**IN THE CASE OF AN ARBITRATION PROCEEDING UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT**

**- and -**

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (1976)**

**- between -**

**ALICIA GRACE; AMPEX RETIREMENT MASTER TRUST; APPLE OAKS PARTNERS, LLC; BRENTWOOD ASSOCIATES PRIVATE EQUITY PROFIT SHARING PLAN; CAMBRIA VENTURES, LLC; THE ESTATE OF CARLOS WILLIAMSON-NASI IN ITS OWN RIGHT AND ON BEHALF OF AXIS SERVICES, AXIS HOLDING, CLUE AND F. 305952; 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 IN HIS OWN RIGHT AND ON BEHALF OF AXIS SERVICES, AXIS HOLDING AND F. 305952; NICHOLAS GRACE; OLIVER GRACE III; OLIVER GRACE III; ON5 INVESTMENTS, LLC; RAINBOW FUND, L.P.; ROBERT M. WITT; ROBERT M. WITT IRA; VISTA PROS, LLC; VIRGINIA GRACE**

Claimants

and

**THE UNITED MEXICAN STATES**

Respondent

**ICSID Case No. UNCT/18/4**

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# FINAL AWARD

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*Members of the Tribunal*

Prof. Diego P. Fernández Arroyo, President
Prof. Andrés Jana Linetzky, Arbitrator
Prof. Gabriel Bottini, Arbitrator

*Secretary of the Tribunal*
Ms. Patricia Rodríguez Martín

*Date of dispatch to the Parties:* 19 August 2024

**REPRESENTATION OF THE PARTIES**

*On behalf of Alicia Grace et al*:

Mr. Juan P. Morillo
Mr. David M. Orta
Mr. Philippe Pinsolle
Ms. Dawn Yamane Hewett
Mr. Alexander Leventhal
Mr. Gabriel Soledad
Ms. Julianne Jaquith
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## TABLE OF DEFINED TERMS

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|---|---|
| 1128 Submissions | Written submissions filed by the United States of America and Canada under Article 1128 of the NAFTA |
| Ad Hoc Group | A group of Bondholders holding the majority of Oro Negro's bonds |
| Afores | Administradora de Fondos para el Retiro |
| BIT | Bilateral Investment Treaty |
| Bondholders | Creditors of the bonds first issued by Oro Negro Drilling on 24 January 2014 |
| C-[#] | Claimants' Factual Exhibit |
| Centre, ICSID | International Centre for Settlement of Investment Disputes |
| CJCI | Dirección General de Consultoría Jurídica de Comercio Internacional |
| CL-[#] | Claimants' Legal Authority |
| Claimants' Post-Hearing Brief or CPHB | Post-Hearing Brief filed by Claimants on 9 September 2022 |
| Decus SPV | Oro Negro Decus Pte. Ltd. |
| FET | Fair and Equitable Treatment |
| FGJCDMX | Fiscalía General de Justicia de la Ciudad de México (formerly known as Procuraduría General de Justicia de la Ciudad de Mexico) |
| FGR | Fiscalía General de la República (formely known as Procuraduría General de la República) |
| Fortius SPV | Oro Negro Fortius Pte. Ltd. |
| FPS | Full Protection and Security |
| FTC | Free Trade Commission of NAFTA |
| Grace Family | Alicia Grace, Carolyn Grace Baring, Diana Grace Bear, Nicholas Grace, Oliver R. Grace III and Virginia Grace |

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|---|---|
| IBA Rules | IBA Rules on the Taking of Evidence in International Arbitration adopted by a resolution of the IBA Council 29 May 2010 |
| ICJ | International Court of Justice |
| ILC Articles | International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts |
| Impetus SPV | Oro Negro Impetus Pte. Ltd. |
| Integradora | Integradora de Servicios Petroleros Oro Negro S.A.P.I de C.V. |
| Hearing | Hearing on Jurisdiction and Merits held from 24 to 30 April 2022 |
| Host State | United Mexican States |
| Home State | United States of America |
| Laurus SPV | Oro Negro Laurus Pte. Ltd. |
| Mexican Enterprises | Axis Services, Axis Holding, Clue and F. 305952 |
| MFN | Most Favored Nation |
| MST | Minimum Standard of Treatment |
| Non-Disputing Parties | United States of America and Canada |
| Nordic Trustee | Nordic Trustee ASA acting in its capacity as trustee for the Bondholders |
| NT | National Treatment |
| Oro Negro | Group of companies composed of Integradora, Perforadora, Oro Negro Drilling and the Singapore Rig Owners |
| Oro Negro Drilling | Oro Negro Drilling Pte. Ltd. |
| Oro Negro Contracts | Primus, Decus, Laurus, Fortius and Impetus Contracts celebrated between PEMEX and Perforadora |
| PEMEX | Petróleos Mexicanos |
| Perforadora | Perforadora Oro Negro S. de R.L. de C.V. |
| Primus SPV | Oro Negro Primus Pte. Ltd. |
| R-[#] | Respondent's Factual Exhibit |

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|---|---|
| Rejoinder or R2 | Rejoinder Brief and its annexes filed by Respondent on 12 July 2021 |
| Reply or C2 | Reply Brief and its annexes filed by Claimants on 22 March 2021 |
| RL-[#] | Respondent's Legal Authority |
| Respondent's Post Hearing Brief or RPHB | Post-Hearing Brief filed by Respondent on 9 September 2022 |
| Singapore Rig Owners | Oro Negro Primus Pte. Ltd., Oro Negro Laurus Pte. Ltd., Oro Negro Fortius Pte. Ltd., Oro Negro Decus Pte. Ltd., Oro Negro Impetus Pte. Ltd. |
| Statement of Claim or C1 | Statement of Claim Brief and its annexes filed by Claimants on 7 October 2019 |
| Statement of Defence or R1 | Statement of Defence and its annexes Brief filed by Respondent on 1 June 2020 |
| UNCITRAL Rules | The Arbitration Rules of the United Nations Commission on International Trade Law that were adopted by the United Nations General Assembly on 15 December 1976 |
| United States | United States of America |
| Treaty or NAFTA | North American Free Trade Agreement |
| Tribunal | Arbitral Tribunal constituted on 25 January 2019 |
| VCLT | Vienna Convention on the Law of Treaties, dated 23 May 1969 |

## I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted on the basis of Articles 1116(1), 1117(1) and 1120(1) of the North American Free Trade Agreement ("**NAFTA**" or the "**Treaty**") and under the Arbitration Rules of the United Nations Commission on International Trade Law that were adopted by the United Nations General Assembly on 15 December 1976 (the "**UNCITRAL Rules**"). By agreement of the Parties, the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") serves as the administering authority for this proceeding.

2. The Claimants are the following:

   (a) Alicia Grace ("**Ms. A. Grace**"), a natural person having the nationality of the United States of America, bringing this claim on her own behalf under NAFTA Article 1116;

   (b) Ampex Retirement Master Trust ("**Ampex Trust**"), a trust organized under the laws of the state of Massachusetts in the United States of America, bringing this claim on its own behalf under NAFTA Article 1116;

   (c) Apple Oaks Partners, LLC ("**Apple Oaks**"), a limited liability company constituted under the laws of the state of California in the United States of America, bringing this claim on its own behalf under NAFTA Article 1116;

   (d) Brentwood Associates Private Equity Profit Sharing Plan ("**Brentwood**"), an investment vehicle organized under the laws of the United States of America, bringing this claim on its own behalf under NAFTA Article 1116;

   (e) Cambria Ventures, LLC ("**Cambria**"), a limited liability company constituted under the laws of the state of Delaware in the United States of America, bringing this claim on its own behalf under NAFTA Article 1116;

   (f) The estate of Carlos Williamson-Nasi (the "**Estate of Mr. Williamson-Nasi**"), who appears on behalf of Carlos Williamson-Nasi ("**Mr. Williamson-Nasi**"), who passed away in the course of this arbitration. Mr. Williamson-Nasi was a natural person having the nationalities of the United States of America, Mexico and Colombia, who brought

this claim on his own behalf under NAFTA Article 1116 and on behalf of the following enterprises under NAFTA Article 1117:

i. Axis Oil Field Services, S. de R.L. de C.V. ("**Axis Services**"), a limited liability company incorporated under the laws of Mexico;

ii. Axis Oil Field Holding, S. de. R.L. de C.V. ("**Axis Holding**"), a limited liability company incorporated under the laws of Mexico;

iii. Clue, S.A. de C.V. ("**Clue**"), a corporation constituted under the laws of Mexico;

iv. Fideicomiso 305952 ("**F. 305952**"), a Mexican special purpose vehicle organized under the laws of Mexico;

(g) Carolyn Grace Baring ("**Ms. C. Grace**"), a natural person having the nationality of the United States of America, bringing this claim on her own behalf under NAFTA Article 1116;

(h) Diana Grace Bear ("**Ms. D. Grace**"), a natural person having the nationality of the United States of America, bringing this claim on her own behalf under NAFTA Article 1116;

(i) Floradale Partners, LLC ("**Floradale**"), a limited liability company constituted under the laws of the state of Delaware in the United States of America, bringing this claim on its own behalf under NAFTA Article 1116;

(j) Frederick Grace ("**Mr. F. Grace**"), a natural person having the nationality of the United States of America, bringing this claim on his own behalf under NAFTA Article 1116;

(k) Frederick J. Warren ("**Mr. Warren**"), a natural person having the nationality of the United States of America, bringing this claim on his own behalf under NAFTA Article 1116;

(l) Frederick J. Warren IRA ("**Warren IRA**"), an investment vehicle organized under the laws of the United States of America, bringing its claim on his own behalf under NAFTA Article 1116;

(m) Gary Olson ("**Mr. Olson**"), a natural person having the nationality of the United States of America, bringing this claim on his own behalf under NAFTA Article 1116;

(n) Genevieve T. Irwin ("**Ms. Irwin**"), a natural person having the nationality of the United States of America, bringing this claim on her own behalf under NAFTA Article 1116;

(o) Genevieve T. Irwin 2002 Trust ("**Irwin Trust**"), a trust organized under the law of the state of Connecticut in the United States of America, bringing this claim on its own behalf under NAFTA Article 1116;

(p) Gerald L. Parsky ("**Mr. Parsky**"), a natural person having the nationality of the United States of America, bringing this claim on his own behalf under NAFTA Article 1116;

(q) Gerald L. Parsky IRA ("**Parsky IRA**"), an investment vehicle organized under the laws of the United States of America, bringing this claim on its own behalf under NAFTA Article 1116;

(r) John N. Irwin III ("**Mr. Irwin**"), a natural person having the nationality of the United States of America, bringing this claim on his own behalf under NAFTA Article 1116;

(s) José Antonio Cañedo-White ("**Mr. Cañedo White**"), a natural person having the nationality of the United Mexican States, also a permanent resident in the United States of America, bringing this claim on his own behalf under NAFTA Article 1116 and on behalf of the following enterprises under NAFTA Article 1117:

i. Axis Services, a limited liability company incorporated under the laws of Mexico;

ii. Axis Holding, a limited liability company incorporated under the laws of Mexico;

iii. F. 305952, a Mexican special purpose vehicle organized under the laws of Mexico;

(t) Nicholas Grace ("**Mr. N. Grace**"), a natural person having the nationality of the United States of America, bringing this claim on his own behalf under NAFTA Article 1116;

(u) Oliver R. Grace III ("**Mr. O Grace**"), a natural person having the nationality of the United States of America, bringing this claim on his own behalf under NAFTA Article 1116;

(v) ON5 Investments, LLC ("**ON5**"), a limited liability company constituted under the laws of the state of Florida in the United States of America, bringing this claim on its own behalf under NAFTA Article 1116;

(w) Rainbow Fund, L.P. ("**Rainbow**"), a limited liability partnership constituted under the laws of the state of California in the United States of America, bringing this claim on his own behalf under NAFTA Article 1116;

(x) Robert M. Witt ("**Mr. Witt**"), a natural person having the nationality of the United States of America, bringing this claim on his own behalf under NAFTA Article 1116;

(y) Robert M. Witt IRA ("**Witt IRA**"), an investment vehicle organized under the laws of the United States of America, bringing this claim on its own behalf under NAFTA Article 1116;

(z) Vista Pros, LLC ("**Vista Pros**"), a limited liability company constituted under the laws of the state of Florida in the United States of America, bringing this claim on its own behalf under NAFTA Article 1116; and

(aa) Virginia Grace ("**Ms. V. Grace**"), a natural person having the nationality of the United States of America, bringing this claim on her own behalf under NAFTA Article 1116.

3. Claimant's claim is submitted against the United Mexican States ("**Mexico**" or the "**Respondent**").

4. The Claimants and Respondent are collectively referred to as the "**Parties**". The Parties" representatives and their addresses are listed above on page 2.

5. The dispute arises in connection with a series of contracts between Petróleos Mexicanos ("**PEMEX**"), the Mexican State-owned oil company, and Perforadora Oro Negro S. de R.L. de C.V. ("**Perforadora**"), a company incorporated in Mexico having as its main activity the lease of oil rigs (the "**Oro Negro Contracts**"). Perforadora is a subsidiary of Integradora de Servicios Petroleros Oro Negro S.A.P.I. de C.V. ("**Integradora**"), a holding company incorporated in Mexico. Claimants portray their direct and indirect shareholding in Integradora as a covered investment under NAFTA. The dispute concerns alleged acts and omissions by the Mexican authorities against Integradora and its subsidiaries (jointly referred as "**Oro Negro**").

## II. PROCEDURAL HISTORY

6. On 19 June 2018, Claimants commenced the present arbitration proceeding against Respondent pursuant to Articles 1116(1), 1117(1) and 1120(1)(c) of the NAFTA and the UNCITRAL Rules.

7. On 24 July 2018, Claimants appointed Prof. Andrés Jana Linetzky, a Chilean and Portuguese national, as arbitrator, pursuant to NAFTA Article 1123 and Article 7 of the UNCITRAL Rules.

8. On 27 August 2018, Claimants requested the Secretary-General of ICSID to appoint an arbitrator pursuant to NAFTA Article 1124 and Article 7 of the UNCITRAL Rules due to Respondent's failure to appoint an arbitrator within 30 days.

9. On 12 September 2018, the Parties confirmed their agreement for ICSID to administer the case. On 13 September 2018, ICSID accepted its appointment as the administering authority for the case.

10. On 17 September 2018, Respondent appointed Mr. Gabriel Bottini, a national of Argentina, as arbitrator, pursuant to NAFTA Article 1123 and Article 7 of the UNCITRAL Rules.

11. On 20 September 2018, the Claimants requested that the Secretary-General of ICSID appoint the President of the Tribunal in this case pursuant to NAFTA Article 1124(2). By letter of the same date, the Respondent responded to the 'Claimants' communication and detailed a number of requirements to be met by the president of the Tribunal.

12. On 24 September 2018, ICSID requested additional information from the Parties regarding the procedure for the appointment of the President of the Tribunal.

13. On 24 and 27 September 2018, the Parties sent communications to ICSID regarding the procedure for the appointment of the President of the Tribunal. On 3 October 2018, ICSID asked the Parties to attempt to reach an agreement on the procedure for the appointment of the President of the Tribunal.

14. On 16 October 2018, the Parties informed ICSID of the agreement reached on the procedure for the appointment of the President of the Tribunal.

15. On 6 December 2018, the Parties sent their respective lists of candidates for President of the Tribunal.

16. On 7 December 2018, ICSID informed the Parties that the list procedure agreed by the Parties had not resulted in the selection of a candidate for President of the Tribunal, and therefore, in accordance with the Parties' agreement, the ICSID Secretary-General would proceed with the appointment.

17. On 16 January 2019, the Secretary-General of ICSID informed the Parties that it intended to appoint Prof. Diego P. Fernández Arroyo, an Argentinian and Spanish national, as Chairman and invited the Parties to submit their comments thereon.

18. In the absence of any comments from the Parties, on 25 January 2019, the Secretary-General of ICSID informed the Parties of the appointment of Prof. Diego P. Fernández Arroyo as presiding arbitrator and that the proceeding was formally initiated. Ms. Celeste Estefanía Salinas Quero, ICSID legal counsel, was appointed to act as Secretary of the Tribunal.

19. The first session of the Tribunal was held on 13 March 2019, by videoconference. The following persons participated in the first session:

*Members of the Tribunal:*

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|---|---|
| Prof. Diego P. Fernández Arroyo | President of the Tribunal |
| Prof. Andres Jana Linetzky | Arbitrator |
| Prof. Gabriel Bottini | Arbitrator |

*ICSID Secretariat:*

| | |
|---|---|
| Ms. Celeste Estefanía Salinas Quero | Secretary of the Tribunal |

*For the Claimants:*

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|---|---|
| Mr. Juan M. Morillo | Quinn Emanuel Urquhart & Sullivan, LLP |
| Mr. David M. Orta | Quinn Emanuel Urquhart & Sullivan, LLP |
| Mr. Philippe Pinsolle | Quinn Emanuel Urquhart & Sullivan, LLP |
| Ms. Dawn Y. Yamane Hewett | Quinn Emanuel Urquhart & Sullivan, LLP |

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|---|---|
| Mr, Daniel Pulecio-Boek | Quinn Emanuel Urquhart & Sullivan, LLP |

*For the Respondent:*

| | |
|---|---|
| Mr. Orlando Pérez Gárate | General Directorate of Legal Counsel for International Trade, Ministry of the Economy |
| Mr. Hugo Gabriel Romero Martínez | General Directorate of Legal Conseul for International Trade, Ministry of the Economy |
| Mr. Alan Bonfiglio Rios | General Directorate of Legal Coneul for International Trade, Ministry of the Economy |
| Mr. Cameron Mowatt, | Tereposky & De Rose, LLP |
| Mr. Alejandro Barragan, | Tereposky & De Rose, LLP |
| Mr. Stephan Becker | Pillsbury Winthrop Shaw Pittman LLP |

20. Following the first session, on 25 March 2019, the Tribunal issued Procedural Order No. 1, incorporating the agreements reached by the Parties, as well as the 'Tribunal's decision on the procedural issues on which the Parties had failed to reach agreement. Procedural Order No. 1 provided, *inter alia*, that the proceedings would be governed by the UNCITRAL Arbitration Rules, except to the extent modified by Section B, Chapter 11 of NAFTA; that the procedural languages would be English and Spanish; and that the place of the proceedings would be Toronto, Canada.

21. On 27 March 2019, the Parties submitted their respective positions in relation to the *amicus curiae* submissions.

22. On 5 April 2019, the Tribunal issued Procedural Order No. 2 on *Amicus Curiae* and Participation of Non-Disputing Parties.

23. On 9 April 2019, the Tribunal circulated a draft Procedural Order No. 3 on confidentiality and invited the Parties to discuss it among themselves and to submit by 19 April 2019 (i) a joint proposal with any agreements that should be included in the confidentiality order and (ii) their positions on the issues on which they disagreed. On 19 April 2019, the Parties submitted their joint proposal for the confidentiality order.

24. On 19 April 2019, Alterna Capital Partners LLC (U.S.), Asia Research & Capital Management Ltd. (Hong Kong), Contrarian Capital Management, LLC (U.S.), CQS (UK) LLP, on its own behalf and on behalf of funds controlled or advised by such firm, GHL Investments Ltd. (Europe), and Ship Finance International Limited (UK Territory/Bermuda) (the "**Applicants**") requested leave to file a submission as a Non-Disputing party to the arbitration (the "**Non-Disputing Party Application**") pursuant to § 1.3 of Procedural Order No. 2 and § 4 of the NAFTA Free Trade Commission's Statement on Non-Disputing Party Participation. The Claimants attached a proposed submission to the Request (the "**Proposed Submission**").

25. On 26 April 2019, the Tribunal issued Procedural Order No. 3 on Confidentiality.

26. On 26 April 2019, the Secretary of the Tribunal transmitted the Non-Disputing Party Application and the Proposed Submission to the Parties in accordance with the instructions given by the President of the Tribunal and invited the Parties to submit comments on the Non-Disputing Party Application by 6 May 2019.

27. At Claimants' request, on 13 May 2019, the Tribunal extended the deadline for the Parties to submit their respective comments on the Non-Disputing Party Application until 20 May 2019. On 20 May 2019, the Parties submitted their comments on the Non-Disputing Party Application.

28. On 24 June 2019, the Tribunal issued Procedural Order No. 4 on the Non-Disputing Party Application. The Tribunal by majority (with Mr. Bottini dissenting) resolved: (i) not to grant leave to the Applicants for the filing of a non-disputing party submission in this arbitration, and (ii) not to grant the Applicants access to the Parties' pleadings and evidence.

29. On 19 July 2019, the Claimants requested an extension of the deadlines for the filing of the Statement of Claim and Statement of Defence.

30. On 21 July 2019, Claimants filed a motion requesting provisional measures, which included the following documentation: Appendices A through E; Witness Statement of Mr. Carlos Williamson-Nasi dated 18 July 2019; Witness Statement of Mr. Gonzalo Gil White dated 18 July 2019; Witness Statement of Mr. José A. Cañedo-White dated 18 July 2019; Exhibits C-

0001 through C-0083; and Legal Authorities CL-0033 through CL-0057 (the "**Request for Provisional Measures**").

31. On 22 July 2019, Claimants requested an expedited briefing schedule for processing the Request for Provisional Measures (the "**Expedited Briefing Request**"). By letter of the same date, the Tribunal invited Respondent to submit comments, by 29 July 2019, on (i) the request for an extension of the 19 July pleading schedule for the Statement of Claim and Statement of Defence; and (ii) the 22 July 2019 request for expedited filing of pleadings for the Application for Provisional Measures.

32. On 29 July 2019, Respondent submitted its comments on Claimants' 19 July 2019 Request and Claimants' 22 July 2019 Expedited Briefing Request, accompanied by the following documents: Exhibit A - Documentary Exhibits and Legal Authorities R-0001 through R-0004.

33. On 7 August 2019, the Tribunal issued Procedural Order No. 5 on the procedural calendar. The Tribunal resolved to extend the deadlines for filing the Statement of Claim to 7 October 2019 and Statement of Defence to 20 April 2020, and updated the procedural calendar, Annex A, which replaced Annex A of Procedural Order No. 1. The Tribunal also invited the Respondent to file a Reply to the Request for Provisional Measures by 8 September 2019.

34. On 6 September 2019, Claimants submitted a letter informing the Tribunal of two events that, in their view, made the measures requested in the Request for Provisional Measures particularly urgent and requested leave of the Tribunal to incorporate certain evidence into the record in support of their Request for Provisional Measures.

35. On 9 September 2019, the Tribunal invited Respondent to submit comments on Claimants' letter by 13 September 2019.

36. On 13 September 2019, Respondent submitted its comments to Claimants' 6 September 2019 letter and requests. Respondent requested a two-week extension to file its response to Claimants' Request for Provisional Measures.

37. By letter dated 16 September 2019, the Tribunal (i) granted Claimants leave to submit the additional evidence referred to in the 6 September 2019 letter and a five-page letter describing the pending legal proceedings before the courts of the United States of America; and (ii)

granted Respondent a two-week extension until 2 October 2019 to file its Response to Claimants' Request for Provisional Measures.

38. On 25 September 2019, Claimants submitted the new evidence, as well as a six-page submission.

39. On 29 September 2019, Respondent alleged that Claimants had failed to follow the Tribunal's instructions and had instead submitted a submission on "new" arguments. Respondent requested that the Tribunal grant it an additional ten days to respond to Claimants' submissions.

40. On 2 October 2019, the Claimants informed the Tribunal that they did not object to the Respondent's request for an extension of time to file their response.

41. On 3 October 2019, the Tribunal informed the Parties that it was granting Respondent an extension of ten days from 2 October 2019 to file its Response to Claimants' Request for Provisional Measures and Claimants' letter of 25 September 2019.

42. Pursuant to the procedural schedule set forth in Exhibit A to Procedural Order No. 5, on 7 October 2019, Claimants filed the Statement of Claim, with Appendices G through K; Witness Statement of Mr. Frederick Warren dated 7 October 2019; Witness Statement of Mr. Gonzalo Gil White dated 7 October 2019; Witness Statement of Mr. Avi Yanus dated 7 October 2019; Witness Statement of Mr. José Antonio Cañedo White dated 7 October 2019; Expert Report of Mr. José Luis Izunza Espinoza dated 7 October 2019; Expert Report of Mr. Pablo T. Spiller and Ms. Carla Chavich (Compass Lexecon) dated 7 October 2019; Expert Report of Mr. Alfonso M. López Melih dated 7 October 2019; Exhibits C-0084 through C-0232; and Legal Authorities CL-0058 through CL-0268 (the "**Statement of Claim**" or "**C1**").

43. On October 14, 2019, Respondent filed its Response to Claimants' Request for Provisional Measures.

44. By letter dated 21 November 2019, Claimants informed the Tribunal of two inadvertent errors in their Statement of Claim filed on 7 October 2019. Those errors related to the citizenship status of Mr. Carlos Williamson-Nasi. Therefore, Claimants provided correct information and

amended their Statement of Claim. Claimants also submitted new Exhibits numbered C-233 and C-234 in support of the corrected information.

45. A hearing on provisional measures was held by telephone on 3 December 2019 (the "**Provisional Measures Hearing**").

46. On 19 December 2019, the Tribunal issued Procedural Order No. 6 on Claimants' Request for Provisional Measures. The Tribunal: (i) ordered the Respondent to use its best efforts to ensure that the arbitration was conducted effectively, and to refrain from taking any unjustified measures that could aggravate the dispute; (ii) requested the Respondent – and specifically the *Fiscalía General de la República* ("**FGR**") and the *Fiscalía General de Justicia de la Ciudad de México* ("**FGJCDMX**") – to provide specific information on the existence of any investigation against Quinn Emanuel and/or the attorneys acting in this arbitration.

47. On 13 January 2020, pursuant to the request in Procedural Order No. 6, Respondent informed the Tribunal that the *Dirección General de Consultoría Jurídica de Comercio Internacional* ("**CJCI**") had requested the FGR and the PGJCDMX to provide specific information to corroborate again whether there were any investigation files or court orders against any member of Quinn Emanuel.[1] Respondent informed the Tribunal that as at the date of issuance of the communications from the FGR and the PGJCDMX, there were no investigation files or injunctions initiated against Quinn Emanuel or any of its members in this arbitration.

48. On 16 January 2020 the Tribunal acknowledged receipt of the Respondent's communication dated 13 January 2020 and informed that no further decision was to be made by the Tribunal for the time being.

49. On 12 February 2020, Claimants sent a letter to the Tribunal regarding Respondent's communication of 13 January 2020. In this regard, the Claimants advised that they considered that the responses of the FGR and the PGJCDMX did not comply with the terms of Procedural Order No. 6 requiring "concrete information on the existence of any

[1] Respondent's Letter (Oficio No. DGCJCI.511.66.014.2020) dated 13 January 2020 signed by Mr. Orlando Pérez Gárate, Director General of the Undersecretariat of Foreign Trade, p. 1.

investigation", and asked the Tribunal to request Respondent to remove any doubt as to the existence of investigations against Quinn Emanuel or any of the Claimants' counsel.

50. On 13 February 2020, the Tribunal invited the Respondent to comment on the Claimants' letter of 12 February 2020. On 18 February 2020, the Respondent responded to the Claimants' communication and indicated that it considered that it had fully complied with Procedural Order No. 6.

51. By communication dated 21 February 2020, upon instructions from the Tribunal, the Secretary of the Tribunal informed the Parties that the Tribunal considered that no indication or evidence of a change of circumstances requiring the issuance of an additional order to Procedural Order No. 6 had been provided.

52. By communication of 3 April 2020, Respondent informed the Tribunal that it had entered into negotiations with Claimants with a view to agreeing on an extension of time for the filing of Respondent's Statement of Defence due to the fact that the cyber-attack suffered by the Ministry of Economy on 22 February 2020 and the international COVID-19 crisis had affected the work undertaken by Respondent to prepare its defence in this arbitration.

53. On 8 April 2020, Respondent informed the Tribunal of the Parties' agreement to extend the filing date of Respondent's Statement of Defence. However, the Parties were still in discussions about the number of weeks of such extension, and the impact it might have on the procedural calendar.

54. On 17 April 2020, Respondent informed the Tribunal that the Parties had failed to reach an agreement on the extension requested by Respondent and therefore requested the Tribunal's intervention on this issue.

55. Upon the Tribunal's instructions, on 19 April 2020, the Secretary of the Tribunal informed the Parties of the Tribunal's decision to extend the deadline for the submission of the Statement of Defence by three weeks from 20 April 2020, i.e., until 11 May 2020. Notwithstanding the foregoing, the Tribunal invited the Parties to continue consulting with each other with a view to reaching an agreement on the remainder of the procedural calendar.

56. On 21 April 2020, the Respondent requested a five-week extension of time to file its Statement of Defence. On 22 April 2020, the Tribunal invited Claimants to comment on Respondent's request by 23 April 2020.

57. On 23 April 2020, Claimants filed their response to Respondent's request accompanied by a proposed procedural schedule and requested the Tribunal to adopt such procedural schedule.

58. On the Tribunal's instructions, on 25 April 2020, the Secretary of the Tribunal informed the Parties of the approval of the extension of the deadline for the submission of the Statement of Defence until 1 June 2020 and invited the Parties to use their best efforts to reach an agreement on the remainder of the procedural calendar.

59. On 22 May 2020, the Parties sent a joint communication to the Tribunal informing that they had failed to reach a consensus on the procedural timetable and requested the Tribunal to decide on the Parties' proposals. On 25 May 2020, the Tribunal invited the Parties to submit their positions on the respective procedural calendar by 29 May 2020.

60. On 29 May 2020, each Party presented, respectively, its positions on the proposed adjustments to the procedural calendar.

61. On 1 June 2020, Respondent filed its Statement of Defence together with: Witness Statement of Mr. Rodrigo Loustaunau Martínez dated 27 May 2020; Witness Statement of Mr. Miguel Ángel Servín Diago dated 25 May 2020; Witness Statement of Mr. José Antonio González Anaya dated 25 May 2020; Witness Statement of Ms. Ma. Luz Lozano Rodríguez dated 26 May 2020; Witness Statement of Mr. Carlos Alberto Treviño Medina dated 8 May 2020; Expert Report of Dr. José Alberro dated 29 May 2020; Expert Report of Mr. Jorge Asali Harfuch dated 29 May 2020; Expert Report of Mr. Francisco Javier Paz Rodríguez dated 5 May 2020; Exhibits R-0004 to R-0231 and Legal Authorities RL-0008 to RL-0125 (the "**Statement of Defence**" or "**R1**").

62. By letter dated 8 June 2020, the Tribunal modified the procedural calendar taking into account the Parties' proposals (thus replacing Annex A of Procedural Order No. 5) and offered the Parties alternative dates for the hearing.

63. On 13 July 2020, pursuant to § 5(iv) of Procedural Order No. 3, Claimants objected to some of Respondent's proposed redactions and proposed other redactions to the Statement of Defence in a separate Transparency Appendix.

64. On 17 July 2020, the Parties confirmed that they were not available to hold the hearing on the dates proposed by the Tribunal. On 21 July 2020, the Tribunal proposed new alternative dates.

65. On 22 June 2020, pursuant to § 5 (i) of Procedural Order No. 3, Respondent filed a redacted version of the Statement of Defence, together with a Transparency Appendix requesting the protection of certain information.

66. On 27 July 2020, pursuant to § 5(v) of Procedural Order No. 3, Respondent objected to Claimants' proposed redactions.

67. On 27 and 29 July 2020, the Parties confirmed their availability to hold the hearing the weeks of 25-29 April 2022 and 2-6 May 2022.

68. On the Tribunal's instructions, on 31 July 2020, the Secretary of the Tribunal informed the Parties that the dates of 25 to 29 April 2022 had been reserved for the hearing.

69. On 4 August 2020 and 7 August 2020, after leave of the Tribunal, Claimants and Respondent each filed, respectively, a one-page submission on redaction requests.

70. By Procedural Order No. 7 of 18 August 2020, the Tribunal issued the Decision on the Parties' Requests for the Protection of Information.

71. On 7 September 2020, each Party filed a request for the Tribunal to decide on the production of documents, including their respective objections and responses.

72. By Procedural Order No. 8 of 9 October 2020, the Tribunal issued the Decision on the Parties' Request for Document Production.

73. On 20 October 2020, Respondent indicated having "serious concerns regarding Applications 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 34, 43, 51 and 72"[2] and requested the Tribunal's guidance

[2] Respondent's Letter (Oficio No. DGCJCI.511.58.530.2020) dated 20 October 2020, p. 1.

on how to comply with the Tribunal's orders in respect of such applications. On 2 November 2020, with the Tribunal's permission, Claimants submitted their comments to Respondent's 20 October 2020 request.

74. On 11 November 2020, by Procedural Order No. 9, the Tribunal issued its Second Decision on the Parties' Request for Production of Documents and decided: (i) to confirm the order to exhibit the documents in relation to requests 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 34 and 72; (ii) to maintain its decision on the relevance and specificity of the documents covered by requests 43 and 51; and (iii) for the rest of the requests subject to such decision, to extend the deadline for exhibition until Friday, 20 November 2020, unless the Parties set, by mutual agreement, a different deadline.

75. On 25 February 2021, Claimants indicated that they intended to file with their Reply documents exhibited by third parties as part of a *discovery* in a bankruptcy proceeding pending before the District Court for the Southern District of New York pursuant to 28 U.S.C. Section 1782 (the "**Chapter 15 Discovery**"). Claimants argued that disclosure of the information obtained in the aforementioned proceeding to any entity, person or representative would require the prior execution of two confidentiality agreements (the "**Protective Orders**"). In order to be able to use these materials in the present arbitration, Claimants requested that the Tribunal and Respondent sign the confidentiality agreements.

76. On 4 and 10 March 2021, the Respondent objected to the signing of the declarations set out in the Protective Orders. On 8 March 2021, Claimants requested the Tribunal to order Respondent to sign the declarations.

77. On 12 March 2021, the Tribunal extended the deadlines for the submission of the Reply and Rejoinder by one week each.

78. On 16 March 2021, the Tribunal issued Procedural Order No. 10 on Claimants' request to sign the declarations contained in the Protective Orders, and decided that neither its Members nor Respondent were required to sign the confidentiality agreements contained in the Protective Orders. The Tribunal also extended the deadlines for filing the Reply to 22 March 2021 and the Rejoinder to 21 June 2021. The rest of the procedural calendar was adjusted accordingly.

79. On 22 March 2021, Claimants filed their Reply, together with: Expert Report of Mr. Charles Duncan Weir dated 22 March 2021; Second Expert Report of Mr. Pablo T. Spiller and Ms. Carla Chavich (Compass Lexecon) dated 22 March 2021; Second Expert Report of Mr. José Luis Izunza Espinosa dated 22 March 2021; Expert Report of Mr. Manuel Elías Tron dated 22 March 2021; Second Expert Report of Mr. Alfonso M López Melih; Second Witness Statement of Mr. Gonzalo Gil White dated 22 March 2021; Second Witness Statement of Mr. Frederick J. Warren dated 22 March 2021; Second Witness Statement of Mr. José Antonio Cañedo White dated 22 March 2021; Witness Statement of Mr. Carlos Williamson-Nasi dated 22 March 2021; Second Witness Statement of Dr. Avi Yanus dated 22 March 2021; Appendices M and L; Exhibits C-0233 to C-0568; and Legal Authorities CL-0269 to CL-0413 ("**Reply**"). Claimants indicated that the Reply contained "Confidential" and "Strictly Confidential" information protected under the Protective Orders. The Claimants also indicated that, pursuant to the Protective Orders, the Reply was not to be seen by or shared with persons other than counsel for the Respondent and the Tribunal.

80. On 23 March 2021, Claimants submitted a new version of the Reply, redacted to conceal information classified as "Strictly Confidential". On 12 April 2021, pursuant to § 5(i) of Procedural Order No. 3, Claimants submitted a redacted version of the Reply, protecting both "Confidential" and "Strictly Confidential" information, together with a Transparency Appendix requesting the protection of certain information. The Claimants also resubmitted the version of their Reply filed on 23 March 2021, in which information classified as "Strictly Confidential" was protected.

81. On 15 April 2021, Respondent addressed a communication to the Tribunal requesting that the Tribunal order Claimants to exhibit and provide to Respondent, on an expedited basis, the entirety of the documents subject to the Protective Orders in the Section 1782 proceeding pending before the courts of the United States of America. On 19 April 2021, the Tribunal invited Claimants to respond to Respondent's 15 April 2021 request.

82. On 21 April 2021, the Claimants sent a communication to the Tribunal refusing to produce the documents, on the grounds that complying with the Respondent's request was unduly burdensome. On 29 April 2021, the Tribunal requested additional clarifications from the Parties, to be submitted by 6 May 2021.

83. On 3 May 2021, the Respondent objected to the version of the Reply submitted by the Claimants on 23 March 2021. The Respondent argued that the Claimants were unilaterally imposing confidentiality requirements on the Tribunal and the Respondent that went beyond those set forth in Procedural Orders No. 1 and 3. On 4 May 2021, the Tribunal invited the Claimants to submit comments in connection with the Respondent's letter of 3 May 2021.

84. On 6 May 2021, the Parties filed their respective briefs where they reaffirmed their positions on the request for production of documents subject to Protective Orders.

85. On the same day, ICSID informed the Parties that due to an internal redistribution of the Centre's workload, Ms. Patricia Rodríguez Martín, ICSID Legal Counsel, had been assigned to serve as Secretary of the Tribunal in the case.

86. On 11 May 2021, Claimants submitted their comments responding to Respondent's 3 May 2021 request in connection with the Reply.

87. On 13 May 2021, the Tribunal issued Procedural Order No. 11 on Respondent's Request for Production of the Documents Protected by the Protective Orders. The Tribunal granted Respondent's Request and ordered Claimants to produce, by 2 June 2021, all documents subject to the Protective Orders from the Section 1782 proceeding pending before the courts of the United States of America.

88. On 27 May 2021, the Tribunal issued Procedural Order No. 12 regarding the Decision on the Parties' Requests for Protection of Information, and ordered that the Reply be published with the edits proposed on 12 April 2021 by the Claimants.

89. On 7 June 2021, the Respondent sent a communication to the Tribunal requesting a 10-week extension for the submission of the Rejoinder. On 8 June 2021, the Tribunal invited the Claimants to comment on the Respondent's request by 11 June 2021. On 11 June 2021, Claimants submitted a letter opposing Respondent's extension request.

90. On 15 June 2021, the Tribunal issued Procedural Order No. 13 on Respondent's Request for extension of time to submit its Rejoinder. The Tribunal decided to grant an extension of two weeks to the Respondent for the submission of the Rejoinder (due no later than 5 July 2021).

91. On 16 June 2021, the Respondent sent a communication to the Tribunal requesting that the Tribunal grant an additional 14 calendar days of extension for the submission of the Rejoinder. On 17 June 2021, the Tribunal invited the Claimants to comment on the Respondent's new request. On 18 June 2021, Claimants sent a letter to the Tribunal objecting to Respondent's new extension request.

92. On 21 June 2021, the Tribunal issued Procedural Order No. 14 regarding Respondent's second request for extension of time to file the rejoinder. The Tribunal granted an extension of one additional week to the Respondent for the submission of the Rejoinder.

93. On 9 July 2021, the Secretary of the Tribunal, at the direction of the Tribunal, informed the United States of America and the Government of Canada of the date for filing submissions under NAFTA Article 1128 ("**1128 Submissions**").

94. On 12 July 2021, Respondent filed its Rejoinder together with: Witness Statement of Mr. Erick Jiménez Reyes dated 2 July 2021; Second Witness Statement of Mr. Rodrigo Loustaunau Martínez dated 10 July 2021; Second Witness Statement of Mr. Miguel Ángel Servín Diago dated 11 July 2021; Second Witness Statement of Mr. Carlos Alberto Treviño Medina dated 9 July 2021; Second Expert Report of Dr. José Alberro dated 9 July 2021; Second Expert Report of Mr. Jorge Asali Harfuch dated 12 July 2021; Second Expert Report of Mr. Francisco Javier Paz Rodríguez dated 12 July 2021; Exhibits R-0232 to R-0369 and Legal Authorities RL-0126 to RL-0221 ("**Rejoinder**" or "**R2**").

95. On 23 July 2021, the Respondent sent a communication to the Tribunal requesting an extension of the deadline for the filing of the 1128 Submissions. The Respondent requested that the six-week period provided for in Procedural Order No. 14 between the last written submission and the 1128 Submissions be counted from the time ICSID published the public versions of the Reply and Rejoinder. On 24 July 2021, the Tribunal invited Claimants to comment on Respondent's request. On 30 July 2021, the Claimants sent a letter to the Tribunal in which they objected to the Respondent's extension request.

96. On 2 August 2021, the Parties sent a communication to the Tribunal informing that they had reached an agreement for the simultaneous filing of the requests for protection of confidential information in the Rejoinder.

97. On 4 August 2021, the Tribunal issued Procedural Order No. 15 on Respondent's Request dated 23 July 2021. The Tribunal rejected Respondent's request and maintained the calendar set forth in Procedural Order No. 14.

98. On 5 August 2021, pursuant to § 5 (i) of Procedural Order No. 3, and the agreement reached by the Parties on 2 August 2021, Respondent submitted an edited version of the Rejoinder, together with a Transparency Appendix requesting that certain information be redacted. Pursuant to the Parties' agreement of 2 August 2021, on the same day, Claimants submitted their Transparency Appendix.

99. On 13 August 2021, the Parties wrote again to the Tribunal informing that they had agreed to submit simultaneous comments to the counterpart's information protection requests on 23 August 2021.

100. On the same date, the Claimants sent a letter to the Tribunal requesting that the witness statement of Mr. Jiménez, submitted together with the Rejoinder on 12 July 2021, be excluded from the case file.

101. On 16 August 2021, the Parties submitted the lists of witnesses and experts that each intended to examine at the Hearing. In their submission, the Claimants requested the appearance of Mr. Yanus, their own witness, to be examined at the Hearing. However, the Respondent had not requested the appearance of Mr. Yanus.

102. Also on 16 August 2021, the Tribunal invited Respondent to submit comments to Claimants' request to exclude Mr. Jimenez's witness statement by 20 August 2021.

103. On 17 August 2021, Respondent sent a communication to the Tribunal requesting an extension of the deadline to reply to Claimants' letter of 13 August 2021, in connection with Mr. Jiménez's witness statement. By email of the same date, the Tribunal granted the extension requested by Respondent.

104. On 20 August 2021, the Respondent sent a communication to the Tribunal requesting it to reject the appearance of Dr. Yanus as a witness at the Hearing since the Respondent had decided not to cross-examine him.

105. On 23 August 2021, Respondent submitted its comments to Claimants' 13 August 2021 request to exclude Mr. Jimenez's witness statement.

106. On the same date, the Parties filed their objections to the opposing Party's requests for protection of information to the Rejoinder.

107. Also on 23 August 2021, the Tribunal invited Claimants to submit observations on the Respondent's request to refuse Mr. Yanus' appearance at the Hearing. Additionally, the Tribunal invited the Parties to discuss among themselves and inform the Tribunal whether, in their opinion, more days should be reserved for the Hearing in light of the number of witnesses and experts called for examination.

108. On 24 August 2021, the Government of Canada and the United States of America each presented their respective 1128 Submissions.

109. On 30 August 2021, Claimants submitted a letter opposing Respondent's request regarding Mr. Yanus. On 1 September 2021, Respondent sent a letter addressing Claimants' 30 August 2021 communication. The Respondent reiterated its request that Mr. Yanus' appearance at the Hearing be denied.

110. On 3 September 2021, the Tribunal issued Procedural Order No. 16 on Claimants' Request to Exclude Mr. Jimenez's Declaration from the case file. The Tribunal rejected the Claimants' request.

111. On the same date, the Claimants requested permission to respond to the Respondent's further communication of 1 September 2021 regarding Mr. Yanus' appearance at the Hearing. The Claimants informed the Tribunal that they proposed that the Parties also reserve the week of 2-6 May for the Hearing.

112. On 7 September 2021, the Tribunal authorized Claimants to respond to Respondent's 1 September 2021 request by 13 September 2021. On the same day, Claimants submitted their observations on the Submissions on Article 1128.

113. On 9 September 2021, the Tribunal issued Procedural Order No. 17 regarding the Decision on the Parties' Requests for Protection of Information.

114. On 13 September 2021, Claimants submitted a letter rejecting Respondent's arguments made in its 1 September 2021 letter regarding the appearance of Mr. Yanus.

115. On 23 September 2021, the Tribunal issued Procedural Order No. 18 addressing Respondent's Request regarding Mr. Yanus' attendance of the Hearing. The Tribunal decided to reject the Respondent's request to exclude Mr. Yanus from testifying at the Hearing, and to call Mr. Yanus directly as a witness of the Tribunal, to be examined at the Hearing. The Tribunal requested the Parties to discuss the extent and modalities of the Hearing and to communicate the results of that discussion to the Tribunal no later than 11 October 2021.

116. On 5 October 2021, Claimants sent a communication to the Tribunal, requesting that the Tribunal order Respondent to produce all data and information underlying Exhibit CR-36 to Dr. José Alberro's Second Expert Report on damages, or exclude from the file the said Exhibit and the portions of Dr. Alberro's report that referred to said Exhibit.

117. On 7 October 2021, the Tribunal invited Respondent to submit observations on Claimants' submission regarding Exhibit CR-36.

118. On 11 October 2021, the Claimants informed the Tribunal that the Parties had been unable to reach an agreement regarding the extent and modality of the Hearing.

119. On 12 October 2021, the Respondent sent a letter to the Tribunal regarding the organization of the Hearing.

120. On 14 October 2021, Respondent filed its response to Claimants' 5 October 2021 communication regarding Exhibit CR-36.

121. On 22 October 2021, the Tribunal issued Procedural Order No. 19 on Claimants' Request regarding Exhibit CR-36 and the organization of the Hearing. The Tribunal rejected Claimants' request to strike Exhibit CR-36 from the record and invited the Parties to discuss among themselves the methodology used for the elaboration of Exhibit CR-36. The Tribunal also decided that the first week of the Hearing would be held between 25 and 30 April 2022, in person, as originally contemplated; and the second week of the Hearing would be held remotely on a date to be determined by the Tribunal and the Parties.

122. On 11 November 2021, the Tribunal reiterated to the Parties its preference for the Hearing to be held, whenever possible, in person and invited the Parties to explore the possibility of holding the Hearing in a Latin American country, should it be impossible to hold it in Washington, D.C., as foreseen in Section 22.1 of Procedural Order No. 1, due to the restrictions in place in response to the COVID-19 pandemic.

123. By letter dated 26 January 2022, counsel for Claimants informed the Tribunal that Mr. Carlos Williamson-Nasi, Claimant in this arbitration, had passed away on 2 January 2022, and advised that:

> Counsel is in the process of consulting with Mr. Williamson-Nasi's family regarding the administration of, and probate proceeding for, his estate, as well as any formalities necessary for the continued prosecution of his claims in this arbitration under the North American Free Trade Agreement.
>
> Claimants' counsel intends to provide the Tribunal with additional information as soon as practicable under these unfortunate circumstances.

124. On 28 January 2022, the Tribunal sent a communication to the Parties in which it took note of the Claimants' notice of 26 January 2022 and invited the Claimants to inform the Tribunal of the impact that Mr. Williamson-Nasi's death would have on the development of the case.

125. On the same date, the Tribunal sent a communication to the Parties, requesting them to inform the Tribunal of the status of their negotiations regarding the venue of the Hearing. In accordance with Section 21.1 of Procedural Order No. 1, the Tribunal also invited the Parties to confirm their availability to hold a pre-hearing organizational meeting on 10 or 11 March 2022.

126. On 11 February 2022, the Claimants informed the Tribunal that they were in communication with the family of Mr. Carlos Williamson-Nasi and would inform the Tribunal of the potential impact on this arbitration as soon as they were able to do so.

127. Also on 11 February 2022, the Parties sent their submissions to the Tribunal regarding the format of the Hearing and the dates for the organizational meeting. The Claimants expressed their preference for the Hearing to be held in person in Washington, D.C. For its part, the Respondent argued that it considered that due to the health crisis generated by COVID-19

and the Omicron variant, it was necessary to hold the Hearing in a virtual format in order to ensure due process and equality of arms between the Parties.

128. On 18 February 2022, the Tribunal issued Procedural Order No. 20 on the format of the Hearing. The Tribunal decided that (a) the Parties should send to the Tribunal no later than Wednesday, 9 March 2022, a list of participants, indicating who would attend the Hearing in person and who would need to connect remotely, as well as the reasons why they would be unable to attend in person; (b) that the pre-hearing organizational meeting would be held on Friday, 11 March 2022; and (c) that the Hearing would be held, in principle, in person in Washington, D.C. between 24 April and 1 May 2022, with the possibility for remote participation by persons who are justifiably unable to attend in person.

129. On the same day, Claimants sent a letter to the Tribunal requesting authorization to submit a third expert report on damages quantification from Pablo Spiller and Carla Chavich. On 22 February 2022, the Tribunal invited the Respondent to submit its comments on the Claimants' request. On 28 February 2022, Respondent sent a letter to the Tribunal opposing Claimants' request.

130. On 4 March 2022, the Tribunal issued Procedural Order No. 21 on Claimants' Request regarding the submission of third expert report on quantification. The Tribunal rejected Claimants' request to submit a third expert report on damages quantification from Prof. Spiller and Ms. Chavich.

131. On 8 March 2022, Respondent sent a letter to the Tribunal updating the list of witnesses to be called at the Hearing. Among others, the Respondent indicated that it no longer required the presence of Mr. Charles Duncan Weir and Mr. Manuel Elías Tron at the Hearing. On 9 March 2022, the Tribunal invited the Claimants to comment on the Respondent's communication of 8 March 2022.

132. On the same date, the Respondent sent a letter to the Tribunal in connection with Procedural Order No. 20, in which the Respondent indicated the persons who would have to remotely connect to the Hearing and informed the Tribunal of the reasons why they would not be able to attend in person.

133. On 10 March 2022, in response to the Tribunal's invitation, Claimants informed the Tribunal of their intention to question Mr. Tron at the Hearing. On the same date, Claimants sent a letter to the Tribunal requesting: (i) authorization from the Tribunal to incorporate into the record of the proceeding a number of additional factual exhibits and legal authorities; and (ii) that the Tribunal order Respondent to require the appearance of Oro Negro's former Chief Legal Officer, Mr. Alonso del Val Echeverría, at the Hearing to be cross-examined.

134. On 11 March 2022, a pre-hearing organizational meeting was held between the Parties and the Tribunal by videoconference, at which procedural, administrative and logistical issues for the preparation of the Hearing were discussed.

135. On the same date, the Tribunal invited Respondent to comment on Claimants' 10 March 2022 request by 18 March 2022.

136. On 18 March 2022, Respondent requested leave to amend Exhibit R-0359, a request that was reiterated on 29 March 2022, together with a request for leave to correct three additional errors in connection with Exhibits R-0132, R-0282 and the final pages of Mr. Alberro's report. On 31 March 2022, the Tribunal invited Claimants to comment on Respondent's 18 March 2022 communication not later than 4 April 2022.

137. By separate letter of the same day, Respondent submitted its written response to Claimants' 10 March 2022 request. Respondent asked the Tribunal to reject Claimants' request to submit new evidence to the record, as well as Claimants' request to order Respondent to produce Oro Negro's former Chief Legal Officer, Mr. Alonso del Val Echeverría, at the Hearing. In addition, the Respondent requested leave to amend Exhibit R-0359.[3]

138. On 25 March 2022, the Tribunal issued Procedural Order No. 22 regarding remote participation in the Hearing, the examination of Mr. Tron and Mr. del Val and the production of additional documents to the file.

[3] See § 133 *supra*.

139. On the same date, the Tribunal issued Procedural Order No. 23 on the Organization of the Hearing to be held at ICSID's facilities in Washington, D.C. from 24 April 2022 to 1 May 2022.

140. On 4 April 2022, Claimants submitted their comments to Respondent's 29 March 2022 request.

141. On 6 April 2022, Respondent informed the Tribunal that Mr. Treviño would not attend the Hearing and requested that Mr. Treviño's two witness statements remain on the record. On 11 April 2022, Claimants submitted their comments to Respondent's 6 April 2022 request.

142. On 7 April 2022, the Tribunal issued Procedural Order No. 24 regarding Respondent's Request to Correct Certain Exhibits.

143. On the same date, the Respondent sent a communication to the Tribunal requesting leave to submit new documentary evidence to the file pursuant to § 18.3 of Procedural Order No. 1. On 8 April 2022, the Tribunal invited Claimants to respond to Respondent's communication of 7 April 2022, not later than Wednesday, 13 April 2022.

144. On 8 April 2022, the Respondent requested the Tribunal's authorization for Ms. Virginia Pérez del Castillo and Mr. Eduardo Fragoso and Ms. María Luz Lozano Rodríguez to participate in the Hearing remotely. On the same date, the Claimants requested that Mr. Avi Yanus appear at the Hearing remotely for health reasons, attaching a medical certificate to that effect.

145. On 11 April 2022, Claimants sent a letter to the Tribunal in response to Respondent's letter of 7April 2022.

146. On 12 April 2022, the Tribunal issued Procedural Order No. 25 concerning Remote Participation in the Hearing. The Tribunal decided to grant the Parties' requests of 8 April 2022.

147. On 13 April 2022, the Tribunal issued Procedural Order No. 26 regarding Respondent's request to add new documentary evidence to the record.

148. By letter dated 15 April 2022, Claimants' counsel informed the Tribunal that Ms. María Clara Lloreda Gomez, the surviving spouse of Mr. Carlos Enrique Williamson-Nasi, had been

formally appointed to act as personal representative of Mr. Williamson-Nasi's estate by the Probate Division of the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County. In her capacity as representative of Mr. Williamson-Nasi's estate, Ms. Lloreda granted a new power of attorney in favour of Claimants' counsel to represent Mr. Williamson-Nasi's estate in this arbitration and to continue to advance claims on behalf of Mr. Williamson-Nasi's estate.

149. On 18 April 2022, the Tribunal issued Procedural Order No. 27 regarding the Testimony of Mr. Treviño. The Tribunal rejected Respondent's request that Mr. Treviño's two witness statements remain on the record.

150. The Hearing on Jurisdiction and the Merits was held from 24-30 April 2022 in Washington, D.C. The following persons were present at the Hearing:

*Tribunal:*

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| Prof. Diego P. Fernández Arroyo | President |
| Prof. Gabriel Bottini | Arbitrator |
| Prof. Andrés Jana | Arbitrator |

ICSID *Secretariat:*

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| Ms. Patricia Rodríguez Martín | Secretary of the Tribunal |
| Ms. Ana Cecilia Chamorro | Paralegal |

*For the Claimants:*

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| Mr. Juan P. Morillo | Quinn Emanuel Urquhart & Sullivan |
| Mr. David M. Orta | Quinn Emanuel Urquhart & Sullivan |
| Mrs. Philippe Pinsolle | Quinn Emanuel Urquhart & Sullivan |
| Ms. Dawn Y. Yamane Hewett | Quinn Emanuel Urquhart & Sullivan |
| Mr. Gabriel F. Soledad | Quinn Emanuel Urquhart & Sullivan |
| Mr. Alexander G. Leventhal | Quinn Emanuel Urquhart & Sullivan |
| Ms. Julianne Jaquith | Quinn Emanuel Urquhart & Sullivan |
| Mrs. Serafina Concannon | Quinn Emanuel Urquhart & Sullivan |

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| Mr. Gregg Badichek | Quinn Emanuel Urquhart & Sullivan |
| Ms. Ana Paula Luna Pino | Quinn Emanuel Urquhart & Sullivan |
| Mr. Woo Yong Chung | Quinn Emanuel Urquhart & Sullivan |
| Ms. Kayla Feld | Quinn Emanuel Urquhart & Sullivan |
| Ms. Kristin T. Casey | Quinn Emanuel Urquhart & Sullivan |
| Ms. Thalia Lamping | Quinn Emanuel Urquhart & Sullivan |
| Mr. Martín Cano | Quinn Emanuel Urquhart & Sullivan |
| Ms. Amanda Ibañez | Quinn Emanuel Urquhart & Sullivan |
| Ms. Cindy Molina | Quinn Emanuel Urquhart & Sullivan |
| Ms. Samantha Gillespie | Quinn Emanuel Urquhart & Sullivan |
| Ms. Alejandra Jovel | Quinn Emanuel Urquhart & Sullivan |
| Mrs. Gabby Treviño | Quinn Emanuel Urquhart & Sullivan |
| Mr. Lesly Martínez | Quinn Emanuel Urquhart & Sullivan |
| | |
| Mr. Elías Mendoza Murguía | Guerra, Hidalgo y Mendoza Attorneys at Law |
| Mrs. Sandra Trejo Santillán | Guerra, Hidalgo y Mendoza Attorneys at Law |
| | |
| Mr. José Antonio Cañedo-White | Claimants/Witness |
| Mr. Frederick J. Warren | Claimants/Witness |
| Mrs. María Clara Lloreda Gómez | Claimants' Representative |
| Mr. Nicolás Williamson | Claimants' Representative |
| Mr. Sebastian Williamson | Claimants' Representative |
| | |
| Dr. Avi Yanus | Witness (by Zoom) |
| Mr. Gonzalo Gil White | Witness |
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| Mr. Alfonso López Melih | Expert |
| Mr. José Luis Izunza Espinosa | Expert |

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| Mr. Pablo T. Spiller (Compass Lexecon) | Expert |
| Mr. Jack Ghaleb (Compass Lexecon) | Expert |
| | |
| Mr. Carlos González | Graphic Consultant |
| Mr. Jorge Cadenas | Litigation technician |
| Mr. Henry Nwatu | IT Support Staff |

*For the Respondent*:

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| Mr. Orlando Pérez Gárate | Secretariat of Economy of Mexico |
| Ms. Cindy Rayo Zapata | Secretariat of Economy of Mexico |
| Mr. Francisco Diego Pacheco Román | Secretariat of Economy of Mexico |
| Mr. Alan Bonfiglio Rios | Secretariat of Economy of Mexico |
| Mr. Rafael Alejandro Augusto Arteaga Farfán | Secretariat of Economy of Mexico |
| Mrs. Laura Mejía Hernández | Secretariat of Economy of Mexico |
| Mr. Eduardo Fragoso Jacobo | Secretariat of Economy of Mexico |
| Mr. Eduardo Amerena | Secretariat of Economy of Mexico |
| Ms. Jacklyne Vargas | Secretariat of Economy of Mexico |
| Mr. César Manuel Remis Santos | Secretariat of Economy of Mexico |
| Ms. Virginia Isabel Pérez del Castillo Pérez | Secretariat of Economy of Mexico |
| Mr. Alejandro Barragan | Tereposky & DeRose LLP. |
| Ms. Ximena Iturriaga | Tereposky & DeRose LLP. |
| Mr. Omar Colomé | Bufete Asali, S.C. |
| Mr. Stephan E. Becker | Pillsbury Winthrop Shaw Pittman |
| Mr. Gary J. Shaw | Pillsbury Winthrop Shaw Pittman |
| | |
| Mr. Rodrigo Loustaunau | Witness / Expert witness |
| | |
| Mr. María Luz Lozano | Witness |
| Mr. José Antonio González Anaya | Witness |

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| Mr. Miguel Ángel Servín Diago | Witness |
| Mr. Javier Paz | Expert |
| Mr. Jorge Asali | Expert |
| Dr. José Alberro | Expert |

*Stenographers*:

Mr. David Kasdan

Ms. Dawn Larson

Mr. Leandro Iezzi

Mr. Rodolfo Rinaldi

*Interpreters*:

Mr. Daniel Giglio

Ms. Silvia Colla

*Zoom Technical Support*:

Mr. Adam Kirn Hennessey

151. In addition, the following attended on behalf of the Non-Disputing Parties:

Canada

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| Mr. Dmytro Galagan | Commercial Law Office |
| Mr. Scott Little | Commercial Law Office |
| Ms. Evelyne Bolduc | Global Affairs Canada |
| Ms. Lori Di Pierdomenico | Commercial Law Office |

United States of America

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| Ms. Lisa Grosh | U.S. Department of State |
| Mr. Álvaro Peralta | U.S. Department of State |
| Ms. Nicole C. Thornton | U.S. Department of State |
| Mr. Edward Rivera | U.S. Department of Commerce |
| Mr. William Hamby-Hopkins | U.S. Department of Commerce |

152. The following persons were questioned during the Hearing:

Mr. Frederick J. Warren

Mr. José Antonio Cañedo White

Mr. Gonzalo Gil White

Dr. Avi Yanus

Mr. Rodrigo Loustaunau

Mr. Miguel Ángel Servín Diago

Mrs. María Luz Lozano

Mr. José Antonio González Anaya

Mr. Alfonso López Melih

Mr. Javier Paz

Mr. Pablo T Spiller

Ms. Carla Chavich

Dr. José Alberro

153. On 18 May 2022, the Tribunal informed the Parties of the clarifications they would need to address in their Post-Hearing Brief.

154. On 11 July 2022, the Tribunal informed the Parties that the Post-Hearing Briefs should be submitted not later than 60 days after the date on which the final versions of the transcripts of the Hearing were available to the Parties, i.e., not later than 9 September 2022. It also informed them that the Parties should submit their cost statements within 30 days of the submission of the Post-Hearing Briefs, i.e. on 10 October 2022.

155. The Parties filed their simultaneous Post-Hearing Briefs on 9 September 2022.

156. On 6 October 2022, the Claimants wrote to the Tribunal on behalf of both Parties, requesting an extension of the deadline to file their cost submissions until 11 November 2022. The Respondent confirmed its agreement with the Claimants' communication on 7 October 2022.

157. On 9 October 2022, the Tribunal informed the Parties that it had approved the requested extension.

158. The Parties submitted their cost statements on 11 November 2022.

159. On 23 November 2022, the Claimants sent a letter to the Tribunal, requesting leave to introduce INTERPOL's decision on Mexico's Second Red Notice Application (the "**Second INTERPOL Decision**") into the record of the arbitration pursuant to § 18.3 of Procedural Order No. 1.

160. On 28 November 2022, the Tribunal invited the Respondent to comment on the Claimants' request by 2 December 2022.

161. On 29 November 2022, the Respondent asked the Tribunal for an extension of the deadline to submit its response to the Claimants' request until 6 December 2022. The extension was authorized by the Tribunal on 2 December 2022.

162. On 6 December 2022, the Respondent submitted its response to the Claimants' request, arguing *inter alia* that the Claimants had failed to demonstrate exceptional circumstances justifying adding the Second INTERPOL Decision on the record.

163. On 19 December 2022, the Tribunal issued Procedural Order No. 30, on the Claimants' request to submit additional evidence into the record.

164. On 7 September 2023, the Respondent sent a letter to the Tribunal requesting leave to add into the record a decision issued by the Tribunal Federal de Justicia Administrativa on 2 August 2023 in Juicio 31949/21 (the "**Decision of Juicio 31949/21**"), alleging that there were exceptional circumstances and good cause justifying the inclusion of the Decision into the record in accordance with Section 18.3 of Procedural Resolution No. 1.

165. On 11 September, the Tribunal invited the Claimants to comment on the Respondent's request before 15 September 2023.

166. On 15 September 2023, the Claimants sent a letter to the Tribunal, objecting to the Respondent's request. In their submission, the Claimants argued that there were no exceptional circumstance or good cause that justified adding the Decision to the record, and that its inclusion would disrupt the equality of arms and prejudice the Claimants' rights to due process.

167. On 3 October 2023, the Tribunal issued Procedural Order No. 31, on the Respondent's request to submit additional evidence into the record.

168. On 10 October 2023, the Respondent saved the Decision of Juicio 31949/21 on the case's Box folder.

169. The procedure was closed on 16 August 2024.

## III. THE POSITIONS OF THE PARTIES

### *1. Claimants' positions*

A) Jurisdiction

170. The claims have been brought under Article 1116(1) and 1117(1) of the NAFTA.

171. Claimants note that Alicia Grace, Carolyn Grace Baring, Diana Grace Beard, Frederick Grace, Frederick Warren, Gary Olson, Genevieve Irwin, Gerald Parsky, John Irwin III, Nicholas Grace, Oliver Grace, Robert Witt, and Virginia Grace are all U.S. nationals.[4]

172. Similarly, Claimants observe that Ampex Trust, Apple Oaks, Brentwood, Cambria, Floradale, Warren IRA, Irwin Trust, Parsky IRA, ON5, Rainbow, Witt IRA, and Vista Pros are enterprises constituted or organized under the laws of one of the states within the United States.[5]

173. Claimants further stress that Mr. Williamson-Nasi is a dual national, holding US and Colombian citizenship. Still, Claimants consider this fact immaterial, especially given that the NAFTA contains no provision prohibiting dual nationals from being afforded the protection of the Treaty.[6]

174. A similar reasoning is put forward with regards to Mr. Cañedo White, who holds Mexican citizenship and is a US permanent resident. According to Claimants, permanent residents would be covered by the NAFTA's protections as per its Article 201.[7]

175. Since Article 1120 of the NAFTA provides a deliberate choice between the ICSID Convention, the ICSID Additional Facility Rules and UNCITRAL Rules, Claimants are of the view that the choice to proceed with this case under UNCITRAL Rules means that any

[4] See C1, § 331.

[5] See C1, § 343.

[6] See C1, § 332; Correspondence from the Claimants dated 21 November 2019, in which they recognize Mr. Williamson-Nasi also has Mexican nationality.

[7] See C1, §§ 334, 336.

potential restriction on dual nationality arising out of the ICSID regime would not be applicable.[8]

176. As to Axis Services, Axis Holding, Clue and F.305952, Claimants consider that these entities can be covered by Article 1117. Notably, Claimants highlight that Article 1117 allows an investor to bring a claim on behalf of a company that the investor owns or controls, further noting that all of the entities above are owned or controlled by US nationals or US permanent residents – namely Messrs. Williamson and Cañedo.[9]

177. Claimants define their investment as the direct or indirect ownership of 43.2% of the shares of Integradora Oro Negro, which would be a protected investment pursuant to Article 1139 of the NAFTA.[10] In this regard, Claimants would be able to bring claims directly on their behalf or indirectly on behalf of other companies holding Integradora's shares.[11]

178. It is Claimants' argument that loss of shareholder value is sufficient to give rise to a claim under Article 1116.[12] In particular, Claimants consider that it would have made little sense for the NAFTA Parties to afford the protection to shares in a local enterprise, and to have granted an investor that has made a protected investment the ability to claim for damages, if that investor was prohibited from making claims to recover for the so-called "reflective loss."[13]

179. Claimants argue that they have met all temporal requirements established by Articles 1116, 1117 and 1120.[14]

180. In addition, Claimants affirm that they have duly observed the conditions set out in Articles 1118 and 1119.[15]

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[8] See C1, § 337.

[9] See C1, § 344.

[10] See C1, § 353.

[11] See C1, § 354.

[12] See C1, § 355.

[13] See Reply, § 526.

[14] See C1, § 360.

[15] See C1, §§ 362-363.

181. With regards to the waiver requirement established in Article 1121, Claimants submitted their consent to arbitration and allegedly waived their right to initiate or continue any proceeding seeking damages against the Respondent based on the same measures underlying that investor's claim in the arbitration.[16]

182. Notably, Claimants rejects Mexico's objection as to the relation between Article 1121 and ongoing US proceedings. Claimants note that Mexico is not a party in any of these US proceedings and no specific acts of Mexico are at issue in these lawsuits.[17]

B) Attribution

183. Claimants argue that PEMEX, under sworn statement before US courts, has represented that it acts on behalf of the Mexican people and that it is fully owned by the Mexican government, consisting essentially of an organ of the Mexican State.[18]

184. From Claimants perspective, PEMEX's actions are attributable to Mexico under rules arising both from the NAFTA and from the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts (the "**ILC Articles**"). Notably, Article 1503 of the NAFTA and Articles 4, 5 and 7 of the ILC Articles would provide for the attribution of PEMEX's actions to Mexico.[19]

185. It is 'Claimants' understanding that, even if Chapter 15 has created a *lex specialis* as to the matter of attribution, this does not mean that the ILC Articles would not be applicable. In this regard, Claimants consider that said instrument could still be applied on a subsidiary and residual basis.[20]

186. Claimants note that PEMEX is a State Enterprise regulated by Articles 1505 and 201(1) of the NAFTA, which would have to act consistently with Mexico's obligations under the NAFTA.[21]

[16] See C1, § 364.

[17] See Reply, §§ 704 ss.

[18] See C1, §§ 368-369.

[19] See C1, § 371.

[20] See Reply, § 772.

[21] See C1, § 374.

187. Furthermore, Claimants affirm that PEMEX always acted under delegated authority, as defined by Article 1503(2) of the NAFTA and by NAFTA Note 45.[22] It is Claimants' contention that PEMEX operates under the PEMEX Law, which purpose would be *inter alia* to "maximize the State's oil revenue and contribute, in this way, to the nation's development."[23]

188. Drawing from case law, Claimants posit that the exercise of PEMEX's delegated governmental authority is materialized in the fact that (i) PEMEX is subject to the directions of Mexico's Minister of Energy, (ii) PEMEX has ample powers to fulfil its purpose, which includes entering into contracts, (iii) the 1938 Decree that created PEMEX declared it a public institution controlled by the State, (iv) PEMEX's Board of Directors, while being vested with ultimate decision-making authority with respect to PEMEX's operations, is a body entirely controlled by government appointees.[24]

189. Claimants note that the obligation set forth in Article 1503(2) of the NAFTA is one of result and not of conduct, that is, a "positive obligation."[25] Consequently, Claimants contend that Mexico failed to meet its duty to ensure that PEMEX acted in a manner consistent with NAFTA's Chapter 11 obligations.[26] In particular, Claimants consider that, by tolerating rampant corruption within PEMEX and allowing the deployment of retaliatory measures against Oro Negro, Mexico did not ensure regulatory control and supervision of PEMEX.[27]

190. Claimants consider that its attribution analysis under Article 1503(2) of the NAFTA is consistent with the attribution analysis as provided in Articles 4, 5 and 7 of the ILC Articles.[28]

191. Importantly, Claimants argue that "[e]ven if Pemex's conduct in imposing drastic amendments to the contracts and eventually terminating the business relationship with Claimants could be

[22] See C1, § 377; Reply, § 784.

[23] See C1, § 378; PEMEX Law at Article 4, CL-83.

[24] See C1, §§ 383-387.

[25] See Reply, § 772.

[26] See C1, § 389.

[27] See C1, § 390.

[28] See C1, §§ 391 ss; Reply, § 771.

considered a seemingly commercial act, the context of the relevant conduct leads to the conclusion that this 'seemingly commercial act' serves a governmental purpose."[29]

192. In fact, Claimants go even further by stating that "[t]he Mexican government expected bribes from Oro Negro."[30]

C) Expropriation

193. Claimants affirm that NAFTA's Article 1110 covers both direct and indirect expropriation, echoing case law on the matter.[31] In this regard, Claimants contend that the test for indirect expropriation is to assess whether the interference with property rights was sufficiently restrictive as to be tantamount to the taking of property from the owner or has substantially deprived the investor of the benefits of their investments.

194. Claimants note that indirect expropriation may take place over a period of time in an incremental way, being characterized by the fact that the measures in isolation do not amount to a breach of Treaty but when taken as a whole have the cumulative effect of expropriating the investors of their investment.[32]

195. Claimants highlight that expropriation under NAFTA does not require any subjective motive, being assessed only on the basis of the ultimate and actual effects of the measures.[33] It is Claimants' view that the scope of NAFTA's Article 1110 encompasses both physical assets, interests arising from contractual relationships and contractual rights *per se*.[34]

196. Claimants state that the investment made in Oro Negro "was based on its [Oro Negro] ability to contract with Pemex—its only customer and México's largest company—,"[35] and that the

[29] See C1, § 401.

[30] See C1, § 403.

[31] See C1, § 408.

[32] See C1, §§ 414 ss.

[33] See C1, § 421.

[34] See C1, § 422.

[35] See C1, § 434.

investors were deprived of the value and benefits of their investment due to Mexico's acts and omissions.[36]

197. In sum, Claimants claim that Mexico undertook a number of actions and omissions that considered together substantially deprived the Claimants of the use and enjoyment of their investment, and thus constituted an expropriation. For the Claimants, the expropriation of their investment was unlawful given that Mexico (a) did not provide compensation, (b) did not observe due process or NAFTA's Article 1105(1), (c) was discriminatory, and (d) did not have any public purpose.[37]

198. Claimants affirm they have demonstrated that their investment consisted *inter alia* of Oro Negro shares, so the value of Claimants' investment was equivalent to the value of those shares, which is in turn based on the value of Oro Negro, its contracts, its rigs, and its reputation for future business. From Claimants' perspective, given that Oro Negro no longer has the Oro Negro Contracts or the Rigs, and its reputation would have been ruined by Mexico, Claimants consider having been substantially deprived of the use and enjoyment of their investment.[38]

199. From Claimants perspective, Mexico would have carried out a politically motivated campaign to destroy Oro Negro due to the latter's refusal to "pay-to-play." In essence, Claimants consider that this campaign was conducted through its State-owned entity, judiciary, police, administrative officers, and the media. According to Claimants, Mexico did so, in part, to benefit certain bondholders – concretely, the creditors of the bonds first issued by the company Oro Negro Drilling on 24 January 2014 (the "**Bondholders**")– and a company who did pay bribes, Seamex, and did all this in very close coordination with the Ad- Hoc Group.[39]

200. Claimants note that Mexico did not pay any compensation regarding the purported expropriation, which ought to be paid on the basis of the investment's fair market value.[40]

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[36] See C1, § 434.

[37] See C1, § 436.

[38] See Reply, § 823.

[39] See Reply, § 866.

[40] See C1, § 439.

201. Claimants also affirm that "Pemex's desire to retaliate against Oro Negro for its refusal to pay bribes, and because of its desire to favour Seamex or domestic companies, is not a legitimate public purpose."[41]

202. Claimants are of the view that Mexico did not afford procedural or substantive due process to the investors while conducting its alleged campaign against Oro Negro.[42] In addition, the interference with the investors' investment would have been discriminatory, for PEMEX "singled out" Oro Negro and treated its competitors more favourably.[43]

D) Fair and equitable treatment

203. Claimants acknowledge that Fair and Equitable Treatment ("**FET**") under the NAFTA is to be applied in light of the international law minimum standard of treatment ("**MST**"), as provided for in a 2001 note issued by the NAFTA Free Trade Commission ("**FTC**").[44] Yet Claimants understand that the international law minimum standard is not static, having evolved over time to encompass broader protections than in the past.[45]

204. Claimants put forward some specific factors elements that would be encompassed by the NAFTA FET clause, such as the following ones: safeguarding investors' legitimate expectations; refraining from unreasonable, arbitrary and discriminatory measures; providing transparency and due process; refraining from harassment, coercion and abusive treatment; and acting in good faith.[46]

205. Claimants characterize the safeguard of investors' legitimate expectations as "[a] cornerstone of the fair and equitable treatment standard."[47] Further, Claimants affirm that "[t]he obligation

[41] See C1, § 444.

[42] See C1, § 448.

[43] See C1, § 452.

[44] See C1, § 454.

[45] See Reply, §§ 892 ss.

[46] See C1, § 460.

[47] See C1, § 462.

to safeguard legitimate expectations can extend to respecting contractual obligations to which the State has bound itself, particularly when the state entity is acting in a sovereign capacity."[48]

206. Claimants do recognize that many arbitral tribunals have ruled that a breach of contract will only amount to a breach of a FET protection if said contractual breach arises from the exercise of sovereign power. Still, Claimants argue that the effects of a contractual breach are to take precedence in the analysis of an FET violation. On these grounds, Claimants affirm that "when the State's action results in a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of value, the State has committed an FET violation."[49]

207. In any event, Claimants underscore that Mexico's conduct in relation to the Oro Negro Contracts does not consist of "mere contractual breach," rather being a "flagrant disregard of Claimants' legitimate expectations, including one in which Claimants could do business transparently with Pemex free from government-led and sponsored corruption, discrimination and reprisals for failing to accede to the government's bribe requests through known government intermediaries."[50]

208. In connection with legitimate expectations, Claimants also argue that any State conduct that is arbitrary, unreasonable, and discriminatory is *per se* a FET breach.[51] Similarly, Claimants argue that any conduct failing to meet standards of due process and transparency would amount to a FET violation, as NAFTA protects these principles in a number of its provisions – namely Articles 1110 and 1115.[52]

209. Furthermore, Claimants consider that disregard for due process and transparency may also be tantamount to a denial of justice.[53]

[48] See C1, § 465.

[49] See C1, § 470.

[50] See Reply, § 904.

[51] See C1, § 471.

[52] See C1, § 476.

[53] See C1, § 479.

210. Another element highlighted by Claimants in relation to the NAFTA FET clause relates to a prohibition against harassment, coercion, and abusive treatment. Indeed, Claimants affirm that the State cannot use its prerogatives to harass, coerce or abuse an investor.[54]

211. While Claimants consider that a finding of *mala fide* is not a requirement for the characterization of a FET violation, they do affirm that any bad faith conduct against an investor would be a "paradigmatic violation of the standard."[55]

212. Claimants note that the United Nations Convention Against Corruption has 186 State Parties out of 195 countries in the world – including Mexico.[56] Similarly, Claimants stress that Mexico criminalizes corruption domestically,[57] while being also a party to the Inter-American Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials.[58]

213. In this context, it is Claimants' understanding that Mexico is bound by a prohibition against corruption, an obligation that has its source in both domestic and international law. Accordingly, the disregard for such prohibition amounts to a FET violation, especially considering Claimants' legitimate expectations.[59]

214. Claimants further reject Mexico's contentions that Oro Negro made risky business decisions. For Claimants, the economic situation in Mexico at that point in time or the drop in global oil prices during the relevant timeframe cannot justify Mexico's conduct. In this regard, Claimants contend that "these macroeconomic issues [cannot] explain or excuse Mexico's collusion with the Ad-Hoc Group to destroy Oro Negro's business with the intention to have that business handed over to the Bondholders, including through Seamex's lease-back of the Rigs to Pemex."[60]

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[54] See C1, § 480.

[55] See C1, § 487.

[56] See C1, § 494.

[57] See C1, §§ 498, 500.

[58] See C1, §§ 495, 497.

[59] See C1, § 502; Reply, § 911.

[60] See Reply, § 914.

215. Claimants contend that the analysis of a FET violation is fact-dependent and must take into account the cumulative effects of the conduct of the State.[61]

216. From Claimants' perspective, Mexico breached its FET obligation in the following ways: (a) retaliating against Oro Negro for refusing to pay bribes by imposing onerous contract terms; (b) disregarding its commitments made in relation to the Oro Negro Contracts, such as returning the contracts to the original daily rates upon expiration of the amendments and not paying the liquidated damages under the Oro Negro Contracts when such contracts were terminated; (c) colluding with the Bondholders to drive Integradora out of business and attempting to award the Oro Negro Contracts to the Bondholders; (d) discriminating against Integradora in comparison to Seamex, a competitor in like circumstances, with regard to contractual rates and termination provisions, likely in exchange for bribes as well as in comparison to ODH, a competitor in like circumstances, which obtained liquidated damages for the termination of its contract; (e) further retaliating against Claimants and their counsel for filing this NAFTA claim by pursuing numerous meritless criminal and civil investigations in Mexico and allowing these baseless investigations to continue, causing Claimants to fear for their safety; and (f) violating Oro Negro's due process rights through irregular judicial proceedings marked by indicia of corruption.[62]

E) Full protection and security

217. Claimants argue that the Full Protection and Security ("**FPS**") standard encompasses the duty to enforce domestic law so as to deter third parties from colluding to destroy investors' investment.[63] In this regard, it is Claimants' view that the FPS standard complements FET to the extent that it affords protection against acts of third parties.[64]

[61] See C1, §§ 503, 504.

[62] See C1, § 505.

[63] See C1, § 532.

[64] See C1, § 532.

218. Claimants argue that FPS cannot be reduced to the physical protection of investors and investments, advocating for a broader approach to the standard. Within this framework, legal protection would also be covered by the FPS clause.[65]

219. The protection to be afforded under the FPS clause, Claimants argue, should not be restricted to actions of private parties, but to conduct involving the State itself. [66]

220. That said, Claimants acknowledge that allegations related to States' encouragement of adverse actions against an investor require a certain level of direct evidence. In light of these considerations, Claimants affirm that the alleged collusion between Mexico and the Bondholders amounted to a FPS breach, for Mexico failed to provide both physical and legal protection to the investors' investments.[67]

221. Claimants further note that, when FET and FPS protections are linked in the same provision, it is not necessary to draw a sharp delimitation of their scope.[68]

222. In particular, Claimants argue that the FPS breach emerged out of the following situations: (a) through Mexico's launch of criminal investigations that would culminate with the seizure of all of Perforadora's cash and rigs; (b) through Mexico's failure to protect the rigs from third parties who intruded on them; (c) in the physical takeover of the rigs, which involved an officer from the *Agencia de Investigación Criminal* flying on a helicopter and forcing to land on a rig; (d) in Pemex's and the Ad Hoc Group's attempt to take the rigs from Oro Negro and lease them back to Pemex through a competitor; (e) through Mexico's failure to stop the reputational attacks against the Claimants launched by one of the largest media conglomerates in Mexico (TV Azteca); (f) through Mexico's launch of meritless tax audits against Integradora and its subsidiaries; and (g) through Pemex's refusal to pay Perforadora the past due daily rates as provided in the Oro Negro Contracts.[69]

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[65] See Reply, § 973.

[66] See C1, § 540.

[67] See C1, §§ 542-543.

[68] See Reply, § 977.

[69] See C1, §§ 543-544.

F) Damages

223. Claimants seek full reparation for the losses allegedly suffered in the form of monetary compensation.[70] The quantification of damages claimed is calculated on the basis of the fair market value of Claimants' investment, in addition to interest and tax.[71]

224. It is Claimants' position that, under international law, they are entitled to choose the damages valuation date. From Claimants' perspective, this is a logical consequence of the standard of compensation, which presides over the quantification of damages.[72]

225. Claimants note that NAFTA does not provide any standard for the valuation of compensation in case of unlawful expropriation, FET and FPS breaches – the Treaty only provide standards for compensation in case of lawful expropriations.[73] Hence, Claimants argue that customary international law standards on the matter should apply.[74]

226. Referring to case law and to Article 34 of the ILC Articles, Claimants observe that their investment has been destroyed, the physical assets (the rigs) were taken, and their investment's reputation was ruined.[75] For these reasons, it is Claimants' view that only monetary compensation can cure the wrongs committed by Mexico.

227. Although Claimants believe that compensation under customary international law may exceed what is provided under the NAFTA standard of compensation for lawful expropriations, Claimants are of the view that fair market value is also the starting point to quantify full compensation under customary international law.[76]

228. Claimants propose the method of discounted cash flow ("**DCF**") as the proper method to assess their investments' fair market value. This calculation could be performed both on the

[70] See C1, § 550.

[71] See C1, § 551.

[72] See Reply, § 1010.

[73] See C1, § 558.

[74] See C1, § 559.

[75] See C1, § 553.

[76] See C1, § 561.

basis of the date of the expropriation or the date of the award – a choice to be guided by the maximization of reparation.[77]

229. In the instant case, Claimants state that "the valuation date for the NAFTA breaches must take into account the full measure of the harm done to Claimants' investment to date."[78]

230. Referring to Article 38 of the ILC Articles, Claimants also consider that the principle of full reparation requires granting post-award interest annually compounded and calculated at a commercially reasonable rate until the actual date of payment.[79]

231. Finally, Claimants observe that the award should be net of tax, for Claimants ought to be placed in the financial position in which they would have been had Mexico not breached its obligations under the Treaty.[80]

### *2. Respondent's positions*

A) Jurisdiction

232. According to Respondent, only 14 Claimants have proven to be Integradora's shareholders, namely Ampex, Apple Oaks, Cambria, Axis Oil Field Services, Floradale, Frederick J. Warren IRA, Brentwood, Gary Olson, Genevieve T. Irwin 2002 Trust, John N. Irwin III, Gerald L. Parsky IRA, ON5, Rainbow Fund, and Robert M. Witt IRA.[81]

233. Concerning the Claimants who do not directly hold Integradora's shares – those who claim to be indirect shareholders in Oro Negro –, it is Respondent's position that they cannot bring a claim in their own name under Article 1116 of NAFTA for the alleged indirect expropriation of their shares. For Respondent, it is a well-established legal principle that a company has a legal personality of its own and its assets do not belong to its shareholders in a proportion

[77] See C1, § 579.

[78] See C1, § 582.

[79] See C1, §§ 603 ss.

[80] See C1, § 607.

[81] See R1, § 488.

equivalent to their shareholding. Even less so when that shareholding passes through various companies, trusts and other investment vehicles[82].

234. Furthermore, Respondent submits that certain Claimants cannot bring claims in respect of their shares in Oro Negro, for these shares are held through intermediaries located in a State outside the NAFTA. This would be the situation of Alicia Grace, Carolyn Grace Baring, Diana Grace Beard, Frederick Grace, Nicholas Grace, Oliver R. Grace III and Virginia Grace, who allegedly hold shares through the Lorraine Grace Trust - Oliver 2311 and Field Nominee Limited, both incorporated in Bermuda.[83]

235. Similarly, Respondent argues that Messrs. Williamson-Nasi and Cañedo White allegedly hold Integradora's shares through Oro Cooperatief, a Dutch legal entity that is controlled by Axis Services and Axis Holding.[84]

236. Respondent further claims that many of the Claimants have filed claims in their own name and on behalf of some individual retirement account, known as an Individual Retirement Account ("**IRA**") or on behalf of some trust that they claim to "own" or control.[85]

237. In instances, continues Respondent, the recognised shareholder in Integradora, in light of the company's share ledger entries, is the IRA or trust in question. This would be the situation of Ms. Irwin and the Irwin Trust, Mr. Warren and the Warren IRA, Mr. Parsky and the Parsky IRA, Mr. Witt and the Witt IRA.[86]

238. Moreover, Respondent contends that Vista Pros ceased to be an investor by selling its shares to ON5 on 1 March 2017. Therefore, it would not qualify as an "investor of a Party" and would not be in a position to initiate arbitration proceedings under NAFTA Article 1116.[87]

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[82] See Rejoinder, § 492.

[83] See R1, §§ 490, 522.

[84] See R1, § 491; Rejoinder, §§ 458 ss.

[85] See R1, § 525.

[86] See R1, § 526.

[87] See Rejoinder, §§ 483 ss.

239. In this regard, Respondent argues that the sale of Vista Pros' shares occurred many months before Oro Negro's Contracts with Pemex were cancelled or Oro Negro was declared bankrupt. Thus, Vista Pros cannot even claim that it was an investor of a Party when the main measures giving rise to this arbitration occurred or, alternatively, that its investment was expropriated prior to 1 March 2017 when it sold its shares to ON5.[88]

240. Respondent also raises objections as to the Tribunal's jurisdiction *ratione personae* in relation to Messrs. Williamson-Nasi and Cañedo White.[89]

241. Respondent contends that nothing in NAFTA provides that dual nationals (or permanent residents) of two NAFTA Contracting States should be permitted to maintain a Chapter 11 claim against either Party. Thus, Respondent argues, the rule of customary international law that a national may not bring claims at the international level against his or her own State should prevail.[90]

242. According to Respondent, even if claims by dual nationals were in principle permitted under the NAFTA, which is not the case, arbitral tribunals should apply the well-established customary rule of dominant and effective nationality.[91]

243. Concretely, Respondent considers puzzling the fact that Mr. Williamson-Nasi lived in Mexico until recently, exercising his citizenship rights, and now tries to distance himself from his Mexican nationality.[92] In relation with Mr. Cañedo White, Respondent notes *inter alia* that he is Mexican by birth and resided in Mexico from birth until 2012.[93]

244. Furthermore, Respondent is of the view that this Tribunal lacks jurisdiction to hear Messrs. Cañedo White and Williamson-Nasi's claims due to their violation of the Article 1121 waiver requirement. Messrs. Cañedo White and Williamson-Nasi initiated and continue to pursue a

[88] See R1, § 527.

[89] See R1, §§ 538 ss; RPHB, §§ 58 ss.

[90] See R1, § 576.

[91] See Rejoinder, § 522.

[92] See R1, §§ 563 ss.

[93] See R1, §§ 569 ss.

lawsuit before a US Court, which would be based on some of the same grounds on which they have based their claims against Respondent.[94]

245. Respondent also considers that Messrs. Williamson-Nasi and Cañedo White, as indirect shareholders, lack standing to bring a claim under Article 1117 because they do not meet the requirement of ownership or control of the Mexican Enterprises.[95]

246. Respondent argues that, unlike other investment treaties, the NAFTA contains no umbrella clause; therefore, the mere breach of a commercial contract cannot give rise to an independent breach of the NAFTA. Accordingly, Respondent submits that if the Tribunal agrees that Claimants have failed to establish their allegations of corruption and collusion in accordance with the applicable high standard of proof, then there is no jurisdiction *ratione materiae*.[96]

247. According to Respondent, Claimants' claim is based on allegations of contractual violations. The Claimants complain about the 2015 and 2016 amendments to the Oro Negro Contracts, Pemex's efforts to negotiate the amendments in 2017, about the alleged delay in payments in their favour, and about the terminations of the Oro Negro Contracts.[97]

248. Respondent also contends that the acts grounding the allegations of a NAFTA breach must have a proximate cause with the damages complained of. In this case, the Claimants would have failed to meet this condition, as they seek to hold Respondent liable for acts of private companies, falling oil prices, and poor business decisions by Oro Negro.[98]

249. Moreover, Respondent points out that NAFTA Article 1116, unlike Article 1117, only allows claims for losses directly suffered by shareholders, and not for reflective losses such as those claimed by some Claimants in this arbitration.[99]

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[94] See R1, § 545.

[95] See R1, § 486.

[96] See Rejoinder, § 529.

[97] See R1, § 762.

[98] See R1, §§ 589 ss; Rejoinder, § 531.

[99] See R1, § 531.

250. From Respondent's perspective, Article 1116 would be limited to situations such as a State's interference with shareholder's corporate rights, interference with the right to receive dividends, attend meetings, vote, etc. Respondent considers that Article 1117 consists of an exceptional type of derivative claim allowing investors to appear on behalf of a corporation to claim for injuries suffered by the corporation.[100]

B) The acts of PEMEX cannot be attributed to Mexico

251. Respondent rejects the application of Article 1503(2) and international law as invoked by Claimants. According to Respondent, Claimants' arguments on attribution fail to recognize that NAFTA Article 1502(3)(a) contains an exception regarding attribution of acts by public and private "monopolies." Notably, PEMEX would be a monopoly whose commercial acts are not attributable to Mexico.[101]

252. Respondent argues that NAFTA Article 1502 only attributes to a NAFTA Party discrete acts implemented in the exercise of an express delegation of governmental authority. For Respondent, PEMEX executed, modified, and terminated the Oro Negro Contracts, but in doing so did not exercise "regulatory, administrative or other governmental functions" under NAFTA Chapter 15.[102]

253. Chapter 15 of NAFTA, Respondent contends, would establish a *lex specialis* for attribution of acts to NAFTA Parties. It is Respondent's view that this *lex specialis* displaces customary international law on attribution.[103]

254. Yet, even if NAFTA's *lex specialis* on attribution did not prevail over the ILC Articles, Pemex's acts cannot be attributed to Respondent. Respondent invokes Article 5 of the ILC, according to which the conduct of an entity must relate to governmental activity and not to any other private or commercial activity in which the entity may have engaged. With respect to Article 8, Respondent invokes the presumption of "general separateness of corporate entities" and reiterates that the fact that the PEMEX Act empowers PEMEX to conclude "procurement

[100] See R1, § 532.

[101] See R1, § 653.

[102] See R1, §§ 588, 657.

[103] See R1, § 658.

contracts for the exportation and extraction of petroleum products in furtherance of the economic development of the Mexican state" does not attribute PEMEX' acts to Respondent.[104]

255. With the Energy Reform, Respondent affirms, modifications were made to the nature of Pemex, which is now a *Empresa Productiva del Estado* and carries out activities similar to that of a private company.[105]

C) The inexistence of a breach under Article 1110

256. According to Respondent, Claimants' list of claims does not describe an expropriation. It describes alleged difficulties experienced by a company that took substantial financial risks and then experienced commercial litigation with its customers and investors.

257. Pursuant to Respondent's account, Claimants make vague assertions about the loss of a "bundle of rights and legitimate expectations," through measures that were "creeping and indirect." Respondent considers that Claimants appear to assert that Oro Negro's "ability to contract with Pemex" is the property right at stake that was taken from them.[106]

258. Respondent highlights that Claimants – a group of minority investors in Integradora – do not assert that the Respondent took any of their shares or ownership rights in Integradora. Respondent affirms that Claimants' claim is based exclusively on alleged indirect injuries directed at them that resulted from actions involving the majority Mexican-owned group of Integradora and its Mexican subsidiaries.[107]

259. Respondent draws attention to the fact that Oro Negro provided dozens of guarantees to the Bondholders. As consequence, continues Respondent, when the company defaulted under the Bond Agreement, the Bondholders sought to enforce such guarantees. Accordingly, upon the initiation of the *Concurso Mercantil* 345/2017, the Bondholders demanded the restitution of the

[104] See Rejoinder, §§ 562-563.

[105] See Rejoinder, §§ 7, 566.

[106] See R1, § 689.

[107] See R1, § 691.

Oro Negro Rigs, a situation that occurred on 15 May 2019, and upon which the rigs left Mexican territory and were sold through public auction in the Bahamas.[108]

260. Hence, it is Respondent's position that it never "took" the rigs. From Respondent's perspective, the fact that Oro Negro has lost title to these assets derives from the dozens of securities it granted to the Bondholders by way of a *carte blanche*.[109]

261. Respondent notes that PEMEX terminated the Oro Negro Contracts in accordance with their applicable terms. In this regard, it is Respondent's position that, contrary to Claimants' assertion, there is currently no injunction or court decision that has declared the early terminations of the Oro Negro Contracts to be illegal, null or void, or to have suspended their effects. Hence, Respondent affirms that the Oro Negro Contracts were legally and validly terminated.[110]

262. Also, Respondent contends that there was no discrimination in PEMEX's treatment of its contractors. Notably, it is Respondent's view that Perforadora was the only operator of 400-feet Jack-up rigs that had five contracts with PEMEX.[111]

263. Furthermore, Respondent states that Claimants have not shown – nor could they have shown – that Oro Negro had a property right over the ability to enter into future contracts with PEMEX.[112]

264. According to Respondent, there was nothing special about Oro Negro Rigs, while there was (and there is) an oversupply of such platforms in the market, and the oil industry is subject to cyclical and severe downturns, such as those experienced in the period discussed in this arbitration.[113]

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[108] See Rejoinder, § 582.

[109] See Rejoinder, § 583.

[110] See R1, § 701; Rejoinder, §§ 577 ss.

[111] See R1, § 702.

[112] See R1, § 703.

[113] See R1, § 704.

265. Respondent affirms that there was no creeping expropriation either, for the alleged measures discussed by Claimants are too remote from each other. For Respondent, Claimants have not provided even *prima facie* evidence that the tariff reductions that Oro Negro agreed to in 2015 and 2016 are in any way related to the Oro Negro Bondholders. In this regard, Respondent consider that Claimants have merely presented a long list of actions, including actions not taken by PEMEX or any governmental authority, and speculate that they are all connected in some way, without providing any evidence of such connection.[114]

266. Similarly, Respondent states that there was no judicial expropriation. It is Respondent's position that judicial acts may breach international obligations only in the most extreme and unusual circumstances, requiring egregious and shocking conduct.[115]

D) The inexistence of a breach under Article 1105

267. Respondent observes that Article 1105 of NAFTA establishes a very specific standard of protection, which has to be analysed by reference to the customary minimum standard of treatment. A preliminary step in this regard would be for Claimants to prove the existence of a relevant rule of customary international law.[116]

268. Furthermore, Respondent considers that customary international law has established a minimum standard of treatment in a limited number of areas, such as the obligation not to deny justice – and this specific instance is only characterized when the outcome of the proceedings runs counter to a most basic sense of judicial propriety.[117]

269. It is Respondent's view that Claimants argue vague notions such as "politically motivated" and "lack of good faith" as alleged principles of customary international law, but cite no instance of state practice, let alone one of *opinio juris*, as evidence of such customary international law standards.[118]

[114] See R1, § 714.

[115] See R1, § 722.

[116] See R1, § 729; Rejoinder, § 591.

[117] See R1, § 731.

[118] See R1, § 733.

270. For Respondent, the customary international law minimum standard prohibits an action that is arbitrary, grossly unfair or idiosyncratic, and discriminatory if the claimant is subjected to racial or regional bias or if it involves an absence of due process leading to an outcome that offends judicial propriety.[119]

271. Thus, it is Respondent's position that Claimants have not satisfied the high threshold for finding a violation of the customary international law standard of Minimum Standard of Treatment.[120]

272. With regards to allegations of corruption made under Article 1105, Respondent considers that the alleged corrupt conduct must have a causal link to the alleged investment treaty violation.[121] In fact, Respondent considers that Claimants have not even discharged their obligation to prove the alleged corruption acts, much less that they had any relation to this arbitration.[122]

273. Respondent further considers that a mere breach of contract or of alleged "legitimate expectations," which presuppose a realistic assessment of risk, do not amount to a denial of fair and equitable treatment.[123]

274. For Respondent, Claimants have presented misguided arguments, arguing that any breach of contract by a State amounts to a denial of fair and equitable treatment because of the investor's legitimate expectations of having a contract performed by the contracting State party.[124]

275. In this regard, it is Respondent's view that international investment treaties are in no way intended to be insurance policies against poor business decisions, to the extent that it would be illegitimate to expect the host State to be liable for losses resulting from imprudent business decisions.[125]

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[119] See R1, § 738.

[120] See R1, §§ 734 ss; Rejoinder, § 598.

[121] See R1, § 743.

[122] See R1, § 748.

[123] See R1, § 749.

[124] See R1, § 752.

[125] See R1, §§ 755 ss.

276. Furthermore, Respondent argues that any potentially protected investors' expectations must be informed by the specific characteristics of the host State. Notably, Respondent notes that investing in developing countries inherently involves a higher degree of risk offset by a higher rate of return.[126]

277. In any event, it is Respondent's view that, even in developed countries, investors' expectations must be justified by means of a proper risk assessment. Concretely, Respondent states that Oro Negro and its investors made highly risky investments that required substantial financing from third parties, with whom they made commitments that, in the end, they did not agree to or could not honour. Moreover, there are risks in the energy industry related to possible falls in oil prices, of which Oro Negro was fully aware.[127]

278. In relation to the allegations of discriminatory treatment, Respondent affirms that PEMEX did not give any contractor a "better deal." Rather, PEMEX negotiated with each contractor taking into consideration the market situation and based on the circumstances applicable to each supplier.[128]

279. Respondent highlights that Pemex treated all contractors in the same manner, stating further that, in relation to the six companies that leased 400-feet Jack-up rigs, rate reductions were negotiated during the same years that they were negotiated with Oro Negro.[129]

280. With respect to Seamex, Respondent notes that its contracts were negotiated at different times and some of their terms were different, as they related to the particularities of the contractual relationship with that company. Respondent is of the view that the contractual relationship between PEMEX and Seamex was in a delicate position due to impending litigation involving large sums related to the termination of the West Pegasus semi-submersible platform, which was much more costly than the other Jack-ups in question. It is for these reasons that Respondent considers that, like any contractual relationship between two companies, the

[126] See R1, § 757.

[127] See R1, §§ 759 ss.

[128] See R1, § 763.

[129] See R1, § 768.

contractual situation between PEMEX and Integradora was not comparable and was naturally different from the contractual relationship between PEMEX and Seamex.[130]

281. Moreover, Respondent draws attention to the fact that Seadrill, the holding company of Seamex, announced in June 2021 that a creditor (Fintech) had requested that the holding company of the Seamex joint venture be placed in provisional liquidation in Bermuda. In particular, Seadrill noted that "[t]he need for the provisional liquidation and restructuring has arisen as a result of Petróleos Mexicanos ('Pemex') not having paid material receivables to SeaMex over a prolonged period of time as well as an objective to deleverage SeaMex's balance sheet."[131]

282. In any case, it is Respondent's position that NAFTA exempts obligations of National Treatment ("**NT**") and Most Favoured Nation ("**MFN**") in procurement by a party or by a state-owned enterprise. For Respondent, Claimants try to present an NT and MFN claims disguised under the cloak of FET allegations.[132]

283. Respondent further contends that that Claimants' allegations concerning due process and transparency lack substance, as the Claimants' argument fails to reconcile the alleged facts with the applicable legal standard, which the Claimants address in a single paragraph by citing two non-NAFTA awards with no apparent bearing on the present case.[133]

284. As to alleged irregularities in criminal investigations and judicial proceedings in Mexico, Respondent considers that the allegations are general and vague. In particular, Respondent alleges that Claimants do not explain how any of these allegations could constitute a violation of a rule of customary international law.[134]

285. In relation to the Claimants' allegations concerning the breach of the FPS standard, Respondent cautions that FET and FPS claims should not be conflated – these are two discrete

[130] See R1, § 768.

[131] See Rejoinder, § 209.

[132] See R1, § 767; Rejoinder, § 605.

[133] See Rejoinder, § 613.

[134] See R1, §§ 769 ss.

standards, addressing different factual circumstances.[135] Indeed, Respondent is of the view that Claimants' claim related to the FPS standard consists of the same allegations in support of their FET claim.[136]

286. Pursuant to Respondent's understanding of customary international law, the FPS principle concerns only physical security of the investor. For Respondent, restricting full protection and security to the physical security of an investor makes sense when both the FET standard and the FPS standard are incorporated under the heading of the customary international law minimum standard of treatment.[137]

E) Damages

287. While Claimants claim damages of at least USD 270 million for the alleged violation of NAFTA Articles 1105 (Minimum Standard of Treatment) and 1110 (Expropriation), Respondent contends that Claimants have failed to establish the existence of a sufficient causal link between the alleged treaty breaches and the damages sought.[138]

288. Respondent disputes, for example, that the loss of the Oro Negro Rigs – the second source of damages identified by Claimants' damages expert – was a consequence of the renegotiation or cancellation of the contracts with PEMEX, or of PEMEX's alleged collusion with the Bondholders, or any of the other measures that Claimants have identified as violating NAFTA. Conversely, Respondent argues that the proximate causes of the loss of the Oro Negro Rigs was the oil crisis and Oro Negro's decision to file for bankruptcy, knowing that this constituted an "event of default" under the 2016 Bond Agreement – an event of default that would trigger the enforcement of guarantees.[139]

289. Similarly, Respondent questions the alleged loss of the advance payments Oro Negro made for the construction of rigs. In this regard, Respondent observes that Claimants have simply

[135] See R1, §§ 772-775.

[136] See R1, § 784.

[137] See R1, § 777.

[138] See R1, § 788.

[139] See R1, § 789.

failed to explain how, in the absence of the measures complained of, Oro Negro would have relied on these advances.[140]

290. Another point of contention concerns the level of damages owed in relation to Article 1110 and 1105 of NAFTA. Respondent is of the view that neither Claimants nor their expert distinguish between the damages associated with the alleged violation of the minimum standard of treatment and those associated with the alleged expropriation. Notably, Respondent indicates that it is unclear what the damages would be if this Tribunal were to determine, for example, that there was no expropriation but a violation of the minimum standard of treatment.[141]

291. In addition to these issues, Respondent also raises concerns as to double recovery. Respondent asserts that Oro Negro is challenging the termination of the Oro Negro Contracts before Mexican courts and has demanded payment of damages following such termination.[142]

292. In any event, in case the Tribunal decided to award damages in Claimants' favour, Respondent consider that these damages should reflect the respective shareholding of each Claimant in Oro Negro.[143]

293. Similarly, in the event of a damages award related to the allegations of expropriation, Respondent considers that the Tribunal should observe the parameters set in Article 1110. In particular, it is Respondent's view that the quantification of damages should take into account the fair market value of the investment calculated immediately before the expropriation – and not at the time when the award is issued.[144]

[140] See R1, § 790.

[141] See R1, § 791.

[142] See R1, § 792.

[143] See R1, § 795.

[144] See R1, §§ 797-799; 804.

294. Respondent believes that the fair market value method is compatible with the standard of full compensation, and it would be for the Claimants to establish the existence of losses suffered over and above what is set out in NAFTA Article 1110(2).[145]

295. Moreover, Respondent considers that Article 1110(2) establishes the measure of compensation for expropriation cases, and that such a measure is generally accepted for both direct and indirect expropriation cases under NAFTA.[146]

296. Respondent observes that Claimants have not asked for consequential damages, as well as failed to establish the factual basis for any additional damages or the nature of these additional damages they allegedly suffered from the "wrongfulness" of the alleged expropriation.[147]

297. As regards any damages eventually awarded in relation to the minimum standard of treatment, Respondent concurs that these have to be calculated in light of the full compensation standard.[148]

298. Respondent is of the view that Claimants fail to distinguish between damages arising from the alleged expropriation and those arising from the alleged violation of the minimum standard of treatment, implicitly taking the position that the violation of Article 1105 is tantamount to an expropriation under Article 1110. In these circumstances, argues Respondent, there is no reason to depart from the use of the fair market value method determined at the date of expropriation as the measure of compensation.[149]

299. Finally, Respondent does not object to the use of the DCF methodology employed by the Claimants' experts, however it does raise numerous objections as to concrete details of the calculation conducted.[150]

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[145] See R1, §§ 800-802.

[146] See Rejoinder, § 668.

[147] See R1, § 803.

[148] See R1, § 808.

[149] See R1, § 808.

[150] See R1, § 862.

## IV. PARTIES'REQUESTS FOR RELIEF

### *1. Claimants' request for relief*

300. The Claimants request the Tribunal to:[151]

i. declare that Mexico has breached Article 1110 (Expropriation) and Article 1105 (Fair and Equitable Treatment and Full Protection and Security) of the Treaty;

ii. order Mexico to compensate Claimants for their losses resulting from Mexico's breaches of the Treaty and international law for an amount of at least USD 270 million as of October 1, 2019, to be supplemented as of the date of the hearing and/or the date that this Tribunal issues its Final Award, plus interest until payment at a commercially reasonable rate, compounded annually;

iii. order Mexico to pay all applicable pre- and post-Award interest;

iv. declare that: (a) the award of damages and interest be made net of all taxes; and (b) Mexico may not deduct taxes in respect of the payment of the award of damages and interest;

v. award such other relief as the Tribunal considers appropriate; and

vi. order Mexico to pay all of the costs and expenses of these arbitration proceedings.

### *2. Respondent's request for relief*

301. Respondent requests the Tribunal to:[152]

[151] See C1, § 612; Reply, § 1052.

[152] See R1, § 884; Rejoinder, § 807.

i. dismiss Claimants' claims in their entirety, either because the Tribunal lacks jurisdiction, or dismiss Claimants' claims as not being in violation of Chapter 11 of NAFTA;

ii. order Claimants to reimburse Respondent for the costs it has incurred in this arbitration, including legal costs, travel costs incurred by its legal team, witnesses and experts, and Mexico's share of the Tribunal's expenses;

iii. order any other relief that the Respondent may seek in the course of this arbitration and that the Tribunal considers appropriate; and

iv. order Claimants to act prudently in this arbitration and to comply fully with Provision 25 of Procedural Order No. 1 and Procedural Order No. 3 (on Confidentiality), in order to avoid document leaks from this arbitration to the media.

302. In the alternative, if the Tribunal concludes that it has jurisdiction and the Respondent has incurred international liability for breach of its obligations under NAFTA, the Respondent requests[153]

i. the Tribunal to determine that the Claimants have failed to prove the requisite causal nexus necessary to find their claims for damages; and

ii. if the Tribunal determines that the Claimants have demonstrated the requisite causal nexus, reduce the amount of damages to an amount not greater than that set forth in Respondent's Rejoinder Brief.

[153] See Rejoinder, § 808.

## V. THE ARTICLE 1128 SUBMISSIONS

### *1. Canada 1128 Submission*

A) Articles 1116 (claim by an investor of a Party on its own behalf) and 1117 (claim by an investor of a Party on behalf of an enterprise) of the NAFTA

303. Canada argues that NAFTA Articles 1116 and 1117 do not allow an investor of a Party to bring a claim against the same Party. In Canada's view, a claimant, whether bringing a claim on its own behalf or on behalf of an enterprise that the claimant owns or controls, cannot be of the same nationality of the Party against which the claimant brings a claim.[154]

304. According to Canada's understanding, the NAFTA's requirement for diversity of nationality in order for a claimant to have standing to bring a claim is consistent with the well-established principle of international law that an individual or entity cannot maintain an international claim against its own State (i.e. the rule of non-responsibility).

305. Canada contends that the NAFTA does not provide a *lex specialis* on the issue of dual nationals and customary law applies so that a claimant is prohibited from making a claim against its State of dominant and effective nationality.[155]

306. It is Canada's contention that, under Article 1116, investors may only recover losses they incur, not losses their investments incur. In other terms, Article 1116 provides a right for an investor of a Party to bring a claim on its own behalf on the ground that the investor has incurred loss or damage.[156]

307. Canada further affirms that, consistent with the ordinary meaning of the provision, and general principles of corporate law recognized by domestic legal systems and customary international law, an investor can only claim under Article 1116 for losses that it has incurred, not for losses incurred by an enterprise it owns and controls.

[154] Canada 1128 Submission, §§ 4 ss.

[155] Canada 1128 Submission, § 8.

[156] Canada 1128 Submission, § 14.

308. With regards to Article 1117, Canada is of the view that it contemplates a specific and limited derogation from the customary international law rule that a claim cannot be asserted by a shareholder for harm to the enterprise in which it holds shares. This implies that, without Article 1117, an investor that is a shareholder could not assert an indirect claim for an injury to the enterprise in which it invested.[157]

B) Article 1105 of the NAFTA (minimum standard of treatment)

309. Canada puts forward the view that the reference to customary international law in the FTC Note confirms that Article 1105 refers to an objective standard of treatment for investors, the minimum standard of treatment under customary international law, and a disputing party alleging a rule of customary international law bears the burden of proving its existence.[158]

310. Canada contends that NAFTA Article 1105 is not an invitation for tribunals to second-guess state policy and decision-making. In particular, Canada considers that MST does not protect an investor's "legitimate expectations."[159]

311. Furthermore, Canada is of the view that, absent a denial of justice, judgments of national courts interpreting domestic law cannot be challenged as a violation of international law.[160]

312. Finally, it is Canada's position that FPS does not extend beyond the physical protection and security of investments.[161]

C) Article 1110 of the NAFTA (expropriation and compensation)

313. Canada considers that the first step in analysing whether there has been a breach of NAFTA's Article 1110 is to identify the specific investment alleged to have been expropriated.[162]

314. Notably, Canada believes that any expropriation analysis must begin with determining whether there is a valid property right capable of being expropriated (*renvoi* to domestic law).

[157] Canada 1128 Submission, § 16.

[158] Canada 1128 Submission, § 23.

[159] Canada 1128 Submission, § 28.

[160] Canada 1128 Submission, § 33.

[161] Canada 1128 Submission, § 38.

[162] Canada 1128 Submission, § 41.

Importantly, for Canada, only legal rights that have vested under the applicable domestic law are capable of being expropriated. Consequently, a potential property right or one that is conditional, in that it may or may not materialize, is not vested and is not capable of being expropriated.[163]

315. Within this framework, Canada affirms that there must be a taking of fundamental ownership rights, either directly or indirectly, that causes a substantial deprivation of economic value of the investment. This means that, for Canada, mere interference with an investor's use or enjoyment of the benefits associated with property is insufficient to constitute an expropriation at international law as reflected in NAFTA Article 1110(1).[164]

316. Furthermore, Canada draws attention to the fact that, in considering allegations that the State has "taken" or "expropriated" the investor's property through its regulatory powers, consideration must be given to the State's police power.[165]

317. Finally, Canada is of the view 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.[166]

D) Article 1503 of the NAFTA (State enterprise)

318. Canada stresses that NAFTA Chapter 15 provides for a *lex specialis* regime in relation to the attribution of acts of monopolies and State enterprises, to the content of the obligations, and to the method of implementation.[167]

319. In this regard, Canada highlights that the obligations in Chapter 11 apply to a state enterprise only where it acts in the exercise of delegated "governmental authority." In Canada's view, the term "governmental authority" is not defined in the NAFTA.[168]

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[163] Canada 1128 Submission, § 42.

[164] Canada 1128 Submission, § 43.

[165] Canada 1128 Submission, § 44.

[166] Canada 1128 Submission, § 45.

[167] Canada 1128 Submission, § 47.

[168] Canada 1128 Submission, § 48.

320. Canada states 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.

321. For Canada, the decisions of other tribunals as to the meaning of the term "governmental authority" in Article 5 of the ILC Articles can, however, be informative – e.g. a tribunal finding that "[w]hat matters is not the *'service public'* element, but the use of '*prérogatives de puissance publique*' or governmental authority."[169]

### *2. United States of America 1128 Submission*

A) Standing to bring a claim and limitations on damages (Articles 1116 and 1117)

322. The United States of America (the "**United States**") argues that dual nationals are to be treated as having the nationality of their "dominant and effective" nationality for purposes of bringing a claim under Chapter 11 of the NAFTA, and that permanent residents are not considered nationals under customary international law.[170]

323. The United States further argues that, under applicable rules of international law, a State Party to the NAFTA is not responsible for a claim asserted against it under Chapter 11 by an investor of another Party who is a permanent resident of another Party but a citizen of the respondent State Party.

324. In addition, the United States highlights that, if a State enterprise is acting under authority that is not delegated (*i.e.*, if the authority is exercised without a transfer or authorization of governmental authority by the NAFTA Party), then a Chapter 11 tribunal lacks jurisdiction to hear any claim of breach of NAFTA's Article 1503(2).[171]

325. From the United States' perspective, Article 1503(2) provides examples of "regulatory, administrative or other governmental authority" that may be delegated. These would include

[169] Canada 1128 Submission, § 49.

[170] US 1128 Submission, §§ 3 ss.

[171] US 1128 Submission, §§ 9 ss.

the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.

326. Hence, the United States upholds the view that the term "regulatory, administrative, or other governmental authority" means the authority of the NAFTA Party in its sovereign capacity.

327. Furthermore, the United States stresses that each claim by an investor must fall within either NAFTA Article 1116 or NAFTA Article 1117 and is limited to the type of loss or damage available under the article invoked.[172]

328. For the United States, Article 1116(1) permits an investor to present a claim for loss or damage incurred by the investor itself, while Article 1117(1), in contrast, permits an investor to present a claim on behalf of an enterprise of another Party that it owns or controls for loss or damage incurred by that enterprise.

329. Within this framework, the United States contends that Articles 1116 and 1117 serve to address discrete and non-overlapping types of injury. Notably, the United States understands that Article 1116 is available to investors when they wish to recover damages incurred directly, while Article 1117 provides for a derivative claim allowing investors to recover losses incurred by an enterprise owned or controlled by them – in this case, the investors' injury would be an indirect one.

330. Importantly, the United States highlights that Article 1117 is applicable only where the loss or damage has been incurred by "an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly." Consequently, it is the United States' view that Article 1117 does not apply where the alleged loss or damage is to an enterprise of a non-Party or of the same Party as the investor.

331. According to the United States, the element of "control of an enterprise" is not defined by the NAFTA, which would reflect a longstanding US practice of leaving this concept open to a case-by-case analysis.

[172] US 1128 Submission, §§ 13 ss.

332. The United States also notes that the ordinary meaning of Articles 1116 and 1117 requires an investor to establish the causal nexus between the alleged breach and the claimed loss or damage. This would allow investors to recover such damages only to the extent that they are established on the basis of satisfactory evidence that is not inherently speculative.

333. Notably, the United States stresses that the standard for factual causation is known as the "but-for" or "*sine qua non*" test whereby an act causes an outcome if the outcome would not have occurred in the absence of the act.

334. Moreover, the United States contends that the ordinary meaning of the term "by reason of, or arising out of" also requires an investor to demonstrate proximate causation. Consequently, injuries that are not sufficiently "direct", "foreseeable", or "proximate" may not, consistent with applicable rules of international law, be considered when calculating damages.

335. With regards to the term "Investor of a Party", the United States advances the position that, under Article 1116(1) of the NAFTA, an investor who wishes to pursue a claim must allege that "another Party" has breached specified obligations in the NAFTA and further that "the investor has incurred loss or damage by reason of, or arising out of, that breach."

336. It is the United States' view that, by using the words "the investor" and "that breach," Article 1116(1) requires that the investor bringing the claim be the same investor who suffered loss or damage as a result of the alleged breach. Hence, Article 1116(1) would 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.

B) Consent and waiver (Articles 1121 and 1122)

337. The United States understands that, because the waiver requirements under Article 1121 are among the requirements upon which the Parties have conditioned their consent, a valid and effective waiver is a precondition to the Parties' consent to arbitrate claims, and accordingly to a tribunal's jurisdiction, under NAFTA Chapter 11.[173]

[173] US 1128 Submission, §§ 42 ss.

338. The United States affirms that compliance with Article 1121 entails both formal and material requirements. From a formal perspective, the waiver would have to be in writing, as well as clear, explicit and categorical. As to the material requirements, a claimant would have to consistently and concurrently with the written waiver abstain from initiating or continuing proceedings with respect to the measures alleged to constitute a Chapter 11 breach in another forum as of the date of the waiver and thereafter.

339. Notably, the United States stresses that Article 1121 requires a claimant's waiver to encompass "any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to" in both Article 1116 and Article 1117, with certain limited, specified exceptions.

340. From the United States' perspective, this requirement is to be interpreted broadly, for the waiver provision is 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.

341. Importantly, the United States considers that, for a waiver to be and remain effective, any juridical person or persons that a claimant directly or indirectly owns or controls, or that directly or indirectly control the claimant, must likewise abstain from initiating or continuing proceedings in another forum as of the date of filing the waiver (and thereafter) with respect to the measures alleged to constitute a NAFTA Chapter 11 breach.

342. It is the United States' understanding that to allow otherwise would permit a claimant to circumvent the formal and material requirements under Article 1121 through affiliated corporate entities, thereby rendering the waiver provision ineffective. This in turn would frustrate the purpose of this waiver provision.

C) Expropriation and compensantion (Article 1110)

343. The United States concurs with Canada that the first step in any expropriation analysis must begin with an examination of whether there is an investment capable of being expropriated.

344. In this regard, the United States draws attention to the fact that it is appropriate to look at the law of the host State for a determination of the definition and scope of the property right or property interest at issue, including any applicable limitations.[174]

345. The United States affirms that under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory. That said, the United States understands that this principle in public international law is not an exception that applies after an expropriation has been found but, rather, is a recognition that certain actions, by their nature, do not engage State responsibility.

346. In relation to indirect expropriations, the United States argues that the Tribunal must look at the following three factors: (i) the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as to support a conclusion that the property has been taken from the owner; (ii) the Tribunal must engage in an objective inquiry of the reasonableness of the claimant's expectations, which depend in part on the nature and extent of governmental regulation in the relevant sector; and (iii) the nature and character of the government action must be considered, including whether such action involves physical invasion by the government or whether it is more regulatory in nature.

347. Finally, the United States is of the view that decisions 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.

D) Minimum standard of treatment (Article 1105)

348. The United States stressed that on 31 July 2001 the FTC, comprising the NAFTA Parties' cabinet-level representatives, issued an interpretation reaffirming that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."[175]

[174] US 1128 Submission, §§ 54 ss.

[175] US 1128 Submission, §§ 66 ss.

349. The United States affirms that the FTC clarified that the concepts of "fair and equitable treatment" and "full protection and security" do "not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens," that "a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)" and that such interpretation "shall be binding" on tribunals established under NAFTA Chapter 11.

350. The United States notes that customary international law is proven by State practice qualified by *opinio juris*. From the United States' perspective, relevant State practice must be widespread and consistent and be accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation.

351. The United States understands that customary international law may be proven by *inter alia* relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.

352. In particular, the United States observes that States may decide expressly by treaty to make policy decisions to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law.

353. However, according to the United States, the practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 1105 in which "fair and equitable treatment" and "full protection and security" are expressly tied to the customary international law minimum standard of treatment.

354. In the same vein, the United States highlights that any arbitral decision interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 1105(1).

355. Moreover, the United States cautions that decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international

law are not themselves instances of "State practice" for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.

356. For the United States, concurring with Canada, the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.

357. In addition, the United States indicates that, once a rule of customary international law has been established, the claimant must then show that the respondent State has engaged in conduct that violates that rule.

358. Importantly, the United States stresses that Chapter 11 tribunals do not have an open- ended mandate to "second-guess government decision-making."

359. The United States alleges that customary international law has crystallized to establish a minimum standard of treatment in only a few areas, notably in relation to FET and FPS obligations.

360. With regards to FET protection, the United States considers that there exists an obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. A denial of justice, according to the United States, in its historical and "customary sense" denotes "misconduct or inaction of the judicial branch of the government" and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process."[176]

361. Consequently, it is the United States' understanding that aliens have no cause for complaint at international law about a domestic system of law provided that the system of justice in question is composed of fair courts, readily open to aliens, administering justice honestly, impartially, and without bias or political control.

362. In this regard, a denial of justice would require that the final act of a state judiciary constitutes a "notoriously unjust" or "egregious" administration of justice "which offends a sense of

[176] US 1128 Submission, §§ 76 ss.

judicial propriety." Accordingly, the United States points out that NAFTA Chapter 11 tribunals are not empowered to be supranational courts of appeal on a state court's application of domestic law.

363. Importantly, the United States considers that the concept of "legitimate expectations" is not a component element of "fair and equitable treatment" under customary international law that gives rise to an independent host State obligation.

364. With regards to FPS, the United States claims to have long maintained that the obligation to accord "full protection and security" requires that each Party provide the level of police protection required under customary international law.[177]

365. In particular, the United States does not consider that FPS requires States to (i) prevent economic injury inflicted by third parties, (ii) provide for legal security, (iii) provide for stability of a State's legal environment, or (iv) guarantee that aliens or their investments are not harmed under any circumstances.

[177] US 1128 Submission, §§ 86 ss.

## VI. FACTUAL BACKGROUND

### *1. Introduction*

366. The following is a summary of the facts as pleaded by the Parties or established by the evidence, without prejudice to any legal conclusions by the Tribunal; many of them will be addressed in subsequent sections. The summary is not intended to be exhaustive, and the absence of reference to particular facts or assertions, or to the evidence supporting any particular fact or assertion, should not be taken as an indication that the Tribunal did not consider those matters. The Tribunal has carefully considered each one of the many arguments and evidence submitted to it in the course of these proceedings.

### *2. The Oro Negro Contracts*

367. The dispute before the Tribunal arises in connection with five contracts celebrated between PEMEX and Perforadora, namely the Primus, Decus, Laurus, Fortius and Impetus Contracts (jointly, the "**Oro Negro Contracts**").[178] Each of these contracts had as its object the lease of a 400 feet Jack-up rigs, i.e., respectively, the Primus, Decus, Laurus, Fortius and Impetus Jack-up rigs (jointly, the "**Oro Negro Rigs**").

368. Although the Oro Negro Contracts operationalized the lease of the Oro Negro Rigs, these rigs themselves were not owned by Perforadora. Instead, Perforadora leased the rigs from other Oro Negro subsidiaries through bareboat charter contracts ("**Bareboat Charters**").[179] In reality, the five Oro Negro Rigs were each owned by a Special Purpose Vehicle incorporated in Singapore (jointly the "**Singapore Rig Owners**"), namely the Oro Negro Primus Pte. Ltd. ("**Primus SPV**"), Oro Negro Laurus Pte. Ltd. ("**Laurus SPV**"), Oro Negro Fortius Pte. Ltd. ("**Fortius SPV**"), Oro Negro Decus Pte. Ltd. ("**Decus SPV**"), and Oro Negro Impetus Pte. Ltd. ("**Impetus SPV**").[180] These SPVs were controlled by another subsidiary of Integradora,

[178] See Primus Contract, C-E.1; Laurus Contract, C-E.2; Fortius Contract, C-E.3; Decus Contract, C-E.4, Impetus Contract, C-E.5.

[179] See C-109 to C-113.

[180] See Corporate Structure of Integradora de Servicios Petroleros Oro Negro, C-D; and Bond Agreement, C-0097, pp. 21 ss.

namely Oro Negro Drilling Pte. Ltd. ("**Oro Negro Drilling**") – which was also incorporated in Singapore.

### *3. The Bond Agreement between Oro Negro Drilling and the Bondholders*

369. In the year of 2014, in order to acquire the Oro Negro Rigs, Integradora raised USD 900 million through the issuance of bonds by Oro Negro Drilling. On 24 January 2014, Oro Negro Drilling and the creditors of these debt instruments (the Bondholders), through Nordic Trustee ASA acting in its capacity as trustee for the Bondholders ("**Nordic Trustee**"), entered into a bond agreement to govern the bonds issued (the "**Bond Agreement**").[181]

370. The Bondholders and Oro Negro Drilling have amended and restated the Bond Agreement several times, including on 29 April 2016, 2 June 2016, 29 September 2016 and 9 November 2016.[182]

371. In particular, the Bond Agreement shows that the Bondholders decided on 7 November 2016 to amend the debt instrument to accommodate certain changes in the Oro Negro Contracts.[183]

372. Among the modifications implemented, the Bondholders decided to waive events of default that had taken place prior to that amendment, such as the non-payment of amortization and interest.[184] Furthermore, the amended instrument contained, among others, the following safeguards in favour of the Bondholders: the right to appoint an "Independent Director," who would have to be consulted prior to the filing of insolvency proceedings involving Oro Negro Drilling and its subsidiaries;[185] and the right to declare an event of default if Integradora,

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[181] See Bond Agreement, C-0097.

[182] See Bond Agreement, C-0097, p. 1.

[183] See Bond Agreement, Attachment 8 and 9, C-0097, pp. 150-152.

[184] See Bond Agreement, Attachment 8, C-0097, p. 150.

[185] Clause 13.5(a) of the Bond Agreement reads as follows: "The constitutional documents of the Issuer and each of its Subsidiaries shall at all times provide for the appointment of a director selected by the Bond Trustee (such selection to be made according to the designation indicated in writing by a majority of the Bondholders or, in the absence of any such designation, in the reasonable discretion of the Bond Trustee, subject only to such individual satisfying the requirements to qualify as an independent director under the listing rules of either Exchange) (such individual, the "Independent Director") and require the vote of such Independent Director, under all circumstances and in all cases, in order for the Issuer or each of its Subsidiaries to file a petition in respect of, commence or agree to become a debtor under any bankruptcy, insolvency, provisional liquidation, scheme of arrangement or judicial management or similar filing, case or proceeding, including, without limitation, any filing, case or proceeding seeking liquidation, winding up, reorganization,

Perforadora, Oro Negro Drilling or the Singapore Rig Owners initiated insolvency proceedings.[186]

373. The Tribunal also notes that, pursuant to the Bond Agreement, the occurrence of an event of default allowed Nordic Trustee to "declare the Outstanding Bonds including accrued interest, costs and expenses to be in default and due for immediate payment" and "to take every measure necessary to recover the amounts due under the Outstanding Bonds and all other amounts outstanding."[187]

374. The Tribunal draws attention to the fact that the Bond Agreement was brought to the file by Claimants, and the authenticity of its content was never in question.

### *4. The renegotiation of the Oro Negro Contracts*

375. The Oro Negro Contracts were the object of several rounds of renegotiations, which took place in 2015, 2016 and 2017.

376. A first round of renegotiations of the Primus, Laurus, Fortius and Decus Contracts was amicably concluded on 26 June 2015 with an agreed reduction of their daily rates from USD 160,000.00 to USD 130,000.00 for the period of a year.[188]

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arrangement, adjustment, protection, relief, composition or a general assignment under any law in any jurisdiction, including the filing of a voluntary or a pre-packaged Concurso filing under the provisions of the Mexican Ley de Concursos Mercantiles (each of the foregoing, an "Insolvency Matter"); provided that such Independent Director shall only be entitled to attend any meeting at which an Insolvency Matter is reasonably anticipated to be considered, shall only be entitled to vote on an Insolvency Matter, and shall only be entitled to receive board materials in connection with any meeting at which there is to be a vote on an Insolvency Matter. The Issuer and each of its Subsidiaries shall provide written notice to the Independent Director of any meeting of its board of directors at which an Insolvency Matter is to be considered in accordance with the notice requirements of the applicable constitutional documents, but in no event less than forty eight {48) hours prior to such meeting, and shall provide the Independent Director with such books and records of the Issuer and/or its Subsidiaries as is reasonably necessary to evaluate all matters related to any Insolvency Matter; provided, however, that the Independent Director shall be provided with such access to such books and records of the Issuer and its Subsidiaries as the Independent Director may reasonably determine to be necessary in order to discharge its duties, including fiduciary duties, in accordance with applicable Law. Except as shall have been approved by Bondholders at a Bondholders Meeting or by Written Resolution, in each case upon the approval thereof by at least a majority of the Voting Bonds present at such Bondholders Meeting or voting in connection with such Written Resolution, the issuer and each of its Subsidiaries shall not amend their respective constitutional documents in any way which is inconsistent with the foregoing requirement or which could reasonably be expected to have a Material Adverse Effect on any Parent Group Company individually or on the Parent Group in the aggregate". See Bond Agreement, C-0097, p. 54.

[186] See Clause 15.1(g) of the Bond Agreement, C-0097, pp. 66-67.

[187] See Clause 15.2 of the Bond Agreement, C-0097, pp. 67-68.

[188] See Amendments to the Oro Negro Contracts in C-H.1 to C-H.4.

377. In October 2015, further modifications to the Oro Negro Contracts were agreed upon, which led to the extension of the duration of the leases of the Primus, Laurus, Fortius and Decus rigs by approximately one year.[189]

378. At the turn of 2015, on 29 and 30 December, the Primus, Laurus, Fortius and Decus Contracts were modified yet again in order to extend payment delays from 20 to 180 days.[190]

379. Further modifications were implemented in November 2016. In particular, the Laurus and Primus Contracts were suspended for the period of one year, while the Fortius, Decus and Impetus Contracts had their daily rates reduced to USD 116,300.00.[191]

380. A new round of renegotiations was triggered by PEMEX in 2017 (the "**2017 renegotiations**"). The amendments negotiated between PEMEX and Oro Negro at this stage were never adopted and are at the root of the present dispute.

### *5. Insolvency proceedings and the termination of the Oro Negro Contracts*

381. It is undisputed that Integradora and its subsidiaries filed for insolvency proceedings in September 2017 before Mexican courts. Notably, Perforadora filed insolvency proceedings on 11 September 2017,[192] while Integradora, Oro Negro Drilling, Primus SPV, Laurus SPV, Fortius SPV, Decus SPV, and Impetus SPV followed suit and filed insolvency proceedings on 29 September 2017.[193] Due to procedural irregularities related to Perforadora's filing, the insolvency proceedings were only admitted on 5 October 2017.[194]

382. On 26 September 2017, the Bondholders declared an event of default as per clause 15.1. (g) of the Bond Agreement, i.e., a direct consequence of Perforadora's filing of insolvency proceedings.

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[189] See Amendments to the Oro Negro Contracts, R-0107 to R-0110.

[190] See Amendments to the Oro Negro Contracts, R-0111 to R0114.

[191] See Amendments to the Oro Negro Contracts in C-I.1 to C-I.5.

[192] See Perforadora Oro Negro *Concurso Mercantil* Petition, C-K.

[193] See Integradora Oro Negro and Subsidiaries *Concurso Mercantil* Petition, C-L.

[194] See Mexican Civil Court Order (11 September 2018), C-0230, p. 1.

383. On 3 October 2017, PEMEX terminated the Oro Negro Contracts based on an alleged early termination clause contained in the instruments, i.e. clause 30.3.2.3 of the Impetus Contract and clause 18 of the rest of the contracts.[195]

384. The Bareboat Charter Agreements were terminated on 5 October 2017, allegedly as a consequence of the termination of the Oro Negro Contracts.[196]

385. PEMEX returned the five oil rigs leased by Oro Negro between October and December of 2017 (Impetus on 10 October, Laurus and Primus on 3 November, Decus on 4 November, and Fortius on 26 December),[197] and Claimants acknowledge that oil rigs were indeed returned as per the return certificates issued by PEMEX.[198]

386. Finally, the Tribunal notes that the judge in the Mexican insolvency proceedings declared Oro Negro in liquidation,[199] ordering Perforadora to return the rigs to the Singapore Rig Owners on 15 May 2019.[200]

### *6. Proceedings before US Courts*

387. The first of the US proceedings related to this arbitration was launched by the Singapore Rig Owners and Oro Negro Drilling on 15 March 2018, with the filing of a petition against Perforadora before the US District Court for the Southern District of New York ("**New York Court**"). This case was initiated under the Bareboat Charters and sought "to recover five drilling vessels [the Oro Negro Rigs] wrongfully withheld by Defendant Perforadora Oro Negro."[201]

388. Then, a series of insolvency related petitions were filed in the United States by individuals acting as Foreign Representatives of Perforadora and Integradora. In addition, a few other US

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[195] See Termination Notices of the Oro Negro Contracts, C-M.1-T to C-M.5-T, p. 3.

[196] See e-mail sent by Singapore Rig Owners (5 October 2017), C-160 to C-164.

[197] See PEMEX documents recording the return of the oil rigs, C-133 to C-136.

[198] See C1, § 136.

[199] See *Concurso* Judge's order declaring Integradora and Perforadora in liquidation (13 June 2019), C-165.

[200] See Rig Return Order (15 May 2019), C-150, p. 10.

[201] According to the complaint filed by Oro Negro Primus Pte. Ltd., Oro Negro Laurus Pte. Ltd., Oro Negro Fortius Pte. Ltd., Oro Negro Decus Pte. Ltd., Oro Negro Impetus Pte. Ltd. against Perforadora against Perforadora ("15 March 2018 Complaint"), R-0002.

proceedings related to this arbitration have been initiated by Messrs. Gonzalo Gil White, José Antonio Cañedo White and Carlos Williamson-Nasi acting on their own behalf.

389. On 20 April 2018, Mr. Alonso del Val Echeverría, acting in his capacity as Foreign Representative of Perforadora and Integradora, filed a petition under Chapter 15 of the US Bankruptcy Code before the US Bankruptcy Court for the Southern District of New York ("**US Bankruptcy Court**").[202] This gave rise to a discovery proceeding targeting PEMEX, Bondholders, Oro Negro Drilling, the Singapore Rig Owners, Deutsche Bank México, Nordic Trustee and others.[203] The petition filed recorded applicants' objective in the following terms:

> Additionally, I am investigating potential causes of action, including in the United States or under United States law, by Integradora Oro Negro and Perforadora Oro Negro against the Bondholders (including the Ad-Hoc Group), Deutsche Bank (including Deutsche México and Deutsche U.S.) and Pemex relating to or arising from their (a) violations of orders issued by the *Concurso* Court; and (b) efforts (concerted or not) to harm Integradora Oro Negro and its Subsidiaries, including Perforadora Oro Negro, by (i) taking over the Jack-Up Rigs; (ii) terminating the Pemex Contracts; and (iii) misappropriating funds in the Mexican Trust or in the Singapore Entities' Accounts.[204]

390. On 22 October 2018, again in his capacity of Foreign Representative of Perforadora and Integradora, Mr. del Val Echeverría filed a petition against the Singapore Rig Owners, AMA and a series of individuals.[205] This petition sought *inter alia* an order prohibiting the Singapore Rig Owners and Bondholders from taking over Oro Negro Rigs,[206] relief that was granted on a temporary basis by the US Bankruptcy Court.[207]

391. On 24 June 2019, in light of the documents obtained through the Chapter 15 Petition, Mr. Gonzalo Gil White, acting both in his personal capacity and as the Foreign Representative of Integradora and Perforadora, filed a complaint against the Ad Hoc Group, the Singapore Rig

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[202] See Chapter 15 Petition and Declaration Filed in the Bankruptcy Court, C-166.

[203] See Chapter 15 Petition and Declaration Filed in the Bankruptcy Court, C-166, p. 26.

[204] See Chapter 15 Petition and Declaration Filed in the Bankruptcy Court, C-166, § 83.

[205] See Complaint filed by Alonso del Val Echeverria as the Foreign Representative of Perforadora and Integradora against Oro Negro Primus Pte. Ltd., Oro Negro Laurus Pte. Ltd., Oro Negro Fortius Pte. Ltd., Oro Negro Decus Pte. Ltd., Oro Negro Impetus Pte. Ltd., AMA Capital Partners, LLC and John Does 1-20 ("22 October 2018 Petition"), R-0210.

[206] See 22 October 2018 Petition, R-0210, p. 20.

[207] See Order Granting Motion for an Ex Parte Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not be Issued (Bankr. S.D.N.Y. 23 October 2018), C-0033.

Owners, a Mexican law firm and a number of individuals.[208] Presenting the same facts discussed in this arbitration and articulating essentially the same accusations, compensation was sought for the harm allegedly caused by the Ad Hoc Group's collusion with PEMEX to destroy Oro Negro.[209]

392. On 10 July 2019, Mr. Gil White, again acting in his personal capacity and as the Foreign Representative of Integradora and Perforadora, filed another complaint against the Ad Hoc Group, the Singapore Rig Owners, a Mexican law firm and a number of individuals. In this case the same facts and accusations arising in this arbitration were again articulated, with compensation being sought for the harm allegedly caused to Integradora and Perforadora in that regard.[210] The Tribunal notes that the complaint opens with the following statements:

> 1. This is an egregious tortious interference case in which a company's creditors and its only customer colluded to drive the company out of business and take over its only assets. The victim is Oro Negro, a Mexican oil services company with five state-of-the-art jack-up rigs used for offshore drilling in the Gulf of México.
>
> [...]
>
> 2. The Ad-Hoc Group and México, including through Pemex, destroyed Oro Negro because the Ad-Hoc Group wanted to, and eventually did, take over Oro Negro's only assets, the Rigs. The Rigs are valuable assets according to the Ad-Hoc Group's own estimates, even without the Oro Negro Contracts, each Rig is worth approximately $150 million.[211]

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[208] See Complaint filed by Gonzalo Gil White in his personal capacity and as Foreign Representative of Perforadora and Integradora against Alp Ercil, Alterna Capital Partners LLC, AMA Capital Partners LLC, Andres Constantin Antonius-Gonzalez, Asia Research and Capital Management Ltd., Kristan Bodden, CQS (UK) LLP, García Gonzalez y Barradas Abogados S.C., GHL Investments (Europe) Ltd., John Fredriksen, Maritime Finance Company Ltd., Paul Matison Leand Jr., Ship Finance International Ltd., Oro Negro Primus Pte. Ltd., Oro Negro Laurus Pte. Ltd., Oro Negro Fortius Pte. Ltd., Oro Negro Decus Pte. Ltd., Oro Negro Impetus Pte. Ltd., Roger Alan Bartlett, Roger Arnold Hancock, Noel Blair Hunter Cochrane Jr., Fintech Advisory Inc., Seadrill Limited, Deutsche Bank México, S.A., and Jane and John Does 1-100 ("24 June 2019 Complaint"), C-0073.

[209] See 24 June 2019 Complaint, C-0073, especially §§ 476-477.

[210] See Complaint filed by Gonzalo Gil White in his personal capacity and as Foreign Representative of Perforadora and Integradora against Alp Ercil, Alterna Capital Partners LLC, AMA Capital Partners LLC, Andres Constantin Antonius-Gonzalez, Asia Research and Capital Management Ltd., Kristan Bodden, CQS (UK) LLP, García Gonzalez y Barradas Abogados S.C., GHL Investments (Europe) Ltd., John Fredriksen, Maritime Finance Company Ltd., Paul Matison Leand Jr., Ship Finance International Ltd., Oro Negro Primus Pte. Ltd., Oro Negro Laurus Pte. Ltd., Oro Negro Fortius Pte. Ltd., Oro Negro Decus Pte. Ltd., Oro Negro Impetus Pte. Ltd., Roger Alan Bartlett, Roger Arnold Hancock, Noel Blair Hunter Cochrane Jr., Fintech Advisory Inc., Seadrill Limited, Deutsche Bank México, S.A., and Jane and John Does 1-100 ("10 July 2019 Complaint"), C-0074.

[211] See 10 July 2019 Complaint, C-0074, §§ 1-2.

393. A further complaint was filed on 26 September 2019 by a series of individuals and Mr. Fernando Pérez Correa in his capacity as Foreign Representative of Integradora and Perforadora against the Singapore Rig Owners, members of the Ad Hoc Group, and a number of other individuals.[212] In this instance, petitioners sought *inter alia* specific performance of a 2016 Mutual Release Agreement entered by Integradora, its shareholders and the Bondholders. Notably, petitioners applied for "a permanent injunction enjoining Defendants from any actions in violation of the 2016 Releases, including initiating or causing to initiate, or taking actions in furtherance of, criminal investigations against Oro Negro and/or its directors or employees for conduct and supposed damages that the 2016 Releases released and discharged."[213]

394. The Tribunal notes that amongst the petitioners acting on their own behalf, one finds Messrs. Gonzalo Gil White, José Antonio Cañedo White and Carlos Williamson-Nasi. Furthermore, one cannot but note that the facts leading to this filing are precisely the Mexican criminal investigations and the arrest warrants that are now discussed in this arbitration.[214]

395. Respondent acknowledges that Mexico is not a party in these US proceedings.[215] The Tribunal also stresses that PEMEX does not appear as a party in any of the proceedings before US courts.

### *7. Mexican criminal investigations and tax audits*

396. Several criminal investigations and tax audits have been launched in Mexico against Integradora, Perforadora and a series of individuals connected with Oro Negro, including some Claimants in this arbitration.

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[212] See Complaint filed by Fernando Pérez-Correa as Foreign Representative of Perforadora and Integradora, José Antonio Cañedo White, Carlos Williamson-Nasi, Gonzalo Gil White and Miguel Ángel Villegas Vargas against Asia Research and Capital Management Ltd., GHL Investments (Europe) Ltd., Ship Finance International Ltd., Oro Negro Primus Pte. Ltd., Oro Negro Laurus Pte. Ltd., Oro Negro Fortius Pte. Ltd., Oro Negro Decus Pte. Ltd., Oro Negro Impetus Pte. Ltd., LLC and Jane and John Does 1-100 ("26 September 2019 Complaint"), R-0048.

[213] See 26 September 2019 Complaint, R-0048, § 178.

[214] See 26 September 2019 Complaint, R-0048, §§ 124 ss.

[215] See R1, §§ 394-395.

397. A first criminal complaint was filed before the FGR by the Singapore Rig Owners on 18 June 2018, which gave rise to the criminal investigation CI 864/2018.[216] The complaint was filed against Integradora, Perforadora and Deutsche Bank Mexico to investigate the potential criminal offense of fraudulent administration. In particular, the facts of this complaint had to do with the alleged mismanagement of funds in the Mexican trust receiving PEMEX payments under the Oro Negro Contracts.

398. Also in June 2018, another criminal complaint was lodged by the Singapore Rig Owners against Mr. Alonso del Val Echeverría before the FGJCDMX, which led to criminal investigation CI 187/2018.[217] The complaint under the FGJCDMX relates to procedural fraud allegedly committed by Mr. del Val Echeverría, former Integradora's Chief Legal Officer. More specifically, Mr. del Val Echeverría is accused of having tried to induce the *Concurso* judge in error through the simulation of a corporative act.[218]

399. Mr. del Val Echeverría is also the subject of another investigation of the FGR, initiated on 18 October 2018 and registered as CI 5523/2018.[219] In this instance, he is accused of committing an offense provided in the *Ley de Amparo*, consisting of omitting information on ongoing criminal investigations against him when he filed an amparo in connection with one of these investigations.[220]

400. The Singapore Rig Owners filed a second criminal complaint before the FGJCDMX on 14 September 2018, launching criminal investigation CI 787/2018.[221] This investigation concerns the criminal offenses of fraudulent administration, tax evasion and abuse of trust, and targets Deutsche Bank México, Messrs. Gil White, Cañedo White, Williamson-Nasi and Villegas.[222]

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[216] See FED/SEIDF/UEIDFF-CDMX/0000864/2018 Complaint (18 June 2018), C-0469.

[217] See Improper Representation Complaint. CI-FPC/74/UI-5S/D/00187/06/-2018 (13 June 2018), C-0015.

[218] See Improper Representation Complaint. CI-FPC/74/UI-5S/D/00187/06/-2018 (13 June 2018), C-0015, § 5.

[219] See Complaint in Criminal investigation FED/JAL/GDL/0005523/2018 (18 October 2018), C-0041.

[220] See Complaint in Criminal investigation FED/JAL/GDL/0005523/2018 (18 October 2018), C-0041.

[221] See Sham Companies' Complaint. CI-FDF/T/UI-1S/D/00787/09-2018 (14 September 2018), C-0016.

[222] See Sham Companies' Complaint. CI-FDF/T/UI-1S/D/00787/09-2018 (14 September 2018), C-0016, §§ 3-4; Sham Companies' Amended Complaint. CI-FDF/T/UI-1 S/D/00787/09-2018 (21 September 2018), C-0017; Sham Companies' Second Amended Complaint. CI-FDF/T/UI-1 S/D/00787/09-2018 (30 November 2018), C-0018.

401. It is in the context of this investigation that arrest warrants were issued by Mexican authorities against Messrs. Gil White, Cañedo White, Williamson-Nasi, del Val Echeverría, and Villegas. In this regard, it has been established that Mexico requested Interpol Red Notices, which were rejected on the grounds that investigations were not yet on a stage were extradition could be obtained under Mexican extradition law.[223] That said, Interpol considered that "it ha[d] no reason to challenge the validity of the investigation against the Applicants."[224]

402. The Tribunal also observes that Mr. del Val Echeverría has been cooperating with Mexican authorities in this investigation.[225] In particular, he informed the authorities of a number of potential wrongdoings connected with the insolvency proceedings filed by Oro Negro, including the following:

> Tengo conocimiento, por el cargo que detentaba como Director Jurídico de PERFORADORA ORO NEGRO S. de R.L. de C.V., que dentro del concurso mercantil 345/2017 del índice del Juzgado Segundo de Distrito en Materia Civil en la Ciudad de México, en noviembre del año pasado dicha empresa solicitó un monto cercano a los $250,000,000.00 doscientos cincuenta millones de pesos 00/100 Moneda Nacional, de las cuentas del fideicomiso para pagar el Impuesto al Valor Agregado que se adeudaba. Sin embargo, por instrucciones de **GONZALO GIL WHITE**, dichos recursos no fueron utilizados para ser pagados al fisco federal sino dispuestos para otros fines.[226]

403. Beyond these criminal investigations, a contempt accusation is being investigated by the FGR's office in Ciudad del Carmen, which was filed on 21 October 2018 and gave rise to criminal investigation CI 480/2018.[227] This further investigation was also launched upon request of the Singapore Rig Owners and is related to Perforadora's alleged refusal to comply with a judicial order to return the Oro Negro Rigs to the Singapore Rig Owners.

[223] See Interpol Decision (7 October 2020), C-0488, pp. 5-7.

[224] See Interpol Decision (7 October 2020), C-0488, § 41.

[225] See *Entrevista del Imputado Alonso del Val Echeverría*, R-0194.

[226] See *Entrevista del Imputado Alonso del Val Echeverría*, R-0194, p. 13.

[227] See Complaint in Criminal investigation FED/CAMP/CAMP/000480/2018 (21 October 2018), C-0040.

404. Finally, on 17 June 2019, upon the request of the Ministry of Finance, the FGR launched an investigation on tax evasion targeting Messrs. Gil White, Cañedo White and Madragon.[228]

405. In addition to these criminal investigations, it has been established that Mexican authorities have launched at least seven tax audits as of October 2017 in respect of Integradora and its subsidiaries.[229]

[228] See SDP Noticias article entitled *Hacienda denuncia a Oro Negro por evasión de más de 10 mdp en 2014* (17 June 2019), C-0082.

[229] See Application for Interim Measures, Appendix C.

## VII. THE ANALYSIS OF THE TRIBUNAL

406. This part deals with the legal analysis of the Tribunal in light of the facts and the evidence presented by the Parties. The Tribunal will first present its views on the burden and standard of proof guiding its evaluation of evidence (1), then the Tribunal will address its jurisdiction under the facts and objections raised during this arbitration (2). A final section exposes in summary form the conclusions of the Tribunal (3).

407. Wherever appropriate, the Tribunal sets out the Parties' positions alongside its analysis.

### *1. Burden and standard of proof*

408. A well-established tenet of dispute resolution is captured by the Latin maxim *onus probandi actori incumbit*, that is, the one who asserts must prove. Such principle is enshrined in Article 24(1) of the UNCITRAL Rules, pursuant to which "[e]ach party shall have the burden of proving the facts relied on to support his claim or defence."

409. This provides a clear rule on the allocation of the burden of proof, which means that Parties must prove all the allegations they advance. However, the UNCITRAL Rules are not as precise in relation to the standard for discharging such burden, with its Article 25(6) stating that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered." Consequently, the Tribunal disposes of broad discretion in its appreciation of the evidence presented by the Parties.

410. An important point of contention between the Parties concerns the standard of proof to assess evidence in support of allegations of corruption. Claimants and Respondent have extensively referred to case law in order to advance their respective proposed standards. Nevertheless, these many decisions demonstrate that the practice of investment tribunals in the assessment of evidence is subject to the circumstances of each case.

411. While the case law brought to the file refers to notions such as balance of probabilities, preponderance of evidence, clear and convincing evidence and intime conviction, the reasoning adopted by arbitrators is usually grounded on the facts and the context of each case. Parties may want to draw a clear and sharp distinction between all these standards, but

investment tribunals tend to be more nuanced regardless of the label they use in their evaluation of evidence.

412. It is true that many of these decisions may describe their reasoning in the assessment of corruption related evidence as one based on the preponderance of evidence or as taking into account the method of red flags,[230] as was the case in *Rutas de Lima* and in *Union Fenosa*.[231] Yet, beyond general statements that circumstantial evidence may be considered in the assessment of allegations corruption, none of the referred cases actually explain how the preponderance of evidence or the balance of probabilities is established.

413. This is made clear in both *Rutas de Lima* and *Union Fenosa*. In *Rutas de Lima*, the arbitrators decided to adopt the method of red flags to assess the preponderance of evidence, but cautioned that "the fact that the Arbitral Tribunal applies a flexible standard of proof does not prevent it from requiring that there be sufficiently specific evidence to reasonably establish the existence of corrupt payments and their connection with the Contract or the June 2016 Minutes" [232] The *Union Fenosa* tribunal was even clearer as to its considerations on the red flags method and the standard of proof:

> Nonetheless, contrary to the Claimant's submissions, the Respondent and its legal representatives should not be criticised for raising its allegations of corruption in this arbitration in regard to Mr El Komy. These allegations were not frivolous. Several were classic "red flags"; but even the reddest of red flags does not suffice without proof of corruption before the tribunal. Whilst it can be relatively easy to allege corruption, it is less easy to prove it, as observed in the Metal-Tech award (2013). Suspicion is not equivalent to proof. Unanswered queries may have innocent explanations, not amounting (in the absence of explanations) to proof of corruption. With hindsight, what businesspeople agree not infrequently defies logic or common- sense to non-business people, again without amounting to proof of corruption. The legal burden of proving corruption rests upon the party alleging corruption; and it is not discharged by placing the burden on the adverse party to prove the absence of corruption.[233] [Emphasis added]

[230] See Reply, §§ 424-425.

[231] See *Union Fenosa Gas v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (31 August 2018), RL-0099, § 7.52; *Rutas de Lima v. Municipalidad Metropolitana de Lima*, Ad Hoc Arbitration, Award (11 May 2020), CL-274, § 402.

[232] See *Rutas de Lima v. Municipalidad Metropolitana de Lima*, Ad Hoc Arbitration, Award (11 May 2020), CL-274, § 403.

[233] See *Union Fenosa Gas v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (31 August 2018), RL-0099, § 7. 113.

414. A similarly nuanced approach is found in *Churchill Mining*. Claimants wished to highlight that the *Churchill Mining* Tribunal "applied the balance of probabilities standard to evaluate the existence of claimants' investment" and "rejected claimants' arguments that, due to the seriousness of respondent's allegations […], the tribunal should apply the 'clear and convincing' evidence standard."[234] Still, this was not exactly the *ratio decidendi* of the case, which is most clear on the following excerpt:

> In sum, the Tribunal considers that the Respondent carries the burden of proving forgery and fraud, which proof will be measured on a standard of balance of probabilities or *intime conviction* taking into account that more persuasive evidence is required for implausible facts, it being specified that intent or motive need not be shown for a finding of forgery or fraud but may form part of the relevant circumstantial evidence. The Tribunal will assess all the available evidence on record and weigh it in the context of all relevant circumstances.[235]

415. The context in which the discussion above took place had to do with the question of whether or not the respondent, in proving its allegation of forgery, had also to prove *mens rea* – that is, intent or motive to commit the forgery. The *Churchill Mining* tribunal was of the view that, as it was not a criminal proceeding, intent and motive need not be proven to ascertain a treaty violation. Yet that tribunal was also clear in stating that such volitional element could be considered in the assessment of evidence. The *Churchill Mining* tribunal further cited other investment cases in order to support the notion that certain facts need more cogent evidence to tilt the balance of probabilities.[236]

416. The criminal standard of proof in common and civil law jurisdictions seems to be analogous. While common lawyers refer to the notion of proof beyond a reasonable doubt, civil lawyers refer to the Latin maxim *in dubio pro reo*. In both instances, the underlying idea evokes the fact that the existence of doubt must be interpreted in favour of the accused. Such a high standard of proof is related to the nature of criminal sanctions.

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[234] See Reply, §§ 423-424.

[235] See *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (6 December 2016), CL-0272, § 244.

[236] See *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (6 December 2016), CL-0272, §§ 240-241.

417. Certainly, one is not dealing with criminal sanctions nor criminal liability in investment arbitration, with evidence in these proceedings being produced for the purpose of proving treaty violations. It is for this reason that investment tribunals have favoured notions evoking the preponderance of evidence, the balance of probabilities or the adjudicator's *intime conviction*.

418. Nevertheless, likelihood and probability are relational measurements, that is, certain things are more likely or probable than others. This means that the level of persuasion that certain evidence may produce depends on the nature and seriousness of the allegations. This fundamental idea was expressed by the *Churchill Mining* tribunal,[237] as it was expressed in the *Libananco* case. Indeed, the *Libananco* tribunal observed the following:

> In relation to the Claimant's contention that there should be a heightened standard of proof for allegations of "fraud or other serious wrongdoing", the Tribunal accepts that fraud is a serious allegation, but it does not consider that this (without more) requires it to apply a heightened standard of proof. While agreeing with the general proposition that *"the graver the charge, the more confidence there must be in the evidence relied on"* (see paragraph 117(a) above), this does not necessarily entail a higher standard of proof. It may simply require more persuasive evidence, in the case of a fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged.[238]

419. When a tribunal is confronted by allegations with criminal repercussions, such as corruption, it must undertake its analysis with the utmost prudence. While the tribunal will not rule on criminal liability, one must recognize that any findings on such an issue may (and often do) reverberate at criminal fora. Although this realization should not be conducive to the transposition of the criminal standard of proof to investment arbitration, it should be taken as a word of caution in investment tribunals' assessment of corruption related evidence.

420. To be clear, regardless of the label chosen to describe the evaluation of evidence by the arbitrator (inner conviction, preponderance of evidence, the balance of probabilities or clear and convincing evidence), one must always take into account the seriousness of the allegation and the rights at stake. This was convincingly expressed by the *ECE* tribunal:

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[237] See *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (6 December 2016), CL-0272, §§ 240-241.

[238] See *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award (2 September 2011), RL-0127, § 125.

> Corruption is a serious matter and when it is alleged, a tribunal must weigh the evidence with care, both to see whether the allegation is made out (and if it is, to then determine the legal consequences that follow) and at the same time to safeguard those against whom corruption is alleged, if the allegations turn out to be unproven.
>
> […] When considering the Claimants' evidence the Tribunal has borne in mind the difficulties of obtaining evidence of corruption. It is well aware that acts of corruption are rarely admitted or documented and that tribunals have discussed the need to 'connect the dots'. At the same time, the allegations that have been made are very serious indeed. Not only would they (if true) involve criminal liability on the part of a number of named individuals, they also implicate the reputation, commercial and legal interests of various business undertakings which are not party to these proceedings and which are not represented before the Tribunal. Corruption is a charge which an arbitral tribunal must take seriously. At the same time, it is a charge that should not be made lightly, and the Tribunal is bound to express its reservations as to whether it is acceptable for charges of that level of seriousness to be advanced without […] either some direct evidence or compelling circumstantial evidence. That said, the Tribunal must of course decide the case on the basis of the evidence before it. If the burden of proof is not discharged, the allegation is not made out. The mere existence of suspicions cannot, in the absence of sufficiently firm corroborative evidence, be equated with proof.[239]

421. Proving corruption is no doubt a difficult endeavour. Obviously, individuals involved in such practices are actively looking for ways of bypassing law enforcement. In reality, proving any criminal activity is a difficult task, to the extent that law enforcement is routinely presented with the need to prosecute crimes and respect the rights of the accused – and the rule of law is supposed to systematically tilt the balance towards the protection of the accused.

422. Notably, it should not be forgotten that, while the prohibition of corrupt practices may very well constitute an element of international public policy,[240] the presumption of innocence is a widely protected human right – with clear expressions in the American Convention on Human Rights[241] and the International Covenant on Civil and Political Rights.[242]

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[239] See *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award (19 September 2013), RL-0098, §§ 4.872 and 4.876.

[240] See C1, §§ 492 ss.

[241] See Article 2 of the American Convention on Human Rights.

[242] See Article 14(2) of the International Covenant on Civil and Political Rights.

423. Within this framework, one cannot expect the standard of proof in investment arbitration to introduce a presumption of guilt in relation to corruption, nor should one expect Respondent to prove its innocence. If such propositions were to prevail, investment arbitration proceedings would be turned into an inquisitorial playground were the burden of proof is shifted merely by alleging the existence of corruption. Hence, the difficulty in obtaining compelling evidence of corruption cannot be an excuse to the subversion of the rule of law.

424. In essence, this Tribunal shares the view expressed by the *Churchill Mining* Tribunal when it calls to "assess all the available evidence on record and weigh it in the context of all relevant circumstances."[243] Certainly, parties in an investment arbitration do not need to prove all the elements of a given criminal offense (such as causation or *mens rea*), nor do they need to prove this beyond a reasonable doubt. Yet, precisely because all relevant facts and circumstances must be considered when assessing evidence, the seriousness of a given allegation sets the background upon which the persuasion of the evidence will be evaluated.

425. In particular, in instances of a very serious allegation (as is the case of corruption), the Tribunal considers that the Party making such allegations has to present compelling and particularized evidence in order to discharge the burden of proof in relation to its allegations. To be sure, suspicion does not amount to conviction. Short of direct evidence of corrupt practices, a considerable accumulation of clear, convincing and particularized circumstantial evidence will be required.

## *2. Jurisdiction*

### A) Preliminary remarks: the sources for the standard of interpretation of the relevant treaty provisions

426. In their discussion of treaty interpretation, both Parties rely heavily on the Vienna Convention on the Law of Treaties, dated 23 May 1969 ("**VCLT**"),[244] with a special emphasis on its Articles 31 and 32, which are considered to reflect customary international law. The Tribunal further notes that Mexico has ratified the VCLT.

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[243] See *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (6 December 2016), CL-0272, § 244.

[244] Both Claimants and Respondent brought to the file copies of the VCLT. See CL-0058 and RL-0054.

427. Given the many references in this regard, the relevant articles shall be transcribed below:

> Article 31 – General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) Any agreement relating to the treaty, which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There 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;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> Article 32 – Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.[245]

428. As it shall be highlighted in due course, according to the Parties, the interpretation that they respectively propose is advanced as the only one in line with the principles of interpretation under the VCLT. The Tribunal is aware that, in some particular cases, there could be more than one reading consistent with this Convention. In any event, the duty of this Tribunal is to unravel the meaning of the relevant treaty rules applicable, by adopting the interpretation that it considers the most appropriate.

429. As a preliminary remark, and in view of the references by the Parties to investment treaties other than the NAFTA, the Tribunal notes that, under the terms of the VCLT, the situations in which one treaty may have an impact on the interpretation of another are limited. More precisely, a treaty concluded between two States is restricted to that relationship and is not expressly recognised by the VCLT as a valid means of interpreting another treaty unless it is covered by Article 31(2). Such a circumstance is logical if one considers that treaties are the result of particular negotiations motivated by legal and political concerns and objectives peculiar to the participants in each specific negotiation.

430. It is true that the texts of other treaties, and their similarities or differences with the NAFTA, may be invoked in an attempt to demonstrate what would be the "ordinary meaning" of the terms used, within the meaning of Article 31(1) of the VCLT. However, the analysis of such references must always be carried out with great caution, ruling out automatic extrapolations. The invocation of the provisions of one treaty can only have an effect on the interpretation of another –and thus such invocation be justified– to the extent that it is shown that there are specific and conclusive facts to raise them to the status of interpretative guidelines for the latter or to identify the intention of the respective contracting parties.

431. In the same vein, the Parties have on countless occasions referred to international decisions, including arbitral decisions, in order to support their arguments and persuade the Tribunal. On some occasions the decisions have simply been referred to, on others they have been developed and analysed in great detail.

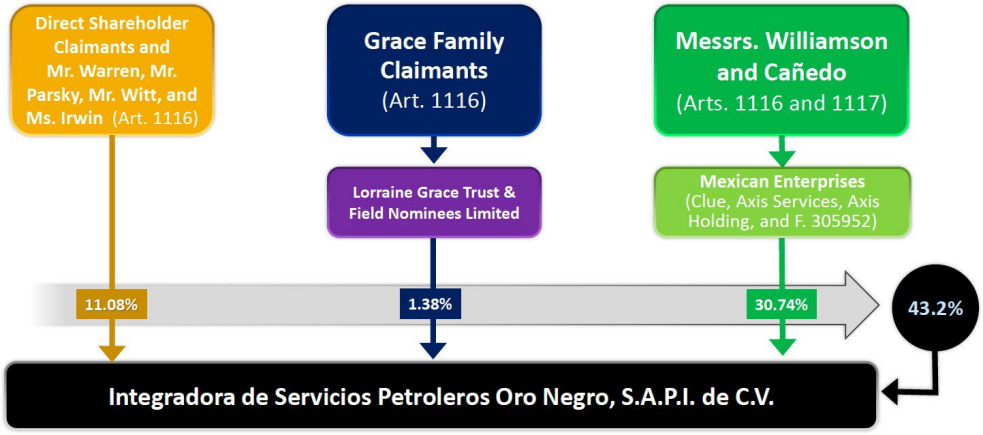
[245] Vienna Convention on the Law of Treaties, dated 23 May 1969, Articles 31 and 32, RL-0054.

432. In this regard, the Tribunal recalls that in international law there is no doctrine of *stare decisis*. This Tribunal is independent of the tribunals that issued the decisions cited and there is no hierarchical subordination among them that could make the decision of one depend on the decisions adopted by others. Nevertheless, as a general principle, the Tribunal considers it desirable, to the extent that the circumstances of the case under analysis and the treaty at issue allow it, to encourage the development of a *jurisprudence constante* on the basis of previous decisions. This could provide some predictability to the disputing Parties and respond to an ongoing demand for more consistency within the international investment system, a demand rooted in the need to enhance its legitimacy. It is with this understanding that the Tribunal will base some of its findings on the content of other arbitral decisions that the Tribunal considers particularly persuasive.

433. The foregoing is by no means contradictory with the Tribunal's primary duty which is, undoubtedly, to render a decision regarding the dispute, based on all the specific factual and legal elements before it. Of course, the search for consistency based on a detailed analysis of previous decisions is, in many cases, unsuccessful. Logically, special care should always be exercised to determine the similarities or differences between the present case and those cases in which such previous decisions were adopted. The very fact that the Parties cite the same cases to propose opposing interpretations evidences the limits of the desire to have a consistent case-law within an absolutely decentralized system and reminds us to what extent the Tribunal should be careful about using case law.

B) Overview of jurisdictional issues

434. Claimants present themselves as US investors holding, both directly and indirectly, shares of Integradora, which they have qualified as a covered investment under Article 1139 (b), (e) and (f) of the NAFTA. On the basis of Claimants' allegations, their shareholding in Integradora may be illustrated through the following diagram:




435. Mexico has raised several objections regarding the jurisdiction of the Tribunal. In particular, Mexico has raised objections as to the Tribunal's jurisdiction *ratione personae* and *ratione materiae*, as well as objections to Claimants' standing in relation to requirements in NAFTA's Articles 1116 and 1117.

436. The Tribunal is aware of the very broad terms upon which NAFTA defines investors and protected investments, which requires an attentive and careful analysis of its jurisdiction to hear this case. NAFTA's Article 1139 defines the term "investor of 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."[246] An investment is defined by the same provision as follows:

> (a) an enterprise;
>
> (b) an equity security of an enterprise;
>
> (c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least

[246] See NAFTA Article 1139, CL-0059.

> three years, but does not include a debt security, regardless of original maturity of a state enterprise;
>
> (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise;
>
> (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
>
> (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d).[247]
>
> [...]

437. Article 1139 provides a further qualification of an investment, by noting that the term "investment of an investor of a Party" is to be understood as "an investment owned or controlled directly or indirectly by an investor of such Party."[248]

438. As one can observe from the aforementioned provisions, the dimensions *ratione personae* and *ratione materiae* of the Tribunal's jurisdiction are inextricably interconnected under the NAFTA. In other words, the qualification of investor depends on whether or not a national or enterprise of a Party other than that of the host State can show to have made a covered investment which is owned or controlled, directly or indirectly, by said national or enterprise.

439. This arbitration has been initiated by 27 different claimants against Mexico, for alleged acts and omissions committed by Mexico in relation to the shares they allegedly held in Integradora. Claimants argue that they qualify as US protected investors as they have held shares, both directly and indirectly, in Integradora before the alleged acts and omissions of Mexico began interfering with their investment.[249]

440. Within this framework, in order to ascertain its jurisdiction over Claimants' claims, the Tribunal must preliminarily assess whether Claimants qualify as nationals of a NAFTA party other than Mexico (C), and if they have made a covered investment under NAFTA, which is

[247] See NAFTA Article 1139, CL-0059.

[248] See NAFTA Article 1139, CL-0059.

[249] See C1, §§ 325 ss; Reply, §§ 456 ss.

owned or controlled, directly or indirectly, by them (D). Then, the Tribunal must establish whether Claimants have standing to bring their claims under Articles 1116 and 1117 the NAFTA (E).

C) Claimants' nationality

441. There are 13 individuals who appear as Claimants litigating exclusively under Article 1116 of the NAFTA, namely Alicia Grace, Carolyn Grace Baring, Diana Grace Beard, Frederick Grace, Frederick Warren, Gary Olson, Genevieve Irwin, Gerald Parsky, John Irwin III, Nicholas Grace, Oliver Grace, Robert Witt, and Virginia Grace.

442. All these individuals have proven to be citizens of the United States of America.[250]

443. There are 12 legal entities that appear as Claimants litigating exclusively under Article 1116 of the NAFTA, namely Ampex Retirement Master Trust, Apple Oaks Partners LLC, Brentwood Associates Private Equity Profit Sharing Plan, Cambria Ventures LLC, Floradale Partners LLC, Frederick J. Warren IRA, Genevieve T. Irwin 2002 Trust, Gerald L. Parsky IRA, ON5 Investments LLC, Rainbow Fund LP, Robert M. Witt IRA, and Vista Pros LLC.

444. All these 12 legal entities have proven to be constituted under laws of the United States of America.[251]

[250] See Alicia Grace's Passport, C-B.1; Carolyn Grace Baring's Passport, C-B.11; Diana Grace Beard's Passport, C-B.12; Frederick Grace's Passport, C-B.14; Frederick Warren's Passport, C-B.15; Gary Olson's Passport, C-B.17; Genevieve Irwin's Passport, C-B.18; Gerald Parsky's Passport, C-B.20; John Irwin III's Passport, C-B.22; Nicholas Grace's Passport, C-B.24; Oliver Grace's Passport, C-B.25; Robert Witt's Passport, C-B.28; and Virginia Grace's Passport, C-B.31.

[251] See First Amendment to the Retirement Master Trust Agreement between Ampex Corporation and State Street Bank and Trust Company, C-B.2; Certificate issued by the California Secretary of State in relation to Apple Oaks Partners LLC, C-B.3; Summary of Accounts issued by Citi Private Bank as custodian to Brentwood Associates Private Equity Profit Sharing Plan, C-B.4; Certificate of Conversion issued by Delaware Secretary of State in relation to Cambria Ventures LLC, C-B.5; Certificate issued by California Secretary of State in relation to Floradale Partners LLC, C-B.13; Summary of Accounts issued by Citi Private Bank as custodian to Frederick J. Warren IRA, C-B.16; Trust Agreement creating the Genevieve T. Irwin 2002 Trust, C-B.19; Review of Assets issued by PENSCO Trust Company in relation to Gerald L. Parsky IRA, C-B.21; Florida Limited Liability Company Annual Report issued in relation to ON5 Investments LLC, C-B.26; Amendment to Certificate of Limited Partnership in relation to Rainbow Fund LP, C-B.27; Account Statement issued by The Entrust Group in relation to Robert M. Witt IRA, C-B. 29; and Florida Limited Liability Company Annual Report issued in relation to Vista Pros LLC, C-B.30.

445. No dispute arises in relation to the nationality of the above individuals and legal entities. The situation is not the same in relation to the remaining individuals and entities that appear as Claimants in this arbitration.

446. Indeed, two Claimants, namely the estate of Mr. Carlos Williamson-Nasi and Mr. José Antonio Cañedo White, advance claims under NAFTA's Article 1116 on their own behalf, as well as under NAFTA's Article 1117 on behalf of certain entities.

447. The estate of Mr. Williamson-Nasi's claims under NAFTA's Article 1117 are submitted on behalf of Axis Services, Axis Holding, Clue and F. 305952.

448. Mr. Cañedo White's claims under NAFTA's Article 1117 are submitted on behalf of Axis Services, Axis Holding, Clue and F. 305952.

449. Mr. Williamson-Nasi, who passed away in the course of this arbitration,[252] was a citizen of Colombia, Mexico and the United States of America.[253] His estate is represented by Ms. Maria Clara Lloreda Gomez, the surviving spouse of Mr. Williamson-Nasi, who granted a new power of attorney in favour of Claimants' counsel to represent Mr. Williamson-Nasi's estate in this arbitration and to continue to advance claims on behalf of Mr. Williamson-Nasi's estate.[254]

450. Respondent raised certain concerns regarding the fact that no further explanation has been given as to the current situation of Mr. Williamson-Nasi's estate,[255] but it did not formulate any specific objections concerning the representation of Mr. Williamson-Nasi's estate in this arbitration. In the view of the Tribunal, this specific issue does not represent an obstacle to assess the quality of investors of Mr. Williamson-Nasi or Mr. Willianson-Nasi's estate under the NAFTA.

[252] See § 123.

[253] See C1, § 332; Claimants' letter dated 21 November 2019, Mr. Williamson-Nasi' Mexican Naturalization Certificate, C-234A; Mr. Williamson-Nasi' USA Naturalization Certificate, C-234A; and Mr. Williamson-Nasi US Passport, C-B.6.

[254] See § 148.

[255] See RPHB, §§ 61-63.

451. Mr. Cañedo White is admittedly a Mexican national,[256] but is currently a United States of America permanent resident.[257]

452. Axis Services, Axis Holding, Clue and F. 305952 have all been constituted under Mexican law,[258] for which reason they will be jointly referred as the "**Mexican Enterprises**."

453. The Tribunal notes that, as a matter of principle, Mexico has not objected to the right of individuals to bring claims on behalf of the Mexican Enterprises under NAFTA's Article 1117. Rather, Mexico questions Messrs. Williamson-Nasi's and Cañedo White's concrete ability to bring claims under NAFTA's Article 1117, for they would have failed to prove ownership and control of the Mexican Enterprises.[259]

454. Before addressing this matter, the Tribunal must first address a further objection raised by Mexico, concerning the Tribunal's jurisdiction *ratione personae* in relation to Messrs. Williamson-Nasi and Cañedo White.

455. Respondent argues that Messrs. Williamson-Nasi and Cañedo White are Mexican nationals, for which reason they would not qualify as protected investors under the terms of the NAFTA.[260]

456. The Tribunal understands that two questions must be answered in relation to this objection, i.e., (i) whether a permanent resident of a given NAFTA Party enjoys a similar level of investment protection to that of NAFTA nationals, and (ii) whether dual nationals may bring claims under NAFTA against one of the States of their nationality.

457. The first question to be answered concerns Mr. Cañedo White's simultaneous status as a US permanent resident and Mexican national. Claimants are of the view that Article 201 of the NAFTA would inform the interpretation of the Chapter Eleven notions of nationality, a

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[256] See C1, § 333.

[257] See Mr. Cañedo White's Green Card, C-B.23.

[258] See Axis Oil Field Services, S. de R.L. de C.V. Entity Registration, C-B.7; Axis Oil Field Holding, S. de R.L. de C.V. Entity Registration, C-B.8; Clue, S.A. de C.V. Certificate of Formation, C-B.9; *Fideicomiso* 305952 Trust Agreement, C-B.10.

[259] See R1, § 493; Rejoinder, §§ 457 ss.

[260] See R1, §§ 538 ss; Rejoinder §§ 562 ss.

provision establishing *inter alia* that, unless otherwise specified, "national means a natural person who is a citizen or permanent resident of a Party […]."[261]

458. This understanding coincides with that espoused by the United States, for whom "[the] express terms of the NAFTA provide that both citizens and permanent residents of a Party 'may submit' a claim to arbitration on behalf of themselves (Article 1116) or an eligible enterprise of another Party (Article 1117) alleging such other Party breached a NAFTA obligation."[262]

459. The Tribunal sees no great difficulty in relation to Mr. Cañedo White's status as US permanent resident, considering that his status as a permanent resident in the United States, under Article 201 of the NAFTA, is to be equated to the status of a US national. This means that, for the purposes of this arbitration, Mr. Cañedo White's status is analogous to that of a dual national holding simultaneously Mexican and US citizenship.

460. Within this framework, the key element the Tribunal must assess is to what extent, if at all, a dual national may bring claims under the NAFTA against one of the States of their nationality. In clearer terms, can Messrs Williamson-Nasi and Cañedo White proceed against Mexico as US nationals, regardless of their Mexican citizenship?

461. In its 1128 Submission, Canada affirms that NAFTA contains a diversity of nationality rule, pursuant to which NAFTA's Articles 1116 and 1117 rely on the concept of "investor of a Party" bringing a claim against "another Party."[263] For this reason, "a claimant, whether bringing a claim on their own behalf or on behalf of an enterprise that the claimant owns or controls, cannot be of the same nationality of the Party against which the claimant brings a claim."[264]

462. The United States arrives at a similar conclusion through a different reasoning. Notably, the United States submits that, considering that Article 1131(1) requires NAFTA tribunals to

[261] See NAFTA's Article 201, Cl-0067.

[262] See US 1128 Submission, § 4.

[263] See Canada 1128 Submission, § 5.

[264] See Canada 1128 Submission, § 5.

decide disputes in accordance with "applicable rules of international law," this means that "a State is not responsible for a claim asserted against it by one of its own nationals."[265]

463. It must be recognized that the ability of dual nationals to bring investment claims is a controversial and delicate topic in investment arbitration, which must always take into account the terms of the relevant investment treaty. Consequently, the decision of the Tribunal in the present instance must not be read as an abstract and generalizable precedent, but rather as an application of the NAFTA provisions in light of the VCLT, and in coordination with the UNCITRAL Rules.

464. It is also important to stress that the case law referred to by the Parties in support of their positions demonstrate that investment tribunals have not dealt with the standing of dual nationals consistently, and some of these decisions did not aim to establish a general principle on the matter. This is the case of the *Serafín García Armas* arbitration tribunal, which arrived at its decision upon a concrete analysis of the treaty practice involving Spain and Venezuela with regards to dual nationals. The specificity of this ruling is made clear in the following passage:

> The fact that Venezuela has signed BITs with certain States in which it excluded from their application the nationals of both signatory countries and others in which it did not do so, shows that the exception to its application was always made expressly and as long as it was not part of reciprocal commitments of the signatories of the respective BITs.
>
> For the same reason, the circumstance that in the vast majority of the BITs signed by Spain (including the BIT) in the period 1990 - 2000, protection for dual nationals had not been excepted (except in a treaty in which this solution was not adopted), shows that the denial of the benefit of the Treaty must be expressly stated in its text so that its application prevails as part of the reciprocal commitments assumed by the signatory States of the BIT.[266]

465. The Tribunal also notes that, in the same context of the Spain-Venezuela BIT involving a claim submitted by members of the García Armas family against Venezuela, another arbitral tribunal expressly deviated from the approach taken by the *Serafín García Armas* tribunal. Notably, the *Manuel García Armas* tribunal held *inter alia* the following:

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[265] See US 1128 Submission, § 5.

[266] See *Serafín García Armas v. República Bolivariana de Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction (14 December 2014), CL-64, §§ 180-181.

> Finally, for the reasons set out above, in this Award, the Tribunal radically differs from the proposition accepted by the tribunal in the case S*erafín García Armas v. Venezuela* that BITs are not subject to the application of customary international law. By definition, every treaty is governed by general or customary international law, as has also been explained above.[267]

466. In other instances, even when the decisions referred to by the Parties intended to make general statements concerning the impact of general international law on the standing of dual nationals, no definitive or consensual position can be found. It suffices to compare, for instance, the approaches of the *Bahgat* tribunal and that of the *Heemsen* tribunal, respectively quoted by Claimants and Respondent. While the first held that:

> [t]he 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,[268]

the second considered that:

> [a]pplying by analogy the contemporary international law of diplomatic protection to investment arbitration, it would have to be considered that only the dual national who is more foreign than national can claim, that is, the investor whose dominant and effective nationality is not that of the State against which he claims.[269]

467. Certainly, NAFTA's Article 1120 provides a deliberate choice to investors allowing them to submit their claims under the ICSID Convention, the ICSID Additional Facility Rules and the UNCITRAL Rules.[270] It is for this reason that Claimants argue that "[g]iven that the NAFTA does not have a textual bar on claims by dual nationals and allows claims under the UNCITRAL Rules, the Tribunal may not read new prohibitions into the UNCITRAL Rules nor into the NAFTA itself."[271]

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[267] See *Manuel García Armas et al. v. República Bolivariana de Venezuela*, Caso CPA No. 2016-08, Award on Jurisdiction (13 December 2019), RL-0048, § 729.

[268] See *Mohamed Abdel Raouf Baghat v. The Arabic Republic of Egypt*, Decision of Jurisdiction (30 November 2017), CL-374, § 230.

[269] See *Enrique Heemsen et al. v. La República Bolivariana de Venezuela*, Caso CPA No. 2017-18, Award on Jurisdiction (29 October 2019), RL-0047, § 433.

[270] See C1, § 337.

[271] See C1, § 338.

468. The Tribunal recognizes that the UNCITRAL Rules do not contain any restriction on claims submitted by dual nationals, which stands in contrast to the approach of the ICSID Convention. Still, one cannot lose sight of the fact that the UNCITRAL Rules were adopted in the context of international commercial arbitration, which could potentially explain why it did not address matters pertaining to dual nationality. Conversely, the ICSID framework was drafted and implemented as a specialized arbitration regime governing disputes between governments and private parties, which is arguably a more eloquent indication of States' intentions in relation to jurisdictional issues pertaining to dual nationality. That said, the mentioned elements *per se* do not provide a sufficiently solid ground to ascertain the standing of dual nationals under the NAFTA.

469. Turning to the text of Articles 1116 and 1117, these provisions establish that "an investor of a Party" is allowed to submit claims for breaches of NAFTA obligations by "another Party." This formula is presented by Respondent as suggestive of a diversity of nationality rule, which would foreclose jurisdiction whenever a claimant holds the nationality of the respondent State. Such conclusion is, however, not convincing because, even if a claimant holds the nationality of the respondent State, it fulfils the only required rule of holding the nationality of another contracting party.

470. Such situation does not pose much of a problem in a regular context where an individual holds only one nationality. The diversity of nationality requirement becomes a much more complicated issue when, as it is the case at hand, a given claimant is a dual national of two NAFTA Parties. Still, the Tribunal is not convinced that the language in Articles 1116 and 1117, by itself, prohibits dual nationals from submitting claims against one of the States of their nationality.[272]

471. Although dual nationality is not expressly dealt by the NAFTA, the Non-Disputing Parties concur that such issues are to be decided in light of the test of the dominant and effective nationality.[273] As a consequence, the Tribunal understands that the Non-Disputing Parties are of the view that a dual national can submit a claim under the NAFTA to the extent that such

[272] For a detailed discussion of the Tribunal's interpretation of Articles 1116 and 1117, see §§ 520 ss.

[273] See Canada 1128 Submission, §§ 9-10; US 1128 Submission, § 5.

a claim is presented against a NAFTA Party other than that of their dominant and effective nationality.[274] This position is consistent with the stance maintained by Mexico, albeit subsidiarily, in this arbitration.[275]

472. The Tribunal finds pertinent to stress the ILC commentary on its "Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties", which expressed the following:

> Subsequent practice under article 31, paragraph 3 (b), must be conducted "in the application of the treaty". This includes not only official acts at the international or at the internal level that serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, *inter alia*, official statements, regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of applications takes place at the internal or at the international level.[276] [emphasis added]

473. Accordingly, the concurring statements submitted by the Non-Disputing Parties in the course of this arbitration alongside the positions of Mexico regarding dual nationals are to be understood as subsequent practice for the purposes of Article 31(3)(b) of the VCLT. In other words, the Tribunal takes note of the existing convergent position of the NAFTA Parties regarding the application of the dominant and effective nationality test to matters of dual nationality not expressly governed by the Treaty.

474. Claimants are adamantly against the application of the dominant and effective nationality test in relation to the claims submitted by Messrs. Williamson-Nasi and Cañedo White.[277] At the same time, Claimants express the concern that under the Respondent's interpretation of the NAFTA "a person holding nationalities of two Treaty Parties […] would not be a national of

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[274] See Canada 1128 Submission, § 9; US 1128 Submission, § 8.

[275] See R1, § 577.

[276] See ILC, "Draft conclusions on subsequent agreements and subsequent practice in relation the interpretation of treaties", Seventieth Session, UN Doc. A/73/10, Chapter VI, p. 32, § 18. Available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_11_2018.pdf . Quoted in *Bilcon of Delaware et al v. Canada*, PCA Case No. 2009-04, Award on Damages (10 January 2019), §§ 378-379, RL-0029. See R1, § 531; Reply, §§ 533-536.

[277] See Reply, § 614.

either Party under any circumstances."[278] The Tribunal considers that this is an unwarranted concern if one applies the dominant and effective nationality test, which has a long and well-established application in general international law and which, in the view of NAFTA Parties, is the applicable test within NAFTA context. Accordingly, in light of the common understanding of the NAFTA Parties regarding the application of the dominant and effective nationality test, the Tribunal finds compelling to proceed with its jurisdictional analysis within this framework.

475. In sum, the Tribunal holds the opinion that, pursuant to the subsequent practice of the NAFTA Parties expressing an agreement regarding the interpretation of matters of dual nationality, the NAFTA allows dual nationals to bring investment claims as long as they prove that their dominant and effective nationality is different from that of the Respondent State. Consequently, in the case at hand, the Tribunal must assess whether Messrs. Williamson-Nasi and Cañedo White have proven that their dominant and effective nationality is that of the United States.

476. The Tribunal also considers important to stress that, regardless of notions of nationality and citizenship often being conflated, Article 201 of the NAFTA provides in no unclear terms that permanent residents are to be considered nationals for NAFTA purposes. Consequently, the analysis of the dominant and effective nationality of Mr. Cañedo White is not automatically determined by the fact that he does not hold US citizenship. Indeed, the Tribunal is of the view that the dominant and effective nationality test serves the function of capturing factual realities beyond formal titles. Hence, facts must take precedence over formal qualifications.

477. In addition, the Tribunal observes that the United States contended that the notion of the dominant and effective nationality does not apply to permanent residents, considering that "the NAFTA's choice of terminology does not mean that permanent residents of one Party are to be considered 'nationals' of that Party for purposes of customary international law generally or, more specifically, with respect to cases of 'dual nationality.'"[279] For the Tribunal, however, this is an unwarranted statement, as Article 201 of the NAFTA puts permanent

[278] See Reply, § 585 (emphasis omitted).

[279] See US 1128 Submission, § 6.

residents on par with nationals of the NAFTA Contracting Parties for the purposes of the Treaty.

478. The Tribunal will now turn to the factual analysis concerning Mr. Williamson-Nasi's nationality (a), and then it will address the facts related to Mr. Cañedo White's nationality (b).

*a. Mr. Williamson-Nasi's nationality*

479. Mr. Williamson-Nasi acquired both US and Mexican citizenship by naturalization, respectively in 1989 and 2002.[280] He described his Mexican naturalization as a result of pragmatic considerations, affirming that "having citizenship would simplify the process of traveling into and out of México."[281]

480. The Tribunal notes that Mr. Williamson-Nasi was born in Colombia in 1960 to a Colombian father and a US mother.[282] In particular, his mother was a US citizen by birth and retained her US citizenship her entire life.[283] He lived continuously in Colombia from birth until he was 18 years of age, when he spent six months in the United States on an exchange program.

481. At age 23, in 1983, Mr. Williamson-Nasi moved to New York City, acquiring the status of permanent resident in 1984.[284] That same year, Mr. Williamson-Nasi married Ms. María Clara Lloreda, a Colombian national, who became a US permanent resident around the same time when he acquired his US citizenship, that is, in 1989.[285] She has been a US permanent resident ever since.[286]

482. Mr. Williamson-Nasi recognized that his three children were born in Mexico between 1995 and 2005, highlighting that "each child was born in México because our primary residence was in México at the relevant times."[287] Yet, all of them also hold US citizenship due to their having

[280] See Mr. Williamson-Nasi' Mexican Naturalization Certificate, C-234A; Mr. Williamson-Nasi' USA Naturalization Certificate, C-234A.

[281] See Witness Statement Carlos Williamson-Nasi, § 41.

[282] See Witness Statement Carlos Williamson-Nasi, § 7.

[283] See Witness Statement Carlos Williamson-Nasi, § 5.

[284] See Witness Statement Carlos Williamson-Nasi, §§ 11 and 12.

[285] See Witness Statement Carlos Williamson-Nasi, §§ 14-15.

[286] See Witness Statement Carlos Williamson-Nasi, § 18.

[287] See Witness Statement Carlos Williamson-Nasi, § 20.

been born to a U.S. citizen.[288] While his daughter lives exclusively in the United States, his two sons live between Mexico and the United States.[289] In addition, Mr. Williamson-Nasi had four siblings, all of whom were either US citizens or US permanent residents with their primary residence in the United States.[290]

483. Mr. Williamson-Nasi stated that his primary residency was currently located in Miami, Florida, United States, not having any registered addresses in Mexico since 2019.[291] Yet, he acknowledged that, from 1990 to 2019, his primary residence was in Mexico.[292] In this period, according to Mr. Williamson-Nasi himself, he spent approximately 40% of the year in the United States, half of the year in Mexico, and a few weeks in other countries.[293]

484. From a financial perspective, Mr. Williamson-Nasi argued that the centre of gravity of his finances have always been the United States. He was a US taxpayer since 1984, had all his financial accounts domiciled in the United States and most of his personal investment portfolio was comprised of US and European securities.[294]

485. The Tribunal notes that Mr. Williamson-Nasi's situation is a very unusual one. He was a national of three States, and one could evidently select facts to demonstrate a closer or further relation to any of the three countries. In reality, the Tribunal is concerned that Mr. Williamson-Nasi may have attempted to distance himself from his Mexican nationality as a result of "pragmatic considerations", as his relocation to the United States suggests – a relocation that occurred almost one year after this arbitration was initiated.

486. Conversely, he has openly admitted that Mexico was his primary residence for almost 30 years. All his three children hold Mexican citizenship and two of his sons admittedly live at least 50%

[288] See Witness Statement Carlos Williamson-Nasi, § 20.

[289] See Witness Statement Carlos Williamson-Nasi, § 20.

[290] See Witness Statement Carlos Williamson-Nasi, §§ 23-26.

[291] See Witness Statement Carlos Williamson-Nasi, §§ 29 and 39.

[292] See Witness Statement Carlos Williamson-Nasi, § 29.

[293] See Witness Statement Carlos Williamson-Nasi, § 29.

[294] See Witness Statement Carlos Williamson-Nasi, §§ 43-45.

of the year in Mexico. In fact, having lived 23 years in Colombia and 6 years in the United States, Mexico is by far the country where Mr. Williamson-Nasi spent most of his life.

487. Moreover, the Tribunal finds that Mr. Williamson-Nasi's allegation that "[his] personal investment portfolio has always been primarily invested in American and European securities, and not in Mexican securities" is unsubstantiated, with no document being offered that would allow the Tribunal to analyse how his finances were managed and structured. For instance, Mr. Williamson-Nasi could have offered recent tax returns from Mexico and the United States, which would serve to substantiate his allegation.

488. Furthermore, the Tribunal is faced with the contradictory situation where Mr. Williamson-Nasi claims to have always limited his exposure to Mexican assets and to the Mexican economy, while appearing in this multi-million-dollar arbitration on behalf of four Mexican investment vehicles that claim to have controlled around 30% of the shares in a Mexican company (i.e. Integradora).

489. Meanwhile, Mexico brought to the file a wealth of information and documents demonstrating that Mr. Williamson-Nasi, until very recently, continued to enjoy and exercise the rights connected with his Mexican nationality.[295] Furthermore, Mexico has also brought to the Tribunal's attention that Mr. Williamson-Nasi omitted to mention the time he acted as advisor of the *Secretaría de Hacienda* of the Mexican Government during the tenure of Mr. Francisco Gil Díaz – the uncle of Mr. Cañedo White and father of Mr. Gonzalo Gil White. The time served by Mr. Williamson-Nasi in the highest echelons of Mexican Government is corroborated by documents introduced into the file by Mexico.[296]

490. Certainly, a selection of facts could point towards relatively strong links between Mr. Williamson-Nasi and the United States, and this could not be expected to be otherwise from someone who managed to acquire US citizenship through naturalization. However, the elements on the file indicate that the strength of his ties to Mexico were much more significant than those he entertained with the United States. Accordingly, the Tribunal considers that, for

[295] See R1, §§ 563 ss; Rejoinder, §§ 524-525.

[296] See *Reporte anual que se presenta de acuerdo con las disposiciones de carácter general aplicables a las emisoras de valores y a otros participantes del mercado correspondiente al año terminado el 31 de diciembre de 2016*, R-0057, p. 83.

the purposes of this arbitration, Mr. Williamson-Nasi's dominant and effective nationality was that of the United Mexican States.

491. In light of the above, the Tribunal considers that it lacks jurisdiction *ratione personae* to hear the claims submitted by the estate of Mr. Williamson-Nasi under Articles 1116 and 1117 of the NAFTA.

*b. Mr. Cañedo White's nationality*

492. Mr. Cañedo White's situation is even clearer than that of Mr. Williamson-Nasi. While Mr. Williamson-Nasi could show a personal and family history indicative of a connection with the United States, the reverse is true in relation to Mr. Cañedo White. During the Hearing, Respondent established a number of facts related to Mr. Cañedo White's deep running family connection with Mexico.

493. For instance, the Tribunal learned that Mr. Cañedo White's father was a prominent Mexican businessman, who had a central role in the organization of the 1970 Football World Cup in Mexico.[297] His father's notoriety in the Mexican football milieu was such that there were attempts to change the name of the Azteca Stadium in Mexico City to Guillermo Cañedo Stadium – a tribute to Mr. Cañedo White's father.[298] The Tribunal also learned that Mr. Cañedo White's brother was the president of América Football Club,[299] a well-known football club in Mexico.

494. The Tribunal was also informed that Mr. Cañedo White and his family are involved in the highest echelons of the Mexican political and business life. Mr. Francisco Gil Díaz, Mr. Cañedo White's uncle, and the father of Mr. Gonzalo Gil White, served as Secretary of Finance from 2000 to 2006, as informed by Claimants themselves.[300] Mr. Cañedo White himself admittedly worked for the Mexican Government, including acting as advisor to Mexican officials during the negotiation of the NAFTA,[301] and has occupied the highest offices in

[297] See Hearing Transcript (English), 412:10-412:15.

[298] See Hearing Transcript (English), 411:20-412:3.

[299] See Hearing Transcript (English), 411:17-411:19.

[300] See C1, § 259.

[301] See Hearing Transcript (English), 411:7-411:13.

leading Mexican companies – such as chairman of the Group Televicentro, a subsidiary of the largest Mexican multi-media company Televisa.[302]

495. Mr. Cañedo White was born in Mexico City in 1961, being a Mexican citizen by birth.[303] From ages 13 to 14, Mr. Cañedo White lived in the United States as a student. Then, he returned to Mexico, where he primarily lived until 2012. Mr. Cañedo White highlighted that, during this time, he continuously travelled to the United States for summer and winter holidays.[304] Four of his five siblings no longer live in Mexico, with only one left living in the country.[305] Out of the four siblings who live abroad, two have recently acquired US citizenship and live in Miami.[306] The Tribunal was not offered any further information concerning the citizenship or domicile of the remaining two siblings of Mr. Cañedo who live outside Mexico.

496. Mr. Cañedo White's wife is a United States citizen, as are his two youngest children. He also has two adult sons and one adult daughter, all of whom are Mexican citizens.[307] His adult daughter currently lives in the United States, where she is completing a doctoral degree.[308]

497. There are certain elements in the file proving that Mr. Cañedo White has strong connections with the United States. Yet, similarly to the analysis undertaken in relation to Mr. Williamson-Nasi, the Tribunal has to assess whether his links to the United States prevail over those to Mexico. In the present instance, the Tribunal considers that the centre of gravity of Mr. Cañedo White's personal and economic affairs has been based in Mexico for most of his life.

498. He was born in Mexico and only moved to the United States when he was 51 years of age – he is currently 62 years old. He and his family have been deeply embedded in the economic, political and cultural life of the country, to an extraordinary and remarkable extent. His move to the United States is a recent one and, pursuant to his own account, he kept his status as a

[302] See Hearing Transcript (English), 407:6-407:13.

[303] See First Witness Statement José Antonio Cañedo-White, § 4.

[304] See First Witness Statement José Antonio Cañedo-White, § 11.

[305] See Hearing Transcript (English), 415:3-415:15.

[306] See Second Witness Statement José Antonio Cañedo-White, § 20.

[307] See Second Witness Statement José Antonio Cañedo-White, § 19.

[308] See Second Witness Statement José Antonio Cañedo-White, § 19.

Mexican taxpayer until 2018.[309] Although two of his siblings may have acquired US citizenship, these naturalizations occurred in 2016 and 2022 – both rather recently.[310]

499. In this regard, the Tribunal considers that Mr. Cañedo White's dominant and effective nationality is that of the United Mexican States. Accordingly, the Tribunal lacks jurisdiction *ratione personae* to hear the claims he presented under Articles 1116 and 1117 of the NAFTA.

D) The investment

500. It is unquestionable that directly holding shares of an enterprise qualifies as a covered investment under NAFTA's Article 1139, so much so that Mexico does not challenge this conclusion.[311] In fact, Mexico argues that "14 of the 27 Claimants appear in the shareholder book of Integradora Oro Negro and, therefore, only those 14 are shareholders of the company."[312]

501. This quotation shows that Mexico does not challenge the shareholding of 14 Claimants, namely Ampex, Apple Oaks, Cambria, Axis Services, Floradale, Frederick J. Warren IRA, Brentwood, Mr. Olson, Genevieve T. Irwin 2002 Trust, Mr. Irwin, Gerald L. Parsky IRA, ON5, Rainbow Fund and Robert M. Witt IRA.[313]

502. That said, Mexico has questioned the Tribunal's jurisdiction in relation to Vista Pros, for "Vista Pros ceased to be an investor of a Party by selling its shares to ON5 on 1 March 1 2017."[314] However, the Tribunal considers that Mexico's position is at odds with Article 1139, which defines an investor as the national of a Party "that seeks to make, is making or has made an investment."[315] Hence, the only necessary element to assess is whether Vista Pros had made, sought to make or was making an investment at the time when the alleged breach took place.

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[309] See Second Witness Statement José Antonio Cañedo-White, § 36.

[310] See Second Witness Statement José Antonio Cañedo-White, § 20.

[311] See R1, §§ 487 ss; Rejoinder, §§ 455 ss.

[312] See Rejoinder, § 456.

[313] See R1, § 488.

[314] See Rejoinder, § 484.

[315] See NAFTA Article 1139, CL-0059.

503. The Tribunal's understanding finds echo in NAFTA case law. For instance, the *Mondev* tribunal held that "[t]o require the claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11."[316] A similar understanding was adopted by the *B-Mex* tribunal, which held that "Article 1116 does not require subsistence of the investment at the time a claim is submitted."[317]

504. Claimants' claims can be traced back to alleged Treaty breaches taking place in November 2016.[318] While the concrete assessment of the occurrence of the breaches is a matter that pertains to the merits of the dispute, for jurisdictional purposes the Tribunal can ascertain that Vista Pros did directly hold Integradora's shares at the time of the facts involved in Claimants' allegations.[319]

505. The Tribunal further recognizes that the remaining individuals and entities above have proven to directly hold Integradora's shares at the time of the alleged treaty breaches, as can be observed in Oro Negro's shareholder's log.[320]

506. Hence, the Tribunal establishes that Ampex, Apple Oaks, Cambria, Axis Services, Floradale, Frederick J. Warren IRA, Brentwood, Mr. Olson, Genevieve T. Irwin 2002 Trust, Mr. Irwin, Gerald L. Parsky IRA, ON5, Rainbow Fund, Robert M. Witt IRA and Vista Pros have made a covered investment under the NAFTA.

507. Certainly, Mexico raises a number of objections related to indirect shareholders of Oro Negro, especially with regards to Messrs. Warren, Parsky, Witt, Ms. Irwin and to the members of the Grace Family.[321] Despite the particularities of the allegations put forward by Mexico in relation

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316 See *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), CL-73, § 91.

317 See *B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award (19 July 2019), CL-290, § 152.

318 See Reply, § 470.

319 See Petróleos Mexicanos' Bylaws, Official Journal of the Federation (5 December 2017), CL-84 and Integradora Oro Negro Stock Registry Book, C-0502.

320 See Integradora Oro Negro Stock Registry Book, C-0502, p. 127.

321 See R1, §§ 525 ss; Rejoinder, §§ 477 ss.

to each of these Claimants, the core element of the objection has to do with the fact that these individuals do not appear in the Integradora's shareholder log.

508. The Tribunal, however, does consider that these individuals have proven to have a covered investment through their indirect holding of Integradora's shares. As already discussed,[322] the terms of Article 1139 are unquestionably broad, including "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise."[323] Furthermore, the same provision establishes that an "investment of an investor of a Party" is to be understood as "an investment owned or controlled directly or indirectly by an investor of such Party."[324]

509. Consequently, when a national of a NAFTA Party, even indirectly, holds "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise," then this must be considered as "an investment of an investor of a Party." Such situation is, in this case, exactly that of indirect shareholders who have structured their investment through intermediary entities.

510. In addition to having proven to be US nationals,[325] the Tribunal notes that Mses. A. Grace, C. Grace, D. Grace, V. Grace, and Irwin, as well as Messrs. F. Grace, N. Grace, O. Grace, Warren, Parsky, and Witt have all proven to be indirect shareholders of Integradora, demonstrating a shareholding chain that can ultimately be traced back to Integradora's shareholder log.[326] Accordingly, the Tribunal considers that they have proven to have made a covered investment for the purposes of NAFTA.

511. Finally, the Tribunal observes that objections have also been raised to the indirect shareholding of Messrs. Williamson-Nasi and Cañedo White. Nevertheless, the Tribunal considers it

[322] See §§ 436 ss.

[323] See NAFTA Article 1139, CL-0059.

[324] See NAFTA Article 1139, CL-0059.

[325] See §§ 441 ss.

[326] See Integradora Oro Negro Stock Registry Book, C-0502, pp. 130-133; Notarized Letter of Confirmation of Beneficiaries of The Lorraine Trust – Oliver 2311, C-0511; Trust Agreement creating the Genevieve T. Irwin 2002 Trust, C-B.19; Summary of Accounts issued by Citi Private Bank as custodian to Frederick J. Warren IRA, C-B.16; Review of Assets issued by PENSCO Trust Company in relation to Gerald L. Parsky IRA, C-B.21; Account Statement issued by The Entrust Group in relation to Robert M. Witt IRA, C-B.29.

unnecessary to address these objections, for the Tribunal has already established that it lacks jurisdiction in relation to all claims submitted by these two individuals.

E) The Claimants' standing in relation to Articles 1116 and 1117 of the NAFTA

512. The Tribunal notes that, albeit vested under the cloak of an investment dispute, a great number of allegations articulated by Claimants in this arbitration are related to multiple private and corporate disputes between Integradora's shareholders amongst themselves, as well as between certain of Integradora's shareholders against the Bondholders who financed its operations –and who came to control some of Integradora's subsidiaries (notably Oro Negro Drilling and the Singapore Rig Owners)–.

513. These disputes have as its mains *locus* the insolvency proceedings before Mexican courts. In these proceedings, certain Oro Negro shareholders have raised doubts as to the proper management of the group. This is the case of Banamex, the fideicommissary of Mexican pensions funds holding the majority of Oro Negro's shares,[327] who has filed a request asking a Mexican court to ascertain if acts in bad faith or other illegal acts were committed by Integradora's board and executives.[328] Some of these executives have testified in this arbitration or appeared as Claimants.

514. This corporate dispute is also being litigated in the US Bankruptcy Court for the Southern District of New York, which has been filed on 20 April 2018 by the foreign representative of Oro Negro under chapter 15 of the US Bankruptcy Code.[329] This has given rise to a number of ancillary proceedings, such as the ones initiated by Mr. Gonzalo Gil White and others against Alp Ercil and others,[330] Gonzalo Gil White and others against Contrarian Capital Management LLC and Nordic Trustee AS,[331] Perforadora Oro Negro and others against AMA

[327] See Integradora Oro Negro Stock Registry Book, C-502, p. 130.

[328] See Written Submission of Banamex in the Mexican insolvency proceedings, R-0164.

[329] See Chapter 15 Petition and Declaration Filed in the Bankruptcy Court, C-166.

[330] See 10 July 2019 Complaint, C-0074.

[331] See 24 June 2019 Complaint, C-0073.

Capital Partners LLC and others,[332] and José Antonio Cañedo White and others against Asia Research and Capital management Ltd. and others.[333]

515. In addition, on 15 March 2018, the Singapore Rig Owners and Oro Negro Drilling, one of Integradora's subsidiaries and the Singapore Rig Owner's parent company, initiated proceedings against Perforadora in the US District Court for the Southern District of New York. These proceedings were brought under the Bareboat Agreements and sought "to recover five drilling vessels [the Oro Negro Rigs] wrongfully withheld by Defendant Perforadora Oro Negro."[334]

516. Parallel proceedings were also initiated in Singapore by Oro Negro Drilling and the Singapore Rig Owners before the Singapore High Court.[335] In these proceedings, Oro Negro Drilling and the Singapore Rig Owners sought interim measures against Messrs. Gonzalo Gil White and Alonso del Val Echeverría in order to bar them from acting on their behalf before Mexican Courts.

517. Considering the existence of the above-mentioned parallel proceedings, the Tribunal is mindful of the risk of affecting the rights of third parties as a result of a ruling which allows Claimants' claims to proceed. Similarly, the Tribunal is very much aware that issuing a decision on the merits may be conducive to an incompatible and/or contradictory outcome with regards to the ongoing insolvency proceedings described previously. It is against this complex factual and legal context that the Tribunal conducts its analysis of Claimants' *locus standi*.

518. As noted above,[336] the interpretation of any provision in the NAFTA is subject to Article 31 of the VCLT.[337] This rule sets forth three basic elements to be taken into account by interpreters, i.e., ordinary meaning, context, and object and purpose, which are to be considered under the aegis of good faith. In addition, a number of further considerations are

[332] See 22 October 2019 Complaint, R-0210.

[333] See 26 September 2019 Complaint, R-0048.

[334] See 15 March 2018 Complaint, R-0002, p. 1.

[335] See *Oro Negro Drilling Pte Ltd and others v. Integradora de Servicios Petroleros Oro Negro, SAPI de CV and others* [2019] SGHC 35, R-0202.

[336] See §§ 426 ss.

[337] See Article 31 of the VCLT, CL-0058, p. 10.

to be equated to the notion of context or are expressly required to be considered alongside context. This is the case, for instance, of:

> Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> and
>
> any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.[338]

519. The process of interpretation under the VCLT, pursuant to the ILC itself, is to be seen as "a single and closely integrated rule,"[339] where none of the elements enumerated in Article 31 takes precedence over each other. Importantly, Article 32 authorizes the interpreter to have further recourse to supplementary means of interpretation in order to confirm meaning reached under Article 31, or whenever the interpretive process of Article 31 leaves meaning ambiguous or obscure.[340]

520. While Claimants argue that "NAFTA tribunals have overwhelmingly declined to adopt the restrictive interpretation of Articles 1116 and 1117,"[341] this Tribunal draws attention to the fact that the decisions relied upon by Claimants in relation to the NAFTA date back 15 years or more. In the meanwhile, investment treaty arbitration has greatly evolved, with the development of a heightened attention to the importance of the VCLT in the interpretation of investment treaties. This element is of considerable importance, for some of the decisions cited by Claimants have not always engaged in treaty interpretation in the manner provided by the VCLT. [342]

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[338] See Article 31(3)(a) and (b) of the VCLT, CL-0058, p. 10.

[339] See ILC, 'Yearbook of the International Law Commission' (1966), vol. II, p. 220, § 8.

[340] For the transcription of Article 32 of the VCLT, see *supra* § 427.

[341] See Reply, § 530.

[342] For instance, the *UPS* decision does not refer, at any point, to the VCLT in its interpretation of Articles 1116 and 1117 of the NAFTA. See *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits (24 May 2007), CL-74. Similarly, the *GAMI* Tribunal did not engage in a direct interpretation of the text of the referred provisions, nor did it refer to the VCLT in its reasoning regarding the matter. See *GAMI Investments Inc. v. United Mexican States*, UNCITRAL, Final Award (15 November 2004), CL-71, §§ 28-38.

521. It is not superfluous to remind that Article 31 of the VCLT is binding on investment tribunals. Accordingly, the starting point of any interpretation of Articles 1116 and 1117 ought to be the text of these provisions, which read as follows:

> Article 1116: Claim by an Investor of a Party on Its Own Behalf
>
> 1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,
>
> and that the investor has incurred loss or damage by reason of, or arising out of, that breach.
>
> 2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.
>
> Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise
>
> 1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.
>
> 2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.
>
> 3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article,

> and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.
>
> 4. An investment may not make a claim under this Section.[343]

522. These two provisions must be considered together, for they provide an immediate context to each other. Notably, the titles of Articles 1116 and 1117 already suggest a distinction between types of discrete claims that a Tribunal can hear, i.e., those brought by an investor on their own behalf and those brought by an investor on behalf of an enterprise.

523. Now, for the purposes of this arbitration, special attention is to be given to the first paragraph of both Article 1116 and 1117. Indeed, these are the provisions that have generated most debate in the course of this arbitration.

524. The Tribunal notes that both texts of Articles 1116(1) and 1117(1) are worded in a very similar way. The two provisions cover breaches under Section A of Chapter 11 and certain breaches under Chapter 15 of the NAFTA (those referring to Articles 1502(3) and 1503(2) of the NAFTA). Furthermore, Articles 1116(1) and 1117(1) include the concepts of "investor of a Party" bringing claims "that another Party has breached an obligation." This Tribunal has already discussed the terms "investor of a Party" and "another Party," as well as the diversity of nationality rule allegedly emerging thereof, and that reasoning would be applicable here *mutatis mutandi*.[344]

525. The Tribunal further considers that Articles 1116(1) and 1117(1) do not pertain to the merits of the dispute, but rather to the Tribunal's jurisdiction. The provisions refer to the ability to bring a claim "that another Party has breached an obligation." Furthermore, the surrounding provisions, Articles 1116(2) and 1117(2), introduce time limitations to an investor's standing in light of the "alleged breach." Considering these elements, the Tribunal is of the view that Articles 1116(1) and 1117(1) regulate Claimants' standing to bring a claim. In that regard, to assess the Claimants' standing, the Tribunal need not ascertain if the alleged breach actually occurred. Rather, it may proceed on the basis of the allegations taken at face value. In other

[343] See Article 1116 and 1117 of the NAFTA, CL-0059.

[344] See §§ 469 ss.

words, the Tribunal is required to consider if the claim filed can be subsumed into either Article 1116(1) or 1117(1) – which constitutes a purely jurisdictional analysis.

526. There is, however, an important difference in the texts of Articles 1116(1) and 1117(1). While Article 1117(1) contains a clause regulating claims brought "on behalf of an enterprise," Article 1116(1) contains no such element. It is here that resides the core of the dispute between the interpretations put forward by the Claimants, Respondent and Non-Disputing Parties.

527. More precisely, Article 1117(1) refers to claims "on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly." There is a lot to unpack in that regard. First, the sentence indicates that an investor appears before the tribunal as a representative of the enterprise ("on behalf of"). Then, the enterprise is qualified as being "of another Party," which introduces a diversity of nationality rule between the "investor" and the "enterprise." Finally, the sentence requires the "investor" to own or control the "enterprise," which can occur directly or indirectly. This last element creates all sorts of questions as to what amounts to control or ownership, but this analysis does not need to be pursued at this stage.

528. The distinction between the two types of claims also finds echo in the broader context of NAFTA Chapter 11, especially in light of Article 1135(2). Indeed, this provision establishes that any compensation or restitution under Article 1117(1) is to be awarded to the enterprise and not to the investor.[345] This suggests yet again that Article 1117(1) could be a special case of representation, to the extent that eventual sums recovered are to be paid to the represented entity.

529. The Tribunal notes that the object and purpose of the NAFTA are not of much assistance in the interpretation of the provisions at hand, especially considering the very particular nature of the NAFTA. Indeed, this is an extraordinary multi-lateral treaty hardly comparable to an ordinary Bilateral Investment Treaty ("**BIT**"). While BITs usually aim at the promotion and protection of investment, the NAFTA was adopted as an instrument of regional economic

[345] See Article 1135(2) of the NAFTA, CL-0059.

integration. This macro-political goal is unfolded into several different objectives focused on promoting the circulation of economic factors such as goods, services and capital.

530. Hence, the Tribunal must contemplate the provisions of Chapter 11, including Articles 1116 and 1117, in light of the host of goals geared towards economic integration in the North America region. Notably, the Tribunal cannot exclusively centre its attention on one single element of Article 102 of the NAFTA, as proposed by Claimants.[346] That said, the Tribunal considers that nothing in the object and purpose of the NAFTA is particularly enlightening when it comes to assessing the meaning of Articles 1116 and 1117.

531. Besides these elements, the Tribunal draws attention to Article 31(3)(b) of the VCLT, requiring that the subsequent practice of the Contracting Parties be considered in the interpretation of Articles 1116 and 1117. Notably, it is undeniable that the NAFTA Parties have consistently espoused a convergent position regarding the interpretation of Articles 1116(1) and 1117(1). This has been made abundantly clear by the Non-Disputing Parties' submissions. Moreover, the Tribunal notes that, since the early 2000's, NAFTA Parties have consistently submitted before investment tribunals that Articles 1116(1) and 1117(1) respectively cover (i) direct injuries to investors and (ii) indirect injuries to an investor caused by injury to a firm in the host country that is owned or controlled by the investor.[347]

532. The Tribunal considers this well-established subsequent practice of the NAFTA Parties as a most persuasive and compelling element in the interpretation of Articles 1116(1) and 1117(1).

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[346] See Reply, § 527.

[347] The United States took this position in, e.g., *Mondev International Ltd. v. The United States of America*, ICSID Case No. ARB(AF)/99/2, Counter-Memorial on Competence and Liability of Respondent United States of America (1 June 2001), p. 76 and Rejoinder on Competence and Liability of Respondent United States of America (1 October 2001), p. 60; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Submission of the United States of America (18 September 2001), RL-0025, §§ 6-10; *Pope & Talbot v. Government of Canada*, UNCITRAL, Seventh Submission of the United States of America (6 November 2001), RL-0028, §§ 2-10; *GAMI Investments, Inc. v. The United Mexican States*, UNCITRAL, Submission of the United States of America (30 June 2003), RL-0034, §§ 2-18; *Bilcon of Delaware et al. v. Government of Canada*, PCA Case No. 2009-04, Submission of the United States of America (29 December 2017), RL-0023, §§ 2-22.

Mexico took the same position in, e.g., *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Submission of the United Mexican States (Damages Phase) (12 September 2001), RL-0026, §§ 41-45; and *GAMI Investments, Inc. v. The United Mexican States,* UNCITRAL, Statement of Defense (24 November 2003), § 167(e) and (h).

Canada took the same position in *Pope & Talbot, Inc. v. Government of Canada,* UNCITRAL, Canada's Counter-Memorial (29 March 2000), §§ 329-332; *United Parcel Service of America, Inc. v. Government of Canada,* UNCITRAL, Canada's Counter-Memorial (Merits Phase) (22 June 2005), RL-0197, §§ 12, 523-525; *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL, Canada's Counter-Memorial (Damages Phase), (7 June 2001), RL-0027, §§ 106-109; *Bilcon of Delaware et al. v. Government of Canada*, PCA Case No. 2009-04, Canada's Counter-Memorial on Damages (9 June 2017), RL-0024, §§ 11-34.

Accordingly, it is the Tribunal's understanding that these provisions establish different rules regulating an investor's standing to bring a claim under NAFTA. On the one hand, Article 1116(1) concerns the capacity of investors to appear before a NAFTA tribunal advancing claims on their own behalf, i.e., articulating allegations of direct interference with their treaty rights. On the other hand, Article 1117(1) governs the capacity of investors to appear on behalf of a specific third party (the "enterprise of another party" that they "own or control directly or indirectly"), articulating allegations that the host State has breached any of the NAFTA provisions dedicated to the protection of investments specified therein.

533. It should be stressed that neither municipal nor international law ordinarily allow someone to claim on behalf of third parties. Rather, one is only allowed to appear in court claiming on one's own behalf. In other words, Article 1117(1) constitutes a case of extraordinary *locus standi*, while Article 1116(1) constitutes a case of ordinary *locus standi*.

534. As regards shareholders' claims, these considerations allow the Tribunal to establish that Article 1116(1) governs the shareholder's right to present claims for direct interference of the State with its protected rights and interests (e.g., State actions that expropriate shares, interfere with the payment of dividends, affect voting rights, etc.). Furthermore, Article 1117(1) governs derivative claims that may be brought on behalf of an enterprise constituted in the host State by a shareholder that can prove ownership or control of said enterprise.

535. The Tribunal is aware that NAFTA's Article 1139 includes direct and indirect shareholding within the meaning of investment[348], and this has been acknowledged in this Award.[349] Nevertheless, demonstrating that an investor has a protected investment is not the sole jurisdictional criteria that the Tribunal ought to analyse under the terms of the NAFTA. Unlike other investment treaties, Articles 1116(1) and 1117(1) introduce distinctive jurisdictional avenues for submitting investment claims, which the Tribunal cannot brush aside.

536. Furthermore, the Tribunal does not ignore that Article 1116(1)(b) refers to loss or damages in a broad and an unqualified manner, which has led Claimants to affirm that "[t]here is simply no basis for reading into these provisions an additional restriction preventing investors from

[348] See *supra* §§ 437 ss.

[349] See *supra* §§ 500 ss.

claiming 'reflective loss'."[350] Similarly, the Tribunal has considered Claimants allegation that "the Non-Disputing Parties submissions cannot form a 'subsequent agreement' for the purposes of the interpretation of the NAFTA – much less one that would modify the ordinary meaning of the text."[351]

537. That said, the Tribunal does not find Claimants' arguments persuasive. Indeed, the VCLT establishes an interpretive process that consists of a single and integrated operation, where ordinary meaning is one of the elements of interpretation. In such integrated process, the interpreter must enrich the ordinary meaning of the text with its context, object and purpose, as well as consider the elements expressed in Article 31(3) – and each of these elements must be given the appropriate weight in light of the circumstances of the case.

538. The requirement to have "incurred loss or damage by reason of, or arising out of, that breach" exists in both Articles 1116(1)(b) and 1117(1)(b). Yet, those requirements cannot mean the same or encompass the same type of loss or damages, for it would be illogical to have two provisions with exactly the same legal implications.

539. Moreover, given that the States are the masters of the Treaty, it would be a perilous undertaking to disregard the consistent and longstanding subsequent interpretive practice of the NAFTA Parties with regards to Articles 1116(1) and 1117(1). Although the Free Trade Commission had the prerogative to issue a binding interpretation of the NAFTA,[352] in no way such power undermines the interpretive force of a subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. As it was observed above, the ILC's "Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties" has made clear that statements in the course of legal disputes qualify as subsequent practice falling under article 31(3)(b) of the VCLT.[353]

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[350] See Reply, § 522.

[351] Claimants' Observations on Article 1128 Submissions, § 42.

[352] See Article 2001 of the NAFTA.

[353] See *supra* § 472.

540. Furthermore, the Tribunal, making use of its prerogative to have recourse to supplementary means of interpretation to confirm the meaning of the terms used in Articles 1116 and 1117, a prerogative provided for in Article 32 of the VCLT, refers to the Statement of Administrative Action submitted to the United States Congress in 1993 describing measures to be taken for the implementation of the NAFTA. The document contains a contemporaneous and official account of a NAFTA Party in relation to Articles 1116 and 1117, which states the following:

> Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by the investor.[354]

541. Hence, the Tribunal is of the view that Articles 1116 and 1117 of the NAFTA consist of two different rules of *locus standi*, one regulating allegations of direct interference with investors' rights and the other regulating allegations of indirect interference with said rights. That said, such rules in and of themselves will not necessarily impact the damages that may or may not be recovered at the end of the proceedings, which is a question that pertains to the merits of the dispute. Furthermore, the Tribunal must caution against extrapolating its conclusions beyond the confines of the NAFTA, for Articles 1116 and 1117 have been the object of a very particular and enduring interpretive practice between the NAFTA Parties, by applying these concrete provisions, which are not present in the majority of the treaties.

542. Now turning to the claims submitted, the Tribunal notes that Mr. Cañedo White and the Estate of Mr. Williamson-Nasi are the only Claimants that have submitted claims under Article 1117 of the NAFTA.[355] Yet, it has already been decided that the claims advanced by these two individuals do not fall under the jurisdiction of this Tribunal.[356]

543. The remaining Claimants have put forward claims under Article 1116 of the NAFTA against measures that indirectly affected their rights.[357] That is to say, the allegations of State

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[354] See Statement of Administrative Action, North American Free Trade Agreement Implementation Act, H.R. Doc. No. 103-159, Vol. I, 103d Cong., 1st Sess. (1993), p. 146. Available at: https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/nafta/NAFTA%20Chapter%20Summaries.pdf. US 1128 Submission, § 15, footnote 11.

[355] See C1, §§ 15(f), 15(t).

[356] See §§ 491 and 499.

[357] See e.g., C1, §§ 15(f), 15(t), 435, 505.

interference are purely indirect, for Claimants attribute to Mexico a series of wrongdoings committed against Oro Negro and its officers. As expressed above, Article 1116(1) is not the appropriate avenue to submit these types of claims under the NAFTA. In this regard, the Tribunal considers that Claimants' claims cannot proceed under Article 1116(1).

544. Furthermore, Claimants do not control or own Integradora, so they could not (and they formally have not) submit a claim on behalf of Integradora under Article 1117(1). Accordingly, the Tribunal considers that Claimants' claims cannot proceed under Article 1117(1) either.

545. In light of the above, the Tribunal declares that it lacks jurisdiction to hear all of Claimants' claims.

### *3. Conclusion*

546. The Tribunal has found that it lacks jurisdiction with regards to all of Claimants' claims. The Claimants' claims are accordingly dismissed in their entirety.

## VIII. COSTS

547. Article 1135(1) of NAFTA provides that a "tribunal may also award costs in accordance with the applicable arbitration rules."

548. Article 38 of the UNCITRAL Rules provides that "[t]he arbitral tribunal shall fix the costs of arbitration in its award" and specifies that the term "costs" includes only:

> (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
>
> (b) The travel and other expenses incurred by the arbitrators;
>
> (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
>
> (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
>
> (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the

> extent that the arbitral tribunal determines that the amount of such costs is reasonable;
>
> (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

549. The UNCITRAL Rules, in its Article 40, further establish that "the costs of arbitration shall in principle be borne by the unsuccessful party," while also providing that "the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case."[358]

550. The UNCITRAL Rules grant the Tribunal considerable discretion in its appreciation of the reasonable apportionment of costs of the arbitration, expressly authorizing cost allocation to be modulated by the particular circumstances of each case. Within this framework, the Tribunal will now proceed to fix and then allocate the costs of this arbitration.

551. The Tribunal observes that, on 25 September 2022, the Parties agreed to distinguish in their respective costs submissions four categories of expenses incurred, i.e., attorneys' fees, expert fees and related expenses, ICSID payments, and additional arbitration related expenses.

552. The Parties submitted their Statements of Cost on 11 November 2022.

553. Claimants informed that they incurred a total of USD 27,837,106.11 for the presentation of their case, which includes attorneys' fees, expert fees and related expenses, ICSID payments, and additional arbitration related expenses.[359]

554. Respondent informed that it had incurred a total of USD 1,873,564.35 for the presentation of their defence, which includes attorneys' fees, expert fees and related expenses, ICSID payments, and additional arbitration related expenses.[360]

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[358] In this respect the UNCITRAL Notes on Organizing Arbitral Proceedings (2016) in its paragraph 48 provide that: "[i]n allocating costs, the arbitral tribunal may also consider certain conduct of the parties. Conduct so considered might include a party's: (a) failure to comply with procedural orders of the arbitral tribunal; or (b) procedural requests (for example, document requests, procedural applications and cross-examination requests), that are unreasonable, to the extent that such conduct actually had a direct impact on the costs of the arbitration and/or is determined by the arbitral tribunal to have unnecessarily delayed or obstructed the arbitral proceedings."

[359] Claimants' Statement of Cost, 11 November 2022, § 20.

[360] Respondent's Statement of Cost, 11 November 2022, p. 1.

555. The Tribunal draws attention to the fact that this arbitration was administered by ICSID upon agreement of the Parties.[361] In this regard, ICSID has informed that administrative fees and expenses amount to USD 504,810.02.

556. The fees and expenses of the Tribunal amount to USD 1,085,667.04

557. In light of the above, the Tribunal fixes the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses at USD 1,590,477.06:

| **Arbitrators' fees and expenses** | |
|---|---|
| **Prof. Diego F. Arroyo** | USD 528,989.90 |
| **Prof. Andrés Jana** | USD 294,306.30 |
| **Mr. Gabriel Bottini** | USD 262,370.84 |
| **ICSID's Administrative Fees** | USD 262,000.00 |
| **Direct expenses** | USD 242,810.02 |
| **Total** | **USD 1,590,477.06** |

558. Now, the Tribunal turns to the apportionment of costs in this arbitration.

559. Claimants and Respondent have both made requests that the other party be ordered to pay all costs and expenses in this arbitration.[362]

560. The Tribunal holds in this award that it lacks jurisdiction to hear all of Claimants' claims. Consequently, for the purposes of Article 40 of the UNCITRAL Rules, the Tribunal finds that Claimants have been the unsuccessful party in this arbitration.

[361] See § 9.

[362] See C1, § 612(v); R1, § 884(ii).

561. That said, the Tribunal draws attention to a relevant circumstance of the case, which will be taken into account in the apportionment of costs.

562. During the document production phase of this arbitration, Respondent failed to produce a series of documents ordered by the Tribunal.[363] At that moment, the Tribunal did not accept Respondent's justifications as to its impossibility to produce said documents.[364] Yet, Respondent proceeded to ignore the Tribunal's order on the basis of the same arguments already rejected.

563. In that regard, even if those documents were not relevant for the final outcome of the case, the Tribunal considers Respondent's behaviour as a sanctionable procedural misconduct and will make use of its discretion in the reasonable allotment of costs to sanction Respondent's violation of the Tribunal's orders.

564. Consequently, the Tribunal determines that each Party has to bear the costs they have respectively incurred as per Article 38(d) and (e) of the UNCITRAL Rules, excluding the fees and expenses incurred by the Tribunal as well as those incurred by ICSID in its capacity as administering authority. With regards to the costs set out in § 557, which include the fees and expenses incurred by the Tribunal and those incurred by ICSID in its capacity as administering authority, the Tribunal determines that Claimants shall bear 75% of those costs, which amounts to USD 1,192,857.8; and Respondent shall bear the remaining 25% of those costs, which amounts to USD 397,619.3.

565. The Tribunal notes that the fees and expenses of the Tribunal as well as ICSID's administrative fees and direct expenses have been paid out of the advances made by the Parties in equal parts.[365] Accordingly, the Tribunal orders the Claimants to pay the Respondent USD 397,619.3 for the expended portion of Respondent's advances to ICSID.

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[363] See Procedural Orders No. 8 and 9.

[364] See Procedural Order No. 9, § 26.

[365] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID. The ICSID Secretariat will provide the Parties with a statement of the case account in due course.

## IX. DECISION

566. For the foregoing reasons, the Tribunal unanimously renders the following decision:

(1) The Tribunal lacks jurisdiction with regards to all of Claimants' claims; and

(2) Claimants shall bear 75% of the costs fixed in §557, which amounts to USD 1,192,857.8. Respondent, for its part, shall bear 25% of the costs fixed in §557, which amounts to USD 397,619.3. Accordingly, the Claimants shall pay the Respondent USD 397,619.3 for the expended portion of Respondent's advances to ICSID. Each Party shall bear its own fees and expenses.

Place of Arbitration: Toronto, Canada

[Signed]

Andrés Jana Linetzky
Arbitror
Date: July 24, 2024

[Signed]

Gabriel Bottini
Arbitror
Date: July 15, 2024

[Signed]

Diego P. Fernández Arroyo
President of the Tribunal
Date: July 18, 2024