INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

LION MEXICO CONSOLIDATED LP
Claimant

v.

UNITED MEXICAN STATES
Respondent

(ICSID Case No. ARB(AF)/15/2)

DECISION ON JURISDICTION

Members of the Tribunal
Juan Fernández-Armesto, President of the Tribunal
David J.A. Cairns, Arbitrator
Laurence Boisson de Chazournes, Arbitrator

Secretary of the Tribunal
Francisco Grob

Assistant to the Tribunal
Luis Fernando Rodríguez

Washington D.C., July 30, 2018

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GLOSSARY OF TERMS AND ABBREVIATIONS

Américas I	One of the two high-end mixed-use skyscrapers planned under the Guadalajara Project to be built in the city of Guadalajara, State of Jalisco
Américas II	One of the two high-end mixed-use skyscrapers planned under the Guadalajara Project to be built in the city of Guadalajara, State of Jalisco
Borrowers	Two Mexican companies, Inmobiliaria Bains, S.A. de C.V and C&C Capital, S.A. de C.V., the borrowing party in three loans made by Lion
CC Jalisco	Civil Code of Jalisco
CC Nayarit	Civil Code of Nayarit
C&C Capital	C&C Capital, S.A. de C.V., a company owned or controlled by Mr. Cárdenas
C&C Ingeniería	C&C Ingeniería y Proyectos, S.A. de C.V., a company owned or controlled by Mr. Cárdenas
Clarion	Clarion Partners, L.P., a real estate investment management company founded in New York in 1982, which manages real estate investments for institutional investors
Credit Agreements	Three contracts signed by Lion with companies owned or controlled by Mr. Cárdenas in February, June and September 2007, making and governing the Loans.
First Loan	Loan, in the form of a "Credit Agreement", between Lion (as Lender), Inmobiliaria Bains (as Borrower) and C&C Ingeniería (another company of Mr. Cardenas) as joint and several obligor. It was signed on February 27, 2007, for the amount of US $15,000,000 plus interest.
First Note	Note issued by Inmobiliaria Bains in favor of Lion for US $15,000,000 on February 28, 2007

Guadalajara Mortgage 1	Mortgage securing the second loan, granted by C&C Capital in favor of Lion over one of the properties pertaining to the Guadalajara Project on June 13, 2007
Guadalajara Mortgage 2	Mortgage securing the third loan, granted by C&C Capital in favor of Lion over one of the properties pertaining to the Guadalajara Project on September 26, 2007
Guadalajara Project	Real estate project that consisted of two high-end mixed-use skyscrapers (Américas I and Américas II), which were to be built by Mr. Cárdenas's companies in Guadalajara, State of Jalisco
Hearing	The hearing on jurisdiction held at the World Bank Headquarters in Washington D.C. on March 22 and 23, 2018
HT	Transcripts of the Jurisdictional Hearing
ICSID	International Centre for Settlement of Investment Disputes
ICSID AF Rules	International Center for Settlement of Investment Disputes Additionally Facility Rules
Inmobilaria Bains	Inmobiliaria Bains, S.A. de C.V. a company owned or controlled by Mr. Cárdenas
Irra I	Respondent's expert report prepared by Mr. René Irra Ibarra dated August 29, 2017
Irra II	Respondent's expert report prepared by Mr. René Irra Ibarra dated December 7, 2017
LGTOC	Ley General de Títulos y Operaciones de Crédito
Lion/ Claimant	Claimant. Lion Mexico Consolidated L.P. is a partnership constituted under the laws of Quebec (Canada), with its main place of business in Texas (USA)
Loans	Three Loans that Lion made in 2007 to two Mexican companies owned or controlled by Mr. Cárdenas, for a principal amount of approximately US $32.8 million. The Loans were secured by the three Mortgages and the issue of three Notes.
Mexico/ Respondent	United Mexican States

Mortgages	Mortgages that secured the three Loans given by Lion in 2007, signed before a public notary in the Spanish language and subject to Mexican Law, namely the laws of the States of Jalisco and Nayarit.
NAFTA	North American Free Trade Agreement between the United States, Canada and Mexico, which entered into force in January 1, 1994
Nayarit Project	Real estate project to be developed by Mr. Cárdenas' companies in Bahía de Banderas, State of Nayarit, Mexico.
Nayarit Mortgage	Mortgage granted by Inmobiliaria Bains in favor of Lion over the Nayarit Project property on April 2, 2008
Notes	Notes formalizing the three Loans made by Lion in 2007, issued under Mexican law, and submitted to the exclusive jurisdiction of the courts of Mexico D.F.
Parties	The Claimant and the Respondent together
PO	Procedural Order
RfA	Request for Arbitration submitted by Lion against Mexico and dated December 11, 2015
Second Loan	Loan, in the form of a "Credit Agreement", between Lion (as Lender), C&C Capital (as Borrower) and Inmobiliaria Bains (as joint and several obligor). It was signed on June 13, 2007, for the amount of US $12,450,000 plus interest.
Second Note	Noted issued by C&C Capital in favor of Lion for US $12,450,000 on June 14, 2007.
Third Loan	Loan, in the form of a "Credit Agreement", between Lion (as Lender), C&C Capital (as Borrower) and Inmobiliaria Bains (as joint and several obligor). It was signed on September 26, 2007, for the amount of US $5,355,479 plus interest.
Third Note	Note issued by C&C Capital in favor of Lion for US $5,355,479 on September 29, 2007.
VCLT	Vienna Convention on the Law of Treaties, adopted on 23 May 1969 and opened for signature on 23 May 1969.

Zamora I	Claimant's expert report prepared by Mr. Rodrigo Zamora Etcharren dated March 6, 2017
Zamora II	Claimant's expert report prepared by Mr. Rodrigo Zamora Etcharren dated October 23, 2017
Zamora III	Claimant's expert report prepared by Mr. Rodrigo Zamora Etcharren dated January 18, 2018

LIST OF CASES

Emmis	*Emmis International Holding BV v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, Exh. CLA-501.
Garanti	*Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, Exh. CLA-502.
Grand River	*Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, 12 January 2011, Exh. CLA-117.
Koch	*Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Partially Dissenting Opinion of Prof. Zachary Douglas QC, 8 October 2017, Exh. CLA-503.
Methanex	*Methanex Corporation v. The United States of America*, Second Submission of Canada Pursuant to NAFTA Article 1128, 30 April 2001, Exh. CLA-120.
Sumo	*Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights, Series C no. 79, Judgment, 31 August 2001, Exh. CLA-061.

I. INTRODUCTION

1. On December 11, 2015, the International Centre for Settlement of Investment Disputes ["**ICSID**"] received a request for arbitration [the "**RfA**"] submitted by Lion Mexico Consolidated L.P. ["**Lion**" or "**Claimant**"], a company constituted under the laws of Quebec, Canada, against the United Mexican States ["**Mexico**" or "**Respondent**"].

2. The RfA was made pursuant to Arts. 1116, 1120, and 1122 of the North American Free Trade Agreement ["**NAFTA**"][1]. It included a request for approval of access to the Additional Facility of the Centre.

3. On December 23, 2015, the Secretary-General registered the RfA and approved access to the Additional Facility pursuant to Art. 4 of the ICSID Additional Facility Rules ["**ICSID AF Rules**"].

4. The Tribunal was officially constituted on July 26, 2016, after all the arbitrators accepted their appointments and the proceedings were deemed to have begun.

5. At the time of this Decision, the Tribunal is composed of three following members:

Mr. Juan Fernández-Armesto
Chairman – Spanish national
Appointed by agreement of the Secretary-General on July 20, 2016.
Armesto & Asociados
General Pardiñas, 102
28006 Madrid, Spain
Tel.: +34 91 562 16 25
E-mail: jfa@jfarmesto.com

Mr. David J.A. Cairns
Co-Arbitrator – British/New Zealand national
Appointed by Claimant on March 10, 2016.
B. Cremades y Asociados
Goya, 18; Planta 2
28001 Madrid, Spain
Tel.: +34 91 423 7200
E-mail: d.cairns@bcremades.com

Prof. Laurence Boisson de Chazournes
Co-Arbitrator – French/Swiss national
Appointed by Respondent on February 2, 2018.
University of Geneva, Faculty of Law

[1] RfA, para. 7.

40, boulevard du Pont-d'Arve
1211 Geneva 4 (Switzerland)
Tel.: +41 (0) 22 379 85 44
E-mail: Laurence.BoissonDeChazournes@unige.ch

II. THE PARTIES

6. This arbitration takes place between Lion Mexico Consolidated L.P. (Canada) and the United Mexican States, a sovereign state.

1. CLAIMANT: LION MEXICO CONSOLIDATED L.P.

7. Claimant is Lion Mexico Consolidated L.P., a partnership incorporated and registered under the laws of the Province of Quebec, Canada. Its main place of business and unified domicile for notifications is the following:

> 1717 McKinney Avenue, Suite 1900
> Dallas, Texas 75202
> United States of America[2]

8. Claimant is represented in this arbitration by:

> Onay Payne
> Lion Mexico Consolidated L.P.
> 230 Park Avenue, 12th Floor
> New York, NY 10169
> T. 212.883.2507
> Email: Onay.Payne@clarionpartners.com
>
> Robert J. Kriss
> Mayer Brown LLP
> 71 S. Wacker Drive
> Chicago, Illinois, 60606
> Tel. +1 312 782 0600
> Email: rkriss@mayerbrown.com
>
> Dany Khayat
> Alejandro López-Ortiz
> José J. Caicedo
> Mayer Brown
> 20, avenue Hoche
> 75008 Paris – France
> Tel. +33.1.53.53.43.43
> Emails: dkhayat@mayerbrown.com
> alopezortiz@mayerbrown.com
> jcaicedo@mayerbrown.com

[2] RfA, para. 2, and Exh. C-1.

2. RESPONDENT: UNITED MEXICAN STATES

9. Respondent is the United Mexican States, a sovereign State.

10. The Respondent is represented in this arbitration by the following counsel:

Samantha Atayde Arellano
Directora General de Consultoría Jurídica de Comercio Internacional
Email: samantha.atayde@economia.gob.mx

Cindy Rayo Zapata
Directora General Adjunta de Consultoría Jurídica de Comercio Internacional
Email: cindy.rayo@economia.gob.mx

Gabriela Alcántara Torres
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Hugo Gabriel Romero Martínez
Email : hugo.romero@economia.gob.mx
Aristeo López Sánchez
Email: alopez@naftamexico.net

Secretaría de Economía
Av. Paseo de la Reforma 296, piso 25, Colonia Juárez,
Delegación Cuauhtémoc, C.P. 06600
Ciudad de México, México

J. Cameron Mowatt
J. Cameron Mowatt, Law Corporation
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Stephan Becker
Pillsbury Winthrop Shaw Pittman
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Alejandro Barragán
J. Cameron Mowatt, Law Corporation
Email: abarragan@isds-law.com

11. Henceforth, Claimant and Respondent will together be referred to as the **Parties**.

III. PROCEDURAL HISTORY

1. THE REQUEST FOR ARBITRATION AND ACCESS TO ICSID ADDITIONAL FACILITY

12. On December 11, 2015, ICSID received Lion's RfA against the United Mexican States, together with 20 factual exhibits[3].

13. The RfA was made pursuant to Arts. 1116, 1120, and 1122 NAFTA[4]. It included a request for approval of access to the Additional Facility of the Centre.

14. On December 23, 2015 the Secretary-General registered the RfA and approved access to the Additional Facility pursuant to Art. 4 of the ICSID Additional Facility Rules. In accordance with Article 5(e) ICSID AF Rules, the Secretary-General invited the Parties to proceed as soon as possible to constitute an Arbitral Tribunal.

2. THE CONSTITUTION OF THE ARBITRAL TRIBUNAL

15. Article 1123 NAFTA specifies the number of arbitrators and the method of their appointment to constitute a Tribunal: unless the disputing parties agree otherwise, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each party, and a presiding arbitrator appointed by agreement of the parties.

16. On March 10, 2016 the Claimant appointed Mr. David J. A. Cairns, a national of the United Kingdom and New Zealand, as an arbitrator in this case. Mr. Cairns accepted his appointment and provided his *curriculum vitae*.

17. On May 10, 2016 the Respondent appointed Mr. Ricardo Ramírez Hernández, a national of Mexico, as an arbitrator in this case. Mr. Ramírez Hernández accepted his appointment and provided his *curriculum vitae.*

18. After the Parties failed to reach an agreement on the presiding arbitrator, in accordance with Article 1124 NAFTA, the Secretary-General served as appointing authority. On July 20, 2016, the Secretary-General appointed Juan Fernández-Armesto, a national of Spain, as President of the Tribunal. Pursuant to Arts. 11(2) and 13 ICSID AF Rules, Mr. Fernández-Armesto accepted the appointment by letter of July 27, 2016, attaching his declaration of independence and impartiality.

19. On July 27, 2016, the Secretary-General confirmed the Arbitral Tribunal had been constituted and the proceedings were deemed to have begun. The Parties confirmed at the first session—held on September 26, 2016—that the Tribunal had been properly constituted

[3] Exhs. C-1 to C-20.
[4] RfA, para. 7.

and neither had any objection to the appointment of its members[5]. Ms. Anneliese Fleckenstein, ICSID Legal Counsel was appointed to serve as the Secretary of the Tribunal.

3. FIRST PROCEDURAL ORDERS AND PRELIMINARY OBJECTION UNDER ART. 45(6)

20. On August 13, 2016 the Tribunal circulated a first draft Procedural Order No. 1.

21. On August 24, 2016 Mexico submitted a **Preliminary Objection to the Tribunal's Jurisdiction** under Art. 45(6) ICSID AF Rules, together with 10 legal authorities[6], on grounds that Lion's claims were manifestly without merit.

22. On August 31, 2016 after receiving the Parties' positions, the Tribunal issued a procedural schedule for the Parties to exchange rounds of pleadings on Mexico's Preliminary Objection.

23. On September 26, 2016 the Parties and the Tribunal held the first session by telephone conference, during which the terms of the Procedural Order No. 1 were discussed.

24. On the same day, Lion submitted its **Response to Mexico's Preliminary Objection**, attaching 4 factual exhibits[7] and 108 legal authorities[8].

25. On October 13, 2016 Mexico submitted its **Reply to Lion's Response on the Preliminary Objection**.

26. On October 14, 2016 the Tribunal issued **Procedural Order No. 1**, after receiving the Parties' comments[9]. The Order covered some procedural matters for the management of this case, *inter alia*, that the procedural language would be English and Spanish, basic rules on submission of pleadings and evidence, that the place of the proceeding would be determined in a separate order, and that Dr. Luis Fernando Rodríguez would serve as the Assistant to the Tribunal. Annex A to the Order set out the Procedural Calendar for this arbitration.

27. On October 31, 2016 Lion submitted its **Rejoinder on Mexico's Preliminary Objection**, attaching 7 factual exhibits[10] and 27 legal authorities[11].

28. On November 24, 2016 the Tribunal issued, after receiving the Parties' positions, the **Procedural Order No. 2**, setting Washington D.C. as the place of this arbitration.

[5] *See* PO 1, paras. 2.1.
[6] Exhs. RLA-1 to RLA-10.
[7] Exhs. C-21 to C-24.
[8] Exhs. CLA-1 to CLA-108.
[9] Lion's and Mexico's communications of September 12, 2016, and Lion's communication of September 25, 2016.
[10] Exhs. C-25 to C-31.
[11] Exhs. CLA-109 to CLA-136.

29. On December 12, 2016 the Tribunal issued a **Decision**, dismissing Mexico's Preliminary Objection to the Tribunal's Jurisdiction under Art. 45(6) ICSID AF Rules.

4. CLAIMANT'S MEMORIAL

30. On March 13, 2017 Lion submitted its **Memorial**, together with 120 factual exhibits[12], 200 legal authorities[13], three witness statements (by Onay Payne, Jose Arechederra, and James Hendricks), and the first expert report on Mexican law, prepared by Rodrigo Zamora, which attached 122 authorities[14].

5. BIFURCATION OF THE PROCEEDINGS

31. On April 4, 2017 Mexico filed a **Request for Bifurcation**, in which Mexico raised two objections to the Tribunal's jurisdiction under Art. 45(2) ICSID AF Rules.

32. On May 4, 2017 Lion submitted its Response to Mexico's Request for Bifurcation (which included 20 legal authorities[15]), opposing the request and demanding that Mexico's objections to jurisdiction be heard together with the merits of the dispute.

33. On May 29, 2017 the Tribunal issued its **Decision**, bifurcating the proceedings in respect of only one of the objections raised, namely: that the Tribunal lacks jurisdiction *ratione materiae* because Lion did not make an investment in Mexico within the terms required by Arts. 1101 and 1139 NAFTA[16].

6. JURISDICTIONAL PHASE

34. On June 30, 2017 the Tribunal issued **Procedural Order No. 3**, setting the procedural calendar for the jurisdictional phase, based on the Parties' comments and agreements[17].

35. On July 13, 2017 the Secretary of the Tribunal informed the governments of USA and Canada of the deadline for NAFTA signatories to make submissions on the interpretation of the treaty under Art. 1128 NAFTA.

36. On August 28, 2017 Mexico submitted a Memorial on Jurisdiction, together with 19 legal authorities[18] and an expert report on Mexican law by René Irra Ibarra (which attached 20 authorities).

[12] Exhs. C-32 to C-151.
[13] Exhs. CLA-137 to CLA-336.
[14] Exhs. I-1 to I-122.
[15] Exhs. CLA-337 to CLA-356.
[16] Request for Bifurcation, paras. 5 and 7–9.
[17] Communications of June 14, 2017.
[18] Exhs. RLA-11 to RLA-29.

37. On October 30, 2017 Lion submitted a **Counter-Memorial** on Jurisdiction, together with five factual exhibits[19], 136 legal authorities[20], and a second expert report on Mexican law by Rodrigo Zamora (which attached 28 authorities).

38. On November 30, 2017 the Tribunal, at the Parties' request[21], granted an extension for the filing of the second rounds of pleadings on jurisdiction.

39. On December 7, 2017 Mexico submitted its **Reply on Jurisdiction**, together with nine legal authorities[22] and René Irra's second expert report (which attached 22 more authorities).

40. On January 19, 2018 Lion submitted its **Rejoinder on Jurisdiction**, together with 47 legal authorities[23], and the third expert report on Mexican law, prepared by Rodrigo Zamora (which attached 19 authorities).

41. On January 22, 2018 the Tribunal and the Parties held a telephone conference to discuss the logistical, procedural, and administrative arrangements for the upcoming hearing on jurisdiction.

42. One day later, the Tribunal issued **Procedural Order No. 4**, on the organization of the hearing, based on the Parties' comments and agreements.

7. REPLACEMENT OF ARBITRATOR RAMÍREZ

43. On January 25, 2018 Mexico-appointed co-arbitrator Mr. Ricardo Ramírez tendered his resignation. The following day Mr. Juan Fernández-Armesto and Mr. David J.A. Cairns considered the reasons for and consented to his resignation under Art. 14(3) ICSID AF Rules. By communication of the same date the Secretary of the Tribunal declared the suspension of the proceedings until Mexico appointed another arbitrator pursuant to Art. 16(2) ICSID AF Rules.

44. On February 2, 2018 Mexico designated Prof. Laurence Boisson de Chazournes, a French and Swiss national, as arbitrator in accordance with Art. 1123 NAFTA and Art. 17(1) ICSID AF Rules.

45. On February 6, 2018 Prof. Boisson de Chazournes accepted the appointment and submitted her declaration under Art. 13 ICSID AF Rules. The same day the proceedings resumed from the point reached at the time the vacancy occurred.

[19] Exhs. C-152 to C-156.
[20] Exhs. CLA-357 to CLA-492.
[21] Communications of November 28 and 29, 2017.
[22] Exhs. RLA-30 to RLA-38.
[23] Exhs. CLA-493 to CLA-539.

8. HEARING ON JURISDICTION

46. On February 19, 2018 the Parties agreed to reschedule the jurisdictional hearing for March 22 and 23, 2018.

47. On February 28, 2018 ICSID notified the Parties and the NAFTA Parties of the new venue, dates, and starting time of the hearing.

48. On March 2, 2018 the Tribunal issued **Procedural Order No. 5**, a revised and updated version of **Procedural Order No. 4** on the organization of the hearing.

49. A hearing on jurisdiction was held at the World Bank Headquarters in Washington D.C. on March 22 and 23, 2018 [the "**Hearing**"]. The following individuals attended the Hearing:

Tribunal	
Prof. Juan Fernández-Armesto	President
Dr. David J.A. Cairns	Arbitrator
Prof. Laurence Boisson de Chazournes	Arbitrator
Assistant to the Tribunal	
Dr. Luis Fernando Rodríguez	
ICSID Secretariat	
Ms. Catherine Kettlewell	
For Claimant	
Counsel:	
Mr. Robert J. Kriss	Mayer Brown
Mr. Dany Khayat	Mayer Brown
Mr. Alejandro López Ortiz	Mayer Brown
Mr. José Caicedo	Mayer Brown
Ms. Patricia Ugalde	Mayer Brown
Parties:	
Ms. Onay Payne	Lion Mexico Consolidated
Ms. Reneé Castro	Lion Mexico Consolidated
Expert:	
Mr. Rodrigo Zamora	Galicia Abogados
For Respondent	
Counsel:	
Ms. Samantha Atayde Arellano	Secretaría de Economía
Mr. Hugo Romero Martínez	Secretaría de Economía

Ms. Cindy Rayo Zapata	Secretaría de Economía
Ms. Gabriela del Carmen Alcántara Torres	Secretaría de Economía
Mr. Aristeo López Sánchez	Secretaría de Economía
Mr. Guillermo Malpica Soto	Secretaría de Economía
Mr. J. Cameron Mowatt	J. Cameron Mowatt, Law Corp.
Mr. Alejandro Barragán	J. Cameron Mowatt, Law Corp.
Mr. Stephan E. Becker	Pillsbury Winthrop Shaw Pittman LLP
Mr. Greg Tereposky	Tereposky & DeRose LLP
Ms. Jennifer Radford	Tereposky & DeRose LLP
Expert:	
Mr. René Irra Ibarra	Irra Ibarra
Mr. René Irra de la Cruz	Assistant to Mr. René Irra Ibarra

50. On April 27, 2018 each Party submitted its Statement on Costs.

51. On June 12, 2018, the Centre informed the Parties and the Tribunal that Mr. Francisco Grob, ICSID Legal Counsel, would replace Ms. Anneliese Fleckenstein as Secretary of the Tribunal while she is on leave.

IV. SUMMARY OF THE RELEVANT FACTS

52. This section describes the factual background of the transactions carried out by Lion in Mexico. The Tribunal has made no independent enquiry or investigation into the facts. The summary is based on Claimant's account, which Mexico does not dispute: "*Los hechos en sí mismos*", Mexico points out in its last submission, "*no se encuentran en disputa*"[24]. It is the legal assessment of these facts that is at issue.

1. LION MEETS MR. CÁRDENAS

53. Claimant, Lion Mexico Consolidated LP, is a limited partnership constituted under the laws of Quebec (Canada), with its main place of business in Texas (USA). Lion was created and is managed by Clarion Partners, L.P. ["**Clarion**"], a real estate investment management company founded in New York in 1982, which manages real estate investments for institutional investors[25].

54. Lion has been making investments in Mexico for over ten years. Over that period, Lion has provided more than US $800 million of capital to entities doing business in Mexico, to be used in developing a wide array of real estate properties, such as hotels, office buildings, residences, warehouses, and resorts[26].

55. Clarion engaged Real Capital Investment Management to identify and present investment opportunities in Mexico[27], and through this channel Mr. Héctor Cárdenas Curiel, a Mexican businessman, was introduced to Lion and Clarion[28]. Mr. Cárdenas was presented as a developer seeking funding for the development of two real estate development projects: the Nayarit Project and the Guadalajara Project.

2. MR. CÁRDENAS'S PROJECTS

56. The Nayarit Project ["**Nayarit Project**"] included an ocean-front residential and resort development in Bahía de Banderas, State of Nayarit[29]. The development plan called for a mixed-use high-end resort to be anchored by a Ritz Carlton hotel, 1,500 luxury residential units, extensive amenities offerings, and two ocean-front golf courses, among other features to be developed on 855 hectares (2,100 acres) with 2.8 miles of ocean frontage[30].

[24] Reply on Jurisdiction, para. 14.
[25] Exh. C-32.
[26] Claimant's Memorial, para. 6.
[27] First Witness Statement of José Javier Arechederra Tovar, para. 6.
[28] First Witness Statement of José Javier Arechederra Tovar, para. 9.
[29] First Witness Statement of James Hendricks, para. 7.
[30] Exh. C-33.

57. The Guadalajara Project ["**Guadalajara Project**"][31] consisted of two high-end mixed-use skyscrapers ["**Américas I**" and "**Américas II**"], which were to be built on approximately 15,000 m^2 (3.74 acres) in the city of Guadalajara, State of Jalisco[32].

58. Mr. Cárdenas's plans for the development of the Nayarit Project and the Guadalajara Project were preliminary and incomplete at the time he requested capital from Lion to acquire land and begin limited infrastructure development[33]. Lion was willing to provide capital for the development of these projects subject to requirements including the following:

- The granting of mortgages to Lion over the land acquired by Mr. Cárdenas and on the subsequent improvements made on that land[34]; and

- The issue of promissory notes to Lion as unconditional commitments to repay the money owed to Lion, with certain procedural privileges under Mexican law[35].

3. THE THREE SETS OF TRANSACTIONS

59. In February, June, and September 2007, Lion made three loans for financing the purchase of the properties for the Nayarit Project and the Guadalajara Project ["**the Loans**"], as well as working capital. Lion provided the Loans to two Mexican companies owned or controlled by Mr. Cárdenas ["**the Borrowers**"]:

- Inmobiliaria Bains, S.A. de C.V. ["**Inmobiliaria Bains**"],

- C&C Capital, S.A. de C.V. ["**C&C Capital**"].

60. The three Loans, with a principal amount of approximately US $32.8 million, were secured by three mortgages and the issue of three promissory notes.

61. The three promissory notes [the "**Notes**"] were all issued under Mexican law, drafted both in English and Spanish (with the Spanish version governing) and submitted to the exclusive and irrevocable jurisdiction of the courts of Mexico, D.F.

62. The three mortgages [the "**Mortgages**"] were signed before a notary public, in Spanish language and subject to Mexican law, namely, the applicable laws of the States of Jalisco **["Guadalajara Mortgages 1 and 2"]** and Nayarit **["Nayarit Mortgage"]**[36].

[31] First Witness Statement of James Hendricks, para. 7.
[32] Exh. C-35 and Exh. C-36.
[33] First Witness Statement of James Hendricks, para. 9, and Claimant's Memorial, paras. 17 and 18.
[34] Exh. C-33 and Exh. C-35.
[35] First Witness Statement of James Hendricks, para. 9.
[36] Zamora II, paras. 144 and 147.

3.1. THE FIRST SET OF TRANSACTIONS

63. The first loan took the form of a "Credit Agreement" between Lion (as Lender), Inmobiliaria Bains (as Borrower) and C&C Ingeniería (another company of Mr. Cardenas) as joint and several obligor. It was signed on February 27, 2007. The loan was for the amount of US $15,000,000, plus ordinary interest at a rate of 18% per year, capitalized every three months, and in the event of a default, a default interest rate of 25% [the "**First Loan**"].

64. The contract provided for the granting of a mortgage (clause four) and the issue of a non-negotiable promissory note (clause two, 2.2(5)) to secure the loan. It enclosed an Exhibit A (with the "Form of Mortgage") and an Exhibit B (with the "Form of Note").

65. The Credit Agreement was written in English and governed by the laws of Mexico[37].

A. The First Note

66. One day after the signing of the Credit Agreement, on February 28, 2007, Inmobiliaria Bains issued the first promissory note in favor of Lion for US $15,000,000, plus ordinary interest at a rate of 18% per year, capitalized every three months, and in the event of a default, a default interest rate of 25% ["**First Note**"].

67. The original maturity date of the First Note was August 28, 2008. The First Note was substituted four times, resulting in a final maturity date as of September 30, 2009[38].

B. The Nayarit Mortgage

68. About one month after the signing of the Credit Agreement, on April 2, 2008, Inmobiliaria Bains granted in favor of Lion the Nayarit Mortgage over the Nayarit Project property, located in the Municipality of Bahía de Banderas[39].

69. The Nayarit Mortgage in its final form secured all the three Loans, including both principal and interest.

70. The Nayarit Mortgage was recorded at the Office of the Public Property Registry of Bucerías, Nayarit, on May 19, 2008[40].

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[37] Exh. C-8.

[38] Exh. C-153 (Versions of the First Note dated February 28, 2007; August 28, 2008; January 20; 2009; March 31, 2009; and July 7, 2009. The initial version of the First Note was signed in two separate promissory notes for US$9,177,020.25 and US$5,822,979.75 (totaling US$15 million), respectively, with the same original maturity date for both of them (August 28, 2008). All subsequent versions of the First Note were issued in a single promissory note for US$15 million.

[39] Exh. C-10.

[40] The Nayarit Mortgage replaced two previous mortgages in favor of Lion, which were subsequently cancelled: a mortgage issued on February 28, 2007, and another on June 13, 2007. While on February 28, 2007, the mortgage only secured the First Loan, it was subsequently replaced to also cover the Second Loan (on June 13, 2007) and Third Loan (on April 2, 2008), respectively, Protocol Mortgage No. 92.496 of April 2, 2008, recorded under Book 285,

3.2. THE SECOND SET OF TRANSACTIONS

71. The second loan also took the form of a "Credit Agreement", between Lion (as Lender), C&C Capital (as Borrower) and Inmobiliaria Bains (as joint and several obligor). It was signed on June 13, 2007, around three months after the first set of transactions. The loan was for the amount of US $12,450,000 plus ordinary interest at a rate of 18% per year, capitalized every three months, and in the event of a default, a default interest rate of 25% [the "**Second Loan**"][41].

72. The contract provided for the granting of a mortgage (clause four) and the issue of a non-negotiable promissory note (clause two, 2.2(2)) to secure the loan. It also enclosed an Exhibit A (with the "Form of Mortgage") and an Exhibit B (with the "Form of Note").

73. The Credit Agreement was again written in English and governed by the laws of Mexico[42].

A. The Second Note

74. The day after the signing of the Credit Agreement, on June 14, 2007 C&C Capital issued the second note ["**Second Note**"] in favor of Lion for US$12,450,000 plus ordinary interest at a rate of 18% per year, capitalized every three months, and in the event of a default, a default interest rate of 25%[43].

75. The original maturity date of the Second Note was September 14, 2007. The Second Note was substituted seven times, leading to a final maturity date of September 30, 2009[44].

B. The Guadalajara Mortgage 1

76. The Guadalajara Mortgage 1 secured the Second Loan, including both capital and interest. It was granted on June 13, 2007, the date of execution of the Credit Agreement, by Bansi S.A., as trustee, as per the instruction of C&C Capital, as founder and beneficiary of the trust, in favor of Lion, over one of the properties pertaining to the Guadalajara Project[45].

77. The Guadalajara Mortgage 1 was recorded at that Public Property Registry about five months later, on November 23, 2007.

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section II, A-13 of the Public Property and Commercial Registry of Bucerías, Nayarit on May 19, 2008 / April 2, 2008. *See* Exh. C-10.

[41] Exh. C-12.

[42] Exh. C-8.

[43] Exh. C-12.

[44] Exh. C-154 (Copy of the versions of the Second Note dated June 14, 2007; September 12, 2007, December 25, 2007; March 30, 2008; September 30, 2008; January 20, 2009; and July 7, 2009). The 6th modified version of the Second Note (issued on March 31, 2009 and cancelled on July 7, 2009) is not available.

[45] Exh. C-14 (Protocol Mortgage No. 7.820 of June 13, 2007 over a property located in Guadalajara, Jalisco, recorded under Sheet 117,850 of the Public Property Registry of the City of Guadalajara, Jalisco on November 23, 2007 / June 13, 2007).

3.3. THE THIRD SET OF TRANSACTIONS

78. The third loan again took the form of a "Credit Agreement" between Lion (as Lender), C&C Capital (as Borrower) and Inmobiliaria Bains (as joint and several obligor). It was signed on September 26, 2007. The loan was for the amount of US $5,355,479 plus ordinary interest at a rate of 18% per year, capitalized every three months, and in the event of a default, a default interest rate of 25% [the "**Third Loan**"][46].

79. The contract provided for the granting of a mortgage (clause four) and the issue of a non-negotiable promissory note (clause two, 2.1(5)) to secure the loan. It again enclosed an Exhibit A (with the "Form of Mortgage") and an Exhibit B (with the "Form of Note").

80. The Credit Agreement was written in English and governed by the laws of Mexico[47].

A. The Third Note

81. C&C Capital issued the Third Note ["**Third Note**"] on September 26, 2007, the date of execution of the Credit Agreement, in favor of Lion for US $5,355,479 plus ordinary interest at a rate of 18% per year, capitalized every three months, and in the event of a default, a default interest rate of 25%. Inmobiliaria Bains signed as joint and several obligor[48].

82. The original maturity date of the Third Note was December 25, 2007. The Third Note was substituted six times, resulting in a final maturity as of September 30, 2009[49].

B. The Guadalajara Mortgage 2

83. The Guadalajara Mortgage 2 secured the Third Loan, including both capital and interest. It was granted on the day of execution of the Credit Agreement, September 26, 2007, by Bansi S.A., as trustee, as per the instruction of C&C Capital as founder and beneficiary of the trust, in favor of Lion, over one of the properties pertaining to the Guadalajara Project[50].

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[46] Exh. C-152 (Third Loan agreement for US$5,355,479 granted by LMC to C&C, September 26, 2007). This Exh. C-152 contains the signature of Lion and the correct original "Due Date" of 90 days at Clause 1.1(7) complements Exhibit C-16. There is no dispute between the Parties on this maturity date of 90 days: it is the one indicated at the RfA, para. 34(c), and was acknowledged by Mexico at Mexico's Preliminary Objection, paras. 40 and 41.
[47] Exh. C-16.
[48] Exh. C-152 (Third Loan agreement for US$5,355,479 granted by Lion to C&C, September 26, 2007). Exh. C-152 contains the signature of Lion and the correct original "Due Date" of 90 days at Clause 1.1(7) complements Exhibit C-016. There is no dispute between the Parties on this maturity date of 90 days: it is the one indicated at the RfA, para. 34(c), and was acknowledged by Mexico at Mexico's Preliminary Objection, paras. 40 and 41.
[49] Exh. C-155 (Copy of the versions of the Third Note dated December 25, 2007; March 30, 2008; September 30, 2008; January 20, 2009; and July 7, 2009). The initial (issued on September 26, 2007 and cancelled on December 25, 2007) and 5th modified version (issued on March 31, 2009 and cancelled on July 7, 2009) of the Third Note are not available.
[50] Exh. C-156 (Protocol Mortgage No. 7.895 over a property located in Guadalajara and recorded under Sheet 2,000,954 of the Public Property Registry of the City of Guadalajara, Jalisco on December 6, 2007 / September 26, 2007). Exh. C-156 complements Exh. C-18, which did not include the annexes of the protocol.

84. The Guadalajara Mortgage 2 was recorded at that Property Public Registry on 6 December 2007.

4. THE DEFAULTS

85. The initial deadlines for repayment of all three Loans were not met. Mr. Cárdenas requested and obtained a series of time extensions: from March 2008 through July 2009, Lion signed maturity date extensions on the First Loan four times[51], on the Second Loans seven times[52], and on the Third Loan six times[53].

86. The last payment date on the three transactions was, ultimately, September 30, 2009, and the debtors failed to satisfy the outstanding amounts by that date. All three Loans were declared in default and interest at the default rate began to accrue on October 1, 2009.

87. Lion sent its first invoice to Mr. Cárdenas for the outstanding principal and interest payments due on April 16, 2010[54]. The amounts due on that invoice, calculated and dated as of March 31, 2010, totaled US $26,618,972 for the Nayarit Project and US $29,649,835 for the Guadalajara Project.

88. Subsequent invoices were sent on July 14, 2010[55]; October 11, 2010[56]; February 14, 2011[57]; April 12, 2011[58], and July 29, 2011[59].

89. The amounts due on the latest invoices sent, calculated and dated as of June 30, 2011, were US $36,041,328.45 for the Nayarit Project and US $40,065,210.38 for the Guadalajara Project.

90. According to Lion, no payments were ever made.

5. LATER DEVELOPMENTS

91. In view of the defaults, in February 2012 Lion sought to enforce its rights judicially. In the following years Lion repeatedly filed legal actions before the Mexican courts. Lion submits that the Mexican courts and public registries engaged in improper conduct, allowing a fraud based upon a forged loan restructuring agreement, which resulted in the unlawful cancellation of Lion's Mortgages and Notes. In its words at the hearing[60].

[51] Exh. C-11.
[52] Exh. C-15.
[53] Exh. C-19.
[54] Exh. C-37.
[55] Exh. C-38.
[56] Exh. C-39.
[57] Exh. C-40.
[58] Exh. C-42.
[59] Exh. C-42.
[60] HT, Day 1, 38:14 – 38:21.

> "Unfortunately, Cárdenas failed to move forward with these Projects as planned and didn't repay the capital as required under the Contract with [Lion]. As you know, [Lion] has alleged that it was wrongfully stripped off its Mortgages and Notes by the fraudulent conduct of various Mexican courts and public registries over a period of three years ..."

92. Lion has brought this arbitration against Mexico under NAFTA to address the unlawful taking of its property (allegedly, a violation of Art. 1110 NAFTA) and Mexico's failure to provide fair and equitable treatment and full protection and security (Art. 1105 NAFTA). Lion is asking the Tribunal to issue an award for damages representing the value of its investment, lost as a result of Mexico's breach of NAFTA.

V. RELIEF SOUGHT

93. In its Memorial, Lion submitted the following request for relief[61]:

> "The Claimant respectfully request the Tribunal:
>
> a) To declare that Mexico has breached its obligations under Articles 1110 and 1115 of NAFTA and international law;
>
> b) To order Mexico to pay the Claimant the loss caused by the cancellation of the Mortgages in the amount of US $76,343,347.00 or, alternatively, US $74,706,873;
>
> c) To order Mexico to pay the Claimant the additional loss caused by cancellation of the Notes in an amount to be determined at a later stage;
>
> d) To order Mexico to pay the Claimant the legal fees incurred in the Mexican court proceedings in an amount of US$ 1,262,650;
>
> e) To order Mexico to pay interest on the amounts under (b) to (d) at the Mexican Legal rate provided by Article 362 of the Mexican Commercial Code compounded monthly, through the date of full and effective payment of those amounts or, alternatively, at the monthly interest rate of the 28-day Interbank Equilibrium Interest Rate (TIIE);
>
> f) To order Mexico to reimburse Claimants all their reasonable legal costs and fees in connection with this arbitration; and
>
> g) Any other remedies that the Tribunal consider appropriate in the circumstances given Mexico's breaches".

94. In its Rejoinder on Jurisdiction, Lion asked the Tribunal for the following relief[62]:

> "140. For the reasons discussed above, the Claimant respectfully requests the Arbitral Tribunal to issue a decision on jurisdiction rejecting Mexico's Jurisdictional Objection and declaring that the Mortgages and Notes are indeed investments under NAFTA Article 1139; and, consequently that it has *ratione materiae* jurisdiction to adjudicate the claims brought by the Claimant; thus ordering the proceedings to continue and the Respondent to file the Respondent's Counter-Memorial in the period remaining, according with the Amended Timetable.
>
> 141. The Claimant also requests the Arbitral Tribunal to order the Respondent to pay all of the costs of the arbitration including the costs of representation associated with the Respondent's Request for Bifurcation and with the jurisdictional phase".

[61] Claimant's Memorial, para. 495.
[62] Rejoinder on Jurisdiction, paras. 140 and 141.

95. Mexico presented its Memorial, requesting the Tribunal the following relief[63]:

> "174. A la luz de lo anterior, la Demandada solicita al Tribunal que desestime esta reclamación en virtud del Artículo 45(2) del Reglamento del Mecanismo Complementario, sobre la base de que la Demandante no ha demostrado haber realizado una inversión en México conforme a la definición del Artículo 1139 del TLCAN y, por lo tanto, carece de competencia *ratione personae* y *ratione materiae*.
>
> 175. La Demandada solicita al Tribunal que ordene a la Demandante reembolsar totalmente los costos de arbitraje y costos de representación legal de la Demandada".

96. Mexico ended its Reply on Jurisdiction with the following request[64]:

> "152. La Demandada solicita al Tribunal desechar la reclamación de conformidad con el Artículo 45(2) de las Reglas de Arbitraje del Mecanismo Complementario del CIADI sobre la base de que la Demandante no ha establecido haber hecho una inversión en México conforme a la definición del Artículo 1139 del TLCAN y, por lo tanto, que este Tribunal carece de jurisdicción *ratione personae* y *ratione materiae*.
>
> 153. La Demandada solicita, además, que el Tribunal ordene a la Demandante indemnizar por completo a la Demandada por los costos del arbitraje y los costos de representación legal, incluyendo los honorarios de sus expertos y viáticos de los testigos y abogados que participen en la audiencia".

[63] Memorial on Jurisdiction, paras. 174 and 175.
[64] Reply on Jurisdiction, paras. 152 and 153.

VI. POSITION OF THE PARTIES

97. Under Art. 45 of the Arbitration (Additional Facility) Rules "the Tribunal shall have the power to rule on its competence".

98. Mexico asks the Tribunal to rule that it lacks jurisdiction *ratione materiae* and *ratione personae*, arguing that Lion never made an investment in Mexico within the terms required by Art. 1139 NAFTA and consequently failed to qualify as a protected investor under the Treaty.

99. The definition of investment under Art. 1139 NAFTA reads as follows[65]:

Article 1139: Definitions	**Artículo 1139: Definiciones**
For purposes of this Chapter:	Para efectos de este capítulo:
[...]	[...]
investment means:	**inversión** significa;
(a) an enterprise;	(a) una empresa;
(b) an equity security of an enterprise;	(b) acciones de una empresa;
(c) a debt security of an enterprise	(c) instrumentos de deuda de una empresa:
(i) where the enterprise is an affiliate of the investor, or	(i) cuando la empresa es una filial del inversionista, o
(ii) where the original maturity of the debt security is at least three years,	(ii) cuando la fecha de vencimiento original del instrumento de deuda sea por lo menos de tres años,
but does not include a debt security, regardless of original maturity, of a state enterprise;	pero no incluye una obligación de una empresa del estado, independientemente de la fecha original del vencimiento;
(d) a loan to an enterprise	(d) un préstamo a una empresa,
(i) where the enterprise is an affiliate of the investor, or	(i) cuando la empresa es una filial del inversionista, o

[65] Exh. C-20.

(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); (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; but investment does not mean, (i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the	(ii) cuando la fecha de vencimiento original del préstamo sea por lo menos de tres años, pero no incluye un préstamo a una empresa del estado, independientemente de la fecha original del vencimiento; (e) una participación en una empresa, que le permita al propietario participar en los ingresos o en las utilidades de la empresa; (f) una participación en una empresa que otorgue derecho al propietario para participar del haber social de esa empresa en una liquidación, siempre que éste no derive de una obligación o un préstamo excluidos conforme al incisos (c) o (d); (g) bienes raíces u otra propiedad, tangibles o intangibles, adquiridos o utilizados con el propósito de obtener un beneficio económico o para otros fines empresariales; y (h) la participación que resulte del capital u otros recursos destinados para el desarrollo de una actividad económica en territorio de otra Parte, entre otros, conforme a: (i) contratos que involucran la presencia de la propiedad de un inversionista en territorio de otra Parte, incluidos, las concesiones, los contratos de construcción y de llave en mano, o (ii) contratos donde la remuneración depende sustancialmente de la producción, ingresos o ganancias de una empresa; pero inversión no significa:

territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or (j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h);	(i) reclamaciones pecuniarias derivadas exclusivamente de: (i) contratos comerciales para la venta de bienes o servicios por un nacional o empresa en territorio de una Parte a una empresa en territorio de otra Parte; o (ii) el otorgamiento de crédito en relación con una transacción comercial, como el financiamiento al comercio, salvo un préstamo cubierto por las disposiciones del inciso (d); o (j) cualquier otra reclamación pecuniaria; que no conlleve los tipos de interés dispuestos en los párrafos (a) a (h);
investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party; [...]	**inversión de un inversionista de una Parte** significa la inversión propiedad o bajo control directo o indirecto de un inversionista de dicha Parte; [...]

100. It is undisputed that the three Loans that Lion made to Inmobiliaria Bains and to C&C Capital, two companies not affiliated with the investor (Lion), do not qualify as investments under the NAFTA: Art. 1139(d) requires that loans to unaffiliated enterprises have an original maturity of "at least three years"[66]. And none of the Loans meets this threshold.

101. Claimant's argument is different. The Loans, documented in the Credit Agreements, were additionally secured by the Mortgages and formalized in the Notes (*pagarés no negociables*). Lion says that the Mortgages and the Notes by themselves qualify as protected investments:

- the Mortgages under Art. 1139(g), as "intangible real estate", and

[66] Exh. C-20.

- the Notes under Art. 1139(h), which extends coverage to "interests arising from the commitment of capital"[67].

102. Mexico disagrees and avers that Lion only made three short-term Loans, which constitute a single economic transaction that does not meet the three-year maturity threshold for the inclusion of loans as an investment within the meaning of Art. 1139(d). The fact that Lion chose to secure the Loans by the issue of the Notes, and the granting of the Mortgages does not, in Mexico's submission, change the conclusion: there is one single economic transaction and one single investment.

103. The Tribunal will first summarize Respondent's (**1.**) and Claimant's (**2.**) positions, and then briefly address the experts' opinions (**3.**).

1. RESPONDENT'S POSITION

104. Mexico says that Claimant made no valid investment under Art. 1139 NAFTA and therefore the Tribunal lacks *ratione personae* and *ratione materiae* jurisdiction to hear Lion's claims.

105. Mexico's position turns on the following arguments:

- Lion's actual investment was to lend three short-term loans only (**1.**);
- The Notes, Mortgages, and Loans are part of a single legal transaction (**2.**);
- The Mortgages and Notes do not qualify as investments under Art. 1139 NAFTA (**3.**).

1.1. LION'S ACTUAL INVESTMENT WAS TO MAKE THREE SHORT-TERM LOANS ONLY

106. The sole economic operation carried out by Lion was to make three short-term loans to Mexican entities, an operation that does not qualify as a protected investment under Art. 1139 NAFTA, as acknowledged by Claimant[68]. The three Loans were documented through three instruments, with the sole purpose of securing payment of the debt – this is their *raison d'être*[69] – and they cannot be considered as separate investments[70]. The definition of "loans" in Art. 1139(d) NAFTA includes loans documented in notes and secured by mortgages. Since the Loans in the present case have a maturity date of less than three years, they do not constitute investments. This should be the end of the analysis[71].

107. The following facts and legal arguments support this conclusion:

[67] Exh. C-20.
[68] Reply on Jurisdiction, para. 8.
[69] Reply on Jurisdiction, para. 83.
[70] Reply on Jurisdiction, para. 3.
[71] HT, Day 1, 27:13 – 28:17

108. First, Lion did not intend to invest in promissory notes or mortgages. The language of the Credit Agreements makes clear that the Notes and the Mortgages were an express condition to grant each Loan[72]. In fact, each Loan was implemented through a Credit Agreement, a Note, and one or more Mortgages[73].

109. Second, the definition of "Credit Documents" under the Credit Agreements expressly includes not only the Credit Agreements, but also the Mortgages and the Notes[74]. Each Loan was subject to the conditions set out in the Credit Agreements, and "any other applicable conditions ... under any other Credit Documents", which include its respective Note and Mortgage – Credit Agreements, Notes and Mortgage are therefore deemed to be part of the same operation[75].

110. Third, the terms of the Notes and of the Mortgages just mirror the terms of the Credit Agreements as to their parties, date of execution, amount of principal, due date, ordinary interest rate, default interest rate, etc. These Notes and Mortgages provide Lion with an additional mechanism to recover the debt generated by the Loans. Accordingly, the Notes cannot constitute a separate or independent debt[76].

111. The several extensions granted by Lion to their debtors confirm the fact that the Notes only document the debt created by the Loans. Each extension was implemented through the amendment of the Credit Agreements, which required the cancellation and delivery of the Notes to the creditor and the execution of a new Note in the terms established in the relevant Credit Agreement[77].

1.2. MORTGAGES, NOTES, AND LOANS: ONE SINGLE LEGAL TRANSACTION

112. If the Loans did not exist, the Notes and the Mortgages would not exist either, as their existence and economic value depends on the Loans[78]. The validity and enforceability of a promissory note or a mortgage depends on the existence of the debt or obligation guaranteed. Once the loans are paid back, the security right of mortgage and the promissory note lose their purpose and become unenforceable[79]. In this case, the Mortgages were mere accessory contracts[80].

113. In fact, the subject matter of the debtor's obligation is the same in the three legal acts: formalizing or securing the repayment of the Loans. This confirms the link between the three legal acts in such a way that it is not possible to talk about three independent

[72] Memorial on Jurisdiction, paras. 14 to 20 and Reply on Jurisdiction, paras. 4 and 8.
[73] Memorial on Jurisdiction, paras. 21 to 30 and Reply on Jurisdiction, para. 16.
[74] Reply on Jurisdiction, para. 16.
[75] Reply on Jurisdiction, para. 16.
[76] Reply on Jurisdiction, paras. 11 and 16.
[77] Reply on Jurisdiction, para. 16.
[78] Reply on Jurisdiction, para. 83.
[79] Reply on Jurisdiction, paras. 24 and 66. Irra II, paras. 19, 20, 55 and 64.
[80] Irra II, para. 48 and Reply on Jurisdiction, para. 30.

transactions or *negotia* with independent economic value. The fact that each legal act is governed by a different legal regime does not change this conclusion. To find otherwise would amount to conclude that three different debts exist[81].

114. Furthermore, the mortgage is a security right created in real property that is never delivered to or owned by the creditor[82], the only right conferred by the mortgage is a preferential right to get paid from the proceeds of the sale of the mortgaged property[83]. This conclusion is not different even if, as in this case, the Civil Codes of Nayarit and Jalisco consider the mortgage as real property[84].

115. Finally, the fact that mortgages and promissory notes have each its own legal features is irrelevant; it just means that payment of the one debt can be obtained through different avenues before the courts in case of the debtor's default[85]. But it does not turn the Notes, the Mortgages, and the Loans into independent operations[86].

116. Consequently, as part of a single legal transaction, the Notes and the Mortgages are subject to the same legal requirements as the Loans to become a protected investment under Art. 1139(d); hence, the requisite of the three-year duration also applies to the Notes and Mortgages, as the instruments securing the Loans[87].

Correct interpretation of Art. 1139 NAFTA

117. A correct interpretation of Art. 1139 NAFTA further reinforces the above conclusion:

118. First, if the Notes and the Mortgages could be considered separately, that would allow protection of any loans – regardless of their original maturity – by just adding a security or an instrument. This was not the intention of NAFTA signatories[88]. The parties to NAFTA sought to restrict the protection to those loans that fulfill the requirements of Art. 1139(d) NAFTA[89]. Claimant's interpretation would cause an absurd anomaly: unguaranteed loans would be subject to the three-year requirement, while guaranteed loans would not; and it would also allow the protection of loans to State enterprises (which are expressly excluded), provided they are guaranteed by a mortgage or another security right[90].

[81] Irra II, para. 15; Reply on Jurisdiction, paras. 26 and 27; and Memorial on Jurisdiction, para. 69.
[82] Art. 2264 Código Civil de Nayarit and Código Civil de Jalisco (Docs. 127 and 128 submitted with the Second Expert Report on Mexican Law of Rodrigo Zamora Etcharren; the First, Second, and Third Expert Reports on Mexican Law of Rodrigo Zamora Etcharren are collectively referred to as the **Zamora Reports**); and Reply on Jurisdiction, para. 44.
[83] Irra II, paras. 52 and 60 and Reply on Jurisdiction, para. 45 and 68.
[84] Irra II, para. 57 and Reply on Jurisdiction, para. 56.
[85] Reply on Jurisdiction, paras. 69, 71, 76 and 78. Irra II, paras. 38 to 41.
[86] Reply on Jurisdiction, para. 72.
[87] Reply on Jurisdiction, para. 86.
[88] Reply on Jurisdiction, paras. 88 and 90.
[89] Reply on Jurisdiction, para. 85.
[90] Reply on Jurisdiction, para. 151, and Memorial on Jurisdiction, paras. 90 to 95.

119. Second, a consistent, comprehensive interpretation of Art. 1139 NAFTA under the principles of Art. 31.1 the Vienna Convention on the Law of Treaties ["**VCLT**"] demands to read the provision and its paragraphs (d), (g) and (h) jointly and therefore, to link and apply the three-year requirement to the Mortgages and the Notes as well[91]. This interpretation gives meaning collectively to the three paragraphs, whilst Lion's interpretation suggests that paragraph (d) only refers to non-guaranteed loans, which is wrong as it adds language to the text[92].

120. Summing up, a correct interpretation leads to the conclusion that the three-year restriction of paragraph (d) of Art. 1139 NAFTA also applies to security rights and promissory notes that guarantee loans. If a mortgage or promissory note is not linked to a loan, the three-year requirement is not relevant; but if the guaranteed asset is a loan, the correct interpretation requires that a consistent meaning is given to Art. 1139 NAFTA as a whole[93].

1.3. MORTGAGES AND NOTES ARE NOT INVESTMENTS UNDER ART. 1139 NAFTA

121. Even if the Mortgages and the Notes were considered as separate investments from the Loans, neither of them fits within the definitions of Arts. 1139(g) and 1139(h) NAFTA: the ordinary meaning of paragraphs (g) and (h) exclude the Mortgages and the Notes from their scope[94].

122. As for the Mortgages, they are not property but rights *in rem*. Due to its own nature, a mortgage cannot be considered "*bienes raíces u otra propiedad tangible o intangible*" under Art. 1139(g) NAFTA. Their purpose is to secure the payment of the loan up to the secured amount, and they are activated after the debtor's default only. They are thus contingent rights[95].

123. Lion wrongly argues that the definition of "property" must be established under Mexican law[96]. Yet the local law of a signatory cannot be used to interpret the Treaty: the interpretation must be carried out from the language itself of NAFTA, taking into account the ordinary meaning of the text and taking into account the context, object, and purpose of NAFTA and the principle of *effet utile*, as demanded by Art. 31 of VCLT[97].

[91] Reply on Jurisdiction, para. 150.
[92] Reply on Jurisdiction, para. 127, and Memorial on Jurisdiction, paras. 80 to 85.
[93] Reply on Jurisdiction, paras. 118 and 123, and Memorial on Jurisdiction, paras. 99-110.
[94] Reply on Jurisdiction, paras. 8 and 85, and Memorial on Jurisdiction, paras. 111-150.
[95] Reply on Jurisdiction, para. 95 and 96.
[96] Reply on Jurisdiction, paras. 14-16.
[97] Reply on Jurisdiction, paras. 99 and 100, and Memorial on Jurisdiction, paras. 151 to 166.

2. CLAIMANT'S POSITION

124. Lion contends that the Mortgages and the Notes constitute valid investments under Art. 1139(g) and Art. 1139(h) NAFTA, respectively. Therefore, the Tribunal has both *ratione materiae* jurisdiction and *ratione personae* jurisdiction to adjudicate the present dispute.

125. Lion's position can be summarized as follows: under Mexican law, the Loans, the Notes, and the Mortgages constitute three different *negotia* (**1.**). It follows that Mortgages and Notes are "investments" under Art. 1139(g) and 1139(h) NAFTA (**2.**).

2.1. LOANS, NOTES, AND MORTGAGES CONSTITUTE THREE DIFFERENT *NEGOTIA*

126. Three different *negotia* were concluded in this case: the Loans, the Notes, and the Mortgages[98]. The three *negotia* are related but still different and separate[99]. Mexico's reasoning is flawed for various reasons[100]:

127. First, independence does not mean that notes or mortgages must each create a new obligation. The Notes and the Mortgages are separate *negotia* from the Loans, with different objects and different parties (in the case of the Mortgages) and separate legal regimes[101]. In fact, mortgages are a right *in rem*, effective *erga omnes*, which allows the creditor to follow the asset even if owned by a third party; this entirely transcends the personal obligation of the loans[102].

128. Claimant does not dispute the fact that whenever there is a mortgage there is a loan (or any other underlying obligation), or that a guarantee is intended to secure a principal transaction. Whenever there is accessoriness, there are two assets: the principal and the accessory[103], as acknowledged by the Supreme Court and the Mexican legal authorities[104]. And these interests require separate treatment for purposes of Art. 1139 NAFTA[105].

129. Second, Loans, Mortgages, and Notes do not have the same object, even if they refer to the same debt. A mortgage creates different property rights and economic interests compared to a loan. While loans have as their object a payment obligation, mortgages provide the possibility for the creditor to be paid from the sale of the mortgaged asset[106]. But mortgages provide the creditor with much more than just a different procedural avenue to claim the underlying debt: mortgages create substantive rights that go beyond the right under a loan, because they allow the creditor to use a specific asset to obtain payment with full priority,

[98] Claimant's Counter-Memorial, para. 19.
[99] Rejoinder on Jurisdiction, para. 20.
[100] Rejoinder on Jurisdiction, para. 22.
[101] Claimant's Counter-Memorial, paras. 18, and 36 to 38.
[102] Zamora II, paras. 160, 169, 170, and 173; and Claimant's Rejoinder, para. 22.
[103] Claimant's Counter-Memorial, para. 157.
[104] Rejoinder on Jurisdiction, paras. 44 and 46, Claimant's Counter-Memorial, para. 246, and Zamora III, para. 105.
[105] Rejoinder on Jurisdiction, para. 43.
[106] Zamora III, paras. 26-32; and Rejoinder on Jurisdiction, para. 22.

regardless of the solvency of the debtor; they also limit the powers of the owner over the asset and they grant the creditor power to protect the value of the asset[107].

130. Therefore, mortgages are autonomous and confer separate economic value[108]. In contrast with the value of the loan, the economic value of the mortgage is unaffected by the debtor's solvency and will remain equal to the value of the asset, as a consequence of the preference granted over the asset[109].

131. Third, while the debtor under a loan undertakes a "debt", the owner of a mortgaged asset (which can be different from the debtor) assumes a "liability" under the mortgage: if the debtor breaches the guaranteed obligation, the owner will suffer the sale of the asset for the benefit of the creditor. No duplication or unjust enrichment takes place[110].

2.2. MORTGAGES AND NOTES ARE "INVESTMENTS" UNDER ARTS. 1139 (G) AND 1139(H)

132. The Mortgages and the Notes can be characterized as "investments" under Art. 1139 NAFTA, separately and independently from the Loans[111]. The Mortgages squarely fall within the categories "real estate or other property" provided by Art. 1139(g) NAFTA[112] (**A.**). The Notes fall within the category of "commitment of capital" under Art. 1139(h) NAFTA[113] (**B.**). Furthermore, Mexico's proposed interpretation of Art. 1139 NAFTA is mistaken (**C.**).

A. The Mortgages are "real estate" and "property"

133. NAFTA does not define the terms "real estate" or "property". Therefore, and unless Mexico shows that the NAFTA State parties intended to refer to an autonomous understanding of the terms "real estate" and "property", it is necessary to refer to municipal law where the property is located[114].

Under Mexican law

134. Consistent with the above, NAFTA State parties and authors, opine that it is appropriate to look at the law of the host State (in this case, Mexico) for a determination of the definition

[107] Claimant's Counter-Memorial, paras. 67 to 72 and 74.
[108] Rejoinder on Jurisdiction, para. 25.
[109] Rejoinder on Jurisdiction, para.14.
[110] Zamora III, para. 32; and Claimant's Rejoinder, para. 22.
[111] Rejoinder on Jurisdiction, para. 49.
[112] Claimant's Counter-Memorial, para. 134; and Rejoinder on Jurisdiction, para. 54.
[113] Claimant's Counter-Memorial, Section IV.C; and Rejoinder on Jurisdiction, para. 54.
[114] HT, 45:19 – 48:1. Rejoinder on Jurisdiction, para. 56.

and scope of "real estate" and "property"[115]. Other international tribunals have seconded this view by holding as follows[116]:

> "In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law".

135. Under the Mexican civil codes that govern the Mortgages, all rights *in rem* are considered "real estate" ("*bienes inmuebles*")[117]. Thus under Mexican law, mortgages are considered "real estate", which is a protected category of "asset" under Art. 1139(g) NAFTA[118]. The Claimant notes that even Mexico and its expert have acknowledged so[119].

136. Mexico's NAFTA-based treaty practice shows that, with only one exception, mortgages are not considered as "related property rights", but interchangeably as either "other tangible or intangible property", "other rights *in rem*", "*autres droits réels*" or "*derechos reales*", "other rights", "other property rights" or "*otros derechos de propiedad*" or, as in NAFTA, as an example of "tangible or intangible property"[120].

137. Twelve out of the twenty-one investment treaties concluded by Mexico with an express mention of mortgages as investments characterize them as "rights *in rem*"[121]. Other treaties refer to "property rights" ("*derechos de propiedad*")[122] when referring to rights *in rem* such as usufructs and mortgages[123]. Conversely, the expression "related property rights" is found

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[115] Claimant's Response to Mexico's Preliminary Objection pursuant to Article 45(6) of the ICSID Arbitration (Additional Facility) Rules, para. 95; Claimant's Counter-Memorial, para. 10(c).
[116] *Emmis International Holding BV v. Hungary*, ICSID Case No. ARB/12/2, Award (16 April 2014), para. 162 (Exh. CLA-501); *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, (19 December 2016), para. 331 (Exh. CLA-502), and *Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, (Exh. CLA-503). Claimant's Rejoinder, para. 58.
[117] Claimant's Response to Mexico's Preliminary Objection pursuant to Article 45(6) of the ICSID Arbitration (Additional Facility) Rules, paras. 96-99; Claimant's Counter-Memorial, paras. 56-59.
[118] HT, Day 1, 48:2 – 48:16.
[119] Rejoinder on Jurisdiction, para. 52, referring to the Reply on Jurisdiction, paras. 36 and 40.
[120] Article 1(4)(e) of the Mexico-Spain BIT (10 October 2006) ("movable or immovable property, as well as mortgages, pledges, usufructs or other tangible or intangible property"). *See* Annex I to Claimant's Counter-Memorial on Jurisdiction.
[121] Treaties concluded with Greece, Portugal, Belgium and Luxembourg, The Netherlands, Iceland, Czech Republic, Korea, Argentina, Germany, Italy, Switzerland and Cuba. *See* Annex I to Claimant's Counter-Memorial on Jurisdiction.
[122] Reply on Jurisdiction, para. 43. The use of the plural shall be emphasized. It shows that Mexico's strict understanding of "property" as referring solely to full ownership or "el derecho real de propiedad" as the necessary addition of the *iura possidendi*, *utendi*, *abutendi* and *fruendi* is wrong.
[123] Treaties concluded with Denmark, Sweden, Finland, Panama, Central American countries, Australia. See Annex I to Claimant's Counter-Memorial.

primarily in the treaties concluded by the United States and only in one of the Mexican bilateral investment treaties: the Mexico-Singapore BIT[124].

Under international law

138. The term "property" has a broad meaning under international law and includes rights in and over a property, i.e., *in rem* rights[125].

139. International tribunals that adopt an autonomous understanding of the term "property" have explained that[126]:

> "[p]roperty can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movable and immovable, corporal and incorporeal elements and any other intangible object capable of having value".

140. Hence, the term "property" used in investment treaties may be understood to refer to both things and rights over such things. "Property" refers to a bundle of *in rem* rights[127]. In contrast, Mexico seems to understand "property" as limited to the right of full ownership, implying that the words "related property rights" cover rights over things other than full ownership[128].

141. However, the ordinary meaning of "property" in the international arena encompasses or is inherently associated with the "rights" over a property, which includes mortgages[129]:

> "Property" may be broadly defined under international law as an entitlement of a person that is related to a thing. It consists of certain rights with regard to the thing that are usually effective against all other persons, that is, in rem rights".

142. Therefore, "property" cannot reasonably mean just the thing, nor its full ownership. Full ownership of a thing is one such legal interest. There are other *in rem* legal interests, including mortgages[130].

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[124] Treaties concluded with Denmark, Sweden, Finland, Panama, Central American countries, Australia. See Annex I to Claimant's Counter-Memorial. Claimant's Rejoinder, para. 82.
[125] Rejoinder on Jurisdiction, para. 75.
[126] Rejoinder on Jurisdiction, paras. 64 and 65. The Case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights, Series C no. 79 (Judgment) (31 August 2001), para. 144 (Exh. CLA-061).
[127] Exh. CLA-165 (*Jahangir Mohtadi and Jila Mothadi v. Iran*, Iran-US Tribunal Award (2 December 1996), 32 Iran-USCTR 158, para. 103: "the Tribunal first turns to the so-called "bundle of rights" that make up the right of ownership. […] the elements of this right traditionally are regarded to include: the right to use the property; the right to enjoy the fruits of it; the power to possess the property; the right to exclude others from the possession or use of the property; and the right to dispose of it. […] Ownership is thus a comprehensive right".)
[128] Rejoinder on Jurisdiction, para.76.
[129] Claimant's Rejoinder, para. 77, and Exh. CLA-063 (John G. Sprankling, *The International Law of Property*, Oxford, 2014, p. 23).
[130] Rejoinder on Jurisdiction, para. 80.

143. The term "property" in Art. 1139(g) NAFTA was used generically by the NAFTA Parties. It operates as an umbrella, covering, in addition to real estate, "other property" (tangible or intangible) recognized as such in the respective domestic laws of the NAFTA Parties, which, in the case of Mexico, include mortgages[131].

* * *

144. It follows from the above that the lack of reference to mortgages or "related property rights" in Art. 1139(g) NAFTA does not prevent the Mortgages from been characterized as "real estate or other property" pursuant to the international *usus loquendi* of the term "property"[132]. Under such *usus loquendi*, the term "property" consists of certain rights with regard to a thing, including those arising from mortgages. The terms "*biens*"/"*bienes*" used in the French and Spanish versions of the NAFTA are understood as expropriable and appropriable movable and immovable elements, including rights *in rem*[133]. Further evidence of the international *usus loquendi* can be found in the treaty practice of the NAFTA State parties, especially those treaties with a definition of "investment" based on Art. 1139 NAFTA. An examination of such treaties shows that, as per Mexico's own *usus loquendi*:

- mortgages are treated within the paragraph defining property as an investment; and

- mortgages are treated separately from loans[134].

B. <u>The Notes are a valid investment</u>

145. The Notes are interests of economic nature arising as a result of the commitment of capital of Lion in Mexico and used for an economic activity; as such, they are also a protected investment under Art. 1139(h) NAFTA.

146. The Notes are "interests":

- under Mexican law ("*títulos de crédito*") containing a person's (subscriber) unconditional promise to pay to another person (holder) a determined sum of money[135].

- following Canada's understanding of the ordinary meaning of "interests"[136].

147. Furthermore, the destination of the commitment was clearly an "economic activity" in Mexico: the disbursements made by Lion were intended and used to provide Mexican

[131] Rejoinder on Jurisdiction, para. 83.
[132] Rejoinder on Jurisdiction, para. 92.
[133] Claimant's Response to Mexico's Preliminary Objection pursuant to Article 45(6) of the ICSID Arbitration (Additional Facility) Rules, paras. 89-93; Claimant's Counter-Memorial, paras. 84 and 88; and Rejoinder on Jurisdiction, para. 52.
[134] Claimant's Counter-Memorial, paras. 213, 222, and 254; and Rejoinder on Jurisdiction, para. 52.
[135] Claimant's Counter-Memorial, para. 135.
[136] Claimant's Counter-Memorial, para. 134.

companies with the funds for the acquisition of land in Mexico and working capital to develop them[137].

C. Mexico's interpretation of Art. 1139 NAFTA is ill-conceived

148. First, Art. 1139(d) NAFTA only refers to loans. There is no reference to mortgages, promissory notes or, more broadly, guarantees securing a loan[138]. The ordinary meaning of the term "loan" in Art. 1139 does not include mortgages, something different and separate from a loan. A mortgage may not exist without an obligation, but an obligation (e.g., a loan) can certainly exist without a mortgage[139].

149. The term "loan" is used in three other provisions in Chapter 11 in addition to Art. 1139 NAFTA (i.e., Arts. 1108, 1109 and 1110). Under these provisions, loans are treated as separate and distinct from guarantees, and only as credits and monetary obligations[140]. And it is used in seven provisions outside Chapter 11, only three being relevant and in two of them (Arts. 1001(5)(a) and 1201(2)(d)) loans are listed as separate assets from their guarantees[141].

150. Similarly, there is no reference in paragraphs (g) and (h) to loans, nor is there any reference to a duration requirement of any sort. The fact that paragraphs (g) and (h) are self-standing is furthermore confirmed by the lack of cross-references to paragraph (d), in contrast to other categories listed as investment in Art. 1139 NAFTA[142]. The drafters of the NAFTA carefully[143] identified the paragraphs that were intertwined or connected[144]; and yet nothing in paragraphs (g) and (h), or in any other paragraph of Art. 1139, indicates or implies that the qualification of a real-estate interest or interests arising from the commitment of capital as an investment is subordinated to other paragraphs of Art. 1139[145].

151. Second, the definition of "investment" under Art. 1139 NAFTA is constituted by eight paragraphs, based upon categories of property rights and economic interests, not business activities[146]. But this does not mean that all the requirements, conditions, and exceptions included in each one of these eight paragraphs must be cumulatively complied with, under the pretext that the ordinary meaning of one those paragraphs shall be read in context. On

[137] Claimant's Counter-Memorial, para. 134; and Rejoinder on Jurisdiction, para. 53.
[138] Claimant's Counter-memorial, paras. 186; and Rejoinder on Jurisdiction, para.106.
[139] HT, 42:8 – 45:18.
[140] Claimant's Counter-Memorial, paras. 208-216; and Rejoinder on Jurisdiction, para. 106.
[141] Claimant's Counter-Memorial, paras. 221-223; and Rejoinder on Jurisdiction, para. 106.
[142] Claimant's Response to Mexico's Preliminary Objection, paras. 28-29; Claimant's Counter-Memorial, para. 205; and Rejoinder on Jurisdiction, para. 106.
[143] As explained by Canada: "The drafters of the NAFTA chose specific language, fully aware of the differences reflected in other provisions of NAFTA". *Methanex Corporation v. The United States of America*, Second Submission of Canada Pursuant to NAFTA Article 1128 (30 April 2001), para. 14, Exh. CLA-120.
[144] Subparagraph (f) excludes from the category under consideration the interests arising from the assets listed in subparagraphs (c) and (d) (debt security and loans). Subparagraph (i) and (j) refer to subparagraphs (d) and (a) to (h) to clarify which claims to money are protected.
[145] Claimant's Counter-Memorial, paras. 201-207; and Rejoinder on Jurisdiction, para. 106.
[146] HT, 41:5 – 42:7.

the contrary, the fact that a condition is included in one of the paragraphs, and not in the general heading that precedes the paragraphs, suggests that the condition in question is applicable to that paragraph and not to the others[147].

152. Since the language of paragraphs (g) and (h) of Art. 1139 NAFTA does not contain any reference to the three-year requirement found in other paragraphs of Art. 1139 NAFTA[148], as Mexico itself has noted, "*sería una interpretación inadmisible dado que implicaría añadir una palabra al Párrafo … que no se encuentra ahí*"[149].

153. Third, Art. 1139 NAFTA is a definition by enumeration of the economic interests that can be considered to be a covered investment. Only three out of these eight categories include restrictions such as the three-year initial maturity duration for loans (paragraphs (c), (d) and (f))[150]. The three-year requirement is thus an exception and must be interpreted restrictively, pursuant to the general principle *exceptiones sunt strictae interpretationis*[151]. This principle entails that a requirement such as the three-year original maturity cannot be applied to any other hypothesis except those to which the text of Article 1139 NAFTA expressly provides it applies[152]. In fact, the only limitation concerning "real estate" or "property" under paragraph (g) is that they shall be acquired or used for an "economic benefit or other business purpose".

154. Fourth, given that the Mortgages qualify as an investment under paragraph (g) and the Notes under paragraph (h) of Art. 1139 NAFTA, such characterization must produce an *effet utile*[153].

155. The *effet utile* doctrine is generally understood as follows[154]:

> "This rule is sometimes invoked as a principle – according to which the interpreter has sometimes to presume that the authors of a treaty, by adopting the wording of a disposition, meant to give it a certain meaning in order for this disposition to receive an effective application".

156. The doctrine is not intended to give guidance in determining whether the asset under consideration is a loan, real estate or property or a commitment of capital. The doctrine simply states that the rules governing any of those categories shall be given their full effect

[147] Rejoinder on Jurisdiction, para. 103.
[148] Rejoinder on Jurisdiction, para. 113.
[149] Reply on Jurisdiction, para. 127.
[150] Claimant's Counter-memorial, para. 195; and Rejoinder on Jurisdiction, para. 106.
[151] Claimant's Counter-memorial, para. 186; and Rejoinder on Jurisdiction, para. 106.
[152] Rejoinder on Jurisdiction, para. 122.
[153] Rejoinder on Jurisdiction, para. 127.
[154] Exh. CLA-539, Jean Salmon, *Dictionnaire de Droit International Public*, Bruylant, 2001, p. 416: "Regle parfois invoquee au titre de principe — selon laquelle l'interprete doit presumer que les auteurs d'un trait&en adoptant les termes d'une disposition, ont entendu leur donner une signification telle que cette disposition puisse recevoir une application effective".)

and meaning[155]. This doctrine operates as a test to make sure that an interpretation is not conducted in bad faith or that it strips a provision of its useful meaning[156]. In this case, nothing prevents an accessory right to be separately qualified as an investment, even when the main operation does not[157].

157. In conclusion, the Loans, the Mortgages, and the Notes fall within three different paragraphs under Article 1139 NAFTA, and shall be characterized separately, as acknowledged by other NAFTA tribunals[158]. Nothing prevents that one asset is protected while another is not[159].

3. THE EXPERTS' POSITIONS

158. The Tribunal will first provide a summary of the expert opinion submitted by Respondent (**1.**) and then of the one produced by Claimant (**2.**).

3.1. THE IRRA OPINIONS

159. Respondent retained Lic. René Irra Ibarra to serve as expert on Mexican law in this arbitration. He submitted two reports with his opinions[160].

160. Lic. Irra testified at the Hearing and ratified the main arguments established in his reports. In particular, he developed the following arguments[161]:

- Lic. Irra identified as his main disagreement with Claimant's expert that in his view there are not three different *negotia*; there is just one *negotium*, evidenced by three legal acts, which are separate, because a mortgage is not a promissory note, and neither of them is a loan; but the existence of three legal acts does not imply that they are different *negotia*[162].

- The Loans are the underlying transaction that gave rise to the other legal acts: the Notes and the Mortgages; Lic. Irra acknowledged that under Mexican law each of the three acts is regulated by a different set of laws; but he rejected that the differences in regulation imply the existence of different *negotia*; the differences are mainly

[155] Exh. CLA-105, Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment (5 December 2011), I.C.J. Reports 644 (2011), p. 673, para. 92.
[156] Rejoinder on Jurisdiction, para. 131.
[157] Claimant's Rejoinder to Mexico's Preliminary Objection pursuant to Article 45(6) of the Arbitration (Additional Facility) Rules, paras. 7 and 8. *See* Exh. CLA-109 (*ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (18 May 2010), paras. 103 and 117).
[158] Claimant's Counter-Memorial, para. 52; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011), paras. 90-122, Exh. CLA-117.
[159] Rejoinder on Jurisdiction, para. 134.
[160] Irra I, dated August 29, 2017 and Irra II, dated December 7, 2017.
[161] HT, Day 1, 77:14 – 132:13.
[162] HT, Day 1, 83:17 – 84:9.

procedural: loans, notes, and mortgages empower the lender to use distinct court actions to enforce its rights[163], without creating separate transactions[164].

- Mortgages and notes require the existence of a loan that is being secured or formalized[165]; the borrower assumes a single obligation, to repay the money lent, plus interest, and this is the only obligation that the creditor can enforce, either through the loans, the notes or the mortgage[166].

3.2. THE ZAMORA OPINIONS

161. Claimant retained Lic. Rodrigo Zamora Etcharren to serve as expert on Mexican law in this arbitration. He submitted three reports on the matter[167].

162. Lic. Zamora testified at the hearing and ratified the main arguments from his reports, in particular[168]:

- There are essential differences between the Loans, the Mortgages, and the Notes, which go beyond furnishing three procedural actions: there are three *negotia* that confer different rights, include different parties, and create different procedural actions[169].

- Each *negotium* is a commercial asset that confers its own set of rights: creditors have different rights under a loan agreement, under a note and under a mortgage[170].

- The three *negotia* give rise to different procedural actions, which may be brought simultaneously; a creditor can claim under the note, under the mortgage or under the loan; this does not mean, however, that a creditor can recover the principal of the loan three times; the principal is owed only once, and Mexican procedural law provides for mechanisms to avoid such result[171].

[163] HT, Day 1, 79:5 – 80:12.
[164] HT, Day 1, 81:15 – 82:4.
[165] HT, Day 1, 83:10 – 83:16.
[166] HT, Day 1, 87:11 – 87:20.
[167] Zamora I, dated March 6, 2017, Zamora II, dated October 23, 2017 and Zamora III, dated January 18, 2018.
[168] HT, Day 1, 135:11 – 169:5.
[169] HT, Day 1, 136:6 – 136:20.
[170] HT, Day 1, 137:5 – 137:19.
[171] HT, Day 1, 142:2 –142:10.

VII. DISCUSSION

163. The Tribunal is called to decide a discrete question: whether non-negotiable promissory notes formalizing, or mortgages securing short-term loans, can still qualify as NAFTA protected investments under Arts. 1139(h) or 1139(g), even if the loans fail the three-year maturity test under Art. 1139(d).

164. In their submissions, the Parties have not referred to any previous decision by any court or tribunal deciding on this very question[172]. The Tribunal is also unable to rely on the opinion of the United States of America or Canada: although both States were entitled to submit their opinion under Art. 1128 NAFTA, both decided not make use of such right. Nor has the NAFTA Commission approved any binding interpretation (under Art. 1131(2) NAFTA) shedding light on the issue.

165. In absence of any guidance, the Tribunal must apply the governing law mandated by Art. 1131(1) NAFTA: the Tribunal

> "shall decide the issues in dispute in accordance with this Agreement [i.e. the NAFTA] and applicable rules of international law".

166. Applying such governing law, the Tribunal will in due course dismiss Claimant's submission that the Notes qualify as protected investments (**1.**), while finding that the Mortgages do indeed qualify as "intangible real estate" for the purposes of Art. 1139(g) NAFTA (**2.**).

1. THE NOTES DO NOT QUALIFY AS INVESTMENTS

167. Claimant's case is that the Notes qualify as protected investments under Art. 1139(h) NAFTA:

> "(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
>
> (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

[172] Claimant has only drawn the attention of the Tribunal to one international law precedent where mortgages were protected as separate investments. Many Americans had mortgages on property taken by Yugoslavia. The Yugoslav Claims Agreement of 1948 did not include any provision concerning mortgages. Notwithstanding the above, the Commission allowed claims for mortgages on the ground that the taking of the encumbered property effectively took from the mortgagee the right to foreclose. Moreover, under the laws of Yugoslavia, a real property mortgage was considered as real property – *see* "Foreign Claim Settlement Commission of the United States", Decisions and Annotations; CLA-511, p. 62; the best known decision is *Erna Lina Klein*, CLA-69.

> (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise".

168. In Claimant's view, the Notes constitute "interests arising from commitment of capital". Lion submits that the concept of "interests", as used in this provision, includes titles, and the Notes qualify as titles. "Interests" also cover "*cosas mercantiles*", and under Mexican law the Notes are "*cosas mercantiles*" . Finally, the other requirements are also met: the source of the Notes is Lion's "commitment of capital" and the destination of the capital is an "economic activity" in Mexico[173].

169. Mexico disagrees. In its submission, the requirements of Art. 1139(h) are not met. Lion made no contribution of capital under the Notes – the only contribution of capital was made under the Loans. Notes are simply instruments which evidence the existence of a debt created by the Loans and facilitate collection of the amounts due[174].

170. The Tribunal – without hesitation – sides with Respondent.

171. The Notes clearly do not constitute protected investments under Art. 1139(g) NAFTA. To support its conclusion, the Tribunal will briefly explain the nature of promissory notes under Mexican law (**A.**), and then will reason why promissory notes do not meet the requirements under Art. 1139(h) (**B.**).

A. <u>Promissory notes under Mexican law</u>

172. The three Credit Agreements entered into between Lion as Lender, and Inmobiliaria Bains and C&C Capital as Borrowers, required that each "Credit Drawdown will be documented in a non-negotiable Note"[175]. Complying with this contractual obligation:

- on February 28, 2007 Inmobiliaria Bains issued the First Note, undertaking to pay to Lion US$15 million, plus interest, with final maturity date September 30, 2009[176].

- on June 14, 2007 C&C Capital issued the Second Note in favor of Lion for US$12.45 million (plus interest), with final maturity date September 30, 2009[177]; and

- on September 26, 2007 C&C Capital issued the Third Note, again in favor of Lion, for US$5,355,479 (plus interest), with final maturity as of September 30, 2009[178].

173. All three Notes share several characteristics:

[173] Claimant's Counter-Memorial, para. 135.
[174] Memorial on Jurisdiction, paras. 117 and 118.
[175] Exh. C-8.
[176] Exh. C-153.
[177] Exh. C-12.
[178] Exh. C-154.

- The Notes are defined as "*pagarés*" subject to Mexican law;

- The Notes incorporate the issuer's unconditional promise to pay Lion the stated amount, plus ordinary and penalty interest;

- The Notes are expressly stated to be "*no negociable*[*s*]";

- Payments are to be made in Lion's designated U.S. bank account, in freely available funds;

- The issuer submits to the jurisdiction of the Courts of Mexico's Distrito Federal.

174. Under Mexican Law *pagarés* are a special category of *títulos de crédito*[179]. And *títulos de crédito* (also known as *títulos valor*) are defined by the Ley General de Títulos y Operaciones de Crédito ["**LGTOC**"] as[180]:

> "*documentos necesarios para ejercitar el derecho literal que en ellos se consigna*".

175. The legal definition underlines the basic trait of a *título de crédito*: a document signed by the issuer, which grants its holder the rights literally mentioned ("*incorporados*", to use the technical expression) in the document.

176. *Pagarés* are one of the basic sub-groups of *títulos de crédito*: documents that formalize the issuer's unconditional promise to pay to the holder a certain amount of money on a certain due date[181]. To be legally considered as a *pagaré*, the document must necessarily include the word "*pagaré*".

177. *Pagarés* are issued to formalize an underlying monetary obligation. Normally, this obligation arises from a contract (*contrato subyacente*) entered into between issuer of the *pagaré* and its first holder. In the present case, the *contratos subyacentes* are the three Credit Agreements signed between Lion and Inmobiliaria Bains/C&C Capital. Under these contracts the borrowers owe certain amounts of principal and interest to Lion, and these obligations are "incorporated" into the three Notes, issued by the borrowers, designating Lion as beneficiary, and which the borrowers delivered to Lion.

178. The relationship between a *pagaré* and its *contrato subyacente* can be "*abstracto*" or "*causal*"[182]:

179. (i) In the first case, the law, seeking to protect third parties that acquire *pagarés* in good faith by endorsement, creates a separation between the underlying contract and the payment obligation incorporated in the *pagaré*. If the initial holder of the note endorses the *pagaré*

[179] Mexican law uses the concept *titulos de crédito.* Other Spanish-speaking jurisdictions use the equivalent expression *títulos valor.*
[180] Art. 5 LGTOC.
[181] Art. 170 LGTOC.
[182] Irra I, para. 15 and Zamora II, para. 110.

to a third party (for instance, a bank), such secondary holder is entitled to request that the issuer pay the stated amount on maturity, while the issuer is prohibited from invoking "*excepciones personales*", i.e. defenses arising from the *contrato subyacente* between the issuer and the first holder[183]. A *pagaré* that has been endorsed and against which *excepciones personales* are not admitted is said to be "abstract".

180. (ii) In the second case, the link between *contrato subyacente* and *pagaré* is not severable: the issuer may deny payment invoking the same defenses that could have been used to reject payment under the *contrato subyacente*. *Pagarés* that have not been endorsed, and especially *pagarés* which are stated to be *no negociables* (i.e., where endorsement is prohibited) are always considered *títulos de crédito causales*[184].

181. *Pagarés no negociables*, as are the Notes issued in the present case, do not provide the holder with an abstract right to collect. The right incorporated into the note is identical to the right arising from the underlying contract. The main advantage conferred by a *pagaré no negociable* is procedural: the holder can enforce the right against the issuer through an *acción ejecutiva*, an expedited procedure that permits the preliminary attachment of the issuer's assets[185].

B. ***Pagarés no negociables*** **do not meet the requirements of Art. 1139(h)**

182. Art. 1139 NAFTA offers a sophisticated and precise definition of protected investments: the provision lists eight categories of "interests" which are considered as investments, and two categories which are excluded[186].

183. The eight categories of interests that qualify as investment are in its turn divided into two groups:

184. The first group comprises paragraphs (a) through (f) plus sub-paragraph (h.ii) of Art. 1139. These six categories of interests all relate to situations where the foreign investor owns or finances "enterprises" located in the host state.

185. The situations where the foreign investor finances an enterprise in the host state are developed in paragraphs (c) and (d) and in sub-paragraph (h.ii):

- Paragraphs (c) and (d) cover "debt securities" bought or "loans" granted by the foreign investor, and specifically require that the financing, if granted to an enterprise which is not affiliated to the investor, has a maturity of at least three years;

[183] *See* Art. 8 LGTOC; Irra I, para. 15.
[184] Irra I, para. 28.
[185] Zamora II, para. 134.
[186] The provision gives the overarching concept of "interests" to the ten categories to which it refers – see last line of the definition.

- Sub-paragraph (h.ii) adds a different type of financing: contracts where the investor commits capital (or other resources), and the remuneration depends "substantially on the production, revenues or profits of an enterprise"; provided that this requirement is met, NAFTA does not additionally require a minimum three-year maturity.

186. The second group of protected investments are those defined in paragraph (g) and sub-paragraph (h.i). These provisions cover two distinct situations:

- Paragraph (g) refers to "real estate or other property, tangible or intangible", acquired or used by the foreign investor for economic benefit or for business purposes; while

- Sub-paragraph (h.i) extends the concept of investments to contracts in which the investor commits capital (or other resources) to economic activity in the host state, "including turnkey or construction contracts or concessions".

a. The Tribunal's decision

187. The basic facts of the case are not in dispute:

- The lender of the financing was Lion, a Canadian company;

- The Borrowers were two unaffiliated enterprises located in Mexico;

- The maturity was less than three years;

- The contract was formalized in three Credit Agreements;

- The Borrowers' repayment obligations were additionally formalized in three non-negotiable *pagarés*;

- The remuneration for the Loans and the *pagarés* was a fixed-interest rate, without any link to the revenues or profits of the Borrowers.

188. In the Tribunal's opinion, Lion's interest deriving from these financings – be it the Credit Agreements or the Notes – does not meet the requirements to be considered as a protected investment under any of the categories defined in Art. 1139 NAFTA:

189. (i) Art. 1139(d) NAFTA[187]:

> "(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,

[187] Exh. C-20.

but does not include a loan, regardless of original maturity, to a state enterprise".

190. The Credit Agreements do not meet the requirements under Art. 1139(d).

191. Whilst it is true that the Credit Agreements qualify as "loans" to an unaffiliated enterprise, as Claimant itself acknowledges, the Loans by themselves cannot constitute protected investments, because they do not pass the three-year maturity test required by Art. 1139(d)(ii).

192. (ii) Art. 1139(c) NAFTA[188]:

> "(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 three years,
>
> but does not include a debt security, regardless of original maturity, of a state enterprise".

193. The Notes fail to qualify as "debt security" under Art. 1139(c).

194. The Tribunal shares the Claimant's opinion that *pagarés no negociables* do not fit within the definition of "debt security" set forth in paragraph (c)[189]: debt securities are tradeable, while endorsement of *pagarés no negociables* is prohibited by law.

195. Be that as it may, even if it were accepted that the *pagarés no negociables* can be considered as "debt securities", the Notes would not qualify: having been issued by an unaffiliated enterprise, they must pass, but fail, the three-year-maturity threshold.

196. (iii) Art. 1139(h.i) and (h.ii) NAFTA[190]:

> "(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
>
> (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
>
> (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise".

197. The Notes also fail to meet the requirements under sub-paragraphs (h.i) and (h.ii).

[188] Exh. C-20.
[189] Claimant's presentation at its closing argument ("**H-2**"), p. 11.
[190] Exh. C-20.

198. Sub-paragraph (h.i) only covers contracts involving "the presence of an investor's property in the territory" of the host state; and to clarify its meaning, the provision provides three examples (turnkey contracts, construction contracts and concessions). This category bears no relationship with the case under discussion: *pagarés no negociables*, where the underlying contract is a loan, do not imply the presence of an investor's property in the host state, and have no relationship with turnkey contracts, construction contracts, and concessions.

199. Sub-paragraph (h.ii) also fails to grant protection to the Notes. It refers to contracts where the investor commits capital, provided that the remuneration depends substantially on the production, revenues or profits of an enterprise located in the host state – a requirement which the fixed-interest Notes do not satisfy.

b. Claimant's counter-arguments

200. Claimant argues that the Notes are protected, by referring simply to the *chapeau* of paragraph (h), and excluding any reference to the examples provided in sub-paragraphs (i) and (ii). In Claimant's submission, the Notes qualify as "interests arising from the commitment of capital […] to economic activity" and consequently are protected[191].

201. The argument is unconvincing – as Mexico has correctly argued[192].

202. In the present case, Lion formalized the commitment of capital contractually – by signing the Credit Agreements. Additionally, Claimant requested and obtained *pagarés no negociables* issued by the Borrowers. The delivery of this causal (*i.e.*, non-abstract) *título de crédito*, intrinsically bound to the Credit Agreement, does not change the nature or the scope of the legal relationship between Lender and Borrowers: their legal relationship continues to be governed by the Credit Agreements, and – for the purposes of Art. 1139 NAFTA – such legal relationship continues to be a "loan" subject to paragraph (d); a loan which does not meet the three-year maturity test. Contrary to Claimant's view, the delivery of this *título de crédito* does not constitute a separate and severable commitment of capital.

203. Claimant puts the focus of its analysis on the *chapeau* of paragraph (h) and submits that any "interests arising from the commitment of capital" are protected.

204. This is not so.

205. The *chapeau* cannot be read by itself. The NAFTA does not extend protection to any "commitments of capital", but only to those which exhibit certain features so as to give rise to "interests". These features are defined through two illustrative examples in sub-paragraphs (h.i) and (h.ii). Both sub-paragraphs share a common feature: both refer to "contracts". Thus, it is safe to conclude that a minimum requirement of "commitments of

[191] Claimant's Counter-Memorial, para. 135.
[192] Memorial on Jurisdiction, para. 116.

capital" protected by paragraph (h) is to be formalized as contracts. The *pagarés no negociables* do not meet this test: they are *títulos de crédito*, not contracts.

206. There is a further argument.

207. The contracts that underlie the *pagarés no negociables* – short-term, fixed-interest loans – do not share any traits with the contracts described in sub-paragraphs (h.i) and (h.ii), which serve as illustrative examples of protected "commitments of capital". Sub-paragraph (h.i) covers construction contracts and concessions, and sub-paragraph (h.ii) contracts with variable remuneration. The ordinary meaning of a term in a treaty must be read in its context, as Art. 31.1 VCLT mandates. And in this case the context provided by sub-paragraphs (h.i) and (h.ii) shows that "commitments of capital" to be protected under paragraph (h) must show some additional, defining feature, which simple short-term fixed-interest loans lack. Loans are specifically governed by Art. 1139(d) NAFTA – and only protected provided that the requirements set forth in that provision are met.

2. THE MORTGAGES QUALIFY AS INVESTMENTS

208. Having concluded that the Credit Agreements and the Notes do not qualify as NAFTA protected investments, the Tribunal must now address Claimant's final argument: that the Mortgages qualify as "intangible real estate or other property" acquired by Lion "for the purpose of economic benefit" under paragraph (g) of Art. 1139.

209. Claimant maintains that under Mexican law mortgages are considered "real estate" and under international law, as "other property"[193].

210. Claimant does not dispute that mortgages are accessory transactions, which secure rights deriving from the Loans, but considers that the three-year minimum maturity required by paragraphs (c) and (d) is inapposite[194], because the Loans and the Mortgages are separate *negotia*, with different objects, different parties, and separate legal regimes. Mortgages are rights *in rem*, effective *erga omnes*, allow the creditor to follow the asset even if owned by a third party, and the value of the mortgage differs from the value of the loan: it is unaffected by the debtor's solvency and will remain equal to the value of the asset[195].

211. Mexico disagrees. It says that mortgages are accessory, and that the only economically relevant transaction was the granting of three short-term loans that did not qualify as an investment. Claimant did not invest in mortgages. The definition of "loans" in paragraph (d) includes loans secured by mortgages. Since the Loans in the present case have a maturity date of less than three years, they do not constitute an investment[196].

[193] HT, Day 1, 48:17 – 51:4.
[194] HT, Day 1, 51:5 – 52:19.
[195] Claimant's Counter-Memorial, para. 74 and 75.
[196] HT, Day 1, 27:14 – 28:18

212. Mexico adds that the mortgage is a security right created over real property, and the real estate is never delivered to nor owned by the creditor; the only right conferred by the mortgage is a preferential right to get paid from the proceeds of the sale of the mortgaged property, and this does not amount to "real estate or other property" under paragraph (g)[197].

213. Finally, Mexico argues that if the Mortgages are considered separately, that would allow protection of any loans – regardless of their original maturity – by just adding a security. This was not the intention of NAFTA signatories[198].

214. The Tribunal will analyze the nature of mortgages under Mexican law (**1**.), and then will reason why the Mortgages in the present case constitute protected investments under Art. 1139(g) NAFTA, without such protection extending to the Loans or the Notes (**2**.).

2.1. MORTGAGES UNDER MEXICAN LAW

215. Lion obtained three mortgages as a security for the Loans:

- On June 13, 2007 Bansi S.A., as trustee, and as per the instruction of C&C Capital, as founder and beneficiary of the trust, granted in favor of Lion the Guadalajara Mortgage 1, which encumbered certain properties of the Guadalajara Project, and secured the principal and interest owed under the Second Loan[199];

- On September 26, 2007, Bansi S.A, again acting as trustee, as per the instruction of C&C Capital, granted in favor of Lion the Guadalajara Mortgage 2, which encumbered certain properties of the Guadalajara Project[200], and secured the principal and interest owed under the Third Loan;

- On April 2, 2008 Inmobiliaria Bains granted the Nayarit Mortgage over the Nayarit Project, located in Bahía de Banderas, securing the three Loans, including principal and interest[201].

216. Under Mexican law, mortgages are regulated by the Civil Code of the states where the real estate is located, regardless of the nature of the obligation which is being secured. In the present case, the Guadalajara Mortgages 1 and 2 are subject to the Civil Code of Jalisco ["**CC Jalisco**"], and the Nayarit Mortgage to the Civil Code of Nayarit ["**CC Nayarit**"][202].

[197] Memorial on Jurisdiction, paras.121 to 150.
[198] HT, Day 1, 29:14 – 33:2.
[199] Exh. C-14.
[200] Exh. C-156.
[201] Exh. C-10.
[202] Zamora II, paras. 144-147.

A. Mortgages are *derechos reales*

217. Arts. 2517 CC Jalisco and 2264 CC Nayarit define mortgages in similar terms[203]:

> "*Artículo 2517.- Es contrato de hipoteca aquél por virtud del cual se constituye un derecho real sobre bienes inmuebles o derechos reales que no se entreguen al acreedor, para garantizar el cumplimiento de una obligación y su grado de preferencia en el pago"*[204].
>
> *"Artículo 2264.- La hipoteca es una garantía real constituida sobre bienes que no se entregan al acreedor, y que da derecho a éste, en caso de incumplimiento de la obligación garantizada, a ser pagado con el valor de los bienes, en el grado de preferencia establecido por la Ley"*[205].

218. Mortgages are defined as *derechos reales* that encumber real estate (or other *derechos reales*), affording the mortgagee the right, if the guaranteed obligation is breached, to be paid with the price resulting from the sale in public auction of the asset. The encumbrance follows the asset: if the mortgagor transfers the asset to a third party, the beneficiary's rights over the real estate remain unaffected[206].

219. Mortgages do not imply that the mortgagee acquires the possession or ownership over the asset. The mortgagee does not enjoy the full set of traditional rights granted to the owner of real estate (*ius utendi*, *ius fruendi*, *ius abutendi*), but only a right of preference: if the secured obligation is not paid, the mortgagee can force the sale of the asset, and the price obtained is used to satisfy the secured obligation[207] – provided that the mortgage has been documented in a notarial deed and registered in the Public Registry[208].

220. As *derechos reales de garantía*, mortgages always secure an underlying obligation, where the mortgagee is the creditor and the mortgagor, the debtor (or a third party willing to provide a guarantee). Although mortgage and underlying obligation are separate *negocios jurídicos*, created by declarations of intent of different persons, and formalized in separate documents, mortgages are said to be "accessory"[209]. Accessoriness implies that payment or voidness of the underlying obligation provokes the extinction of the mortgage – but not that both legal relationships are identical[210].

221. The value of the mortgage and that of the underlying obligation also do not have to coincide, neither at the time of creation or thereafter: the value of the main obligation fluctuates with

[203] Zamora II, para. 149
[204] Doc. 127 to Zamora Reports.
[205] Doc. 128 to Zamora Reports.
[206] Art. 2546 CC Jalisco and Art. 2265 CC Nayarit (Docs. 127 and 128 to Zamora Reports).
[207] Zamora II, paras. 153-154.
[208] Zamora II, para. 188.
[209] Irra II, para. 48.
[210] *See* Rocío Diéguez Oliva, *El principio de accesoriedad y la patrimonialización del rango*, Cuadernos de Derecho Registral, 2009, Exh. CLA-455.

the solvency of the debtor, while the value of the mortgage depends on the worth of the mortgaged real estate (and the legal preference granted to mortgages)[211].

B. Mortgages are *bienes inmuebles*

222. The CCs of Jalisco and of Nayarit distinguish between "*bienes inmuebles*" and "*bienes muebles*".

223. Under Art. 799 CC Jalisco and Art. 738 CC Nayarit, the definition of "*bienes inmuebles*" extends not only to tangible assets but also to certain intangible rights:

- Tangible real estate is labelled as "*inmuebles por naturaleza"*, and is defined by the fact that such assets "*no pueden trasladarse de un lugar a otro*";

- But both CCs, following a long tradition, also extend the concept of *bienes inmuebles* to certain intangible rights over real estate (the so-called "*bienes inmuebles intangibles o incorporales*").

224. Picking up on this tradition, Art. 799 XII CC Jalisco and Art. 738 XII CC Nayarit provide that "*los derechos reales sobre inmuebles*" are also to be considered as *bienes inmuebles.* The *derechos reales sobre inmuebles* are certain defined categories of rights *in rem*, including but not limited to mortgages[212].

225. The necessary corollary is that, under the relevant municipal law, the Mortgages constitute *bienes inmuebles* (and more specifically *bienes inmuebles incorporales o intangibles*).

2.2. MORTGAGES MEET THE REQUIREMENTS OF ART. 1139(G)

226. Under Art. 1139(g) NAFTA, protected investments include (*inter alia*) "intangible real estate", provided that the investor uses the asset for "economic benefit or other business purpose".

227. Claimant says that the definition of "intangible real estate" must be established applying the *lex situs*, in this case the CCs Jalisco and Nayarit, and that under such rules mortgages indeed qualify as intangible real estate. Lion adds that the second requirement is also met: the Mortgages were granted for economic benefit.

228. The Tribunal concurs. It will first explain its reasoning (**A.**), and then will analyze Mexico's counter-arguments (**B.**)

[211] H-2, p. 70.
[212] Docs. 127 and 128 to Zamora Reports.

A. The Tribunal's reasoning

229. Under Art. 1139(g) NAFTA an asset, to be considered as a protected investment, must meet two requirements: it must constitute "intangible real estate" and it must be used for economic benefit or other business purpose.

230. The Mortgages satisfy both requirements.

231. (i) NAFTA does not offer a definition of the term "intangible real estate" used in its Art. 1139(g). Absent such definition, to determine whether an investor holds "intangible real estate", it is necessary to refer to the law of the host state. As the tribunal stated in *Emmis*[213]:

> "Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law".

232. The municipal law in this case are the legal systems of the Mexican states of Nayarit and Jalisco, since the encumbered real estate is located in these jurisdictions and both legal systems embrace the *lex loci rei sitae* principle:

> "*Artículo 14.- Los bienes inmuebles ubicados en el Estado y los bienes muebles que en él se encuentren, se regirán por las disposiciones de este Código"* [214].
>
> *"Artículo 15.- La determinación del derecho aplicable se hará conforme a las siguientes reglas: . . .*
>
> *V. Los bienes inmuebles ubicados en el Estado de Jalisco y los bienes muebles que en él se encuentren, se regirán por las disposiciones de este Código"* [215].

233. Applying the CCs of Nayarit and Jalisco, the Tribunal has already concluded that both civil law systems explicitly and unequivocally include mortgages within the legal category of *derechos reales*, which in their turn constitute *bienes inmuebles*, and more specifically *bienes inmuebles intangibles* or intangible real estate.

234. The Mortgages thus constitute intangible real estate, and meet the first requirement under Art. 1139(g) NAFTA.

235. There is a small discrepancy between the terminology used in the Civil Codes of Nayarit and Jalisco, and the one used in the Spanish version of the NAFTA: while the Civil Codes refer to *bienes inmuebles*, the Spanish version of the NAFTA refers to *bienes raíces*. Both expressions are synonyms in Spanish[216]. The same conclusion, that there is no difference between *bienes inmuebles* and *bienes raíces*, is reached by comparing the terminology used

[213] *Emmis International Holding BV v. Hungary*, ICSID Case No. ARB/12/2, Award (16 April 2014), para. 162. Exh. CLA-501.
[214] Doc. 128 to Zamora Reports.
[215] Doc. 127 to Zamora Reports.
[216] *See*, Diccionario del Español Jurídico, Real Academia Española, entry "bien raíz"; available at http://dej.rae.es/#/entry-id/E41960.

in the three equally authentic texts of the Treaty[217]: the French text uses the expression "*biens immobiliers*" as equivalent to "real estate" in English and "*bienes raíces*" in Spanish.

236. (ii) The second requirement established by Art. 1139(g) is also met: Lion acquired the Mortgages for economic benefit and with a business purpose. Lion is an investment company, and the purpose of the Mortgages was to secure commercial loans, granted to two Mexican enterprises, with the purpose of earning interest (and eventually to invest in certain real estate projects situated in Mexico).

237. For these reasons, the Tribunal is satisfied that the ordinary meaning of "real estate or other property, tangible or intangible" in Art. 1139(g) includes the Mortgages.

Consistent treaty practice

238. The conclusion that the Mortgages constitute protected investments is confirmed by Mexico's treaty practice. Investment treaties signed by Mexico frequently include *derechos reales* as a category of protected investments, and refer to mortgages as specific *derechos reales* which are contained within the scope of protection.

239. The treaty practice starts with Mexico's proprietary Model of Investment Promotion and Protection Agreement, which in its Art. 2 provides a list of investments, and specifically extends protection to "any other right *in rem*, such as mortgages" [218]:

> "[…] immovable property, acquired in the expectation or used for the purpose of economic benefit or business purposes, as well as any other right *in rem*, such as mortgages, liens, pledges, usufructs and similar rights".

240. There are at least 22 BITs signed by Mexico, which follow the same structure, and confirm that in Mexico's understanding *hipotecas* (mortgages) fall within the category of *bienes inmuebles intangibles*[219]. The first was the BIT between Mexico and Spain, executed back in 1995, whose Art. 1 (4) (e) extended protection to

> "*la propiedad de bienes muebles o inmuebles, así como hipotecas, derechos de prenda, usufructos u otra propiedad tangible o intangible […] adquiridos para actividades económicas u otros fines empresariales*".

241. The language of the Treaty shows that, in Mexico's understanding, *hipotecas* form part of the general category of "*propiedad intangible*" and, more specifically, of "*propiedad intangible de bienes inmuebles*".

[217] *See* Art. 2206 NAFTA, Exh. C-20.
[218] *See* Carlos García Fernández, *The Mexican Model of Investment Promotion and Protection Agreement. ¿Hay algo nuevo bajo el sol?*, in Jorge A. Vargas, *Mexican Law: A Treatise for Legal Practitioners and International Investors*, Vol. 4, West Group, 2001, p. 68, Exh. CLA-129.
[219] *See* a list in Claimant's presentation at its opening argument, p. 12.

242. There are good reasons why mortgages should constitute a category of protected investment of their own. Mortgages are also inextricably linked with the piece of real estate that they burden. And the value of this right *in rem* can be affected by measures adopted by the host state, targeted at such piece of real estate (e.g., expropriation) or specifically at the mortgage (e.g., dilution of preference). The purpose of treaties, when they include mortgages among the protected assets, is to extend the scope of protection to this type of situations.

243. Summing up: the Mortgages – i.e. the *derechos reales de garantía* – granted to Lion, meet the two conditions required by Art. 1139(g) to qualify as investments protected by the NAFTA.

B. Mexico's counter-arguments considered

244. Mexico raises several counter-arguments.

245. First, Mexico says that Claimant did not invest in mortgages; the only economically relevant transaction was the granting of three short-term Loans[220]. The Mortgages in this case are accessory to and form an integral part of the Loans, and the definition of "loans" in paragraph (d) including loans secured by mortgages. Since the Loans have a maturity date of less than three years, they do not constitute investments[221].

246. The Tribunal is not convinced.

247. Lion provided funds to Inmobiliaria Bains/C&C Capital, and in exchange obtained two sets of rights:

- personal rights against the borrowers deriving from the Credit Agreements (and the Notes), plus

- rights *in rem* (*derechos reales*) over certain real estate assets located in Jalisco and Nayarit.

248. Art. 1139 NAFTA does not define "investment" as an abstract notion. It simply states that "investment means" one of eight categories of assets or "interests", each defined in a separate paragraph, and each subject to specific requirements. The technique followed by Art. 1139 has an important implication: to be considered as a protected investment, an asset or interest must meet the requirements of one of the eight categories. If an investor holds several interests, and all qualify under different paragraphs of Art. 1139, each interest will be protected. And if some of these interests meet the requirements, and others do not, those compliant will still enjoy protection: an investor cannot be denied protection for compliant interests simply because he or she also holds non-compliant assets.

[220] Reply on Jurisdiction, paras. 90-93.
[221] HT, Day 1, 27:14 – 28:18.

249. In the present case, Lion holds three interests that fall into two categories:

- Credit Agreements and Notes: these interests are not protected, because the Notes do not fall under paragraph (h) (as already explained) and under paragraph (d) loans to unaffiliated borrowers require a minimum maturity of three years – a condition which is not met;

- Mortgages: in accordance with municipal law, mortgages constitute "intangible real estate"; under paragraph (g), "intangible real estate" is protected, provided that the asset was acquired for economic benefit or business purposes – a requirement that Lion does comply with.

250. Art. 1139 NAFTA does not provide that an investor holding distinct interests, some of which individually qualify as a protected investment while others fail, should be denied protection, simply because one or more assets fail the test. Consequently, the Tribunal sees no reason to deny protection to the Mortgages under paragraph (g), simply because its Credit Agreements and Notes fall short of the standards under paragraphs (d) and (h).

251. Mexico has tried to circumvent this conclusion, arguing that the Mortgages are ancillary transactions, and that Loans and Mortgages must be considered as one and the same transaction.

252. Contrary to Mexico's submission, the Mortgages, albeit ancillary, are not and never were integral parts of the Loans. Loans and Mortgages resulted from separate declarations of consent, made by different persons, at different times, and in different documents:

- The Loans were formalized in the Credit Agreements, the contracts in which Lion consented to lend and the Borrowers undertook to repay principal and interest; while

- The Mortgages were created thereafter, in three separate notarial deeds, in which the mortgagors unilaterally consented to the encumbrance of their property as a security for the Loans.

253. From an economics point of view, there is also no identity between Loans and Mortgages: the value of the Loans is the dependent on the borrowers' solvency and capacity to pay, while the value of the Mortgages hinges on the price which the encumbered real estate will attain in a public auction and on the legal preference afforded to the mortgagee.

254. Second, Mexico adds that a mortgage is a security right created in real property that is never delivered to or owned by the creditor; the mortgage only confers a preferential right to the proceeds of the sale of the mortgaged property. Mexico concludes that mortgages are not "real estate or other property" under paragraph (g)[222].

[222] Memorial on Jurisdiction, paras. 121-150.

255. The Tribunal concurs with Mexico that mortgages are indeed security rights in real estate, and that possession of the asset does not pass to the mortgagee. But Mexico's suggested consequence is a *non sequitur*.

256. As the Tribunal has already explained, under municipal law mortgages are considered *derechos reales*, which by law constitute *bienes inmuebles intangibles*, and Art. 1139(g) expressly extends protection to this category of assets. The ordinary meaning of "intangible real estate" in paragraph (g), which the Tribunal has established by applying Mexico's own municipal law, does not support, but rather contradicts, Mexico's argument that mortgages are to be excluded.

257. Finally, Mexico argues that if the Mortgages are considered separately, that would allow protection of any loan (regardless of its maturity) by just adding a security – a result said to be contrary to the intention of the NAFTA signatories[223].

258. Mexico's counter-argument is based on a misconception: the Respondent assumes that, if the mortgage constitutes a protected investment, the protection is automatically extended to the loan. This is not so.

259. Loan and mortgage constitute separate categories of interests, with separate sets of requirements to become protected investments. This implies that in certain situations the mortgage may constitute a protected investment, while the underlying loan will not. In those cases, the Treaty protection afforded to the mortgage is not extended to the loan. The scope of protection which the investor enjoys, will depend on the measures adopted by the host state in breach of the Treaty. If such measures affect the mortgage or the encumbered real estate asset, the investor will be entitled to invoke NAFTA protection. If the measures target the loan, no such protection will be forthcoming. To provide a simple example: an investor holding a mortgage, which secures an underlying loan that does not meet the three-year maturity requirement, is protected against an improper expropriation of the real estate, which destroys the value of the mortgage[224] – but not for a measure which specifically targets the transfer of funds deriving from loans[225].

3. CONCLUSION

260. In its Rejoinder on Jurisdiction, Lion asked the Tribunal for the following relief[226]:

> "140. For the reasons discussed above, the Claimant respectfully requests the Arbitral Tribunal to issue a decision on jurisdiction rejecting Mexico's Jurisdictional Objection and declaring that the Mortgages and Notes are indeed investments under NAFTA Article 1139; and, consequently that it has *ratione materiae* jurisdiction to adjudicate the claims brought by the Claimant; thus ordering the proceedings to continue and the

[223] HT, Day 1, 29:14 – 33:2.
[224] In breach of Art. 1110 NAFTA.
[225] E.g., a breach of the right to transfer under Art. 1109 NAFTA.
[226] Rejoinder on Jurisdiction, para. 140.

> Respondent to file the Respondent's Counter-Memorial in the period remaining, according with the Amended Timetable."

261. Mexico ended its Reply on Jurisdiction with the following request[227]:

> *"152. La Demandada solicita al Tribunal desechar la reclamación de conformidad con el Artículo 45(2) de las Reglas de Arbitraje del Mecanismo Complementario del CIADI sobre la base de que la Demandante no ha establecido haber hecho una inversión en México conforme a la definición del Artículo 1139 del TLCAN y, por lo tanto, que este Tribunal carece de jurisdicción* ratione personae *y* ratione materiae".

262. The Tribunal has come to the following conclusions:

- The Notes do not qualify as investments under Art. 1139 NAFTA, for the reasons established in Section VII.1 above;

- The Mortgages do qualify as investments under Art. 1139(g) NAFTA and the Tribunal has *ratione materiae* and *ratione personae* jurisdiction to adjudicate the claims brought by Lion based on measures adopted by Mexico that affect the Mortgages, for the reasons set forth in Section VII.2.

263. In accordance with section 16 and the latest version of the Amended Timetable (Annex A) of the Procedural Order No. 1, as well as para. 13 of the Decision on Bifurcation, the suspension of the proceedings is hereby lifted. Respondent still has 78 days from the date of the issue of this Award to the Parties to file its Counter-Memorial in the period remaining[228].

264. The Tribunal will shortly convene the Parties to discuss the continued progression of the arbitration.

265. The decision on costs is reserved.

[227] Reply on Jurisdiction, paras. 152 and 153.
[228] *See* communication of the Tribunal's Secretary dated April 27, 2017, issuing an updated calendar and taking note of March 21, 2017 as the agreed-upon date in which Claimant's Memorial is deemed submitted.

VIII. DECISION

266. For the foregoing reasons, the Tribunal decides as follows:

1. DECLARES that the Mortgages qualify as investments and that the Tribunal has jurisdiction *ratione materiae* and *ratione personae* to adjudicate claims brought by Lion based on measures adopted by Mexico which affect the Mortgages;

2. DECLARES that the Notes do not qualify as investments and that the Tribunal lacks jurisdiction *ratione materiae* and *ratione personae* to adjudicate claims brought by Lion based on measures adopted by Mexico which affect the Notes.

3. RESERVES the decision on costs for a future determination.

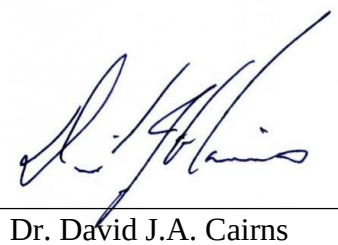
267. In accordance with section 16 and the latest version of the Amended Timetable (Annex A) of the Procedural Order No. 1, as well as para. 13 of the Decision on Bifurcation, the suspension of the proceedings is hereby lifted. Respondent still has 78 days left to file its Counter-Memorial in the period remaining[229].

268. The Tribunal will shortly convene the Parties to discuss the continued progression of the arbitration.

Place of arbitration: Washington D.C. (USA)

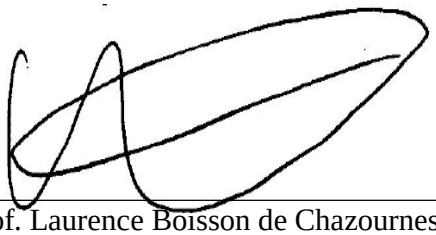
Date: July 30, 2018

[229] *See* communication of the Tribunal's Secretary dated April 27, 2017, issuing an updated calendar and taking note of March 21, 2017 as the agreed-upon date in which Claimant's Memorial is deemed submitted.



Dr. David J.A. Cairns
Arbitrator

Date: July 20, 2018



Prof. Laurence Boisson de Chazournes
Arbitrator

Date: July 23, 2018

Prof. Juan Fernández-Armesto
President of the Tribunal

Date: July 19, 2018