AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA

MEXICO – MEASURES CONCERNING LABOR RIGHTS AT THE SAN MARTIN MINE (MEX-USA-2023-31A-01)

FINAL DETERMINATION OF THE PANEL

RAPID RESPONSE LABOR MECHANISM
PANEL ESTABLISHED PURSUANT TO ARTICLE 31-A.5.3 OF THE USMCA

April 26, 2024

Panel Members

Gary Cwitco (Chair)
Lorenzo de Jesús Roel Hernández
Kevin P. Kolben

TABLE OF CONTENTS

ABBREVIATIONS USED IN THIS DETERMINATION

Abbreviation	Description
AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
Coaligados or Los Trabajadores Coaligados	The coalition workers working at the mine in Sombrerete, Zacatecas
IMMSA or San Martín mine	Industrial Minera México, S.A. de C.V. (San Martín Unit)
LFT	Mexican Federal Labor Law (*Ley Federal del Trabajo)*
FCAB or CAB	Mexican Conciliation and Arbitration Board (*Junta Federal de Conciliación y Arbitraje*)
Mexican Constitution	The Political Constitution of the United Mexican States
Mexico	United Mexican States
Mineros or Los Mineros	National Union of Mine, Metal, Steel and Allied Workers of the Mexican Republic (*Sindicato Nacional de Trabajadores Mineros, Metalúrgicos y Similares de la República Mexicana*)
RRLM or RRM or the Mechanism	Facility-Specific Rapid Response Labor Mechanism between the United States and Mexico
Rules or Rules of Procedure	Rules of Procedure for Chapter 31 (Dispute Settlement) (Annex III to Chapter 31)
SCJN	Supreme Court of Justice of the Nation (*Suprema Corte de Justicia de la Nación)*
SNTEEBMRM	National Union of Mine Exploration, Exploitation and Beneficiation Workers of the Mexican Republic (*Sindicato Nacional de Trabajadores de la Exploración, Explotación y Beneficio de Minas de la República Mexicana*)
STPS or MLSS	Mexican Ministry of Labor and Social Security
United States	United States of America
USMCA or T-MEC or CUSMA or Agreement	Agreement between the United States of America, the United Mexican States, and Canada, which entered into force on July 1, 2020
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

HOLDING

1. The matter submitted by the United States of America (i.e. the Complainant Party) for determination by the Panel does not come under the jurisdiction of the Facility-Specific Rapid Response Labor Mechanism (Mechanism) of the United States-Mexico-Canada Agreement (USMCA), and therefore the Panel is not empowered to make a Denial of Rights determination in this instance. To fall within the jurisdiction of the Mechanism, the Panel must determine: (a) that the San Martín mine is a Covered Facility as defined in Article 31-A.15 of the Mechanism; and, (b) that the claim has been brought with respect to an alleged Denial of Rights under legislation that complies with Annex 23-A (Worker Representation in Collective Bargaining in Mexico).

2. The Panel finds that the San Martín mine qualifies as a Covered Facility under Article 31-A.15 (ii) of the Mechanism, and thus meets the first jurisdictional test for justiciability. However, the Panel also finds that the conduct alleged to constitute a Denial of Rights does not meet the jurisdictional requirements of Chapter 31-A, because it has not been brought with respect to an alleged Denial of Rights under legislation that complies with Annex 23-A. Here, the conduct challenged by the Complainant Party as an alleged Denial of Rights is, under Mexican Constitutional Law and Mexico's Federal Labor Law (LFT), subject to the jurisdiction of pre-2019 versions of the LFT as well as pre-2019 adjudicatory bodies. Therefore, the matter falls outside of the jurisdiction of the Mechanism.

I. INTRODUCTION

3. The dispute before the Panel presents an unusually complicated set of facts and legal issues. The complexity is exacerbated by the length of time over which those events have taken place, and by the complicated jurisdictional issues that are raised in the denial of rights claim. While the United States does not argue that every event or action in the factual history below constitutes a Denial of Rights, it is important to review the key events and origins of this dispute, which date well before the entry into force of the USMCA on July 1, 2020. The historical context is important because the events alleged to constitute an ongoing denial of rights originate directly or indirectly in a legal strike that commenced in 2007. Because of the procedural history of these events, Mexican courts have applied versions of the LFT enacted *prior* to the 2019 Labor Law Reform to adjudicate the many legal disputes that have arisen out of the ongoing strike.

A. Procedural History

4. On May 18, 2023, the United States notified Mexico (i.e. the Respondent Party) that on May 15, 2023, it received a petition regarding the San Martín mine, located in the vicinity of Sombrerete, Zacatecas.[1]

[1] USMCA Rapid Response Mechanism petition from the USW, AFL-CIO, and Miners' Union, May 15, 2023, Annex USA-1; Email Communication from Josh Kagan (Assistant U.S. Trade Representative for Labor Affairs, USTR) to Karime Danae Tapia Nacar (Mexican Secretariat of the Economy), May 18, 2023, Annex USA-2. Article 31-A.4.1 of the USMCA provides that a Party shall notify the other Party within five business days of initiating its domestic process for determining whether to invoke the Mechanism. The United States stated that it began its domestic process regarding the San Martín mine on May 15, 2023.

5. On June 16, 2023, the United States requested Mexico, under Article 31-A.4.2 of the Mechanism, to conduct a review of an alleged Denial of Rights at the San Martín mine.[2] The United States alleged that workers at the mine were being denied their rights to freedom of association and collective bargaining in violation of Mexico's obligations under both the LFT and the USMCA. The United States made two central claims: First, it alleged that despite there being an ongoing legally recognized strike at the San Martín mine, the mine was open and operating in violation of the LFT, which requires that during a legal strike nearly all work must cease in that facility.[3] Second, the United States alleged that the employer, Grupo México,[4] was engaged in collective bargaining with a group of workers that was not the recognized union in possession of the exclusive collective bargaining rights at the mine. The Complainant Party thus alleges in this dispute that the conduct in question violates several sections of the LFT related to freedom of association and collective bargaining.[5]

[2] Review Request from the United States Trade Representative to Mexican Secretary of the Economy, June 16, 2023, Annex MEX-1.

[3] Request for the establishment of a panel, Annex MEX-5; in relation to Article 935 of Mexico's Federal Labor Law (*Ley Federal del Trabajo* - LFT).

[4] While the petition referred to Grupo México as the employer, the owner and direct employer of the San Martín mine is the Mexican headquartered Industrial Minera Mexico, S.A. de C.V. (IMMSA). IMMSA, in turn is held by Minera Mexico S.A. de C.V, a Mexican holding company which in turn is owned by Southern Copper Corporation (SCC), a corporation chartered in the state of Delaware, USA. SCC is a subsidiary of Americas Mining Corporation, an American Holding Company, which in turn is owned by Grupo México, the parent company. See, United States' Reply Submission, para. 11.

[5] These include Article 449 of the LFT, which requires that "the court and the corresponding civil authorities enforce the right to strike, granting workers the necessary guarantees and giving them the assistance that they request in order to suspend the work"; Article 935 of the LFT, which requires that "prior to the suspension of work, the court, with a hearing of the parties will establish the indispensable number of workers who will continue working so that the work continues to be carried out, whose suspension seriously damages the safety and conservation for the premises…"; Section IV of Article 133 of the LFT, which prohibits employers or their representatives from "obligating workers by coercion or by any other means, to join or withdraw from the union or group to which they belong, or to vote for a certain candidacy, as well as any act or omission that violates their right to decide who should represent them in the collective bargaining;" and Section VII of Article 133 of the LFT, which provides that employers or their

6. On June 26, 2023, Mexico confirmed its intention to conduct an internal review.[6]

7. On July 31, 2023, Mexico shared its findings with the United States. Mexico determined that the United States' allegations regarding the situation at the San Martín mine were outside the Mechanism's scope of application.[7] Mexico claimed that: (1) the alleged Denial of Rights at the San Martín mine took place before the USMCA entered into force, and thus the events alleged to constitute a Denial of Rights are not subject to review under legislation that complies with Annex 23-A of the USMCA; and (2) the San Martín mine does not constitute a "Covered Facility" within the meaning of Article 31-A.15. Therefore, in Mexico's view the subject matter of the complaint did not fall within the scope of the Mechanism because Mexico's obligations under Annex 23-A and Annex 31-A commence only from the entry into force of the USMCA (July 1, 2020), whereas the legally relevant origin of the dispute at the mine precedes this date.[8] Therefore, the "request for review was not within the scope of the Mechanism."[9]

8. On August 22, 2023, the United States sent a letter to Mexico disagreeing with its determination. It stated that it continued to have a good faith belief that a Denial of Rights was occurring at the San Martín mine, and it therefore requested the establishment of a Panel in

representatives are prohibited to "Execute any act that restricts workers' rights granted to them by law." Request for the establishment of a panel, August 22, 2023, Annex MEX-5. See also USMCA Rapid Response Mechanism petition from the USW, AFL-CIO, and Miners' Union, Annex USA-1.

[6] Letter from Alejandro Encinas Nájera (Undersecretary, Mexican Secretariat of the Economy) to Jayme White (Deputy United States Trade Representative), June 26, 2023, Annex USA-3 and Annex MEX-2.

[7] Mexico's Results from Internal Investigation Concerning Denial of Rights at the San Martín Mine, July, 31, 2023, Annex MEX-3 and USA-4.

[8] Ibidem.

[9] Mexico's Results from Internal Investigation Concerning Denial of Rights at the San Martín Mine, July, 31, 2023, Annex MEX-3, at para 60.

accordance with Article 31-A.5.1(a) "to request that the respondent Party allows the Panel an opportunity to verify the Covered Facility's compliance with the law in question and determine whether there has been a Denial of Rights."[10]

9. The Secretariat established a Panel on August 30, 2023, pursuant to Article 31-A.5.3 of the Mechanism. The Panel members were chosen by lot from the panelist lists established per the rules in the Mechanism.[11] The Panel is composed of the following members:

Gary Cwitco (Chair), Joint List

Lorenzo de Jesús Roel Hernández, Mexican List

Kevin P. Kolben, United States List

10. Endeavoring to comply with the five business day timeframe provided for in the Mechanism, on September 6, 2023, the Panel "confirmed" the United States' request pursuant to Article 31-A.6.[12] The Panel also noted that "nothing in its confirmation prejudged arguments that the Parties might make with respect to any issue before the panel, including but not limited to: (i) whether the San Martín mine is a Covered Facility within the meaning of Article 31-A.15; (ii) whether the alleged Denial of Rights is covered by the USMCA; and (iii) the substance of the allegations."[13]

[10] United States Communication to Mexico Providing Its Reasons for Disagreement with Mexico's Determination of No Denial of Rights, Annexes MEX-4 and Request for the establishment of a panel, August 22, 2023, Annex MEX-5.

[11] Article 31-A.3 of the USMCA.

[12] Article 31-A.6 of the USMCA.

[13] Panel's confirmation of petition pursuant to Article 31-A.6 of the USMCA, September 6, 2023, attached as Annex I to this report.

B. Factual History

11. The central facts and events that the Panel deems most relevant to the resolution of the jurisdictional issues in this complaint are as follows. Notably, the Parties have by and large accepted that there are few facts in dispute – only their legal consequences.

i. The 2007 Strike

12. In 2007, the leadership of the Sindicato Nacional de Trabajadores Mineros, Metalúrgicos, Siderúrgicos y Similares de la República Mexicana (Mineros) declared a strike at the San Martín mine owned by Industrial Minera de México, S.A. de C.V. (IMMSA), a subsidiary of Grupo México.[14] At or around the same time, the Mineros also initiated strikes at two other IMMSA-owned mines whose workers at the time were also represented by the Mineros.[15] The Mineros claimed the main issues at the San Martín mine concerned health and safety conditions, the employer's compliance with certain provisions of the collective bargaining agreement (CBA), including the recognition of the union and its leadership, and payment of dues owed to the union.[16] The Mineros submitted its strike petition to the Mexican government on June 28, 2007, and the strike officially commenced on July 30, 2007.[17]

[14] According to the LFT applicable at the time, no strike vote by the membership was legally necessary to commence a strike.

[15] Those mines are the Cananea and Taxco mines. The Taxco mine remains on strike, while the Cananea mine is not on strike and is currently represented by a different union, namely, the Sindicato Nacional de Trabajadores de la Exploración, Explotación y Beneficio de Minas de la República Mexicana (SNTEEBMRM).

[16] Mexico, Initial Written Submission, para. 21.

[17] List of Demands with Strike Notice from the Union, June 28, 2007, Annex MEX-10.

13. According to the LFT, once a strike is declared and it meets certain procedural requirements, all work at a facility must cease apart from a specified number of workers determined by the authorities who "must… continue the work, the suspension of which would seriously prejudice the safety and conservation of the premises, machinery and raw materials or the resumption of the work." [18] For the purposes of this dispute, production at the mine effectively ceased until 2018 when another chain of events pertinent to this dispute began.[19]

14. July 30, 2007, is a central date for the legal resolution of this case because under Mexican law all the subsequent events and litigation, including the events alleged to constitute a Denial of Rights by the United States are, in the analysis of the Panel, subject to the pre- 2017 Constitutional law and the pre-2019 LFT.

15. Under the Mexican industrial relations system, strikes are a powerful tool that unions use to resolve conflicts with employers. Because the LFT imposes no duty to bargain in good faith on unions or employers, the strike serves as a central tool to induce employers and unions to either come to the table and/or utilize legal procedures to resolve disputes and return to normal activities as soon as possible.[20] Indeed, the length of this strike, the factual background, the amount of litigation, and the time to resolve that litigation are by all accounts wholly out of the ordinary and have been costly both for the workers and the employer.

[18] Article 935 of the LFT.

[19] See *infra* Section I(B)(iv) in this report.

[20] See Professor Graciela Bensusán, Transcript of testimony of legal expert, para. 38

ii. Imputability Trial

16. On January 24, 2011, IMMSA filed a request for an imputability trial. An imputability trial is a request to a labor court or tribunal that it make a final determination about who is responsible for causing the strike, and that the court or tribunal issue a determination on any potential remedy. The remedy may include, for example, backpay for workers, other forms of compensation, and/or requirements to comply with clauses of the CBA. Importantly, an imputability request implies that if a labor court makes a final adjudication on a strike action and which party is at fault, the court's resolution ends the strike.[21]

17. Under the version of the LFT applicable at the time, however, an imputability trial could only be requested by a union and not by an employer. Accordingly, IMMSA's request was initially rejected by the Federal Conciliation and Arbitration Board (FCAB).[22] IMMSA appealed the decision, and on November 7, 2012, the Supreme Court of Justice of the Nation (SCJN) held that the provision of the LFT granting only unions the right to file an imputability request was unconstitutional, and that employers such as IMMSA had the right to request an imputability trial and, by extension, the termination of a strike.[23] The litigation before the FCAB continued from 2013 to 2014, when the FCAB declared the investigation completed, but, for reasons unclear to

[21] Id. at para. 68; in relation to Section IV of Article 469 and Article 937 of the LFT.

[22] Special Board No. 16 of the Federal Conciliation and Arbitration Board, Agreement on the Imputability Request, February 24, 2011, Annex MEX-20.

[23] Second Chamber of the Supreme Court of Justice of the Nation, Judgment on Amparo in Review, November 7, 2012, Annex MEX-21. That judicial decision granting the employer the right to file an imputability lawsuit is incorporated into the 2019 LFT. Therefore, in the 2019 reform to the LFT, both unions and employers are granted the right to request an imputability trial to end a strike. In the case of employers, however, the current law provides that the request may only be made if the strike lasts for more than 60 days. See Article 937 of the LFT.

the Panel, no final resolution was issued.[24] On March 15, 2018, seven years after IMMSA's initial filing, and after the nominal success of a rival union in winning ownership of the CBA, as discussed in the next section, the Mineros decided to file its own request with the FCAB to issue an imputability award.[25]

18. On June 14, 2023, the FCAB issued a final resolution in the imputability proceeding that had begun in 2011 upon petition by IMMSA, and then joined in 2018 by a similar petition by the Mineros.[26] The June 14, 2023 resolution held that the strike was imputable to IMMSA, meaning IMMSA bore legal responsibility for the start of the strike. Accordingly, IMMSA was required, among other orders, to recognize the union's leaders, pay a significant amount of backpay to the workers who had been on strike since 2007, and remit union dues to the Mineros.[27] In addition, the tribunal granted 15 days to the striking workers who had not returned to work to do so if they so chose. After 15 days, if the striking workers did not report for work, IMMSA would be under no obligation to rehire them.[28]

19. The Mineros, IMMSA, and the Coaligados appealed the July 14, 2023 resolution by filing Amparos to the Collegiate Court for Labor Matters. However, while each party appealed on

[24] Chart of Relevant Trials prepared by Mexico, Annex MEX-56, sections 18 and 19.

[25] Miners' Union's Request of Imputability, March 8, 2018, Annex MEX-26.

[26] Special Board No. 10 of the Federal Conciliation and Arbitration Board, Imputability Award, June 14, 2023, Annex MEX-47.

[27] Ibidem.

[28] Ibidem.

various grounds, none, including the Mineros, requested that the element of the FCAB decision establishing that the strike was over be declared null and void. [29]

iii. CBA Ownership (*Titularidad*)

20. While the initial imputability litigation was proceeding, on August 14, 2013, a rival union to the Mineros, namely the Sindicato Nacional de Trabajadores de la Exploración, Explotación y Beneficio de Minas en la República Mexicana (SNTEEBMRM), filed a claim for ownership of the CBA that was legally held by the Mineros.[30] SNTEEBMRM requested a vote or "recount" (*recuento)* that was to be carried out by secret ballot in the presence of the FCAB at the San Martín mine.[31]

21. The Mineros, in turn, filed a claim for ownership of the CBA on June 16, 2017 in opposition to the effort by the SNTEEBMRM.[32] On February 28, 2018, the FCAB conducted a vote (*recuento)* and the result was that out of 414 workers eligible to vote, 262 voted for SNTEEBMRM and 150 for the Mineros, with two null votes recorded.[33] On June 26, 2018 the FCAB issued an initial decision whereby it legitimated the vote and granted ownership of the CBA to the SNTEEBMRM.[34]

[29] Sindicato Minero, Motion Submitted for Direct Amparo, June 30, 2023, Annex MEX-48; IMMSA, Motion Submitted for Direct Amparo, June 30, 2023, Annex MEX-51; Coaligados, Motion Submitted for Direct Amparo, August 18, 2023, Annex MEX-52.

[30] CBA Ownership Claim filed by SNTEEBMRM, August 14, 2013, Annex MEX-27.

[31] Id, pages 8-10.

[32] Miners' Union, Response to the complaint by SNTEEBMRM and counterclaim, June 16, 2017, Annex MEX-28, pages 70 and 72.

[33] Special Board No. 10 of the Federal Conciliation and Arbitration Board, Headcount of Union Representative Election, February 28, 2018, Annex MEX-29.

[34] Special Board No. 10 of the Federal Conciliation and Arbitration Board, First Ownership Award, June 26, 2018, Annex MEX-30, page 36.

22. The Mineros appealed that decision, however, and, after a lengthy litigation process, the 2018 FCAB decision in favor of the SNTEEBMRM that upon appeal was eventually overturned by the SCJN on June 23, 2021.[35] The SCJN held that during an ongoing strike action, *titularidad* from the striking union may not be transferred to another union until the strike legally ends. The Mineros thus legally retained ownership of the CBA and the exclusive rights to negotiate the CBA with the employer. This remains the current status.[36]

iv. Strike Termination by the Coaligados

23. The next set of events that relates to the original strike action is an effort by a dissident group of workers to end the strike at the San Martín mine and return to work. The United States argues that the ongoing operation of the mine, which directly resulted from that effort, violates Articles 449 and 935 of the LFT and thus illegal.[37] Consequently, the United States alleges that IMMSA is engaging in a Denial of Rights.

24. On August 21, 2018, subsequent to the vote to transfer *titularidad* to the SNTEEBMRM, a group of workers referring to themselves as the "Coaligados" organized a vote to end the strike. According to the submissions to the FCAB by the Coaligados, 253 out of the 485 voting-eligible striking workers attended the meeting, and all 253 voted to end the strike with zero workers

[35] Second Chamber of the SCJN, Judgement on Amparo in Review, July 23, 2021, Annex MEX-34, para. 41-42; see also Annex USA-11 at 35-36.

[36] Special Board No. 10 of the FCAB, Incidental Resolution on Legal Personality, June 9, 2023, Annex MEX-46 at 17-19 (reaffirming status of Los Mineros as the titular union at the facility).

[37] In its Request for a Panel, the United States quoted from the LFT in effect as of May 1, 2019. In its Reply Submission, the United States clearly articulates its argument that it "has identified *current* conduct at the facility and is challenging these ongoing actions as a breach of *current* Mexican law that complies with Annex 23-A."

voting against.[38] The next day, the Coaligados together with IMMSA submitted a notarized set of meeting minutes and a petition to the FCAB requesting the legal termination of the strike. On August 23, 2018, two days after the vote took place, the FCAB declared the strike legally terminated by means of agreement between the workers and the employer.[39]

25. Once the FCAB entered its decision, work at the mine restarted soon thereafter.

26. The Mineros appealed the FCAB decision certifying the termination of the strike, and on May 31, 2019, the Third District Labor Court reversed the FCAB's August 23, 2018 decision to end the strike.[40] Specifically, the court held that because the Coaligados lacked legal personality, it did not have the power to unilaterally end a strike, and that the Mineros should have been entitled to a hearing on the matter before the FCAB.[41] More appeals and litigation ensued, but it was not until June 9, 2023 that the FCAB definitively ruled that its August 23, 2018 determination that the strike had been terminated by the workers was null and void.[42] That final decision was handed down nearly four years after the Coaligado's initial vote and FCAB determination. During that time, the mine re-commenced full operations with the 253 "Coaligados" in addition to a number of additional employees subsequently hired by the mine.

[38] Minutes of the Assembly held by the Coalition Workers, August 21, 2018, Annex MEX-38.

[39] Special Board No. 10 of the Federal Conciliation and Arbitration Board, Appearance resolution, August 23, 2018, Annex MEX-39.

[40] Third District Court for Labor Matters in Mexico City, Judgement on Amparo Trial, May 31, 2019, Annex MEX-43.

[41] Ibidem.

[42] Special Board No. 10 of the FCAB, Incidental Resolution on Legal Personality, June 9, 2023, Annex MEX-46.

v. Negotiations between IMMSA and the Coaligados

27. The final relevant set of facts in this dispute concerns a series of negotiations and negotiated agreements that were allegedly concluded between IMMSA and the Coaligados.[43] These agreements and negotiations are relevant to this dispute because the United States argues that the negotiations constitute a violation of the LFT, specifically Sections IV and VII of Article 133, and thus constitute a Denial of Rights.[44] The United States presented evidence of agreements that were first concluded on September 2018,[45] and subsequent agreements that were executed again in 2020, 2021, 2022, and 2023.[46]

II. JURISDICTION

28. Before it may undertake any substantive analysis of whether there exists a Denial of Rights, the Panel must first determine if it has jurisdiction over the dispute. The general parameters of our jurisdiction are set out in Article 31-A.2 of the USMCA and its accompanying footnote. This Article establishes that:

> the Mechanism shall apply whenever a Party (the "complainant Party") has a good faith basis belief that workers at a Covered Facility are being denied the right of free association and collective bargaining under laws necessary to fulfill the obligations

[43] The correct term for and characterization of these discussions and contract negotiations are matters of dispute between the parties.

[44] See U.S. Reply Submission paras. 68-72.

[45] Extraordinary Bonus Agreement, September 21, 2018, Annex MEX-40.

[46] Id. at para. 70. See also agreements between IMMSA and the Coaligados, Annex USA-16, Annex USA-17, and Annex USA-18. Mexico argues *contra* the United States that these agreements do not in fact constitute enforceable collective bargaining agreements under Mexican law *inter alia* because not all signatures are present under the printed names of the agreements, and because they were never submitted to the relevant authorities for validation.

> of the other Party (the "respondent Party") under the Agreement (a "Denial of Rights").[47]

29. Footnote 2, which is appended to the end of Article 31-A.2, in turn, reads:

> With respect to the United States, a claim can be brought only with respect to an alleged Denial of Rights owed to workers at a covered facility under an enforced order of the National Labor Relations Board. With respect to Mexico, a claim can be brought only with respect to an alleged Denial of Rights under legislation that complies with Annex 23-A (Worker Representation in Collective Bargaining in Mexico).

30. Central to applying Article 31-A.2 is the definition of the term "Covered Facility." Article 31-A.15 of the Mechanism provides that one of two conditions must be met for a facility to be considered a Covered Facility. Article 31-A.15 reads:

> For the Purposes of this Annex: Covered Facility means a facility in the territory of a Party that: (i) produces a good or supplies a service traded between the Parties; or (ii) produces a good or supplies a service that competes in the territory of a Party with a good or a service of the other Party, and is a facility in a Priority Sector.

31. The term "Priority Sector" is defined in the same Article 31-A.15 as "a sector that produces manufactured goods, supplies services, or involves mining." There is no question that the San Martín mine is a facility in a Priority Sector (i.e. the mining sector). There is, however, a question as to whether the San Martín mine qualifies as a Covered Facility under Article 31-A.15.

[47] Protocol Replacing the North American Free Trade Agreement with the Agreement Between Canada, the United States of America, and the United Mexican States (United States-Mexico-Canada Agreement - USMCA/T-MEC/CUSMA) signed on November 30, 2018, entered into force on July 1, 2020, Article 31-A.2.

32. The complainant Party bears the burden of demonstrating that the alleged conduct falls within the scope of the Mechanism.[48] In its initial Request for a Panel, the United States asserted that the conduct that allegedly constituted a Denial of Rights was subject to the Mechanism and thus fell within the jurisdiction of the Panel. Adopting a *prima facie* standard of review, the Panel held that the statements and evidence provided in the Request were sufficient to meet the pleading requirements, and it confirmed the Request for a Panel.[49] However, the Panel also stated it would subject the jurisdictional issues to further investigation during the procedure.[50]

33. Mexico subsequently argued in its Initial Written Submission that the Panel lacked jurisdiction over this matter.[51] It argued, first, that the Panel lacks *rationae voluntatis* and *ratione materiae* jurisdiction because the "labor legislation set forth in Annex 23-A of the USMCA is not applicable" to the case;[52] second, that it lacked *rationaae temporis* jurisdiction because the "measures claimed by the United States predate the entry into force of the USMCA;[53] and third,

[48] USMCA Rules of Procedure for Chapter 31 (Dispute Settlement), established in accordance with Article 30.2.1(e) (Free Trade Commission) and Article 31.11 (Rules of Procedure for Panels), adopted by Decision No.1 Annex III of the Free Trade Commission on July 2, 2020, Article 14.

[49] Article 31-A.6 of the Rules of Procedure provides that "[a] panel established under Article 31-A.5 shall have five business days after it is constituted to confirm that the petition:

(a) identifies a Covered Facility;

(b) identifies the respondent Party's laws relevant to the alleged Denial of Rights; and

(c) states the basis for the complainant Party's good faith belief that there is a Denial of Rights."

[50] Panel's confirmation of petition pursuant to Article 31-A.6 of the USMCA, September 6, 2023, attached as Annex I to this report.

[51] Mexico's Initial Written Submission, Part IV.

[52] Id. at para. 113.

[53] Id. at para. 130.

that the Panel lacks *Ratione Materiae* jurisdiction because the San Martín mine is not a Covered Facility.[54]

34. The Panel's jurisdiction analysis thus focuses on three jurisdictional questions: (1) is the San Martín mine a Covered Facility?; (2) is the alleged Denial of Rights "brought under legislation that complies with Annex 23-A?"; and (3) are the events alleged to constitute a Denial of Rights retroactive to before the time of the entry into force of the Agreement, and thus not subject to the Mechanism's Jurisdiction.

35. We address these issues in the order they are presented in Article 31.A.2.

a. Whether the San Martín mine constitutes a "Covered Facility"

36. We first turn first to the question of whether the San Martín mine is a Covered Facility. Again, Article 31-A.15 reads:

> For the Purposes of this Annex: Covered Facility means a facility in the territory of a Party that: (i) produces a good or supplies a service traded between the Parties; or (ii) produces a good or supplies a service that competes in the territory of a Party with a good or a service of the other Party, and is a facility in a Priority Sector.

37. Both conditions (i) and (ii) share common language, specifically: "Covered Facility means a facility in the territory of a Party that: produces a good or supplies a service…" We therefore analyze those clauses together.

[54] Id. at para. 139.

i. Definition of a "Covered Facility" that "produces a good or supplies a service"

a. Arguments of the Parties

38. In its submissions, the United States argues that it has met its burden to show that the San Martín mine is a Covered Facility. To meet its burden under Article 31-A.15(i), it presents SEC 10-K filings from Southern Copper Corporation (SCC)—the U.S. headquartered and New York Stock Exchange listed holding company of IMMSA. Those filings state that IMMSA operations, which include several underground mines in addition to the San Martín mine, export metal ore to the United States.[55] The United States acknowledges that it does not possess "disaggregated sales data that separates out the export information for each mine."[56] But because "IMMSA shows large amounts of exports into the U.S. from the IMMSA mines during this period," the United States argues it has met its burden to show the San Martín mine is a "facility in the territory of a Party that produces a good or supplies a service traded between the Parties."[57]

39. The United States argues that it has also met its burden of showing the San Martín mine is a Covered Facility under the second condition, 31-A.15(ii). Again, to meet its burden of proof, the United States points to SCC's SEC filing, and states that "[i]n 2022, the IMMSA unit recorded $464.7 million dollars in sales specifically within the territory of Mexico. The company had sales of $387.6 million in the territory of Mexico in 2021. In 2020, Grupo Mexico [sic] had a total of

[55] Southern Copper Corporation, Presentation 10-K, February 28, 2023, Annex USA-5, pp. 174-175.

[56] United States' Reply Submission, para. 54.

[57] Ibidem.

$341.1 million dollars in sales within the territory of Mexico."[58] It also provides documentation that United States firms exported the same metal ores into Mexican territory, as required by Article 31-A.15(ii), that IMMSA allegedly entered into the Mexican stream of commerce by citing to US Census data and Mexican trade statistics.[59] In brief, the United States argues in its Reply Submission that, to meet its burden, it is sufficient to show that IMMSA's group of mines, and not the San Martín mine specifically, exports goods to the United States (Article 31-A.15(i)), and/or produces goods for domestic sale in Mexico that compete with United States goods (Article 31-A.15(ii).[60]

40. While the United States did not propose a general interpretive theory of "produces a good or supplies a service" in its written submissions, during the hearings before the Panel, it made a broader argument about the Covered Facility test than previously articulated in its earlier written submissions. It argued that a specific facility need not produce a good or service that is *itself* exported to the United States. It stated that "the definition reflects that, in a circumstance in which a good is traded between the parties, and when the facility in question is a producer of such a good, then the RRM will apply to that facility."[61] That is, the specific good or service need not emanate directly from the facility in question, but rather the facility in question must produce a good or service that is exported to the United States, even if by other producers.[62]

[58] Id. at para. 55. Presumably, the Complainant Party meant to refer to IMMSA and not Grupo Mexico.

[59] Id. at paras. 56-57; Appendix: U.S. exports of copper minerals and concentrates to Mexico, Annex USA-22.

[60] United States' Reply Submission, para.54.

[61] United States' opening statement at the hearing, Hearing transcript, para. 41.

[62] Ibidem.

41. Mexico argues in its written submissions that the evidence presented by the United States is insufficient to meet its burden under either Article 31-A.15 (i) or (ii). This is because the Mechanism requires that to satisfy the requirements of Article 31-A.15 (i) or (ii),[63] the good or service exported to the United States or, respectively, produced for the Mexican market must be shown to originate from the specific facility in question.[64]

b. Panel's Interpretation

42. The Panel agrees with Mexico's interpretation of Article 31-A.15(i) and (ii). Specifically, that to show that a facility is a Covered Facility, the complainant Party has the burden to prove that the goods or services referred to in Article 31-A.15(i) and (ii) originate from the specific facility in question.

43. If the first condition of the Covered Facility test were to be read as broadly as the United States would have the Panel do, it could lead to the finding of a Denial of Rights in facilities with no proximate trade link with United States commerce. Such an interpretation could in theory allow for the finding under Article 31-A.15(i), for example, of a denial of rights in a factory that produces carburetors solely for export to the Chinese market just because other Mexican factories produce "like" carburetors that are exported to the United States market.

[63] Mexico's Initial Written Submission, para. 149.
[64] Ibid.

44. Similar problems arise with the application of the United States' interpretation of Article 31-A.15(ii). For example, the SEC filings the United States relies on also state that IMMSA exports metal ores from its mines to Europe, Asia, and the Americas. But the filings do not disaggregate data based on individual mines.[65] Conceivably, based on this information, all the ores from the San Martín mine could be exported only to markets outside of Mexico. It would therefore be odd that the Mechanism might apply to a facility that does not export into the market of the complaining Party, into its own market, or into the market of any Party to the USMCA, for that matter.

45. The expanded United States interpretation of Article 31-A.15(ii) expressed at hearings could even mean a facility is a Covered Facility under that section if it exports all its goods or services outside the North American trading region. This is because other factories in the Responding Party's territory might produce the same good or service for sale or consumption in the respondent Party's territory, and the complainant Party exports the same good or service into the respondent Party's territory. These results make little sense given the purpose and context of the Mechanism, which is to address Denials of Rights in specific facilities that are implicated in direct trade relationships with the United States.

46. One way of understanding the relationship is thus: the Parties to the USMCA are providing each other special tariff treatment provided that each Party adheres to certain rules. Those rules

[65] See Appendix: U.S. exports of copper minerals and concentrates to Mexico, Annex USA-22.

are presumably related to trade between the Parties. The Parties have agreed to a Mechanism that ensures that facilities producing goods that either enter the stream of commerce of another Party, or that remain in the territory of a Party but "compete" with goods of another Party in that territory, then the Mechanism applies. One justification proffered by the United States in hearings for the inclusion of the Mechanism in a trade agreement, and thus being subject to trade remedies, is to address conditions of unfair competition. That is, violating freedom of association and collective bargaining rights in a specific facility means the cost of producing that good will be "unfairly" reduced, thus providing an unfair advantage in the market. If that were true, it makes little sense to then apply the Mechanism to facilities with no trade relations with the complainant Party. In addition, the United States argued that there were other interests other than unfair competition that underlie the purpose of the Mechanism, such as mutually shared commitments to protecting workers' rights.[66]

47. In adopting this interpretation of the text, the Panel understands the intent of the Covered Facility requirements to be expansive such that it can address Denials of Rights at facilities with a trade nexus to a complainant Party's market or its exports into a respondent Party. The language includes all priority sector firms that either (a) export directly to the United States, or, (b) produce for a Mexican market in which United States exports also compete. These two tests are clearly expansive in their reach – indeed, many thousands of facilities surely come under its scope.

[66] United States´ statement at the hearing, Hearing transcript, page 116.

48. But the coverage is not without limits, and the Panel cannot accept the expansive interpretation of the United States that the Covered Facility definition should be read to include (a) all facilities that produce goods or services that, as a category, are traded between the Parties, even if the specific facility does not in fact do so; or, (b) that produce categories of goods and services for the domestic market that the United States also exports to Mexican Territory.[67] Such an interpretation would make the Covered Facility definition almost meaningless as a condition that delimits access to the Mechanism. In the view of the Panel, violations of the rights to freedom of association and collective bargaining in facilities, i.e. a Denials of Rights, must have, under the Mechanism, a trade nexus to the complainant Party. The burden to demonstrate this nexus falls upon the complainant.

49. The structure of remedies provided for in Annex 31-A also supports the Panel's interpretation. For example, before a finding of a Panel is issued, the Mechanism provides that a Party may "delay final settlement of customs accounts related to entries of goods from the Covered Facility"[68] as soon as a request for a panel is delivered to the respondent Party. Such a request would presumably only apply to a facility that directly exports to the United States if the facility is, as here, claimed to qualify as a Covered Facility under Article 31.A.15(i).

50. The same is true of the remedies provided for in the event a Panel finds a Denial of Rights. For example, in the case that a Panel finds in favor of a complainant Party, and if the Parties cannot

[67] United States' Reply Submission, pages 17-19.

[68] Article 31-A.4.3 of the USMCA.

agree on a remedy, the Mechanism provides that successful complainants may suspend "preferential tariff treatment for goods manufactured at *the* (emphasis added) Covered Facility or the imposition of penalties on goods manufactured at or services provided by *the* Covered Facility."[69] The Panel emphasizes "the" here because the remedies are intended to finely target the facility in question. If a facility can be shown neither to export to the complainant Party's market, nor produce for the domestic market, there is no remedy provided for that would be able to specifically target that facility. Unlike trade remedies in other contexts, there is no facility to impose remedies, for example, on categories of goods as a whole. The remedies must be targeted to the facility in which a Denial of Rights occurred.

51. These remedies, including the initial suspension of liquidation orders, might not significantly affect trade flows between the Parties, but could significantly affect the financial viability and competitiveness of firms that might compete with complainant Party's firms *outside* of the USMCA economic territory. If the jurisdiction of a Panel were such that it could find a Denial of Rights in nearly any facility in a Party's territory that produces for the global market, it would potentially open the door to trade-restricting conduct, which is explicitly not the intent of the Mechanism.[70]

[69] Article 31-A.10 of the USMCA.

[70] Article 31-A.1.2 of the USMCA.

c. Panel's Holding

52. The Panel therefore holds that to meet its burden to show a facility is a Covered Facility, the United States must show that the product or service referred to in Article 31.A-15 (i) and (ii) originates from the specific facility in question. Here, the United States would have to show that the San Martín mine exported its production to the United States. The Panel finds, however, that the United States did not meet its burden to show that the San Martín mine is a Covered Facility under 31.A-15.(i), because it showed no evidence that the San Martín mine individually "produces a good or supplies a service traded between the Parties." That is, it only showed that IMMSA's mines as a group export to the United States.

53. Article 31.A-15(ii) presents a more complicated situation. Here, too, the United States made no showing that the San Martín mine specifically produces for the Mexican market, only that IMMSA as a group produces for the Mexican market. However, the evidentiary record includes information that does make this showing.[71] In seeking to refute the United States claim that the San Martín mine is a Covered Facility under Article 31-A.15(ii), IMMSA stated, albeit without evidence, that its production from the San Martín mine was in fact captured internally for IMMSA's own consumption, presumably in Mexico.[72] Given that the nature of the verification

[71] As indicated by IMMSA, all the production from the San Martín mine is captively consumed by other IMMSA-affiliated facilities located in Mexico, which shows that the San Martín mine does indeed sell in Mexico and *prima facie* competes with other suppliers in the Mexican market. See NGE submission by IMMSA, para. 102. Furthermore, regarding why production by affiliated companies within a group for internal consumption still competes with domestic and imported goods, see WTO Appellate Body Report, *US - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, para. 105. This document found that combed cotton yarn produced by vertically integrated fabric producers for their own use was "directly competitive" with combed cotton yarn imported from Pakistan.

[72] See Mexico's opening statement at the hearing, para.56.

proceeding is such that the Panel is charged with investigating and gathering facts, the Panel considers this acknowledgment to be sufficient to meet the United States burden. In this sense, albeit submitted after the initial Request for a Panel, IMMSA has provided during the verification process what the United States needed to show to meet its burden. The panel thus determines that the San Martín mine produces a good or supplies a service in the Mexican territory within the meaning of Article 31-A.15(ii).

ii. The Definition of "competes" in Article 31.A-15 (ii)

54. While the first element of Article 31.A-15(ii) has been satisfied, the next issue is to determine whether that good "competes in the territory of a Party with a good or a service of the other Party …". Article 31.A-15 (ii) differs from Article 31.A-15(i) in that the former includes the requirement that the good or service "competes in the territory of a Party with a good or a service of the other Party." 31-A.15(i), as discussed above, requires only that a facility in the territory of a party produce a good or supply a service traded between the Parties. There is no requirement that the goods "compete." If a good or service cannot qualify under Article 31.A-15(i), then presumably it is not exported to a complainant Party's territory. Therefore, in the Panel's interpretation, to fall within the coverage of 31-A.15(ii), the facility must produce a good or service that is produced (a) for use or sale in the respondent Party's territory; and (b) it must *compete* in the territory of a Party with a good or service of the other Party.

55. The Panel has already addressed the interpretation and application of the first element of 31-A.15(ii) above, and it now turns to the interpretation of "competes."

a. Arguments of the Parties

56. The United States, relying on the Oxford English Dictionary, defines compete to mean: "To strive with others in the production and sale of commodities, or command of the market."[73] Mexico offers a similar definition, relying on the *Diccionario de la Lengua Española*, submitting that 'competition', which is the noun form of compete, "is a situation in which firms compete in a given market by offering or requesting the same product or service."[74]

57. The Complainant Party has argued that it has met its burden to demonstrate that metal ores produced by the San Martín mine compete with United States exports in the Mexican market simply by showing, through the SEC filings of its parent company, that IMMSA produces metal ores for the Mexican market. This implies that competition between goods or services should be understood in light of how the supply of goods affects the micro-economics of a market. This is because "when the facility such as the San Martín Mine manufactures copper ore and concentrates and sends them to an end-user or customer in Mexico, that end-user or customer

[73] United States' Reply Submission, para. 50.

[74] Mexico's rebuttal submission, para. 74. One element that the definitions share, and which is also confirmed when referencing a specialized dictionary of economics, is that 'competition,' the noun form of 'compete' is generally understood to occur between firms or individuals – that is, economic agents. See Oxford Dictionary of Economics (Ed.s. Nigar Hasimzade, Gareth Mules, John Black, 5th ed. 2017) ("Competition 1. The situation when anybody who want to buy or sell has a choice of possible suppliers or customers. 2. The formal assumption in economic modeling of every agent acting as a price-taker. 3. The notion of two or more economic agents engaged in strategic interaction and pursuing individual gain.") The wording of the Article 31-A.15 thus potentially presents a confusion and difficulties in interpretation because it refers to goods or services that compete. However, this is not unusual in international economic law.

is no longer in the market to acquire other copper ore and concentrates that are available for sale from the United States."[75]

58. Mexico argues that the United States has not met its burden to demonstrate that the San Martín's metal ores production competes with United States exports in the Mexican market. First, it argues there is no evidence that the San Martín mine itself produces for the domestic market. But even if it were the case, Mexico argues, the United States' burden is to demonstrate that there is competition such that "there are overlapping markets within Mexico for the same products as the San Martín Mine and those exported by the United States."[76] Or that there is a "rivalry or dispute between its exports and the goods produced at the San Martín Mine."[77] In Mexico's view, exports into the Mexican market by the United States in which other like goods produced by Mexican producers are consumed or sold does not in itself constitute competition. Rather, "more elements are required…to evidence there is competition."[78] Mexico also argues there must be a clear showing that the specific ores produced in the San Martín mine directly compete with United States exports. This might be shown through expert analysis or other similar evidence – not just proof of exports into the market.[79] Rather, there must be a "high, clear, and convincing evidentiary standard" that competition exists.[80]

[75] United States´ rebuttal submission, para 12.

[76] Mexico's rebuttal submission, para. 75.

[77] Ibid.

[78] Ibid.

[79] Mexico's opening statement at the hearing, pages 11-13

[80] Mexico's rebuttal submission, para. 65.

59. Finally, as noted, IMMSA in its written submission made the claim that the San Martín mine "has not sold any copper ore or concentrates to unaffiliated facilities in Mexico. It is all captively consumed."[81] It made this argument in the context of showing that the mine did not itself either exports goods to the United States or enter its goods into the Mexican stream of commerce. Therefore, the mine does not meet the first part of the tests in Article 31-A.15(i) and (ii). Mexico only referenced this claim in hearings before the Panel,[82] while the United States chose to engage with the argument even though it was raised by a non-Party.[83]

b. Panel's Interpretation

60. The Panel believes that the text of the Mechanism does not require a complainant Party to satisfy the stringent burden of proof argued for by Mexico. Standard economic theory holds that if like or substitutable products are bought and sold within the same market, it can be assumed from an economic perspective that they are in "competition" with each other.[84] Competition does not require, for example, a showing of public marketing campaigns in which firms target each other, or branded goods sitting on shelves next to each other competing for

[81] IMMSA, Non-Governmental Entity Submission, para. 103.

[82] Mexico's opening statement at the hearing, para 57.

[83] United States' Rebuttal Submission, para. 8.

[84] There are various reasons in economic theory that support this notion of "competition." One is the "substitution effect." The substitution effect occurs when the price of one good is higher in relation to another that has comparable utility to the consumer. The consumer will substitute the higher-priced good for the lower-priced one, resulting in more sales for the latter. A second reason is related to simple supply and demand effects. Assuming steady demand, an increased supply of a good in a market will generally decrease that good's price all things being equal. Because competition and increased supply lowers prices, suppliers have an interest in restricting market access to new entrants because it would require them to *compete* and charge a price closer to the market equilibrium price, resulting in lower profits than a firm would earn in a market closed to competitors.

consumers. In applying Article 31-A.15(ii), the Panel thus considers goods or services to compete if they are like or substitutable and bought, sold, and/or consumed in the same economic territory.[85] The Panel's approach is akin to adopting a balance of probabilities standard as applied to whether or not goods compete with each other in a market. That is, if it can be shown that like or substitutable goods or services are bought and sold in a market, it is more probable than not that they compete with each other.

61. To satisfy the conditions of Article 31-A.15(ii), a complainant Party must therefore show (a) that the facility in question produces a good or service that (b) is bought, sold, and/or consumed in the respondent Party's territory, and that c) a like or substitutable good or service is exported by the complainant into the respondent Party's territory. Such a showing is, in the Panel's view, sufficient to meet the complainant Party's initial burden of proof that the goods or services in question compete. To require that the complainant Party demonstrate a "rivalry" or "overlapping markets within Mexico for the same product" goes beyond the ordinary meaning of the terms of the Mechanism and the USMCA "in their context and in light of their object and purpose."[86]

[85] See WTO Appellate Body Report, *Korea-Alcoholic Beverages*, paras. 114-115, 117-118 120 and 137. It should be emphasized that drawing on WTO jurisprudence to help interpret language of the mechanism is of limited utility because the context and purpose of WTO Agreements and that of the Mechanism substantially differ.

[86] Article. 31 of the Vienna Convention on the Law of Treaties (adopted on May 23, 1969, entered into force on January 27, 1980) 1155 UNTS 331. In accordance with Article 31.13.4 of the USMCA, the panel is required to interpret the USMCA treaty in accordance with customary rules of treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which, in turn, require adjudicators to interpret a treaty "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".

62. The Panel recognizes that commodities such as metal ores and other fungible goods from specific producers are notoriously difficult to track, and often undergo significant processing or transformation along the supply chain. It also recognizes that mining is explicitly indicated as a "priority sector" in the Mechanism.[87] To require a showing that the commodities be traced to the specific mine or producer all the way upstream the supply chain could potentially make it difficult for a complainant Party to meet its burden. Indeed, the supply chain tracing of commodities presents significant challenges for many firms that aim to do so for supply chain social compliance purposes or to meet regulatory requirements.[88] However, the increased difficulty in this sector of tracing the supply chain must be balanced with the consequences of requiring too low an evidentiary standard, such that firms without any nexus to trade flows between the Parties would be subject to the Denial of Rights claims. The Panel believes that every situation and dispute will be context-specific, and that a Panel will thus have to balance these concerns in determining how much evidence is sufficient for a complainant Party to meet its burden.

c. Panel's Holding

63. Here, the evidence put forward by the United States in the form of SEC filings by IMMSA's holding company, SCC, is sufficient to meet its initial burden to show that the metal ores produced

[87] Article 31-A.15 of the USMCA.

[88] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S. Code Chapter 53 § 1502; California Transparency in Supply Chains Act, SB 657, US Code Chapter 556 § 1714.43 § 19547.5.

by the San Martín mine "compete" with like metal ores that were exported by the United States into Mexico.[89]

64. While the United States' showing is sufficient to meet its initial burden, the Respondent Party in this case would have an opportunity to argue that, in fact, the goods are not like or substitutable, or that for other reasons the metal ores in question do not compete. For example, if it chose to adopt IMMSA's argument that there was captive consumption and that captive consumption by a vertically integrated firm takes those goods out of competition, it could have done that.[90]

iii. Burden of Proof

65. The Panel finds that to meet its burden to show a facility is a Covered Facility, the complainant Party must show that the facility in question either a) produces a good or service exported to the complainant Party's market (Article 31-A.15(i)); or b) produces a good or service that competes with a good or service of a Party in a Party's territory (Article 31-A.15(ii)). This effectively means that the product or service remains in the territory of the respondent Party, and the complainant Party exports a like or substitutable good to that territory.

[89] Because the United States has shown that the products in question are "like," in that the United States exports to Mexico the same metal ores as those produced by the San Martín mine, there is no need for the Panel to further analyze the question of whether the products or services are "like" or "substitutable."

[90] This is not to say that such an argument would necessarily win, because even captive consumption can affect broader market dynamics, prices, and consumer choice. See WTO Appellate Body Report, *US - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, para. 105 (finding that combed cotton yarn produced by vertically integrated fabric producers for their internal consumption was **"**directly competitive**"** with combed cotton yarn imported from Pakistan).

66. The Panel believes that as applied to the question of a Covered Facility, this burden should preferably be satisfied by the complainant in the initial request for the establishment of a panel. To establish a panel, Article 31-A.2 (Denial of Rights) provides that "[T]he Mechanism shall apply whenever a Party has a good faith basis belief that workers at a Covered Facility are being denied the right of free association and collective bargaining under laws necessary to fulfill the obligations of the other Party…"Article 31-A.5 (Requests for Establishment of Rapid Response Labor Panel) provides that if the complainant Party fulfills the requirements under Article 31-A.4 (Requests for Review and Remediation), it may submit a petition to the Secretariat to request that the respondent Party allow a panel to "(a) verify the Covered Facility's compliance with the law in question and determine whether there has been a Denial of Rights… or (b) request "the establishment of a panel to determine whether there has been a Denial of Rights." Once a panel is established, Article 31-A.6 (Confirmation of Petition) provides it has five business days to "confirm that the petition (a) identifies a Covered Facility; (b) identifies the respondent Party's laws relevant to the alleged Denial of Rights; and (c) states the basis for the complainant Party's good faith belief that there is a Denial of Rights."

67. The Panel finds that "good faith belief" in Article 31-A.2 modifies the clause "workers at a Covered Facility." It does not modify "Covered Facility." This reading is reinforced by the Articles that follow, including Article 31-A.6, which requires a panel to confirm that the petition "(a) *identifies* (emphasis added) a Covered Facility;" but also "states the basis for the complainant Party's *good faith* (emphasis added) belief that there is a Denial of Rights." Therefore, the

complainant Party should provide more proof in the initial Request to establish that a facility is a Covered Facility than it is required to show that there is a potential Denial of Rights.

68. Other procedural and structural components of the Mechanism also persuade the Panel that this is the correct interpretation. Article 31-A.6, for example, requires that a panel established under Article 31-A.5 shall have five business days after it is constituted to *inter alia* "confirm that the petition (a) identifies a Covered Facility […]" This suggests that this preliminary requirement should be clearly demonstrated to the Panel before it confirms the request. Such a showing need not require extensive evidence and economic studies but rather evidence that is sufficiently probative to proceed, meaning it credibly shows a direct linkage between the facility in question and either (a) exports a good or supplies a service traded between the parties; or (b) produces a good or supplies a service that competes in the territory of a Party with a good or a service of the other Party.

69. There is sufficient opportunity for a complainant Party to make this initial investigation into whether the facility-in-question is a Covered Facility. Otherwise, a complainant Party can request the establishment of a Panel and hope that during the verification there will be evidence uncovered that the facility will qualify. But this is contrary to the structure and intent of the Mechanism as the Panel reads it.

70. Of course, even if that preliminary burden is met by the complainant Party, the respondent Party will then have an opportunity to refute such evidence and disprove that the facility is a "Covered Facility" during subsequent stages of the process.

71. Applying such an evidentiary standard in the Request for a Panel stage of a procedure will also help ensure that panels are not tied up with investigations of what should be preliminary jurisdictional issues. Allowing for a lower evidentiary standard at the preliminary stages of a Request risks misallocating resources and empaneling dispute settlement procedures under the mechanism that will only fail for reasons of jurisdiction. The Panel believes that the intent and purpose of the verification process is primarily to enable a Panel to investigate and collect information on the substantive aspects of Denial of Rights claims to enable remediation of freedom of association and collective bargaining rights violations if so found and to do so rapidly.

72. In its initial confirmation of this dispute, the Panel applied a good faith *prima facie* standard that was less stringent than the standard the Panel now has articulated above, and that was considered sufficient to proceed to the verification stage. In hindsight that standard should have been more stringent. However, the Panel was cognizant that, as a first-instance deployment of the Mechanism's Panel process, the jurisdictional and other procedural questions were novel. It, therefore, explicitly noted that the jurisdictional issues were not pre-judged.

73. Finally, the Panel is reluctant to articulate a specific evidentiary standard to be applied to a complainant Party's burden to demonstrate that a facility is a Covered Facility, or at what stage in the proceeding such a standard must be met. The varied contexts of different Denial of Rights claims will require flexibility for Panels. Indeed, the Rules of Procedure contain a specific provision dealing with burdens of proof in USCMCA disputes, which merely establishes that a complaining party shall have the burden of showing that a denial of rights (or an inconsistency, failure,

nullification or impairment, depending on the context of the dispute at hand) has occurred.[91] It does not prescribe a specific evidentiary standard. However, the rules specify that only a *prima facie* standard will be applicable if the responding declines to participate in the panel proceeding. This implies that the quantum of proof should be higher in typical disputes. The standard of proof in trade and civil cases is generally one of balance of probabilities, or what is also termed as preponderance of the evidence.[92] That is, the party with the burden must show it is more likely than not that what it seeks to show is true.

iv. Summary of Panel's Finding

74. In sum, the Panel finds, based on a reading of its text and in light of its context and purpose, that the Mechanism was intended to address violations of freedom of association and collective bargaining in facilities that have more than just a tenuous trade relationship with the United States. To satisfy its burden under 31-A.2, the complainant Party must show that the specific facility in question is either (a) directly exporting goods or services to the complainant Party's territory to satisfy the requirements of Article 31-A.15(i), or (b) producing goods or services for the domestic market to satisfy the requirements of Article 31-A.15(ii). If relying on Article31-A.15(ii), the complainant Party must additionally show that it exports like or substitutable goods or services into the territory of the respondent Party. Here, the United States has failed to show

[91] Article 14.1 of the Rules of Procedure (Burden of Proof Regarding Inconsistent Measures and Exceptions).
[92] See e.g. WTO Panel Report, *Thailand — Cigarettes (Philippines) (Article 21.5 - Philippines)*, para. 7.777; WTO Panel Report, *Saudi Arabia — IPRs*, para. 7.39; Permanent Court of Arbitration, Award, *DTEK v. Russia*, PCA Case No. 2018-41, Award of 1 November 2023, para. 568; ICSID, Award, *Border Timbers v. Zimbabwe*, ICSID Case No. ARB/10/25, Award of 28 July 2015, para. 177-178; ICSID, Award, *LSF-KEB v. Korea*, ICSID Case No. ARB/12/37, Award of 30 August 2022, para. 672.

that the San Martín mine is a Covered Facility under Article 31-A.15(i). It also failed in its initial evidence to show that the mine is a Covered Facility under Article 31-A.15 (ii). However, IMMSA's statement in its written submission that all the San Martín production is captively consumed provides the Panel with sufficient evidence to conclude that the San Martín mine is, based on the balance of probabilities, a Covered Facility.

75. Mexico's arguments that the United States failed to meet its burden to show that the goods in question "compete" were not persuasive. In this instance, once IMMSA made its claim that the San Martín mine's production was captively consumed in Mexico, the burden shifted to Mexico to demonstrate that those goods did not compete with the like exports of the United States into Mexico.

b. Annex 23-A and Chapter 31-A

76. The second jurisdictional issue concerns whether the actions alleged by the United States to constitute a Denial of Rights fall within the jurisdiction of the Mechanism and are thus subject to a determination by the Panel. This is not a straightforward question, and the analysis here is complicated by the unusual history and legal treatment of events. Mexico claims that the events in question fall outside of the Mechanism's jurisdiction, specifically the *rationae materiae* or subject matter jurisdiction of the Panel, and thus are not eligible for evaluation as a Denial of Rights. The United States, on the other hand, argues that the language of the Mechanism does indeed encompass the actions it alleges to constitute a Denial of Rights, and thus those actions fall within the jurisdiction of the Panel.

77. Here, the question is if the alleged violation of the workers' rights to strike under Articles 449 and 935 of the LFT, and the alleged interference by the employer into the workers' choice of a collective bargaining agent by means of negotiating with an organization that is not the workers' recognized union in violation of Sections IV and VII of Article 133 of the 2019 LFT, fall within the scope of the Mechanism and the Panel's jurisdiction.

78. To resolve the jurisdictional issue, it is necessary to examine Article 31-A.2, which defines a Denial of Rights, together with Annex 23-A (Worker Representation in Collective Bargaining in Mexico), which is referred to in the footnote to Article 31-A.2. It is not possible to understand the definition and jurisdictional limitations of a Denial of Rights without analyzing Annex 23-A.

i. Article 31-A.2

79. Article 31-A.2 reads:

> The Mechanism shall apply whenever a Party (the "complainant Party") has a good faith basis belief that workers at a Covered Facility are being denied the right of free association and collective bargaining under laws necessary to fulfill the obligations of the other Party (the "respondent Party") under this Agreement (a "Denial of Rights").

80. The Article is modified by a footnote—namely, footnote 2—that is central to understanding the purpose and coverage of the Article. Footnote 2 reads:

> With respect to the United States, a claim can be brought only with respect to an alleged Denial of Rights owed to workers at a covered facility under an enforced order of the National Labor Relations Board. With respect to Mexico, a claim can be brought only with respect to an alleged Denial of Rights under legislation that

complies with Annex 23-A (Worker Representation in Collective Bargaining in Mexico).[93]

81. Footnote 2 clearly functions as a "limiting" clause.[94] That is, it delineates and circumscribes the legal and factual basis upon which a Denial of Rights claim can be pursued. In the case of the United States, a Denial of Rights allegation can only be based on an enforced order of the National Labor Relations Board (NLRB).[95] Therefore, Mexico can presumably only pursue a Denial of Rights claim if there has been an "enforced order" by the NLRB. This condition requires that an administrative enforcement action be initiated, adjudicated, and enacted by the U.S. authorities against a Covered Facility.[96]

82. In the case of Mexico, which is the matter before the Panel, a Denial of Rights claim can only be brought "with respect to an alleged Denial of Rights under legislation that complies with Annex 23-A." The interpretation of what "under legislation that complies with Annex 23-A" means is the central point of disagreement between the Parties and is also the focus of the Panel's analysis.

83. Again, the reason why this question is important is because the actions that are alleged to constitute a Denial of Rights have been treated by Mexican courts as having their legal origin

[93] Article 31-A.2 of the USMCA, footnote 2.

[94] Mexico also argues that footnote 2 to Article 31-A.2 should be understood as a limiting footnote. See Mexico's Reply Submission, para. 29.

[95] The NLRB is the administrative agency tasked by Congress to enforce and adjudicate U.S. federal labor law, the National Labor Relations Act (NLRA).

[96] It is beyond the scope of this Panel to determine under what circumstances a Denial of Rights violation would apply to a facility with an enforced NLRB order, but the intention is clear that the basis of law is the NLRA and adjudication by the NLRB is a necessary condition for a Denial of Rights claim. That is, the United States is required ex-ante to have adjudicated the manner under its own legal regime.

in the 2007 strike. They have thus been subject to the pre-2019 LFT and have been adjudicated in the industrial relations institutions that were operative prior to the 2019 LFT, including the FCAB. Such legal treatment is required under Mexican labor law according to Transitory Article 7 of the 2019 LFT Reform decree, which provides that cases initiated before the 2019 reforms are to be treated under the pre-2019 labor law and must be adjudicated and processed in the institutions that enforced the pre-2019 LFT.[97] Mexico's constitution also provides that laws shall not be applied retroactively[98], and non-retroactivity is also a general principle of customary international law.[99] Furthermore, according to Transitory Article 3 of the 2017 Reform decree of Mexico's constitution matters that were in the process of being addressed by labor courts at the time of commencement of their functions shall be resolved in accordance with the provisions applicable at the time of initiation of such matters[100]

[97] The text of the Seventh Transitory Article of the 2019 LFT Reform reads as follows:

> *Seventh. Pending Matters.* Proceedings pending before the Ministry of Labor and Social Welfare and the federal and local Conciliation and Arbitration Boards will be concluded by the latter in accordance with the provisions in effect at the time they were initiated. … (emphasis added)

[98] Article 14 of the Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos*). We note that the SCJN has applied Article 14 to labor disputes, indicating, notably, that "a conflict that arose when the previous law was in force must be resolved, regarding substantive issues, in accordance with that law". See Supreme Court of Justice of the Nation, Jurisprudential thesis, *Non-Retroactivity of the New Federal Labor Law*, Amparo Directo 597/71, Section 30 of the Oil Workers Union of the Mexican Republic, Isolated Thesis, August 2, 1971. Judicial Weekly, Fourth Chamber, 7th Epoch. Annex MEX-74.

[99] Article 28 of the Vienna Convention on the Law of Treaties functions as the general standard governing the temporal applicability of treaties. According to this provision, a treaty does not bind a party regarding any act or fact occurring or any situation ceasing to exist before the treaty's entry into force for that party. See United Nations, Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969. Furthermore, we note that, as us, the International Court of Justice (ICJ) has referred to Article 28 of the Vienna Convention on the Law of the Treaties as a legal provision reflecting customary international law. See ICJ Judgement, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, para 100. See also ICJ Judgement (Jurisdiction), *Ambatielos case*, page 40.

[100] Decree declaring various provisions of Articles 107 and 123 of the Political Constitution of the United Mexican States amended and supplemented, regarding Labor Justice, Published in the Official Gazette of the Federation on February 24, 2017. (*Decreto por el que se declaran reformadas y adicionadas diversas disposiciones de los artículos*

ii. Annex 23-A

84. Annex 23-A, which is referenced in footnote 2, is an annex to Chapter 23 of the USMCA, which is entitled the "Labor Chapter." Annex 23-A was negotiated to remedy what the Parties agreed was a failure of Mexican labor law and its industrial relations system to sufficiently protect freedom of association and collective bargaining rights.[101]

85. Paragraph 1 of Annex 23-A provides the general context, obligation, and source of legitimacy of the Annex. It reads:

> Mexico shall adopt and maintain the measures set out in paragraph 2, which are necessary for the effective recognition of the right to collective bargaining, given that the Mexican government incoming in December 2018 has confirmed that each of these provisions is within the scope of the mandate provided to the government by the people of Mexico in the elections.

86. Paragraph 2 then proceeds in subparagraph (a) to define Mexico's general obligations to respect freedom of association and collective bargaining free from employer domination or interference. It reads:

> Mexico shall provide in its labor laws the right of workers to engage in concerted activities for collective bargaining or protection and to organize, form, and join the union of their choice, and prohibit, in its labor laws, employer domination or interference in union activities, discrimination, or coercion against workers for union activity or support, and refusal to bargain collectively with the duly recognized union.[102]

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107 y 123 de la Constitución Política de los Estados Unidos Mexicanos, en materia de Justicia Laboral) Publicado en el Diario Oficial de la Federación el 24 de febrero de 2017.

[101] Paragraph 1 of Annex 23-A indicates that "the Mexican government incoming in December 2018 has confirmed that each of these provisions is within the scope of the mandate provided to the government by the people of Mexico in the elections."

[102] But the specific rules that give these broad principles substance are subject to varying interpretation and application. For example, subparagraph (a) provides that Mexico shall provide in its labor laws employer…refusal to bargain collectively with the duly recognized union. But without more substantive rules on what constitutes a

87. In the sub-paragraphs that follow, the Annex then moves from the general to the specific, listing changes to Mexican labor law that are necessary for the effectuation of sub-paragraph (a). Those changes address Mexico's much-commented-upon historical challenges in the realm of democratic and representative unionism. [103] These include, for example, establishing independent bodies to register and certify union elections and also resolve disputes. [104] Accordingly, under the 2019 labor law reform, the FCABs stopped adjudicating new labor disputes. In their place, new judicial labor courts were created to hear and resolve disputes of first instance, and a new Federal Center for Conciliation and Labor Registration (CFCRL) was created to register CBAs and unions as well as conduct individual and collective conciliations.[105]

88. The Annex also provides that Mexico shall provide for an effective verification system to ensure union leaders are elected through free and secret votes of its members, [106] and that Mexico institute laws that ensure that challenges to union representation be carried out by the CFCRL through a secret vote.[107] It also requires that Mexico adopt legislation per the Mexican constitution ensuring that initial or first-time-negotiated collective bargaining agreements enjoy

"refusal," this general principle becomes vague. This is especially so given there is no duty to bargain in good faith in Mexican law, although there is a requirement in the face of the law to "negotiate an agreement" with the union.

[103] A central problem identified by commentators was the widespread phenomenon of "company unions," whereby companies and unaccountable union leaders would strike a sweetheart deal between the company and union, often to the benefit of employers, union leadership, and political parties; but of questionable benefit to the workers themselves.

[104] Annex 23-A, para 2(b).

[105] Article 9 of the Organic Law of the Federal Center for Conciliation and Labor Registration *(Ley Orgánica del Centro Federal de Conciliación y Registro Labora*l).

[106] Article 358 of the 2019 LFT.

[107] Section III (d) of Article 390 Bis of the LFT.

genuine worker support and consent;[108] that any updates and revisions to CBAs be subject to verifications of worker support and consent; and that all CBAs in effect at the time the 2019 LFT was implemented be subject to verification votes to gauge worker support within four years of the enactment of the law.[109] Finally, the Annex provides for transparency to ensure that workers have access to their CBAs and understand their contents.[110]

89. In other words, Annex 23-A is devoted in significant part to identifying granular amendments to the LFT. Its primary purpose, as understood by the Panel, is to encourage democratic unionism and an industrial relations and labor law regime that facilitates genuine bargaining grounded in worker consent. Notably, paragraph 3 of Annex 23-A provides that the entry into the force of the USMCA "may be delayed until such legislation becomes effective." This text signals that the Parties understood and agreed that the entry into force of the entire trade agreement could be delayed until the passage of "such legislation."

iii. Arguments of the Parties

90. A central disagreement, and perhaps misunderstanding, between the parties is the meaning and application of "under legislation that complies with Annex 23-A," found in footnote 2. The United States argues that "any Mexican laws that 'comply' with paragraph 2(a) of Annex 23-A can give rise to a Denial of Rights with the scope of the mechanism... Each of the provisions

[108] Idem, Section III (e).

[109] Idem, Section III (f)

[110] Idem, Section III (g).

of Mexican law identified in the U.S panel request fulfills the conditions set out in Annex 23-A."[111] In other words, in the Panel's understanding, the United States is arguing that so long as the cited Articles of the 2019 LFT broadly concern the general principles of freedom of association and collective bargaining described in paragraph 2(a) of Annex 23-A, and the events in question have occurred after the entry into force of the USMCA, then the Mechanism is applicable.[112] Consistent with that interpretation, the United States claims that it "has identified *current* conduct at the facility and is challenging these ongoing actions as a breach of *current* Mexican law that complies with Annex 23-A."[113]

91. Mexico argues that "under legislation that complies with Annex 23-A," in Article31-A.2 Footnote 2 refers uniquely to the currently enacted 2019 LFT. In this sense, the Parties appear to in fact agree, although their briefs seem to presume otherwise.[114] But Mexico takes that argument a step further than the United States. Mexico argues that, by definition, a Denial of

[111] The United States defines complies to mean "to act in accordance with, and fulfillment of, wishes, desires, requests, demands, conditions, or regulations[.]". See United States Reply Submission, para. 30.

[112] To perhaps extend the United States' argument: the sub-paragraphs that follow subparagraph (a) relate to issues of freedom of association and collective bargaining rights. It is therefore unnecessary to evaluate the compliance of any provision of Mexican law with those provisions because, by definition, they fall within the penumbra of subparagraph (a). Furthermore, according to the Panel's understanding of the United States' argument, it makes no difference if the alleged Denial of Rights has been or would be treated under previous iterations of the LFT. What matters, in the Panel's interpretation of the argument, is if the alleged Denial of Rights would violate current Mexican law regardless of under what version of labor law and in what institutions the Mexican courts would adjudicate the matter.

[113] Id. at para. 35.

[114] A significant confusion seems to have emerged in the arguments of the Parties due, perhaps, to a misunderstanding of each other's arguments. Mexico appears to have assumed that the United States was arguing that the prior version of the LFT could be considered to be "legislation that complies with Annex 23-A." The United States appears to have understood Mexico to argue that only the Articles that were amended by the 2019 LFT could be considered to be "legislation that complies with Annex 23-A." The Parties then proceeded to engage in arguments that were not responding to the claims actually made by the other Party.

Rights cannot be found if the conduct in question is or would be based on the pre-2019 LFT.[115] And because the conduct cited by the United States that allegedly constitutes a Denial of Rights has been treated by Mexican law under the pre-2019 LFT, therefore, by definition there cannot be a Denial of Rights finding under the Mechanism because the Mechanism and the Panel have no jurisdiction over the matter.[116] In Mexico's view, "under legislation that complies with Annex 23-A" must be understood to mean that if a matter is being, or has been, adjudicated under law and institutions existing prior to the 2019 LFT, then those matters are outside of the scope of the Mechanism. Here, Mexico argues, the 2019 LFT is not applicable to the conduct in question, and therefore it "would be impossible" for the United States' claim to be covered by the Mechanism.[117]

92. For its part, the United States insists that it does not "dispute that the ongoing judicial proceedings related to the San Martín mine will be decided based on the laws in force at the time of their initiation."[118] Indeed, it accepts the prior rulings of the Mexican courts and argues it is in fact relying on those rulings to "establish the two principal legal facts on which this case is based: (1) the lawful and ongoing status of the strike; and (2) the rights of Los Mineros, and not the Coalition, to legally and exclusively represent the workers at the mine."[119] The United States argues that the Mechanism is applicable, through the 2019 LFT, to actions that take place post-

[115] Mexico, Initial Written Submission, para. 115. "the United States can only bring a claim under the [Mechanism] if there is an alleged Denial of Rights under the LFT, as amended on May 1, 2019, and not under a prior version to it."

[116] Id. at para 116.

[117] Ibidem.

[118] United States' Reply Submission, para. 36.

[119] Ibidem.

entry into force of the USMCA, even if those actions would be subject to the jurisdiction of the pre-2019 LFT in Mexican courts.[120]

93. Rather, the United States argues that the conduct it claims to constitute a Denial of Rights should be considered as such because IMMSA is currently engaging in violations of Mexican labor law currently in force, specifically the 2019 LFT. It argues that the ongoing operation of the San Martín mine violates Mexican law because the law, and subsequent legal decisions on the legality of the strike, require that the mine cease operations.[121]

c. *Rationae Temporis:* Retroactivity

94. The final jurisdictional issue raised by the Parties is the matter of retroactivity. Both Parties agree that alleged Denial of Rights violations that occur prior to the entry into force of the Agreement are not justiciable under the Mechanism.[122] However, the United States argues that the conduct about which it has complained is ongoing and/or has taken place after the enactment of the Agreement. Therefore, the principle of non-retroactivity is not applicable. That is, the

[120] There appears to be a mischaracterization and misunderstanding by the Parties of each other's arguments. Mexico claims that the United States argues that a Denial of Rights claim can be brought based on the pre-2019 LFT, and that the United States is seeking to apply the pre-2019 LFT to the Denial of Rights claim. The United States in turn takes Mexico to mean that only provisions of the LFT that were amended in 2019 could form the basis of a Denial of Rights Claim. Neither of the Parties, in the Panel's view, in fact made those arguments. We therefore do note address the merits of each Party's arguments or responses in these matters.

[121] United States' Reply Submission, paras. 60-67; United States' Rebuttal Submission, paras. 18-23.

[122] Mexico's Initial Written Submission, para. 130; United States' Reply Submission, paras. 35 and 36; Mexico's Reply Submission , para. 57; Mexico's statement at the hearing, Hearing transcript, page 70. Furthermore, at the hearing, the United States expressly stated that it was not asking the panel "to make findings on events that predated the entry into force at the USMCA" and that "is [was} not claiming a Denial of Rights based upon the actions of IMMSA in 2007 or at any other point prior to the entry into force of the USMCA". See, respectively, US' statement at the hearing, Hearing transcript, page. 18; US' opening statement at the hearing, para. 36.

United States argues it is not seeking a Denial of Rights finding for actions that occurred prior to July 1, 2020, but rather for events that occurred, and continue to occur, after that date, thus bringing the matter within the jurisdiction of the Agreement.[123]

95. Mexico, on the other hand, argues that the principle of non-retroactivity does apply here, and that "the alleged Denial of Rights occurred long before the entry into force of the USMCA."[124] However, Mexico appears to be applying a somewhat different concept of non-retroactivity from that of the United States. That is, generally speaking, if the events that occur post-entry into force of the USMCA derive from pre-entry-into-force activities, the Mechanism is not applicable.[125]

96. As noted, there is no contention between the Parties regarding the applicability of the USMCA to events occurring prior to its entry into force – the USMCA is not applicable to those events. Rather, the disagreement concerns the applicability of the USMCA and the Mechanism to events that took place after the entry into force of the USMCA, but whose causal origin lies in events that took place before its entry into force on July 1, 2020, and, according to Mexican jurisdictional rules, are covered by pre-2019 labor legislation.

97. This situation presents unique challenges for the Panel given the unusual and likely *sui generis* nature of this dispute, and of the legal questions it implicates.

[123] United States' Reply Submission, paras. 35.

[124] Mexico Initial Written Submission, para. 138.

[125] Mexico Reply Submission, para. 56; Mexico's statement at the hearing, Hearing transcript, page 102.

98. Reviewing the Parties' arguments as applied to the facts here will help illustrate the differing jurisdictional analyses of the Parties. With regards to the ongoing operation of the mine, the United States contends that currently enacted Mexican law and judicial application of that law to this dispute requires the mine to cease operations. Because this has not occurred, in the view of the United States, there is an ongoing Denial of Rights.[126] In response, Mexico argues that in fact the strike has been legally terminated because of the June 14, 2023 determination by the FCAB.[127] Nevertheless, according to Mexico, the fact that the strike has been adjudicated by the FCAB according to the pre-2019 LFT means that the matter is outside the scope of the Mechanism and thus falls outside the jurisdiction of the Panel.[128] The United States argues that what is relevant is that the mine is, in its interpretation, operating in contravention of the judicial determination—not that the matter is being litigated under the pre-2019 LFT.[129]

99. The second issue concerns the United States' claim that IMMSA's negotiations with the Coaligados violates Sections IV and VII of Article 133 of the LFT, which provide that a firm may not interfere with a workers' choice of a union or executing any act that restricts workers' rights granted to them by law.[130] The United States argues that IMMSA's relationship with the

[126] The United States has made reference to Articles 449 and 935 of the LFT as being the legal provisions being breached by IMMSA as a result of continuing operations at the mine. United States' Reply Submission, paras. 19-20 and 64-67. See also United States' Rebuttal Submission, para. 23.

[127] Mexico's Reply Submission, para. 182; Mexico's statement at the hearing, Hearing transcript, pages 78, 80-81, and 130.

[128] Mexico's oral statement at the hearing, Hearing transcript, page 70. The Panel will not analyze the substantive merits of these arguments because that would concern the analysis of the substantive merits of the Denial of Rights claim, which the Panel has determined is outside its jurisdiction.

[129] United States' Reply Submission, para. 20: United States' Rebuttal Submission, para. 23; United States' statement at the hearing, Hearing transcript, pages 19-20.

[130] Sections IV and VII of Article 133 of the LFT.

Coaligados violates those provisions of the 2019 LFT, and its negotiations with the Coaligados therefore constitute a Denial of Rights.[131] Mexico, on the contrary, argues that the negotiations and agreements, depending on how one characterizes them, between the coalition and IMMSA fall outside the Panel's jurisdiction because those actions "derive" from acts (i.e. the formation of the Coaligados) that were "consummated prior to [the] entry into force [of the USMCA]."[132] Because the agreements "derive" from the pre-USMCA formation of the Coaligados, applying the Mechanism to those acts would therefore violate rules of non-retroactivity in international law and violate Mexican law on non-retroactivity as applied to the 2019 LFT reform.

i. Panel's Holding

100. The Panel finds that while there is some confusion in the arguments of the Parties, in fact it would appear that they agree on a fundamental premise, namely: that footnote 2 of Article 31-A.2 of the USMCA refers to Denials of Rights that occur under the 2019 LFT or other currently in effect laws that comply with Annex 23-A. It does not apply to prior versions of the 2019 LFT or other laws not currently in force. The Panel agrees with this interpretation of the Mechanism. The Parties also agree that acts that occur prior to the entry into force of the Agreement do not fall within the scope of the Mechanism.

101. However, where the Parties disagree is if the Mechanism and by extension a Panel has jurisdiction over an alleged Denial of Rights if the events in question fall under the jurisdiction of

[131] United States' Reply Submission, paras. 23-24 and 68-72.

[132] Mexico Reply Submission, para. 56.

pre-2019 LFT laws and tribunals, even if such events are ongoing post-entry into force of the USMCA. In addition, they disagree as to whether a set of actions, such as those of the negotiations between the Coaligados and IMMSA, some of which took place after the entry into force of the USMCA, fall under the scope of the Mechanism if those events derive from acts that took place prior to the entry into force of the USMCA.

102. The Panel finds, first, that footnote 2 in Article 31-A.2 of the USMCA should be understood to limit the application of Denial of Rights claims to violations arising from the 2019 LFT. The Panel understands that there is no disagreement between the Parties on this issue, so there is no need to engage in a significant analysis of the matter. Based on the Panel's reading of the ordinary meaning of the text of the Mechanism, in its context and in light of the USMCA's object and purpose, such an interpretation is compelling for the following reasons.

103. Footnote 2 refers to "legislation that complies with Annex 23-A." Annex 23-A's primary purpose is to provide that Mexico "shall adopt and maintain" measures which are necessary for the effective recognition of the right to collective bargaining. Those measures are specifically given legitimacy in the text by the fact that the text explicitly notes that the incoming Mexican government, in December 2018, had agreed that it was given the mandate to adopt and maintain such measures by the electorate.[133] Those measures are then listed in the paragraph 2, with paragraph 2(a) highlighting the general principle of the rights of workers to engage in collective bargaining and join the union of their choice. Subsequent sub-paragraphs detail specific

[133] Annex 23-A, para. 1.

substantive provisions that are to be included in the new legislation. Paragraph 3 specifies that "it is the expectation of the Parties that Mexico shall adopt legislation described above by January 1, 2019. It is further understood that entry into force of this Agreement may be delayed until such legislation becomes effective." Thus, the Annex clearly envisages the implementation and incorporation of those provisions into new legislation as a condition for the USMCA's implementation.[134]

104. In sum, Annex 23-A clearly envisions that a new labor legislation will be adopted that will incorporate these provisions, some of which, such as paragraph 2(b), create entirely new institutions to register union elections, trade unions and collective bargaining agreements, and establish independent labor courts to adjudicate labor disputes. Accordingly, "legislation" in footnote 2 refers to the new legislation envisioned in Annex 23-A, which became codified in the 2019 LFT. Therefore, to come under the jurisdiction of the Mechanism, there must be a claim in the Request for a Panel that the legislation envisioned in the Mechanism i.e. the 2019 LFT is being violated.

[134] The Panel further notes that the entry into force of the USMCA was delayed partly because Mexico's new labor legislation was not adopted until May of 2019. Indeed, the first version of the treaty was signed on November 30, 2018. This version included paragraph 3 above, which required Mexico to issue new labor legislation. Soon after Mexico's new labor was issued, the three parties to the USMCA signed the revised treaty on December 10, 2019. Crucially, as indicated by Mexico, in an official statement by the United States Labor Department following the entry into force of Mexico's new law, the United States acknowledged that "The Government of Mexico approved a labor law reform package consistent with its commitments in this Annex on May 1, 2019". See Mexico's Initial Written Submission, para. 107, referring to U.S. Department of Labor, *United States-Mexico-Canada Agreement (USMCA) Labor Rights Report*, Annex MEX-64. In other words, not only was the entry into force of the USMCA specifically delayed because Mexico's new labor law had not been adopted within the deadline of January 1, 2019, as expressly required by paragraph 3 of Annex 23-A to Chapter 23, but one relevant United States agency publicly acknowledged in writing that Mexico's new labor law was "consistent" with Annex 23-A. These elements suggest that Mexico's new labor law was an instrument connected to the conclusion of the USMCA which the United States accepted, and thus that this law is part of the context of the USMCA and this Mechanism.

105. Second, the Panel finds that if the events that are alleged to constitute a Denial of Rights are being adjudicated under the pre-2019 LFT or are highly likely to be adjudicated under pre-2019 LFT, then the Mechanism does not apply, and the Panel does not have jurisdiction over those events.

106. Finally, the Panel does not agree with Mexico's argument that simply because a set of events "derive" from an act that occurred prior to the entry into force of the USMCA, those subsequent acts by definition do not come under the scope of the Mechanism.

107. There are compelling reasons to be wary of adopting an interpretation of the Mechanism that would allow for jurisdiction over Denial of Rights claims in matters that are treated by Mexican legal authorities under prior versions of the LFT and its institutions. First, both parties accept that a panel should be primarily guided by Mexican labor law in its decision-making. This principle is also consistent with the reading of footnote 2 discussed earlier. Mexican constitutional and federal labor law require that labor disputes that originate prior to the 2019 LFT be treated under the law in effect at the time of the events that constitute the legal origin of the litigation.[135] If a panel were to analyze whether acts constitute a Denial of Rights under the 2019 LFT, but the parties to a labor dispute are guided by the rules and institutions of a prior labor law and industrial relations regime, then there are potentially two different legal standards being applied to those parties, which potentially creates a significant conflict as well as uncertainty for the Parties. While

[135] Seventh Transitory Article of the DECREE amending, adding, and repealing various provisions of the Federal Labor Law, the Organic Law of the Judicial Branch of the Federation, the Federal Public Defense Law, the Law of the National Housing Fund Institute for Workers, and the Social Security Law, concerning Labor Justice, Union Freedom, and Collective Bargaining, Published in the Official Gazette of the Federation on May 1, 2019.

such a conflict might be permissible if the Parties had explicitly provided for it in the Mechanism, there is no indication that this is the case.

108. At the substantive analysis stage, which the Panel is not engaging in, the conflict can become particularly problematic. When determining whether a Denial of Rights has occurred, a Panel will inevitably have to analyze the events that transpired and their legal treatment. The chain of events, their legality, and the degree to which rights of collective bargaining and freedom of association rights may have been violated must be understood in context of the judicial decisions and law applicable at the time the events took place, which will inform and shape decisions by the involved actors in the actions that follow. To treat those subsequent events as separate from the chain of events and legal context that shaped the decisions behind them risks applying standards and expectations that were built into the 2019 LFT to actions taken prior to the enactment of that law.

109. Here, the conduct in question has its origins in a strike that began in 2007. The strike and events that are proximately linked to the strike have been extensively litigated under the pre-2019 labor law reform. The pre-2019 LFT does not conform in important ways with the 2019 LFT nor by extension with Annex 23-A. For example, the FCAB has been charged with ruling on several issues at stake in this matter, yet the FCAB no longer exists except to finalize adjudications in matters initiated prior to the 2019 LFT's enactment that had fallen within its jurisdiction. Decisions made by the workers, the employer, and the unions involved in this dispute have surely been shaped by the knowledge that litigation by the parties would be adjudicated according to pre-2019 law and institutions.

110. We can apply the jurisdictional approach described above to the specific issues raised in this dispute.

111. In the case of the claim that the San Martín mine is operating in contradiction to the law, the matter is outside of the jurisdiction of the Panel because the strike in question has been litigated in two streams. The first stream concerns the imputability trial that was petitioned for by both IMMSA and Los Mineros. The initial imputability petitions were initially filed in 2011 by IMMSA and in 2018 by the Mineros. The FCAB's final decision on the matter, which is subject to Amparos that do not appeal the decision to end the strike, was not issued until June 14, 2023, over three years after the entry into force of the USMCA, and 16 years after the initial outbreak of the strike. The imputability trial was adjudicated by the FCAB according to the pre-2019 LFT, and the actions of the parties to that litigation were guided and shaped by that law and expectations of how the case would be decided under that law and by the institution of the FCAB.

112. The second stream of strike litigation concerns the Coaligados' vote to end the strike. The FCAB initially recognized the end of the strike and work at the mine quickly resumed.[136] That decision was appealed by Los Mineros and declared null and void by a higher court after a series of hearings and legal decisions.[137] However, the final decision of the FCAB applying the decision of the higher court that declared null and void the FCAB's original decision did not occur until June 9, 2023, when on remand the FCAB (a) definitively annulled its 2018 ruling that the strike

[136] Special Board No. 10 of the Federal Conciliation and Arbitration Board, Appearance resolution, August 23, 2018, Annex MEX-39.

[137] Third District Court for Labor Matters in Mexico City, Judgement on Amparo Trial, May 31, 2019, Annex MEX-43.

had concluded, and (b) declared that the substantive issues concerning the strike would be addressed in an imputability procedure.[138] During that time, the Mineros, the Coaligados, and IMMSA all took actions in the context of litigation based on pre-2019 law and based on the involvement and decision-making power of the FCAB, which continues to adjudicate and hear labor issues that remain unresolved and subject to the pre-2019 LFT.

113. The case of the bargaining with the Coaligados presents a more challenging set of facts, but the logic is still applicable. It should be noted that the specific issue of the alleged negotiations between IMMSA and the Coaligados, which began in 2020, was never challenged by Los Mineros in Mexican courts or the FCAB. Thus, unlike the strike, there is no stream of litigation on that specific issue. However, it is clear to the Panel that the interactions between IMMSA and the Coaligados stemmed directly from litigation and decisions taken by the FCAB and courts under pre-2019 LFT labor law. For example, IMMSA began its alleged negotiations with the Coaligados once that group voted to end the strike. It also began its alleged negotiations during a period—June 26, 2018 until September 6, 2021—in which the FCAB had granted *titularidad* to a competing union, and thus for a period during which Los Mineros were not recognized as the owner of the CBA. The litigation, the institutions involved, and the length of time to adjudicate are all specific to the prior LFT and prior system, and thus the Panel does not believe that the Mechanism envisages, given its specific reference to the new legislation passed in 2019, that such cases were subject to its jurisdiction.

[138] Special Board No. 10 of the FCAB, Incidental Resolution on Legal Personality, June 9, 2023, Annex MEX-46.

114. While Mexico has argued that the alleged negotiations between IMMSA and the Coaligados should be outside of the Mechanism's jurisdiction because the events themselves "derive" from events that occurred prior to the entry into force of the agreements, the Panel does not believe that it is necessarily the correct framework to analyze the question. Many events in industrial relations "derive" from prior events. The issue for the Panel, at least as applied to the situation here, is that the events that have been challenged derive in a proximate way from events that have been litigated under the prior legal regime, and would likely be subject to pre-2019 versions of the LFT and subject to the jurisdiction of pre-2019 courts, as per the Seventh Transitory Article of the 2019 LFT Reform Decree. Of course, the reasons why those events are or would be subject to the prior labor law regime are due to when they initially occurred and were submitted to the Mexican legal regime for resolution.

115. The Panel proposes a framework for the Parties and future Panels to consider if a dispute with similar jurisdictional questions should again arise. The general rule should be that if the originating events in question occurred prior to the enactment of the May 1, 2019 LFT, then they are subject to the previous law and are not within the jurisdiction of the Mechanism. If they occur after the implementation of the May 1, 2019 LFT but before the USMCA took effect on July 1, 2020, then only the actions that took place (a) after the entry into force of the USMCA and (b) are subject to the 2019 LFT should fall under the jurisdiction of the Mechanism. This would be the case even if those actions derive from events that transpired in the interim between May 1, 2019 and July 1, 2020. Any events that take place post-July 1, 2020 and are subject to the 2019 LFT fall clearly within the jurisdiction of the Mechanism.

116. In sum, the Panel concludes that, based on the ordinary meaning of footnote 2 of Article 31-A.2, when read in light of its context and purpose under the USMCA and the Mechanism, the application of the Mechanism is limited to violations of freedom of association and collective bargaining rights as defined and enshrined in the 2019 LFT.

117. Actions that are or are highly likely to be adjudicated under pre-2019 Mexican labor law are not subject to Denial of Rights claims. In this dispute, the alleged violations of freedom of association and collective bargaining rights that are the subject of the request for the establishment of a panel have their origin in a strike dating back to 2007. According to Mexican labor and constitutional law, these matters have been adjudicated under labor law that pre-dates the 2019 labor law legislation and fall within the jurisdiction of tribunals, such as the FCAB, that are no longer empowered to adjudicate disputes subject to the 2019 LFT. Therefore, the Panel lacks jurisdiction over these matters.

118. To clarify the Panel's analysis, the application of the Mechanism across different periods and situations can be analyzed as follows:

Panel's temporal jurisdiction under the U.S.-Mexico Facility-Specific Rapid-Response Labor Mechanism

	Applicability of law to the events in question	
Date of occurrence of the events in question	***Events Legally Treated under Pre-2019 versions of Federal Labor Law***	***Events Legally Treated under 2019 Federal Labor Law***
Events occurring pre-July 1, 2020	Not Within the Jurisdiction of the Mechanism	Not Within Jurisdiction of the Mechanism[139]
Events occurring post-July 1, 2020	Not Within the Jurisdiction of the Mechanism	Within the Jurisdiction of the Mechanism

III. CONCLUSION

119. The factual and legal history of this dispute is highly unusual and unlikely to repeat itself. The transition from the pre-2019 to the 2019 LFT meant that legal disputes that originated prior to the implementation of the 2019 LFT are treated under the prior law and by institutions, such as the FCAB, that would not be applicable to events that took place after the implementation of the new law. Few industrial disputes continue for the time period that the one between IMMSA and the Mineros has, and few give rise to the extensive litigation and legal complexities that resulted. Our analysis of the Mechanism finds that a Denial of Rights finding can only be applied to events that take place after the entry into force of the USMCA, and that are subject to the 2019

[139] This would encompass issues that took place post-2019 labor law reform, but pre-entry into force of USMCA.

LFT. The events alleged by the United States to constitute a Denial of Rights did not meet those criteria in this case.

HELD: **The Panel lacks jurisdiction in this instance to determine if a Denial of Rights under Article 31-A.2 of the USMCA has occurred**.

Signed,

Gary Cwitco, Chair

Lorenzo de Jesús Roel Hernández, Panelist

Kevin P. Kolben, Panelist

Acknowledgement: The Panel wishes to acknowledge the invaluable work of Dr. Manuel Sánchez Miranda, assistant to Gary Cwitco; José Emmanuel González Carbajal, assistant to Lorenzo de Jesús Roel Hernández; and Valentina Ahumada Poumian, assistant to Kevin P. Kolben. The three, while officially assigned to an individual panelist, worked as a team to provide research and support in all areas of the Panel's work in accordance with Article 12.4 of the Rules of Procedure. Their efforts informed and improved our work immeasurably and their contributions are greatly appreciated.

SEPARATE VIEW PURSUANT TO ARTICLE 31.13 (8) OF THE USMCA

I. INTRODUCTION

1. I have prepared this separate view as an annex to the unanimous final determination to which I am a signatory, because, I believe, for reasons I explain below, that the "Factual History" included in Section I.B. of the Panel's determination, while accurate, is incomplete.

2. The Panel has unanimously determined, as a matter of law, that it lacks jurisdiction under the USMCA to pronounce on the merits of the San Martín mine case. However, as noted at the outset of the proceedings, the Panel would need to conduct a detailed analysis of the substantive issues in the dispute before it could make any determinations on the complex jurisdictional challenges raised by Mexico.

3. Early in the proceedings, the Panel asked the Parties for their views on the scope and purpose of the verification process. Based on those responses, the Panel then concluded that it was the intention of the Parties, when drafting the provisions of Chapter 31-A of the USMCA, that a Rapid Response Panel would be a panel with the authority to take whatever steps and seek whatever evidence it considered necessary to ensure that it had a full and complete understanding of the substantive issues affecting the alleged denial of rights notwithstanding the submissions from the Parties.

4. Accordingly, the Panel conducted a thorough factual investigation in which it reviewed documents, interviewed witnesses in the context of a verification, consulted with a Mexican labor law expert on the LFT, and held a hearing with the Parties. During this process, the panel amassed a significant body of evidence, some of which resulted from the Panel's own initiative to engage a legal expert and to request additional documents from the Parties and the non-governmental entities (NGEs).

5. It is my view that the RRLM panels have a unique mandate representing a convergence of trade law interpretation and labor and worker rights investigation. In its final determination, the Panel has included a "Factual History" section that outlines the events unanimously deemed relevant by its members to settle the dispute at hand.[1] The Panel, however, was not able to reach a consensus regarding the level of detail to be provided about these facts, especially as they pertain to the issue of Denial of Rights. From my perspective, the historical account presented in the Panel report omits some significant events and actions that I consider are crucial for a comprehensive understanding of the dispute's background and history, and of the actions taken by various actors in this dispute. Omitting these details risks losing critical insights from the analysis conducted.

6. I also believe that the Parties intended for the Panel to conduct its work with openness and transparency. I share that perspective and believe there is an obligation to disclose the results of the fact-finding exercise the Panel undertook during the proceedings. This is irrespective of the Panel's conclusion, which I share, that it lacks jurisdiction to determine the presence or not of a "Denial of Rights" at the mine.

7. I have therefore prepared a "separate view" under Article 31.13 (8) of the USMCA that offers a more detailed Factual History as outlined below. Before proceeding, however, I wish to offer a preliminary note. Article 31.13 (8) of the USMCA does not define what constitutes a "separate view." It is also noteworthy that the Spanish and French versions of the USMCA employ different terms for what the English version calls a "separate view." The Spanish text employs the term "opinion divergente," directly translating into "dissenting opinion" in English, a term generally used in general international law to describe a judge's reasoned disagreement with the majority's determination. Conversely, the French version uses the more neutral term "opinion individuelle", which translates into "individual opinion" in the English language. This latter term is broad enough in general international law practice to encompass not only dissenting but also

[1] See Section I.B. of the Panel's final determination.

non-dissenting views. The wording “separate view” used in the English version appears to cover both possibilities as well. I interpret this “separate view” as being a non-dissenting opinion.

8. In this instance, while I concur with the final determination as presented in the Panel’s review, I have authored this concurrent view to supplement the historical record with a series of facts that I considered relevant but which my colleagues did not. My intention is to provide supplementary context to the final determination with these facts and some personal analysis.

9. Both Mexico and the United States concur that the dispute before the Panel is both complicated and atypical of labor disputes in Mexico. I share that view. It is also my assessment that, in part because of the changes in Mexico’s LFT enacted in 2019, a fact pattern similar to the one before us is unlikely to reoccur. As the Panel has noted those legislative changes were primarily designed to strengthen union democracy and union independence, and to reform the administrative organs that apply Mexican labor law, primarily through the transfer of adjudication authority to the judicial branch of government.

10. As noted above, the Panel lacks jurisdiction in this dispute. Therefore, what follows is not a determination of whether a “Denial of Rights” did or did not occur at the San Martín mine, nor should it be interpreted as such. Rather, it is a factual recounting of my understanding of the history of the dispute and an analysis beyond the scope of the legal determination.

II. DISCUSSION

11. There are four central factual and legal issues at the heart of the dispute at the San Martín mine. These are:

1) The 2007 strike;
2) The ownership dispute over which union held title to the collective agreement at the mine;
3) The formation of the Coaligados and its role in ending the strike and resuming work; and,

4) The allegation of illegal bargaining between IMMSA and the Coaligados once work had recommenced.

12. The facts and related legal actions are deeply intertwined, with each issue's progression or stagnation in legal resolution being inextricably linked. However, in an attempt to clarify the events, I will deal with each issue independently, with some unavoidable points of overlap and repetition. While the Panel discussed the basic factual and legal history, I will expand on that narrative here with additional details.

The Strike

13. The strike commenced on July 30, 2007, when Los Mineros, following unsuccessful conciliation attempts, called for the suspension of work at the mine. There were a significant number of issues in dispute. Key among them were concerns about health and safety, the failure of the employer to recognize and bargain with the union's local and national leadership, and its failure to submit dues to the union.[2]

14. As with many facts in this dispute, the circumstances surrounding the strike are contested. Witnesses from the Coaligados testified during the verification that they were coerced into leaving work by Los Mineros under threat of violence.[3] Conversely, the Mineros deny this and claim that there was overwhelming support for the strike among its members. I am unable to confirm or refute either of these claims.

15. Foreshadowing the highly litigious nature of this dispute, the employer and the union filed legal claims and counterclaims[4] regarding the strike's lawfulness. That litigation was not resolved until almost two years later, on May 28, 2009, when the Federal Conciliation and Arbitration Board

[2] See Bill of Petitions and Strike Notice of the Sindicato Minero, June 28, 2007, Annex MEX-10.

[3] Testimonies of Witnesses 1A, 2A and 3A.

[4] Litigation may have been the preferred option along with the strike because of the absence of an obligation under the LFT on either party to a dispute to bargain or more specifically, bargain in "good faith."

(FCAB) confirmed the strike's legality.[5] Neither my colleagues nor I have any reason to doubt, nor has any Party argued otherwise, that the basis of the original strike was on legitimate grievances, a view supported by the imputability award that found IMMSA responsible for causing the strike.[6]

16. It is clear from the evidence that, following the strike's commencement, there were virtually no attempts by either the union or the employer to initiate bargaining that might resolve the issues in dispute.[7] As noted in our determination, there is currently nor was there at the time, an obligation under Mexican labor law to bargain in good faith. Rather, the economic impact of the strike is the primary incentive for the parties to work towards a settlement. However, the conclusion I draw from the evidence is that both the employer and the union were content to let the strike play out and see if the other side "blinked" first. This continued until January 21, 2011, three and a half years into the strike when IMMSA filed for an imputability trial—a legal procedure under the LFT where a court determines the responsible party of a strike and may provide a remedy which will also result in the end of the strike.[8] At the time of the initial filing, the law only provided for unions to initiate such cases. Accordingly, in the first instance the claim filed by IMMSA was determined to be non-justiciable. Through a series of Amparo filings and counter fillings, the SCJN ultimately determined that it was unconstitutional to deny employers the right

[5] Judgement, FCAB Special Board 10, May 28, 2009, Annex MEX-17.

[6] This award, as has been noted, is under appeal at the time of writing.

[7] On October 6, 2022, Los Mineros wrote to IMMSA to, among other things, request the employer "initiate bargaining with the union … to solve the procedure for the strike." See Letter from Los Mineros to San Martín Mine, October 26, 2022, Annex USA-25. In addition, during the verification Los Mineros provided the Panel with a copy of the email that forwarded the request to Grupo México. At the same time, the union indicated that there was further evidence of its attempts to restart bargaining with IMMSA, promising to provide the Panel with that evidence following the verification. The union did, in a post-hearing submission, provide the Panel with documents from 2013 that indicated they were communicating with the judicial and governmental authorities but not directly with the employer. I also am surprised that email was the method used to transmit a request to bargain, rather than a more formal mechanism that would ensure proof the delivery and receipt of the message. IMMSA denied receiving the request. Private Affidavits from IMMSA representatives, Annex SM-41.

[8] Section IV of Article 469 with reference to Article 937 of the LFT.

to seek an imputability award, and it directed the FCAB to initiate an imputability trial based on the employer's petition.[9]

17. That trial began on February 25, 2013. What happened during the next five years is unclear from the documentary record. What we do know is that both the union and the employer participated in the legal proceedings, and the union also chose to exercise its right to file an imputability request seven years later on March 8, 2018.[10] The two cases were joined and heard together.

18. In that same year, 2018, the 10th Special Board of the FCAB suspended the imputability trial to wait for a result in ongoing parallel litigation related to the strike. A second union, SNTEEBMRM, had challenged Los Mineros' "*titularidad*," and sought to be granted "ownership" of the CBA, which was held by Los Mineros.[11]

19. Twelve years after IMMSA filed its imputability petition, and five years after Los Mineros did, the FCAB definitively issued its decision on June 14, 2023, in which it held that the strike was to be imputed to IMMSA, meaning IMMSA was to be held legally responsible. IMMSA was ordered to pay significant lost wages to striking workers, recognize the union leadership and remit lost dues to the union as a result. This decision is currently subject to Amparos related to the award amounts and other issues. According to Mexican labor law and its interpretation by the legal expert witness, Professor Graciela Bensusán, this decision resulted in the termination of the strike and the legalization of the resumption of work.[12] None of the parties to the ongoing

[9] Second Chamber of the Supreme Court of Justice of the Nation (SCJN) (*Suprema Corte de Justicia de la Nación* - SCJN), Judgement on Amparo in Review November 7, 2012, Annex MEX-21.

[10] Miners' Union's Request of Imputability, March 8, 2018, Annex MEX-26.

[11] National Union of Mine Exploration, Exploitation and Beneficiation Workers of the Mexican Republic (*Sindicato Nacional de Trabajadores de la Exploración, Explotación y Beneficio de Minas de la República Mexicana).*

[12] It is noteworthy that, in its written submissions and oral statements throughout the proceedings, the United States has denied that the strike has ended. For example, in its opening statement at the hearing, the United States considered that "the Panel should not find that the Imputability Award 'ended' the strike; nor should it find that the Award resolved the effects of IMMSA's violation of Mexican law in continuing operations during the strike". See

litigation have requested in their subsequent appeals that the strike be reinstated by the courts, and that work should stop.

20. It is my view that neither Los Mineros nor IMMSA exhibited any urgency to end the strike. The employer was willing to endure the financial costs of the work stoppage and clearly believed it had no obligation to initiate bargaining.[13] Had any pressure existed on the company to negotiate prior to 2018, it likely dissipated when the Coaligados voted to end the strike on August 21, 2018 and return to work, and the FCAB allowed the mine to re-open.

21. The union, for its part, also seemed intent to allow the strike to continue. Witnesses from Los Mineros acknowledged receiving financial support from the union since the strike began, which has increased over the years.[14] Coaligados witnesses, on the other hand, claimed severe economic hardship during the strike, including financial struggles, inability to afford basic necessities, and negative impacts on family dynamics, all of which gives them an incentive to continue working at the mine.[15] There is no record of any attempt to re-start bargaining until 2022, and the union did not utilize its other legal option. It delayed filing an imputability request until 2018, almost 11 years after the strike began –only after the employer gained the right to, and did, file such a claim. The Mexican judicial and administrative bodies also appeared to have no particular urgency to resolve the strike. Indeed, decisions, which were admittedly addressing complex issues, took years to be finalized.

22. Through all of this, a significant number of miners at the San Martín mine have remained on strike.

United States' opening statement at the hearing, para. 58. Furthermore, witnesses representing Los Mineros during the verification also shared the view that the imputability award did not end the strike nor did it resolve the violations to the collective bargaining agreement incurred by IMMSA. See Verification Transcript, Testimony of Witness 10C.

[13] The IMMSA witnesses at the verification were adamant that it was not the employer's responsibility to attempt to re-start bargaining.

[14] Testimony of Witness 9C.

[15] Testimony of Witness 2A.

The Title or Ownership Dispute

23. The legal dispute over union representation rights at the San Martín mine began in 2013. In August of that year, SNTEEBMRM filed for what is known in Mexico as an "ownership trial." Legal claims and counter claims were filed by SNTEEBMRM and Los Mineros over several years. For reasons that are not explained in the various submissions to the Panel, this initial application for "*titularidad*," or ownership of the collective bargaining agreement (CBA), dragged on without a resolution for many years. On February 28, 2018, the FCAB organized a vote in which 414 workers participated, with 262 votes in support of SNTEEBMRM, 150 votes in support of Los Mineros, and two null votes.[16] Based on this election, the 10th Special Board issued a decision granting the SNTEEBMRM ownership of the CBA.[17]

24. Los Mineros witnesses and their subsequent legal filings claimed that the vote was not conducted fairly, and that violence and intimidation prevented a fair determination of the wishes of the workers at the San Martín mine.[18] I am unable to either confirm or refute these claims.

25. Following the 2018 ownership award, another Amparo led to a second ownership award of April 2, 2019, which also confirmed SNTEEBMRM as the legitimate representative union.[19] On October 31, 2019, following an Amparo filed by Los Mineros, the Labor Court overturned the previous two decisions and remanded the matter to the FCBA to reassess the situation and issue a corrected ruling. This decision found *inter alia* that problems existed with the list of workers

[16] Special Board No. 10 of the Federal Conciliation and Arbitration Board, Headcount of Union Representative Election, February 28, 2018, Annex MEX-29.

[17] See Special Board No. 10 of the Federal Conciliation and Arbitration Board, First Ownership Award, June 26, 2018, Annex MEX-30. Although the award granted "titularidad" to SNTEEBMRM, the actual ownership of the CBA was not transferred because the decision was under appeal in the Amparo courts. Under Mexican law, the ownership is not transferred until a final decision is made.

[18] Testimonies of Witnesses 7C and 8C. See also Special Board 10 of the Federal Conciliation and Arbitration Board, Second Ownership Award, April 2, 2019, Annex MEX-32 and First Collegiate Court in Matters of Labor of the First Circuit, Judgment on Direct Amparo, October 31, 2019, Annex MEX-33.

[19] Special Board 10 of the Federal Conciliation and Arbitration Board, Second Ownership Award, April 2, 2019, Annex MEX-32.

who were entitled to participate in the February 28, 2018 election, thus lending some support to allegations by Los Mineros of defective procedures in the voting.[20]

26. Both SNTEEBMRM and IMMSA appealed the award to the SCJN. These appeals were joined and treated together by the courts. The SCJN, however, rejected the arguments of both IMMSA and SNTEEBMRM, and definitively confirmed Los Mineros as the legitimate bargaining representative on June 23, 2021. The SCJN held that it would be a violation of the fundamental right to strike if a union could lose its bargaining rights to another union during a strike. In the view of the SCJN, "to admit an action of ownership in a strike scenario would mean to infringe upon this social right recognized by [Mexico's] Federal Constitution." The SCJN further interpreted that, "although the right to strike and the right to choose the representative union are fundamental rights of workers, they cannot coexist due to their very nature."[21] A subsequent award by the FCAB on September 6, 2021, implemented this ruling.[22]

27. Despite this decision, SNTEEBMRM's efforts to replace Los Mineros continued. A few months after the decisions of the Supreme Court and the subsequent ruling of the FCAB, SNTEEBMRM filed on November 13, 2021, a new application to replace Los Mineros as the representative union.[23] This application was denied based on the prior SCJN decision that prohibits the replacement of an incumbent union during a legal strike.[24]

28. The Panel, in the conduct of its review, requested and received a document that accompanied the SNTEEBMRM application for "*titularidad*." Attached to the application was an

[20] First Collegiate Court in Matters of Labor of the First Circuit, Judgement on Direct Amparo, Annex MEX-33.

[21] Second Chamber of the SCJN, Judgement on Amparo in Review, July 23, 2021, Annex MEX-34, para. 51.

[22] Special Board No. 10 of the Federal Conciliation and Arbitration Board, Third Ownership Award, July 23, 2021, Annex MEX-36.

[23] Communication from Mexico in response to Panel's fact-gathering request, February 14, 2024, Annex 1, "Demanda de Titularidad," November 13, 2021.

[24] Communication from Mexico in response to Panel's fact-gathering request, February 14, 2024, Annex 3, "Decision on the Dismissal of the Ownership Claim of SNTEEBMRM, issued by the Federal Labor Tribunal for Collective Matters in Mexico City on December 14, 2021.

annex containing a register of SNTEEBMRM's members at the time, on the basis of which SNTEEBMRM claimed to have garnered support from "each and every single worker" at the San Martín mine for its ownership campaign.[25] The document provided the names of 553 employees who had allegedly joined the union, including personal identification[26] and addresses for each person.[27] Yet during the verification process, all witnesses from the Coaligados denied that they were, or ever had been a member of or affiliated to SNTEEBMRM.[28]

29. Although the General Secretary of SNTEEBMRM, Mr. Felipe Vázquez Tamez, was invited to appear as a witness to assist the Panel in the verification process, he did not respond to the invitation issued by the Secretariat on the Panel's behalf.

30. It is unusual for a union in an organizing campaign to obtain the support of 100% of the workers in a facility. And if the witness testimony by the Coaligados is credible, their names should not have been appeared on a list of members of SNTEEBMRM. The Panel was not able to obtain an explanation of how SNTEEBMRM acquired the names of 553 San Martín mine employees with detailed personal information. IMMSA categorically denied during the verification having assisted any workers or workers' organizations in their efforts to end the strike and/or change ownership of the CBA.[29] Therefore, I am not able to resolve the contradictions between the oral testimony of witnesses at the verification and the documentary evidence in our possession.

[25] Communication from Mexico in response to Panel's fact-gathering request, February 14, 2024, Annex 2, Letter from SNTEEBMRM's General Secretary to the Director General of the Ministry of Labor and Social Security's Registry of Associations, signed on October 7, 2021, stating the following in relevant part: "Through this document, I respectfully come before you to declare that all workers of the company named INDUSTRIAL MINERA MEXICO S.A. DE C.V. (SAN MARTIN UNIT), located at Mineral de San Martín, Municipality of Sombrerete, State of Zacatecas, have joined our union. For this purpose, I am attaching the roster of members of this legal entity for inclusion in the case records. This is for any legal purposes that may apply."

[26] The personal identification listed is the CURP or *La Clave Única de Registro de Población*, and is a unique registration number for every resident of Mexico.

[27] Communication from Mexico in response to Panel's fact-gathering request, February 14, 2024, Annex 2, Register of SNTEEBMRM's members, October 7, 2021.

[28] Testimonies of Witnesses 1A, 2A, 3A and 4A.

[29] Testimony of Witness 6B.

31. The evidence produced at the verification included the following information that I believe to be without dispute: SNTEEBMRM represents workers at the Santa Barbara mine, another mine owned and operated by IMMSA, and the relationship between that union and the employer at this mine was described by IMMSA representatives as positive and cooperative.[30] Those are adjectives, that one would not apply to the relationship between IMMSA and Los Mineros.

32. In summary, even though the question of which union had bargaining rights was under review by Mexican judicial and administrative authorities for many years, the question was definitively resolved in September of 2021 when Mexican judicial authorities held that Los Mineros "owned" the collective agreement and the associated bargaining rights. As a result, as of that date, it was clearly established in law that IMMSA was permitted only to negotiate over the CBA with Los Mineros. The implication of this is discussed in the next section.

33. This observation does not constitute a finding that a "Denial of Rights" occurred as defined by the USMCA, for that is outside the Panel's jurisdiction in this case and would require a different kind of analysis than that engaged in here. However, I observe that despite the lack of ambiguity about which union had "*titularidad*," there was "negotiating-like" conduct occurring between the Coaligados and IMMSA. This issue is addressed in more detail in a following section.

Coaligados Formation

34. As litigation regarding imputability and ownership of the collective agreement slowly progressed through the Mexican legal system, a group of striking miners undertook an effort to end the strike and resume work. Under Mexican Federal Labor Law, a coalition is a recognized legal entity and is defined as "a temporary agreement of a group of workers or employers for the defense of their common interests." [31] Labor unions are considered to be "permanent

[30] Testimony of Witness 6B.

[31] Articles 354 and 355 of the LFT.

coalitions."[32] On August 21, 2018 a group of 253 out of a total of 485 workers still officially on strike, called a meeting at which they voted to end the strike, immediately resume work, and end their association with Los Mineros.[33] They have come to be known as "Los Trabajadores Coaligados" or the Coaligados.

35. During the verification, all witnesses representing the Coaligados asserted that their coalition's formation was a spontaneous movement by dissident workers acting independently on their own initiative. However, several of these witnesses recalled that colleagues from the Santa Barbara mine, whose workers were represented by the SNTEEBMRM, provided assistance and advice on how they could end the strike.[34] The witnesses were unable to explain how the strikers who received invitations to attend the meeting and vote were selected, who organized the meeting or secured the meeting room, who contacted the notary who certified the vote, or who prepared the meeting minutes. The Coaligados, according to their testimony, lack formal leaders, decision-making processes, and sources of funding. Effectively, according to the testimony, everything transpired from discussions among the miners who decided to take spontaneous action, largely without outside organizational assistance.[35]

36. While the evidence shows that while there were 485 miners officially on strike, the remaining 232 strikers who did not vote or participate were neither notified nor invited to participate in the meeting, discussion, or vote.[36]

37. The following day, on August 22, 2018, the Coaligados, joined by IMMSA, appeared before the FCAB and jointly presented the notarized results, requesting the FCAB to implement the three

[32] Article 441 of the LFT.

[33] See Minutes of the Assembly held by the Coalition Workers, August 21, 2018, Annex MEX-38. See also the Coaligados' submission, November 20, 2023.

[34] Testimonies of Witnesses 2A, 3A and 4A.

[35] Ibidem.

[36] This was confirmed by witnesses from both the Coaligados and Los Mineros during the verification.

resolutions adopted at the meeting. Among the legal representatives for the Coaligados at this hearing was an individual who is currently the General Secretary of SNTEEBMRM.[37]

38. In contrast to other legal proceedings in this dispute up to that point, the FCAB swiftly issued a decision on August 23, 2018, declaring the legal termination of the strike on the grounds that the striking workers and the employer had mutually agreed to end it.[38] In response to this decision, Los Mineros filed an Amparo challenging the FCAB decision, which in turn led to a number of hearings and legal decisions.[39] Ultimately, on May 31, 2019, the courts concluded that: (i) Los Mineros' right to be heard had been violated; (ii) the decision of August 23, 2018 terminating the strike was "null and void" because the Coaligados did not possess legal personality; and, (iii) additional hearings should be conducted where Los Mineros could participate and exercise its rights to due process.[40]

39. IMMSA and the Coaligados appealed this decision to the Circuit Court, but the Court delayed the decision until the SCJN resolved related legal issues involving the ownership trial discussed earlier. Once the SCJN ruled in favor of Los Mineros on October 23, 2021, the FCAB issued a final decision on December 9, 2021, declaring its August 23, 2018, decision to end the strike null and void. On January 24, 2022, Los Mineros filed a petition with the FCAB requesting, *inter alia*, that activities at the mine be suspended. No final decision was made, however, until June 9, 2023, when the FCAB definitively annulled the 2018 decision that the strike had ended

[37] The Coaligados' submission, November 20, 2023; Testimony of Witness 4A, Verification transcript, page 36; Special Board No. 10 of the Federal Conciliation and Arbitration Board, Appearance resolution, August 23, 2018, Annex MEX-39; and, Communication from Mexico in response to Panel's fact-gathering request, February 14, 2024, Annexes 2 and 4.

[38] Special Board No. 10 of the Federal Conciliation and Arbitration Board, Appearance resolution. August 23, 2018, Annex MEX-39. According to Section I of Article 469 of the LFT, **"**The strike shall end: I. By agreement between the striking workers and the employers." A minor confusion relates to the number of strikers. The total is reported as 485, with 253 of them attending the meeting on August 21, 2018. This leaves 232 strikers who did not attend. Yet, the decision suggests there were 209 remaining strikers who were given 30 days to resume work, should they choose to do so.

[39] See Seventh District Court for Labor Matters in Mexico City, Judgement on Permanent Injunction against the August 23 Minutes, September 7, 2018, Annex MEX-41.

[40] Third District Court for Labor Matters in Mexico City, Judgement on Amparo Trial, May 31, 2019, Annex MEX-43.

and declared that the substantive issues regarding the strike would be decided in the separate imputability trial procedure.[41] The FCAB then issued its imputability award five days later, on June 14, 2023, finding the strike imputable to IMMSA, ordering remedies to the workers and the union, and ordering that operations at the workplace be normalized, thereby ending the strike.[42] The decision to end the strike by the FCAB was thus made on legal grounds separate and apart from the 2018 petition to end the strike.

40. After 11 years on strike, it is understandable some number of striking workers would begin a movement to end the strike and resume work. However, according to the LFT in effect at that time, the mine was not permitted to resume operations during a legal strike unless specific conditions were satisfied.[43] The confusion created by the contested legality of the strike and the mine's operation is the basis for much of the complexity of the dispute.

41. Part of the difficulty stems from the original August 23, 2018 decision, which Professor Bensusán suggested in her discussion with the Panel as allowing "an illegal resumption of work." She stressed that this decision constituted "violations" because "the Board was not permitted to simply, by a majority vote, lift the strike status; it required the participation of the union in the lifting, because the strike originated from a violation of the collective agreement …"[44]

42. While the imputability award's order of full back pay for strikers may be seen as a form of remediation for the failure of the mine to cease operations during a legal strike, a court's initial authorization to the end of a strike—subsequently deemed "null and void" by a higher court but only enforced years later—significantly undermined Los Mineros' bargaining power with IMMSA, given that the strike is the primary leverage a striking union has in negotiations with an employer.

[41] Special Board No. 10 of the FCAB, Incidental Resolution on Legal Personality, June 9, 2023, Annex MEX-46.

[42] Special Board No. 10 of the Federal Conciliation and Arbitration Board, Imputability Award, June 14, 2023, Annex MEX-47.

[43] See Article 469 of the LFT.

[44]Testimony of Legal Expert, Professor Graciela Bensusán, Transcription, paras. 89 and 115.

Furthermore, the exact status of the strike following the May 2019 ruling remained unclear. The overturned decision triggered a sequence of actions by IMMSA and the Coaligados that complicated the dispute further and posed severe challenges to the effective realization of Los Mineros' collective bargaining rights. This issue is addressed next.

Coaligados Bargaining

43. The factual characterization of the documents submitted by the United States as evidence of bargaining between IMMSA and the Coaligados is contested.[45] Do these documents represent amendments to the CBA between IMMSA and a group of workers lacking legal bargaining rights? Was the bargaining process by a coalition an action "in defence of their common interests" as allowed by the LFT? Was this coalition, in fact, operating under the direction of or aided by SNTEEBMRM during an ownership dispute? Or rather, were the agreements merely minutes of meetings where the employer unilaterally declared new wage rates and other benefits? My factual summary and analysis follow.

44. First, as previously noted, the Coalition at the San Martín mine was officially established at a general assembly held on August 21, 2018. This meeting took place six months after the February 18, 2018 application by SNTEEBMRM to replace Los Mineros, and at a time when SNTEEBMRM had had been legally declared owner of the CBA,[46] although that decision, as explained above, was under appeal.

45. It is also uncontested that one of the legal representatives of the Coaligados before the FCAB in its effort to end the strike in August 2018, was Mr. Felipe Vázquez Tamez, who at the time of writing is the General Secretary of SNTEEBMRM[47] and is regularly listed as the Coaligados' legal

[45] Annexes USA-16, USA-17 and USA-18. These three annexes contain the agreements between IMMSA and the Coaligados.

[46] See Special Board No. 10 of the Federal Conciliation and Arbitration Board, First Ownership Award, June 26, 2018, Annex MEX-30.

[47] Testimony of Witness 4A, Verification transcript, page 36.

representative throughout the many underlying proceedings of this dispute.[48] He is also listed as the legal representative of the Coaligados in this Panel's proceedings.[49]

46. In addition, Mr. Guillermo Rubén Jaramillo Cervantes acted as co-legal counsel for the Coaligados in various proceedings before Mexican judicial authorities. In my analysis of the documentary record, his earliest appearance is found in the application of the Coaligados to end the strike at the San Martín mine on August 22, 2018.[50] He was also present for the negotiations of the Extraordinary Bonus Agreement [51] and the Legal Capacity hearing on behalf of the Coaligados.[52] At the same time, Mr. Jaramillo Cervantes acted as the legal representative of SNTEEBMRM in other legal actions concerning the "titularidad" dispute.[53]

47. Without detailing every legal filing, decision, or appeal, it suffices to assert that through a complicated series of decisions by the FCAB and various courts issued between 2018 and 2021, ownership of the CBA was nominally awarded to both unions at different times in different decisions. By a decision of the SCJN on June 23, 2021, Los Mineros was determined to have *titularidad*. That decision vacated previous rulings granting ownership of the CBA to SNTEEBMRM, and upheld a decision of October 31, 2019, that recognized Los Mineros as the legitimate union

[48] See e.g. Appearance by IMMSA and the Coalition Workers, August 22, 2018, Annexes MEX-37; Minutes of the Assembly held by the Coalition Workers, August 21, 2018, MEX-38; and, Special Board No. 10 of the Federal Conciliation and Arbitration Board, Appearance resolution, August 23, 2018, MEX-39. See also Communication from Mexico in response to Panel's fact-gathering request, February 14, 2024, Annexes 2 and 4.

[49] Coaligados' Submission to the Panel, November 20, 2023.

[50] Appearance by IMMSA and the Coalition Workers, August 22, 2018, Annex MEX-37.

[51] Extraordinary Bonus Agreement, September 21, 2018, Annex MEX-40.

[52] Minutes of Hearing held before the Special Board No. 10 of the Federal Conciliation and Arbitration Board, March 17, 2022, Annex MEX-45.

[53] See, for example, SNTEEBMRM's application for an Amparo Directo 342/2021 submitted to the Panel by the Mexican Party as Annex 4 in an email of February 14, 2024; see also the list of SNTEEBMRM members associated with its application for ownership in the CBA in 2022, titled "Registro de 553 personas afiliadas sindicato" included as Annex 2 in the same email.

and ordered the FCAB to issue a new award.[54] The FCAB issued that award on September 6, 2021, finally confirming that Los Mineros owned the CBA and consequently the bargaining rights.[55]

48. It is therefore the case that, even though the question of which union had bargaining rights was under review by Mexican judicial authorities for many years and, as noted above, was resolved by the SCJN only in September of 2021, the Mexican courts held that Los Mineros "owned" the collective agreement and the associated bargaining rights.[56]

49. The United States alleged in its Request for a Panel that IMMSA was collectively bargaining with an organization that did not hold title to the agreement,[57] referencing meetings that occurred in February of 2020, 2021, 2022 and 2023 between IMMSA and the Coaligados.[58] I make my own analysis of these events in the following paragraphs.

50. At the time these four sessions[59] of the alleged bargaining with the Coaligados, the FCAB's decision declaring that the strike was over had not yet been overturned but was under appeal. Despite two decisions by the FCAB granting ownership of the CBA to SNTEEBMRM, the actual

[54] The Initial Written Submission by Mexico, dated September 28, 2023, details this history in paragraphs 47-79.

[55] See e.g. Annexes MEX-30, MEX-32, MEX-33, MEX-34 and MEX-36. See also Annexes USA-16, USA-17 and USA-18.

[56] A more complete summary is attached as an Annex to this separate view.

[57] United States' Reply Submission, para. 23; United States' Rebuttal Submission, paras. 24 and 25. See also a reference to these alleged bargaining sessions within the USMCA Rapid Response Mechanism petition from the USW, AFL-CIO, and Miners' Union, page 8, Annex USA-1; and, Sindicato Minero, Motion Submitted for Direct Amparo, Annex, MEX-48.

[58] See, agreements between IMMSA and the Coaligados, Annexes USA-16, USA-17 and USA-18.

[59] For the purpose of this separate view, only the sessions from 2020, 2021, 2022 and 2023 are considered in the analysis. However, it is noteworthy that the evidentiary record also contains an agreement signed in 2019 whereby IMMSA and the Coaligados agreed to a wage increase. See Annex USA-18, pages 23-25. This latter agreement is not considered in the analysis as, from the reading of this exhibit, it is unclear whether the negotiations that led to it had a clear relationship with the existing collective bargaining agreement. This stands in contrast to, for example, the 2020 and 2022 agreements, which contain an express and detailed reference to various provisions of the existing collective bargaining agreement, or the 2021 agreement, which at clause five indicates that "The parties agree to ratify this Agreement before the Conciliation Center and the Tribunals of the Judicial Power through their legally accredited representatives." Idem.

ownership always legally remained with Los Mineros, as the transfer of ownership could not take place while Amparos were being adjudicated.

51. That means that the CBA rights holder – Los Mineros – was neither present nor the primary bargaining agent in any of these discussions. That was, rather, the Coaligados. In addition, the documents resulting from the four sessions suggest that SNTEEBMRM representatives attended every one of them.

52. None of these meetings took place in Sombrerete, the location of the mine. Rather, they seem to have taken place in Monterrey, which also happens to be the location of the offices of SNTEEBMRM.[60]

53. A review of the relevant documents resulting from the four sessions shows that *inter alia:*

- The 2020 agreement provided a wage increase and purported changes to multiple clauses in the collective agreement.[61]
- The 2021 agreement increased wages and included other monetary items and created a new job classification. In addition, it states that "the Parties agree[d] to ratify this Agreement before the Conciliation Center and the Tribunals of the Judicial Power through their legally accredited representatives at Special Board Number Thirteen, so that it may be granted the force of an executed award"[62] although this appears not to have been done.[63]

[60] Testimony of Witness 8C. See also agreements between IMMSA and the Coaligados in Annexes USA-16, USA-17, USA-18 and Agreement Between the Coalition and IMMSA, Annex USA-23, all of which mention that the agreements were signed in the city of Monterrey, in the State of Nuevo León.

[61] Annex USA-16.

[62] Annex USA-17.

[63] Mexico's Rebuttal Submission, paras. 144-145; Mexico's opening statement at the hearing, paras. 142-143; Mexico's oral statement at the hearing, hearing transcript, pages 68-69, 83-84 and 108.

- The 2022 agreement increased wages and other monetary items referencing various clauses in the CBA and offered several specific benefits to the "union."[64]
- The 2023 agreement also increased wages and certain other monetary items as well as created a new job classification.[65]

54. In all but one of these agreements, there are signatures from representatives of both the Coaligados and IMMSA, with at least one signatory who is an official of SNTEEBMRM. Notably, in some of these agreements, the signature of SNTEEBMRM's current General Secretary[66] is present.[67] Furthermore, in the 2020 and 2023 agreements, a SNTEEBMRM member and local leader at the Santa Barbara mine is also a signatory.[68]

55. Contrary to the documentary evidence, witnesses from the Coaligados denied attending any such session.[69]

[64] Annex USA-18.

[65] Ibidem.

[66] The identity of SNTEEBMRM's General Secretary has been inferred from two documents submitted as annexes to Mexico's comments on the US' designation of a certain delegate as an observer in the verification (Email communication from Mexico, February 14, 2024), namely: (i) annex 2 (i.e. *amparo directo* brief by the Coaligados, signed on January 4, 2021); and (ii) annex 4 (i.e. letter from SNTEEBMRM's General Secretary to the Director General of the Ministry of Labor and Social Security's Registry of Associations, signed on October 7, 2021). These two documents were signed by SNTEEBMRM's General Secretary at the time. The individual's name was visible to the Panel. The signatory of these documents acted as legal representative of the Coaligados in the present panel proceedings. Submission of the Coaligados to the Panel, November 20, 2023. Furthermore, one of the witnesses at the hearing confirmed that this person is SNTEEBMRM's current General Secretary. See Verification transcript, Testimony of Witness 4A, page 36. The evidentiary record does not contain information as to whether this person held the role of SNTEEBMRM's General Secretary at the time when the agreements between IMMSA and the Coaligados were signed.

[67] See 2019 and 2020 agreements between IMMSA and the Coaligados, Annexes USA-16 and USA-18.

[68] Annex USA-16. In all the agreements the SNTEEBMRM representatives are described as "apoderado legal" (legal representative) to the Coaligados or their legal representatives and thus they appear not in their capacity as officials of another union. The signing of the documents appears to be haphazard and not all the names listed on the various agreements have signatures associated with those names. What is clear is that all the documents except that from 2023 were signed by representatives of the Coaligados and IMMSA. In the case of 2023, the document is unsigned, however the names of 2 commissioners are listed along with the representatives of the 2 parties.

[69] The Panel, in order to maintain the confidentiality of the identity of the witnesses, is only making general rather than specific references to the testimony. See Special Procedures Concerning the Protection of Witness Identities During Verification, adopted by the Panel on January 24, 2024.

56. The witnesses from IMMSA did not deny that the meetings took place; however, they characterized them as informational sessions where the employer announced the unilateral changes being made to the terms and conditions of employment.[70] This description, however, contradicts the documents themselves. Every agreement includes the following description of the actions leading to finalizing their content:

> The parties declare that after having held *various discussions aimed at the granting of an increase in various benefits and in the tabulated salaries per man and per day*, they have reached a satisfactory agreement, which is set forth in the following clauses[71]
>
> (emphasis added)

57. That phrase "various discussions aimed at the granting of an increase in various benefits and in the tabulated salaries per man and per day" must be interpreted by the ordinary meaning of the words and those words strongly suggest that negotiations occurred and clauses of the original CBA formed the basis of the negotiations, as shown in the table appended to this analysis. In other words, the text of these agreements constitutes a clear indication that negotiations between IMMSA and the Coaligados have taken place since 2020, and that the increase of wages and benefits was not unilaterally determined by IMMSA.

58. I will not speculate on the reasons for the contradictions between the documentary evidence and the oral testimony, or why IMMSA would have used the language of negotiations in the agreements to characterize the interactions with the Coaligados if that is not what they were. I do, however, conclude that the documentary evidence created at the time of the meetings is more credible than the oral testimony.

[70] Testimony of Witness 5B.

[71] Unofficial translation, USA-16, USA-17 and USA-18.

59. Mexico has argued that these events and documents cannot be considered collective bargaining or amendments to the collective agreement because they were not submitted to the appropriate administrative bodies as required under the LFT to be enforceable CBAs, and therefore they were not enforceable or legal amendments to the CBA.[72] IMMSA argues that the agreements were legal wage agreements with a temporary coalition as permitted provided for in the LFT. But Coalitions (Coaligados) under the LFT are not permitted to own or bargain amendments to CBAs.

60. Professor Bensusán was emphatic on this point:

> "…if there was no union and no CBA, the coalition can agree to whatever it wants with the employer as long as its members agree that it represents their common interests"
>
> […]
>
> I insist, the coalition does not have the personality to negotiate or modify a collective agreement…:[73]

61. The Panel has unanimously decided it has no jurisdiction to make a legal determination as to whether the negotiation processes and/or the wage agreements constituted a "Denial of Rights" as defined in the Mechanism. However, from a separate viewpoint, when analyzed through a labor relations lens, it is my personal view that the documents and testimonies within the evidentiary record reveal a process closely resembling collective bargaining.

62. This leads to my final comment.

[72] Mexico's opening statement at the hearing, paras. 142-144.

[73] Testimony of Legal Expert, Professor Graciela Bensusán, Transcript, para. 180.

63. The Coaligados have been described throughout this process as an independent organization of workers. The evidence suggests that the links between the Coaligados and SNTEEBMRM are close. I cannot find any action taken by the Coaligados that did not involve SNTEEBMRM leadership in some way. While l make no judgement as to whether this constitutes a "Denial of Rights", it is of concern, based on principles of freedom of association and collective bargaining rights, that a union whose attempts to obtain ownership of the CBA were found to be not legally permissible, could then apparently worked closely with a group of dissident workers to engage in activities that might be seen to undermine the legally recognized union. If it were the situation that an employer and the second union acted in concert, it could result in the undermining of the bargaining power of the legitimate union.[74] Such a result would run counter to the purpose of the labor law reforms undertaken by Mexico in 2019 and of the Mechanism, which is to ensure that workers have greater democratic control over their unions, and that unions and employers do not enter into agreements without workers' consent.

III. CONCLUSION

64. As stated earlier, some of the facts addressed in the preceding analysis became apparent to the Panel through our own investigation and review of documents. Some of those documents were provided in response to the Panel's request for additional information.

65. I offer this summary in an effort to be transparent and disclose what I consider important facts that emerged during the Panel's fact-finding exercise. I have also shared my personal analysis and a possible interpretation of those facts, fully acknowledging that the Panel, and any member thereof, lacks jurisdiction to make any findings regarding a "Denial of Rights."

[74] As noted above representative of IMMSA denied that they supported or held a preference for either union.

ANNEX

Annex USA-16 **February 11, 2020**	**Annex USA-17** **February 9, 2021**	**Annex USA-18** **February 10, 2022**	**Annex USA-18** **February 9, 2023**
Recital Third: The parties declare that after having held various discussions aimed at granting an increase in various benefits and in the tabulated salaries per man and per day, they have reached a satisfactory agreement, which is set forth in the following clauses.	*Recital Third*: The parties declare that after having held various discussions aimed at granting an increase in various benefits and in the tabulated salaries per man and per day, they have reached a satisfactory agreement, which is set forth in the following clauses.	*Recital Third*: The parties declare that after having held various discussions aimed at granting an increase in various benefits and in the tabulated salaries per man and per day, they have reached a satisfactory agreement, which is set forth in the following clauses.	*Recital Third*: The company and Coaligados consider they have fully revised the salary tabulation agreement and have reached an agreement that generates the celebration of this agreement.
Second Clause: The company agrees to allocate a 6.0% increase to the daily tabulated salaries per man and per legal workday, which will be applied to all unionized personnel as of 00:01 hours on February 11, 2020.	*Second Clause*: The company agrees to allocate a 6.0% increase to the daily tabulated salaries per man and per legal workday, which will be applied to all unionized personnel as of 00:01 hours on February 9, 2021.	*Second Clause*: The company agrees to allocate a 7.5% increase to the daily tabulated salaries per man and per legal workday, which will be applied to all unionized personnel as of 00:01 hours on February 11, 2022.	*Second Clause*: The company and the Coaligados agree to allocate a 7.0% increase to the daily tabulated salaries per man and legal workday, which will be applied to all unionized personnel as of 00:01 hours on February 11, 2023.
Third Clause: The company will grant a one-time payment of $500 MXN net to each worker without setting a precedent.	*Third Clause*: The company will grant a one-time payment of $500 MXN net to each worker without setting a precedent.	*Third Clause*: The company will grant a one-time payment of $500 MXN net to each worker without setting a precedent.	*Third Clause*: The company agrees to pay the Treasury of the Local Executive Committee of the Union a one-time lump-sum payment of $50,000 MXN as conflict expenses.
Fourth Clause: The company agrees to cover the conflict expenses in the amount of $40,000 MXN.	*Fourth Clause*: The company agrees to cover the conflict expenses in the amount of $50,000 MXN.	*Fourth Clause*: The company agrees to cover the conflict expenses in the amount of $53,750 MXN.	*Fourth Clause*: The company agrees to create the dust collector category with a tabulated salary of $328.37 MXN plus the salary increase resulting from this revision.

Annex USA-16 **February 11, 2020**	**Annex USA-17** **February 9, 2021**	**Annex USA-18** **February 10, 2022**	**Annex USA-18** **February 9, 2023**
Fifth Clause: The company and the Coaligados agree that in order to increase the competitiveness of the workplace, they agree to an increase in the following benefits contained in the collective bargaining agreement: Article 59: Keeps the same text, changing where it says $600 MXN to read $1,200 MXN. Article 60: Keeps the same text, changing where it says thirteen salary days' to read 14 salary days'. Article 83: Keeps the same text, changing where it says $280 MXN to read $1,500 MXN. Article 96: Keeps the same text, changing where it says $5,200 MXN to read $10,000 MXN. Article 97: Keeps the same text, just change where it says 10 courses to read 15 updated correspondence courses. Article 98: Keeps the same text, changing where it says $220 MXN to read $2,000 MXN. Article 112: Keeps the same text, just changes where it says 1 month	*Fifth Clause*: The Parties agreed to ratify this Agreement before the Conciliation Center and the Tribunals of the Judicial Power through their legally accredited representatives at Special Board Number Thirteen, so that it may be granted the force of an executed award.	*Fifth Clause*: The company and the Coaligados agree that in order to increase the competitiveness of the workplace, they agree to an increase in the following benefits contained in the collective bargaining agreement: Article 38: Keeps the same text, changing where it says 28 days of tabulated salary to read 29 days of tabulated salary, changing where it says 29 days of tabulated salary to read 30 days of tabulated salary, and changing where it says 30 days of tabulated salary to read 31 days of tabulated salary. It is agreed to extend the vacation agreement to workers who have more than 20 days of vacation to enjoy, with the option to choose between enjoying the entirety of the days they are entitled to for vacation or in periods of 6, 12, and 18 days, with the company settling the remaining days according to the selected period, notifying the company in writing with fifteen days' notice in advance. Article 51: Keeps the same text, changing where it says $1,300 MXN to read $2,000 MXN.	*Fifth Clause*: The company agrees to grant a one-time food voucher of $943 MXN to each of the active employees working at the mine.

Annex USA-16 February 11, 2020	Annex USA-17 February 9, 2021	Annex USA-18 February 10, 2022	Annex USA-18 February 9, 2023
salary advance to read 45 days salary advance. This advance will be granted as long as the employee does not have absences for 30 days prior to the request for the advance. Article 121: Keeps the same text, changing where it says $2,000 MXN to read $10,000 MXN. Article 123: Keeps the same text, changing where it says $1,000 MXN to read $3,500 MXN. Article 133: Keeps the same text; changing where it says 84 pairs of mine footwear to read 90 pairs of mine footwear and where it says 104 pairs to read 110 pairs of surface footwear. Article 166: Keeps the same text, changing where it says $25,000 MXN to read $40,000 MXN and where it says $50,000 to read $80,000 Article 171: Keeps the same text, changing where it says $8 MXN to read $15 MXN. Article 185: Keeps the same text; just change where it says 34 days to read 36 days.		Article 59: Keeps the same text, changing where it says $1,200 MXN to read $1,800 MXN. Article 83: Keeps the same text, changing where it says $110 MXN to read $300 MXN and changing where it says $1,500 MXN to read $1,750 MXN. Article 96: Keeps the same text, changing where it says $10,000 MXN to read $12,500 MXN. Article 98: Keeps the same text, changing where it says two workers or children of workers' to read three workers or children of workers. Article 112: Keeps the same text, just changes where it says 45 days salary advance to read 50 days salary advance. This advance will be granted as long as the employee has not been absent for 60 days before the request for the advance. In case of not meeting this requirement, the advance of 45 days will be granted, provided there are no unjustified absences in the last 30 days. Article 121: Keeps the same text, changing	

Annex USA-16 February 11, 2020	Annex USA-17 February 9, 2021	Annex USA-18 February 10, 2022	Annex USA-18 February 9, 2023
Request for increase: increase in the vacation bonus to all employees of one day of salary.		where it says $10,000 MXN to read $20,000 MXN. Article 123: Keeps the same text, changing where it says $3,500 MXN to read $4,000 MXN. Article 133: Keeps the same text; changing where it says 90 pairs of mine footwear to read 100 pairs of mine footwear and where it says 110 pairs to read 110 pairs of surface footwear. Article 166: Keeps the same text, changing where it says $40,000 MXN to read $45,000 MXN and where it says $80,000 to read $90,000. Article 178: Keeps the same text, changing where it says $5,000 MXN to read $10,000 MXN Article 184: The company commits to reactivating the savings fund benefit according to a new regulation set forth in the agreement. Article 185: Keeps the same text; just change where it says 36 days to read 37 days.	

Annex USA-16 February 11, 2020	Annex USA-17 February 9, 2021	Annex USA-18 February 10, 2022	Annex USA-18 February 9, 2023
		Agreement Points: 1.The company agrees to provide 100 chairs and 2 tables for the meetings carried out by the union. 2. The company will provide a color printer. 3. The company agrees to provide three archivists for the union offices. 4. The company will provide once a year 4 new wheels for the Durango brand vehicle. 5. The company will provide once a year 4 new wheels for the Acura brand vehicle. 6. The company commits to reactivating the payment of the piecework bonus for the underground miner category in the amount of $84.70 MXN per day worked. 6. The company undertakes to define the electrical department workers who belong to the mine and surface area, the above, in order to identify the beneficiaries established in article 158 of the CBA.	

ANNEX I. CONFIRMATION OF PETITION PURSUANT TO ARTICLE 31-A.6

September 6, 2023

BACKGROUND

1. On July 16, 2023 the United Sates (i.e. the Complainant Party) filed a petition in which it was alleged that a Denial of Rights was occurring at the San Martín mine (the Covered Facility) owned by Grupo Mexico and located in the state of Zacatecas, Mexico.

2. On July 31, 2023, Mexico (the Respondent Party) sent a report to the United States in which it determined that no denial of rights exists.

3. On August 22, 2023 the United States disagreed with the determination made by Mexico and in accordance with Article 31-A.5.1(a) of the USMCA requested "the establishment of a panel to request that the respondent Party allow the panel an opportunity to verify the Covered Facility's compliance with the law in question and determine whether there has been a Denial of Rights."

4. In accordance with Article 31-A.5.3 the Secretariat established this panel on August 30, 2023.

5. On September 4, 2023, the Mexican Party, in accordance with article 31-A-6 initiated the requirement of the panel to confirm the petition.

ANALYSIS

6. This analysis is based on the documentation available to the panel as of September 5, 2023.

7. Article 31-A.6 requires that a panel

> "shall have five business days after it is constituted to confirm that the petition:
> (a) Identifies a Covered Facility;

(b) Identifies the respondent Party's laws relevant to the alleged Denial of Rights; and
(c) States the basis for the complainant Party's good faith belief that there is a Denial of Rights.

8. Article 31-A.15 offers the definitions for the purposes for of the Annex:

"Covered Facility means a facility in the territory of a Party that:

(i) Produces a good or supplies a service traded between the Parties; or
(ii) Produces a good or supplies a service that competes in the territory of a Party with a good or service of the other Party,

And is a facility in a Priority Sector."

"Priority Sector means a sector that produces manufactured good, supplies services or involves mining."

9. The United States contends that the facility in question is one that "mines copper and other minerals [and] due to the significant bilateral trade between Mexico and the United States in copper and other minerals, the San Martín mine is a "Covered Facility."

10. Mexico denies that the San Martín mine is a covered Facility within the meaning of Article 31-A.15. Mexico further contends that the possible Confirmation of the Petition should not be interpreted in the sense that the Panel has validated the existence of a "Covered Facility." Rather that the Confirmation consists only of a *prima facie* analysis that does not prejudge any arguments that Mexico may make regarding the San Martín mine's conformity with the definition of a "Covered Facility," the substance of the disagreement between the Parties or the jurisdictional objections that Mexico asserts with respect to the application of the Rapid Response Mechanism to the issue before us.

11. The Panel notes that the United States in its petition has specified four sections of Mexico's LFT which it alleges give rise to the Denial of Rights at the San Martín mine:

- Article 449, which requires that "the court and the corresponding civil authorities will enforce the right to strike, granting workers the necessary guarantees and giving them the assistance that they request in order to suspend the work."

- Article 935, which requires that "prior to the suspension of work, the court, with a hearing of the parties, will establish the indispensable number of workers who will continue working so that the work continues to be carried out, whose suspension seriously damages the safety and conservation of the premises, machinery and raw materials or the resumption of work. For this purpose, the court may order the performance of the proceedings it deems appropriate."

- Section IV of Article 133, which prohibits employers or their representatives from "obligating workers by coercion or by any other means, to join or withdraw from the union or group to which they belong, or to vote for a certain candidacy, as well as any act or omission that violates their right to decide who should represent them in the collective bargaining."

- Section VII of Article 133, which prohibits employers or their representatives from "taking any action that restricts the rights of the workers granted to them by the laws."

12. In the petition requesting the establishment of this panel the United States outlined its good faith belief that a Denial of Rights was taking place at the San Martín mine. Those reasons are set out below:

> "The United States considers that workers at the Covered Facility are being denied the right of free association and collective bargaining. The Covered Facility appears to be engaging in normal operations during an ongoing strike without waiting for a lawful resolution and appropriate authorization from the Mexican courts. Grupo México, the employer operating the Covered Facility, also appears to be collectively bargaining with a different labor organization not lawfully authorized to represent workers for the purposes of collective bargaining. The employer is applying the agreements negotiated with this organization to workers at the Covered Facility.
>
> As the USMCA expressly recognizes, the right to strike is linked to the rights to freedom of association and collective bargaining, which cannot be realized without

> protecting the right to strike. Mexican laws complying with Annex 23-A of the USMCA prohibit an employer from continuing regular operations at a facility where the workers are participating in an ongoing strike, and from bargaining with a labor organization that is not the proper representative of the workers. Therefore, the situation at the San Martín mine represents an ongoing denial of workers' rights as outlined in the USMCA."

13. Mexico in the report sent to the Unites State on July 31, 2023 determined that no denial of rights had taken place and that the situation at the San Martín mine was not covered by Annex 31-A of the USMCA "because: (1) the alleged Denial of Rights at the Covered Facility occurred prior to entry into force of the USMCA and did not implicate legislation that complies with Annex 23-A of the USMCA; and (2) the San Martín mine is not a "Covered Facility" within the meaning of Article 31- A.15."

DECISION

14. The panel finds that the petition of the United States meets the *prima facie* requirements of Article 31-A.6 and the petition is hereby confirmed.

15. The panel also notes that nothing in this confirmation prejudges arguments that the Parties may make with respect to any issue before the panel including but not limited to:

(1) Whether or not the San Matín Mine is a covered facility within the meaning of Article 31-A.15;
(2) Whether or not the alleged Denial of Rights is covered by the USMCA; and
(3) The substance of the allegations.

Gary Cwitco – Chair

Lorenzo de Jesús Roel Hernández – Member

Kevin P. Kolben – Member

ANNEX II. RULING ON THE SUSPENSION OF TIMELINES AND CHANGES IN PROCEDURE FOR TRANSLATIONS OF WRITTEN SUBMISSIONS

November 23, 2023

The Panel has the authority and duty under Article 24.4 of the Rules of Procedure for Chapter 31 (Dispute Settlement) and general principles of due process to suspend proceedings and/or amend timelines to allow for professional translation of written submissions. This Ruling is based on both the ordinary and plain meaning of the text of the Rules of Procedure, and the general principles of due process and fairness that are inherent in judicial proceedings. In the instance of delays in translation of a final written determination, agreement of the Parties is required to suspend proceedings and/or amend timelines.

I. INTRODUCTION AND SUMMARY

1. The purpose of this Ruling is to resolve outstanding questions and provide clarity for the interpretation of the Rules of Procedure for Chapter 31 (Dispute Settlement) ("Rules of Procedure") (Annex III) as applied to the Facility-Specific Rapid Response Mechanism (RRM). The Ruling has been issued after consideration of the written submissions[1] of the Parties as well as oral arguments made in a Zoom hearing on October 25, 2023.

2. The issue addressed here is how the Panel should interpret the Articles and provisions in the Rules of Procedure with respect to the amendment of timelines and procedures while awaiting translation of documents and submissions. Specifically, in the case where there are delays or extensive time requirements for the translation of documents, do the Rules of Procedure require the Parties' agreement for timelines and/or procedures to be altered by the Panel? Or alternatively, does the Panel possess the authority to unilaterally extend and alter the timelines and procedures without the agreement of the Parties? The matter is important because

[1] Mexican Party, Letter to the Panel, Comments on the Panel's questions regarding the United States' representations regarding the procedural calendar, Official Letter No. DGCJCI.511.93.819.2023, October 19, 2023.

if agreement were mandated in all cases, it could result in situations whereby the Parties, to comply with prescribed timelines, would have to respond to submissions and/or written evidence before they were fully translated and considered. The Panel has determined that this would be contrary to the text and language of Chapter 31 and the Rules of Procedure, and contravene international norms of due process.

3. The Panel has chosen to issue this Ruling because there might seem to be contradictions or conflicts on the surface between the provisions found in the three different Sections of the Rules of Procedure. The Sections in question are Section A: General Provisions; Section B: Rules Applicable to Dispute Settlement under Section A of Chapter 31; and Section C: Rules of Procedure for the United States-Mexico Facility-Specific Rapid Response Labor Mechanism.

4. The issue initially arose because of delays in the translation of the Respondent Party's (i.e. Mexico) initial submission, which included 80 annexes totaling approximately 2,000 pages.[2] The translation of the entirety of the submission would have required significant time and resources, requiring material adjustments in the procedural time frames and schedules initially outlined by the Panel and prescribed by Chapter 31A. In subsequent discussions between the Parties and the Panel, it was resolved that Mexico would identify the parts of the annexes that were fundamental to supporting the arguments and assertions made in its submission, and that only those parts would be translated. It was further agreed to extend the timelines for the Reply Submission of the Complainant Party (i.e. United States.)

5. The issue, however, gave rise to a potential problem: how to treat timelines if the Parties are not able to reach an agreement to extend them when translations are not completed. The Rules of Procedure make the answer to that question potentially ambiguous given an arguable lack of clarity in certain respects. The Panel therefore chose to analyze the Rules of Procedure

[2] United Mexican States, San Martín Mine, Initial Written Submission by the United Mexican States (MEX-USA-2023-31A-01) (September 28, 2023).

and issue this Ruling. The Panel has determined that sharing its rationale with the Parties could provide useful guidance to both them and future Panels if similar issues were to arise in the future.

6. Finally, the Panel emphasizes that it does not wish, nor does it have the authority, to restrict or limit what either Party submits to make its case. The Panel does, however, have an obligation to determine the relevance of those submissions and the weight that should be given to them. That obligation requires that the Panel and the Parties have sufficient opportunity to consider the written submissions and documents that require translation.

7. The Panel also reminds the Parties that the RRM is by its very nature designed to proceed expeditiously. Furthermore, fairness and due process require that each Party is cognizant of the facts and specifics of the other Party's full submission. Because of the requirement in this procedure that all documents and submissions be translated into English or Spanish, respectively, the Panel therefore encourages the Parties to reflect on what is essential to support their cases and to construct and potentially limit their submissions accordingly.

8. As noted above, in the instant case, the Parties agreed to limit the scope of the annexes to facilitate adherence to the timelines.

II. ANALYSIS

a. Applicability of Sections A, B, and C of the Rules of Procedure to the RRM

9. As noted, the Rules of Procedure are divided into three sections:

1. Section A: General Provisions
2. Section B: Rules Applicable to Dispute Settlement under Section A of Chapter 31
3. Section C: Rules of Procedure for the United States-Mexico Facility-Specific Rapid Response Labor Mechanism.

10. In this first part of our analysis, we examine how each section of the Rules of Procedure should be applied to the RRM. We determine if all sections apply to the RRM or only specific sections. We find that all three sections apply. Where, however, there is a direct conflict in subject matter between Section C and provisions in Section A or B, Section C controls.

11. Section C requires the least analysis, for it clearly applies only to the RRM and as such also controls in case of subject matter conflict. However, the question remains as to how Sections A and B should be understood to apply to RRM procedures.

i. Section A: General Provisions

12. This section is, as the title suggests, a general provision section that applies to all dispute settlement procedures under the USMCA. Both the title and provisions therein lead to the conclusion that the legal rules from Section A apply to Sections B and C as well for the following reasons.

13. First, Section A is titled "General Provisions," indicating that its rules apply broadly to any dispute settlement proceeding under Chapter 31, which includes RRM panels. Second, Article 1 explicitly states that the Rules of Procedure "apply to dispute settlement proceedings arising under Chapter 31." This statement does not distinguish between specific sections of the chapter or its Annex.

14. Third, Section A makes several references to Section C. These include, for example: Article 2 (Definitions), which contains multiple references to provisions in Section C; Article 12 (Remuneration and payment of expenses), which describes payment details for panelists and assistants, explicitly including those involved in labor-related disputes; and Article 14 (Burden of proof), which establishes rules of proof for disputes arising under Chapter 31 in general.

15. These observations lead to two conclusions: (i) Sections A, B, and C constitute a single legal framework that should be interpreted and applied harmoniously; and (ii) the rules in Section A generally apply to RRM panels, a specialized procedure under Chapter 31.

16. A key provision in Section A that is pertinent to the issue at hand and thus merits note is Article 9.5. According to this Article, "A panel may, if the disputing Parties agree, modify a time period applicable in the panel proceeding and make such other procedural or administrative adjustments as may be required in the proceeding." This is a general provision that creates a default rule that any amendments to timelines or other procedural adjustments to any dispute settlement under Chapter 31 must be consented to by the Parties. Thus, barring any specific rules to the contrary, changes to time frames and procedures cannot be made unilaterally by any dispute settlement panel governed under Chapter 31. This could suggest that all amendments by a panel to timeline and procedural matters require the consent of the Parties. But for reasons we expand on below, this is not the case.

ii. Section B: Rules Applicable to Dispute Settlement under Section A of Chapter 31

17. We now turn to Section B of the Rules of Procedure. The title of Section B, "Rules Applicable to Dispute Settlement under Section A of Chapter 31," clearly states that its provisions apply to dispute settlement proceedings under Section A of Chapter 31. Section A of Chapter 31 provides for rules generally applicable to dispute settlement procedures under the USMCA. They are distinguished from Section B of Chapter 31, which applies only to "domestic proceedings and private commercial dispute settlement." The general rules of Section A are modified in some, but not all, respects by the provisions contained in Annex 31-A, which governs disputes initiated under the RRM between the United States and Mexico. Canada and Mexico negotiated its own but largely similar RRM procedure in Annex B of Chapter 31.

18. Notably, the authority for the RRM mechanism provided for in Annex 31-A is explicitly located in Section A of Chapter 31. First, Article 31.2 (Scope) reads that "unless otherwise

provided for in this Agreement, the dispute settlement provisions of this Chapter apply…with respect to the avoidance or settlement of disputes between the Parties regarding the interpretation or application of this Agreement…"[3]

19. Second, the Parties (United States-Mexico and Canada-Mexico) agreed to Annexes 31-A and 31-B establishing the RRM "pursuant to Article 31.5.1" of Section A of Chapter 31 (Good Offices, Conciliation, and Mediation). Thus, because the authority to create the RRM mechanism is rooted in Section A of Chapter 31, and Section A of Chapter 31 is governed by Sections A and B of the Rules of Procedure, this leads to the conclusion that Section B of the Rules of Procedure therefore also applies to RRM disputes unless there is a normative conflict between Section C and Sections A or B of the Rules of Procedure.

20. The Panel concludes that the rules in Sections A and B of the Rules of Procedure also apply to RRM panels, unless there is a clear normative conflict over the same subject matter covered by Section C. In such cases, Section C rules would generally take precedence.

b. Text of Articles 9.5 (Section A), 24.4 (Section B), and 26.20 (Section C)

21. Having addressed the general applicability of the Sections of the Rules of Procedure to RRM Panels, we now turn to the specific question at hand: whether an adjustment of a timeline due to delays in translation of documents requires the agreement of the Parties in all cases. There are several legal provisions within Annex III that would allow panels generally to extend time periods or suspend proceedings contingent on the Parties' consent or specifically related to issues of translation: Article 9.5 found in Section A; Article 24.4 located in Section B; and Article 26.20 from Section C. For ease of comparison, we include the text of the relevant provisions below.

[3] Article 31.2(a).

Article 9.5 (Section A)

22. The first provision, as noted above, is Article 9.5 found in Section A of the Rules of Procedure, which addresses the alterations of timelines and procedures.

Article 9: General Operation of Panels

> 9.5. A panel may, if the disputing Parties agree, modify a time period applicable in the panel proceeding and make such other procedural or administrative adjustments as may be required in the proceeding.

Article 24.4 (Section B)

23. The second provision of relevance in this matter is Article 24.4, located in Section B. Article 24.4 addresses the suspension of time periods to allow for the translation of written submissions.

Article 24: Translation and Interpretation

> 1. A participating Party shall…notify the …the Secretariat…of the language in which it will make its written submissions, oral arguments and presentations, and in which it wishes to receive the written submissions and hear the oral arguments and presentations of the other participating Parties…
>
> 2. If…written submissions or oral arguments and presentations in a panel proceeding will be made in more than one language…the …Secretariat shall arrange for the translation of the written submissions and the panel reports or for the interpretation of arguments at any hearing, as the case may be.
>
> 3. If the…Secretariat is required to arrange for the translation of a written submission or report in one or more languages, it shall not deliver that written submission to the panel and other participating Parties until all translated versions of that written submission or report have been prepared.
>
> 4. Any time period applicable to a panel proceeding shall be suspended for the period necessary to complete the translation of any written submissions.

Article 26.20 (Section C)

24. The third relevant legal provision is Article 26.20, which is found in Section C of the Rules of Procedure. This provision is specific to the RRM and speaks directly to the question of changes in time periods due to translation. To provide the complete and necessary context of that Article, we include the entire sub-section in which it is located, entitled "Languages."

Article 26: United States-Mexico Rapid Response Labor Panels

LANGUAGES

17. Any document presented to the panel may be presented in English or Spanish. If the panel or a Party requests the translation of any document presented to it, the responsible Section of the Secretariat shall notify the Parties, arrange the translation, and provide the panel and both parties with the translation once it has been produced.

18. If the panel conducts a hearing, and the Parties and panel do not all agree that the hearing shall be conducted exclusively in one language, the responsible Section of the Secretariat shall arrange for interpretation. If the panel conducts a verification, the responsible Section of the arrange for any interpretation desired by the panel.

19. The panel may issue its written determination in either English or Spanish. As soon as possible after issuance of the written determination, the responsible Section of the Secretariat shall arrange for the determination to be translated into the other language. Any disputing Party may provide comments on a translated version of a document that is prepared in accordance with these Rules.

20. If both Parties agree, any time period applicable to a panel proceeding shall be suspended for the period necessary to complete the translation.

21. The costs incurred to prepare a translation of a written determination and all other translation and interpretation requirements in a panel proceeding shall be borne equally by each Party's Section of the Secretariat.

c. There Is No Conflict Between Articles 24.4, 26.20 and 9.5 Because They Do Not Address the Same Subject Matter

25. On their face, Article 24.4, and Articles 9.5 and 26.20 could be read to conflict. Article 9.5 requires agreement of the Parties for any change to timelines and procedures in a dispute settlement proceeding. In contrast, Article 24.4 provides for mandatory suspension of timelines by a panel until written submissions are translated regardless of the agreement of the Parties. Yet Article 26.20, like Article 9.5, requires the consent of the Parties for there to be any suspension of time periods due to the need to complete a translation.

26. If we were to interpret the three Articles to address the same subject matter, then clearly Article 26.20 would control, for it is found in Section C, which specifically provide for Rules of Procedure applicable only to the RRM. And thus, as we have noted above, in cases of subject matter conflict, rules in Section C take precedence.

27. However, we now explain why in fact there is no subject-matter conflict between these three Articles exists. At first glance, Articles 24.4, 26.20, and 9.5 could all be read to address the same subject matter because all three establish rules for changing time periods and procedures.[4] However, this would be a misreading. Article 9.5 is a general provision that provides the default requirement for amending timelines and procedures from what is prescribed in Chapter 31. Articles 24.4 and Article 26.20, on the other hand, are more specific: both address the issue of changes in timelines and procedures due to translation and interpretation requirements. Thus, we can rule out subject-matter conflict between Article 9.5 with Articles 26.20 and 24.4.

28. However, there could still potentially be a subject matter conflict between Articles and 24.4 and 26.20 if those Articles address the same subject matter, because those Articles articulate different rules and procedures for addressing delays due to translation. Article 24.4 requires a

[4] Indeed, the Mexican party relied on Article 9.5 in its official letter to the Panel on the issue. Supra note 1.

delay, without qualification, in the proceedings for translation of any "written submissions."[5] While Article 26.20, on the other hand, requires agreement between the parties for a timeline to be suspended in order to complete "the translation." In such a case, Article 26.20 would govern, and agreement between the Parties would be required.

29. To understand why there is in fact no conflict, we must engage in close readings of Articles 24.4 and 26.20, consider their context, and interpret them in light of their related provisions. That is, we must, as required by Article 31 of the Vienna Convention, interpret the Articles "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[6]

i. Article 24.4

30. We first examine Article 24.4. Article 24.4 is in Section B of the Rules of Procedure, which as we have already held is applicable to the RRM procedure barring direct subject matter conflict with rules in Section C. The title of Article 24 is: Translation and Interpretation, and the subparagraphs of Article 24 all address questions of translation and interpretation. Article 24.1 establishes that in any proceeding, a Party shall quickly notify the Secretariat of the language in which it wishes to make submissions, receive submissions, and make oral arguments. Article 24.2 provides that the Secretariat "shall arrange for the translation of the written submissions and the panel reports or for the interpretation of arguments at any hearing, as the case may be." Article 24.3 provides that if the Secretariat is required to "arrange for the translation of a written submission or report in one or more languages" that it shall not deliver the original untranslated

[5] Article 24.4 "Any time period applicable to a panel proceeding shall be suspended for the period necessary to complete the translation of any written submissions."

[6] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 31. Indeed, as indicated in Article 31.13.4 of the USMCA, panels shall interpret the USMCA treaty in accordance with customary rules of interpretation of public international law, as reflected in the Vienna Convention on the Law of Treaties.

written submission or report to the other Party until that written submission or report has been translated.

31. Finally, Article 24.4 addresses the issue of what happens to timelines during the period necessary to translate submissions or panel reports. To reiterate, it clearly states that "a panel proceeding shall be suspended for the period necessary to complete the translation of any written submissions."

32. That is, Article 24.4, read in the context of all other paragraphs within Article 24, must be understood to dictate the procedures for the general functioning of the panels in the process of document submission. This is the general rule as it applies to translation and timelines. To put it colloquially: translation time stops the clock.

ii. Article 26.20

33. We now turn to Article 26.20. This Article is one of several provisions found under the heading "Languages." The first Article under that heading, namely Article 26.17, provides the general rule that any submission to the Panel may be in English or Spanish; that either Party may request a translation of said documents; and that the Secretariat "shall…provide the panel and both parties with the translation once it has been produced." There are no time constraints or deadlines provided for translation, and a translation could therefore potentially take a significant amount of time and still be permissible.

34. In this sense, Article 26.17 most closely resembles Article 24.4 insofar as it is a general requirement that documents be translated. The paragraphs that follow Article 26.17 then proceed from the general to the specific, and address questions of interpretation and translation at specific stages of the RRM procedure. Article 26.18 addresses requirements for interpretation services during a hearing and, if requested by the panel, a verification procedure.

35. Article 26.19 then proceeds to address the rules governing the issuance of a "written determination." A written determination is the final written decision of a Panel in a RRM dispute after it has conducted its verification.[7] It can be written in Spanish or English, but Article 26.19 provides that "[a]s soon as possible…the responsible Secretariat …shall arrange for the determination to be translated into the other language," and that any disputing Party may provide comments on the translated version of the written determination.

36. The Panel also notes that the Article 26.19 requires that a translation of the written determination be done "as soon as possible." It should also be noted that an essential characteristic of the RRM, which distinguishes it from the USMCA's general dispute settlement procedures, is its object and purpose. That is, the RRM is intended to be "rapid," and as such is subject to specific time constraints.[8] This is presumably because in matters regarding freedom of association and collective bargaining rights violations in specific facilities, the Parties agreed to develop a process that could remedy those violations quickly.

37. We now turn to Article 26.20, which provides in full that, "If both Parties agree, any time period applicable to a panel proceeding shall be suspended for the period necessary to complete *the translation* (emphasis added)." The term "the translation" clearly references the translation of the written determination discussed in the prior provision, Article 26.19. Otherwise, Article 26.20 would have read "a translation" or "any translation." Moreover, given that each paragraph within Article 26 is increasingly specific, it would not make sense in the general context of the structure of Article 26 to read Article 26.20 as encompassing of all written submissions or translations.

[7] The written determination is the functional equivalent of a final report in other dispute settlement processes governed by Chapter 31. Article 31.17(5) (Chapter 31, USMCA).

[8] For example, Article 31-A.8(1.b) (Chapter 31, USMCA) provides that a panel shall make a determination on whether or not there is a Denial of Rights within 30 days after completing its verification.

38. The object and purpose of the RRM also leads to a similar conclusion. The implementation of, and remedies for, a Denial of Rights determination are intended to be expeditious, as indicated by the comparatively quick timelines provided for in Annex 31-A and the Rules of Procedure to Chapter 31, and by the very title of the RRM. Although written comments on the written determination are allowed, there is no opportunity for the Parties to appeal a written determination. The written determination is to be in writing and made public,[9] and "[a]fter receipt of a determination by a panel [that] there has been a Denial of Rights" the Complaining Party may begin the procedures for implementing remedies.[10]

39. Because excessive delays in translation could unreasonably delay the exercise of rights to remedy once a written determination has been issued by the Complaining Party and negatively impact the ability to "ensure remediation of a Denial of Rights,"[11] it is our interpretation that the Parties to Section C of the Rules of Procedure intended to guard against the ability of the losing party to delay implementation of remedies due to translation delays. Hence the requirement of there being "agreement between the Parties" to suspend panel proceedings, which the Complaining Party would presumably be reluctant to provide.

40. Accordingly, because Article 26.20 addresses the very specific instance of a translation of the panel's written determination, we find that the Article does not address the same normative issues as do Articles 9.5 or 24.20. Article 9.5 is a generally operative provision that treats all matters related to time periods and other procedure and administrative issues in a dispute. Article 24.4 directly addresses matters of translation of documents in all contexts. In sum, we find that 26.20 only applies to the translation of written determinations by a panel at the end of the verification process, and that agreement by the Parties is required only to suspend procedures due to delays in translation of that written determination.

[9] Article 31-A.8 (5).

[10] Article 31-A.9.

[11] Annex 31-A.1 (2).

d. The Panel's Duty to Safeguard Due Process and Ensure the Fair and Impartial Administration of Justice.

41. While the Panel has determined for the reasons above that Article 24.4 controls in the context of altering timelines and procedures due to required times for translation, principles of due process support the Panel's interpretation and Ruling. Due process is a widely accepted principle of international law and courts, and one that is also common to all national systems of law.[12] For instance, the WTO Appellate Body in *Chile - Price Band System* found that the obligation to afford due process is "inherent" in the dispute settlement system.[13] Similarly, the Appeals Chamber of the ICTY in *Prosecutor v. Aleksovski* has noted that "each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."[14] By the same token, the International Court of Justice has noted that "[g]eneral principles of law and the judicial character of the Court do require that, even in advisory proceedings, the interested parties should each have an opportunity, and on a basis of equality, to submit all the element relevant to the questions which have been referred to the review tribunal."[15]

42. Moreover, this Panel's duty to safeguard due process is implicit in the Rules of Procedure, particularly in Article 9.4. That provision grants panels the latitude to adopt "appropriate procedures" when a procedural question arises that is not covered by the Rules of Procedure. While Article 9.4 directs a panel to consult with the Parties, it is not required to receive the Parties'

[12] See e.g. UNIDROIT Principles of Transnational Civil Procedure, principle 3. See also Charles T Kotuby Jr and Luke A Sobota, Chapter 3 'Modern Applications of the Principles of International Due Process', Section C 'Procedural Equality and the Right to be Heard', in *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press, 2017) 176–183.

[13] WTO Appellate Body Report, *Chile – Price Band System*, at para 176. See also WTO Appellate Body Report, *India – Patents (US)*, para. 94; WTO Appellate Body Report, *US — Continued Suspension / Canada — Continued Suspension*, para. 433; WTO Appellate Body Report, *Thailand — Cigarettes (Philippines)*, para. 147; WTO Appellate Body, Report, *Australia — Salmon*, para. 278.

[14] Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, Decision of the Prosecutor's Appeal on Admissibility of Evidence, *Prosecutor v. Aleksovski*, Case No. I-95-14/1-A, 16 February 1999, 24.

[15] International Court of Justice, Advisory Opinion, *Application for Review Judgement No. 158 of the United Nations Administrative Tribunal*, para. 36, 12 July 1973.

consent of agreement. We read the term "appropriate" to imply that a panel has a duty to make procedural adjustments to ensure due process. This Panel must treat Parties equally and ensure that they have a reasonable opportunity to respond to the claims, arguments, and evidence submitted by another Party. The authority granted to panels under Article 9.4 becomes crucial in situations in which there is disagreement among the parties with respect to aspects of the procedure that affect the ability to be heard. In such scenarios, we are of the view that a panel must exceptionally intervene, based on its authority under general principles of international law and under Article 9.4 of the Rules of Procedure to correct any grave or manifest procedural inequality.

43. This Panel does not lose sight of the special nature of this RRM procedure. It is acutely aware of the rationale for the expedited timeframes established in Annex 31-A and the Rules of Procedure to Chapter 31. We must emphasize, however, that the responsibility of this Panel to uphold due process is not an optional guideline but a fundamental tenet of ensuring fairness and integrity in the proceedings. The inclusion of Article 9.4 in the Rules of Procedure consolidates our view that, despite not explicitly stating so, the Parties have implicitly recognized and not deviated from the principle of due process.

44. Finally, the principle and right to an equal opportunity to be heard is explicit in Articles 26.13-26.16, which fall under the section entitled "Opportunity to be Heard." Article 26.13 specifically provides that, when setting deadlines for submissions or a hearing, the panel chair and Parties "shall keep in mind the need to ensure the Parties an equal opportunity to present their positions." A parallel article is also present in Article 27.13 of the Rules for the Canada-Mexico RRM.

45. The Panel will therefore be guided by its inherent duty to uphold due process in cases in which it is necessary to correct any grave or manifest procedural inequality.

III. CONCLUSION

46. For the reasons detailed above, the Panel in this dispute will be guided by Article 24.4 of the Rules of Procedure and principles of due process regarding suspension of timelines and alterations in procedures to complete translations of documents and submissions. It will do so while also being mindful of the RRM's purpose, and its requirements for rapid verification and, if warranted, remediation. **Issued: November 23, 2023**

ANNEX III. RULING ON THE REQUEST FOR LEAVE BY THE CHAMBER OF COMMERCE OF THE UNITED STATES TO SUBMIT WRITTEN VIEWS

January 18, 2024

1. On January 12, 2024 the Panel received a communication from the Secretariat in which they forwarded a request for leave to submit an *amicus curiae* brief from the Chamber of Commerce of the United States.

2. The Panel met to discuss this request for leave on January 17, 2024.

3. The Panel notes that the procedures for a non-governmental entity to seek leave to submit written views are set out in Article 20 of the Rules of Procedure Chapter 31 (Dispute Settlement.)

4. Article 20 is cited in full below:

> Article 20: Submission of Written Views by Non-governmental Entities
>
> 1. A panel may, on application made by a non-governmental entity located in the territory of a disputing Party, within 20 days after the last panelist is appointed, grant leave to that entity to file written views that may assist the panel in evaluating the submissions and arguments of the disputing Parties.
>
> 2. The application for leave must:
>
> (a) contain a description of the non-governmental entity, including, as applicable, a statement of its nationality or place of establishment, membership, sources of financing, legal status, and the nature of its activities;
>
> (b) identify the specific issues of fact and law the non-governmental entity will address in its submission;
>
> (c) explain how the non-governmental entity's submission would assist the panel in the determination of the factual or legal issue related to the dispute by bringing a perspective, particular knowledge, or insight that is different from that of the participating Parties and why its views would be unlikely to repeat legal and factual arguments that a Party has made or is expected to make; and 15

(d) contain a statement disclosing:

(i) whether the non-governmental entity has or had any relationship, direct or indirect, with a Party;

(ii) whether the non-governmental entity received or will receive assistance, financial or otherwise, in the preparation of its application for leave or its submission; and (iii) if the non-governmental entity has received assistance referred to in subparagraph

(ii), the Party or person providing the assistance and the nature of that assistance;

(e) be made in writing, dated and signed by an official of the non-governmental entity, and include the address and other contact details of the official;

(f) be no longer than 1000 words;

(g) be made in a language notified by Article 24 (Translation and Interpretation) of these Rules; and

(h) be delivered to the responsible Section of the Secretariat.

3. The responsible Section of the Secretariat shall promptly provide any request made by a non-governmental entity to each Party and the panel, and make the request available to the public. The panel shall, after consulting the Parties, decide within seven days after the date of its receipt of the request whether to grant the non-governmental entity leave to submit written views in whole or in part. The responsible Section shall promptly (a) notify the non-governmental entity and the Parties of its decision, and (b) make the decision available to the public.

4. The panel shall set a reasonable date by which the Parties may comment on the application for leave.

5. In making its decision to grant leave, the panel shall take into account the requirements in paragraph 2 and any views by the disputing Parties on the application for leave.

6. If the panel has granted leave to a non-governmental entity to file written views, the panel shall set the date for delivery of the non-governmental entity's written submission, and the date for delivery of any responses to that submission by the Parties.

7. The submission of the non-governmental entity must:

(a) be dated and signed by an official of the non-governmental entity;

(b) be no longer than 10 typed pages, including any appendices;

(c) address only the issues of fact and law that the non-governmental entity described in its application for leave, subject to any further limitations imposed by the panel in its granting of leave;

(d) be made in a language notified by a Party under Article 24 (Translation and Interpretation) of these Rules; and

(e) be delivered to the responsible Section of the Secretariat.

8. The panel shall ensure that the disputing Parties have an appropriate opportunity to provide comments to the panel on any submission by a non-governmental entity.

9. A panel is not required to address in its report any issue raised in a written submission by a non-governmental entity of a Party.

10. The responsible Section of the Secretariat shall make submissions by non-governmental entities public as soon as possible after it is submitted to the panel and at the latest by the time the final report is issued.

11. Each disputing Party shall, no later than 14 days after the date of the establishment of the panel, make public:

(a) the establishment of the panel;

(b) the opportunity for non-governmental entities in each Party's territory to submit requests to provide written views in the dispute; and

(c) the procedures and requirements for making such submissions, consistent with these Rules.

DECISION

5. The Rules are both extensive and clear that a number of specific criteria must be met for NGE's written views to be accepted.

6. The first, established in Article 20.1, is that "[a] panel may, on application made by a non-governmental entity located in the territory of a disputing Party, within 20 days after the last panelist is appointed…"

7. On this basis alone the request by the Chamber of Commerce of the United States fails to meet the clear requirements. The Panel was named on August 31, 2023 and the request was received on January 12, 2024, a period of four- and one-half months and the request is therefore outside the prescribed time frame.

8. For this reason, the Panel declines to grant leave.

ANNEX IV. SPECIAL PROCEDURES CONCERNING THE PROTECTION OF WITNESS IDENTITIES DURING VERIFICATION

January 24, 2024

REQUEST FOR PUBLIC OBSERVATION OF THE VERIFICATION

1. Parties shall provide advance notification to the panel, of the individuals from their delegation who will observe the verification. Parties have the right to raise objections on the other Party's nominations. Nominated individuals will be deemed authorized to observe the verification if no objections are lodged before this panel at least 20 calendar days prior to the verification date. The final decision on whether a particular person is authorized to observe the verification rests upon the panel.

2. Each authorized person shall comply with the prescriptions contained in these special procedures. Each observer is required to submit a copy of their identification to the Secretariat (e.g. passport, driver's license, etc.) for identity verification purposes at least 10 days prior to the verification date.

VIRTUAL/REMOTE VERIFICATION

3. Witness testimonies shall be taken through video-link. Prior to the commencement of the verification, all witnesses shall be informed of the identities of the authorized observers. Furthermore, witnesses shall be informed in plain language regarding the measures in place to safeguard their anonymity.

4. Only authorized persons shall have access to the live streaming of the verification. In making logistical arrangements for the taking of witness testimony through video-link, the Secretariat shall plan to verify the identity of all attendees against the list of authorized persons.

5. The verification sessions shall be recorded. Access to these recordings shall be strictly limited to authorized persons. All recordings shall be destroyed upon completion of this panel proceeding.

6. Observers are expressly prohibited from engaging in any form of audio or video recording of the verification proceedings.

7. The Secretariat will prepare, in collaboration with the translators, transcripts of the verification. Distribution of these transcripts shall be done as soon as practicable following the completion of the verification and transcripts shall be confined strictly to authorized persons.

8. Witnesses' names will be anonymized in the panel report and verification transcripts.

OBLIGATION OF CONFIDENTIALITY REGARDING WITNESS IDENTITIES

9. Parties and observers are irrevocably bound to uphold the strictest confidentiality regarding the identities of witnesses. This obligation encompasses all forms of communication, both written and oral, and extends beyond the termination of the proceedings.

10. In the event that, in a subsequent stage of the proceedings, parties find it imperative to address, comment upon, or challenge any statements made by a witness during the verification process, they shall do so in a manner that preserves the anonymity of the witness’s identity.

ANNEX V. RULING ON THE REQUEST BY IMMSA TO APPEAR AND PARTICIPATE IN THE HEARING

February 13, 2024

1. On February 6, 2024, the panel received a letter from legal counsel for the employer, IMMSA, dated February 2, 2024, requesting to appear and participate in the hearing scheduled for February 28-29, 2024.

2. IMMSA justifies its request on two grounds. First, it considers it can provide valuable information for the panel's determination-making, particularly regarding the panel's jurisdiction and whether a denial of rights has taken place at the San Martín mine. As a way of example, IMMSA claims that it could "provide a unique perspective, as well as key factual information, pertaining to the theoretical conditions of competition between products produced by the Mine and products exported to Mexico from the United States".

3. Secondly, IMMSA considers that the panel should consider that the potential impact of the panel's determination, if any, will largely fall on the mine. IMMSA thus considers that, to ensure fairness and due process, IMMSA should be afforded the right to present its views at the hearing.

4. The Panel met to consider this request on February 8, 2024.

5. Article 20 of the Rules of Procedure governs the submission of written views by non-governmental entities (NGEs) in USMCA panel proceedings including those of the Rapid Response Labor Mechanism.[1] The Article delineates the two principal rights granted to NGEs: (1) the right

[1] The United States requested that the Panel not refer the non-Party actors in the present dispute as NGEs. These are IMMSA, Sindicato Nacional de Trabajadores Mineros, Metalúrgicos, Siderúrgicos y Similares de la República Mexicana (Sindicato Minero), and Los Trabajadores Coaligados. The Panel recognizes that these actors differ in nature from NGEs that might be invited to submit views in a non-chapter 31-A dispute because they are the direct subjects of the dispute and are participants in the verification procedure. However, for the purposes of the submission of written views, the Panel has consistently referred to these actors as NGEs because it has relied on Article 20 (Submission of Written Views by Non-governmental Entities) of the Rules of Procedure for Chapter 31 (Dispute Settlement) for procedural guidance. The Panel relied on Article 20 because the Rules of Procedure do not specifically provide for

to request leave to submit written views; and (2) the right to submit such views if the panel so authorizes. Even if NGEs fulfills the various conditions set out in Article 20, the panel has full discretion to approve or reject an NGE application.

6. NGEs do not have additional procedural or substantive rights under either the Rules of Procedure or the USMCA Facility-Specific Rapid Response Mechanism (Chapter 31-A), such as the ability to appear or participate in hearings. Nothing in the text of the USMCA or the Rules of Procedure suggests otherwise.

7. Article 9.4 of the Rules allows the Panel, should a procedural question not covered by the rules arise, in consultation with the Parties, to adopt an appropriate procedure.

8. While Article 9.5 allows the Panel, if the Parties agree, to make "other procedural or administrative adjustments as may be required in the proceedings." The difference between the two provisions is significant. Article 9.4 demands consultation with the Parties while Article 9.5 demands the agreement of the Parties.

9. The Panel was unable to reach consensus during its February 8th meeting about which of these two Articles was the operative clause. However, because both Articles require the participation of the Parties, the Panel, through the Secretariat, convened a meeting with the Parties on February 12, 2024.

10. The Parties were asked to state their views on the IMMSA request as well as their opinions on which Article the Panel should use to make its determination with respect to this request.

11. Both the United States and Mexico supported Article 9.4 as the clause the Panel should use in evaluating the request.

written submissions from the subjects of the dispute. Future panels might consider whether Article 20 ought to govern such written submissions. However, for the purposes of the verification procedure governed by Articles 20.11-20.12 of the Rules of Procedure, the Panel will refrain from referring to these actors as NGEs.

12. While the reasons were not identical, neither Party supported the request by IMMSA to participate in the hearings.

13. The United States cited Article 31-A.8 (2) Panel Process and Determination which states: "Before making its determination, the panel shall provide both Parties an opportunity to be heard." The United States argued that the text clearly limited the right to be heard to the disputing Parties.

14. It was further noted that IMMSA as well "Los Mineros" and "the Coaligados" had been invited to submit written views to the Panel, and all had done so. IMMSA was also granted leave to submit additional information to the Panel after their original submission. Lastly, representatives of IMMSA have been invited to participate in the verification which will aid the Panel in ascertaining the factual situation.

15. Finally, the United States noted that participants in the hearing under already agreed to procedures must have been designated as able to receive confidential information. No one from IMMSA has such a designation.

16. Mexico for its part raised the concern of the precedent that would be created for any future Panel in a Chapter 31 dispute by granting a non-Party the right to participate in what is a state-to-state process.

17. Mexico also noted that IMMSA had already been heard through their extensive submission and should the Panel require further information the Panel retained the right to request that information at any time.

DECISION

18. In interpreting the USMCA and the rules of Procedure for dispute settlement, the Panel must be guided by the intentions of the Parties to the Agreement. It is clear on reading the text that the Parties intended to grant non-state actors the right, upon application to a Panel, to make written submissions within very clear guidelines. Additionally, a verification process was

established to allow the Panel to interview and question witnesses who possess knowledge of what is happening or what has happened on-the-ground at the facility, that is subject to a complaint under the RRLM process.

19. In the present case, IMMSA has already made a comprehensive written submission. Its submission is more than 60 pages long, surpassing any of Mexico's or the United States' submissions, and it includes 41 exhibits. IMMSA has also, as noted above, been granted leave to submit into the record the product of its FOIA application to the US government.

20. Finally, it should be noted that in trade disputes it is not unique that an industry or sector may be subject to the economic consequences of a Panel decision. But despite the potentially significant economic impact that trade disputes have on private actors, trade agreements such as the USMCA are state-to-state mechanisms. And it is up to the Parties to determine in which ways, if any, non-state actors are entitled to participate and make their views known.

21. For all of these reasons the Panel denies IMMSA's request to appear and participate in the hearings.

22. However, the Panel has agreed to authorize IMMSA and the other NGEs already invited to provide submissions in this case the opportunity to submit new information for the Panel's consideration following the hearing. Such additional submissions will be limited to no more than 10 typed pages, which must be submitted no later than three working days after the end of the hearing.