of the Claimant's witnesses that the government's management of [claimant's cattle operation] resulted in a decline of the production levels.*"[565]

561 *Id.* ¶ 296.

562 *Id.*

563 *Id.* Emphasis supplied.

564 *Id.* ¶ 297.

565 *Id.*

527. Based upon these findings, the Tribunal concluded "that the nexus between Venezuela's declared purpose to achieve wider access to food and the expropriation of [claimant's cattle operation] [was] not obvious."[566] Even though the Tribunal did not offer "a definitive ruling on this requirement [for a public purposes]" and refrained from doing so upon a finding that Venezuela had not met the due process predicate, the nexus analysis is here applicable. [567]

528. Formally, the taking of property based upon a Presidential Resolution in furtherance of a national policy of land reform on its face constitutes a public purpose. Where the Presidential Resolution as here has been discharged, there can be no nexus between the declared purpose of meeting the textual language of the Resolution, or of complying with a contextual policy concerning land reform. When substantively analyzed, (i) the discharge of the Presidential Resolution, and (ii) the passage of time, eighty-three (83) years between its enactment and the taking, and twenty-four (24) years from its discharge to the taking, no public purpose can be gleaned.

529. In the case before this Tribunal, the July 1 and July 7, 2022 Notices made clear that the purpose of the taking was to discharge and fully satisfy the longtime outstanding conveyance of the remaining 280 hectares under the 1939 Presidential Resolution. The evidence before this Tribunal, however, establishes that the 1939 Presidential Resolution was fully discharged and satisfied by March 14, 1994. [568] Hence, satisfying and discharging a Presidential Resolution that already had been fulfilled 28 years earlier in 1994 cannot be found to constitute a legitimate public purpose.

---

566 *Id.* ¶ 300.

567 *Id.*

568 *See* (**C-0032-SPA**) and (**C-0033**).

530. Often, however, the "how" is more important than the "what." The discharge and satisfaction of the 1939 Presidential Resolution is no exception. The evidence in the form of documents authored or subscribed to by representatives of Mexico's Federal government acting in their official capacities points to the conveyance of 280 hectares known as *Potrero Grande* or *Paso de Cedros* as conveyed to the communal landowners of San Isidro in satisfaction of any right that they may have had to *El Petacal* pursuant to the 1939 Presidential Resolution.

531. This conveyance of the 280 hectares to the communal landowners of San Isidro is *how* the 1939 Presidential Resolution was discharged and fully satisfied. Therefore, twice conveying the purportedly "pending" 280 hectares to the communal landowners is neither a *genuine* or *bona fide* government measure *for* a public purpose.

532. In the context of this specific government measure, there is very little insight that can be had from post-taking conduct by or on behalf of the government of Mexico. [569] In this proceeding, there is evidence of record stating that "*[t]he legal and physical taking of the 120 hectares has left ABG's Nutrilite S.R.L. farming operation without the original buffer with respect to which the farmed arable parcels were designed.*"[570] Mr Eppers further testifies that "*what used to be a buffer, the 120 hectares, is now a source of contamination.*"[571]

---

569 It is widely recognized that post measure conduct on the part of the host-State may be considered in determining the extent to which the measure at issue was taken for a public purpose. *ADC Affiliate Limited et al. v. the Republic of Hungary*, ICSID Case No. ARB/03/16, (Award), October 2, 2006 (Neil Kaplan CBE QC, Hon. Charles Brower, Prof. Albert Jan van den Berg), ¶ 433, **CL-0018-ENG** (noting that there was no "public interest" where a subsequent privatization of the asset taken demonstrated that the alleged "public interest" was not legitimate.)

570 Eppers Witness Statement (**CWS-002**) at ¶ 98. Emphasis supplied.

571 *Id.*

533. Indeed, as of the filing of this submission, the communal landowners have neglected the 120 hectares comprising exactly 42.85% of *El Petacal*. The property cannot be said to be anywhere close to its highest and most productive use, let alone in furtherance of macro- and micro- economic gains that the *El Petacal* organic farming, processing, and packaging operation contributed, and continues to contribute to the southern quadrant of the State of Jalisco known as *El Llano en Llamas*. Mr. Eppers' testimony on this point merits citation and consideration in its entirety:

> *The communal landowners have abandoned most of the 120 hectares. Parts, however, of it are used for conventional farming that does rely on pesticides. In order to protect against Nutrilite S.R.L.'s own buffer that insulated us from conventional inorganic farming operations and undesirable pollination and insects, we have had to sacrifice arable land within the 160 hectares. Consequently, arable land in the 160 hectares has diminished in favor of increasing buffer land from this critical parcel. Ultimately, this inversely proportional relationship will not be sustainable and crop production will suffer. Signs of this inevitability already are present.*
>
> *Even a cursory inspection of the 120 hectares reveals that there are insect pests growing on this parcel that are prejudicial to the crops and plants being farmed on the 160 hectares. The communal landowners have, among other things, planted conventional corn pursuant to inorganic farming methodologies.*
>
> *Other parts of the 120 hectares are not being farmed or otherwise maintained. They have become a Petri dish for undesirable contaminants in the form of insects. These factors are having an adverse effect on the 160 hectares.*
>
> *It would take approximately three (3) years to regain the organic status that the 120 hectares enjoyed prior to having been physically taken by the communal landowners in July 2022*.[572]

534. The communal landowners' post-expropriatory conduct is inimical to the actual policy that the former Governors of the State of Jalisco, Mr. Carlos Rivera Aceves (term: 1992-1995), and Mr. Alberto Cárdenas Jiménez (term: 1995-2001), and President Ernesto Zedillo Ponce de León (term: 1994-2000) sought to advance through foreign

572 *Id.* at 32, ¶¶ 100-104.

direct investment that would bring sustainability to the region.[573] The policy that heralds a period of privatization and development in furtherance of sustainability does constitute a legitimate, authentic, and *bona fide* public purpose. Notwithstanding the conceptual uncertainties endemic to orthodox views of the public purpose doctrine in the customary and conventional international law of investment protection because of the perceived presumptions and latitudes granted to host-States in defining and determining what constitutes a public purpose, sustained analysis of the doctrine's more contemporary doctrinal development points to sustainability as an objective talisman by which to gauge the authenticity of public purpose in a number of scenarios.[574]

535. Unlike the metric of sustainable development in furtherance of a then public purpose seeking to address foundational issues concerning the bringing of electricity and potable water to rural areas pursuant to a hybrid policy of privatization and foreign direct investment, the taking here at issue can point to no public purpose or policy beyond merely stating that the measure constitutes a public purpose because of the self-judging criterion that the taking is a State measure.

---

573 *See* Eppers Witness Statement (**CWS-002**) at ¶¶ 158-160.

574 United Nations Conference on Trade & Development, World Investment Report 2012 U.N. Doc. UNCTAD/WIRO/2012, U.N. Sales No. E. 12 II. D. 3 (2012), **CL-0119-ENG**.

While the UNCTAD Report represents a commitment to an unmitigated broadening of the public purpose doctrine, the drafters of the primacy of sustainable development within a rubric of a tempered ratio between regulation and transparency:

> *This new generation of investment policies has been in the making for some time, and is reflected in the dichotomy in policy directions over the last few years, with simultaneous moves to further liberalize investment regimes and promote foreign investment on the one hand, and to regulate investment in* ***pursuit of public policy objectives on the others.*** *It reflects the recognition that liberalization,* ***if it is to generate sustainable development outcomes****, has to be accompanied – if not preceded –* ***by the establishment of proper regulatory and institutional frameworks. The key policy change is to strike balance between regulation and openness.***
>
> (Emphasis supplied.)

536. In this regard the *ADC v. Republic of Hungary* Tribunal aptly noted that "*a treaty requirement for* 'public interest' *requires some genuine interest of the public. If mere reference to 'public interest' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met*."[575] (Emphasis in original.)

537. The taking of *El Petacal* pursuant to an eighty-three (83) year-old Presidential Resolution that had been formally and substantively discharged twenty-eight (28) years prior to the taking at issue does not constitute a legitimate and authentic public purpose giving rise to a lawful expropriation.[576]

---

[575] *Supra* 398*, ADC v. Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, ¶ 432, **CL-0018-ENG**.

[576] *Quiborax v. the Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, (Award), September 16, 2015 (Prof. Gabrielle Kaufmann Kohler, Hon. Marc Lalonde, P.C., O.C., Q.C., Prof. Brigitte Stern) ¶ 245, **CL-0120-ENG** (noting that while the State has a sovereign right to determine what is in its national and public interest, and there might have been a legitimate interest in implementing the measure at issue, if the measure itself was not carried out in accordance with the law, the expropriation will be deemed unlawful in that regard); *Azurix Corp. v. the Argentine Republic*, ICSID Case No. ARB/01/12, (Award), July 14, 2006, (Dr. Andrés Rigo Sureda, Hon. Marc Lalonde, P.C., O.C., Q.C., Dr. Daniel Hugo Martins) ¶¶ 310-311, **CL-0121-ENG** (observing that "[t]he argument made by the S.D. Myers Tribunal is somehow contradictory. According to it, the BIT would require that investments not be expropriated except for a public purpose in that there would be compensation if such expropriation takes place and, at the same time regulatory measures that may be tantamount to expropriation would not give rise to a claim for compensation if taken for a public purpose. The public purpose criterion as an additional criterion to the effect of the measures under consideration needs to be complemented.); and *Waguih Elie George Siag and Clorinda Vecchei v. the Arab Republic of Egypt*, ICSID Case No. ARB/05/15, (Award), June 1, 2009, (David A.R. Williams, Q.C., Prof. Michael Pryles, Prof. Francisco Orrego Vicuña) ¶ 432, **CL-0106-ENG** (holding that "[t]he Tribunal does not accept that because an investment was eventually put to public use, the exception of that investment must necessarily be said to have been 'for' a public purpose. In the present case it is clear that the Claimants' land was not expropriated for particular assignment to [a public entity], because the expropriation took place in 1996 and [public entity] was not constituted until 2000…. There were six years between expropriation and the first indication that a public use was intended. The Tribunal finds on the evidence that in the present circumstances, Claimants' land was not expropriated 'for a public purpose'").

2. *El Petacal* Was Taken in a Discriminatory Manner

538. Non-discriminatory treatment in the manner of the taking is a predicate to its legality.[577] It was logical that "to show discrimination the investor must prove that it was subjected to different treatment in similar circumstances without reasonable justification, typically [but not exclusively] on the basis of its nationality or similar characteristics."[578] It should be added for the sake of completeness that a claimant may have to proffer an evidentiary showing of intent[579] to discriminate, but in any event discriminatory effect must be established.[580]

539. Four observations on discriminatory treatment merit discussion. First, in this case the *best evidence* demonstrating a *different treatment* are the July 1 and July 7, 2022 Notices.[581] Different treatment necessarily follows from the customized nature of both Notices.

540. Both Notices, based upon the ordinary meaning of their own textual language, make clear that generally only the taking of 280 hectares is necessary to satisfy the 1939 Presidential Resolution. The July 1, 2022 Notice is most distinctive as to this point:

> En *referencia a la Resolución Presidencial publicada en el Diario Oficial de la Federación el 18 de noviembre de 1939, mediante la cual se benefició al poblado de San Isidro, municipio de San Gabriel, estado de Jalisco,* ***con una superficie***

---

577 *Tidewater Investment S.R.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, (Award), March 13, 2015 (Prof. Campbell McLachlan, Q.C., Dr. Andrés Rigo Sureda, Prof. Brigitte Stern) ¶ 127, **CL-0140-ENG** (stating the Hornbook Principle that "[*i*]*n order to be lawful, a State taking of property must be non-discriminatory*").

578 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, (Award), April 4, 2016 (Dr. Laurent Lévy, Dean John Y. Gotanda, Prof. Laurence Boisson de Chazournes) ¶ 715, **CL-0122-ENG**.

579 *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, (Award), June 1, 2009, ¶ 439, **CL-0106-ENG**.

580 *Id.*

581 See July 1, 2022 Notice (**C-0081-SPA)** and July 7, 2022 Notice (**C-0074-SPA)**.

de 536 hectáreas de las cuales se encuentran pendientes de ejecutar 280 hectáreas.

(Emphasis supplied.)

541. The July 7, 2022 Notice goes on to assert that SEDATU already on June 30 and July 1, 2022, the very same date of the first Notice, had undertaken "technical work" in furtherance of complementary execution on the subject property.[582] It further adds that pursuant to the technical work undertaken at *El Petacal*, SEDATU had noted that 121 hectares on the subject property consisted of raw land covered by nets and canvases.[583] It additionally stated that pursuant to the 1939 Presidential Resolution, within twenty-four (24) hours from July 4, 2022, at 9:00 p.m., the property would be transferred and placed in the custody and control of its beneficiaries.[584]

542. This language amply demonstrates that the Mexican Federal government only targeted *El Petacal* as the subject matter of complementary execution in furtherance of allegedly discharging the 1939 Presidential Resolution. While it may be asserted with *some* degree of accuracy that in 1939 in Mexico land reform was common pursuant to Presidential Resolutions and decrees of this ilk, no such inference can be reasonably drawn in 2022.

543. The taking of *El Petacal* was not part of national land reform. Moreover, because the Notices are based on the 1939 Presidential Resolution, the only beneficiaries to the particular taking are the communal landowners of San Isidro.

544. For these reasons, the specificity of the Notices as to the quantum of land to be taken as a whole in satisfaction of the 1939 Presidential Resolution, and the only property

582 *Id.*, *see* third full paragraph of July 1, 2022 Notice (**C-0081-SPA**).

583 *Id.*

584 *Id.*

with respect to which that 1939 Presidential Resolution allegedly was to be discharged, compels the conclusion that *only El Petacal* was selected for the purported task of perfecting the 1939 Presidential Resolution's mandate.[585] The Notices nowhere mention a normative imperative to take property meeting specific characteristics at a regional or national level. Only ABG's Nutrilite S.R.L.'s organic farming operation is treated in this manner.

545. Second, the evidence before this Tribunal demonstrates that for purposes of considering NAFTA (1994) Art. 1110.1(b), (i) similar properties in like circumstances, (ii) did not have legal title wrested from them by an instrumentality of the Mexican Federal government and conveyed to a third party (public or private). Mr. Eppers testifies on this factual proposition:

> *ABG and Nutrilite S.R.L. are unaware of any comparable scenario where either a foreign (non-Mexican) or domestic (Mexican) investor has had its farming operation located in the State of Jalisco executed upon or otherwise taken for purposes of allegedly discharging a Presidential Resolution, let alone the Presidential Resolution referenced in the July 1, 2022 Notice.*[586]
>
> (Citation omitted)

546. He further provides that *"[b]y way of example, (i) Reiter Affiliates Companies LLC, (ii) NutraSweet (owned by the private equity firm J. W. Childs Associates), and (iii) Hortifruit S.A. (a company based in Chile) all have farming, processing, and packaging operations in the State of Jalisco in El Llano en Llamas."*[587] Mr. Eppers has, however, testified that "*[n]one of these farming operations…has suffered the same or similar*

---

585 As previously noted, the July 1, 2022 Notice itself provides that it is directed only at *El Petacal*. *See supra* (**C-0081-SPA**).

586 Eppers Witness Statement (**CWS-002)** at ¶ 188.

587 *Id.*, ¶ 189.

fate of having complete legal ownership and partial physical possession transferred to local communal landowners."[588]

547. The terms of the taking conceptually leave no alternative but to conclude that (i) ABG's Nutrilite S.R.L. operation has been discriminated against by receiving treatment that is uniquely circumscribed to *El Petacal*, and (ii) no other similarly situated agricultural/horticultural farming enterprise has been accorded the same or similar treatment.

548. Third, as discussed in Section V.B, *supra*, there can be no basis grounded in reason for the taking in the context of a public purpose or other State action because the 1939 Presidential Resolution was fully discharged pursuant to the initiatives of the now expropriating entity, SEDATU, twenty-eight (28) years earlier on March 14, 1994.[589] Although formally engaging in a complementary execution pursuant to a Presidential Resolution enjoys the categorical nomenclature of a reasonable and legitimate State action, substantively it cannot be the case where, as here the Mexican government seeks to execute on a stale Presidential Resolution long-since satisfied, and against a single landowner. For this reason the Notices pursue an objective that is discriminatory, unreasonable and illegitimate.

549. There is no authority determinatively establishing whether a claimant *must* prove *discriminatory intent* on behalf of the alleged expropriating State, let alone on what constitutes the juridical elements of such proof.[590] The discriminatory effect, however, is patent.

---

588 *Id.*

589 *Supra* at 47-55, ¶¶107-114

590 *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, (Award), June 1, 2009, ¶ 439, **CL-0106**.

550. SEDATU transferred legal title and complete ownership interest in the 280 hectares comprising *El Petacal* in the State of Jalisco, Municipality of San Gabriel, in the Township of San Isidro to the communal landowners of that Township.[591] In addition to transferring legal ownership and interest in the 120 hectares parcel known as *Puertas Uno* and *Dos* of *El Petacal*, material and physical possession of that parcel was conveyed to the communal landowners of San Isidro on July 14, 2022.[592]

551. It did so on an ad hoc basis and exclusively as to a single non-national investor. On a regional and statewide basis no other similar farming operation was divested of title to property for purposes of having it conveyed to the communal landowners of particular townships. Consequently, both theoretically and practically, undisputable evidence of discriminatory effect lies before this Tribunal.

3. *El Petacal* Was Taken Without Any Semblance or Pretense of Due Process

552. The July 1 and July 7, 2022[593] Notices did not provide for any process, let alone due process. Indeed, the July 7, 2022 Notice limits itself to advising Nutrilite S.R.L.'s legal representative that a meeting will be held at the "*House of the communal landowners of San Isidro*" on July 14, 2022. That meeting is not described as a venue for a hearing to adjudicate the merits of the taking that already had been effectuated as to the 120

591 See **C-0081-SPA and C-0074-SPA**; **C-0050-SPA** *Acta de Posesión y Deslinde de Polígono de las 280-00-00 Hectáreas Pendientes a Entregar de la Ejecución Complementaria de la Resolución Presidencial del 23 de agosto de 1939 Publicada en el Diario Oficial de la Federación el 18 de noviembre del Mismo Año, Por la Cual se Benefició el Ejido San Isidro, Municipio San Gabriel, Estado de Jalisco*, dated July 14, 2022.

592 *Id*. (**C-0050-SPA**).

It is worth reiterating for the sake of completeness that even though the *Acta de Posesión y Deslinde* provides that legal, juridical, and material ownership of this property was conveyed on July 14, 2022, the July 1, 2022 Notice states that it was actually transferred on that date, i.e., within twnety-four (24) hours of July 4, 2022 at 9:00 p.m.

593 See July 1, 2022 Notice (**C-0081-SPA)** and July 7, 2022 Notice (**C-0074-SPA)**.

hectares parcel (*Puertas Uno* and *Dos* of *El Petacal*) according to the July 1, 2022 Notice. There can be no substitute, however, for the very language contained in the July 7, 2022 Notice in this regard:

> *En virtud a lo anterior y de conformidad a lo dispuesto por los artículos 307, 308 y demás relativos y aplicables de la Ley Federal de la Reforma Agraria pero aplicable al caso concreto atento a lo que dispone el artículo tercero transitorio de Ley Agraria vigente se les notifica que a las 10:00 diez horas del día 14 catorce de julio del 2022, en el local que ocupa la casa ejidal del poblado de San Isidro, del municipio de San Gabriel, estado de Jalisco, lugar en donde se llevará a cabo el inicio de la diligencia de los trabajos técnicos de la ejecución complementaria de la Resolución Presidencial anteriormente citada, lo que se les comunica a efecto de que se sirvan a concurrir personalmente o por medio de su representante debidamente acreditado al lugar de la diligencia de los trabajos en comento, en la inteligencia de que su ausencia o retraso no será motivo de la suspensión el acto de referencia*.[594]

553. Nutrilite S.R.L. personally and/or through its credentialed representative is invited to attend the meeting, and advised that it is the place where "the technical work" to be undertaken shall take place with respect to the complementary execution of the 1939 Presidential Resolution ("*lugar en donde se llevará a cabo el inicio de la diligencia de los trabajos técnicos de la ejecución complementaria de la Resolución Presidencial anteriormente citada, …*"). Thus, ABG and Nutrilite S.R.L. are notified that they shall be advised of the logistics having to do with a determination already made.

554. Indeed, the July 7, 2022 Notice in very plain and direct language makes clear that the scheduled events, i.e., the complementary execution of the 280 hectares comprising *El Petacal*, shall take place irrespective of whether the owner and/or its legal representative failed to attend the meeting or attended the meeting late (*"en la inteligencia de que su ausencia o retraso no será motivo de la suspensión el acto de referencia.*")

---

594 *Id.* (**C-0074-SPA**) July 7, 2022 Notice.

555. This single paragraph represents the due process accorded to Claimant.

556. Among the multiple reiterations of the well-known due process standard that must be met to render a taking legal, the Tribunal's articulation in *ADC v. Hungary*[595] is comprehensively helpful:

> *…'due process,' in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as* ***reasonable advanced notice, a fair hearing and an unbiased and impartial adjudicator*** *to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard****. If not legal procedure of such nature exits at all, the argument that 'the actions are taken under due process' rings hollow.***[596]

557. Tribunals have been in unison holding that the alleged measure must meet the broad and generic concept of due process and not be tethered to the domestic expropriation rubric of the host-State.[597]

---

595 See *supra 398, ADC v. Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, ¶ 435, **CL-0018-ENG**.

596 *Id.*, ¶ 435. This approach was confirmed in *Crystallex v. Venezuela* (*supra* note 601) ¶ 713, **CL-0122-ENG** (adopting the identical language from *ADC v. Hungary*, **CL-0018-ENG**).

597 *See, e.g., Feldman v. Mexico,* ¶ 140, **CL-0117-ENG** (observing "… *this Tribunal could find a NAFTA violation even if Mexican courts uphold Mexican law [citation omitted], this Tribunal is not bound by a decision of a local court if that decision violates international law*." And adding that NAFTA "*does not require a claimant to exhaust local court remedies before submitting a claim to arbitration.*"); *Rusoro Mining Limited v. the Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5 (Award), August 22, 2016 (Juan Fernández-Armesto, Francisco Orrego Vicuña, Judge Bruno Simma) ¶ 389, **CL-0123-ENG** (finding that *"[t]he Treaty requires that the nationalization be effected 'under due process of law.' The requirement does not specifically refer to the municipal expropriation law of [the host-State], but to due process in general, a generic concept to be construed in accordance with international law. In essence, due process requires (i) that the decision to nationalize be property adopted, and (ii)that the expropriated investor have an opportunity to challenge such decision before an independent and impartial Tribunal.*"); *see also* R. Dolzer and C. Schreuer, Principles of International Investment Law, Oxford Univseristy Press (2008), 1st Edition p. 91, **CL-0124-ENG**.

558. Measured against this standard, the Tribunal is invited to find that Respondent has not sufficiently established that the taking was carried out in keeping with any conceivable concept resembling the referenced due process standard. At the very outset, it should be observed that the due process standard articulated in *ADC v. Hungary* uses the term "such as" in part to ensure that the elements of due process articulated are non-exhaustive, but at the same time sufficiently illustrative to provide guidance. In this connection three observations are necessary.

559. First, there was no *reasonable advance notice*. Notwithstanding drafting deficits and internal contradictory language, the July 1, 2022 Notice, as previously referenced, is advisory in nature. It states with certainty and clarity that the beneficiaries of the taking (execution of the 1939 Presidential Resolution) should take "immediate possession" by July 5, 2020 of the 120 hectares comprising *Puertas Uno* and *Dos* of *El Petacal*.[598]

560. Furthermore, that Notice itself advises that during the day immediately preceding the Notice (June 30, 2022) and the day of the Notice (July 1, 2022) technical survey work was undertaken on the subject property in furtherance of the process comprising the very taking itself.[599]

561. The July 7, 2022 Notice is equally clear as to this point. As referenced,[600] that instrument simply advises that the survey work in furtherance of the property's taking "*shall take place*" (*se llevará a cabo*) on the scheduled meeting date, July 14, 2022. And in fact, the *Acta de Posesión y Deslinde* confirms that on that date (July 14, 2022) not only was the technical survey work undertaken and finished, but legal title to the 280 hectares comprising *El Petacal* was conveyed to the communal landowners of

598 *See* (**C-0081SPA**) July 1, 2022 Notice, fourth complete paragraph.

599 *Id.*

600 *Supra* ¶ 536 citing to (**C-0074-SPA**) July 7, 2022 Notice.

San Isidro. And according to that document which conflicts with the July 1, 2022 Notice providing for a July 5, 2022 actual date on which physical possession was to be secured, on July 14, 2022 the 120 hectares comprising *Puertas Uno* and *Dos* of *El Petacal* were also "physically" and "materially" conveyed to the communal landowners of San Isidro.

562. Second, as there was no actual notice of a hearing, but rather a "take it or leave it" invitation to witness the formal technical survey work in furtherance of the taking on that very day (July 14, 2022), it follows that there was no hearing, let alone a fair hearing.

563. Third, as there was no hearing, the question of whether an *impartial* hearing took place is moot.

564. Certainly, Tribunals have found that a due process obligation can be amply met in non-procedural vested venues and circumstances. A helpful example is present in the *Venezuela Holdings BV v. the Bolivarian Republic of Venezuela*.[601]

565. There, Venezuela's National Assembly had adopted a law providing for Presidential authority to relocate a group of stakeholders in a specific project concerning the exploration, exploitation, and processing of oil reserves to be merged into new corporate entities arising from particular hydrocarbon legislation. Prior to issuing a decree to this effect, the investors-stakeholders were accorded an opportunity to participate in negotiations with the Venezuelan government and "*to weigh their*

601 *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, (Award), October 9, 2014 (H.E. Judge Gilbert Guillaume, Prof. Gabrielle Kaufmann-Kohler, Dr. Ahmed Sadek El-Kosheri), **CL-0125-ENG.**

interests and make decisions during a reasonable period of time, [which the Tribunal found] was compatible with a due process obligation of [the BIT there at issue]."[602]

566. In the case before this Tribunal, no comparable negotiations or conversations ever took place. Formally and substantively, after the July 1 and July 7, 2022 Notices were served on Nutrilite S.R.L.'s legal representative, the July 14, 2022 conveyance of title of the 280 hectares comprising *El Petacal* took place.[603]

567. For the sake of completeness, former Mexican Supreme Court Justice Dr. José Ramón Cossío Díaz and Lic. Raúl M. Mejía Garza have submitted an Expert Report that now constitutes evidence in this proceeding.[604] As part of that Report, the authors analyze Mexico's national expropriation law together with relevant amendments and revisions to that legislation published on December 22, 1993, and corresponding jurisprudence that the Supreme Court of Mexico has issued regarding due process requirements that must be met as a predicate to compliance with this body of law.[605] They state as follows after canvassing relevant jurisprudence:

> *Es importante señalar que la línea de precedentes no se refiere directamente al tema que afecta a Nutrilite, dado que judicialmente no se ha presentado un caso similar, ni siquiera sobre la posibilidad de revertir una expropiación o una dotación, sino que se refieren a los elementos del debido proceso como son la garantía de audiencia previa, la justa indemnización o la posibilidad de aplazamiento en su pago, todos estos elementos del debido proceso que se mezclan elementos nacionales con elementos de tratados internacionales. Así, las condiciones establecidas en las disposiciones señaladas de los tratados se han incorporado mediante dos vías: primero, mediante la reforma a la Ley de*

602 *Id.* ¶ 297.

603 As previously noted, the July 1, 2022 Notice made clear that the communal landowners of San Isidro were accorded the right to physical possession of the 120 hectares comprising *Puertas Uno* and *Dos* of *El Petacal* by no later than July 5, 2022. The communal landowners of San Isidro availed themselves to this perceived entitlement. Eppers Witness Statement (**CWS-002**) at ¶ 92).

604 Report of former Mexican Supreme Court Justice Dr. José Ramon Cossío Díaz and Lic. Raúl M. Mejía Garza, **CER-003**.

605 *Id.* at 16.

Expropiación con las reformas publicadas en el DOF del 22 de diciembre de 1993; segundo, mediante el cambio de criterios por parte del Poder Judicial Federal, en particular la SCJN, partiendo del cambio en la jurisprudencia histórica en materia de garantía de audiencia previa en procedimientos de expropiación federales o locales argumentando la incorporación de las disposiciones del TLCAN al derecho interno, hasta sus últimos criterios en los que incorpora ya términos como la 'justa indemnización' que son tomados directamente de elementos convencionales de derechos humanos como la Convención Interamericana de Derechos Humanos (CIADH).

(Emphasis supplied. Citation omitted.)[606]

568. The authors further note that Mexican Supreme Court has undertaken an effort to revise precedent addressing the incorporation of expansive due process tenets, such as those enunciated in the NAFTA (1994) into domestic expropriation proceedings, highlighting the need to accord all stakeholders with a hearing as a predicate to the implementation of any State measure resulting in a taking of property.[607] Their findings on this point merit consideration:

Este criterio fue revisado de nuevo en enero de 2006 al resolverse 3 amparos en los que se impugnaba la Ley de Expropiación Federal por las mismas razones que tradicionalmente: por falta de garantía de audiencia. En esta ocasión el Pleno de la SCJN revisó y cambió su criterio, con lo que interrumpió la jurisprudencia histórica y la sustituyó no con otro criterio de Pleno sino de la Segunda Sala a solicitud del ministro presidente, lo que hizo por una mayoría de cuatro votos con el criterio establecido en la tesis: 2a./J. 124/2006, publicada en el Semanario Judicial de la Federación y su Gaceta, tomo XXIV, septiembre de 2006, pág. 278, de rubro: 'EXPROPIACIÓN. LA GARANTÍA DE AUDIENCIA DEBE RESPETARSE EN FORMA PREVIA A LA EMISIÓN DEL DECRETO RELATIVO'. Las razones del cambio fueron varias, pero una de las fundamentales se debió a los compromisos asumidos por el Estado mexicano a partir de la firma del TLCAN. [citation omitted.]

Es por ello que para esta opinión los actos realizados por el Gobierno mexicano a través de SEDATU en la toma de los terrenos propiedad de NUTRILITE ***sin seguir un procedimiento de expropiación mediante la Ley de Expropiación vigente pueden considerarse, desde el derecho***

606 *Id.* at 16.

607 *Id.* at 17.

> ***interno, violatorios de las normas constitucionales y legales nacionales relativas a la expropiación por causa de utilidad pública y justa indemnización y la ley de inversiones extranjeras, por ir en contra de las normas establecidas directamente en los instrumentos internacionales firmados y ratificados por el Estado mexicano***.[608]
>
> (Emphasis supplied.)

569. Put simply, as a matter of fact and law not even the pretense of due process preceded the taking.

4. Compensation for the Taking

570. ABG and Nutrilite S.R.L. did not receive any compensation arising from the transfer of title of the 280 hectares comprising *El Petacal* to the communal landowners of San Isidro.

571. The taking of *El Petacal* was (i) not for a public purpose and actually contrary to a public purpose (i) discriminatory, (iii) lacking in due process, and (iv) without compensation.

XV. MEXICO'S EXPROPRIATION OF EL PETACAL INFRINGED THE MINIMUM STANDARD OF TREATMENT OF FAIR AND EQUITABLE TREATMENT

572. Mexico's taking of *El Petacal's* legal title from ABG and Nutrilite S.R.L. and conveyance of title to the communal landowners of San Isidro allegedly in satisfaction of the 1939 Presidential Resolution constitute a breach of minimum treatment in accordance with international law, including fair and equitable treatment. NAFTA (1994) Article 1105 (Minimum Standard of Treatment), in pertinent part reads:

> *1. 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.*

608 *Id.* at 18.

573. Under the plain meaning of the "fair and equitable treatment" standard, Mexico is required to observe fairness and equity of treatment, as these terms are generally understood in non-technical terms, with respect to investors. The terms "fair" and "equitable" commonly have been interpreted to mean "*'just,' 'even-handed,' 'unbiased,' [and] 'legitimate'.*"[609] Under such analysis, the central determination is whether "*in all the circumstances [of the case] the conduct at issue is fair and equitable or unfair and inequitable*."[610]

574. More specifically, the customary and conventional international law obligation to accord a fair and equitable treatment has been interpreted to require treatment in accordance with an investor's legitimate investment-backed expectations.[611] In this regard, host-States such as Mexico are required:

> *To provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host-State to act in a consistent manner, free from ambiguity and t transparently in its relations with the foreign investor …. Any and all State actions conforming to such criteria should relate not only to the guidance, directives or requirements issued, or the resolutions approved thereunder,* ***but also to the goals underlying such regulations****. The foreign investor also expects the host-State to act consistently, i.e., without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor…. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in*

609 *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, (Award), February 6, 2007) ¶ 290 (Dr. Andrés Rigo Sureda, Judge Charles N. Brower, Professor Domingo Bello Janeiro), **CL-0034-ENG**.

610 F.A. Mann, *British Treaties for the Promotion and Protection of Investment*, 52 BRITISH Y. B. INT'L. L. 241, 244 (1984), **CL-0135-ENG**.

611 *See Mondev International LTD. v. United States of America*, (Sir. Ninian Stephen, Prof. James Crawford, Judge Stephen M. Schwebel), **CL-0093-ENG;** *see also TÉCNICAS MEDIOAMBIENTALES Tech Med S.A. v. the United Mexican States*, ICSID Case No. ARB(AF)/00/2, (Award), May 29, 2003, at ¶ 113, **CL-0104-ENG** (Horacio Grigera Naón, Prof. José Carlos Fernández Rosas, Carlos Bernal Verea); *Plama Consortium, Ltd. V. Republic of Bulgaria*., ICSID Case No. ARB/03/24, (Award), August 27, 2008 (Carl F. Salans, Abigail Reardon, Ciril Pelovski), **CL-0139-ENG**.

conformity with the function usually assigned to such instruments, and not to deprive the investment without the required compensation.[612]

(Emphasis supplied.)

575. Legitimate expectations may follow from explicit or implicit representations made by the host-State, or from its contractual commitments. These representations may then entitle an investor to presume that the State's overall legal and business framework will remain stable.[613]

576. The recognition of an investor's legitimate expectations is not determined by the investor's subjective expectations. Rather, they are the result of a balancing operation of the different interests at stake, taking into account all circumstances, including the political, socioeconomic, and cultural conditions prevailing in the host-State.[614] For example, "*the weight of the investor's expectations increases the more concrete and individualized these representations are.*"[615]

577. As noted by Dr. Iona Tudor, the criteria followed by the various Tribunals when analyzing legitimate expectations are the following:

(a) *The type of conduct necessary to generate expectations that become legitimate by the authority of this conduct – an authority of the host-State;*

---

612 *TÉCNICAS MEDIOAMBIENTALES Tech Med S.A. v. the United Mexican States*, ICSID Case No. ARB(AF)/00/2, (Award), May 29, 2003, at ¶ 154, **CL-0104-ENG**.

613 cr. kläger, Fair and Equitable Treatment in International Investment Law at 164, 169 (Cambrige University Press 2011), **CL-0126-ENG**.

614 *id.* at 186; Ioana Tudor, The Fair and Equitable Treatment Standard in International Law of Foreign Investment at 164 (Oxford University Press 2008), **CL-0127-ENG** (explaining that "*ICSID tribunals underlined the important of this preliminary observation phase of the conditions of the host-state by foreign investors,*" since the ICSID system is not designed to be "an insurance system" for imprudent investments).

615 cr. kläger, Fair and Equitable Treatment in International Investment Law at 186-187, **CL-0126-ENG**.

(b) *The level of the expectations have to be reasonable and justifiable in light of the conduct of the State and of the general context;*

(c) *There has to be a causal link between the failure to respect these expectations and the damage suffered by the Investor[.]*[616]

578. For example, in *CME v. Czech Republic*,[617] the claimant invested in a joint venture to acquire a television broadcasting license that was facilitated by respondent's Media Council. When the other party in the joint venture violated its duties to the claimant under Czech law and the license, "*the Media Council failed to take responsibility for the role it had played in igniting the dispute, ignored its own regulatory obligations … [it] has refused to fulfill its obligation, binding on all organs of the Czech Republic, to comply with the Treaty.*" [618] The Tribunal held that respondent "*intentional[ly] undermine[d]*" claimant's investment, by "*breach[ing] its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest.*"[619]

579. Other examples of investor expectations that Tribunals have found to be protected by the fair and equitable treatment standard include:

(a) The expectation of reasonable assurances by government officials of regulatory approvals, where the State denied a construction permit to build a

---

616 Ioana Tudor, The Fair and Equitable Treatment Standard in International Law of Foreign Investment 166, **CL-0137-ENG**.

617 *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, (Partial Award) September 13, 2001 (Dr. Wolfgang Kühn, Düsseldorf, Judge Stephen M. Schwebel, JUDr. Jaroslav Hándl, Prague), **CL-0128-ENG**.

618 *Id.* ¶ 136.

619 *Id.* ¶ 611.

landfill, after the claimant was assured by government officials that the permit was forthcoming and after the construction project was virtually completed.[620]

(b) The expectation of reasonable compensation, after the host-State's allocation of compensation shares stemming from a joint venture with the claimant essentially deprived claimant of its investment value by "*in practice avoid[ing] to pay compensation*" even though the underlying agreement gave the State "reasonable discretion" to set the compensation amounts.[621]

(c) The expectation of the host-State's legal framework to entice foreign investment in public utility licenses (i.e., a favorable tariff scheme with guaranteed calculations in U.S. Dollars and statutory compensation if the scheme was altered), where the currency provision was discarded, and the tariff review process was discontinued, thus "*completely dismantling the very legal framework constructed to attract investors.*"[622]

(d) The expectation that the investment contract will not be terminated, unless its termination provisions are adhered to, where (1) the State instrumentality that was a party to the agreement unilaterally rescinded it; (2) an appointed quasi-judicial entity summarily ruled against the claimants, without allowing them sufficient due process for "*real possibility to present their position*"; and (3) the

620 *Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1*, (Award), August 30, 2000, ¶ 99, **CL-0102-ENG**.

621 *Iurii Bogdanov, Agurdino-Invest. Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC (Award), September 22, 2005 (Giuditta Cordero Moss) ¶ 4.2.4.8, **CL-0129-ENG**.

622 *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc.v. Argentine Republic*, ICSID Case No. ARB/02/1, (Award) July 25, 2007 (Tatiana de Maekelt, Francisco Rezek, Albert Jan van den Berg) ¶ 139, **CL-0130-ENG**.

grounds cited by the quasi-judicial entity in its ruling against the claimants did not acknowledge claimants' legal rights under the contract.[623]

580. An investor is entitled to protection of its "reasonable expectation"[624] even when the Contracting State is pressured to change its regulatory framework by international bodies. In *Ioan Micula*[625] the claimants built large-scale, state-of-the-art food and beverage production facilities in an underdeveloped area pursuant to a variety of incentive programs enacted by Romania to encourage foreign investments.[626]

581. After the claimants invested a substantial amount of capital, Romania revoked a customs duties exemption five years ahead of schedule. Romania's primary defense was that the custom duties exemption was incompatible with European Union law, and thus it was forced to renounce that incentive in order to join the EU Commission, which confirmed that it did in fact require Romania to terminate that incentive program.

---

623 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, (Award), July 29, 2008 (Bernard Hanotiau, Marc Lalonde, Stewart Boyd) ¶¶ 615-618, **CL-0131-ENG**.

624 *See, e.g., Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, (Partial Award), March 17, 2006 (Sir Arthur Watts KCMG QC, Maître L. Yves Fortier CC QC, Prof. Dr Peter Behrens) ¶ 302, **CL-0073-ENG** ("*the standard of "'air and equitable treatment' is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the 'fair and equitable treatment' standard included in Article 3.1 of the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations*"); *Total SA v. Argentine Republic*, ICSID Case No. ARB/04/01, (Decision on Liability), December 27, 2010 (Prof. Giorgio Sacerdoti, Sr. Luis Herrera Marcano, Henri C. Alvarez), ¶ 117, **CL-0017-ENG** ("*the expectation of the investor is undoubtedly 'legitimate' and hence subject to protection under the fair and equitable treatment clause, if the host-State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilization clauses on which the investor is therefore entitled to rely as a matter of law*"); *Eureko BV v. Republic of Poland*, (Partial Award) August 19, 2005 (L. Yves Fortier, C.C., Q.C., Judge Stephen M. Schwebel, Prof. Jerzy Rajski) ¶¶ 232, 242 **CL-0062-ENG**.

625 *See Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20 (Award), December 11, 2013 (Dr. Laurent Lévy, Dr. Stanimir A. Alexandrov, Prof. Georges Abi-Saab), **CL-0070-ENG**.

626 *Id.* ¶ 158.

582. Even so, the *Ioan Micula* Tribunal held that claimants had a legitimate expectation that they would be entitled to the incentives for the full ten (10)-year period envisaged by the legislation because respondent "*made a representation that created a legitimate expectation that [the incentives] would be available substantially in the same form as they were initially offered.*"[627] Despite the stated importance of complying with EU regulations, Romania was nonetheless liable for violating the legal commitments made to the claimants.

583. The case before this Tribunal is much simpler. Here the Mexican government can point to no pretense for disavowing its multiple official representations that the 1939 Presidential Resolution would not constitute the basis for the taking of the property at issue.

A. ABG's Expectations Are Legitimate and Amply Meet the FET Requirement

1. The Representations Relied Upon Were Made In Writing By Authoritative Representatives of Mexico's Federal Government

584. In this case, the Tribunal has been provided with nineteen (19) core documents authored and/or subscribed to by high-ranking representatives of Mexico's Federal government who represented to NPI and Nutrilite S.R.L. two simple and undisputable propositions. First, that Mexico's Federal government, together with the government of the State of Jalisco, would undertake best efforts to see to it that the 1939 Presidential Resolution would be fully discharged and satisfied.

585. Both levels of government (Federal and State) stated quite lucidly that the methodology pursuant to which the 1939 Presidential Resolution would be satisfied was pursuant to the initiative on the part of Mexico's Federal government and the government of the State of Jalisco to acquire the 280 hectares comprising *Potrero*

627 *Id.* ¶ 677.

Grande or *Paso de Cedros* and to convey that property to the communal landowners of the State of Jalisco. The conveyance would be in exchange for documentation stating that the communal landowners would relinquish any claim to execution on the property known as *El Petacal* based upon that 1939 Presidential Resolution.

586. Three documents in particular embody the intent to execute this strategy: (i) the *Guadalajara Agreement* dated February 15, 1994,[628] (ii) the *Coordination Agreement* (*Acuerdo de Concertación*) dated September 25, 1993,[629] and (iii) the letter from the Governor of the State of Jalisco, Mr. Carlos Rivera Aceves to C. Víctor M. Cervera Pacheco, Secretary of the Agrarian Reform, dated February 17, 1994.[630]

587. In addition to these three instruments, there are no less than fifteen (15) documents, all authored by high-ranking representatives of Mexico's Federal government, providing that Mexico's Federal government (i) undertook steps to discharge and fully satisfy the 1939 Presidential Resolution, and (ii) was successful in so doing.[631]

---

628 *Supra* ¶¶ 82, 86-87.

629 *Supra* ¶¶ 37-43.

630 *Supra* ¶¶ 88-90.

631 (i) Administrative Order (*Oficio*) dated November 19, 1993, from Lic. Alejandro Díaz Guzmán of Mexico's Federal Secretary of the Agrarian Reform to Lic. Raúl Pineda Pineda (*Oficial Mayor de la Secretaría de la Reforma Agraria*) (**C-0023-SPA**);

(ii) Legal Opinion from Lic. Ignacio Ramos Espinoza (Director General) of the Secretary of the Agrarian Reform to Lic. Juan Reyes Flores, Coordinator of Department of Payment for Real Property and Indemnifications, dated February 22, 1994 (**C-0022-SPA**);

(iii) Correspondence from the Coordinator of Payment Concerning Real Property and Indemnification, Lic. Juan Reyes Flores, to the Director General of Legal Affairs of the Secretary of Agrarian Reform, Lic. Ignacio Ramos Espinoza, dated February 9, 1994 (**C-0027-SPA**);

(iv) Agrarian Release (*Convenio*: *Finiquito Agrario*) entered into between the Secretary of Agrarian Reform, represented by Lic. Raúl Pineda Pineda (*Oficial Mayor*), and Lic. Ignacio Ramos Espinoza (*Director General de Asuntos Jurídicos*), the proprietors of the property known as *Potrero Grande* or *Paso de Cedros*, Mrs. Esperanza Nava Gómez and C. José Nava Palacios, and C. Adolfo Reyes González (*Comisariado Ejidal del Poblado "San Isidro" Venustiano Carranza hoy San Gabriel, Jalisco, President*), on the part of the communal landowners of San Isidro, as well as the Secretary of the Communal Landowner

Organization, C. Mario Rosales Laureano, and that organization's Treasurer, C. Daniel Lázaro Durán, dated March 14, 1994 (**C-0032-SPA**);

(v) Agrarian Release (*Convenio*: *Finiquito Agrario*) entered into between the Secretary of the Agrarian Reform, represented by C. Víctor M. Cervera Pacheco, the organization titled, *Unión Campesina Democrática,* represented by C. Gerardo Avalos Lemus, and the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco,* C. Adolfo Reyes González (President) on the part of the communal landowners of San Isidro, dated March 14, 1994 (**C-0033-SPA**);

(vi) The *Guadalajara Agreement*, dated February 15, 1994 executed by Alejandro Díaz Guzmán (*Federal Delegate of the Secretary of the Agrarian Reform*), Arturo Gil Elizondo (*Secretary of Rural Development-State of Jalisco*), Gustavo Martínez Guitón (*Secretary of Economic Promotion-State of Jalisco*), Humberto Anaya Serrano (*Rural Development-State of Jalisco*), Rafael Hidalgo Reyes (*Sub-General Manager Electricity District-State of Jalisco*), Adriana de Aguinaga (*Legal Counsel for Nutrilite S.R.L. [Goodrich Riquelme y Asociados]*), Enrique Romero Amaya (*Counsel for Nutrilite S.R.L.*), Roberto Vargas Maciel (*Exportag, S.A. de C.V. on behalf of NPI and Nutrilite S.R.L.*), Abelardo Reyes Vargas (*Exportag, S.A. de C.V. on behalf of NPI and Nutrilite S.R.L.*), Sergio Vargas Maciel (*Exportag, S.A. de C.V. on behalf of NPI and Nutrilite S.R.L.*), and Mr. David T. Tuttle (*NPI and Nutrilite S.R.L.*) (**C-0021-SPA**);

(vii) The *Coordination Agreement* (*Acuerdo de Concertación*), dated September 25, 1993 executed by (i) Sr. Raúl Peña Herz (*Secretary of the Agrarian Reform*), (ii) Arturo Gil Elizondo (*Secretary of Rural Development*), (iii) Dip. Gerardo Avalos Lemus (Representative of the organization, *La Unión Campesina Democrático y Apoderado Legal del Ejido San Isidro,* and legal representative of the communal landowners of San Isidro), (iv) Sr. Mario Rosales Laureano (*Secretary of the "Comisariado Ejidal"*), (v) José Araiza (*Suplente del Comisariado Ejidal*), (vi) Sr. Alejo Enciso Estrada (*Representante del Grupo de Campesinos de El Petacal*), (vii) Sergio Vargas Maciel (Exportag, S.A. de C.V. on behalf of Nutrilite S.R.L.), and (viii) José Roberto Vargas Maciel (Exportag, S.A. de C.V. on behalf of Nutrilite S.R.L.) (**C-0020-SPA**);

(viii) Document demonstrating *Conformity and Satisfaction* (*Asunto: Se Manifiesta Conformidad*) signed y José Araiza Chávez, President of the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco* and J. Guadalupe Reyes Martínez, Secretary of the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco*, and Alfredo Villa Jacobo, Treasurer of the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco,* twice stamped by the *Registro Agrario Nacional Secretaría de Desarrollo Agrario, Territorial y Urbano (SEDATU)*, dated March 26, 1994 (**C-0038-SPA**);

(ix) Document titled "*Acta de Posesión y Deslinde de Polígono de las 280-00-00 Hectáreas Pendientes a Entregar de la Ejecución Complementaria de la Resolución Presidencial del 23 de agosto de 1939 Publicada en el Diario Oficial de la Federación el 18 de noviembre del Mismo Año, Por la Cual se Benefició el Ejido San Isidro, Municipio San Gabriel, Estado de Jalisco*" ("*Acta de Posesión y Deslinde"*), (**C-0050-SPA**);

(x) Copy of check issued by the Secretary of the Treasury (Secretaría de Hacienda y Crédito Público, Tesorería de la Federación, signed by C. Esperanza Nava Gómez (Proprietor), and C. José Nava Palacios (Proprietor) issued by the Bank of Mexico, Check No. 01809286 and three times stamped by official stamp of the Secretary of Agrarian Reform (**C-0039-2-SPA**);

(xi) Receipt of payment dated March 14, 1994 issued by the Secretary of the Agrarian Reform, and signed by Lic. Raúl Pineda Pineda (*Oficial Mayor*), C. Esperanza Nava Gómez (Proprietor), and C. José Nava Palacios (Proprietor) (**C-0039-1-SPA**);

588. The creation and processing of these documents constitutes conduct on the part of government officials that generate reasonable and legitimate expectations. Indeed,

(xii) Correspondence from the Coordinator of Payment Concerning Real Property and Indemnification, Lic. Juan Reyes Flores, to Lic. Arturo Sánchez Zavala, Coordinator of the Program for the Incorporation of Lands to the Ejido Regime, dated February 18, 1994 (**C-0029-SPA**);

(xiii) Correspondence dated February 23, 1994 from Lic. Raúl Pineda Pineda (*Oficial Mayor*) to C. P. Rafael Casellas Fitzmaurice, Director General of Administration, regarding solicitation for authorization of resources for payment (**C-0031-SPA**);

(xiv) Correspondence from Lic. Alfredo Galeana Ortega, Unidad de Pago de Predios e Indemnizaciones to Lic. Arturo Rafael Sánchez Zavala, Coordinator of the Program for the Incorporation of Lands to the Ejido Regime, dated February 22, 1994 (**C-0030-SPA**);

(xv) Receipt (*ASUNTO: Acuse de Recibo*) signed by José Araiza Chávez, President of the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco* and J. Guadalupe Reyes Martínez, Secretary of the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco*, and Alfredo Villa Jacobo, Treasurer of the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco, President,* Jalisco, dated March 26, 1994, twice stamped by the *Registro Agrario Nacional Secretaria de Desarrollo Agrario, Territorial y Urbano (SEDATU)*, acknowledging receipt of six documents:

(i) Oficio de Comisión,

(ii) Convenio de fecha 11 de marzo de 1994,

(iii) Convenio Subsidiario de fecha 11 de marzo de 1994,

(iv) Acta de Posesión y Virtual de las 280-00-00 Has.,

(v) Acta de Deslinde y Amojonamiento de las 280-00-00 Has., and

(vi) Plano del Deslinde Complementario.

(**C-0039-SPA**);

(xvi) Document signed by José Araiza Chávez, President of the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco* and J. Guadalupe Reyes Martínez, Secretary of the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco, President, Jalisco*, and Alfredo Villa Jacobo, Treasurer of the *Comisariado Ejidal del Poblado "San Isidro," Venustiano Carranza hoy San Gabriel, Jalisco, President,* Jalisco, pursuant to which the communal landowners acknowledge having been surveyed with respect to the property known as *Potrero Grande* or *Paso de Cedros* on March 16, 1994, twice stamped by the *Registro Agrario Nacional Secretaría de Desarrollo Agrario, Territorial y Urbano (SEDATU)*, dated March 26, 1994, (**C-0040-SPA**); and

(xvii) Document titled "*Acta Relativa al Deslinde y Amojonamiento de los Terrenos Que Se Entregan al Núcleo Agrario Denominado 'San Isidro', Municipio de San Gabriel (antes Venustiano Carranza), Estado de Jalisco, en Cumplimiento al Convenio de Finiquito Celebrado el once de marzo de mil novecientos noventa y cuatro, por la Oficialía Mayor de la Secretaría de la Reforma Agraria,*" and, in part, by the *Comisionado* of the Secretary of the Agrarian Reform and bearing four stamps of the *Registro Nacional de la Secretaría de Desarrollo Agrario, Territorial, y Urbano (SEDATU)* (**C-0042-SPA**).

these documents in fact caused NPI and Nutrilite S.R.L. to continue to invest in the *El Petacal* organic farming operation, and more immediately, to purchase the remaining 120 hectares of *El Petacal* known as *Puertas Uno* and *Dos*.[632]

---

632 On this point Mr. Hunter testifies:

We relied on the government and court representations and NPI continued its investments in El Petacal throughout 2018. Indeed, but for these and similar representations and acts of support from the Governors of the State of Jalisco (Messrs. Aceves and Cárdenas Jiménez) and the President of the United Mexican States (President Zedillo), NPI, through Nutrilite S.R.L., would not have invested in El Petacal and implemented its staged investment over time in order to create a world class organic farming and processing operation that would spawn micro-economic development for the southern region of the State of Jalisco and more overarching macro-economic benefits for the State of Jalisco as a whole.

Hunter Witness Statement (**CWS-001-ENG**) ¶ 199.

Also this time commenting on the effect that the *Guadalajara Agreement* and *Coordination Agreement* had on the effect that NPI and Nutrilite S.R.L., Mr. Hunter states:

The Guadalajara Agreement much like the Coordination Agreement, will provide the Arbitral Tribunal with a sense of the support and representations that Mexican State and Federal government officials very affirmatively were communicating and providing to Nutrilite S.R.L. Mexican State and Federal representatives provided Nutrilite S.R.L. with very tangible representations, such as the Guadalajara Agreement and the Coordination Agreement, regarding the stability, support, and protection that Nutrilite S.R.L.'s investment would receive. These representations assured Nutrilite S.R.L., NPI, and ABG that moving forward with the staged development of El Petacal would be a prudent and commercially sound course of conduct.

Id., ¶ 201.

In this connection, Mr. Hunter further testifies:

At that time, the last quarter of 1993 and first quarter of 1994, Nutrilite S.R.L. and NPI had the conviction that all levels of the Mexican government would cooperate in protecting the development and operation of an organic farming and processing center. For this reason, the staged investment ensued.

Id., ¶ 205.

Mr. Hunter testifies in connection with the two agrarian releases (C-0032-SPA and C-0033-SPA) and their effect on NPI's Nutrilite S.R.L.'s decision to go forward with the staged investment, in part, by purchasing the 120 hectares known as *Puertas Uno* and *Dos de El Petacal*:

These two releases state that the communal landowners of San Isidro opined that the August 23, 1939 Presidential Resolution was fully satisfied. Mexico's Federal government together with representatives of the State of Jalisco's government arranged for the conveyance of Potrero Grande or Paso de Cedros to the communal landowners with the goal of satisfying the communal landowner's claims pursuant to the August 23, 1939 Presidential Resolution so that NPI's and Nutrilite S.R.L.'s plans to develop a world-class organic farming operation would take place and galvanize the economic development of El Llano en Llamas. The two agrarian releases suggested

2. The Level of Expectation on the Part of Claimant Was Reasonable and Justified in Light of the Conduct of the State and of the General Context

589. The evidence before the Arbitral Tribunal demonstrates that NPI, Nutrilite S.R.L., and ABG worked hand-in-glove with Federal and State (Jalisco) government representatives to develop the southern region of the State of Jalisco. Claimant did so, in part, because the Mexican Federal government had guaranteed that title to the 280 hectares comprising *El Petacal* would not be challenged on the basis of the 1939 Presidential Resolution.[633]

590. These efforts, premised on multiple written and oral representations by the highest officials of the Federal government of Mexico and the government of the State of Jalisco, provided a general context that in addition to giving rise to reasonable and justifiable expectations, over time *continuously bolstered* such expectations.

591. The concept of reliance on a legitimate expectation understandably centers on the narrow set of conduct on the part of States that create reasonable and justifiable expectations on the part of an investor to act in reliance on such conduct. Therefore, a failure by the State to honor those expectations could result in damages to the investor. The language cited from *TecMed v. Mexico* in paragraph 574, *supra* is helpful on this point:

> *The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such*

---

at the time that it was appropriate for NPI and Nutrilite S.R.L. to purchase Puertas Uno and Dos. As previously referenced, the 120 hectares comprising Puertas Uno and Dos were purchased on May 12, 1994.

Id., ¶ 213.

633 *Id.* ¶ ¶ 96, 146, *see also* Eppers Witness Statement (**CWS-002**) at ¶¶ 126, 177;

regulations…The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.[634]

592. Tribunals find "legitimate expectations" giving rise to "*reasonable reliance on the part of an investor where a claimant, as here, establishes (i) the existence of a promise or assurance attributable to a company organ of the State, (ii) reliance by the claimant as a matter of fact, and (iii) the extent to which such reliance is based on reasonableness, commercial or otherwise.*"[635] All three prongs are here met.[636]

---

634 *Tech Med v. Mexico*, ¶ 154, **CL-0104-ENG**.

635 *Micula v. Romania*, ¶ 668, **CL-0070-ENG**.

636 *See also Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, (Award), January 12, 2011, (Fali S. Nariman, Prof. James Anaya, John R. Crook) ¶ 141, **CL-0071-ENG** (noting that *"[o]rdinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made explicitly or implicitly by a State party*"); *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, (Decision on Jurisdiction and Liability) April 10, 2013, ¶¶ 912, 957, **CL-0072-ENG** (Justice Gustaf Möller, Prof. Piero Bernardini, Prof. Antonio Remiro Brotóns) (noting that there are two types of commitments that host-States generally advance, those specific to their addressee, and others particular to object or purpose. The latter can be considered specific if "*its precise object was to give a real guarantee of stability to the investor. Usually general texts cannot contain such commitments, as there is no guarantee that they will not be modified in due course. However, a reiteration of the same type of commitment in different types of general statements could considering the circumstances, amount to a specific behavior of the State, the object and purpose of which is to give the investor a guarantee on which it can justifiably rely.*");*., Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, (Partial Award), March 17, 2006 (Sir Arthur Watts KCMG QC, Maître L. Yves Fortier CC QC, Prof. Dr Peter Behrens) ¶ 329, **CL-0073-ENG** ("*the Tribunal finds that the claimant's reasonable expectations to be entitled to protection under the Treaty need not be based on an explicit assurance from the Czech Government. It is sufficient that [investor] when making its investment, could reasonably expect that, should serious financial problems arise in the future for all of the Big Four banks equally and in case the Czech Government should consider and provide financial support to overcome these problems, it would do so in a consistent and even-handed way.*"); *Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, (Decision on Jurisdiction, Applicable Law and Liability)*, November 30, 2012, ¶ 7.78, **CL-0074-ENG** (V.V. Veeder, Prof. Gabrielle Kaufmann-Kohler, Prof. Brigitte Stern) (observing that *"[f]airness and consistency must be assessed against the backdrop of information that the investor knew and should reasonably have known at the time of the investment and of the conduct of the host-State. While specific assurances given by the host-State may reinforce the investor's expectations, such an assurance is not always indispensable […]. Specific assurances will simply make a difference in the assessment of the investor's knowledge and of the reasonability and legitimacy of its expectations.*"); *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6 (Award) August 27, 2019, ¶ 1368, **CL-0075-ENG** (Juan

3. There Is a Causal Link between the Mexican Government's Violation of the Reasonable Expectation That the 1939 Presidential Resolution Had Been Formally and Substantively Discharged By March 14, 1994 and the Damages the Claimant Has Suffered

593. This third prong readily has been satisfied based upon the proffered evidence. Mexico represented to Claimant that the 1939 Presidential Resolution had been fully satisfied and discharged.[637] Mexico assured Claimant that for this reason the 1939 Presidential Resolution would not constitute a basis for divesting Claimant of its title to, or possession of, the 280 hectares comprising *El Petacal*.[638]

594. Mexico, however, did not honor these representations and transferred the legal title of *El Petacal*, and the physical possession of a portion of *El Petacal*, to the communal landowners of San Isidro.[639] Therefore, Claimant has suffered damages arising from the loss of legal title to the 280 hectares sustaining a world-class organic farming

---

Fernández-Armesto, Oscar M. Garibaldi, J. Christopher Thomas QC) (stating that *"[a] State can create legitimate expectations vis-à-vis a foreign investor in two different contexts, the State makes representations, assurances, or commitments directly to the investor (or to a narrow class of investors or potential investors). But legal expectations can also be created in some cases by the State's general legislative and regulatory framework: an investor may make an investment in reasonable reliance upon the stability of that framework, so that in certain circumstances a reform of the framework may breach the investor's legitimate expectations.*"); and *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, (Decision on Jurisdiction, Liability and Pre-Trial Decision on Quantum), February 19, 2019, ¶ 388, **CL-0077-ENG** (Prof. Vaughan Lowe, Hon. James Jacob, Prof.Christian Tomuschat) (asserting that *"[t]he Tribunal does not consider it necessary that a specific commitment be made to each individual claimant in order for a legitimate expectation to arise. At least in the case of a highly-regulated industry, and provided that the representations are sufficiently clear and unequivocal, it is enough that a regulatory regime be established with the overt aim of attracting investments by holding out to potential investors the prospect that the investments will be subject to a set of specific regulatory principles that, as a matter of deliberate policy, be maintained in force for a finite length of time. Such regimes are plainly intended to create expectations upon which investors will rely; and to the extent that those expectations are objectively reasonable, they give rise to legitimate expectations when investments are in fact made in reliance upon then.*");

637 *See supra* ¶ 107.

638 *Id.*

639 *See supra* ¶ 107.(q).

processing and packaging operation. The damages suffered can be quantified by the value ascribed to the loss of this income-producing property.

595. The damages suffered are consequential to the taking of the property based upon the false premise that it is possible to engage in the complementary execution of a Presidential Resolution that has been fully discharged or otherwise satisfied. Respondent has disrespected its legal obligation to confer on Claimant and its investment fair and equitable treatment consonant with the minimum standards of protection embodied in customary international law and NAFTA (1994) Art. 1105(1).

XVI. MEXICO HAS VIOLATED ITS LEGAL OBLIGATION TO PROVIDE CLAIMANT WITH TREATMENT NO LESS FAVORABLE THAN THAT WHICH IT ACCORDS TO ITS OWN NATIONALS

596. NAFTA (1994) Art. 1102 (National Treatment) in pertinent part states:

> *1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
>
> *2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

597. Claimant submits that Section XIV of this Memorial addressing Art. 1110.1(b) establishes the extent to which Mexico's treatment of Claimant and its investment was discriminatory with respect to nationals similarly situated and in like circumstances. That Section is here incorporated by reference. Claimant has no additional legal or factual arguments to submit beyond those already stated in the referenced provision.

598. Claimant invites the Tribunal to find that Mexico has accorded Claimant and its investment treatment significantly less favorable than that which it has provided to nationals in similar and like circumstances.

XVII. ABG IS ENTITLED TO FULL REPARATION FOR ITS DAMAGES

599. ABG has been damaged by reason of Respondent's breaches and is entitled to compensation for its losses.[640]

A. The *Chorzów* "Full Reparation" Standard Applies To Mexico's Breaches

600. As the arbitral tribunal explained in *Quiborax S.A. v. Plurinational State of Bolivia*, [641]

> "*It is a basic principle of international law that States incur responsibility for their internationally wrongful acts. This principle is set forth in ILC Article 1, which provides that "[e]very internationally wrongful act of a State entails the international responsibility of that State." The corollary to this principle, which was first articulated by the PCIJ in the often-quoted Chorzów case*[642] *is that the responsible State must repair the damage caused by its internationally wrongful act. As stated in ILC Article 31:*
>
> *Article 31*
>
> *Reparation*
>
> *1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*
>
> *2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of the State.*"

601. This reparation must be "full," i.e., it must eliminate all consequences of the internationally wrongful act and restore the injured party to the situation that would have existed if the act had not been committed.[643] If restitution in kind is impossible or not practicable, the compensation awarded must wipe out all of the consequences of

---

640 Both Article 1135 of NAFTA and Article 14.D.13 of USMCA expressly authorize the tribunal to award "*monetary damages and any applicable interest*."

641 *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Award dated September 16, 2015, ¶¶ 327-328, **CL-0120-ENG**.

642 (Footnote 352 in original) (c*iting Factory at Chorzów, Germany v. Poland, Judgment, Claim for Indemnity, Jurisdiction, Judgment No. 8, (1927) PCIJ Series A No. 9, July 26, 1927, p. 21,* **CL-0078-ENG**.)

643 (Footnote 353 in original) (c*iting Factory at Chorzów,* Germany v. Poland, Judgment, Claim for Indemnity, Merits, Judgment No. 13, (1928) PCIJ Series A No. 17, ICGJ 255 (PCIJ 1928) 13 Sept. 1928, p. 47, **CL-0079-ENG**).

the wrongful act. In this respect, ILC Article 36 provides that "*[t]he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution,*" adding that "*compensation shall cover any financially assessable damage, including loss of profits insofar as it is established.*"[644]

602. Also citing the *Chorzów* case, the tribunal in *Bank Melli Iran v. Kingdom of Bahrain*[645] elaborated that:

> '"*Full" reparation must … eliminate all consequences of the internationally illicit act and restore the injured party to the situation that would have existed if the act had not been committed.*
>
> *In this respect, ILC Article 36(1) provides that "[t]he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.*[646] *Article 31(2) specifies that a compensable injury includes "any damage, whether material or moral, caused by the internationally wrongful act"*[647] *and, again under Article 36(2), "compensation shall cover any financially assessable damage, including loss of profits insofar as it is established."*[648]
>
> *While they were drawn up for interstate disputes, these general principles of international law are routinely applied by analogy in investor-state arbitration such as the present one*.

644 *See also, e.g., Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahrain*, PCA Case No. 2017-25, Award dated November 9, 2021, ¶¶ 738-739, **CL-0080-ENG;** *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB03/19, **CL-0081-ENG** and *AWG Group Limited v. The Argentine Republic*, UNCITRAL Rules, Award dated April 9, 2015, ¶¶ 25-27, **CL-0082-ENG**.

645 *Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahrain*, PCA Case No. 2017-25, Award dated November 9, 2021, ¶¶ 739-741, **CL-0080-ENG.**

646 (Footnote 801 in original) (*citing* ILC Articles on State Responsibility, Article 36(1), **CL-0088-ENG**.).

647 (Footnote 802 in original) (*citing* ILC Articles on State Responsibility, Article 36(2), **CL-0088-ENG**).

648 (Footnote 803 in original) (*citing* ILC Articles on State Responsibility, Article 36(2), **CL-0088-ENG**).

603. The "full reparation" principle set out in *Chorzów* and in the ILC Articles applies even to treaties that provide compensation standards for lawful expropriations. For example, the tribunal in *Archer Daniels Midland Co. v. The United Mexican States*[649] explained that the compensation standard contained in NAFTA's Article 1110, concerning expropriations, did not govern Claimants' National Treatment (Article 1102) and Performance Requirements (Article 1106) claims. Because the compensation language of Article 1110(2) does not even purport to address other investment protection provisions, the tribunal looked to international law and applied the *Chorzów*/ILC Articles principle to the National Treatment and Performance Requirements claims.[650]

604. Indeed, compensation standards such as those set out in NAFTA Article 1110(1)(d) and USMCA Article 14.8.1(c) apply only to cases of *lawful* expropriation. Where, as here, an expropriation is *unlawful* (as shown above), the broader "full reparation" standard of *Chorzów* and the ILC Articles applies.

---

649 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award dated November 21, 2007, paras. 278, 280-281, 283, **CL-0083-ENG** (Noting that, "*[a]s the Feldman Tribunal observed, " ... the only detailed measure of damages specifically provided in Chapter 11 is in Article 1110(2-3), 'fair market value,' which necessarily applies only to situations that fall within Article 1110*") (*citing Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award dated December 16, 2002, ¶ 194, **CL-0117**).

650 Many investment treaties, including NAFTA and USMCA, expressly provide for the application of international law from sources outside of the treaties' own language. (Indeed, it would be difficult to resolve most treaty disputes without doing so). Article 1131 of NAFTA, entitled "Governing Law", provides in pertinent part that "*[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.*" Article 14.D.9 of USMCA contains a virtually-identical provision to the effect that "*[Subject to interpretation decisions under Article 30.2], when a claim is submitted under Article 14.D.3.1 (Submission of a Claim to Arbitration), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.*"

605. For example, in *Stabil LLC v. The Russian Federation,*[651] the tribunal found that the respondent's expropriation of claimants' investment breached Article 5 of the relevant BIT, giving rise "t*o an obligation to make full reparation for the injury caused by that act.*" The tribunal further noted that,

> *[w]hile Article 5(2) of the [BIT] provides a standard of compensation, that standard applies only in the event of an expropriation that is lawful under the text provided in Article 5(1). As the expropriation in the present case was held to be unlawful, the standard of Article 5(2) does not apply. The Tribunal will therefore resort to customary international law and, in particular, to the principle set forth in Chorzów…*

606. Similarly, the tribunal in *Burlington Resources Inc. v. Republic of Ecuador*[652] rejected the respondent's contention that the "prompt, adequate and effective" compensation standard for expropriations under the BIT applied to an unlawful expropriation:

> *In the Tribunal's view, the appropriate standard of compensation in this case is the customary international law standard of full reparation. Article III(1) only describes the conditions under which an expropriation is considered lawful; it does not set out the standard of compensation for expropriation resulting from breaches of the Treaty. This conclusion has*

---

651 *Stabil LLC, Rubenor LLC, Rustel LLC, Novel-Estate LLC, PII Kirovograd-Nafta LLC, Crimea-Petrol LLC, Pirsan LLC, Trade-Trust LLC, Elefteria LLC, VKF Satek LLC, and Stemv Group LLC v. The Russian Federation,* PCA Case N0. 2015-35, Award dated April 12, 2019, paras. 264-265, **CL-0110-ENG**.

652 *Burlington Resources Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Reconsideration and Award dated February 7, 2017, paras. 160, 177, **CL-0084-ENG** (citing *Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8,* Award dated February 6, 2007, ¶ 349, **CL-0034**; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary,* Award dated October 2, 2006, ¶ 483, **CL-0018**; *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt,* ICSID Case No. ARB/05/15, Award dated June 1, 2009, ¶ 540, **CL-0106**; *Saipem S.p.A. v. The People's Republic of Bangladesh,* ICSID Case No. ARB/05/7, Award dated June 30, 2009, ¶ 201, **CL-0085-ENG**; *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica,* ICSID Case Nos. ARB/08/1 and ARB/09/20, Award dated May 16, 2012, ¶ 306, **CL-0086-ENG**; *Azurix Corporation v. The Argentine Republic,* ICSID Case No. ARB/01/12, Annulment Decision dated September 1, 2009, ¶ 324 and note 254, **CL-0019**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated August 20, 2007, paras. 8.2.3–8.2.7, **CL-0087-ENG**; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile,* ICSID Case No. ARB/01/7, Award dated May 25, 2004, ¶ 238, **CL-0089-ENG**; and *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Award dated September 16, 2015, ¶ 326, **CL-0120**.).

> *been reaffirmed in a number of cases where the treaty in question had similar language. The authorities cited by Ecuador in this regard are unpersuasive; it is clear in this case that the Treaty provides the primary rules of international law, i.e., the State's substantive obligations, and not the secondary rules, i.e., those that determine the State's responsibility for breach of those obligations. In the absence of such a secondary rule in the Treaty, the Tribunal must turn to customary international law.*
>
> *…*
>
> *The appropriate standard of compensation is thus the customary international law standard of full reparation set out in Article 31 of the ILC Articles, applied by analogy.*

607. Some commentators and tribunals have adopted the position that the *Chorzów* standard does not apply to expropriations that were lawful *except for* the failure to pay compensation.[653] As noted below, the texts of NAFTA and USMCA do not support such an interpretation. In any case, it has been shown above that Mexico's expropriation of *El Petacal* violated each and every provision of NAFTA's and USMCA's expropriation provisions, and therefore the *Chorzów* standard is clearly applicable in this case. In *Burlington Resources v. Ecuador,* for example, the tribunal found that "*the expropriation was unlawful not only for failure to pay compensation*", but on other grounds, as well. Thus, the tribunal could "*dispense with determining whether the standard of compensation under customary international law is different for expropriations that are unlawful solely as a result of the failure to pay compensation as opposed to expropriations that are unlawful on other grounds.*" In such circumstances, as here, *Chorzów* and the ILC Articles provided the appropriate standard of compensation.[654]

---

653 *See Burlington Resources Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Reconsideration and Award dated February 7, 2017, paras. 151-153, **CL-0084-ENG** (reciting respondent's arguments and citations to that effect).

654 *Burlington Resources Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Reconsideration and Award dated February 7, 2017, paras. 176-177, **CL-0084-ENG.**

608. Neither Chapter 11 of NAFTA nor Chapter 14 of USMCA identify any particular measure of compensation for breaches of investment protection standards. In fact, they say nothing about *any* amount of compensation to be received by investors, except for the limited provisions contained in their expropriation provisions, NAFTA Article 1110 and USMCA Article 14.8. Thus, as the tribunals found in *Archer Daniels Midland* and in *Feldman,* the appropriate measure of compensation for non-expropriation breaches of the treaties is the *Chorzów*/ILC Articles standard under customary international law.

609. Moreover, the specific language of those provisions makes plain that they are also not intended to establish a measure of compensation to be awarded by tribunals for breaches of the treaties' expropriation provisions. Rather, they establish the amount of compensation that must be paid "without delay" upon expropriation if a treaty breach is to be avoided. In other words, payment without delay of this measure of compensation is a condition precedent to the lawfulness of the expropriation. If it is not paid without delay, the expropriation is unlawful.

610. NAFTA Article 1110(1) establishes four conditions that must be met in order for an expropriation to comply with the treaty – *i.e.,* in order for the expropriation to be lawful:

> *1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:*
>
> *(a) for a public purpose;*
>
> *(b) on a non-discriminatory basis;*
>
> *(c) in accordance with due process of law and Article 1105(1); and*

> *(d) on payment of compensation in accordance with paragraphs (2) through (6).*

611. Article 14.8(1) of USMCA follows the identical structure, in very similar language:

> *1. No Party shall expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation), except:*
>
> *(a) for a public purpose;*
>
> *(b) in a non-discriminatory manner;*
>
> *(c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2, 3, and 4; and*
>
> *(d) in accordance with due process of law.*

612. Thus, under both treaties, violation of any of the four preconditions for a lawful expropriation renders the expropriation unlawful.

613. The subsequent provisions of each article establish the *amount* of compensation that must be paid to avoid unlawfulness. Failure to pay that amount of compensation means that one of the four preconditions to lawfulness has not been met, rendering the expropriation unlawful. Significantly, neither treaty contains language allowing for an expropriation to be lawful when payment is not made promptly and the investor is forced to go through the investor-State arbitration process to obtain redress.

614. For example, to comply with the precondition established in NAFTA Article 1110(1)(d), the State must comply with Article 1110(2) and (3), which require both that a minimum *amount* of compensation be paid and that the payment be made *without delay:*

> *2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared*

tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

615. Article 14.8.2 of USMCA is to the same effect:

2. Compensation shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation);

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realizable and freely transferable.

616. Mexico's failure to pay the prescribed amount of compensation for ABG's investments "without delay" breached Articles 1110(1)(d), (2), and (3) of NAFTA, and Articles 14.8.1(c) and 14.8.2(a) and (b) of USMCA, rendering the expropriation unlawful on this ground alone.[655] Mexico's additional breaches of NAFTA Article 1110(1)(a)-(c) and USMCA Article 14.8.1(a), (b), and (d) are further reasons why the expropriation was unlawful. Consequently, the *Chorzów I*LC compensation principle applies to each of ABG's claims, including the expropriation claims.

617. Significantly, the *Chorzów I*LC principle requires full reparation for a State's treaty breaches, including in circumstances where that amount exceeds the fair market value

[655] *See Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica,* ICSID Case Nos. ARB/08/1 and ARB/09/20, Award dated May 16, 2012, ¶¶ 304-306, **CL-0086-ENG** (failure to pay adequate compensation within a reasonable period of time rendered expropriation unlawful and treaty's compensation standard nonbinding under Costa Rica – Germany BIT).

of expropriated property at the time of expropriation. In *Siemens v. Argentine Republic,* the tribunal explained that

> [t]he key difference between compensation under the Draft Articles and the *Factory at Chorzów* case formula, and Article 4(2) of the [Argentina-Germany BIT] is that under the former, compensation must take into account "all financially assessable damage" or "wipe out all the consequences of the illegal act" as opposed to compensation "equivalent to the value of the expropriated investment" under the Treaty. Under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages.[656]

618. The *Quiborax* tribunal reached a similar conclusion "*after carefully analyzing the PCIJ's reasoning in Chorzów*":

> *As in the present case, Chorzów dealt with an expropriation where the wrongful act of the expropriating State was not limited to the lack of payment of compensation. The Court held that the compensation to be awarded in these cases 'is not necessarily limited to the value of the undertaking at the moment of the dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated.' According to the Court, a contrary conclusion would be 'tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned.'*

---

656 *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award dated February 6, 2007, ¶ 352, **CL-0034**. See also *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award dated May 16, 2012, ¶ 307, **CL-0086-ENG** ("*where property has been wrongfully expropriated, the aggrieved party may recover (1) the higher value that an investment may have acquired up to the date of the award and (2) incidental expenses. Illegality of expropriation may also influence other discretionary choices made by arbitrators in the assessment of compensation.*"); Irmgard Marboe, "Compensation and Damages in International Law: The Limits of 'Fair Market Value'", 4(6) Transnational Dispute Mgmt 727 (2007), **CL-0090-ENG**, cited in *Quiborax* at fn. 441 ("*It follow, thus, from the principle of full reparation as formulated by the PCIJ in Chorzów Factory, that the valuation is not normally limited to the perspective of the date of the illegal act or some other date in the past. An increase in value of the valuation object, consequential damage, subsequent events and information, at least up until the date of the judgment or award, must be taken into account in the evaluation of damages.*").

> *Rather, on the basis that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed,' the Court concluded that an unlawful expropriation 'involves the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible.'*[657]

619. Thus, Mexico is obliged to "*make full reparation*" to ABG for Mexico's violations of the treaties, and to "*wipe out all of the consequences*" of Mexico's wrongful actions. This "*compensation shall cover any financially assessable damage, including loss of profits insofar as it is established*."[658]

B. ABG's El Petacal Investment Is The Linchpin Of Its Nutrilite (And Other) Business

620. Mexico's expropriation of ABG's investment at *El Petacal* has devastating consequences for ABG's business. As explained in the Witness Statement of Claimant's Chief Supply Chain Officer, Brian Kraus, which is **CWS-004** to this Memorial, the organic farm at *El Petacal* grows a selection of crops (the " *El Petacal* Crops") that are critical ingredients in a wide range of ABG's Nutrilite- and Artistry-branded products (the "Mexico-Source Products"). (see ¶¶ 15-16, **CWS-004**).

621. Indeed, as Mr. Kraus explains, it is the crops that are grown at *El Petacal* "*that are, from a commercial and supply chain perspective, the critical portion of the Mexico-*

---

657 *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Award dated September 16, 2015, paras. 371-372, **CL-0120** (*citing* International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Arts. 31, 36, **C-0088-ENG** and *Factory at Chorzów, Germany v. Poland*, Judgment, Claim for Indemnity, Merits, Judgment No. 13, (1928) PCIJ Series A No. 17, ICGJ 255 (PCIJ 1928) 13 Sept. 1928, p. 47, **CL-0079-ENG**).

658 International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Arts. 31, 36, **CL-0088-ENG**; c*iting Factory at Chorzów, Germany v. Poland*, Judgment, Claim for Indemnity, Merits, Judgment No. 13, (1928) PCIJ Series A No. 17, ICGJ 255 (PCIJ 1928) 13 Sept. 1928, p. 47, **CL-0079-ENG** .

Source Products." Unlike the other ingredients in those products, which could reasonably be obtained from alternative sources,

> *an interruption in the supply of the El Petacal Crops would result in a major disruption and delay in the production of the Mexico-Source Products because substitute sources of the El Petacal Crops, compliant with certified organic farming practices and with Amway's seed-to-supplement process requirements, are not readily or immediately available. As important, the El Petacal Crops support and strengthen the organic claims of the Mexico-Source Products, which is critical from a commercial standpoint.*
>
> (¶ 17, **CWS-004**).

622. Mr. Kraus explains the particular challenges posed by the loss of the investment at *El Petacal* . First, ABG and its affiliated companies do not have an alternative source of supply for 99% of the *El Petacal* Crops (the 1% exception being watercress). ABG is searching for a potential substitute location but has thus far been unsuccessful, in part because of the very specific environmental and local requirements that a substitute location would need to meet. In any case, even if a suitable substitute location can be obtained, it will require years to prepare the land for organic farming compliant with Amway's standards, to obtain the appropriate certifications, and to reconstruct the sophisticated physical facilities required for the operation. (The process of developing the *El Petacal* operation similarly required a number of years). (¶ 18, **CWS-004**).

623. Not only has ABG thus far been unable to identify a substitute location for raising the *El Petacal* Crops; it also does not currently have outside sources of supply to replace them. As Mr. Kraus explains, securing such external sources is itself a time-consuming and expensive proposition, requiring identification and then qualification of suitable suppliers (which can require several harvests to complete), with qualified suppliers

then requiring 12 months or more of lead time to include ABG's needs in their crop plans. In addition, because outside suppliers are not within Amway's control, having multiple suppliers for each product is important in order to mitigate ABG's potentially greater risk of supply chain interruption. (¶ 19, **CWS-004**).

624. Once ABG has been able to restore its supply of crops, whether from a new ABG farm at an alternate location, or from qualified outside suppliers, each of ABG's final products using those crops will need to be re-registered in each jurisdiction where the products are sold to reflect the ingredients from new sources. In addition to governmental re-registrations, labeling and marketing materials must also be updated for each product. (¶ 20, **CWS-004**).

625. Mr. Kraus succinctly explains the consequences of these facts:

> In short, the cessation of supply from the *El Petacal* farm will mean that the Mexico-Source Products simply cannot be sold for a period of years.
>
> As a result, the farm at *El Petacal* is currently necessary for production of the Mexico-Source Products; the *El Petacal* Crops render the finished products into which they are incorporated unique; and the farm is the principal source of their value.
>
> (¶¶ 19-20, **CWS-004**).

626. Mr. Kraus further explains how ABG realizes the value of the Mexico-Source Products. Although ABG could sell its products directly to end customers and independent business owners, it currently chooses, for reasons of convenience and efficiency, to sell through a number of affiliates and subsidiaries, all of which, like ABG, are wholly-owned entities in the Amway family. As a result, some of the value of ABG's products is currently realized on the books of those subsidiaries and affiliates. (¶ 23, **CWS-004**).

627. Exhibit **BK-0002-ENG** shows how this process works in the case of the farm at *El Petacal* . The farm plants, grows, harvests, partially processes, and packages the *El*

Petacal Crops, which are then sold to ABG. In turn, ABG processes, manufactures, and packages the finished Mexico-Source Products, which are Amway products. Thereupon, ABG sells the Mexico-Source Products to Access Business Group International, LLC (ABGIL), which in turn distributes them to affiliated Amway sales companies in the U.S. and abroad. Those Amway sales companies (all affiliates of ABG, ABGIL, and Nutrilite) sell the products onward to end customers and independent business owners. (¶ 24, **CWS-004**).

628. Notwithstanding this multi-step distribution process within the Amway family, Mr. Kraus explains,

> Because the end-users are purchasing the unique and distinctive Amway products manufactured by ABG, the real value generated by ABG's *El Petacal* farm is the price at which Amway is selling the Mexico-Source Products derived from the *El Petacal* Crops, less the organization's cost of making and selling them (such as production, packaging, marketing, and distribution costs). The fact that some of that value is currently realized on the books of ABG's affiliates is an artifact of Amway's current business structure, which could be reversed should ABG decide to do so.
>
> (¶ 25, **CWS-004**).[659]

C. ABG Has Suffered Extensive Damages As A Result of Mexico's Treaty Breaches

629. ABG is submitting as **CER-004** to this Memorial the Expert Report of Antonio L. Argiz, CPA/ABV/CFF/CGMA, ASA, CVA, CFE. Mr. Argiz is the South Florida Managing Principal of BDO USA, P.C., and has over 40 years' of experience in his field, including

[659] In fact, the full value realized from the Mexico-Source Products could be shifted onto ABG's books, even without reallocating tasks among its affiliated companies, by simply revising the intra-Amway pricing mechanisms currently in use. Although ABGIL's sales to Amway's sales affiliates are priced using a "transactional net margin method" that is essentially based on the market price rather than the cost, ABG is currently selling to ABGIL on a cost-plus basis. By shifting to the "transactional net margin method" of pricing the Mexico-Source Products sold to ABGIL, ABG could capture on its own books the value represented by those products (which value is destroyed by the loss of the El Petacal farm). (¶ 26, **CWS-004**).

audits, business planning, economic damages, fraud examinations, valuations, royalty disputes, and litigation cases. (**AA-0001-ENG**). Mr. Argiz was retained by ABG to provide expert opinions concerning ABG's damages in this case. (¶ 1, **CER-004**).

630. Mr. Argiz analyzed ABG's losses from two perspectives. First, he calculated the lost profits that could be identified as a result of Mexico's taking of ABG's investment. Next, in light of certain assumptions that were made as part of the lost profits analysis,[660] and in light of the fact that ABG's business will be severely disrupted for a period of years, he also calculated the fair market value of ABG's business that would cease to operate, or would be disrupted, as a result of Mexico's actions. (¶¶ 18-19, **CER-004**).

631. Mr. Argiz estimated ABG's lost profits as US $1.495 billion before prejudgment interest. (¶ 20, **CER-004**; **AA-0007-ENG**).

632. Alternatively, Mr. Argiz estimated the fair market value of ABG's severely disrupted business operations (the loss of value represented by the Mexico-Source Products business) as US $2.7 billion before prejudgment interest. (¶ 21, 67, **CER-004**; **AA-0010-ENG**).

633. In addition, Mr. Argiz determined that the out-of-pocket costs incurred by ABG solely as a result of the taking of the property during the period during which it has possession of the last part of the expropriated property (the approximately 160 hectares), which

---

660 The lost-profits analysis relied upon certain assumptions that ABG's business "*disruption would be temporary and qualified alternate suppliers will be secured and a new farm located and able to provide the required crops of comparable quality, all in a timely manner", and also "that the Amway Independent Business Owners ('ABOs') through which Amway generates most of its sales would not leave the Amway system when such a significant portion of its business and 'seed-to-supplement' story is severely disrupted.*" (¶ 19). As Mr. Argiz notes, "*these are significant assumptions*" and may not be satisfied; hence the need for the business valuation. (*Id.*)

include costs for pest control, security, and other expenses, amount to US $384,482 through December 31, 2023. (¶ 22, **CER-004**; AA-0011-ENG).[661]

634. As noted by Mr. Argiz, there is no assurance that the assumptions limiting the lost profits analysis (disruption only temporary; new supplies obtained in a timely manner; Amway IBO-Distributors do not terminate their contracts with Amway) will be realized in practice. The most accurate assessment of ABG's losses due to Mexico's actions – and the approach most consistent with the *Chorzów/*ILC Articles approach – is Mr. Argiz's valuation of ABG's severely disrupted business operations, which amounts to US $2.7 billion before prejudgment interest.

635. Consequently, the tribunal should award ABG the sums of US $2.7 billion (value of severely disrupted business operations), US $384,482 (out of pocket costs through December 31, 2023), additional out of pocket costs through the date of the award, prejudgment interest, and costs of the arbitration, all as compensation for Mexico's multiple breaches of the treaties.

XVIII. CONCLUSION

636. For the reasons here detailed, ABG respectfully requests that the Tribunal make the following determinations:

(a) The Tribunal has jurisdiction over this dispute.

(b) The United Mexican States have breached Arts. 1102, 1105, and 1110, of the NAFTA (1994), as well as customary international law, by failing to comply with

[661] These out-of-pocket costs do not include the value of the El Petacal property or potential losses resulting from the absence of land to allow plots to rest periodically in accordance with good agricultural practices. They also do not include the danger to ABG's organic certification posed by actions taken by the *ejido* in possession of the 120 hectares. (¶ 22, **CER-004**).

its obligations with respect to expropriations and compensation, fair and equitable treatment, and the national treatment standard.

(c) The United Mexican States must compensate ABG for the foregoing breaches in the amount of USD 2,700,384,482 plus prejudgment interest at a normal commercial rate until the date of payment, together with such other related amounts as are just and appropriate under the circumstances.

(d) The United Mexican States shall assume the costs of these proceedings, including but not limited to the Centre's, arbitrators', attorneys', and experts' fees.

Dated: May 23, 2024.

Pedro J. Martínez-Fraga
C. Ryan Reetz
Kevin Cheung

Bryan Cave Leighton Paisner LLP (BCLP)
200 S. Biscayne Blvd.
Suite 400
Miami, Florida 33131
Tel.: (786) 322-7500
Fax: (786) 322-7501

Counsel for Claimant,
Access Business Group LLC

By:_____/s/_____
Pedro J. Martínez-Fraga

ANNEX 1

Statements by USMCA Parties, U.S. Government Advisors, and Former USMCA Negotiators

Statements by the U.S. Government:

- In an October 2018 press briefing in connection with the conclusion of USMCA, "[t]wo senior [U.S.] administration officials" engaged in the following exchange:

  "*Q: Can you go through any changes to Chapter 11 and the investor-state dispute settlement, both with Mexico and with Canada?*

  And secondly, can you talk a little bit about President Trump and what his level of involvement was during the final stage of negotiations?

  SENIOR OFFICIAL: With respect to your second question, we're just going to refer you to the White House for the involvement of President Trump.

  But with respect to Chapter 11, the ISDS, basically we're going to be phasing out Chapter 11 with respect to Canada.

  SENIOR OFFICIAL: The investment protections in Chapter 11 are going to continue to be available. But the substantive investment protections are available to everyone.

  There is a question of investor-state dispute settlement; that is going to be phased out with regard to Canada."[662]

- In October 2018, USTR prepared a paper to "*outlin[e] potential changes to the USMCA Investment Chapter to respond to stakeholder concerns . . . .*"[663] In this paper, the lead U.S. negotiator for USMCA's investment chapter explains that:

  "*Under the ISDS grandfather clause, investors can bring ISDS claims under NAFTA 1994 for three additional years with respect to investments established or acquired between January 1, 1994 and the date of the termination of NAFTA 1994 (*i.e.*, the lifetime of NAFTA 1994).*"[664]

662 Website of World Trade Online, "Quoted: Senior Administration Officials on the USMCA," <https://insidetrade.com/trade/quoted-senior-administration-officials-usmca>, accessed on May 22, 2024, **C-0094-ENG**.

663 Please refer to *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Claimant's Counter Memorial on Preliminary Objections dated August 11, 2023, footnote 233, **CL-0076-ENG**.

664 *Id*.

- October 2018 talking points written by a USTR official and reviewed by the State Department in preparation for OECD investment committee meetings explain that:

  "*investors that have established or acquired investments during the lifetime of the NAFTA can continue to bring ISDS claims under the NAFTA rules and procedures with respect to those 'legacy investments' for three years after the termination of the NAFTA.*"[665]

- Similarly, briefing materials dated November 17, 2018 (approximately two weeks before USMCA was signed) that USTR and the State Department used to prepare for a meeting of the UNCITRAL Working Group III state that:

  "*investors that have established investments during the lifetime of the NAFTA can continue to bring ISDS claims under NAFTA rules and procedures with respect to those 'legacy investments' for three years after the termination of the NAFTA.*"[666]

- In April 2019, the U.S. International Trade Commission explained that:

  "*ISDS expires for current investments three years after USMCA enters into force (pending claims can proceed in this window). . . . Annex 14-C of USMCA states that current and pending investments under the original NAFTA are still subject to the ISDS mechanism under the original NAFTA, following original Section B procedures indicated in NAFTA*".[667]

- In January 2020, the U.S. Congressional Research Service explained that:

  "*for certain claims brought by investors against a NAFTA Party involving investments established or acquired while NAFTA was in force and that still exist when USMCA enters into force, Article 14-C.1 permits the relevant NAFTA provisions to apply for three years after NAFTA is terminated.*"[668]

---

665 Email Exchange between Michael Tracton and Lauren Mandell, "RE: OECD Week Item," October 19, 2018, at p. 1 of attachment "Talking Points on USMCA Investment Chapter for OECD Investment Committee Meetings" (p. 2 PDF) (emphasis supplied), **OW-0014-ENG**.

666 Please refer to *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Claimant's Counter Memorial on Preliminary Objections dated August 11, 2023, footnote 235, **CL-0076-ENG** (emphasis supplied).

667 U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, Inv. No. TPA 105-003, USITC Pub. No. 4889 (April 2019), at p. 195 (emphasis supplied), **C-0095-ENG** .

668 Congressional Research Service, "USMCA: Implementation and Considerations for Congress," Legal Sidebar No. LSB10399, January 30, 2020, at p. 3, **C-0096-ENG** (emphasis supplied).

- In 2021, the State Department explained that:

  "*Canada is not a party to the USMCA's chapter on investor-state dispute settlement (ISDS). Ongoing NAFTA arbitrations are not affected by the USMCA, and investors can file new NAFTA claims by July 1, 2023, provided the investment(s) were "established or acquired" when NAFTA was still in force and remained "in existence" on the date the USMCA entered into force. An ISDS mechanism between the United States and Canada will cease following a three-year window for NAFTA-protected legacy investments.*"[669]

Statements by the Canadian Government:

- In November 2019, the Government of Canada stated that "*NAFTA's existing ISDS mechanism will continue to apply for three years after termination of the Agreement for investments made prior to the entry into force of CUSMA.*"[670]

- In October 2021, Canada's Minister of International Trade published a briefing book stating that "*CUSMA does allow for ISDS 'legacy claims' to be brought under NAFTA Chapter 11 until June 30, 2023.*"[671]

- The Government of Canada stated that:

  "The parties [to CUSMA] have also agreed to a transitional period of three years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry into force of CUSMA. . . . [T]he original NAFTA ISDS mechanism will remain available to investors

669 Website of U.S. Department of State, "2021 Investment Climate Statements: Canada," <https://www.state.gov/reports/2021-investment-climate-statements/canada/>, accessed on February 8, 2024, **C-0097-ENG** (emphasis supplied). The U.S. State Department similarly concluded in 2022 that "*investors can file new NAFTA claims by July 1, 2023, provided the investment(s) were 'established or acquired' when NAFTA was still in force and remained 'in existence' on the date the USMCA entered into force. An ISDS mechanism between the United States and Canada will cease following a three-year window for NAFTA-protected legacy investments.*". Website of U.S. Department of State, "2022 Investment Climate Statements: Canada," <https://www.state.gov/reports/2022-investment-climate-statements/canada/>, accessed on February 8, 2024, **C-0098-ENG**.

670 Website of Government of Canada, "Minister of International Trade - Briefing book," November 2019, <https://www.international.gc.ca/gac-amc/publications/transparency-transparence/briefing-documents-information/transition-trade-commerce/2019-11.aspx?lang=eng>, accessed on February 8, 2024, **C-0089-ENG.**

671 Website of Government of Canada, "Minister of International Trade - Briefing book," October 2021, < https://www.international.gc.ca/transparency-transparence/briefing-documents-information/briefing-books-cahiers-breffage/2021-10-trade-commerce.aspx?lang=eng>, accessed on February 8, 2024, **C-0099-ENG**.

with respect to their existing investments for a period of three years after entry-into-force of CUSMA."[672]

- The Government of Canada stated that "*[t]he [USMCA] Parties have also agreed to a transitional period of three years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry into force of CUSMA.*"[673]

- The Government of Canada stated that "*[t]he 3 [USMCA] Parties have also agreed to a transitional period of 3 years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry into force of CUSMA*."[674]

Statements by the Mexican Government:

- In its September 9, 2019, Reporte T-MEC No. 14, Capitulo de Inversión del T-MEC, the Secretaria de Economia stated that:

"*In the case of claims that may arise between the investors from Canada and the United States with the respective governments, the dispute settlement mechanism under NAFTA will continue to be applied provisionally. Three years after the entry into force of the T-MEC [USMCA] said mechanism shall cease to apply for Canada and the US, and in the event a dispute arises between investors and governments, the parties shall resort to domestic courts or some other mechanism of dispute resolution.*"[675]

This statement confirms that "the dispute settlement mechanism under NAFTA will continue to be applied" for three years after the termination of NAFTA.

---

672 Website of Government of Canada, "Investment chapter summary," <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/investment-investissement.aspx?lang=eng>, accessed on February 8, 2024, **C-0090-ENG**.

673 Website of Government of Canada, "Explore key changes from NAFTA to CUSMA for importers and exporters," <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/nafta-cusma_aceum-alena.aspx?lang=eng>, accessed on February 8, 2024, **C-0100-ENG.**

674 Website of Government of Canada, "GBA+ of the Canada-United States-Mexico Agreement," <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/gba-plus_acs-plus.aspx?lang=eng>, accessed on February 8, 2024, **C-0101-ENG**.

675 Please refer to *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Claimant's Counter Memorial on Preliminary Objections dated August 11, 2023, footnote 244, **CL-0076-ENG** .

Statement by a U.S. Government Advisory Committee:

- On September 27, 2018, the Industry Trade Advisory Committee for Services ("Services ITAC") submitted its report to USTR on the draft USMCA.[676] The Services ITAC understood that USMCA would allow claims for breaches of NAFTA during the transition period. It viewed Annex 14-C as effectively replicating a traditional BIT sunset clause, albeit for a shorter period. According to the Services ITAC's report:

  > *[T]he transition period for bringing ISDS claims under the original NAFTA is limited to 3 years from the date of NAFTA termination. The 3 year window is short compared to the 10 year period typically provided under terminated BITs.*[677]

Statements by Former USMCA Negotiators:

Statements by Lauren Mandell (Former U.S. Government USMCA Negotiator)

- As noted above, Mr. Mandell was the chief negotiator of USMCA's investment chapter. In an article written shortly after he left his position with the Office of the U.S. Trade Representative, Mr. Mandell, stated:

  > *The key features of this approach [in USMCA] were: . . . a three-year transition period during which investors from all three jurisdictions could continue to use NAFTA ISDS rules and procedures to bring claims in relation to "legacy investments" established or acquired in the territory of another Party during the lifetime of the NAFTA. . . . Going forward, after a three-year transition period, US investment policy posits that these types of disputes will need to be resolved through alternative means.*[678]

- A piece that Mr. Mandell co-authored in 2021 stated, in connection with changes to Mexico's Electricity Industry Law in 2021 (after the replacement of NAFTA and the entry into force of USMCA):

---

676 ITAC members have "direct access to policymakers at Commerce Department and the Office of USTR. In such capacity advisors assist in developing industry positions on U.S. trade policy and negotiating objectives" and "*must have a Department of Commerce Security Clearance up to the SECRET level because they will have access to classified trade-related information.*" *See* website of U.S. Department of Commerce, International Trade Administration, "Industry Trade Advisory Center: Become an Advisor," <https://legacy.trade.gov/itac/become-an-advisor.asp>, accessed on February 8, 2024, **C-0102-ENG** . In short, the Services ITAC was set up specifically to discuss U.S. positions and strategy with U.S. negotiators throughout the negotiation of trade agreements like USMCA.

677 Report of the Industry Trade Advisory Committee on Services, "A Trade Agreement with Mexico and potentially Canada," September 27, 2018, **C-0103-ENG**.

678 Lauren Mandell, "The Trump Administration's Impact on US Investment Policy," 35 *ICSID Review* 345 (2020), at pp. 357-58 (emphasis supplied), **C-0104-ENG**.

Foreign investors in the Mexican energy sector—especially investors pursuing remedies in Mexican court—need to exercise care to ensure that they do not inadvertently forfeit their rights to seek relief under international trade and investment agreements such as the USMCA. This note offers three tips for US and Canadian investors to preserve and advance their USMCA rights . . . .

Subject to an important exception, the USMCA eliminates ISDS with respect to Canada, and it narrows access to ISDS as between the United States and Mexico (excluding with respect to investors with certain defined government contracts). The exception is that US, Canadian and Mexican investors with "legacy investments" in the territory of another Party—investments established during the lifetime of the NAFTA (January 1, 1994–July 1, 2020)—have full access to ISDS under NAFTA rules for claims brought within three years after the date of the USMCA's entry into force, meaning until July 1, 2023 . . . .

The ISDS landscape will change on July 1, 2023, three years after the date of the USMCA's entry into force. Canadian investors will be unable to file new claims against Mexico, though they will still have access to ISDS under the CPTPP. US investors will be able to file new claims, but with notable limitations. Except for those with certain defined government contracts, US investors will lose the ability to lodge some types of claims that might otherwise be viable with respect to the new electricity law, including indirect expropriation and fair and equitable treatment claims. Most US investors will also face requirements to initiate and maintain proceedings in Mexican court for as long as 30 months before they may pursue ISDS. Therefore, US and Canadian investors in Mexico's energy sector should be mindful of their potential change in circumstances on July 1, 2023. To file a claim before that deadline, an investor would need to submit a notice of intent to Mexico by April 1, 2023.[679]

- In an October 2022 presentation at American University, Mr. Mandell stated:

  One key feature is that the parties agreed to permit NAFTA ISDS claims for three additional years. So, July 1, 2020, NAFTA goes away but there was this view that the NAFTA—that the parties could continue to bring claims under NAFTA rules for three years. This is Annex 14-C. But then I

679 Website of John F. Walsh, David J. Ross, Danielle Morris, and Lauren Mandell, "Three Tips for Investors in Mexico's Energy Sector Regarding Potential USMCA Claims," March 18, 2021, <https://www.wilmerhale.com/en/insights/client-alerts/20210318-three-tips-for-investors-in-mexicos-energy-sector-regarding-potential-usmca-claims> (emphasis supplied), accessed on February9, 2024, **C-0092-ENG** .

think the key point is that 248 after July 1 of 2023, after the three year period, this transition period, the rules change significantly.[680]

- In April 2023, Mr. Mandell delivered a presentation at the ANADE "Seminario Trinacional – México-Estados Unidos-Canadá" conference. He participated in a panel titled "Protección de inversions en el T-MEC," where he was listed as the chief U.S. negotiator for the investment chapter of T-MEC (USMCA) and special counsel at WilmerHale.[681] We have provided Mr. Mandell's full presentation with this submission.[682] During his presentation, Mr. Mandell explained as follows:

  July 1st of 2023 is a very important date here. Until July 1st of 2023 there were these things called legacy claims. . . . Until July 1 of 2023, the NAFTA rules can still apply effectively, and so for example, U.S. investors can continue to bring ISDS claims using NAFTA rules until July 1st of 2023, provided the investors issued a Notice of Intent to bring a claim 90 days in advance, essentially before March 31st of 2023.

  . . .

  Things change after July 1st of 2023. NAFTA claims are no longer available for . . . U.S. investors in Mexico or Mexican investors elsewhere. . . . Most . . . U.S. investors in Mexico essentially lose meaningful access to ISDS. . . . In order for a US investor after July 1 of 2023 to go to ISDS against Mexico, they have to first litigate in Mexican domestic court for up to two and a half years. . . . [Y]ou are then limited in the types of claims that you can bring. You can effectively bring two types of claims [national/most-favored nation treatment, or direct expropriation]. . . . If you have an issue and you think your investment has been indirectly expropriated after July 1st of 2023, most U.S. investors cannot go to ISDS there. And also for the minimum standard of treatment, which is also a very important standard, it is off limits after July 1st of 2023 for investors.

---

680 American University Washington College of Law, *USMCA Chapter 14: Experiences (US Perspective)* (Panel Presentation by Lauren Mandell and others at Expert Panel Series on International Arbitration — Investment Agreements of the 21st Century: USMCA and Beyond, October 25, 2022), *full video available at* https://media.wcl.american.edu/Mediasite/Play/c9b76a5aa39f4b06809d33a6be13414c1d (emphasis supplied), **C-0105-ENG.**

681 Website of "1° Seminario Trinacional – México-Estados Unidos-Canadá,", <https://anade.org.mx/quienes-somos/1er-seminario-trinacional-mexico-estados-unidos-canada/>, accessed on February 8, 2024, **C-0093-ENG**.

682 Please refer to *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Claimant's Counter Memorial on Preliminary Objections dated August 11, 2023, footnote 252, **CL-0076-ENG**.

So, those are two major impediments for most investors, which leads me to conclude a lack of sort of meaningful access to ISDS.[683]

Statement by Hugo Romero Martinez (Former Mexican Government USMCA Negotiator)

- Mr. Romero Martinez was the Deputy-General Counsel for International Trade at the Mexican Ministry of Economy while USMCA was being negotiated, Lead of Mexico in the Trade Remedies Group in connection with USMCA, and a member of Mexico's team in the Legal and Institutional Group in connection with USMCA.[684] A publication issued by Van Bael & Bellis and RRH Consultadores S.C. in which he is listed as one of "the lawyers to contact" states:

  The United States-Mexico-Canada Agreement (USMCA), which replaced the North American Free Trade Agreement (NAFTA) on July 1, 2020, kept alive NAFTA's Investment Chapter (Chapter 11) for a 3-year period allowing investors to submit legacy investment claims to arbitration under NAFTA within that survival period . . . .

  Canadian, Mexican or US investors, affected by measures taken by Mexico, US or Canada respectively, which won't have access to ISDS (or the same level of access to ISDS) after the expiry of the legacy clause should consider carefully whether to submit a legacy claim under NAFTA before July 1, 2023. Since this will also require submission of a notice of intent at least 90 days before submission of the claim, such assessments must be undertaken very urgently and any notice of intent filed before the end of [March 2023] at the latest.[685]

683 Please refer to *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Claimant's Counter Memorial on Preliminary Objections dated August 11, 2023, footnote 252, **CL-0076-ENG**.

684 Website of RRH Consultores, S.C., "Hugo Romero Martínez," < https://rrhconsultores.com.mx/en/our-team>, accessed on February 8, 2024, **C-0106-ENG.**

685 Website of Van Bael & Bellis, "Investors' Right to Bring Investment Claims Under the NAFTA Investment Chapter Expires Soon," published March 13, 2023, < https://www.vbb.com/media/Insights_Articles/13-03-2023_NAFTA_legacy_-_FINAL.pdf> (emphasis supplied), accessed on February 8, 2024, **C-0045-SPA**.

ANNEX 2

List of Abbreviations and Defined Terms

1939 Presidential Resolution	Presidential Resolution dated August 23, 1939
Acta de Deslinde	Acta Relativa al Deslinde y Amojonamiento de los Terrenos Que Se Entregan al Núcleo Agrario Denominado “San Isidro”, Municipio de San Gabriel (antes Venustiano Carranza), Estado de Jalisco, en Cumplimiento al Convenio de Finiquito Celebrado el once de marzo de mil novecientos noventa y cuatro, por la Oficialía Mayor de la Secretaría de la Reforma Agraria dated March 11, 1994 (**C-0042-SPA**)
Acta de Posesión y Deslinde	Acta de Posesión y Deslinde de Polígono de las 280-00-00 Hectáreas Pendientes a Entregar de la Ejecución Complementaria de la Resolución Presidencial del 23 de agosto de 1939 Publicada en el Diario Oficial de la Federación el 18 de noviembre del Mismo Año, Por la Cual se Benefició el Ejido San Isidro, Municipio San Gabriel, Estado de Jalisco dated July 14, 2022 (**C-0050-SPA**)
Alticor	Alticor Inc.
Amway	Amway Corporation
Analysis	The PHH Fantus Consulting Project Specifications for New Farmland Analysis (**C-0016-ENG**)
CAFTA-DR	Dominican Republic – Central America – United States Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement
Coordination Agreement	Acuerdo de Concertación dated September 15, 1993 (**C-0020-SPA**)

CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
El Petacal Crops	Crops grown at *El Petacal*
Eppers Witness Statement	Witness Statement of Keith Michael Eppers (**CWS-002**)
Guadalajara Agreement	Guadalajara Agreement dated February 15, 1994 (**C-0021-SPA**)
Hunter Witness Statement	Witness Statement of Robert Paul Hunter (**CWS-001**)
IBO-Distributors	Independent Business Owner distributors
ICSID Convention	The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
KORUS FTA	Korea-US Free Trade Agreement
KVA	kilo volt amps
Mexico	United Mexican States
Mexico-Source Products	Critical ingredients produced by *El Petacal* and used in a wide range of ABG's Nutrilite- and Artistry- branded products
Mr. Hunter	Mr. Robert P. Hunter, Alticor's former Vice President, Global Engineering, Maintenance, EH & S Real Estate, Misc. Administrative Services and Supply Chain Center of Excellence

NAFTA	North American Free Trade Agreement
Notice of Intention	Notice of Intent to Submit a Claim to Arbitration dated October 11, 2022
NPI	Nutrilite Products Inc.
Nutrilite S.R.L.	Nutrilite S. de R. L. de C.V.
OSP	Organic System Plan
Parker Witness Statement	Witness Statement of Mr. John Patrick Parker (**CWS-003**)
PO2	Procedural Order No. 2 of January 19, 2024
SPAC	Services Policy Advisory Committee on the North American Free Trade Agreement
SEDATU	Registro Agrario Nacional Secretaría de Desarrollo Agrario, Territorial y Urbano
Services ITAC	The US Industry Trade Advisory Committee for Services
Schreuer Opinion	Expert Opinion by Christoph Schreuer (**CER-001**)
United States-Honduras Side Letters	United States-Honduras side letters in connection with the Dominican Republic – Central America – United States Free Trade Agreement
USMCA	United States-Mexico-Canada Agreement

USMCA Protocol	Protocol Replacing the NAFTA with the USMCA dated November 30, 2018
Uzbekistan/ Kyrgyz BIT	Agreement Between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic on the Mutual Promotion and Protection of Investments
VCLT	The Vienna Convention on the Law of Treaties
Wethington Opinion	Expert Report by Olin L. Wethington (**CER-002**)
World Bank Guidelines	Guidelines on the Treatment of Foreign Direct Investment