

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

SILVER BULL RESOURCES, INC.

Claimant

and

UNITED MEXICAN STATES

Respondent

ICSID Case No. ARB/23/24

AWARD

Members of the Tribunal

Mr. Ian Glick KC, President

Mr. Stephen Drymer, Arbitrator

Prof. Philippe Sands KC, Arbitrator

Secretary of the Tribunal

Ms. C. E. Salinas Quero

Date of dispatch to the Parties: 29 May 2026

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2022
C-[#]	Claimant’s Exhibit
CL-[#]	Claimant’s Legal Authority
Hearing	Hearing on jurisdiction and merits held on 6-10 October 2025.
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Mexico’s Counter Memorial	Respondent’s Counter Memorial dated 23 December 2024
Mexico’s Rejoinder	Respondent’s Rejoinder dated 30 August 2025
Mexico’s Post-Hearing Brief	Respondent’s Post Hearing Brief dated 21 November 2025
NAFTA	North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, signed on 17 December 1992, entered into force on 1 January 1994
R-[#]	Respondent’s Exhibit
RL-[#]	Respondent’s Legal Authority
Silver Bull’s Memorial	Claimant’s Memorial dated 17 June 2024
Silver Bull’s Reply	Claimant’s Reply dated 25 April 2025
Silver Bull’s Post-Hearing Brief,	Claimant’s Post-hearing Brief dated 21 November 2025, updated on 7 January 2026
Transcript, Day [#] [page:line]	Transcript of the Hearing

Tribunal	Arbitral tribunal constituted on 5 January 2024
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I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the “**ICSID Convention**”) and under Annex 14-C (“Annex 14-C”) of the US-Mexico-Canada Agreement (the “**USMCA**”), which entered into force on 1 July 2020, and the North American Free Trade Agreement (“**NAFTA**”), which entered into force on 1 January 1994 and was terminated on 30 June 2020.
2. The claimant is Silver Bull Resources, Inc. (“**Silver Bull**,” the “**Claimant**,” or “**SVB**”), a company incorporated under the laws of Nevada, United States of America, with its principal executive offices at 777 Dunsmuir Street, Suite 1605, Vancouver, British Columbia, Canada. Silver Bull brought its claims on its own behalf, pursuant to NAFTA Article 1116, and on behalf of Minera Metalín S.A. de C.V. (“**Minera Metalín**”) pursuant to NAFTA Article 1117. Minera Metalín is a company incorporated under the laws of Mexico, with corporate seat in Sierra Mojada, Coahuila de Zaragoza, Mexico.
3. The respondent is the United Mexican States “**Mexico**” or the “**Respondent**”).
4. The Claimant and the Respondent are collectively referred to as the “Parties.” The Parties’ representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

A. REGISTRATION, TRIBUNAL CONSTITUTION AND FIRST SESSION

5. On 28 June 2023, Claimant filed with ICSID a request for arbitration against Mexico (the “Request”) along with exhibits C-0001 to C-0071 and legal authorities CL-0001 to CL-0047.
6. On 20 July 2023, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In

the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

7. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the Parties.
8. The Tribunal is composed of Mr. Ian Glick, a national of the United Kingdom, President, appointed by agreement of the Parties; Mr. Stephen Dwyer, a national of Canada, appointed by the Claimant; and Professor Philippe Sands, a national of United Kingdom, the French Republic and the Republic of Mauritius,¹ appointed by the Respondent.
9. On 5 January 2024, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), notified the Parties that all three arbitrators had accepted their appointments, and that the Tribunal was, therefore, deemed to have been constituted on that date. Mr. Francisco Abriani, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
10. On 13 February 2024, in accordance with ICSID Arbitration Rule 29(1), the Tribunal held a first session with the Parties, by video conference.

B. THE WRITTEN PHASE

11. On 26 February 2024, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 1 July 2022, that the procedural languages would be English and Spanish, and that the place of proceeding would be Washington, D.C. Procedural Order No. 1 also sets out the procedural schedule. On the

¹ On 29 April 2026, the Parties were informed that as of 18 March 2026, Prof. Sands was no longer a national of the Republic of Mauritius.

same date, Ms. Salinas Quero, ICSID Legal Counsel, was designated as Secretary of the Tribunal in replacement of Mr. Abriani.

12. On 11 March 2024, the Tribunal issued Procedural Order No. 2, concerning the scope of transparency and confidentiality.
13. On June 17, 2024, the Claimant submitted its Memorial on the merits and jurisdiction, with exhibits C-0072 to C-0151 and legal authorities CL-0048 to CL-118. The Memorial was accompanied by witness statements of Timothy Barry, Brian Edgard, Juan Manuel López Ramírez, and Matthew Melynk, and an expert report of Santiago Dellepiane (Berkeley Research Group).
14. On August 20, 2024, the Claimant filed a proposal to disqualify Prof. Philippe Sands under ICSID Arbitration Rule 22(1) (the “**Disqualification Proposal**”). The Disqualification Proposal was accompanied by exhibits C-0152 to C-0155 and legal authorities CL-0119 to CL-0139. On the same date, the proceeding was suspended.
15. On 10 September 2024, the Respondent filed a reply to the Disqualification Proposal along with exhibits R-0001 and legal authorities RL-0001 to RL-0016; on 16 September 2024, Prof. Sands furnished explanations; and on 23 September 2024, the Claimant filed a final written submission along with exhibits C-0156 to C-0158 and legal authority CL-0140.
16. On 21 October 2024, the arbitrators not subject to the disqualification proposal, issued a decision rejecting the proposal. On the same date, the proceeding resumed.
17. On 23 December 2024, the Respondent filed a Counter Memorial on jurisdiction and the merits, with exhibits R-0002 to R-0080 and legal authorities RL-0017 to RL-0107, together with a witness statement (by Lorenzo Fraire) and expert reports (by Carlos del Razo Ochoa and Tiago Duarte-Silva).
18. On 10 February 2025, the Parties simultaneously exchanged their respective responses to document production objections and their applications to the Tribunal regarding document production.

19. On February 19, 2025, following the Parties' document requests, the Tribunal issued Procedural Order No. 3, concerning the production of documents.
20. On 25 April 2025, the Claimant filed a Reply on jurisdiction and merits, with exhibits C-0172 to C-0498 and legal authorities CL-0168 to CL-0213. The Reply was accompanied by the second expert report of Santiago Dellepiane (Berkeley Research Group), the second witness statements of Tim Barry, Brian Edgar, Juan Manuel López Ramírez, Matthew Melnyk and the witness statement of Christopher Richards.
21. On 26 June 2025, the Respondent requested that the Tribunal order the Claimant to produce a complete copy of a criminal file in relation to a complaint filed by Minera Metalín on 19 September 2019.
22. On 2 July 2025, the Claimant filed its response to Respondent's request of 26 June and voluntarily produced the complete criminal file as exhibit C-0498.
23. On 31 August 2025, the Respondent filed a Rejoinder on jurisdiction and merits, with exhibits R-0081 to R-0172 and legal authorities RL-0111 to RL-0171. The Rejoinder was accompanied by the second witness statement of Lorenzo Fraire Hernández and witness statements by Antonio Valez Pérez and Elías Portillo Vásquez, and by the expert reports of Dr. Tiago Duarte-Silva (second) and of Carlos del Razo Ochoa (second) and Rodolfo Islas Valdes. In his second witness statement, Lorenzo Fraire Hernández indicated that he was unable to testify in person at the hearing as he did not hold a U.S. visa.
24. On 5 September 2025, the United States and Canada filed written submissions as Non-Disputing Treaty Parties, pursuant to NAFTA Article 1128. On the same date, a non-disputing party filed an application to file a written submission pursuant to ICSID Arbitration Rule 67(1) (the "**Amicus Curiae Application**").
25. Also, on 5 September 2025, the Claimant applied to the Tribunal for an order that the Tribunal direct the Respondent to promptly take all necessary steps to secure the in-person attendance of Lorenzo Fraire Hernández at the hearing or, alternatively, that he testify from a neutral location in Mexico City. On the same date, the Respondent applied for the Tribunal to authorise Lorenzo Fraire Hernández to attend the hearing remotely.

26. On 8 September 2025, the President of the Tribunal and the Parties held by videoconference a meeting on the organization of the hearing.
27. On 11 September 2025, the Claimant submitted its reply on the issue of the in-person or remote attendance of Lorenzo Fraire Hernández to the hearing.
28. On 12 September 2025, the Claimant filed (i) its Response to NAFTA Article 1128 Submissions, with legal authorities CL-0214 to CL-0220; and (ii) its Comments on the Amicus Curiae Application, with legal authorities CL-0221 to CL-0232. Also on 12 September 2025, the Respondent filed (i) its Comments on NAFTA Article 1128 and Amicus Curiae Submissions, with legal authorities RL-0172 to RL-0180.
29. On 15 September 2025, the Tribunal issued Procedural Order No. 4, permitting the remote attendance of Lorenzo Faire Hernández from a neutral location in Mexico City. The Tribunal ordered Respondent to bear the travel and accommodation expenses of Lorenzo Fraire Hernández, without prejudice to the Tribunal’s final costs allocation as between the Parties.
30. On 18 September 2025, the Tribunal issued Procedural Order No. 5 on the organization of the hearing.
31. On 22 September 2025, the Tribunal issued Procedural Order No. 6, rejecting the Amicus Curiae Application. The Tribunal noted that the Applicant had failed to demonstrate any knowledge of the facts of the dispute; had based some of its comments on factual conclusions drawn that are disputed between the Parties and which may turn to be false; and had presented in a generic manner its observations relating to due diligence, human rights and environmental law. Thus, the Tribunal determined, “considering all the relevant circumstances [...] the Tribunal is not – on the basis of the material submitted – able to be satisfied that admitting the proposed Submission would assist the Tribunal in determining any aspect of this dispute.”²

² Procedural Order No. 6, paragraph 15.

C. THE ORAL PHASE

32. On 6 to 10 October 2025, a hearing on jurisdiction and merits was held at ICSID’s offices in Washington, D.C. (the “Hearing”). The following persons were present at the Hearing:

Tribunal:

Mr. Ian Glick	President
Mr. Stephen Drymer	Arbitrator
Professor Philippe Sands	Arbitrator

ICSID Secretariat:

Ms. Celeste E. Salinas Quero	Secretary of the Tribunal
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For the Claimant:

Boies Schiller Flexner (UK) LLP

Timothy L. Foden
Timothy Smyth
Nicolás Caballero Hernández
Andrés Alvarez Calderón
Anthony Hadjiantoniou
Haley Brown

RiosFerrer + Gutiérrez

Ricardo Ríos Ferrer
Julio C. Gutiérrez Morales
Victoria Moran
Héctor Osorio (remote participant)
Uriel Sánchez (remote participant)

Other

Timothy Barry	Claimant’s representative and Fact witness
Brian D. Edgar	Fact Witness
Christopher Richards	Fact Witness
Juan Manuel López Ramírez	Fact Witness
Matthew Melnyk	Fact Witness
Santiago Dellepiane	Expert Witness
Matthew Stein	Expert
Carla Ambrosano	Expert
Tegan Wekwerth	Expert

For the Respondent:

Dirección General de Consultoría Jurídica de Comercio Internacional, Subsecretaría de Comercio Exterior

Alan Bonfiglio Ríos
Rafael Rodríguez Maldonado
Pamela Hernández Mendoza
Rafael Alejandro Augusto Arteaga Farfán
María Daniela Parra Hernández
Sergio Alonso Patiño Reyes
Santiago Yarahuán Doderó
Rosa María Baltazares Gómez

Tereposky & DeRose LLP

Greg Tereposky
Alejandro Barragán
Daniel Hohnstein
Juan Pablo Gómez
María Mateus (remote participant)
Madalina Fetescu (remote participant)

Other

Lorenzo Fraire Hernández (remote participant)	Fact Witness
Elías Portillo Vásquez	Fact Witness
Antonio Valdez Pérez	Fact Witness
Tiago Duarte-Silva	Expert Witness
Alene Hanson	Expert
Michelle Sandoval Siman (remote participant)	Expert
Jacob Marin-Thomson (remote participant)	Expert
Carlos del Razo (remote participant)	Expert
Karime Eugenia Vázquez Hernández (remote participant)	Expert
Jessica Labra Granados (remote participant)	Expert
Rodolfo Islas Valdes	Expert
Giovanni Raúl Gutiérrez Calvillo	Expert
Miranda Vela García (remote participant)	Expert

Non-Disputing Treaty Parties

United States of America

U.S. Department of State

Lisa Grosh	Assistant Legal Adviser
David Bigge	Chief of Investment Arbitration

Mary Muino	Attorney-Adviser
<i>Canada</i>	
<i>Global Affairs Canada</i>	
Sylvie Tabet	General Counsel
Jean-Francois Hebert	General Counsel
Florence Beaudet	Counsel
Dayeon Min	Counsel
Marianna Maza Pinero	Paralegal
<i>Court Reporters:</i>	
Leandro Lezzi	Spanish court reporter
Virginia Masce	Spanish court reporter
Dawn Larsson	English court reporter
<i>Interpreters:</i>	
Silvia Colla	Spanish⇔English interpreter
Daniel Giglio	Spanish⇔English interpreter
Charlie Roberts	Spanish⇔English interpreter

33. During the Hearing, the following persons were examined:

<i>On behalf of the Claimant:</i>	
Timothy Barry	Claimant's representative and Fact witness
Matthew Melnyk	Fact Witness
Christopher Richards	Fact Witness
Brian Edgar	Fact Witness
Juan Manuel López Ramírez	Fact Witness
Santiago Dellepiane	Quantum Expert
<i>On behalf of the Respondent:</i>	
Lorenzo Fraire Hernández	Fact Witness
Elías Portillo Vásquez	Fact Witness
Antonio Valdez Pérez	Fact Witness
Rodolfo Islas Valdes	Legal Expert
Tiago Duarte-Silva	Quantum Expert

D. POST-HEARING PHASE

34. On 21 November 2025, the Parties filed simultaneous Post-hearing Briefs. Claimant submitted legal authorities CL-0233 to CL-0241 with its Brief. The Respondent did not file any new authorities. In its Post-Hearing Brief, the Claimant amended its request for relief, reflecting two alternative scenarios: "Scenario 1" and "Scenario 2." Under Scenario 1, the

Claimant asked, among others, for a quantum phase for the Parties to adapt their quantum valuations.

35. On 28 November 2025, the Parties submitted their agreed transcript corrections to both, the English and the Spanish languages transcripts. The Parties informed that only one disagreement remained in relation to the inclusion of a footnote suggested at page 78, line 3 of Day 1 of the English language transcript. On 2 December 2025, the Tribunal informed the Parties of its decision to exclude the suggested footnote, as it did not consider it to be an appropriate correction to the transcript, which is intended to record what was said at the hearing.
36. Also on 28 November 2025, the Respondent asked permission from the Tribunal to add to the record (i) two court orders issued on 11 November 2025 by the first instance civil court of the Torrejón Judicial District in relation to the Valdez litigation; and (ii) the award issued on 21 November 2025 in the arbitration *Access Business Group LLC v. United Mexican States* (ICSID Case No. ARB/23/15).
37. On 4 December 2025, the Claimant opposed to Respondent's application of 28 November. The Claimant also asked that the Tribunal order the Respondent to pay its share of advance on costs for an amount of USD 200,000.00, which the Claimant had paid on 30 September 2025, under protest.³
38. On 5 December 2025, the Parties filed simultaneous submissions on costs, which they updated on 13 April 2026, at the invitation of the Tribunal.
39. Also on 5 December 2025, the Respondent, in accordance with the opportunity granted by the Tribunal at the Hearing,⁴ submitted comments on the new legal authorities submitted by Claimant in its Post-Hearing Brief. The Respondent also objected that Claimant had

³ On 16 July 2025, ICSID requested each Party to make advance payment of USD 200,000.00 to cover the costs of the hearing. On 12 August 2025, ICSID confirmed receipt of the Claimant's payment. On 8 September 2025, ICSID notified the Parties of the Respondent's default and invited either Party to pay the outstanding amount. On 3 October 2025 we informed the Parties that ICSID received on 30 September 2025 the amount of USD 199,980.000 from the Claimant, corresponding to the Respondent's portion of the requested advance payment.

⁴ Transcript, Day 5, page 1275:1-4. "If any new Legal Authorities are introduced by either side, then the other side will be allowed, after the Briefs, to comment on them" (President).

used the Post-Hearing Brief and questions posed by the Tribunal at the Hearing as an opportunity to modify or recast its case, noting that the Claimant had presented new requests for relief concerning NAFTA Articles 1102, 1103 and 1105 and requested opening a new quantum phase.

40. On 11 December 2025, the Respondent replied to Claimant's response of 4 December and reiterated its requests of 28 November for the admission of two new exhibits and one new legal authority.
41. Also on 11 December 2025, the Secretariat shared with the Parties the final transcripts (incorporating the Parties' agreed corrections and the Tribunal's decision of 2 December).
42. On 7 January 2026, the Claimant, in accordance with the Tribunal's instructions at the Hearing,⁵ submitted its revised Post-Hearing Brief, with updated transcript references.
43. Also on 7 January 2026, the Tribunal informed the Parties that it was not minded to admit the new authority or the new documents whose admission Respondent had requested on 28 November 2025. The Tribunal added that if its view changed, it would notify the Parties. The Tribunal also addressed Claimant's request for a further quantum phase, made in its Post-Hearing Brief. The Tribunal indicated that "[...] other than to indicate its concern at what it characterises as "entirely new claims", the Respondent has not been asked for, or made, any substantive submissions: see paragraphs 2 to 7 of the Respondent's Comments on Claimant's New Legal Authorities. The Tribunal will address in due course whether it requires to hear anything further from the Parties about this request."⁶
44. On 14 January 2026, the Claimant asked that the Tribunal (i) order ICSID to reimburse Claimant the USD 100,000.00 that the Respondent had recently paid to cover its share of

⁵ Transcript, Day 5, page 1273:2-6 "...once the perfected Transcript arrives, you can -- you can make any corrections to your submissions that you think are necessary on the footing that your submissions will have already gone in" (President).

⁶ Tribunal's letter to the Parties, dated 7 January 2026, page 2.

the advance that was outstanding since July 2025;⁷ and (ii) order Respondent to pay the outstanding balance of USD 100,000.00.

45. On 3 February 2026, ICSID requested an additional advance of USD 400,000.00. ICSID informed that Claimant's payment of 30 September 2025, which covered Respondent's share of the advance requested on 16 July 2025, had been credited to satisfy its share of the latest advance payment required.
46. On 4 February 2026, the Tribunal informed the Parties that it had considered the Claimant's application of 14 January 2026, which had been rendered moot by ICSID's letter of 3 February 2026, which requested a further advance and credited Claimant's payment of 30 September 2025 to satisfy its share of that advance.

III. FACTUAL BACKGROUND

47. Silver Bull's allegations of breach by Mexico of Articles 1102, 1103, 1105 and 1110 of NAFTA all arise from what it describes as the "Continuing Blockade" of its Project in that country by members of a local mining co-operative. This Continuing Blockade began in September 2019 and was still in place at the time this case was heard, although it is Silver Bull's contention that it lost its investment in the Project at the end of August 2022, when its principal partner in the Project pulled out.
48. Silver Bull claims that the Mexican authorities "failed to take meaningful action to resolve" the blockade,⁸ doing nothing to bring it to an end or to sanction the perpetrators. It also alleges that Mexico is responsible for instigating the blockade because the acts of a Federal Deputy who allegedly instigated and supported the Continuing Blockade are attributable to Mexico.

⁷ On 8 January 2026, ICSID informed the Parties that, on 31 December 2025, it had received from Respondent a payment of USD 100,000.00. Such amount corresponded to half of the USD 200,000.00 advance that had been requested on 16 July 2025.

⁸ Silver Bull's Post-Hearing Brief, paragraph 2.

49. Thus, according to Silver Bull, “Mexico enabled an unlawful blockade to persist for years, culminating in the total loss of the Claimant’s investment”.⁹
50. This section of the Award is concerned, on the basis of the witness and documentary evidence placed before the Tribunal, to establish the facts relevant to Silver Bull’s allegations of treaty breach. It is not concerned with the evidence relating to the quantum of any loss.
51. Silver Bull in its Reply invites the Tribunal to draw adverse inferences from Mexico’s failure to produce certain documents, or classes of documents, which it was ordered to produce.¹⁰ This is not something that has proved to be necessary. The Tribunal has been able to form a reasonably clear picture of what occurred from the material before it without the need to draw inferences, adverse or otherwise, from the absence of certain documentary material.
52. Mexico, for its part, says that the evidence of Silver Bull’s witnesses should be approached with caution as “their credibility is compromised by obvious financial interests”.¹¹ Mexico points out that all Silver Bull’s witnesses except Mr. Melnyk (who received compensation of USD 900 per day), stand to receive a proportion of any damages received by Silver Bull. However, the Tribunal did not form the impression that these witnesses were consciously trying to mislead it, although like many witnesses, it was apparent that they tended to see, and to recollect, events from their side’s perspective.
53. Mexico also says that certain evidence was obtained illegally, by Mr. López secretly recording conversations with, in particular Mr. Fraire, and that such evidence should be accorded no weight.¹² However, this issue is not one on which the Tribunal has to form a view, as it has only relied on information confirmed by Mr. Fraire during the course of his oral evidence.

⁹ Silver Bull’s Post-Hearing Brief, paragraph 43.

¹⁰ Silver Bull’s Reply, Sections 2.1, 2.5, 2.7 and 2.8.

¹¹ Mexico’s Post-Hearing Brief, paragraph 28.

¹² Mexico’s Post-Hearing Brief, paragraphs 43 to 46.

A. SILVER BULL

54. Silver Bull was incorporated on 8 November 1993 in Nevada, United States of America, as Cadgie Company and, on 28 June 1996, it changed its name to Metalline Mining Company (“Metalline”).¹³
55. Mexico is the world’s leading producer of silver.¹⁴ In July 1996, Metalline incorporated a company in Mexico, originally called Minera Star Morning, S.A. de C.V. and subsequently called Minera Metalín S.A. de C.V., to carry out exploration work in that country. This was possible because of a Mexican Mining Law of 1992 which permitted mining companies, whether carrying out exploration or exploitation work, to be wholly foreign owned.¹⁵ At all material times Metalline (now Silver Bull) has been, directly or indirectly, the sole shareholder in Minera Metalín.¹⁶
56. In April 2010, Metalline, by then a public company listed on the New York Stock Exchange entered into a reverse merger with Dome Ventures Corp., a public company listed on the Toronto Stock Exchange.¹⁷ In April 2011, the merged company was renamed Silver Bull Resources, Inc.¹⁸
57. Silver Bull is what is known as a junior exploration company. Its business is to look for commercially viable mineral resources that can be developed into a mine. If successful, it might then (amongst other strategies) sell all or part of the project to a major mining company to take the project through to extraction.¹⁹

B. SIERRA MOJADA AND MINEROS NORTEÑOS

58. Sierra Mojada is a municipality in the State of Coahuila in Mexico. This is an area with a long history of mining, stretching back into the nineteenth century. It contains deposits of

¹³ Silver Bull’s Memorial, paragraph 2.1; Mr. Edgar’s First Witness Statement, paragraph 4.1.

¹⁴ Transcript, Day 2, page 591 (Mr. Edgar).

¹⁵ Silver Bull’s Memorial, paragraph 2.17.

¹⁶ Silver Bull’s Memorial, paragraphs 2.1 and 2.7; Mr. Edgar’s First Witness Statement, paragraph 5.25.

¹⁷ Silver Bull’s Memorial, paragraph 2.5; Mr. Barry’s First Witness Statement, paragraph 3.2.

¹⁸ Silver Bull’s Memorial, paragraph 2.6; Mr. Edgar’s First Witness Statement, paragraph 5.24.

¹⁹ Transcript, Day 2, pages 557 to 560.

both silver and zinc,²⁰ and there are many old mineshafts in the area.²¹ The municipality embraces the small towns of Sierra Mojada, La Esmeralda, San José de Carranza, Salina del Rey, and Hércules, and has a population of about 6,500,²² the majority of whom, according to the Municipal President, live in poverty.²³ It is a community that would welcome the benefits which mining developments could be expected to bring.²⁴

59. Sierra Mojada lies near the northwestern border of Coahuila. It is about 35 kilometres from Química del Rey, about 230 kilometres from Torreón, a similar distance from San Pedro de las Colonias, about 270 kilometres from Monclova, and about 450 kilometres from the State Capital of Saltillo.
60. La Esmeralda is a community of about a thousand people. The local mining co-operative is the Sociedad Cooperativa de Explotación Minera Mineros Norteños S.C.L. (“Mineros Norteños”). In 1997 this owned a number of mining concessions in the area. In 1997 and 2000, the co-operative had 143 members, but by 2024 deaths had reduced this number to about 70 surviving members.²⁵ The members and their families live mostly in La Esmeralda. Since 2014, Mr. Fraire has been the President of the co-operative and, as he says, “Mining is our livelihood”.²⁶

C. THE PROJECT

61. Between 1996 and 2002, Minera Metalín acquired a number of mining concessions and surface title rights in Sierra Mojada.²⁷ These concessions originally totalled 9,530.4

²⁰ Silver Bull’s Memorial, paragraphs 2.2 and 2.13; Mr. Edgar’s First Witness Statement, paragraphs 5.6 to 5.8.

²¹ Mr. Barry’s First Witness Statement, paragraph 4.4.

²² Mr. Fraire’s First Witness Statement, paragraph 8; Transcript, Day 3, page 683; Mexico’s Counter Memorial, paragraph 45.

²³ Mr. Portillo’s First Witness Statement, paragraph 4; Mr. López’s First Witness Statement, paragraph 3.1.

²⁴ See, for example, Mr. Portillo’s First Witness Statement, paragraph 10.

²⁵ Mr. Fraire’s First Witness Statement, paragraph 21.

²⁶ Mr. Fraire’s First Witness Statement, paragraph 21.

²⁷ Silver Bull’s Memorial, paragraphs 2.9 and ff.; Mr. Barry’s First Witness Statement, paragraph 3.1.

hectares,²⁸ subsequently reduced to 6,485.32 hectares.²⁹ The company acquired two of these concessions, and certain surface rights, from Mineros Norteños.³⁰ In particular:

- (a) On 30 August 1997, Minera Star Morning (as it was then called) entered into a contract with Mineros Norteños whereby Mineros Norteños granted it the right to carry out exploration works on the two concessions for three years, and also granted it an option to purchase them (the “1997 Agreement”).³¹ The contract also provided for royalty payments as set out in more detail below.
- (b) On 30 August 2000, Minera Metalín entered into a contract with Mineros Norteños whereby Minera Metalín exercised its option and Mineros Norteños sold the two mining concessions to Minera Metalín in return for USD 3,600,000 and certain royalty obligations referred to in more detail below (the “2000 Agreement”).³² Mineros Norteños also sold to Minera Metalín some land and buildings.
- (c) On 18 December 2002, Mineros Norteños sold to Minera Metalín surface rights to five lots of land totalling 126.95 hectares.³³

The 1997 and 2000 Agreements were both governed by Mexican law.

- 62. On one of the lots acquired from Mineros Norteños (Lot 6), Minera Metalín established a camp to act as a base for its exploration activities. The camp had gates and a wire mesh cyclone fence perimeter.³⁴ The main gate of the camp is reached by an unpaved road which bisects the public road from Sierra Mojada to La Esmeralda at a crossroads. Along the unpaved road, somewhere between 50 and a 100 metres from the main gate of the camp, there is what Mr. López calls “the second checkpoint”. At paragraph 7 and 42 of his Second

²⁸ Silver Bull’s Memorial, paragraphs 2.9.

²⁹ Silver Bull’s Reply, paragraph 30.

³⁰ Silver Bull’s Memorial, paragraph 2.18.

³¹ Contract 1997, 30 August 1997, R-0002.

³² Agreement between Mineros Norteños and Minera Metalín dated 30 August 2000, Exhibit C-0009.

³³ Mr. Barry’s First Witness Statement, paragraph 4.6. Minera Metalín acquired a further 775 hectares in surface rights into 2013: see Mr. Barry’s First Witness Statement, paragraph 4.21.

³⁴ Silver Bull’s Reply, paragraphs 103 to 106; Mr. López’s Second Witness Statement, paragraph 17.

Witness Statement he says the distance is 100 metres; but in his report sent to (amongst others) Mr. Barry on 12 September 2029 he estimates 50 metres.³⁵ At paragraphs 36 and 43 of his Second Witness Statement he says that the boundary of Minera Metalín's land was at the second checkpoint, though his report of 12 September 2019 suggests that the property line is rather further off.³⁶ The differences do not matter as it is clear that the camp was well within the land owned by the company³⁷ and that (at the very least) the land between the second checkpoint and the main gate of the camp belonged to it. It also appears from the photograph at paragraph 42 of Mr. López's Second Witness Statement that crossing the boundary line by the second checkpoint involved clambering over a simple rope barrier strung between posts.³⁸

D. THE ROYALTIES DISPUTE WITH MINEROS NORTEÑOS

63. Clause 5 of the 1997 Agreement provided, so far as material, that Minera Star Morning:

"...agrees to pay the cooperative a royalty of 2% of the net amount of the smelting settlements or first-sale invoices paid to [Minera Star Morning] for the sale of minerals and metals obtained and sold from [the concessions], after deducting maquila and freight costs to the smelter, until a total amount of \$10,475,000.00 USD...is covered, including the purchase price referred to in Clause Fourth above.³⁹ At that point, the obligation to continue paying royalties shall cease. ...

...

*[Minera Star Morning] commits to making its best efforts as a diligent miner to bring [the concessions] into production no later than four years after entering into this contract, provided it has purchased the rights to them from [Mineros Norteños]."*⁴⁰

³⁵ Email from Juan Manuel to R. Hernández with a description of the events that occurred in 2019, 12 September 2019, at page 1252, R-0129.

³⁶ See also his email of 7 September 2019 at Exhibit C-0221. At paragraph 8.12 of his First Witness Statement, he says that the property line is at the crossroads with the road from Sierra Mojada to La Esmeralda.

³⁷ Indeed, the whole of Lot 6 is surrounded by land owned by the company: see the map at paragraph 103 of Silver Bull's Reply and Mr. Barry's Second Witness Statement, paragraphs 36 and 37.

³⁸ See, for example, Mr. Fraire's First Witness Statement, paragraph 29.

³⁹ That is, the price of the option and certain periodic payments.

⁴⁰ Contract 1997, 30 August 1997, R-0002.

64. Clause 7 of the 2000 Agreement provided as follows:

“Pursuant to Clause Five of the [1997 Agreement] ...[Minera Metalín] undertakes to deliver as royalty and discovery premium to [Mineros Norteños] 2% of the net amount of the smelting payments or purchase and sale invoices of the mineral extracted from the mining lots, up to the total amount of \$6,875,000.00..., the obligation to pay royalties ceasing upon payment of this amount. In case of transfer of the Rights over the mining concessions that are the object of this contract to third parties, the contract shall include this obligation.”⁴¹

65. Mineros Norteños doubtless anticipated that these Agreements would, reasonably soon, lead to a flow of royalties to the co-operative which could be shared amongst its members, and also to job opportunities for them.

66. Between 2002 and 2010, Metalline (as it was then called) carried out various exploratory works at the Project.⁴² However, by 2009 the company was running out of funds.⁴³ This ultimately led to its merger with Dome and its renaming as Silver Bull (described above). It also led to the introduction of new management, in particular the arrival of Mr. Edgar as Chairman of the Board of Silver Bull, and of Mr. Barry, first as Vice President of Exploration and then as Chief Executive Officer of Silver Bull, and as President of Minera Metalín.

67. Between 2010 and 2013, Silver Bull (through Minera Metalín) carried out further exploratory work and studies, and also acquired additional surface rights for mining activities.⁴⁴ There were also periodic meetings between Mr. Barry and Mineros Norteños, some of whose members were working at the Project.⁴⁵ He also regularly met local community leaders.⁴⁶ However, falling prices for silver and zinc during 2014 and 2015 led

⁴¹ Agreement between Mineros Norteños and Minera Metalín, 30 August 2000, clause 7, C-0009.

⁴² Mr. Barry’s First Witness Statement, paragraph 4.7.

⁴³ Silver Bull’s Memorial, paragraphs 2.21 and 2.22; Mr. Edgar’s First Witness Statement, paragraph 4.7.

⁴⁴ Mr. Barry’s First Witness Statement, paragraphs 4.16 to 4.21.

⁴⁵ Mr. Barry’s First Witness Statement, paragraphs 4.26 and 4.27.

⁴⁶ Mr. Barry’s First Witness Statement, paragraph 4.28.

to a significant reduction in exploration activities,⁴⁷ although work in 2015 did result in the discovery of a large area containing sulphide minerals.⁴⁸

68. Unfortunately, none of this exploratory work produced any royalties for Mineros Norteños, whose members were growing impatient. They had sold the two concessions to Minera Metalín in 2000 and now, many years later, there was still no mining in production, and hence no royalties and only a few new jobs.⁴⁹
69. Early in 2014, Mr. Barry learnt that Mineros Norteños was intending to sue Minera Metalín. In an attempt to head this off, he held a meeting with the cooperative and told the members that this would not accelerate the production of minerals or the payment of royalties; and he made them an offer of a small cash payment together with, if Minera Metalín or Silver Bull were sold, accelerated royalties.⁵⁰ This was all to no avail. On 20 May 2014, Mineros Norteños commenced proceedings in the Mexican courts against Minera Metalín claiming USD 6,875,000 in unpaid royalties and USD 13,250,000 in lost wages. A further without prejudice offer failed to halt the proceedings.⁵¹
70. The litigation continued for seven years, until March 2021. Summarising and simplifying a long and complex procedural history, the claim failed at first instance, in October 2017, and on appeal at the end of July 2019; and the subsequent *amparo* action, that is, a constitutional challenge to the appeal court's decision, failed in March 2021. In barest outline, the claim failed on what amounted to a preliminary objection because it was founded on the premise (which it appears the Mexican courts accepted⁵²) that the concessions sold to Minera Metalín should have come into production in 2001 (four years

⁴⁷ Mr. Barry's First Witness Statement, paragraphs 4.25 and 4.29.

⁴⁸ Mr. Barry's First Witness Statement, paragraphs 4.29 and 4.30.

⁴⁹ Mr. Barry estimated that, on average, about 10 or 12 members of the co-operative were employed on the Project in any one year: Transcript, Day 2, page 447.

⁵⁰ Mr. Barry's First Witness Statement, paragraph 4.34.

⁵¹ Mr. Barry's First Witness Statement, paragraphs 4.35 and 4.36; Mr. López's First Witness Statement, paragraphs 4.4 and 4.9. Mineros Norteños also started unsuccessful criminal proceedings against members of Silver Bull's management: Mr. Barry's First Witness Statement, paragraphs 4.38 and 4.39.

⁵² See, for example, Judgment on the Incident of Non-Compliance with Term or Condition, 24 April 2015, page 15, R-0023.

after the 1997 Agreement). The alleged breach of contract had thus occurred more than ten years before the commencement of proceedings and was, accordingly, statute barred.⁵³

E. THE FEBRUARY 2016 DEMONSTRATION

71. Meanwhile, even though the litigation was still pending, the members of Mineros Nortesños decided, at a meeting held on Sunday 31 January, to take direct action to try to push Silver Bull into paying them the royalties to which they thought they were entitled.
72. On Tuesday 2 February 2016, Mr. López, Minera Metalín's country manager, learned about the planned action. On 3 February, he delivered a letter to the Municipal President of Sierra Mojada, asking for his intervention and the support of local police; and the company's counsel sent copies of the letter to the Governor of the State of Coahuila, the State Secretary of the Interior, the State Secretary of Economy, and the Chief of Police in Sierra Mojada. Mr. López also met the Municipal President and the Chief of Police⁵⁴. On the instructions of Mr. Barry (who was in Canada) Mr. López locked the camp gates.
73. The outline of the events of 4 February 2016 is reasonably clear. In the morning, fifty or sixty members of Mineros Nortesños, led by Mr. Fraire, arrived at the camp gate at about 8am. They were accompanied by three local police officers and a municipal official. Mr. López was inside the camp, along with two other Minera Metalín employees. Members of the cooperative tried to open the gates, but they were locked. They demanded to speak to Mr. Barry and said no-one would be able to leave until he came and spoke with them. It is clear that they had heard a (false) rumour that Minera Metalín was bankrupt.⁵⁵ During the morning, Mr. López sought help from the Public Prosecutor's Office in Química del Rey and also from officials in Saltillo. About noon, the municipal official and the Sierra Mojada Chief of Police told Mr. López that they had tried to persuade Mineros Nortesños to leave the property but had failed, and they themselves then left. Later that afternoon, members of the cooperative padlocked and chained the front and rear gates of the camp. At least one

⁵³ Silver Bull's Memorial, paragraphs 2.69 and 2.71.

⁵⁴ Silver Bull's Memorial, paragraphs 2.75 and 2.76. Mr. Barry's First Witness Statement, paragraph 4.41; Mr. López's First Witness Statement, paragraphs 6.1 to 6.10; Mr. López's Second Witness Statement, paragraph 6; Letter from Minera Metalín to the President of the Municipality of Sierra Mojada, 03 February 2016, C-0070.

⁵⁵ See the Transcript of 4 February 2016 at Exhibit C-0190, first page.

leader of Mineros Norteños (Mr. Merced) was recorded as saying, “we won’t let anyone in or out”.⁵⁶ There was also a certain amount of melodramatic language about members of the co-operative dying if they had to.⁵⁷ Finally, around 10 pm, two Public Prosecutors arrived from Monclova, together with two police officers. They told the Mineros Norteños members that they were trespassing on private property and (according to Mr. López) told them to leave or be arrested. The locks and chains were removed, and the demonstration dispersed.⁵⁸

74. In his oral evidence Mr. Fraire himself very frankly accepted the following, albeit much of it was inconsistent with, or not mentioned in, his two prior witness statements. He did not need fifty-nine other people with him just to talk to Mr. Barry. On the day of the action, he told the municipal official present that Mineros Norteños had gone to Mineros’ property to “take over the Mines”. He also agreed that he and one of his colleagues had told employees of Minera Metalín that Mineros Norteños would not let anyone in or out of the mining camp. Mr. López told him and the municipal official that they were both on private property and could be committing a crime. Mr. Fraire agreed that he had replied “the Mines are still ours.” He also agreed that he had told one of his colleagues that “we’re going to lock this up with a padlock. No-one’s going to have access.”; and that he did in fact place a padlock on the front gate of the camp. He said that he did this because he believed that Mr. Barry was in Sierra Mojada and would eventually have to either enter or leave his office. Mr. Fraire maintained that the demonstration was peaceful. They did not attack anybody there; and they later removed all the padlocks so that people could go in and out. He accepted that one of his colleagues had demanded that Minera Metalín employees should open the gates so that Mineros Norteños members could enter the camp. When the two officers of the Public Prosecutor’s Office arrived, he had admitted to them that the Mineros Norteños members were on private property. He accepted that one of the Prosecutors had told him

⁵⁶ Transcript of 4 February 2016, at Exhibit C-0190, fourth page.

⁵⁷ Transcript of 4 February 2016, at Exhibit C-0194, first page.

⁵⁸ See the First Witness Statement of Mr. López, paragraphs 6.13 to 6.24 and his Second Witness Statement, paragraphs 7 to 9; and Transcript, Day 3, pages 701 to 711.

not to invade private property and had asked him to remove the padlock, which he had done.⁵⁹

75. Whether or not the two Prosecutors threatened the members of Mineros Norteños with arrest, it is quite clear they did tell them to stop trespassing on Minera Metalín's property, and that they persuaded them to end their action and to disperse. The protest (which Silver Bull calls the first blockade) had lasted no more than fourteen hours.
76. It is, however, worth noting that the following day, 5 February 2016, Minera Metalín filed a submission in the ongoing civil litigation requesting the court to enjoin Mineros Norteños from blockading the Project.⁶⁰ No order appears to have resulted from this.
77. Despite the failure of its action, between February 2016 and September 2019 Mineros Norteños continued to press for the royalties to which it thought it was entitled, and also to be paid certain legal costs, at meetings and in correspondence with Silver Bull⁶¹ whilst, as already recorded, the litigation continued. Indeed, it is clear from the evidence of Mr. Barry and Mr. Fraire that, between 2016 and 2019 (and, indeed, earlier), there were repeated attempts to settle the royalties dispute, but all were abortive.⁶² The parties blame each other, but it makes no difference to the outcome to the present arbitration who was responsible for the failure of these negotiations. The fundamental problem was always the same. The members of Mineros Norteños believed that they were owed royalties, and the management of Silver Bull believed that none were due until a mine went into production.

F. SOUTH32

⁵⁹ Transcript, Day 3, pages 701 to 711; see also Mr. López's Second Witness Statement, paragraph 14.

⁶⁰ Mr. López's First Witness Statement, paragraph 7.3.

⁶¹ Mr. Barry's First Witness Statement, paragraph 4.46; Mr. López's First Witness Statement, paragraphs 7.1 to 7.17. See also, for example, Response to Mineros Norteños's Proposal (attaching original proposal from 9 March 2016), 9 April 2016, C-198; Proposal from Mineros Norteños to Minera Metalín, 8 June 2017, C-204; Proposal from Mineros Norteños to Minera Metalín, 15 June 2017, C-207; Proposal from Mineros Norteños to Minera Metalín, 24 September 2018, C-210; and Proposal from Mineros Norteños to Minera Metalín, 15 March 2019, C-213.

⁶² Mr. Barry's First Witness Statement, paragraph 4.46; his Second Witness Statement, paragraphs 20 to 34; Mr. Fraire's First Witness Statement, paragraphs 24, 26 and 27; Transcript, Day 3, pages 723 to 731 (Mr. Fraire); Mexico's Rejoinder, paragraph 191.

78. Meanwhile, Silver Bull was carrying on in its exploration work.⁶³ Although it had raised fresh funds in 2016 and 2017,⁶⁴ it needed to raise further capital to enable it to pursue the Project. On 1 June 2018, Silver Bull, together with its subsidiaries, entered into an Option Agreement with South32 International Investment Holdings Pty Ltd (“South32”), an Australian major mining company.⁶⁵ This provided for a preliminary investment by South32 of USD10 million in four tranches over four years, and for an option to acquire 70 per cent of Minera Metalín for a further USD90 million thereafter; and from time to time Silver Bull drew down funds provided by South32 from June 2018⁶⁶ until (as appears below) the final quarter of 2020.
79. This investment (together with further funds from a private placement⁶⁷) enabled exploration work to continue: for example, in 2018 there was an airborne geographical survey of the Project,⁶⁸ and in early 2019 there was a significant drilling campaign.⁶⁹ However, the money from South32 was for work on the Project, not for paying to Mineros Norteños to settle its claim, which continued to fester.
80. On 1 December 2018, Mr. Andres Manuel López Obrador became President of Mexico. He and his MORENA Party (which won majorities in both houses of the Mexican Congress) appeared to be much more sceptical about foreign investment, particularly in the mining sector, than previous administrations.⁷⁰
81. According to Mr. Barry, by 2019:

⁶³ Mr. Barry’s First Witness Statement, paragraphs 4.57 and 6.1 to 6.3; and his Second Witness Statement, paragraph 14.

⁶⁴ Mr. Barry’s First Witness Statement, paragraph 4.31.

⁶⁵ Option Agreement between Silver Bull Resources Inc., Minera Metalín, S.A. de C.V., Contratistas de Sierra Mojada, S.A. de C.V. and South 32 International Investment Holdings Pty Ltd., 1 June 2018, C-0031. Mr. Barry’s First Witness Statement paragraphs 4.53 to 4.55; and his Second Witness Statement paragraph 14; Mr. Edgar’s First Witness Statement, paragraph 6.6.

⁶⁶ Mr. Barry’s First Witness Statement, paragraph 4.56; Mr. Richards’s Witness Statement, paragraph 22.

⁶⁷ Mr. Barry’s First Witness Statement, paragraph 4.56.

⁶⁸ Mr. Barry’s First Witness Statement, paragraph 4.57.

⁶⁹ Mr. Barry’s First Witness Statement, paragraphs 4.57, 6.1 and 6.3; and his Second Witness Statement, paragraph 14.

⁷⁰ Silver Bull’s Memorial, paragraphs 2.103 to 2.110; Mr. Barry’s First Witness Statement, paragraphs 5.1 and 5.2.

“... we had already completed extensive exploration work, which led to several promising discoveries, including the Sulphide Zone. Our primary investor, South32, was highly enthusiastic about the Project, and I firmly believe it would have exercised its option to acquire a 70% interest under the terms of the Option Agreement. Had that occurred, we would have partnered with them to develop and implement a mine plan. Our objective at the time was to reach the feasibility study stage using the USD 90 million South32 had committed to invest upon exercising their option, a process we anticipated would take approximately three to four years.”⁷¹

G. SEPTEMBER 2019, START OF THE CONTINUING BLOCKADE

82. As already recorded, Mineros Norteños lost its appeal in the royalties litigation at the end of July 2019. This left the members of the co-operative very unhappy. They were convinced they were entitled to be paid royalties, and the fact that the Mexican courts seem to have thought that production should have started in 2001 may have strengthened that belief; and, as Mr. Fraire admitted in oral evidence, Mineros Norteños decided to take the law into its own hands.⁷²
83. On Tuesday 3 September 2019, Mineros Norteños held a meeting. This was attended by the local Member of Congress, Congressman Borrego, a member of the ruling MORENA Party. At that meeting, Mr. Borrego encouraged the members of the co-operative to again blockade the Project (indeed he seems to have proposed it) and, as Mr. Fraire put it, “take the mines”. Mr. Borrego would support them and give them access to lawyers if they got into trouble.⁷³ Indeed, Congressman Borrego subsequently paid for travel tickets, gasoline and food to help Mineros Norteños pursue its campaign against Minera Metalín with money out of his own pocket.⁷⁴
84. On the same day, 3 September, Mr. López was told by three workers at the Project about the meeting and that Mineros Norteños planned another blockade to start on 8 September

⁷¹ His Second Witness Statement, paragraph 17; see also Mr. Edgar’s First Witness Statement, paragraph 5.28; and Transcript, Day 2, pages 582 to 588 (Mr. Edgar).

⁷² Transcript, Day 3, page 714 (Mr. Fraire).

⁷³ Transcript, Day 3, pages 756 to 759 and 767 (Mr. Fraire).

⁷⁴ Mr. Fraire’s Second Witness Statement, paragraphs 37 and 38; Transcript, Day 3, pages 749, 750, 758, 759 and 772 (Mr. Fraire); see Mr. López’s First Witness Statement, paragraphs 8.4 to 8.6, in which he recounts what he was subsequently told about this meeting.

2019. Mr. López emailed Mr. Barry to tell them this.⁷⁵ He also contacted the Citizen Attention Service for the State of Coahuila, and the Public Prosecutor from Química del Rey.⁷⁶

85. On the following day, Wednesday 4 September 2019, Mr. López was told that Congressman Borrego had attended the meeting of Mineros Norteños, that he had suggested a blockade and offered to assist them by speaking and ensuring that television and news media were present.⁷⁷
86. On Thursday 5 September 2019, Mr. López went to Química del Rey and spoke to the Public Prosecutor, who assured him that he would provide assistance to Minera Metalín in the event of a blockade. The Public Prosecutor told him that he would meet the leaders of Mineros Norteños to tell them that if they blockaded the camp, they would face legal consequences.⁷⁸
87. On Friday 6 September 2019, Mr. López was telephoned by the Public Prosecutor who told him that he had spoken to Mineros Norteños and told them that blockading the Project was against the law. The Public Prosecutor also told Mr. López that local police in Sierra Mojada, as well as the Mayor of Sierra Mojada were aware of the impending blockade. The Public Prosecutor told Mr. López that Mineros Norteños had told the Prosecutor that Congressman Borrego would be attending the blockade and that if the Deputy told them it was okay to “take the camp” the co-operative would begin a blockade whether or not it was legal.⁷⁹
88. On Sunday 8 September 2019, Mr. López arrived at the camp at 7am. At 10am, about ten local police officers arrived, who parked in between the camp and the second checkpoint. Work continued normally at the camp until about noon, when one of the workers called Mr. López to tell him that members of Mineros Norteños were coming. Mr. López emailed

⁷⁵ Email from Juan Manuel Lopez Ramirez to Tim Barry et al., 4 September 2019, JMLR-14.

⁷⁶ Mr. López’s First Witness Statement, paragraphs 8.2 and 8.3.

⁷⁷ Mr. López’s First Witness Statement, paragraphs 8.4 and 8.5.

⁷⁸ Mr. López’s First Witness Statement, paragraph 8.8; his Second Witness Statement, paragraph 34. See also Email from Juan Manuel López Ramírez to Tim Barry, 07 September 201, C-221.

⁷⁹ Mr. López’s First Witness Statement, paragraphs 8.9 and 8.10; and his Second Witness Statement, paragraph 34.

Mr. Barry to say the protestors were now in front of the camp, and the latter replied to say that no-one should confront them.⁸⁰ Indeed, it remained Silver Bull's policy throughout to avoid a confrontation with Mineros Norteños at the Project.⁸¹

89. About 10 minutes later the first members of Mineros Norteños arrived at the property line, and the police spoke to Mr. López to ask him to come down to the second checkpoint as Mineros Norteños said they wanted to speak to him. Mr. López walked down to the checkpoint to try to speak to the members of the co-operative but they declined to speak to him saying they only wanted to speak with Mr. Barry. Mr. López telephoned Mr. Luna, a camp assistant, and instructed him to close and lock all of the entry points to the camp: that is, the front gate, a large door for trucks, a smaller door for people, and the back emergency exit gate.⁸²

90. Mr. López stayed about half an hour by the checkpoint and during that time members of Mineros Norteños began to cross over the rope barrier and to walk up to the front gate of the camp. According to Mr. López:

"The police appeared overwhelmed by the number of people from Mineros Norteños who were pushing past them and up to the camp, so they did nothing to stop them."

This appeared to the Tribunal to be confirmed by video that had been taken at the time. Mr. López estimates about 100 people went past him on the way up to the camp.⁸³

91. Believing he had no way of returning to the camp without a confrontation, Mr. López accepted a ride from his wife's cousin back to his own house in town because he felt that it was safest to get out of the Project property as quickly as possible so that he could direct a response from the safety of his home. When he arrived home, he called the Public Prosecutor in Química del Rey to ask for his assistance and to tell him that the police could

⁸⁰ Mr. López's First Witness Statement, paragraphs 8.13 and 8.14; his Second Witness Statement, paragraph 39. See also Email Correspondence Between Juan Manuel López Ramírez and Tim Barry, 8 September 2019, C-222. In his First Witness Statement, Mr. López gives the time as 12.30pm, but his email to Mr. Barry is timed at 11.59.

⁸¹ See, for example, Transcript, Day 2, page 630 (Mr. López).

⁸² Mr. López's First Witness Statement, paragraphs 8.15 to 8.17; his Second Witness Statement, paragraphs 41, 42 and 45; Transcript, Day 2, pages 644-646 (Mr. López).

⁸³ Mr. López's First Witness Statement, paragraphs 8.18 and 8.19; his Second Witness Statement, paragraph 42.

not manage the situation. The Prosecutor put Mr. López in touch with the Co-ordinator of all Prosecutors in Coahuila State, Mr. Irágu, who told Mr. López that he would try to summon another Prosecutor and would call him back. Later that afternoon, Mr. Irágu did call him back to tell him that nobody was available to come to the camp that day but that Mr. López could try calling him again tomorrow.⁸⁴

92. At that point there were six people left inside the camp, Mr. Melnyk and Mr. Velázquez, who were both geologists, Mr. Chavarría Chairez, a water truck driver, Mr. Navidad, a student geologist intern, Mr. Gastélum, a driller, and Mr. Luna. The other workers who had been at the Project that day had been working outside the camp operating drill rigs and working with the geological samples, and they had escaped to Sierra Mojada on back roads once they saw that Mineros Norteños had arrived at the camp.⁸⁵ There was also drilling equipment belonging to a third-party contractor left in the camp.
93. Later that afternoon, Mr. Navidad telephoned Mr. López from the camp to tell him that Congressman Borrego (who had arrived with reporters) was giving a speech outside the front gate and that there were between 120 and 150 people outside the camp.⁸⁶ Mr. Navidad told Mr. López that Congressman Borrego was denouncing Minera Metalín for refusing to make payments to Mineros Norteños that the co-operative was owed and saying that it was a classic example of the misbehaviour of foreign mining companies. Congressman Borrego and the media he had brought with him left the Project site later that afternoon.⁸⁷ It also appears that Mineros Norteños had the support of the Municipal President of Sierra Mojada.⁸⁸

⁸⁴ Mr. López's First Witness Statement, paragraphs 8.20 and 8.21; his Second Witness Statement, paragraphs 44 and 47.

⁸⁵ Mr. López's First Witness Statement, paragraph 8.22.

⁸⁶ Silver Bull suggests that Congressman Borrego accompanied Mr. Fraire to the mine site (Post-Hearing Brief, paragraph 50), but Mr. Fraire's evidence, properly understood, is only that Congressman Borrego was there that day, not necessarily at the outset: see Transcript, Day 3, page 754. It seems more likely from Mr. López's evidence about Mr. Navidad's telephone call that Congressman Borrego arrived during the afternoon.

⁸⁷ Mr. López's First Witness Statement, paragraphs 8.23 and 8.24; his Second Witness Statement, paragraph 47; Mr. Fraire at Transcript, Day 3, page 754.

⁸⁸ Email from Juan Manuel López Ramírez to Tim Barry et al., 18 September 2019, at paragraph 2, C-232.

94. It is clear from the photographic evidence, and that of witnesses, that on the first day of what for convenience the Tribunal will call a blockade, at least for much of the day the crowd in front of the camp included many women and children and that some of those present were elderly. That night, however, male members of Mineros Nortesños remained on site, and appeared to be patrolling around it with flashlights. Mr. Melnyk says that he felt “it was not safe for any of us to leave the camp because of the high risk of physical confrontation.”⁸⁹
95. The next morning, Monday 9 September 2019, Mineros Nortesños was still outside the camp, and the six Minera Metalín employees were still inside it. Mr. Melnyk, who was inside the camp, felt those outside to be hostile and threatening.⁹⁰ At about noon Mr. López spoke again to Mr. Irágu who suggested that Minera Metalín should sue Mineros Nortesños to enjoin them from remaining on its property, which he said the company could do once a Public Prosecutor came out to the site. However, by 4pm Mr. López had not heard anything further, so he rang Mr. Irágu’s office again, and he was given the phone number of a Public Prosecutor based in Torreón, and told that a Prosecutor would give Mr. López a call the next day. Mr. López in his turn told the local police that a Prosecutor from Torreón would be coming, and the local police warned Mineros Nortesños that it was time to pack up and head back to town before the Prosecutor arrived. Shortly afterwards the local police telephoned Mr. López to tell him that Mineros Nortesños was not leaving and were calling for reinforcements so that their numbers could overwhelm the Prosecutor when she arrived.⁹¹
96. In the meantime, Mr. López was speaking to Mr. Melnyk and Mr. Velázquez about enabling them to leave the camp. Mr. Melnik says that he felt imprisoned in the camp and could not wait to get out.⁹² Indeed, he had a flight to catch from Torreón. Between them they decided that the two would leave through the back gate that night and, around 11pm,

⁸⁹ Mr. Melnyk’s First Witness Statement, paragraph 4.16; and his Second Witness Statement, paragraph 16.

⁹⁰ Mr. Melnyk’s First Witness Statement, paragraphs 4.11 and 4.17; his Second Witness Statement, paragraph 16.

⁹¹ Mr. López’s First Witness Statement, paragraphs 8.26 to 8.28.

⁹² Mr. Melnyk’s Second Witness Statement, paragraph 8.

that is what they did, walking for about 45 minutes until they were picked up by Mr. López's assistant who drove them to Sierra Mojada.⁹³

97. At around noon on Tuesday 10 September 2019, Mr. López telephoned the Chief Prosecutor in Torreón who told Mr. López that he could not come to the site to intervene unless Mineros Norteños did something violent, and that he would not come to the site just to tell them that their conduct was improper. Mr. López then spoke to Mr. Barry and Mr. Jorge Sánchez (Silver Bull's lawyer) and they decided to put together the paperwork necessary to start legal proceedings against Mineros Norteños. Although not mentioned in his First Witness Statement, according to a report which Mr. López emailed to Silver Bull's lawyers, and Mr. Barry, on 12 September 2019, on 10 September he also spoke to a Mr. Benjamin in the Public Prosecutor's Office in San Pedro (which Mr. López had been told was the relevant office with jurisdiction over Sierra Mojada), and Mr. Benjamin advised him that, for the Public Prosecutor's Office to intervene, he would need to file a criminal complaint.⁹⁴

98. On the morning of Wednesday 11 September 2019, Mr. Barry (who that day travelled to Mexico City⁹⁵) and Mr. López exchanged emails. Mr. Barry said this, amongst other things:

"I just spoke to Matt Melnyk who confirmed that no-one can leave the camp freely – as a consequence this has evolved into a hostage situation. The police need to be notified of this and brought to the site immediately.

As you know Mexico is highly sensitive to hostage and kidnap type situations and it would reflect very badly on MN if they have taken people hostage. Our staff cannot freely leave the project and do not have access to food, water and medicines [sic].

Please contact the police as soon as you are able.

⁹³ Mr. López's First Witness Statement, paragraph 8.30 and 8.31; Transcript, Day 2, pages 629 and 630 (Mr. López's First Witness Statement, paragraph 8.31; Mr. Melnyk's First Witness Statement, paragraphs 4.21 to 4.30. The Tribunal notes that Mexico has sought to discredit the evidence of Mr. López and Mr. Melnyk by reference to the audio recordings at Exhibits C-189, 190, 193 and 194: see Mexico's post-Hearing Brief, paragraphs 149 to 151. However, these recordings date from February 2016, not September 2019).

⁹⁴ Email from Juan Manuel to R. Hernández with a description of the events that occurred in 2019, 12 September 2019, R-0129.

⁹⁵ Mr. Barry's First Witness Statement, paragraph 6.8.

I will be contacting the Canadian and American Embassies[.]”⁹⁶

99. Mr. López responded saying, amongst other things:

“Theres not danger right now for the people that are in the camp (Driller, driver of watertruck, Geologist resident, and the guard), because they want to be there by themselves, we have food and all services. Nobody are under medical prescription.

About Matt’s comment, I decided to send them (Matt and Jose) by the back door, assuming that if he tried [sic] to leave by the main door the MN people can stop them to much time and loss his flight.

Is delicate to me and my family because we live in town, if I talk about hostages with the police, the police will say to them that I said that. All the police or most have family with MN.

I am agree that this situation was taking to much time and everybody is desperate but I can not lie in this (hostages) please understand my situation.

Tomorrow the driller and the watertruck driver will go out the camp by the main entry and we will see if the block them or they menace them, the police know this and they will give them support for that.

The decision to keep the guard [Mr. Luna] there is mine and this guard is one worker that I trust to much to inform and keep the camp safe. The geologist resident want to be there because he expect that this will finish soon and he will want to finish his residence.

I never asked if this guys had to be there but if you think that this is necessary this guys can leave the camp by the main entry or by the door that we have in the back side of the camp, and if MN stop them then this will be another problem for MN.

The local police as we saw in the past and right now will not do anything until the prosecutor comes, because they are totally outnumbered and they received that order of not confront this people. Who gave the order? [I] do not know, but Mayor? is very probably.

Trust in me that I will be the first to inform to the police and then you if some situation of hostages happens.

⁹⁶ Email from Juan Manuel to R. Hernández with a description of the events that occurred in 2019, 12 September 2019, R-0129.

Please let me know your comments and instructions.”⁹⁷

Mr. López emphasised in evidence his fear for himself and his family that Mineros Norteños would be told of any allegations he might make.⁹⁸

100. Mr. Barry replied the following day:

“I agree with your assessment.

Let’s wait for the Prosecutor to arrive.

When the water truck driver looks to exit the camp we should have done one filming this. If it looks like they are going to stop him then he should stop – we do not want this to turn violent.

Good luck and keep is [sic] informed how things go.”⁹⁹

101. In the light of this exchange, the Tribunal finds it difficult to accept the suggestion that, as of 11 September, the remaining four people left in the camp can fairly be described as hostages or as having been kidnapped.¹⁰⁰ That somewhat overstates the position. As we shall see, three of them left the following day, albeit with some difficulty; and the fourth (Mr. Luna), at least at this stage, stayed in the camp because Mr. López wanted him there.

102. Nonetheless, it would be wrong to minimise the practical impact of what was happening. Mr. López puts it this way.

“Once Mineros Norteños started its Blockade, our core activities stopped. Actual mining work – like exploration, drilling and geological surveying – happens outside the camp. Without freedom of movement, the Project simply could not function. Those trapped inside the camp were not conducting operations – they were stuck in the support facility, doing what little they could to protect equipment and themselves. By the second day of the Blockade, Mineros Norteños had pitched tents, set up cooking stations, and brought supplies to the camp’s main gate. They were clearly

⁹⁷ Email from Juan Manuel to R. Hernández with a description of the events that occurred in 2019, 12 September 2019, R-0129.

⁹⁸ Transcript, Day 2, page 643.

⁹⁹ Email from Juan Manuel to R. Hernández with a description of the events that occurred in 2019, 12 September 2019, R-0129. Shortly after this email, Mr. López sent a number of people, including Mr. Barry, a “Report on the occupation of the camp by member of Mineros Norteños” dated 10 September 2019, also at Exhibit R-0129.

¹⁰⁰ See, for example, Transcript, Day 2, pages 618, 619 and 642 (Mr. López).

planning to stay and had no intention of permitting the Project works to proceed. That intention has not changed. To this day, the Blockade continues. There is always someone on site, making clear that Mineros Norteños has no plans to leave."¹⁰¹

Moreover, even though the protestors were in fact unarmed, and there was no evidence before of us of any actual violence, there was clearly (initially, mass) trespass on Minera Metalín's land and the Tribunal accepts that those inside the camp, until they left it, felt trapped and that it was a tense and threatening situation in which to be.

103. On Thursday 12 September 2019, Mr. Chavarría Chairez, Mr. Gastélum (who was a diabetic and needed to buy medicine) and Mr. Navidad decided to leave the camp. They later told Mr. López that when they approached the front gate members of Mineros Norteños shouted at them that they couldn't leave until Mr. Barry arrived and thus, initially, they were prevented from leaving. However, eventually, as Mr. Chavarría Chairez and Mr. Gastélum were just contract workers, and not employees of Minera Metalín, and Mr. Navidad was just a student intern, Mr. Fraire, who was present, allowed them to leave, telling them they would never be allowed to come back.¹⁰² The police, whom Mr. López had asked to attend to ensure the three could leave, did attend, but not until after they had left the camp.¹⁰³

H. THE CRIMINAL COMPLAINT

104. On the same day, Minera Metalín filed a criminal complaint with the Public Prosecutor's Office in San Pedro. This alleged, among other things:

"V. On September 8, 2019, at approximately 13.00 hours, in the vicinity of the facilities of my [client], approximately 120 people, which included adult men and women, as well as minors, began to arrive and gather, to finally remain at the entrance and around the referred facilities, physically preventing the access and/or exit of the people who work for my [client] in said facilities.

VI. The events described in the previous paragraph took place in front of different members of police corporations [sic], who did not prevent the

¹⁰¹ Mr. López's Second Witness Statement, paragraph 48.

¹⁰² Mr. López's First Witness Statement, paragraph 8.36. See also Mr. López's email to Mr. Barry of 12 September 2019 at Exhibit R-0129, and his Witness Statement of 18 September 2019 at Exhibit C-0229, page 33.

¹⁰³ Mr. López's Statement at Exhibit C-0229.

members of MN and their companions from accessing the vicinity of my client's facilities, but warned that they were accessing private property without the consent of the owner.

VII. Since September 8, 2019 and to, members of MN have been stationed at the access and in the vicinity of the facilities of my client, preventing the entry or exit of personnel working in the service of my client.

VIII. It is important to indicate that on this date, September 12, 2019, at approximately 09.30 hours, 3 persons in the service of my represented party, ... [Messrs. Navidad, Gastelum and Chairez] and who were trying to leave the premises of my represented party, were prevented from doing so by a group of members of MN [sic], denying them exit of such property, against their will."

The complaint concluded:

"In view of the foregoing, the undersigned hereby denounces and/or files a complaint against WHOEVER OR WHOEVER RESULTS RESPONSIBLE, for their probable responsibility or participation in the commission of the fact that the law indicates as crimes of DISPOSSESSION, UNLAWFUL DEPRIVATION OF LIBERTY and/or whatever results, requesting that once all the pertinent proceedings have been carried out, charges be brought against the accused(s)." ¹⁰⁴

The complaint went on to request the initiation of an investigation.

I. THE CAMP EMPTIES

105. By Friday 13 September 2019, only Mr. Luna was left in the camp. Mr. López instructed him to shut everything down, hide anything valuable, and lock up buildings and vehicles. There were still at least 60 members of Mineros Norteños camped outside the front gate. Moreover, Mr. López was told by a friend that Congressman Borrego was back in Sierra Mojada and encouraging the members of the co-operative to continue with the blockade. Mr. López says that he saw a (now – deleted) post from Congressman Borrego on his Facebook page encouraging more people to come and join the blockade.¹⁰⁵

¹⁰⁴ Criminal Complaint Filed by Minera Metalín with the San Pedro de Las Colonias Public Prosecutor's Office 12 September 2019, page 2 and 3, C-0225. There is a typographical error in paragraph VIII of the English version which refers to "MM" when, in the original Spanish, it is "MN".

¹⁰⁵ Mr. López's First Witness Statement, paragraphs 8.38 and 8.40.

106. On the same day, 13 September, the Public Prosecutor's Office in San Pedro issued an order for an investigation into Mineros Norteños for alleged "dispossession and deprivation of liberty". It called for a police report within five days.¹⁰⁶ Also on that day, Mr. López was called by a Public Prosecutor who told him that she had been assigned to the case. It was a Friday and she said she would not be able to come until Tuesday 17 September.¹⁰⁷
107. On Saturday 14 September 2019, Mr. Luna told Mr. López that the back emergency exit had now been chained and locked shut by members of Mineros Norteños.¹⁰⁸
108. The Public Prosecutor did not in fact arrive until Wednesday 18 September 2019, when she came to Mr. López's house (having previously been directed by her supervisor to the wrong village). She saw the camp, which she walked around and took photographs, but it appears that members of Mineros Norteños prevented her from completing her investigation. She also interviewed Mr. López and his assistant Mr. Olague. When leaving, she told Mr. López that she thought she had sufficient evidence to prosecute the case.¹⁰⁹ However, she made no attempt to end the blockade and no information from her is entered on the criminal file.¹¹⁰
109. In addition, the police took four witness statements that day: from Mr. López, Mr. Olague, Mr. Luna and also Mr. Guevara (another Minera Metalín worker). These all made clear that the demonstrators were blocking passage to and from the camp. These statements were entered into the criminal file the following day under cover of a report from the interviewing officers, together with a sketch map of the site prepared by one of the

¹⁰⁶ Order from Public Prosecutor's Office to Initiate Criminal Investigation, 13 September 2019, C-0407.

¹⁰⁷ Mr. López's First Witness Statement, paragraph 8.41.

¹⁰⁸ Mr. López's First Witness Statement, paragraph 8.42.

¹⁰⁹ Mr. López's First Witness Statement, paragraphs 8.44 and 8.45; and his Second Witness Statement, paragraph 69. See also Mr. López's email to Mr. Barry of 19 September 2019 at Exhibit C-0232.

¹¹⁰ Silver Bull's Reply, paragraph 234.

officers.¹¹¹ An officer also noted in manuscript Mr. Luna saying, “I’m still locked in the facility as these people won’t let anyone in or out.”¹¹²

110. On Thursday 19 September 2019, Mr. López received a call from the Prosecutor’s Office telling him that two Prosecutors would be dealing with the case.¹¹³ The same day, Mr. Luna told Mr. López that he was going to try to get out the camp. This he did that night by climbing over the fence at the back of the camp.¹¹⁴ The blockade had so far lasted twelve days and the camp was now empty of Minera Metalín staff. Indeed, it has remained empty of the company’s staff ever since, except for an inspection by Mr. López in October 2021.¹¹⁵ The blockade by Mineros Norteños has also remained, as members of the co-operative have continued picketing the camp in shifts, and were still doing so at the time of the hearing of this case.¹¹⁶

J. LATE SEPTEMBER AND EARLY OCTOBER 2019

111. On the same day, 19 September, Mr. Barry sent an email to South32. This indicated that he expected a Prosecutor to visit the site, and he went on to say, amongst other things:

“We should have a better understanding of MN’s plans post the State Prosecutors visit and whether or not this will turn into a long siege by Mineros Norteños [sic]. With this in mind I am also looking at the results of the drilling and although we have had some success I am asking if there is a S32 size target to be had here (as I am sure you are). Target wise we have hit all out main targets with moderate results ... As a result, one

¹¹¹ Sworn Statement by Mr. Carlos Daniel Luna Cisneros, 18 September 2019, C-0228; Sworn Statement by Mr. Juan Manuel López Ramírez, 18 September 2019, C-0229; Sworn Statement by Mr. Óscar Ariel Olague Corral, 18 September 2019, C-0230; Sworn Statement by Roberto Guevara Carrillo, 18 September 2019, C-0231; Report of Registration and Inspection of the Scene, 18 September 2019, C-0408; and Homologated Police Report (Notice of Allegedly Criminal Acts), 19 September 2019, C-0409. In its Post-Hearing Brief (paragraph 27), Silver Bull suggests that the report (Exhibit C-0409) “states clearly that “since September 8th, mining workers took over the entrance to the mining company’s facilities without letting in or out the personnel that work in the installation.””. However, a fair reading of the report as a whole suggests that this was a summary of Minera Metalín’s complaint (i.e. the matter under investigation), not a finding of fact.

¹¹² Criminal File Exp 650-SP-UIISP-2019, 13 September 2019, at page 40, C-0498 (Silver Bull’s Opening Slide No. 6).

¹¹³ Mr. López’s First Witness Statement, paragraph 8.49.

¹¹⁴ Mr. López’s First Witness Statement, paragraphs 8.47 and 8.48.

¹¹⁵ Transcript, Day 2, pages 659 and 660, and see below.

¹¹⁶ See, for example, Mr. Portillo’s Witness Statement, paragraph 14.

scenario for us to consider is to finish up the JV and split the remaining expenditure.”¹¹⁷

The “JV” is clearly the venture established by the Option Agreement, and Mr. Barry was giving South32 an opportunity to terminate the venture if it wished; although he said in evidence that he did not expect it to do so, and it did not.¹¹⁸

112. On 20 September 2019, the Public Prosecutor’s Office summoned four leaders of Mineros Norteños, including Mr. Fraire, to appear to provide testimony on 27 September, but they failed to attend.¹¹⁹
113. On Tuesday 24 September 2019, Mr. Fraire came to Mr. López’s house to ask if a meeting could be arranged between Mineros Norteños and a representative of Minera Metalín. Mr. López agreed and the following day he met 10 members of the co-operative. At that meeting the members insisted that they would not accept the decision dismissing their case against Minera Metalín and said that if the co-operative’s four leaders were arrested, there would still another 139 members who would remain blockading the camp. They asked for a meeting with Mr. Barry, but on condition he made them a monetary offer.¹²⁰
114. Also on 24 September 2019, and again on 9 October 2019, Minera Metalín submitted supplemental criminal complaints to the Prosecutor’s Office. These, amongst other things, explained the current state of the royalties litigation, pointing out that Mineros Norteños’s actions were a reaction to its defeat on appeal. The September complaint also added:

“XX. It should be noted that since September 14, 2019, the members of MN have placed chains and padlocks on one of the

¹¹⁷ Correo electrónico de Tim Barry a Mirek Wozga de South 32 en relación con la Manifestación (actualización y desglose de gastos), 19 de septiembre de 2019, R-0081.

¹¹⁸ Transcript, Day 2, pages 494 and 498. Two days earlier, on 17 September 2019, Mr. Barry had suggested to Silver Bull’s Mexican lawyer that the latter should warn the Mexican authorities that “one of the world’s largest mining companies has a joint venture on the project and is very seriously considering leaving the project”. Email Correspondence Between Juan Manuel López Ramírez and Tim Barry, 24 September 2019, C-241. This does not appear to have been true.

¹¹⁹ Mr. López’s Second Witness Statement, paragraph 74; Summons Issued to Andrés García Nájera to Appear as an Accused Party, 20 September 2019, C-0234; Summons Issued to José Merce Aguilar Alfaro to Appear as an Accused Party, 20 September 2019, C-0235; Summons Issued to Lorenzo Fraire Hernández to Appear as an Accused Party, 20 September 2019, C-0236; and Summons Issued to Óscar Carrillo Ramírez to Appear as an Accused Party, 20 September 2019, C-0237.

¹²⁰ Mr. López’s First Witness Statement, paragraph 9.2.

access doors to the facilities of my client, preventing anyone from entering or leaving them ...”¹²¹

Moreover, the complaint of October included the following:

*“XXII. METALIN wishes to avoid any confrontation at all costs. However, it is clear that it has an obligation to protect its investment and assets in Mexico. Therefore, you are kindly requested to take and execute the necessary measures to ensure that METALIN’s workers are not again subjected to an illegal deprivation of their freedom, that METALIN’s land and facilities are not invaded, nor that the ore from its mine[s] is stolen; that the access road to METALIN’s facilities is cleared so that Major Drilling de Mexico, S.A. de C.V. can enter and recover its machinery and equipment.”*¹²²

115. On 4 October 2019, Mineros Norteños wrote to Minera Metalín asking for a “proposal for the payment of the debt that they have owed us since August 2000” describing this as “the only way to conclude the conflict in which we are immersed”.¹²³
116. According to Mr. López, on 9 October 2019, he, Mr. Luna and Mr. Chavarría Chairez (the watertruck driver) went to the Public Prosecutor’s Office to make statements (in Mr. Luna’s case, his second). However, these do not appear in the copy of the criminal file obtained by Silver Bull. Mr. López says he also asked the Prosecutor if he could send police to clear out members of Mineros Norteños from Minera Metalín’s property, but was told that only a judge could order such an act.¹²⁴
117. On 11 October 2019, police officers came to Sierra Mojada to tell leaders of Mineros Norteños that they had to go to the Prosecutor’s Office on 15 October.¹²⁵

¹²¹ Supplemental Filing to Criminal Complaint Filed by Minera Metalín with the San Pedro de las Colonias Public Prosecutor’s Office, 24 September 2019, C-0239.

¹²² Supplemental Filing to Criminal Complaint Filed by Minera Metalín with the San Pedro de las Colonias Public Prosecutor’s Office, 09 October 2019, C-0247.

¹²³ Mineros Norteños letter to Minera Metalín, 04 October 2019, C-0148; Transcript, Day 3, page 732 (Mr. Fraire).

¹²⁴ Mr. López’s First Witness Statement, paragraph 9.4; and his Second Witness Statement, paragraph 75.

¹²⁵ Mr. López’s First Witness Statement, paragraph 9.5.

K. FORCE MAJEURE NOTICE

118. The same day, Silver Bull sent a notice of force majeure to South32 pursuant to the Option Agreement.¹²⁶ This said, amongst other things:

“Reason for Force Majeure: Since the start of the blockade;

MN effectively and illegally imprisoned 4 of our employees for 12 days until they escaped camp.

MN has illegally blocked our access to our property and interrupted our lawful business.

MN has illegally block Major Drilling, our drilling contractor, from access to its equipment that is worth hundreds of thousands of dollars.

MN have refused all attempts by us to meet in Torreon to try and resolve this. We have offered to pay for all transportation, hotel and meal expenses in order to present a negotiated solution.

MN has also informed us they will not recognise the court ruling on their law suit should they lose. In addition they have also informed us of their intent to invade our private property, utilize our equipment and infrastructure, access underground workings and mine and sell our ore.

As a result of the above Minera Metalin cannot perform its duties of running our agreed exploration program until the situation is resolved and has hence called a Force Majeure. It is difficult to put an accurate time on when the blockade will come to an end, however Silver Bull is taking the following measures to try and find a speedy resolutions.

Measures and Remedies undertaken to date:

We have shut down the work program and removed all staff from site in the interests of safety.

We have alerted the appropriate authorities including the State Prosecutor, local and state police, the Coahulia state government, and the Mexican mining department. We have filed criminal charges against the leaders of MN with the State Prosecutor of Coahulia.

¹²⁶ Mr. Barry’s First Witness Statement, paragraph 8.1; Letter from SVB to South32, 11 October 2019, C-0035.

We have informed the Canadian Embassy and the Mexican chamber of mines of the situation and asked for their support.

We have reached out to MN both directly and indirectly in an attempt to meet and start a dialogue to resolve the situation.

...

We will keep in close contact with you and let you know how things evolve. I look forward to a speedy resolution on this."¹²⁷

119. South32 did not seek to exit the Project and, indeed, around this time, according to Mr. Barry, South32 orally agreed to cover Silver Bull's running costs, which it did until the final quarter of 2020.¹²⁸ Indeed, Mr. Richards records that South32 made the following payments between 2019 and 2021; USD 3,126,982 during 2019, USD 265,845 during 2020, and USD 22,384 during 2021.¹²⁹ The Tribunal discusses the evidence about this agreement in greater detail below.

L. MID-OCTOBER TO END 2019

120. On 15 October 2019, the four leaders of Mineros Norteños appeared at the Public Prosecutor's Office in San Pedro, but they declined to testify about the matters under investigation.¹³⁰
121. So far as the criminal investigation is concerned, nothing further seems to have occurred until July 2020, as appears below. Moreover, Mr. Fraire confirmed that, in 2019, no-one from the Public Prosecutor's Office ever asked Mineros Norteños to leave the site of its blockade.¹³¹

¹²⁷ Letter from SVB to South32, 11 October 2019, C-0035.

¹²⁸ Transcript, Day 2, pages 460 to 467 (Mr. Barry); pages 538 and 539 (Mr. Richards).

¹²⁹ Mr. Richards's Witness Statement, paragraph 24.

¹³⁰ Appointment of Defense Counsel and Interview with the Accused Andrés García Nájera, 15 October 2019, C-0411; Appointment of Defense Counsel and Interview with the Accused Lorenzo Fraire Hernández, 15 October 2019, C-0412; Appointment of Defense Counsel and Interview with the Accused José Merce Aguilar Alfaro, 15 October 2019, C-0413; and Appointment of Defense Counsel and Interview with the Accused Óscar Carrillo Ramírez, 15 October 2019, C-0414; Transcript, Day 3, pages 714 and 715 (Mr. Fraire).

¹³¹ Transcript, Day 3, page 715.

122. On 18 November 2019, Mr. López again met Mineros Norteños. He says that they told him they wanted to have a meeting with Mr. Barry at which Congressman Borrego would act as a “mediator” and that if Minera Metalín was not able to attend such a meeting by December, they would “take other actions”.¹³² Two days later, on 20 November 2019, Mineros Norteños wrote to Mr. Barry asking for a meeting to discuss settling the royalties dispute,¹³³ and a meeting took place between representatives of Minera Metalín and the cooperative on 27 November 2019 at which the former offered the latter Silver Bull shares to be credited against royalties.¹³⁴ This was rejected on 30 November.¹³⁵
123. On 5 December 2019, Mr. Barry sent a letter to the First Secretary and Trade Commissioner at the Canadian Embassy in Mexico, copied to the Municipal President of Sierra Mojada, the local police there, the Governor of Coahuila, the United States Embassy, the Office of the Directorate General of Mines (“DGM”), the Public Mining Registry, and the Public Prosecutor in San Pedro.¹³⁶ This expressed fears about further hostile action by Mineros Norteños, and asked for assistance in persuading the Mexican authorities to intervene to protect Minera Metalín’s property. The First Secretary replied that she would arrange a meeting between Minera Metalín and the DGM at the Mexican Ministry of Economy.¹³⁷
124. That meeting took place on 13 December 2019. Mr. Barry, Mr. Sánchez (Minera Metalín’s lawyer) and Mr. López met the Undersecretary of Mining, Mr. Quiroga, and other officials including the Director General of Mining Development, Mr. Jabalera. The Undersecretary promised that he would ensure that steps were taken to clear the blockade.¹³⁸ However, no such steps were taken.

¹³² Mr. López’s First Witness Statement, paragraph 9.7.

¹³³ Mr. López’s First Witness Statement, paragraph 9.8; Letter from Lorenzo Fraire Hernandez et al. to Tim Barry, 20 November 2019, JMLR-024.

¹³⁴ Mr. López’s Second Witness Statement, paragraph 119; Email from Juan Manuel López Ramírez to Tim Barry, 27 November 2021, C-0301.

¹³⁵ Proposal from Mineros Norteños to Minera Metalín, 30 November 2021, C-0302.

¹³⁶ Mr. Barry’s First Witness Statement, paragraph 7.4; Letter from Tim Barry to G. Dompierre, 5 December 2019, C-0036.

¹³⁷ Mr. Barry’s First Witness Statement, paragraph 7.6.

¹³⁸ Mr. Barry’s First Witness Statement, paragraph 7.7. Mr. López’s First Witness Statement, paragraph 9.13. Emails between Tim Barry and Antonio Leonardo Suárez Mejía of the Mexican Ministry of Economy, 15 December 2019 to 8 January 2020, C-0037.

M. CONGRESSMAN BORREGO

125. On 30 December 2019, Mr. López was told there had been a meeting between Mineros Norteños and Congressman Borrego and his staff. This had discussed negotiations with “the Canadians”, and also which lawyer should act for Mineros Norteños.¹³⁹
126. On 18 June 2020, Congressman Borrego visited the blockade, bringing a new lawyer with him. He also (according to Mr. López) suggested that members of Mineros Norteños go to Mexico City to publicise their cause; and, it seems, he helped the co-operative in some discussions with Ministry of Economy lawyers aimed at resolving the dispute (though the details of this are obscure).¹⁴⁰
127. However, according to Mr. Fraire, Mineros Norteños (presumably about this time, or shortly thereafter) ceased contact with Congressman Borrego, at least until Mr. Fraire joined him at a political rally in Sierra Mojada in 2024.¹⁴¹ The reason for the loss of contact seems to be this. During his cross-examination the transcript of a conversation between Mr. López and Mr. Fraire was put to Mr. Fraire. It was suggested to him that he had told Mr. López that Congressman Borrego had wanted “*lana*” (Mexican slang for money) “In exchange for moving things there politically”, and Mr. Fraire agreed that this was correct. The cross-examination went on as follows:

“Q. And so to be crystal clear, this is you saying that Congressman Borrego wanted money in exchange for the political support of his federal office in your dispute with Metalin; correct?”

A. Well, this is not exactly what he said but this is what we thought. That it could have been that he was looking for some economic benefit, but he never said it outright. But we concluded that he wanted some economic consideration because there were a lot of expenses. He went to a lot of expense to help us.

¹³⁹ Mr. López’s First Witness Statement, paragraphs 10.1 to 10.4. See also paragraph 10.6 on further discussions within Mineros Norteños about who should represent them.

¹⁴⁰ Mr. López’s First Witness Statement, paragraphs 11.1 and 11.2; Email from Juan Manuel Lopez Ramirez to Tim Barry et al, 23 June 2020, C-0116.

¹⁴¹ Mr. Fraire’s First Witness Statement, paragraph 45; his Second Witness Statement, paragraph 40.

Q. And do you have any idea where the money for these expenses came from, Mr. Fraire? The Government, I would presume.

A. No. We don't know. We don't know. He was a businessman. And he had a line of trucks, and he had his own money.

Q. But –

A. He said he would support us, but out of his own pocket. He said, "I am supporting you from my own pocket because the Government right now is not giving me anything."

Q. And when you concluded that Deputy Borrego wanted "lana" that was in exchange for his political support that he would lend to your blockade; correct?

A. Yes, correct.

...

Q. ... you're saying that Congressman ... wanted "una feria" [money]; correct? That's what you said?

A. Well, yes, he gave us to understand that that's what he wanted. He was never overt about it. He never said it directly. He didn't – he never said a percentage or anything like that. He never said that.

Q. And then you seem to state in that same passage that after you went to the Chamber of Deputies and told seven other deputies what was happening, Mr. Borrego disappeared; correct?

A. That's right, yes. That's correct.

Q. And the reason he disappeared, it seems, you are saying that –

A. Yeah. He – I called him on the phone and he never answered my phone calls.

Q. And you were aware of the belief that the reason he disappeared was because, after you told those seven deputies about the problem, Borrego must have said that those deputies were going to realize that he had created the whole movement there is Sierra Mojada. That's what you're saying in that passage; isn't it?

A. *That's correct, yes.*"¹⁴²

This evidence is relevant not only to the relationship between Congressman Borrego and Mineros Norteños, it also bears on Silver Bull's allegation that the Mexican State, through Congressman Borrego, was responsible for initiating the blockade, in addition to being responsible for not ending it.

128. At paragraph 52 of its Post-Hearing Brief, Silver Bull says this:

"Congressman Borrego's conduct was carried out under the cover of his official position within the Chamber of Deputies. As Mr. Fraire confirmed, he used his political office to incite the Continuing Blockade, provide material support and shield its perpetrators from prosecution, publicly promoting the anti-mining and anti-foreign investment rhetoric aligned with the MORENA party's political agenda."

129. The Tribunal, however, is not persuaded that Congressman Borrego's conduct can be attributed to the Mexican State. It is true that he was the local congressman and a member of the governing party. But Mr. Fraire's evidence strongly suggests that Mr. Borrego was acting for his own personal advantage, both political and, as some have alleged, possibly financial. There is no evidence of any government support. Indeed, Congressman Borrego at one stage told Mr. Fraire that his financial support for Mineros Norteños was coming from his own pocket, not the government. Moreover, it is worth noting that Mr. Fraire, when speaking of what Mr. Borrego said at the meeting of 3 September 2019, said that he offered to find Mineros Norteños lawyers if they got into trouble, but did not suggest he could or would prevent the authorities initiating such trouble.¹⁴³

N. THE BLOCKADE, THE ROYALTIES DISPUTE, AND THE PUBLIC PROSECUTOR'S INVESTIGATION: MID-2020 – MID-2021

130. In late June 2020, two employees of Minera Metalín went to the camp to check on its status and found that someone had cut a hole in the back fence, and items had apparently been

¹⁴² Transcript, Day 3, pages 772 to 776 (Mr. Fraire), and see also his evidence at pages 767 and 768.

¹⁴³ Transcript, Day 3, pages 758 and 759. Moreover Mr. López confirms that Mr. Fraire said much the same thing to him in January 2024: see Mr. Mr. López's First Witness Statement, paragraph 8.6.

stolen from the camp.¹⁴⁴ Diesel had been syphoned out of vehicles left in the camp and the stereo's in them had been stolen.¹⁴⁵

131. The Tribunal notes that, for the purposes of Articles 1116 and 1117 of NAFTA, 28 June 2020 marks the commencement date for the prescription period in these proceedings. Silver Bull may not make a claim on its own behalf if, before 28 June 2020, it first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it had incurred loss or damage. The same rule applies *mutatis mutandis* to claims brought by Silver Bull on behalf of Minera Metalín, though in such a case the relevant knowledge is that of Minera Metalín. The Tribunal also notes that two days later, on 30 June 2020, NAFTA terminated.
132. On 29 July 2020, Minera Metalín, through its lawyer, made another criminal complaint, this time concerning the break-in to the camp.¹⁴⁶
133. On 12 August 2020, Mr. López met Mineros Norteños at their request. He was handed a letter listing negotiating points, including an advance payment of USD 2 million, and a payment of USD 50,000 for each Mineros Norteños member who had worked at the Project in the past but could no longer work, in return for a commitment to withdraw the claims that Mineros Norteños had against Minera Metalín and a commitment to assist in the exploration of the Project. Minera Metalín rejected these proposals.¹⁴⁷
134. It is worth pausing at this point to consider the positions of the parties in relation to the royalties dispute between Silver Bull and Mineros Norteños. Silver Bull relies on the fact that, during his oral evidence, Mr. Fraire accepted that Minera Metalín had no obligation to pay royalties until a mine began to produce and sell silver and zinc, and that Mineros Norteños knew in 2000 that it would take longer than a year for that to happen. It also relies on the fact that the Mexican courts dismissed Mineros Norteños's claims. These facts,

¹⁴⁴ Email from Juan Manuel Lopez Ramirez to Tim Barry et al., 29 June 2020, C-0145.

¹⁴⁵ López's First Witness Statement, paragraphs 12.2 to 12.4.

¹⁴⁶ Draft Contract between Minera Metalín and Magnalec, C-0352.

¹⁴⁷ Mineros Norteños Board of Directors Proposal to Minera Metalín; Mr. López's First Witness Statement, paragraphs 13.1 and 13.3, C-0119.

Silver Bull says, shows that its refusal to give way to Mineros Norteños's demands was justified, and that Mineros Norteños was seeking illegal "vigilante justice".¹⁴⁸

135. By contrast, Mexico relies on the fact that the Mexican courts dealt with Mineros Norteños's royalty claims on the basis that Minera Metalín was contractually bound to start production paying royalties in 2001. It describes Silver Bull as choosing "to ignore court rulings that found it had failed to fulfil its contractual commitments to commence production and pay royalties, which were the root causes of the demonstrations."¹⁴⁹ Indeed, it alleges that Silver Bull provoked the blockade.
136. In the Tribunal's judgment, the meaning and effect of the 1997 and 2000 Agreements is a matter of Mexican law, into which it has no need to trespass. It is enough for the Tribunal to accept:
- (a) Mineros Norteños's attempt to recover royalties from Minera Metalín through the Mexican courts failed;
 - (b) Mineros Norteños's aging members genuinely believed that they had been forced to wait too long for such royalties and that, whatever the law said, they looked on them as a debt that should be paid;
 - (c) Silver Bull's management genuinely believed Mineros Norteños's position was unreasonable, and that Minera Metalín should not pay sums which were not legally recoverable, and that to do so would be to succumb to extortion.

Indeed, one of the reasons the dispute proved so intractable is that both sides believed that they were right.

137. On 6 October 2020, Minera Metalín's lawyer sent the Public Prosecutor nine (undated) photographs to be included in the criminal file said to show demonstrators or pickets on

¹⁴⁸ Silver Bull's Post-Hearing Brief, paragraphs 13 to 16.

¹⁴⁹ Mexico's Post-Hearing Brief, paragraph 13.

Minera Metalín's land;¹⁵⁰ and he sent further material (including the notarised public property deed for lot 6) for the criminal file on 26 October 2020.¹⁵¹

138. Minera Metalín's lawyers regularly contacted the Public Prosecutor in San Pedro in order to obtain updates on the criminal complaint that it had filed against Mineros Norteños.¹⁵² However, the Public Prosecutor made no move to obtain a court order ordering Mineros Norteños to cease remaining on Minera Metalín's property and, as Mr. López puts it,

*"During the spring of 2021, we were mostly waiting for the Public Prosecutor in San Pedro to act."*¹⁵³

139. On 15 February 2021, an expert designated by the Prosecutor's Office travelled to Sierra Mojada to inspect the lot (Lot 6) on which the camp was situated. In the course of describing what he did in his field forensic report, he said the following.

*"... I could not enter the abovementioned place [Lot 6] since there are approximately 45 persons predominantly of the masculine sex restricting the free access to the place to whom I informed of the reason for which I was in the place, informing me that access was not possible nor the taking of photographs, so I proceeded to take the location via geolocation ..."*¹⁵⁴

As Lot 6 was entirely surrounded by land owned by Minera Metalín,¹⁵⁵ it seems probable that the picket in place in February 2021 was still on the company's property.

¹⁵⁰ Written Submission by Minera Metalín Requesting Inclusion of Photographic Evidence in Criminal File, 17 August 2020, C-0419.

¹⁵¹ Written Submission by Minera Metalín Requesting Inclusion of Judicial Resolution in Criminal File, 26 October 2020, C-420, and Written Submission by Minera Metalín Submitting Certified Property Deed and Requesting Inclusion in Criminal File, 26 October 2020, C-421.

¹⁵² Mr. López's First Witness Statement, paragraph 14.2.

¹⁵³ Mr. López's First Witness Statement, paragraph 14.2.

¹⁵⁴ Field Criminalistics Report by Licenciado Fulgencio Tovar Escobedo Regarding the Sierra Mojada Site, 15 February 2021, C-0356.

¹⁵⁵ See the map at paragraph 103 of Silver Bull's Reply; Mr. Barry's Second Witness Statement, paragraphs 36 and 37.

140. As already mentioned, in March 2021, Mineros Norteños's *amparo* application failed.¹⁵⁶ According to Mr. Barry, he expected this would lead to Mineros Norteños lifting the blockade, or to the Mexican authorities taking action to resolve it. He was mistaken.¹⁵⁷
141. On 16 June 2021, an attorney from the investigation unit in San Pedro sent an information card to the State Attorney General's Office rehearsing Mineros Metalin's complaint about the events of early September 2019 and saying that the case was still being investigated.¹⁵⁸

O. FURTHER NEGOTIATIONS

142. There was an exploratory meeting between representatives of Silver Bull and Mineros Norteños in Torréon on 22 June 2021;¹⁵⁹ and on 4 August 2021, Mr. Barry sent a letter to the co-operative, amongst other things asking for access to the Project so that he could inspect the premises.¹⁶⁰ However, on 6 August, Mineros Norteños replied that it would not grant access to anyone from Minera Metalín. The letter said, amongst other things:

"... I remind you that the sit-in is under no circumstances illegal, as you deceitfully attempt to make it appear.

...

*I further remind you that your presence here in our country is ILLEGAL (NOT welcome), given that we have submitted a request your expulsion from Mexico ... Instead of making a serious proposal, you demanded access, which we do not accept, because of your lies, abuses, and violations. You have violated rules of general application ..., **infringed** upon human rights, **infringed** legal provisions and the **Political***

¹⁵⁶ Mr. Barry's Second Witness Statement, paragraph 43. See the emails at Email from Tim Barry to Mirek Wozga and Andrew Roy from South32, 31 March 2021, C-0266.

¹⁵⁷ Mr. Barry's First Witness Statement, paragraph 7.10.

¹⁵⁸ Information Note Issued by the Public Prosecutor's Office, 16 June 2021, C-0426.

¹⁵⁹ Email from Tim Barry to Andrew Roy and Mirek Wozga of South32, 27 June 2021, and C-0273, Email from Tim Barry to Mirek Wozga and Andrew Roy (South32), 27 June 2021, C-0272.

¹⁶⁰ Mr. López's First Witness Statement, paragraph 14.4; Mr. Barry's Second Witness Statement, paragraph 44; Mr. Edgar's Second Witness Statement, paragraph 9; Transcript, Day 3, pages 732 to 735 (Mr. Fraire). Letter from Minera Metalín to Mineros Norteños, 4 August 2021, C-0278.

Constitution (of Mexico), and engaged in corruption to achieve your own interests, to the detriment of Mexican society and our country.”¹⁶¹

143. Moreover, Mineros Norteños sent two further letters to Minera Metalín (on 6 August and 14 September) asserting ownership of the Project because Minera Metalín had never paid, and also asking for a meeting, failing which it threatened to start mining the concessions itself.¹⁶² However, according to Mr. Barry, he thought that it was not safe for him to visit Sierra Mojada any longer.¹⁶³
144. Nonetheless, on 17 September 2021, Mr. Barry responded saying that they were open to negotiations, but that Minera Metalín must first be able to inspect the state of the property.¹⁶⁴ Mineros Norteños replied the same day, making it clear that they would not “vacate” before “we have the deposit order, the bank name and account that you provide”.¹⁶⁵
145. On 23 August 2021, Mr. Barry sent an email to the Mr. Jabalera pointing out that the two-year anniversary of the blockade was approaching.¹⁶⁶ The email continued saying (amongst other things):

“As discussed [in a telephone call the previous week], we believe if this issue is not resolved shortly then it is highly likely our partner South32 will give up on a resolution being reached and walk away from the project.

This would be a major blow to the chances of ever becoming a mine.

As also discussed, we are open to talks with Minera Norteños but before we enter any dialogue we require unconditional access to the property in

¹⁶¹ Mr. Edgar’s Second Witness Statement, paragraph 11; Transcript, Day 3, pages 735 to 741 (Mr. Fraire- who explained at page 738 that the expulsion being sought was that of Mr. Barry). Letter from Mineros Norteños to Minera Metalín, 06 August 2021, C-0280.

¹⁶² Second Letter from Mineros Norteños to Minera Metalín, 06 August 2021, C-0281, and Letter from Mineros Norteños to Minera Metalín, 14 September 2021, C-0287.

¹⁶³ Mr. Barry’s Second Witness Statement, paragraph 46.

¹⁶⁴ Mr. Edgar’s Second Witness Statement, paragraph 12; Email Correspondence Between Juan Manuel López Ramírez, Tim Barry and Brian Edgar Regarding Response to Mineros Norteños, 17 September 2021, C-0289.

¹⁶⁵ Mr. Edgar’s Second Witness Statement, paragraph 12; Letter from Mineros Norteños to Minera Metalín, 17 September 2021, Exhibit C-0290.

¹⁶⁶ Email from T. Barry to J. Jabalera seeking assistance with the Continuing Blockade, 23 August 2021; Mr. Barry’s First Witness Statement, paragraph 7.12, C-0043.

order [sic] to assess its condition and if any illegal damage has occurred since they took illegal possession. ...

After a 7 year court case, we successfully defended the law suit Minera Norteños filed against us with confirms there is no money to be paid to them until a mine is in production. We have also successfully filed criminal charges against the lead members of the Co-Operative which highlights their illegal blockade.

We now respectfully ask that the Mexican State and Federal Governments uphold the law. We have been patient, two years is a very long time to wait for the law to prevail.

As I say we are happy to work with the Government to resolve the situation but first we must have 7 days to inspect and assess the property.”¹⁶⁷

146. Mr. Barry emailed Mr. Jabalera again on 26 August 2021 saying,

“It has now been over two weeks since our call where you were going to arrange a Government meeting with Minera Norteños to end the blockade.

Is there any update from your end to ending the blockade? As discussed, time is of the essence here.

This illegal blockade has lasted for 2 years and we believe it is time for the Mexican Authorities to do something about this.

We have won the law suit Mineros Norteños filed against us which shows we do not need to pay Minera Norteños anything until a mine goes into production.

The Coahuila District Attorney agrees is illegal and has filed criminal charges against Minera Norteños.

Quite frankly this blockade has now turned into an attempt to extort our company for cash. Ironically by blocking access to our project Minera Norteños is ensuring they can never be paid their royalty.

We are also concerned by the group that appears to be using Minera Norteños to further their own political aims. This has the potential to be extremely disruptive for the entire mining industry in Mexico and these individuals should be stopped.

¹⁶⁷ Email from T. Barry to J. Jabalera seeking assistance with the Continuing Blockade, 23 August 2021, C-0043.

Please let us know if you have any update for us.”¹⁶⁸

Mr. Jabalera did not reply.¹⁶⁹

147. Although in June (or July) 2021, Minera Metalín, through one of its lawyers, had been given to understand that the criminal file was ready for submission to a judge, on 1 September 2021, Minera Metalín and Silver Bull learned that the prosecuting authorities were not proceeding with charges.¹⁷⁰ Thereafter, at least according to the criminal file, nothing further happened in the investigation until January 2023.
148. On 17 October 2021, there was a meeting in Torréon between Silver Bull’s lawyer, Mr. Valásquez, and Mineros Norteños, and another (again in Torréon) later in November. Silver Bull made an offer of its own shares to settle the dispute,¹⁷¹ but this was rejected at the end of November. Mineros Norteños demanded, “50% of the debt and after four months the other 50%”.¹⁷²
149. Although Mr. Barry suggests that at that meeting leaders of Mineros Norteños agreed to Minera Metalín inspecting the site,¹⁷³ in fact, when Mr. López went there on 23 October 2021, as he reported the same day, he had to jump over the fence because the pickets denied access through the main gate, “because they have their camp there.”¹⁷⁴ Mr. Edgar describes what Mr. López found as, “damage, theft and vandalism”.¹⁷⁵ However, Mr. López’s report indicates that most buildings and equipment was untouched. Some items, and some diesel had been taken from, or off, vehicles. Mineral samples taken by Minera Metalín were still there, and two shafts were “OK”. Some batteries and spare parts and tools had been taken

¹⁶⁸ Mr. Barry’s First Witness Statement, paragraph 7.13; Email from T. Barry to J. Jabalera seeking assistance with the Continuing Blockade, 26 August 2021, C-0044.

¹⁶⁹ Mr. Barry’s First Witness Statement, paragraph 7.13.

¹⁷⁰ Mr. López’s Second Witness Statement, paragraph 79; Mr. Barry’s First Witness Statement, paragraph 7.10; Email from Rodrigo Hernández to Tim Barry, 01 September 2021, Exhibit C-0286.

¹⁷¹ According to Mr. Portillo, in addition Silver Bull offered USD 200,000 to Mineros Norteños at the first meeting and USD 300,000 at the second: see his Witness Statement, paragraphs 28 and 35.

¹⁷² Mr. Barry’s Second Witness Statement, paragraphs 48 to 53; Transcript, Day 3, pages 743 to 745 (Mr. Fraire). Proposal from Mineros Norteños to Minera Metalín, 30 November 2021, C-0302; see also Mr. Portillo’s Witness Statement, paragraphs 27 to 31 and 34 and 35.

¹⁷³ Mr. Barry’s Second Witness Statement, paragraph 49.

¹⁷⁴ Site Inspection Report Prepared by Juan Manuel López Ramírez, 23 October 2021, C-298.

¹⁷⁵ Mr. Edgar’s Second Witness Statement, paragraph 12.

from major equipment. Of course, he could not tell whether the thefts had been committed by members of Mineros Norteños or by someone else, but Mr. López recorded Mineros Norteños members telling him that “somebody” had stolen some water pipes.¹⁷⁶ It is worth noting that, on a later visit (in April 2024), Mr. López discovered that Mineros Norteños was taking ore from the waste dump on the site and selling it.¹⁷⁷

150. There was a further meeting between representatives of Silver Bull and Mineros Norteños in Mexico City on 5 March 2022, at which Silver Bull again offered shares; and again this came to nothing.¹⁷⁸ Throughout, Mineros Norteños wanted an immediate payment of royalties before it would end its blockade. However, quite apart from any other obstacle to settlement, Silver Bull itself had very little cash, and it could not divert to Mineros Norteños funds that it had received from South32 for the purpose of exploration.¹⁷⁹
151. It is worth noting that Municipal President Portillo, who attended these meetings between October 2021 and March 2022 (and another in February 2023) as a mediator formed the impression that Mineros Norteños’s “main concern” was that, if the Project were sold, the royalty obligations would be lost.¹⁸⁰ In fact the 1997 and 2000 Agreements required the transfer of those obligations to a third-party buyer, but Mr. Portillo had never read the contracts. Indeed, it is a complaint made by Silver Bull that none of the Mexican officials who played any part in its dispute with Mineros Norteños (other than the judges in the litigation) ever seemed to have understood, or even read, the contracts.¹⁸¹
152. On 11 May 2022, Silver Bull wrote to Mr. Fraire asking for Mineros Norteños to appoint a representative for the purpose of settlement discussions, and to provide a statement

¹⁷⁶ Site Inspection Report Prepared by Juan Manuel López Ramírez, 23 October 2021; see also Mr. Portillo’s Witness Statement, paragraph 18, C-0298.

¹⁷⁷ Mr. López’s First Witness Statement, paragraph 15.5.

¹⁷⁸ Mr. Barry’s Second Witness Statement, paragraphs 57 and 58; see also Mr. Portillo’s Witness Statement, paragraphs 42 and 43.

¹⁷⁹ Transcript, Day 2, pages 477, 478, 484 and 485 (Mr. Barry).

¹⁸⁰ Mr. Portillo’s Witness Statement, paragraph 30; Transcript, Day 3, pages 799 to 804 (Mr. Portillo). He also says that Mineros Norteños feared that any cash payment without a formal written agreement (which Silver Bull was unwilling to provide) would enable the company to treat the debt as settled: see paragraphs 29 and 35 of his Witness Statement.

¹⁸¹ Silver Bull’s Post-Hearing Brief, paragraphs 45 to 47.

whether the cooperative was interested in a reasonable resolution, and to confirm whether it still sought payment for the full amount of post-production royalties.¹⁸² On 17 May 2022, Mineros Norteños replied, repeating its demand for the full amount of royalty payments.¹⁸³

153. Further discussions in June and July 2022 failed to achieve anything before events intervened to make further negotiations pointless, at least so far as Silver Bull was concerned.¹⁸⁴

P. SOUTH32 PULLS OUT

154. On 5 July 2022, Mr. Barry had a telephone conversation with Mr. Wozga of South32 in which the latter expressed that company's desire to leave the Project. Further communications followed and, on 31 August 2022, the parties entered into a mutual termination of the Option Agreement. Under this, South32 agreed to pay Silver Bull the sum of USD 518,000, representing USD 175,000 for rehabilitation of the Project site and environmental reporting, and USD 343,000 for reimbursement of direct Project related expenditure.¹⁸⁵

155. Mr. Barry observes in his First Witness Statement:

“After the termination of South32’s Option Agreement, we came to realise that we were not going to be able to further progress the Project. Put another way, when South32 – who had demonstrated a real commitment to the Project through nearly three years of the Continuing Blockade – pulled out, we realised that we had lost the financing and development partner necessary to progress the Project. We also realised that no other reasonable investors would be interested in a mining project that continued to be illegally blockaded after three years with no hope of Government intervention. Indeed, I spoke with existing shareholders and investors of Silver Bull, and they all agreed that additional investors would not be interested in the Project given the continuing Blockade and the

¹⁸² Mr. Barry’s First Witness Statement, paragraph 7.14; Letter from SVB to Mineros Norteños, 11 May 2022, TB-15.

¹⁸³ Mr. Barry’s First Witness Statement, paragraph 7.15; Letter from Mineros Norteños to SVB, 17 May 2022, TB-16.

¹⁸⁴ See for example, Proposal from Mineros Norteños to Minera Metalín, 20 June 2022, C-0320.

¹⁸⁵ Mr. Barry’s First Witness Statement, paragraphs 8.5 and 8.6; Mr. Barry’s Second Witness Statement, paragraph 63; Exhibit C-0048, Termination Agreement between Silver Bull Resources Inc., Minera Metalín, S.A. de C.V. and South 32 International Investment Holding Pty Ltd., 31 August 2022.

Government's failure to act, and that Silver Bull should move to pursue projects elsewhere.”¹⁸⁶

156. There is some dispute about why South32 agreed to terminate the Option Agreement. However, Mr. Edgar was quite clear. When it was suggested to him that it was “disappointing drilling results or the failure to identify any commercially mineable ore body,” he replied:

“I don’t believe that’s a factor. I know exactly why South32 left. They got locked out the Project for over three years, and they had had enough.”¹⁸⁷

Moreover, in the Tribunal’s judgment, if South32 had wished to quit because it thought the Project unpromising, waiting until August 2022 before doing so is inexplicable.

157. Mexico has also suggested that South32 may have terminated the Option Agreement because of the Valdez litigation described below. However, as discussed in that section, this is implausible. In the Tribunal’s view, Mr. Edgar was correct: South32 left because they had waited long enough for work on the Project to resume.

Q. 2023 – 2024

158. On 10 January 2023, investigating officers produced a further police report which was said to be “continuing with the investigations in relation to the complaint...for the crime of dispossession and deprivation of liberty...against” Mineros Norteños. It records that the officers:

“...upon arriving at the main road which leads to the facilities of the mine we find a blockade which was a makeshift encampment with a female person...when we told her the reason for our presence this person told us her name...informing us that she is a member of Mineros Norteños and since September 8, 2019 they made a blockade in the mine, stopping workers and works until they reach an agreement on the money owed to the members of Mineros Norteños...

...we interviewed a male person...he told that he is a member of [Mineros Norteños] and that since September 8, 2019 they closed with blockades to stop the work at the mine because they claim that the company Metalin has not completed the purchase of the mine, which is owned by [Mineros

¹⁸⁶ Paragraph 8.7.

¹⁸⁷ Transcript, Day 2, pages 581 and 582 (Mr. Edgar).

*Norteños], so that so far they still have the mine occupied denying entry to workers...*¹⁸⁸

159. According to Mr. Portillo, in early 2023 there was another meeting between Mr. Velásquez (for Silver Bull) and Mineros Norteños which was again abortive.¹⁸⁹

160. On 2 March 2023, Silver Bull filed its Notice of Intent to Submit a Claim to Arbitration.¹⁹⁰ At that time, as Mr. López puts it:

*“... no one working for Minera Metalín, including me, had been back to the Sierra Mojada Project in more than two years because we feared that if we tried to re-enter the camp, Mineros Norteños would confront us, and there would be a conflict.”*¹⁹¹

161. On 26 June 2023, the Public Prosecutor’s Office supposedly issued a request to Minera Metalín for additional information, asking for contact details for five of the six employees who had been in the camp in September 2019.¹⁹² Silver Bull says that Minera Metalín never received this request.

162. On 28 June 2023, Silver Bull issued its Request for Arbitration.

163. On 23 September 2024, the Public Prosecutor in San Pedro archived the criminal file.

164. Minera Metalín currently employs two people at Sierra Mojada: Mr. López and one other.¹⁹³

R. WHERE WAS THE BLOCKADE AND WAS IT ILLEGAL?

165. It is clear that, during the period 8 to 19 September 2019, the members of Mineros Norteños were picketing the camp right up to the front gate and the mesh fence. This was clearly trespassing on Minera Metalín’s land. They have continued to picket ever since. At one point in his evidence Mr. Fraire said that, if the weather was bad, the pickets sheltered in a

¹⁸⁸ Homologated Police Report (Notice of Potentially Criminal Acts), 10 January 2023, C-0464.

¹⁸⁹ Mr. Portillo’s Witness Statement, paragraphs 42 and 43.

¹⁹⁰ Notice of Intent to submit a claim to arbitration (without exhibits), 02 March 2023, C-0069.

¹⁹¹ Mr. López’s First Witness Statement, paragraph 14.7.

¹⁹² Exhibit C-0353.

¹⁹³ Transcript, Day 2, page 603.

structure attached to the front gate.¹⁹⁴ At another point he said they used the guard hut at the entrance to the company's property.¹⁹⁵ However, it seems clear that when the expert from the Prosecutor's Office visited the site in February 2021, the picket was on Metalin's land, and that when Mr. López inspected the camp in October of that year, members of Mineros Norteños were still in place at the front gate of the camp.¹⁹⁶

166. Mr. López says that the picket moved from the front gate of the camp to the property line in 2023, after Silver Bull had given its Notice of Intent, but that in April 2024 it was moved back the front gate.¹⁹⁷ The Tribunal is satisfied that, at least during the period from 8 September 2019 to the end of August 2022 (when South32 terminated the Option Agreement), Mineros Norteños maintained its picket on land owned by Minera Metalín. The purpose of this was to keep the company out until it agreed to a settlement acceptable to Mineros Norteños.
167. Unsurprisingly, unauthorised entry onto another person's property is illegal in Mexico. As is (or at least may be) physically preventing someone from entering their own property.¹⁹⁸
168. No member of Mineros Norteños has ever been charged with any offence in relation to its trespass on Minera Metalín's property.¹⁹⁹

S. THE VALDEZ LITIGATION

169. Mexico says that this litigation is relevant to why South32 terminated the Option Agreement, and whether Silver Bull has suffered any loss;²⁰⁰ and it is convenient to summarise briefly the relevant facts, and to deal with the termination point, here.

¹⁹⁴ Transcript, Day 3, pages 719 and 720.

¹⁹⁵ Transcript, Day 3, page 784.

¹⁹⁶ See also the police visit of early January 2023, when they found pickets encamped on Minera Metalín's land and paragraphs 13 and 14 of Mr. Portillo's Witness Statement.

¹⁹⁷ Mr. López's First Witness Statement, paragraphs 14.8, 15.1 and 15.2.

¹⁹⁸ Transcript, Day 4, pages 960, 961, and 997 to 1,003 (Mr. Islas).

¹⁹⁹ Transcript, Day 3, page 720 (Mr. Fraire).

²⁰⁰ Mexico's Post-Hearing Brief, paragraphs 37 to 40, 109 to 111 and 178.

170. On 21 April 2010, Minera Metalín entered into an agreement with Mr. Jaime Valdez and Mrs. Maria Valdez²⁰¹ under which, in return for an initial and some annual payments staged over up to five years, Minera Metalín was granted access to explore, and an option to acquire, three mining concessions. If it decided to buy them, Minera Metalín would have to pay USD 5.9 million.²⁰² To terminate the option without paying for the concessions, Minera Metalín was required to give 30-days notice prior to vacating them.²⁰³
171. Minera Metalín made the payments for 2010, 2011 and 2012.²⁰⁴ According to Mr. Barry, Minera Metalín then gave the necessary notice to terminate the option on 3 June 2013.²⁰⁵ According to Mr. Antonio Valdez, Mr. and Mrs. Valdez's son, it did not.²⁰⁶
172. Again summarising and simplifying a long and complex procedural history,²⁰⁷ on 15 February 2016, Mr. Antonio Valdez filed a lawsuit against Minera Metalín on behalf of his parents alleging that they were entitled to be paid the full sum provided for in the contract. This claim was dismissed at first instance in March 2017.²⁰⁸ However, on 17 June 2019, that judgment was annulled²⁰⁹ and, on 10 October 2020, an appeal was allowed, ordering Minera Metalín to pay a total of USD 5.9 million.²¹⁰
173. Minera Metalín did not pay, and proceedings for execution began in March 2022.²¹¹ On 7 July 2022, a judge ordered the attachment of a Minera Metalín bank account and certain

²⁰¹ Mr. Valdez died in 2017 and Mrs. Valdez died in 2019: see Silver Bull's Reply, paragraph 325.

²⁰² Mr. Barry's Second Witness Statement, paragraph 72.

²⁰³ Contract of promise of assignment of onerous rights between the Valdez and Metalín, R-0042.

²⁰⁴ Mr. Valdez's Witness Statement, paragraph 14.

²⁰⁵ Mr. Barry's Second Witness Statement, paragraph 72.

²⁰⁶ Transcript, Day 3, pages 861 and 862.

²⁰⁷ See Mexico's Counter Memorial, paragraphs 235 to 255, and Silver Bull's Reply, at paragraphs 318 to 338 for a fuller account of these proceedings.

²⁰⁸ Judgment in Civil Suit 103/2016, R-0046.

²⁰⁹ Interlocutory Judgment of the First Judge of First Instance for Civil Matters of the Judicial District of Tlaxcala on nullity, 17 June 2019, C-0032.

²¹⁰ Judgment of Regional Chamber of the Superior District Court of the State, 01 October 2017, C-0029.

²¹¹ Request for initiation of execution of final judgment 184/2020, R-0050.

other property,²¹² which was extended to 18 concessions held by Minera Metalín on 2 June 2023.²¹³

174. As matters stood at the time of the hearing in this arbitration, further proceedings were required before Minera Metalín could lose ownership and control of all the properties attached, and before they could be sold.²¹⁴
175. Silver Bull characterises the proceedings since 2017 as “Highly Questionable and Irregular”,²¹⁵ but could only dispute them in *amparo* proceedings, which it did not bring, asserting that it could not afford to do so.²¹⁶
176. In June 2022, Mr. Antonio López used South32’s “EthicsPoint” on its website to complain that South32’s partner, Silver Bull, had failed to pay a judgment in Mexico. Mexico suggests that this report, and the attachment of Minera Metalín’s assets, may have been what caused South32 (which was aware of the Valdez litigation²¹⁷) to terminate the Option Agreement.²¹⁸ In the Tribunal’s judgment, however, this suggestion is supposition and appears unlikely. There is no mention of the Valdez litigation in the email correspondence between Silver Bull and South32 dealing with the termination of the Option Agreement and, in particular, no complaint there that Silver Bull was in breach of its obligation to keep Minera Metalín’s property free of encumbrances.²¹⁹

²¹² Order of admission of the assets designated by the Claimant for seizure of July 5, 2022, R-0054.

²¹³ Authorization of extension of the lien, R-0059.

²¹⁴ Transcript, Day 3, pages 886 and 887 (Mr. Valdez).

²¹⁵ Silver Bull’s Reply, Section 2.11.1.

²¹⁶ Transcript, Day 2, pages 548 and 549 (Mr. Richards).

²¹⁷ Transcript, Day 2, pages 481 and 485 (Mr. Barry).

²¹⁸ Mexico’s Post-Hearing Brief, paragraphs 109 and 110. Mexico also refers to Silver Bull’s Form 10-K at Exhibit R-0084, but this was not filed until after 31 October 2022, and thus after South32 had terminated the Option Agreement.

²¹⁹ Emails between T. Barry, A. Roy, D. Klinck, W. Mirek, B. Edgar and C. Richards between 5 July 2022 to 15 August 2022, 15 August 2022, C-0126; and see the Option Agreement, clause 5.2 at Exhibit C-0031. Option Agreement between Silver Bull Resources Inc., Minera Metalín, S.A. de C.V., Contratistas de Sierra Mojada, S.A. de C.V. and South 32 International Investment Holdings Pty Ltd., page 42, C-0031.

IV. PARTIES' REQUESTS FOR RELIEF

A. CLAIMANT

177. In its Reply, the Claimant requested that the Tribunal:

*“(a) **DECLARE** that Mexico has breached its obligation to accord full protection and security to the Claimant’s investments under Article 1105 of the NAFTA;*

*(b) **DECLARE** that Mexico has breached its obligation to accord fair and equitable treatment to the Claimant’s investments under Article 1105 of the NAFTA;*

*(c) **DECLARE** that Mexico has breached its obligation not to expropriate the Claimant’s investments under Article 1110 of the NAFTA;*

*(d) **DECLARE** that Mexico has breached its obligation to accord national treatment to the Claimant and its investments under Article 1102 of the NAFTA;*

*(e) **DECLARE** that Mexico has breached its obligation to accord most-favored nation treatment to the Claimant and its investments under Article 1103 of the NAFTA;*

*(f) **ORDER** Mexico to pay compensation for the loss and damage sustained by the Claimant and Minera Metalin as a result of Mexico’s breaches of its obligations under the NAFTA, in an amount of not less than US\$ 315.3 million, or such other amount quantified during the course of this proceeding;*

*(g) **ORDER** Mexico to pay pre-award and post-award interest on a compound basis at a rate calculated by reference to Mexico’s borrowing cost;*

*(h) **ORDER** Mexico to bear the costs of the arbitration and compensate the Claimant for all its costs and expenses incurred in relation to this proceeding, including the fees and expenses of their counsel, in-house counsel, witnesses and experts and reasonable funding costs, the fees and expenses of the Tribunal, and ICSID’s other costs and fees;*

*(i) **DECLARE** that the award is net of all Mexican taxes;*

(j) **ORDER** Mexico to indemnify SVB in respect of any adverse consequences that may result from the imposition of double taxation liability by the United States tax authorities; and

(k) **AWARD** such other and further relief as the Tribunal deems appropriate.”²²⁰

178. The Claimant also:

*“reserve[d] its rights further to amend, develop, and quantify its claims and requests for relief, assert additional claims and requests for relief, and to present further argument and evidence in the course of the arbitration, in accordance with the ICSID Convention and the ICSID Arbitration Rules.”*²²¹

179. In its Post-hearing Brief, the Claimant submitted the following request:

“Scenario I

205. If the Tribunal adopts the position of the majority in the TC Energy case and concludes that “the obligations imposed by NAFTA ceased to apply after the 30th of June 2020, even in relation to legacy claims or what have been called in these proceedings ‘continuing violations’”, the Claimant respectfully requests the Tribunal to:

(a) DECLARE that by its conduct up until 30 June 2020 Mexico breached its obligation to accord full protection and security to the Claimant’s investments under Article 1105 of NAFTA;

(b) DECLARE that by its conduct up until 30 June 2020 Mexico breached its obligation to accord fair and equitable treatment to the Claimant’s investments under Article 1105 of NAFTA;

(c) DECLARE that by its conduct up until 30 June 2020 Mexico breached its obligation to accord national treatment to the Claimant and its investments under Article 1102 of NAFTA;

(d) DECLARE that by its conduct up until 30 June 2020 Mexico breached its obligation to accord most-favored nation treatment to the Claimant and its investments under Article 1103 of NAFTA;

²²⁰ Silver Bull’s Reply, paragraph 716.

²²¹ Silver Bull’s Reply, paragraph 717.

*(e) GRANT the Claimant's request for a quantum phase, enabling both Parties to adapt their quantum valuations to the appropriate valuation date, in accordance with the Tribunal's further directions.*²²²

5.2 Scenario 2

206. If the Tribunal adopts the minority position in TC Energy and therefore "in relation to legacy claims or call them continuing violations of legacy claims, the obligations imposed by NAFTA remained in force after the 30th of June 2020," the Claimant respectfully requests the Tribunal to:

(a) DECLARE that Mexico has breached its obligation to accord full protection and security to the Claimant's investments under Article 1105 of NAFTA;

(b) DECLARE that Mexico has breached its obligation to accord fair and equitable treatment to the Claimant's investments under Article 1105 of NAFTA;

(c) DECLARE that Mexico has breached its obligation not to expropriate the Claimant's investments under Article 1110 of NAFTA;

(d) DECLARE that Mexico has breached its obligation to accord national treatment to the Claimant and its investments under Article 1102 of NAFTA;

(e) DECLARE that Mexico has breached its obligation to accord most-favored nation treatment to the Claimant and its investments under Article 1103 of NAFTA;

(f) ORDER Mexico to pay compensation for the loss and damage sustained by the Claimant and Minera Metalin as a result of Mexico's breaches of its obligations under NAFTA, in an amount of not less than US\$ 315.3 million, or such other amount quantified during the course of this proceeding;

(g) ORDER Mexico to pay pre-award and post-award interest on a compound basis at a rate calculated by reference to Mexico's borrowing cost;

(h) ORDER Mexico to bear the costs of the arbitration and compensate the Claimant for all its costs and expenses incurred in relation to this proceeding, including the fees and expenses of their counsel, in-house

²²² Silver Bull's Post-hearing Brief, paragraph 205.

counsel, witnesses and experts and reasonable funding costs, the fees and expenses of the Tribunal, and ICSID's other costs and fees;

(i) DECLARE that the award is net of all Mexican taxes;

(j) ORDER Mexico to indemnify SVB in respect of any adverse consequences that may result from the imposition of double taxation liability by the United States tax authorities; and

(k) AWARD such other and further relief as the Tribunal deems appropriate.”²²³

B. RESPONDENT

180. In its Rejoinder, the Respondent requested the Tribunal to:

“Order the Claimant to pay all costs and expenses of this arbitration;

To include in that order any additional expenses related to these proceedings that Mexico reasonably incurs until the issuance of the Award; and

Order that such sums bear compound interest from the date of the Award until full payment, at a reasonable commercial rate to be determined by the Tribunal.”²²⁴

181. Mexico further requested that the Tribunal determine:

“That it lacks jurisdiction ratione temporis, ratione voluntatis, and ratione materiae;

If the Tribunal assumes jurisdiction, it should reject the claims on their merits, because the alleged loss of investment is attributable to the Claimant;

That no breach of the provisions of NAFTA has been demonstrated;

Alternatively, if the Tribunal concludes that it has jurisdiction and that the Respondent has incurred international liability, the Respondent requests that its position on the quantum of damages be taken into consideration.

²²³ Silver Bull's Post-Hearing Brief, paragraph 206.

²²⁴ Mexico's Rejoinder, paragraph 1042.

If the Tribunal determines that the Respondent expropriated the Claimant's investment, Mexico requests that the Tribunal order the Claimant to transfer all of Metalin and Contractors' assets to the Respondent to avoid double recovery. This includes, without limitation: mining concession titles, exploration data and results as of the Valuation Date, real estate, and equipment. It also requests that payment of the award be conditional upon the delivery of these assets free of any encumbrances.”²²⁵

182. In its Post-hearing Brief, the Respondent reiterated its request for relief.

183. It should be noted that, on 5 December 2025, in connection with its comments to the new legal authorities submitted by the Claimant in its Post-hearing Brief, Mexico stated:

“...[t]he Claimant’s new requests for relief concerning Articles 1102/1103 and 1105—which appear for the first time in its PHB—are entirely new claims. The Claimant’s further request to open an additional quantum phase underscores the magnitude of this procedural departure.

5. Notwithstanding the foregoing, the Claimant has introduced in its PHB new substantive allegations, arguments, and issues that it has not previously raised in this arbitration, and cited new legal authorities to support these new positions. The introduction of these new arguments at this stage of the proceeding gives rise to serious due process concerns. In accordance with the Tribunal’s instructions, the Respondent restricts this submission to addressing the new legal authorities referenced in the Claimant’s PHB.”²²⁶

V. JURISDICTION

A. APPLICABLE LAW

184. Article 25(1) of the ICSID Convention reads in relevant part as follows:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When

²²⁵ Mexico’s Rejoinder, paragraph 1044.

²²⁶ Mexico’s comments of 5 December 2025, paragraphs 4 and 5 (footnotes omitted).

the parties have given their consent, no party may withdraw its consent unilaterally.”

185. In addition to Article 25 of the ICSID Convention, the Claimant relies on NAFTA Articles 1116(1), 1117(1), and 1120 and USMCA’s Annex 14-C to establish consent to arbitrate.

186. NAFTA Articles 1116(1), 1117(1), and 1120 provide in relevant part:²²⁷

“Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises)

[...]and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. 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.”

“Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises)

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on

²²⁷ North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States (extracts), CL-0004.

which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise

has incurred loss or damage.”

“Article 1120: Submission of a Claim to Arbitration

1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:

(a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention

... ”

187. USMCA’s Annex 14-C provides:²²⁸

“ANNEX 14-C

LEGACY INVESTMENT CLAIMS AND PENDING CLAIMS

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; and

*(c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party’s obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.^{20,}
²¹*

2. The consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of:

²²⁸ Agreement between the United States of America, the United Mexican States, and Canada (USMCA) (extract), CL-0044.

(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;

[...]

3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.

4. For greater certainty, an arbitration initiated pursuant to the submission of a claim under paragraph 1 may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by the expiration of consent referenced in paragraph 3, and Article 1136 (Finality and Enforcement of an Award) of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.

5. For greater certainty, an arbitration initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 while NAFTA 1994 is in force may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by the termination of NAFTA 1994, and Article 1136 of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.

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 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement;

(b) "investment", "investor", and "Tribunal" have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994; and

(c) "ICSID Convention", "ICSID Additional Facility Rules", "New York Convention", and "Inter-American Convention" have the meanings accorded in Article 14.D.1 (Definitions)."

188. Footnotes 20 and 21 to Paragraph 1(c) of USMCA's Annex 14-C provide:

"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 I-VII (Reservations and Exceptions to Investment, Cross-Border Trade in Services and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim.

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)”

B. JURISDICTIONAL OBJECTIONS

189. What follows in this section is a summary of the Parties’ position in relation to Mexico’s jurisdictional objections. References in this Award to parts of the Parties’ written and oral pleadings are not intended to be exhaustive, but to provide an overview of this dispute; they do not claim to include all facts, laws, and arguments referenced by the Parties. These will be discussed, as far as considered relevant, in the context of the Tribunal’s analysis of the disputed issues.
190. The Respondent objects to the jurisdiction of this Tribunal on the basis that **(1)** the Claimant cannot bring a claim under NAFTA Art. 1110 (Expropriation) on the basis of Annex 14-C of the USMCA; **(2.1)** the Claimant’s claim under NAFTA Art. 1105 (Minimum Standard of Treatment) is time barred, and **(2.2)** alternatively, the Claimant can neither bring those claims under Annex 14-C of the USMCA as they fall outside the Tribunal’s jurisdiction *ratione temporis* and *ratione voluntatis*; **(3)** the Claimant’s claims under NAFTA Articles 1102 (National Treatment) and 1103 (Most-Favoured-Nation Treatment) also fall outside the Tribunal’s jurisdiction *ratione temporis* and *ratione voluntatis*; and **(4)** there is no protected investment, since (i) the Claimant did not maintain control and ownership over a covered investment, (ii) the Claimant’s interest in the Option Agreement is not an investment covered under NAFTA Art. 1139, and (iii) the Option Agreement fails the *Salini* test.

(1) Whether the claim under NAFTA Art. 1110 (Expropriation) can be submitted to arbitration under Annex 14-C of the USMCA

a. Respondent's Position

191. The claim for indirect expropriation under NAFTA Art. 1110 fails for lack of jurisdiction *ratione temporis* and *ratione voluntatis*. On jurisdiction *ratione temporis*, the Respondent's case is that by the time the alleged indirect expropriation breach occurred, the NAFTA obligations were no longer binding on the NAFTA parties, including Mexico.²²⁹ On jurisdiction *ratione voluntatis*, the Respondent's case is that the consent that it extended through Annex 14-C of the USMCA does not cover claims arising from measures post-termination of NAFTA.²³⁰
192. The Respondent argues that (i) the Claimant's theory of indirect expropriation is outside the temporal scope of both NAFTA and the USMCA; (ii) claims for alleged breaches of NAFTA can only be committed for breaches produced when NAFTA was in force; (iii) the NAFTA parties have a shared understanding of the meaning of Annex 14-C; (iv) the official statements of the NAFTA parties constitute "subsequent practice" in the terms of the Vienna Convention on the Law of Treaties ("the Vienna Convention") and the Tribunal must consider them; and (v) the exclusion of claims for indirect expropriation under Annex 14-D of the USMCA confirm Mexico's interpretation.

(i) Claimant's theory of indirect expropriation is outside the temporal scope of NAFTA and the USMCA

193. Mexico submits that a breach of NAFTA Article 1110 cannot materialize retroactively as a result of actions that took place after NAFTA's termination. Indirect expropriation occurs when an investment's loss of value becomes permanent and reaches or exceeds the threshold that neutralizes or destroys its value.²³¹ Expropriation cannot renew itself daily; there is no such thing as an indirect continuous or recurrent expropriation, because a

²²⁹ Mexico's Counter Memorial, paragraph 324.

²³⁰ Mexico's Counter Memorial, paragraph 324.

²³¹ Mexico's Counter Memorial, paragraph 325, referring to *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 ("*Tecmed v. Mexico*"), paragraphs 116-117, cited in *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Award, 21 November 21 2022 ("*Lone Pine Resources v. Canada*"), paragraph 497, RL-0032.

permanent loss of value can only occur at one moment in time. Even in cases of creeping expropriation, such as when the circumstances leading to the expropriation occur progressively, the expropriation itself materializes at a specific moment in time, which is when the breach crystallizes.²³²

194. The Claimant argues, and for purposes of its jurisdictional objection, Mexico agrees, that the alleged breach crystallized, that is, the loss threshold of the Claimant's indirect expropriation claim was reached when South32 exited the Project on 31 August 2022,²³³ *i.e.*, more than two years after NAFTA's last day, 30 June 2020 (the "Termination Date").²³⁴ However, a breach of NAFTA Article 1110 cannot materialize retroactively as a result of actions that took place after NAFTA's termination.²³⁵ The United States of America and Canada, as Non-Disputing treaty parties to this case, confirm as much. The United States submitted that acts occurring after the termination of a treaty "have to be looked in and of themselves to see if there is a breach" considering the new treaty²³⁶ and "the breach has to be looked at in connection with the temporal scope" of whatever agreement is in place at that time.²³⁷ Canada's position is that "we cannot rely on conduct that is subsequent to add to the breach."²³⁸

(ii) Claims for alleged breaches of NAFTA can only be submitted for breaches produced when NAFTA was in force

195. The alleged breach of NAFTA Article 1110 for indirect expropriation happened when NAFTA was no longer in force. The Claimant is not claiming a breach of the USMCA. The Claimant's case under NAFTA Article 1110 hinges on Annex 14-C of the USMCA extending NAFTA's substantive obligations of Section A of Chapter XI beyond the

²³² Mexico's Post-hearing Brief, paragraph 69.

²³³ "On 31 August 2022, [...] South32 and SVB terminated the Option Agreement for the Project. [...] the termination of the Option Agreement resulted in the complete loss of the Project's value, as well as the value of the amounts SVB invested to acquire and develop the Project." Silverbull's Memorial, paragraph 4.16; Mexico's Post-hearing Brief, paragraph 68.

²³⁴ Mexico's Counter Memorial, paragraph 328. Mexico's Post-hearing Brief, paragraph 69.

²³⁵ Mexico's Post-hearing Brief, paragraph 70.

²³⁶ Mexico's Post-hearing Brief, paragraph 71, citing Transcript, Day 1, page 335: 10-12.

²³⁷ Mexico's Post-hearing Brief, paragraph 71, citing Transcript, Day 1, page 336: 8-11.

²³⁸ Mexico's Post-hearing Brief, paragraph 71, citing Transcript, Day 1, page 377: 9-11.

Termination Date and on continuing to be binding on the NAFTA parties for actions or omissions taking place during three additional years.²³⁹ Mexico's consistent position,²⁴⁰ has been that Annex 14-C of the USMCA does not extend beyond the Termination Date the application of substantive investment protections of Section A of NAFTA Chapter XI.²⁴¹ The transition period of the USMCA is only of a procedural character.²⁴² What Annex 14-C does is to extend consent to arbitrate under the mechanism of NAFTA Section B (Settlement of Disputes) the claims alleging a breach of Section A arising from facts predating the Termination Date.²⁴³

196. The Claimant's argument that Mexico's position imposes a temporal limitation into Annex 14-C that is not in the text of Annex 14-C fails. Mexico's interpretation does not "import" a non-textual "time limitation" into Annex 14-C; instead, the time requirement is set by the ordinary meaning of the terms of Annex 14-C, NAFTA's termination, and the rules of international law.²⁴⁴
197. On the ordinary meaning of the terms of Annex 14-C of the USMCA, Mexico refers to the customary rules and principles of treaty interpretation codified in Article 31 of the Vienna Convention.²⁴⁵ Specifically, Mexico's interpretation is supported by the ordinary meaning of the terms in Paragraph 1 of Annex 14-C,²⁴⁶ interpreted in their context (including footnotes 20 and 21, Article 14.2(3), and the Protocol replacing NAFTA with the USMCA)²⁴⁷ and in light of the object and purpose of the USMCA,²⁴⁸ together with the

²³⁹ Mexico's Post-hearing Brief, paragraphs 70, 72.

²⁴⁰ Mexico's Counter Memorial, paragraph 330, referring to Mexico's position in *Legacy Vulcan, LLC v. United Mexican States*, *Coeur Mining v. United Mexican States*, *Access v. United Mexican States*, and non-disputing party submission in *TC Energy Corporation, TransCanada Pipelines Limited v. United States of America*.

²⁴¹ Mexico's Counter Memorial, paragraph 330.

²⁴² Mexico's Post-hearing Brief, paragraph 73.

²⁴³ Mexico's Counter Memorial, paragraph 339; Mexico's Rejoinder, paragraph 440.

²⁴⁴ Mexico's Rejoinder, paragraph 434.

²⁴⁵ Mexico's Counter Memorial, paragraph 339; Mexico's Rejoinder, paragraph 440.

²⁴⁶ Mexico's Rejoinder, paragraphs 441-454.

²⁴⁷ Mexico's Rejoinder, paragraphs 455-471.

²⁴⁸ Mexico's Rejoinder, paragraph 472-475.

subsequent practice of the three USMCA Parties²⁴⁹ and the absence of “subsequent agreements” or rules of international law indicating otherwise.²⁵⁰

198. Mexico explains that Annex 14-C repeatedly uses the term “consent” of the Parties with reference to the submission of a claim to arbitration:

- Paragraph 1 of Annex 14-C refers to the consent of the Parties to submit a claim to arbitration under Section B for a breach of *inter alia* Section A obligations.
- Paragraph 2 states that “consent under paragraph 1” (*i.e.*, consent to submit a claim under the mechanism of Section B) satisfies certain requirements
- Paragraph 3, sets at three years from NAFTA’s termination the duration of the “consent under paragraph 1” (*i.e.*, consent to submit a claim under the mechanism of Section B). Importantly, paragraph 3 does not refer to the validity or enforceability of Section A obligations.

199. Relying on footnote 20 to Paragraph 1 of Annex 14-C, Mexico submits that the context of Annex 14-C confirms that Annex 14-C only applies to measures taken while NAFTA was in force (*i.e.*, before the Termination Date).

200. Footnote 20 to Paragraph 1 reads in relevant part:

“For greater certainty, the relevant provisions in [...] Chapter 11 (Section A) (Investment) of the NAFTA 1994 apply with respect to such a claim.”

201. For Mexico, footnote 20 affirms the principle of intertemporal law, according to which disputes must be assessed under the law in force when the relevant events happened, not when the dispute arises.²⁵¹

202. Footnote 20 uses “for greater certainty” to clarify existing obligations in treaty drafting, not to create new rights or requirements. The phrase “with respect to such a claim” refers

²⁴⁹ Mexico’s Rejoinder, paragraph 476-485.

²⁵⁰ Mexico’s Rejoinder, paragraph 440.

²⁵¹ Mexico’s Rejoinder, paragraph 455.

to claims described in paragraph 1, confirming that relevant provisions of Section A Chapter 11 apply when alleging breach of an obligation under Section A. This clarification does not alter the applicable time period in which a breach may occur, which remains the time period in which the obligation is in force and binding.²⁵² Mexico submits that footnote 20 reflects the principle of customary international law codified in Article 70.1(b) of the Vienna Convention, according to which “the termination of a treaty [...] does not affect any right, obligation or legal situation of the parties, created through the execution of the treaty prior to its termination” (unless the treaty provides otherwise or the parties agree otherwise).²⁵³ Mexico refers to the tribunal majority in *TC Energy*, which found it “extremely unlikely that an agreement to extend for three years not only Section A of Chapter 11 but also [other NAFTA provisions] would have been done by implication in obscure terms and not explicitly in Annex 14-C or the final provisions of [the] USMCA [...]”²⁵⁴

203. Mexico also submits, contrary to the Claimant’s contention, that footnote 21 to Paragraph 1 of Annex 14-C does not refer to the issue of continuing breach. According to the Claimant, in a case of continuing breach, an investor could submit a claim under Annex 14-C and Annex 14-E of the USMCA; but since the Claimant is not eligible to submit claims under Annex 14-E, it remains eligible to submit its claims under Annex 14-C. Mexico’s position, however, is that the ordinary meaning of the text of footnote 21 is that an investor who is “eligible to submit claims to arbitration under paragraph 2 of Annex 14-E” cannot submit a claim to an arbitral tribunal under paragraph 1 of Annex 14-C (*i.e.*, with respect to an existing investment). The terms of footnote 21 do not preclude the possibility that such an investor may have: (i) an investment that meets the conditions of a “legacy investment” under paragraph 6 of Annex 14-C, and (ii) a claim alleging a breach of a Section A obligation within the meaning of paragraph 1. However, the terms of footnote

²⁵² Mexico’s Rejoinder, paragraph 457.

²⁵³ Mexico’s Rejoinder, paragraph 458.

²⁵⁴ Mexico’s Rejoinder, paragraph 459, citing *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024 [redacted] (“*TC Energy v. United States, Award*”), paragraph 163, RL-0042.

21 make it clear that an investor in this situation cannot submit its claim to arbitration under Annex 14-C against Mexico or the United States.²⁵⁵

204. Relying on rules of international law, Mexico argues that, without an explicit party agreement or a sunset clause extending NAFTA Section A obligations beyond the Termination Date, NAFTA parties were no longer bound by those obligations as of 1 July 2020. Pursuant to NAFTA Article 1131(1) Section B, a tribunal established under NAFTA Section B shall decide the issues in dispute in accordance with NAFTA and applicable rules of international law. Under Article 13 of the ILC Articles, an act of a State is not a breach of an international obligation, unless the State is bound by the obligation in question at the time the act occurs.²⁵⁶ Regarding the consequences of termination of a treaty, Article 70.1(a) of the Vienna Convention establishes that, unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty releases the parties from any obligation to further perform the treaty.²⁵⁷
205. Here, neither NAFTA nor the USMCA contain an explicit agreement between the NAFTA parties to extend NAFTA Section A obligations beyond 30 June 2020.²⁵⁸ Neither does NAFTA contain a sunset clause extending NAFTA's substantive protections after its termination.²⁵⁹
206. Mexico submits that under Article 70 of the Vienna Convention, as a consequence of the termination of the NAFTA, the NAFTA parties were "release[d] [...] from any further obligation to perform the treaty." For Mexico, Annex 14-C of the USMCA is deliberately silent about the continuation of NAFTA Section A obligations during the three years following NAFTA's termination, precisely because the NAFTA parties did not

²⁵⁵ Mexico's Rejoinder, paragraph 463.

²⁵⁶ Mexico's Counter Memorial, paragraph 332, citing Article 13 of the International Law Commission Articles on State Responsibility: "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs." Mexico's Rejoinder, paragraph 432.

²⁵⁷ Mexico's Counter Memorial, paragraph 332, citing Article 70.1(a) of the Vienna Convention; Mexico's Rejoinder, paragraph 432.

²⁵⁸ Mexico's Counter Memorial, paragraph 333; Mexico's Post-hearing Brief, paragraph 76.

²⁵⁹ Mexico's Counter Memorial, paragraph 334; Mexico's Rejoinder, 434.

contemplate applying NAFTA Section A Chapter XI beyond 30 June 2020.²⁶⁰ By way of contrast, the NAFTA parties explicitly agreed in Article 34.4 of the USMCA to extend Chapter XIX obligations beyond NAFTA's termination.²⁶¹

207. So, if the USMCA parties had intended to extend the temporal scope of Section A obligations, the terms of Annex 14-C could have provided that with respect to legacy investments NAFTA Chapter XI "shall continue to apply" or "shall remain in effect" for three years from the date of termination. It would not have been necessary to extend the consent of each party or to refer the dispute settlement mechanism of Section B separately from claims for breach of the substantive obligations in Section A. Or the USMCA parties could have avoided Annex 14-C altogether by including a transitional provision similar to Article 34.1.4 of the USMCA, explicitly stating that Chapter 11 of NAFTA "shall continue to apply to legacy investments for three years from the date of termination of NAFTA [sic]".²⁶²
208. Mexico also points to the decision of the majority of the tribunal in *TC Energy v. United States*, which viewed the absence of a sunset clause language in the USMCA and the fact that the United States had never signed a treaty with an implicit sunset clause, as suggesting that the parties did not intend Annex 14-C as a provision having the effects of a sunset clause.²⁶³

(iii) The NAFTA parties have a shared understanding of the meaning of Annex 14-C

209. Mexico submits that, as confirmed by the Non-Disputing Party submissions of Canada and the United States,²⁶⁴ Annex 14-C was devised to resolve procedural issues arising from the

²⁶⁰ Mexico's Counter Memorial, paragraph 337.

²⁶¹ Mexico's Counter Memorial, paragraph 336, citing Article 34.54 of the USMCA which provides: "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." [emphasis added by Mexico]

²⁶² Mexico's Rejoinder, paragraph 454.

²⁶³ Mexico's Counter Memorial, paragraph 338, citing *TC Energy v. United States*, Award, paragraph 176, RL-0042.

²⁶⁴ Mexico's Post-hearing Brief, paragraphs 77-83.

NAFTA-USMCA transition, to cover situations in which claims for a breach of Section A could not be submitted to arbitration before the Termination Date.²⁶⁵

210. The NAFTA parties' common interpretation is further illustrated by the fact that in the absence of Annex 14-C, an investor with claims arising out of facts occurred days before 30 June 2020, could not submit a claim under Annex 14-D of the USMCA because the breach would pre-date the USMCA's entry into force and tribunals would lack jurisdiction *ratione temporis*.²⁶⁶ Likewise, that investor could not submit a claim to arbitration under NAFTA, because it could not have complied with the 90-day notice requirement under Article 1119 or with the 6-month period under Article 1120(1).²⁶⁷

211. The United States' oral submission at the Hearing was clear in that:

*"[w]ithout Annex 14 C, any NAFTA claims that had not yet been asserted at the time the Treaty was terminated in July 2020 would have been extinguished [...] This meant that, if the NAFTA breach occurred shortly before termination but had not yet been asserted in a Notice of Arbitration, the investor would have lost any right to assert that claim. Annex 14-C provided three additional years for the assertion of such claims."*²⁶⁸

212. Canada clarified that when the protocol replacing NAFTA with CUSMA (USMCA) entered into force on 1 July 2020, NAFTA was terminated, meaning that the NAFTA parties were no longer bound by its obligations. It was unnecessary to specify that Annex 14-C only applied to events happening before NAFTA's expiration, as international law already provided that NAFTA ceased to bind the parties after 1 July 2020.²⁶⁹

(iv) Under the Vienna Convention, the official statements of the NAFTA parties are "subsequent practice" that the Tribunal must consider

213. Under Article 31(3) of the Vienna Convention the subsequent practice of States in interpreting a treaty must be considered, including declarations made during a legal

²⁶⁵ Mexico's Rejoinder, paragraph 428.

²⁶⁶ Mexico's Counter Memorial, paragraphs 339-341.

²⁶⁷ Mexico's Counter Memorial, paragraphs 342-344; Mexico's Rejoinder, paragraph 429.

²⁶⁸ Mexico's Post-hearing Brief, paragraph 80.

²⁶⁹ Mexico's Post-hearing Brief, paragraph 79.

dispute. The Non-Disputing Parties' submissions in this arbitration are formal submissions under NAFTA Article 1128 on the interpretation of NAFTA and thus constitute relevant subsequent practice under Article 31(3)(b) of the Vienna Convention. These submissions in this and other cases unanimously support the Respondent's interpretation of Annex 14-C. All three NAFTA parties have uniformly referenced their posterior uniform practice and agreed with the tribunal majority in *TC Energy* regarding Annex 14-C's interpretation.

214. Contrary to the Claimant's assertion, Canada's and the United States' Non-Disputing Party submissions under NAFTA Article 1128 qualify as subsequent practice under Article 31.3(b) of the Vienna Convention. It is widely recognized that official statements made by the Treaty parties in dispute resolution proceedings after the subscription of USMCA, constitute "subsequent practice" under Article 31.3(b) of the Vienna Convention.²⁷⁰ Also, their Non-Disputing Party submissions address questions of treaty interpretation; they are not, despite Claimant's assertion to the contrary, "post-hoc self-serving statements."²⁷¹

(v) USMCA Annex 14-D's exclusion of indirect expropriation claims confirms Mexico's interpretation

215. The Claimant's indirect expropriation claim is not covered by NAFTA's temporal scope because the alleged total loss of the investment occurred when South32 terminated the Option Agreement on 31 August 2022. That is, the alleged indirect expropriation took place within the USMCA's temporal scope. But under the new dispute resolution regime agreed under the USMCA, Annex 14-D does not allow Claimant to submit a claim for indirect expropriation.
216. The Claimant contends that USMCA Annex 14-C permits parties to pursue NAFTA Article 1110 claims for actions that started under NAFTA although the breach materialized while the USMCA was already in force, such as an indirect expropriation occurring in August 2022. This argument would assume (i) that despite NAFTA's termination on 30 June 2020, its substantive obligations under Section A Chapter XI would still apply to measures, situations or circumstances predating that date, and (ii) that NAFTA obligations should

²⁷⁰ Mexico's Post-hearing Brief, paragraph 86.

²⁷¹ Mexico's Post-hearing Brief, paragraph 86, citing Transcript, Day 1, page 162: 19-21 (Claimant).

prevail over USMCA provisions for any claims tied to pre-1 July 2020 situations, even after the USMCA's entry into force.²⁷²

217. For the Tribunal to agree with such position, it would have to reach three contradictory conclusions:
218. First, that the Claimant's claim is not a creeping expropriation. Because, if it were a creeping expropriation, "the date of the expropriation is the date on which the incriminated actions first lead to a deprivation of the investor's property that crossed the threshold and became tantamount to an expropriation."²⁷³ This is consistent with Article 14 of the ILC, which provides that "the breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed [...]".²⁷⁴
219. Second, that there is such a thing as a continuing indirect expropriation, that is, that an investor could continuously lose the total or near total value of its investment, which is logically impossible. At most, successive acts can lead up to a unique moment at which the deprivation occurs, which is precisely what defines a creeping expropriation. The Claimant relies on cases illustrating that point.²⁷⁵ However, there is no support for the proposition that an expropriation may occur continuously before the moment at which the Claimant is deprived of its investment.²⁷⁶
220. Third, if the Tribunal concluded that there was a continuous indirect expropriation which commenced before the moment at which the Claimant claims the loss of its investment, the Tribunal would have to conclude that the expropriation started before 31 August 2022. Specifically, to constitute a breach of NAFTA Article 1110 it would have to conclude that

²⁷² Mexico's Post-hearing Brief, paragraph 90.

²⁷³ Mexico's Post-hearing Brief, paragraph 92, citing *Veteran Petroleum Limited (Cyprus) v. Russia*, PCA Case No. 2005-05/AA228, Final Award, 18 July 2014, paragraph 1761, RL-0150. [emphasis added]

²⁷⁴ Mexico's Post-hearing Brief, paragraph 92, citing Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts, Article 14, RL-0017.

²⁷⁵ Mexico's Post-hearing Brief, paragraph 93, referring to Claimant's Opening Statement, Slide 177 (*Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, 8 December 2000 ("Wena Hotels v. Egypt", CL-0049; *Olin Holdings Ltd v. State of Libya*, ICC Case No. 20355/MCP, 25 May 2018 ("Olin v. Libya"), CL-0173; *Mohamed Abdel Raouf Bahgat v. the Arab Republic of Egypt (I)*, PCA Case No. 2012-07, 23 December 2019 ("Bahgat v. Egypt"), CL-0172).

²⁷⁶ Mexico's Post-hearing Brief, paragraph 93.

the expropriation started before NAFTA's Termination Date on 30 June 2020. However, such a conclusion would be contrary to the Claimant's own arguments and evidence, since the Claimant has insisted that its loss of its Project crystalized on 31 August 2022 with the termination of the Option Agreement.²⁷⁷ In short, unless the Claimant can show that the indirect expropriation occurred while NAFTA Article 1110 was in force, the Claimant cannot show that a breach of NAFTA Article 1110 falls within the Tribunal's jurisdiction.²⁷⁸

221. Finally, for the case of an indirect expropriation crystalizing much later after the entry into force of the USMCA, the Claimant offers no explanation as to why the USMCA parties would agree to allow an investor use Annex 14-C of the USMCA to submit a claim under NAFTA Article 1110, while Annex 14-D of the USMCA does not permit to make such claim under Article 14.8 of the USMCA. The Claimant submits that for cases in which the alleged breach started while NAFTA was in force but crystalized while the USMCA was already in force, the USMCA parties left it to the discretion of the claimant if the consent provisions of Annex 14-C or those of Annex 14-D would apply in respect of indirect expropriation.²⁷⁹ But the Claimant does not explain how to resolve the conflict of rules between USMCA (which exclude claims for indirect expropriation) and those of NAFTA (which allow claims for indirect expropriation).²⁸⁰

b. Claimant's Position

222. On the substance of the objection, the Claimant argues that NAFTA's termination does not deprive the Tribunal of jurisdiction over any of its claims because (i) in accordance with Article 70 of the Vienna Convention, the NAFTA parties did agree extend until 30 June 2023 the application of NAFTA's substantive obligations of Section A through Paragraph 1 of Annex 14-C of the USMCA; and (ii) even if Annex 14-C did not extend those

²⁷⁷ Mexico's Post-hearing Brief, paragraph 94.

²⁷⁸ Mexico's Post-hearing Brief, paragraph 95.

²⁷⁹ Mexico's Post-hearing Brief, paragraph 96, referring to Transcript, Day 1, page158: 13-20; page165: 2-20.

²⁸⁰ Mexico's Post-hearing Brief, paragraph 96.

substantive obligations, Mexico's misconduct constitutes a continuing breach that commenced before NAFTA's Termination Date.

(i) USMCA's Annex 14-C extends NAFTA's Section A substantive obligations until the end of the transition period (30 June 2023)

223. Under Article 70 of the Vienna Convention, parties to a treaty will be released of their treaty obligations unless the treaty otherwise provides or the treaty parties otherwise agree. The Claimant submits that the NAFTA parties, through Annex 14-C of the USMCA, did agree to extend NAFTA Section A substantive obligations within the three-year consent period.²⁸¹ This, the Claimant argues, results from a good faith interpretation of Paragraph 1 of Annex 14-C and its footnote 20 in light of their object and purpose, in accordance with Article 31 of the Vienna Convention.²⁸²
224. According to the Claimant, Paragraph 1 of Annex 14-C provides four conditions for the NAFTA parties to consent to arbitration with respect to legacy investments, such as Claimant's.
225. First, the claim must relate to a legacy investment. This first condition is clearly met because the Claimant invested in Mexico in 2000, well before NAFTA's termination. Second, the claims must be for an alleged breach of the investment protections of NAFTA Section A Chapter XI. This second condition is also met, since the Claimant claims multiple breaches of Section A Chapter XI, including NAFTA Articles 1105 and 1110. Third, the claim must be brought in accordance with NAFTA Section B Chapter XI and USMCA Annex 14-C, a condition which is also met. Fourth, the claims must be brought within three years of NAFTA's termination, which occurred on 30 June 2020. This fourth condition is also met, since the Claimant filed its Request for Arbitration on 28 June 2023.²⁸³
226. The Claimant argues that Annex 14-C of the USMCA does not explicitly exclude legacy NAFTA claims against measures taken during the three-year consent period. The Claimant

²⁸¹ Silver Bull's Reply, paragraph 446.

²⁸² Silver Bull's Reply, paragraph 448.

²⁸³ Silver Bull's Reply, paragraph 448.

contends Mexico's interpretation artificially imposes a temporal limitation not stated in the text of Annex 14-C. The Claimant cites the *TC Energy* dissent by Mr. Álvarez, which found no requirement in the text of Annex 14-C that breaches must have occurred before NAFTA's termination,²⁸⁴ noting the USMCA parties could have, but did not add such a restriction.²⁸⁵

227. The Claimant argues that footnote 20 to Paragraph 1 of Annex 14-C confirms the Claimant's interpretation. The Claimant notes that in *TC Energy*, Prof. Schreuer testified that through footnote 20 the USMCA drafters "confirmed that Annex 14-C chooses NAFTA's substantive obligations as the applicable law to Annex 14-C claims" and that "the words 'for greater certainty' [indicate] that the choice was already contained in paragraph 1 of Annex 14-C." The Claimant adds that as Prof. Schreuer noted "[b]y virtue of Annex 14-C paragraph 1, Article 1131 of NAFTA, and footnote 20, NAFTA's substantive protections continue to apply to legacy investments during the transition period, provided the claim is brought before July 1, 2023. To this extent, NAFTA continues to apply even after its termination because the parties have so agreed in Annex 14-C."²⁸⁶
228. Since the Claimant filed its Request for Arbitration on 28 June 2023, *i.e.*, within three years after NAFTA's termination, the Claimant's claim under NAFTA Article 1110(1) is timely under Annex 14-C of the USMCA.²⁸⁷

(ii) Annex 14-C of the USMCA provides consent for claims of continuing breach

229. The Claimant argues that its claims, including indirect expropriation, fall under the Tribunal's jurisdiction because Annex 14-C covers continuing breaches that began before and continued into the three-year transition period.²⁸⁸

²⁸⁴ Silver Bull's Reply, paragraph 450, citing *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Dissenting Opinion of Arbitrator Henri C. Alvarez K.C., 12 July 2024 ("*TC Energy v. United States*, Dissenting Opinion"), paragraph 9, CL-0202.

²⁸⁵ Silver Bull's Reply, paragraph 451, citing *TC Energy v. United States*, Dissenting Opinion, paragraph 6, CL-0202.

²⁸⁶ Silver Bull's Reply, paragraph 453, citing *TC Energy v. United States*, Award, paragraph 110, RL-0042.

²⁸⁷ Silver Bull's Reply, paragraph 454.

²⁸⁸ Transcript, Day 1, page 160:6-11.

230. The Claimant's claims stem from Mexico's continuing acts and omissions regarding the Continuing Blockade, which started on 8 September 2019 and persist. The Claimant distinguishes this case from *TC Energy*, where the conduct occurred after NAFTA ended on 30 June 2020.²⁸⁹ Here, unlike *TC Energy*, the conduct that forms the basis of the Claimant's indirect expropriation claim is continuing in nature and commenced before NAFTA's Termination Date. Several investment treaty tribunals have found that continuing wrongful acts and omissions may give rise to an indirect expropriation.²⁹⁰
231. According to the Claimant, Mexico's ongoing actions and omissions have indirectly expropriated the Claimant's investment by causing significant and lasting harm. This is different from "creeping" expropriation, which specifically involves a series of state actions over time that together result in expropriation.²⁹¹
232. The Claimant submits that footnote 21 to Paragraph 1 of the USMCA is meant to address continuing breaches. Footnote 21 clarifies that if an investor is eligible to submit claims under both Annex 14-C and paragraph 2 of Annex 14-E for such breaches, they may only bring the claim under Annex 14-E, not Annex 14-C. The Claimant notes that the United States confirmed this position in its submission in *TC Energy*.²⁹² The Claimant emphasizes that the carve-out in footnote 21 applies only where the investor is eligible to submit a claim under Annex-14 *and* Annex 14-E of the USMCA.²⁹³
233. Here, the Claimant is not eligible to submit claims under Annex 14-E, so it remains eligible to submit claims to arbitration under Annex 14-C arising out of Mexico's continuing breaches that commenced before the NAFTA's Termination Date.²⁹⁴

²⁸⁹ Silver Bull's Reply, paragraph 455.

²⁹⁰ Silver Bull's Reply, paragraph 457, referring to *Wena Hotels v. Egypt*, paragraphs 84, 99, CL-0049; *Olin v. Libya*, paragraph 166, CL-0173. *Bahgat v. Egypt*, paragraphs 6, 232, CL-0172.

²⁹¹ Silver Bull's Reply, paragraph 458.

²⁹² Silver Bull's Reply, 460, citing *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America (II)*, ICSID Case No. ARB/21/63, Respondent's Reply to Claimants' Observations on Respondent's Request for Bifurcation, 2 March 2023, paragraph 31.

²⁹³ Silver Bull's Reply, paragraph 461.

²⁹⁴ Silver Bull's Reply, paragraph 462.

234. Also, the fact that the Claimant's indirect expropriation claim crystalized on 31 August 2022, does not divest the Tribunal of jurisdiction *ratione voluntatis* or *ratione temporis*. On this point, the Claimant relies on the decision of the International Court of Justice (ICJ) in *Nicaragua v. Colombia*. In that case, Nicaragua raised claims under the Pact of Bogota, which had ceased to be in force in Colombia. The Court found it had jurisdiction over claims relating to incidents occurring after the treaty's termination, since these were directly related to the subject matter and linked to earlier incidents already within its jurisdiction. Thus, the ICJ maintained jurisdiction *ratione temporis* over Nicaragua's post-termination claims.²⁹⁵
235. The Tribunal should reach to a similar conclusion here: like in *Nicaragua v. Colombia*, Mexico's measures after NAFTA's termination are a continuation of the same measures that existed before NAFTA's termination; specifically, Mexico's continued refusal to end the Continuing Blockade on the Project. Mexico's misconduct both before and after the Termination Date is inextricably linked. The Tribunal should therefore exercise jurisdiction over all of Mexico's continuing acts and omissions, which crystalized in loss and damage on 31 August 2022.²⁹⁶

(2) Whether the claim under NAFTA Art. 1105 (Minimum Standard of Treatment) is time-barred

a. Respondent's Position

236. The Tribunal lacks jurisdiction *ratione temporis* over the Claimant's Minimum Standard of Treatment claim under NAFTA Art. 1105. The Claimant's claim includes claims for alleged breach of the obligation of full protection and security (FPS) and of the obligation to accord fair and equitable treatment (FET)).
237. NAFTA Arts. 1116(2) and 1117 (2), which establish the time limitations for submitting a claim, set a maximum period of three years for an investor to bring a claim, starting from the date the investor or the relevant enterprise first knew or first should have known about

²⁹⁵ Silver Bull's Reply, paragraph 464, citing *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, International Court of Justice, Summary 2022/3, 21 April 2022, Section II, CL-0205.

²⁹⁶ Silver Bull's Reply, paragraph 465.

the alleged breach and the damage. Several NAFTA tribunals have determined that this three-year limitation period is clear and rigid, *i.e.*, not subject to suspension, prolongation or other qualification.²⁹⁷

238. Since the Claimant filed its Request for Arbitration on 28 June 2023, then only a date after 28 June 2020, would be the cut-off date or *dies a quo* for the Claimant's filing to meet NAFTA's three-year limitation period.²⁹⁸ The Parties agree that 28 June 2020 is the relevant "Cut-off Date."²⁹⁹

(i) The limitation period starts when the investor or the enterprise first knows or first should have known of the breach, and the characterization of a breach as "continuing" does not extend the limitation period

239. For the limitation period under NAFTA Arts. 1116(2) and 1117(2) to be triggered, "constructive knowledge" is sufficient, meaning that knowledge of the breach and damage is imputed to the investor or enterprise if a third person acting with reasonable diligence would have known about it.³⁰⁰ This three-year limitation period begins when the investor or enterprise first knows or first should have known of a breach and of the existence of the damage, not when the losses crystalized.³⁰¹
240. The Respondent rejects the Claimant's contention that for "continuing" violations, the limitation period does not begin until the unlawful activity ends. The Respondent criticizes the Claimant's reliance on international human rights cases to support its proposition that continuing violations renew the limitation period. Those cases are not comparable to NAFTA disputes and NAFTA's ordinary meaning and the subsequent practice of its parties require application of the limitation period from the first actual or constructive knowledge

²⁹⁷ Mexico's Counter Memorial, paragraph 281, citing *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, paragraph 63, RL-0019 and *Grand River Enterprises Six Nations, Ltd. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006 ("*Grand River v. United States*"), paragraph 29, RL-0020.

²⁹⁸ Mexico's Counter Memorial, paragraph 286.

²⁹⁹ Mexico's Rejoinder, paragraph 376.

³⁰⁰ Mexico's Counter Memorial, paragraph 281-283, citing *Grand River v. United States*, paragraph 58-56, 66, RL-0020.

³⁰¹ Mexico's Counter Memorial, paragraph 284.

of the alleged violation, regardless of whether the action or omission is continuous or complete. The Claimant's cited examples mostly involve human rights breaches, where remedies available go beyond compensation and limitation periods are interpreted toward the protection of human rights and fundamental freedoms.³⁰²

241. The Respondent submits that the Claimant's theory of the continuing character of the breach for purposes of the limitation period goes against the interpretation and the *effet utile* of NAFTA Articles 1116 and 1117, because, in contravention of the Vienna Convention general rule of interpretation, it leaves without effect the words "first acquired knowledge."³⁰³
242. In this sense, the Respondent distinguishes this case from *Energía v. Guatemala* on which the Claimant relies. The Respondent acknowledges that the limitation period in the relevant treaty in *Energía v. Guatemala* was similar to those in NAFTA Articles 1116 and 1117, but the facts of the cases differ significantly, especially since in that case Guatemala had assumed responsibility beyond the treaty by signing an agreement with the investor.³⁰⁴
243. The Respondent also refers to the dissenting opinion criticising the majority's interpretation of the limitation period in *Energía v. Guatemala* for relying on Article 14 of the ILC Articles instead of the treaty text or general international law. The dissent argued there was no basis for interpreting the treaty as treating continuing and instantaneous violations differently regarding prescription periods.³⁰⁵ This is so since, as the ILC 2006 Report on Fragmentation of International Law recognizes, investment law is a *lex specialis* system within general international law and special treaty rules can override general

³⁰² Mexico's Rejoinder, paragraphs 389-392.

³⁰³ Mexico's Rejoinder, paragraph 399; Transcript, Day 1, page 251:13-17 and page 252:1-4.

³⁰⁴ Mexico's Rejoinder, paragraph 401.

³⁰⁵ Mexico's Rejoinder, paragraph 402, citing *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56 ("*Energía y Renovación v. Guatemala*"), Dissenting Opinion of Prof. Raúl Emilio Vinuesa, 31 March 2025, paragraph 83, RL-0118.

customary international law in cases of actual inconsistency or discernible intent that one provision secludes the other.³⁰⁶

244. Here, like the claimant in *Energia v. Guatemala*, Silver Bull ignores the fact that Article 55 of the ILC Articles provides that “these articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”³⁰⁷ NAFTA’s silence on “continuing breaches” does not imply a tacit agreement to extend limitation periods for such breaches.³⁰⁸
245. NAFTA parties have adopted a position on this point which has the effect of rejecting the majority interpretation in *Energía v. Guatemala* on limitation periods for continuing breaches.³⁰⁹ Thus, the Claimant’s position would require the Tribunal to ignore subsequent practice by NAFTA parties in the application of the Treaty, which establishes their agreement on its interpretation.³¹⁰
246. The Respondent relies instead on *Ríos v. Chile* and *Resolute Forest v. Canada*. In *Ríos v. Chile*, the tribunal acknowledged that “as *lex specialis*, the Treaty does not condition the statute of limitations on claims on the continued existence or duration of the tort. Instead, according to [the treaty] the statute of limitations begins to run from the moment a claimant becomes aware of the alleged violation and the losses. Thus, the criterion of the Treaty is the claimant’s knowledge of the existence of the wrongful act, regardless of its duration.”³¹¹
247. Similarly, the NAFTA tribunal in *Resolute Forest* determined, based on the ordinary meaning of the terms used and the object and purpose of the provision, that the breach

³⁰⁶ Mexico’s Rejoinder, paragraph 402, citing *Energía y Renovación v. Guatemala*, Dissenting Opinion of Prof. Raúl Emilio Vinuesa, 31 March 2025, paragraphs 81-83, RL-0118.

³⁰⁷ Mexico’s Rejoinder, paragraph 403, citing Articles of the International Law Commission on the International Responsibility of States, Article 55, RL-0017.

³⁰⁸ Mexico’s Rejoinder, paragraph 404.

³⁰⁹ Mexico’s Rejoinder, paragraph 404.

³¹⁰ Mexico’s Rejoinder, paragraph 409.

³¹¹ Mexico’s Rejoinder, paragraph 406, citing *Carlos Ríos and Francisco Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021 (“*Ríos v. Chile*”), paragraph 202, RL-0120.

occurs when the state act is first perfected and can be definitely characterized as a breach, being irrelevant if a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter.³¹²

248. The Claimant has confirmed that its claims under Article 1105 arise solely from the alleged loss of its Project when the Option Agreement was terminated. Given this characterization of its loss, the Claimant cannot assert, in light of its proposal to South32 in September 2019 to consider terminating the Option Agreement, that it first acquired knowledge of this damage or loss in August 2022.
249. The Claimant states its Article 1105 claims are based solely on the alleged loss of its Project following the Option Agreement's termination.³¹³ Since the Claimant proposed terminating the agreement with South32 in September 2019, it cannot assert to have first acquired knowledge of this damage or loss in August 2022. Thus, the claims for breach of NAFTA Article 1105 are time-barred and outside the Tribunal's jurisdiction *ratione temporis*.

(ii) Before 28 June 2020, the Claimant knew of the alleged breach of the FPS obligation

250. The Claimant argues that Mexico failed to protect Silver Bull's investment from the Continuous Blockade and failed to take reasonable action to restore access to the Project site. Specifically, Mexico allegedly failed to dislodge Mineros Norteños and its encampment from Silver Bull's property, or to sanction Mineros Norteños and its representatives for their unlawful actions.³¹⁴
251. In the Respondent's case, it is reasonable to assume that the Claimant knew or should have known of the breaches and damages during the 9 months and 20 days that elapsed between September 2019 (the date when the Continuing Blockade began) and 28 June 2020.

³¹² Mexico's Rejoinder, paragraph 407, citing *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 ("*Resolute Forest v. Canada*"), paragraph 158, RL-0027.

³¹³ See Silver Bull's Reply, paragraph 438.

³¹⁴ Mexico's Counter Memorial, paragraph 291.

252. The ongoing effects of an alleged breach do not change the start date on which an investor first became aware of it for the purposes of a limitation period.³¹⁵ Relying on *Grand River v. United States*, the Respondent argues that the continued impact of a violative measure does not extend or reset the limitation period, instead, the clock starts when the investor first becomes aware or first should have become aware of the breach and the damages.³¹⁶
253. The Claimant cannot rely on Mexico’s alleged omissions as being a “continuing act” to select a later date, such as when the damages crystallized (August 2022), to avoid the clear and rigid time limitation of NAFTA Arts. 1116(2) and 1117(2).³¹⁷ The Claimant’s position is contrary to Art. 14(3) of the ILC Articles, which provides that “[t]he breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.” [emphasis added].³¹⁸ Thus, even for continuing acts, the date when the breach occurred is the relevant date triggering the limitation period under NAFTA Arts. 1116(2) and 1117(2).³¹⁹
254. The Claimant had actual or constructive knowledge of Mexico’s alleged failure to provide FPS and its financial impact in September 2019, from the day when the Second Blockade began. Communications and inaction by Mexican authorities at that time reinforce the Claimant’s awareness. According to the Claimant, on 10 September 2019, an official from the Coahuila Prosecutor’s Office informed Mr. López Ramírez that “he could no come to the site to intervene unless Mineros Norteños did something violent [...]”.³²⁰ On the same date, the Claimant submits, the police left the Sierra Mojada project and the Sierra Mojada Mayor refused to provide the Claimant with any support.³²¹ On 18 September 2019,

³¹⁵ Mexico’s Counter Memorial, paragraph 296, referring to *Resolute Forest v. Canada*, paragraph 158, RL-0027.

³¹⁶ Mexico’s Counter Memorial, paragraph 298, referring to *Grand River Enterprises Six Nations v. United States of America*, UNCITRAL, Award, 12 January 2011, paragraph 81, RL-0028.

³¹⁷ Mexico’s Counter Memorial, paragraph 299.

³¹⁸ Mexico’s Counter Memorial, paragraph 294, citing to International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), Chapter IV.E.1, November 2001, Article 14(3), R-0026.

³¹⁹ Mexico’s Counter Memorial, paragraph 295.

³²⁰ Mexico’s Counter Memorial, paragraph 302, citing Witness statement of Mr. López Ramírez, paragraph 8.33.

³²¹ Mexico’s Counter Memorial, paragraph 302, citing Witness statement of Mr. López Ramírez, paragraph 8.34.

according to the Claimant, the Coahuila Prosecutor's Office went to the site and took no action.³²²

(iii) Before 28 June 2020, the Claimant knew of the alleged breach of the FET obligation.

255. The Claimant knew or should have known of the alleged breach of the FET obligation before 28 June 2020. The Claimant argues that Mexico breached its obligation to grant Metalín FET because Mexican authorities allegedly failed to end the Continuing Blockade, protect Silver Bull's personnel and facilities and address or sanction the Continuing Blockade or the damage inflicted to the Project, thereby, also frustrating Silver Bull's legitimate expectations.³²³
256. Mexico disputes both the Claimant's description of NAFTA Art. 1105's standard and the timing of the Claimant's knowledge of its alleged breach. It is unreasonable to assume that the Claimant would find that Mexico's omissions of 2019 and 2020 were not a breach of FET, but that those of August 2022 were. It is Mexico's position that since the First Blockade was resolved in one day in 2016, the Claimant surely expected a similarly prompt response for the Continuing/Second Blockade and should have realized any breach of NAFTA Art. 1105 resulting from Mexico's alleged inaction well before 28 June 2020. The Claimant had plenty of time to file a claim for breach of NAFTA Art. 1105 before the statute of limitations expired and cannot shift responsibility for its delay onto the Respondent.³²⁴
257. The Claimant remains evasive as to the date when it first became aware of the alleged "continuing violations" of Article 1105, but it claims the State's actions have constituted violations of Article 1105 since September 2019 and persist. Mexico argues that a continuing breach, for limitation purposes, occurs when the State act is first perfected and can be characterized as a breach of the relevant obligation, in line with Article 14(3) of the ICJ Articles on State Responsibility. Mexico further contends that it is not credible the

³²² Mexico's Counter Memorial, paragraph 302, citing Silver Bull's Memorial, paragraph 2.146.

³²³ Mexico's Counter Memorial, paragraph 306.

³²⁴ Mexico's Counter Memorial, paragraphs 308-310.

Claimant had no actual or constructive knowledge of the violations during the nine months and 290 days between the start of the “Second Blockade” and the Cut-Off Date (28 June 2020). A reasonable diligent investor would have known.³²⁵

258. Additionally, Mexico asserts that the Claimant incorrectly interprets the legal framework, noting that under NAFTA, the limitation period starts when the claimant first acquired knowledge of the breach and resulting damage, regardless of whether the measure complained of is continuing or complete.³²⁶

(iv) Before 28 June 2020, the Claimant knew or should have known of the damage.

259. The Claimant first knew or should have known of the damages suffered due to the alleged breach of NAFTA Art. 1105 before 28 June 2020, and not first on 31 August 2022, with the departure of South32 from the Project. The claims under NAFTA Art. 1105 are time-barred because the three-year limitation period in NAFTA Articles 1116(2) and 1117(2) begins when the Claimant first knew or should have known of the breach and damages, not when the loss was fully “crystallized.”³²⁷ Multiple NAFTA tribunals have confirmed that precise knowledge of the loss or damage is not required to start the limitation period, which would otherwise be unreasonably postponed to the detriment of the respondent State.³²⁸
260. Evidence adduced by the Claimant shows the Claimant had actual knowledge of the damage before 28 June 2020. The Memorial attributes to Mineros Norteños the theft of various items.³²⁹ On 11 October 2019, Silver Bull’s CEO, Mr. Barry, sent to South32 a Force Majeure Notice identifying the losses arising from the stoppage of the drilling program, the closure of the exploration program and the withdrawal of personnel from the

³²⁵ Mexico’s Rejoinder, paragraphs 380, 381.

³²⁶ Mexico’s Rejoinder, paragraph 382.

³²⁷ Mexico’s Counter Memorial, paragraphs 311, 312.

³²⁸ Mexico’s Counter Memorial, paragraphs 313-315, citing *William Clayton v. Government of Canada*, PCA Case No. 2009-4, Award on Jurisdiction and Liability, 17 March 2015, paragraph 275, RL-0030 and *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, paragraph 87, RL-0031.

³²⁹ Items such as thousands of diesel fuel, furniture, vehicles from the Claimant’s facilities, including the resale of stolen diesel, extraction and sale of ca. 40 tons of minerals. See Mexico’s Counter Memorial, paragraph 319.

site. This October 2019 Notice, the Respondent submits, contradicts the idea that the Claimant did not foresee damage at that time.³³⁰

261. The Respondent notes that the Claimant has acknowledged that when it sent the Force Majeure Notice it “had no basis yet to conclude that [...] the damage caused to its investment [...] would be irreversible.”³³¹ The Respondent explains that the blockade halted Metalín’s exploration of the Sierra Mojada Project. For the Respondent, it is unrealistic and not credible to suggest that an investor with Silver Bull’s experience - which since 1993 has been developing mining projects- would take longer than 9 months of “continuous” delay or interruption to realize that the Second Blockade caused damage to its investment.³³² The more so, when the interruption was significant enough to justify invoking force majeure.³³³
262. The Respondent also submits that as early as September 2019, the Claimant knew of the alleged loss or damage, because it was contemplating the exit of South32 from the Option Agreement before having any idea of the duration of the demonstration or Mexico’s response to the demonstrations. The Respondent cites a 19 September 2019 email from Mr. Barry to South32, sent 11 days after the start of the second demonstration. In that email Mr. Barry contemplated “Whether or not this will turn into a long siege by Minera Norteños” and he raised “shutting down the program” and explored the option to “finish up the JV and split remaining expenditure” due to moderate drilling results.³³⁴

b. Claimant’s Position

263. NAFTA Articles 1116(2) and 1117(2) require investors to file claims within three years of when they knew or should have known about the alleged breach and resulting loss or damage.

³³⁰ Mexico’s Counter Memorial, paragraphs 320-322; Mexico’s Rejoinder, paragraph 377.

³³¹ Mexico’s Rejoinder, paragraph 384, citing Silver Bull’s Reply, paragraph 434.

³³² Mexico’s Counter Memorial, paragraph 317.

³³³ Mexico’s Rejoinder, paragraph 384.

³³⁴ Mexico’s Rejoinder, paragraphs 379, 386, citing Email correspondence dated 19 September 2019, between Mr. Tim Barry and Messrs. Mirek Wozga, Darryl Steane, and Mike Roberts, regarding: “Update and Breakdown of Expenses,” R-0081.

264. As these provisions make clear and as NAFTA Chapter 11 tribunals have confirmed, the limitation period begins only when the investor or its enterprise knows both about the alleged breach and the resulting loss or damage. If these are learned at different times, the period starts with the later event.³³⁵
265. The Claimant's claim under NAFTA Article 1105 is timely because less than three years passed between the moment when the Claimant or Minera Metalín knew of the loss and damage on 31 August 2022 and the Claimant's filing for arbitration on 28 June 2023.³³⁶
266. The Claimant notes that, for purposes of NAFTA Articles 1116(2) and 1117(2), the parties agree that the cut-off date is 28 June 2020, *i.e.*, three years before the Claimant filed its Request for Arbitration. The parties, however, disagree on whether the Claimant knew or should have known of the loss of damage before 28 June 2020.³³⁷

(i) The claims arise out of Mexico's continuing breaches which renew the limitation period

267. Mexico objects to the timing of the Claimant's claim but fails to acknowledge that its breaches of NAFTA Article 1105 are continuing, starting with the blockade imposed in September 2019 and persisting to date. These breaches arise out of Mexico's failure to end the blockade despite repeated requests from the Claimant and Minera Metalín.³³⁸
268. Under principles of international law, where, as here, a State's breach is continuing, the limitation period begins only after the unlawful activity ceases.³³⁹ Article 14(2) of the ILC Articles makes clear that a State's continuing breach extends over the entire period during which the State's wrongful act or omission persists.³⁴⁰ This is so, the Claimant submits,

³³⁵ Silver Bull's Reply, paragraph 404.

³³⁶ Silver Bull's Reply, paragraph 405.

³³⁷ Silver Bull's Reply, paragraph 407.

³³⁸ Silver Bull's Reply, paragraph 410.

³³⁹ Silver Bull's Reply, paragraphs 411-413, referring, among others, to ILC Articles on State Responsibility, Art. 14, CL-0081. See also Transcript, Day 1, page 134:5-11.

³⁴⁰ Silver Bull's Reply, paragraph 412, citing ILC Articles on State Responsibility, Art. 14(2), CL-0081: "The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation." See also Transcript, Day 1, page 133:10-22, page 134:1-7.

because the State is considered to repeat the breach day after day, thus a claimant becomes aware of the breach day after day, thereby, renewing the limitation period until the breach stops.³⁴¹

269. The Claimant supports its position by reference to Article 14 of the ILC Articles, an earlier ILC Report,³⁴² and jurisprudence of the European Court of Human Rights (“ECHR”)³⁴³ the Inter-American Commission on Human Rights (“IACHR”),³⁴⁴ and investment treaty tribunals.³⁴⁵
270. Regarding investment treaty tribunals, the Claimant cites *UPS v. Canada*, *Energía v. Guatemala* and *Tecmed v. Mexico* to support its position on limitation periods for claims involving continuing breaches.³⁴⁶ In *UPS*, the tribunal held that continuing conduct constitutes continuing breaches and renews the limitation period under NAFTA Article 1116(2).³⁴⁷ Similarly, *Energía* found that continuous violations suspend the limitation period until the breach ceases, as the knowledge of the violation and damages suffered are renewed daily.³⁴⁸ *Tecmed* also determined that in the case of a composite act the limitation period begins when the State’s misconduct is fully consummated.³⁴⁹
271. The same conclusion applies here, where Mexico’s breaches of NAFTA Article 1105 were not consummated with the initial failure to act when the Continued Blockade commenced

³⁴¹ Silver Bull’s Reply, paragraph 411. See also Transcript, Day 1, page 135:1-12.

³⁴² International Law Commission, “Report of the International Law Commission on the work of its thirtieth session, 8 May – 28 July 1978,” in Yearbook of the International Law Commission, 1978, vol. II, Part Two, A/33/10, footnote 437, CL-0010.

³⁴³ *M.R. De Becker v. Belgium*, Application No. 214/56, Decision of 9 June 1958, Yearbook of the European Convention on Human Rights, 2 (1958-59), page 234, CL-0194.

³⁴⁴ *Neville Lewis v. Jamaica*, Inter-American Commission on Human Rights, Case 11.825, Report No. 97/98, 17 December 1998, paragraph 52, CL-0195; *Peter Blaine v. Jamaica*, Inter-American Commission on Human Rights, Case 11.827, Report No. 96/98, 17 December 17, 1998, paragraph 52, CL-0196.

³⁴⁵ Silver Bull’s Reply, paragraphs 412-421.

³⁴⁶ Silver Bull’s Reply, paragraphs 418-421.

³⁴⁷ Silver Bull’s Reply, paragraph 418, citing *United Parcel Service of America v. Government of Canada*, Award on the Merits, ICSID Case No. UNCT/02/1, 11 June 2007, paragraph 28, CL-0198.

³⁴⁸ Silver Bull’s Reply, paragraph 419, citing *Energía y Renovación v. Guatemala*, Award, 31 March 2025, paragraph 246, CL-0176.

³⁴⁹ Silver Bull’s Reply, paragraph 421, citing *Tecmed v. TMexico*, paragraph 74, CL-0200.

on 8 September 2019, but continued beyond the cut-off date of 28 June 2020, renewing the limitation period day by day.³⁵⁰

272. Mexico argues that the words “first acquired” in NAFTA Articles 1116(2) and 1117(2) imply that the Claimant should have known of the alleged NAFTA Article 1105 breach during the more than nine months between the Continuing Blockade’s start and the Cut-Off Date. However, Mexico’s position ignores the continuing character of the alleged breach, which renewed the limitation period under NAFTA Articles 1116(2) and 1117(2). Accordingly, the Claimant’s claims under NAFTA Article 1105 are timely.³⁵¹

(ii) Claimant’s loss and damage crystallized during the limitation period

273. The Claimant’s position is that it only knew of the relevant loss or damage on 31 August 2022, when South32 terminated the Option Agreement and it became clear that the Project was no longer viable.³⁵² The Claimant filed its Request for Arbitration on 28 June 2023, less than three years after the termination of the Option Agreement. Thus, irrespective of when the Claimant first knew of Mexico’s continuing breaches, the date of its knowledge of the loss and damage incurred falls well within the limitation period.³⁵³
274. The Claimant argues that if the Tribunal determines that the Claimant first knew or should have known of the loss or damage after the cut-off date, Mexico’s limitation objection fails, making it unnecessary to specify when knowledge of the breach arose.³⁵⁴ In contrast, Mexico contends, without support, that for *ratione temporis* jurisdiction over Article 1105 claims, both knowledge of the breach and the damage must arise post cut-off date (*i.e.*, after 28 June 2020).³⁵⁵
275. Under NAFTA, a claim will be time-barred if the investor knows of both the breach and the loss, before the cut-off date. Logically, knowledge of the loss cannot happen earlier

³⁵⁰ Silver Bull’s Reply, paragraph 422. Transcript, Day 1, page 138:19-22, page 139:1-5.

³⁵¹ Silver Bull’s Reply, paragraphs 423, 424.

³⁵² Silver Bull’s Reply, paragraph 426. Transcript, Day 1, page 141:2-6.

³⁵³ Silver Bull’s Reply, paragraph 427.

³⁵⁴ Transcript, Day 1, page 140:18-22, page 141:1.

³⁵⁵ Silver Bull’s Reply, paragraph 428.

than the knowledge of the breach. Thus, in case in which, as here, the investor knows of the loss after the cut-off date (*i.e.*, after 28 June 2020), its claim is not time-barred.³⁵⁶ The Claimant submits that NAFTA Tribunals have consistently found that where knowledge of breach and damage is not simultaneous, the limitation period starts to run only after knowledge of the loss is acquired.³⁵⁷ In any event, since Mexico's breach of NAFTA Article 1105 is continuous and persists, the limitation period is renewed.³⁵⁸

276. The Claimant also rejects Mexico's argument that the Claimant acquired before 28 June 2020 knowledge of loss and damage, both actual and constructive. The Force Majeure notice sent to South32 on 11 October 2019 was to suspend the parties' obligations under the Option Agreement during a preventing event; it did not imply that the parties had suffered loss or damage, or that the contract was at an irreversible end.³⁵⁹ The Claimant refers to Mr. Barry's witness testimony that "we did not consider that we had suffered any loss at that point, or that the Project was in any way irretrievable"³⁶⁰ when the Claimant notified South32 of the force majeure.
277. Mexico cites the Claimant's Force Majeure notice, which describes Mineros Norteños' illegal blockades of valuable equipment, but these statements do not show the Claimant knew of loss or damage. The Claimant's statements reflect that the operations were "interrupted" its expectation that the situation would be "resolved," detailing efforts to initiate dialogue and measures for a "speedy solution." As of 11 October 2019, Silver Bull had no reason to believe Mexico would refuse reasonable action to end the blockade or that any resulting damage would be irreversible.
278. Mexico claims the Claimant should have foreseen damage before the Cut-Off Date because a "prudent investor" would have sought to estimate the financial and operational impact of the Continuing Blockade. This claim is unavailing. The Claimant acted prudently by

³⁵⁶ Silver Bull's Reply, paragraph 429.

³⁵⁷ Silver Bull's Reply, paragraph 431, citing *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, paragraph 347, CL-0088.

³⁵⁸ Silver Bull's Reply, paragraph 432.

³⁵⁹ Silver Bull's Reply, paragraph 433.

³⁶⁰ Silver Bull's Reply, paragraph 433, citing Mr. Barry's Second Witness Statement, paragraph 64.

promptly reporting the Continuing Blockade to Mexican authorities, expecting action as in 2016. However, Mexico failed to take the necessary steps.³⁶¹

279. Mexico cites thefts, extortion, and mineral sales at the mine as evidence that the Claimant was or should have been aware of damages before the Cut-Off Date.³⁶² However, the Claimant only learned of these incidents after the Cut-Off Date due to being denied access to inspect the site. In response to Mexico's document request, Silver Bull searched for relevant insurance claims but found none.³⁶³
280. The Claimant's NAFTA Article 1105 claims do not stem from these thefts, but from Mexico's repeated failure to protect Silver Bull's investment and lift the Continuing Blockade, as it did in 2016. The resulting loss of the Project was crystallized by the termination of the Option Agreement on 31 August 2022, not by Mineros Norteños's thefts. The Claimant referenced the thefts only to show Mineros Norteños's control over the Project site and their ability to act with impunity.³⁶⁴
281. For the above reasons, Mexico's *ratione temporis* objection regarding NAFTA Article 1105 claims fails.

(3) Whether the Tribunal has Jurisdiction *Ratione Voluntatis* and *Ratione Temporis* over the Claim under NAFTA Art. 1105

a. Respondent's Position

282. In its Rejoinder, the Respondent made the alternative argument that the claim for breach of Article 1105 falls outside the Tribunal's jurisdiction *ratione voluntatis* (which implies an element of *ratione temporis*) because the alleged loss or damage resulting from the termination of the Option Agreement in August 2022 occurred when Article 1105 was no longer binding on Mexico.³⁶⁵

³⁶¹ Silver Bull's Reply, paragraph 435.

³⁶² See Mexico's Counter Memorial, paragraph 319.

³⁶³ Silver Bull's Reply, paragraph 437.

³⁶⁴ Silver Bull's Reply, paragraph 438.

³⁶⁵ Mexico's Rejoinder, paragraph 412.

283. As discussed above in relation to the interpretation Annex 14-C (See Section V.1.a), after NAFTA's termination on 30 June 2020, its substantive obligations under Chapter 11 no longer apply, and the NAFTA/USMCA parties did not consent to arbitration for breaches occurring after NAFTA's Termination Date.
284. Arbitration under USMCA's Annex 14-C is limited to claims involving "legacy investments" for breaches of NAFTA obligations, which necessarily can only occur when those NAFTA obligations were still in force and binding, *i.e.*, in relation to acts taking place before NAFTA's termination. This position is in line with Article 13 of the ILC Articles on State Responsibility, which provides that an act of State is not breach of an international obligation unless the State is bound by the obligation at the time the act occurs.³⁶⁶ Also, both the United States and Canada have confirmed that Annex 14-C permits only claims for breaches of NAFTA alleged to have occurred while NAFTA was in force, *i.e.*, it does not provide consent to arbitrate alleged NAFTA breaches that occurred after NAFTA's termination.³⁶⁷
285. This principle also applies to the concept of "continuing violation" of ILC Article 14(2), according to which "[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation."³⁶⁸
286. Accordingly, an alleged continuing breach of NAFTA could not extend beyond NAFTA's termination date (30 June 2020) because at that point the NAFTA obligations ceased to be binding on the NAFTA parties.³⁶⁹ Once the USMCA took effect, any subsequent acts could only breach the new regime under USMCA and not NAFTA. Therefore, losses related to

³⁶⁶ Mexico's Rejoinder, paragraph 417, citing ILC Articles, vol. II, part 2 (2001), UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), page 57, RL-0123.

³⁶⁷ Mexico's Rejoinder, paragraph 414, citing *Cyrus Capital Partners, L.P. and Contrarian Capital Management, LLC v. United Mexican States*, ICSID Case No. ARB/23/33, Article 1128 Submission of the United States of America, 15 July 2025, paragraph 4, RL-0121 and Article 1128 Submission of Canada, 15 July 2025, paragraph 13, RL-0122.

³⁶⁸ Mexico's Rejoinder, paragraph 418.

³⁶⁹ Mexico's Rejoinder, paragraphs 418, 419.

events such as the termination of the Option Agreement in August 2022 cannot be attributed to a violation of NAFTA Article 1105.³⁷⁰

b. Claimant's Position

287. The Claimant submits that Mexico's jurisdictional objection based on NAFTA's termination can only refer to the Claimant's indirect expropriation claim. ICSID Arbitration Rules 43(2) and 45(b) require that preliminary objections be raised as soon as possible, that is, the Claimant argues, at the latest in the Counter Memorial. Mexico is, therefore, precluded from extending that objection to other claims, such as the claims for breach of NAFTA Article 1105, as it intended to do in its Rejoinder. The Claimant requests that the Tribunal exclude this new objection.³⁷¹
288. In any event, NAFTA's termination does not deprive the Tribunal of jurisdiction over any of the Claimant's claim, for the reasons summarized in section **B.1(1)b.** above.

(4) Whether the Tribunal has Jurisdiction *Ratione Temporis* and *Ratione Voluntatis* over the Claims under NAFTA Articles 1102 (National Treatment) and 1103 (Most-Favoured-Nation Treatment)

a. Respondent's Position

289. In its Rejoinder, the Respondent also raised a jurisdictional objection with respect to the Claimant's claims under NAFTA Articles 1102 and 1103.³⁷²
290. The Respondent argues that the Claimant misinterprets Annex 14-C of the USMCA, which only extended the ability to arbitrate "legacy investment" claims relating to acts before NAFTA's termination, not as a survival clause for obligations after NAFTA ended. As explained above (see section V.B(1)a(iii) above), the consensus among USMCA parties supports this interpretation. The Respondent further states that any alleged breach of NAFTA Articles 1102 or 1103 could not continue past 1 July 2020, when NAFTA was replaced by the USMCA, since parties were no longer bound by NAFTA obligations for

³⁷⁰ Mexico's Rejoinder, paragraphs 419, 420.

³⁷¹ Transcript, Day 1, page 149:18-22, page 150:112.

³⁷² Mexico's Rejoinder, Section III. C.

subsequent acts. As explained above (see paragraph 204 above), according to international law, a state can only breach an obligation if that obligation was in force at the time of the act (Article 13 of the ILC Articles).³⁷³

291. In its Memorial, the Claimant failed to identify when the alleged breaches of NAFTA Articles 1102 and 1103 occurred,³⁷⁴ preventing the Respondent's analysis for purposes of prescription and existence of the obligations at the time of the alleged breach.³⁷⁵ In its Reply, the Claimant clarified that the relevant treatment it alleged to be less favourable treatment under Articles 1102 and 1103 "began in September 2019 and continues to this day."³⁷⁶ The Claimant, while not describing the alleged breaches as "continuing," bases its argument on the same mistaken reading of USMCA Annex 14-C used in its Article 1110 indirect expropriation claim, *i.e.*, "the investment protections under the NAFTA continued to apply to legacy investments until 30 June 2023 pursuant to Article 14-C of the USMCA."³⁷⁷
292. The Claimant mistakenly suggests that NAFTA breaches, specifically here, breaches of Articles 1102 and 1103 could arise both before and after NAFTA's termination. First, the Claimant errs in its interpretation of Annex 14-C. Under Annex 14-C the Parties consent to a three-year period to use the ISDS mechanism from Section B NAFTA Chapter 11 to arbitrate "legacy investment" claims and "pending claims" alleging pre-termination breaches. Annex 14-C is not a "survival clause" and does not extend NAFTA Section A obligations to actions occurring after NAFTA ended and was replaced by the USMCA.³⁷⁸ On this point, the Respondent relies on the arguments and evidence presented above (see section V.B(1))
293. Second, any breach of NAFTA Articles 1102 or 1103 could not extend beyond NAFTA's termination on 1 July 2020, as the State Parties were released from their substantive

³⁷³ Mexico's Rejoinder, paragraph 517.

³⁷⁴ Mexico's Rejoinder, paragraph 510.

³⁷⁵ Mexico's Rejoinder, paragraph 511.

³⁷⁶ Mexico's Rejoinder, paragraph 513, citing Silver Bull's Reply, paragraph 591.

³⁷⁷ Mexico's Rejoinder, paragraph 513, citing Silver Bull's Reply, paragraph 592.

³⁷⁸ Mexico's Rejoinder, paragraph 515.

obligations under Section A of Chapter 11 for acts occurring after that date. Article 70(1)(a) of the Vienna Convention confirms that treaty termination releases parties from further performance unless the treaty otherwise provides or the parties otherwise agreed, which is not the case here. Therefore, breaches could only occur while NAFTA was in effect. The USMCA Parties' consensus, as established in the subsequent practice, is that claims cannot be based on alleged NAFTA breaches that occurred after NAFTA's termination. Accordingly, Articles 1102 and 1103 do not apply to acts or facts arising post-1 July 2020.³⁷⁹ This is in line with Article 13 of the ILC Articles on States Responsibility.

294. Any unfavourable treatment by Mexican authorities before NAFTA ended could potentially breach Articles 1102 or 1103 at that time, but any such treatment after that date would at best fall under the USMCA, not NAFTA.³⁸⁰
295. Additionally, the alleged loss the Claimant claims to have suffered in August 2022 (resulting from the termination of the Option Agreement) cannot be attributed to breaches of NAFTA Articles 1102 or 1103, since the loss or damage incurred when the Option Agreement was terminated or thereafter, took place more than two years after Articles 1102 and 1103 had ceased to be binding on Mexico.³⁸¹ Finally, to the extent that breach of Articles 1102 and 1103 occurred before NAFTA's termination, it is notable that the Claimant's investment retained its value while NAFTA was in force, with continued funding under the Option Agreement.³⁸²
296. For those reasons, the Tribunal lacks jurisdiction *ratione temporis* and *ratione voluntatis* over the claims under NAFTA Articles 1102 and 1103.

b. Claimant's Position

297. As the Claimant explained at the Hearing,³⁸³ Mexico sought impermissibly to expand its NAFTA termination objection in its Rejoinder, to include the Claimant's FET, FPS and

³⁷⁹ Mexico's Rejoinder, paragraph 516.

³⁸⁰ Mexico's Rejoinder, paragraph 519.

³⁸¹ Mexico's Rejoinder, paragraph 520.

³⁸² Mexico's Rejoinder, paragraph 521.

³⁸³ Transcript, Day 1, page149:18-22, page150:1-12.

discrimination claims (NAFTA Articles 1102 and 1103).³⁸⁴ Mexico's approach is impermissible under ICSID Arbitration Rules 43(2) and 45(b)(i), which mandate that "[a] party shall notify the Tribunal and the other party of its intent to file a preliminary objection as soon as possible" and in any event no later than "by the date to file the counter-memorial on the merits."³⁸⁵ The Claimant argues that this rule has been applied consistently to prevent belated objections and the Tribunal here should do the same.³⁸⁶

298. In any event, as stated above (see section V.B(1)b(i) above) the Claimant maintains its position that NAFTA's substantive provisions continued to apply during the three-year transition period under Annex 14-C of the USMCA.³⁸⁷
299. In addition, as stated above (see section V.B(1)b(ii) above) USMCA's Annex 14-C applies to breaches based on continuing conduct that started before and continued during the three-year transition period, which is the case here.³⁸⁸
300. Also, the Tribunal is not bound by the *TC Energy* majority decision, which in any case is inapposite as it did not address continuing breaches as those at issue here (see ¶233 above).³⁸⁹
301. For those reasons, the Tribunal should therefore find that it has jurisdiction over all of the Claimant's claims, including those made under NAFTA Articles 1102 and 1103.

(5) Whether the Tribunal has Jurisdiction *Ratione Materiae*

a. Respondent's Position

302. The Respondent argues that (i) the Claimant does not own and/or control the assets that form the Claimant's investment in the terms of NAFTA Article 1139, which defines

³⁸⁴ Silver Bull's Post-hearing Brief, paragraph 81.

³⁸⁵ Silver Bull's Post-Hearing Brief, paragraph 81, citing ICSID Arbitration Rules, Articles 43(2) and 45(b)(i).

³⁸⁶ Silver Bull's Post-Hearing Brief, paragraph 81, referring to See, e.g., *Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*), Decision on Annulment, 5 May 2017 ("*Aguas de Barcelona v. Argentina*"), paragraph 389, CL-0130.

³⁸⁷ Silver Bull's Post-Hearing Brief, paragraph 80.

³⁸⁸ Silver Bull's Post-Hearing Brief, paragraph 80. See also Reply, paragraphs 457-460.

³⁸⁹ Silver Bull's Post-Hearing Brief, paragraph 80.

“investment of an investor of a Party” as “an investment owned or controlled directly or indirectly by an investor of such Party.” (ii) Also, the Option Agreement with South32 is not an investment.

303. Mexico relies on the ordinary meaning of the terms “ownership” and “control” to argue that the Claimant did not possess or control the concessions that were part of the Sierra Mojada Project, as the assets of those concessions were subject to attachments and Minera Metalín’s bank accounts and facilities were seized in the Valdez litigation.³⁹⁰
304. The Respondent notes that the seizures of the concessions result from forceful execution of binding judgments of Mexican courts and the Claimant’s continued failure to pay the judgments will lead to the Claimant losing the right to use the property, enjoy its economic benefits or dispose of it freely, even if the Claimant retains formal ownership. Therefore, the Respondent submits, the Claimant’s characterization of the seizure as a mere judicial attachment is misleading.³⁹¹ The Respondent also notes that since 5 December 2023, the Claimant’s operating properties, including workshops, offices and main access points were awarded to the Valdez family.³⁹²
305. Regarding the South32 Agreement, Mexico argues that it does not fit the definition of investment set out in NAFTA Article 1139(h)(ii), which reads:

“Investment means;

...

(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

...

³⁹⁰ Mexico’s Counter Memorial, paragraphs 345-348.

³⁹¹ Mexico’s Rejoinder, paragraphs 532, 533.

³⁹² Mexico’s Rejoinder, paragraph 534.

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;”³⁹³

306. An option agreement is one where the seller grants the buyer the option to purchase the property. Here, Silver Bull, as seller, granted South32, as buyer, the put option for a 4-year period. To maintain that right, South32 made advance capital payments to cover exploration activities according to a budget approved by both parties. At the end of the 4-year period, South32 could exercise the option to purchase, covering the remainder of the agreed amount (US\$ 100 million). Mexico argues that the initial capital contributions or the exercise of the call option, cannot be considered “remuneration” that “depends on the production, revenues or profits of a company,” since the Option Agreement depended on the will of South32, not on the results of the Sierra Mojada Project. The Claimant cannot speculate and assume that South32 would exercise the option. The reality is that South32 never exercised the option, and the parties terminated the Option Agreement by mutual agreement. South32’s initial payments are, at most, pecuniary claims which are excluded from NAFTA’s definition of investment under Article 1139(i).³⁹⁴

b. Claimant’s Position

307. The Claimant notes that Mexico only disputes, based on the Valdez litigation, that the Claimant does not own and/or control certain assets that it considers investments under NAFTA.³⁹⁵

308. The Claimant submits that the judicial attachments resulting from the Valdez litigation are provisional remedies or “precautionary measures” and do not support Mexico’s conclusion that Silver Bull had no ownership or control over the mining concessions, surface rights, or equipment and infrastructure as of the date of the Request for Arbitration (28 June 2023) nor as of the date when such investments were deprived of value (31 August 2022).³⁹⁶

³⁹³ Mexico’s Counter Memorial, paragraphs 351-353.

³⁹⁴ Mexico’s Counter Memorial, paragraphs 355, 356; Mexico’s Rejoinder, paragraph 537; Mexico’s Post-Hearing Brief, paragraph 98.

³⁹⁵ Silver Bull’s Reply, paragraph 470.

³⁹⁶ Silver Bull’s Reply, paragraphs 471, 472.

309. Judicial attachments do not affect the legal title or ownership; they limit the alienation or sale of property. Only the execution of the attached property through a court-ordered transfer or sale extinguishes the legal title and ownership.³⁹⁷ At the time of the Rejoinder, the transfer of the concession had not occurred and at the hearing Mexico did not attempt to argue otherwise.³⁹⁸
310. Regarding the Option Agreement, the Claimant submits that it is a protected investment in terms of NAFTA Article 1139(h), whose subparagraphs (i) and (ii) provide non-exhaustive examples of the types of interest that could fall within the definition of Article 1139.³⁹⁹
311. The Claimant submits that the Option Agreement satisfies the test for NAFTA Article 1139(h) adopted by the tribunal in *Merrill & Ring Forestry LP v. Canada* (existence of an actual and demonstrable entitlement to a certain benefit under an existing contract or other legal instrument)⁴⁰⁰ and even the more demanding four criteria identified by the tribunal in *Lone Pine Resources v. Canada*.⁴⁰¹ Further, the Option Agreement provided Silver Bull with a critical funding and development partner, thereby, forming an essential part of the investment and constituting an actual and demonstrable entitlement to a benefit for purposes of NAFTA Article 1139(h).⁴⁰²
312. Besides, the Option Agreement is “part and parcel” of Silver Bull’s investment in the Sierra Mojada Project, as it is inextricably linked with the operation and advancement of the Project. In *Finley Resources v. United Mexican States*, the tribunal found the relevant instrument, a bond, to be so closely related to the investment made, entailing such a massive potential commitment of resources if the bond was called, that it was considered as part

³⁹⁷ Silver Bull’s Reply, paragraph 472.

³⁹⁸ Silver Bull’s Post-Hearing Brief, paragraph 67.

³⁹⁹ Silver Bull’s Reply, paragraph 479.

⁴⁰⁰ Silver Bull’s Reply, paragraph 482, citing *Merrill & Ring Forestry LP v. Government of Canada*, NAFTA/UNCITRAL (“*Merrill & Ring v Canada*”), Award, 31 March 2010, paragraph 142, CL-0029.

⁴⁰¹ The alleged protected investment must be (i) an interest, (ii) arising out of the commitment of capital or other resources in the territory of a NAFTA party, (iii) which capital must have been committed towards economic activity in the territory of the NAFTA party, and (iv) must be pursuant to a contractual arrangement. Silver Bull’s Reply, paragraph 480, 481, citing *Lone Pine Resources v. Canada*, paragraph 347, RL-0032.

⁴⁰² Silver Bull’s Reply, paragraph 482.

and parcel of the interest arising from the commitment of other resources by the investor in that case in Mexico.⁴⁰³

313. Finally, the Option Agreement does not fall in the exclusion of NAFTA Article 1130(i), since it is not a claim to money, and is not divorced from Silver Bull's investments in the Sierra Mojada Project.⁴⁰⁴

VI. TRIBUNAL'S ANALYSIS

A. GENERAL INTRODUCTION TO JURISDICTION

314. As already summarised, Mexico has raised a number of jurisdictional objections to Silver Bull's claims.
315. Although it is not the order in which Mexico has pleaded its objections, the Tribunal will deal with the issues it has raised as follows:
- (a) What is the true meaning and effect of Annex 14-C of the USMCA and, in particular, as regards legacy investments, does it extend Mexico's substantive obligations, contained in Section A of Chapter 11 of NAFTA ("Section A"), for three years after the termination of the latter agreement?
 - (b) In the light of the answer to (a), are any of Silver Bull's claims wholly or partly unsustainable?
 - (c) In the light of the answers to (a) and (b), are any of Silver Bull's otherwise sustainable claims wholly or partly time-barred?

⁴⁰³ Silver Bull's Reply, paragraph 483, citing *Finley Resources v. Mexico*, Decision on Jurisdiction and Liability, 4 November 2024, paragraph 256, CL-0209.

⁴⁰⁴ Silver Bull's Reply, paragraph 486.

- (d) In respect of any claims that Silver Bull can maintain in the light of the answers to the previous questions, do those claims relate to investments protected by Section A?

316. For reasons that will become apparent, when dealing with Silver Bull's individual claims, the Tribunal will deal first with that under Article 1110 of NAFTA (Expropriation and Compensation), then with the claims under Article 1105 (Minimum Standard of Treatment), and finally with those under Articles 1102 (National Treatment) and 1103 (Most-Favored-Nation Treatment).

B. THE MEANING AND EFFECT OF ANNEX 14-C

317. In this Arbitration, Silver Bull has submitted claims alleging breaches by Mexico of the latter's obligations under Articles 1102, 1103, 1105 and 1110 of Section A of Chapter 11 of NAFTA (the Chapter concerning investment). Silver Bull says that it is entitled to submit these claims pursuant to Annex 14-C of the USMCA, which provides for certain "Legacy Investment Claims" to be submitted to arbitration under Section B of Chapter 11 of NAFTA ("Section B") after the termination of NAFTA.

318. Mexico, on the other hand, says that, insofar as the alleged conduct complained of occurred after the termination of NAFTA, on 30 June 2020, it has not consented to claims relating to such conduct to be submitted to arbitration, and that on the basis of the evidence before the Tribunal Annex 14-C does not give the Tribunal jurisdiction over these claims. In other words, the Tribunal lacks jurisdiction *ratione voluntatis*.

319. The correct interpretation of Annex 14-C is an issue on which distinguished jurists have previously disagreed,⁴⁰⁵ and thus it must be examined with particular care. Unlike the Tribunal in *TC Energy*, we have not received any expert evidence on this issue, but in addition to the submissions of the Parties we have had the benefit of non-disputing treaty party submissions, both written and oral, from the United States of America and from

⁴⁰⁵ *TC Energy v. United States*, Award, RL-0042.

Canada, pursuant to NAFTA Article 1128 and USMCA Article 14.D.7(2) on the interpretation of NAFTA and the USMCA.

(1) Termination of NAFTA

320. Article 1 of the Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada provides as follows.

*“Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA.”*⁴⁰⁶

321. The USMCA entered into force on 1 July 2020, following the termination of the NAFTA.

322. Article 70(1)(a) of the Vienna Convention, to which Mexico is a party, provides as follows.

“Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

*(a) releases the parties from any obligation further to perform the treaty;”*⁴⁰⁷

The United States is not a party to the Vienna Convention but recognises it as an “authoritative guide” to treaty law and practice. In particular it accepts that this Article reflects the default position in customary international law.⁴⁰⁸

323. Accordingly, save to the extent that the State parties to NAFTA and the USMCA have otherwise agreed, their obligations under NAFTA ceased at the end of 30 June 2020. These included Mexico’s obligations under Section A of Chapter 11 of NAFTA (“Section A” or,

⁴⁰⁶ Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada, CL-0041.

⁴⁰⁷ Vienna Convention on the Law of Treaties, RL-0018.

⁴⁰⁸ Submission of the United States of America, paragraph 7 and footnote 15. See also paragraph 11 and footnote 19, paragraph 15 and footnote 27, paragraph 14 and footnote 26, and footnote 65.

as the case may require, the “Section A obligations”), which were superseded by new obligations concerning investments as contained in Chapter 14 of the USMCA.

(2) The USMCA: Article 14

324. Article 14 of the USMCA is a Chapter titled and which addresses matters of ‘Investment’. Article 14.2 sets out the scope of that Chapter and provides, *inter alia*, as follows.

“3. For greater certainty, this Chapter, except as provided for in Annex 14-C (Legacy Investment Claims and Pending Claims) does 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.

4. For greater certainty, an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).”

325. Article 14 sets out the obligations of the three parties. These include obligations relating to National Treatment (Article 14(4)), Most Favoured Nation Treatment (Article 14(5)), a Minimum Standard of Treatment (Article 14(6)), and Expropriation and Compensation (Article 14(8)).

326. That brings the Tribunal to Annex 14-C itself, which is titled ‘Legacy Investment Claims and Pending Claims’. The text of the operative paragraphs provides 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; and

(c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party’s obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.

2. *The consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of:*

(a) *Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;*

(b) *Article II of the New York Convention for an “agreement in writing”; and*

(c) *Article I of the Inter-American Convention for an “agreement”.*

3. *A Party’s consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.*

4. *For greater certainty, an arbitration initiated pursuant to the submission of a claim under paragraph 1 may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal’s jurisdiction with respect to such a claim is not affected by the expiration of consent referenced in paragraph 3, and Article 1136 (Finality and Enforcement of an Award) of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.*

5. *For greater certainty, an arbitration initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 while NAFTA 1994 is in force may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal’s jurisdiction with respect to such a claim is not affected by the termination of NAFTA 1994, and Article 1136 of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.*

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 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement;*

(b) *“investment”, “investor”, and “Tribunal” have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994; and*

(c) “ICSID Convention”, “ICSID Additional Facility Rules”, “New York Convention”, and “Inter-American Convention” have the meanings accorded in Article 14.D.1 (Definitions).”⁴⁰⁹

There are also two footnotes to paragraph 1 (footnotes 20 and 21), and these we set out and address later in this section.

327. It is clear, from paragraphs 1 and 6 of Annex 14-C, that each party to the USMCA (including Mexico) consented to the submission to arbitration of certain claims “with the respect to a legacy investment”, that is with respect to (so far as relevant in this case) an investment of a United States investor in the territory of Mexico established or acquired between 1 January 1994 and 30 June 2020, and in existence on 1 July 2020. Such arbitration was to be “in accordance with Section B of Chapter 11 (Investment) of NAFTA” (“Section B”)’ and the right to submit such claims was limited to the period of three years from 1 July 2020 (“the three-year period”).
328. Finally, it is appropriate to note the provisions of Annex 14-D, which is titled ‘Mexico-United States Investment Disputes’. This provides that only breaches of the following USMCA obligations can be arbitrated: (i) National Treatment, (ii) Most-Favored-Nation Treatment, and (iii) direct expropriation.

(3) The issue raised by Silver Bull’s claims

329. Amongst the legacy investment claims that could be made during the three-year period – which ended on 30 June 2023 - were claims alleging breach of a Section A obligation. It is not in dispute that Silver Bull has brought the claims in this case within the three-year period, alleging breaches by Mexico of such obligations. However, some of the breaches alleged in these claims are said to have occurred, or continued, between 1 July 2020 and 31 August 2022, the latter being the date on which Silver Bull’s Option Agreement with South32 was terminated. In other words, Silver Bull relies on, inter alia, acts and omissions that allegedly occurred not only before 1 July 2020, but also after that date and within the

⁴⁰⁹ Agreement between the United States of America, the United Mexican States, and Canada (USMCA) (extract), CL-0044.

three-year period that followed. Silver Bull says these acts and omissions are themselves, or form part of, breaches by Mexico of its Section A obligations.

330. As already observed, it is not in dispute that Annex 14-C provides consent by Mexico to arbitrate legacy investment claims, so long as they are submitted within the three-year period. The question before the Tribunal is whether such claims can be made in respect of acts or omissions by Mexico alleged to have occurred during that period, that is to say between 1 July 2020 and 30 June 2023. That in turn raises the question whether the Section A obligations themselves continued to be in force after 30 June 2020 and during the three-year period that followed. If they were in force, they gave rise to obligations that could be breached; if they were not in force, they did not give rise to any obligations that could be breached. Whether or not they were in force turns on what the State Parties to NAFTA or the USMCA agreed: if they did not agree to extend their application, those obligations were brought to an end at the end of the day on 30 June 2020. As submitted by the United States, claims cannot be made for breach of an obligation allegedly committed before that obligation came into force or after it ceased to be in force.⁴¹⁰
331. As both the United States and Canada point out, NAFTA did not contain a survival, or sunset, clause. It follows that any agreement to extend any of the substantive obligations in NAFTA beyond the termination of that agreement must be found, if anywhere, in the USMCA.⁴¹¹
332. Silver Bull pleads that “Annex 14-C Extends the Application of the Substantive Investment Protections Contained in Section A of NAFTA Chapter 11” until the end of the three-year period.⁴¹² Mexico says that it does not.⁴¹³
333. Relatedly, Silver Bull puts its case on jurisdiction on two different bases that need to be distinguished. First, it says that, for legacy investments, the effect of Annex 14-C is that

⁴¹⁰ Submissions of the United States of America, paragraphs 4 to 6, citing *Feldman v. United Mexican States* NAFTA/ICSID Case No. ARB (AF) 99/1, 6 December 2000.

⁴¹¹ Submission of the United States of America, paragraph 8; Submissions of Canada, paragraph 6.

⁴¹² See, for example, Silver Bull’s Reply, section 3.2.1.

⁴¹³ See, for example, Mexico’s Rejoinder, paragraph 366.

Section A obligations remained in force for the three-year period, and thus breaches of them could and, it says, did, take place during that period. In this context it argues that the majority decision in *TC Energy* – which reached a contrary conclusion - was wrong, and that the dissent was correct.

334. Secondly, Silver Bull says that the blockade of the Project was continuous from September 2019 (and indeed still continues) and:

*“...Mexico’s measures in this case that occurred after the NAFTA termination date are simply a continuation of the same measures that existed before the NAFTA termination date, namely, Mexico’s continued refusal to act to end the Continuing Blockade imposed on the Project. Mexico’s misconduct before and after the NAFTA termination date is also inextricably linked; indeed, it is not distinct. The Tribunal should therefore exercise its jurisdiction over the entirety of Mexico’s continuing acts and omissions, which crystalized in loss and damage on 31 August 2022.”*⁴¹⁴

In this regard, Silver Bull argues that the majority decision in *TC Energy* is irrelevant as that case was concerned with an alleged breach that occurred after NAFTA had terminated.

335. In addition, Silver Bull relies on a procedural objection to insulate its claims under Articles 1102, 1103 and 1105 from Mexico’s jurisdiction objection.
336. It is to this procedural point that the Tribunal turns first, in order to establish at the outset whether this jurisdiction objection by Mexico affects all of Silver Bull’s claims, or just the claim for expropriation.

(4) The procedural objection

337. The ICSID Arbitration Rules provide, so far as material, as follows.

“Rule 43.

Preliminary Objections

(1) A party may file a preliminary objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or for other

⁴¹⁴ Silver Bull’s Reply, paragraph 465.

reasons is not within the competence of the Tribunal (“preliminary objection”).

(2) A party shall notify the Tribunal and the other party of its intent to file a preliminary objection as soon as possible.

(3) The Tribunal may at any time on its own initiative consider whether a dispute or an ancillary claim is within the jurisdiction of the Centre or within its own competence.

...

Rule 45

Preliminary Objections without a Request for Bifurcation

If a party does request bifurcation of a preliminary objection within the time limits referred to in Rule 44(1)(a) or the parties confirm that they will not request bifurcation the preliminary objection shall be joined to the merits and the following procedure shall apply:

...

(b) the memorial on the preliminary objection shall be filed:

(i) by the date to file the counter-memorial on the merits;

...”

338. Silver Bull points out that, although Mexico raised this (*ratione voluntatis*) jurisdictional objection in relation to Silver Bull’s expropriation claim in its Counter Memorial, it only argued it in relation to Silver Bull’s other claims for the first time in its Rejoinder. Arbitration Rules 43(2) and 45(b) require that preliminary objections should be raised as soon as possible, and at the latest in the Respondent’s Counter Memorial, and Mexico, it argues, is therefore precluded from adding new objections “at the eleventh hour in its Rejoinder”. Accordingly, the Tribunal should exclude the later objections.⁴¹⁵ Silver Bull also cites the Decision on Annulment in *Suez, Sociedad General de Aguas de Barcelona*

⁴¹⁵ Transcript, Day 1, pages 149 and 150.

*S.A. and Vivendi Universal S.A. v. Argentine Republic*⁴¹⁶ as authority that “belated objections” should be rejected.⁴¹⁷

339. However, Mexico’s failure to raise this jurisdiction point earlier in relation to Silver Bull’s claims under Articles 1102, 1103 and 1105 of NAFTA has not prejudiced Silver Bull in its conduct of this arbitration; it has been able to argue fully why it contends the point is wrong. *Aguas de Barcelona* is distinguishable: it was a case in which it was common ground that the jurisdictional objection (as to whether a particular debt constituted a protected investment) was never raised in the proceedings before the tribunal by the respondent State at all. Thus it is scarcely surprising that the Committee held that this failure meant that it was far too late to raise it in the annulment proceedings.⁴¹⁸
340. Even if Mexico had not raised the jurisdiction point in relation to the claims under Articles 1102, 1103 and 1105, the fact that it was raised in relation to the claim under Article 1110 would inevitably have led the Tribunal to consider whether the other claims, to the extent they relate to conduct occurring after 30 June 2020, were within its jurisdiction. Indeed, so far as may be necessary, the Tribunal invokes Rule 43(3) to do so here, and rejects this procedural objection.

(5) Interpretation of treaties

341. Article 42(1) of the ICSID Convention provides as follows.

“The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”

342. In the present case, the rules of law agreed by the parties are contained in Article 1131 of NAFTA, under the heading “Governing Law”, which forms part of Section B of Chapter 11 of that agreement.

⁴¹⁶ *Aguas de Barcelona v. Argentina*, CL-0130.

⁴¹⁷ Silver Bull’s Post-Hearing Brief, paragraph 81.

⁴¹⁸ See *Aguas de Barcelona v. Argentina*, paragraphs 385-390, CL-0130.

“1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”

343. The applicable rules of international law in relation to matters of interpretation are contained in Section 3 of the Vienna Convention. This provides, so far as material, as follows.

“ARTICLE 31

GENERAL RULE OF INTERPRETATION

1. 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

ARTICLE 32

SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) *leaves the meaning ambiguous or obscure; or*

(b) *leads to a result which is manifestly absurd or unreasonable.”*

These two articles of the Vienna Convention are widely recognised to reflect rules of customary international law.

344. Silver Bull’s first argument is that Annex 14-C had the effect that, as regards legacy investments, the Section A obligations remained in force during the three-year period after the termination of NAFTA on 30 June 2020. However, before turning to our own examination of Annex 14-C, it is important to say a little more about *TC Energy*, as the Tribunal, while not bound by the decision of any other tribunal, is under a duty to carefully consider any relevant prior decisions. Accordingly, we pay careful regard to both the majority decision and to the dissent in the course of its consideration of the meaning of the Annex.

a. TC Energy Award

345. These were claims by TC Energy Corporation and TransCanada Keystone Pipeline L.P. (together “TransCanada”) against the United States of America alleging that the revocation, in January 2021, of a 2019 permit for an oil pipeline from Canada to Texas constituted a breach of NAFTA. The United States argued by way of preliminary objection that, by the time the revocation occurred, NAFTA had expired and it was no longer bound by it, and that therefore the revocation could not constitute a breach, and accordingly the Tribunal had no jurisdiction over the claims.⁴¹⁹

346. TransCanada contended that, as a result of the USMCA Protocol and Annex 14-C, both Section B and Section A of Chapter 11 of NAFTA continued to apply in respect of legacy

⁴¹⁹ *TC Energy v. United States*”, Award, paragraph 80, RL-0042.

investments for the three-year period.⁴²⁰ It advanced two alternative arguments for its contention

*“The first is that the offer to arbitrate that is included in Paragraph 1 of Annex 14-C is applicable to breaches of Section A having occurred both before and after the termination of NAFTA on 30 June 2020 ... The second ... is that the acceptance by the Claimants of the offer to arbitrate included in Paragraph 1 of Annex 14-C perfects a choice of law agreement whereby the parties to this arbitration agreed to make Section A of NAFTA Chapter 11 the law applicable to their dispute.”*⁴²¹

347. However, as the majority (Mr. Alexis Mourre and Professor John R. Crook) pointed out:

*“... under both theories Annex 14-C needs to be interpreted as extending Section A beyond 30 June 2020.”*⁴²²

348. The majority rejected both theories put forward by the claimant. Pursuant to Article 31 of the Vienna Convention, they concluded that the ordinary meaning of Annex 14-C meant that consent to arbitrate was established until 30 June 2023 for facts capable of constituting a breach of NAFTA, but only in respect of that period during which NAFTA was in force.⁴²³ Pursuant to Article 32, they concluded that documents (to which we will refer below) on which TransCanada relied did not allow them to depart from this conclusion.⁴²⁴ The majority also rejected the suggestion that Annex 14-C constituted a choice of law agreement whereby the parties to the arbitration had agreed to apply NAFTA, even if terminated, to TransCanada’s claims.⁴²⁵

349. Mr. Henri C. Alvarez KC dissented from the majority view. In his view, the Section A obligations remained in force for legacy investments for the three-year period.⁴²⁶ He also took the view that the documents relied on by TransCanada supported that interpretation of the Annex.⁴²⁷

⁴²⁰ *TC Energy v. United States*, Award, paragraphs 105 and 107, RL-0042.

⁴²¹ *TC Energy v. United States*, Award, paragraph 136, RL-0042.

⁴²² *TC Energy v. United States*, Award, paragraph 138, RL-0042.

⁴²³ *TC Energy v. United States*, Award, paragraphs 142-177, RL-0042.

⁴²⁴ *TC Energy v. United States*, Award, paragraphs 178-198, RL-0042.

⁴²⁵ *TC Energy v. United States*, Award, paragraphs 199-207, RL-0042.

⁴²⁶ *TC Energy v. United States*, Dissenting Opinion, paragraphs 1-12, CL-0202.

⁴²⁷ *TC Energy v. United States*, Dissenting Opinion, paragraphs 13-32, CL-0202.

350. There is thus a very clear difference of opinion as to the meaning and effect of Annex 14-C which the Tribunal in the present arbitration, here involving a claim against Mexico, must address.

b. Textual analysis

351. The Tribunal turns first to consider, in accordance with Article 31(1) of the Vienna Convention, the ordinary meaning to be given to the terms of Annex 14-C in their context and in the light of the object and purpose of the USMCA.

352. Such consideration must start with the text of the operative provisions of Annex 14-C: that is, paragraphs 1 to 5 of the Annex.

353. By paragraph 1, each State Party “consents...to the submission of a claim to arbitration in accordance with Section B...alleging breach of an obligation under...Section A of Chapter 11...”. The verb which expresses what the Parties are doing is “consents” and, *prima facie*, this paragraph constitutes a consent by the Parties to arbitrate under Section B. It does not, at least expressly and on its face, include an agreement to extend any substantive obligations contained in Section A, so as to keep them in force during the additional three-year period. The paragraph does however, contain an implicit choice of law, in that it provides that claims falling within its terms are to be determined by reference to the relevant provisions of NAFTA, and thus not by reference to the equivalent provisions of the USMCA. However, this in itself says nothing about whether those NAFTA provisions are applicable to acts or omissions that occurred after the termination of NAFTA, and within the three-year period from its termination.

354. Paragraph 2 declares that “The consent under paragraph 1 and the submission of a claim to arbitration” in accordance with Section B and Annex 14-C “shall satisfy” the requirements in three international conventions for consents or agreements to be in writing. This treats the consent given in paragraph 2 as a consent or agreement to arbitrate, thereby supporting the view that this is what it is. This paragraph does not extend any substantive obligations contained in Section A, so as to keep them in force during the three-year period.

355. Paragraph 3 provides that, “A Party’s consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.” This sets a terminus for the duration of the “consent under paragraph 1”, but says nothing to indicate whether paragraph 1 also includes an agreement to extend substantive obligations, or (if it does not) that might expand paragraph 1 from a consent to arbitrate into an agreement to extend substantive obligations. If paragraph 3 were not there, the time limits for claims would be those contained in Articles 1116(2) and 1117(2) of Section B, by which time runs from the date of knowledge, or the date when knowledge should have first been acquired, of the alleged breach and of the loss or damage incurred, and which might have allowed for claims to be initiated more than three years after NAFTA terminated.
356. Paragraph 4 provides, “For greater certainty,” that if “an arbitration has already been initiated pursuant to the submission of a claim under paragraph 1” within the three-year period, “the Tribunal’s jurisdiction with respect to such a claim is not affected by the expiration of consent referenced in paragraph 3.” Again, this provision treats the consent contained in paragraph 1 as a consent conferring jurisdiction; that is, as a consent or agreement to arbitrate. The paragraph says nothing to indicate whether paragraph 1 also includes an agreement to extend substantive obligations.
357. Paragraph 5 provides, again “For greater certainty”, that the jurisdiction of a Tribunal to determine claims submitted to arbitration under Section B before NAFTA terminated is not affected by that termination. As it is dealing with arbitrations commenced before NAFTA terminated, the paragraph tacitly assumes that all the acts and omissions complained of in the claim will have taken place before then. Again, it says nothing to indicate whether paragraph 1 includes an agreement to extend substantive obligations.
358. Silver Bull points out that “Annex 14-C does not contain any express exclusion of legacy NAFTA claims arising out of measures taken during the three-year consent period”⁴²⁸ That may be true, but it offers no help to Silver Bull. In accordance with Article 70(1)(a) of the Vienna Convention, unless the State Parties to a treaty “otherwise provide”, obligations

⁴²⁸ Silver Bull’s Reply, paragraph 449.

under that treaty are released on its termination. There must be an agreement providing for their extension, and mere silence cannot achieve this.

359. Silver Bull also adopts and repeats paragraph 9 of the dissent in *TC Energy* in which Mr. Alvarez says:

*“In my view, the natural meaning of Annex 14-C is that the Parties agreed to arbitrate claims alleging breaches of obligations under NAFTA Chapter 11, Section A for a period of three years after the termination of NAFTA. Therefore, unless the text otherwise expressly provides, for the purposes of Annex 14-C, Chapter 11, Section A must remain in force. Again, Annex 14-C 1 does not limit its application to alleged breaches that occurred prior to the termination of NAFTA. Rather, it provides consent to arbitrate claims alleging a breach of an obligation of Section A of Chapter 11 with respect to legacy investments, without distinguishing between breaches that occurred before or after termination of NAFTA. Rather, it provides consent to arbitrate claims alleging a breach of an obligation of Section A of Chapter 11 with respect to legacy investments, without distinguishing between breaches that occurred before or after the termination of NAFTA.”*⁴²⁹

For completeness, the paragraph concludes:

“The Respondent seeks to read in a temporal limitation and effectively add an additional condition in the language of the text. In my view, the Respondent’s interpretation, which the majority accepts, makes the term “obligation” bear a meaning that is not justified in the context of Annex 14-C.”

360. With respect, the Tribunal disagrees with the conclusions of Mr Alvarez. The effect of the USCMA is that the NAFTA terminates on 30 June 2020. That termination includes all the obligations under Section A of Chapter 11 (Investment) of NAFTA 1994. For the Claimant’s argument to prevail, it would have to establish that Annex 14-C extends the application of those obligations beyond 30 June 2020, for a period of three years.
361. In the view of the Tribunal, the consent to arbitrate contained in Annex 14-C does not – on its face – provide that the Section A obligations shall remain in force during the additional three-year period. Nor does it, in our view, provide that by necessary implication they should do so. All the consent in Annex 14-C entails is that those obligations, if breached

⁴²⁹ Silver Bull’s Reply, paragraph 450; *TC Energy v. United States*, Dissenting Opinion, paragraph 9, CL-0202.

before NAFTA was terminated, remain justiciable by arbitration, provided a claim is made within the three-year period. It is not a necessary complement to, or consequence of, this that the Section A obligations themselves should remain in force during that period. There is, in our view, a cardinal distinction between, on the one hand, the extension of a substantive obligation and, on the other, the extension of a right to arbitrate – a procedural right- later in time an obligation that was previously applicable but has subsequently ceased to have effect.

362. The majority of the Tribunal in *TC Energy* addressed this point in the following terms:

“152. The purpose of Annex 14-C is to establish consent to arbitrate in accordance with Section B in respect of certain claims. That purpose is procedural in nature and does not cover the substantive provisions of NAFTA unless there is evidence to the contrary. Annex 14-C is therefore only an exception to the expiration of NAFTA in respect to the offer to arbitrate. It is not an exception to the termination of Section A.

153. The structure of the treaty confirms that the purpose of Annex 14-C was not to extend the substantive obligations in Section A of NAFTA, but only the procedure for submission of a claim under Section B. The USMCA parties did in fact agree on transitional provisions extending the life of other substantive provisions of NAFTA in Article 34.1 of USMCA. While Article 34.1(1) states that “the parties recognize the importance of a smooth transition from NAFTA 1994 to this Agreement”, the rest of Chapter 34 indicates that this language refers to matters other than investment. Critically, there is no language in Chapter 34, or anywhere else in USCMA, indicating that the parties intended to maintain the substantive provisions of Section A of Chapter 11 in respect of legacy investments.”

The majority in that Tribunal also decided as follows:

“155. In the Arbitral Tribunal’s view, any agreement to extend Section A would either have been mentioned in Chapter 34 or, in view of its significance, be the subject of a specific provision elsewhere.

156. There is however no indication in USMCA that the parties intended to extend the substantive provisions of Section A beyond 30 June 2020. To the contrary, both Annex 14-C and the relevant other provisions in the Protocol, in Chapter 14 and in the Final Provisions of USMCA point to the conclusion that Annex 14-C only extended NAFTA in respect of the offer to arbitrate included in Section B. Because Section A expired on 30 June 2020, the conclusion must be that the offer to arbitrate contained in

Article 1 of Annex 14-C is only maintained in respect of facts predating the expiry of NAFTA.”

363. We note that this approach is, in effect, shared by all three parties to NAFTA and the USMCA. This is Mexico’s position in this arbitration, as Respondent. The representative of the United States made the same point when she appeared before the Tribunal:

*“What the Parties agreed to in Annex 14-C was to allow holders of legacy investments an additional three years to submit Claims for breach of certain NAFTA provisions that had allegedly occurred while the NAFTA was in force. The Parties did not agree that the NAFTA’s substantive investment obligations would continue to bind them during this three-year period or, indeed, for a period after the NAFTA’s termination.”*⁴³⁰

364. The Representative of Canada also made the same point, when she appeared before the Tribunal:

*“Annex 14-C addresses dispute settlement, nothing more. It extends recourse to NAFTA investor-State dispute settlement for a limited period after the Treaty termination. That is all. Nowhere in the annex is there an agreement by the CUSMA parties to extend the substantive obligations of NAFTA which ceased to bind the NAFTA Parties when the NAFTA terminated.”*⁴³¹

365. The views of the parties to the USCMA do not bind the Tribunal, of course. But the arguments they make, and the reasons given in support of those arguments, may be taken into account. The Tribunal concurs with the views of the majority in the award of the *TC Energy* Tribunal, as set out in its paragraphs 152-3 and 155-6, as reproduced above. The Tribunal also considers that the views expressed by the representatives of Canada and the United States cannot be faulted in their legal logic and clarity, to the effect that Annex 14-C does not extend the Section A obligations. We note that if Annex 14-C did have that effect, it would run into the obvious difficulty that the Section A substantive obligations would have legal effect in parallel with the related and overlapping – but also very distinct – substantive obligations set forth in *inter alia* Articles 14(4) to (9). That would make no sense.

⁴³⁰ Ms Lisa Grosh, Day 1, p. 328:12 et seq.

⁴³¹ Ms Florence Beaudet, Day 1, p. 365:22 et seq.

366. Silver Bull argues that even if the text of paragraph 1 of Annex 14-C does not expressly say that the Section A obligations are extended so as to apply during the three-year period, whether generally or in respect of legacy investments in particular, footnote 20 to that paragraph confirms that they continued to apply to legacy investments during that period.⁴³²

367. The footnote provides in relevant part as follows:

*“For greater certainty, the relevant provisions in ... Chapter 11 (Section A) (Investment) ... of NAFTA 1994 apply with respect to such a claim.”*⁴³³

368. In the Tribunal’s opinion, this is a classic “out of abundance of caution” note by a careful draftsman. It does no more than confirm what paragraph 1 itself provides: “the relevant provisions” of Section A may be applied to a later claim alleging a breach of an obligation under Section A that occurred prior to 30 June 2020, that is, while the NAFTA (including its Section A obligations) was extant. What it does not do itself, or say that paragraph 1 does, is provide that Section A obligations are, or are to be treated as being, in force after the termination of NAFTA. What it does say is that the substantive obligations by reference to which a claim concerning legacy investments will be determined are those in Section A, not for example, those in Chapter 14 of the USMCA. But if the obligations Section A were not in force at the time the acts or omissions claimed of occurred – for example, after 30 June 2020- footnote 20 does not of itself make them so, or say that paragraph 1 makes them so.

369. Accordingly, when Mr. Alvarez says that “the application of Section A is confirmed by footnote 20,”⁴³⁴ we agree, but not for the same reasons (or with the same consequence) as the view expressed by Mr. Alvarez. Footnote 20 does indeed confirm that claims falling within the terms of paragraph 1 are to be determined by reference to Section A, and not by reference to Chapter 14 of the USMCA. But the footnote is, in the view of the Tribunal, entirely neutral as to whether the Section A obligations themselves were to remain in force after NAFTA terminated: on its face it says nothing about the continued effect of the

⁴³² Silver Bull’s Reply, paragraph 452.

⁴³³ Silver Bull’s Reply, paragraph 452, citing USMCA, Annex 14-C, footnote 20, CL-0044.

⁴³⁴ TC Energy v. United States, Dissenting Opinion, paragraph 10, CL-0202.

Section A obligations and, in the view of the Tribunal, it cannot be read to imply such a consequence.

c. The terms of Annex 14C in their context

370. There is an additional contextual point, that the Tribunal thinks important and which was ventilated during the hearing.⁴³⁵ As already mentioned, the investment obligations contained in Chapter 11 of NAFTA have now been superseded by those contained in Chapter 14 of the USMCA, and this forms part of the context within which to interpret Annex 14-C.
371. One of the claims made by Silver Bull in this arbitration is for expropriation, contrary to Article 1110 of NAFTA.⁴³⁶ The claim is for indirect expropriation, relying on the alleged failure by Mexico, starting in September 2019 and continuing thereafter,⁴³⁷ to end what Silver Bull calls the “Continuing Blockade” of the Project, and which is said to have culminated on 31 August 2022, “in the complete loss of the Project’s value”.⁴³⁸
372. Both NAFTA, at Article 1110, and the USMCA, at Article 14.8, prohibit direct and indirect expropriation, save in specified circumstances. The USMCA, however, says rather more about indirect expropriation. Article 14.8 itself refers to expropriation or nationalization occurring “indirectly through measures equivalent to expropriation or nationalization”; and at Annex 14-B there is a statement of the Parties’ “shared understanding” of what constitutes expropriation, including in particular indirect expropriation.
373. This is significant because under the USMCA, unlike NAFTA, Mexico and the United States of America have excluded from their consents to arbitration under Annex 14-D any claims for indirect expropriation. This is the position for claimants acting on their own behalf, by virtue of Article 14.D.3:1(a)(i)(B), and for claimants acting on behalf of an enterprise they own or control, by virtue of Article 14.D.3:1(b)(i)(B).

⁴³⁵ Transcript, Day 1, pages 156 and 157, and 264 to 268.

⁴³⁶ Silver Bull’s Memorial, Section 4(A); and its Reply, paragraph 496-513.

⁴³⁷ See, for example, Silver Bull’s Memorial, paragraph 4.17.

⁴³⁸ Silver Bull’s Memorial, paragraph 4.16.

374. Thus, in a case involving the United States or Mexico, where indirect expropriation is alleged, if the whole course of conduct alleged to have resulted in an indirect expropriation occurred before NAFTA terminated, provided the claim is initiated timeously, it is justiciable in an arbitration pursuant to Annex 14-C; but if the whole of that course of conduct occurred after NAFTA terminated, it is not justiciable by arbitration. However, if Silver Bull's interpretation of Annex 14-C is correct then, if the conduct which is alleged to have resulted in an indirect expropriation began on (say) 20 June 2020 and ended on 31 August 2022, the whole course of conduct, including any acts or omissions alleged to have occurred after 30 June 2020, could found a claim in arbitration pursuant to Annex 14-C of the USMCA; but if the course of conduct began on 1 July 2020, it could not be arbitrated pursuant to Annex 14-D of the same treaty.
375. It is clear from Article 31(1) of the Vienna Convention that a treaty is to be interpreted as a whole. Moreover, although Article 32 is concerned with a supplementary means of interpretation, it follows from the wording of Article 32(b) that those interpreting a treaty should seek to avoid a result which is manifestly absurd or unreasonable.
376. In the Tribunal's judgment, it would be manifestly absurd and unreasonable if acts or omissions alleged to form part of a course of conduct resulting in an indirect expropriation in 2022 could be taken into account as part of a claim in arbitration if that course of conduct started before 1 July 2020, but not if that course of conduct started on or after 1 July 2020. Mexico and the United States have not consented to arbitrate claims for indirect expropriation where the alleged expropriation occurs after 30 June 2020; and it would make no sense if such a claim became justiciable in an arbitration simply because the course of conduct complained of is said to have started before July 2020, but it is accepted that it had not yet resulted in an expropriation by that date.
377. For this additional reason, the Tribunal does not accept the interpretation put forward by Silver Bull, and concludes that it does not have jurisdiction to determine whether a claim of indirect expropriation has been perfected by 1 July 2020.

d. Continuing breach

378. Silver Bull also relies on the assertion that Mexico committed what it describes as a “continuing breach”: that is a breach that continued from September 2019 until the end of August 2022 and beyond. Pausing here, Silver Bull refers to the concept of a continuing breach in two different contexts: first, to help answer the allegations that the Tribunal lacks jurisdiction;⁴³⁹ and secondly, to help answer the allegation that its claims (or some of them) are out of time.⁴⁴⁰ The Tribunal is here concerned with the first of these two points.
379. Moreover, the argument relating to continuing breach itself involved two separate, albeit complementary, contentions. First, it is said that Annex 14-C, properly construed, is intended to cover continuing breaches, and that this is confirmed by the wording of footnote 21 to paragraph 1. Secondly, Silver Bull contends that, given its view that the Tribunal has jurisdiction, it should exercise it over the entirety of Mexico’s continuing acts and omissions.
380. As to the first of these contentions, in its Reply, Silver Bull says, amongst other things:

“...its claims in this case...arise out of Mexico’s continuing unlawful acts and omissions in relation to the Continuing Blockade. Those continuing unlawful acts and omissions commenced on 8 September 2019 and continue to this day. ...[u]nlike in TC Energy, the conduct that forms the basis of SVB’s indirect expropriation claim here is continuing in nature and commenced before the NAFTA termination date. ...a number of investment treaty tribunals have found that continuing wrongful acts and omissions may give rise to an indirect expropriation. ...[references then made to Wena Hotels v. Egypt, Olin Holdings Ltd v. Libya, Mohamed Abdel Raouf Bahgat v. Egypt]...These cases can be distinguished from cases of so-called “creeping” expropriation, which is “[a] form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates a situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property.” In the present case, like the above cases, the State’s wrongful conduct are continuing acts and omissions that result in an indirect expropriation due to their “significant and lasting negative effect” on the investment.”⁴⁴¹

⁴³⁹ See, for example, Silver Bull’s Reply, Section 3.2.2.

⁴⁴⁰ See, for example, Silver Bull’s Reply, paragraph 402 and Section 3.1.1.

⁴⁴¹ Silver Bull’s Reply, paragraphs 455-458.

381. Silver Bull then refers to the second footnote to paragraph 1 of Annex 14C, footnote 21, which provides as follows⁴⁴²:

“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).”

It argues that the footnote only excludes continuing claims where the investor would otherwise be eligible to claim both under Annex 14-C and Annex 14-E.⁴⁴³

382. Silver Bull’s first point is, in effect, another way of arguing that the Section A obligations remained in force for legacy investments during the three-year period after 30 June 2020, albeit specifically for continuing breaches. It seeks to characterise Mexico’s course of conduct between September 2019 and August 2022 as a single tort or delict, or wrong, and one which can be treated as one continuing breach of each of Articles 1102, 1103, 1105 and 1110 of NAFTA.

383. The Tribunal, however, cannot see how a person – legal or natural - can continue to breach an obligation that has ceased to have legal effect or force after a certain date. Once Mexico’s Section A obligations were brought to an end, on 30 June 2020, it could no longer be asserted that it continued to breach them. As Article 14.2 of the ILC Articles on State Responsibility provides:

*“The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.”*⁴⁴⁴

If a State has been released from the international obligation which a third person has relied on while it was in force, it is no longer required to conform with that obligation once it is no longer in force.

⁴⁴² Silver Bull’s Reply, paragraphs 459-460.

⁴⁴³ Silver Bull’s Reply, paragraph 461.

⁴⁴⁴ International Law Commission, Articles on State Responsibility, Article 14.2 CL-0081.

384. Footnote 21 does not assist Silver Bull. It is true that it presupposes a case in which, in relation to a covered government contract, (absent the footnote) an investor would be eligible to make both a legacy claim under Annex 14-C and a claim for breach of Article 14 under Annexes 14-D and 14-E. However, the language of the footnote is clearly concerned with cases where, in relation to the same covered government contract, the State has successively breached first NAFTA and then, after NAFTA's termination, the USMCA. The effect of the language of footnote 21 is that, in such a case, an investor can only make a claim under Annexes 14-D and 14-E. The footnote does not contemplate that a State can have committed breaches of obligations under both NAFTA and the USMCA at the same time.⁴⁴⁵
385. Moreover, specifically in relation to Article 1110 of NAFTA, the Tribunal again notes that Mexico has not consented to arbitrating claims for indirect expropriation under the USMCA. In the Tribunal's view, it is hard to understand the logic of a situation in which, by agreeing to Annex 14-C, Mexico will have imposed upon itself a consent to arbitrate a claim where the conduct of the State cannot be said to have had "an effect equivalent to direct expropriation" (to quote Annex 14-B of the USMCA) until August 2022.
386. The Tribunal accepts, of course, that the consequences of a pre-termination breach of Section A obligations might not have manifested themselves in terms of loss or damage until after NAFTA had terminated, or might manifest themselves both before and after termination. In such a case the investor can invoke Annex 14-C to make a claim. Moreover, a State's conduct after a treaty has terminated may be relevant when a tribunal is assessing the nature and significance of pre-termination conduct, and in particular whether the latter constitutes the breach of obligations under that treaty. However, these are entirely separate questions from jurisdiction.
387. As to the second contention, Silver Bull, referring to *Nicaragua v. Colombia*,⁴⁴⁶ argues:

"...Mexico's measures in this case that occurred after the NAFTA termination date are simply a continuation of the same measures that

⁴⁴⁵ See also the majority opinion in *TC Energy v. United States*, Award at paragraphs 166 and 167.

⁴⁴⁶ *Alleged Violation of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, International Court of Justice, Summary, 2022/3, 21 April 2022, CL-0205.

existed before the NAFTA termination date, namely, Mexico's continued refusal to act to end the Continuing Blockade imposed on the Project. Mexico's misconduct before and after the NAFTA termination date is also inextricably linked; indeed, it is not distinct. The tribunal should therefore exercise its jurisdiction over the entirety of Mexico's continuing acts and omissions, which crystalized in loss and damage on 31 August 2022."⁴⁴⁷

388. In *Nicaragua v. Colombia*, pursuant to the Pact of Bogotá, Nicaragua brought proceedings against Colombia alleging that Colombia had breached certain maritime obligations under customary international law. Colombia denounced the Pact, but Nicaragua filed its application before the denunciation took effect, and whilst Colombia was still bound by the Pact. The International Court of Justice had already held that it had jurisdiction over the dispute, and the question of consent did not arise at the stage of proceedings dealt with in this judgment. The question was whether the Court had jurisdiction *ratione temporis* to deal with breaches alleged to have occurred after Colombia had ceased to be bound by the Pact.
389. Jurisdiction was founded on the fact that there had been a dispute between the parties when Nicaragua's application was filed. Thus, as the Court held, the only question was whether the facts alleged to have occurred after Colombia's denunciation took effect formed part of the same dispute, or would have transformed the dispute before the Court into a dispute of a different character.
390. Thus, in *Nicaragua v. Colombia*:
- (a) the treaty in question was not the source of the obligations said to have been breached, but merely conferred jurisdiction on the Court to hear certain disputes between the parties;
 - (b) the claim was commenced before Colombia ceased to be bound by the treaty; and accordingly

⁴⁴⁷ Silver Bull's Reply, paragraph 465.

- (c) the only issue was whether the breaches alleged to have occurred after Colombia ceased to be bound by the treaty was whether they were part of the same dispute, or transformed it into a dispute of a different character.

391. The Court concluded:

*“47. ... the claims and submissions made by Nicaragua in relation to incidents that allegedly occurred after 27 November 2013⁴⁴⁸ arose directly out of the question which is the subject-matter of the Application, that those alleged incidents are connected to the alleged incidents that have already been found to fall within the Court’s jurisdiction, and that consideration of those alleged incidents does not transform the nature of the dispute between the Parties in the present case. The Court therefore has jurisdiction *ratione temporis* over Nicaragua’s claims relating to those alleged incidents.”*

392. The situation in the present case is clearly distinguishable: the issue is whether the provisions containing Mexico’s consent to arbitrate alleged breaches of the Section A obligations, provided claims were brought within the three-year period, additionally had the effect of keeping those Section A obligations in force for that period, after 30 June 2020. In the view of the Tribunal, they did not. Accordingly, Mexico’s alleged conduct after 30 June 2020 cannot be relied on by Silver Bull as constituting part of a continuing breach of those Section A obligations. Nicaragua by contrast, could rely on Colombia’s alleged conduct after it had ceased to be bound by the pact of Bogotá, as constituting part of the dispute it had already referred to the International Court of Justice. As already observed, the only way that Silver Bull can bring post-termination events into its dispute with Mexico is as allegedly factual consequences of the earlier alleged breaches, or to help assess their nature; it cannot rely on them as part of those alleged breaches themselves.

e. Article 31: conclusion

393. Accordingly, having regard to the ordinary meaning of the language of Annex 14-C (and putting aside until later the question of subsequent State practice), the Tribunal finds it difficult to disagree with the submission made on behalf of Canada that the Annex

⁴⁴⁸ The date on which Colombia’s denunciation of the Pact took effect. *Alleged Violation of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, International Court of Justice, Summary, 2022/3, 21 April 2022, page 3, CL-0205.

addresses dispute settlement, nothing more; and that it extends recourse to NAFTA investor-State dispute settlement for a limited period after NAFTA terminates; and that is all.⁴⁴⁹ In short, the Annex operates to extend the State Parties' consent to arbitrate in accordance with Section B (which would otherwise have expired with NAFTA), but not the Section A obligations.

394. Thus, the Tribunal agrees with the majority in *TC Energy* that:

*"... the ordinary meaning of Annex 14-C is that consent to arbitrate was established until 30 June 2023 for facts capable of constituting a breach of NAFTA while NAFTA was in force."*⁴⁵⁰

f. Article 32: supplementary means of interpretation

395. The Tribunal does not think that the meaning of Annex 14-C is either ambiguous or obscure, or that its meaning requires any confirmation by supplementary means. However, for completeness, the Tribunal notes the discussion of such supplementary means in *TC Energy*.

396. In that case, TransCanada relied on certain documents produced during the course of the proceedings, including:

*"... inter alia, documents and negotiating proposals shared among the USMCA parties, preparatory materials such as talking points that were used to explain the meaning and purpose of the negotiating proposals, evidence of internal deliberations regarding the position of the United States, and internal U.S. Government materials interpreting Annex 14-C after the text had been negotiated."*⁴⁵¹

These documents were mostly redacted in both the majority and the dissenting opinions in *TC Energy*, and do not form part of the record in this arbitration. However, the Tribunal does have the benefit of what was said about them in *TC Energy*, and it is apparent that many of them would never have been shared with Mexico.⁴⁵²

⁴⁴⁹ Transcript, Day 1, pages 365 and 366.

⁴⁵⁰ *TC Energy v. United States*, Award, paragraph 177, RL-0042.

⁴⁵¹ *TC Energy v. United States*, Award, paragraph 102, RL-0042.

⁴⁵² See the discussion in the *TC Energy v. United States*, Award at, for example, paragraph 184, RL-0042.

397. As already recorded, the majority in that case concluded:

*“... that an investigation based on supplementary rules of interpretation does not allow to depart from the conclusions drawn on the basis of article 31 VCLT, which is that the offer to arbitrate contained in Annex 14-C only applies to events pre-dating the 1st of July 2020.”*⁴⁵³

Of course, this Tribunal cannot, and does not, comment on the contents of documents it has not seen.

398. In his dissent Mr. Alvarez takes a different view from the majority. There he refers specifically to two exhibits, C-143 and C-221. The latter contains a quotation from an email from Mr. Mandell, who was one of the United States’ senior negotiators of the investment chapter of the USMCA, including Annex 14-C. Although the earlier parts of the exhibit are redacted, Mr. Mandell’s response to a Mr. Gharbieh (then the Director for Investment for the United States Trade Representative) are not.

*“Regarding your question, we intended the annex to cover measures in existence before AND after USMCA entry into force. That could probably be clearer. I’d have to think about the best textual argument, but the one that immediately comes to mind rests on paragraph 3. If we were just intending to allow claims for pre-existing measures, we likely wouldn’t have framed a three-year consent period – we would have just defaulted to the statute of limitations in NAFTA Section B that would apply to claims for those measures. In other words, we would have omitted paragraph 3 altogether. The contrary argument – the purpose of paragraph 3 was intended to alter the SOL for claims with respect to pre-existing measures, that’s it, doesn’t make a lot of sense. I think it’s also significant that the title of the annex – and the key concept in the annex – references legacy investments, not legacy measures. If we were focused only on legacy measures, it would have been easy to expressly limit paragraph 1 accordingly, but we didn’t. Finally, I think footnote 21 probably helps as well. The whole point of the footnote was to require keyhole investors to arbitrate under the “new and improved” USMCA rules and procedures (there was no reason to give them the option of arbitrating under NAFTA rules and procedures under 14-C instead). If 14-C only applied to pre-existing measures, there’d be no reason to say that. We’d just be punishing keyhole investors, which is contrary to the clear intentions of the whole keyhole framework.”*⁴⁵⁴

399. Mr. Alvarez says of both exhibits:

⁴⁵³ *TC Energy v. United States*, Award, paragraph 198, RL-0042.

⁴⁵⁴ *TC Energy v. United States*, Dissenting Opinion, paragraph 29, CL-0202.

*“I accept that these are internal documents that postdate the signature of the USMCA and are not admissible to interpret the common intention of the Parties at the time of signature of the USMCA.”*⁴⁵⁵

and, in particular of C-143:

*“The exchanges recorded in [the exhibit] come after the entry into force of the USMCA and cannot serve as preparatory work to the USMCA under VCLT Article 1132.”*⁴⁵⁶

Nevertheless, he describes them both as “of interest”, and C-143 “as useful” for the interpretive exercise under Article 32 of the Vienna Convention. With respect, we disagree. Even without seeing the redacted parts of these two exhibits, it seems evident to the Tribunal, in view of the nature of the documents in question, that they are not materials of the sort which can be relied upon under the Vienna Convention (and its customary international law analogies) to interpret the USMCA.

400. Accordingly, the Tribunal derives no assistance from supplementary means of interpretation in determining the meaning of Annex 14-C.

g. Subsequent State practice

401. Taking into account State practice is, of course, one of the primary means of treaty interpretation listed in Article 31 of the Vienna Convention. It would ordinarily be considered before any discussion of supplementary means of interpretation. In the present case, however, the Tribunal has been concerned to first establish whether Annex 14-C has an unambiguous meaning without regard to any subsequent practice that might affect how it would otherwise be understood. As discussed above, in the Tribunal’s judgment it has. Moreover, that meaning accords with the meaning said to be established by the subsequent practice of the State Parties to the USMCA.
402. Thus, it is for completeness that the Tribunal records that Mexico, supported by the United States of America and Canada, submits that there has been subsequent State practice in the application of the USMCA which has established the agreement of the State Parties

⁴⁵⁵ *TC Energy v. United States*, Dissenting Opinion, paragraph 25, CL-0202.

⁴⁵⁶ *TC Energy v. United States*, Dissenting Opinion, paragraph 30, CL-0202.

regarding the interpretation of Annex 14-C. In support of this, they rely on submissions made by each of them in previous cases involving Annex 14-C (including *TC Energy*).⁴⁵⁷

403. As Canada succinctly puts it:

“9. The subsequent practice of all three CUSMA Parties is evidence of the Parties’ agreement that the CUSMA Protocol and CUSMA Annex 14-C do not permit claims based on an alleged NAFTA breach that occurred after the NAFTA was terminated.”

404. The Tribunal notes that the submissions in the previous cases referred to are consistent with that view of the meaning of the Annex. However, the Tribunal has reached the same conclusion for the reasons set out above. That being so, the Tribunal does not think it necessary to decide whether the State Parties’ practice in the application of the USMCA since it came into force has established an agreement between them to like effect. At the very least, it can be said that there is certainly no agreement to the contrary.

(6) Conclusion on jurisdiction

405. For the reasons set out above, the meaning and effect of Annex 14-C is that Mexico consented to arbitrate claims where the facts alleged were capable of constituting a breach of NAFTA only while NAFTA was in force: that is, until 30 June 2020. The Tribunal also holds that Mexico is entitled to raise its jurisdictional objection in relation to all the claims brought by Silver Bull, insofar as they relate to conduct which allegedly occurred after 30 June 2020.

C. CONSEQUENCES OF ANNEX 14-C DECISION AND TIME-BAR

(1) Introduction

406. The first consequence of the Tribunal’s decision on the correct interpretation of Annex 14-C is that, as Silver Bull accepts, in that scenario, “its claim for indirect expropriation under NAFTA Article 1110 cannot be sustained”.⁴⁵⁸ Thus, when considering Mexico’s other jurisdictional objections, the Tribunal is now only concerned with Silver Bull’s claims

⁴⁵⁷ See, for example, Mexico’s Rejoinder, paragraphs 476 to 485; the Submission of the United States of America, paragraphs 13 to 15, and the Submission of Canada, paragraph 9.

⁴⁵⁸ Silver Bull’s Post-Hearing Brief, paragraph 77.

under Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment) and 1105 (Minimum Standard of Treatment) of NAFTA.

407. However, the effects of the Tribunal's decision go further than making Silver Bull's claim under Article 1110 unsustainable. It also calls into question the basis of Silver Bull's claims in respect of liability and compensation under the other three Articles.
408. The Tribunal begins, therefore, by repeating those three Articles, and Articles 1116 and 1117 of NAFTA, which provide (in combination with paragraph 3 of Annex 14-C) the temporal limitations on making claims.
409. So far as material, Articles 1102, 1103 and 1105 provide as follows.

"Article 1102: National Treatment

- 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 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.*
- 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favourable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.*

...

Article 1103: Most-Favored-Nation Treatment

- 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party 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 investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

...

Article 1105: Minimum Standard of Treatment

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.*

... ”

410. The temporal restrictions on making claims of breach appear in Articles 1116 and 1117 of NAFTA. So far as material, these provide as follows:

“Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. *An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:*
 - (a) *Section A or Article 1503(2) (State Enterprises), or*
 - (b) *Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party’s obligations under Section A,*

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. *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.*

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. *An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:*

- (a) *Section A or Article 1503(2) (State Enterprises), or*
 - (b) *Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.*
2. *An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.*

...”

411. Mexico has sought to rely on the three-year time-bars contained in these Articles. As already recorded, Silver Bull issued its Request for Arbitration on 28 June 2023. Accordingly, if Mexico can rely on these bars, Silver Bull would be precluded from asserting a claim on its own behalf in respect of an alleged breach if it knew, or should have known, of the breach and that it had incurred loss or damage before 28 June 2020; and Silver Bull would be precluded from asserting a claim on behalf of Minera Metalin if the latter knew, or should have known, of the alleged breach and that it had incurred loss or damage before the same date.

(2) Further preliminary points

412. Before considering on an individual basis whether, and if so to what extent, Silver Bull’s claims under Articles 1102, 1103 and 1105 of NAFTA can be sustained, it is important to note the following.
413. First, Silver Bull takes the position that, because Mexico did not rely on the time-bar in relation to the Articles 1102 and 1103 claims in its Counter Memorial, it should be precluded from doing so. Moreover, because of this, in its Reply, Silver Bull dealt with the time-bar objection only in the context of Article 1105. Thus, the only detailed pleading by Silver Bull on the time-bar point relates to its Article 1105 claim, although if Mexico is not precluded from pleading the time-bar objection in relation to Articles 1102 and 1103, then most of Silver Bull’s arguments under Article 1105 apply *mutatis mutandis* to its claims under these Articles.

414. Secondly, it follows from the Tribunal's decision as to the meaning and effect of Annex 14-C that, as regards all three allegedly breached obligations, only conduct by Mexico that occurred prior to 1 July 2020 will be relevant for the purposes of determining liability and compensation. For the reasons already discussed, Mexico cannot have been in breach of the obligations contained in any of these articles for conduct that occurred after 30 June 2020 as, after that date, those obligations no longer existed or had any legal force.
415. Thirdly, the Tribunal has rejected the suggestion that Mexico, through Congressman Borrego, was responsible for instigating and maintaining the blockade and, accordingly, questions of time-bar do not arise in relation to the Congressman's conduct.
416. Fourth, assuming for the purposes of argument that Mexico's failure to bring Mineros Norteños's blockade of the Project to an end before July 2020 did constitute (whether from the outset, or from some point during the period between 8 September 2019 and June 2020) breaches of one or more of these Articles, the question arises whether such breaches caused any loss to Silver Bull or Minera Metalín recoverable in this arbitration. This is because, as appears below, it is and always has been Silver Bull's case that it suffered no recoverable loss until 31 August 2022 when South32 terminated the Option Agreement.
417. Moreover, Silver Bull (without putting it in such stark terms) in its Post-Hearing Brief effectively recognises that it currently has no case on loss if (as has turned out to be the case) it is wrong about the meaning and effect of Annex 14-C.
418. The Tribunal turns first to its interpretation of Articles 1116(2) and 1117(2) of NAFTA.

(3) Interpretation of Articles 1116(2) and 1117(2) of NAFTA

419. There are three possible interpretations of when time begins to run under these Articles in the case of an alleged breach of an obligation which is repeated, or continues, from day-to-day over a period of time, in particular where (as here) the alleged breach consists of inaction on the part of the State.
- (a) Time begins to run on the date the investor/enterprise first knows, or should know, of both the alleged breach and the fact that it has suffered resulting loss or damage,

with the consequence that a claim must be brought within three years of that date not only in respect of the State's inaction prior to that date, but also in respect of any continuing inaction after that date.

- (b) Time does not begin to run before the end of the entire period in which the State remains in breach of its obligation, as the three-year period is renewed each day, and only starts to run as soon as the investor/enterprise knows, or should know, of both the alleged breach in its entirety, and that it has incurred loss or damage resulting from the breach.
- (c) Time begins to run on the date the investor/enterprise first knows, or should know, of both the alleged breach and that it has suffered resulting loss or damage, but only in relation to the alleged breaches of obligation up to that date; thereafter, time begins to run day-by-day in respect of each day that there is a further (or continuing) breach, provided there is the necessary actual or constructive knowledge of loss or damage.

420. Silver Bull supports the second of these interpretations.⁴⁵⁹ It relies on Articles 14(2) and (3) of the International Law Commission Articles on State Responsibility for Internationally Wrongful Acts,⁴⁶⁰ on certain human rights decisions, and on *UPS v. Canada*, the majority decision in *Energia y Renovación v. Guatemala*, and *Tecmed v. Mexico*.

⁴⁵⁹ Silver Bull's Reply, paragraphs 411-423.

⁴⁶⁰ CL-0081 ENG, Article 14 of the International Law Commission, Draft Articles Responsibility of States for International Wrongful Acts (2001) provides as follows.

"Extension in time of the breach of an international obligation

1. *The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.*
2. *The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.*
3. *The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during*

421. The Tribunal is not as such bound by any of these decisions, even if they are to be taken into account, and, in the case of *UPS* and *Energia* (where the language of the limitation provision was the same as in this case) respectfully disagrees with them. Article 55 of the ILC Articles expressly excludes the application of those Articles “... where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility a State are governed by special rules of international law.”⁴⁶¹
422. The language of Articles 1116(2) and 1117(2) clearly creates a special rule establishing the date on which time begins to run for the purpose of bringing a claim. Articles 14(2) and (3) of the ILC Articles are not concerned specifically with the operation of time-bars, but with identifying the occurrence and, in certain cases, the duration of wrongs that may be attributable to the State. In the absence of specific language such as appears in Articles 1116(2) and 1117(2), Article 14(2) and (3) might well assist a tribunal to identify when a limitation period starts to run; but Article 14 cannot be used to override clear treaty language. The words “first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor [or the enterprise] has incurred loss or damage” are clear, and are irreconcilable with time only starting to run when a continuing breach (or, more accurately, a breach repeated daily) concludes, that is, at the moment when the impugned conduct ceases, or (to use language suggested in *Tecmed*) the offending conduct is somehow consummated. Moreover, if Silver Bull is right, in the case of inaction by a State, the operation of the time-bar might be postponed indefinitely, which appears to the Tribunal to render the provisions *inutile*.
423. Mexico argues for the first possible interpretation set out above.⁴⁶² This is based on a literal reading of Articles 1116(2) and 1117(2), and the fact that the three State Parties to NAFTA all agreed on such a position in *Detroit Bridge Company v. Canada*. Indeed, Mexico suggests their common position constitutes subsequent practice by the State Parties to

which the event continues and remains not in conformity with that obligation.”

⁴⁶¹ Idem, Article 55.

⁴⁶² Mexico’s Rejoinder, paragraphs 382 and 388-411; and its Post-Hearing Brief, paragraphs 58-66.

NAFTA within the meaning of Article 31(3)(b) of the Vienna Convention.⁴⁶³ It also relies on the Decision on Jurisdiction and Admissibility in *Resolute Forest Products Inc. v. Government of Canada*.⁴⁶⁴

424. The United States of America, in its Submission argues that:

“18. The limitations period is a “clear and rigid” requirement that is not subject to any “suspension,” “prolongation,” or “other qualification.” An investor first acquires knowledge of an alleged breach and loss under NAFTA Articles 1116(2) and 1117(2) as of a particular “date.” Such knowledge cannot first be acquired at multiple points in time or on a recurring basis. As the Grand River tribunal recognized, subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitations period once an investor knows, or should have known, of the alleged breach and loss or damage incurred thereby.

19. Thus where a “series of similar and related actions by a respondent state” is at issue, an investor cannot evade the limitations period by basing its claim on “the most recent transgression” in that series. To allow an investor to do so would “render the limitations provisions ineffective[.]” An ineffective limitations period would fail to promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties. An ineffective limitations period would also undermine and in effect change the NAFTA Parties’ consent because, as noted above, the NAFTA Parties did not consent to arbitrate an investment dispute if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach and knowledge that the claimant has incurred loss or damage.”⁴⁶⁵

Canada makes a similar point at paragraph 21 of its Submission.

425. Although the Tribunal does not accept that there is enough demonstrated subsequent practice for the purposes of Article 31(3)(b) of the Vienna Convention to apply, the Tribunal to a large extent agrees with the approach set forth by the three former parties to NAFTA, at least insofar as it affects alleged breaches of an obligation that have continued to occur up to the date when the investor first acquires, or should have first acquired,

⁴⁶³ Mexico’s Rejoinder, paragraph 397.

⁴⁶⁴ *Resolute Forest v. Canada*, RL-0027.

⁴⁶⁵ Submission of United States of America, paragraphs 18 and 19.

knowledge of both the alleged breach and of resulting loss or damage. Consistently with the language of the provisions, time must start to run in respect of any alleged breach that has occurred before that date and which was known or ought to have been known to cause loss or damage, and thus in respect of any loss or damage consequential thereon whenever suffered.

426. However, on that date the investor (or its enterprise) cannot know whether the State's (alleged) breach of obligation is going to continue or not or whether, if it is, it is going to cause further or different loss or damage. What if the inaction continues for years thereafter, steadily causing more and different loss? Is loss or damage irrecoverable where it has been caused solely by the fact that the State has continued to commit the same breach for more than three years day-after-day after it has first acquired, or should have first acquired, all the relevant knowledge?

427. Mexico relies on the fact that the tribunal in *Resolute Forest* said this.

"158. Articles 1116(2) and 1117(2) of NAFTA refer to the time when the breach 'first' occurred. According to the ordinary meaning of the terms used and the object and purpose of the provision (under Article 31 of the Vienna Convention on the Law of Treaties), whether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant. In terms of Article 14(2) of the Articles on State Responsibility, '[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.' But the breach nonetheless occurs when the State act is first perfected and can be definitively characterized as a breach of the relevant obligation. Here the reopening of the Port Hawkesbury mill on favourable terms – alleged by the Claimant to constitute a breach of Articles 1102(3) and/or 1105(1) – first occurred not later than September 2012.

*159. In these circumstances the Tribunal does not need to attempt to reconcile the apparent discrepancies between various NAFTA tribunals concerning continuing wrongful acts."*⁴⁶⁶

⁴⁶⁶ *Resolute Forest v. Canada*, paragraphs 158 and 159, RL-0027/CL-0218. Here, the tribunal in *Resolute Forest*, refers not only to *UPS*, but also to *Apotex Inc. v. Government of the United States*, *Glamis Gold Ltd v. United States of America*, and *Gand River Enterprises Six Nations Ltd v. United States*.

428. However, as the tribunal made clear at paragraphs 155 to 157, *Resolute Forest* was not a case where the alleged breach was still continuing after the dies a quo. It was a case where the alleged breaches of Articles 1102(3) and 1105(1) were completed three months before the critical date, although they had a continuing effect thereafter; and the alleged expropriation took place after the critical date, so the time-bar issue did not arise in respect of that claim.⁴⁶⁷
429. As already observed, Articles 1116(2) and 1117(2) contain special rules providing for time-bars. In the Tribunal's judgment, Articles 14(2) and (3) of the ILC Articles, which talk of an act of a State "having a continuing character", and of an obligation to prevent a given event extending over "an entire period", do not provide assistance in interpreting these NAFTA provisions.
430. Here, it is necessary to avoid the confusion that can arise in relation to time-bars by the use of the phrase "continuing breach". Where a State allegedly fails to perform its obligations under Articles 1102, 1103 or 1105 of NAFTA, at least where, as here, the alleged failure consists of inaction, for the purposes of limitation the State commits a breach of those obligations each day it does nothing. Every day the State fails to act when it should it commits a wrong. It is true that every day the State commits the same wrong, but a fresh claim arises *de dei in diem*.
431. In the Tribunal's judgment, this follows from the fact that the time-bar is expressed to operate three years from (*inter alia*) the date on which the investor or the enterprise first acquired, or should have first acquired, knowledge that it has incurred loss or damage. Taking the blockade of a site by way of example, and assuming for these purposes the State's failure to clear the blockade to be a breach of Articles 1102, 1103 and/or 1105, each day's failure to end the blockade might give rise to very different sorts of loss or damage. On one day it might only result in the investor being unable to exploit its investment. On another day, whilst it might again result in the investor being unable to exploit its investment, it might also result in the site being entered by third parties and property being damaged or stolen. It seems to the Tribunal plain that, in the latter eventuality (and

⁴⁶⁷ See *Resolute Forest v. Canada*, paragraph 163, RL-0027.

assuming the investor knows of State's inaction that constitutes the breach) the time-bar must apply once three years have elapsed from when the investor first learns (or should have first learnt) of the loss and damage it incurred that day, even though the State's failure to end the blockade, and the investor's inability to exploit its investment, might have started long before, and might continue long after the incursion. If the State had ended the blockade that day, the investor could have resumed exploiting its investment and the damage and theft would never have occurred. The investor's inability to exploit its investment and the damage to, or loss of, its property on that day was caused by the State's failure to comply with its obligations on that day, not its earlier or later failures.

432. Mexico and the non-disputing treaty parties rely on the Decision on Objections to Jurisdiction in *Grand River Enterprises Six Nations, Ltd v. United States of America*.⁴⁶⁸ In that case the claimant complained about (*inter alia*) legislation enacted by various US states to implement a settlement agreement (the "MSA") resolving claims between certain such states and four United States tobacco producers concerning the medical costs incurred by those states in treating tobacco-related illnesses. The claimant was not a party to the settlement, but it was affected by the consequential legislation which required manufacturers to place funds in escrow with respect to each sale of taxed cigarettes or face enforcement actions and penalties.

433. At paragraph 81 of the Decision, the tribunal said this.

"At the hearing, the Claimants advanced a further argument, to the effect that the limitations periods under Articles 1116(2) and 1117(2) applied separately to each contested measure taken by each state implementing the MSA. Hence, they maintained, there is not one limitations period, but many. This is not how the Claimants pleaded their case. Their pleadings did not indicate, except in a limited and anecdotal way, the particular states and times where their products were sold to consumers. Instead, the claims were directed against the adoption and enforcement of the escrow statutes and other measures in a generic manner. Moreover, this analysis seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries. In any case, the argument is unconvincing on the facts as it pertains to the

⁴⁶⁸ *Grand River Enterprises Six Nations, Ltd, et al. v. United States of America*, Decision on Objections to Jurisdiction, 20 July 2006 ("Grand River v. United States"), RL-0020/CL-0220.

escrow statutes. All of the 46 concerned states adopted such legislation by 2000, so that in all of them there was an existing duty to escrow with respect to any past sales in that State as of January 1, 2001. ”

434. Although there are obvious differences between that case and this one, the central point for present purposes is the tribunal’s reasoning that:

“... this analysis seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries.”

435. The Tribunal respectfully disagrees. First, if this is what the tribunal was suggesting, it does not follow from the fact that an investor can complain about a later breach, that it may not be time-barred in respect of earlier, similar and related breaches. Secondly, it seems to this Tribunal that an investor will only be entitled to claim in respect of a later breach if that breach is distinct and causes it to incur loss or damage which was not caused, or also caused, by the earlier (already time-barred) breach or breaches.
436. On the basis that there is a separate wrong each day, time starts running as soon as the investor knows, or ought to know, that there was a breach on that day, and that it incurred loss or damage caused thereby. If no claim is made in time then, after three years, claims for that wrong are time-barred. The limitation period in respect of earlier breaches is not extended; and the limitation provisions are effective in their consequences.
437. In the view of the Tribunal, each day a State breaches Articles 1102, 1103 or 1105, the State commits a fresh breach of obligation which may cause loss or damage. In accordance with the terms of Articles 1116(2) and 1117(2), knowledge of that breach cannot be acquired earlier than that day. If the breach is a repetition, or continuation, of breaches that have been ongoing, and causing loss or damage, for a period of time then, as a matter of fact, the investor may well know of it, or ought to know of it, at once. But time will only start to run for that breach as soon as the necessary knowledge is, or should be, acquired. Time will not have started to run at some earlier point just because an identical or similar breach was committed earlier, because it is to be treated as distinct. Of course, in the case of breaches occurring day-after-day, if earlier breaches become time-barred, there may be

practical difficulties in deciding what, if any, loss or damage was caused by those breaches which are not affected by the time-bar, and what was caused by earlier breaches. But that is a question for evidence, and it is for the investor to prove (if it can) what loss or damage can properly be attributed solely to the later breaches.

438. Any compensation ultimately awarded may be for the accumulated loss and damage incurred over time, but it remains the case that each day's failure by the State is a discrete wrong, and repeated breaches do not constitute a single indivisible wrong.
439. As already pointed out, for the time-bar to operate, the investor must know, actually or constructively, not only of the breach, but of loss or damage. It is, however, trite law that the investor does not need to know the full extent and type of such loss or damage.⁴⁶⁹ Moreover, it seems to the Tribunal plain that the reference to loss or damage is to any loss or damage, or at least any material loss or damage, which the investor actually incurs as a result of the alleged breach. Whether and when an investor acquires actual or constructive knowledge that it has incurred loss or damage is an objective question. The investor cannot simply point to the particular loss or damage in respect of which it chooses to claim and say, "I did not know about that loss or damage, nor should I have done, more than three years before the start of this arbitration". Otherwise, an investor could prolong the limitation period unilaterally simply by making a claim only in respect of loss or damage incurred later in time than that originally suffered.
440. However, before asking whether, in the Tribunal's opinion, prior to 28 June 2020 Silver Bull and/or Minera Metalín did know, or should have known, of the alleged breaches and of loss or damage they incurred as a result of those breaches, it is necessary to look at Silver Bull's pleaded case, and its evidence, on these matters.

a. The Article 1105 claims: Silver Bull's pleaded case on the time-bar

441. Silver Bull alleges that, by failing to bring Mineros Norteños's blockade of the Project to an end, Mexico has failed to accord its investment fair and equitable treatment and/or full protection and security, thereby causing loss and damage to both Minera Metalín and to

⁴⁶⁹ See for example, *Resolute Forest v. Canada*, paragraph 165, RL-0027.

Silver Bull. As already observed, those allegations of breach must now be confined to conduct that occurred up to and including 30 June 2020.

442. Mexico says that Silver Bull and Minera Metalin first acquired, or should have first acquired, knowledge of Mexico's alleged breaches and that they had incurred loss or damage as a result thereof prior to 28 June 2020, and that accordingly Silver Bull's claims are time-barred.
443. Silver Bull's answer on knowledge of breach is the argument it makes on continuing breach, as already discussed. Its answer on knowledge of loss or damage is that none occurred until 31 August 2022, less than three years before proceedings began.
444. Silver Bull's Reply contains the following.

"402. ...

First, the Tribunal has jurisdiction ratione temporis in respect of SVB's claims under NAFTA Article 1105. As set forth in the Memorial and below, those claims, which arise out of Mexico's continuing breach of its obligations to accord fair and equitable treatment and full protection and security to SVB's protected investments, are timely. Specifically, Mexico's breaches of NAFTA Article 1105 are continuing in nature, have not ceased, and therefore operate to renew the limitation period. In any event, SVB's claims under NAFTA Article 1105 are timely because no more than three years have elapsed since SVB, or Minera Metalin, first acquired knowledge of the loss and damage caused by Mexico's continuing breaches and the filing of SVB's Request for Arbitration on 18 June 2023.

...

404. ... as NAFTA Chapter 11 Tribunals have consistently affirmed, the limitation period starts to run only when the investor, or its enterprise, has acquired both knowledge of the alleged breach and knowledge that it has incurred loss or damage as a result. Where knowledge of these two events is not simultaneous, the limitation period runs from the later of these events.

405. As SVB demonstrated in its Memorial, its claims under the NAFTA, including NAFTA Article 1105, are timely because no more than three years have elapsed since SVB, or Minera Metalin, acquired knowledge of the loss and damage caused by Mexico's continuing breaches on 31 August 2022 and the filing of SVB's Request for Arbitration on 28 June 2023.

...

425. *As SVB has demonstrated, SVB's claims are timely because no more than three years have elapsed since SVB, or Minera Metalin, acquired knowledge of the loss and damage caused by Mexico's continuing breaches and the filing of SVB's RFA on 28 June 2023.*

426. *Specifically, SVB acquired knowledge of the loss and damage incurred as a result of Mexico's continuing breaches on 31 August 2022, when South32 terminated the Option Agreement due to Mexico's refusal to take any action to end the Continuing Blockade for nearly three years. As Mr. Barry explains, from that moment forward, the Project was unviable: SVB had lost its critical financing and development partner for the Project and – in view of the Continuing Blockade and Mexico's continued refusal to act – no reasonable investor would have invested in the Project, as confirmed by Mr. Barry's discussions with prominent shareholders and investors and by communications of those investors to the market.*

...

427. *... Irrespective of when SVB first acquired knowledge of Mexico's continuing breaches, the date of its knowledge of the loss and damage incurred falls well within the limitation period.*

...

429. *... as explained above, a claim will be time-barred under the NAFTA only if the investor has knowledge of both events (i.e., breach and loss or damage incurred) before the cut-off date. Logically, the date on which the second limb of the test is satisfied, viz., knowledge of the loss or damage incurred, cannot arise any earlier than the date on which the investor acquired knowledge of the breach. Thus, where, as here, the investor obtained knowledge of the second event after the Cut-Off Date, its claim will not be time-barred.*

...

438. *... the Claimant's claims under NAFTA Article 1105 arise out of Mexico's continued and repeated refusal to take reasonable action in its power to protect the Claimant's investment and to lift the Continuing Blockade, as it did in 2016. This continued and repeated refusal to act is what led directly to the Claimant's loss of its Project in its entirety, which loss crystallized on 31 August 2022 with the termination of the Option Agreement ..."*

445. Moreover, in the course of its opening oral submissions, Counsel for Silver Bull said this.

“We come now to the final element of the test, which is that the – – when the damage, the knowledge or the loss or damage occurred. And it is important to note that, if the Tribunal finds that, if that moment in time was after the cutoff date, then that’s enough to defeat the Limitation Period objection. And it doesn’t need to go into when exactly the knowledge of the breach arose.

The answer is that the Claimant’s [sic] only acquired knowledge of the relevant loss or damage on 31 August 2022, when South32 exited the Option Agreement. That was the point at which it became clear that the Project was no longer viable.”⁴⁷⁰

446. Counsel was asked by the Tribunal:

“... when did the right to bring a claim arise? Is this the date you’re identifying as the right to bring a claim under the NAFTA?”⁴⁷¹

Counsel replied:

“Well, the breach already occurred before this. So the breach already started 9 September 2019. So, technically, the Claimant could have brought a claim then, but it is only 31 August 2022 when its losses crystallize that it actually has suffered loss and can peg damages to its claim.”⁴⁷²

This led the Tribunal to ask:

“... is it then your position that no loss occurred until the 31st of August 2022, but the right to bring a claim arose much earlier but would not give rise to damages because no loss was suffered?”⁴⁷³

Counsel replied:

“Technically, yes, the Claimant could have brought the Claim at any point once the breach started, but it would be doing so without being able to claim for damages at that point.”⁴⁷⁴

447. Moreover, it is apparent from the sections of Silver Bull’s Post-Hearing Brief quoted below under the heading “A further quantum hearing?”, that Silver Bull accepts that the only case on loss or damage it has so far advanced in this arbitration is that it lost the full fair market

⁴⁷⁰ Transcript, Day 1, p. 140:16-22, page 141:1-6.

⁴⁷¹ Transcript, Day 1, page 142:13-16.

⁴⁷² Transcript, Day 1, page 142:17-22, page 143:1.

⁴⁷³ Transcript, Day 1, page 143:4-8.

⁴⁷⁴ Transcript, Day 1, page 142:9-13.

value of the Project at the end of August 2022, at the moment when South32 terminated the Option Agreement.

b. Silver Bull's evidence as to the timing of its loss or damage

448. The Tribunal turns next to Silver Bull's evidence as to when it first incurred loss or damage. This is relevant not only to the Article 1105 claims, but also to the claims under Articles 1102 and 1103.

449. It will be observed that this evidence was given in support of Silver Bull's case that, whenever it acquired, or should have acquired, knowledge of the alleged breaches of NAFTA, it did not acquire, nor should it have acquired, knowledge of any loss or damage more than three years before it commenced this arbitration.

450. This evidence was given principally by Mr. Barry. However, before turning to his testimony it is worth noting the basis on which Silver Bull's expert, Mr. Dellepiane, was instructed to assess damages. At paragraph 7 of his First Report, he says this.

*"I am instructed to assess damages to Claimant based on the principle of full reparation. This requires that I quantify damages that places Claimant in the financial position it would have occupied in the absence of the alleged breaches. I am further instructed to assess damages as of 31 August 2022 (the "Date of Valuation"), which is predicated on the termination of the South32 Option Agreement and signaled the point at which Claimant and its subsidiaries were left without any options for continuing to fund the Project as a direct consequence of Respondent's actions..."*⁴⁷⁵

451. Mr. Barry gave oral evidence about loss.

"Q. And it's my understanding that your position is – or the position of Silver Bull that when South32 withdrew in August 2022, that was the end of the Project?

A. Yes. It became unfinanceable at that point.

Q. Is it your position – and I'm asking you this as a factual question – that there were not any losses or damages to Silver Bull up until that time?

⁴⁷⁵ See also paragraph 2(c) of Mr. Dellepiane's Second Expert Report.

A. *It's an unknown question because, as I say, these kind of Blockades are something that happens often in our business, and when – often, when they are resolved, you just go back to work and there is no – there is no real damage. It's only when a catastrophic situation comes, like the exit of South32, for us, that these losses are crystallized.*

Q. *But before that point – for example, you mentioned the – your employees being unable to exit from the site. Is that damage to Silver Bull, that action in and of itself?*

A. *Well, no, because I think everyone got out safely. I think it damaged those people personally, but from a Project prospective, I think if the Blockade had been lifted two weeks later, we could have easily gone back to work probably with six less employees, but ...*

Q. *On October 11, 2019, Silver Bull notified South32 of a force majeure event under the Option Agreement; is that correct?*

A. *Correct.*

Q. *And that notification specified several reasons for declaring force majeure including the illegal imprisonment of the employees, which you raised, the illegal blocking of access to Silver Bull's property and to drilling equipment, and an expressed intention of Mineros Norteños to "invade our property, utilize our equipment and infrastructure, access underground workings, and mine and sell our ore."*

Does that sound accurate?

A. *Yes.*

Q. *And it further specifies that "as a result Minera Metalin cannot perform its duties of running our agreed exploration program until the situation is resolved and has, hence, called a force majeure."*

Does that sound accurate?

A. *Yes, that is accurate.*

Q. *Now, you agree that these events and the consequent impossibility of progressing the Project created adverse economic effects on Silver Bull.*

A. *At this point, no. With these actions, no. I think, as I say, if the Blockade had ended two weeks later, we would have gone back to work and we would still be working on the Project.*

Q. So how many weeks would the Blockade have to be in effect before Silver Bull experienced noticeable – so non insignificant losses?

A. I think that is the wrong question.

...

...

Q. ... my question is this: When that Blockade started, the exploration activities ceased: correct?

A. Correct.

Q. That's your case.

And at that point, you were still incurring costs: correct?

A. Correct.

Q. And we talked about this earlier, but in an exploration company, those costs are basically accumulated so they grow over time; correct?

A. Correct.

Q. And so, by definition, as long as that protest was in place on a daily basis, Silver Bull's losses would increase; correct?

A. Well, the cost of doing business would increase, but with regard to it being a loss, I don't think it was a loss, per se. It was just a cost.

...

Q. So, again, to back to my question, every day that access to the site was blocked, Silver Bull would be incurring losses that would be added to the accumulated losses, correct?

A. That's true from an accounting point of view, but the loss, I think, we're talking about is the loss of the Project and the loss of the engine of the Company.

Q. So is it your position that there was no damage or losses to the Company until South32 terminated their Agreement?

A. Nothing that I would highlight as being not typical for exploration Projects that undergo a Blockade like this. It really was the South32 exit that made the Project unviable for us.

Q. When the force majeure was declared, Silver Bull assumed or agreed to cover all expenses during that period; correct?

A. No, South – so South32 – well, under a force majeure, as the Tribunal, I understand – understands well, that is meant to stop all costs and expenditure from South32. South32, however agreed to fund the running costs of Silver Bull for a period of time. I believe that was about 12 months, and then after that, Silver Bull took over the costs of the Company.

Q. Right. So that's what I'm speaking of. So at that point where [South32] agreed to cover all expenses during the force majeure period with the intention that South32 would continue its investment after Silver Bull and Metalin regained access to the Project site" it's from that point forward, and Silver Bull was incurring these expenses; correct?

A. Yes, correct.

Q. And then from an accounting perspective those expenses would have increased your accumulated costs?

A. Well – agreed. It is an accounting cost.

Q. Right. And those are recorded as losses in the Company; correct?

A. Accounting losses.

PRESIDENT GLICK: Forgive me. I just want to be quite clear about this. When did you enter into this agreement with South32, that they would cover the costs for the first 12 months?

THE WITNESS: It was a verbal agreement because South32 expected the Blockade to be lifted relatively quickly. ... And so, the way it worked was South32 would make quarterly cash calls on them, and after the fourth one - so after 12 months, they made the decision – they said, look, we want to see our money go into exploration, not into keeping Silver Bull's corporate costs intact." So that's when we took over the corporate costs.

PRESIDENT GLICK: And when was that?

THE WITNESS: I believe it was the end of 2020, around there.

PRESIDENT GLICK: So it moved from – about the end of 2020 the burden of financing the continuing running costs of the company moved from South32 to Silver Bull?

THE WITNESS: Correct.”⁴⁷⁶

452. The Tribunal was slightly puzzled by Mr. Barry’s oral evidence because it seemed inconsistent with paragraph 8.4 of his First Witness Statement, paragraph 65 of his Second Witness Statement, and paragraph 37 of the Statement of Mr. Richards, Silver Bull’s Chief Financial Officer. All of these suggested that Silver Bull had agreed to bear the financial burden of maintaining the costs of the Project during the blockade. However, in support of his evidence, Mr. Richards cited an email exchange in July 2022 which took place during the negotiations for South32’s exit from the Project.⁴⁷⁷

453. In the first email, dated 5 July 2022, Mr. Barry asserted:

*“By way of background, when the blockade first kicked in, we quickly convened with the South32 team and said we would take over the costs of maintaining the project.”*⁴⁷⁸

454. This appears to be the passage on which Mr. Richards was relying.

455. However, later in the same email chain, on 20 July 2022, Silver Bull’s then President, Mr. Klinck, recorded that:

*“... since early 2020, SVB has taken on the financial burden to maintain a going concern at the project...”*⁴⁷⁹

In a later email of 6 August 2022, when commenting on a breakdown of the costs incurred by Silver Bull “that under the JV agreement, would have been allocated to the Sierra Mojada approved expenditures”, he noted, amongst other things,

⁴⁷⁶ Transcript, Day 2, pages 461-468.

⁴⁷⁷ Emails between T. Barry, A. Roy, D. Klinck, W. Mirek, B. Edgar and C. Richards between 5 July 2022 to 15 August 2022, C-0126.

⁴⁷⁸ Emails between T. Barry, A. Roy, D. Klinck, W. Mirek, B. Edgar and C. Richards between 5 July 2022 to 15 August 2022, page 5, C-0126.

⁴⁷⁹ Emails between T. Barry, A. Roy, D. Klinck, W. Mirek, B. Edgar and C. Richards between 5 July 2022 to 15 August 2022, page 3, C-0126

*“In early 2021 when SVB made the decision to incur the majority of the operating costs temporarily for Sierra Mojada ...”*⁴⁸⁰

This appears broadly consistent with Mr. Barry’s oral evidence that Silver Bull only took over the burden of paying off these costs out of its own resources from about the start of 2021. Moreover, Mr. Richards’s oral evidence, and his record of South32’s payments between 2019 and 2021 also suggest that Mr. Barry’s oral evidence was right.⁴⁸¹ Accordingly, the Tribunal accepts that South32 funded the running costs of Silver Bull (or at least those relevant to the Project) from September 2019 until about the end of 2020.

(4) The Article 1105 claims: are they sustainable and, if so, are they wholly or partly time-barred?

456. By way of introduction, and as already observed, only conduct prior to 1 July 2020 can found liability for these claims. Moreover, the Tribunal’s interpretation of Articles 1116(2) and 1117(2) of NAFTA means that, once Silver Bull and Minera Metalín have acquired, or should have acquired, the relevant knowledge of breach and loss, time starts to run on a daily basis for limitation purposes.

457. As is clear from the pleadings and evidence quoted above:

- (a) despite being pressed to do so, Mr. Barry would not accept that Silver Bull had suffered any immediate financial loss from the Blockade;⁴⁸²
- (b) the only loss for which Silver Bull currently seeks compensation is the loss of the value of the Project, and this did not occur, on its own argument, before August 2022;

⁴⁸⁰ Emails between T. Barry, A. Roy, D. Klinck, W. Mirek, B. Edgar and C. Richards between 5 July 2022 to 15 August 2022, page 2, C-0126.

⁴⁸¹ Transcript, Day 2, pages 538 and 539; and see paragraph 24 of Mr. Richards Witness Statement, referred to above: for 2019: USD3,126,982; for 2020: USD 265,845; for 2021: USD 22,344.

⁴⁸² See also Mr. Barry’s Second Witness Statement, paragraph 64: “...when we notified South32 of a *force majeure*...we did not consider that we had suffered any loss at that point...”.

- (c) however, Mr. Barry accepted that running costs continued to be incurred “from an accounting point of view”, so these must have appeared in the books of Silver Bull and Minera Metalín, increasing their accumulated losses;
 - (d) these costs continued to be incurred whilst all work on the Project was halted,⁴⁸³ and were thus wholly or largely wasted; and
 - (e) South32 agreed to, and did, cover these costs from September 2019 until the final quarter of 2020 by meeting cash calls from Silver Bull.
458. On the basis of the evidence before the Tribunal, running costs continued to be incurred between September 2019 and the end of June 2020 (when NAFTA terminated) and thereafter. If these are properly to be regarded as losses, then clearly both Silver Bull and Minera Metalín knew about them. Conversely, if, because they were covered by cash payments from South32, those incurred up to the end of 2020 are not properly to be regarded as losses, then Silver Bull and Minera Metalín incurred no losses before NAFTA terminated, or for about six months thereafter.
459. In the Tribunal’s judgment, the failure of the Mexican authorities to bring the blockade to an end between September 2019 and the end of June 2020 allows Silver Bull to raise an arguable case that Mexico committed the breaches of Article 1105 which the former alleges. That being so, the question arises: when did Silver Bull and Minera Metalín first acquire, or when should they first have acquired, knowledge of those breaches, and knowledge that (in the case of Silver Bull) the investor (and in the case of Minera Metalín) the enterprise had incurred loss?
460. As to knowledge of the breach:
- (a) the blockade began on 8 September 2019 and continued, apparently continuously, through to the end of June 2020 and beyond;

⁴⁸³ See also Silver Bull’s Form 10-K for Fiscal Year Ended 21 October 2021, page 5, R-0086.

- (b) the *force majeure* notice of 11 October 2019 makes clear that the blockade had resulted in work on the Project ceasing altogether;
- (c) despite requests to various Public Prosecutors (and other authorities), no-one from the Mexican authorities attempted to end the blockade;
- (d) the criminal complaint filed in September 2019 produced no discernible outcome so far as Silver Bull or Minera Metalín was concerned;
- (e) by December 2019, Silver Bull and Minera Metalín were seeking help of the Canadian Embassy to try to persuade the Mexican authorities to help them. There was a meeting with Mr. Quiroga and others, but nothing happened.

461. In the Tribunal’s judgment it is plain that Minera Metalín and Silver Bull were well aware of the inaction on the part of the State which they now allege constituted failure to accord them fair and equitable treatment or full protection and security well before June 2020. This seems to emerge as well from Silver Bull’s case as pleaded in writing and orally, as discussed above.

462. In its Rejoinder, Mexico says this.

*“... it is simply not credible that the Claimant had no actual or constructive knowledge of the alleged violations said to result from the Mexican State’s alleged omissions during the 9 months and 20 days that elapsed between the date the “Second Blockade” began and the dies a quo (June 28, 2020). At a minimum, a reasonable third-party investor, subject to Chapter 11 of NAFTA, acting with due diligence (including consultations with legal counsel), would have been aware of this.”*⁴⁸⁴

The Tribunal agrees.

463. In the Tribunal’s judgment, the wasted running costs referred to above clearly constituted losses incurred by Minera Metalín and Silver Bull. As Mr. Barry admitted, they appeared in the companies’ books; and calling them “accounting costs” does not make them disappear. The fact that they were ultimately met from cash infusions from South32 makes

⁴⁸⁴ Mexico’s Rejoinder, paragraph 381.

no difference to the fact that they were losses which the companies incurred. As already mentioned, Silver Bull and Minera Metalín clearly knew about all these costs from September 2019 onwards. Moreover, it is clear from Mr. Richards's evidence that the losses ran into some hundreds of thousands of dollars.⁴⁸⁵

464. The practical result of the Tribunal's findings is this. Silver Bull is left with a claim alleging that Mexico was in breach of its obligations under Article 1105 of NAFTA on 28, 29 and 30 June 2020. Claims for prior breaches are time-barred. Claims for subsequent breaches are unmaintainable as the obligations allegedly breached terminated on 30 June 2020. Moreover, it also follows that, if the Tribunal is wrong in its interpretation of Articles 1116(2) and 1117(2) of NAFTA, and Mexico is right, then all Silver Bull's claims under Article 1105 are time-barred.
465. Quite separately from the time-bar point, Silver Bull has no pleaded case as to any loss or damage that might be attributable to the alleged breaches on those three days in June 2020 (whenever incurred), and has put in no evidence as to that, or as to its loss as at 30 June 2020.
466. Accordingly, as matters stand, Silver Bull has advanced no case or evidence in these proceedings to support a claim for damages or compensation attributable to the only breaches of obligation that it would otherwise be open to it to allege, namely that Mexico was in breach of its obligations under Article 1105 of NAFTA on 28, 29 and/or 30 June 2020. In this regard, the Tribunal notes the language of Articles 1116 and 1117, which makes clear that claims submitted for arbitration must allege, and the investor or the enterprise (as the case may be) must prove, that the claimant has incurred loss or damage by reason of, or arising out of, the alleged breach. In the absence of any such allegation and proof, Silver Bull can have no sustainable claim for relief and thus (unless recast⁴⁸⁶) even this limited claim must be dismissed.

⁴⁸⁵ See paragraph 24 of Mr. Richards's Witness Statement.

⁴⁸⁶ See below, paragraphs 490 and ff.

(5) The claims under Articles 1102 and 1103: the procedural objection

467. Mexico did not assert its time-bar argument in its Counter Memorial in relation to Silver Bull's claims under Articles 1102 and 1103; though it did complain (specifically in relation to Article 1102) that Silver Bull's Memorial omitted the facts necessary for Mexico to consider the point.⁴⁸⁷ In its Rejoinder, Mexico pleaded that the Article 1103 claim suffered from the same deficiency; though it cannot be said to have articulated a time-bar defence in respect of either claim with any clarity.
468. However, in its Post-Hearing Brief, Silver Bull accepted that it had understood Mexico to be relying in its Rejoinder on the time-bar defence in respect of Silver Bull's claims under Articles 1102 and 1103, albeit in Silver Bull's view, impermissibly.⁴⁸⁸
469. Moreover, in oral argument and in its Post-Hearing Brief, Mexico made clear that it takes essentially the same time-bar point in relation to claims under Articles 1102 and 1103 as it does in relation to the claim under Article 1105.⁴⁸⁹ Silver Bull argues on the basis of ICSID Arbitration Rules 43 and 45 that Mexico should be precluded from making those objections.
470. This is, of course, the same point that Silver Bull raised in respect of Mexico's objections on the lack of jurisdiction *ratione voluntatis* raised in relation to Silver Bull's non-expropriation claims, and the Tribunal rejects Silver Bull's point for the same reasons. Though as appears below, the point does not matter as these two claims are unsustainable in any event.

(6) The claims under Articles 1102 and 1103: are they sustainable, and if so are they wholly or partly time-barred?

471. Silver Bull alleges that Mexico breached its obligation to provide national treatment to Silver Bull and its investment, contrary to Article 1102 of NAFTA, and its obligation to

⁴⁸⁷ Mexico's Counter Memorial, paragraph 493.

⁴⁸⁸ Silver Bull's Post-Hearing Brief, paragraph 81.

⁴⁸⁹ Transcript, Day 1, pages 257 and 258; Mexico's Post-Hearing Brief, paragraph 50.

provide most-favored-nation treatment to them, contrary to Article 1103.⁴⁹⁰ In brief, Silver Bull alleges that the Mexican authorities acted to bring blockades at other mines to an end, whilst it failed to do so at Sierra Mojada. Moreover, it also says that Mexico wrongly discriminated as between *Mineros Norteños* (which it characterises as a domestic investor⁴⁹¹) and Silver Bull.

472. Silver Bull accepts that the legal burden lies on it to satisfy the Tribunal that Mexico has breached these Articles.⁴⁹²
473. One preliminary point of interpretation arises. Articles 1102(1) and (2) and 1103(1) and (2) each refer to the State according to investors or investments “treatment no less favorable than it accords, in like circumstances”; and Article 1102(3) uses similar language. Silver Bull suggests that this only requires that the investor or investment be “in like circumstances” to the comparator or comparators it relies on in order to demonstrate breach.⁴⁹³
474. Simply as a matter of language, this is clearly a misinterpretation. Mexico is correct to argue that the question is not restricted to whether the investor or investment is in like circumstances to the comparator, but whether the treatment of the investor or investment is in like circumstances to the treatment of the comparator, and thus whether the other investor or investment has been given more favourable treatment in like circumstances.⁴⁹⁴ Similarities between the investor and investment and any comparator investor or investment only form part of the equation; another part is the treatment of those investors.
475. In its Memorial and its Reply, Silver Bull relies on a number of alleged comparators to establish that it and its investment have been treated less favourably than other investors and investments.

⁴⁹⁰ Silver Bull’s Memorial, paragraphs 4.52 and 4.53, and 4.55 to 4.70; Silver Bull’s Reply, paragraphs 265-268 and 575 to 613; Silver Bull’s Post-Hearing Brief, paragraphs 72, 77, 78, 85, 86, 102, 133 and 205.

⁴⁹¹ Silver Bull’s Memorial, paragraph 4.63; see also Silver Bull’s Reply, paragraph 577(a).

⁴⁹² Silver Bull’s Memorial, paragraph 4.58.

⁴⁹³ Silver Bull’s Memorial, paragraphs 4.61 and 4.62; Silver Bull’s Reply, paragraph 582.

⁴⁹⁴ Mexico’s Counter Memorial, paragraph 461-466; Mexico’s Rejoinder, paragraphs 821-823.

476. In its Memorial, after asserting that Mineros Norteños is a comparator, Silver Bull says this:

“4.21 ... Most critically ... the Mexican authorities during this same time period took swift action against other blockades imposed on other mining projects in Mexico. These included:

(a) Minera Penmont’s mining operation at La Herradura located in Sonora in 2023;

(b) the Los Filos mine in Guerrero in 2021;

(c) Americas Gold and Silver’s San Rafael mine in Sinaloa in 2021; and

(d) Pan American Silver’s La Colorada mine in Zacatecas in 2023.

4.22 From these examples, it is evident that the Mexican authorities had the resources and the ability to intervene in and end the Continuing Blockade, as they did contemporaneously to restore law and order at other mining projects in Mexico. The Mexican authorities also swiftly intervened in and ended the initial Blockade in 2016 at Sierra Mojada. That Mexico chose not to take any reasonable action in respect of the Continuing Blockade unlawfully imposed by Mineros Norteños in September 2019 and continuing until today is clear evidence of discrimination.

...

4.63 In this case, there are several comparators operating in the mining sector, subject to the same legal regime and providing comparable products and services. These include mining projects operating in Mexico and owned by domestic investors, such as Mineros Norteños, as well as mining projects operating in Mexico and owned by foreign investors, such as Fresnillo plc (United Kingdom) and Americas Gold and Silver Corporation (United States).”⁴⁹⁵

477. In its Reply, at paragraph 267, in addition to referring to what happened at Sierra Mojada in 2016 and to Mineros Norteños, Silver Bull lists the following mining projects at which it says the Mexican authorities brought blockades or similar incidents to an end: the El Ratón Iron Mine operated by Gan-Bo, in May 2013; the Limón-Guages mine operated by

⁴⁹⁵ Footnotes omitted.

Torex Gold Resources, in November 2017; the Peñasquito mine operated by Newmont Goldcorp, in September 2019; the Los Filos mine operated by Equinox Gold, in June 2021; the San Rafael Silver Mine operated by Americas Gold and Silver Corporation, in September 2021; the La Herradura Gold Mine operated by Fresnillo, in May 2023; and the La Colorada Silver Mine operated by Pan American Silver, in October 2023.⁴⁹⁶

478. Silver Bull says that it is entitled to rely on the comparative treatment of other investors and investments both before and after NAFTA terminated, and in relation to the former pleads that

“593. ... Mexico afforded more favourable treatment to:

(a) Mineros Norteños from 2019 to the present, by allowing them to blockade the Project, hold the Claimant’s personnel hostage, steal and damage the Claimant’s property, and ultimately take de facto possession of the Project;

(b) Various foreign investors, by swiftly intervening to resolve blockades or other illegal activity affecting their mining operations, as set out in section 2.8 above.

594. All of these comparators were “in like circumstances” to the Claimant and its investments. Specifically, they all (i) operate in mining sector in Mexico; (ii) are subject to the same legal regime, namely the Mexican Mining Law and Regulations; and (iii) provide comparable products and services, i.e., valuable minerals.”

479. Mexico has raised number of arguments against these claims, including the assertion that “the Claimant has provided no evidence ... to support its allegations”.⁴⁹⁷ It has also relied on differences in circumstances between what happened at the other mines mentioned in Silver Bull’s Memorial and what happened at the Project.⁴⁹⁸

480. In its Reply Silver Bull disputes the relevance of these alleged differences.⁴⁹⁹

⁴⁹⁶ See also Slide 200 of Silver Bull’s opening presentation.

⁴⁹⁷ Mexico’s Counter Memorial, paragraph 460.

⁴⁹⁸ Mexico’s Counter Memorial, paragraphs 474-488; see also Mexico’s Rejoinder, paragraphs 813-888.

⁴⁹⁹ Silver Bull’s Reply, paragraphs 594-605.

481. The Tribunal makes no finding on whether the alleged differences exist, or if they do, what might be their legal relevance. It is concerned with a more fundamental difficulty with Silver Bull's case as pointed out by Mexico. Apart from a few newspaper articles,⁵⁰⁰ Silver Bull has adduced no evidence, whether from a factual witness or an expert, concerning the incidents at other mines to which it has referred, and in particular, no evidence to satisfy the Tribunal that they occurred and were brought to an end "in like circumstances" to those obtaining at the Project. However, even on the exiguous basis of the newspapers articles exhibited, it is clear, for example, that at some of the mines referred to much greater violence occurred than at Sierra Mojada.
482. Although the circumstances in which the relevant treatment occurred do not have to be identical, they do have to be materially similar. Whether the other incidents relied on by Silver Bull and the alleged treatment by Mexico of the investors/investments in those cases are genuinely comparable with what has happened in the present case can only be established by proper evidence and analysis. He who alleges must prove. In the Tribunal's judgment, Silver Bull's case that the treatment of other mining investors and investments occurred "in like circumstances" does not get off the ground. There is simply no sufficient evidence to support it.
483. So far as the supposed comparison with Mineros Nortesños is concerned, Silver Bull says this in its Reply:

"597. With respect to Mineros Nortesños, Mexico argues that it was not in "like circumstances" with the Claimant because Mineros Nortesños was not blockaded by a third party. This submission misses the point. Mineros Nortesños was in precisely the same circumstances as the Claimant, as the Claimant and Mineros Nortesños were both mining companies party to a dispute regarding their rights in the same Project. Mexico treated Mineros Nortesños more favorably than the Claimant by allowing it to blockade and take the Claimant's mine with impunity, while refusing to take any action to restore the Claimant's rights to its investments. In other words, Mexico took the Mexican company's side over the foreign investor that was the subject of that company's aggression.

⁵⁰⁰ Exhibits C-0122, 0123, 0134, 0136, 0169, 0170 and 0465. Mexico also produced certain newspaper articles, as well as certain company statements, at Exhibits R-072 to 079.

598. *Moreover, as noted above, Mineros Norteños was a local mining cooperative that operated in the same sector, was subject to the same legal and regulatory regime, and sold the same commodities as the Claimant (i.e., valuable minerals). The test of “like circumstances” referred to above is therefore satisfied.”*

484. In the Tribunal’s judgment this is an unsustainable contention. Mineros Norteños is a miners’ co-operative, made up of (mostly elderly) individual miners. Silver Bull is an international junior mining company. The two are entirely different entities. Silver Bull is complaining about its treatment as the investor in the Project. Mineros Norteños was acting as a co-operative claiming to be owed money by Silver Bull. It was not acting as a Mexican investor in a mine nor was it treated as such by Mexico. Mineros Norteños is not a relevant comparator.
485. For completeness, in the Tribunal’s judgment, it is not open to an investor to support a claim for breach of Articles 1102 or 1103 by saying that, on an earlier occasion, the State treated it more favourably than on the occasion complained of. Silver Bull is not one of Mexico’s “own investors” for the purposes of Article 1102. Nor was it (in 2016 when the allegedly more favourable treatment occurred) an investor “of any other Party or of a non-Party”. What happened in 2016 does not provide a relevant comparison.
486. Moreover, quite independently of the problems identified by the Tribunal above, even were there sustainable cases that Mexico had breached Articles 1102 and/or 1103 of NAFTA:
- (a) Silver Bull clearly knew of these alleged breaches (and of the allegedly more favorable treatment given to Mineros Norteños) prior to June 2020, as the other mining comparisons relied on include ones occurring between 2013 and 2017, and the allegedly more favourable treatment of Mineros Norteños was happening in front of Silver Bull’s eyes; and
 - (b) for the reasons discussed above, Silver Bull knew or should have known that it was suffering loss or damage prior to June 2020.

Thus these claims would face the same time-bar as the claim under Article 1105; and would similarly lack a relevant case for damages or compensation pleaded or supported by evidence. Accordingly, these claims must be dismissed.

(7) A further quantum hearing?

487. In its Post-Hearing Brief, Silver Bull says the following about the position that will arise if “the Tribunal adopts the position of the majority of the *TC Energy* tribunal and finds that after 30 June 2020 Mexico’s obligations under NAFTA ceased to apply to legacy investments”, something that Silver Bull calls Scenario 1:

“8. *As the Claimant will explain:*

Under Scenario 1, there is ample evidence to conclude that Mexico committed continuing breaches of its NAFTA obligations from 8 September 2019 – when the Continuing Blockade started – through to 30 June 2020, when NAFTA terminated. The Tribunal may take into account events from after 30 June 2020 both to elucidate the nature of the Respondent’s breaches that began prior to that date, and to assess the full nature and extent of the Claimant’s losses. The Claimant’s losses stemming from Mexico’s continuing breaches under Scenario 1 ultimately crystallized on 31 August 2022 and Mexico must compensate the Claimant in full for those losses.

In light of the Tribunal’s guidance at the hearing regarding Scenario 1, the Claimant will need to make certain adjustments to its damages model, namely to: (i) adjust the valuation date to 30 June 2020 to avoid compensating the Claimant for any losses arising after the NAFTA termination; and consequently (ii) adjust the comparator set to reflect the new valuation date. Accordingly, the Claimant requests leave to file supplemental damages testimony to address these two issues should the Tribunal proceed under Scenario 1.

...

106. *Because there is no temporal limitation on the obligation of full reparation, the fact that the Claimant’s loss crystallized on 31 August 2022, after the NAFTA termination does not affect Mexico’s obligation to pay damages. Provided that the Tribunal is satisfied that (i) there is a sufficiently proximate causal link between Mexico’s conduct prior to 30 June 2020 and the Claimant’s loss; and (ii) the Claimant’s loss is not too remote to be compensable, it should award damages.*

107. *Both of the above requirements are met in the instant case. First, the Claimant's losses which crystallized on 31 August 2022 when South32 formally withdrew from the Project, are causally linked to Mexico's unlawful conduct, which was ongoing by 30 June 2020. That conduct prevented the Claimant from making further progress towards production and ultimately led to South32's exit.*

108. *Second, the Claimant's damage cannot be considered too indirect or remote. Mexico's inaction from 9 September 2019 to 30 June 2020 prevented the Claimant from moving the Project forward or obtaining further investment. The destruction of the Claimant's investment, which ultimately occurred when South32 exited the Project, was a natural and foreseeable consequence of Mexico's conduct, which commenced prior to the NAFTA termination.*

109. *In sum, the causal link between the Respondent's unlawful inaction and the Claimant's losses is direct, continuous and unbroken. The mere fact that the Claimant's loss materialized after NAFTA's termination does not sever the causal chain between the pre-June 2020 breach and the harm that crystallized thereafter, and the Claimant's losses are not too remote to be compensable. The same conclusions hold true in the alternative scenario that the Tribunal finds the losses crystallized earlier. As noted above, and in Section 4 below, the Claimant should be given the opportunity to adjust its damages model to calculate the losses arising under Scenario 1.*

...

135. *As explained above, if the Tribunal adopts Scenario 1, Mexico's breaches of Articles 1102 (National Treatment), 1103 (MFN treatment) and 1105 (FET and FPS) of NAFTA are firmly established up to 30 June 2020. Mexico must therefore compensate the Claimant in an amount that wipes out the Claimant's loss in accordance with the principle of full reparation. Full reparation is only attained in this case by assessing the Claimant's loss on the basis of the investment's FMV. The Claimant's damages under Scenario 1 would be determined by comparing the difference between the FMV of the Claimant's investment in light of the State's wrongful conduct (the "actual" scenario) and the FMV of the Claimant's investment in the absence of such measures (the counterfactual "but for" scenario).*

136. *The parameters for this analysis would be similar to those the Claimant has assessed in its current damages model, except that under Scenario 1, the relevant comparison is between the situation as of 30 June 2020 – the date up to which Mexico's liability has been established – and the circumstances that would have existed but for those breaches. Selecting 30 June 2020 ensures that any loss that is attributable to Mexico's conduct after 30 June 2020 is excluded.*

137. *In the actual scenario assessed as of 30 June 2020, Mexico's continued inaction had already halted exploration at Sierra Mojada and denuded Silver Bull of its ability to exercise effective control of the Project. Even though the total loss of the Project attributable to Mexico's breaches crystallized on 31 August 2022, the Claimant had already been dispossessed of its investment and it was not clear if or when the Mexican authorities would act to resolve the Continuing Blockade. The contents of the criminal file in fact demonstrate that the Mexican authorities were not pursuing any action to resolve the Continuing Blockade as of 30 June 2020 – there are no documents in the criminal file from between October 2019, when Mineros Norteños's leaders refused to testify, and 30 June 2020.*

138. *The but-for scenario is straightforward. As Mr. Barry testified, had Mexico fulfilled its obligations, Silver Bull would have "go[ne] back to work and there [would have been] no real damage". In short, the Project would have continued advancing and its intrinsic value preserved.*

139. *Because BRG's valuation model relied on 31 August 2022 as the Valuation Date, its assumptions would require adjustment under Scenario 1, for example to reflect an adjusted comparator set of transactions by reference to the adjusted valuation date. The Claimant therefore requests respectfully that the Tribunal provide procedural directions for a brief quantum phase, allowing both Parties to adapt their valuations to the appropriate temporal framework while maintaining the same FMV-based methodology.*

140. *This approach would be consistent with tribunals' approaches in similar situations. For instance, in Total v. Argentina, the tribunal held that Argentina had breached its FET obligations towards a French investor in the gas industry as a result of its emergency laws but had not expropriated the investment. The tribunal considered that a subsequent quantum phase was "necessary for the parties to elaborate and document their respective positions as to damages". Here, as in Total, the finding on liability under Scenario 1 would similarly require an additional quantum phase.*

141. *Moreover, the TC Energy decision, which gave rise to Scenario 1, was issued in July 2024 – after the Claimant filed its Memorial and presented its quantum case. The Claimant could not have anticipated the need to plead an alternative valuation under a hypothetical scenario that did not yet exist. Procedural fairness requires affording both Parties the opportunity to recalibrate their damages analyses in light of the Tribunal's liability finding, as international practice consistently allows.*

142. *Mexico argued at the hearing that "the Claimants have not articulated damages specifically within the term of the NAFTA" and therefore "the Respondent's position on the quantum of damages in relation to Scenario 1 is that no claim for damages have been made within the term of the NAFTA". Mexico's position is overly simplistic. As*

explained above, the basic parameters of the Claimant's damages valuation would remain valid in Scenario 1, subject to the adjustments outlined above."

488. Silver Bull therefore asks, in its Request for Relief, that the Tribunal:

*"(e) GRANT the Claimant's request for a quantum phase, enabling both Parties to adapt their quantum valuations to the appropriate valuation date, in accordance with the Tribunal's further directions."*⁵⁰¹

489. Silver Bull thus says that it ought to be able to re-open the issue of quantum, even after the written pleadings and hearings have concluded. It says it could not have anticipated the need to plead alternative values because, when pleading, TC Energy had not yet been decided. In the Tribunal's judgment, however, that is not a persuasive argument. Mexico asserted its position in relation to the scope of Annex 14-C in its Counter Memorial. Though it is true that, at the stage, Mexico limited its reliance on the point to rebutting Silver Bull's claim for expropriation, the issue was clearly a live one. Silver Bull and its lawyers must have realised –on any reasonable view- that the question of whether Mexico's Section A obligations survived the termination of NAFTA would be in issue.

490. Moreover, it is apparent to the Tribunal that Silver Bull's decision to stick rigidly to its case – namely that it suffered no loss or damage whatsoever, and that it neither had nor should have had knowledge of any loss or damage, until South32 terminated the Option Agreement - must have been at least in part a strategic one, presumably dictated by a concern that asserting any earlier loss or damage would expose Silver Bull to the risk of losing the time-bar point which Mexico had raised in its Counter Memorial. As long as Silver Bull could successfully maintain the position that there was no loss or damage until August 2022, there was no chance that any of its claims would be wholly or partly barred by Articles 1116(2) or 1117(2).

491. Silver Bull could have advanced an alternative valuation of its claims in its Reply. It did not do so. As demonstrated above, for its own reasons, it ran its entire case on the basis of loss arising in and after August 2022. Mexico defended the case on that basis and, in its comments on Silver Bull's New Legal Authorities of 5 December 2025, it indicated its

⁵⁰¹ Silver Bull's Post-Hearing Brief, paragraph 205(e).

opposition to Silver Bull being allowed at that late stage to recast its case in its Post-Hearing Brief. In the Tribunal's judgment, Silver Bull is precluded from now reversing and recasting its approach and arguments. Indeed, it would be unjust to allow Silver Bull to run an entirely new "alternative" case at this stage of the arbitration, after the close of the oral hearings.

492. By way of postscript, the Tribunal is bound to observe that the suggestion that the fair market value of Silver Bull's investment had materially diminished by 30 June 2020 seems highly dubious. South32 plainly thought the Project capable of re-starting; it did not pull out until over two years later. Nor does the suggestion seem consistent with Mr. Barry's evidence referred to above. Moreover, any recoverable loss or damage would need to be attributable to Mexico's (alleged) breach or breaches of NAFTA on just three days. Whatever the true position as to any loss or damage as at the end of June 2020, it is not a case that Silver Bull should be allowed to advance for the reason stated above.

D. DO SILVER BULL'S CLAIMS RELATE TO INVESTMENTS PROTECTED BY SECTION A?

493. Mexico raised as its final jurisdictional objection the question whether all the investments in respect of which Silver Bull makes claims are ones covered by Article 1139 of NAFTA and Article 25(1) of the ICSID Convention.
494. In brief, Mexico argues that, as a result of the Valdez litigation, Minera Metalín neither owns nor controls much of the property it once held,⁵⁰² and that the Option Agreement, being a mere commercial agreement, is not a qualifying investment.⁵⁰³
495. In other circumstances these arguments might have led to a lengthy discussion of interesting and possibly difficult points. In the present case, however, given that Mexico accepts that Silver Bull does (or at least at the time it began the proceedings, did) have covered investments, and the fact that the Tribunal has held that all Silver Bull's claims for

⁵⁰² Mexico's Counter Memorial, paragraphs 345-350; Mexico's Rejoinder, paragraphs 523 and 530-534; and Mexico's Post-Hearing Brief, paragraphs 97-98.

⁵⁰³ Mexico's Counter Memorial, paragraphs 351 and 352; Mexico's Rejoinder, paragraphs 526-543; and Mexico's Post-Hearing Brief, paragraphs 97 and 98.

damages or compensation fail, the question of precisely what covered investments it holds or held is academic, and falls away.

E. CONCLUSION

496. The effect of the Tribunal's assessment and decisions above can be summarised as follows.

- (a) In respect of Article 1110, the Tribunal has no jurisdiction over Silver Bull's claim, and it must be dismissed.
- (b) In respect of Article 1105, Silver Bull's claims that Mexico breached its obligations are time-barred, insofar as they seek to base liability on Mexico's conduct prior to 28 June 2020; they are outside the Tribunal's jurisdiction insofar as they seek to base liability on Mexico's conduct after 30 June 2020; and they are all unsupported by a sustainable claim that Silver Bull has incurred loss or damage which was caused between 28 June and 30 June 2020. Accordingly, they must be dismissed.
- (c) In respect of Articles 1102 and 1103, Silver Bull's claims that Mexico breached its obligations are time-barred, insofar as they seek to base liability on Mexico's conduct prior to 28 June 2020; they are outside the Tribunal's jurisdiction insofar as they seek to base liability on Mexico's conduct after 30 June 2020; and they are unsupported by a sustainable claim that Silver Bull has incurred loss or damage which was caused between 28 June and 30 June 2020. Accordingly, they must be dismissed.

VII. COSTS

A. CLAIMANT'S COST SUBMISSIONS

497. The Claimant filed its Costs Statement on 5 December 2025 and an updated Costs Statement on 13 of April 2026. In its original statement, the Claimant requested that the Tribunal order the Respondent to (i) pay all costs of the arbitration and compensate the Claimant for all its costs and expenses incurred in relation to this proceeding; (ii) pay any

additional costs and expenses that the Claimant may incur before the Tribunal renders its award; (iii) reimburse the Claimant for the USD 200,000.00 advance on costs that the Claimant paid of Respondent's behalf on 30 September 2025; and pay compounded interest on such advancement until the date of payment, calculated on the basis of a reasonable commercial rate determined by the Tribunal.⁵⁰⁴ In its updated statement, in relation to (iii), the Claimant requested that the Tribunal grant such order or relief it deems appropriate to ensure that Claimant is fully indemnified with respect to the portion of the advances on costs it paid on behalf of the Respondent, to the extent Mexico has not yet reimbursed such amount.⁵⁰⁵

498. The Claimant requests compensation for a total amount of USD 7,626,300.99, which comprises fees and expenses for legal representation (USD 5,909,222.19), expert fees and costs (USD 791,811.61), costs incurred by witnesses (350,267.19), and lodging fee plus advances paid to cover the Tribunal's and ICSID's fees and expenses (USD 575,000.00).⁵⁰⁶
499. The Claimant's costs for legal and expert fees and expenses and for witness costs (including the lodging fee but excluding the advances on costs paid to ICSID) amount to **USD 7,076,300.99** and Claimant's arbitration costs (*i.e.*, the advances on costs paid to ICSID) amount to **USD 550,000.00**.

B. RESPONDENT'S COST SUBMISSIONS

500. The Respondent requests that the Tribunal order the Claimant to bear all costs and expenses of these proceedings, and to include any additional expenses related to these proceedings that Mexico reasonably incurs until issuance of the award.⁵⁰⁷
501. In its Costs Statement, as of 5 December 2025, as updated on 13 April 2026, the Respondent indicated it had incurred a total of **USD 1,975,423.76**, out of which **USD**

⁵⁰⁴ On 3 February 2026, ICSID requested each Party to pay an additional advance payment of USD 200,000.00 and informed the Claimant that its payment of 30 September 2025, which covered Respondent's share of the advance requested on 16 July 2025, had been credited to satisfy its share of the latest advance requested.

⁵⁰⁵ Silver Bull's Updated Statement of Costs, dated 13 April 2026.

⁵⁰⁶ Silver Bull's Statement of Cost, dated 5 December 2025, page 3.

⁵⁰⁷ Mexico's Rejoinder, paragraph 1042.

250,000.00 correspond to Tribunal and ICSID fees and expenses advanced by the Respondent.⁵⁰⁸

VIII. TRIBUNAL'S DECISION ON COSTS

502. Article 61(2) of the ICSID Convention provides:

“In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.”

503. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

504. The Tribunal takes a number of factors into account. This was a case where, at the outset, the interpretation of the USMCA was not yet fully established, and legitimate issues both of fact and law were raised. However, the Respondent has prevailed, and, in the Tribunal's judgement, that outcome also needs to be reflected in the order for costs. Moreover, in relation to the arbitration costs matters are complicated by the fact that (taking into account that the payment of USD 200,000.00 initially paid by the Claimant on behalf of the Respondent has subsequently been credited to satisfy advances due from the Claimant) the Claimant has advanced USD 549,960.00 whereas the Respondent has advanced only USD 250,000.00.

505. In the Tribunal's judgement, the Respondent should recover the majority of its costs reasonably incurred for legal and expert fees and expenses and for witness costs, and the Claimant should pay the majority of the costs of the arbitration.

506. Dealing first with the Respondent's costs for legal and expert fees and expenses and for witness costs. The claim is for USD 1,725,423.76 and (subject to the set-off referred to

⁵⁰⁸ Mexico's Costs Statement, dated 13 April 2026, page 1.

below) the Tribunal will order 60 percent of that, USD 1,035,254.25, to be paid to it by the Claimant.

507. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Mr. Ian Glick KC	181,140.28
Mr. Stephen Drymer	138,457.26
Prof. Philippe Sands KC	98,814.68
ICSID's administrative fees	156,000.00
Direct expenses	144,473.13
Total	<u>718,885.35</u>

508. The above costs have been paid out of the advances made by the Parties.⁵⁰⁹ The Claimant advanced USD 549,960.00 and the Respondent USD 250,000.00. Of the costs of the arbitration, the Claimant should pay 60 per cent and the Respondent 40 per cent. Because the Claimant has paid more than the Respondent, this allocation will be achieved by deducting by way of set off USD 37,554.14 from the USD 1,035,254.25 that would otherwise have been ordered to be paid by the Claimant to the Respondent in respect of legal and expert fees and expenses and for witness costs.
509. Accordingly, the Tribunal orders the Claimant to pay the Respondent (after set off) USD 997,700.11 to cover a reasonable proportion of the Respondent's legal fees and expenses.⁵¹⁰
510. In their pleadings, both Parties request that sums payable should bear compound interest at a commercial rate. However, in this case the only sum that is being ordered to be paid is in

⁵⁰⁹ The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

⁵¹⁰ The sum of USD 997,700.11 ordered to be paid by the Claimant was arrived at as follows: First, the costs of the arbitration have been allocated 60% to the Claimant (*i.e.*, USD 431,331.21) and 40% to the Respondent (*i.e.*, USD 287,554.14). Because the Respondent only advanced USD 250,000.00, the Claimant covered the USD 37,554.14 shortfall on the Respondent's behalf. Second, the Claimant owes the Respondent USD 1,035,254.25 for legal fees and expenses. The USD 37,554.14 arbitration costs shortfall covered by the Claimant must be deducted from this amount, resulting in a final payable amount of USD 997,700.11.

reimbursement of costs incurred by the Government of Mexico. In the Tribunal's judgement, the just order here is that simple interest at the US Prime Rate should be payable on that sum (or on the outstanding balance thereof) from the date of the Award until payment.

IX. AWARD

511. For the reasons set forth above, the Tribunal decides as follows:

- (1) In respect of Article 1110, the Tribunal has no jurisdiction over Silver Bull's claim, and it must be dismissed.
- (2) In respect of Article 1105, Silver Bull's claims that Mexico breached its obligations are time-barred, insofar as they seek to base liability on Mexico's conduct prior to 28 June 2020; they are outside the Tribunal's jurisdiction insofar as they seek to base liability on Mexico's conduct after 30 June 2020; and they are all unsupported by a sustainable claim that Silver Bull has incurred loss or damage which was caused between 28 June and 30 June 2020. Accordingly, they must be dismissed.
- (3) In respect of Articles 1102 and 1103, Silver Bull's claims that Mexico breached its obligations are time-barred, insofar as they seek to base liability on Mexico's conduct prior to 28 June 2020; they are outside the Tribunal's jurisdiction insofar as they seek to base liability on Mexico's conduct after 30 June 2020; and they are unsupported by a sustainable claim that Silver Bull has incurred loss or damage was caused between 28 June and 30 June 2020. Accordingly, they must be dismissed.
- (4) Orders the Claimant to bear 60% of the costs of the arbitration, and 60% of Respondent's own legal fees and expenses, which after setting-off of the costs of the arbitration already paid by the Claimant, results in the Claimant being ordered to pay the Respondent USD 997,700.11 corresponding to Respondent's own legal fees and expenses together with simple interest thereon (or on the outstanding balance thereof) at the U.S. Prime Rate from the date of this Award until payment.
- (5) Rejects all other claims and defenses.

[Signed]

Mr. Stephen Drymer
Arbitrator

Date: May 29, 2026

Professor Philippe Sands KC
Arbitrator

Date:

Mr. Ian Glick KC
President of the Tribunal

Date:

[Signed]

Mr. Stephen Drymer
Arbitrator

Professor Philippe Sands KC
Arbitrator

Date:

Date: May 29, 2026

Mr. Ian Glick KC
President of the Tribunal

Date:

Mr. Stephen Drymer
Arbitrator

Date:

Professor Philippe Sands KC
Arbitrator

Date:

[Signed]

Mr. Ian Glick KC
President of the Tribunal

Date: May 29, 2026