UNITED STATES – SAN MARTÍN MINE

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

REBUTTAL SUBMISSION OF THE UNITED STATES OF AMERICA

December 13, 2023

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TABLE OF ABBREVIATIONS

Abbreviation	Definition
CBA	Collective Bargaining Agreement
Coalition	Los Trabajadores Coaligados
FCAB	Federal Conciliation and Arbitration Board
FLL	Federal Labor Law
Grupo Mexico	Grupo México, S.A.B. de C.V.
IMMSA	Industrial Minera México, S.A. de C.V.
Los Mineros	Sindicato Nacional de Trabajadores Mineros, Metalúrgicos, Siderúgicos y Similares de la República Mexicana
Mexico	United Mexican States
Minera Mexico	Minera México, S.A. de C.V.
NGE	Non-Governmental Entity
RRM	Facility-Specific Rapid Response Labor Mechanism
SCJN	Suprema Corte de Justicia de la Nación
Southern Copper	Southern Copper Corporation
U.S.	United States of America
USMCA or the Agreement	United States – Mexico – Canada Agreement

TABLE OF SUPPLEMENTAL EXHIBITS

Annex No.	Description
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)

I. Introduction

1. The United States offers this rebuttal submission to the Panel pursuant to Article 31-A.7.2 of the United States – Mexico – Canada Agreement (USMCA or the Agreement). The rebuttal submission is provided consistent with the Panel's submission schedule setting forth the timing and nature of the filings in this proceeding issued on September 14, 2023.[1]

2. This panel dispute involves a straightforward application of the Facility-Specific Rapid Response Labor Mechanism (RRM) set forth in Annex 31-A to the USMCA. In the U.S. Reply Submission, the United States provided the clear factual record and textual and legal authority to support a determination of an ongoing Denial of Rights at the San Martín Mine. This included an analysis about why that determination – one that can be made exclusively regarding current and ongoing conduct at a Covered Facility in Mexico – is directly supported by the text of the USMCA.

3. In the Reply Submission, the United States set forth its disagreements with the Initial Written Submission offered by Mexico, and for the convenience of the Panel, we reiterate those positions without restating them in detail. Fundamentally, Mexico misconstrues the U.S. position in this case as challenging past conduct rather than current ongoing conduct at the mine. Because Mexico has no defense to that ongoing conduct, Mexico raises a variety of other alleged procedural or technical issues, all of which fail upon inspection, as detailed in the Reply Submission.

4. The arguments presented by Los Mineros in its NGE submission support the U.S. submissions in this dispute, and we encourage the Panel to consider these additional arguments in determining that there is a Denial of Rights at the mine. The submissions offered by the San Martín Mine and Los Trabajadores Coaligados (the Coalition) simply restate the positions already presented by Mexico and therefore do not offer any persuasive arguments rebutting the U.S. case. In fact, as they confirm that illegal bargaining continues to take place between the mine and the Coalition, they also support the U.S. case.

5. The United States maintains its position that the factual record and guiding text of Annex 31-A provide clear support for a determination of an ongoing Denial of Rights at the mine. For the reasons set forth below, the United States disagrees with the arguments raised in the submissions by Mexico, the San Martín Mine, and the Coalition, none of which provide compelling arguments to rebut the U.S. case. We request that after reviewing the record and arguments herein, that the Panel issue a report and make a determination of an ongoing Denial of Rights at the mine.

[1] All references to the translated copy of the written submissions filed by the Non-Governmental Entities (NGEs) are designated as "[Party's] Written Submission," with a corresponding page number in the format in which the translated copy of that document was received. Any references to an exhibit submitted by a Party or NGE are designated as "USA," "MEX," or "SM," respectively, followed by their appropriate exhibit number. The abbreviation nomenclature and exhibit numbers listed in the original reply submission are likewise adopted here.

II. The facts support a determination that the mine is a Covered Facility for the purposes of the RRM.

A. The trade data and information provided in support of the Covered Facility analysis is sufficient to show the mine meets the RRM standards.

6. As explained in the U.S. Reply Submission, the San Martín Mine meets the definition of a "Covered Facility" under Annex 31-A of the Agreement because of its documented business activity. The text of the Agreement provides two ways in which a facility can be a Covered Facility: (i) if it produces a good or supplies a service traded between the Parties; or (ii) if it 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[.]"[2]

7. The San Martín Mine meets both tests for establishing a Covered Facility. The documentary evidence shows that Industrial Minera México, S.A. de C.V. (IMMSA) is producing goods at the San Martín Mine, namely copper and other ores and concentrates, that are traded between the United States and Mexico, and that the San Martín Mine also produces goods that compete within the territory of Mexico with goods or services of the United States. The production and sale of these goods is reflected in the records attached to the U.S. Reply Submission, and no documentary evidence has been provided to the Panel that contravenes these basic facts.

8. In IMMSA's submission (Company's Written Submission), the company claims that the mine cannot be considered a Covered Facility because it "captively consume[s]" all the copper ore and concentrates it produces, and because it does not export minerals from this mine into the United States. In the U.S. Reply Submission, we produced records in the form of U.S. Securities and Exchange Commission filings that reflect imports from IMMSA into the territory of the United States. IMMSA, on the other hand, has not presented any evidence to show that it does not export goods produced at the San Martín Mine to the United States, such that it would not be a Covered Facility under prong one. The company is the only entity with complete access to business records and transactions to clarify the questions it poses about the nature of its goods and where they are sent, and it elected to provide no documentary evidence or factual record in that regard.[3]

9. With respect to exports from the San Martín Mine to the United States, the documentary evidence shows that IMMSA recorded sales within the territory of the United States in the amount of $54 million in 2022.[4] Although that figure is based on aggregate sales data for the company's three operating mines, IMMSA has not presented evidence to show that the exports do not originate at the San Martín Mine.

10. IMMSA is also incorrect that captive consumption would prevent it from being a Covered Facility under prong two of Article 31-A.15. IMMSA simply asserts in its submission – without evidence or verifiable details – that "the mine has not sold any copper ore or

[2] USMCA Article 31-A.15.
[3] If the Panel requires additional information to reach its conclusions, we anticipate the verification stage of the RRM process serving as an appropriate venue for developing or otherwise clarifying the record.
[4] Annex USA-5 (Southern Copper Corporation – 10-K Filing) at 174.

concentrates to unaffiliated facilities in Mexico," and that all of its production is "captively consumed."[5] This argument fails because it is contrary to the factual record provided in the U.S. Reply Submission, and because this business activity – even at face value – still places their mineral ores and concentrates in competition with U.S. imports.[6]

11. Although no evidence was provided to support the company's argument, even taking its assertions at face value, the fact that the mine's products are "captively consumed" does not prevent the San Martín Mine from being considered a Covered Facility within the meaning of the Agreement. IMMSA's production of copper ore and concentrates at the San Martín Mine and their subsequent sale to one of its affiliates, is still the production of a good that "competes in the territory of a Party with a good or a service of the other Party[.]"[7]

12. As shown in the U.S. Reply Submission, U.S. copper producers annually export over $1 billion in copper ore and concentrates to Mexico for sale.[8] When a 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 is no longer in the market to acquire other copper ore and concentrates that are available for sale from the United States. Such goods are necessarily in competition for the purposes of the Covered Facility definition. The ordinary meaning of the term "compete" is to "strive with others in the production and sale of commodities, or command of the market," which directly applies in the context of the production and sale of copper commodities such as ore and concentrates.[9] As referenced in the U.S. Reply Submission, the company'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.[10] These facts are consistent with a finding that these goods are in competition as described in prong two of Annex 31-A.15.

13. Therefore, as with Mexico's Written Submission, the arguments presented in the Company's Written Submission provide neither factual evidence nor correct legal argumentation to rebut that the San Martín Mine is a Covered Facility within the meaning of Article 31-A.15 of the USMCA.

III. The current and ongoing factual record at the San Martín Mine and the text of the Agreement support a determination of a Denial of Rights at the mine.

[5] Company's Written Submission at 36-37.
[6] The record reflects that IMMSA recorded $464 million in sales specifically within the territory of Mexico in 2022. Annex USA-5 at 174.
[7] USMCA Article 31-A.15.
[8] Cross-border trade from the United States into Mexico of these same ores and concentrates exceeds $1 billion dollars per year and is a major source of commerce between the countries. As just one example, the University of Arizona recently noted in its 2023 Annual Report on "Arizona's Trade and Competitiveness in the U.S.-Mexico Region," that practically all Arizona exports of copper ore and concentrates go to Mexico. Annex USA-24 (2023 Annual Report on Arizona-Mexico Economic Indicators) at 25-26. These exports of copper ore and concentrates are sold in regular commerce within Mexico for the market price of those goods.
[9] "Compete." (verb[2], meaning 2.b). *Oxford English Dictionary.* Oxford University Press, 2023 (available at https://www.oed.com/dictionary/facility_n?tab=meaning_and_use#4935835).
[10] Annex USA-5 at 22.

14. As explained in the U.S. Reply Submission, the U.S. case relates to a present and ongoing Denial of Rights at the San Martín Mine, and does not relate to the past actions of the company that precede entry into force of the USMCA. The request for review and the panel request are focused exclusively on the company's *current* conduct at the mine resulting in a present and ongoing Denial of Rights. An allegation relating to current conduct fits squarely within the scope of Annex 31-A of the Agreement, which states that the RRM "shall apply" whenever a Party has a good faith basis to believe 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[.]"[11]

15. The U.S. request for review and panel request set out the basis for a finding of a present and ongoing Denial of Rights. The United States has raised the sections of Mexican domestic federal labor law that are presently being violated at the mine (e.g., through ongoing illegal operations and through the negotiation and application of labor agreements that were the product of unlawful collective bargaining), including how those various sections are covered within the scope of Article 23-A.2(a) of the Agreement.

16. In its Reply Submission, the United States explained why the arguments of Mexico, therefore, do not prevent this Panel from making the requested determination and findings. The submissions provided by the San Martín Mine and the Coalition simply restate the inaccurate position of Mexico on this issue, including the incorrect assertion that the panel request is focused on applying the law to past disputes or conduct prior to the entry into force of the Agreement.

17. Consequently, including for the additional reasons described here, the United States reiterates the position set forth in the U.S. Reply Submission. The United States respectfully requests that the Panel reach a determination that a Denial of Rights has occurred at the San Martín Mine based on the factual record and a review of the clear text of the Agreement.

A. **Workers are currently being denied the effective right to strike at the mine because the company is operating the mine during an ongoing strike.**

18. The company's continued operation of the mine during a strike is a violation of Mexican law and therefore constitutes a Denial of Rights under Annex 31-A of the USMCA. As explained in the U.S. Reply Submission, and consistent with the facts set out in Mexico's Written Submission, the ongoing status of the strike was confirmed by Mexico's highest court, the Suprema Corte de Justicia de la Nación (SCJN), on June 23, 2021.[12] This is true notwithstanding the fact that a single ruling by the FCAB briefly allowed the mine to reopen before its decision was vacated as a result of an amparo proceeding.[13] The mine's operation

[11] USMCA Article 31-A.2. "Party" or "Parties" is defined to mean Mexico and the United States, singly or collectively. USMCA Article 31-A.15.
[12] Annex MEX-34 (Judgment on Amparo Directo 118/2020, Second Chamber of the Supreme Court of Justice of the Nation) at 41-42.
[13] Annex MEX-42 (Judgment on Amparo in Review 78/2019, Fifth Collegiate Labor Court of the First Circuit) at 274-278.

despite the ongoing strike is a denial of workers' freedom of association and collective bargaining rights because it limits the leverage of the workers to obtain an agreement from the company.

19. The Company's Written Submission argues without support that there was a vote "to terminate" the strike and that nothing in Mexican law prevents the company from continuing regular business operations at the San Martín Mine during the union's ongoing strike.[14] To the contrary, the factual record shows that on May 31, 2019, a court agreed with Los Mineros that they were a requisite and necessary party when deciding whether to terminate a strike, that the Coalition had not lawfully ended the strike, and that the union was relieved from complying with a prior inconsistent decision from the FCAB that had issued on August 23, 2018.[15] After an amparo was filed on December 9, 2021, a reviewing Mexican court resolved the suit by upholding the 2019 judgment, declaring the pending appeals by IMMSA and the Coalition inadmissible, and vacating the FCAB's strike ruling from August 23, 2018.[16]

20. On June 19, 2023, a court issued a long-awaited "imputability" decision and concluded that the mine was at fault and the cause of the strike.[17] The court ordered the mine to comply with its obligations under at least 14 sections of Mexican labor law, required it to pay lost wages and benefits to over two hundred workers, and set forth a timeline for a resumption of work 15 days later at the mine.[18] This decision was issued based on the facts as they existed at the time of the imputability hearing between Los Mineros and the company – prior to the mine's unlawful resumption of operations – and contains an implied understanding that no work was presently occurring at the mine.[19]

21. On July 3, 2023, on account of several valid and compelling concerns raised by the union, the court held that the return-to-work portion of the imputability order would be held in abeyance pending a resolution of the union's concerns.[20] The court stated that the suspension was "granted" so that the existing status quo (i.e., the status quo prior to the imputability award being enjoined) was maintained and the workers were not on a 15-day timeline to report to the

[14] Company's Written Submission at 45.
[15] Annex MEX-43 (Judgment on Amparo 1729/2018 issued by the Third District Labor Court in Mexico City) at 9.
[16] Annex MEX-42 at 274-278.
[17] Annex MEX-47 (Imputability Award, 10th Special Board of the Federal Conciliation and Arbitration Board) at 82-85.
[18] Annex MEX-47 at 82-85.
[19] Annex MEX-49 (Injunction in Amparo 634/2023, Federal Conciliation and Arbitration Board) at 7-8.
[20] The concerns raised by the union in its petition for injunctive relief included things like the union's well-documented concerns about safety and health violations at the mine that it needed to verify were resolved, the physical safety of strikers when they arrived and were placed in conflict with the existing unlawful workforce, and logistical concerns to return numerous workers to the site after a lengthy strike. Annex MEX-49 at 4-5.

mine.[21] The status quo at the time the imputability award was issued was that there was an ongoing strike at the mine led by the titleholding union Los Mineros.[22]

22. The court's suspension of the return-to-work order was issued in response to the union's concerns over health and safety compliance at the mine and other concerns and it remains in effect today. Contrary to the company's submission, the order does not provide them any express or implied right to operate the mine in violation of Mexican labor law as they engage in repeated appeals of the underlying decision. The decision did nothing to change the legal status quo prior to the imputability award: an ongoing strike by the lawful bargaining representative for the mine's employees.

23. Without the effective right to strike being enforced, the company has no incentive to cooperate with the striking union to resolve its outstanding concerns or to otherwise engage in bargaining if it continues to operate as usual with non-striking replacement workers. It is not surprising that, in faithfully applying Mexico's labor laws, the Mexican courts preserved the ability of the union holding a valid CBA to maintain their strike as part of the existing status quo. Even as the return-to-work order is currently enjoined, the strike remains in effect, and the company is failing to comply with current Mexican law so long as it fails to cease normal operations. Therefore, the Panel should find that an ongoing Denial of Rights exists at the mine.

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

24. The unrebutted factual record in this case also supports a finding that the company is unlawfully bargaining with the Coalition and that this behavior violates the terms of the FLL. As referenced in the U.S. Reply Submission, the SCJN reviewed the situation and reached the conclusion that Los Mineros is the titleholding union that represents workers at the mine.[23] This means that any collective bargaining taking place with another group is unlawful. As a consequence, the agreements that the San Martín Mine negotiated with the Coalition in 2020, 2021, and 2022, and any other negotiated acts, were unlawfully negotiated and applied to workers in violation of FLL sections 133.IV and 133.VII.

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[21] Annex MEX-49 at 5 ("se procede a conceder la suspension solicitada para el efecto de que las cosas se mantengan en el estado que actualmente guardan, hasta en tanto se resuelve en forma definitiva el juicio de garantias, dicha suspension se concede para efectos de impedir que se den por terminadas las relaciones de trabajo existentes con aquellos trabajadores que decidan no reanudar labores, en la inteligencia de que la empresa no podra rescindir los contratos de trabajo respecto de los trabajadores, que decidan no reanudar actividades, ni tampoco podra sustituirlos por otros trabajadores y dejando la posibilidad de aquellos trabajadores que decidan regresar voluntariamente a sus labores").

[22] The Company's Written Submission concedes that the court system has "determined that Los Mineros continues to [hold title] to the CBA," and that the CBA is "valid[.]" Company's Written Submission at 49-50.

[23] The Company's Written Submission repeatedly makes confusing references to "votes" that were conducted in 2018 and in years prior and references them for the proposition that they have some type of legal force or that they represented the "will" of workers. This is an incorrect assertion. Any such vote that took place was overruled or otherwise declared void by the court system, which ultimately concluded in the December 9, 2021 ruling that Los Mineros is and has at all relevant times been the titleholder of bargaining rights at the facility. Annex MEX-42 at 274-278.

25. The factual record supports a finding that unlawful and unauthorized bargaining has taken place and is continuing. The Panel can review multiple examples of these unlawfully negotiated agreements, which are included in the annexes to the U.S. Reply Submission. On February 9, 2023, IMMSA managers met with Coalition representatives in Monterrey, Mexico (the headquarters of the FNSI union federation discussed in the U.S. Reply Submission, over 350 miles away from the mine), and negotiated changes to working conditions at the mine without the agreement or presence of Los Mineros.[24] The agreement specifically states, among other things, that its negotiated terms will directly apply "to all unionized personnel at the facility," despite the fact that it was not negotiated with Los Mineros.[25] It quotes the collective bargaining agreement negotiated by Los Mineros at length and provides a list of changes to the text of multiple sections of the CBA.[26] It states that the purpose of the changes is to "to increase the competitiveness of the workplace."[27]

26. The Company's Written Submission asserts that the United States is "contesting the fact that workers have had their wages increased,"[28] and that "there is no evidence that the company has taken any measures to restrict workers' rights under the law[.]"[29] These statements are not only untrue, they are irrelevant to the Panel's inquiry in this dispute.

27. When employees lawfully elect a union as their collective-bargaining representative (i.e., the "titleholding" union), that union is empowered by workers and empowered under the law. This remains true whether or not a specific worker or group of workers are later persuaded to act without authorization and agree to circumvent their lawful bargaining representative. Therefore, the fact that bargaining took place at all with an organization that is not the legal representative of the workers is a violation of Mexican law and a restriction of workers' rights. The fact that the company or any of its individual employees "agreed" to a change in their working conditions or the CBA does not alter the underlying conduct. The behavior itself undermines the entire system on which collective bargaining is built, undermines the authority of the lawful union bargaining representative, and directly interferes with the union's ability to operate in the workplace.

28. Likewise, with respect to restrictions on workers' rights, the company is well aware that there have been repeated legal judgments rendered that found IMMSA's actions were contrary to Mexican labor law, including the finding that Los Mineros is the titleholding union at the mine despite the unauthorized bargaining that the company is conducting.[30]

29. The San Martín Mine also claims that the union has never reached out to the company seeking to bargain, citing as evidence two identical written statements signed by its Human

[24] Annex USA-18 (2022 Agreement Between the Coalition and IMMSA) at 1-2.
[25] Annex USA-18 at 2 ("por hombre y por jornada, mismo que se aplicara a todo el personal sindicalizado, a partir de las 00:01 horas del día once de febrero de dos mil veintitrés.").
[26] Annex USA-18 at 7-10.
[27] Annex USA-18 at 7-10.
[28] Company's Written Submission at 7.
[29] Company's Written Submission at 44.
[30] Annex MEX-47 at 82-85.

Resources staff.[31] Again, the company's claims are both factually untrue and legally irrelevant. Nothing in the law puts the onus on the union to ensure that a company refrains from bargaining with another entity during a strike. But in fact, Los Mineros did attempt to continue to bargain with IMMSA. For example, on October 6, 2022, Los Mineros sent the mine a letter requesting the mine end its unlawful operations and urging the mine to engage in good faith bargaining.[32] The letter states expressly that the union considers the mine to be illegally operating and that it requests that the company "suspend production activities and start collectively bargaining with the union in order to agree upon a mutual resolution to the strike."[33] Nonetheless, the mine is continuing to operate and continuing to unlawfully bargain with the Coalition and apply those agreements to unionized workers.

30. In its written submission, the Coalition asks the Panel to conclude that, because the FLL has a reference to workers and companies forming "coalitions," it therefore is allowed to "represent workers for the purposes of collective bargaining" and displace Los Mineros, including by making decisions about the union's ongoing strike or engaging in their own open and ongoing bargaining with the company.[34] This position has been directly refuted by the Mexican court system, however, which has held that Los Mineros is the titular union at the mine, and that the Coalition is not. In fact, Mexico's submission does not even attempt to dispute this fact.[35]

31. Consequently, the evidence before the Panel on both of the substantive issues remains an uncontroverted and direct example of the ongoing unlawful operation of the mine and of unlawful bargaining between the San Martín Mine and the Coalition. It is on this basis that the United States respectfully requests that the Panel make a determination that there is an ongoing Denial of Rights at the mine.

IV. Errata

32. There are a few minor corrections to the U.S. Reply Submission filed with the Panel on October 31, 2023 that the United States respectfully requests the Panel note when reviewing the Reply Submission.

Page	Original	Corrected
Page 4-5, ¶ 5	"Metalúrgicos y Similares"	"Metalúrgicos, Siderúrgicos y Similares"
Page 5, fn. 4	"Metalúrgicos y Similares"	"Metalúrgicos, Siderúrgicos y Similares"
Page 9, fn. 45	"30 de julio de 207"	"30 de julio de 2007"
Page 22, ¶ 64	"does affect the analysis"	"does not affect the analysis"

[31] Annex SM-41 (Statement on Collective Bargaining at the San Martín Mine) at 2-3.
[32] Annex USA-25 (Letter from Los Mineros to San Martín Mine) at 1-2.
[33] Annex USA-25 at 2.
[34] Coalition Written Submission at 11.
[35] Mexico's Initial Written Submission at 47 (noting that Los Mineros has obtained legal decisions finding "the lawfulness of the strike, [their] ownership of the CBA, and the imputability to IMMSA[.]").

V. Conclusion

33. In conclusion, and for the reasons set forth above, the United States respectfully reiterates its request that the Panel, after conducting its verification, make a determination that there is a Denial of Rights at the San Martín Mine based on IMMSA's continued operations of the facility during a strike and because it is collectively bargaining with an unauthorized group of workers at the facility. In coming to this determination, the United States also requests that the Panel reject Mexico's arguments that the San Martín Mine is not a Covered Facility within the meaning of Article 31-A.15, and that the current, ongoing actions of the mine are not within the scope of the USMCA Rapid Response Mechanism.