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CERTIFICATE

VENTO MOTORCYCLES, INC.

v.

UNITED MEXICAN STATES

(ICSID CASE NO. ARB(AF)/17/3)

I hereby certify that the attached documents are true copies of the English and Spanish versions of the Tribunal's Award dated 6 July 2020.

Meg Kinnear
Secretary-General

Washington, D.C., 6 July 2020

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

VENTO MOTORCYCLES, INC.
Claimant

and

UNITED MEXICAN STATES
Respondent

ICSID Case No. ARB(AF)/17/3

AWARD

Members of the Tribunal
Dr. Andrés Rigo Sureda, President of the Tribunal
Prof. David Gantz, Arbitrator
Mr. Hugo Perezcano, Arbitrator

Secretary of the Tribunal
Ms. Marisa Planells-Valero

Date of dispatch to the Parties: 6 July 2020

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TABLE OF ABBREVIATIONS/DEFINED TERMS

ACAFI	*Administración Central de Auditoría Fiscal Internacional* (Central Administration of International Fiscal Audit)
AED	Aeromechanical and Electronic Design, Inc.
AMIA	Asociación Mexicana de la Industria Automotriz A.C.
C-[#]	Claimant's Exhibit
CBP	United States Customs and Border Protection Agency
Cl. PHB	Claimant's Post Hearing Brief dated 12 February 2020
CL-[#]	Claimant's Legal Authority
Counter-Memorial	Respondent's Counter-Memorial dated 12 November 2018
First Loan Agreement	Loan Agreement between Vento and MotorBike of 13 October 2001 (C-0005)
Hearing	Hearing on jurisdiction, merits and quantum held on 18 to 22 November 2019
Honda	Honda de México, S.A. de C.V.
ICSID Additional Facility Rules	ICSID Arbitration (Additional Facility) Rules (2006)
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Joint Venture	The joint venture established by Vento and MotorBike under the Joint Venture Agreement and in respect of which MotorBike assigned all of its rights and obligations to Mototransp in April 2006
Joint Venture Agreement	Joint Venture Agreement between Vento and MotorBike of 1 October 2001 (C-0003)

Memorial	Investor's Memorial dated 23 June 2018
MotorBike	MotorBike, S.A.
Mototransp	Mototransp, S.A.
NAFTA	North American Free Trade Agreement
Notice of Intent	Vento's Notice of Intention to Submit a Claim to Arbitration submitted to the *Secretaría de Economía* on 20 February 2017
Operadoras	Operadoras en Servicios Comerciales, S.A. de C.V.
PROSEC	*Programa de Promoción Sectorial* (Sectorial Promotion Program)
PROSEC Decree	*Decreto por el que se Establecen Programas de Promoción Sectorial* (Decree that Establishes Sectorial Promotion Programs)
R-[#]	Respondent's Exhibit
Rejoinder	Respondent's Rejoinder dated 2 August 2019
RL-[#]	Respondent's Legal Authority
Relevant Mexican Investments	Honda de México, S.A. de C.V., Yamaha Motor de México S.A. de C.V. and Operadoras en Servicios Comerciales, S.A. de C.V.
Reply	Claimant's Reply Memorial dated March 15, 2019
REPUVE	*Registro Público Vehicular* (Public Vehicle Registry)
Request for Arbitration	Claimant's request for the institution of proceedings under Article 2 of the ICSID Additional Facility Rules, submitted to the Secretary-General of ICSID on 8 August 2017
Resp. PHB	Respondent's Post Hearing Brief dated 12 February 2020

Rule 2(a)	General Rule of Interpretation 2(a) of the Harmonized Commodity Description and Coding System
SAT	*Servicio de Administración Tributaria* (Tax Administration Service)
Second Loan Agreement	Loan agreement between Vento and MotorBike of 1 March 2010 (C-0006)
TFJFA	*Tribunal Federal de Justicia Fiscal y Administrativa* (Federal Tribunal of Fiscal and Administrative Justice)
Tr. Day [#] [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 19 January 2018
Vento	Vento Motorcycles, Inc.
Yamaha	Yamaha Motor de México S.A. de C.V.

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the North American Free Trade Agreement ("**NAFTA**"), which entered into force for the United Mexican States and the United States of America on 1 January 1994, and the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (the "**ICSID Additional Facility Rules**").

2. The claimant is Vento Motorcycles, Inc. ("**Vento**" or the "**Claimant**") a corporation incorporated under the laws of Texas with its registered office in Laredo, Texas.

3. The respondent is the United Mexican States ("**Mexico**" or the "**Respondent**").

4. The Claimant and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

5. The dispute relates to Mexico's denial of NAFTA preferential *ad valorem* import tariffs to motorcycles assembled by the Claimant in the United States and exported to Mexico, which allegedly culminated in the impairment and ultimate destruction of the Claimant's business under a joint venture agreement that it entered into with MotorBike, S.A. ("**MotorBike**") for the sale and marketing of motorcycles in Mexico on 1 October 2002 (the "**Joint Venture Agreement**").

II. PROCEDURAL HISTORY

6. On 20 February 2017, pursuant to NAFTA Article 1119, Vento served a notice of its intention to submit a claim to arbitration (the "**Notice of Intent**") to the Respondent.[1]

7. On 8 August 2017, the Secretary-General of ICSID received a request for arbitration dated 7 August 2017 for the institution of proceedings under Article 2 of the ICSID Additional Facility Rules, submitted by the Claimant against Mexico on its own behalf under NAFTA

[1] Exhibit 4 to the Request for Arbitration, Notice of Intent (20 February 2017).

Article 1116 and on behalf of MotorBike, S.A. and Mototransp, S.A., two Mexican enterprises, under NAFTA Article 1117 (the "**Request for Arbitration**"). Simultaneously, the Claimant submitted a request for approval of access to the Additional Facility under Article 2(a) of the ICSID Additional Facility Rules. The Request for Arbitration was supplemented by the Claimant's letters of 24 August, 1, 8 and 12 September 2017.

8. On 15 September 2017, the Secretary-General of ICSID approved access to the Additional Facility and registered the Request for Arbitration in accordance with Articles 4 of the ICSID Additional Facility Rules. In the Notice of Registration, the Secretary-General of ICSID invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Chapter III of the ICSID Additional Facility Rules.

9. NAFTA Article 1123 provides that the Tribunal be comprise three arbitrators, one arbitrator appointed by each of the Parties and the third, the presiding arbitrator, appointed by agreement of the Parties.

10. On 3 November 2017, the Claimant appointed Prof. David Gantz, a national of the United States of America, as arbitrator. Prof. Gantz accepted the appointment by letter of 10 November 2017. Together with his acceptance, Prof. Gantz provided the Parties with a declaration of his independence and impartiality and a disclosure statement.

11. On 6 November 2017, pursuant to NAFTA Article 1124, the Claimant requested that the Secretary-General of ICSID appoint the arbitrators not yet appointed.

12. On 17 November 2017, the Respondent appointed Mr. Hugo Perezcano, a national of Mexico, as arbitrator. Mr. Perezcano accepted the appointment on 5 December 2017. Together with his acceptance, Mr. Perezcano provided the Parties with a declaration of his independence and impartiality and a disclosure statement.

13. On 28 November 2017, the Secretary-General of ICSID proposed that the appointment of the third arbitrator and President of the Tribunal be made through a strike-and-rank list of seven candidates. By communications of 29 November and 1 December 2017, the Claimant and the Respondent, respectively, accepted the proposal from the Secretary-General of ICSID.

14. On 5 January 2018, in accordance with the agreed procedure, the Secretary-General of ICSID provided the Parties with a list of seven candidates. Each Party submitted its ranking of candidates on 16 January 2018.

15. By letter of 17 January 2018, the Secretary-General of ICSID informed the Parties that the overall most preferred candidate was Dr. Andres Rigo Sureda, a national of the Kingdom of Spain, and that, in accordance with ICSID Additional Facility Article 11(2), the Centre was going to seek his acceptance of the appointment as President of the Tribunal. Dr. Rigo Sureda accepted his appointment on 18 January 2018 and provided the Parties with a declaration of his independence and impartiality.

16. On 19 January 2018, in accordance with Article 6(3) of the ICSID Additional Facility Rules, the Secretary-General of ICSID notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Marisa Planells-Valero, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

17. In accordance with Article 9 of the ICSID Additional Facility Rules, the Tribunal held a first session with the Parties on 12 March 2018, by telephone conference.

18. Following the first session, on 2 April 2018, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues, including the procedural calendar for this arbitration. Procedural Order No. 1 provided, *inter alia*, that the applicable ICSID Additional Facility Rules were those in effect from 10 April 2006, except to the extent that they were modified by Section B of NAFTA Chapter Eleven. It also indicated that the procedural languages were English and Spanish and that the place of arbitration was Toronto (Canada). On the same date, the Tribunal invited the Parties to file submissions by 11 April 2018 on the matters of confidentiality, transparency, and publication of documents, which had been discussed during the first session. On 1 May 2018, after various exchanges with the Parties, the Tribunal issued a decision on Confidentiality, Transparency, and Publication.

19. On 15 June 2018, the Tribunal issued Procedural Order No. 2 on the Claimant's Document Production Request.

20. On 9 July 2018, after various exchanges with the Parties, the Tribunal issued Procedural Order No. 3 on the Claimant's Resubmitted Requests for Production of Documents 7, 8, 10-16 and 18.

21. On 23 July 2018, the Claimant filed its Investor's Memorial ("**Memorial**"); accompanied by exhibits C-0001 to C-0038; legal authorities CL-0001 to CL-0106; witness statements, by Mr. Isaac Calderón, Mr. César Núñez-Cázares, Mr. Javier Sarro, Mr. Gabriel Arriaga, and Mr. Guillermo Massieu; and expert reports by Mr. Gerardo Lozano, Mr. Edgar García and, on damages, by Mr. Rodrigo Gómez and Mr. Óscar Sánchez.

22. On 1 October 2018, the Tribunal issued Procedural Order No. 4 on the Respondent's Request for Production of Documents.

23. On 12 November 2018, the Respondent filed its Counter-Memorial ("**Counter-Memorial**"), accompanied by exhibits R-0001 to R-0084; legal authorities RL-0001 to RL-0034; witness statements by Mr. Gabriel Oliver García, Mr. José Ramón Jáuregui Tejeda, and Mr. Jorge Antonio Libreros Calderón; and expert reports by Mr. Rafael Romo Corzo, and, on damages, by Fausto García Asociados, S.C.

24. On 28 December 2018, the Parties informed the Tribunal of their agreement to modify the procedural calendar.

25. On 25 January 2019 the Tribunal issued Procedural Order No. 5 on the Claimant's Second Request for Production of Documents.

26. On 19 February 2019, after various exchanges with the Parties, the Tribunal issued an amended procedural calendar extending to 15 July 2019 the time-limit for the Respondent to submit its Rejoinder and confirming that the hearing would take place from 18 to 22 November 2019 in Washington D.C.

27. On 15 March, 2019, the Claimant filed its Reply Memorial ("**Reply**"), accompanied by exhibits C-0039 to C-0060; legal authorities CL-0107 to CL-0158; second witness

statements by Mr. César Núñez-Cázares, Mr. Isaac Calderón, Mr. Gabriel Arriaga, and Mr. Guillermo Massieu; additional witness statements by Mrs. Claudia Núñez-Cázares, Mr. José Alberto Ortúzar, Mr. Daniel Ortiz Nashiki, Mr. Michael Hu, Mr. Eduardo Gómez Macías, Mr. Eduardo Bucay; second expert reports by Mr. Gerardo Lozano and, on damages, by Mr. Rodrigo Gómez and Mr. Óscar Sánchez; and additional expert reports by Mr. Leonardo Giacchino, Mr. James Lloyd Loftis, and Mr. Eduardo Díaz Gavito. In its Reply, the Claimant informed that it was withdrawing the claims made on behalf of MotorBike and Mototransp under NAFTA Article 1117(1).

28. On 19 March 2018, the Claimant informed of certain discrepancies in the index of factual exhibits and legal authorities attached to its Reply. The Claimant also transmitted the witness statements of Ms. Sara Patricia Ortega Domínguez and Mr. Alan Eini and the original Spanish version of the Second Expert report on damages by Mr. Rodrigo Gómez and Mr. Oscar Sánchez, which it had accidentally omitted to submit with its Reply. The Claimant undertook that these documents had been completed and executed by their respective affiants on 14 March 2019.

29. On 20 March 2019, on the basis of the Claimant's delay in completing the filing of its Reply, the Respondent requested a one-week extension for the submission of its second request for documents. On that same day, the Claimant agreed to the requested extension.

30. By a second communication of that same date, the Claimant informed that, together with its Reply, it had also inadvertently submitted incorrect versions of Dr. Giacchino's second expert report and of Mr. César Núñez Cázares's second witness statement. By this same communication, the Claimant provided a corrected version of Dr. Giacchino's report and a third witness statement by Mr. César Núñez Cázares explaining how he intended his second statement to read. On 22 March 2019, in view of the Parties' agreement, the Tribunal granted the one-week extension requested by the Respondent for the filing of its second request for documents.

31. Also on 22 March 2019, the Respondent requested the Tribunal to strike from the record the alternative claim of treatment no less favourable made by the Claimant in its Reply ("**Alternative TNLF Claim**") and the documents submitted by the Claimant after the filing

deadline for its Reply. The Respondent also requested an order from the Tribunal holding Vento, MotorBike and Mototransp jointly liable for any costs awarded to the Respondent. On 29 March 2019, the Claimant submitted observations on the Respondent's request. On 12 April 2019, the Tribunal decided to reserve its decision on the Claimant's Alternative TNLF Claim and to reject the Respondent's request to strike documents from the record. Nevertheless, the Tribunal granted an opportunity for the Respondent to request an extension for the submission of its Rejoinder.

32. On 23 April 2019, the Tribunal and the Parties were informed that Ms. Planells-Valero would be taking temporary leave, and that Ms. Alicia Martín Blanco, ICSID Legal Counsel, would serve as Secretary of the Tribunal during her absence.

33. On 17 May 2019, the Tribunal issued Procedural Order No. 6 on the Respondent's Second Request for Production of Documents.

34. On 2 July 2019, the Respondent requested an extension to file its Rejoinder by 2 August 2019. On 8 July 2019, the Claimant opposed Respondent's request and proposed a new date for the submission of the Respondent's Rejoinder or, in the alternative, permission to submit an errata list pertaining to its Reply. On 9 July 2019, the Tribunal granted the extension requested by the Respondent and the Claimant's request to file an errata list. The Claimant submitted the errata list on 12 July 2019.

35. On 26 June 2019, the Parties submitted an agreed procedural calendar to the Tribunal.

36. Pursuant to the agreed procedural calendar, on 2 August 2019, the Respondent filed its Rejoinder ("**Rejoinder**"), accompanied by exhibits R-0085 to R-0148; legal authorities RL-0035 to RL-045, witness statements by Ms. Itzel Ivón Martínez Hernández, Mr. Juan Díaz, and Ms. Georgina Estrada, second witness statements by Mr. Gabriel Oliver García, Mr. José Ramón Járegui Tejeda, and Mr. Jorge Antonio Libreros Calderón; an expert report by Mr. Sébastien Pouliot, and second expert reports by Mr. Rafael Romo Corzo, and, on damages, by Fausto García Asociados, S.C.

37. On 23 August 2019, the United States of America and Canada filed a submission as non-disputing State Parties pursuant to NAFTA Article 1128.

38. On 28 August 2019, the Claimant filed a request to strike from the record certain documents submitted by the Respondent with its Rejoinder.

39. On 6 September 2019, the Parties filed observations on the non-disputing State Parties' submissions of 3 August 2019.

40. On 11 September 2019, the Respondent submitted a request to the Tribunal to strike from the record certain paragraphs of the Claimant's observations on the non-disputing State Parties' submissions.

41. On 13 September 2019, the Respondent submitted comments on the Claimant's request of 28 August 2019.

42. On 16 September 2019, the Claimant responded to the Respondent's request of 11 September 2019.

43. On 18 September 2019, the Parties submitted their respective lists of witnesses and experts to be called for cross-examination during the hearing.

44. On 19 September 2019, counsel for the Claimant informed that Mr. George Ruttinger and Mr. Eduardo Mathison, of Crowell & Moring LLP, had been retained by the Claimant as co-counsel in this matter.

45. On 2 October 2019, the Tribunal issued Procedural Orders No. 7 and No. 8, respectively, on the Claimant's request of 28 August 2019 and the Respondent's request of 11 September 2019 to strike certain information and documents from the record. In doing so, the Tribunal invited the Claimant to submit a revised version of its observations on the non-disputing State Parties' submissions, which the Claimant did on 7 October 2019.

46. On 4 October 2019, the Parties submitted their agreements on the draft procedural order for the organization of the hearing. On 9 October 2019, the Tribunal issued Procedural Order No. 9 on the organization of the hearing.

47. On 17 October 2019, the Respondent informed the Tribunal that Mr. Fausto Garcia, the Respondent's damages expert called for cross-examination by the Claimant, was unable to

attend the Hearing due to a health issue and indicated that Mr. José Pedro González Rajme, co-author of the expert report submitted by the Respondent, was available for cross-examination by the Claimant. In view of this, the Claimant responded on October 23, 2019 with a proposal to modify the agenda for the Hearing. On that same date, the Respondent provided a medical report issued by Mr. Garcia's doctor and requested an opportunity to reply to the Claimant's comments.

48. Also on 23 October 2019, the Tribunal and the Parties were informed that Ms. Marisa Planells-Valero was resuming her functions as Secretary of the Tribunal in this proceeding.

49. By communication of 25 October 2019, the Tribunal took note that Mr. García would not be able to attend the hearing because of health issues but that Mr. González was available for cross-examination.

50. On 28 October 2019, representatives of the United States of America confirmed their attendance to the Hearing.

51. On 29 October 2019, the Respondent replied to the Claimant's communication of 23 October 2019. Further communications from the Parties on the matter of the appearance of the Respondent's quantum experts were received on 30 October 2019.

52. A hearing on jurisdiction, merits and quantum was held in Washington DC from 18 to 22 November 2019 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:

Dr. Andrés Rigo Sureda	President
Prof. David Gantz	Arbitrator
Mr. Hugo Perezcano	Arbitrator

ICSID Secretariat:

Ms. Marisa Planells-Valero	Secretary of the Tribunal

For the Claimant:

Mr. Luis F. Aguilar	Aguilar & Loera S.C.
Dr. Todd Weiler	Barrister & Solicitor
Mr. George D. Ruttinger	Crowell & Moring. LLP
Mr. Alejandro Loera	Aguilar & Loera S.C.
Ms. Fiamma Rizzo	Aguilar & Loera S.C.
Mr. Hugo Hidalgo	Aguilar & Loera S.C.
Ms. Patricia Arratíbel	Aguilar & Loera S.C.
Ms. Ana Favila	Aguilar & Loera S.C.
Mr. Rodrigo Aguilar	Aguilar & Loera S.C.
Mr. Sebastián Aguilar	Aguilar & Loera S.C.
Mr. Eduardo Mathison	Crowell & Moring LLP
Ms. Staci E. Gellman	Crowell & Moring LLP
Mr. Richard E. Walck	Global Financial Analytics, LLC

For the Respondent:

Mr. Orlando Pérez Garate	Director General de Consultoría Jurídica de Comercio Internacional, Secretaría de Economía
Ms. Cindy Rayo Zapata	Directora General Adjunta de Consultoría Jurídica de Comercio Internacional, Secretaría de Economía
Mr. Aristeo López Sánchez	Consejero Jurídico, Secretaría de Economía, Embajada de México en Washington D.C.
Mr. Francisco Diego Pacheco Román	Director de Consultoría Jurídica de Comercio Internacional, Secretaría de Economía
Mr. Jorge Avilés Cerezo	Subdirector de Consultoría Jurídica de Comercio Internacional, Secretaría de Economía
Ms. Ileana Pantiga Paz	Directora de Cumplimiento y Seguimiento de Instrumentos y Programas de Comercio Exterior, Secretaría de Economía
Mr. Stephan E Becker	Pillsbury Winthrop Shaw Pittman, LLP
Ms. Stephanie Rosenberg	Pillsbury Winthrop Shaw Pittman, LLP
Mr. Jorge Vera	Pillsbury Winthrop Shaw Pittman, LLP
Ms. Jacklyn Vargas	Pillsbury Winthrop Shaw Pittman, LLP
Mr. J. Cameron Mowatt	Tereposky & DeRose, LLP
Mr. Alejandro Barragán	Tereposky & DeRose, LLP

Court Reporters:

Ms. Dawn Larson
Ms. María Eliana Da Silva

Interpreters:

Mr. Daniel Giglio
Ms. Elena Howard
Ms. Sonia Berah

53. Representatives of the United States of America also attended the Hearing.

54. The following persons were examined during the Hearing:

On behalf of the Claimant:

Witnesses

Mr. Gabriel Arriaga Callejas
Ms. Claudia Guerra Núñez Cázares
Mr. César Núñez Cázares
Mr. Isaac Calderón Birch

Experts

Mr. Rodrigo Gómez Alarcón
Mr. Óscar Sánchez Herrera
Mr. Eduardo Díaz Gavito
Mr. Leonardo Giacchino

On behalf of the Respondent:

Witnesses

Mr. Gabriel Oliver
Mr. José R. Jáuregui
Mr. Juan Díaz Mazadiego

Experts

Dr. Sébastien Pouliot
Mr. José Pedro González Rajme

55. On 2 December 2019 the Tribunal provided the Parties with further instructions regarding the corrections to the transcripts, the post-hearing briefs, and the statements of costs.

56. On 10 January 2020, the Parties submitted their agreed corrections to the hearing transcripts.

57. The Parties submitted their simultaneous Post Hearing briefs on 12 February 2020.

58. The Parties submitted their Statements of Costs on 13 March 2020.

59. The proceeding was declared closed on 5 June 2020.

III. FACTUAL BACKGROUND

60. On 10 January 2001, Esther Calderón Birch and Jorge Pastor García Mares incorporated MotorBike under the laws of Mexico, with a duration of 5 years, a clause of exclusion of foreigners and a share capital of MX$50,000. Ms. Calderón Birch subscribed to 95.5% of shares and Mr. Pastor García, the remaining 4.5%. The company was not constituted with variable capital, so any modification to its share capital required a reform of its by-laws by notarized public deed (which did not happen). Its corporate purpose was limited to the import and export of haberdashery, sporting goods, toys, children's accessories, fantasy jewelry and related items; as well as the import, export and sale of food, alcoholic beverages and condiments.[2]

61. On 30 August 2001, Claudia Núñez-Cázares (who also indistinctly used her maiden name, Claudia E. Guerra) established Vento Motorcycles, Inc. under Texas law.[3]

62. On 1 October 2001, Vento and MotorBike set out in the Joint Venture Agreement the terms and conditions of their joint venture for the sale and marketing of motorcycles in Mexico (the "**Joint Venture**").[4]

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[2] C-0002, Articles of Incorporation of MotorBike. S.A.

[3] C-0001, Articles of Incorporation of Vento Motorcycles, Inc.

[4] C-0003, Joint Venture Agreement.

63. On or around the date on which Vento and MotorBike signed the Joint Venture Agreement, Claudia Núñez-Cázares and Isaac Calderón Birch verbally agreed to reinvest the Joint Venture profits in the Joint Venture.[5]

64. On 13 October 2001, Vento and MotorBike entered into a loan agreement under which Vento was obliged to lend to MotorBike during the term of the Joint Venture Agreement up to a cumulative amount of US$10,000,000.00, with an annual rate of interest of 5%. MotorBike was obligated to repay the loan upon termination of the Joint Venture (the "**First Loan Agreement**").[6]

65. Aeromechanical and Electronic Design, Inc. ("**AED**") was established on 15 October 2001 under the laws of Texas. Edward Treviño was appointed as sole director.[7]

66. In November 2001, the Joint Venture began to operate. AED began importing motorcycle parts from China into the United States. AED then assembled engines that it subsequently sold to Vento along with the rest of the parts that make a motorcycle. Vento completed the assembly and exported the finished motorcycles to Mexico. AED labeled the engines as "Made in the USA."[8]

67. Since the beginning of 2002, concerns relating to the importation into Mexico of Vento-branded motorcycles arose. The Mexican press reported that earlier that year the Central Customs Control Administration had seized "Vento-branded motorcycles of Chinese origin" for failing to pay import duties.[9] (Tribunal's Translation).

68. On 19 February 2002, MotorBike, through Eduardo Bucay as its sole director, applied to the *Secretaría de Economía* for authorization to operate under a *Programa de Promoción*

[5] First Witness Statement of Isaac Calderón Birch (1 June 2018), ¶ 19, footnote 2; Witness Statement of Claudia Núñez-Cázares (10 January 2019), ¶ 9.

[6] C-0005, First Loan Agreement (13 October 2001).

[7] R-0018, Articles of Incorporation of Aeromechanical and Electronic Design, Inc.

[8] Witness Statements of Claudia Núñez-Cázares (10 January 2019), ¶ 10.

[9] C-0014, Media smear campaign examples, p. 4.

Sectorial ("**PROSEC**"), a program which would permit MotorBike to import motorcycle parts originating in China for the assembly of motorcycles in Mexico.[10]

69. On 28 February 2002, the *Secretaría de Economía* conducted a verification visit to MotorBike's facilities to ensure that they were suitable to operate under the *Decreto por el que se Establecen Programas de Promoción Sectorial* (the "**PROSEC Decree**"). Eduardo Bucay informed the *Secretaría de Economía* that "currently the company only sells motorcycles and scooters, as well as spare parts and provides mechanical services to the final customer" (Tribunal's Translation). He stated that MotorBike had 20 employees (6 administrative staff, 11 mechanics and 3 workers) and added that at that time it did not have the necessary equipment to assemble motorcycles. The Secretaría noted that MotorBike did not carry out any production process or activity, and that it was in the process of reorganizing or adapting its facilities so that it would be able to carry out assembly processes. Eduardo Bucay committed to demonstrate MotorBike's readiness to perform assembly activities within one month, by 26 March 2002.[11]

70. On 4 March 2002, the *Secretaría de Economía* determined that, under the PROSEC Decree, MotorBike could not be considered a producer because it did not manufacture the goods in question. Consequently, it denied MotorBike's PROSEC application.[12]

71. On 27 June 2002, the *Instituto Mexicano de la Propiedad Industrial* registered the Vento trademark in favor of Isaac Calderón Birch effective from 4 March 2002 (the filing date of the application).[13]

72. By mid-2002, Mexico's *Servicio de Administración Tributaria* ("**SAT**") had begun an inquiry into the origin of Vento-branded motorcycles imported into Mexico.[14]

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[10] C-0044, Response to First PROSEC request (19 February 2002).
[11] C-0044, Response to First PROSEC Request (19 February 2002).
[12] C-0044, Response to First PROSEC Request (19 February 2002).
[13] C-0008, Vento's Trademark Registration, p. 1.
[14] C-0044, Response to First PROSEC Request (19 February 2002), p. 8.

73. According to statements from Vento executives reported by the Mexican press, these inquiries were motivated by claims made by the *Asociación Mexicana de la Industria Automotriz A.C.* ("**AMIA**") and some Japanese motorcycle manufacturers established in Mexico.[15]

74. On 11 July 2002, SAT requested the US customs authorities to investigate Vento's constitution and legal existence. SAT addressed the request to the Customs Attaché at the U.S. Embassy in Mexico under the Agreement between the Government of Mexico and the United States Government on Mutual Assistance between their Customs Administrations, dated 20 June 2000.[16]

75. On 22 July 2002, MotorBike filed a new application for PROSEC designation, changing the description of the activities to be performed. MotorBike stated that it would carry out the manufacture and assembly of motorcycles, bicycles and similar goods.[17]

76. On 24 July 2002, the *Secretaría de Economía* made another verification visit to MotorBike's facilities. Eduardo Bucay again attended the visit. The *Secretaría* found that MotorBike imported "from its U.S. affiliate" various semi-assembled parts, performed an assembly process consisting of attaching wheels, handlebars and accessories, and provided the final finishing process. MotorBike had 45 employees (17 administrative staff, 16 mechanics and 12 workers) for such purpose.[18]

77. On 2 August 2002, the *Secretaría de Economía* once more denied MotorBike's application for PROSEC. Again, the *Secretaría* determined that the company did not manufacture the goods, so it could not be considered a producer under the PROSEC Decree.[19]

78. On 18 November 2002, AMIA members purchased a Vento all-terrain vehicle from a department store in Mexico. The seller explained that it was a unit assembled in Laredo,

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[15] C-0014, Media smear campaign examples, pp. 3-5.

[16] R-0044, Letter from the United States Customs Attaché, p. 1.

[17] C-0045, Response to Second PROSEC Request.

[18] C-0045, Response to Second PROSEC Request, p. 23.

[19] C-0045, Response to Second PROSEC Request, p. 7.

Texas, with parts imported from Taiwan. AMIA members disassembled the all-terrain vehicle completely to check the origin of the parts. The all-terrain vehicle had a metal plate indicating that it had been assembled by Vento at its assembly plant in Laredo, Texas. Some pieces indicated that they had been manufactured in Taiwan, although most of the parts had no indication of their origin.[20]

79. According to press reports, on 19 December 2002, at the invitation of Vento, SAT officials visited Vento's plant in Laredo, Texas. It was an informal visit and, therefore, SAT could not make any official findings or determinations. The Central Administrator of Customs Control, Mario Córdova López, said in an interview that they looked at Vento's offices and assembly lines, and were able to observe goods that were coming in. He noted that Vento's executives had informed him that none of the motorcycle components were manufactured in the United States. Mr. Córdova López acknowledged that motorcycles sold in a Mexican department store at that time were of better quality than those SAT had seized earlier that year, but that he was not convinced that the motorcycles were NAFTA originating goods. Therefore, SAT would continue with an inquiry that it had already initiated.[21]

80. On 7 January 2003, the Customs Attaché of the United States Embassy in Mexico responded to the SAT's July 2002 request for information. He informed that a U.S. Customs Service agent had visited the establishment of a company called Matrix American Group, Inc., where César Núñez-Cázares identified himself as the owner of Vento. The agent noticed that Vento had about 20 employees. César Núñez-Cázares stated that Vento acquired motorcycle parts in Asia, mainly in Hong Kong; imported them into the United States, where it paid import tariffs, and transported them to the Laredo plant where the motorcycles were assembled in 24 hours. He added that some of the components were manufactured in the United States, but were then exported to Asian countries, where they were incorporated into finished products. The Customs Associate informed that, based on

[20] C-0014, Media smear campaign examples, p. 4; Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶ 17.
[21] C-0014, Media smear campaign examples, pp. 5-6.

the observations of the Customs Service agent who visited Vento's plant, less than 50% of Vento's assembly and manufacturing was carried out at the Laredo plant.[22]

81. In the same month, SAT contacted AMIA regarding Vento motorcycle imports "to learn first-hand their concerns regarding the alleged transshipment of Vento's motorcycles" through the United States. (Tribunal's translation). AMIA informed SAT that it had purchased a Vento motorcycle in Mexico, disassembled it and concluded that all the parts were of Chinese origin. José Alberto Ortúzar requested AMIA to file a formal written complaint.[23]

82. In early 2003, around February, after the informal visit to Vento's plant in Laredo, Texas, Mr. Córdova López summoned Gabriel Oliver García to a meeting to discuss the importation into Mexico of Vento motorcycles. Gabriel Oliver attended together with José Ramón Jáuregui Tejeda, Administrator of International Legal Procedures, and José Alberto Ortúzar Cárcova, International Audit Manager, both attached to the Central Administration of International Tax Audit led by Gabriel Oliver.[24]

83. In February 2003, AMIA filed a formal written complaint against the importation into Mexico of Vento motorcycles with a NAFTA certificate of origin, as requested by José Alberto Ortúzar Cárcova. AMIA filed its complaint in accordance with the guidelines of the Audit Programming Committee of the General Administration of Large Taxpayers of the SAT.[25]

84. On 1 March 2003, Vento, through Claudia E. Núñez-Cázares, as registered agent of the company, filed the Public Information Report for 2002 for purposes of the Texas Franchise Tax. The Report identifies Claudia E. Núñez-Cázares as president and director of Vento.

[22] R-0044, Letter from the United States Customs Attaché to SAT.

[23] Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶¶ 17, 19.

[24] Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶¶ 10-13.

[25] Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶ 20.

Vento submitted similar reports for 2004, 2005, 2006 and 2007. The 2006 and 2007 reports identified César Núñez-Cázares as the corporation's Secretary.[26]

85. On 7 April 2003, SAT notified Vento that it would conduct a verification visit at Vento's facilities in Laredo, Texas starting on 2 June 2003, in order to verify the origin of goods exported by Vento to Mexico from 1 January to 31 December 2002, under preferential tariff treatment with NAFTA certificates of origin issued by Vento as the producer and/or exporter of the goods. SAT sent a copy of the notification to the US customs authority.[27] On 16 March 2003, Vento consented to the verification visit.[28]

86. Around June 2003, at the time the SAT carried out the verification visit to Vento in Laredo, Texas, Isaac Calderón Birch introduced his nephew, Alan Eini, to César Núñez-Cázares. The three of them held a telephone conversation regarding the possibility of entering the U.S. market with Vento motorcycles and all-terrain vehicles imported from Mexico.[29]

87. On 2 June 2003, SAT officials, including José Alberto Ortúzar Cárcova, Gabriel Arriaga Callejas and Daniel Ortiz Nashiki, initiated the verification visit at Vento's plant in Laredo, Texas.[30]

88. The verification visit ended on 6 June 2003. Minutes of the visit were drawn up. They recorded the documents that Vento provided to SAT's officials, including the detailed list of parts used in the assembly of each motorcycle model, not including the engine. Vento stated that all the engines were NAFTA originating goods and provided a letter where Claudia Núñez-Cázares, as President of AED, so certified. Luis Felipe Aguilar Rico, in his capacity as Vento's legal representative during the verification visit, stated that Vento considered the motorcycles to be NAFTA originating goods in accordance with the

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[26] R-0002, Vento Public Information Report 2002 TX; R-0004, Vento Texas Public Information Reports 04, 05 TX; R-0005, Vento Public Information Reports 06, 07, 08 TX.

[27] C-0028, 2003 Official notification to practice a verification of origin on Vento; C-0029, 2004 Official notification to practice a verification of origin on Vento; R-0046, Oficio 330-SAT-VII-10852.

[28] R-0127, Court judgments confirming origin verification determinations, p. 485.

[29] Second Witness Statement of Isaac Calderón Birch (30 January 2019), ¶ 19.

[30] R-0046, Oficio 330-SAT-VII-10852.

applicable rules of origin: *de minimis* rule provided for in NAFTA Article 405 for all models with the exception of one, for which Vento had used the transaction value rule.[31]

89. On 1 July 2003, SAT notified AED of its intention to verify the origin of the engines that it sold to Vento and that were used in motorcycles exported to Mexico during 2002 under NAFTA preferential tariff treatment.[32]

90. On 24 July 2003, Vento filed an "Application by Foreign Corporation for Authorization to Transact Business in Florida" (i.e. as a company incorporated outside Florida). It identified Alan M. Eini as Vento's Treasurer and Chief Operating Officer, Claudia E. Núñez-Cázares as Director and President, and César Núñez-Cázares as Secretary. Vento attached to both applications a certificate from the State of Texas confirming that the company was incorporated in Texas and was in good standing at that time.[33]

91. Vento submitted annual reports as a for profit company to the State of Florida for 2004, 2005 and 2006. In its 2004 report (submitted on 5 July 2004), Claudia E. Núñez-Cázares, César Núñez-Cázares and Alan M. Eini were identified as directors or officers of Vento. In its 2005 report (submitted on 24 January 2005), Isaac Calderón Birch was included as an officer or director of the company. Vento excluded Alan M. Eini from its 2006 report (submitted on 27 January 2006).[34]

92. On 15 August 2003, two days before the origin verification visit, AED submitted a "Prior Disclosure for Engine Kits" to the U.S. Customs and Border Protection Agency ("**CBP**") in which it requested to retroactively change the tariff classification of imported parts of motorcycle engines. AED explained that since 2001 it had been importing "engine components" from China subject to a free rate of duty and classified them as "engine kits" under General Rule of Interpretation 2(a) of the Harmonized Commodity Description and Coding System ("**Rule 2(a)**"). However, from a recent review of Customs rulings

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[31] R-0046, Oficio 330-SAT-VII-10852; R-0047, Oficio 330-SAT-VII-10852-4; R-0128, Letter from AED regarding the origin of the engines.

[32] C-0026, 2004 and 2005 SAT Final origin determinations, p. 7.

[33] R-0010, Application by Foreign Corporation for Authorization to Transact Business in Florida.

[34] R-0011, 2004 For Profit Corporation Annual Report; R-0012, 2005 For Profit Corporation Annual Report; R-0013, 2006 For Profit Corporation Annual Report.

interpreting that Rule and in accordance with the advice of outside counsel, AED had determined that Rule 2(a) was not applicable and that the imported components were not "engine kits" but rather "bulk components destined for an assembly operation in Laredo." Accordingly, it determined that it had omitted the payment of import duties and attached a check for more than US$70,000 for the duties owed. AED sent two follow-up submissions to CBP and, on 22 January 2004, submitted another prior disclosure statement essentially on the same terms, to which it attached another check of more than US$40,000 for omitted duties.[35]

93. The verification visit to AED took place on 18 August 2003.[36]

94. On 11 September 2003, SAT determined that the engines AED assembled and that were incorporated into Vento motorcycles exported to Mexico during 2002 did not comply with NAFTA rules of origin.[37]

95. On 25 September 2003, Alan M. Eini filed on behalf of Vento an application to do business in California. Mr. Eini identified himself as Treasurer of Vento. This application was accompanied by a certificate from the State of Texas certifying that the company was incorporated in Texas and was in good standing on that date.[38]

96. On 7 October 2003, AED brought an administrative appeal (*recurso de revocación*) action against SAT's 11 September 2003 determination that its engines did not comply with NAFTA rules of origin.[39]

97. On 8 October 2003, "Import Specialists from the Port of Laredo" visited Vento's plant in Texas.[40]

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[35] R-0048, AED Prior Disclosures (15 August 2003 and 22 January 2004).

[36] C-0026, 2004 and 2005 SAT Final origin determinations.

[37] C-0004, CBP's Communication to Senator Cornyn, p. 2; C-0026, 2004 and 2005 SAT Final origin determinations; R-0127, Court judgments confirming origin verification determinations, p. 582.

[38] R-0015, Statement and Designation by Foreign Corporation.

[39] R-0127, Court judgments confirming origin verification determinations, p. 582.

[40] C-0004, CBP's Communication to Senator Cornyn, p. 2.

98. On 21 October 2003, Savia Ltd., a company incorporated in Hong Kong, registered "Vento" in the United States as a trademark for "motorcycles, motorbikes, scooter and structural parts thereof."[41]

99. On 12 November 2003, AED requested a ruling from CBP regarding the correct tariff classification in the U.S. of "certain engine components" it imported from China that it specifically described as "crankshaft and spark plugs used in the production of the motorcycle engines." It then described its operations as follows:

> AED imports engine components from [China] for use in manufacturing operations in the United States. The imported components are packaged in bulk —e.g., plastic bags full of very large quantities of gaskets, bolts, nuts, seals, grommets, etc., or cardboard boxes full of dozens of pistons rings, valves, spark plugs, bearings, etc. In their condition as imported, the components are not put up in individual kits containing all of the components needed to make one engine or one motorcycle. Although the invoice contains the phrase "engine kit" immediately preceding the listing of all the engine components, this is for purposes of identifying the engine parts. The components listed under the phrase "engine kits" are not packaged in individual kits and all of the components are separately listed under the "kit" description[…].[42]

100. AED clarified that it had initially classified the components as unassembled engine kits under Rule 2(a), but on the recommendation of its lawyers, it had submitted a prior disclosure statement to CBP and requested reclassification. The questions that AED posed to CBP were: (1) whether the imported components, namely crankshafts and spark plugs, should be classified as unassembled engines under Rule 2(a); or (2) if not, how should "crankshafts and sparkplugs [sic] for engines be classified"?[43]

101. On 15 December 2003, CBP responded to AED's request for a tariff classification ruling as follows: "Based on the facts that you have made available, we find that the imported engine components [are described as spark plugs and crankshafts for internal combustion engines for motorcycles] are not unassembled engines within the meaning of Note 2(a) of

[41] R-0082, Vento Trademark Registration by Savia Limited Corporation from Hong Kong.

[42] R-0050, AED's letter requesting advisory ruling from CBP, p. 2.

[43] R-0050, AED's letter requesting advisory ruling from CBP, p. 3.

the General Rules of Interpretation (GRI). Accordingly, the subject spark plugs and crankshafts are to be separately classified."[44]

102. On 13 January 2004, SAT notified Vento its conclusions from the origin verification, and of its intention to deny NAFTA preferential tariff treatment to Vento's imports of motorcycles into Mexico during 2002. It gave Vento a deadline to respond and defend its rights.[45]

103. On 12 February 2004, Vento responded to SAT. It disagreed with its conclusions.[46]

104. On 28 January 2004, SAT provided Vento with a questionnaire to verify the origin of motorcycles exported by Vento to Mexico from 1 January to 24 August 2003, under preferential tariff treatment with certificates of origin issued by Vento in its capacity as producer. SAT sent a copy of the notification to the CBP.[47]

105. On 26 April 2004, SAT issued its decision in which it determined that the certificates of origin issued by Vento for motorcycles imported into Mexico during 2002 were invalid and, therefore, denied NAFTA preferential tariff treatment to those imports. SAT provided a copy of the resolution to all importers of such motorcycles.[48]

106. On 19 May 2004, SAT sent AED a questionnaire to verify the origin of the engines that Vento acquired from AED and incorporated into the motorcycles it exported to Mexico during 2003.[49]

107. On 16 August 2004, CBP responded to AED's prior disclosures concerning imports of motorcycle engine parts from China. It determined that the loss of revenue arising from AED's negligence in importing such parts free of duty between 15 January 2002 and 23

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[44] C-0030, Results of AED Inspect by CBP, p. 2.

[45] C-0004, CBP's Communication to Senator Cornyn; C-0026, 2004 and 2005 SAT Final origin determinations, p. 144.

[46] R-0127, Court judgments confirming origin verification determinations, p. 485; C-0004, CBP's Communication to Senator Cornyn; C-0026, 2004 and 2005 SAT Final origin determinations.

[47] C-0029, 2004 Official notification to practice a verification of origin on Vento.

[48] C-0026, 2004 and 2005 SAT Final origin determinations.

[49] C-0026, 2004 and 2005 SAT Final origin determinations, p. 62.

April 2003 was in excess of US$114,000. CBP imposed a penalty of US$3,677.77, equivalent to interest on the revenue loss from the date of liquidation of the imports for customs purposes. CBP stated that, once the charges had been paid, it would accept AED's prior disclosure and consider the case closed.[50]

108. On 19 August 2004, Vento initiated an administrative appeal against SAT's determination of 26 April 2004 whereby it denied NAFTA preferential tariff treatment to motorcycles exported during 2002. On or about the same date, AED initiated a separate administrative appeal against the same determination.[51]

109. On 7 September 2004, CBP sent a letter to José Alberto Ortúzar Cárcova of SAT. CBP stated that SAT's decision regarding the origin of motorcycles exported by Vento was in conflict with CBP's interpretation of the Harmonized System and a ruling that it had issued to AED for engine components that AED imported into the United States. Therefore, based on its ruling issued to AED and the analysis by CBP personnel, it warned that a successful claim could be made under Article 401(b) of the NAFTA.[52]

110. On 2 November 2004, CBP sent a letter to United States Senator John Cornyn in response to an inquiry he made on Vento's behalf regarding eligibility of Vento's motorcycles for preferential tariff treatment under the NAFTA. CBP informed Senator Cornyn that its position was that imported engine components are not unassembled engines within the meaning of Rule 2(a); however, Mexican customs authorities held an opposite view on this point and had informed AED that its motorcycle engines incorporated into Vento branded motorcycles could not be considered to be NAFTA originating goods. According to the letter, the customs authorities of both countries had been discussing this issue for around one year, apparently in the context of the Vento origin verification. CBP assured Senator

[50] R-0049, CBP Penalty Notice.

[51] R-0127, Court judgments confirming origin verification determinations, p. 486.

[52] C-0004, CBP Communication to Senator Cornyn, p. 5.

Cornyn that it would continue to make efforts to resolve the issue with the Mexican authorities.[53]

111. Vento closed its assembly plant in Laredo and ceased to operate by the end of 2004.[54]

112. On 3 January 2005, Claudia E. Núñez-Cázares on behalf of AED, replied to the origin questionnaire sent by SAT regarding Vento motorcycles exported to Mexico during 2003. However, she did not provide all the information requested, which prompted a new request by SAT on 7 February 2005 to provide the missing information.[55]

113. On 18 April 2005, Claudia E. Núñez-Cázares on behalf of AED, responded to SAT's request for additional information. AED again failed to provide the complete information requested.[56]

114. On 30 May 2005, SAT notified AED that its engines did not comply with the specific NAFTA rule of origin and, therefore, determined that they were not NAFTA originating goods. At an unspecified date, but within the legal timeframe, AED initiated an administrative appeal against SAT's determination.[57]

115. On 1 August 2005, SAT notified Vento its conclusions from the origin verification, and of its intention to deny NAFTA preferential tariff treatment to imports of motorcycles into Mexico during 2003. It gave Vento a deadline to respond and defend its rights.[58]

116. On 26 August 2005, Vento responded to SAT. It disagreed with SAT's conclusions.[59]

117. On 20 September 2005, SAT issued its decision in which it determined that the certificates of origin issued by Vento for motorcycles imported into Mexico during 2003 were invalid

[53] C-0004, CBP Communication to Senator Cornyn.

[54] First Witness Statements of César Núñez-Cázares (4 June 2018), ¶ 25bis.

[55] C-0026, 2004 and 2005 SAT Final origin determinations, p. 63.

[56] C-0026, 2004 and 2005 SAT Final origin determinations, p. 63.

[57] C-0004, CBP's Communication to Senator Cornyn; C-0026, 2004 and 2005 SAT Final origin determination, p. 66.

[58] C-0026, 2004 and 2005 SAT Final origin determinations, p. 144.

[59] C-0026, 2004 and 2005 SAT Final origin determinations, p. 130.

and, therefore, denied NAFTA preferential tariff treatment to those imports. SAT delivered a copy of the resolution to all importers of such motorcycles.[60]

118. On 20 December 2005, Vento initiated an administrative appeal against SAT's determination of 20 September 2005 whereby it denied NAFTA preferential tariff treatment to motorcycles exported during 2003.[61] At an unspecified date, but within the legal timeframe, AED separately initiated administrative appeal of SAT's determination.

119. MotorBike was established with an initial duration of only 5 years that expired on 10 January 2006. On 2 January 2006, MotorBike held an Extraordinary General Shareholder's meeting in which it was agreed to, *inter alia*, extend the duration of the company to 15 years from the date of incorporation.[62]

120. On 29 March 2006, Alberto García González and María Antonieta de los Ángeles Jiménez y Alonso incorporated Mototransp S.A. ("**Mototransp**") under the laws of Mexico.[63]

121. On 6 April 2006, MotorBike, with Vento's agreement, assigned all its rights and obligations under the Joint Venture Agreement to Mototransp.[64]

122. On June 27, 2006, Isaac Calderón Birch on behalf of Vento, acting as the company's President, surrendered Vento's right and authority to transact business in the State of California.[65]

123. Sometime around mid-2008, SAT rejected AED's appeal of its 11 September 2003 determination that engines incorporated into motorcycles exported by Vento to Mexico during 2002 did not qualify as NAFTA originating goods.[66]

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[60] C-0026, 2004 and 2005 SAT Final origin determinations, p. 130.
[61] R-0127, Court judgments confirming origin verification determinations, p. 67.
[62] R-0027, MotorBike Public Deed No 16,049, p. 6.
[63] C-0023, Articles of Incorporation of Mototransp, S.A.
[64] C-0009, MotorBike's Assignment letter to Mototransp S.A.
[65] R-0017, Surrender of business CA.
[66] R-0127, Court judgments confirming origin verification determinations, pp. 291-292.

124. On 26 November 2008, SAT rejected AED's administrative appeal of its 30 May 2005 determination that engines incorporated into motorcycles exported by Vento during 2003 did not qualify as NAFTA originating goods.[67]

125. On or around 4 February 2009, Jorge Pastor García Mares transferred to Isaac Calderón Birch all the shares that he held in MotorBike.[68]

126. On 4 February 2009, MotorBike held a General Ordinary Shareholder's Meeting. Eduardo Bucay Camacho resigned as MotorBike's Sole Director. The Shareholders named Alegre Calderón Birch as MotorBike's Sole Director in his stead. On the same date, Mototransp granted Alegre Calderón Birch general powers of attorney to act on behalf of Mototransp.[69]

127. On 30 March 2009, SAT rejected Vento's administrative appeal and confirmed its 20 September 2005 determination whereby it denied NAFTA preferential tariff treatment to motorcycles exported by Vento to Mexico during 2003.[70]

128. On 9 July 2009, SAT rejected Vento's administrative appeal and confirmed its 26 April 2004 determination whereby it denied NAFTA preferential tariff treatment to motorcycles exported by Vento to Mexico during 2002.[71]

129. On 19 August 2009, Vento brought an action before the *Tribunal Federal de Justicia Fiscal y Administrativa* ("**TFJFA**") to annul SAT's 20 September 2005 determination that denied NAFTA preferential tariff treatment to motorcycles that Vento exported during 2003.[72]

130. At the request of the Comptroller of Public Accounts of Texas, on 28 August 2009, the Texas Secretary of State forfeited Vento's and AED's corporate charters for failure to pay

[67] R-0127, Court judgments confirming origin verification determinations, pp. 166, 173.
[68] R-0028, MotorBike Public Deed No. 66,971, p. 1.
[69] R-0028, MotorBike Public Deed No. 66,971, p. 2.
[70] R-0127, Court judgments confirming origin verification determinations, pp. 379, 416, 419.
[71] R-0127, Court judgments confirming origin verification determinations, p. 480.
[72] R-0127, Court judgments confirming origin verification determinations, p. 1.

the franchise tax required for doing business in Texas. As a result, neither could continue to do business.[73]

131. On 1 March 2010, Vento and MotorBike entered into an interest-free loan agreement, whereby Vento would loan MotorBike up to US$3,200,000.00 upon request of MotorBike, and MotorBike would repay Vento "within a period not to exceed the time that tax authorities, courts and other implicated authorities [of Mexico] take to resolve the dispute concerning the certificate of origin" (the "**Second Loan Agreement**").[74] (Tribunal's translation).

132. On 27 September 2010, Isaac Calderón Birch on behalf of Vento surrendered Vento's authority to transact business or conduct affairs in the State of Florida.[75]

133. On 25 November 2010, SAT again rejected AED's administrative appeal against the 30 May 2005 determination that AED's engines incorporated into motorcycles exported to Mexico during 2003 did not comply with the NAFTA rules of origin.[76]

134. On 15 March 2011, AED brought an action before the TFJFA to annul SAT's 30 May 2005 determination that confirmed that its engines did not meet the NAFTA rules of origin.[77]

135. On 10 January 2013, the High Chamber of the TFJFA issued separate judgments in annulment cases brought by AED (against SAT's 30 May 2005 determination) and Vento (against SAT's 30 March 2009 determination) involving exports to Mexico during 2003.

[73] R-0006, Forfeiture of Vento's Corporate Status; R-0024, Forfeiture of AED's Corporate Status.

[74] C-0006, Second Loan Agreement (1 March 2010) .

[75] R-0014, Withdrawal to do business in Florida.

[76] R-0127, Court judgments confirming origin verification determinations, pp. 253-255. The 24 February 2015 judgment of the High Chamber of the TFJFA records that SAT rejected AED's administrative appeals against SAT's own 30 March 2005 determination that AED's engines did not comply with the NAFTA rules of origin on two occasions: first on 26 November 2008 and again on 25 November 2010, although there is no indication of why there were two separate administrative appeal decisions. In any event, SAT's 30 March 2005 determination was confirmed by Mexican courts after exhaustion of all remedies. R-0127, Court judgments confirming origin verification determinations, pp. 467-468.

[77] R-0127, Court judgments confirming origin verification determinations, p. 364.

The judgment against Vento was later struck-down by an *amparo* court and remanded to the TFJFA for a new determination.[78]

136. On 2 April 2013, the *Instituto Mexicano de la Propiedad Industrial* registered a license whereby Isaac Calderón Birch granted MotorBike and Mototransp, respectively, the use of the Vento trademark.[79]

137. By judgment of 12 September 2013, the 18th Circuit Court denied AED's *amparo* action against the TFJFA's judgment of 8 January 2013. SAT's determination of 30 May 2005 concerning AED's engines incorporated in motorcycles exported during 2003 was thus definitively confirmed.[80]

138. By judgment of 26 September 2013, the 9th Circuit Court determined that the TFJFA had not considered Vento's evidence involving CBP's ruling concerning Rule 2(a). Therefore, it granted Vento's amparo action involving exports to Mexico during 2003 and remanded the case to the TFJFA.[81]

139. By judgment of 8 October 2013, the High Chamber of the TFJFA dismissed Vento's annulment action against SAT's determinations involving motorcycles exported during 2002. This judgment was later struck-down by an *amparo* court and remanded to the TFJFA for a new determination.[82]

140. By judgment of 5 November 2013, the High Chamber of the TFJFA revoked its 8 January 2013 judgment and, having considered Vento's evidence involving CBP's ruling regarding Rule 2(a), again confirmed SAT's determinations that denied motorcycles exported during 2003 NAFTA preferential tariff treatment. This judgment was later struck-down by an *amparo* court and remanded to the TFJFA for a new determination.[83]

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[78] R-0127, Court judgments confirming origin verification determinations, pp. 212, 583, 596.
[79] C-0008, Vento's Trademark Registration, pp. 2-3.
[80] R-0127, Court judgments confirming origin verification determinations, p. 213.
[81] R-0127, Court judgments confirming origin verification determinations, pp. 5, 211.
[82] R-0127, Court judgments confirming origin verification determinations, pp. 475, 602.
[83] R-0127, Court judgments confirming origin verification determinations, p. 6.

141. Vento brought a new amparo action against the TFJFA's judgment of 15 November 2013. On 15 January 2015, the 9th Circuit Court granted Vento's amparo because the TFJFA had failed to consider if AED could have been the subject of Vento's origin verification. The case was again remanded to the TFJFA.[84]

142. On 24 February 2015, the TFJFA issued a new judgment and again confirmed SAT's determinations that denied NAFTA preferential tariff treatment involving exports during 2003.[85]

143. On 19 May 2015, the 9th Circuit Court confirmed that the TFJFA had duly complied with its remand. Vento did not challenge that judgment by the TFJFA, which was declared final on 17 June 2015.[86] SAT's 20 September 2005 determination that denied NAFTA preferential tariff treatment for exports during 2003 was thus definitively confirmed.

144. On 2 July 2015, the TFJFA issued a new judgment on remand involving Vento's exports during 2002. It again dismissed Vento's annulment action. On 8 September 2015, Vento brought a new *amparo* action against that judgment.[87]

145. On 19 November 2015, MotorBike held an Extraordinary General Shareholder's Meeting, which agreed to extend the duration of the company for a total of 20 years from the date of incorporation.[88]

146. On 26 May 2016, the 4th Circuit Court denied Vento's *amparo* action involving exports during 2002. On 10 June 2016, all remedies having been exhausted, the TFJFA declared its 2 July 2015 judgment final and SAT's 26 April 2004 determination that denied NAFTA preferential tariff treatment for exports during 2002 was thus definitively confirmed.[89]

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[84] R-0127, Court judgments confirming origin verification determinations, pp. 1-3.

[85] R-0127, Court judgments confirming origin verification determinations, p. 468.

[86] C-0034, Final Mexican Court decisions regarding the origin verifications of 2002 and 2003 audits, pp. 4-5. R-0127, Court judgments confirming origin verification determinations, p. 810.

[87] R-0127, Court judgments confirming origin verification determinations.

[88] R-0029, MotorBike Public Deed No. 82,644, p. 4.

[89] C-0034, Final Mexican Court decisions regarding the origin verifications of 2002 and 2003 audits, pp. 2-3. R-0127, Court judgments confirming origin verification determinations, p. 810.

147. Between May 2016 and April 2017, Isaac Calderón Birch and Luis Felipe Aguilar Rico met at least a dozen times with various SAT officials and officials of the *Registro Público Vehicular* ("**REPUVE**") to complain about, and provide information on, imports into Mexico of motorcycle parts from China by members of the Mexican motorcycle industry for purposes of assembling and commercializing motorcycles in Mexico. During that period, Isaac Calderón Birch exchanged various communications with those officials and provided numerous documents and information to support an allegation that Chinese motorcycles were being smuggled into Mexico. Mexican authorities requested additional information and proceeded to investigate the complaint.[90]

148. On 17 May 2017, having paid franchise taxes owed, Vento applied to the Texas Secretary of State for reinstatement and setting aside of the forfeiture. Vento was subsequently returned to good standing corporate status, although it is not clear precisely on what date.[91]

IV. THE PARTIES' REQUESTS FOR RELIEF

(1) Claimant's Request for Relief

149. The Claimant asserts that the Tribunal has jurisdiction over this dispute and that Mexico has breached the NAFTA by violating its obligations under NAFTA Article 1102, 1103, 1104, and 1105.

150. In its Reply, the Claimant requests that the Tribunal issue an award:

a. declaring that the United Mexican States has violated its obligations under the NAFTA, by taking the measures described in its Memorial against Claimant's investment;

b. awarding the Claimant compensation for all damages and losses suffered as a result of the conduct of Mexico, on the basis of full reparation, in an amount to be determined as of the date of the award, as quantified by

[90] First Witness Statement of Isaac Calderón Birch (1 June 2018), ¶¶ 79-84, and Exhibits ICB-009-ICB-021 to that witness statement.

[91] R-0007, Vento, Reinstatement of corporate status TX.

Messer's Gómez and Sánchez Second Expert Opinion on damages, with the assistance of Dr. Leonardo Giacchino, in accordance with five loss scenarios, to be considered in the alternative, as follows:

Table 9: Estimación de daños totales: Itálika + Vento
$2,748,000,000.00

Table 10: Estimación de daños totales: Itálika + Vento, según los puntos de venta
$1,133,000,000.00

Table 11: Estimación de daños totales: Participación de mercado de 2003
$707,000,000.00

Table 12: Estimación de daños totales: Planta de Vento en México en 2004
$942,000,000.00

Table 13: Estimación de daños totales: Planta de Vento en México en 2014
$658,000,000.00

c. awarding the Claimant post-award interest on all sums awarded, until enforcement of the award is completed, in an amount based upon a commercially reasonable rate;

d. awarding the Claimant any amount required to pay any applicable tax in order to maintain the integrity of the award;

e. awarding the Claimant its costs and expenses of this proceeding, including attorneys' fees, in an amount to be determined in the course of this proceeding by such means as the Tribunal may direct; and

f. ordering such other and further relief as may be just and appropriate in the circumstances.[92]

(2) Respondent's Request for Relief

151. The Respondent submits objections as to the admissibility of the claims and the jurisdiction of the Tribunal over the dispute and denies each of Vento's claims under NAFTA. The

[92] Reply, ¶ 410.

Respondent requests that the Tribunal render an award dismissing Vento's claims and ordering that Vento bear the costs of the arbitration, including the Respondent's costs for legal representation and assistance.[93]

V. ADMISSIBILITY

(1) The Parties' Positions

a. Respondent's Position

152. The Respondent explains that Vento allowed its status as a corporation in Texas to forfeit from 28 August 2009 until 17 March 2017, when it was able to restore it following payment of the relevant taxes. Accordingly, the Respondent submits, this arbitration proceeding was never properly initiated as Vento did not legally exist when it submitted the Notice of Intent to Arbitrate on 20 February 2017.[94]

153. Pursuant to the Texas Business Organizations Code, Sec. 11.001 (4), "*a 'terminated entity'* means a domestic entity the existence of which has been […] forfeited pursuant to the Tax Code, unless the forfeiture has been set aside." Sec 11.356 states that a "*forfeited*" entity continues in existence for three years after termination, but only for the purpose of prosecuting or defending claims and disposing of property, and "may not continue its existence for the purpose of continuing the business or affairs for which the terminated entity was formed unless the terminated filing entity is reinstated." According to the Respondent, the Texas courts have interpreted these provisions as a requirement to ignore the measures taken after the entity was forfeited and before its reinstatement. In any event, pursuant to these provisions, Vento was only permitted to prosecute a claim within the three years following its termination in 2009, and thus the Notice of Intent could not have been filed on its behalf on 20 February 2017. [95]

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[93] Rejoinder, ¶ 339; Respondent's Statement of Costs.

[94] Counter-Memorial, ¶¶ 171-172.

[95] Counter-Memorial, ¶ 173. Rejoinder, ¶ 72, and Memorandum of Stephan E. Becker and Michael Evan Jaffe (5 June 2019) attached to the Rejoinder.

154. The Respondent also notes that the Notice of Intent was submitted by Luis Felipe Aguilar Rico on behalf of Vento. The Respondent submits that the accompanying power of attorney issued in favor of Luis Felipe Aguilar Rico was formally deficient because it only granted him powers to represent Vento in Mexico and was issued in 2003 by César Núñez-Cázares who, at the time, was not a member of Vento's Board of Directors.[96]

155. In addition, the Respondent claims that Vento, through Claudia Núñez-Cázares, did not properly authorize Luis Felipe Aguilar Rico to file the Request for Arbitration. In particular, the Respondent explains that, in response to ICSID's pre-registration questions, the Claimant incorrectly stated that Claudia Núñez-Cázares was the sole member of Vento's Board of Directors and had the power to authorize the filing of the Request for Arbitration. However, documentary evidence later revealed that César Núñez-Cázares became one of Vento's directors in 2006.[97]

156. Furthermore, the Respondent notes, the signature of "Claudia E. Guerra" from one of her prior corporate filings on behalf of Vento with the Texas state authority did not match the signature of "Claudia E. Guerra" in the letter that the Claimant submitted to ICSID purporting to be Vento's consent to ICSID's jurisdiction and confirmation that Vento had taken the necessary internal actions to authorize the Request for Arbitration.[98]

157. Accordingly, the Respondent concludes, Vento failed to comply with the requirements of ICSID Additional Facility Rule 3 and, thereby, it must be seen as having failed to consent to the arbitration "in accordance with the procedures set out in this Agreement," as per the text of NAFTA Article 1121(1). [99]

b. Claimant's Position

158. According to the Claimant, tax forfeiture did not prevent Vento from submitting a Notice of Intent under NAFTA Chapter 11. The Claimant and its expert on Texas law, Mr. James

[96] Counter-Memorial, ¶ 174.
[97] Counter-Memorial, ¶¶ 178-181; Rejoinder, ¶ 73.
[98] Counter-Memorial, ¶¶ 183-187.
[99] Counter-Memorial, ¶ 189.

Lloyd Loftis, explain that, when a Texas corporation files a Notice of Intent while in forfeiture, and is subsequently reinstated, its reinstatement retroactively validates the act under Texas law. Furthermore, the Claimant notes that Vento never surrendered its "corporate existence." As a result, following reinstatement, a Texas court would consider Vento as having been, at all relevant times, a Texas corporation, and would consider acts taken during the period of forfeiture to be valid acts of Vento. In conclusion, the Notice of Intent would be treated by a Texas court as having been filed by an active corporation on 20 February 2017.[100]

159. The Claimant also explains that, even if the power of attorney submitted together with its Notice of Intent could be considered as somehow formally deficient as a matter of Mexican law, such fact had no bearing on the admissibility of Claimant's claims, since "NAFTA Article 1119 does not require a Claimant's counsel to attach a power of attorney document to its Notice of Intent, much less one that meets the formalities of any one NAFTA Party's laws."[101]

160. The Claimant explains that its declaration during the pre-registration phase that Claudia Núñez-Cázares was the sole member of Vento's Board of Directors at the time of the filing of the Request for Arbitration was "an innocent mistake."[102] According to the Claimant, the natural consequence of a failure to satisfy any particular term of the arbitral rules it chose under NAFTA Article 1120(1) "is not a loss of NAFTA jurisdiction but rather a functional impediment to proceeding with the claim until such terms have been satisfied."[103] The Claimant concludes noting that, in accordance with Article 4 of the ICSID Additional Facility Rules, the Secretary General of ICSID was satisfied that the Claimant complied with the requirements of Articles 3 of the ICSID Additional Facility Rules and registered the Request for Arbitration.[104]

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[100] Reply, ¶ 160, citing Expert Report of James Lloyd Loftis (March 12, 2019), ¶ 36.
[101] Reply, ¶ 162.
[102] Reply, ¶ 162.
[103] Reply, ¶ 167.
[104] Reply, ¶¶ 169-171.

(2) The Tribunal's Analysis

161. The Respondent has raised two admissibility questions, namely, whether the Claimant existed under Texas law while it was in a forfeited status and could cause a Notice of Intent be delivered to the Respondent in accordance with NAFTA Article 1119, and whether the Request for Arbitration was properly authorized by Vento in accordance with NAFTA Article 1121. Before addressing them, the Tribunal considers it necessary to clarify the respective roles of the Secretary-General of ICSID and the Tribunal in the context of the registration of an arbitration request.

162. Article 4 of the ICSID Additional Facility Rules requires the Secretary-General of ICSID to be satisfied that "the request conforms in form and substance to the provisions of Article 3." This article sets forth the content requirements of the request, including, in the case of juridical persons, a statement that "it has taken all necessary internal actions to authorize the request."[105] The review of the request by the Secretary-General of ICSID for registration purposes is not conclusive as regards the competence of the Tribunal or the merits of the request. The Secretary-General of ICSID reminds the Parties in the notice of registration that, as provided in Article 5(d) of the ICSID Additional Facility Rules, "the registration of the request is without prejudice to the powers and functions of the Arbitral Tribunal in regard to competence and the merits."

163. The first admissibility objection concerns the status of Vento as a forfeited company from 28 August 2009 until 17 May 2017. Under Texas law, a forfeited entity is terminated. The term "termination" refers to the end of corporate privileges not to the end of the company's existence. A forfeited company continues to exist and termination may be set aside upon payment of the franchise tax. According to the Claimant's expert on Texas law, Mr. Loftis, this is explained by the revenue collection nature of the measure. During the first three years in forfeiture, a company may file claims or defend itself against claims and dispose of property, but "may not continue its existence for the purpose of continuing the business or affairs for which the terminated entity was formed unless the terminated filing entity is

[105] Article 3(1)(e) of the ICSID Additional Facility Rules.

reinstated."[106]. In a legal opinion attached to the Counter-Memorial, counsel for the Respondent disagree and argue that Vento was prohibited under Texas Law from submitting the Notice of Intent and "whether or not Vento was later reinstated is irrelevant."[107] The Respondent cites two Texas court cases that determined on appeal that the plaintiffs were barred from pursuing their respective claims because the claims had been filed after the three-year period following forfeiture and the claims, therefore, were *extinguished* under Texas Law.[108]. However, these cases are inapposite because the present claim is not governed by the law of Texas, but rather by the NAFTA.[109] The Respondent has raised an objection concerning the Tribunal's jurisdiction *ratione temporis* (which the Tribunal will address below), but, as will be seen, it is distinct from the present question of admissibility. Consequently, the Claimant's evidence that the acts that the company took during the forfeited period were retroactively ratified at the end of the forfeited status stands unrebutted and they have been subsequently validated as well.

164. As a matter of fact, a Notice of Intent was delivered to the Respondent by the Claimant on 20 February 2017. It is acknowledged to have been received on that date by the Respondent's *Subsecretaría de Comercio Exterior.* Therefore, the question is not whether the Notice of Intent existed but whether Vento had the capacity to validly deliver such notice while in forfeited status.

165. The Respondent has not disputed the assertion of the Claimant that, as follow up to the Notice of Intent, the Parties met in Mexico City in May 2017 "where both satisfied the NAFTA Article 1115 obligation to seek a mutually acceptable resolution of the dispute identified in it."[110] In fact the Respondent does not contend that Vento ceased to exist. The Respondent's counsel, Stephan E. Becker, concluded that "[u]nder Texas law, Vento is not allowed to pursue its claim, and it was legally barred from engaging in business while its

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[106] R-0081, Texas Business Organizations Code, Chapter 11, Sec. 11.356(b).

[107] Memorandum of Stephan E. Becker and Michael Evan Jaffe (5 June 2019) attached to the Rejoinder.

[108] R-0140, 2016-06-31 *Atcco Mortg. Inc. v. Beasley*; R-0141, 2005-03-03 *Emmett Props. v. Halliburton Energy Servs.*

[109] Pursuant to NAFTA Article 1131 (1) "*a Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.*"

[110] Reply, ¶ 158.

charter was forfeited from 2009 to 2017," but he does not question that Vento continued to exist as a corporation.[111] Indeed, the Respondent admits that Vento continued to exist, although "only in theory, as a non-operative ghost company that was barred from doing business."[112] (Tribunal's translation).

166. Accordingly, the Tribunal concludes that the Respondent has failed to prove that Vento lacked the capacity to deliver its Notice of Intent to the Respondent in accordance with NAFTA Article 1119.

167. The second admissibility question concerns whether the Request for Arbitration was properly authorized by Vento and met the requirement of consenting to arbitration under NAFTA Article 1121. The Respondent bases its objection on three grounds (i) Claudia Núñez-Cázares did not sign herself the Request for Arbitration, (ii) she was not the sole director of the Board of Directors of Vento as affirmed by counsel for the Claimant to the Secretary-General of ICSID in the process of registration of the Request for Arbitration, and (iii) there is no evidence that Luis Felipe Aguilar Rico was authorized to submit the Request for Arbitration in the name of Vento.

168. The Claimant has recognized the mistake in informing ICSID that Claudia Núñez-Cázares was the sole member of the Board of Directors of Vento.[113] The Claimant further confirmed that she has always been the President[114] and the sole shareholder of Vento.[115] As explained in detail below,[116] Claudia Núñez-Cázares retained ownership and control of Vento at all relevant times and was authorized to act on behalf of Vento.

169. The issue of the signature of Claudia Núñez-Cázares in the letter accompanying the Request for Arbitration arises because it is significantly different from the signature of Claudia Núñez-Cázares at the time of incorporation of Vento 16 years earlier. The Tribunal

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[111] Memorandum of Mr. Stephan E. Becker and Mr. Michael Evan Jaffe (5 June 2019) attached to the Rejoinder, p. 10.
[112] Rejoinder, ¶ 144.
[113] Reply, ¶ 168.
[114] Reply, ¶¶ 9, 24.
[115] First Witness Statement of César Núñez-Cázares (4 June 2018), ¶ 7. *See also*, Tr. Day 1, p. 23:1-4.
[116] *See* Section VI.B(2) (a), Ownership and Control of Vento.

agrees with the Respondent that one does not need to be an expert in graphology to see how different the two signatures are. But Claudia Núñez-Cázares has participated in this proceeding from the beginning and she had ample opportunity to protest the use of her name. She has not denied that she authorized filing the Request for Arbitration and there is no question that she consented to submit the claim to arbitration on behalf of Vento. The representation of Vento by Luis Felipe Aguilar Rico can be answered similarly. He has been counsel to Vento throughout this proceeding. If there was a procedural defect it has been cured by the fact that Claudia Núñez-Cázares, as sole shareholder and President of Vento, has not informed this Tribunal that Luis Felipe Aguilar Rico does not properly represent Vento.

170. Accordingly, the Tribunal concludes that the Request for Arbitration was properly authorized by Vento and met the requirements of NAFTA Article 1121. The Tribunal, therefore, rejects the Respondent's second admissibility objection.

VI. JURISDICTION

A. Jurisdiction *Ratione Materiae*

171. NAFTA Article 1139 defines "investment" as follows:

> **[I]nvestment** means:
> (a) an enterprise;
> (b) an equity security of an enterprise;
> (c) a debt security of an enterprise
> (i) where the enterprise is an affiliate of the investor, or
> (ii) where the original maturity of the debt security is at least three years,
> but does not include a debt security, regardless of original maturity, of a state enterprise;
> (d) a loan to an enterprise
> (i) where the enterprise is an affiliate of the investor, or
> (ii) where the original maturity of the loan is at least three years,
> but does not include a loan, regardless of original maturity, to a state enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

(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 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) […].

172. The term "enterprise" is defined by NAFTA Article 1139, which refers back to NAFTA Article 201 that contains the definition applicable to the whole of the NAFTA as follows:

Article 1139: Definitions

For purposes of this Chapter:

[…]

enterprise means an "enterprise" as defined in Article 201 (Definitions of General Application), and a branch of an enterprise […].

Article 201: Definitions of General Application

[…]

enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-

> owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association […].

173. Vento's Joint Venture with MotorBike (and subsequently with Mototransp) for purposes of commercializing in Mexico motorcycles assembled in Laredo, Texas, was the principal investment that the Claimant identified. The Claimant also identified the following types of investments:

a. an interest in an enterprise that entitles the owner to share in income or profits of the enterprise because it was entitled to receive under the Joint Venture Agreement 90% of the income from the sales of, and service to, motorcycles in Mexico;[117]

b. tangible and intangible property used for the purpose of economic activity in Mexico in the form of approximately 10,000 motorcycles exported to Mexico and the reinvestment of the Joint Venture's profits;[118]

c. interests arising from the commitment of capital or other resources in Mexico under the Joint Venture Agreement; and

d. two loans to MotorBike.[119]

174. The investments referred to in subparagraphs (a)-(c) above are part of the Joint Venture. The Claimant has not raised independent claims and it did not specify the loss or damage incurred by reason of, or arising out of, the alleged breaches of the NAFTA in relation to such purported investments. Therefore, the Tribunal will not treat them separately.

175. The Claimant also considered that the loans, in addition to being covered under subparagraph (d) of the definition of "investment" in NAFTA Article 1139, are also "property" in the form of capital contributions and, thus, covered under subparagraph (g) as well. The Tribunal notes that the Claimant did not raise independent claims or specify the loss or damage incurred with respect of either the loans as such under subparagraph (d)

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[117] Memorial, ¶ 106.
[118] Memorial, ¶ 107.
[119] Memorial, ¶¶ 108-110.

or as property under subparagraph (g). Notably, the Claimant's expert on quantum did not make any reference to the loans in either of its reports. The Tribunal will not treat them separately either.

(1) The Joint Venture Agreement

a. The Parties' Positions

(i) Respondent's Position

176. The Respondent argues that Vento did not make an *investment* as that term is defined in NAFTA Article 1139. Therefore, it is not *an investor of a Party* and consequently it lacks standing to bring a claim under Section B of NAFTA Chapter 11. Thus, it argues, the Tribunal lacks jurisdiction to hear Vento's claims.[120]

177. There is no dispute between the Parties that Vento and MotorBike entered into the Joint Venture Agreement. However, the Respondent contends that the Joint Venture Agreement did not create an *entity*. Rather, it argues, it is "simply an informal joint venture," merely a "commercial contract" for the sale by MotorBike of motorcycles in Mexico and, as such, it is expressly excluded from the definition of investment in NAFTA Article 1139 (i).[121] (Tribunal's translation).

178. According to the Respondent, the term "enterprise," as defined in NAFTA Article 201, must result in the creation of an *entity*. In its Rejoinder, the Respondent equated "entity" with "juridical person." In its view, therefore, an enterprise, as defined in NAFTA Article 201, must be a distinct legal person.[122] Hence, a joint venture — or, for that matter, any of the other items included in that definition — that does not "involve the constitution or creation of an entity" that is a juridical person, is neither an enterprise nor, for that reason, an investment under NAFTA Article 1139(a).[123] (Tribunal's translation).

[120] Counter-Memorial, ¶ 191.
[121] Counter-Memorial, ¶¶ 213, 215-216.
[122] Rejoinder, ¶ 98.
[123] Counter-Memorial, ¶ 211; Rejoinder, ¶ 98.

(ii) Claimant's Position

179. According to the Claimant, the Respondent's position is unsupported by the text of the NAFTA Article 201 definition of "enterprise," which includes entities that "are not generally considered to be legal persons" such as trusts and partnerships, in addition to joint ventures.[124] It argues that the treaty context does not support the Respondent's interpretation either. For instance, NAFTA Article 1117 specifically makes this distinction. It provides that an investor of a party may submit to arbitration under Section B a claim "on behalf of an enterprise of another Party **that is a juridical person** that the investor owns or controls directly or indirectly […]."[125] Thus, "'entity' must necessarily mean something **other than** a 'legal person.'"[126]

180. The Claimant also offered the evidence of its legal expert, Gerardo Lozano Alarcón, who distinguished between reciprocal and associative contracts under Mexican law. He noted that, while "the parties to a reciprocal contract, such as an ordinary contract for the sale of goods, always remain essentially in apposition to each other, in the case of an associative contract — such as a joint venture agreement — the parties' interests converge in their pursuit of a shared objective (here: the establishment and operation of a business enterprise that markets, distributes, sells, and services small displacement motorcycles in Mexico)."[127]

181. The Joint Venture was entered into pursuant to the laws of Mexico. Its purpose was to "'promote, sell and in general commercialize small displacement motorcycles in Mexico."[128] Thus, it was an investment in the territory of Mexico.

[124] Reply, ¶ 177.
[125] Reply, ¶¶ 177, 179 (emphasis in the original).
[126] Reply, ¶ 185 (emphasis in the original).
[127] Reply, ¶ 186.
[128] Reply, ¶ 192.

b. The Tribunal's Analysis

182. As the Claimant correctly points out, Mexico's position that an "enterprise," as defined by NAFTA Article 201, must be a legal person is unsupported by the plain text of that article. The definition is quite broad: "enterprise means any entity […]" provided that it is "constituted or organized under applicable law." In both English and Spanish "entity" is as broad a term as can be used to refer to something that exists.[129] The Respondent focused on narrower meanings of the word in support of its proposition that an enterprise must be a legal person. However, similar to the approach taken by NAFTA Article 201, even the definitions cited by the Respondent include different types of associations, some of which would be legal persons (e.g. *sociedades mercantiles* or corporations) and others would not. Indeed, in addition to qualifying "entity" with the indefinite adjective "any" and using the phrase "constituted or organized," which is obviously meant to widen the scope of the definition, of the five concrete examples of enterprises contained in the definition of "enterprise" in NAFTA Article 201, only one —corporation— would clearly be a distinct legal person. As indicated by the Claimant, trusts and partnerships are not generally considered to be legal persons and neither are sole proprietorships.[130]

183. The principle of effectiveness —*ut res magis valeat quam pereat*— also precludes the Respondent's narrow interpretation. Both Parties' experts agree that a joint venture may or may not result in the creation of a legal person. The distinction that Respondent's legal expert, Rafael Romo Corzo, draws between "informal" and "corporate" joint ventures does not assist the Respondent because it does not inform in any way the scope of the definition in question. In fact, it highlights the opposite view. If the Respondent were correct that only "corporate" joint ventures are covered by the definition of "enterprise" in NAFTA

[129] *See* "entity, n.". OED Online. December 2019. Oxford University Press. https://www.oed.com/viewdictionaryentry/Entry/62904 (accessed 18 May 2020): "**entity**, n. 1. Being, existence, as opposed to non-existence; the existence, as distinguished from the qualities or relations, of anything. 2. That which constitutes the being of a thing; essence, essential nature.3. a. concrete. Something that has a real existence; an ens n., as distinguished from a mere function, attribute, relation, etc. 4. indefinitely. What exists; 'being' generally." "entidad". Moliner, María. *Diccionario del uso del español*. 3ª ed. Ed. Gredos, Madrid, 2007, p. 1189: "**entidad** 1. f. Ente o cosa; particularmente, cosa no material. 2 Cualidad de ente; circunstancia de ser o existir […] 4 En sentido amplio, asociación o colectividad de cualquier clase. En sentido restringido, asociación de personas, oficial o privada, con determinada actividad; como una real academia, un ateneo o un partido político. Asociación, colectividad, organismo, sociedad mercantil."

[130] Memorial, ¶¶ 100-101, 105; Reply, ¶ 177.

Article 201, the inclusion of "joint venture" would be redundant because it would already be covered by the term "corporation."

184. Similarly, the Respondent's reference to the use of the word "enterprise" in the definition of "investment" in NAFTA Article 1139 is equally unhelpful to its position because it does not inform the content of that term. While not directly relevant to the scope of the definition, it does provide some context in the sense that, in addition to "real estate" and "interests arising from the commitment of capital or other resources" to which the Respondent refers, "investment" covers agreements, instruments, interests and property that do not create a legal person (e.g. securities, loans, tangible and intangible property, and interests of different types).

185. The Respondent also argues that the Joint Venture was nothing more than a commercial contract for the sale of goods, namely motorcycles, in Mexico and, as such, it is expressly excluded from the definition of "investment."[131] However, the evidence demonstrates and the Tribunal finds that the Joint Venture was much more than that. It involved joint efforts, cooperation and the commitment of resources, skills and know-how by both contracting parties (Vento and MotorBike) to the development of an economic activity in Mexico. Indeed, even if not everything that the contracting parties committed to contribute to the venture materialized (the Tribunal will return to the loans), Vento contributed resources in the form of capital, facilities for the assembly of motorcycles as well as finished motorcycles and motorcycle parts (for service and repairs); its skills and know-how in the motorcycle assembly business and the exportation of goods; services, including client development and administrative services (e.g. accounting); and the nexus with AED which made possible the importation of parts from China for assembly of motorcycles in the United States. Motorbike contributed resources in the form of facilities in Mexico for storage and workshops; its client and distribution networks; skills and know-how of the motorcycle market in Mexico; services, including distribution, marketing and repair services; and the nexus with Mr. Calderón, who owned the Vento trademark. Both cooperated throughout the life of the venture and contributed time and efforts to develop a

[131] Counter-Memorial, ¶¶ 213-218.

business and achieve its goals (even if they did not ultimately succeed). The Joint Venture parties agreed to share in the profits, as opposed to engaging in transactions involving the exchange of goods for money.

186. Thus, the Tribunal finds that the Joint Venture is an enterprise and, therefore, an investment in accordance with NAFTA Chapter 11. Consequently, the Tribunal rejects Mexico's objection.

(2) Loans

187. The Joint Venture Agreement provides:

> ARTICLE 6
> CONDITION PRECEDENT FOR CLOSING
> 6.1 Upon the execution of this Agreement, Vento and Motorbike will enter into a loan agreement, by means of which Vento will grant a loan in favor of Motorbike, for a total amount up to US$10,000,000.00 (Ten million dollars 00/100 Currency of the United States of America) (the "Loan Agreement").[132]

188. Pursuant to that provision, Vento and Motorbike entered into the First Loan Agreement on 13 October 2001. Vento agreed to "make loans to the Borrower [MotorBike] from time to time during the term of this Agreement in an aggregate principle amount of US10,000,000.00."[133] The First Loan Agreement did not specify the term but set the maturity date when MotorBike agreed to repay the borrowings "at the date of termination of the JV Agreement."[134]

189. On 1 March 2010, Vento and MotorBike entered into the Second Loan Agreement whereby MotorBike could borrow up to US$3,200,000 during the following 6 months. MotorBike agreed to repay the loan no later than the date when "the fiscal authorities, as well as the courts and other relevant authorities" had resolved the "dispute concerning the certificate

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[132] C-0003, Joint Venture Agreement, Art. 6.

[133] C-0005, First Loan Agreement dated October 13th, 2001, First Clause.

[134] C-0005, First Loan Agreement dated October 13th, 2001, Second Clause.

of origin."[135] The Second Loan Agreement is far from clear on such date, but presumably it would be no later than when final decisions of the Mexican courts concerning SAT's determinations on the origin of Vento motorcycles imported in 2002 and 2003 became *res judicata*. The last of such decisions was issued in May 2016.[136]

a. The Parties' Positions

(i) Respondent's Position

190. The Respondent denies that Vento made any loans to MotorBike and argues that the Claimant did not submit any evidence that it did. According to Vento's tax records, the reported sales and cost of sales show that Vento was reimbursed "almost completely for the motorcycles it exported to Mexico."[137] (Tribunal's translation). It argues that "pro forma invoices" are not the actual sales invoices and, in any event, they reveal numerous inconsistencies with the Claimant's argument, including MotorBike being invoiced directly by Chinese suppliers of motorcycle parts delivered to Vento in Laredo; imports by MotorBike of motorcycle parts directly from China; imports by MotorBike of fully assembled motorcycles directly from China; imports of other types of goods such as electric scooters and gasoline skateboards; and "paid" invoices for zero quantity of goods and zero amount due.[138] The Respondent also notes that, in response to the Tribunal's order that Vento produce documents related to the loan, the Claimant stated that "no documents exist that could be responsive to Respondent's request."[139]

191. With regard to the US$3.2 million loan, the Respondent noted that the deposits recorded in the bank statements that the Claimant submitted as proof that it had transferred the money to MotorBike do not show who transferred the money to MotorBike and, although

[135] C-0006, Second Loan Agreement dated 1 March 2010, Third Clause.
[136] *See* ¶ 146 above.
[137] Rejoinder, ¶ 83.
[138] Rejoinder, ¶¶ 84 *et seq*.
[139] Rejoinder, ¶ 88.

it requested from the Claimant documents that identified the source of such transfers, the Claimant responded that it had found no such documents.[140]

(ii) Claimant's Position

192. In its Memorial, the Claimant argued that Vento had "extended two loans to MotorBike, the first in 2001, for US$10 million, and the second in 2010, for US$3.2 million."[141]

193. The Claimant subsequently characterized the US$10 million loan as a "revolving credit facility" or a "line of credit" and contends that, instead of advancing MotorBike sums of money, as provided for in the First Loan Agreement and the Joint Venture Agreement, Vento supplied it with motorcycles: "Vento's contribution to the business of the JV enterprise —its investment— consisted in Vento's extension of a US$10 million credit facility to MotorBike, the execution of which both JV partners knew would take the form of advancements of inventory to MotorBike."[142] The Claimant asserts that it provided the Respondent with copies of importation records and matching "pro forma invoices" as proof of "MotorBike's everyday utilization of this credit facility" and that "[i]nstead of making payment on each invoice within the 30-day period stipulated thereon, between June 2002 and July 2003 MotorBike exhausted $7.8 million of the $10 million available to it" but "MotorBike never paid for approximately $1.8 million worth of inventory advance under the facility," which "has been recorded as a long-term debt obligation (to Vento) on MotorBike's books."[143]

194. The Claimant also argued that between March and July 2010, it transferred US$3.2 million to MotorBike pursuant to the Second Loan Agreement, as shown in MotorBike's bank statements.[144] The Claimant added that that loan had an indefinite maturity date, it imposed no interest and it is still outstanding.[145]

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[140] Rejoinder, ¶ 94.
[141] Memorial, ¶ 108 (footnotes omitted).
[142] Reply, ¶¶ 193-194, 202, 209.
[143] Reply, ¶¶ 201, 204-205.
[144] C-0007, Exhibit evidence loan 2010.
[145] Reply, ¶¶ 220, 222.

b. The Tribunal's Analysis

195. Vento and MotorBike entered into two loan agreements: one in 2001[146] and another one in 2010.[147] The existence of the Loan Agreements is not in dispute.

196. A loan to an enterprise where the original maturity is at least three years is an investment under NAFTA Article 1139. The original maturity stipulated in the First Loan Agreement was five years: as noted, MotorBike agreed to repay the borrowings at the termination of the Joint Venture Agreement, which was originally entered into for a five-year term. The maturity of the Second Loan Agreement was contingent on the finality of domestic administrative and judicial decisions involving the origin verifications of the goods that Vento exported to Mexico in 2001 and 2002. There is no dispute either that such proceedings concluded in 2016 with final decisions of the Mexican courts in 2015 and 2016, respectively.[148]

197. The Loan Agreements, however, are not sufficient proof of an "investment." The Respondent denies that Vento actually loaned any money to MotorBike under the Loan Agreements.

198. Despite the Claimant's *post hoc* re-characterization of the first loan as a "credit facility" involving inventory rather than money, the Tribunal finds that it was not. It is simply not supported by the First Loan Agreement, and Patricia Ortega's testimony, a MotorBike employee since 2002,[149] is contradicted by the Claimant's original argument that the 10,000 motorcycles that it contributed to the Joint Venture are an investment in the form of "tangible property […] used for the purpose of economic activity in [the] territory […] [of Mexico]."[150] The motorcycles were to be sold by MotorBike in Mexico (and indeed they were sold), while the US$10 million loan "was destined to fund the business

[146] C-0005, First Loan Agreement dated 13 October 2001.
[147] C-0006, Second Loan Agreement dated 1 March 2010.
[148] Memorial, ¶ 64; Counter-Memorial, ¶ 293. *See* also ¶ 146 above.
[149] Witness Statement of Patricia Ortega Domínguez (14 March 2019).
[150] Memorial, ¶ 107 (brackets in original).

operations of the joint venture."[151] Patricia Ortega's testimony is also contradicted by that of Claudia and César Núñez-Cázares. At the Hearing, Claudia Núñez-Cázares confirmed that "another essential element [of the Joint Venture Agreement] is that we [i.e. Vento] would contribute with 10,000 motorcycles in a period of two years and up to $10 million dollars."[152] César Núñez-Cázares's testimony is consistent with hers.[153] Claudia Núñez-Cázares testified that "Vento never actually sent money to MotorBike or received interest payments" from MotorBike.[154] According to César Núñez-Cázares, the business grew quickly and "became self-sufficient in a very fast manner."[155] The Joint Venture partners' initial estimate of 10,000 motorcycles in two years was quickly surpassed. By the end of 2003 the Joint Venture had sold 38,000 motorcycles "and what happened," testified Claudia Núñez-Cázares at the hearing, "is that we never really had to pay $10 million dollars […]. So, it was not necessary to send money because we generated that money by the selling of the motorcycles."[156]

199. The Claimant did not demonstrate that it transferred any funds to MotorBike under the Second Loan Agreement either. As noted by the Respondent, MotorBike's banking records do not show who made the payments that were highlighted[157] and the Claimant did not provide any documents of its own. In its response to the Respondent's document request, the Claimant declared that it had no responsive documents other than MotorBike's banking records exhibited as evidence of the second loan.[158] It surmised that "[t]o the extent that such documents did once exist, it would appear that they were destroyed well before the commencement of the arbitration."[159]

200. Accordingly, the Tribunal finds that the Claimant did not make an investment in the form of loans under NAFTA Chapter 11. It is therefore unnecessary to say more in respect of

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[151] Memorial, ¶ 24.
[152] Tr. Day 2, p. 348:12-14.
[153] Tr. Day 2, pp. 290:22-291:3.
[154] Tr. Day 2, pp. 360:15-17, 369:17-370:1.
[155] Tr. Day 2, p. 308:8-15.
[156] Tr. Day 2, pp. 369:7-370:6.
[157] C-0007, Exhibit evidence loan 2010.
[158] C-0007, Exhibit evidence loan 2010.
[159] Procedural Order No. 4 (1 October 2018), Respondent's Redfern Schedule, p. 8.

the Claimant's failure to have raised a claim in connection with the loans under NAFTA Article 1116.

B. Jurisdiction *Ratione Personae*

201. NAFTA Article 1116(1) provides in pertinent part: "An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A [of Chapter 11] […] and that the investor has incurred loss or damage by reason of, or arising out of, that breach." Vento has submitted a claim to arbitration under that article. Initially, it also sought to bring claims under NAFTA Article 1117 on behalf of MotorBike and Mototransp but subsequently withdrew those claims.[160]

(1) The Parties' Positions

a. Respondent's Position

202. The Respondent has presented two objections. First, it argued that Isaac Calderón Birch financed Vento and is its "legitimate owner,"[161] either directly or through what it called "*el Grupo Calderón*," an indeterminate group of persons including Isaac Calderón Birch himself, César Núñez-Cázares and others.[162] The Respondent asserts that "the claim is Mr. Calderón's who, as a Mexican citizen, lacks standing" to submit it to arbitration under the NAFTA.[163] (Tribunal's translation).

203. The Respondent also asserted that Vento forfeited its corporate status in August 2009 and ceased to operate, at which time "the ownership and control over Vento had clearly shifted to Mexico and Vento was no longer a United States citizen" (sic).[164] It added that "at least since 2009 Vento has existed only theoretically and its Mexican owners reactivated it in 2017 only as a vehicle to submit this claim" to arbitration.[165] The Respondent argues that

[160] Reply, ¶ 239.
[161] Counter-Memorial, ¶ 2; Rejoinder, ¶ 145.
[162] Counter-Memorial, ¶ 3.
[163] Rejoinder, ¶¶ 141, 149.
[164] Counter-Memorial, ¶ 243 .
[165] *Id.*

the continuous nationality rule under customary international law requires that the claim must continuously belong to an investor of a NAFTA Party other than Mexico but, since "[Vento] is controlled by [Mexican] nationals and it does not have substantial business activities in [Texas], and the seat of management and the financial control of the corporation are both located in [Mexico] […] the claimant's nationality must be deemed to be Mexican."[166] (Tribunal's translation; brackets in original).

b. Claimant's Position

204. The Claimant contends that Vento was incorporated by Claudia Núñez-Cázares in August 2001 under the laws of Texas.[167] She was appointed as the sole director of the company and subsequently identified as the company's President in several corporate filings.[168] César Núñez-Cázares also became a director in 2006.[169] Vento was at all times controlled by Claudia Núñez-Cázares and her husband, César Núñez-Cázares.[170]

205. Vento entered into the Joint Venture Agreement with MotorBike. Vento at all times legally controlled the business operations of the Joint Venture under the Joint Venture Agreement and it also exercised *de facto* control over the day-to-day operations.[171] The Claimant denies that Isaac Calderón owned or controlled Vento, AED or the Joint Venture and denies the existence of the so-called *Grupo Calderón*.[172]

206. With respect to the continuous nationality rule, the Claimant argues that the Respondent has confused Vento, a company constituted and organized under the laws of Texas, with the Joint Venture, which is an enterprise constituted and organized under applicable Mexican laws. The Claimant does not deny that it "endured a period of tax forfeiture in Texas" that precluded it from performing "certain corporate functions" (although it

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[166] *Id.*
[167] Memorial, ¶ 17; Reply, ¶ 24.
[168] Reply, ¶ 24.
[169] Reply, ¶ 24.
[170] Reply, ¶¶ 36, 150.
[171] Memorial, ¶¶ 30, 103, 105; Reply, ¶¶ 223 *et seq*.
[172] Reply, ¶¶ 36, 153, 199, 232, 247, among others.

suggests that such corporate incapacity was limited to Texas). However, it denies that ownership or control of Vento was transferred to Mexican entities or that Vento ceased to exist. Therefore, Vento never had a nationality problem.[173]

207. The Claimant also disputes that the continuous nationality rule applies at all. It argues that it is contrary to the text of NAFTA Articles 1116 and 1117 because it would introduce "a new restriction *ratione personae* on the rights of NAFTA investors [sic] to seek redress under Chapter 11, Part B."[174] In any event, it contends that the relevant date was 7 August 2017 when it submitted its Request for Arbitration "on which date it [Vento] was a U.S. national, in good standing and full compliance with all of its obligations under Texas law."[175]

(2) The Tribunal's Analysis

208. The Respondent's objections are contradictory and somewhat confusing. If Isaac Calderón Birch owned and controlled Vento and this NAFTA Chapter 11 claim, then there was no change of "nationality." But if the claim changed from the hands of a US national to the hands of a Mexican national, then Isaac Calderón Birch was not initially the "owner" of the claim or the one who owned or controlled Vento. One cannot prove one without disproving the other. The Respondent has not really stated on which theory it stands and what role —if any— the other theory would play. It would appear that it put forward several arguments in the hope that one would stick, rather than presenting a more considered view.

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[173] Reply, ¶¶ 242-246.
[174] Reply, ¶ 254.
[175] Reply, ¶ 258.

a. Ownership and Control of Vento

209. In its Counter-Memorial, the Respondent argued rather vaguely that Isaac Calderón Birch was the "legitimate owner" of Vento either directly or through a so-called *Grupo Calderón*.[176] The Claimant vehemently denied it.

210. The Respondent later abandoned the *Grupo Calderón* argument. There was no further discussion about it in the Respondent's Rejoinder or its arguments at the Hearing. Beyond a vague reference to an indeterminate group of people that included Isaac Calderón, César Núñez-Cázares, Alan Eini "*y otros*,"[177] the Respondent did not provide any evidence of who comprised it, how it operated or how it influenced Vento's decisions regarding the operation of the Joint Venture. The Tribunal finds that there was no such group.

211. The Respondent did not offer any evidence either that Isaac Calderón owned Vento. There is no dispute that Vento was incorporated by Claudia Núñez-Cázares.[178] There is no evidence that she transferred the ownership of her stake in Vento or that, subsequent to Vento's incorporation, Isaac Calderón Birch or others acquired an ownership interest in the company. At the Hearing, Claudia Núñez-Cázares confirmed she is still the owner of Vento[179] and the Tribunal so finds.

212. The Respondent's arguments relate more to control over Vento at certain points in time. Claudia Núñez-Cázares was appointed the sole director of Vento in 2001 upon incorporation.[180] Corporate filings in Texas where Vento was incorporated and had its place of business show that she remained Vento's President up until 2008, the year before Vento forfeited its corporate status and ceased further filings. In 2017, Claudia Núñez-Cázares, again identified as Vento's President, sought and obtained reinstatement of the

[176] Counter-Memorial, ¶¶ 2-3.
[177] Counter-Memorial, ¶ 3.
[178] C-0001, Vento Articles of Incorporation.
[179] Tr. Day 2, p. 358:7.
[180] C-0001, Vento Articles of Incorporation.

company and later filed the Public Information Report for that year. César Núñez-Cázares was Vento's Secretary during the same period.[181]

213. A few corporate filings in Florida and California register Alan Eini as an officer or director (operations manager or treasurer) of Vento. However, those filed in Florida identify Claudia Núñez-Cázares as "DP," i.e. Director and President of Vento. Some of those filings also identify Isaac Calderón Birch as President of Vento.[182] Vento offered a rather implausible story of how that came about (supported by witness statements of Isaac Calderón Birch and Alan Eini). Nonetheless, it is of no consequence because the filings also identify Claudia Núñez-Cázares as Director and President of Vento, except for the two whereby Vento surrendered its right to do business in California and Florida, respectively.[183] Yet, these two notices of withdrawal from business hardly contradict evidence that show that Claudia Núñez-Cázares remained in control of Vento throughout.

214. The testimony of Claudia and César Núñez-Cázares is consistent in that respect. They were the ones who leased the facilities where the assembly plant was located, they hired the workers, kept Vento's accounting records, retained external consultants and, overall, managed the day-to-day operations of Vento.

b. Nationality

215. Vento closed its assembly facilities at the end of 2004.[184] Vento continued to operate on a smaller scale for a short time mainly to satisfy certain prior commitments and to dispose of its inventory.[185] It completely ceased operations sometime in 2007 or 2008 and forfeited its corporate status in 2009.[186] Other than its attempts to expand its business in California and Florida which, by its own admission, were unsuccessful, and its entering into the

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[181] R-0002, Vento Public Information Report 02 TX; R-0004, Vento Public Information Reports 04 2005 TX; R-0005, Public Information Reports 06, 07, 08 TX; R-0008, Vento Public Information Report 2017 TX; R-0007, Vento Reinstatement of corporate status;R-0016, Vento, Public Information Report 2004.

[182] R-0010, Foreign Corp. Filing FL; R-0011, Vento Annual Report 2004; R-0012, Vento Annual Report 2005; R-0013, Vento Annual Report 2006.

[183] R-0017, Surrender of Business CA; R-0014, Withdrawal to do Business FL.

[184] First Witness Statement of César Núñez-Cázares (4 June 2018), ¶ 25bis.

[185] Tr. Day 2, p. 319:4-12.

[186] R-0006, Forfeiture of Vento's Corporate Status.

US$3.2 million Second Loan Agreement with MotorBike in 2010, it appears that from around 2007 on Vento focused almost exclusively on defending its NAFTA origin claim in Mexico.

216. It is not at all clear if, in raising the continuous nationality rule objection, the Respondent was referring to Vento, Vento's owner, the investment or the claim. There is no dispute that Vento forfeited its corporate status, although the Parties disagree on the effects that such forfeiture had both in respect of what it could or could not do during the period of forfeiture in Texas and, more broadly, in the United States and elsewhere, and in respect of the present NAFTA Chapter 11 claim.[187] As explained above,[188] the Claimant's expert on Texas law testified that "the forfeiture of its charter does not affect the existence of the corporation"[189] and the Respondent did not contend that Vento ceased to exist.[190] In fact, Vento did not conduct any business after 2009.[191] To the extent that motorcycles with the Vento brand were sold in Mexico after Vento ceased to operate in the United States, that business was carried out by others and it was not subject to the Joint Venture Agreement.[192] In fact, Vento filed its last tax return in the United States in 2007 or 2008.[193] As already found by the Tribunal, after 2007 Vento focused on defending its origin claim in Mexico and its ability to do so has not been questioned.[194]

217. The Respondent argued that, at the time it forfeited its corporate status, somehow "the ownership and control over Vento had clearly shifted to Mexico and Vento was no longer a United States citizen" (sic). It offered no explanation or evidence as to how Vento lost its U.S. nationality or acquired Mexican nationality, either *de jure* or *de facto* such that "the claimant's nationality must be deemed Mexican,"[195] given that it claims that Vento

[187] *See* ¶¶ 152-153 and 158 above.
[188] *See* Section V(2), Admissibility.
[189] Expert Report of James Lloyd Loftis (12 March 2019), ¶ 36.
[190] Rejoinder, ¶ 144.
[191] *See* ¶¶ 130 and 215 above.
[192] *See* ¶¶ 234-239, Scope of the Investment.
[193] Tr. Day 2, p. 319:18-19.
[194] *See* ¶ 215 above.
[195] Counter-Memorial, ¶ 243.

essentially remained "non-operative" from mid-2009 onward.[196] Mexico did not provide any explanation or evidence as to how control and ownership of Vento shifted to Mexico and to whom. (Tribunal's translation).

218. The Tribunal finds that Vento is a corporation constituted and organized under the laws of the United States. It is a national of the United States for purposes of the NAFTA and has remained so at all relevant times. Claudia Núñez-Cázares, a U.S. national, retained ownership and control of Vento at all relevant times. Therefore, the Tribunal rejects Mexico's objections.

c. Ownership and Control of the Investment

219. The Tribunal is satisfied that Vento controlled the investment, that is, the Joint Venture.

220. Because the Respondent argued that a contractual joint venture is not an enterprise in accordance with NAFTA Article 201 and, therefore, it is not an investment for purposes of NAFTA Chapter 11, the Respondent focused its arguments on Vento's ownership or control of MotorBike and Mototransp. Yet, the relevant question is whether Vento owned or controlled the Joint Venture. The Respondent's arguments, therefore, are mostly inapposite and failed to refute the Claimant's claim that it exercised control over the investment.

221. Control is not limited to "corporate control" as exercised through voting rights. The Tribunal agrees with the notion of control as formulated by the *Thunderbird* tribunal:

> It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholders meetings. Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation. Ownership and legal control may assure that the owner or legally controlling party has the ultimate right to determine key decisions. However, if in practice a person exercises that position with an expectation to receive an economic return

[196] Counter-Memorial, ¶ 4.

> for its efforts and eventually be held responsible for improper decisions, one can conceive the existence of a genuine link yielding the control of the enterprise to that person.[197]

222. Under the Joint Venture Agreement and according to the witness statements of Claudia and César Núñez-Cázares and Isaac Calderón Birch, which are all consistent on this point, there is no doubt that Vento exercised control over the Joint Venture and its business activities.[198] The whole purpose of the Joint Venture was to commercialize in Mexico motorcycles assembled by Vento in the United States.[199] Thus, MotorBike's participation in the Joint Venture operations —and indeed, the Joint Venture as a whole— depended on Vento assembling motorcycles and exporting them to Mexico. While the Joint Venture Agreement established the initial contribution of 10,000 motorcycles in the first two years of operation and provided that both contracting parties would thereafter define the number of additional units and models to be contributed, it is clear that Vento controlled production which, in turn, was the sole source of supply of the Joint Venture operations in Mexico. Vento was responsible for procurement of motorcycle parts and components (including engines). It was the owner of the assembly facilities, it hired and trained the workforce, it controlled the plant's processes and quality of the motorcycles. Vento was also responsible under the Joint Venture Agreement for making capital contributions. As it turns out, the Joint Venture quickly became self-supporting and there was no need for Vento to make additional capital contributions, including through loans, but that does not detract from the notion of control of the Joint Venture and its business activities. Under the Joint Venture Agreement, Vento was to receive 90% of the profits which, evidently, gave it greater weight in the decision-making process of the Joint Venture and its business activities.[200]

223. Vento did not own or control MotorBike or Mototransp. At the Hearing, Isaac Calderón Birch testified without any hesitation that, regardless of who MotorBike's shareholders of

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[197] RL-007, *International Thunderbird Gaming Corporation v. Government of the United States of Mexico*, Award, IIC 136 (2006), 26 January 2006, ¶ 108.

[198] Witness Statement of Claudia Núñez-Cázares (10 January 2019), ¶¶ 7, 8, 15; First Witness Statement of César Núñez-Cázares (4 June 2018), ¶ 7; Second Witness Statement of César Núñez-Cázares (5 February 2019), ¶¶ 13-14; First Witness Statement of Isaac Calderón Birch (1 June 2018), ¶¶ 18-19.

[199] C-0003, Joint Venture Agreement, Art. 2.

[200] C-0003, Joint Venture Agreement, Art. 5.4.

record were, undoubtedly MotorBike was his company and he was the person managing MotorBike; he incorporated both companies and all of their corporate records were in his custody.[201] The Tribunal finds that this was the case for both MotorBike and Mototransp. The Joint Venture Agreement did impose certain corporate limitations on MotorBike (and on Mototransp after the assignment) but that is further proof that Vento controlled the Joint Venture, not that Isaac Calderón Birch transferred control of his companies to Vento. The Joint Venture Agreement provided that "Each Party is an independent entity and […] [n]othing contained herein [i.e. the Joint Venture Agreement] shall be construed to create […] [any] relationship other than that of independent Parties."[202]

224. The Tribunal therefore finds that Vento controlled the investment and rejects the Respondent's objection *ratione personae*.

C. Jurisdiction *Ratione Temporis*

225. The Claimant admits that "the losses suffered by the Claimant and its investment enterprises began accruing in 2003." However, it argues that "Vento would lack the information necessary to attribute those losses to Mexico's breaches of the NAFTA until May 2016 for Articles 1102 and 1103 and May 2017 for Article 1105." [203] The Respondent contends that the claim has lapsed because more than three years have elapsed from the date on which the investor first acquired knowledge, or should have first acquired knowledge, of the alleged breach and that the investor incurred loss or damage.[204]

226. The principal facts of this dispute are inextricably linked to the merits and to the Respondent's objection. There is no effective way for the Tribunal to cleanly separate the facts as they relate to the merits or to this jurisdictional objection in order to ascertain when the Claimant first acquired, or should have first acquired, knowledge of the alleged breach

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[201] Tr. Day 2, pp. 389:1-3, 390:12-16, 401:9-402:5.
[202] C-0003, Joint Venture Agreement, Art. 13.3.
[203] Memorial, ¶ 124.
[204] Counter-Memorial, ¶ 247.

and knowledge that it had incurred loss or damage as a result thereof. Therefore, the Tribunal has decided to consider them together.

VII. LIABILITY

A. NAFTA Articles 1102, 1103 and 1104

(1) The Parties' Positions

a. Claimant's Position

227. The Claimant initially argued:

> The Vento-MotorBike joint venture sourced its products from the Vento manufacturing facility in Laredo, Texas. After the SAT decisions of 2003 and 2004 rendered this approach uneconomical, the joint venture continued the business of Vento's investment in Mexico using motorcycles sourced directly from China. It was a stop-gap measure, adopted while Vento's court challenges to the SAT decisions were under consideration. It was only because Vento's challenges took far too long – twelve years – to resolve, that this temporary solution became semi-permanent. That is why, as soon as the first of two courts ruled, in May 2015, Vento and Mototransp started looking for a new way to do business.[205]

228. The Claimant asserts that nine Mexican companies were "engaged in the marketing, distribution, sales, and servicing of small displacement motorcycles in the territory of Mexico at the same time as either the Vento-MotorBike or the Vento-Mototransp joint venture."[206] Six of those companies "were engaged in the importation of disassembled motorcycles, as components, and thereby evading the higher duties they should have been paying if SAT's construction of LIGIE Rule 2(a) had been evenly applied."[207] Two of the latter are owned by nationals of Japan.[208]

229. The Claimant contended disparate treatment in respect of:

[205] Memorial, ¶ 202.

[206] Memorial, ¶ 203.

[207] Memorial, ¶ 205.

[208] Memorial, ¶ 204.

a. the importation into Mexico of disassembled motorcycles and failure to apply Rule 2(a), which would have resulted in a 30% import duty; and

b. allowing certain Mexican companies to label their motorcycles as "Made in Mexico" and to use corresponding vehicle identification numbers, while Vento branded motorcycles were required to be labelled as "Made in China," which placed them at a "reputational" disadvantage.[209]

230. The Claimant argued as well that in 2016 it brought to the attention of Mexican officials at SAT, the *Secretaría de Economía* and the REPUVE the failure to enforce Rule 2(a) on goods imported by its Mexican competitors but they did not take any action until after it served its Request for Arbitration in this proceeding on Mexico. It asserts that some origin verifications were initiated then but no action was taken regarding the use of the "Made in Mexico" mark. In any event, it argues that the belated actions cannot redress the Joint Venture's losses, which it claims go back to 2002.[210]

231. Following the Respondent's defense that all of the Claimant's so-called comparators were PROSEC holders, the Claimant raised an alternative claim that Mexico failed to accord Vento and the Joint Venture treatment no less favorable than that accorded to Mexican (and foreign-owned Mexican) PROSEC holders because it denied MotorBike's application for PROSEC twice in 2002.[211]

b. Respondent's Position

232. The Respondent denies that Vento or the Joint Venture were in similar circumstances to Vento's so-called comparators. The Respondent contends that circumstances were different in a number of important respects. AED imported motorcycle parts into the United States, assembled the engines and then sold those engines as NAFTA originating goods and the rest of the parts to Vento. Vento then assembled the motorcycles and exported them to Mexico as NAFTA goods. MotorBike principally but also others, such

[209] Memorial, ¶¶ 207 and 209.

[210] Memorial, ¶¶ 211-212.

[211] *See* ¶¶ 70, 77 above.

as large department stores, imported those goods paying no duties under NAFTA preferential tariff treatment. In contrast, Vento's so-called comparators were all located in Mexico. They imported motorcycle parts directly from China or India into Mexico, assembled motorcycles and sold them directly in the Mexican market. The Respondent's main argument, however, is that all such comparators were beneficiaries of PROSEC, a duty exemption program that among its benefits exempted program participants from the application of Rule 2(a). Vento and the imports under the Joint Venture Agreement were subject to an entirely different legal regime than the one that applied to Vento's so-called comparators.[212]

233. The Respondent asserts that the Claimant confused the regulations that apply to the "*Hecho en México*" trademark and vehicle identification numbers (which include a code that identifies the country of origin of the vehicles) and the rules that govern preferential tariff treatment under the NAFTA, including Rule 2(a). The Respondent explained in detail how those rules operate.[213]

(2) The Tribunal's Analysis

a. Scope of the Investment

234. The Claimant contends that Vento and the Vento-MotorBike and Vento-Mototransp Joint Ventures have been accorded treatment less favorable than that accorded to its so-called comparators, but it has failed to distinguish clearly between treatment accorded to:

a. Vento as an investor of another Party;

b. Vento, MotorBike or Mototransp in respect of activities that they carried out pursuant to the Joint Venture Agreement; and

c. Vento, MotorBike or Mototransp in respect of activities that they carried beyond the terms of the Joint Venture Agreement.

[212] Counter-Memorial, ¶¶ 326, 328.

[213] Counter-Memorial, ¶¶ 330-335.

235. The Claimant vigorously argued that the contractual Joint Venture is an investment in and of itself in accordance with NAFTA Chapter 11 and that it did not necessarily have to constitute or organize an entity with a separate legal personality —nor does it claim to have done so. The Tribunal has determined that the Claimant is correct. Yet, one of the consequences of having established a contractual joint venture is that, unlike corporations or other types of juridical persons, the *investment* cannot take a life of its own and make decisions for itself, for instance, to go into a new line of business. In this particular case, the Joint Venture Agreement determines what Vento's *investment* can do. Obviously, that does not mean that Vento, MotorBike or Mototransp could not have engaged in other activities that are not covered by the Joint Venture Agreement but, to the extent that they did, those activities fall outside the scope of the investment.

236. The Joint Venture Agreement is quite specific regarding the scope of the investment:

> ARTICLE 2
>
> PURPOSE
>
> 2.1 The purpose of this Agreement is to (i) define the terms of participation and cooperation by the Parties in order to promote, sell and in general commercialize the Products in the Territory, on a first instance through Motorbike, and afterwards, if the Parties consider it convenient, through a JV Company to be incorporated pursuant to the laws of the Territory, which capital stock shall be owned by the Parties on a proportion to be determined (the "JV Company"); and (ii) share information, know-how and expertise to engage in the development of a joint business plan to commercialize, with exclusivity, the Products in the Territory.
>
> ARTICLE 3
>
> COMMERCIALIZATION OF THE PRODUCTS IN THE TERRITORY
>
> 3.1 The Parties agree to conduct joint efforts to commercialize the Products in the Territory through Motorbike pursuant to the terms provided herein and in any other commercial arrangements agreed by the Parties, and in a future, if the Parties consider it convenient and/or more profitable, through the JV Company, pursuant to the terms set forth herein.[214]

[214] C-0003, Joint Venture Agreement, Arts. 2-3 (emphasis added).

237. The contracting parties "memorialize[d] in this [Joint Venture] Agreement their commercial arrangements in order to make optimum use of their respective resources through a joint business for the commercialization of the Products within Mexico" by MotorBike.[215] "Products" were defined as motorbikes manufactured by Vento in the US[216] and "Territory," as that of the United Mexican States.[217] Vento and MotorBike (or subsequently Mototransp) did not amend the terms of the Joint Venture Agreement, enter into "other commercial arrangements" or incorporate a "JV Company" and the Claimant did not purport to have modified the *investment* in any way.

238. In simple terms, in accordance with the Joint Venture Agreement, Vento would assemble motorcycles in the United States and export them to Mexico to be commercialized there by MotorBike. As already noted, Vento closed its assembly facilities at the end of 2004. It satisfied any ongoing commitments toward its clients and otherwise disposed of its inventory by 2007. Vento and the Joint Venture ceased all operations in 2007, so much so that Vento surrendered its authority to do business in California and Florida, it filed its last federal tax return in 2008 and it let its corporate status lapse in 2009. After 2007, there were no more "Products," as defined in the Joint Venture Agreement, to be exported to, and commercialized in, Mexico and Vento did not commit any further capital or resources to the Joint Venture. While it entered into the Second Loan Agreement with MotorBike in 2010, the Tribunal has found that it actually did not loan any money to MotorBike and, in any event, MotorBike had assigned "all and each of its rights and obligations deriving from the JV Agreement and the [First] Loan Agreement [to] Mototransp, S.A." in 2006.[218] After 2009, Vento only continued to defend its claims before Mexican administrative and judicial authorities, but the Claimant does not complain of a denial of national or most favored nation treatment in the conduct of the administrative or judicial proceedings themselves.

239. Therefore, the relevant timeframe to assess treatment of both Vento as the investor of another Party and its investment (i.e. economic activities carried out under the Joint

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[215] C-0003, Joint Venture Agreement, Third Recital.

[216] C-0003, Joint Venture Agreement, First Recital.

[217] C-0003, Joint Venture Agreement, Art. 1.

[218] C-0009, Assignment letter (6 March 2006).

Venture Agreement) is from 1 October 2001 when Vento was incorporated to 28 August 2009 when it forfeited its corporate status. Activities carried out by MotorBike or Mototransp to assemble motorcycles in Mexico, including MotorBike's application for PROSEC, as well as the importation in Mexico of motorcycles from China by such companies and their commercialization there —whether or not Vento participated in the decision-making processes— are beyond the scope of the investment and, therefore, they are beyond the jurisdiction of this Tribunal.

b. NAFTA Articles 1102 and 1103

240. The Parties are generally in agreement regarding the elements that need to be considered in assessing a denial of national treatment or of most-favored nation treatment claim. The Claimant suggested that the analysis should begin by identifying the "domestic investors and/or investments in a comparable position with the claimant investor/investments,"[219] while the Respondent argued that "[f]irst, it must be shown that the Respondent State has accorded to the foreign investor or its investments —treatment […] with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of the relevant investments."[220] However, given that national treatment and most favored nation treatment are relative standards that compare the conduct of the host-State toward certain investors or their investments with respect to the host-State's conduct toward other investors or their investments, there is no precise methodology to perform the analysis. These are necessarily fact-specific enquiries and what may be an appropriate starting point in one case may not be so in another. In any event, neither the treatment nor the similarities or differences between the relevant circumstances can be considered in isolation. What is important are the circumstances as they relate to the alleged treatment accorded to the investors or investments in question.

241. In this case there is a more fundamental issue to resolve before engaging in the analysis of the Respondent's conduct. The Tribunal has established that Vento is the "investor of

[219] Memorial, ¶ 183.

[220] Counter-Memorial, ¶ 315, citing RL-0029, *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008, ¶ 117.

another Party" and the Joint Venture, the "investment" for purposes of NAFTA Chapter 11.[221] Yet, it appears that none of the "comparators" identified by the Claimant "in the marketing, distribution, sales, and servicing of small displacement motorcycles in the territory of Mexico at the same time as either the Vento-MotorBike or the Vento-Mototransp joint venture" operated in Mexico through joint venture arrangements.[222] Thus, the Claimant has conflated the alleged treatment of the "investor/investment," but it has not identified to whom or to what Vento should be compared *qua* investor. All of the so-called comparators that the Claimant identified are Mexican corporations that are either Mexican-owned or Japanese-owned and, therefore, *investments*. The Claimant did not identify any of the Mexican owners of such corporations as appropriate "comparators" under NAFTA Article 1102 and, while it understood that two of the corporations "are owned by nationals of Japan: Honda and Yamaha,"[223] its denial of most-favored nation treatment claim is limited to treatment of the two Japanese-owned Mexican investments. Consequently, the Tribunal rejects all claims that the Respondent breached NAFTA Articles 1102(1) or 1103(1) for failure to accord to Vento treatment no less favorable than that it accorded to Mexican investors or to investors of a non-NAFTA Party.

242. The Claimant identified nine "enterprises which were engaged in the marketing, distribution, sales, and servicing of small displacement motorcycles in the territory of Mexico at the same time as either the Vento-MotorBike or the Vento-Mototransp joint venture."[224] Only six of them "were engaged in the importation of disassembled motorcycles, as components"[225] without paying import duties applicable to fully assembled motorcycles (Operadoras en Servicios Comerciales, S.A. de C.V. ("**Operadoras**"), responsible for the Italika brand, Diseños y Clásicos de México, S.A. de C.V., for the Bajaj brand, Honda de México, S.A. de C.V. ("**Honda**"), responsible for the Honda brand, Motoroad, S.A. de C.V., responsible for the Carabela brand, Yamaha Motor de México

[221] *See* ¶¶ 234-239, Scope of the Investment.
[222] Memorial, ¶ 203.
[223] Memorial, ¶ 204.
[224] Memorial, ¶ 203.
[225] Memorial, ¶ 205.

S.A. de C.V. ("**Yamaha**"), responsible for the Yamaha brand, and Veloci Motors S.A. de C.V., responsible for the brand Veloci). However, only three of them, Honda, Yamaha and Operadoras, were authorized to import motorcycle parts under PROSEC, an import duty exemption program, between 2001 and 2009.[226] The Claimant understood that Honda and Yamaha were owned by nationals of Japan. The Respondent did not dispute it. Operadoras was owned by Mexican nationals. Thus, Honda and Yamaha are the relevant investments for purposes of the NAFTA Article 1103 claim and Operadoras is the relevant investment for purposes of the NAFTA Article 1102 claim (the "**Relevant Mexican Investments**").

243. According to the Respondent, "it is necessary to begin with a comparison between domestic and foreign investors [in this case between the investments in question] operating in the same business or economic sector […],"[227] but that is too broad a reference point. (Tribunal's translation). This case involves the management, conduct or operation of the investments in question and the circumstances to consider will be given by the factual context that is relevant to both, the Claimant's investment on the one hand, and the Relevant Mexican Investments on the other. All material circumstances need to be considered and weighed.

244. The Claimant presents a rather simplistic argument: it asserts that the Relevant Mexican Investments "were engaged in the importation of disassembled motorcycles, as components"[228] and those Investments as well as the Joint Venture were "engaged in the business of [assembly,] marketing, distribution, sales, and servicing of small displacement motorcycles (i.e. motorcycles with engines between 50cc and 250cc) […] at the same time."[229] It concludes, therefore, that they were all "in like circumstances." The Claimant summarily dismissed as "nominal" a few of the differences pointed out by the Respondent: the location of Vento's assembly facilities in the United States; that motorcycle parts and

[226] Counter-Memorial, ¶ 264, Table 1.
[227] Counter-Memorial, ¶ 318.
[228] Memorial, ¶ 205.
[229] Memorial, ¶¶ 202-203.

components were imported from China by AED; and that fully assembled motorcycles were then imported into Mexico by MotorBike and others.[230]

245. The Claimant complains that SAT applied Rule 2(a) to "motorcycle components which had been imported into the U.S. for production of Vento-branded motorcycles" subsequently exported to Mexico on the one hand[231] but failed to apply that rule to imports by the Relevant Mexican Investments of disassembled motorcycles into Mexico on the other hand[232], which resulted in:

    a. Vento branded motorcycles being subject to a 30% ad valorem importation duty, while the Relevant Mexican Investments paid an average 10%;[233] and

    b. motorcycles produced by the Relevant Mexican Investments having "enjoyed the benefit of a "Made in Mexico" label, [while] Vento products have been forced to bear a "Made in China" label instead."[234]

246. Rule 2(a) comes into play because Vento assembled motorcycles in the United States exclusively from parts and components imported into the United States by AED from China. AED assembled the engines and sold them along with the rest of the motorcycle parts to Vento, who finished assembling the motorcycles. AED certified that the engines were NAFTA originating goods which in turn allowed Vento to certify that the motorcycles were NAFTA originating goods as well. MotorBike and other importers were then able to claim preferential tariff treatment —in effect 0% tariffs— under the NAFTA upon importation of the motorcycles into Mexico. As a result of the origin verifications, SAT concluded that motorcycle engines assembled by AED were not produced in the United States. Rather, the engine parts imported from China were disassembled engines and, under Rule 2(a), they had to be classified as the finished or fully assembled engines. Thus, the engines did not meet the change in tariff classification requirement under the applicable

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[230] Reply, ¶¶ 337, 344-346.

[231] Memorial, ¶ 68.

[232] Memorial, ¶ 205.

[233] Memorial, ¶ 209.

[234] Memorial, ¶ 209.

NAFTA rules of origin and could not be certified as NAFTA originating goods. SAT then moved on to the motorcycles and applied essentially the same reasoning. Since all of the motorcycle parts and components (including the engine components) for each and every model of motorcycles assembled by Vento and later exported to Mexico were originally imported into the United States from China, they were disassembled motorcycles and, under Rule 2(a), they had to be classified as finished or fully assembled motorcycles. SAT concluded that the processes carried out by AED and Vento in the United States (and as Claimant repeatedly emphasized during the Hearing) were simple assembly operations that did not add any meaningful component in terms of a production process and the essence of the goods exported to Mexico was not altered because they were disassembled when Vento purchased them from AED. In other words, SAT found that AED imported motorcycles from China which Vento subsequently exported to Mexico after carrying out simple assembly operations. Vento's motorcycles did not comply with the NAFTA rules of origin and did not qualify as NAFTA originating goods. Therefore, SAT denied them preferential tariff treatment and required importers to pay the corresponding import duties.[235]

247. In contrast, none of the Relevant Mexican Investments was based in the United States. They were all based in Mexico and carried out all of their assembly, distribution, marketing, sale and servicing operations there. They imported certain motorcycle parts and components from China and India under PROSEC for further assembly into motorcycles, which were then sold directly in the Mexican market.

248. There are certain similarities: Vento and the Relevant Mexican Investments imported parts and components from China, they each used them in their respective assembly processes to produce similar small displacement motorcycles, which were then marketed, distributed and sold in the Mexican market, and they all offered post-sale servicing. However, many differences are apparent from the above description. The Claimant dismissed them as nominal but the Tribunal finds that they were not.

[235] C-0026, 2004 and 2005 SAT final origin determinations.

249. The Tribunal has already alluded to the first and, perhaps, most evident difference: the type of investment. The Joint Venture was established by contract for a very specific and limited purpose —and it was the only one of its type among all the investments in question.

250. The Joint Venture parties made a deliberate choice to establish the assembly plant in the United States mainly for purposes of being able to label the motorcycles as "Made in the USA" (or "Assembled in the USA," as testified by César Núñez-Cázares at the Hearing),[236] and assuming they could take advantage of the NAFTA rules of origin. It was a strategic business decision which figured prominently throughout the Claimant's pleadings, the Witness Statements of Claudia and César Núñez-Cázares and Isaac Calderón Birch, as well as in the Claimant's expert reports on damages. Indeed, the Claimant asserted that this gave it a "reputational advantage."[237] Both AED and Vento, respectively, labelled the engines and motorcycles as "Made in the USA."[238] The Claimant stated that "[t]he origin of a motorcycle can have a significant impact on a customer's purchase decision": consumers overwhelmingly believed that motorcycles "Made in USA" were better than those made in Mexico or China; they would purchase a "Made in USA" motorcycle over one "Made in China" for the same price and were actually prepared to pay more for motorcycles "Made in the USA."[239] One of the Claimant's witnesses, Javier Sarro Cortina who worked for Grupo Salinas, the owners of Elektra and Operadoras, testified that "[t]he brand Vento was attractive for Elektra because the motorcycles were made in the United States and because the Mexican consumer has admiration for several American brands."[240] While the Joint Venture contemplated the possibility of Vento and MotorBike incorporating a company in Mexico (the so-called JV Company), they obviously never "consider[ed] it convenient," even after SAT had determined that Vento's assembly process in the United States was insufficient to confer its motorcycles NAFTA origin.

[236] *See* ¶ 263 below.

[237] Memorial, ¶¶ 6, 248.

[238] Memorial, ¶¶ 20-21.

[239] Memorial, ¶ 49.

[240] Witness Statement of Javier Sarro Cortina (13 July 2018), ¶ 12.

Also, while MotorBike explored early on the possibility of establishing an assembly plant in Mexico, the Joint Venture parties never really considered relocating to Mexico.

251. Vento and MotorBike also made a conscious decision to limit the Joint Venture's industrial processes to the assembly of motorcycles exclusively from parts and components imported from China. At the Hearing, César Núñez-Cázares made it abundantly clear. He testified: "The Joint Venture was begun first of all, Vento had the commitment of establishing an assembly plant in Laredo, Texas."[241] In response to a question by Respondent's counsel about the "idea" of "shifting production to Mexico," César Núñez-Cázares clarified: "in our work plan"[242] (i.e. the work plan that he discussed with Isaac Calderón Birch in 2000 prior to setting up the Joint Venture) "and during our negotiations [of the Joint Venture Agreement], well, we wanted to ultimately move production of motorcycles from the U.S. to México that is to say, to shift the assembly plant to México […]";[243] and in response to a question from one of the arbitrators, César Núñez-Cázares testified: "Our model was totally different because, I repeat, we have never thought of building motorcycles. We are assemblers."[244] At its peak, Vento produced around 38,000 motorcycles[245] in 2 assembly lines[246] with around 20 employees (perhaps twice that many).[247] On the sales and distribution side, MotorBike had around 60 distributors in Mexico and employed around 100 persons who were responsible for market sales, distribution, spare parts and post-sale services.[248]

252. In contrast, the Relevant Mexican Investments were all corporations constituted in Mexico that had broader industrial or business activities and significant investments in Mexico. Honda and Yamaha are worldwide manufacturers of motorcycles (among many other products), including in Mexico (in fact, Honda participates in the broader automotive

[241] Tr. Day 2, pp. 289:22-290:2.
[242] Tr. Day 2, p. 316:16-20.
[243] Tr. Day 2, pp. 316:19-317:1.
[244] Tr. Day 2, p. 333:8-10.
[245] Memorial, ¶ 38.
[246] Second Witness Statement of César Núñez-Cázares (5 February 2019), ¶ 26.
[247] R-0044, Letter from the United States Customs Attaché to SAT.
[248] Memorial, ¶¶ 31-32.

industry in Mexico) where they also have assembly operations. They mainly sold motorcycles through their own dealerships. Both have had a strong presence in the Mexican motorcycle sector since well before the Joint Venture was even conceived.[249]

253. Neither the Claimant nor the Respondent provided much evidence on the extent of Operadoras's industrial processes. The Tribunal has only been able to glean limited information through indirect evidence. The Tribunal did not have access to the documents whereby the *Secretaría de Economía* granted Operadoras its PROSEC authorization or the minutes of official on-site visits to its facilities, similar to those concerning MotorBike's PROSEC applications in 2002.

254. The Respondent identified Operadoras as a manufacturer and assembler.[250] According to Eduardo Díaz Gavito's evidence, assembly processes are "minor operations" that do not qualify as manufacturing.[251] PROSEC is only available to direct producers, namely those who manufacture certain goods (including motorcycles, three and four-wheel motorcycles and sidecars), and indirect producers who manufacture certain parts and components that they then supply to direct producers.[252] He explained that in his more than 18 years of professional experience, the *Secretaría de Economía* has only authorized PROSEC to "those whose productive processes involve the physical or chemical transformation of goods. That is when the components and inputs undergo a substantial change […]."[253] (Tribunal's translation). At the Hearing, he added: "It wouldn't be enough just to assemble it [a motorcycle] to be considered as a motorcycle producer; rather in other words, if the parts were just put together."[254] However, based on C-0042 which the Claimant gave him access to, Eduardo Díaz Gavito concluded: "I can observe that these [operations that Operadoras performs in its plant] equally consist of assembly, in like circumstances, to

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[249] Counter-Memorial, ¶ 264, Table 1. FGA-0009- MarketLine Report - Industry Profile Motorcycles in Mexico; First Witness Statement of Isaac Calderón Birch (1 June 2018), ¶ 10.

[250] Counter-Memorial, ¶ 264, Table 1.

[251] Expert Legal Opinion of Eduardo Díaz Gavito, ¶ 18.

[252] Expert Legal Opinion of Eduardo Díaz Gavito, ¶¶ 4-5. Tr. Day 2, p. 245:20-246:9.

[253] Expert Legal Opinion of Eduardo Díaz Gavito, ¶ 17.

[254] Tr. Day 2, p. 247:12-15.

those performed by MotorBike."[255] (Tribunal's translation). His observation was based on one sentence of a 24-page document where Operadoras stated that, although the majority of the parts and components required to assemble Italika motorcycles are imported, it procured goods in Mexico for over MX$128 million. At the Hearing, Eduardo Díaz Gavito confirmed that he had never visited Operadoras's or MotorBike's facilities and the extent of his knowledge of their respective industrial processes was, with regard to Operadoras, that sentence in C-0042, and, for MotorBike, its PROSEC applications and the corresponding determinations of the *Secretaría de Economía*.[256] In general, the Tribunal found Eduardo Díaz Gavito's legal opinion very helpful, but it found his conclusion on Operadoras's production or industrial processes wanting. It is at odds with what he has observed in more than 18 years of professional experience. More importantly, the document in question (C-0042) is a secondary document submitted in 2017; it is neither Operadoras's PROSEC application nor its authorization, while MotorBike's documents date back to 2002 and include its applications, the records of verification visits and the ensuing determinations. In the paragraph that precedes the sentence where Operadoras referred to the assembly of parts and components, it asserted that it had invested close to MX$232 million in its industrial facilities, which included 4 assembly lines with a capacity to produce 650,000 motorcycles and had created over 2,300 direct jobs and over 6,000 indirect jobs.[257] There is a monumental difference with MotorBike's facilities which never became operational, and even with Vento's facilities in Laredo. Based on the limited evidence, the Tribunal can only conclude that it is more likely than not that Operadoras was a manufacturer as well as an assembler, although it cannot ascertain the extent of its industrial processes. Yet, the Claimant bears the burden of establishing that Vento was in similar circumstances to Operadoras. It has not satisfied that burden in respect of the industrial processes that each of them performed.

[255] Expert Legal Opinion of Eduardo Díaz Gavito, ¶ 22. C-0042, Request and confirmation criteria from SE Managing Director of Foreign Trade.

[256] Tr. Day 2, pp. 271:13-15, 273:17-274:6.

[257] C-0042, Request and confirmation criteria from SE Managing director of foreign Trade, p. 2.

255. The way Vento and MotorBike organized the Joint Venture had other important implications.

256. AED imported into the United States the totality of the parts and components that Vento would later assemble into finished motorcycles. Such imports were subject to U.S. customs laws and regulations. AED initially imported those inputs from China subject to import duty exemptions provided for in U.S. laws and regulations as evidenced by its 15 August 2003 and 22 January 2004 "Prior Disclosure[s] for Engine Kits," whereby it advised CBP that it had erroneously "imported engine components from China and classified them as unassembled engines under subheading 8407.31.0080, Harmonized Tariff Schedule of the United States (HTSUS), [pursuant to General Rule of Interpretation (GRI) 2(a)] […] subject to a free rate of duty." However, having "reviewed various [U.S.] Customs rulings interpreting GRI 2(a)" it had determined that it did not apply to its imported engine kits. Thus, AED requested that its "engine kits" be retroactively reclassified under the "HTSUS" and paid CBP the duties it had omitted.[258]

257. In contrast, the Relevant Mexican Investments imported motorcycle parts and components into Mexico. As such, they were subject to Mexican customs laws and regulations and, because the Relevant Mexican Investments had PROSEC authorization, imports were subject to Mexico's PROSEC Decree. R-0035 identifies the legal framework applicable to such imports by the Relevant Mexican Investments: the PROSEC Decree, the Customs Law and its Regulations, the Federal Tax Code, the Federal Administrative Procedure Law, two *Acuerdos* (administrative resolutions) of the *Secretaría de Economía*, one issuing general foreign trade rules and criteria and another one concerning procedures conducted by that agency, and Mexico's Tariff Schedule under the Import and Export Duties Law.[259] Obviously, none of these applied to AED's imports into the United States.

258. Vento assembled its motorcycles in Laredo, Texas, and then exported the finished goods to Mexico. It certified them as originating goods under the NAFTA, which allowed Mexican importers to claim NAFTA preferential tariff treatment. Vento's *finished*

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[258] R-0048, AED Prior Disclosures (15 August 2003 and 22 January 2004).

[259] R-0035, PROSEC, General Information.

motorcycles were thus subject to the NAFTA, and Mexican customs laws and regulations upon importation into Mexico before they could enter the Mexican market. The Relevant Mexican Investments assembled their motorcycles in Mexico and sold them directly in the Mexican market so the foreign trade legal framework applicable to Vento's motorcycles was simply irrelevant.

259. And, because Vento's motorcycles had claimed NAFTA tariff preferences, both the finished goods and the parts and components of which they were comprised were subject to the treaty's origin verification procedures. The Mexican Relevant Investments' motorcycles obviously were not subject to such procedures but neither were the imported parts and components because their origin was not in question —indeed it was entirely irrelevant whether they had been imported from China, India or any other country with which Mexico did not have a free trade agreement— and preferential duties were expressly authorized under PROSEC. Also, parts and components imported by the Mexican Relevant Investments under PROSEC were expressly meant to be used in industrial processes in Mexico to increase Mexican companies' competitiveness in the Mexican market and abroad.[260] There was nothing to be verified in connection with the duty-free importation of parts and components by the Relevant Mexican Investments.

260. Vento was not eligible for PROSEC authorization. Eduardo Díaz Gavito testified that only juridical persons constituted in Mexico and registered in Mexico's Federal Taxpayers Registry were eligible to receive PROSEC authorization.[261] Unlike the NAFTA, which provided for the elimination of tariffs on all goods, PROSEC was meant to stimulate production in Mexico in certain industrial sectors. Therefore, it granted tariff preferences to the importation of certain *inputs* (i.e. parts and components as well as machinery) listed in Article 5 of the PROSEC Decree (although the list of inputs was subsequently expanded through other regulations) in order to produce certain finished goods listed in Article 4 of the same Decree, including motorcycles. It did not establish preferences for finished goods. At the Hearing, Eduardo Díaz Gavito explained: "Specifically, if we read Article 4 of the Decree, it says that the goods to be manufactured are 22 tariff items, those listed on

[260] Expert Legal Opinion of Eduardo Díaz Gavito, ¶¶ 8-11; R-0035, PROSEC, General Information.

[261] Expert Legal Opinion of Eduardo Díaz Gavito, ¶ 12.

the slide, but what [sic, i.e. that] refers to motorcycles, three-wheel motorcycles, four wheel motorcycles and sidecars. The Mexican Government is interested in having this merchandise produced in México, and the benefit accorded for producing motorcycles in Mexico is to import certain inputs."[262]

261. The Claimant complained that Rule 2(a) was not applied to imports of motorcycle parts and components that the Relevant Mexican Investments made under PROSEC. The Respondent argued that PROSEC is an exception to the application of Rule 2(a). The Tribunal finds that it is. It makes no sense that a government program would provide tariff preferences for the importation of inputs, only to render such preferences meaningless by requiring that such inputs be classified as the finished good, which does not benefit from such preferences. More importantly, in contrast to Vento's assembly model, the Relevant Mexican Investments were not importing the totality of the parts and components under PROSEC. At the Hearing, Eduardo Díaz Gavito testified that for the production of motorcycles, Article 5 of the PROSEC Decree only includes inputs classified under 19 tariff items. He explained that originally it contained many more but import duties have been completely phased-out on a most-favored nation level over time.[263] Further, unlike Vento that from 2001-2004 assembled motorcycles exclusively from parts and components imported from China, the Claimant did not show that the Mexican Relevant Investments operated in the same manner. Other than the testimony of Isaac Calderón Birch, who in 2016 —eight years after the Joint Venture had ceased to operate— surmised that the six so-called comparators were importing all of the motorcycle parts and components from India and China, there is little evidence that would allow the Tribunal to conclude that that was in fact the case, especially in the relevant period (2001-2009). As noted, Honda and Yamaha were manufacturing motorcycles in Mexico —albeit, apparently fewer small displacement motorcycles— long before the Joint Venture came into being. Operadoras appears to have been moving gradually toward importing more parts and components, but even in 2017 it was not importing the totality of them[264] and there is no evidence as to what

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[262] Tr. Day 2, p. 246:2-9.

[263] Tr. Day 2, pp. 246:10-247:2.

[264] C-0042, Request and confirmation criteria from SE Managing director of foreign Trade.

might have been the mix of domestically sourced and imported inputs in 2008 (when it obtained its PROSEC authorization) and 2009.

262. The Claimant also complained that even if it had relocated its assembly lines to Mexico it would not have been able to obtain PROSEC authorization and a dispensation of Rule 2(a). Yet, that was not a result of the discriminatory application of the PROSEC Decree, but rather because of its business decision to operate exclusively as an assembler of motorcycles and source all of its parts and components from China.

263. Finally, we address the "Made in […]" labels. The Claimant complains that it faced "overwhelming competition" from motorcycles bearing "Made in Mexico" labels,[265] while SAT "deprived Vento of the ability to label its motorcycles as 'Made in U.S.A.'"[266]. However, there is simply no evidence on the record that Mexican authorities prevented Vento or MotorBike from labelling their motorcycles as "Made in USA." That is a country marking issue unrelated to the NAFTA Rules of Origin, which presumably is governed by U.S. laws and regulations over which Mexican authorities would have no jurisdiction, just as the "Made in Mexico" mark is governed by Mexico's laws and regulations. At the Hearing, César Núñez-Cázares presented a novel view which shows that he, at least, clearly understood the distinction between the NAFTA rules of origin and country of origin labelling. In response to questions from the Tribunal, he explained:

> [A]s far as I recall, unless there was a mistake, we never claimed that the label said "Made in the USA." Our product says "Assembled in the USA."[267]
>
> […]
>
> Until our last few operations that we carried out in 2005, we never removed our label that said "Assembled in the USA."[268]
>
> […]

[265] Memorial, ¶ 66.

[266] Memorial, ¶ 60.

[267] Tr. Day 2, p. 393:18-394:1 (Spanish).

[268] Tr. Day 2, p. 396:8-14 (Spanish).

> "Assembled in the USA" is the process that we do. We performed an assembly process. Originating does not determine that it is assembled in the United States. The originating is only determined by a rule of origin that specialists explained to us at the time how we had to determine it base on the NAFTA. And that's what determines the origin, not that I place a label on a product because I would have no basis to do so. Labelling —anyone can label a product and that does not mean that it's originating. We place our label based on our process […].[269] (Tribunal's translation)

264. In light of César Núñez-Cázares's testimony at the Hearing, the pleadings are simply wrong on this point. According to his evidence, Vento never labeled its motorcycles (or engines) as "Made in the USA"; it was neither prevented from labelling them as "Assembled in the USA" by Mexican authorities nor did it stop attaching that label to its motorcycles until it ceased production entirely. After Vento closed its Laredo assembly plant in 2004 and the Joint Venture ceased to operate, MotorBike and later Mototransp imported fully assembled motorcycles into Mexico, while the Relevant Mexican Investments imported motorcycle parts and components. MotorBike and Mototransp were not "forced" to label their products as "Made in China." Naturally, motorcycles manufactured in China can only be labelled as "Made in China." In any event, neither MotorBike nor Mototransp imported motorcycles from China pursuant to the Joint Venture Agreement and they are beyond the Tribunal's jurisdiction and the scope of this dispute.

265. In sum, the very strategic business choices that Vento and MotorBike made in structuring the Joint Venture placed the Joint Venture in very different circumstances from those of the Relevant Mexican Investments. Treatment accorded to the Joint Venture, including treatment accorded to Vento (and MotorBike) as they operated pursuant to the Joint Venture Agreement was simply not comparable. The Tribunal therefore finds that there was no breach of NAFTA Articles 1102 or 1103 by the Respondent and rejects those claims in their entirety. The Respondent's objection *ratione temporis* as it relates to NAFTA Articles 1102 and 1103 has consequently become moot.

[269] Tr. Day 2, pp. 397:16-398:12 (Spanish).

c. NAFTA Article 1104

266. The Claimant's NAFTA Article 1104 claim can be disposed of succinctly. The Claimant merely referred to NAFTA Article 1104[270] but it provided no explanation as to how the Respondent failed to accord Vento or the Joint Venture the better of the treatment required by NAFTA Articles 1102 and 1103 and it did not identify any loss or damage by reason of, or arising out of, a breach of that provision. Accordingly, the Tribunal dismisses that claim in its entirety.

B. NAFTA Article 1105

(1) The Parties' Positions

a. Claimant's Position

267. The Claimant argues that SAT officials, specifically those who conducted the origin verification of Vento's exports of motorcycles to Mexico in 2002 and 2003, including the verification visits to Vento and AED in 2003 and 2004, "were not operating under the normal rules of procedure known to Vento and MotorBike, but rather under a secret set of "marching orders" which required them to come to a particular, discriminatory conclusion, regardless of how they reached it," namely "to find some reason to stop the joint venture from being able to import U.S.A.-made, Vento-branded motorcycles into Mexico on the duty-free basis to which they were legally entitled." The Claimant contends that SAT officials did so by interpreting and applying Rule 2(a) in a novel way, even though it contradicted the interpretation of that rule by U.S. Customs Officials, and specifically targeted Vento since Rule 2(a) was not applied to any of Vento's competitors in Mexico and none of them were subject to "verification reviews" despite the "normal SAT practice [having been] to conduct verification reviews of an entire industry."[271]

268. The Claimant is not challenging before this Tribunal SAT's interpretation or application of Rule 2(a) as a matter of Mexican law or international law. It accepts that under the NAFTA, SAT had authority to practice origin verifications, including verification visits,

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[270] *See* Memorial, Section VI(A); Reply, Section V(A).

[271] Memorial, ¶¶ 176-178.

"anywhere in the NAFTA Free Trade Zone […] for the purpose of ensuring that all imports into Mexico receive the correct tariff classification and determination of origin" and that it also had the discretion to interpret and apply Rule 2(a). Moreover, it admits that "Claimant's objective is not to demonstrate that the SAT officials who cited Rule 2(a) when stripping Vento-branded motorcycles of duty-free status were incorrect as a matter of Mexican law." However, it argues that SAT officials exercised their authority at the behest of the incumbent motorcycle industry leaders and AMIA, the automotive industry association, "for the improper purpose of damaging Vento's business in Mexico." The Claimant also argues that some of the officials who were involved in the verification visit to Vento and AED in 2003 and whose testimony it submitted in support of its claim have now declared that, in their view, Vento appeared to be in compliance with its obligations under Mexican law but that "the audit team members relented when faced with sustained pressure from their superiors to follow the anti-Vento *línea*."[272]

269. According to the Claimant, Vento's competitors directly and through AMIA carried out a smear campaign against the Vento brand publicly claiming that Vento-branded motorcycles were of Chinese origin and lobbied the Mexican government for protection. AMIA accused Vento of transshipping Chinese motorcycles in the United States, and subsequently exporting them to Mexico as originating goods under NAFTA preferential tariff treatment. Allegedly, SAT officials who conducted the verification visits were told to expect to find transshipment operations and, in any event, instructed "to find the Vento MotorBike joint venture non-compliant with Mexican customs law" and that motorcycles assembled by Vento did not qualify as originating goods under the NAFTA for the purpose of protecting "established motorcycle firms in Mexico from an unwanted U.S. competition."[273]

270. In sum, the Claimant argues that the Respondent's conduct was arbitrary and discriminatory because SAT officials, acting under express "marching orders," specifically targeted Vento and the Joint Venture operations, to the exclusion of Vento's competitors

[272] Memorial, ¶¶ 73, 178; Reply, ¶¶ 317, 319-321.
[273] Memorial, ¶¶ 40-44, 55-59, 166; Reply, ¶¶ 55-61.

in Mexico —indeed at the behest of such competitors— in order to reach a predetermined outcome for the purpose of driving Vento out of the Mexican motorcycle market.

b. Respondent's Position

271. The Respondent argues generally that the Claimant has not established a breach of the customary international law minimum standard of treatment prescribed by NAFTA Article 1105. While it denies that "marching orders" were given, the Respondent argues that the Claimant has failed to establish that a prohibition against such type of orders can be characterized as a rule of customary international law. The Respondent asserts that the Claimant in reality is complaining about Mexican authorities having conducted a verification of origin and found a breach of the NAFTA's origin provisions and of Mexico's Customs Law and that the Claimant wants the Tribunal to rule on the outcome of the verification of origin, which has been decided by Mexican tribunals and would be beyond the Tribunal's jurisdiction.[274]

272. The Respondent denies that "marching orders" were issued to audit Vento for purposes of establishing a specific outcome. It admits that the verification of origin was prompted by the Mexican motorcycle industry acting through AMIA, but it explained in some detail the procedure leading to a decision by SAT to carry out the audit. Early in 2003, AMIA approached SAT's *Administración Central de Auditoría Fiscal Internacional* ("**ACAFI**") to complain that Vento-branded motorcycles were being imported into Mexico under NAFTA preferential tariff treatment but did not qualify as NAFTA originating goods. ACAFI requested that AMIA submit a formal complaint using an official form for that purpose. AMIA filed the complaint and submitted supporting evidence. It argued that Vento-branded motorcycles were manufactured and assembled in China except for the wheels and the handlebar, which were assembled in Vento's plant in Laredo and then exported to Mexico as NAFTA originating goods.[275]

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[274] Counter-Memorial, ¶¶ 280, 283-286, 292-294, 305-308; Rejoinder, ¶¶ 179-181.
[275] Counter-Memorial, ¶¶ 297, 299-302; Rejoinder, ¶¶ 166.

273. The Respondent noted that, although the Claimant submitted witness evidence that "marching orders" were issued, none of the Claimant's witnesses who allegedly received such "marching orders" identified who had issued those orders to each of them or pressured them to reach a predetermined outcome. The Respondent offered the witness statement of two of the superiors of the SAT officials who were present during the verification visits to Vento and AED — José Ramón Jáuregui Tejeda who was Gabriel Arriaga Callejas' immediate superior, and Gabriel Oliver García who was the highest ranking official within ACAFI at the time the verification visits were conducted. They denied having issued or relayed any such "marching orders" and, in any event, they both left SAT before the final decisions were issued.[276]

274. The Respondent argued that the decision to conduct an audit was not based exclusively on a complaint filed by private parties nor was it taken by a single official within SAT. It explained that SAT carried out its own preliminary investigation and gathered additional information and evidence through several of its own departments and outside sources including U.S. customs authorities. If ACAFI concluded that an audit was warranted, the case was submitted to an internal committee comprised of senior officials of different areas within SAT who would make a joint decision. The Respondent argues that this was the procedure followed in Vento's case.[277]

275. The result of the verification of origin was the Respondent's conclusion that motorcycles assembled by Vento in the United States did not comply with the NAFTA rules of origin and, therefore, they could not benefit from NAFTA's preferential tariff treatment. The Respondent argues that the views that certain persons who were involved in the origin verifications have expressed in the present proceedings to the effect that Vento was in full compliance with Mexican customs laws or regarding the application of Rule 2(a) are irrelevant because SAT's determination is correct as a matter of Mexican law since it has

[276] Counter-Memorial, ¶¶ 295-296; Rejoinder, ¶¶ 167, 183.
[277] Counter-Memorial, ¶¶ 297, 300, 303; Rejoinder ¶¶ 186-189.

been validated by Mexican courts, to which Vento had full access. Vento was able to fully exercise its rights to challenge such measures and such remedies were exhausted.[278]

(2) The Tribunal's Analysis

a. The Minimum Standard of Treatment

276. The NAFTA Free Trade Commission has clarified that NAFTA Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens (Joint Statement by the NAFTA Free Trade Commission, 31 July 2001).[279] There is no dispute between the Parties about that. Both Parties endorse the minimum standard of treatment under international law required by NAFTA Article 1105 as formulated by the ICSID tribunal in *Waste Management II*,[280] the infringement of which requires proof of conduct attributable to the State and harmful to the claimant that:

> […] is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety –as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[281]

277. However, the Respondent argues that, whether or not "marching orders" were issued, the Claimant must prove a rule of customary international law that prohibits the notion of "marching orders" and provide evidence of the relevant state practice and the necessary *opinion iuris.*[282] On the other hand, the Claimant accepts the *Waste Management II* formulation as a good starting point, and expands it in respect of obligations for the state to act transparently, to provide certainty and to refrain from affecting the basic expectations

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[278] Counter-Memorial, ¶¶ 293, 305, 308, 311; Rejoinder, ¶¶ 166, 172, 178.

[279] CL-0009, NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001).

[280] Memorial, ¶¶ 144-145; Counter-Memorial, ¶ 287.

[281] RL-0028, *Waste Management Incorporated v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004 ("***Waste Management II***"), ¶ 98.

[282] Counter-Memorial, ¶ 283.

of investors,[283] although the Claimant's main argument is that the conduct of SAT officials lacked due process, and it was arbitrary and discriminatory. The Tribunal will address these arguments in turn.

(i) "Marching orders" as a specific category of customary international law

278. The Respondent's argument that the Claimant would need to prove that customary international law specifically proscribes notions of so-called marching orders can be disposed of summarily. The Claimant is correct that it does not need to prove the existence of a discrete rule of customary international law that specifically prohibits particular actions that states or state agents engage in. While these types of rules may emerge, it is self-evident that this is not how international custom develops. Nor is there any process that typifies a list of specific actions under the aegis of customary international law.

279. "Marching orders" is, after all, simply how this Claimant chose to characterize the Respondent's conduct about which it complains. Nevertheless, the Claimant has described that conduct in sufficient detail and it contends that it breaches the customary international law standard of treatment as articulated by the *Waste Management II* tribunal, with which both Parties agree. As noted, the Claimant mainly argues that such conduct was arbitrary, discriminatory and lacking in due process.[284]

(ii) Evolving nature of customary international law

280. The Claimant contends that customary international law was not "frozen in amber" at the time of the *Neer* decision (by reference to how the *Pope & Talbot* tribunal characterized Canada's position regarding the fair and equitable treatment standard in that case) but, rather, that it is evolutive. While Claimant acknowledges that the minimum standard of treatment of aliens under customary international law goes back a long time, it argues that the fair and equitable treatment standard is more novel, dating back only to 1951, and that it was adopted to improve the minimum standard of treatment.[285]

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[283] Memorial, ¶¶ 143-145, 149-151.

[284] Memorial, ¶¶ 153 *et seq*.

[285] Memorial, ¶ 143, referring to *Pope & Talbot v Canada*, Award on Damages, IIC 195 (2002), 31 May 2002, ¶ 57.

281. Even if the expression "fair and equitable treatment" only began to be used in the early 1950s (Paparinskis notes: "The precise language of 'fair and equitable' or very similar to that was not unknown to the pre-Second World War international law" and he traces it as far back as the 17th century through those or comparable terms[286]), the standard was not created then, as suggested by the Claimant. Nor is there any support for the Claimant's proposition that that particular formulation was meant to improve a standard of customary international law by way of its inclusion in a treaty, that is as a matter of conventional international law. Evidently, custom is not created by decree, much less by inclusion of a particular expression or formula in a treaty.

282. Rather, the content of the minimum standard of treatment, including that of the fair and equitable treatment standard, must be found in customary international law. Certainly, customary international law evolves, but it does so in the same manner in which it is created: through international custom, that is from a general and consistent practice of States that they follow from a sense of legal obligations. The NAFTA Free Trade Commission has acknowledged that there is an international minimum standard of treatment of aliens and the fair and equitable treatment standard is part of that minimum.

283. As already indicated above, the Parties have endorsed the formulation of the minimum standard in *Waste Management II*. The Claimant even "recommends" that the Tribunal apply the formulation in this case. The Respondent has noted that the standard set by *Waste Management II* is high and has referred to *Cargill*, which it considers an amplification of *Waste Management II*. The *Cargill* tribunal observed that the words used to describe conduct in breach of the minimum standard, although imprecise, are significantly narrower than the standard present in the *Tecmed* award. [287] On the other hand, the Claimant refers to *Waste Management II* as a point of departure to expand the content of the minimum standard by relying on principles of good faith and due process and drawing wide ranging

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[286] Martins Paparinskis, The International Minimum Standard and Fair and Equitable Treatment (Oxford: OUP, 2013), pp. 21 *et seq*.

[287] Counter-Memorial, ¶ 288, referring to RL-0020, *Cargill, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009 ("***Cargill***"), ¶ 296.

conclusions for which the Claimant finds support in *Tecmed.*[288] The Parties' arguments for a standard higher or lower do not detract from *Waste Management II*, which, in the view of the Tribunal, reflects a proper understanding of the minimum standard of treatment.

284. Accordingly, the Tribunal will analyze the claims that the Respondent's actions breached NAFTA Article 1105 against the minimum standard of treatment as formulated by the *Waste Management II* tribunal that both Parties agree is a correct expression of NAFTA Article 1105. In essence, the Claimant complains of a lack of due process, arbitrary and discriminatory treatment in SAT's administrative proceedings which led to the 26 April 2004 and 20 September 2005 determinations that denied NAFTA preferential tariff treatment to motorcycles assembled by Vento in the United States and imported into Mexico during 2002 and 2003.

b. SAT's determinations are not inconsistent with Mexican or international law applicable to origin or customs procedures

285. The Claimant has stated that it does not seek "to demonstrate that the SAT officials who cited Rule 2(a) […] were incorrect as a matter of Mexican law"[289] and "[f]or the avoidance of any doubt, [that] Vento is not asking the Tribunal to determine whether the construction of LIGIE Rule 2(a) adopted by SAT officials was plausible or otherwise justifiable as a matter of municipal law."[290]. However, it is not merely a question of whether different

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[288] In arguing that the general principle of good faith informs the fair and equitable treatment standard, which therefore requires a state to act transparently to provide certainty to foreign investors, and to refrain from affecting their basic expectations, the Claimant misquoted from Bing Cheng for the proposition that, in the absence of good faith, international law would be a mockery. Memorial, ¶¶ 149-150, referring to, Bin Cheng, General Principles of Law as Applied by International Court and Tribunals (CUP: Cambridge, 2006) at 113. Bing Cheng, however, was referring specifically to the principle of *pacta sunt servanda*. The text quoted by Bin Cheng comes from the Interlocutory Decision on Jurisdiction in the *Rudloff case* of the United States – Venezuela Mixed Claims Commission (1903) where Umpire Barge rejected Venezuela's jurisdictional objections because the two nations had agreed in a Protocol of 17 February 1903 to submit to the Commission "[a]ll claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments […]." In his decision, Umpire Barge recalled "that the Commission, whose whole jurisdiction is only founded on this agreement, has certainly above all to apply the great rule, "*pact servanda*," without which international as well as civil law would be a mere mockery […]." Rudloff Case (Interlocutory), US-Venezuela Mixed Claims Commission (1903-5) UNRIAA 255. The Claimant quoted Bin Cheng as follows: "Good faith 'is [also] an indisputable rule of international law, without which the very notion of international law itself would be a mockery.'" Memorial, ¶ 149. The Tribunal disapproves of these tactics.

[289] Memorial, ¶ 73.

[290] Memorial, ¶ 178; Reply, ¶¶ 329-330.

legal interpretations were plausible. It bears emphasizing at the outset that the evidence before this Tribunal shows that:

a. SAT's determinations that motorcycles assembled by Vento in the United States and exported to Mexico in 2002 and 2003 were not originating goods and could not benefit from NAFTA preferential treatment, including through the application of Rule 2(a), stand as a correct application of Mexican law;

b. in deciding the challenges that both Vento and AED brought against SAT's decisions, the Mexican courts interpreted —albeit for internal law purposes— the relevant provisions of NAFTA Chapters 4 and 5 and they are the only evidence before this Tribunal of the interpretation of those provisions to the case at hand by a competent court; and

c. neither SAT's determinations nor the Mexican courts' decisions were challenged by the United States as inconsistent with Mexico's NAFTA obligations, the United States being the only Party that could have raised a claim under the appropriate dispute settlement provisions (i.e. NAFTA Chapter 20) regarding the interpretation or application of NAFTA Chapters 4 and 5.

(i) SAT's determinations are a correct application of Mexican law

286. The Claimant admits: "Vento exhausted its local remedies by challenging the final decisions relating to the 2002 and 2003 audits before Mexican federal courts."[291] The same holds true of AED. Indeed, Vento and AED resorted to SAT's internal administrative revocation proceedings and then separately challenged SAT's determinations before Mexico's courts. Each of them first sought to annul SAT's determinations before the TFJFA, which confirmed them; and each of them subsequently challenged the constitutionality of those judgments before Mexico's federal *amparo* courts. Different

[291] Memorial, ¶ 114.

courts with different compositions decided those challenges. The final determinations and judgments in every case consistently upheld SAT's decisions.

287. The Claimant has not raised a denial of justice claim. The most that it does is to assert faintly that "Vento's challenges took far too long – twelve years – to resolve"[292], something that "seemed like an inordinate period of time even for the Mexican court practice."[293] Yet, it did not provide any details of how those proceedings unfolded or what may have delayed a final decision.

288. The evidence shows that Vento specifically challenged SAT's determinations on the administrative appeal concerning the 2003 and 2004 origin verifications before the TFJFA because SAT issued both of them long after the legal deadlines had passed. The TFJFA rejected the claims because the law expressly gives private parties the option to either challenge a government agency's failure to issue a determination within the legal timeframe, or to wait for the agency to issue the determination. The TFJFA found that SAT had indeed exceeded the legal timeframe for issuing its respective decisions on the administrative appeals. However, it noted that it was open for Vento at all times to challenge SAT's failure to issue a timely determination and reasoned that, having chosen to wait, it was precluded from complaining about the delay.[294]

289. As it turns out as well, the Respondent's evidence shows that Vento in fact succeeded in three separate *amparo* proceedings involving SAT's 2004 and 2005 determinations, respectively, twice in 2013 and once again in 2015 because, among other things, the TFJFA had failed to consider Vento's evidence that the U.S. customs authorities had allegedly determined that Rule 2(a) did not apply to the subject goods —an allegation that the Claimant has also made before this Tribunal. Both the Ninth Circuit Court in 2013 and 2015 and the Fourth Circuit Court in 2013 remanded the corresponding judgments to the TFJFA which, accordingly, in each case revoked its judgment, duly considered the evidence and otherwise complied with the *amparo* courts' decisions and rendered new

[292] Memorial, ¶ 202.

[293] Memorial, ¶ 75.

[294] R-0127, Court judgments confirming origin verification determinations, pp. 416-418 and 495-497.

judgments again confirming SAT's decisions. Vento again challenged each of those judgments before the *amparo* courts. Thus, whilst the Claimant has provided no details of how the domestic administrative and judicial proceedings unfolded following the issuance by SAT of its 2004 and 2005 determinations, or even attempted to explain by what standards they took long, the Claimant cannot complain that such proceedings took longer because it exercised its rights even if only with partial success.[295]

290. The Claimant submitted the evidence of Gabriel Arriaga Callejas who testified that "the determination made by SAT to Vento had no precedent, and it was a complete manipulation of the regulations at hand in order to determine a breach in terms of Rule 2(a)."[296] In the view of the Tribunal, there is very little credibility to be given to Gabriel Arriaga Callejas's testimony. For one thing, while he speaks of SAT as though it were a third person, he was part of SAT himself, and he was personally and directly involved as a lawyer in drafting and issuing the 2004 and 2005 determinations in question. Indeed, he initialed the 2004 determination before José Alberto Ortúzar Cárcova signed it and it was notified to Vento. By April 2004, when the determination was issued, both Gabriel Oliver García and José Ramón Jáuregui Tejeda, Gabriel Arriaga Callejas's immediate superior, had left SAT and neither of their positions had been filled. Thus, Gabriel Arriaga Callejas was at that time the senior lawyer within ACAFI and the official who was ultimately responsible for ensuring the legality of that determination.

291. Gabriel Arriaga Callejas also testified to the existence of the so-called marching orders. Mr. Arriaga asserted that "[a]ny official who transgresses these informal rules will likely lose any opportunity for promotions and in some cases could be regarded as disobeying an order of a superior, which leads to the immediate dismissal from the position."[297] At the Hearing he testified that he considered that the situation surrounding issuance of the determinations was absolutely irregular.[298] Yet, he not only failed to report it as such (he

[295] R-0127, Court judgments confirming origin verification determinations.
[296] First Witness Statement of Gabriel Arriaga Callejas (9 July 2018), ¶ 33.
[297] First Witness Statement of Gabriel Arriaga Callejas (9 July 2018), ¶ 16.
[298] Tr. Day 3, p. 479:14-16.

testified that he had no one to report it to,[299] which the Tribunal finds very hard to believe), but he continued to work at SAT for five more years and was promoted twice (while his immediate superiors, as noted, had left SAT prior to the first determination being issued).[300]

292. The evidence before this Tribunal does not show anything irregular about the application of Rule 2(a), but there is very little credibility to be given to the statement of a witness who accepts that he committed an irregularity and, by his own admission, benefitted from that. In any event, whatever Gabriel Arriaga Callejas may have believed then or now, even the Claimant accepts that SAT's determinations, and specifically its application of Rule 2(a), were "plausible enough to survive judicial scrutiny"[301] and, more importantly, the overwhelming and consistent evidence of Mexican administrative authorities on appeal, and four —likely five— different Mexican federal courts (the TFJFA on separate cases brought by Vento and AED, respectively, and three federal *amparo* courts, the Fourth and Ninth Circuit Courts in *amparo* actions brought by Vento involving, respectively, SAT's 2004 and 2005 determinations, as well as the Eighteenth Circuit Court (and likely another circuit court in a different amparo proceeding brought by AED)) is that SAT's determinations of 2004 and 2005 are a correct application of Mexican law.

(ii) SAT's determinations stand as a correct application of NAFTA for purposes of Mexican law

293. The TFJFA reviewed the consistency of SAT's 2004 and 2005 determinations with NAFTA Chapters 4 and 5. The High Chamber of the TFJFA had such jurisdiction: "The Second Section of the High Chamber of the Fiscal and Administrative Justice Federal Tribunal is competent under section XIII of Article 14 and section VIII of Article 23 of its Organic Law, because the claimant [Vento] argues that the North American Free Trade Agreement was breached to its detriment […]." Quoting relevant jurisprudence, the court added "Sections of the High Chamber are competent to decide cases where the determination that is challenged is based on an international trade treaty or agreement

[299] Tr. Day 3, p. 479:13-21.

[300] The Tribunal further considers Mr. Arriaga's testimony below in ¶¶ 306 and ff.

[301] Reply, ¶ 61.

entered into by Mexico or where the claimant submits that such treaties or agreements have not been applied to its benefit."[302] (Tribunal's translation). As noted, the TFJFA judgments were reviewed by Mexico's federal *amparo* courts.

294. Mexican courts found SAT's determinations to be consistent with Mexico's obligations under Chapters 4 and 5 of the NAFTA. To be sure, those decisions concern the interpretation and application of the NAFTA within the realm of Mexico's internal law. Nevertheless, they are the only evidence before this Tribunal of the interpretation of those provisions to the case at hand by a competent court.

c. Mexico's administrative and judicial decisions have not been challenged as a matter of international law

295. The Claimant argues that "U.S. Customs and Border Protection Agency ("U.S. CBP") certified that imported engines and motorcycles components by AED are not subject to the General Rules of Interpretation 2(a)" and that they "qualified as having been made in the U.S.A. under the terms of NAFTA Article 401 and Annex 401."[303] Those statements are not accurate. CBP never so certified.

296. As shown by the Respondent, AED itself began importing motorcycle parts and components free of duty and classifying them as unassembled kits under Rule 2(a):

> Since 2001, AED has imported engine components from China and classified them as unassembled engines under subheading 8407.31.0080, Harmonized Tariff Schedule of the United States (HTSUS) subject to a free rate of duty […] [having] concluded that the components comprising the engine kits should be classified as unassembled engines pursuant to General Rule of Interpretation (GRI) 2(a).[304]

297. Shortly after the first verification visit to Vento's assembly plant in Laredo and only a few days before the verification visit to AED's plant, AED submitted to the CBP a "Prior disclosure for Engine Kits Entered Under Subheading 8407.31.0080," whereby it declared

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[302] R-0127, Court judgments confirming origin verification determinations, p. 34.

[303] Memorial, ¶¶ 22, 48, 176; Reply, ¶ 65.

[304] R-0048, AED Prior Disclosures of 15 August 2003, and 22 January 2004, p. 1.

that it had determined that Rule 2(a) did not apply to its imported "engine kits." Instead, they should be classified as "bulk components destined for an assembly operation in Laredo." AED assessed and paid the import duties that it had omitted.[305] AED later requested a "Classification Ruling" from the CBP: "At issue is whether the engine components in question must be classified as unassembled engines […] pursuant to General Rule of Interpretation ("GRI") 2a."[306] It specifically described such "engine components in question" as only "crankshaft [sic] and spark plugs used in the production of motorcycles" and asked: "If the engine components are not classified as unassembled engines under heading 8407, under which subheadings should the crankshafts and sparkplugs [sic] for engines be classified?"[307] The CBP replied: "The articles in question are described as spark plugs and crankshafts for internal combustion engines for motorcycles."[308] As a result, it found: "Based on the facts that you [AED] have made available, we find that the imported engine components are not unassembled engines within the meaning of Note 2(a) of the General Rules of Interpretation (GRI). Accordingly, <u>the subject spark plugs and crankshafts</u> are to be separately classified."[309] This letter is referred to in later correspondence as "the New York Ruling."

298. In September 2004, shortly after SAT issued its first determination concerning motorcycles imported during 2002, the CBP sent a letter to José Alberto Ortúzar Cárcova (who was present during the 2003 verification visit and who had just signed SAT's 26 August 2004 determination). The letter stated that the New York Ruling had "classified AED's unassembled engines as individual components and not as a General Interpretative Rule (GIR) 2(a) unassembled engine" and that, consequently, SAT's determination "is in conflict with our [i.e. CBP's] interpretation of the Harmonized System and the ruling issued to AED for the components that they import into the United States [i.e. the New York

[305] R-0048, AED Prior Disclosures of 15 August 2003, and 22 January 2004.
[306] R-0050, AED's letter requesting advisory ruling, p. 1.
[307] R-0050, AED's letter requesting advisory ruling, pp. 1, 3.
[308] C-0030, Results of AED Inspect by CBP, p. 1.
[309] C-0030, Results of AED Inspect by CBP, p. 2 (emphasis added).

Ruling].” Thus, it warned: “Based on our ruling and examination by CBP personnel, we believe that a successful claim can be made under Article 401(b).”[310]

299. It is quite obvious that the CBP letter to José Alberto Ortúzar Cárcova misconstrued the New York Ruling. Evidently, spark plugs and crankshafts —two of the approximately 2,000 parts that make up a motorcycle engine— are not motorcycle engines and should be classified separately, which is what the New York Ruling determined.

300. This issue was analyzed in detail by the TFJFA on two separate occasions. Indeed, that was the reason why the Fourth and Ninth Circuit Courts independently granted Vento *amparos* and remanded the judgments. Both Circuit Courts instructed the TFJFA to consider the New York Ruling and related evidence. The TFJFA did and arrived at the conclusion that the New York Ruling said exactly what it says: spark plugs and crankshafts are not unassembled motorcycle engines. Consequently, the New York Ruling had no bearing on SAT's application of Rule 2(a). The Circuit Courts found no fault with the revised judgments, and ultimately denied Vento's subsequent *amparo* actions.[311]

301. Although the author of the letter to José Alberto Ortúzar Cárcova expressed CBP's belief that a successful claim could be made against Mexico under NAFTA Chapter 4, the United States never did so. This Tribunal does not need to speculate why the United States customs authorities did not accurately describe the New York Ruling or why the United States did not file a claim against Mexico. The fact is that it did not, and SAT's determinations stand unchallenged as a matter of the interpretation and application of NAFTA Chapters 4 and 5.

(i) Alleged lack of due process

302. The Claimant complains of a lack of due process in the origin verifications that culminated in SAT's 2004 and 2005 determinations that denied NAFTA preferential treatment to motorcycles that Vento exported to Mexico during 2002 and 2003. The Claimant's main argument is that SAT officials who were involved in those origin procedures were under

[310] C-0004, CBP's Communication to Senator Cornyn, pp. 4-5.
[311] R-0127, Court judgments confirming origin verification determinations.

"secret 'marching orders' which compel[ed] them to arrive at a pre-determined result, regardless of whether that result is objectively correct or appropriate" in order "to halt and reverse Vento's expansion into Mexico's motorcycle market."[312]. It argues:

> [The] "secret practice of issuing and observing "marching orders" is blatantly inconsistent with the rule of law" [and offends] "the principle of due process, as it is impossible for a foreign investor whose enterprise has become the target of a marching order to even know the case against him, much less defend against it. Moreover, marching orders necessarily constrain SAT officials from performing their statutory duties in a fair and objective manner, forcing them to exercise their authority for an improper purpose instead – viz. to reach a predetermined result dictated from above.[313]

303. The Claimant adds that implementation of such "marching orders" was necessarily non-compliant with basic norms of due process because they were not known to Vento, which rendered it impossible for it to obtain a fair administrative adjudication of its case and, indeed, denied it "elementary due process" because, if an effective remedy was available from Mexico's courts, it was deprived of it as it did not learn that SAT officials had acted under "marching orders" until after they had exhausted all avenues of review and appeal.[314]

304. The Claimant relies principally on the witness statements of Gabriel Arriaga Callejas and Guillermo Massieu Urquiza. It also submitted the witness statements of José Alberto Ortúzar Cárcova and Daniel Ortiz Nashiki. The latter two, along with Gabriel Arriaga Callejas, were three of the four SAT officials who conducted the verification visits to Vento's and AED's plants in Laredo, Texas in 2003. Notably, however, neither Mr. Ortúzar Cárcova nor Mr. Ortiz Nashiki testified that they were under "marching orders."

305. Guillermo Massieu Urquiza's testimony is of no assistance to the Tribunal because he was offered as a fact witness but he was not involved in, and has no personal or direct knowledge of, any of the relevant facts of this case. He testifies that he "was not part of

[312] Memorial, ¶¶ 167, 175.

[313] Memorial, ¶ 172.

[314] Memorial, ¶¶ 15, 175.

the team that audited Vento" in 2003 and 2004.[315] He joined SAT in 2009, shortly before SAT decided the administrative appeals of its 2004 and 2005 determinations (revocation proceedings) but he "did not serve in the revocations appeal area" while he worked for SAT.[316] His only involvement was minimal, sometime between 2011 and 2013 (he does not specify when) because the legal department in charge of defending SAT's determinations in the annulment proceedings brought by Vento (and AED) before the TFJFA "requested a technical opinion" (presumably from him or from the area where he worked) "to respond to arguments made by the taxpayer" (presumably Vento) "in his claim for nullity," although he was not personally involved in those proceedings either.[317]

306. As already noted, Gabriel Arriaga Callejas's testimony is simply not credible. He testifies that on three occasions, including in respect of Vento's origin verification, he "personally witnessed marching orders from higher-ranking officials being performed by public servants which required them to deviate the legal criteria that should have been applied in the circumstances" (sic).[318] He states specifically "[I was] told by my superior to make sure that there were indeed transshipment operations to re-label the motorcycles" assembled by Vento in Laredo and then exported to Mexico.[319] He explained: "I understood this aspect of his direction to be a marching order and confirmed it with Mr. [José Ramón] Jáuregui [Tejeda]. We were directed to ensure that we found something against Vento's operations in Mexico."[320] He adds that "[e]very member of the team who participated in Vento's on-site audit had been told that Vento was allegedly transshipping all of the motorcycles it sold in Mexico and that it had to be stopped."[321] Mr. Arriaga, however, did not identify who actually gave him those "marching orders." His immediate superior was José Ramón Jáuregui Tejeda. Mr. Arriaga initially declared that he confirmed with Mr. Jáuregui the "marching orders" that both of them allegedly received from an unidentified person. He did not say that Mr. Jáuregui Tejeda was the one who gave him such orders. Mr. Jáuregui

[315] First Witness Statement of Guillermo Massieu Urquiza (12 July 2018), ¶ 19.
[316] First Witness Statement of Guillermo Massieu Urquiza (12 July 2018), ¶ 22.
[317] First Witness Statement of Guillermo Massieu Urquiza (12 July 2018), ¶ 16.
[318] First Witness Statement of Gabriel Arriaga Callejas (9 July 2018), ¶ 18.
[319] First Witness Statement of Gabriel Arriaga Callejas (9 July 2018), ¶ 25.
[320] First Witness Statement of Gabriel Arriaga Callejas (9 July 2018), ¶ 25.
[321] First Witness Statement of Gabriel Arriaga Callejas (9 July 2018), ¶ 26.

Tejeda and Mr. Oliver García, who was the head of ACAFI at the time the verification visits took place, denied that either gave, received or confirmed such "marching orders." In his second witness statement, Mr. Arriaga Callejas declared: "specifically with respect to the marching orders I was given in Vento's particular case, it is important to add the instructions I was given by my hierarchical superior upon ordering the verification visit to Vento, who expressly stated that we should find, by whatever means possible, reasons to disqualify said motorcycles as originating goods."[322] (Tribunal's translation).

307. It is telling, however, that even then, faced with Gabriel Oliver's and José Ramón Jáuregui's rebuttal, Mr. Arriaga Callejas appears to suggest that it might have been Mr. Jáuregui Tejeda who gave him such orders —which meant he was changing his prior testimony— but still failed to identify the person by name and to provide any details of the circumstances in which such orders were given specifically to him. Furthermore, at the Hearing, when Mr. Arriaga Callejas explained why he had not reported to his superiors at SAT the 2004 determination as having been an "irregular situation" (by then both Mr. Oliver García and Mr. Jáuregui Tejeda had left SAT), he responded that he had no access to them: "No. There was no access. The general administrator did not grant anybody access. So we did not have that possibility to go higher up."[323]. (Tribunal's translation). The Claimant attempts to shrug-off the evident inconvenience of a nameless, unidentified senior official: "Obviously, it is in the very nature of these marching orders that the official at the other end of the line, i.e. the person called upon to implement it, is generally unaware of who first requested it."[324] But that does not dispose of the issue. Gabriel Arriaga Callejas has testified that someone personally gave him specific orders. Yet, he has failed to give any indication of who that person might have been.

308. That is not the only inconsistency in the Claimant's argument and Mr. Arriaga Callejas's testimony. The Claimant argues that "by the time the first origin verification review was conducted in June 2003, it appears that SAT officials were united in having already made

[322] Second Witness Statement of Gabriel Arriaga Callejas (4 March 2019), ¶ 61.
[323] Tr. Day 3, p. 556:5-10 (Spanish).
[324] Reply, ¶ 323.

up their minds that Vento motorcycles were non-originating and that Vento was engaged in the illegal transshipment of Chinese motorcycles through the U.S. into Mexico, falsely claiming their products to have been made in the U.S.A."[325] Mr. Arriaga Callejas testified that he was personally ordered to find that Vento was engaged in illegal transshipment operations, as had been every other "member of the team who participated in Vento's on-site audit." Yet, his testimony is at odds with that of José Alberto Ortúzar Cárcova who testified that AMIA had expressed concern about Chinese motorcycles that were being transshipped through the United States by Vento, competing unfairly with motorcycles produced by the Mexican industry and had taken a significant share of the Mexican market in a short time.[326] José Alberto Ortúzar Cárcova declared that, after internal meetings at SAT and initial deliberations: "The first instructions I received then were to analyze the information and verify it against the information in the authority's [i.e. SAT's] institutional systems […] [and] to contact the complainants to better understand the issues," which he did "in order to learn first-hand of the alleged transshipment of motorcycles by Vento."[327] (Tribunal's translation). In fact, according to Daniel Ortiz Nashiki, Mr. Ortúzar Cárcova relayed these instructions to him and it was Mr. Ortiz Nashiki who actually accessed SAT's databases and gathered all the information concerning imports of Vento motorcycles, as well as information about other importers.[328] Having met with AMIA, Mr. Ortúzar Cárcova requested that it file a formal written complaint in accordance with SAT's guidelines for such purposes, and to provide "the background, data and information that would allow the area where I was working to better direct its analysis processes."[329] (Tribunal's translation). Mr. Ortúzar Cárcova's evidence shows that he led the initial analysis of all that information and he concluded that an origin verification was warranted. The matter was then submitted to the Audit Programming Committee comprised of senior officials of different areas within SAT, which reviewed it and authorized initiating an origin verification.[330] Mr. Ortúzar Cárcova was the highest-ranking official during, and

[325] Reply, ¶ 55.

[326] Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶ 11.

[327] Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶¶ 16-17.

[328] Witness Statement of Daniel Ortiz Nashiki (6 March 2019), ¶ 7.

[329] Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶ 19.

[330] Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶ 20.

the one who led, the verification visits to Vento's and AED's plants. It appears that he, himself, had formed the view that SAT needed to investigate whether Vento was engaged in transshipment.

309. In any event, even if he or the other auditors who visited Vento's and AED's plants in 2003 were instructed to find that Vento was transshipping Chinese motorcycles, they plainly disregarded any such instructions. The statements of both the Claimant's and the Respondent's witnesses (even that of Mr. Arriaga Callejas) are consistent in this respect. More importantly, there is no mention at all of transshipment or similar operations in any of SAT's decisions. SAT found that Vento was engaged in simple assembly operations[331] —just as they have been described repeatedly by the Claimant in these proceedings. The decisions turn on an entirely different issue that the Tribunal has already addressed and will not repeat here.

310. Nor does the evidence support that the SAT auditors or other officials who were involved in the origin verifications were compelled —or even predisposed— "to arrive at a pre-determined result." Quite the opposite. Other than the testimony of Mr. Arriaga Callejas, that of the Claimant's witnesses, José Alberto Ortúzar Cárcova and Daniel Ortiz Nashiki, as well as that of the Respondent's witnesses, Gabriel Oliver García and José Ramón Jáuregui Tejeda, is largely consistent, but José Alberto Ortúzar Cárcova persuasively articulates that the auditors' modified and refined their thinking and reasoning as the verification progressed. Preliminary conclusions were put to the test; more evidence was gathered and analyzed; and officials met and deliberated regularly before reaching a final decision in a collegiate manner. As noted, at the outset AMIA approached SAT to complain about Vento's operations. José Alberto Ortúzar Cárcova requested that it submit a formal written complaint and to provide supporting evidence and information, which AMIA did. The complaint was analyzed and submitted to a Committee which authorized commencing an origin verification.[332] A verification visit took place at Vento's assembly plant in Laredo where the auditors verified that Vento had an assembly plant with around

[331] C-0026, 2004 and 2005 SAT final origin determinations, p. 36.

[332] Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶ 20.

50 workers.[333] Upon returning from the first verification visit, Mr. Ortúzar Cárcova reported to Mr. Oliver García that, in his view, "the exported goods under preferential tariff treatment complied with the specific rule of origin and therefore qualified as originating goods."[334] (Tribunal's translation). Nonetheless, Mr. Ortúzar Cárcova declared that that was only a preliminary conclusion that needed to be corroborated.[335] Consequently, the officials involved in the origin verification held numerous meetings, and analyzed all the information that Vento had supplied, including invoices and declarations of origin issued by AED.[336] As a result, the group as a whole agreed to audit AED because the engine "was an essential component and its value was decisive in the regional value content calculation."[337] (Tribunal's translation). Following the verification visit to AED, the documents gathered during both verification visits were comprehensively analyzed and after deliberating over the results, the officials involved concluded as a group that Rule 2(a) was applicable and found that the subject motorcycles, in fact, did not qualify as NAFTA originating goods.[338]

311. There was nothing "secretive" about the process either. The Claimant's evidence shows that AMIA had made its position publicly known and it was widely reported in the press.[339] In fact, that is what prompted the Claimant to invite Mr. Mario Córdova López, Central Administrator of Customs Audits, to visit Vento's plant in December 2002 and see first-hand its assembly operations.[340] Mr. Córdova López is reported by one of Mexico's leading newspapers to have said then: "if there are reasonable doubts about the origin of the vehicles, an international audit is undertaken" and added that SAT would likely visit Vento's plant but explained that the process leading to an international audit was difficult

[333] Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶ 22.
[334] Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶ 25 .
[335] Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶ 26.
[336] Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶ 26.
[337] Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶ 27.
[338] Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶ 28.
[339] C-0011, César Sánchez, *Liverpool Rejects Accusation*s, Reforma newspaper published (8 December 2002); C-0014, Media smear campaign examples; C-0015, AMIA public statement.
[340] First Witness Statement of César Núñez-Cázares (4 June 2018), ¶ 19.

and it would take several months.[341] Mr. Ortúzar Cárcova described the internal deliberation and decision-making processes within SAT which, in fact, took several months before SAT, in April 2003, informed the U.S. customs authorities that it would undertake an origin verification of motorcycles exported by Vento in 2002, and later that same month notified Vento commencement of the origin verification.[342]

312. In every hierarchical structure there is an inherent line of authority or command. The executive branch of essentially all governments is organized in this manner. Instructions are given, received and executed as a matter of course. To say that officials lower in the hierarchy receive and execute instructions or orders given by higher-ranking officials is nothing more than to describe one aspect of how governments —at least their executive branches— operate. Nonetheless, it is not unusual for governments to introduce checks and balances into these lines of authority or command. Both the Claimant's and the Respondent's witnesses have shown that SAT operated in this manner. Some of the key decisions were taken in a collegiate manner. For instance, the decision to initiate the origin verifications was presented to, and authorized by, the Audit Programming Committee; and the application of Rule 2(a) was the result of internal deliberations and agreed to jointly by the officials involved in the verification proceedings, including Mr. Ortúzar Cárcova. Private parties are generally not privy to government agencies' internal deliberations and decision-making processes, but that does not make them "secretive," in the sense that they are covert or deliberately concealed from interested persons and the public. And SAT's decisions were ultimately subject to scrutiny by independent tribunals. There was no mysterious hand that rocked the cradle.

313. As regards the administrative process itself, once the decision to initiate the verification was taken by the Audit Programming Committee, SAT informed the U.S. customs authorities and a few days later notified Vento.[343] Vento consented to the verification visit in May 2003.[344] The visit took place as planned from 2-6 June 2003. In July 2003, SAT

[341] C-0014, Media smear campaign examples, p. 4.

[342] C-0028, 2003 Official notification to practice a verification of origin on Vento.

[343] C-0028, 2003 Official notification to practice a verification of origin on Vento.

[344] R-0045, Consentimiento de Vento para la visita de verificación.

informed AED that it intended to visit its plant.[345] The visit took place on 18 August 2003.[346] On 11 September 2003, SAT informed AED that its engines did not meet the NAFTA Rules of origin.[347] On 13 January 2004, SAT presented its conclusions to Vento and notified Vento that it intended to deny preferential tariff treatment, affording it an opportunity to present further evidence and to rebut its preliminary findings.[348] Vento replied on 4 February 2004. SAT issued its final determination on 26 April 2004.[349] Vento resorted to the administrative revocation proceedings on 19 August 2004.[350] The origin verification concerning motorcycles exported in 2003 followed the exact same process, except that information was gathered from Vento and AED through written questionnaires and no verification visits took place.[351] The Tribunal has already referred to the administrative appeal and the judicial processes that followed.

314. NAFTA's provisions on administrative proceedings and judicial review and appeal contained in NAFTA Articles 510, 1804 and 1805 require that persons of another Party that are directly affected by administrative proceedings —in the present case Vento (but also AED)— are provided notice when a proceeding is initiated, including a description of the proceeding, a statement of the legal authority under which the proceeding is initiated and a general description of any issues in controversy; that such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action; that procedures are in accordance with domestic law; that judicial, quasi-judicial or administrative tribunals are available for the purpose of the prompt review and, where warranted, correction of final administrative actions; that such tribunals be impartial and independent of the office or authority entrusted with administrative enforcement and they do not have any substantial interest in the outcome of the matter; that Vento (as well as AED) had a reasonable opportunity to support or defend their respective positions; and that decisions were based on the evidence and submissions

[345] C-0026, 2004 and 2005 SAT final origin determinations.
[346] C-0026, 2004 and 2005 SAT final origin determinations.
[347] C-0004, Communication issued by the U.S. CBP to Senator John Cornyn who acted on behalf of Vento.
[348] C-0026, 2004 and 2005 SAT final origin determinations, p. 37.
[349] C-0026, 2004 and 2005 SAT final origin determinations.
[350] R-0127, Court judgments confirming origin verification determinations, p. 10.
[351] C-0026, 2004 and 2005 SAT final origin determinations.

of record and the record compiled by the administrative authority. As a factual matter, the Tribunal finds that Mexico's legal processes in the present case met such requirements.

315. As a consequence of the foregoing, the Tribunal rejects the Claimant's claim of breach of NAFTA Article 1105 for lack of due process.

(ii) Alleged arbitrariness

316. There is some overlap between the claims of arbitrariness and lack of due process because according to Claimant issuing the so-called marching orders was arbitrary in itself and also because they were kept secret from the Claimant.[352] The Tribunal has already addressed these two issues and rejects the claim that the Respondent acted arbitrarily for the same reasons already given. In its Reply, the Claimant raised an alternative claim that the Respondent arbitrarily denied the Joint Venture the right to use PROSEC in a manner similar to Mexican manufacturers. The Tribunal has also addressed this matter. The Tribunal rejects this claim as well as it relates to NAFTA Article 1105.

317. Even though the Claimant accepts that SAT's application of Rule 2(a) was "seemingly justified, or at least justifiable" under Mexican law, it contends that it was also legally open to SAT not to have applied the rule and to simply accepted that motorcycles assembled by Vento were NAFTA originating goods.[353] However, according to the Claimant, SAT abused its discretionary authority "for the improper purpose of damaging Vento's business in Mexico" to protect the Mexican-based motorcycle industry.[354] The Claimant expressed that its "legitimate expectations rested on SAT officials performing their duties without preference, for a proper purpose, and in conformity with due process."[355]

318. Firstly, as demonstrated by the Respondent, AED had concluded on its own that Rule 2(a) applied to its imports of engine parts and components into the United States, which allowed it to benefit from duty free treatment.[356] Even if, on advice of counsel, it later rectified that

[352] Memorial, ¶ 179.
[353] Memorial, ¶ 170.
[354] Memorial, ¶¶ 126, 161, 163, 170, 179; Reply, ¶ 317.
[355] Memorial, ¶ 164.
[356] R-0048, AED Prior Disclosures of 15 August 2003, and 22 January 2004.

action, reclassified the affected imports and paid the additional duties owed, AED and Vento can hardly complain that a similar application by SAT of the very same rule was arbitrary.

319. International trade and investment agreements are not a shield against domestic competition. Given Vento's penetration of the market, it is not surprising in the least that its Mexican competitors would react and complain to the authorities. Foreigners are entitled to due process, but international agreements are no safe-passage against domestic legal actions, even if they are instigated by local competitors. The fact that authorities respond to complaints filed by local businesses does not establish complicity and, as noted in the preceding section, the Tribunal finds that in this case there was none. As noted, the statements of the Respondent's witnesses, Gabriel Oliver García and José Ramón Jáuregui Tejeda, and the Claimant's witness, José Alberto Ortúzar Cárcova, show that there was nothing arbitrary in the decision to verify the origin of the imported motorcycles. Vento's motorcycles were comprised exclusively of Chinese parts and components. That was its business model. When, according to Mr. Ortúzar Cárcova, members of the Mexican industry acquired a Vento-branded motorcycle and took it apart, that is exactly what they found. Their doubts about whether the motorcycles qualified as originating goods and could properly benefit from NAFTA's preferential tariff treatment were entirely reasonable. This was sufficiently obvious that Mr. Ortúzar Cárcova asked AMIA officials to submit a formal written complaint along with all the background, data and information.[357]

320. In fact, that the Joint Venture operations would be audited was by no means unexpected either by the Joint Venture partners. The Joint Venture was a carefully planned strategy and the Joint Venture partners assessed the potential benefits as well as the potential risks. For instance, MotorBike was incorporated in a completely unconventional manner. For one thing, its corporate life was limited to five years. A member of the Tribunal pointed this out at the Hearing to witness Isaac Calderón Birch. It is worth quoting the exchange:

[357] Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶¶ 17-19.

> First, something that really surprises me is that MotorBike was incorporated for a five-year period, and I wanted to know why was the company created for a period of five years. For a number of years I have worked in the field of Corporate Law, and I have never seen a corporation like this. I have incorporated many companies. I have been on boards of directors. I've been a member of a board, and I have never seen a company that lasts less than 99 years. But I have never seen a company that was created to last five years.
>
> THE WITNESS: That's a question that I remember perfectly well from my accountant. He said, and excuse me to all that are present, is that "nobody reviews the dead" […].[358]

321. The business was structured in the United States by splitting operations between Vento and AED and keeping them legally and physically separate. All imports from China were in the upstream company, AED, and all exports to Mexico in the downstream company, Vento. The engines, after assembly from imported parts by AED were then sold downstream to Vento as NAFTA originating goods. Because of the value of the engines as compared to the rest of the motorcycle, the engines would basically be expected to confer NAFTA origin to the whole motorcycle (meeting the 50% or 60% regional value content depending on the methodology used), assuming that the assembled engines were accepted to be NAFTA originating goods. This was clearly a management strategy that carried some risks in the event of an origin verification by Mexican officials.

322. The Joint Venture partners may well have believed that Vento-branded motorcycles met the NAFTA rules of origin,[359] but under NAFTA Chapter 5 and applicable Mexican law, that determination ultimately lies with SAT, the Mexican "customs administration" referred to in NAFTA Article 506, which is subject to administrative and judicial review, and it was indeed reviewed. As noted earlier, it has been definitively established in this case that SAT's application of Rule 2(a) was legally correct. The Claimant argues that the opposite interpretation and result were also legally possible, but there is no evidence that they were, beyond Gabriel Arriaga Calleja's opinion, to which the Tribunal has already referred. The United States could have challenged SAT's application of Rule 2(a) under the NAFTA, but it did not.

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[358] Tr. Day 2, pp. 402:12-403:4.

[359] Memorial, ¶ 50.

323. For these reasons, the Tribunal rejects the claim that the Respondent acted arbitrarily in breach of NAFTA Article 1105.

(iii) Alleged discriminatory treatment

324. Finally, again based mainly on the witness statement of Gabriel Arriaga Callejas (and Guillermo Massieu Urquiza, to which the Tribunal has already referred) the Claimant argues that SAT's conduct of the origin verifications and application of Rule 2(a) was discriminatory because they targeted Vento. To the extent that the Claimant's claim is about nationality-based discrimination, the Tribunal has already dealt with it in the context of NAFTA Articles 1102 and 1103.

325. Beyond that, Mr. Arriaga Callejas testified: "As far as I know, from the motorcycle industry, Vento was the only enterprise audited at that time. From the previous audits in which I intervened I have no knowledge that there has been any other audit to enterprises with similar processes to Vento's, whether they were foreign companies or companies in Mexico. There were no audits to similar enterprises of the automotive or the motorcycle industry that could be Vento's competitors."[360] Mr. Arriaga Callejas explained: "Usually, audits were performed on different enterprises within the same industry usually on a simultaneous basis. Thus, whenever one company was audited other enterprises of the same industry were audited too […] audits were always performed on a certain industry, not on a specific enterprise."[361]

326. However, NAFTA rules of origin and origin verification procedures evidently only apply to imports that are claimed to be NAFTA originating goods. The evidence before this Tribunal is that between 2001, when the Claimant began exporting motorcycles to Mexico, and 2005, when both origin verifications had concluded, there were no other "enterprises with similar processes to Vento's." César Núñez-Cázares was unaware of any other producers or exporters in the United States that had the same or a similar business model.[362] At the Hearing, Mr. Arriaga Callejas declared that prior to initiating an origin verification,

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[360] First Witness Statement of Gabriel Arriaga Callejas (9 July 2018), ¶ 35.
[361] First Witness Statement of Gabriel Arriaga Callejas (9 July 2018), ¶ 13.
[362] Tr. Day 2, pp. 333:17-334:14.

SAT analyzed all imports of the goods in question, identified the main importers, obtained a copy of the corresponding certificates of origin and determined who the producers and exporters of the goods were. Asked how many other enterprises SAT had found that assembled motorcycles in the United States and then exported them to Mexico during the relevant period, he replied categorically that SAT never conducted that analysis but rather focused exclusively on Vento.[363] However, his testimony is contradicted by those of José Alberto Ortúzar Cárcova and Daniel Ortiz Nashiki. Mr. Ortiz Nashiki testifies that, instructed by Mr. Ortúzar Cárcova, he personally undertook that analysis.[364]

327. Even if Mexican manufacturers began importing motorcycle parts and components from China, India or elsewhere later in time, their origin was not in question and, in any event, it was irrelevant because they operated under PROSEC, a duty waiver program which was available (if authorized) for imports from anywhere in the world, except from countries with which Mexico had entered free trade agreements, such as the United States and Canada under NAFTA. Obviously, the NAFTA origin rules and procedures were inapplicable to companies based elsewhere than in the United States (or Canada). At the Hearing, Mr. Arriaga Callejas admitted that, of course, Mexican producers were not audited because they manufactured motorcycles in Mexico and therefore their origin was not even at issue for customs purposes. In response to questions from the Tribunal, he clarified that he did not mean to suggest that once an origin verification was launched, SAT then verified all exporters, importers and all domestic and foreign producers. Rather, if the origin verification involved imports from the United States, SAT focused only on producers and exporters of the same type of goods in the United States.[365]

328. Regarding the application of Rule 2(a), the evidence shows that there were no other U.S.-based assemblers or exporters, which is dispositive. Exports of goods assembled exclusively from imported non-originating materials overall do not appear to have been very common either. At the Hearing, Mr. Arriaga Callejas referred to centrifugal pumps

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[363] Tr. Day 3, p. 463:2-12.

[364] Witness Statement of José Alberto Ortúzar Cárcova (5 March 2019), ¶ 16; Witness Statement of Daniel Nashiki (6 March 2019), ¶ 7.

[365] Tr. Day 3, pp. 463:13-465:22.

and certain textile products[366] —although the Tribunal doubts that cutting, gluing and similar operations with fabrics would qualify as assembly— and the Claimant referred to a case involving flat screen TVs in 2015 (which, given the timeframe, is probably not that relevant).[367] Finally, the Tribunal has already addressed the non-application of Rule 2(a) to the Mexican manufacturers in the context of the NAFTA Article 1102 and 1103 claims.

329. For these reasons, the Tribunal rejects the claim that the Respondent's actions were discriminatory in breach of NAFTA Article 1105.

330. The Tribunal rejects all other claims of breach of NAFTA Article 1105. In light of this, it has become unnecessary to resolve the Respondent's objection to jurisdiction *ratione temporis*.

VIII. COSTS

A. Claimant's Cost Submissions

331. In its submission on costs of 13 March 2019, the Claimant argues that the Respondent should bear the total arbitration costs incurred by Claimant, including legal fees and expenses totaling **US$8,540,996.00**, broken down as follows (i) legal fees (US$7,481,238.00), (ii) Expert witnesses' and consultants' fees (US$556,215.00), (iii) other expenses (US$103,543.00), and (iv) advances toward the Tribunal's fees and expenses, and ICSID's administrative fees (US$400,000).[368]

332. The Claimant argues that such costs are justified and appropriate given the scope and complexity of issues put in dispute by Respondent and add that the Respondent's "various obstructionist tactics" and "its procedural misconduct throughout this proceeding also provides an additional basis to award Claimant its costs."[369]

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[366] Tr. Day 3, pp. 460:16-461:12.

[367] Memorial, ¶ 126.

[368] Claimant's Statement of Costs, ¶¶ 3-4.

[369] Claimant's Statement of Costs, ¶¶ 11-19.

B. Respondent's Cost Submissions

333. In its submission on costs of 13 March 2019, the Respondent submits that the Claimant should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses totaling **US$1,587,580.56**, broken down as follows: (i) legal fees and expenses of external legal counsel (US$1,057,459.58), (ii) internal legal expenses (US$9,945.00), (iii) expert's fees and witness' expenses (US$145,175.98), and (iv) advances toward the Tribunal's fees and expenses, and ICSID's administrative fees (US$375,000).[370]

334. The Respondent argues that the Claimant's abusive conduct in the context of this dispute, "increased the complexity of this arbitration and the burden imposed on the Respondent."[371] (Tribunal's translation). In particular, the Respondent states that the Claimant made a series of allegations that it knew, or should have known, were incorrect, presented contradictory claims, introduced new claims in its Reply Memorial, abandoned its claims on behalf of MotorBike and Mototransp and tried to present new evidence during the Hearing.[372] The Respondent requests an order from the Tribunal holding Vento, MotorBike and Mototransp jointly liable for the Respondent's costs.[373]

C. The Tribunal's Decision on Costs

335. Unless the Parties otherwise agree, under Article 58 of the ICSID Additional Facility Rules, the Tribunal has discretion in deciding "how and by whom the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne." This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

[370] Respondent's Statement of Costs.
[371] Resp. PHB, ¶¶ 113.
[372] Resp. PHB, ¶¶ 113-115.
[373] Resp. PHB, ¶¶ 116-117.

336. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in US$):

Arbitrators' fees and expenses	
Andrés Rigo Sureda	97,735.00
David Gantz	66,028.65
Hugo Perezcano	205,559.73
ICSID's administrative fees	126,000.00
Direct expenses	132,457.20
Total	**627,780.58**

337. The above costs have been paid out of the advances made by the Parties in equal parts.[374] As a result, each Party's share of the costs of arbitration amounts to US$313,890.29.

338. In determining the allocation of costs, the Tribunal has considered all of the circumstances of the present arbitration. The Respondent has prevailed but not entirely. The Respondent raised objections to admissibility and jurisdiction and only prevailed in the objection related to loans. In respect of the Respondent's objection *ratione temporis*, the Tribunal has ultimately decided on the merits and dismissed the claims. Based on these considerations, the Tribunal awards the Respondent 50% of its legal fees and expenses and 60% of the arbitration costs. Accordingly, the Tribunal orders the Claimant to pay the Respondent the amount of US$188,334.17 for the expended portion of the Respondent's advances to ICSID and US$793,790.28 to cover Respondent's legal and expert fees and administrative expenses.

339. Since the Tribunal awards to the Respondent part of its costs, it remains for the Tribunal to address the Respondent's request that the Tribunal hold Vento, MotorBike and Mototransp jointly liable for the Respondent's costs. In this respect, the Tribunal recalls that MotorBike and Mototransp are not parties to these proceedings, and under NAFTA Article 1136, this

[374] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

Award has binding force only between "the disputing parties and in respect of the particular case." Therefore, the Tribunal denies the request.

IX. AWARD

340. For the reasons set forth above, the Tribunal decides as follows:

a. To dismiss the objections to admissibility.

b. To reject the jurisdictional objection *ratione materiae* in respect of the Joint Venture and declare that the Joint Venture qualified as an investment.

c. To declare that no investment was made in the form of loans under NAFTA Chapter 11 and uphold the jurisdictional objection *ratione materiae* in this respect.

d. To reject the jurisdictional objection *ratione personae*.

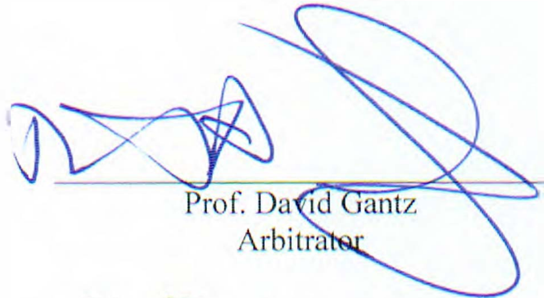
e. To declare that the Respondent did not breach its obligations under NAFTA and dismiss the claims on the merits.

f. To award the Respondent US$982,124.45 representing 50% of its legal fees and expenses and 60% of the arbitration costs. Such amount shall be payable by the Claimant no later than 30 days after the date of issuance of this Award.

g. To deny the Respondent's request that the Tribunal hold Vento, MotorBike and Mototransp jointly liable for the Respondent's arbitration costs.

h. To dismiss all other claims.

Place of Arbitration: Toronto, Canada



Prof. David Gantz
Arbitrator

Date: 7-2-2020

Mr. Hugo Perezcano
Arbitrator

Date:

Dr. Andrés Rigo Sureda
President of the Tribunal

Date:

Place of Arbitration: Toronto, Canada

Prof. David Gantz Arbitrator	 Mr. Hugo Perezcano Arbitrator
Date:	Date: July 2, 2020 ICSID Case ARB(AF)/17/3

Dr. Andrés Rigo Sureda
President of the Tribunal

Date:

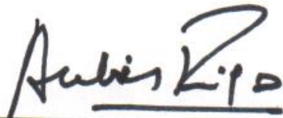
Place of Arbitration: Toronto, Canada

Prof. David Gantz
Arbitrator

Date:

Mr. Hugo Perezcano
Arbitrator

Date:



Dr. Andrés Rigo Sureda
President of the Tribunal

Date: July 2, 2020