IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED MEXICAN STATES, *Petitioner*, v. LION MEXICO CONSOLIDATED L.P., *Respondent*.	Civil Action No. 1:21-cv-03185 (TFH)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF LION MEXICO CONSOLIDATED L.P.'S CROSS-PETITION TO CONFIRM, RECOGNIZE, AND ENFORCE AN ARBITRAL AWARD

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Respondent Lion Mexico Consolidated L.P. ("Lion Mexico")[1] respectfully submits this Reply Memorandum of Law in support of its Cross-Petition (the "Cross-Petition") to Confirm, Recognize, and Enforce the Award, pursuant to the Federal Arbitration Act ("FAA") [Dkt. 15].

PRELIMINARY STATEMENT

Mexico's opposition to confirmation of the Award is based upon a demonstrably false premise, that the Tribunal "admitted that it was disregarding the plain meaning of the NAFTA," and in particular that "it acknowledged the 'literal reading' of Article 1105(1) but then expressly stated it would not apply it." Petition at 2, Dkt. 1; (*see also* "the Tribunal stated that the 'literal reading of Art. 1105 of NAFTA' affords fair and equitable treatment protection only to investments…." Reply Memorandum in Further Support of the Petition ("Mexico Reply MOL") at 10, Dkt. 16/17. The Tribunal never made any such admissions, statements, or findings as to a "literal reading" of Article 1105. To the contrary, the Tribunal only recited *Mexico's* argument: "Mexico's first argument is based on a literal reading of Art.1105 of NAFTA." After stating Mexico's argument, the Tribunal rejected it in the sentence that followed: "Contrary to Mexico's submission, the Tribunal finds that NAFTA Art. 1105 does indeed grant protection to Lion as an investor." The Tribunal never endorsed Mexico's argument nor accepted that there was a "literal" interpretation of "investment of investor" in Article 1105, and therefore never rejected or disregarded such an interpretation There is no factual predicate for the arguments made by Mexico here.

[1] Lion Mexico adopts and incorporates herein all abbreviations and definitions from its Memorandum of Law in Opposition to the Petition to Vacate and in Support of the Cross-Petition to Confirm, Recognize, and Enforce an Arbitration Award ("Lion Mexico MOL") Dkt. 15-1.

Mexico's assertion that there is a "plain meaning" of Article 1105(1), which inescapably leads to its interpretation, is not supported by the text. The article provides: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment in accordance with international law, including fair and equitable treatment and full protection and security." Nothing in this provision prohibits the Tribunal from reaching the conclusion that this Article permitted Lion Mexico to commence arbitration proceedings to protect its mortgage investments in Mexico. Mexico contends that in making this finding, the Tribunal exceeded its powers and acted in manifest disregard of the law because, in its view, a "literal reading" of the Article did not permit "investors" to act to protect their "investments." That interpretation, however, does not follow from the text of the Article.

Mexico further claims, without explanation, that the FTC Note supports this position. The FTC Note provides in pertinent part: "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party." The FTC Note does not state that "Article 1105(1) does not permit investors to commence proceedings to protect their investments," as Mexico would have it. The Tribunal considered the FTC Note and reasonably concluded that the reference to "aliens" in the FTC Note indicated that the protection afforded by the Article permitted investors to protect their investments.

In the absence of predicate facts, Mexico's legal arguments in opposition to confirmation fail. Moreover, Mexico's admissions in its Reply MOL provide further support for the dismissal of its arguments. For example, Mexico's concession that it was proper for the Tribunal to consider "applicable rules of international law" and the terms of Article 1105 "in context and in light of the object and purpose of the treaty," is fatal to its claims that the Tribunal acted

improperly by failing to strictly enforce a "literal" interpretation of the Article. The Tribunal did consider such rules and context in rendering the Award. Not only has Mexico failed to identify a single NAFTA Tribunal that has accepted its preferred interpretation of Article 1105, it cannot distinguish those arbitral decisions relied upon, and cited to the Tribunal, which supported the Tribunal's conclusion.

Mexico's arguments make clear that its objection to the Award is simply based on the contention that the Tribunal incorrectly interpreted Article 1105, which even if true, and it is not, is not a basis to oppose confirmation. Accordingly, Mexico cannot claim that the Tribunal exceeded its authority or manifestly disregarded the law in any way. Therefore, this Court should confirm, recognize, and enforce the arbitration award—regardless of whether or not the Court agrees with the Tribunal's decision.

ARGUMENT

Mexico's opposition to the Cross-Petition fails as a matter of fact and law, as a consequence, this Court should confirm, recognize, and enforce the Award. In a unanimous decision, the Tribunal exercised its acknowledged authority to interpret NAFTA Article 1105(1) in light of its context and purpose. As set out below, and contrary to Mexico's claims, there is no governing interpretation of Article 1105 at odds with the Tribunal's decision and the Tribunal never acknowledged that there was. Accordingly, the arguments that the Tribunal exceeded its authority or otherwise acted in manifest disregard of the law both fail.

I. The Award Should Be Confirmed

Mexico does not contest that "judicial review of arbitral awards is extremely limited," and courts "do not sit to hear claims of factual or legal error" as appellate courts would. Mexico Reply MOL, at 11, Dkt 16/17. However, Mexico disputes Lion Mexico's reading of *Belize Soc. Dev. Ltd. v. Gov't of Belize*. 668 F.3d 724, 727 (D.C. Cir. 2012) (internal citations and quotation

marks omitted) that there is an "emphatic federal policy in favor of arbitral dispute resolution" which applies with "special force in the field of international commerce," such that "the FAA affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards." Mexico claims that the *Belize* case "says no such thing." *See* Mexico Reply MOL at 12, FN 7, Dkt. 16/17. However, Mexico's position appears to be based on a reading of the underlying district court opinion,[2] because the D.C. Circuit in *Belize* clearly stated that a heightened deference is owed to foreign arbitral awards.

Mexico also argues that "the authorities that Lion [Mexico] cites in support of its contention that 'courts do not recognize mere disagreement as grounds to vacate a foreign arbitral award' are inapposite." *See* Mexico Reply MOL at 3, Dkt. 16/17. Lion Mexico never suggested that the facts of those cases were analogous to the facts of this case, but the broad proposition does apply, and Mexico does not argue otherwise. *See* Lion Mexico MOL at 12-14, Dkt. 15-1. It cannot be plausibly argued that the "emphatic federal policy in favor of arbitral dispute resolution" is served by re-litigating decisions clearly within an arbitrator's authority. *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 631, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985).

Recognizing the weakness of its arguments, Mexico appears to inject a claim in its reply that the Tribunal was biased. Mexico contends that disregarding the plain meaning of Article 1105 "allowed the tribunal to achieve its desired result," Mexico Reply MOL at 2, Dkt. 16/17. As an initial matter, Mexico did not challenge this Award under 9 U.S.C. § 10(a)(2), which

[2] Mexico's citation to *Belize Soc. Dev. Ltd.* appears to conflate the D.C. Circuit opinion, which Lion Mexico cited in its MOL and the underlying District Court opinion, which Lion Mexico did not cite. *See* Mexico Reply MOL at 12, FN. 7, Dkt. 16/17. This error appears to explain why Mexico contends that the above-referenced passage is not contained in the opinion.

permits a court to vacate an arbitration award due to "evident partiality or corruption in the arbitrators." *See generally* Petition, Dkt. 1. This casual suggestion that three eminent arbitrators, including the arbitrator nominated by Mexico, were partial or corrupt, should be rejected out of hand.

A. The Tribunal Did Not Exceed Its Powers

As noted, Mexico's arguments suffer from several fatal flaws. *First*, the Tribunal did not acknowledge that Article 1105(1) had a plain meaning, which it proceeded to disregard. The Tribunal merely recited Mexico's argument, which it then rejected. *Second*, the meaning of Article 1105(1) is not obvious from the text of the Article, and in any event must be interpreted subject to "applicable rules of international law" and "in context and in light of the object and purpose" of NAFTA. *Third*, the interpretative guidance that the Tribunal relied upon supports the decision it reached. *Fourth*, and finally, whether the decision that the Tribunal reached was correct or not, it properly exercised its authority in reaching its conclusion, so that it cannot be challenged here.

Mexico's acknowledgement that "context" and "purpose" are relevant considerations in interpreting Article 1105 necessarily concedes that the Tribunal should not—and cannot—limit its interpretation to a textual analysis of Article 1105 in isolation. In particular, Mexico noted that NAFTA Article 1131 instructs the Tribunal to "decide the issues in dispute in accordance with this agreement *and applicable rules of international law*," *see* Mexico Reply MOL at 3, Dkt. 16/17 (emphasis added), and that such applicable rules of international law include the Vienna Convention of the Law of Treaties (the "VCLT"). *Id.* at 4. Mexico in fact quotes the relevant provision of the VCLT: "[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*." *Id.* (quoting VCLT Article 31(1)) (emphasis added).[3]

Indeed, the acknowledgment that the Tribunal possessed the authority to interpret Article 1105 implicitly concedes that the Article was reasonably susceptible to different interpretations, rather than the single interpretation urged by Mexico. *See* Mexico Reply MOL at 4, Dkt. 16/17 (" . . . the tribunal should have interpreted Article 1105 accordingly."). Mexico's argument becomes nothing more than a claim that "the tribunal's decision was not correctly decided," (Mexico Reply MOL at 5, Dkt. 16/17) but this Court "do[es] not sit to hear claims of factual or legal error by an arbitrator. . . ." *Kurke v. Oscar Gruss & Son, Inc.*, 454 F.3d 350, 354 (D.C. Cir. 2006) (quoting *Teamsters Loc. Union No. 61 v. United Parcel Serv., Inc.*, 272 F.3d 600, 604 (D.C. Cir. 2001)).

1. The Cases Cited By Mexico Are Distinguishable

In support of its argument that the language of Article 1105 provides protection to investments, but does not permit investors to act to protect their investments, Mexico cites to three arbitration awards. As discussed below, these arbitrations either did not address NAFTA or the tribunals explicitly declined to engage in the very analysis that Mexico relies on them for.

Mexico's citation to *Valeri Belokon v. The Kyrgyz Republic* is entirely misplaced. UNCITRAL, Award, Oct. 24, 2014. (*See* Mexico Reply MOL at 12, Dkt. 16/17). This arbitration did not concern NAFTA whatsoever; Kyrgyzstan is not and has never been a member of the North American Free Trade Agreement, and the underlying dispute addressed terms of a Bilateral Investment Treaty ("BIT") between Kyrgyzstan and Latvia. *See generally Valeri Belokon v. The Kyrgyz Republic*. Moreover, despite Mexico's contention that the *Kyrgyz*

[3] However, in its argument, Mexico ignores the italicized language..

Republic dispute involved "similar language to Article 1105," Mexico failed to note that under the relevant BIT, "[i]nvestments is a defined term." *Id.* at ¶ 245. Accordingly, the UNCITRAL tribunal did not engage in any interpretation of the phrase "investments of investor," much less the same interpretative analysis that the Tribunal in *Lion Mexico Consolidated L.P. v. United Mexican States* was required to perform.

Mexico also relies on a single paragraph from *Mr. Joshua Dean Nelson v. United Mexican States*, to suggest certain treaties may protect investments and not investors. ICSID Case No. UNCT/17/1, Final Award, June 5, 2020. Although this dispute did address NAFTA Article 1105, the tribunal was not tasked with deciding the scope of the phrase "investments of investors." In context, it is clear that in the paragraph cited by Mexico, the tribunal does nothing more than quote Article 1105(1) to confirm that a threshold requirement of identifying the investment that had been unfairly and inequitably treated had been satisfied, "before reviewing Claimant's allegations of unfair and inequitable treatment." *Id.* at ¶ 312. As the tribunal clearly states just two paragraphs after Mexico's quoted section: "[t]he Parties do not dispute that Tele Fácil[4] is an investment protected by NAFTA Chapter Eleven." *Id.* at ¶ 314. Thus, contrary to Mexico's argument, the tribunal in this case specifically stated that the meaning of the phrase "investments of investors" was not in dispute and it did not analyze the phrase.

Finally, Mexico's citation to *Grand River Enterprises Six Nations v. United States*, refutes rather than supports its position. UNCITRAL, Award, Jan. 12, 2011. Mexico's *Grand River* quote supports the position that investors may avail themselves of Article 1105 when their

[4] In *Mr. Joshua Dean Nelson v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, June 5, 2020, Tele Fácil was "the investment that was [allegedly] not granted fair and equitable treatment . . . ." ¶ 314.

investments are affected: "Article 1105 provides no scope for individual investors' claims that they have received treatment contrary to international law, *except as that treatment affects a covered investment*." *Id.* at ¶ 177[5] (emphasis added). The *Grand River* Tribunal interpreted Article 1105 as offering protection to an investor, so long as that investor possessed a covered investment—the exact same situation that Lion Mexico faces here. It should be noted however, that although the tribunal in the *Grand River* case addressed "a potential issue with regard to Article 1105's limitation to "investments' but not 'investors," and interpreted the provision in the same way as the Tribunal in the arbitration at issue, the *Grand River* tribunal went on to explain that this issue "was not pursued by the Parties," and that it "need not make any decisions in this regard." *Id.* at ¶ 206.

In sum, Mexico's suggestion that "several tribunals have adopted" its position on the proper interpretation of Article 1105 is entirely without basis. The three arbitral decisions it cites involved: (i) a dispute that did not address NAFTA whatsoever; (ii) a dispute in which the parties did not contest whether NAFTA Article 1105 applied, and (iii) a dispute in which the tribunal specifically stated it was not addressing the interpretation of "investments of investors." Mexico's inability to find any support for its interpretation of Article 1105's reference to "investment of investors" establishes how unfounded its argument is. As established in Lion Mexico MOL, Dkt. 15-1, when NAFTA tribunals are tasked with interpreting Article 1105(1), they do not limit their inquiry to the text, but rely on a combination of the text, context, and interpretative guidance. Here, the Tribunal took that same approach and correctly held that Article 1105(1) applies to Lion Mexico.

[5] Mexico's citation incorrectly attributes this quote to ¶ 117.

2. Mexico Fails to Distinguish Relevant Case Law and Authorities.

Mexico challenges the case law cited by Lion Mexico asserting that no case authorizes an arbitration tribunal to "ignore the plain language of the arbitration agreement." *See* Mexico Reply MOL at 3, Dkt. 16/17.[6] This is a strawman argument; Lion Mexico never suggested the text of Article 1105 should be ignored, nor did the Tribunal ignore that language. Although both NAFTA interpretative guidance and international guidance generally place less emphasis on plain meaning interpretations than domestic courts, the D.C. Circuit has recognized that a "literal interpretation" of a statute or contract is not necessarily the correct interpretation. *See Eagle Pharms., Inc. v. Azar*, 952 F.3d 323, 333 (D.C. Cir. 2020) (explaining that a "literal interpretation" of a statute will be disregarded when a party shows that "Congress did not mean what it appears to have said" or when "as a matter of logic and statutory structure" the literal interpretation cannot be correct.); *Lannan Found. v. Gingold*, 300 F. Supp. 3d 1, 25 (D.D.C. 2017) (Hogan, J.)(". . . while it is helpful for courts to turn to dictionaries to aid in interpreting a disputed term, ultimately the construction of a term will depend on the context in which the term is used 'taking into account the contract as a whole.'") (internal citations omitted); *RCJV Holdings, Inc. v. Collado Ryerson, S.A. de C.V.*, 18 F. Supp. 3d 534, 545 (S.D.N.Y. 2014) ("Because contract interpretation is an exercise in 'common sense' rather than 'formalistic literalism,' 'words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby.'") (internal citation omitted)

[6] Similarly, Mexico's criticism of Lion Mexico's citation to *BG Grp., PLC v. Republic of Argentina*, is likewise misplaced. 572 U.S. 25, 33, 134 S. Ct. 1198, 1206, 188 L. Ed. 2d 220 (2014); *see* Mexico Reply MOL at 3, Dkt. 16/17. Lion Mexico cited this case in support of its argument that the Tribunal possessed the authority to interpret and apply Article 1105. *See* Lion Mexico MOL at 13, Dkt. 15-1. As noted above, Mexico has now conceded that the Tribunal did in fact possess such authority.

In addition, Mexico criticizes Lion Mexico's citation to *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL Award (Merits Phase 2) (10 April 2001). *See* Mexico Reply MOL at 6-7, Dkt. 16/17. Mexico claims that "Lion [Mexico] cites to the very April 2001 ruling of the *Pope & Talbot* tribunal that three NAFTA governments, through the NAFTA Free Trade Commission, corrected by the issuance of the Notes of Interpretation in July 2011." *Id.* at 6. Mexico thereby suggests that the Notes of Interpretation rejected the relevant ruling of the tribunal in that case. What Mexico fails to explain, however, is that the FTC did not issue its Notes of Interpretation to correct the tribunal's application of the phrase "investments of investor." Indeed, in the revised Award, issued after the FTC Notes of Interpretation and which Mexico cites, the tribunal noted that " . . . Canada accepts that *damages incurred by the Investor* may be recoverable where there has been a breach of Article 1105." *Pope & Talbot, Inc. v. The Government of Canada*, UNCITRAL, Award in Respect of Damages, May 31, 2002 at ¶ 73 (emphasis added). Lion Mexico's citation to the April 2001 Award is no different than a citation to a domestic case reversed on other grounds.

II. The Tribunal Did Not Act In Manifest Disregard Of The Law

To the extent that the doctrine of manifest disregard of the law remains an independent basis to vacate an arbitration award, and Lion Mexico submits that it does not, Mexico has failed to show such manifest disregard. In *Mesa Power Grp., LLC v. Gov't of Canada*, 255 F. Supp. 3d 175 (D.D.C. 2017),[7] the Court explained it would not vacate an arbitration award due to manifest

[7] Mexico's criticism of Lion Mexico's citation of *Mesa* is misguided. As explained in its earlier brief, *see* Lion Mexico MOL at 20, Dkt. 15-1, Lion Mexico cited *Mesa* for the broad proposition that a showing of manifest disregard requires more than a tribunal applying "the wrong standard;" it requires a tribunal to disregard a "well-defined, explicit, and clearly applicable" standard. 255 F. Supp. 3d at 189. Although *Mesa* also addresses NAFTA Article 1105, Lion Mexico noted that a difference clause was at issue in *Mesa* than in the present case. *See* Lion Mexico MOL at 20, FN 13, Dkt. 15-1.

disregard of the law, unless a petitioner could identify a "well-defined, explicit, and clearly applicable" interpretation that a tribunal failed to apply. *Mesa Power Grp.*, LLC, 255 F. Supp. 3d at 189. Indeed, manifest disregard requires that "the arbitrators appreciated the existence of a governing legal principle but expressly decided to ignore it." *Johnston Lemon & Co. v. Smith*, 886 F. Supp. 54, 56 (D.D.C. 1995) aff'd, 84 F.3d 1452 (D.C. Cir. 1996). As discussed above, there is no such interpretation of, or governing legal principal applicable to, Article 1105 which the Tribunal recognized and failed to apply. On the contrary, all tribunals interpreting Article 1105 have interpreted it in the same way as the Tribunal in the arbitration at issue.

Contrary to the claims of Mexico, the Tribunal's reference to a "literal reading" of Article 1105 was merely to cite Mexico's argument; the Tribunal made no finding of its own that Mexico's argument was in fact the literal reading of Article 1105. However, even if Mexico were correct as to how Article 1105 should be understood if read "literally" and in isolation, that would not end the inquiry for the Tribunal. As Mexico's concedes, the Tribunal properly considered the FTC Notes[8] and the decisions of other tribunals which analyzed the phrase "investments of investors." Moreover, as Mexico's own citations make clear, a "plain-meaning" interpretation of Article 1105(1) is not a "governing legal principle." *Johnston Lemon & Co.*, 886 F. Supp. at 56. In fact, the three tribunal awards Mexico cited above, *see supra* at 6-8, suggest either that no such well-defined interpretation of Article 1105 exists or that the Tribunal applied the accepted interpretation here.

A. Manifest Disregard Is Not An Independent Basis For Vacatur

Although the D.C. Circuit has not explicitly rejected the doctrine of manifest disregard of the law as a basis to vacate an arbitration award, it has not endorsed the doctrine nor vacated

[8] Likewise, the very fact that the FTC issued interpretative guidance suggests that the meaning of the Article is not apparent based on a review of the text.

an award on that basis since the Supreme Court's decision in *Hall St. Assocs., L.L.C. v. Mattel, Inc.* 552 U.S. 576, 128 S. Ct. 1396 (2008). Mexico contends that the doctrine has survived *Hall Street* and cites to *Selden v. Airbnb, Inc.* in support of that position. 4 F.4th 148, 160 n. 6 (D.C. Cir 2021). However, the court in *Selden* noted that "in *Hall Street*, the Supreme Court held that the FAA's list of grounds for refusing to enforce an award is exclusive," and that because plaintiff had not established that the arbitrator disregarded the law, it need not reach the issue in the case before it. *Id.* The *Selden* court therefore did not address the issue because it was not squarely before it, but indicated that manifest disregard of the law as a basis for vacatur independent of the provisions of the FAA was not viable. Mexico does not attempt to, because it cannot, offer any explanation as to how manifest disregard of the law can survive as an independent basis for vacatur in light of *Hall Street*.

III. The Court Should Confirm, Recognize, And Enforce The Award

As set forth above, there is no basis to vacate, modify or correct the Award. Mexico has failed to demonstrate that the Tribunal exceeded its powers or acted in manifest disregard of the law in rendering the Award. Indeed, to the contrary, the record demonstrates that the Tribunal properly and unanimously exercised its judgment in issuing the Award after consideration of the parties legal arguments and evidence. Under 9 U.S.C. § 9, the court "must" confirm an arbitration award unless it vacates that award. *Owen-Williams v. BB & T Inv. Servs., Inc.*, 717 F. Supp. 2d 1, 10 (D.D.C. 2010). Accordingly, Lion Mexico requests that the Court grant its Cross-Petition, and enter an order confirming, recognizing and enforcing the Award.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny Mexico's Petition to Vacate the Arbitration award, and grant Lion Mexico's Cross-Petition to Confirm, Recognize, and Enforce the Arbitration Award.

Respectfully submitted,

Dated: March 25, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically on March 25, 2022 with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all parties and counsel of record by operation of the Court's CM/ECF system.

/s/ Reginald R. Goeke