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## Do International Mining Investors Have an FPS Claim Against Mexico for Cartel Extortion?

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The growing interference of Mexican drug cartels in mining activities questions whether international investors can be protected by investment treaties. This post offers an initial outlook as to whether cartel extortion could constitute a violation of the Full Protection and Security (“FPS”) standard typically found in such treaties.

### Background

During the last 17 years, ever since Mexico launched its full-scale “war on drugs”, Mexican cartels have grown increasingly sophisticated in broadening their repertoire of [illicit activities](#). A business that historically consisted of cross-border drug trafficking has branched into dozens of novel ventures ranging from controlling the [vast US-Mexico remittances market](#), to scamming [U.S. seniors with beachfront timeshares](#).

Amid an expansive process of diversification, in which organized crime seeks to reap a profit from the country’s most lucrative sectors, drug cartels have started to prey more frequently on [Mexico’s buoyant mines](#). According to recent reports, international miners have seen their Mexican operations disrupted by several types of narco-related extortions. Just in October 2023, Pan American Silver [suspended](#) its operations in one of its mines in the State of Zacatecas due to the theft of silver concentrate. In Sinaloa, a region notorious for its drug cartel, Americas Gold and Silver announced that its *Cosalá* mine was affected by a prolonged blockade showing “[organized criminal elements](#)”. In Guerrero, one of the country’s most turbulent enclaves, Canadian miners succumbed to [paying “taxes”](#) to cartels in exchange for security, a situation that has been [recognized](#) by Mexico’s President López Obrador. All in all, the Mexican Mining Chamber estimates that some mines [may be losing 30%](#) of their revenue due to the compound effects of criminal extortion.

This general climate of lawlessness and sustained losses raises the question of whether international mining investors could avail themselves of investment treaties and bring an FPS claim against Mexico for failing to protect their operations from organized crime.

### Potential FPS Claims

FPS, as a prescribed investment protection standard, has a rich history dating back to at least the 19<sup>th</sup> century.<sup>1)</sup> Despite a varied number of formulations in modern investment treaties, and subsequent discussions about its true scope, there is a general consensus that at a minimum, it consists of the sovereign's subjective obligation to physically protect and exercise vigilance over the investor's property. Depending on the specific fact pattern, a sovereign's omission to protect an investment from third-party interference can eventually turn into a breach of FPS.<sup>2)</sup>

A series of cases in investor-State jurisprudence have pointed in that direction. For instance, in *Tatneft v. Ukraine*, the tribunal found a breach of FPS when Ukraine failed to offer police protection to an investor's refinery during a tumultuous seizure carried out by private forces (¶428). Similarly, in the controversial *Von Pezold v. Zimbabwe*, a case in which the investor's estate was raided and occupied by local settlers, the tribunal found Zimbabwe liable for failing to provide police protection and specifically for the "non-responsiveness of police to various violent incidents" (¶597). In *Cengiz v. Libya*, a case related to the looting and raid of two infrastructure projects in the context of Libya's 2011 socio-political uprising, the tribunal concluded that Libya had failed to provide security to valuable investments, facilitating "private mobs [who] were repeatedly able to raid the [m]ain [c]amps, looting equipment and destroying facilities" (¶442).

In the more recent *De Sutton v. Madagascar* case, a dispute in which hundreds of rioters pillaged and torched a garment factory in the city of Mahajanga, the tribunal concluded that the local police's inaction and general passiveness toward the investor's property loss constituted a violation of the FPS standard. In reaching its decision, the tribunal confirmed that the FPS standard: (i) imposes upon the State an obligation of means and no results (¶301), (ii) has as its principal objective, the physical protection of investments from violent acts (¶299), and (iii) is meant to protect investments from third-party acts (¶303). The tribunal noted that a detailed study of the concrete factual circumstances is necessary to judge whether the State has actually breached the standard. In the tribunal's eyes, this examination should gauge the investor's knowledge of the country's level of security when it decided to invest, the progression of risks during the enjoyment of the investment, the investor's response to the violent occurrence, and the State's resources and overall capacity to intervene (¶309).

Although there are still no cases specifically related to the mining sector and organized crime interference, considering the rationale behind these decisions (*i.e.*, a State's failure to protect foreign investors' property from third-party illicit acts constitutes a breach of the standard), it is more likely than not that Mexico's failure to protect mining operations from cartel extortion can be construed as an FPS violation. Naturally, and as the *De Sutton* case makes clear, whether narco-extortions constitute an FPS breach will be a case-by-case determination hinging on the specific circumstances and the treaty provisions underpinning any such claim.

In the last three years, Mexico has seen a wave of investment cases pertaining to the mining industry. Canadians Coeur Mining, First Majestic, and Goldgroup Resources have brought "legacy claims" under NAFTA, although their claims do not seem to be associated with criminal extortions. but rather with tax rebates and corporate transactions.

Interestingly, last year, a different Canadian miner, Silver Bull, filed a NAFTA legacy arbitration against Mexico. According to public information, the Canadian miner alleges that in 2019 a group of locals started occupying its *Sierra Mojada* mine demanding illegal royalty payments. Silver Bull claims that Mexican authorities have failed to lift the blockade or otherwise resolve the situation,

causing a loss of US\$ 178 million. In its most recent [report](#), Silver Bull says that it has alleged a violation of the FPS protection under NAFTA, among others <sup>3)</sup> There is no public confirmation that the *Sierra Mojada* blockade is tied to organized crime.

## Conclusion

The hefty and progressive toll that organized crime exacts on the Mexican economy has been a central theme of this year's [presidential campaign](#). The new President-elect Claudia Sheinbaum will face a difficult security environment and address this problem which hinders the country's economic outlook. A [recent poll](#) shows that the gravest concern of Mexican business executives is the lack of security in operations and the general deterioration of the rule of law.

In this context, the Silver Bull NAFTA arbitration will be the first one in Mexico to adjudicate a dispute in which an international miner claims that extortion from local groups constitutes a breach of FPS. But Silver Bull will most likely not be the last. If the climate of insecurity continues to pervade mining operations, it is probable that similar claims will ensue. Although the period to present NAFTA legacy claims has elapsed, and even though Canada has renounced ISDS under the USMCA, as the recent Almaden Minerals case [shows](#), Canadian miners can invoke the newer Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which also provides protection for FPS violations.

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## References

?1 Schreuer C., Dolzer R., Principles of International Investment Law, Oxford University Press, 2012, pp. 160-161.

?2 For a comprehensive analysis on the scope of the FPS obligation under international law and treaty practice, see: Nartnirun Junnngam, The Full Protection and Security Standard in International Investment Law; What and Who Is Investment Fully Protected and Secured From, American University Business Law Review, 2018.

?3 Apparently, Silver Bull has also alleged a violation of the Fair and Equitable Treatment standard and indirect expropriation. Note that under NAFTA the FPS standard is contained in Article 1105, which provides for the Minimum Standard of Treatment under International Law. This might raise a separate discussion about the true demarcations of each standard beyond customary international law.

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