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)

MEMORANDUM OF LAW IN OPPOSITION TO THE UNITED MEXICAN STATES' PETITION TO VACATE THE ARBITRATION AWARD AND IN 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") respectfully submits this Memorandum of Law: (a) in opposition to the Petition (the "Petition") of the United Mexican States ("Mexico") to vacate the Arbitration Award dated September 20, 2021 in ICSID Case No. ARB(AF)/15/2 (the "Award") [Dkt. 1]; and (b) in support of Lion Mexico's Cross-Petition (the "Cross-Petition") to Confirm, Recognize, and Enforce the Award, pursuant to the Federal Arbitration Act ("FAA"). Attached as Exhibit A to the Declaration of John M. Conlon, dated February 4, 2022 (the "Conlon Declaration") is a duly certified copy of the Award.

PRELIMINARY STATEMENT

Lion Mexico commenced the arbitration that is the subject of this Petition and Cross-Petition under the auspices of the North American Free Trade Agreement ("NAFTA") after years of fruitless litigation in Mexico and as a last resort to address the unlawful taking of, and the failure of Mexico to provide fair and equitable treatment and full protection and security for, its mortgage investments in violation of NAFTA Article 1105. As summarized below and set out in detail in the Award, Mexican courts failed to provide elemental due process with respect to Lion Mexico's investments. Namely, the Mexican courts extinguished Lion Mexico's mortgages—which the Tribunal concluded constituted investments under NAFTA—as a result of a judicial process commenced and concluded without notice to Lion Mexico. When Lion Mexico learned of this, the Mexican courts denied Lion Mexico the opportunity to present evidence that the mortgages were extinguished as the result of fraudulent conduct of a Mexican counter-party and to appeal the fraudulently obtained judgment.

The Tribunal, consisting of three exceptionally experienced arbitrators following lengthy submissions by the parties and several days of hearings, issued a 212 page Award, which set out in great detail the denial of justice that occurred with respect to the judgments that resulted in

extinguishing the mortgages and depriving Lion Mexico of its investments. The Tribunal found that the conduct of the Mexican courts in canceling the mortgages without notice and refusing to grant Lion Mexico an opportunity to present evidence to demonstrate that the mortgages were canceled as a result of fraud violated both Mexican procedural rules and elemental principles of due process under International Law, and accordingly, under NAFTA. There is no dispute about these factual findings of the Tribunal. The sole issue before this Court is whether, in interpreting Article 1105(1)(a) of NAFTA, the Tribunal exceeded its powers or acted in manifest disregard of the law in holding that the phrase "investment of investor" applied to Lion Mexico, so that it could commence arbitration proceedings to protect its mortgage investment in Mexico. *See* Award at ¶¶ 356-58. Even assuming that a challenge to an arbitration award based on a claim that it was issued "in manifest disregard of the law," is a valid basis for vacatur, and Lion Mexico submits it is not, Mexico's arguments fail.

Mexico claims that the Tribunal acknowledged the plain meaning of that phrase to preclude such protection and then disregarded that meaning. However, Mexico misconstrues the Tribunal's analysis. The Tribunal never conceded that the interpretation preferred by Mexico was the correct interpretation, but that the phrase must be interpreted in view of the guidance for interpretation that has been issued in connection with the Article as well as how other NAFTA Tribunals have interpreted the Article. Indeed, Mexico has not cited a single arbitration award that applied its interpretation of Article 1105(1)(a). A review of the Tribunal's analysis will confirm the correctness of its approach. Moreover, even if Mexico were correct, and it is not, that its textual analysis of Article 1105(1)(a) was somehow superior to the analysis conducted by the Tribunal, that does not support the relief it requests here. The Tribunal in reaching its decision, neither exceeded its powers nor acted in manifest disregard of the law, even assuming that the

latter ground remains a basis for vacatur. Accordingly, Mexico's Petition should be denied and the Cross-Petition of Lion Mexico should be granted.

BACKGROUND

I. Underlying Dispute[1]

Lion Mexico is a Canadian limited partnership with its principal place of business in Dallas, TX. Award at ¶ 56. Over a ten-year period, Lion Mexico invested more than $800 million in real estate projects in Mexico. *Id.* at ¶ 57. Through these projects, Lion Mexico was introduced to Sr. Héctor Cárdenas Curiel ("Sr. Cárdenas"), a Mexican businessman. *Id.* In 2006, Sr. Cárdenas sought a partner for two large real estate development projects: the "Nayarit Project" and the "Guadalajara Project," and found a partner in Lion Mexico. *Id.*

The following year, Lion Mexico made three loans in support of the projects, secured by mortgages, totaling $32,805,489. Award at ¶¶ 62-85. Each loan was documented by a credit agreement between Lion Mexico and Sr. Cárdenas' companies, as well as promissory notes and a mortgage for the properties in Lion Mexico's name.[2] *Id.* Following the Debtors' failure to meet the initial repayment deadlines, between March 2008 and July 2009, Lion Mexico agreed to

[1] Mexico argues that while the "fact that Lion [Mexico] was defrauded by Mr. Cardenas is reprehensible," it was equivalent to one of those "instances in which plaintiffs in the U.S. courts have suffered injury but ultimately had no recourse because of jurisdictional or substantive limits in the law." Petition at ¶ 61. That assertion is incorrect. The Tribunal found that the Mexican courts repeatedly denied the elemental due process rights to Lion Mexico, which constituted a violation of NAFTA. It was not merely "jurisdictional or substantive limits in the law" which deprived Lion Mexico of its investments, but the failure of the Mexican courts to properly apply the law as written to afford Lion Mexico due process.

[2] Lion Mexico was the lender for each of the three loans. *Id.* at ¶¶ 62-85. The borrower and the joint and several obligor varied for each of the loans among several of Sr. Cárdenas's companies: Inmobiliaria Bains, S.A. de C.V., C&C Ingeniería, S.A. de C.V., and C&C Capital, S.A. de C.V. (collectively, the "Debtors"). Inmobiliaria Bains was the borrower under the first loan, while C&C Ingeniería was the joint and several obligor. On the second and third loans, C&C Capital was the borrower, while Inmobiliaria Bains was the joint and several obligor. *Id.* The borrower for each loan then issued Promissory Notes in favor of Lion Mexico, and all of which had a maturity date of August 28. 2008.

extend the maturity dates at least four times for each loan. *Id.* at ¶ 86. In the final extension, the payment due date was deferred to September 30, 2009. *Id.* The Debtors again failed to repay the amounts owed on September 30, and all three loans were declared in default on October 1, 2009. *Id.* at ¶ 87. After some unsuccessful negotiations to restructure the loans which concluded in February 2012, Lion Mexico then served the Debtors, with a formal demand for payment under penalty of initiating a foreclosure action. *Id.* at ¶ 92.

Shortly after receiving the formal demand, and unbeknownst to Lion Mexico, the Debtors filed a "Cancellation Lawsuit" before the Juez Noveno de lo Mercantil of the State of Jalisco ("Juez de lo Mercantil"), a local civil court, on March 13, 2012. *Id.* at ¶ 93. Sr. Cárdenas lives and does business in the State of Jalisco. This lawsuit was a part of a larger "complex judicial fraud scheme[] by Sr. Cárdenas to avoid the imminent foreclosure of the Mortgages." *Id.* at ¶¶ 93-94.

The first step in Sr. Cárdenas's scheme was to fabricate a settlement contract ("Términos") which included the forged signature of Lion Mexico's legal representative in Mexico. *Id.* at ¶ 103. The Términos, which Lion Mexico never saw, much less agreed to, provided that Lion Mexico agreed to the cancellation of all pending debts of the Debtors, the cancellation of the mortgages, and the return of the notes to the Debtors in exchange for an interest in Sr. Cárdenas's companies. *Id. at* ¶ 88. The Debtors then commenced the Cancellation Lawsuit noted above before the Juez de lo Mercantil, which concluded that the Debtors had satisfied their contractual obligations under the Términos while Lion Mexico was in breach. *Id.* at ¶ 96. The Términos also purportedly established jurisdiction in the Juez de lo Mercantil—the court where Sr. Cárdenas's businesses were located—rather than the Courts of Mexico City, which the parties had negotiated in the Promissory Notes to be the exclusive forum for litigation.

Id. at ¶ 101. Moreover, the Términos also included an address for notice and service of process for Lion Mexico and the name of an attorney in Jalisco, Mexico, but the named lawyer had no connection to Lion Mexico and the address was not that of a Lion Mexico office. *Id.* at ¶ 102.

Several weeks after the Debtors filed the Cancellation Lawsuit, a court officer of the Juez de lo Mercantil attempted to serve Lion Mexico at the false address listed in the Términos. *Id.* at ¶ 104. A lawyer at the address, who had no affiliation with Lion Mexico whatsoever, accepted service on behalf of Lion Mexico. *Id.* at ¶ 107. In furtherance of the scheme, this lawyer took no action to represent Lion Mexico or even alert it to the existence of the Cancellation Lawsuit. *Id.* Accordingly, in May 2012, the Juez de lo Mercantil declared Lion Mexico in default, despite the fact that it had no notice of the fraudulent Cancellation Lawsuit. *Id.* at ¶ 110. Shortly thereafter, the Juez de lo Mercantil conducted no due diligence, as required by Mexican law, to ensure that notice was provided to Lion Mexico. Instead, the Juez de lo Mercantil issued a judgment (1) declaring the loans satisfied; and (2) canceling the mortgages (the "Cancellation Judgment"). *Id.* at ¶¶ 111, 414-15.

Sr. Cárdenas's scheme did not end here. Under relevant Mexican law, appellate review of a judgment such as the Cancellation Judgment is available only if the case satisfies an amount-in-controversy threshold. *Id.* at ¶ 118. To that end, Sr. Cárdenas's legal team asserted that the amount-in-controversy, with respect to the Cancellation Judgment, was less than MEX $500,000 (approximately USD $24,000) and the Juez de lo Mercantil accepted this representation. *Id.* In fact, the loan balances that were the subject of the claims at this time exceeded USD $40,00,000—approximately 1600 times greater than the amount represented to the court to be in controversy. *Id.* at ¶ 88. The Court accepted this representation even though it had evidence available to it—namely the loan documents that were part of the court record—showing the

value of the mortgage investment. *Id.* at ¶¶ 439-40. Accordingly, this case was rendered ineligible for any substantive appeal based on the false claimed amount in controversy, and instead could be reviewed only through a process called Amparo ("Amparo")—an appellate challenge based on a violation of human rights under the Mexican Constitution. *Id.* at ¶¶ 118-19. Sr. Cárdenas furthered his scheme by arranging for a lawyer to fraudulently appear on behalf of Lion Mexico and file an Amparo of the Cancellation Judgment, only to then abandon the appeal altogether. *Id* at ¶ 120. The filing and subsequent abandonment of an Amparo extinguishes a party's right to pursue further appeals. *Id.* As a result, Lion Mexico—still unaware of these proceedings—was deemed to have exhausted its appeals of the Cancellation Judgment based on the Términos. *Id.* at ¶ 121.

Lion Mexico first learned of the Cancellation Judgment approximately 6 months after the abandonment and default of the Amparo, in December 2012. *Id.* at ¶ 138. It immediately attempted to remedy the appeal by filing an Amparo with the Juez de Distrito en Materia Civil ("Juez de Distrito"). *Id.* at ¶¶ 139-42. Specifically, Lion Mexico sought a declaratory judgment that (1) it had never been properly served in the Cancellation Lawsuit and (2) that the Términos upon which it was based was a forgery. *Id.* at ¶¶ 145-46. While this Amparo was pending before the Juez de Distrito, Sr. Cárdenas's legal team argued to an appellate court, the Segundo Tribunal Colegiado en Materia Civil del Tercer Circuito (the "Tribunal de Queja"), that Lion Mexico's petition challenging the settlement award was procedurally defective, in that the petition was not properly signed on Lion Mexico's behalf. *Id.* at ¶ 151. Not only did the appellate court accept this argument, but it also refused to permit Lion Mexico to correct the signature—a decision that the Tribunal later noted stood in "stark contrast with the treatment granted to [Sr. Cárdenas]" whose filings included several "formalistic deficienc[ies]," which were either ignored or excused

by the Mexican Courts. *Id.* at ¶¶153-54. Thus, the Juez de Distrito would not permit Lion Mexico to argue that it had been the victim of fraud. *Id.* at ¶ 154.

Since it was not allowed to present its arguments and evidence regarding lack of service, notice, and forgery, the Juez de Distrito denied Lion Mexico's attempt to reverse the Juez de lo Mercantil's Cancellation Judgment. *Id.* at ¶ 158. Nevertheless, on December 19, 2013, Lion Mexico then sought a recurso de revision—the Mexican law equivalent of a motion to reconsider—of the Juez de Distrito's decision. *Id.* at ¶ 167. Eventually, 16 months later, on April 17, 2015, the Tribunal de Queja issued an award formally remanding the recurso de revision to the Juez de Distrito, finding that the abandonment of the fraudulent Amparo, filed in Lion Mexico's name, had limited the Tribunal de Queja's jurisdiction, which reasoning was adopted *sua sponte* by the Tribunal de Queja, no party having argued that point. *Id.* at ¶ 174. Only in this remand order, three years after the fact, did Lion Mexico learn that a fraudulent Amparo had been filed in its name and that it would be unable to challenge the authenticity of that Amparo. *Id.* at ¶ 171. When remanded to the Juez de Distrito, the only issue for consideration would be an admissibility issue, as to the existence of the prior Amparo, and no evidence would be admitted as to the fraudulent nature of the Términos. Having made no progress in vindicating its rights in three years of litigation, Lion Mexico recognized the futility in continuing to pursue relief in the Mexican civil courts and initiated this NAFTA arbitration proceeding.[3] *Id.* at ¶ 179.

II. ICSID Tribunal

On December 11, 2015, Lion Mexico formally submitted a Request for Arbitration, pursuant to NAFTA, to the International Centre for Settlement of Investment Disputes

[3] Lion Mexico also initiated legal actions against Sr. Cárdenas and his affiliates in the Mexican criminal courts. As of the Tribunal's September 2021 Award, Sr. Cárdenas had been imprisoned on some charges, while other criminal actions were delayed until the civils courts resolved issues concerned the forged documents. *See* Award at ¶¶ 180-83.

("ICSID"). *Id.* at ¶ 12. The Secretary-General then registered the Request and approved access to the ICSID Additional Facility Rules. *Id.* The Tribunal[4] was formally constituted in July 2016 to address Lion Mexico's claims under NAFTA Chapter 11. *Id.* NAFTA Chapter 11 governs investments and investment-related disputes. *See* NAFTA Ch. 11. This chapter permits a "disputing investor" to submit a claim to arbitration under the ICSID Additional Facility Rules. NAFTA Art. 1120.

The arbitration proceedings took approximately five years to complete and included several procedural challenges. Most significantly, the Tribunal granted Mexico's request to bifurcate the proceedings into a jurisdictional phase and a merits phase. Tribunal's July 30, 2018 Decision on Jurisdiction at ¶¶ 31-33. During the jurisdictional phase, the Tribunal significantly limited the scope of the claims that Lion Mexico could pursue in the arbitration. It held that Lion Mexico's promissory notes were not qualifying investments under NAFTA Article 1139,[5] and dismissed all claims related to the notes. *Id.* at ¶¶ 203-08. In addition, the Tribunal found that Lion Mexico's mortgages were qualifying investments pursuant to NAFTA Article 1139(g) and that any claims related to the mortgages would proceed to the merits phase. *Id.* at ¶¶ 226-28.

[4] At the time it issued the Award, the ICSID Tribunal was comprised of Juan Fernández-Armesto (President of the Tribunal), David J.A. Cairns (nominated by Lion Mexicon), and Laurence Boisson de Chazournes (nominated by Mexico). According to the ICSID arbitrator database, Fernández-Armesto has participated in 30 ICSID Proceedings, Cairns in 6, and Boisson de Chazournes in 14. *See* Exhibit B to Conlon Declaration. When originally constituted, the Tribunal included Ricardo Ramírez instead of Boisson de Chazournes. Tribunal's July 30, 2018 Decision on Jurisdiction at ¶ 43. Ramírez resigned on January 25, 2018, and was replaced by Boisson de Chazournes the following week. *Id.*

[5] NAFTA Article 1139 provides the definitions of several terms used throughout NAFTA Chapter 11. As relevant here, it provides that "'Investment' means . . . real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes." NAFTA Art. 1139(g).

After jurisdictional issues were resolved, the arbitration continued for another three years. Lion Mexico sought relief on three different causes of action: (1) that its investment had been the victim of judicial and administrative expropriation under NAFTA Article 1110;[6] (2) that it had been denied justice which amounted to Mexico's failure to provide fair and equitable treatment under NAFTA Article 1105;[7] and (3) that Mexico failed to grant Lion Mexico's investment full protection and security under NAFTA Article 1105. Award at ¶ 187.

Following nine procedural orders, a three-day merits hearing, and both pre- and post-hearing briefing, the Tribunal issued its Award. All members of the Tribunal, including the arbitrator nominated by Mexico, concurred in the Award. In 924 paragraphs across 215 pages, the Tribunal carefully recited the arguments of the parties and completed its own analysis. *See Award generally.* The Award thoroughly addressed each argument from the parties, as well as the non-disputing party submissions of the United States and Canada. *See id.* at ¶ 189. As an initial matter, the Tribunal concluded that it could not consider Lion Mexico's Article 1110 argument, until it first resolved Lion Mexico's denial of justice argument under Article 1105. *Id.* at ¶ 196. As relevant here, the Tribunal found that Lion Mexico had been denied justice by Mexico's judiciary in violation of NAFTA Article 1105. *Id.* at ¶ 354.[8] The Tribunal explained in the Award that Article 1105 requires NAFTA members to provide the "customary international

[6] "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation') . . . ." NAFTA Art. 1110(1)

[7] "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." NAFTA Art. 1105(1).

[8] In the 321 pages of briefing submitted by Mexico to the Tribunal, Mexico devoted less than three pages of its argument to this point, which consisted entirely of textual analysis, without any reference to authorities or other case law. *See* Mexico's Counter Memorial, 26 October 2018 at ¶¶ 134-44, attached as Exhibit 3 to the Declaration of Stephan Becker, dated December 6, 2021 (the "Becker Declaration").

law minimum standard of treatment of aliens," and since "aliens" in this context must mean investors, Lion Mexico was entitled to protection which Mexico failed to provide. *Id.* at ¶ 356. More specifically, it noted that Mexico's judiciary permitted improper service of Lion Mexico, *id.* at ¶¶ 400-08 and failed to ascertain whether the forged settlement agreement contained any irregularities, as the Juez de lo Mercantil was required to do. *Id.* at ¶¶ 409-10. Indeed, the Award noted that

> [w]ith a minimum of diligence, the Juez de lo Mercantil could and should have realized that Lion was a foreign company that needed to be served internationally. . . . The omission to verify whether [Lion Mexico] had been properly notified was exacerbated when subsequent procedural steps and decisions were simply notified by means of a noticeboard in the courthouse. . . . The lack of any diligence reached its zenith, when the Juez de lo Mercantil issued a default judgment, fully accepting the Debtors' claims. No attempt was made to ascertain that [Lion Mexico] was duly informed of the decision, and of its right to lodge an appeal.

Id. at ¶¶ 415-17.

Although the Tribunal noted that "the standard for a finding of denial of justice is high," *id.* at ¶ 370, it concluded that Mexico's failure to provide fair and equitable treatment to Lion Mexico constituted a denial of justice. *Id.* at ¶ 371. More specifically, the Tribunal explained that a denial of justice, as relevant here, "requires a finding of an improper and egregious procedural conduct by the local courts (whether intentional or not), which does not meet the basic internationally accepted standards of administration of justice and due process, and which shocks or surprises the sense of judicial propriety." *Id.* at ¶ 299. The Tribunal then found that Lion Mexico was denied justice on three separate grounds: (1) improper service and improper declaration of default, *id.* at ¶¶ 399-422; (2) improper denial of the right to appeal, *id.* at ¶¶ 436-48; and (3) denial of the right to submit evidence of forgery. *Id.* at ¶¶ 496-505. Accordingly, the Tribunal awarded Lion Mexico $47,000,000 in compensatory damages, plus legal fees, costs, and both pre-and post-judgment interest. *Id.* at ¶ 924.

ARGUMENT

Mexico argues that the Court should vacate the Award under FAA § 10(a)(4), claiming that the Tribunal exceeded its powers and that it issued the Award in a manifest disregard of the law. These arguments fail. The Award is the product of a thoughtful and deliberative process, conducted over the course of five years, in which the Tribunal exercised only the appropriate power conveyed to it. As such, Mexico has failed to show that the Tribunal exceeded its powers or issued the Award in manifest disregard of the law. Moreover, and as discussed below, it is uncertain whether the manifest disregard doctrine continues to be recognized in this circuit as an independent basis for vacating the arbitration award. Lion Mexico submits that the doctrine should not be recognized as an independent basis for vacatur following the Supreme Court's decision in *Hall St. Assocs., L.L.C. v. Mattel, Inc.* 552 U.S. 576, 128 S. Ct. 1396 (2008). Accordingly, the Court should deny Mexico's Petition and grant Lion Mexico's Cross-Petition.

I. Mexico Has Not Demonstrated Grounds to Vacate the Award Under the FAA.

"[J]udicial review of arbitral awards is extremely limited," and courts "do not sit to hear claims of factual or legal error by an arbitrator as [they would] in reviewing decisions of lower courts." *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)). Indeed, "Courts have long recognized that judicial review of an arbitration award is extremely limited." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37-38, 108 S. Ct. 364, 98 L.Ed.2d 286 (1987); *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1178 (D.C. Cir. 1991). The Federal Arbitration Act reflects "the emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 631, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985). This federal policy favoring arbitration applies "with special force in the field of international commerce." *Belize Soc. Dev. Ltd. v. Gov't of*

Belize, 668 F.3d 724, 727 (D.C. Cir. 2012). The D.C. Circuit has explained that "the FAA affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards: the Convention is 'clear' that a court 'may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.'" *Id.* (quoting *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007)).

A. The Tribunal Did Not Exceed its Powers.

Mexico first argues that the Tribunal exceeded its powers in finding that NAFTA Article 1105 protects Lion Mexico directly, rather than only Lion Mexico's investment, *i.e.*, the mortgages. Specifically, Mexico claims that the Tribunal failed to apply an unambiguous legal standard when it interpreted the phrase "investment of investor" in Article 1105(1) to extend protection to Lion Mexico. As the Tribunal explained, however, Mexico's argument is based on an exceedingly narrow interpretation of Article 1105, which stands at-odds with both NAFTA's interpretative guidance and previous Tribunal decisions.

Ultimately, Mexico's position is no more than a disagreement with the Tribunal's application of Article 1105, and courts do not recognize mere disagreement as grounds to vacate a foreign arbitral award. *See United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 371, 98 L. Ed. 2d 286 (1987) ("[A]n arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.").[9]

[9] Mexico has not argued that the Tribunal "imperfectly executed" its powers under § 10(a)(4). *See* Dkt. 1 at pg. 11-24.

In addition, Courts have long recognized that arbitrators bear the responsibility for interpreting relevant treaty provisions. *See BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 33, 134 S. Ct. 1198, 1206, 188 L. Ed. 2d 220 (2014) ("[T]he question before us is who—court or arbitrator—bears primary responsibility for interpreting and applying Article 8's local court litigation provision. . . . In answering the question, we shall initially treat the document before us as if it were an ordinary contract between private parties. Were that so, we conclude, the matter would be for the arbitrators. We then ask whether the fact that the document in question is a treaty makes a critical difference. We conclude that it does not."); *see also LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 879 (D.C. Cir. 2021) ("The conjunction of *Chevron* and *Henry Schein* means that we must accept the arbitral tribunal's determination that [Petitioner's] claim fell within the ECT. It makes no difference that *Henry Schein* dealt with a domestic, commercial contract and the ECT is an international treaty. '[A] treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent.' *BG Group*, 572 U.S. at 37, 134 S. Ct. 1198.").

Moreover, Mexico's argument is improperly premised on the idea that a U.S. Court sits as a court of appeal in reviewing foreign arbitral awards. Even if this Court believes that the Tribunal's interpretation was incorrect, the Tribunal acted well within its powers when it interpreted and applied Article 1105—particularly because it did so in reliance on both previous Tribunal decisions and binding interpretative guidance—so § 10(a)(4) does not provide a basis for vacating the Award. Notably, Mexico also took a contrary position during the hearing, acknowledging that Article 1105 protects investors, when Mexico's representative stated: "An investor can only claim denial of justice due to fair and just treatment according to Article 1105

and not expropriation pursuant to NAFTA Article 1110. Transcript of Hearing on the Merits and Quantum, July 22, 2019, Volume 1, at 312, attached as Exhibit C to the Conlon Declaration.

Section 10(a)(4) provides, as relevant here, that the Court may vacate an arbitration award if "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). Mexico contends that the Tribunal exceeded its powers by misapplying NAFTA Article 1105. This Article provides, in relevant part, that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." NAFTA Art. 1105(1). In short, Mexico argues that Article 1105(1) applies strictly to "investments" and not the "investors." As the Tribunal correctly found, this argument fails.

The Free Trade Commission ("FTC") was established under NAFTA Article 2001. The FTC is comprised of cabinet-level representatives from each of the NAFTA members, and its responsibilities include "(a) supervise the implementation of this Agreement; (b) *oversee its further elaboration*; (c) resolve disputes that may arise regarding its interpretation or application; (d) supervise the work of all committees and working groups established under this Agreement, referred to in Annex 2001.2; and (e) consider any other matter that may affect the operation of this Agreement." NAFTA Art. 2001(2)(a-e) (emphasis added). In July 2001, the NAFTA Free Trade Commission issued "Notes of Interpretation of Certain Chapter 11 Provision," ("FTC Notes of Interpretation") which included interpretative guidance on Article 1105(1). It provides, in relevant 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." FTC Notes of Interpretation (B)(1), attached as Exhibit 7 to the

Becker Declaration. The Tribunal reasoned that the reference to "aliens" in the context of investment protection could only mean "investors." Award at ¶ 358. Consistent with this FTC guidance, the Tribunal observed that multiple international arbitration tribunals have explained that NAFTA Article 1105 is broadly read to protect "investors."[10] The Tribunal cited a number of those cases in its Award. *Id.*

For example, the Tribunal cited *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, Aug. 2, 2010, a case in which an *ad hoc* NAFTA Arbitral Tribunal explained that "Article 1105 of NAFTA seeks to ensure that *investors* from NAFTA member States benefit from regulatory fairness." Becker Declaration Exhibit 6 at ¶ 179 (emphasis added). Similarly, the Tribunal also cited *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, in which that ICSID Tribunal stated that "[t]he Tribunal first notes that Article 1105(1) provides for the treatment of another Party's *investors* 'in accordance with international law.' It goes on to indicate that such treatment includes fair and equitable treatment and full protection and security." Becker Declaration Exhibit 8 at ¶ 183 (emphasis added). Moreover, domestic courts have similarly recognized that NAFTA Article 1105—particularly, in view of the FTC Notes of Interpretation—ensures fair treatment of foreign investors. *See Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracion y Produccion*, 962 F. Supp. 2d 642, 652 (S.D.N.Y. 2013), aff'd, 832 F.3d 92 (2d Cir. 2016) ("NAFTA Article 1105 . . . requires a 'fair and equitable treatment' of foreign investors in Mexico.").

[10] While Mexico did not refer to the FTC Notes of Interpretation in its submission to the Tribunal, in its Petition, it claims that the Tribunal disregarded these notes. Petition at ¶ 53. To the contrary, the Tribunal considered the FTC Notes of Interpretation and concluded they supported its findings. In addition, other than making a conclusory statement, Mexico does not explain how these notes support its position.

In addition, Lion Mexico brought the following additional authorities to the attention of the Tribunal, all of which support the Tribunal's conclusion, but are not cited in its Award: *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL Partial Award (13 November 2000) ("Article 1105 of the NAFTA requires the Parties to treat *investors* of another Party in accordance with international law"); *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL Award (Merits Phase 2) (10 April 2001) ("the Tribunal interprets Article 1105 to require that covered investors *and* investments receive the benefits of the fairness elements."); *Mobil Investments Canada & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) ("*Article 1105 may protect an investor* from changes that give rise to an unstable legal and business environment, but only if those changes may be characterized as arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard.") *See* Claimants Reply on the Merits, 21 February 2019 at pg. 126), attached as Exhibit D to the Conlon Declaration.

Moreover, if the Tribunal were to accept Mexico's argument, no one would have standing in the present case, despite the fact the mortgages were a protected investment, which Mexico does not contest. Mexico does not explain how rights with respect to Lion Mexico's mortgage investments could be protected. The mortgages themselves could not commence legal proceedings, nor can they be served or sued. Only Lion Mexico, as the investor in the investment and as claimant in the Arbitration, can act to protect its mortgage investment. Any other interpretation would render the inclusion of mortgages as protected investments under Article 1139(g) of the NAFTA (*see* Tribunal's Decision on Jurisdiction, 30 July 2018 at ¶¶ 226-69, Award Annex A) pointless, and would contradict the canons of treaty interpretation codified by Article 31 of the Vienna Convention on the Law of Treaties. As a creature of law, an investment

must be afforded due process before it can be extinguished. The interpretation of Article 1105 adopted by the Tribunal, the FTC, and all the tribunals interpreting NAFTA recognize this fundamental principle.

i. The Submission of the United States Does Not Support an Argument that the Tribunal Exceeded its Powers

Mexico also criticizes the Tribunal for declining to defer to the argument made by the United States in its non-disputing party brief. *See* Petition at ¶ 59. As Mexico notes, the United States submitted a NAFTA Article 1128 brief—the NAFTA-equivalent of an *amicus curiae* brief—in this dispute, in which it argued that the Tribunal should interpret Article 1105(1) as applying only to the "investments of investors" and not to the investors themselves. *See Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Submission of the United States of America, June 21, 2019 (the "U.S. Submission").

Contrary to Mexico's argument here, the U.S. Submission only further establishes that the Tribunal acted entirely within its powers under § 10(a)(4). As noted above, the United States submitted its brief pursuant to NAFTA Article 1128. This Article provides that "[o]n written notice to the disputing parties, a Party may make submission to a Tribunal on a *question of interpretation of this Agreement*." NAFTA Art. 1128 (emphasis added). Thus, the United States necessarily acknowledged that the Tribunal would need to interpret Article 1105(1), and it sought to persuade the Tribunal to adopt its preferred interpretation. However, the fact that the Tribunal was not persuaded by the arguments of the United States and decided to adopt a different interpretation of Article 1105(1) does not indicate the Tribunal exceeded its powers—to the contrary, it demonstrates the Tribunal properly discharged its responsibilities by considering the arguments of interested parties and ruling on them. Significantly, the United States only argued what it believe the Tribunal *should* do, and at no point did the United States contend that

the Tribunal lacked the authority to reach a different interpretation. Moreover, arguments made pursuant to NAFTA Article 1128 are not binding on the Tribunal, but can be given whatever weight the Tribunal deems appropriate.

Finally, Mexico's Petition seeks to vastly expand both 9 U.S.C. § 10(a)(4) and the role of U.S. Courts in reviewing arbitration awards. Mexico challenges only one aspect of the Tribunal's Award—3 paragraphs out of 924—its interpretation of Article 1105. But the interpretation of this Article was squarely before the Tribunal in deciding this dispute. As noted above, both Mexico and Lion Mexico, as well as the United States, briefed this specific issue. Indeed Mexico urged the Tribunal to accept its own interpretation of Article 1105. Yet Mexico argues here that the Tribunal exceeded its authority solely because the Tribunal rejected Mexico's preferred interpretation. Now, Mexico asks this Court—in defiance of the strong federal policy favoring arbitration—to impermissibly substitute its judgment for that of the Tribunal.

B. The Tribunal Did Not Manifestly Disregard the Law in Issuing the Award

Mexico has similarly failed to establish the Tribunal issued the Award in a manifest disregard of the law.[11] Manifest disregard "means much more than failure to apply the correct law. 'Manifest disregard' may be found, for example, if the panel understood and correctly stated the law but then proceeded to ignore it." *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1182 (D.C. Cir. 1991). Mexico, as the party seeking to invoke a manifest disregard theory, "must at least establish 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). Indeed, this Court has previously recognized that

[11] As discussed below, Lion Mexico submits that manifest disregard of the law should not be considered as an independent basis for vacatur. The D.C. Circuit has not granted vacatur of a foreign arbitration award due to manifest disregard of the law since the Supreme Court's 2008 Opinion in *Hall Street*.

"[a]ssuming manifest disregard survived *Hall Street*, the Court must first determine whether the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether." *Coyne v. Hewlett-Packard Co.*, 308 F. Supp. 3d 207, 211 (D.D.C. 2018).

Mexico cannot meet this threshold. In its Petition, Mexico argues that the Tribunal recognized Mexico's preferred interpretation of Article 1105 as the correct interpretation of the Article, but then disregarded what it knew to be the correct interpretation for a rule of its own invention. Award at ¶ 356; Petition at ¶ 53 ("[The Tribunal] expressly stated that it was disregarding the language of Article 1105.") This is a mischaracterization of the Tribunal's analysis and is based on a misapprehension of what the Tribunal meant by "literal reading" of Article 1105. Mexico is conflating the phrase "literal reading," with "correct reading" or "established interpretation." However, as the Tribunal explained immediately after its "literal reading"[12] remark, it would not view the language in isolation, but needed to also consider both the FTC Notes of Interpretation and how other NAFTA Tribunals had interpreted Article 1105. *See* Award at ¶¶ 356-58. Only after it considered this necessary context did the Tribunal reject Mexico's proffered "literal reading" of the Article.

Specifically, in its reasoning set out in the Award, the Tribunal explained that it was using the FTC's guidance, which "equates the standard of protection to be applied under Art. 1105 of the NAFTA with the standard of 'customary international law minimum standard of treatment of aliens,'" and that it understood the "reference to 'aliens,' in a context of investment protection, can only mean investors." Award at ¶ 358. It then cited other arbitral awards, which—as noted above—likewise explained that Article 1105(1) is a "source of protection for

[12] Similar to "literal reading," Black's Law Dictionary defines "strict interpretation" as "[a]n interpretation according to the narrowest, most literal meaning of the words without regard for context and other permissible meanings." Black's Law Dictionary (11th ed. 2019)

investors rather than solely for their investments." *Id.* Whether or not the Tribunal was correct in its analysis—and it was—the Tribunal did not disregard the language of Article 1105.

The Tribunal's approach cannot possibly be seen as a manifest disregard of the law. The interpretation of Article 1105 was, indeed, governed by the rules of customary international law codified by Article 31 of the Vienna Convention on the Law of Treaties. Pursuant to Article 31(1), "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." Mexico's literal reading of Article 1105 was subject to its proper context, which included FTC's Note of Interpretation. It was, therefore, legitimate – and actually correct – for the Tribunal to rely on FTC's guidance to determine the correct reading of Article 1105.

In addition, this Court has previously addressed a Tribunal's interpretation of NAFTA Article 1105 in the manifest disregard context. In *Mesa Power Grp., LLC v. Gov't of Canada*, 255 F. Supp. 3d 175 (D.D.C. 2017),[13] the Court explained that:

> [t]he tribunal stated the governing legal rule by quoting Article 1105, and interpreted it by drawing on past arbitral awards to give meaning to the vague standard of 'fair and equitable treatment.' Moreover, even if the tribunal stated the wrong standard, [Petitioner] has certainly not demonstrated that there is a different interpretation of 'fair and equitable treatment' that is well-defined, explicit, and clearly applicable here. At best, there is conflicting authority on how deference plays into the standard under Article 1105, as demonstrated by the numerous arbitral awards submitted by the parties that employ deference to a government's decisionmaking slightly differently . . . . Thus, this award cannot be vacated on the ground of manifest disregard of the law.

Mesa Power Grp., LLC, 255 F. Supp. 3d at 189. This same principle applies here. Mexico has not and cannot identify any "well-defined, explicit, and clearly applicable" interpretation of Article 1105 that the Tribunal failed to apply. Mexico has simply offered its own textual analysis

[13] This case addressed a Tribunal's interpretation of Article 1105's "fair and equitable treatment" clause.

of Article 1105, which no tribunal or court has ever adopted. In contrast, the Tribunal looked to the FTC Notes of Interpretation and past arbitral awards for guidance. Award at ¶ 358. Thus, the Tribunal did not manifestly disregard the law.

Finally, Mexico's reliance on *Raymond James Fin. Servs. v. Bishop*, 596 F.3d 183 (4th Cir. 2010), *Warfield v. ICON Advisors, Inc.*, No. 3:20CV195-GCM, 2020 U.S. Dist. LEXIS 105321 (W.D.N.C. June 16, 2020), and *Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F.2d 1125 (3d Cir. 1972)[14] is misplaced. As an initial matter, these cases did not address awards issued by an international arbitral body, meaning they were not subject to the enhanced deference that U.S. Courts must give to foreign arbitral awards. *See Belize Soc. Dev. Ltd.*, 668 F.3d at 727 ("the FAA affords the district court little discretion in refusing or deferring enforcement of *foreign* arbitral awards.") (emphasis added). Furthermore, these cases generally involve an arbitrator who disregarded the necessary context of the arbitration—such as the arbitrator in *Warfield* who failed to recognize that a former employee was employed at-will. 2020 U.S. Dist. LEXIS 105321 at *6. In contrast, the Tribunal here interpreted a provision of NAFTA necessary to resolve the dispute, and did so in accordance with previous NAFTA arbitral awards and other relevant guidance.

As with Mexico's § 10(a)(4) argument, this is nothing more than a mere disagreement with the Tribunal's decision. A U.S. Court's review of a foreign arbitral award is *not* a broad opportunity for second bite at the apple by a disappointed party, yet that is precisely what Mexico seeks here. The same issues that Mexico has raised here were fully considered and

[14] It is unclear that *Swift Industries, Inc.*'s manifest disregard analysis remains valid. The Third Circuit has not addressed whether manifest disregard of the law survived *Hall Street*. *See Whitehead v. Pullman Grp., LLC*, 811 F.3d 116, 120 (3d Cir. 2016).

rejected by the Tribunal, and this Court should decline Mexico's request that it act as a court of appeal now.

II. Manifest Disregard is not the law of the Circuit

In *Hall Street*, the Supreme Court held that "[9 U.S.C.] §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification." *Hall St.*, 552 U.S. at 584, 128 S. Ct. at 1403. Manifest disregard of the law is, however, a "judicially created doctrine" and not a basis for vacatur under section 10 or section 11. *Banco de Seguros del Estado v. Mut. Marine Off., Inc.*, 344 F.3d 255, 263 (2d Cir. 2003); *see also Dluhos v. Strasberg*, 321 F.3d 365, 369 (3d Cir. 2003) (same). Moreover, the D.C. Circuit has not permitted the vacatur of any foreign arbitral award since *Hall Street* on the basis of manifest disregard of the law. *See Mesa Power Grp.*, 255 F. Supp. 3d at 183 ("The D.C. Circuit has not decided the issue [of manifest disregard].").

Since the *Hall Street* decision, a Circuit-split has emerged on whether a court may vacate an arbitration award due to manifest disregard of the law. The Fifth, Eighth, and Eleventh Circuits no longer recognize manifest disregard as a valid ground of review, whereas the Second, Fourth, Sixth, and Ninth Circuits have held that manifest disregard—in seemingly in a more-limited form—survives *Hall Street*.[15] To the extent manifest disregard is considered merely as a "shorthand for § 10(a)(4)," as in the Ninth Circuit, *see e.g.*, *Comedy Club Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) or as the section 10 grounds collectively, then the use of the phrasing "manifest disregard of the law" is permissible under *Hall St.* 552 U.S. at 585,

[15] *See Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009); *Medicine Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010); *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1314 (11th Cir. 2010); *see also Stolt–Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 93–95 (2d Cir. 2008); *Wachovia Sec. LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012); *Coffee Beanery, Ltd. v. WW, LLC*, 300 Fed. Appx. 415, 419 (6th Cir. 2008); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1281 (9th Cir. 2009).

128 S. Ct. at 1404 ("Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them.").

However, as stated by the Eleventh Circuit, to the extent that manifest disregard is considered independent of § 10(a), it is a "judicially created bas[is] for vacatur," and is "no longer valid in light of *Hall Street*." *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010). Here, Mexico's manifest disregard argument is either a mere restatement of its argument that the Tribunal exceeded its power under § 10(a)(4), or expresses an intention to expand review of arbitration awards beyond the § 10(a) factors—which the Supreme Court has specifically disallowed and as this Circuit has recognized. *Belize*, 668 F.3d at 727 ("the Convention is 'clear' that a court 'may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.'"). Moreover, manifest disregard should not be a basis for overturning arbitration awards because it can too easily invite courts to substitute their judgment of what the law should be for the judgment of arbitrators whom the parties previously agreed should make these judgments.

Accordingly, this Court should not permit Mexico to vacate the Tribunal's Award on a manifest disregard theory. Although Lion Mexico maintains that Mexico has not shown that the Tribunal acted in manifest disregard of the law, given that there is no binding precedent that establishes the continued validity of manifest disregard as a basis to vacate an arbitration award post *Hall Street*, it should not be considered an independent basis for vacatur.[16]

[16] It is unnecessary for the Court to reach a decision on whether manifest disregard still exists if it rejects Mexico's argument. *See Selden v. Airbnb, Inc.*, 4 F.4th 148, 160 (D.C. Cir. 2021) ("It is unclear, however, whether manifest disregard remains a valid ground for vacatur after the Supreme Court's decision in *Hall Street* . . . . Because [Petitioner] has not established that the

III. The Court should confirm, recognize, and enforce the arbitral award

Lion Mexico respectfully requests that this Court issue an order confirming the Award in Accordance with Section 9 of the FAA. That section provides "at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9. The Tribunal issued the Award on September 21, 2021 and Lion Mexico filed its Cross-Petition to confirm the Award on February 4, 2022, which, as set forth above, is within one year of the date of the Award. In addition, Lion Mexico has filed a duly certified copy of the Award and has served Mexico with its Cross-Petition in accordance with 9 U.S.C. § 9.

As set forth above, Mexico has not, and cannot, establish any valid grounds to vacate or modify the Award. Thus, this Court should enter an Order confirming the award. *Owen-Williams v. BB & T Inv. Servs., Inc.*, 717 F. Supp. 2d 1, 10 (D.D.C. 2010) ("[u]nder the terms of § 9 [of the FAA], a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in section 10(a).") (quoting *Hall St. Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 582, 128 S. Ct. 1396, 170 L.Ed.2d 254 (2008)).

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.

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arbitrator disregarded the law, we need not resolve whether manifest disregard remains a ground for vacating an arbitration award.").

Respectfully submitted,

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/s/ Reginald R. Goeke
Reginald R. Goeke (DC Bar No. 435613)
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
Tel: +1 (202) 263-3000
rgoeke@mayerbrown.com

John M. Conlon (*pro hac vice*)
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
Tel: +1 (212) 506-2500
jconlon@mayerbrown.com

Attorneys for Respondent Lion Mexico Consolidated L.P.