

**IN THE MATTER OF
AN ARBITRATION UNDER THE RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW**

Alicia Grace; Ampex Retirement Master Trust; Apple Oaks Partners, LLC; Brentwood Associates Private Equity Profit Sharing Plan; Cambria Ventures, LLC; Carlos Williamson-Nasi; Carolyn Grace Baring; Diana Grace Beard; Floradale Partners, LLC; Frederick Grace; Frederick J. Warren; Frederick J. Warren IRA; Gary Olson; Genevieve T. Irwin; Genevieve T. Irwin 2002 Trust; Gerald L. Parsky; Gerald L. Parsky IRA; John N. Irwin III; José Antonio Cañedo-White; Nicholas Grace; Oliver Grace III; ON5 Investments, LLC; Rainbow Fund, L.P.; Robert M. Witt; Robert M. Witt IRA; Vista Pros, LLC; Virginia Grace

Claimants

v.

United Mexican States

Respondent

CLAIMANTS' OBSERVATIONS ON THE ARTICLE 1128 SUBMISSIONS

September 7, 2021

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TABLE OF CONTENTS

	<u>Page</u>
I. THE NON-DISPUTING PARTIES’ ARTICLE 1128 SUBMISSIONS CANNOT ASSIST THE TRIBUNAL IN INTERPRETING THE NAFTA	2
A. Treaty Interpretation: The Non-Disputing Parties’ Article 1128 Submissions Cannot Offer A Binding Interpretation Of The NAFTA, Much Less Rewrite Its Provisions	2
B. Customary International Law: The Non-Disputing Parties’ Purported Views On What Customary International Law Should Be Have No Effect On The Current State of Customary International Law, Nor The NAFTA Itself	5
II. JURISDICTION & ADMISSIBILITY: THE NON-DISPUTING PARTIES’ BID TO READ ADDITIONAL REQUIREMENTS INTO THE NAFTA FAILS UNDER THE RULES OF TREATY INTERPRETATION	7
A. Dual Nationality: The Non-Disputing Parties Concede That Dual Nationals May Bring Claims Under The NAFTA, But Their Attempt To Read A “Dominant And Effective” Nationality Requirement Into The NAFTA Does Violence To The Text Of The NAFTA And The Canons Of International Law	7
B. Reflective Loss: The Non-Disputing Parties’ Bid To Include A “No Reflective Loss” Rule In The NAFTA Is Unsubstantiated And Would Render The NAFTA’s “Investment” Definition Ineffective	16
C. “Investor” Definition: Claimants Have Established That They Are Investors Under the NAFTA.....	24
D. Waiver: Article 1121 Does Not Prohibit A Claimant From Pursuing Local Proceedings Against a Private Party for Harms Caused By It.....	24
III. ATTRIBUTION: ON THE NON-DISPUTING PARTIES’ OWN CASE, MÉXICO IS RESPONSIBLE FOR ALL RELEVANT ACTS OF PEMEX	26
IV. MERITS: THE NON-DISPUTING PARTIES’ ATTEMPT TO NARROW THE SCOPE OF THE NAFTA’S PROTECTIONS CANNOT OVERCOME THE LANGUAGE OF NAFTA OR THE CURRENT STATE OF THE MINIMUM STANDARD OF TREATMENT UNDER INTERNATIONAL LAW	31
A. Expropriation: The Non-Disputing Parties’ Attempts To Artificially Narrow The Scope Of Compensation For Expropriation Under The NAFTA Is Contrary To The Cannons Of International Law.....	31
B. The Minimum Standard of Treatment: The Non-Disputing Parties Rely On An Incorrect Version (Their Own) of the Minimum Standard of Treatment	34
1. Fair And Equitable Treatment: The Non-Disputing Parties’ Bid To Exclude Key Aspects Of The NAFTA’s Fair And Equitable	

	Treatment Protection Does Not Reflect The Current Content Of The Minimum Standard Of Treatment	36
	(i) Judicial Measures	37
	(ii) Legitimate Expectations.....	41
	(iii) Non-Discrimination	43
	(iv) Transparency	44
	(v) Good Faith	46
	(vi) Corruption	46
2.	Full Protection and Security: The Non-Disputing Parties Cannot Ignore The Reality That The Minimum Standard of Treatment Covers Both Physical and Legal Protection and Security	47
V.	CONCLUSION.....	51

1. Claimants hereby submit their observations on the August 24, 2021 submissions of Canada and the United States (together, the “**Non-Disputing Parties**”) filed pursuant to Article 1128 of the NAFTA (together the “**Article 1128 Submissions**”).

2. While Article 1128 gives NAFTA Parties the opportunity to make submissions “on questions of interpretation,” it does not allow the NAFTA Parties to use those submissions to attempt to impose a binding interpretation of the NAFTA. The Article 1128 Submissions are the non-binding, *ex post* opinions of non-parties whose interests are aligned with the Respondent’s. One needs to look no further than the quite egregious interpretations of the NAFTA standards of protection advanced by the Non-Disputing Parties to see that they are advancing self-serving arguments aimed at attempting, improperly, to influence this Tribunal to issue an award that would do violence to the plain and ordinary meaning of NAFTA’s text. They do so in all likelihood because, at least in part, it will aid them in defending the NAFTA cases which each of them must defend. For this reason, they are little more than an opportunity for the NAFTA Parties to produce a written record seeking to impermissibly restrict the substantive protections and procedural rights that the NAFTA’s drafters established in clear and unambiguous language so that they can cite them in later submissions when the States are acting as respondent (as México does repeatedly throughout its own submissions). In this regard, the Non-Disputing Parties’ Article 1128 Submissions do not assist, and the views offered by the Non-Disputing Parties should not be accepted by, this Tribunal.

3. In making these submissions, the Non-Disputing Parties seek to cast aside the canons of international law – the rules of treaty interpretation and customary rule – and replace them with what the Non-Disputing Parties, as respondents, wish the NAFTA and customary international law were (which, of course, they cannot do). They seek to restrict access to arbitration by *inter alia*

reading into the NAFTA implicit rules that (1) bar reflective loss and (2) require an investor who is a dual national show that his or her “dominant and effective” nationality is not that of the respondent State – even though such requirements are not only nowhere to be found in the NAFTA, but would also render ineffective other key provisions of the NAFTA. At the same time, Canada argues that Chapter 15 of the NAFTA would displace the customary international law rules of State responsibility in their entirety, even though, as the United States rightly acknowledges, that provision only purports to create an obligation on States to ensure that State enterprises comply with the NAFTA. In any event, this provision is not applicable here, as Pemex is a State organ under international law. On the merits, the Article 1128 Submissions seek to limit the scope of liability by reading out of the NAFTA key investment protections universally recognized by other tribunals.

4. Below Claimants will (I) recall the relevant canons of international law that the Non-Disputing Parties seek to cast aside before explaining why the Non-Disputing Parties’ submissions on (II) jurisdiction, (III) admissibility, and (IV) the merits do not assist this Tribunal as they are contrary to those basic rules of international law.

I. THE NON-DISPUTING PARTIES’ ARTICLE 1128 SUBMISSIONS CANNOT ASSIST THE TRIBUNAL IN INTERPRETING THE NAFTA

A. Treaty Interpretation: The Non-Disputing Parties’ Article 1128 Submissions Cannot Offer A Binding Interpretation Of The NAFTA, Much Less Rewrite Its Provisions

5. In their Article 1128 Submissions, the Non-Disputing Parties purport to put forward the “proper interpretation” of the NAFTA,¹ with which (they say) “all three NAFTA Parties agree.”² Yet, as will be explained, those submissions seek clearly to do more than just “interpret” the

¹ See, e.g., United States 1128 Submission, ¶ 2.

² See United States 1128 Submission, ¶¶ 16 n.17, 33, 43, 73 n.117, 74; Canada 1128 Submission, ¶ 22.

provisions of the NAFTA. Like México's defense in this arbitration, they seek to import additional requirements into the NAFTA (for example, a "dominant and effective" nationality requirement for dual nationals and a "no reflective loss" requirement) where the NAFTA's drafters included no such language. However, the international law rules of treaty interpretation, upon which the Non-Disputing Parties themselves rely,³ do not allow them to do so.

6. Article 31 of the Vienna Convention on the Law of Treaties, which reflects customary international law, imposes a textual approach to treaty interpretation: "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."⁴ This means that a decisionmaker must look to the text of the words, not what the contracting parties might say about those words *ex post*.⁵ It also reflects "that terms were intended to mean something, rather than nothing" (the principle of effectiveness under international law) and that treaty parties "act honestly, fairly and reasonably, and [. . .] refrain from taking unfair advantage" (the principle of good faith).⁶

7. In a clear acknowledgment that their submissions go far beyond the four corners of the NAFTA, the Non-Disputing Parties repeat that their calculated submissions reflect a "subsequent

³ See United States 1128 Submission, ¶ 16; Canada 1128 Submission, ¶ 4.

⁴ Vienna Convention on the Law of Treaties, 1969 (emphasis added), **CL-58**

⁵ See, e.g., *Garanti Koza v. Turkmenistan*, ICSID Case No. ARB/11/20, Award (Dec. 19, 2016), ¶ 231 (finding that although the Respondent argues that an investment must have been "actively made" that argument finds no support in the ordinary meaning of the words used in the BIT), **CL-414**; *Flemingo Dutyfree v. Republic of Poland*, UNCITRAL, Award (Aug. 12, 2016), ¶ 324 (finding that the fact that a treaty's substantive protections only apply to "all investments made by investors" cannot prevent a claim by an investor that has acquired an investment with no capital contribution into the host State because the express definition of "investment" in the treaty refers to assets "acquired" in accordance with the laws of the host State and "the definition of 'investment' is definitive"), **CL-205**

⁶ M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff, 2009, p. 425, **CL-433**. See also *Occidental Exploration and Production Company v. The Republic of Ecuador* ("Occidental v. Ecuador"), LCIA Case No. UN3467, Final Award (July 1, 2004), ¶ 68 ("The Tribunal agrees with both parties in that the proper interpretation of Article X must not result in rendering it meaningless. This is the conclusion that arises evidently from the Vienna Convention on the Law of Treaties in respect of interpretation."), **CL-36**.

agreement” as a matter of international law.⁷ Yet, while Article 31(3) of the Vienna Convention provides that “[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions . . .”⁸ the diffuse and self-interested submissions of various NAFTA parties, acting as respondents and non-disputing parties in this and other proceedings, cannot be considered a “subsequent agreement” from the purposes of Article 31(3). Moreover, as explained, that “subsequent agreement” does not seek to interpret the NAFTA, but rather to impermissibly modify its provisions. Under international law, subsequent agreements “must be seen in their interaction with other means of interpretation,” and do not “necessarily possess a conclusive, or legally binding, effect”⁹—and thus any subsequent agreement would be only one factor amongst others, including the “ordinary meaning” of the text and “good faith,” that the Tribunal would need to take into account.

8. Most fatal to the Non-Disputing Parties assertions, however, is the reality that, if the Non-Disputing Parties really wanted to “interpret” the NAFTA (rather than simply lay down a marker to argue against liability in arbitrations brought against them), they would have done so through Article 2001 of the NAFTA, which establishes the Free Trade Commission, a high-level body “*comprising cabinet-level representatives of the Parties or their designees,*” with the authority to “resolve disputes that may arise regarding [the NAFTA’s] interpretation or application.” Tellingly, however, they have not done so with respect to any of the issues on which they now opine.

⁷ See United States 1128 Submission, ¶ 16.

⁸ Vienna Convention on the Law of Treaties, 1969, CL-58.

⁹ See ILC Report, 68th Session, 2016, UN Doc A/71/10, Chapter VI, ¶ 4, CL-415.

B. Customary International Law: The Non-Disputing Parties’ Purported Views On What Customary International Law Should Be Have No Effect On The Current State of Customary International Law, Nor The NAFTA Itself

9. In their Article 1128 Submissions, the Non-Disputing Parties seek to impose their own interpretation of customary international law—either to displace the clear provisions of the NAFTA or to restrict an otherwise applicable rule of customary international law. Again, under the rules of international law, they cannot do so.

10. First, under international law, the NAFTA—as an international law agreement—is *lex specialis* and displaces any otherwise applicable rules of customary international law.¹⁰ Thus, the customary international law rules applicable to nationality in cases of diplomatic protection cannot apply in this case as the NAFTA clearly establishes who may bring claims under the NAFTA.

11. Second, while the Non-Disputing Parties attempt to narrow the scope of existing rules of international law by arguing that “the existence of a rule of customary international law requires that there be ‘a settled practice together with *opinion juris*’” (although they do not dispute the existence of the rule of customary international law itself, *i.e.*, an obligation of fair and equitable treatment or full protection and security), they ignore that it is for this Tribunal, and this Tribunal alone, to establish the scope of any rule of customary international law whose existence is not in dispute.¹¹ Numerous are the decisions of arbitral tribunals that have interpreted the scope of

¹⁰ See, e.g., *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ, Judgment, (June 27, 1986), ¶ 274 (“In general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim.”), **CL-416**; *Philips Petroleum Co. Iran v. The Islamic Republic of Iran, the National Iranian Oil Company*, Award (June 29, 1989), (1989-Volume 21) Iran-U.S. Claims Tribunal Report, ¶ 116 (the tribunal “applies the *lex specialis* of the Treaty of Amity and that it need not therefore make any finding with respect to customary international law”), **CL-239**.

¹¹ See *Windstream Energy LLC v. The Government of Canada*, PCA Case No. 2013-22, Award (Sept. 27, 2016), ¶ 350 (“The Tribunal agrees that it is in the first place for the party asserting that a particular rule of customary international law exists to prove the existence of the rule. However, in the present case the issue is not whether the relevant rule of customary international law exists; the minimum standard of treatment contained in Article 1105(1) of NAFTA is indeed a rule of customary international law, as interpreted by the FTC in its Notes of Interpretation.

existing customary rules of international law without any reference to the restrictive standards of proof to which the Non-Disputing Parties seek to put Claimants.¹² Indeed, the fact that the Non-Disputing Parties *themselves* seek to rely on investor-State case law (albeit outdated and irrelevant) in their own submissions on the content of customary international law rules is testament to this basic reality under international law.¹³ In any event, and even if the Non-Disputing Parties were correct, it is now settled law that that “[w]hen parties to a treaty agree that a tribunal may render binding decisions on the interpretation or application of that treaty, the decisions of that tribunal constitute, for the States concerned, both State practice and—thanks to the requirement of explicit ratiocination in terms of international law—*opinio juris*.”¹⁴

12. Third, the Non-Disputing Parties ignore that customary international law is not a static subject-matter, but one that—in the words of the Non-Disputing Parties themselves—“is not ‘frozen in time,’” but instead “evolve[s].”¹⁵ Indeed, the Non-Disputing Parties and México do not deny that customary international law has now evolved to obligate States under the FET standard to ensure that its State organs do not engage in acts of corruption, a testament to the reality that tribunals may determine the scope of existing rules of customary international law.¹⁶ Their

The issue therefore is not whether the rule exists, but rather how the content of a rule that does exist - the minimum standard of treatment in Article 1105(1) of NAFTA - should be established. The Tribunal is therefore unable to accept the Respondent’s argument that the burden of proving the content of the rule falls exclusively on the Claimant.” (emphasis added), **CL-85**.

¹² See, e.g., Claimant’s Reply (“Reply”), ¶ 897 n.1926.

¹³ See United States 1128 Submission, ¶¶ 5, 17, 32, 34, 55, 58-63, 69, 71, 72, 75; Canada 1128 Submission, ¶ 16, 20, 24, 25, 26, 31.

¹⁴ Michael Reisman, “Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law”, *ICSID Review - Foreign Investment Law Journal* (2015), **CL-417**; see also *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (Mar. 24, 2016), ¶¶ 496-502, 504-505, 512, 553, **CL-86**; *Windstream Energy LLC v. The Government of Canada*, PCA Case No. 2013-22, Award (Sept. 27, 2016), ¶¶ 350-352, 355-361, **CL-85**.

¹⁵ *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award (Jan. 9, 2003), ¶ 179, **CL-136**.

¹⁶ See *infra*, ¶¶ 72-74.

reliance on outdated and irrelevant case law to support their narrow interpretation of the substantive protections under the NAFTA is but another reason why this Tribunal should not accept their arguments.

II. JURISDICTION & ADMISSIBILITY: THE NON-DISPUTING PARTIES' BID TO READ ADDITIONAL REQUIREMENTS INTO THE NAFTA FAILS UNDER THE RULES OF TREATY INTERPRETATION

A. Dual Nationality: The Non-Disputing Parties Concede That Dual Nationals May Bring Claims Under The NAFTA, But Their Attempt To Read A “Dominant And Effective” Nationality Requirement Into The NAFTA Does Violence To The Text Of The NAFTA And The Canons Of International Law

13. In its submissions, México has incorrectly argued (1) that the NAFTA does not allow claims by dual nationals and (2) that, in the alternative, if it does, such dual nationals must show that their dominant and effective nationality is of a NAFTA Party that is not the respondent State.¹⁷ The Non-Disputing Parties appear to concede that the NAFTA does not bar claims by dual nationals under Chapter 11 – which is only logical given that the NAFTA does not mention (much less bar claims by) dual nationals anywhere in its text.¹⁸ However, the Non-Disputing Parties echo México’s meritless contention that the NAFTA contains an implicit “dominant and effective” nationality rule. That position is clearly wrong as a matter of international law. Tellingly, it has not been supported by a single NAFTA tribunal in the agreement’s nearly 30-year history. The rules of international law leave no doubt as to why.

14. The provisions of the NAFTA are clear and need no gloss. Under NAFTA Article 1116, “[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation” under various provisions of the NAFTA.¹⁹ NAFTA Article 1139

¹⁷ See Statement of Defense (“SOD”), ¶¶ 562-584; Rejoinder, ¶¶ 495, 516-528.

¹⁸ See United States 1128 Submission, ¶¶ 3-8; Canada 1128 Submission, ¶¶ 3-13.

¹⁹ NAFTA Art. 1116.

defines an “investor of a Party” as “a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.”²⁰ Article 201 in turn defines “national” as “a natural person who is a citizen or permanent resident of a Party.”²¹

15. The NAFTA, as the Claimants have explained,²² “contains a clear definition of who is to be considered a national,”²³ which neither excludes claims by dual nationals nor subjects them to any ulterior requirements. The Non-Disputing Parties cannot deny that the NAFTA is *lex specialis* and thus would displace any otherwise applicable rules of customary international law. The Tribunal’s analysis should stop here. This has been the finding of numerous tribunals, as the Claimants have shown in their Statement of Claim and Reply.²⁴

16. In their Article 1128 Submissions, the Non-Disputing Parties raise a number of arguments as to why the NAFTA’s *lex specialis* rule in Article 201 and other provisions should be displaced. None, however, withstand scrutiny under the rules of international law.

17. First, and as a preliminary matter, the Non-Disputing Parties’ submissions rest on a fallacy—*i.e.*, that a supposed customary international law rule prohibits States from offering diplomatic protection to dual nationals unless the dual national’s “dominant and effective” nationality is not the State that has prejudiced it.

18. That is wrong. As the leading scholars in international law confirm, the rules of customary international law with respect to diplomatic protection have no application to investor-State

²⁰ NAFTA Art. 1139.

²¹ NAFTA Art. 201.

²² See Statement of Claim (“SOC”), ¶¶ 327-329; Reply, ¶ 584.

²³ *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt* (“*Siag v. Egypt*”), ICSID Case No. ARB/05/15, Decision on Jurisdiction (Apr. 11, 2007), ¶ 198, **CL-318**.

²⁴ See SOC, ¶ 578 n.1003; Reply, ¶¶ 527 n.1333, 539-540, 612, 615.

arbitration.²⁵ This is because “the rules of nationality in a BIT do not follow the rules as they pertain to the right of diplomatic protection between two states which have both granted nationality to the same person”²⁶ and that “where the investment treaty is silent on the question of the standing of dual nationals, there is no reason to imply the default rule of diplomatic protection to the effect that dual nationals must be excluded from the tribunal’s jurisdiction *ratione personae*.”²⁷ This reality has been echoed by numerous investor-State tribunals, which have found that “[t]he rules of customary international law applicable in the context of diplomatic protection do not apply as such to investor-State arbitration” and that “[h]ad the Contracting Parties intended to set additional limitations as regards jurisdiction *ratione personae*, no doubt they would have expressly stated such limitations in the text of the BIT.”²⁸ The ILC Draft Articles on Diplomatic Protection even

²⁵ See *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20 , Award (July 14, 2010), ¶ 69 (expert opinion of Professor Dolzer), **CL-371**

²⁶ *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (July 14, 2010), ¶¶ 69, 70, **CL-371**.

²⁷ Zachary Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (Cambridge University Press 2009), p. 321 (emphasis added), **CL-430**.

²⁸ *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20 , Award (July 14, 2010), ¶¶ 69-70, **CL-371**; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (Oct. 17, 2013), ¶¶ 127-128 (noting that the tribunal “sees no basis for applying a rule of diplomatic protection that would trump the specific regime created by the Treaty”), **CL-372**; *El Paso Energy International Company v. Argentine Republic* (“*El Paso v. Argentina*”), ICSID Case No ARB/03/15, Award (Oct. 31, 2011), ¶ 213 (“BITs do not concern situations such as that addressed in *Barcelona Traction*. they do not pertain to diplomatic protection, nor do they reflect the rules of general international law in matters of investment protection. Interpreted in conformity with the canons of treaty law, they prescribe that rights and interests of foreign shareholders”), **CL-155**; *Siag v. Egypt*, Decision on Jurisdiction, ¶¶ 172-173, 198 (“While it may be asserted that if this were a diplomatic protection case it could be argued differently, the parties have consented to have their dispute resolved under the ICSID Convention and it sets out a particular regime for the determination of jurisdiction.”), **CL-318**; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004), ¶ 141 (“The issues before this Tribunal concern not diplomatic protection under customary international law but the rights of investors, including shareholders, as determined by the Treaty.”), **CL-373**; *Victor Pey Casado and President Allende Foundation v. Republic of Chile I* (“*Pey Casado*”), ICSID Case No. ARB/98/2, Award (May 8, 2008), ¶ 415 (“*El APPI no aborda expresamente la cuestión de si los dobles nacionales hispano-chilenos quedan cobijados o no bajo su ámbito de aplicación. En opinión del Tribunal de arbitraje, no estaría justificado (basándose en unas pretendidas normas de derecho internacional consuetudinario) añadir un requisito de aplicación que no se desprenda ni su letra o ni su espíritu.*”), **CL-413**; *Mohamed Abdel Raouf Bahgat v. The Arabic Republic of Egypt*, PCA Case No. 2012-07, Decision on Jurisdiction (Nov. 30, 2017), ¶ 230 (“The Tribunal cannot discern from relevant jurisprudence any clear, applicable general principle of international law that would prohibit a dual national in his or her private capacity from bringing a claim against a State of his or her nationality pursuant to an investment treaty.”), **CL-374**.

warn that such rules are not applicable to investment treaties because “dispute settlement procedures provided for in BITs . . . offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration, avoid the political uncertainty inherent in the discretionary nature of diplomatic protection and dispense with the conditions for the exercise of diplomatic protection.”²⁹

19. Canada appears to concede so much by arguing that a “‘general rule’ has emerged in investor-State dispute settlement, whereby tribunals apply the dominant and effective nationality rule by default”³⁰ (clearly no such rule would need to “emerge” if it were already covered by the existing rules of customary international law). However, Canada’s self-serving submissions on customary international law are no substitute for the law itself. Canada fails to address the majority of recent international tribunal decisions that confirm the opposite.³¹ Its reliance on a single

²⁹ *Draft Articles on Diplomatic Protection, with Commentaries*, Yearbook of the International Law Commission, 2006, vol. II(2), Art. 17, ¶ 2 (emphasis added), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf, **CL-420**.

³⁰ See Canada 1128 Submission, ¶ 9 n.12.

³¹ See *Mohamed Abdel Raouf Bahgat v. The Arabic Republic of Egypt*, PCA Case No. 2012-07, Decision on Jurisdiction (Nov. 30, 2017), ¶¶ 230-231 (“Some academic writing indicates that where an underlying BIT does not clarify whether dual nationals might bring claims, principles of international law on effective nationality might be considered by a tribunal in order to determine its jurisdiction based on the dominant nationality of the claimant-investor. However, any developments in international law must yield to the *lex specialis* of the investment treaty.”), **CL-374**; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (Oct. 17, 2013), ¶¶ 127-28, **CL-372**; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (July 14, 2010), ¶¶ 69-70, **CL-371**; *El Paso v. Argentina*, Award, ¶ 213 (“BITs do not concern situations such as that addressed in *Barcelona Traction*: they do not pertain to diplomatic protection, nor do they reflect the rules of general international law in matters of investment protection. Interpreted in conformity with the canons of treaty law, they prescribe that rights and interests of foreign shareholders.”), **CL-155**; *Siag v. Egypt*, Decision on Jurisdiction, ¶ 198 (“The Tribunal concurs with the finding of the ICSID Tribunal in the *Champion Trading* case that the regime established under Article 25 of the ICSID Tribunal does not leave room for a test of dominant or effective nationality. The BIT contains a clear definition of who is to be considered a national.”), **CL-318**; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004), ¶ 141, **CL-373**; *Pey Casado*, Award, ¶ 415, **CL-413**; *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/2, Decision on Jurisdiction and Admissibility (Sept. 24, 2008), ¶ 101 (“It is also doubtful whether the genuine link test would apply pursuant to the BIT. The Contracting Parties to the BIT are free to agree whether any additional standards must be applied to the determination of nationality. Sweden and Romania agreed in the BIT that the Swedish nationality of an individual would be determined under Swedish law and included no additional requirements for the determination of Swedish nationality. The Tribunal concurs with the *Siag* tribunal that the clear definition and the specific regime established by the terms of the BIT should prevail and that to hold otherwise would result in an illegitimate revision of the BIT.”), **CL-418**.

NAFTA case, the decision in *Feldman*, gets it nowhere. The tribunal in that case declined to apply any customary international law rules of diplomatic protection to “the NAFTA legal framework”³² and determined that a permanent resident is a “national” for NAFTA purposes “if that State is different from the State where the investment is made.”³³

20. Yet, even if the customary rules of international law could apply, they have clearly evolved to allow dual nationals to bring claims without restriction (not the opposite, as Canada has argued). Both Non-Disputing Parties rely on two decisions—an ICJ decision from 1955, the *Mergé* case, and an Iran-US Claims Tribunal (“IUSCT”) decision from 1984³⁴—to support their interpretation of international law. However, they fail to explain that those two decisions themselves reflected an evolution in the content of customary international law from a prior rule that a State could not be liable for acts against its own nationals in any circumstances.³⁵ In the nearly seven decades that have now passed from the *Mergé* decision and the nearly four decades from the IUSCT decision, customary international law has clearly evolved further to allow dual nationals to bring claims without restriction, as the relevant investor-State cases confirm.³⁶

³² *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (Dec. 2000), ¶¶ 30-31, **CL-419**.

³³ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (Dec. 2000), ¶ 34, **CL-419**.

³⁴ United States 1128 Submission, ¶ 5 n.1; Canada 1128 Submission, ¶ 9 n.13.

³⁵ See e.g., *Iran v. United States*, Case No. A/18 Decision No. DEC 32-A18-FT (Apr. 6, 1984) (“Not only is [the rule] more than 50 years old and found in a treaty to which only 20 States are parties, but great changes have occurred since then in the concept of diplomatic protection, which concept has been expanded.”), **CL-431**.

³⁶ See *Mohamed Abdel Raouf Bahgat v. The Arabic Republic of Egypt*, PCA Case No. 2012-07, Decision on Jurisdiction (Nov. 30, 2017), ¶ 230, **CL-374**; *Serafin García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela* (“*García Armas and García Gruber v. Venezuela*”), PCA Case No 2013-3, Decision on Jurisdiction (Dec. 15, 2014), ¶¶ 54, 176-181 (annulled on other grounds, *García Armas and García Gruber v. Venezuela*, PCA Case No. 2013-03, Judgment of the Paris Court of Appeal (June 3, 2020)), **CL-64**; *Pey Casado*, Award, ¶ 415, **CL-413**.

21. Second, Canada argues that “there can be no presumption that NAFTA establishes a *lex specialis* for claims by dual nationals,”³⁷ but that is wrong and, in any event, misses the point. It is beyond dispute that the NAFTA is *lex specialis*. One of the elements of this *lex specialis* is its dispute resolution provisions. Absent an international investment treaty, investors are not able to bring claims against States for breaches of international law protections. The NAFTA allows them to do so. The NAFTA’s Article 201 governs access to arbitration for physical persons and, in defining the term “national,” requires only that they be citizens or permanent residents of one of the NAFTA Parties. This is in stark contrast to the definition of “national” under the customary international law rules of diplomatic protection, which is far more restrictive (*i.e.*, “a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law”³⁸).

22. The United States concedes that “the NAFTA and customary international law define ‘nationality’ differently.”³⁹ But repeating México’s argument, it asserts contradictorily that “the NAFTA’s choice of terminology does not mean that permanent residents of one Party are to be considered ‘nationals’ of that Party. . . .”⁴⁰ As noted, Article 201 of the NAFTA clearly defines “national” as “a natural person who is a citizen or permanent resident of a Party.”⁴¹ Hence, a permanent resident of one Party cannot but be considered a ‘national’ of that Party, irrespective of whether that person holds the nationality of another NAFTA Party. The United States’ assertion

³⁷ Canada 1128 Submission, ¶ 8.

³⁸ See *Draft Articles on Diplomatic Protection, with Commentaries*, Yearbook of the International Law Commission, 2006, vol. II(2), Art. 4, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf, CL-420.

³⁹ United States 1128 Submission, ¶ 6.

⁴⁰ United States 1128 Submission, ¶ 6.

⁴¹ NAFTA Art. 201 (emphasis added).

to the contrary would completely invert the plain text of the NAFTA, as Article 201 does not read: “a natural person who is a citizen or permanent resident of a Party *and only of that Party*.” Such a rewriting of the NAFTA would exceed the Tribunal’s power and constitute an “illegitimate revisions of the terms of the [investment treaty] and the [domestic law as to nationality].”⁴²

23. In an attempt to justify why the Tribunal ought to add a restriction to the NAFTA that does not exist in the text, Canada relies on the ICJ’s *ELSI* decision from 1989 for the proposition that “[a]n important principle of international law should [not] be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so.”⁴³ But far from assisting Canada’s argument, this decision illustrates why the absence of a prohibition on dual nationals and of a dominant and effective nationality test in the NAFTA is dispositive. Although the intention of a treaty’s drafters is irrelevant, in any event, the NAFTA *does* make sufficiently clear the intention to allow citizens and permanent residents to bring claims without restriction. Tellingly, both Non-Disputing Parties have signed numerous treaties that either exclude claims by dual nationals altogether⁴⁴ or expressly impose a “dominant and effective”

⁴² *Siag v. Egypt*, Decision on Jurisdiction, ¶ 201 (“The Tribunal finds that this case does not present a situation where there is scope for international law principles to override the operation of Egyptian domestic law as to nationality. To do so would in effect involve the illegitimate revision of the terms of the BIT and the Nationality Law by the Tribunal.”), **CL-318**.

⁴³ Canada 1128 Submission, ¶ 8.

⁴⁴ See Canada-Uruguay Bilateral Investment Treaty of 1991, Article I(e), **CL-344**; Canada - South Africa Bilateral Investment Treaty, Article I(g), **CL-345**; Canada - Romania Bilateral Investment Treaty of 1996, Article I(f), **CL-346**; Canada – Venezuela Bilateral Investment Treaty, **CL-347**; Canada - Ecuador Bilateral Investment Treaty, Article I(g), **CL-348**; Barbados - Canada Bilateral Investment Treaty, Article I(g), **CL-349**; Canada - Croatia Bilateral Investment Treaty, Article I(e), **CL-350**; Canada - Lebanon Bilateral Investment Treaty, Article I(e), **CL-351**; Armenia - Canada Bilateral Investment Treaty, Article I(g), **CL-352**; Canada - Uruguay Bilateral Investment Treaty of 1997, Article I(e), **CL-353**; Canada - Peru Bilateral Investment Treaty, Article I, **CL-354**; Canada - Romania Bilateral Investment Treaty of 2009, Article I(h), **CL-355**; Canada - Jordan Bilateral Investment Treaty, Article I(w), **CL-356**; Canada - Kuwait Bilateral Investment Treaty, Article I, **CL-357**; Canada - Tanzania Bilateral Investment Treaty, Article I, **CL-358**.

nationality test.⁴⁵ But the NAFTA contains neither restriction.⁴⁶ This tortured submission lays bare just how weak the Non-Disputing Parties’ bid to read a “dominant and effective” nationality requirement into the NAFTA really is.

24. Third, Canada argues that “Articles 1116 and 1117 are clear” in restricting claims by dual nationals simply because they refer to “[a]n investor of a Party” bringing a claim against “another Party” (or, as Canada conveniently puts it, a “different” Party).⁴⁷ That, however, makes no sense. Articles 1116 and 1117 must be read in accordance with the definitions of the terms that are found in their provisions—namely the definition of a national under Article 201 as a “natural person who is a citizen or permanent resident of a Party”—may bring claims only against “another Party.” Article 1116 does not prevent a natural person from bringing claims against “another Party” so long as he holds the nationality of “a Party” (regardless of whether he is a dual national) or is a permanent resident of such Party. If Articles 1116 and 1117 “clearly” barred claims by dual nationals, they would “clearly” say so. They do not.

25. To support this hopeless argument, Canada seeks to rely on the final awards in the *Loewen* and *GAMI* cases, which, it says, support the position that “[t]ribunals have also reasoned that the

⁴⁵ See Canada - Peru Bilateral Investment Treaty, Article I, **CL-354**; Canada - Jordan Bilateral Investment Treaty, Article I(w), **CL-356**; Benin - Canada Bilateral Investment Treaty, Article I, **CL-359**; Canada - Nigeria Bilateral Investment Treaty, Article I, **CL-360**; Canada - Serbia Bilateral Investment Treaty, Article I, **CL-361**; Canada - Senegal Bilateral Investment Treaty, Article I, **CL-362**; Canada - Mali Bilateral Investment Treaty, Article I, **CL-363**; Canada - Côte d’Ivoire Bilateral Investment Treaty, Article I, **CL-364**; Burkina Faso - Canada Bilateral Investment Treaty, Article I, **CL-365**; Canada - Guinea Bilateral Investment Treaty, Article I, **CL-366**; Canada - Hong Kong, China SAR Bilateral Investment Treaty, Article I, **CL-367**; Canada - Moldova Bilateral Investment Treaty, Article I, **CL-368**. See United States-Uruguay Bilateral Investment Treaty, Article 1 (emphasis added), **CL-327**; Free Trade Agreement between the United States of America and Peru, Article 10.28, **CL-328**; Trade Promotion Agreement between the United States and Panama, Article 10.29, **CL-329**; Free Trade Agreement between the United States and the Republic of Korea, Article 11.28, **CL-330**.

⁴⁶ Indeed, in the very same year, both Canada and México entered into the United States-México-Canada Agreement (“USMCA”), which provides that “*a natural person who is a dual citizen is deemed to be exclusively a national of the State of his or her dominant and effective citizenship*,” and the CPTPP, which contains no such restriction. See USMCA, Article 14.1 (emphasis added), **CL-319**; Reply, ¶ 597.

⁴⁷ NAFTA Arts. 1116, 1117.

NAFTA was ‘clearly intended to protect investors of one Contracting Party against practices occurring in one of the other Contracting Parties.’”⁴⁸ Yet, those awards do not address claims brought by dual nationals at all. In *Loewen*, the tribunal rejected the proposition that a Canadian corporation, which had been reorganized under an American corporate charter, could maintain a claim against the United States under the NAFTA.⁴⁹ Similarly, in *GAMI*, the tribunal found that Mexican minority shareholders (who were not dual nationals) in a Mexican corporation could not maintain a NAFTA claim against Mexico in their own right (although a U.S. corporation in which they were shareholders could).⁵⁰ These decisions are of no relevance to any question before the Tribunal.

26. Finally, Canada suggests that allowing dual nationals to bring claims in arbitration would be inconsistent with the object and purpose of the NAFTA found in Article 102,⁵¹ but that is not a serious argument. As Canada admits, those objectives, in relevant part, “are to (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; [. . .] [and] (c) increase substantially investment opportunities in the territories of the Parties.”⁵² If anything, protection of dual nationals under the NAFTA would *advance* these objectives. The *Feldman* tribunal rejected an attempt to limit who could act as a claimant under the NAFTA because, the “increase of both investment opportunities and their effective protection [reflected in Article 102] is also supported by enlarging the circle of investors

⁴⁸ Canada 1128 Submission, ¶ 5 n.5.

⁴⁹ *The Loewen Group, Inc and Raymond L. Loewen v. United States of America* (“*Loewen*”), ICSID Case No. ARB (AF)/98/3, Award (June 26, 2003), ¶¶ 220-240, **CL-166**.

⁵⁰ *GAMI Investments Inc. v. United Mexican States* (“*GAMI v. Mexico*”), UNCITRAL, Final Award (Nov. 15, 2004), ¶¶ 38, 122, **CL-71**.

⁵¹ See Canada 1128 Submission, ¶ 6 & n.7.

⁵² NAFTA Art.102.

to be protected, beyond nationals of another State Party, to permanent residents therein as well.”⁵³ The same is true with respect to dual nationals. The NAFTA’s definition of a “national,” taken with its purpose in Article 102, serves to enlarge the circle of investors to be protected and thus opposes reading in a restrictive “dominant and effective” nationality requirement.

27. No rule of international law—much less the forced and contradictory ones put forward by México and the Non-Disputing Parties—can support reading a “dominant and effective” nationality requirement into the NAFTA.

B. Reflective Loss: The Non-Disputing Parties’ Bid To Include A “No Reflective Loss” Rule In The NAFTA Is Unsubstantiated And Would Render The NAFTA’s “Investment” Definition Ineffective

28. In its submissions, México has argued that Claimants’ Article 1116 claims must fail because Claimants cannot be compensated for “reflective loss” (*i.e.*, losses that they have incurred as shareholders in companies affected by México’s prejudicial conduct).⁵⁴ As Claimants have explained,⁵⁵ however, this argument seeks to rewrite NAFTA Article 1116 in violation of the rules of international law—and would render ineffective (in breach of international law) Article 1139’s definition of an “investment” as one “owned or controlled directly or indirectly” by an investor.⁵⁶

29. The Non-Disputing Parties, however, double down on México’s arguments, which they repeat in their Article 1128 Submissions. Those arguments, however, are no more compelling when articulated by the Non-Disputing Parties as they are when put forward by México.

30. Tellingly, neither Non-Disputing Party addresses the reality that reading a “no reflective loss” requirement into NAFTA Article 1116 would be contrary to the international law rules of

⁵³ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (Dec. 2000), ¶ 35, **CL-419**.

⁵⁴ SOD, ¶ 529.

⁵⁵ Reply, ¶¶ 523-526.

⁵⁶ NAFTA Art. 1139.

treaty interpretation. Article 1116 is unambiguous: “An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under [the NAFTA] . . . and that the investor has incurred loss or damage by reason of, or arising out of, that breach.” The ordinary meaning of “loss or damage” is straightforward: any loss or damage (including loss or damage suffered by an investor indirectly due to actions by the State that affect the value of shares in a company held by the investor).

31. This is confirmed by NAFTA Article 1139. That provision defines an investment as one “owned or controlled directly or indirectly” by an investor—and even includes in the “investment” definition “an equity security of an enterprise,” including “voting and non-voting shares,” as well as “an interest in an enterprise that entitles the owner to share in income or profits of the enterprise.”⁵⁷ The Non-Disputing Parties’ “interpretation” of Article 1116, however, would render these provisions ineffective given that any loss suffered to an “indirect” investment or to shares in a company is “reflective loss” (on the Non-Disputing Parties’ case).

32. The Non-Disputing Parties offer an unconvincing response: allowing claims for “reflective loss,” they say, “must be interpreted in the context of Article 1117.”⁵⁸ That provision allows investors to bring claims on behalf of Mexican enterprises that they own or control. It does not, however, allow investors to bring claims (1) on behalf of entities that are not constituted or organized in a NAFTA State or (2) on behalf of a Mexican enterprise where the investors are only minority shareholders without control. If the Non-Disputing Parties’ interpretation were applied, indirect investors and minority investors that cannot bring claims under Article 1117 would be left

⁵⁷ NAFTA, Art.1139 (emphasis added).

⁵⁸ Canada 1128 Submission, ¶ 17; *see also* United States 1128 Submission, ¶¶ 15, 23.

unprotected by the NAFTA—even though, under Article 1139, their investments are clearly protected.

33. As a matter of international law, that simply cannot be—as the Non-Disputing Parties’ arguments to the contrary confirm.

34. First, the Non-Disputing Parties argue that Articles 1116 and 1117 were drafted to reflect “general principles of corporate law recognized by domestic legal systems and the customary international law,”⁵⁹ which they claim are articulated in the ICJ’s *Barcelona Traction* decision. According to the Non-Disputing Parties, “[n]othing in the text of Article 1116 indicates that the NAFTA Parties intended to derogate from the general principle of separate legal personality between investors and their enterprise.”⁶⁰ Yet, even if any “general principles” of customary international law could apply, they would be displaced by the *lex specialis*, the unambiguous provisions of the NAFTA (including its “investment” definition). As the ICJ explained in its decision in *Diallo* (on which the United States relies⁶¹), “in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments.”⁶²

35. This is reflected in the overwhelming case law of NAFTA tribunals. For example, the *Mondev* tribunal “noted that Chapter 11 specifically addresses issues of standing and scope of application through a series of detailed provisions, most notably the definitions of ‘enterprise’, ‘investment’, ‘investment of an investor of a Party’ and ‘investor of a Party’ in Article 1139” and

⁵⁹ Canada 1128 Submission, ¶¶ 14, 15; United States 1128 Submission, ¶¶ 17, 23.

⁶⁰ Canada 1128 Submission, ¶ 16.

⁶¹ United States 1128 Submission, ¶¶ 17-18.

⁶² *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment (Preliminary Objections) dated 24 May 2007, 2007 I.C.J. Rep. 582, ¶ 88, **RL-0032**.

that thus “there does not seem to be any room for the application of any rules of international law dealing with the piercing of the corporate veil or with derivative actions by foreign shareholders.”⁶³

36. Non-NAFTA tribunals also recognize that a minority shareholder may bring claims for losses to its shares where the treaty’s “investment” definition includes “direct or indirect” investments or shares.⁶⁴ For example, the *CMS* tribunal found that there was “no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders.”⁶⁵

37. Tellingly, no NAFTA tribunal in the treaty’s nearly 30 years has rejected jurisdiction or admissibility on “reflective loss grounds.”⁶⁶ And for good reason. The NAFTA text allows it and international law supports it.

⁶³ *Mondev International Ltd. v. United States of America* (“*Mondev*”), ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶ 79, **CL-73**; see also *Waste Management, Inc. v. United Mexican States II* (“*Waste Management II*”), ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 85 (“Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise. If the NAFTA Parties had wished to limit their obligations of conduct to enterprises or investments having the nationality of one of the other Parties they could have done so. Similarly, they could have restricted claims of loss or damage by reference to the nationality of the corporation which itself suffered direct injury. No such restrictions appear in the text.”), **CL-113**.

⁶⁴ See, e.g., *Lanco International Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal (Dec. 8, 1998), ¶¶ 12-14, **CL-304**; *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Decision on Jurisdiction (July 18, 2013), ¶ 282, **CL-301**; *Suez, Sociedad General de Aguas de Barcelona S.A. & Inter Aguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (May 16, 2006), ¶ 51, **CL-302**; *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), (Aug. 2, 2004), ¶¶ 39, 49, **CL-303**; *Azurix Corp. v. Argentine Republic* (“*Azurix v. Argentina*”), ICSID Case No. ARB/01/12, Decision on Jurisdiction (Dec. 8, 2003) ¶ 62, **CL-305**; *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum (Feb. 19, 2019), ¶¶ 178, 202, **CL-306**; *RREEF Infrastructure (G.P.) Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/13/30 (June 6, 2016), ¶ 120, **CL-307**.

⁶⁵ *CMS Gas Transmission Company v. Argentina* (“*CMS Gas v. Argentina*”), ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (Jul. 17, 2003), ¶ 48, **CL-78**.

⁶⁶ Reply, ¶¶ 529-537.

38. In any event, the Non-Disputing Parties' suggestion that the drafters of the NAFTA included Article 1117 in accordance with an unwritten "no reflective loss" rule is not only illogical as a matter of the text of the NAFTA and customary international law, it is irrelevant. The Non-Disputing Parties offer no evidence of those drafters' alleged intentions (even though they themselves would clearly possess such evidence) and, even if they did, the drafters' intentions are irrelevant under the textual approach to treaty interpretation under international law (unless the provisions of the treaty are "ambiguous or obscure," and the relevant provisions of the NAFTA are not).⁶⁷

39. Second, the Non-Disputing Parties argue that were shareholders permitted to claim under Article 1116 for reflective loss, Article 1117 would be rendered "superfluous"⁶⁸ or "redundant"⁶⁹ because it would allow investors to bring claims both as shareholders and on behalf of the enterprise.

40. Yet, that is not so. There is nothing "redundant" about allowing an investor to bring claims on its own behalf, but also on behalf of an enterprise that it owns or controls. As the *Kappes* tribunal explained in respect to virtually identical provisions of the DR-CAFTA, where the local enterprise remains a going concern, the controlling or majority shareholder (even with only a 51%

⁶⁷ It is well-settled that Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT")—neither of which mentions intention at all—does not follow a subjective approach that relies on the intention of the parties to the treaty. The International Law Commission ("ILC"), in connection with its work on the VCLT, stated that the Commission's approach to treaty interpretation was on the basis that the *text of the treaty* must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation." Reports of the Commission to the General Assembly, Yearbook of the International Law Commission 1966, Vol. II, p. 223 (1967), **CL-421**. Paraphrasing the above quote from the ILC, the NAFTA tribunal in *Methanex v. United States* also found that "the approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation." *Methanex Corp. v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits (Aug. 3, 2005), Part II-Chapter B, ¶ 22 (footnote omitted), **CL-151**.

⁶⁸ United States 1128 Submission, ¶ 23.

⁶⁹ Canada 1128 Submission, ¶ 18.

shareholding) may choose to bring a claim “on behalf of” that enterprise or in its own name. The NAFTA offers two separate routes because making a claim under Article 1117 “could provide the going-concern enterprise with a potential route to far greater damages recovery, and therefore greater restored health, precisely because the claim could be brought for the enterprise’s full injury regardless of its upstream shareholding structure.”⁷⁰

41. Numerous NAFTA tribunals have rejected the Non-Disputing Parties’ suggestion otherwise. For example, the *Mondev* tribunal rejected the assertion that there is a strict separation between Articles 1116 and 1117, based on principles of customary international law,⁷¹ and found that *Mondev* was entitled to bring a claim under Article 1116 based solely on its interest in its local enterprise.⁷² In *GAMI*—a case that Canada incorrectly relies upon—a tribunal found that, even though investors only hold 14.18% of a local enterprise, they could still bring claims for losses to the value of their shares in that enterprise because “the fact that GAMI is only a minority shareholder does not affect its right to seek the international arbitral remedy.”⁷³

42. The United States all but acknowledges the absurdity of this position when it argues that its position constitutes a “subsequent agreement or subsequent practice” under the international law rules of treaty interpretation.⁷⁴ Yet, the Non-Disputing Parties submissions cannot form a “subsequent agreement” for the purposes of interpretation of the NAFTA—much less one that would modify the ordinary meaning of the text. While the NAFTA Parties could have issued an

⁷⁰ *Daniel W. Kappes et al. v. Guatemala* (“*Kappes*”), ICSID Case No. ARB 18/43, Decision on Respondent’s Preliminary Objections (Mar. 13, 2020), ¶ 147, **CL-295**.

⁷¹ *Mondev*, Award ¶ 79, **CL-73**.

⁷² *Mondev*, Award ¶¶ 82-83, **CL-73**.

⁷³ *GAMI v. Mexico*, Final Award, ¶ 37, **CL-71**.

⁷⁴ United States 1128 Submission, ¶ 16. Canada argues that “[a]ll three NAFTA Parties have agreed on the distinction between direct claims that can be brought under Article 1116 and the indirect claims that can be brought under Article 1117.” Canada 1128 Submission, ¶ 22.

interpretation under Article 2001 on the issues discussed in their submissions, they have not done so. There must be a reason for that inaction, and it is telling and important for this Tribunal. Having failed to issue a binding interpretation under Article 2001, they must now accept the clear language of Articles 1116 and 1117 as they are.

43. Finally, the United States invokes NAFTA Article 1121 (a waiver against various actions in domestic courts) and Article 1135 (the payment of awards) to advance the incorrect claim that Article 1116 bars recovery of reflective loss.

44. According to the United States, the requirement under Article 1135(2) that compensation be paid to the enterprise when a claim is brought on behalf of the enterprise under Article 1117 “is aimed at preventing the investors from effectively stripping away a corporate asset (the claim) to the detriment of others with a legitimate interest in that asset, such as the enterprise’s creditors.”⁷⁵ Of course, there is no support for that bald assertion, which is contradicted by the compelling logic laid out in the *Kappes* decision—*i.e.*, that Article 1117 exists to allow a going concern to recover losses and continue to operate in better financial shape.

45. The United States (and Canada) also argues that “Articles 1121(1)(b) and 1121(2)(b) also reinforce the distinction between Articles 1116 and 1117, respectively, in order to reduce the likelihood of multiple actions and double recovery.”⁷⁶ Yet, this assertion defies logic. These provisions of Article 1121 merely establish “different preconditions for and consequences of a claim,” depending on whether a claimant invokes Article 1116 (to claim “on its own behalf”) or Article 1117 (to claim “on behalf of” an enterprise).⁷⁷

⁷⁵ United States 1128 Submission, ¶ 28.

⁷⁶ United States 1128 Submission, ¶ 27. Canada essentially suggests the same in a footnote. Canada 1128 Submission, ¶ 17 n.26; *see also id.* at ¶ 20 (“[T]he risks of double recovery and inconsistent decisions arise, and concerns for judicial economy grow, as the number of cases brought to address the same harm increases.”).

⁷⁷ *Kappes*, Decision on Respondent’s Preliminary Objections, ¶ 139, **CL-295**.

46. Likewise, the United States' claim that Article 1117(3) "promotes judicial economy by providing for the consolidation of claims, thereby reducing the risk of double recovery and inconsistent awards when the claims are based on the same events"⁷⁸ is beside the point. That provision merely concerns the situations where "two or more claims" are submitted both by an investor under Article 1117 on behalf of an enterprise owned or controlled by the investor (*i.e.*, controlling shareholder) and a "non-controlling investor" in the same enterprise under Article 1116 in its own right. Nothing on the face of Article 1117(3) indicates that a non-controlling investor is prohibited from claiming "loss or damage" to its interest in the enterprise under Article 1116, much less where the controlling shareholders bring no claim under Article 1117 on behalf of the enterprise in which Claimants hold a minority shareholding (or under Article 1116 on behalf of the controlling shareholders themselves). If anything, "[a]ny difficulties arising from a multiplicity of claimants can be taken care of by a number of devices"—and one such device is provided under Article 1117(3)—"*but [they] do not require that the investor be deprived of its standing.*"⁷⁹ As noted, the *GAMI* tribunal held that *GAMI* (a minority shareholder) was "entitled" to bring a "reflective loss" claim under Article 1116. There, the majority shareholders could not bring a claim under Article 1117 because they were "Mexican nationals and [did] not have standing under Chapter 11 of NAFTA."⁸⁰ Reading a "no reflective loss" requirement into the NAFTA, therefore, would not only do violence to the treaty, but would violate the canons of international law.

⁷⁸ United States 1128 Submission, ¶ 25.

⁷⁹ Christoph Schreuer, Shareholder Protection in International Investment Law, in *COMMON VALUES IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT* 612 (Pierre-Marie Dupuy et al. eds., 2006) (emphasis added), **CL-422**.

⁸⁰ *GAMI v. Mexico*, Final Award, ¶¶ 37-38, **CL-71**.

C. “Investor” Definition: Claimants Have Established That They Are Investors Under the NAFTA

47. The United States briefly comments on the defined term “investor of a Party.” It states that “Article 1116(1) does not authorize a different investor to bring a claim on behalf of the investor who suffered the loss or damage as a result of the alleged breach” and that “[t]here is no provision in Chapter Eleven which authorizes an investor to bring a claim for an alleged breach relating to a different investor.”⁸¹ Yet, that submission is entirely irrelevant in this case. México has made no assertion disputing that Claimants are not the “same” or “original” investor who have made investment in Mexico⁸² and Claimants have shown that each of the 27 Claimants in the present arbitration are investors with protected investments.⁸³ To the extent that the United States is arguing that “indirect” losses are not covered by the NAFTA, that argument is directly contrary to the definition of “investment” found in Article 1139, and should not be accepted for the reasons Claimants explained above.⁸⁴

D. Waiver: Article 1121 Does Not Prohibit A Claimant From Pursuing Local Proceedings Against a Private Party for Harms Caused By It

48. Simply because certain Claimants have brought non-NAFTA claims against private parties before a U.S. court, Respondent has attempted to argue in this arbitration that these local proceedings somehow violate the waiver requirement in Article 1121 of the NAFTA, and therefore the Tribunal lacks jurisdiction *ratione personae* over Claimants.⁸⁵ Article 1121 provides that, in order to submit a claim under Article 1116, an investor must waive the “right to initiate or

⁸¹ United States 1128 Submission, ¶¶ 36-37.

⁸² United States 1128 Submission, ¶¶ 37, 41.

⁸³ SOC, ¶¶ 15, 327-29; Reply, Section III.A.

⁸⁴ See *supra* Section II.B.

⁸⁵ SOD, ¶ 558.

continue . . . any proceedings with respect to the measure of the disputed Party that is alleged to be a breach[.]” Claimants have shown that México’s objection fails both as a matter of law and facts, because the local proceedings criticized by México simply do not fall within the scope of Article 1121: those local proceedings were pursued against strictly private parties (the Bondholders, not México) and did not involve the same “measures” (under NAFTA) as those challenged in this arbitration (the actions of the Bondholders themselves, not any actions attributable to México).⁸⁶ To be clear, Respondent is not a party in any of the local proceedings before the U.S. court.

49. In its Article 1128 Submission, the United States argues for an expansive interpretation of the words “with respect to” in Article 1121 because its proposed interpretation is “consistent with the purpose of this waiver provision: to avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of ‘conflicting outcomes and thus legal uncertainty.’”⁸⁷

50. That argument, however, is irrelevant to México’s objection, which turns not on the meaning of “with respect to,” but of “measure.” That term is defined in Article 201 of the NAFTA as a “law, regulation, procedure, requirement or practice.” The words “with respect to” cannot broaden the discrete definition of “measure” in Article 201. It also does not cover acts by non-State, private actors (*e.g.* the Bondholders).⁸⁸

⁸⁶ See Reply, Section III.D.

⁸⁷ United States 1128 Submission, ¶ 51 (citing *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award (Jan. 26, 2006), ¶ 118, **CL-70**).

⁸⁸ *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Final Award (Apr. 30, 2015), ¶ 114 (“*una medida (o acto) del estado que un inversionista alega constituye una violación del TLCAN*”) (emphasis added), **CL-381**; *Detroit International Bridge Company v. Government of Canada* (“*Detroit v. Canada*”), PCA Case No. 2012-25, Award on Jurisdiction (Apr. 2, 2015), ¶ 303 (“[T]he formulation in Article 1121 focuses on the State measure—the governmental act—which has given rise to the dispute.” (emphasis added)), **RL-0038**.

51. This is confirmed by the purpose of Article 1121—as articulated by the United States itself—that is, “to avoid the need for a respondent State to litigate concurrent and overlapping proceedings.”⁸⁹ It follows that Article 1121 will be breached *only where* the claimant initiated or continued legal actions against the host States in parallel with NAFTA arbitrations and involving the same measures at stake in the underlying NAFTA arbitration.⁹⁰ That is not the case here.

III. ATTRIBUTION: ON THE NON-DISPUTING PARTIES’ OWN CASE, MÉXICO IS RESPONSIBLE FOR ALL RELEVANT ACTS OF PEMEX

52. In its submissions, México has insisted that Pemex is a monopoly, not a state enterprise, and thus Article 1502(3)(a) of the NAFTA applies to exclude liability.⁹¹ Under that provision, México is obliged to ensure that a state monopoly “acts in a manner that is not inconsistent with the Party’s obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it.”⁹² Claimants have explained, however, that it is Article 4 of the ILC Draft Articles on State Responsibility that applies. This is because Pemex is a State organ under international law and Articles 1502 and 1503 do not purport to displace any rules of attribution under customary international law, but only to impose a positive obligation (*i.e.*, to ensure that State enterprises and monopolies comply with the NAFTA).⁹³ Moreover, to the extent that the NAFTA’s Chapter 15 applies, Article 1503, which governs México’s responsibility in respect to state enterprises (not monopolies), would govern.⁹⁴

⁸⁹ United States 1128 Submission, ¶ 51 (emphasis added).

⁹⁰ *Detroit v. Canada*, Award on Jurisdiction, ¶¶ 331, 336, **RL-0038**; *Waste Management Inc. v. United Mexican States I*, ICSID Case No. ARB(AF)/98/2, Arbitral Award (June 2, 2000), ¶ 29, **RL-0043**.

⁹¹ SOD, ¶ 655.

⁹² NAFTA Art. 1502(3)(a).

⁹³ Reply, ¶¶ 770-772, 800-807, 813-819; SOC, ¶¶ 392-396.

⁹⁴ Reply, ¶¶ 776, 784-797; SOC, ¶¶ 372-390.

That article is fundamentally identical to Article 1502 in all relevant parts. It provides in relevant part:

Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.⁹⁵

53. As Claimants have explained, Pemex *was* acting through “regulatory, administrative or other governmental authority” delegated to it under Mexican law given *inter alia* that it was expressly set up to exploit a natural resource to provide wealth to the Mexican State.⁹⁶

54. The Non-Disputing Parties appear to acknowledge that México has it wrong, as they only address Article 1503 (state enterprises), and not Article 1502 (monopolies). More importantly, however, they confirm that Article 1503 cannot act to prevent México’s liability in this case.

55. The United States acknowledges (correctly) that NAFTA Articles 1116 and 1117 allow investors to bring claims for breach of Articles 1502(3) and 1503(2)(a), just as it allows investors to bring claims under Chapter 11. It argues that, if a State enterprise breached the NAFTA but was not acting under “delegated authority,” “a Chapter Eleven tribunal lacks jurisdiction to hear any claim of breach of Article 1503(2).”⁹⁷ Whether that proposition is true or not, it is not at issue in this arbitration, as Claimants argue and have proven that Pemex is State organ and also that it was acting under authority delegated to it by México when it took the measures that harmed Claimants’ investments. In any event, the United States hence confirms that Articles 1502(3) and

⁹⁵ NAFTA Art. 1503(2) (emphasis added).

⁹⁶ See Reply, ¶¶ 785-788; SOC, ¶¶ 379-386.

⁹⁷ United States 1128 Submission, ¶ 11.

1503(2)(a) do not act to limit liability for the acts of State organs under international law, but simply impose a positive obligation on the NAFTA Parties to “ensure” compliance by State enterprises and monopolies acting under “delegated authority.” Thus, the customary law rules of state responsibility applicable to a State organ (like Pemex) still apply. This is what Claimants claim, *i.e.*, that México, through its State organ, breached Articles 1105(1) and 1110(1) of the NAFTA. The United States’ Article 1128 Submission only confirms that those provisions cannot displace the international law rules of state responsibility.

56. Canada, however, argues the *opposite*. It does not claim that Articles 1502 and 1503 reflect independent grounds of liability that do not displace the international law rules of State responsibility with respect to State organs, but that “NAFTA Chapter Fifteen provides for a *lex specialis* regime in relation to the attribution of acts of monopolies and state enterprises” and thus “[t]he obligations in Chapter Eleven apply to a state enterprise only where it acts in the exercise of delegated ‘governmental authority.’”⁹⁸ In other words, like México, it argues that Article 1502(3) is not an independent ground for liability, but a rule of attribution. That, as the Claimants explained, is irrelevant where, as here, the purported State enterprise, Pemex, is a State organ (as México itself has argued before US courts⁹⁹) and thus the international law rules of state responsibility must apply. It also cannot be reconciled with Canada’s position in respect to “dual nationality” that “[a]n important principle of international law should [not] be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so.”¹⁰⁰ The Non-Disputing Parties cannot have it both ways.

⁹⁸ Canada 1128 Submission, ¶ 47.

⁹⁹ Reply, ¶¶ 817-819; SOC, ¶¶ 18-21.

¹⁰⁰ Canada 1128 Submission, ¶ 8.

57. Yet, even if Pemex were not a State organ, Canada’s Article 1128 submission would get México nowhere because Pemex, as Claimants have proven, clearly acted under delegated authority when it entered into a business relationship with Claimants and then exacted onerous terms and finally sought to terminate its business relationship with Oro Negro in retaliation after they refused to pay bribes. True to form, Canada seeks to narrow the scope of liability under Article 1502(3), but its submissions cannot assist México.

58. First, Canada maintains, relying on *Mesa Power v. Canada* and *Windstream Energy v. Canada*, that “[a] NAFTA Party is not responsible for the acts or omissions of a state enterprise merely because the State enterprise has the authority to enter into contracts or may receive directions from the State government.”¹⁰¹ But Claimants have already explained that the *Mesa Power* tribunal found that, where (in a situation analogous to Pemex here) a state enterprise was granted the authority to enter into contracts for the procurement and supply of electricity, it was acting under authority delegated by a NAFTA Party under Article 1503(2) (e.g., “to assist the Government of Ontario in achieving goals in the development and use of alternative or renewable energy technology and resources . . . and for the ultimate benefit of the people of Ontario”¹⁰²). As for *Windstream*, the tribunal’s decision in that case only confirms that it can be of no relevance here as it explained that “an assessment of the relevant directions [from the State government] cannot be made *in abstracto*, but only *in concreto*.”¹⁰³ Thus, on the *Windstream* tribunal’s case, this Tribunal must conduct its own fact-specific inquiry in this case.

¹⁰¹ See Canada 1128 Submission, ¶ 47; SOD, ¶ 665.

¹⁰² *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award (Mar. 24, 2016), ¶¶ 368, 372-75, 445, 448, **CL-86**.

¹⁰³ *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award (Sept. 27, 2016), ¶¶ 233-234, **CL-85**.

59. The other examples that Canada offers in a bid to narrow the scope of governmental authority—the *UPS* and *Jan de Nul* cases—do México’s case no favors. In *UPS*, Canada observes that “the tribunal contrasted the exercise of ‘governmental authority’ with the use by a state enterprise of ‘those rights and powers which it shares with other businesses competing in the relevant market and undertaking commercial activities,’”¹⁰⁴ but here there can be little doubt that Pemex was acting on the exercise of “governmental authority” when it breached the treaty by repudiating its contracts with Oro Negro in retaliation for the refusal to pay a bribe, which it did relying upon special administrative rules that apply exclusively to Pemex and confer it special powers that no private entity in México’s oil industry has.¹⁰⁵ The *Jan de Nul* case is equally inapposite given that it applies the wrong legal standard under ILC Article 5 by looking at the nature of the particular conduct at issue (to assess whether it was governmental in nature), not whether such conduct was pursuant to a delegated authority that is governmental (which, as other tribunals have explained, is the correct standard as a matter of international law¹⁰⁶). Moreover, and even if the Tribunal were to look at the “nature of conduct,” *Jan de Nul* would still be of no assistance. In that case, the tribunal found that the Suez Canal Authority’s treatment of the claimants during the tendering process and the performance of the contract was not the exercise of delegated governmental authority because it “acted like any contractor trying to achieve the best price for the services it was seeking.”¹⁰⁷ It was not (as Pemex was) acting to abuse State authority in a bid to obtain kickbacks, colluding with the Bondholders to deprive Claimants of their

¹⁰⁴ Canada 1128 Submission, ¶ 48.

¹⁰⁵ Reply, ¶ 789; SOC, ¶ 513.

¹⁰⁶ *Flemingo DutyFree Shop Private Ltd. v. Poland*, UNCITRAL, Award (Aug. 12, 2016), ¶¶ 379, 436-437, 445, **CL-205**; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (Nov. 13, 2000), ¶¶ 77-78, 83, **CL-247**.

¹⁰⁷ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (Nov. 6, 2008), ¶ 169, **RL-0065**.

investments and to benefit a competitor of Oro Negro (Seamex) that was partially owned and controlled by one of México's most influential businessmen (David Martínez Guzmán), and unilaterally imposing draconian amendments to its contracts with Oro Negro under direction and instruction by México to do so.

60. Therefore, nothing in the Non-Disputing Parties' submissions changes the inescapable conclusion that the acts of Pemex must be attributed to México pursuant to ILC Article 4, or, in the alternative, Article 1502(3) of the NAFTA.

IV. MERITS: THE NON-DISPUTING PARTIES' ATTEMPT TO NARROW THE SCOPE OF THE NAFTA'S PROTECTIONS CANNOT OVERCOME THE LANGUAGE OF NAFTA OR THE CURRENT STATE OF THE MINIMUM STANDARD OF TREATMENT UNDER INTERNATIONAL LAW

A. Expropriation: The Non-Disputing Parties' Attempts To Artificially Narrow The Scope Of Compensation For Expropriation Under The NAFTA Is Contrary To The Canons Of International Law

61. Claimants have shown that México's actions have led to the creeping expropriation of their investments in México (Oro Negro, its jack-up rigs, its contracts, and its ability to continue to do business in México). México denies this and seeks to narrow the applicable legal standard for expropriation.

62. The Non-Disputing Parties unsurprisingly echo México's submissions and seek to narrow the scope of potential liability under Article 1110 of the NAFTA. They attempt to do so with two unconvincing arguments.

63. First, the Non-Disputing Parties suggests that Article 1110(1) does not protect legal rights that have not "vested under the applicable domestic law" against expropriation.¹⁰⁸ It justifies this assertion with the claims that "NAFTA Article 1110(1) reflects the customary international law

¹⁰⁸ See Canada 1128 Submission, ¶ 42; United States 1128 Submission, ¶ 55.

standard with respect to expropriation”¹⁰⁹ and that “[o]nly legal rights that have vested under the applicable domestic law are capable of being expropriated.”¹¹⁰ Yet, there is no basis to read Article 1110 to include such a restriction. Rather, Article 1110(1) provides that “[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party.” The NAFTA’s definition of “investment” clearly goes beyond rights that “vested under applicable domestic litigation, including “other property, tangible or intangible” and “interests arising from the commitment of capital or other resources.”¹¹¹

64. While both Non-Disputing Parties claim that Article 1110(1) “reflects the customary international law standard with respect to expropriation,”¹¹² that is stated nowhere in the provision. Tellingly, the Non-Disputing Parties did not seek to offer any interpretation to that effect through the FTC in Article 2001—as they did for Article 1105. In this context, Article 1110(1) must be read as it is in accordance with the other provisions of the NAFTA.

65. Second, the United States argues that “[d]ecisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants . . . do not give rise to a claim for expropriation under Article 1110.”¹¹³ This point, although Claimants maintain that it is an incorrect interpretation of Article 1110, is ultimately irrelevant as Claimants do not allege that México expropriated their investments through a judicial process alone (instead, they argue that judicial acts constituted a part of the creeping expropriation of their assets). However, it bears noting that nothing in Article 1110 excludes judicial expropriation. To the contrary, Article 1110’s

¹⁰⁹ See Canada 1128 Submission, ¶ 40; United States 1128 Submission, ¶ 55.

¹¹⁰ See Canada 1128 Submission, ¶ 42; United States 1128 Submission, ¶ 55.

¹¹¹ NAFTA Art. 1139.

¹¹² See Canada 1128 Submission, ¶ 40; United States 1128 Submission, ¶ 55.

¹¹³ United States 1128 Submission, ¶ 64.

reference to a Party necessarily includes its judicial organs as a matter of the customary international law rules of State responsibility.

66. Moreover, the two sources upon which the United States relies only confirm that a State can be liable for expropriating an investor's investment through judicial acts. Professor Paparinskis's article confirms that "taking of property through the judicial process could be said to constitute expropriation."¹¹⁴ Similarly, the *Loewen* award found only that an expropriation claim based on judicial acts "adds nothing to the claim based on Article 1105," not that liability for judicial expropriation could not otherwise exist.

67. Canada does not deny that judicial expropriation exists, but instead argues that "[a] domestic court's bona fide adjudication as to whether a property right exists under domestic law cannot be recast as an expropriation of that property."¹¹⁵ Yet, that assertion (even if it were true) is irrelevant in this case, where Mexican courts have never found that any investment rights did not exist as a matter of Mexican law.

68. Finally, the United States even goes so far as to suggest that "it is inappropriate [for a tribunal] to search for a State's alleged ulterior motives when a State has articulated plausible reasons for enacting the measures in question."¹¹⁶ Yet, numerous tribunals have looked beyond an act's purported justification to find that it had lacked a public purpose or had discriminatory intent.¹¹⁷ And of course this Tribunal has a duty to look into México's intent when it has been

¹¹⁴ Martins Paparinskis, *THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT* 208 (2013), **CL-423**.

¹¹⁵ Canada 1128 Submission, ¶ 64.

¹¹⁶ United States 1128 Submission, ¶ 63.

¹¹⁷ *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award (Oct. 9, 2018), ¶¶ 413-415, 417, 419, **CL-424**; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (Oct. 2, 2006), ¶¶ 423-425, 429-433, 441-443, **CL-120**; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States ("Tecmed v. Mexico")*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003), ¶¶ 122, 128, 132-133, 139, 144, 146-147, **CL-101**; *Quiborax S.A., Non-*

presented with evidence and arguments that México has acted illegally and for improper and illegal purposes. To fail to do so, as the United States apparently argues, would be a dereliction of this Tribunal's duties.

B. The Minimum Standard of Treatment: The Non-Disputing Parties Rely On An Incorrect Version (Their Own) of the Minimum Standard of Treatment

69. Like México, the Non-Disputing Parties seek to limit the scope of potential liability under Article 1501(1) of the NAFTA. They purport to put Claimants to proof of the minimum standard of treatment under customary international law (the “Minimum Standard Treatment”) and charge them with the burden of showing “a general and consistent practice of States that they follow from a sense of legal obligation”—nearly impossible where, as here, the protections afforded under the NAFTA do not require States to *do* anything, but simply reflect standards of liability in investor-state arbitration—and “widespread and consistent” acceptance in *opinio juris* in order to establish the content of any customary international law rule.

70. However, the Minimum Standard of Treatment that the Non-Disputing Parties ask this Tribunal to apply is not consistent with the rules of international law and would be devoid of any real force. While they appear to agree that the Minimum Standard of Treatment does include a prohibition on corruption, the Non-Disputing Parties seek to narrow the scope of liability for a denial of justice to cases where the “domestic system of law” – not the judicial decision in question – does not conform to a “reasonable standard of civilized justice” (a low standard, to say the least).¹¹⁸ In addition, they seek to exclude protections for legitimate expectations, transparency, good faith, non-discrimination, and legal protection and security. Ultimately, the Fair and

Metallic Minerals S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Award (Sept. 16, 2015), ¶¶ 245-248; 253-254, **CL-245**; *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility (Jan. 15, 2008), ¶ 142, **CL-425**.

¹¹⁸ See United States 1128 Submission, ¶ 77.

Equitable Treatment (“FET”) and Full Protection and Security (“FPS”) obligations—in the view of México and the Non-Disputing Parties—would compel them only to ensure against a final judicial decision was “egregious” and the legal system that rendered it did not confirm to a “reasonable standard of civilized justice” or physical destruction of an investor’s property by its own State actors.

71. That is not what international law requires. As Claimants have explained, and as numerous NAFTA and other decisions have confirmed, the Minimum Standard of Treatment tracks the FET standard found in other treaties, and includes the protections that Claimants have identified.¹¹⁹

¹¹⁹ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (Aug. 22, 2016) ¶ 520 (The customary international minimum standard “has developed and today is indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter. The whole discussion of whether [...] the BIT incorporates or fails to incorporate the [customary international minimum] Standard when defining FET has become dogmatic: there is no substantive difference in the level of protection afforded by both standards”), **CL-139**; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (“*Rumeli*”), ICSID Case No. ARB/05/16, Award (July 29, 2008), ¶ 611, (“[The tribunal] shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law.”), **CL-124**; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (“*Biwater v. Tanzania*”), ICSID Case No. ARB/05/22, Award (July 24, 2008), ¶ 592 (“[T]he Arbitral Tribunal also accepts, as found by a number of previous arbitral tribunals and commentators, that the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law.”), **CL-140**; *Azurix v. Argentina*, Award, ¶ 361 (“[T]he minimum requirement to satisfy this standard [fair and equitable treatment] has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law.”), **CL-141**; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (Aug. 18, 2008), ¶¶ 335-337, **CL-142**; *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (Mar. 17, 2006), ¶ 291 (“[I]t appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied.”), **CL-143**; *Waste Management II*, Award, ¶ 98, **CL-113**; *Merrill & Ring Forestry L.P. v. The Government of Canada* (“*Merrill & Ring v. Canada*”), UNCITRAL, Award (Mar. 31, 2010), ¶ 211, **CL-138**; *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 283 (“The central inquiry therefore is: what does customary international law currently require in terms of the minimum standard of treatment to be accorded to foreigners? The *Waste Management II* tribunal concluded that a general interpretation was emerging from NAFTA awards.”), **CL-150**; *Methanex Corp. v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits (Aug. 3, 2005), Part IV, Chapter C, ¶ 12, Chapter D, ¶ 8 (referring to the fair and equitable treatment standard articulated in *Waste Management II* with approval), **CL-151**; *GAMI v. Mexico*, Final Award, ¶ 95 (“The ICSID tribunal in *Waste Management II* made what it called a ‘survey’ of standards of review applied by international tribunals dealing with complaints under Article 1105. It observed the emergence of a ‘general standard for Article 1105.’”), **CL-71**; *Mobil Investments Canada Inc. and Murphy Oil Corp. v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, ¶ 141 (“The [*Waste Management*] tribunal

1. Fair And Equitable Treatment: The Non-Disputing Parties’ Bid To Exclude Key Aspects Of The NAFTA’s Fair And Equitable Treatment Protection Does Not Reflect The Current Content Of The Minimum Standard Of Treatment

72. The Claimants have shown that México’s actions have breached its obligations under Article 1105(1) with respect to its FET obligation. México does not seriously deny the facts underlying the Claimants’ FET claim, but instead seeks to narrow the legal standard artificially in a bid to escape liability.

73. The Non-Disputing Parties echo México’s submissions, but say precious little about the FET obligations that they seek to exclude wholesale from the NAFTA’s scope of protection. Tellingly, they address nowhere the decisions of NAFTA tribunals, including the *Waste Management* tribunal, that have confirmed that the Minimum Standard of Treatment includes the broad protections that México has no doubt breached in this case—*i.e.*, “conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety” and where “the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”¹²⁰

74. The only defense that the Non-Disputing Parties appear to advance is that “decisions of international courts and arbitral tribunals interpreting ‘fair and equitable treatment’ as a concept of

identified the customary international law standard.”), **CL-146**; *see also Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007), ¶ 291, **CL-105**; *CMS Gas v. Argentina*, Award, ¶ 284, **CL-221**; *Occidental v. Ecuador*, Final Award, ¶¶ 188-90, **CL-144**.

¹²⁰ *Waste Management II*, Award, ¶ 98 (emphasis added), **CL-113**. As explained in the Statement of Claim, that recitation has been endorsed by NAFTA tribunals, as well as tribunals analyzing FET provisions that tie the protection to the customary international law minimum standard of treatment and tribunals that do not, supporting the conclusion that the FET standard reflects the evolution of the customary international law Minimum Standard of Treatment. *See* SOC, ¶ 458 & nn.769-771.

customary international law are not themselves instances of ‘State practice’ for purposes of evidencing customary international law.”¹²¹ Yet, that is clearly wrong as a matter of international law, as Claimants have shown. The decisions of international tribunals can and do reflect the scope of customary international law obligations—and the Non-Disputing Parties themselves rely on (outdated and irrelevant) case law on numerous occasions to do so.¹²² In this case, the decisions of international tribunals show that the Minimum Standard of Treatment has evolved to reflect the protections that other tribunals have recognized under autonomous FET standards. The evidence for each of these protections speaks with one voice.

(i) Judicial Measures

75. The Non-Disputing Parties’ suggestion that an investor’s claim challenging judicial measures under Article 1105¹²³ “historically” is limited to a claim for denial of justice under the customary international law Minimum Standard of Treatment¹²⁴ and that such a denial of justice must be “egregious” or comparably extreme or that the domestic system itself must not comply with “a reasonable standard of civilized justice” is clearly not the case today.

76. The current reality is that judicial violations of due process, lack of transparency, unfairness, arbitrariness, or corruption may also violate the FET obligation under Article 1105(1) without necessarily constituting a “historic” denial of justice under international law. As the NAFTA tribunal in *Waste Management* noted, the FET standard is infringed by conduct that “involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case

¹²¹ United States 1128 Submission, ¶ 73; see Canada 1128 Submission, ¶ 26.

¹²² See United States 1128 Submission, ¶ 5 n.1 (citing *Mergé Case* and *Iran v. United States*), ¶ 23 n.27 (citing *Nottebohm Case*); Canada 1128 Submission, ¶ 9 n.13 (citing *Nottebohm Case*, *Mergé Case*, and Iran-United States Claims Tribunal).

¹²³ The United States refers to “Article 10.5.1.” There is no such article in the NAFTA. Claimants presume that the United States intended to refer to NAFTA Article 1105.

¹²⁴ See United States 1128 Submission, ¶¶ 77-80; Canada 1128 Submission, ¶¶ 33-36.

with a manifest failure of natural justice in judicial proceedings.”¹²⁵ Similarly, the *Merrill* tribunal also “identified unfair and inequitable treatment with conduct that is arbitrary, grossly unfair, unjust or idiosyncratic which, in so far as it also encompasses questions of due process, leads to an outcome which ‘offends judicial propriety.’”¹²⁶ Likewise, the NAFTA tribunal in *Loewen* observed that “manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough.”¹²⁷ And the recent NAFTA tribunal in *Eli Lilly* confirmed that “a claimed breach of the customary international law minimum standard of treatment requirement of NAFTA Article 1105(1) may be properly a basis for a claim under NAFTA Article 1105 notwithstanding that it is not cast in denial of justice terms.”¹²⁸

77. Numerous non-NAFTA tribunals have also found a breach of FET by a judicial organ in contexts other than denial of justice, for example, where a government influences administrative or court procedures, where a judicial body misapplies the law in a malicious manner, where criminal or civil judicial authorities are used for an improper purpose, or where the state has acted intentionally, through its judicial bodies, to harm the investor’s investment intentionally.¹²⁹ In *Deutsche Bank*, for example, the tribunal found that a Supreme Court decision without a proper examination and without properly informing the claimant’s investment was motivated by political reasons and constituted a breach of FET in the form of a due process violation.¹³⁰

¹²⁵ *Waste Management II*, Final Award, ¶ 98, CL-113.

¹²⁶ *Merrill & Ring v. Canada*, Award, ¶ 199, CL-138.

¹²⁷ *Loewen*, Award, ¶ 132, CL-166.

¹²⁸ *Eli Lilly and Company v. Canada*, ICSID Case No. UNCT/14/2, Final Award (Mar. 16, 2017), ¶ 223, CL-123.

¹²⁹ See *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. 064/2008, Partial Award on Jurisdiction and Admissibility (Sept. 2, 2009), ¶ 221, CL-217.

¹³⁰ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (Oct. 31, 2012), ¶¶ 478-80, CL-392.

78. While the Non-Disputing Parties purport to rely on NAFTA decisions for their unsupported position (even though they allege contradictorily that such decisions cannot reflect customary international law), that case law cuts against their position. Nowhere in the *Azinian* award—cited by Canada—does that NAFTA tribunal state that denial of justice is the only basis to challenge a national court’s decision under international law (as Canada suggests). Rather, the *Azinian* tribunal recognized that “[t]he responsibility of the State for acts of judicial authorities may result from . . . a decision of a municipal court [that is] *clearly incompatible with a rule of international law*,” even when such decision does not amount to “denial of justice.”¹³¹ Likewise, the decisions in NAFTA cases *Grand River* and *Mondev*—also cited by Canada—do not assist México’s case or Canada’s position. The tribunal in *Grand River* did not purport to opine on whether judicial measures could give rise to liability under the Minimum Standard of Treatment—outside of a denial of justice context—but simply endorsed the conception of “denial of justice in international law as involving the failure of a national judicial system, taken as a whole, to render due process to aliens.”¹³² The tribunal in *Mondev* meanwhile held that assessment of an alleged breach of the denial of justice standard obliges a tribunal to assess whether a decision has been “clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment,”¹³³ not “egregious” treatment, as the Non-Disputing Parties have argued.

79. Canada’s reliance on non-NAFTA decisions in support of the standard it advances gets it no further.¹³⁴ The tribunals in *GEA v. Ukraine* and *Liman v. Kazakhstan* merely endorsed the

¹³¹ *Robert Azinian et al. v. The United Mexican States*, ICSID Case No ARB(AF)/97/2, Award (Nov. 1, 1999), ¶ 98 (emphasis in original), **CL-178**.

¹³² *Grand River Enterprises Six Nations, Ltd., et.al. v. United States of America*, NAFTA/UNCITRAL, Award, 12 January 2011, ¶ 223 (emphasis in original), **RL-0184**.

¹³³ *Mondev*, Award, ¶ 127, **CL-73**.

¹³⁴ *See* Canada 1128 Submission, ¶ n.55.

Mondev tribunal’s articulation of denial of justice, but did not rule out claims for anything other than a denial of justice.¹³⁵ The *Liman* tribunal further endorsed the *Loewen* tribunal’s statement that “a lack of due process leading to an outcome which offends a sense of judicial propriety is enough.”¹³⁶ While the tribunal in *Infinito Gold v. Costa Rica* did opine that “claims of arbitrariness or unfairness in the context of judicial decisions must be viewed through the lens of denial of justice” under customary international law, it adopted the standard articulated in *Eli Lilly* and found that a State “may incur international responsibility as a result of the decisions of its courts even in the absence of a denial of justice.”¹³⁷

80. Finally, the Non-Disputing Parties argue that challenges to judicial decisions based on denial of justice must refer only to “final” decisions,¹³⁸ and that claimants must exhaust all remedies in order to bring a claim in respect to judicial measures.¹³⁹ Yet, that too is incorrect and inapposite. The NAFTA does not call for claimants to use or exhaust local remedies prior to bringing an arbitral claim, as several NAFTA tribunals, including one cited by Canada, have recognized.¹⁴⁰ It must be read in accordance with the ordinary meaning of its text.

¹³⁵ *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award (Mar. 31, 2011), ¶ 312, **CL-432**; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (Excerpts) (June 22, 2010), ¶ 275, **CL-201**.

¹³⁶ *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (Excerpts), (June 22, 2010), ¶ 278, **CL-201**.

¹³⁷ *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award (June 3, 2021), ¶ 367, **CL-426**.

¹³⁸ See United States 1128 Submission, ¶ 79; Canada 1128 Submission, ¶ 36.

¹³⁹ See Canada 1128 Submission, ¶ 36.

¹⁴⁰ See *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (June 14, 2013), ¶ 257 & n.113 (noting that the applicability of judicial finality in investor-State arbitration, which was assumed by the parties in that proceeding, “is an assumption that has been challenged by some commentators”), **CL-427**; *GAMI v. Mexico*, Final Award, ¶ 101 (“[C]laims of breaches of NAFTA could be brought to arbitration under Chapter 11 without the need to exhaust local remedies.”), **CL-71**; *Waste Management II*, Award, ¶ 133 (“Chapter 11 of NAFTA does not require that a party should exhaust local remedies before bringing an international claim”), **CL-113**; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), ¶ 97 n.4 (“The question of turning to NAFTA before exhausting local remedies was examined by the parties. However, Mexico does not insist that local remedies must be exhausted. Mexico’s position is

(ii) Legitimate Expectations

81. The Non-Disputing Parties seek to exclude “legitimate expectations” from the Minimum Standard of Treatment because (in Canada’s words) “[t]he mere fact that a State takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of the customary international law standard of treatment.”¹⁴¹ Yet, this straw dog, self-serving characterization distorts how international tribunals have interpreted the concept of “legitimate expectations.” Numerous NAFTA tribunals have found that “the concept of ‘legitimate expectations’ relates, within the context of the NAFTA framework, to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages”¹⁴² and, even more broadly that “any investor will have an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy objectives.”¹⁴³ The NAFTA Preamble itself states that a purpose of the Treaty was to establish “clear . . . rules” and “ensure a predictable commercial framework for business planning and investment.”¹⁴⁴

82. The Non-Disputing Parties have little to say in response to the compelling force of the case law and the text of the NAFTA.

correct . . .”), **CL-95**; *William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (“*Bilcon*”), PCA Case No. 2009-04, Award on Damages, 10 January 2019, ¶ 213, **RL-0029**.

¹⁴¹ Canada 1128 Submission, ¶ 30.

¹⁴² *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award (Jan. 26, 2006), ¶ 147, **CL-70**; *Waste Management II*, Award, ¶ 98, **CL-113**; *Merrill & Ring v. Canada*, Award, ¶ 233, **CL-138**; *Bilcon*, Award on Jurisdiction and Liability, ¶ 572, **CL-396**.

¹⁴³ *Merrill & Ring v. Canada*, Award, ¶ 233, **CL-138**.

¹⁴⁴ NAFTA Preamble, **CL-171**.

83. The United States argues that it is “aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors’ expectations,”¹⁴⁵ but that misses the point. Again, it is for international tribunals to interpret the scope of an international law obligation, not for the United States to do so.

84. The case law upon which the United States relies gets it no further. The *Azinian* and *Waste Management II* NAFTA tribunals found only that the FET obligation does not protect an investor’s legitimate expectations to contractual arrangements with the host State.¹⁴⁶ Governmental interference in an investor’s contract with a host State entity does, however, violate legitimate expectations, as the tribunals in *MTD*,¹⁴⁷ *CME*,¹⁴⁸ *Rumeli*,¹⁴⁹ and *Alpha Projektholding*¹⁵⁰ all held. Moreover, the NAFTA’s FET standard undeniably protects an investor’s legitimate expectations that a host State will respect the contractual obligations that it has entered into with the investor *in a sovereign capacity*. As the *Mondev* tribunal explained, “a governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1105 and with contemporary standards of national and international law concerning governmental liability for contractual performance.”¹⁵¹

¹⁴⁵ See United States 1128 Submission, ¶ 81.

¹⁴⁶ See United States 1128 Submission, ¶ 78 n.133.

¹⁴⁷ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (Mar. 21, 2007), ¶ 69, **RL-0094**.

¹⁴⁸ *CME Czech Republic B.V. v. The Czech Republic* (“*CME v. Czech Republic*”), UNCITRAL, Partial Award (Sept. 13, 2001), ¶ 591, **CL-118**.

¹⁴⁹ *Rumeli*, Award, ¶ 615, **CL-124**.

¹⁵⁰ *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award (Nov. 8, 2010), ¶422, **CL-173**.

¹⁵¹ *Mondev*, Award, ¶ 134, **CL-73**; see also *Waste Management II*, Award, ¶ 115 (“an outright and unjustified repudiation of the transaction” may constitute a breach of the FET obligation where there is no “remedy [] open to the [investor] to address the problem.”), **CL-113**; *Impregilo S.p.A. v. The Argentine Republic*, ICSID Case No ARB/07/17, Award (June 21, 2011), ¶ 299, **CL-253**; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (Jan. 29, 2004), ¶ 162 (“[A]n unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under

85. Canada acknowledges the reality that NAFTA case law accepts an investor’s legitimate expectations as a component of Article 1105, but hedges by asserting that this component is “non-determinative.”¹⁵² But none of the NAFTA cases that Canada cites says that. To the contrary: each case notes that a State’s breach of an investor’s legitimate expectations, such as Claimants allege in this case, can give rise to a claim under Article 1105.

(iii) Non-Discrimination

86. The United States argues that “Article 1105(1) does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination,”¹⁵³ but numerous NAFTA tribunals have determined that the Minimum Standard of Treatment of FET is violated by conduct that “is discriminatory.”¹⁵⁴

87. Moreover, the United States’ suggestion that “investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Eleven that specifically address that subject (Articles 1102 and 1103), and not Article 1105(1)”¹⁵⁵ is simply wrong. Each

[the FET obligation].”), **CL-397**; *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (Feb. 12, 2010), ¶ 146 (“[A] State’s non-payment of a contract is, in the view of the Tribunal, capable of giving rise to a breach of fair and equitable treatment requirement, such as, perhaps, where the non-payment amounts to a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of its value.”), **CL-176**.

¹⁵² Canada 1128 Submission, ¶ 19 n.31.

¹⁵³ United States 1128 Submission, ¶ 82.

¹⁵⁴ *Waste Management II*, Award, ¶ 98, **CL-113**. See also *Merrill & Ring v. Canada*, Award, ¶ 208, **CL-138** (“[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention on the part of the state.”); *Bilcon*, Award on Jurisdiction and Liability, ¶ 572, **CL-396** (“breaches of the international minimum standard might arise in some special circumstances—such as changes in a legal or policy framework that have retroactive effect, are not preceded by reasonable notice, are aimed or applied in a discriminatory basis.”); *GAMI v. Mexico*, Final Award, ¶ 94 (“[e]ach NAFTA Party must to the contrary accept liability if its officials fail to implement or implement regulations in a discriminatory or arbitrary fashion.”), **CL-71**; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde (Dec. 1, 2005), ¶ 102 (“Equality between individuals and absence of favouritism—i.e. non-discrimination—plays a role in the assessment of legitimate expectation. That is even more relevant in investment treaties where the prohibition on discrimination in favour of domestic competitors is formally enshrined, as in Art. 1102 of the NAFTA”), **CL-220**.

¹⁵⁵ See United States 1128 Submission, ¶ 82.

provision serves its own purpose. As the *Glamis Gold* tribunal found, “under the NAFTA, there are two types of discrimination: nationality-based discrimination [e.g. in Articles 1102 and 1103] and discrimination that is founded on the targeting of a particular investor or investment [e.g. in Article 1105(1)].”¹⁵⁶ Numerous other tribunals have recognized that discrimination or political favoritism against an investor is a violation of the FET standard.¹⁵⁷ Accordingly, non-discrimination has crystallized into a component of the FET obligation of the Minimum Standard of Treatment under customary international law.

(iv) Transparency

88. The United States’ assertion (again) that it is “aware of no general and consistent State practice and *opinio juris* establishing an obligation of host-State transparency under the minimum standard of treatment”¹⁵⁸ is (again) off-mark. There can be little doubt that “transparency” has crystallized into a component of FET under customary international law. The United States fails to engage with any of Claimants’ many citations to scholarship¹⁵⁹ and arbitral tribunals’ statements that transparency is an element of the FET standard under international law.¹⁶⁰

¹⁵⁶ *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (June 8, 2009), ¶ 542 n.1087, **RL-0090**.

¹⁵⁷ See *CMS Gas v. Argentina*, Award, ¶ 290, **CL-221** (“Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.”); *Gold Reserve v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014), ¶ 564, 580-581, **CL-152**; see also *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* (“*Ioannis*”), ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (Mar. 3, 2010), ¶ 441, **CL-134**.

¹⁵⁸ United States 1128 Submission, ¶ 83.

¹⁵⁹ See, e.g., R. Dolzer & C. Schreuer, *Principles of International Investment Law* 145-160 (2d ed. 2012), **CL-135**.

¹⁶⁰ See, e.g., *Ioannis*, Award, ¶ 441 (holding it is a legitimate expectation under the fair and equitable treatment obligation that a State “conduct itself vis -à-vis [its] investment in a manner that [is] reasonably justifiable and [does] not manifestly violate basic requirements of consistency, transparency, even-handedness and nondiscrimination”), **CL-134**; see also *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (Jul. 28, 2015), ¶ 546 (agreeing with and quoting Claimants’ submission, noting that “[a] State is thus expected to behave . . . in a ‘consistent, even handed, unambiguous, transparent, candid’ manner”), **CL-130**; *Murphy Exploration and Production Company International v. Republic of Ecuador II*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award (May 6, 2016), ¶¶ 205-206, 208 (“the repeated reference to ‘fair and equitable’ treatment in investment treaties and arbitral awards shows that the FET standard is now generally accepted as reflecting recognisable components, such as: transparency”), **CL-145**; *Convia! Callao S.A. and CCI - Compañía de Concesiones de*

89. While the United States cites three decisions, they do not support its assertion. The *Metalclad* decision that the United States cites is not the final award in that arbitration, but a Canadian court decision on a set-aside action from two decades ago. That that court found that “[n]o authority was cited” for a “transparency” obligation under the NAFTA in those proceedings, is entirely irrelevant to the existence of a “transparency” protection under the Minimum Standard of Treatment today. Similarly, the *Feldman* decision cited by the United States was rendered two decades ago and cannot be taken as a reflection of the current state of the Minimum Standard of Treatment. In any event, it did not exclude that “transparency” could be part of the Minimum Standard of Treatment, but merely was “doubtful” that a lack of transparency with respect to complex national tax law *alone* could violate international law.¹⁶¹ Likewise, the *Merrill* tribunal—writing over a decade ago—confirmed that, at that time, “transparency” was “nonetheless approaching that stage” of being “proven to be part of the customary law standard.”¹⁶² As the decisions cited by Claimants confirm, today it is. Thus, the assertions by the United States and

Infraestructura S.A. v. Republic of Peru, ICSID Case No. ARB/10/2, Final Award (May 21, 2013), ¶ 604 (“The Tribunal is then in agreement with what has been affirmed by other arbitral tribunals [including *Waste Management v. Mexico*] in which the FET serves as the legal basis to protect foreign investors from arbitrary, inconsistent, not transparent and capricious behavior attributable to host States.”) (counsel translation), **CL-159**; *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award (Oct. 8, 2009), ¶ 167 (“exercising a State’s discretion on the basis of corruption is a [. . .] fundamental breach of transparency and legitimate expectations.’), **CL-161**; *Blusun v. Italy*, ICSID Case No. ARB/14/3, Final Award (Dec. 27, 2016), ¶ 362 (“encourage and create stable, equitable, favourable and transparent conditions for investors’ including ‘to accord at all times . . . fair and equitable treatment”), **CL-206**; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), ¶ 131 (“Thus, this Tribunal, having considered, as previously stated, the sources of international law, understands that the fair and equitable standard consists of the host State’s consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.”), **CL-156**; *see also, e.g., FREIF Eurowind Holdings Ltd v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award (Mar. 8, 2021), ¶ 525 (“Spain has complied with the fair and equitable treatment clause by acting transparently and in good faith . . .”), **CL-428**.

¹⁶¹ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), ¶ 133, **CL-109**.

¹⁶² *Merrill & Ring v. Canada*, Award, ¶ 231, **CL-138**.

Canada are outdated, and transparency has crystallized into a component of the FET obligation of the Minimum Standard of Treatment under customary international law.

(v) Good Faith

90. The United States’ claim that good faith “is not in itself a source of obligation where none would otherwise exist”¹⁶³ again is wrong. The United States cites no NAFTA—or any investment—jurisprudence, but only its own submissions in four NAFTA cases and three interstate International Court of Justice opinions from the previous century (1986, 1988, and 1999) concerning the law of armed conflict.¹⁶⁴ These citations are antiquated and irrelevant to the Minimum Standard of Treatment in its present form. In reality, as the NAFTA tribunal in *Waste Management II* observed, “[a] basic obligation of the State under Article 1105(1) is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means.”¹⁶⁵ Again, the United States does not engage with any of Claimants’ many references to scholarship¹⁶⁶ and arbitral jurisprudence,¹⁶⁷ which remove any doubt that the obligation to act in good faith is one of the hallmark elements of the FET standard under customary international law.

(vi) Corruption

91. It bears noting that neither the Non-Disputing Parties nor México dispute Claimants’ explanation in their Statement of Claim that the State is obligated under the FET standard to ensure

¹⁶³ United States 1128 Submission, ¶ 85.

¹⁶⁴ See United States 1128 Submission, ¶¶ 84-85 nn.145-148.

¹⁶⁵ *Waste Management II*, Award, ¶ 138, **CL-113**.

¹⁶⁶ See, e.g., R. Dolzer & C. Schreuer, *Principles of International Investment Law* 145-160 (2d ed. 2012), **CL-135**.

¹⁶⁷ See, e.g., *Murphy Exploration and Production Company International v. Republic of Ecuador II*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award (May 6, 2016), ¶¶ 205-206, 208, **CL-145**; *El Paso v. Argentina*, Award, ¶ 348, **CL-155**; *Gold Reserve v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014), ¶ 591, **CL-152**; *Siag v. Egypt*, CID Case No. ARB/05/15, Award (June 1, 2009), ¶ 450 (describing the principle that States must act in good faith as the “general, if not cardinal principle of customary international law”), **CL-132**; *Rumeli*, Award, ¶ 609, **CL-124**; *Biwater v. Tanzania*, Award, ¶ 602, **CL-140**; see also, e.g., *FREIF Eurowind Holdings Ltd v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award (Mar. 8, 2021), ¶ 525 (“Spain has complied with the fair and equitable treatment clause by acting transparently and in good faith . . .”), **CL-428**.

that its State organs do not engage in acts of corruption.¹⁶⁸ Claimants have demonstrated that over the past few decades, a customary international law prohibition on bribery and corruption has emerged, as represented, *inter alia*, by the numerous multilateral anticorruption treaties and agreements that the Parties have signed, and the national anticorruption laws that they have adopted in conjunction.¹⁶⁹ Their silence here is a further acknowledgement by the NAFTA Parties that the Minimum Standard can—and does—evolve.¹⁷⁰ Accordingly, a failure to root out and punish corruption to the detriment of investors protected under the NAFTA violates the FET obligation of Article 1105(1), as the Parties do not dispute.

2. Full Protection and Security: The Non-Disputing Parties Cannot Ignore The Reality That The Minimum Standard of Treatment Covers Both Physical and Legal Protection and Security

92. Claimants have shown that México have breached México’s obligations under the NAFTA to provide both physical and legal protection and security to Claimants’ investments by, *inter alia*: working with the Ad-Hoc Group to bring meritless criminal investigations against Claimants, including by fabricating evidence or perpetrating the use of fabricated evidence; failing to protect Oro Negro’s rigs from, and actively assisting, physical incursions by third parties; dispossessing Oro Negro of its rigs; failing to root out corruption within Pemex to Claimants’ detriment;

¹⁶⁸ See SOC, § III.D.4.

¹⁶⁹ See SOC, ¶¶ 494-501.

¹⁷⁰ *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award (Jan. 9, 2003), ¶ 179 (noting that México, the United States, and Canada have all accepted “that the customary international law referred to in Article 1105(1) is not ‘frozen in time’ and that the minimum standard of treatment does evolve”), CL-136; *Mondev*, Award, ¶¶ 119 (“The United States itself accepted that Article 1105(1) is intended to provide a real measure of protection of investments, and that having regard to its general language and to the evolutionary character of international law, it has evolutionary potential.”), 124 (“The [United States] noted that there was some common ground between the parties to the present arbitration in respect of the FCT’s interpretations, namely, ‘that the standard adopted in Article 1105 was that as it existed in 1994, the international standard of treatment, as it had developed to that time . . . like all customary international law, the international minimum standard has evolved and can evolve . . . the sets of standards which make up the international law minimum standard, including principles of full protection and security, apply to investments.’ . . . [B]oth Canada and Mexico expressly accepted this point.”), CL-73.

colluding with the Ad-Hoc Group to financially strangle Oro Negro; fostering a media smear campaign against Claimants; initiating several baseless tax audits against Integradora and its subsidiaries; and refusing to pay Perforadora approximately USD 24 million in past due daily rates.¹⁷¹ While México concedes that it can bear liability for breaches of its obligation to provide physical security, it rejects any liability for legal security and protection.¹⁷²

93. The Non-Disputing Parties also argue that “NAFTA Article 1105 does not extend beyond the physical protection and security of investments.”¹⁷³ That interpretation of Article 1105, however, cannot be supported by the ordinary meaning of that provision, which refers to “full protection and security.” A good faith interpretation of the phrase “full protection and security” can only yield the conclusion that *all* forms of protection and security are to be provided—physical and legal—not solely *physical* protection and security. That conclusion is consistent with the findings of at least seventeen other tribunals, which have found that a full protection and security obligation requires both physical and legal protection and security, particularly where the obligation is qualified by the word “full.”¹⁷⁴ The Non-Disputing Parties do not deny this. Instead,

¹⁷¹ See, e.g., SOC, ¶¶ 543-544; Reply, ¶¶ 995-996.

¹⁷² See SOD, ¶¶ 772-784; Rejoinder, ¶¶ 637-658.

¹⁷³ United States 1128 Submission, ¶¶ 86-87; Canada 1128 Submission, ¶¶ 37-39.

¹⁷⁴ See *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award (Mar. 27, 2020), ¶ 664 (“The Tribunal has reviewed the terms of the BIT in accordance with Article 31 of the VCLT and in light of the authorities adduced by the Parties, and has noted that the terms “protection” and “security” in [the BIT] are qualified by “full” without any exclusion or limitation. The Tribunal therefore agrees with [claimant] that the standard of “full protection and security” as set in the BIT is not limited to safeguards against physical interference by State organs and private persons, but extends to accord legal safeguard for the investment and the returns of the investor.”), **CL-399**; *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award (Jan. 18, 2019), ¶ 482 (“The Tribunal shares the Claimant’s position that, if there are no express limits in the Treaty, this obligation is not limited to physical security, but also comprises a duty to afford legal security to investments. This interpretation has been confirmed by various tribunals.”), **CL-400**; *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award (July 2, 2018), ¶ 652, **CL-401**; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award (July 21, 2017), ¶ 905, **CL-402**; *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos ARB/08/1 and ARB/09/20, Award (May 23, 2012), ¶ 281, **CL-244**; *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award (Nov. 12, 2010), ¶ 263 (“[I]t is apparent that the duty of protection and security extends to providing a legal framework that offers legal protection to

the United States misleadingly states that “the vast majority of cases in which the customary international law obligation of full protection and security was found to have been breached are those in which a State failed to provide reasonable protection against acts of a criminal nature that physically invaded the person or property of an alien.”¹⁷⁵ However, even if this were true, it would be of no assistance to the Tribunal. The simple fact that, in a majority of cases, a breach of physical, and not legal, protection and security was purportedly argued, and found, does not change the reality that full protection means full protection, *i.e.*, physical and legal protection and security. In an illustration of just how wrong the Non-Disputing Parties are on this point, the United States argues that full protection and security does not “provide for stability of a State’s legal

investors - including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights.”), **CL-184**; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (Dec. 27, 2010), ¶ 343 (“A plain reading of [full protection and security], in accordance with Article 31 VCLT, shows that the protection provided for by [the treaty] to covered investors and their assets is not limited to physical protection but includes also legal security. The explicit linkage of this standard to the fair and equitable treatment standard supports this interpretation.”), **CL-214**; *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability (Sept. 2, 2009), ¶ 246 (noting that other “tribunals have applied [protection and security] more broadly to encompass legal security as well. Therefore, it could arguably cover a situation in which there has been a demonstrated miscarriage of justice.”), **CL-217**; *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award (Nov. 3, 2008), ¶¶ 144-45 (finding that Full Protection and Security is not inherently limited to protection and security of physical assets and that it would be “unduly artificial to confine the notion of ‘full security’ only to one aspect of security, particularly in light of the use of this term in a [treaty] directed at the protection of commercial and financial investments.”), **CL-162**; *Biwater v. Tanzania*, Award, ¶ 729 (holding that Full Protection and Security “implies a State’s guarantee of stability in a secure environment, both physical, commercial and legal.”), **CL-140**; *Ares International S.r.l. and MetalGeo S.r.l. v. Georgia*, ICSID Case No. ARB/05/23, Award (Feb. 26, 2008), ¶ 10.3.4, **CL-403**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶¶ 7.4.15-7.4.16, **CL-79**; *Azurix v. Argentina*, Award, ¶ 408 (“[F]ull protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor’s point of view . . . [W]hen the terms “protection and security” are qualified by “full” and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.”), **CL-141**; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award (Dec. 29, 2004), ¶ 170, **CL-404**; *Occidental v Ecuador*, Final Award, ¶ 187, **CL-144**; *Tecmed v. Mexico*, Award, ¶ 177 (indicating that dysfunction of the host State authorities and their active encouragement of adverse actions can violate the minimum requirements of the full protection and security standard), **CL-101**; *CME v. Czech Republic*, Partial Award, ¶ 613 (“The Media Council’s actions in 1996 and its actions and inactions in 1999 were targeted to remove the security and legal protection of the Claimant’s investment in the Czech Republic. . . . The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued. This is not the case. The Respondent therefore is in breach of this obligation.”), **CL-118**.

¹⁷⁵ United States 1128 Submission, ¶ 86.

environment,” but ignores entirely the decision in *Biwater Gauff v. Tanzania*, which held precisely the opposite, *i.e.*, that full protection and security “implies a State’s guarantee of stability in a secure environment, both physical, commercial and legal.”¹⁷⁶

94. The Non-Disputing Parties seek to rely on a number of authorities that, they say, support their position, but they ignore that those authorities are either outdated or irrelevant. Of those cases, only four date from 2010 onwards—compared to no fewer than seven cases relied upon by the Claimants. The more recent arbitral decisions cited by the Non-Disputing Parties also do not advance their position. For example, while the *Suez v. Argentina* tribunal did find that, in the France-Argentina BIT, “the full protection and security standard primarily seeks to protect investment from physical harm,” it also explained that “[t]he fact that the French BIT employs the fair and equitable treatment standard and the full protections and security standard *in two distinct articles* and refers to them as separate and distinct standards leads to the conclusion that the Contracting Parties must have intended them to mean two different things.”¹⁷⁷ That is not the case of the NAFTA, where both fair and equitable treatment and full protection and security appear in Article 1105(1) as aspects of “treatment in accordance with international law.” By the same token, *IMFA v. Indonesia*, *Crystallex v. Venezuela*, and *Infinito Gold*, largely rely on speculation that legal protection and security under the FPS obligation might overlap with protections afforded by the FET obligation, whereas the “traditional” form of physical protection would not.¹⁷⁸ However, the mere fact that the protections of two treaty provisions may overlap does not mean that the

¹⁷⁶ *Biwater v. Tanzania*, Award, ¶ 729, **CL-140**.

¹⁷⁷ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID No. ARB/03/19, Decision on Liability (July 30, 2010), ¶ 172, **RL-0115**.

¹⁷⁸ See *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, PCA Case No. 2015-40, Final Award (Mar. 29, 2019), ¶ 267, **CL-429**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016), ¶ 634, **CL-108**; *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award (June 3, 2021), ¶ 623, **CL-426**.

scope of one of those treaty obligations must be limited artificially beyond what its ordinary meaning would require, as the growing number of tribunals to recognize that the FPS obligation incorporates legal protection would agree.

95. Lest there be any doubt that the full protection and security obligation under the minimum standard of treatment in Article 1105(1) covers legal, as well as physical, protection, both Non-Disputing Parties admit that they have concluded treaties that, under the full protection and security obligation, only require “each Party to provide the level of police protection required under customary international law.”¹⁷⁹ Clearly, they would not have needed to do so if full protection and security under the minimum standard of treatment did not require protection beyond that, and it bears emphasizing that they did not so limit the full protection and security standard within the text of the NAFTA.

96. Therefore, the Non-Disputing Parties’ view of the FPS obligation is antiquated and unmoored from the bulk of modern arbitral jurisprudence, which recognizes that “full” protection and security covers physical as well as legal security.

V. CONCLUSION

97. On the basis of the foregoing, Claimants respectfully submit that the Tribunal ignore the assertions regarding treaty interpretation in the Non-Disputing Parties’ Article 1128 Submissions and respectfully request that the Tribunal grant the relief requested at paragraph 1052 of the Reply.

¹⁷⁹ See United States 1128 Submission, ¶ 86 & n.149; Canada 1128 Submission, ¶ 39 & n.72.

Respectfully submitted on behalf of Claimants,



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