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UNITED STATES – SAN MARTÍN MINE

(MEX-USA-2023-31A-01)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA

February 28, 2024

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Abbreviation	Definition
CFCRL	Federal Center for Conciliation and Labor Registration
Coalition	Los Trabajadores Coaligados
FCAB	Federal Conciliation and Arbitration Board
FLL	Federal Labor Law
Grupo México	Grupo México, S.A.B. de C.V.
ILO	International Labor Organization
IMMSA	Industrial Minera Mexico, S.A. de C.V.
Los Mineros	Sindicato Nacional de Trabajadores Mineros, Metalúrgicos, Siderúrgicos y Similares de la República Mexicana
Mexico	United Mexican States
Rapid Response Mechanism or RRM	Facility-Specific Rapid Response Labor Mechanism
SCJN	Suprema Corte de Justicia de la Nacion
SNTEEBMRM	Sindicato Nacional de Trabajadores de la Exploración, Explotación y Beneficio de Minas en la República Mexicana
Southern Copper	Southern Copper Corporation
U.S.	United States of America
Drafting Convention	USMCA Drafting Convention
USMCA	United States – Mexico – Canada Agreement
USMCA Implementation Act or the Act	United States – Mexico – Canada Agreement Implementation Act
USW or United Steelworkers	United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union

TABLE OF EXHIBITS

Annex No.	Description
U.S. Reply Submission	
USA-1	Petition (May 15, 2023)
USA-2	Notification E-mail to Mexico (May 18, 2023)
USA-3	Mexico Letter Accepting Review (June 26, 2023) (Confidential)
USA-4	Mexico's Results of the Internal Investigation (Courtesy Translation) (July 31, 2023) (Confidential)
USA-5	Southern Copper Corporation – 10-K Filing (February 28, 2023)
USA-6	10-K Addendum – San Martín Mine (February 21, 2023)
USA-7	Los Mineros Conciliation Hearing (August 21, 2007)
USA-8	Los Mineros Conciliation Hearing (Courtesy Translation) (August 21, 2007)
USA-9	2006 Collective Bargaining Agreement (July 2006)
USA-10	Coalition Letter to Human Resources (August 21, 2018)
USA-11	SCJN Decision (Courtesy Translation) (June 23, 2021)
USA-12	Press Release: Results, Third Quarter and Nine Months 2022 (October 27, 2022)
USA-13	Press Release: Results, First Quarter 2023 (April 26, 2023)
USA-14	Press Release: Second Quarter and Six Months 2023 (July 27, 2023)
USA-15	Press Release: Results, Third Quarter and Nine Months 2023 (October 24, 2023)
USA-16	2020 Agreement Between the Coalition and IMMSA (February 11, 2020)
USA-17	2021 Agreement Between the Coalition and IMMSA (February 9, 2021)
USA-18	2022 Agreement Between the Coalition and IMMSA (February 10, 2022)
USA-19	CFCRL Communication to Los Mineros (July 19, 2023)
USA-20	10-K Addendum – Charcas Mine (February 21, 2023)
USA-21	10-K Addendum – Santa Barbara Mine (February 21, 2023)
USA-22	Appendix: U.S. Exports of Copper Ores and Concentrates to Mexico
USA-23	2022 Agreement Between the Coalition and IMMSA (Courtesy Translation) (Feb. 10, 2022)
U.S. Rebuttal Submission	
USA-24	2023 Annual Report on Arizona-Mexico Economic Indicators (June 2023)
USA-25	Letter from Los Mineros to San Martín Mine (October 6, 2022)

OPENING STATEMENT

1. Good morning, Mr. Chair and members of the Panel. On behalf of the U.S. delegation, I would like to begin by thanking the Panel members, the support staff assisting you, and the Mexican Section of the USMCA Secretariat for your work on this dispute.

I. Introduction

2. The Facility-Specific Rapid Response Labor Mechanism (Rapid Response Mechanism or RRM) set forth in Annex 31-A of the USMCA is a critical tool negotiated by the United States and Mexico to ensure that workers can meaningfully exercise their rights – including the right to freedom of association, the "effective" right to strike, the right to "organize, form, and join the union of their choice" without interference, and the right to engage in collective bargaining.

3. We are here today because unionized workers at the San Martín Mine exercised their lawful right to strike, and their employer, Industrial Minera Mexico (IMMSA), is continuing normal operations at the mine during the strike in violation of Mexican law and is unlawfully bargaining with an unauthorized group of workers. The United States has shown in its written Reply Submission and Rebuttal Submission that these actions constitute ongoing Denials of Rights in breach of Mexico's commitments under Annex 31-A of the USMCA because they are in breach of Articles 449, 935, 133.IV, and 133.VII of the Federal Labor Law (FLL).

4. Because Mexico has disagreed that the Denials of Rights exist, and therefore has failed to take action to remediate the violations of Mexican law at the facility, the United States has asked this Panel to make its own determination. Importantly, the plain text of the USMCA is the principal guiding authority for the Panel in reaching its determination in this proceeding. In

reaching that determination the Panel must consider the ordinary meaning of the language in the Agreement taken in context and in light of its object and purpose, consistent with the Vienna Convention on the Law of Treaties. Under a proper interpretation of the USMCA, because IMMSA is violating Mexican law, the Panel must find that IMMSA is denying workers at the San Martín Mine their right of freedom of association and collective bargaining.

5. As we have stated, Mexico does not appear to deny that the actions identified in the panel request are currently occurring at the facility, nor does Mexico focus its defense on arguing that the company's actions do not violate current Mexican law. Instead, Mexico attempts to avoid these issues by arguing that the USMCA RRM does not apply at all. Mexico is wrong, and therefore the Panel should find a Denial of Rights.

6. In this statement, first, we will explain why the Rapid Response Mechanism applies to the claims identified in the U.S. panel request. Specifically, we will show that the RRM applies to the U.S. claims because they involve Mexican laws that "comply with" Annex 23-A of the USMCA, and because they relate to actions currently ongoing at the facility.

7. Second, we will explain that the San Martín Mine is a "Covered Facility" within the meaning of Article 31-A.15 of the Agreement, because the goods produced at the facility – copper, silver, lead and zinc ores and concentrates – are traded between the parties on the order of billions of dollars annually.

8. Finally, we will discuss why the actions taken by IMMSA at the facility constitute Denials of Rights that Mexico has failed to remediate. Specifically, the United States will show that IMMSA continues to operate its facility at the San Martín Mine, despite the fact that the

lawful strike that was started by Los Mineros, who is the duly recognized representative union at its facility, has not been concluded. Likewise, we will show that at the time of the panel request, and continuing forward, IMMSA continues to engage in unlawful bargaining over the terms and conditions of employment of workers at the facility with a group known as "Los Trabajadores Coaligados" – a group that is not the legal representative union of the workers.

II. The U.S. claims are within the defined scope of the Rapid Response Mechanism set forth in the USMCA.

A. The U.S. claims fall within the scope of a "Denial of Rights" within the meaning of Article 31-A.2 of the USMCA

9. First, Mexico argues that the laws identified in the U.S. panel request do not comprise laws subject to the RRM because they fall outside the scope of Annex 23-A. Mexico argues that only those laws passed as part of Mexico's 2019 labor reforms can be considered to have been "adopted and maintained" within the meaning of Annex 23-A, and that only those laws where "the whole legislative instrument… observe[s] the content of Annex 23-A" can be considered to "comply with" that Annex. Mexico's arguments are contrary to the text of USMCA and self-serving. If adopted by the Panel, this approach would render the RRM largely useless in accomplishing its purpose of ensuring remediation of denials of workers' rights to freedom of association and collective bargaining.

10. Article 31.13.4 of the USMCA requires dispute settlement panels to "interpret this Agreement in accordance with customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties." Article 31 of the Vienna Convention sets forth the "General rule of interpretation" that "[a] treaty shall be

interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Therefore, the Panel must start its interpretive exercise with the text of Annex 31-A.

11. Article 31-A.2 of Annex 31-A states that the Rapid Response 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[.]" Footnote 2 of Article 31-A.2 states that "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." Therefore, if a law "complies with" that Annex – meaning "acts in accordance with, and fulfillment of, wishes, desires, requests, demands, conditions, or regulations,"[1] then that law shall be covered within the scope of the Rapid Response Mechanism.

12. Annex 23-A provides that Mexico shall adopt and maintain measures that are necessary for the effective recognition of the right to collective bargaining, including:

> 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.

13. This provision (and the others in Annex 23-A) sets forth the scope of relevant obligations that must be provided for in Mexico's laws for it to be in compliance with Mexico's obligations under Article 23.3(1) of the USMCA. Violations of Mexican laws that "comply with" this

[1] "Comply" (meaning II.5). *Oxford English Dictionary.* Oxford University Press, 2023. Available at: https://www.oed.com/dictionary/comply_v1.

Annex 23-A can therefore give rise to a Denial of Rights within the scope of the mechanism. As Mexico discusses in its submissions, and as is evident from Annex 23-A, to provide for the full scope of protections set out in that Annex, new legislation was required, and was anticipated to be enacted by January 1, 2019.

14. The question before the Panel with respect to the scope of coverage of the RRM, however, is not whether Mexico has complied with its obligations under Annex 23-A, but whether, pursuant to Footnote 2 of Article 31-A.2, the laws identified in the U.S. panel request are laws "complying with" Annex 23-A. That is, the Panel must determine whether the laws in question are "in accordance with," or "in fulfillment of" the obligations described in Annex 23-A, and in particular, paragraph 2 of that Annex. If they do, the Panel need not go on to address Mexico's separate argument that Mexico only had an obligation to "adopt and maintain" certain legal instruments *pursuant to* that Annex. That is a separate question implicating a separate USMCA obligation.

15. Turning to the question of laws "complying with" Annex 23-A, each of the provisions of Mexican law identified in the U.S. panel request fulfills some aspect of the conditions set out in Annex 23-A, rendering those provisions within the scope of the Rapid Response Mechanism. In the U.S. panel request, the United States referenced Mexican law to illustrate the existing laws that are being violated at this facility. The first laws cited in the panel request are Article 449 and 935 of the FLL. Article 449 requires that:

> "the tribunal and the corresponding civil authorities shall enforce the right to strike, granting workers the necessary guarantees and providing them with the assistance that they request in order to suspend work,"

Article 935 provides that:

> "prior to the suspension of work" a "tribunal, with a hearing of the Parties, shall establish the indispensable number of workers who must continue working so that the work continues to be carried out, whose suspension seriously prejudice[s] the safety and conservation of the premises, machinery and raw materials or the resumption of work."

16. These provisions provide a framework for understanding how strikes are to take place, and that they involve a shutdown of business operations at a facility except to the extent that a court otherwise approves the performance of basic maintenance tasks to conserve the premises. These provisions relate directly to situations where workers' rights to freely associate and utilize the effective right to strike are being undermined by the unlawful operation of the mine while the strike remains ongoing. An employer that violates these provisions and operates its facility despite a strike by its workers is "interfering" with the lawful union activity of those employees.

17. The panel request also cites Article 133.IV of the FLL, which restricts companies from "forcing 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 infringes their right to decide who should represent them in […] collective bargaining," and Article 133.VII, which restricts employers or their representatives from "executing any act that restricts the rights granted to the workers by the laws[.]"

18. These articles of the FLL are covered within the scope of the RRM because Annex 23-A of the Agreement requires Mexico to prohibit companies from refusing to bargain collectively with the "duly recognized union", and the FLL similarly restricts any act or omission that infringes workers' right to decide who should represent them in collective bargaining.

19. Annex 23-A also requires that Mexico prohibit employers from engaging in "coercion" or "interference" in union activity, and Article 133.IV restricts companies from "forcing workers by coercion or by any other means, to join or withdraw from the union or group to which they belong." Similarly, the enforcement of the right to strike described in Article 449 of the FLL and the government's role established in Article 935 prevent the same type of "interference" in union activity as the requirement listed in Annex 23-A.

20. Consequently, the content of Articles 133.IV and VII, and Articles 449 and 935, fulfill the conditions set out in paragraph 2, and therefore "comply with" Annex 23-A within the meaning of Footnote 2 to Article 31-A.2 of the USMCA.

21. If the Panel finds that the laws cited in the U.S. panel request comply with Annex 23-A, it need not go on to evaluate whether these laws were "adopted or maintained" *pursuant to* that Annex, as that is a separate obligation relating to Mexico's compliance with Chapter 23 of the USMCA. However, for completeness, we note that Mexico is also wrong when it suggests that the terms "adopt and maintain" would exclude from coverage of the Annex any law that was not in whole enacted upon entry into force of the USMCA.

22. Mexico argues that because the text of the Agreement says "adopt and maintain," and because the text of Annex 23-A refers to the "Mexican government incoming in December 2018," this means that the text of Annex 23-A limits the United States to only requesting review of laws that were included as part of Mexico's 2019 labor reforms.

23. These arguments are fundamentally flawed for many reasons. First, Mexico's contention that its obligation was limited to adopting measures under the Annex apparently relies on the

idea that its adoption of the 2019 Labor Reform was done pursuant to its obligations under Annex 23-A. However, the USMCA did not come into effect until July 1, 2020. Therefore, the 2019 labor reform itself was an existing measure for purposes of the USMCA. Under Mexico's logic, because all of its laws were *existing laws* at the time of entry into force, there were no laws to adopt at all, or to then maintain. This would be an absurd result, and obviously not one that is supported by the text of the agreement.

24. Indeed, even the idea that an obligation would exist only at a certain point in time – entry into force of the Agreement – makes little sense. If Mexico were to repeal a measure taken pursuant to Annex 23-A, its obligation to adopt and maintain measures that provide for the protections set out in Paragraph 2, for example, would continue to apply. In other words, Mexico had an obligation at the time of entry into force to adopt any new measures needed to comply with that Annex, and it continues to have such an obligation today.

25. Moreover, the full text of the Agreement states that 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." (emphasis added)

The text then proceeds to describe those obligations that must be provided for or in Mexican law. It states that Mexico agrees to adopt and maintain domestic labor laws that protect "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." The Annex continues on to describe several legislative reforms that were needed in addition to the maintenance of Mexico's existing protections, without which workers would simply have no effective union rights.

26. Mexico erroneously cites to the USMCA Drafting Convention, which states that:

> *To the extent possible*, use "adopt" to refer to the establishment or introduction of new measures and "maintain" to refer to existing measures, *or to the enforcement or application of measures*. Thus, the obligation *will often be* to "adopt or maintain". (emphasis added)

27. Contrary to Mexico's arguments, Paragraph 12 of the USMCA Drafting Convention (the Drafting Convention) supports the U.S. position on the meaning of the words "adopt and maintain" in this case. The Drafting Convention states that the words will "often" – but not exclusively – be "adopt or maintain," but it is clear from this language that the Drafting Convention does not require that a specific formulation must be used. Therefore, while the Convention may reflect an intention that the terms should be used in the way indicated "to the extent possible", where the terms are not used in that way, no determination may be drawn from that fact. Instead, again, under the standard set forth in the Vienna Convention, the Panel must look to the ordinary meaning of the text, in context and in light of its object and purpose, when interpreting the text of the USMCA.

28. Annex 23-A, paragraph 1, expressly states that Mexico must both "adopt and maintain" the measures set out in paragraph 2 of Annex 23-A. By using the word "maintain", the text indicates that the scope of Annex 23-A was inclusive of existing laws. Paragraph 2 of Annex 23-A confirms this understanding. For example, subparagraph (a) states that Mexico shall

"[p]rovide in its labor laws" various collective bargaining and free association rights, subparagraph (c) states that Mexico shall "[p]rovide in its labor laws" an effective system relating to union votes, subparagraph (d) states that Mexico shall "[p]rovide in its labor laws" union representation challenges through Labor Courts, and subparagraph (g) states that Mexico shall "[p]rovide in its labor laws" public access to collective bargaining agreements. By contrast, subparagraphs (e) and (f) state that Mexico shall "adopt legislation in accordance with Mexico's Constitution" to accomplish other goals. Thus, in addition to the other reasons discussed previously, paragraph 2 of Annex 23-A contemplates that it would not be necessary to "adopt legislation" in all cases to ensure recognition of the right to freedom of association and collective bargaining.

29. Other provisions of the Labor and other Chapters of the USMCA also provide context for the phrase "adopt and maintain," and confirm the U.S. position. Most relevantly, Article 23.3.1 states: "Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights […]." It is pursuant to this obligation, and specifically the obligation to adopt and maintain laws providing for "freedom of association and the effective recognition of the right to collective bargaining," that Footnote 7 applies. If the obligation applied only to those new laws that needed to be adopted in order to comply with Article 23.3.1, that would mean that the United States, for example, took on no obligation at all. And potentially that Mexico took on no obligations except those identified in Footnote 7. This again shows that an erroneous application of the Drafting Convention would lead to an absurd result, not consistent with the text of the Agreement when read in its proper context.

30. Mexico's reading would have the effect of artificially excluding whole sections of Mexican law that provide for the rights and obligations reflected in Paragraph 2 of Annex 23-A, both from its obligation to adopt and maintain those measures, and from the scope of the RRM, which is aimed at ensuring the remediation of the denial of those workers' rights described in the Annex. For example, the prohibitions on hiring discrimination against workers for their union affiliations, interference with internal union affairs, and carrying out retaliation by "implicit or explicit reprisals" against workers for union activity, all were protected under existing Mexican laws prior to 2019, and all of which must be prohibited in order to satisfy the requirements of Annex 23-A.

31. The Panel asked about the meaning of the term "legislation" in footnote 2 of Annex 31-A and its relationship to Annex 23-A. The Oxford English Dictionary defines "legislation" as meaning "the action of making or giving laws; the enactment of laws, law-giving; an instance of this."[2] This term thus encompasses the provisions of the FLL identified in the U.S. panel request, and any others "complying with" Annex 23-A. The Articles of the FLL that we have discussed in the U.S. submissions are part of "legislation" under Mexico's domestic law and because their requirements fall within the scope of Annex 23-A, these laws are therefore "legislation that complies with Annex 23-A."

32. The Panel also asked whether it may determine if there has been a Denial of Rights absent, or even in contradiction to, a Mexican judicial or administrative determination that there

[2] "Legislation" (meaning 1). *Oxford English Dictionary.* Oxford University Press, 2023. Available at: https://www.oed.com/dictionary/legislation_n?tab=meaning_and_use#39646626.

has been a violation of Mexican law (or whether a determination by a court of a labor law violation *per se* is required for a finding of an ongoing Denial of Rights). The answer to the first question is yes. The Panel can certainly determine that there exists a Denial of Rights through facts that establish a denial of the right of freedom of association and collective bargaining "under laws necessary to fulfill the obligations of the other Party." No prior judicial or administrative determination is necessary for a denial of rights to be "under laws necessary to fulfill the obligations of the other Party." It may also be the case that a judicial or administrative determination has found no violation of Mexican law, but the facts establish a denial of rights "under laws necessary to fulfill the obligations of the other Party" – that is, because Mexican law does not provide for a certain protection but should provide for it. Such a gap, which may lead a judicial or administrative body to find no violation of Mexican law, could lead both to a finding of a Denial of Rights under Annex 31-A as well as a direct breach of Annex 23-A.

33. The answer to the second question is no. A determination by a court of a labor law violation is not a *per se* requirement for finding an ongoing Denial of Rights. These cases may arise in a variety of different postures and with different procedural histories and contexts. The proper function and authority of the Panel in relation to the decisions of Mexican administrative bodies and courts is that the Panel must evaluate any decisions that exist (and situations where they do not) and then determine whether or not the resulting conditions deny workers' rights at the facility. The Panel can – and should – evaluate when an underlying decision does not resolve a Denial of Rights at a facility, which may occur when a decision fails to address or remediate that denial, for example.

34. In this case, however, the Panel need not reach the issues raised in its questions, because the U.S. claims and arguments in this dispute are consistent with the findings of Mexican courts given the current posture of those proceedings, as we will explain in more detail in our discussion of the June 2023 Imputability Award.

35. Consequently, we respectfully ask that the Panel reject Mexico's arguments that the laws cited in the U.S. panel request fall outside the scope of coverage of the RRM, and to determine, as explained below, that IMMSA has violated each of those laws and denied the right of freedom of association and collective bargaining to unionized workers at the San Martín Mine.

B. The United States is asking the Panel to evaluate the current conduct of the mine under its existing legal obligations under Mexican law, and this does not constitute a "retroactive" application of the Rapid Response Mechanism.

36. Mexico is asking the Panel to conclude that any violations of workers' rights at the facility—whether or not they are continuing—fall outside the scope of the RRM because the events at the facility predate the entry-into-force of the USMCA. This argument fails because the United States is 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. Rather, the United States bases its claims on the current situation at the facility, since entry into force of the USMCA. Because these claims relate to a current Denial of Rights, they fall within the definition of a "Denial of Rights" in Article 31-A.2 of the Agreement, which states that the RRM "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[.]"

37. The U.S. panel request includes the following claims, all of which allege current violations of Mexican law:

- 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; and
- The employer *is applying* the agreements negotiated with this organization to workers at the Covered Facility.

38. Mexico has argued that, because the strike commenced prior to entry into force of the USMCA, the RRM cannot be used to address the circumstances of the strike at all. However, none of the U.S. claims require the Panel to make findings on actions or events that pre-date July 1, 2020. As the United States has explained, because the strike at the San Martín Mine continued past July 1, 2020 and remains ongoing, the failure of IMMSA to comply with Mexican laws requiring it to discontinue normal operations constitutes a present and ongoing Denial of Rights. Therefore, Mexico is wrong that the Panel lacks jurisdiction to hear the U.S. claim regarding the illegal operation of the mine during an ongoing strike.

39. Mexico's Rebuttal Submission also claims that because the Coaligados group came into existence in 2018, the unspecified "effects" of the Coaligados formation – which apparently include any and all actions the coalition may take or have taken since entry into force of the

USMCA are beyond the reach of the Rapid Response Mechanism. This is an illogical argument that would result in the exclusion of all actions taken by any entity from the scope of the RRM merely because the entity may have come into existence prior to entry into force of the Agreement. That an illegal action may have commenced prior to entry into force of the USMCA simply has no bearing on whether that action continues post entry into force and thus falls within the scope of rights and obligations of the Parties to the USMCA. Consequently, any argument by Mexico that the allegations in the U.S. panel request or the specific conduct in this case "predates" the entry-into-force of the USMCA is simply misplaced, inaccurate, and unsupported by the text of the Rapid Response Mechanism.

III. The evidence supports a finding that the San Martín Mine is a "Covered Facility" within the plain language and meaning of the definition in Annex 31-A of the Agreement.

40. As set out in the U.S. Reply and Rebuttal Submissions, IMMSA is a "Covered Facility" within the meaning of Article 31.A-15 of the USMCA. Under Article 31-A.15, the term "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[.]" To qualify as a Covered Facility, a facility must meet the definition for at least one of these two categories. In this case, the San Martín Mine constitutes a Covered Facility under both definitions.

41. As applied in this particular case, the mine qualifies as a Covered Facility because the evidence shows that it produces multiple "goods" that are also "traded" between the Parties. We first note that the plain language of the Agreement does not require that the good or goods

produced at the Covered Facility must themselves be exported. Rather, 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. This makes sense, because whether or not a particular producing facility's goods are exported, their production of a good – and the costs of that production including the costs of complying with local labor laws – will affect the market for that good, both in terms of production levels and sales prices, among other things. Furthermore, were a producer with multiple production facilities permitted to evade coverage of the RRM by simply exporting the goods produced at one facility rather than the other, or by commingling or otherwise obfuscating the goods produced at the facility in question, that would undermine the intent of the Parties and the efficacy of the Agreement itself. Therefore, even if exports of IMMSA-produced minerals cannot be specifically verified based on the information available to the United States, the fact that the same minerals are otherwise traded between Mexico and the United States is sufficient to satisfy the first definition of a Covered Facility.

42. In this case, however, the United States has in fact shown that not only are copper and other minerals exported from Mexico to the United States, but IMMSA itself exports large quantities of those same minerals to the United States. The U.S. Reply Submission spells out in specific detail the amounts of milled tons of mining material that the mine produced as recently as 2022. In that year, the mine produced 1,413,207 milled tons of ore material. This ore product resulted in the production of 19,091 tons of copper concentrate, 41,320 tons of zinc concentrate, and 3,540 tons of lead concentrate. With respect to copper concentrate, this product amounted to

51.15% of IMMSA's total copper concentrate production that year. During this same time period, IMMSA recorded sales of $54.0 million dollars "within the territory of the United States." This means that IMMSA exported products from its facilities to the United States. The United States does not have access to disaggregated export data that separates out the export information for each mine, but the combined data declared by IMMSA shows large amounts of exports of the products produced at the San Mart*i*n Mine to the United States from IMMSA mines.

43. The United States presented this evidence of trade between the Parties to the Panel in its submissions because these IMMSA records are available, and because they establish both the goods produced by San Martín Mine and IMMSA's exports of these goods to the United States. Although the Panel asked in its Issues in Dispute document about specific data from the United States Customs and Border Protection service, comparable data is not available in this case and will not always be available in every specific situation involving an overseas corporate entity which deals in raw commodities or other products that are the subject of international trade.

44. The Panel also requested information on whether the term "traded between the parties" can refer to inputs into other final or intermediate goods that are then traded between the Parties. This question is difficult to answer in the abstract because of the number of factual scenarios and arrangements that could exist. Therefore, a panel should evaluate this issue on a case-by-case basis depending upon the specific facts in question. In many cases, an input product that is then transformed into other final or intermediate goods would not be considered the same good or

product. The Panel need not reach this issue in this case, however, because the United States has identified exports and imports of the same goods that are produced by the San Martín Mine.

45. We now turn to the second definition of Covered Facility under Article 31-A.15, which pertains to facilities that 'produce a good or supply a service that competes in the territory of a Party with a good or a service of the other Party[.]' The ordinary meaning of the term "compete" is to "strive with others in the production and sale of commodities, or command of the market,"[3] which directly applies in the context of the production and sale of copper, silver, lead and zinc ore and concentrate commodities.

46. As with the first definition under 31-A.15, it is not necessary under a plain reading of the text for the United States to demonstrate that the goods specifically produced at the Covered Facility are themselves in competition with imports of the United States. Rather, the United States need only show that the goods produced at the mine are goods that are generally in competition in Mexico. Consistent with the evidence provided in Annex USA-22, exports of U.S. copper, silver, lead and zinc ores and concentrates are imported into Mexico and therefore compete in the Mexican market with those same goods.

47. In addition, as discussed in the U.S. Reply Submission, IMMSA's own filings state that their products are in "competition" with "other copper mining and producing companies around the world," and that "global and local market conditions, including the high competitiveness in the copper mining industry," affect the value of their goods. IMMSA's records show sales

[3] "Compete." (verb2, meaning 2.b). *Oxford English Dictionary*. Oxford University Press, 2023 (available at https://www.oed.com/dictionary/compete_v2?tab=meaning_and_use#8817865).

within the territory of Mexico of copper, silver, lead, and zinc ores and concentrates amounting to $464.7 million in 2022. As the United States has demonstrated, U.S. companies exported approximately $1.098 billion of copper ore and concentrates into Mexico in the first 8 months of 2023, $37.5 million in lead ores and concentrates, and $181,203 in zinc ores and concentrates. According to the Government of Mexico's records, the total volume of imports of copper ore and concentrates whose "main commercial origin" was the United States amounted to approximately $1.21 billion dollars in 2022. Therefore, significant quantities of U.S. copper, lead, and zinc raw ores and concentrates "compete" in Mexico with the copper, silver, lead, and zinc ores and concentrates produced by the San Martín Mine.

48. We recall that IMMSA has argued that it "captively consumes" all the copper ore and concentrates it produces, and claims that this exempts it from qualifying as a Covered Facility under the USMCA. However, whether IMMSA consumes the good itself (for example, at an affiliated facility), or sells the good to an external buyer, the goods produced at the facility are still in the markets for copper, lead, silver, and zinc ore and concentrates, regardless of who the end-user or customer is in Mexico. Whatever the nature of the relationship between the producer and the consumer, transfers between these entities would still commercial transactions impacting the market for these goods within Mexico, and thus would not preclude these products from being seen as "competing" with U.S. imports of the same products. Rather, the company is simply vertically integrating its production to reduce the cost of its inputs. Without this integration, however, the end-user or customer consuming San Martin's products would be in the market to acquire other copper, lead, silver, or zinc ore and concentrates that are otherwise

available for purchase, including from the United States. Therefore, the alleged "captive" nature of the consumption of the San Martín Mine's goods does not preclude the facility from qualifying as a Covered Facility under Article 31-A.15(ii) of the USMCA.

49. Based on the foregoing, we respectfully request that the Panel find that the San Martín Mine is a Covered Facility under either definition set out in Annex 31-A.15 of the USMCA, such that the claims identified by the United States in its panel request fall within the scope of a "Denial of Rights" under Article 31-A.2 of the Agreement.

IV. The evidence presented to the Panel establishes that there is an ongoing Denial of Rights to workers at the San Martín Mine as a result of the company's unlawful operations and illegal bargaining with an unauthorized group of workers.

A. A finding of a "Denial of Rights" does not require the complete denial of a workers' rights to freedom of association and collective bargaining.

50. Mr. Chair, and members of the Panel, one of the most troubling and problematic assertions by Mexico in its Rebuttal Submission is its contention that a "Denial of Rights" can only be found if "a very high threshold" is met that "condemns the system […] of a State as such." In Mexico's view, such a violation must be "egregious," reflect "bad faith," be "willful," "clear and malicious," "serious," and "total," among other characteristics. None of these terms is based on the text of the Agreement. Moreover, Mexico's interpretation runs contrary to the entire conception of the facility-specific Rapid Response Mechanism, which came into existence as a method of holding specific facilities accountable for their illegal behavior. The United States considers all violations of workers' rights to the freedom of association and the basic right to engage in union activity and collective bargaining to be serious violations. If a law complying with Annex 23-A is not being complied with, then the right of free association and collective

bargaining as supported by that law is not being protected. Mexico's argument reflects an attempt to change and raise the standard for a Denial of Rights after-the-fact and in a way that would completely undermine the agreed-upon exchange of concessions that led to the successful conclusion of the USMCA.

51. As we already have explained, the Panel must interpret the provision of the USMCA based on the ordinary meaning of its terms, in context. A "Denial of Rights" is defined in Article 31-A.2 of the Agreement, which states that the Rapid Response 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 Party under this Agreement." The terms "freedom of association" and "collective bargaining" are closely related, often used interchangeably, and touch on much of the same subject-matter, including the right to freely engage in labor organizing and union activity (hence, the agreed-upon title of Annex 23-A of the Agreement, "Worker Representation in Collective Bargaining in Mexico"). We have already discussed the scope of those freedom of association and collective bargaining rights pertinent to the RRM which are laid out in Chapter 23 of the USMCA and within Annex 23-A. The phrase "under laws necessary to fulfill the obligations of the other Party" reflects that any denial of rights would be the result of a failure to comply with those laws which protect the right to freedom of association and collective bargaining as required under the USMCA.

52. A "denial" is a "refusal (of what is asked, offered, etc.)."[4] Therefore, where the law requires that something be granted to workers in order to protect their right to freedom of association and collective bargaining, an employer's failure to follow that law results in a denial of that right. When a worker exercises their right to be represented by an independent union and then is openly fired for doing so, that worker has been denied their rights to freedom of association and to collective bargaining. When workers organize and attempt to exercise their right to strike, but a facility continues operating despite Mexican laws requiring that normal operations cease, those workers have been denied their effective right to strike (which implicates the freedom of association and the right to engage in collective bargaining). Mexico's contention that workers' right to freedom of association and collective bargaining must be wholly denied, such that *no* aspect of that right is respected by an employer, is not only unsupported by the text of the Agreement, but would render the RRM practically useless. Indeed, an employer could easily evade consequences under the RRM simply by complying with *some*, but not *all*, Mexican laws relating to freedom of association and collective bargaining. Therefore, the Panel should decline to adopt Mexico's interpretation of the term Denial of Rights, and should find that a Denial of Rights exists at the facility based on IMMSA's failure to comply with Articles 449, 935, 133.IV and 133.VII of the FLL.

[4] *Oxford English Dictionary.* Oxford University Press, 2023 "denial" (meaning 2). Available at: https://www.oed.com/dictionary/deny_n1?tl=true

B. Workers are currently being denied the effective right to strike at the facility because the company is unlawfully operating the mine prior to the conclusion of a strike in violation of Mexican law.

53. The evidence presented to the Panel by the United States demonstrates that there is an ongoing Denial of Rights at the San Martín Mine, because, contrary to Mexico's contentions, IMMSA continues to operate the mine despite an ongoing strike by unionized workers.

1. The Imputability Award has not concluded the ongoing strike at the facility because the return-to-work order in the award is temporarily enjoined, and because the Denial of Rights remains ongoing.

54. Mexico claims in its Rebuttal Submission that the Imputability Award issued by the Federal Conciliation and Arbitration Board (FCAB) on June 14, 2023, "resolved" the specific issue of the strike at the facility and that any Denial of Rights at the facility related to that issue has now become a moot point. Mexico argues that this is the case because the FCAB's award also included an order that directed striking workers to return to work.

55. Mexico is in error. As previously referenced in our submissions, this return-to-work order is presently enjoined pursuant to a court order based on concerns raised in an "amparo" challenge and an accompanying request for suspension filed by the union. The suspension was granted by the FCAB on July 3, 2023, and therefore, while the amparo is pending, the Imputability Award will not go into effect and the status quo ante continues at the facility. That is, the striking workers continue to strike, and as long as the mine continues to operate with replacement workers, it does so illegally.

56. The lack of any resolution to the Denial of Rights at the facility is clear when one considers the situation that would have existed had IMMSA been acting consistently with

Mexican law during the strike. Under Article 935 of the FLL, the company's normal operations would have ceased and the facility would only have been permitted to continue work the suspension of which "seriously damages the safety and conservation of the premises, machinery and raw materials or the resumption of work." Under these circumstances, a return-to-work order would be straightforward. *All* employees would have required any necessary training and other preparation to return to work, for example, because *no* employees would have been engaged in normal production operations during the strike. And the employer would have had every incentive to cooperate with the unionized workers and to resume production as soon as possible.

57. None of that is true at the San Martín Mine, however. Because IMMSA continued to operate the mine during a strike, striking workers were not in a position to return to work safely within the time period ordered in the Imputability Award, and for this and other reasons, the order is subject to multiple amparos. This being the case, the status quo continues. IMMSA continues to operate the mine illegally with workers who should not have been working during the strike, and who by law should not be working there now. Therefore, the ongoing *effects* of IMMSA's violation of Mexican law in continuing operations during the strike remain unresolved, and thus the denial of workers' right to freedom of association and collective bargaining remains ongoing despite the issuance of the Imputability Award.

58. The expert testimony of Professor Graciela Bensusán Areous is consistent with this view. As she explains, a strike unequivocally means the shutdown of business operations at the facility. What Professor Bensusan also emphasizes in her testimony is how "atypical" the situation at the

San Martín Mine is. The fundamental tension here is that in 2018 the facility reopened with non-striking workers after a decision by the FCAB that has since been overturned by reviewing courts. Despite the decision having been overturned, the mine has not ceased to operate using replacement workers. This has resulted in the untenable and as of yet unremediated situation of two classes of workers—one group illegally working, and the other group legally on strike—a situation that the Imputability Award failed to resolve. Thus, while Professor Bensusán testified that in her view an imputability award usually marks the end of a strike, she also made clear that the situation at the mine is not at all usual. In this situation, all parties filed an amparo against the award, and Los Mineros' request for a suspension of the return-to-work order was granted. Therefore, 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.

59. We recall that the Imputability Award did not resolve the issue of the replacement workers, because that decision was based upon a legal record that closed prior to the Coaligados' attempt to take over representation of workers at the mine. Therefore, the court did not consider the presence of these non-unionized workers at all.

60. In its Issues in Dispute document, the Panel asked how the U.S. position on this fact is consistent with Paragraph Three of the FCAB determination, and we will briefly explain this issue now. Paragraph Three of the FCAB's imputability award refers to the company's having "recruited external staff to fill newly created posts or permanent vacancies," and we understand

that the Panel seeks to understand whether this "external staff" refers to Coaligados workers. It does not.

61. As discussed on Page 4 of the Imputability Award, the record being considered in the decision was closed on November 5, 2014, a date prior to the reopening of the mine in 2018 based on Coaligados' attempts to represent workers. As of November 5, 2014, the investigation was declared closed and the case files were ordered to be turned over for a draft resolution. It was upon this record that the June 14, 2023 imputability award was decided.

62. The workers referred to in paragraph 3 are "recruited external staff to fill newly created posts or permanent vacancies[.]" On Page 5, in Roman numeral II of the section titled "Considerando," the court identifies the issue they are referring to as whether IMMSA violated the collective-bargaining agreement in a number of different ways in 2007 and are responsible for the outbreak of the strike. Article 5 of the 2006 collective-bargaining agreement requires new hires to be placed through the union, and the union alleged a violation of this provision by the company in its list of demands. It was these original collective bargaining agreement violations that the Imputability Award references. Moving forward to Page 12 of the award, the court discusses the evidence offered by the company to rebut this allegation. Nowhere does the award mention Coaligados or discuss the situation at the mine in 2023, when the award was issued.

63. Therefore, the Denial of Rights at the San Martín Mine continues, because the strike continues under the current suspension granted as part of the amparo filed against the Imputability Award, and because the mine continues to operate normally despite that ongoing

strike. Moreover, the *effects* of IMMSA's violation of Mexican law in continuing operations during the strike remain unresolved, and thus the denial of workers' right to freedom of association and collective bargaining remains ongoing despite the issuance of the Imputability Award.

2. IMMSA's continued operations during an ongoing strike is a violation of Mexican law and constitutes a Denial of Rights under the Agreement.

64. With respect to the unlawful operation of the mine during a strike, Mexican law is clear that a company may not operate its facility normally during a strike. This principle is outlined in Articles 449 and 935 of the Federal Labor Law. Those sections of the law demonstrate that "enforcement of the right to strike" includes suspension of work at the worksite. The suspension of work does allow – at the direction of a court – for certain indispensable work to continue to preserve the safety and conservation of the premises and machinery. To confirm this, we can turn to the testimony of the Panel's expert witness Professor Graciela Bensusán Areous, who testified that in terms of Mexican law, "the legal effect of a strike means that the activities [of a company] are paralyzed and it is the total paralysis of [their business] activity."[5] When a company interferes with these rights by restarting or maintaining its production and full business activity, that conduct not only violates these two provisions in the FLL, but is also the "execution of an act that restricts the rights granted to workers" under Mexican law in violation of Article 133.VII of the FLL. In this instance, IMMSA is currently engaged in the full operation of its

[5] Transcript, Testimony of Professor Graciela Bensusán Areous at Paragraph 89.

business at the San Martín Mine, resulting in an ongoing Denial of Rights to workers at the facility.

65. Citing sections of its 2006 FLL (which is very similar language in its current law), Mexico contends that the evidence provided to the Panel does not meet that standard, because there is not specific evidence that Mexican courts or the FCAB failed to intervene in the strike. This argument is misplaced, and misunderstands the standard for establishing a Denial of Rights. In the case of a "Denial of Rights" under Article 31-A.2, the only burden that the United States carries in a Rapid Response Mechanism proceeding is establishing by a preponderance of the evidence that there is an ongoing Denial of Rights for workers at the facility in question. To the extent that the Denial of Rights reflects a failure by the other Party (i.e., Mexico) to fulfill its obligations under the USMCA, the United States is under no burden to describe in a counter-factual way exactly how the specific details of that domestic failure occurred. Nor does the United States need to show that Mexico failed to effectively enforce its labor laws. Rather, the fact that operations are ongoing is sufficient to demonstrate the facility's failure to comply with Mexican law.

66. Consequently, we respectfully ask that the Panel determine that there is an ongoing Denial of Rights at the San Martín Mine because the mine continued operations during an ongoing strike, and because the effects of this violation remain ongoing despite the issuance of the Imputability Award.

C. Workers are currently being denied their right to representation by their legally designated union because the company is unlawfully bargaining with a group that it is not legally authorized to bargain with.

67. IMMSA also violates workers' right to freedom of association and collective bargaining because IMMSA has been bargaining with a non-representative group and applying the agreements it has made with that group to workers at the facility.

68. Article 133.IV of the FLL, whose current language was amended on January 5, 2019, prohibits employers and their representatives from "any act or omission that infringes [on workers'] right to decide who should represent them [for the purposes of collective bargaining]." Likewise, Article 133.VII of the FLL prohibits employers from "executing any act that restricts the rights granted to workers by the laws." The record clearly reflects that IMMSA is presently engaged in unlawful and unauthorized collective bargaining with the "Coaligados" in violation of Mexican law.

69. Mexico suggests in its Rebuttal Submission that the collective-bargaining agreements being negotiated between IMMSA and the coalition "do not represent an illegal conduct in contravention of the right to collective bargaining […] because they lack validity[.]"[6] That is, Mexico appears to argue that unlawful bargaining could only be taking place if the documents submitted as a result of such bargaining were "officially" filed with the FCAB. However, whether or not IMMSA or Coaligados attempted to file illegal collective bargaining agreements, the facts demonstrate that these parties did in fact engage in bargaining and came to agreements

[6] Mexico's Rebuttal Submission at 38.

that were then applied to workers at the facility. In fact, testimony from Los Mineros during the verification indicated that negotiations between the Coaligados and IMMSA may be occurring right now.

70. The United States has submitted multiple examples of these unlawful agreements, which state that their negotiated changes to working conditions will directly apply "to all unionized personnel at the facility.". The existing collective-bargaining agreement negotiated by Los Mineros prior to the strike – which only they have the legal right to amend – is referred to in the agreements, which provide a list of changes to sections of the Los Mineros collective-bargaining agreement. This evidence clearly demonstrates that IMMSA is unlawfully bargaining with the Coaligados regarding their rates of pay, other types of compensation, and their general terms and conditions of employment, despite the fact that Coaligados was not legally authorized to represent workers at the facility for purposes of collective bargaining.

71. We note that the testimony of the Coaligados workers and of IMMSA representatives supports a finding that Los Mineros is the legal representative union of the workers at the mine. With respect to IMMSA's illegal bargaining with Coaligados, however, the testimony of the Coaligados and IMMSA at the verification was inconsistent with both their respective written submissions and the documentary evidence on the record, and therefore does not credibly rebut the U.S. on this issue.

72. Consequently, we respectfully ask that the Panel reach the conclusion that IMMSA's illegal bargaining with the Coaligados represents an ongoing Denial of Rights to workers at the facility in violation of the commitments set forth in the USMCA.

V. Responses to additional questions raised by the Panel.

73. The Panel has asked the Parties about the relationship between the labor obligations in the USMCA and ILO Conventions, and whether the Panel needs to consider any conflict between these laws. The answer is no. First, the United States has not requested any findings regarding the facility's compliance with ILO Conventions. Rather, the United States has referred to certain of those conventions because they are part of Mexican law, and may be looked to by the Panel for purposes of interpreting the specific provisions of the FLL cited in the U.S. panel request. Second, the Panel's task under Annex 31-A is to determine whether a Denial of Rights has occurred at the facility under laws necessary to fulfill the obligations of Mexico. The basis for a finding that a Denial of Rights has occurred would be the failure of the facility to comply with Mexican legislation complying with Annex 23-A of the USMCA, as identified in the U.S. panel request. None of these inquiries relates to international labor standards more generally, and the Panel therefore need not consider whether a conflict exists between Mexican labor law and international labor standards.

74. The Panel also asks in its Issues in Dispute document, who can be "held responsible" for creating a "Denial of Rights", and whether it is the employer, the state, a union, or all of the above. Mexico made commitments in the USMCA to remedy Denials of Rights under the USMCA. And the question before the Panel is whether an ongoing Denial of Rights exists at the Covered Facility in question. In this case, the United States has raised claims regarding the employer's non-compliance with certain Mexican laws, which gives rise to Denials of Rights

under the USMCA. But it is the Parties who are "responsible" for compliance with their international obligations under the USMCA.

75. And in response to the Panel's question regarding what kind of remediation the United States may seek in the event of a finding in our favor, we note that there are two types of remediation that would be needed in this case. The first is remediation of the Denials of Rights at the San Martín Mine. Mexico may request that the Panel include recommendations in its report regarding the remediation of any Denials of Rights found to exist at the facility. Whether or not Mexico chooses to do that, however, for Mexico to come into compliance with its obligations, it must ensure that any violations of Mexican law are resolved, such that the corresponding Denial of Rights also would be remediated. This would mean that normal operations are discontinued until the strike has concluded, and that collective bargaining with a group that is not the legal representative of workers at the mine ceases. Second, in the event a Denial of Rights is found to exist, the United States may impose remedies in the form of trade sanctions as indicated in the USMCA, including the suspension of liquidation of duties on products from the San Martin mine and the suspension of preferential tariff and duty status for imports from the facility.

VI. Conclusion

76. As we have demonstrated in the U.S. Reply Submission, the U.S. Rebuttal Submission, and this opening statement, IMMSA's conduct at the San Martín Mine represents an ongoing Denial of Rights within the meaning of the Rapid Response Mechanism and the USMCA, specifically including the continued operation of the mine facility during the pendency of a

lawful strike under Mexican law, and their circumvention of the duly recognized union at the facility and their decision to engage in unlawful bargaining with an unauthorized group of employees to establish their terms and conditions of employment.

77. Accordingly, the United States continues to respectfully request that the Panel issue a determination that finds the existence of an ongoing Denial of Rights at the San Martín Mine, in breach of Mexico's commitments under the USMCA.

78. Mr. Chair, members of the Panel, this concludes our opening statement. We thank you for your attention and look forward to responding to any questions you may have.